

# **EXHIBIT R**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ORACLE CORPORATION, a	)	
Delaware corporation, ORACLE	)	
USA, INC., a Colorado	)	
corporation, and ORACLE	)	
INTERNATIONAL CORPORATION, a	)	
California corporation,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 07-CV-1658 (PJH)
	)	
SAP AG, a German corporation,	)	
SAP AMERICA, INC., a Delaware	)	
corporation, TOMORROWNOW,	)	
INC., a Texas corporation, and	)	
DOES 1-50, inclusive,	)	
	)	
Defendants.	)	
	)	

VIDEOTAPED 30(b)(6) DEPOSITION OF DEFENDANTS

SAP AG AND SAP AMERICA,

BY AND THROUGH ITS CORPORATE DESIGNEE

CHRISTOPHER FAYE

WEDNESDAY, MARCH 18, 2009

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

REPORTED BY: HOLLY THUMAN, CSR No. 6834, RMR, CRR

(1-417606)

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Q. You have seen, I take it, the Amended

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Notice of Deposition of SAP AG and SAP America Re

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Project Blue, which is under the first tab in one of

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the notebooks you brought this morning?

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A. Yes.

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Q. And you understand that you've been

10:23:35 1 designated as the corporate representative for  
10:23:37 2 purposes of this 30(b)(6) deposition?

10:23:39 3 A. Yes.

10:23:42 4 Q. You're testifying on behalf of both SAP AG  
10:23:44 5 and SAP America?

10:23:47 6 A. Yes, I believe that's true.

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10:38:17 2 Q. Why weren't Board members informed of the  
10:38:26 3 failure to comply with their directive until 2007?

10:38:27 4 MS. FROYD: I'm going to object on the  
10:38:30 5 grounds of privilege. To the extent that you can  
10:38:32 6 answer that question without revealing the contents  
10:38:34 7 of attorney-client communication, you may do so.  
10:38:46 8 Otherwise, I'll instruct you not to answer.

10:38:47 9 THE WITNESS: I don't think I could answer  
10:38:48 10 that question.

10:38:50 11 MR. PICKETT: Q. Was the reason they were  
10:38:55 12 not told until 2007 solely a legal reason, or were  
10:38:59 13 there business reasons in addition?

10:38:59 14 MS. FROYD: That's a "yes" or "no"  
10:39:19 15 question.

10:39:21 16 THE WITNESS: Could I talk to you quickly  
10:39:24 17 for a second?

10:39:25 18 MR. PICKETT: Can we go off the record  
10:39:26 19 then, please?

10:39:26 20 THE WITNESS: Yes.

10:39:27 21 THE VIDEO OPERATOR: Off the record, the  
10:39:42 22 time is 10:39.

10:43:01 23 (Recess from 10:39 a.m. to 10:43 a.m.)

10:43:02 24 THE VIDEO OPERATOR: We're back on the  
25 record. The time is 10:43.

10:43:05 1 MS. FROYD: All right. We went off the  
10:43:07 2 record because the witness had a question regarding  
10:43:10 3 a privileged communication. We've discussed it, and  
10:43:13 4 he's now I believe ready to answer the question.

10:43:14 5 THE WITNESS: Sure. Can you just repeat  
10:43:16 6 the question again real quick?

10:43:17 7 MR. PICKETT: Q. Sure. Were the reasons  
10:43:19 8 that the Board was not told about TomorrowNow's  
10:43:23 9 failure to comply with its directive prior to 2007  
10:43:26 10 solely legal reasons, or were there also business  
10:43:28 11 reasons involved?

10:43:31 12 A. I don't know of any business reasons.

10:43:33 13 Q. So solely legal?

10:43:36 14 A. Yeah. I can't think of anything other than  
10:43:37 15 privileged communications.

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Q. The first question, "Were there any incentives, warnings, or reprimands that were discussed and/or put in place for SAP TomorrowNow personnel and/or SAP personnel in order to facilitate the implementation of the directives," that was a question you had for Mr. White?

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A. Yes.

10:46:17 20

Q. And he answered no?

10:46:18 21

A. Yes.

10:46:20 22

Q. Is there any business reason there were no incentives, warnings, or reprimands?

10:46:25 23

10:46:28 24

A. None that I know of.

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Q. So that was a legal decision?

10:46:32 1 MS. FROYD: Objection. Calls for  
10:46:36 2 speculation, calls for a legal opinion.

10:46:38 3 THE WITNESS: I don't know the reason for  
10:46:39 4 the decision.

10:46:41 5 MR. PICKETT: Q. Well, as corporate  
10:46:43 6 representative, why was it the corporation decided  
10:46:49 7 not to put any incentives in place to comply with  
10:46:52 8 the Board's directives?

10:46:54 9 MS. FROYD: Objection on privilege. To the  
10:46:56 10 extent that you can answer that without revealing  
10:46:58 11 the contents of attorney-client communication, you  
10:46:59 12 may do so.

10:47:02 13 MR. PICKETT: Let me say, you can have that  
10:47:04 14 objection. But he's here as a 30(b)(6) corporate  
10:47:09 15 representative, and whatever the corporation's  
10:47:11 16 reasons for doing that, if they're legal, you can  
10:47:13 17 say that, but if there's anything else, we're  
10:47:16 18 entitled to get it through the 30(b)(6) process.

10:47:17 19 MS. FROYD: That's true, and I will  
10:47:21 20 continue to give the objections I see fit.

10:47:22 21 MR. PICKETT: Q. Go ahead.

10:47:26 22 A. So I don't know of any reason other than  
10:47:29 23 possible privilege reasons that this was put in  
10:47:31 24 place.

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10:51:16 21 Q. Why did it take TomorrowNow over 3 years to  
10:51:21 22 comply with the Board's directive?

10:51:23 23 MS. FROYD: I'm going to object to that,  
10:51:25 24 again, to the extent that it calls for the  
25 revelation of a privileged communication.

10:51:28 1                    To the extent that you can answer that  
10:51:30 2     without revealing the contents of attorney-client  
10:51:33 3     communication, you may do so. Otherwise, I'll  
10:51:50 4     instruct you not to answer the question.

10:51:52 5                    THE WITNESS: So other than privileged  
10:51:55 6     information, I know that Mark White discussed it in  
10:52:01 7     his deposition. I don't have any information beyond  
10:52:02 8     that.

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10:59:41 11 Q. SAP did have control of TomorrowNow once it  
10:59:42 12 acquired it. True?

10:59:43 13 A. Yes.

10:59:46 14 Q. And SAP could have insisted on compliance  
10:59:51 15 with its directive to TomorrowNow. True?

10:59:53 16 A. Yes, I believe that's true.

10:59:55 17 Q. They could do whatever had to be done to  
10:59:59 18 make sure that its subsidiary was following the  
11:00:00 19 Board's order?

11:00:02 20 A. Yes, I believe that's true.

11:00:05 21 Q. They didn't do that, though. Correct?

11:00:07 22 MS. FROYD: Objection. Lacks foundation.

11:00:08 23 THE WITNESS: They didn't --

11:00:10 24 MR. PICKETT: Q. They didn't insist on  
25 compliance with the directive?

11:00:14 1 MS. FROYD: Objection. Lacks foundation,  
11:00:16 2 assumes facts.

11:00:18 3 THE WITNESS: No, I wouldn't characterize  
11:00:22 4 it that way. I think we did insist upon compliance.

11:00:24 5 MR. PICKETT: Q. Well, so it's your  
11:00:28 6 testimony that SAP's Board insisted on compliance  
11:00:32 7 with its January 2005 directive?

11:00:32 8 A. Yes.

11:00:35 9 Q. What did the Board do to insist on  
11:00:40 10 compliance with the January 2005 directive?

11:00:41 11 A. They communicated the directive to  
11:00:44 12 TomorrowNow.

11:00:48 13 Q. Well, they didn't directly.

11:00:50 14 A. Directly through me.

11:00:52 15 Q. So there was an initial communication  
11:00:55 16 through you to Mr. Nelson. Right?

11:00:55 17 A. Yes.

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MR. PICKETT: Q. What was SAP's

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expectation as to the timing of compliance with the

11:17:29 4

Board's January 2005 directive?

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A. I don't believe that -- well, this is going

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to be time-dependent. So what time period are you

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talking about?

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Q. In January 2005. When the directive

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issued.

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A. So in January of 2005, I think the answer

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is no, there was no specific time frame that the

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Board had in mind.

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Q. That was not my question.

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It was -- the question was with respect to

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any expectation of timing, not with respect to a

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specific time frame.

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A. I don't think my answer changes much. I

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don't think they had an explicit expectation of

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timing.

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Q. Did they have a general expectation that it

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would be complied with, first of all?

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A. Yes.

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Q. And did the Board also have a general

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expectation that it would be complied with as soon

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as possible?

11:18:27 1 A. Yes. They generally had that expectation.  
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Q. After, say, a year had passed and there wasn't compliance with the Board directive, did the topic of how quickly compliance should be achieved come up again?

MS. FROYD: I'm going to object based on privilege.

11:26:49 1                    Again, if you can answer the question  
11:26:52 2     without revealing the contents of an attorney-client  
11:26:54 3     privileged communication, you may do so. Otherwise,  
11:26:56 4     I instruct you not to answer.

11:26:58 5                    THE WITNESS: The topic of whether there  
11:27:00 6     was a specific date, or the topic just generally  
11:27:02 7     of --

11:27:02 8                    MR. PICKETT: Q. Just generally. What's  
11:27:07 9     going on? I asked you back in January 2005 to get  
11:27:11 10    the software copies off the TomorrowNow servers.  
11:27:12 11    What's going on?

11:27:13 12                    MS. FROYD: Same objection, same  
11:27:14 13    instruction.

11:27:16 14                    THE WITNESS: Yes. So during that time  
11:27:21 15    frame, Greg -- Greg Nelson and Andrew and I  
11:27:25 16    certainly had conversations about the urgency of the  
11:27:28 17    Board directive.

11:27:29 18                    MR. PICKETT: Q. What did SAP tell  
11:27:34 19    TomorrowNow about the urgency?

11:27:36 20                    A. That it was a Board directive, that they  
11:27:45 21    had to comply with it, and that it was urgent, and  
11:27:48 22    that they needed to make more progress.

11:27:51 23                    Q. Did it become more urgent after 2 years of  
11:27:55 24    noncompliance?

25                    A. After 2 years, yes, certainly it was more

11:28:02 1 urgent.

11:28:06 2 Q. Is that because Oracle sued SAP?

11:28:08 3 A. I didn't communicate with them after Oracle  
11:28:13 4 sued SAP. In the time frame immediately before  
11:28:17 5 that, I was communicating with them and expressed  
11:28:19 6 the urgency.

11:28:25 7 Q. Well, if I'm telling someone, do this act  
11:28:28 8 as soon as possible, and more than 2 years later, it  
11:28:31 9 still isn't done, I would be frustrated.

11:28:33 10 Were you frustrated by TomorrowNow's  
11:28:39 11 failure to comply?

11:28:45 12 A. Yes, certainly. Yes is the short answer to  
11:28:45 13 that question.

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11:29:54 12 MR. PICKETT: Q. What did TomorrowNow tell

11:30:00 13 SAP prior to the lawsuit about its failure to comply

11:30:03 14 with the directive?

11:30:05 15 MS. FROYD: Let me make the privilege

11:30:07 16 objection again. To the extent that you can answer

11:30:09 17 that question without revealing the contents of an

11:30:11 18 attorney-client privileged communication, you may do

11:30:15 19 so. Otherwise, I instruct you not to answer.

11:30:18 20 THE WITNESS: From our perspective, from

11:30:22 21 what they told us, we felt that there actually was

11:30:31 22 some compliance. That although it certainly wasn't

11:30:39 23 complete, that steps were being made, and there were

11:30:45 24 difficulties on their side in completing it more

25 rapidly than they were.

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11:34:38 16 Q. The Board's directive was oral. Correct?

11:34:43 17 A. The -- when it was expressed in that -- in  
11:34:46 18 the original time frame in early 2005, yes.

11:34:49 19 Q. Well, was it ever written?

11:34:52 20 A. I think it was written in the June two  
11:35:02 21 thousand -- 2008 -- no, 2007, right -- 2007  
11:35:04 22 directive.

11:35:06 23 Q. It was restated in June 2007?

11:35:08 24 A. Yes.

25 Q. The oral directive, January 18, 2005,

11:35:15 1 that's when it was issued. Right?  
11:35:17 2 A. January 18, 2005. Yes.  
11:35:19 3 Q. On the phone call with the Board members?  
11:35:20 4 A. Yes.  
11:35:26 5 Q. It was just as enforceable and valid and  
11:35:32 6 meant to happen as if it were in writing. Correct?  
11:35:32 7 A. Yes.  
11:35:35 8 Q. In other words, it was mandatory; the Board  
11:35:36 9 meant what it said?  
11:35:40 10 A. Yes. It was mandatory.  
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11:58:34 7 Q. So SAP's position is that it does not know

11:58:36 8 when the directive was communicated to TomorrowNow

11:58:40 9 other than to state it was between January 19 and

11:58:41 10 March 16 --

11:58:42 11 A. Yes.

11:58:44 12 Q. -- 2005?

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12:29:31    1    as soon as possible.    Right?

12:29:31    2            A.    Yes.

12:29:34    3            Q.    And I believe you testified also that there  
12:29:37    4    was some urgency to compliance with the Board's  
12:29:39    5    directive.

12:29:39    6            A.    Yes.

12:29:43    7

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12:30:02    11

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12:30:06    13

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During of March 2005 to March 2007 periodic  
update period that you've identified, what  
conversations were there with Mr. Andrew Nelson and  
yourself concerning the directive, Project Blue, the  
effort to move PeopleSoft software off the

12:40:46 1 TomorrowNow servers?

12:40:47 2 A. Right. So --

12:40:49 3 MS. FROYD: Objection. I'm going to give  
12:40:50 4 you the same privilege instruction.

12:40:52 5 To the extent that this question calls for  
12:40:54 6 revealing the contents of an attorney-client  
12:40:57 7 communication, then I instruct you not to answer.

12:40:59 8 If you can answer without revealing the  
12:41:02 9 contents of an attorney-client communication, you  
12:41:03 10 may do so.

12:41:05 11 THE WITNESS: So early on, I think as we've  
12:41:08 12 discussed, it would have been communication of the  
12:41:18 13 directive and help for him understanding it.

12:41:20 14 Later, the conversations would have been  
12:41:31 15 less frequent, but I believe there may have been one  
12:41:36 16 or two after Greg was assigned, Greg Nelson was  
12:41:44 17 assigned to -- to take over the project.

12:41:49 18 There would have been one certainly in  
12:41:54 19 early 2007. I don't know the exact date. But I  
12:41:57 20 know there was a phone call that Andrew Nelson was  
12:42:05 21 on. And the content would probably have been, I  
12:42:09 22 guess, higher level than the conversations that I  
12:42:13 23 was having with Greg in the sense that it was more  
12:42:21 24 just a -- making sure that he understood the  
25 directive and his urgency -- and its urgency,

12:42:28 1 rather.  
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MR. PICKETT: Q. I believe you told me  
earlier the directive was mandatory. Correct?

A. Yes.

Q. So when Andrew Nelson testified that SAP  
told him that it wasn't mandatory, that it was,  
rather, a preference, he's wrong?

A. Yes, he's wrong.

Q. And at no time did TomorrowNow  
legitimate -- well, let me rephrase that.

Did SAP ever suggest at any time to

13:53:21 1 TomorrowNow that the directive was not mandatory?  
13:53:25 2 A. No.  
13:53:28 3 Q. Did TomorrowNow ever tell SAP that it did  
13:53:31 4 not consider the directive to be mandatory?  
13:53:35 5 A. No.  
13:53:39 6 Q. Did SAP ever suggest in any way that  
13:53:42 7 TomorrowNow should not begin implementing the  
13:53:43 8 directive?  
13:53:52 9 A. No.  
13:53:55 10 Q. Mr. Kagermann testified at page 335 of his  
13:54:01 11 deposition that SAP planned to require TomorrowNow  
13:54:04 12 to remove the copies that it had on its machines of  
13:54:08 13 PeopleSoft software at the time it bought the  
13:54:15 14 company to minimize potential risk of infringement  
13:54:17 15 of the software.  
13:54:21 16 Is that consistent with SAP's position?  
13:54:23 17 A. Yes, it sounds like it.  
13:54:27 18 Q. Were there other reasons for the directive?  
13:54:30 19 MS. FROYD: Objection. Vague and ambiguous  
13:54:33 20 as to time. And also, to the extent that this calls  
13:54:37 21 for revealing an attorney-client privileged  
13:54:40 22 communication, I instruct you not to answer it.  
13:54:43 23 If you can answer it without doing so, then  
13:55:01 24 you may answer.  
25 THE WITNESS: So can you repeat what he

13:55:06 1 said?

13:55:07 2 MR. PICKETT: Q. My question was, were  
13:55:08 3 there other reasons?

13:55:10 4 His reason was, minimize potential risk of  
13:55:13 5 infringement of the software.

13:55:14 6 MS. FROYD: Same objections and  
13:55:16 7 instruction.

13:55:18 8 THE WITNESS: Yes.

13:55:20 9 MR. PICKETT: Q. What were they?

13:55:23 10 MS. FROYD: Same objection and instruction.

13:55:24 11 THE WITNESS: I can't answer that based on  
13:55:27 12 that instruction.

13:55:28 13 MR. PICKETT: Q. So they were legal  
13:55:30 14 reasons?

13:55:31 15 MS. FROYD: Same objection and instruction.

13:55:33 16 THE WITNESS: Yes.

13:55:36 17

13:55:50 18

13:55:50 19

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14:02:33 1

14:02:35 2

14:02:36 3

14:02:39 4

14:07:55 5

14:07:55 6

14:07:57 7

14:07:59 8

14:08:01 9

14:08:03 10

14:08:05 11

14:08:06 12

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14:08:16 15

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14:08:38 23

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MS. FROYD: Okay. So we went off the

record because the witness had a question regarding

privilege. Now that we're back on, I'm going to

give an instruction, and I think the witness will be

able to answer the question.

So Mr. Faye, with regard to the question

that Mr. Pickett just asked, I continue to make the

privilege objection. If you are able to give a

response that gives a technical reason or a business

reason, then you may do so. But if your answer

would reveal the contents of an attorney-client

privileged communication, then I instruct you not to

answer.

THE WITNESS: Okay. Can you ask the

question again?

MR. PICKETT: Q. What did Mr. Nelson tell

you when you told him about the directive?

MS. FROYD: Same objection and instruction.

14:08:48 1 THE WITNESS: He expressed concerns about  
14:08:56 2 cost, customer perception, how difficult it would be  
14:09:05 3 to move customers over. I guess under the same  
14:09:08 4 heading of cost, I think logistics, just, you know,  
14:09:12 5 how he would do it, those kinds of issues.

14:09:13 6 MR. PICKETT: Q. What did he say about his  
14:09:18 7 concern about cost?

14:09:20 8 A. I'm not going to remember exactly what he  
14:09:23 9 said. I mean, generally he had a concern I think  
14:09:25 10 that it would cost more, but I'm not going to  
14:09:30 11 remember it in more detail than that.

14:09:35 12 Q. Did he tell you, it'll cost more, so SAP  
14:09:38 13 should know that?

14:09:38 14 MS. FROYD: Objection. Vague and  
14:09:43 15 ambiguous.

14:09:44 16 THE WITNESS: I don't -- he didn't -- I  
14:09:47 17 don't think he said anything like that, but I can't  
14:09:48 18 recall exactly.

14:09:49 19 MR. PICKETT: Q. Did SAP know it would  
14:09:56 20 cost more when it issued the directive?

14:09:58 21 A. I don't know.

14:10:01 22 Q. What did he say with respect to difficulty  
14:10:07 23 in moving customers?

14:10:12 24 A. I think the primary concern for him was one  
25 of logistics. That it's not a small undertaking to

14:10:22 1 try to relocate the customer environments of -- I  
14:10:25 2 don't recall the number, but I guess at the time it  
14:10:27 3 was a couple hundred. I don't really know the  
14:10:34 4 number, but many customers, to switch over.  
14:10:35 5 Difficult undertaking.  
14:10:38 6  
14:10:41 7  
14:10:42 8  
14:10:44 9  
14:10:47 10  
14:10:49 11  
14:10:53 12  
14:11:08 13  
14:11:10 14  
14:11:15 15  
14:11:16 16  
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14:15:11 8

14:15:12 9

14:15:15 10 Q. What did you on behalf of SAP tell

14:15:17 11 Mr. Nelson about his concerns?

14:15:17 12 MS. FROYD: Objection. Vague and

14:15:19 13 ambiguous. Also a privilege objection.

14:15:20 14 To the extent that you can answer that

14:15:26 15 question as it relates to technical or business

14:15:29 16 concerns, you may answer. But to the extent that it

14:15:34 17 would reveal attorney-client privileged

14:15:51 18 communication, then I instruct you not to answer.

14:15:52 19 THE WITNESS: I think my response to him,

14:16:01 20 based upon my role, is that those -- those concerns

14:16:09 21 from a directive perspective are largely irrelevant,

14:16:14 22 in terms of the directive as a mandatory thing, and

14:16:15 23 has to be followed.

14:16:17 24 I mean, certainly those are issued that

25 have to do with how well he would be able to comply

14:16:24 1 with the directive, or, you know, what his timeline  
14:16:32 2 was. But it -- there was nothing I could do about  
14:16:38 3 it. I wasn't in charge of his headcount or budget.  
14:16:41 4  
14:16:43 5  
14:16:45 6  
14:16:49 7  
14:16:52 8  
14:17:00 9  
14:17:07 10  
14:17:09 11  
14:17:17 12  
14:17:20 13  
14:17:24 14  
14:17:28 15  
14:17:32 16  
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14:18:01 24  
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14:21:17 7

MR. PICKETT: Q. And Mr. Nelson promised

14:21:20 8

that TomorrowNow would comply with the directive

14:21:23 9

regardless of the difficulties he raised. Is that

14:21:23 10

correct?

14:21:24 11

MS. FROYD: Objection. Mischaracterizes

14:21:28 12

the testimony, assumes facts.

14:21:30 13

THE WITNESS: I don't know if it was so

14:21:33 14

formalistic as a promise that they will do it. But

14:21:38 15

certainly, there was an understanding that it was

14:21:42 16

their obligation and that they would do it.

14:21:44 17

Although he did, obviously, express the

14:21:47 18

difficulties.

14:21:49 19

MR. PICKETT: Q. He would obey the

14:21:49 20

directive?

14:22:02 21

A. Yes.

14:22:06 22

Q. Did you ever remind Mr. Nelson that upon

14:22:09 23

first hearing of this sometime between January and

14:22:14 24

March 2005, that he had promised -- I'm sorry, that

25

he had indicated he would obey the directive?

14:22:18 1 MS. FROYD: That's a "yes" or "no"  
14:22:22 2 question.  
14:22:24 3 THE WITNESS: Yes.  
14:22:27 4 MR. PICKETT: Q. What was his response?  
14:22:29 5 MS. FROYD: Objection. To the extent that  
14:22:31 6 this calls for revealing an attorney-client  
14:22:33 7 privileged communication, I'll instruct you not to  
14:22:40 8 answer. If you can answer otherwise, you may do so.  
14:22:41 9 THE WITNESS: He recognized his obligation  
14:22:44 10 to complete the directive.  
14:22:46 11 MR. PICKETT: Q. He recognized that in  
14:22:53 12 Year 1, when he didn't comply -- when TomorrowNow  
14:22:53 13 didn't comply?  
14:22:56 14 A. He -- yes, he recognized it in Year 1.  
14:22:58 15 Year 1, 2005.  
14:23:02 16 Q. He recognized it in Year 2, 2006?  
14:23:05 17 A. Yes. He expressed to me his recognition of  
14:23:06 18 his obligation to comply.  
14:23:11 19 Q. He recognized it in 2007 when there still  
14:23:14 20 had been no compliance with the directive?  
14:23:18 21 A. I last talked to him in very early 2007.  
14:23:21 22 But yes, in very early 2007.  
14:23:24 23 Q. Did you ever start to think, well, even  
14:23:27 24 though he's saying he's going to comply, it doesn't  
25 look like he's complying?

14:23:33 1 A. No. Because we actually thought he was  
14:23:34 2 complying.

14:23:37 3 Q. What was the basis -- when did you first  
14:23:40 4 believe he was complying?

14:23:41 5 A. We -- so these aren't -- this is  
14:23:52 6 conversations with Greg now. But in late 2005 we  
14:23:54 7 started to have the impression that they were  
14:23:54 8 complying.

14:23:57 9 Q. They were starting to comply, or they were  
14:24:01 10 in fact complying?

14:24:03 11 A. Starting to comply. So it's a gradual  
14:24:10 12 process. It's -- so it's probably fair to say that  
14:24:15 13 during that time frame from March to March, 2005 to  
14:24:17 14 2006, we never had the impression that they were a  
14:24:19 15 hundred percent, that they had a hundred percent  
14:24:23 16 moved everything. But starting to comply in the  
14:24:27 17 sense of moving customer environments, it -- at the  
14:24:28 18 end of 2005.

14:24:30 19 Q. Did you ever have any sense during that  
14:24:35 20 March 2005 to March 2007 time frame of the number of  
14:24:38 21 customers they had moved off their local servers, or  
14:24:45 22 the percentage?

14:24:48 23 A. I never really had a sense, I guess, in  
14:24:54 24 terms of numbers. I think in late 2005, I would  
25 have said it was a pretty small percentage, because

14:25:02 1 I knew kind of -- you know, the project had really  
14:25:05 2 just started in the middle of 2005, so I didn't  
14:25:08 3 expect that they had made a tremendous amount of  
14:25:09 4 progress.

14:25:15 5 Over the course of -- over the course of  
14:25:19 6 2006, I don't really have an impression in terms of  
14:25:24 7 a percentage. It was just constantly expressed that  
14:25:29 8 they were making progress with their customers in  
14:25:32 9 moving them over.

14:25:36 10

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14:26:00 20

14:26:06 21

14:26:09 22

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14:26:17 24

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14:26:19 1

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14:26:23 3

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MR. PICKETT: Q. Was there steady progress

14:26:31 6

towards compliance over the 3-year period?

14:26:33 7

A. My impression was that there was -- or a

14:26:39 8

2-year period between 2005, 2007.

14:26:42 9

Q. Well, they weren't compliant until April

14:26:43 10

30, 2008. Correct?

14:26:46 11

A. No, I think it's fair to say that there

14:26:48 12

was -- in retrospect, having what I have in front of

14:26:53 13

me now, that it's fair to say there was not steady

14:26:56 14

progress on compliance during that 3-year period.

14:26:59 15

Q. Do you know why Project Blue was put on

14:27:02 16

hold?

14:27:02 17

A. No.

14:27:06 18

Q. Did SAP -- was SAP aware at the time

14:27:10 19

Project Blue was put on hold that that had happened?

14:27:10 20

A. No.

14:27:14 21

Q. So TomorrowNow concealed it?

14:27:15 22

MS. FROYD: Objection. Assumes facts,

14:27:18 23

argumentative.

14:27:20 24

THE WITNESS: I don't know what they did.

25

I only know that I didn't know it.

14:27:24 1                    MR. PICKETT: Q. Did anyone at SAP know  
14:27:24 2    it?  
14:27:27 3                    A. Not that I know of.  
14:27:29 4                    Q. When did you learn about it?  
14:27:32 5                    A. Preparing for this.  
14:27:34 6                    Q. Do you know why Project Blue was put on  
14:27:35 7    hold?  
14:27:37 8                    A. No.  
14:27:41 9                    Q. Did SAP approve putting Project Blue on  
14:27:42 10    hold?  
14:27:45 11                    A. Not to my knowledge.  
14:27:50 12  
14:27:53 13  
14:28:02 14  
14:28:02 15  
14:28:10 16  
14:28:14 17  
14:28:18 18  
14:28:22 19  
14:28:25 20  
14:28:26 21  
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14:28:31 24  
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14:29:54 17

14:30:02 18

14:30:03 19

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MR. PICKETT: Q. The Board's directive to  
remove local environments from the TomorrowNow  
servers affected both PeopleSoft and J.D. Edwards at  
the time at issue. Is that correct?

A. Yes.

Q. Did it subsequently apply to Siebel?

A. Yes.

Q. Did SAP -- was SAP aware that TomorrowNow  
was creating local environments on its servers for  
Siebel software?

MS. FROYD: Objection. Assumes facts.

THE WITNESS: I don't know.

MR. PICKETT: Q. Did the topic ever come

14:30:28 1 up between SAP and TomorrowNow as to whether

14:30:31 2 TomorrowNow was complying with the directive in

14:30:48 3 connection with its Siebel maintenance?

14:30:50 4 A. I don't remember.

14:30:54 5 Q. Did SAP ever ask TomorrowNow about how it

14:30:57 6 was providing service for Siebel?

14:31:03 7 MS. FROYD: Objection. Beyond the scope.

14:31:06 8 THE WITNESS: I don't -- I don't remember.

14:31:08 9

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14:31:15 11

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14:31:25 14

14:31:27 15

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14:31:32 17

14:31:35 18

14:31:53 19

14:31:54 20

14:31:56 21

14:31:57 22

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15:37:15 1

15:37:19 2

15:37:22 3

15:37:23 4 Q. Let me ask you to take a look at

15:37:31 5 Exhibit 464. It's the June 26, 2007 memo referred

15:37:41 6 to in your Exhibit 1139. We looked at this earlier.

15:37:45 7 It's what you've described as the June 2007

15:37:45 8 directive.

15:37:54 9 MS. FROYD: It's Exhibit 464.

15:37:56 10 MR. PICKETT: Q. That's it there.

15:37:59 11 You have Exhibit 464 in front of you?

15:38:00 12 A. Yes.

15:38:09 13 Q. And that's the June 2007 directive?

15:38:14 14 A. It's -- I label it that on here. Probably

15:38:17 15 more accurate to say it's a June 2007 email

15:38:21 16 implementing the directive, but ...

15:38:24 17 Q. Exhibit 1139, prepared by you for this

15:38:29 18 deposition, describes it as the June 2007 directive.

15:38:32 19 A. It says June 2007 directive and then lists

15:38:35 20 this Bates number and exhibit number, yes.

15:38:37 21 Q. Those are your words?

15:38:38 22 A. They are my words.

15:38:41 23 Q. Are you saying this is not a June 2007

15:38:41 24 directive?

25 A. Well, it's -- I guess this is largely just

15:38:49 1 a semantic issue. But this is an email from Andrew  
15:38:54 2 Nelson to his employees at TomorrowNow. The way  
15:38:58 3 that I would, I guess, view this is that this is an  
15:39:03 4 implementation email for the directive.

15:39:06 5 Q. For the January 2005 directive?

15:39:08 6 A. Yes.

15:39:10 7 Q. What prompted Mr. Nelson to send  
15:39:13 8 Exhibit 464?

15:39:14 9 MS. FROYD: Object on the grounds of  
15:39:17 10 privilege. To the extent that you are able to  
15:39:19 11 answer that question without revealing the contents  
15:39:23 12 of an attorney-client privileged communication, you  
15:39:29 13 may do so. Otherwise, I'll instruct you not to  
15:39:30 14 answer.

15:39:32 15 THE WITNESS: I can't answer based on that  
15:39:32 16 instruction.

15:39:34 17 MR. PICKETT: Q. Is there any reason these  
15:39:37 18 procedures were put in writing?

15:39:39 19 MS. FROYD: Again, I'll instruct you on the  
15:39:42 20 grounds of privilege. To the extent you can answer  
15:39:45 21 that question without revealing the contents of an  
15:39:47 22 attorney-client privileged communication, you may do  
15:40:21 23 so. Otherwise, I instruct you you not to answer.

15:40:22 24 THE WITNESS: I don't think I could answer  
25 based on that instruction.

15:40:24 1 MR. PICKETT: Q. The directive issued in  
15:40:29 2 June -- in January 2005 applied to all TomorrowNow  
15:40:31 3 customers. True?  
15:40:32 4 A. Yes.  
15:40:37 5 Q. This Exhibit 464 applies only to new  
15:40:41 6 TomorrowNow customers as of June 2007. Correct?  
15:40:42 7 MS. FROYD: Objection. Calls for  
15:40:45 8 speculation.  
15:40:46 9 THE WITNESS: I believe that's what it says  
15:40:48 10 on its face.  
15:40:51 11 MR. PICKETT: Q. Why is this limited to  
15:40:56 12 new customers, contrary to the terms of the  
15:40:57 13 directive?  
15:40:57 14 MS. FROYD: Objection. Calls for  
15:41:03 15 speculation, assumes facts. Also, to the extent  
15:41:07 16 that answering this question would cause you to  
15:41:11 17 reveal the contents of an attorney-client privileged  
15:41:12 18 communication, then I would have to instruct you not  
15:41:13 19 to answer.  
15:41:15 20 If you can answer without revealing such  
15:41:17 21 communication, you may do so.  
15:41:18 22 THE WITNESS: I can't answer it based on  
15:41:19 23 that instruction.  
15:41:21 24  
25

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15:44:51 4

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15:44:57 6

15:44:58 7

MR. PICKETT: Q. What prompted the

15:45:03 8

recommunication of the directive in August 2007?

15:45:04 9

MS. FROYD: Again I'm going to object on

15:45:06 10

the grounds of privilege.

15:45:07 11

To the extent that you can answer that

15:45:09 12

question without revealing the content of an

15:45:10 13

attorney-client privileged communication, you may do

15:45:14 14

so. Otherwise, I instruct you not to answer.

15:45:15 15

THE WITNESS: I can't answer it based on

15:45:16 16

that instruction.

15:45:16 17

15:45:19 18

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15:46:02 5  
15:46:04 6  
15:46:07 7  
15:46:09 8  
15:46:11 9  
15:46:12 10  
15:46:14 11  
15:46:17 12  
15:46:21 13  
15:46:23 14  
15:46:29 15  
15:46:34 16  
15:46:37 17  
15:46:46 18  
15:46:48 19  
15:46:55 20  
15:46:57 21  
15:47:00 22  
15:47:01 23  
15:47:03 24

Q. What do you know about the discussions,  
25 analyses documents or communications leading up to

15:47:09 1 the decision to issue the August 2007 Board  
15:47:09 2 directive?

15:47:10 3 MS. FROYD: Again, I'll advise you that to  
15:47:13 4 the extent you can answer that question without  
15:47:15 5 revealing the contents of an attorney-client  
15:47:19 6 communication, privileged communication, you may do  
15:47:22 7 so. Otherwise, I instruct you not to answer.

15:47:23 8 THE WITNESS: I can't answer based upon  
15:47:24 9 that instruction.

15:47:26 10 MR. PICKETT: Q. What was the content of  
15:47:29 11 the August 2007 recommunication of the Board  
15:47:35 12 directive?

15:47:39 13 A. I believe it was identical to the -- to the  
15:47:42 14 original one. In essence, that the environments  
15:47:46 15 need to be relocated from TomorrowNow to the  
15:47:47 16 customer.

15:47:52 17  
15:47:56 18  
15:47:58 19  
15:48:00 20  
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16:27:36 8  
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16:49:16 11  
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16:49:21 13  
16:49:24 14  
16:49:41 15  
16:49:45 16  
16:49:47 17  
16:49:50 18  
16:49:52 19  
16:49:56 20  
16:49:57 21  
16:50:01 22  
16:50:07 23  
16:50:09 24  
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MR. PICKETT: Q. Does Exhibit 535, the  
wind-down final report, indicate by when TomorrowNow  
had achieved compliance with the Board directive?

A. I think ultimately, yes.

Q. Ultimately where?

A. Ultimately, on the day that TomorrowNow was  
wound down.

Q. So October 31, 2008?

A. Right.

17:31:56 1  
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17:32:19 7  
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17:32:36 13  
17:32:38 14  
17:32:40 15  
17:32:43 16  
17:32:48 17  
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17:33:02 21  
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17:33:20 24  
25

MR. PICKETT: Q. What was it that resulted  
in SAP learning that TomorrowNow's progress towards  
compliance was not as they had allowed you to

17:33:28 1 believe?

17:33:29 2 MS. FROYD: I'm going to object on the  
17:33:31 3 grounds of privilege and instruct you not to answer  
17:33:32 4 that question.

17:33:34 5 MR. PICKETT: Q. Did Greg Nelson ever  
17:33:38 6 mislead SAP?

17:33:40 7 A. I think the answer for Greg is essentially  
17:33:45 8 the same. It's hard for me to separate out every  
17:33:47 9 time that -- the communications from one or the  
17:33:50 10 other.

17:33:56 11 So I think it's also fair to say that  
17:33:59 12 during that time frame, during the late 2006 -- or  
17:34:03 13 I'm sorry, the late 2005, 2006 time frame, when we  
17:34:05 14 had really developed an impression that they were  
17:34:08 15 making more progress, most of my communication  
17:34:12 16 during that time was with Greg. There were  
17:34:14 17 certainly conversations with Andrew as well, as  
17:34:18 18 we've talked about. So it's fair to say both of  
17:34:25 19 them, you know, generated that understanding that we  
17:34:30 20 had.

17:34:33 21 Q. Did you ask for any written reports about  
17:34:35 22 progress?

17:34:38 23 A. No.

17:34:40 24 Q. Why not?

25 MS. FROYD: Objection to the extent that

17:34:46 1    that question calls you to reveal the contents of an  
17:34:49 2    attorney-client privileged communication.  If it  
17:34:52 3    does, I instruct you not to answer.  If you can  
17:34:54 4    answer without revealing such a communication, you  
17:35:05 5    may do so.

17:35:06 6                    THE WITNESS:  I can't answer it based on  
17:35:07 7    that objection.

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MR. PICKETT: Q. Were your conversations with Andrew and Greg Nelson as their attorney or in connection with enforcement of the Board directive?

A. As their attorney.

Q. Was one of the topics you discussed compliance with the Board directive?

A. Yes.

Q. And did you do anything other than talk with them for 2 plus years about that topic with respect to obtaining that compliance?

MS. FROYD: That's a "yes" or "no" question.

THE WITNESS: No.

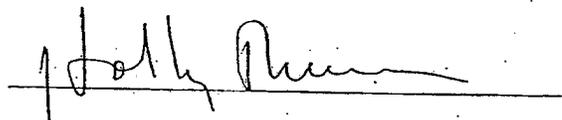
CERTIFICATE OF REPORTER

1 I, HOLLY THUMAN, a Certified Shorthand  
2 Reporter, hereby certify that the witness in the  
3 foregoing deposition was by me duly sworn to tell the  
4 truth, the whole truth, and nothing but the truth in the  
5 within-entitled cause; that said deposition was taken  
6 down in shorthand by me, a disinterested person, at the  
7 time and place therein stated, and that the testimony of  
8 the said witness was thereafter reduced to typewriting,  
9 by computer, under my direction and supervision;

10  
11 That before completion of the deposition,  
12 review of the transcript [X] was [ ] was not requested.  
13 If requested, any changes made by the deponent (and  
14 provided to the reporter) during the period allowed are  
15 appended hereto.

16 I further certify that I am not of counsel or  
17 attorney for either or any of the parties to the said  
18 deposition, nor in any way interested in the event of  
19 this cause, and that I am not related to any of the  
20 parties thereto.

21  
22 DATED March 20, 2009

23  
24 

25 HOLLY THUMAN, CSR No. 6834