

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND 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 DEPOSITION OF
BRIAN S. SOMMER

FRIDAY, JUNE 25, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY
REPORTED BY: HOLLY THUMAN, CSR No. 6834, RMR, CRR
(1-429044)

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 BRIAN S. SOMMER - 6/25/2010

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1 --o0o--
 2 Deposition of BRIAN S. SOMMER, taken by the
 3 Plaintiffs, at BINGHAM McCUTCHEM, Three Embarcadero
 4 Center, San Francisco, California 94111, commencing
 5 at 9:00 a.m., on FRIDAY, JUNE 25, 2010, before me,
 6 HOLLY THUMAN, CSR, RMR, CRR.
 7 --o0o--
 8 OAPPEARANCES
 9 FOR THE PLAINTIFFS:
 10 BINGHAM MCCUTCHEM
 Three Embarcadero Center
 11 San Francisco, California 94111
 By: HOLLY HOUSE, Attorney at Law
 12 LUCIA MacDONALD, Attorney at Law.
 13 BOIES, SCHILLER & FLEXNER LLP
 1999 Harrison Street, Suite 900
 14 Oakland, California 94612
 By: FRED NORTON, Attorney at Law
 15
 16 FOR THE DEFENDANTS:
 17 JONES DAY
 555 California Street, 26th Floor
 San Francisco, California 94104
 18 By: JASON McDONELL, Attorney at Law
 ELAINE WALLACE, Attorney at Law
 19 ALSO PRESENT:
 20 TED HOPPE, Videographer
 ELIZABETH DEAN, TM Financial Forensics
 21
 22
 23
 24
 25

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1 SAN FRANCISCO, CALIFORNIA; FRIDAY, JUNE 25, 2010
 2 9:00 a.m.
 3 --o0o--
 4 PROCEEDINGS
 5 THE VIDEO OPERATOR: Here begins Volume 1,
 6 Videotape No. 1 in the deposition of Brian Sommer
 7 in the matter of Oracle versus SAP AG in the United
 8 States District Court, Northern District of
 9 California, Oakland Division.
 10 Today's date is June 25th, 2010; the time
 11 on the video monitor, 9 o'clock.
 12 The video operator today is Ted Hoppe,
 13 employed by Merrill Legal Solutions, San Francisco.
 14 This videotaped deposition is taking place
 15 at Three Embarcadero Center in San Francisco.
 16 Counsel, could you please voice identify
 17 yourselves and state whom you represent.
 18 MS. HOUSE: Holly House and Lucia
 19 MacDonald from Bingham McCutchen, for the
 20 plaintiffs.
 21 MS. DEAN: Elizabeth Dean, TM Financial
 22 Forensics.
 23 MR. NORTON: Fred Norton, Boies Schiller.
 24 MR. McDONELL: Jason McDonell and Elaine
 25 Wallace from Jones Day, for Defendants.

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BRIAN S. SOMMER - 6/25/2010

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09:01:17 1 THE VIDEO OPERATOR: Very good. The court
09:01:19 2 reporter today is Holly Thuman of Merrill Legal
09:01:24 3 Solutions.
09:01:25 4 Holly, could you please swear the witness
09:01:28 5 in
09:01:38 6 --o0o--
09:01:38 7 BRIAN S. SOMMER,
09:01:38 8 _____
09:01:38 9 called as a witness, having been first duly sworn,
09:01:38 10 was examined and testified as follows:
09:01:38 11 ---oOo---
16:29:58 12 EXAMINATION BY MS. HOUSE.
09:01:39 13 MS. HOUSE: Q. Good morning.
09:01:39 14 A. Good morning.
09:01:40 15 Q. You understand the oath you just took
09:01:42 16 obligates you to tell the truth, the whole truth
09:01:44 17 here today, just as you would if in court?
09:01:50 18 A. Yes.
09:01:51 19 Q. Do you understand you are to provide full
09:01:53 20 and complete answers?
09:01:54 21 A. Yes, I do.
09:01:54 22 Q. And do you agree to do so?
09:01:56 23 A. Yes, I do.
09:01:57 24 Q. And it's very important that you
09:01:58 25 understand my questions before you answer. So do

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09:02:00 1 you agree that you'll let me know if there's
09:02:02 2 anything you don't understand in my question?
09:02:04 3 A. Yes, I will.
09:02:04 4 Q. Thank you. Did you bring any notes to
09:02:07 5 this deposition?
09:02:08 6 A. I brought a copy of my report.
09:02:10 7 Q. Does it have any notes in it?
09:02:12 8 A. It has a couple.
09:02:13 9 Q. Okay. Let's break and make a copy.
09:02:18 10 THE VIDEO OPERATOR: Going off the record,
09:02:18 11 the time now is 9:02.
09:02:21 12 (Recess from 9:02 p.m. to 9:09 a.m.)
09:09:32 13 THE VIDEO OPERATOR: The time now is 9:09
09:09:34 14 and we're back on the videotape record.
09:09:37 15 MS. HOUSE: Q. What if anything did you
09:09:38 16 do to prepare for your deposition today?
09:09:40 17 A. I reread my own report a couple of times.
09:09:44 18 I read Mr. -- reread Mr. Meyer's report. I watched
09:09:52 19 about a day and a half's worth of the video
09:09:56 20 deposition of Mr. Steve Clarke, and I read
09:10:01 21 Mr. Clarke's report.
09:10:06 22 Q. Did you meet with Defendants' attorneys?
09:10:09 23 A. Yes, I did.
09:10:10 24 Q. How long?
09:10:13 25 A. I met with them probably 7 days over about

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09:10:20 1 a 3- or 4-week period.
09:10:24 2 Q. To prepare for this deposition?
09:10:26 3 A. Yes.
09:10:28 4 Q. Who did you meet with?
09:10:32 5 A. Jason McDonell, Elaine -- and Patrick
09:10:36 6 Delahunty were the two main ones that I met with.
09:10:40 7 I met with Elaine for about a day, and then there
09:10:46 8 were a couple other attorneys. There was a Scott,
09:10:49 9 and I don't remember his last name. He was there
09:10:53 10 for about a little more than a half a day, half day
09:10:55 11 to three-quarters of a day, probably. And there
09:10:57 12 were a couple other people, like even a paralegal
09:11:00 13 that walked in the room from time to time, but I
09:11:02 14 don't have their names.
09:11:03 15 Q. And what did you discuss?
09:11:08 16 MR. McDONELL: That's privileged.
09:11:09 17 MS. HOUSE: It's not privileged.
09:11:09 18 MR. McDONELL: Under the stipulation.
09:11:12 19 MS. HOUSE: Q. Did anything that you
09:11:12 20 discussed assist in your preparation for the
09:11:15 21 deposition today?
09:11:20 22 MR. McDONELL: I instruct you -- well,
09:11:21 23 you -- you may answer "yes" or "no," but beyond
09:11:24 24 that, don't disclose any of those communications in
09:11:26 25 the stipulation.

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09:11:27 1 THE WITNESS: Can you repeat the question?
09:11:34 2 MS. HOUSE: Q. Did any of the 7 days that
09:11:35 3 you spent with Jones Day's attorneys assist you in
09:11:37 4 preparing for your deposition?
09:11:41 5 A. I would say -- I'd have to say yes.
09:11:44 6 Q. Are you relying on any of the information
09:11:47 7 that you discussed in those 7 days in answering
09:11:49 8 your questions today?
09:11:50 9 MR. McDONELL: I instruct you not to
09:11:51 10 answer under the stipulation. We could confer --
09:11:55 11 MS. HOUSE: Based on reliance? We're
09:11:56 12 talking about reliance, which is one of the things
09:11:58 13 we're allowed to test.
09:11:59 14 Q. What are you relying on?
09:12:01 15 MR. McDONELL: No, no, no. It's -- let's
09:12:06 16 take a short break and I'll read the stipulation.
09:12:09 17 Off the record, please.
09:12:11 18 THE VIDEO OPERATOR: Going off the record,
09:12:12 19 the time now is 9:11.
09:13:26 20 (Recess from 9:11 a.m. to 9:15 a.m.)
09:15:06 21 THE VIDEO OPERATOR: The time now is 9:14,
09:15:07 22 and we're back on the videotape record.
09:15:09 23 MR. McDONELL: Counsel, I'm going to
09:15:10 24 instruct the witness not to disclose any
09:15:11 25 communications with counsel in connection with

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09:15:14 1 preparing for the deposition and the stipulation
09:15:16 2 regarding expert discovery, which precludes such
09:15:20 3 inquiry.
09:15:22 4 MS. HOUSE: Q. In any of the materials
09:15:24 5 that you looked at in your 7 days of preparation
09:15:26 6 with the Jones Day attorneys, are you using any of
09:15:29 7 that material, relying on it in providing any of
09:15:32 8 your opinions in this case?
09:15:33 9 MR. McDONELL: The answer is no, Counsel,
09:15:34 10 he has not.
09:15:36 11 MS. HOUSE: Excuse me?
09:15:37 12 MR. McDONELL: He has not.
09:15:39 13 MS. HOUSE: He's not going to --
09:15:40 14 MR. McDONELL: He's not relying on any of
09:15:42 15 that for purposes of his testimony or for any part
09:15:44 16 of his expert opinion. I instruct him not to
09:15:46 17 answer.
09:15:47 18 MS. HOUSE: Q. So none of the -- did you
09:15:48 19 look at anything in connection with your
09:15:50 20 preparation?
09:15:50 21 You can answer "yes" or "no."
09:15:52 22 A. Did I look at anything in preparation for
09:15:54 23 this deposition. Yes.
09:15:56 24 Q. And any of the material that you looked
09:15:58 25 at, are you relying on it as a basis for any of

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09:16:01 1 your opinions in this case?
09:16:03 2 MR. McDONELL: He is not. I've told you
09:16:04 3 that already, Counsel.
09:16:05 4 THE WITNESS: I am not.
09:16:06 5 MS. HOUSE: Q. So for instance, when you
09:16:07 6 looked at Mr. Clarke's deposition and -- are you
09:16:11 7 relying on that in connection with your deposition
09:16:13 8 today?
09:16:14 9 MR. McDONELL: Counsel, that's different.
09:16:15 10 That's something he did privately, that was not any
09:16:17 11 kind of communication --
09:16:18 12 MS. HOUSE: Let him answer.
09:16:20 13 Q. Are you relying on it, sir?
09:16:22 14 A. I'm not relying on it for opinions. I
09:16:23 15 have never given a deposition like this before in
09:16:26 16 my life, and I wanted to make sure I knew what I
09:16:29 17 was going to get into. I viewed it as training
09:16:31 18 more than anything else.
09:16:32 19 Q. Okay. Are you relying on Mr. Clarke's
09:16:34 20 report in connection with your opinions?
09:16:36 21 A. No, I am not.
09:16:37 22 Q. Okay. Have you ever had your deposition
09:16:45 23 taken before?
09:16:46 24 A. I did have one, briefly.
09:16:51 25 Q. When was that?

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09:16:52 1 A. That would have been probably 4 years ago.
09:16:58 2 Q. What was it in connection with?
09:16:59 3 A. It was an estate matter, and I was asked
09:17:02 4 to describe a conversation that involved a
09:17:09 5 decedent.
09:17:11 6 Q. It's fair to say that had nothing to do
09:17:14 7 with ERP software?
09:17:15 8 A. Absolutely nothing to do with that.
09:17:23 9 Q. Have you ever been qualified or accepted
09:17:24 10 as an expert in any court?
09:17:26 11 MR. McDONELL: Calls for a legal
09:17:26 12 conclusion.
09:17:28 13 THE WITNESS: No.
09:17:30 14 MS. HOUSE: Q. Have you ever been an
09:17:31 15 expert witness in any other piece of litigation?
09:17:34 16 MR. McDONELL: Same objection.
09:17:35 17 THE WITNESS: No.
09:17:38 18 MS. HOUSE: Q. So there's -- there is no
09:17:39 19 expert work listed in your CV, and that's because
09:17:44 20 you have never been an expert witness before.
09:17:46 21 Correct?
09:17:46 22 A. I have not been an expert witness. In
09:17:50 23 fact, I've never even been in a trial. So --
09:17:53 24 Q. Well, welcome to the fray.
09:17:55 25 A. Yeah, thank you very much.

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09:18:01 1 Q. So have you ever provided an expert report
09:18:04 2 other than the one in this case?
09:18:06 3 A. No, I have not.
09:18:10 4 Q. Have you -- in your non-expert work, have
09:18:14 5 you ever been employed by SAP?
09:18:17 6 A. No, I have not been employed by SAP.
09:18:20 7 Q. Probably bad phrasing.
09:18:22 8 Have you ever done any work for SAP, for
09:18:24 9 instance, as a consultant?
09:18:27 10 A. The closest I ever got to that, I was
09:18:30 11 asked to show up one day at a -- to be part of a
09:18:35 12 panel that they brought a bunch of industry
09:18:38 13 research analysts in to comment on some business
09:18:46 14 strategy and product strategy questions they had.
09:18:48 15 That was many, many years ago.
09:18:50 16 Q. How about your company TechVentive? Have
09:18:54 17 they done any engagements outside of this work with
09:18:57 18 you in this case?
09:18:59 19 A. No. It has not.
09:19:11 20 MS. HOUSE: I'm going to show you a page
09:19:12 21 from the TechVentive website. We'll mark it as
09:19:16 22 3244.
09:19:17 23 (Deposition Exhibit 3244 was marked for
09:19:20 24 identification.)
09:19:21 25 MS. HOUSE: Q. And I want to ask you

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09:19:21 1 about it.
09:19:26 2 MR. McDONELL: Do you have just one extra
09:19:28 3 copy for us, Counsel? Thank you.
09:19:37 4 MS. HOUSE: Q. And this is a page, I'll
09:19:40 5 represent to you, that was printed off from the
09:19:41 6 TechVentive website. That's your company.
09:19:44 7 Correct?
09:19:44 8 A. Yes.
09:19:44 9 Q. And it's the page that's titled "Clients &
09:19:48 10 References."
09:19:48 11 A. Yes.
09:19:49 12 Q. And there's a reference in the second
09:19:52 13 paragraph that says: Through partners, TechVentive
09:19:55 14 has also assisted technology firms like SEEC, SAP,
09:19:59 15 Initiate, et cetera.
09:20:00 16 What is the reference to SAP there?
09:20:02 17 A. That was that "through partners" point;
09:20:05 18 that is that advisory day deal that I referenced
09:20:10 19 just a moment ago.
09:20:11 20 Q. So when you put that down as a client or
09:20:13 21 reference, you're referencing something you did 4
09:20:16 22 years ago that you previously just described?
09:20:19 23 A. Yes, I am.
09:20:20 24 MR. McDONELL: I'm sorry. Did you say 4
09:20:22 25 years ago, counsel? His testimony was --

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09:20:24 1 THE WITNESS: Probably about 4 years ago.
09:20:26 2 MR. McDONELL: Okay, sorry.
09:20:27 3 MS. HOUSE: Q. That's why I said it.
09:20:29 4 THE WITNESS: I don't remember exactly.
09:20:31 5 MS. HOUSE: Q. Have you ever worked with
09:20:32 6 Oracle before?
09:20:35 7 A. No, I do not believe I have.
09:20:37 8 Q. Did you ever work with PeopleSoft before?
09:20:47 9 A. I don't think I've had an engagement with
09:20:48 10 PeopleSoft. I have been a -- I have been a speaker
09:20:50 11 at a bunch of their conferences, but I don't
09:20:54 12 believe I've had them as a client.
09:20:57 13 Q. How about JD Edwards? Were they ever a
09:21:00 14 client?
09:21:00 15 A. No, they were not.
09:21:03 16 Q. Can you name any clients that you've had
09:21:05 17 that are in the ERP space?
09:21:08 18 A. Yes, I can.
09:21:09 19 Q. Who?
09:21:11 20 A. I've done some work for SYSPRO, for --
09:21:23 21 give me a second here. I'm a little
09:21:25 22 undercaffeinated this morning.
09:21:27 23 Q. I can solve that.
09:21:33 24 A. Workday. I've done -- do you want to
09:21:38 25 count any of the other like HR vendors?

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09:21:40 1 I've done a bunch of project portfolio
09:21:44 2 management vendors that are -- some of their
09:21:46 3 solutions are in ERP product lines. That would
09:21:49 4 include Primavera. I've done some smaller
09:21:53 5 assignments for companies like Open Ratings, which
09:21:57 6 is now part of NetSuite. I've done some reprint
09:22:00 7 right deals with NetSuite, and Salesforce.com, I
09:22:05 8 believe.
09:22:12 9 Q. What was your work with SYSPRO?
09:22:17 10 A. I developed some white papers for them
09:22:22 11 related to the medical devices ERP space, and
09:22:32 12 another one on the food manufacturing -- well,
09:22:34 13 food, whatever, the food industry and ERP.
09:22:41 14 Q. And those -- when you say white papers,
09:22:44 15 what do you mean? Were you engaged by SYSPRO to
09:22:49 16 write papers on their behalf? What do you mean by
09:22:52 17 that?
09:22:52 18 A. They asked me to develop a paper about the
09:22:56 19 issues involved in those two respective industries.
09:23:00 20 The one on the food industry, for example, I looked
09:23:04 21 at a number of functional requirements that an ERP
09:23:10 22 package would have to have if it were to
09:23:13 23 successfully satisfy the regulatory requirements
09:23:18 24 and -- that are present in that industry. And
09:23:22 25 they're literally -- I went and researched things

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09:23:25 1 like all the different recalls of food and other
09:23:27 2 kind of matters.
09:23:28 3 Q. Your work for SYSPRO, did it have anything
09:23:30 4 to do with purchasing of ERP software?
09:23:34 5 MR. McDONELL: Vague and ambiguous.
09:23:38 6 THE WITNESS: I mean, the context of
09:23:40 7 the -- of this report would identify -- it did
09:23:44 8 identify some of the kinds of functionality that a
09:23:46 9 buyer might need to look at. So I guess in that
09:23:49 10 capacity, the answer would be yes.
09:23:51 11 MS. HOUSE: Q. But it wasn't assisting in
09:23:53 12 actually helping SYSPRO purchase any ERP software?
09:23:56 13 MR. McDONELL: Vague and ambiguous. Asked
09:23:58 14 and answered.
09:23:59 15 THE WITNESS: That would be correct.
09:24:01 16 MS. HOUSE: Q. And did your white paper
09:24:02 17 have anything to do with a provision of support on
09:24:05 18 the ERP applications that you were discussing?
09:24:08 19 A. No.
09:24:10 20 MR. McDONELL: Object to the form of the
09:24:11 21 question.
09:24:11 22 Mr. Sommer, can I ask you to pause for a
09:24:15 23 moment between the question and answer so I can
09:24:16 24 object.
09:24:19 25 MS. HOUSE: Q. The next company that you

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09:24:20 1 identify as being in the -- at least somehow
09:24:24 2 related to ERP was Workday.
09:24:26 3 A. Yes.
09:24:27 4 Q. What work can you do for them in
09:24:29 5 connection with ERP?
09:24:32 6 A. That was a fairly recent deal. They asked
09:24:35 7 me to interview a number of companies who had
09:24:41 8 recently moved from on-premise ERP software to
09:24:45 9 software-as-a-service or on-demand types of
09:24:48 10 application software.
09:24:50 11 And from that research, I've produced a
09:24:54 12 white paper.
09:24:57 13 Q. About that -- the pros and cons of the
09:25:00 14 switch, or --
09:25:01 15 A. It mostly talked about how large
09:25:03 16 enterprises are now shifting their purchase
09:25:06 17 decisions away from on-premise and to -- onto
09:25:11 18 software-as-a-service type products. And it
09:25:14 19 discussed some of the common evolution paths that
09:25:18 20 customers are going through as they transition to
09:25:21 21 this new style of application software.
09:25:23 22 Q. And Workday, are they an ERP vendor?
09:25:29 23 A. Yes, they are. They have -- they started
09:25:31 24 off with human resource applications. They've
09:25:36 25 added payroll. They now have financial

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09:25:38 1 applications that they're selling in the
09:25:41 2 marketplace as well.
09:25:44 3 Q. So you weren't assisting them in
09:25:46 4 purchasing any ERP?
09:25:48 5 MR. McDONELL: Vague and ambiguous.
09:25:49 6 Object to the form.
09:25:50 7 THE WITNESS: That would be correct.
09:25:52 8 MS. HOUSE: Q. And you weren't assisting
09:25:53 9 them in evaluating support on their ERP
09:25:58 10 applications, were you?
09:26:01 11 MR. McDONELL: Same objections.
09:26:03 12 THE WITNESS: Support is only tangentially
09:26:09 13 referenced in that report. And that's because
09:26:14 14 software-as-a-service products don't have the same
09:26:17 15 kind of maintenance requirements or -- I don't know
09:26:21 16 what word I'd want to use there -- that an
09:26:24 17 on-premise product would have.
09:26:28 18 MS. HOUSE: Q. But it's fair to say that
09:26:29 19 the work that you were doing with Workday in
09:26:31 20 conducting these interviews and writing this white
09:26:33 21 paper had nothing to do with assisting anybody in
09:26:36 22 the purchase of support?
09:26:38 23 MR. McDONELL: Object to the form.
09:26:47 24 THE WITNESS: I struggle with your word --
09:26:50 25 your phrase, would have nothing to do. Again, I

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09:26:52 1 said the report tangentially touches on the
09:26:56 2 question of maintenance, because there is a
09:26:57 3 difference in maintenance --
09:26:58 4 MS. HOUSE: Q. I understand that there
09:26:59 5 is, and you've explained it. But I'm trying to
09:27:01 6 understand that this particular project, its
09:27:05 7 purpose and goal was not to assist in the purchase
09:27:06 8 of support.
09:27:08 9 MR. McDONELL: Object --
09:27:11 10 MS. HOUSE: Q. Of ERP. Correct?
09:27:13 11 MR. McDONELL: Object to the form.
09:27:13 12 THE WITNESS: In that -- in the way you
09:27:15 13 phrased the question, then I would say that would
09:27:16 14 be correct, yeah.
09:27:18 15 MS. HOUSE: Q. Is this a publicly
09:27:19 16 published paper?
09:27:21 17 A. Yes. In fact, people can find it on
09:27:24 18 the -- I believe it still may be out there on the
09:27:28 19 Workday website.
09:27:31 20 Q. And are the SYSPRO papers publicly
09:27:33 21 available?
09:27:35 22 A. They were for some time. They may still
09:27:37 23 be on -- available through SYSPRO.
09:27:40 24 Q. And how long ago did you do the SYSPRO
09:27:42 25 work?

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09:27:45 1 A. I would guess around 2008.
09:27:47 2 Q. And the Workday work?
09:27:50 3 A. That started -- that may be 2010.
09:27:57 4 Q. The next item you listed for me when I was
09:28:01 5 asking you about your ERP clients was Primavera.
09:28:06 6 Could you tell me what -- first of all, what is
09:28:08 7 Primavera?
09:28:09 8 A. Primavera is a project portfolio
09:28:14 9 management software company. They help companies
09:28:16 10 keep track of project costs and project completion,
09:28:25 11 and it's used a lot by companies in the
09:28:29 12 architectural, engineering, construction
09:28:32 13 industries, among others.
09:28:35 14 Q. And what work did you do for Primavera?
09:28:40 15 A. The bulk of what I did with Primavera
09:28:43 16 actually was what more -- they sponsored a blog of
09:28:47 17 mine.
09:28:48 18 Q. And what's the name of that blog?
09:28:50 19 A. Back then, I believe they sponsored
09:28:54 20 Software Safari.
09:29:00 21 Q. And so you didn't actually do any work
09:29:03 22 directly for them; they were assisting you?
09:29:05 23 A. Well, this goes back a number of years,
09:29:07 24 but I think I did a small either paper or research
09:29:11 25 project for them, but that's all it was. The bulk

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09:29:15 1 of what I had to do with them, the vast majority of
09:29:18 2 my economic relationship was with the sponsorship
09:29:23 3 on the blog.
09:29:27 4 Q. So it's fair to say that your work for
09:29:29 5 Primavera didn't have anything to do with either
09:29:31 6 assisting them in the purchase of ERP software or
09:29:35 7 ERP software support?
09:29:37 8 MR. McDONELL: Compound.
09:29:40 9 THE WITNESS: Correct.
09:29:42 10 MS. HOUSE: Q. And how long ago was your
09:29:43 11 work with Primavera?
09:29:46 12 A. It probably would have been in 2005 or
09:29:50 13 earlier. Probably more like around 2003, 2004.
09:29:54 14 It's been a while back.
09:29:56 15 Q. I believe the next company you listed was
09:29:59 16 Open Rating?
09:30:01 17 A. Open Rating?
09:30:02 18 Q. Is that right?
09:30:03 19 A. I -- that was one of these I did with a
09:30:06 20 partner, yes.
09:30:07 21 Q. And is that an ERP vendor?
09:30:10 22 A. No. Actually, I would probably classify
09:30:12 23 them as a procurement and sourcing vendor. You do
09:30:16 24 find that functionality in ERP packages, though.
09:30:21 25 And some of Open Rating's competitors are -- have

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09:30:29 1 been acquired by companies like SAP.
09:30:32 2 Q. When did you work with Open Rating?
09:30:36 3 A. Again, that would have been probably --
09:30:43 4 probably at the last time I probably did any work
09:30:48 5 with them, it probably would have been 4 years ago.
09:30:50 6 Q. And has any of your work with Open Rating
09:30:53 7 had to do with assisting in the purchase of ERP
09:30:56 8 software?
09:31:02 9 A. I'm going to ask you to define that
09:31:04 10 "purchase" question a little bit more clearly in
09:31:08 11 this particular case.
09:31:09 12 Q. Well, in the selection of ERP software?
09:31:18 13 MR. McDONELL: Vague and ambiguous.
09:31:22 14 MS. HOUSE: Q. For purchase. Either by
09:31:23 15 them or their clients. How's that?
09:31:27 16 A. Thank you. The work that I did was to
09:31:29 17 help them understand how to sell better to software
09:31:35 18 buyers in their space.
09:31:42 19 Q. And what was the end product? Was it a
09:31:50 20 white paper?
09:31:50 21 A. No.
09:31:51 22 MR. McDONELL: Vague and ambiguous.
09:31:52 23 MS. HOUSE: Q. Just advice?
09:31:54 24 A. It was advice and some training that I
09:31:57 25 developed for their -- with a partner, I developed

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09:32:01 1 to help their sales organization and marketing
09:32:03 2 organization be more effective.
09:32:07 3 Q. And did you include in that also the sale
09:32:10 4 of support on their software?
09:32:14 5 A. No. That wasn't relevant in that case.
09:32:24 6 Q. I think the last company you mentioned was
09:32:27 7 Salesforce.com?
09:32:29 8 A. Yes.
09:32:29 9 Q. And what work have you done for
09:32:31 10 Salesforce?
09:32:33 11 A. The only thing that's coming straight to
09:32:37 12 mind is, they did acquire some reprint rights to
09:32:40 13 some -- a white paper I believe I published that
09:32:43 14 featured some aspect of Salesforce or its products.
09:32:51 15 Q. Have you ever done any work with
09:32:53 16 Salesforce in connection with the topic of the
09:32:59 17 purchase of ERP software?
09:33:03 18 A. No.
09:33:03 19 Q. Or with the topic of the purchase of
09:33:06 20 support for ERP software?
09:33:12 21 A. I would have to say, only tangentially
09:33:15 22 again. They're another one of these
09:33:16 23 software-as-a-service vendors, so maintenance is
09:33:19 24 just a different kind of animal in that space. So
09:33:22 25 it may have been covered in the -- that may have

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09:33:25 1 been covered in the report. I just don't recall.
09:33:28 2 Q. And the report that you reference, what
09:33:30 3 report is that?
09:33:32 4 A. I don't remember which one they may have
09:33:34 5 licensed. I've written quite a bit about
09:33:37 6 Salesforce.com.
09:33:38 7 Q. They didn't commission any work from you.
09:33:40 8 Is that right?
09:33:41 9 A. That is correct. They did not.
09:33:47 10 Q. And is that paper available -- you don't
09:33:49 11 know which one it is. Right?
09:33:51 12 A. I don't know which one it is.
09:33:53 13 Q. Have we now gone over all of the companies
09:33:55 14 that you have done any ERP-related work for?
09:34:05 15 A. Let me think. I mean, I -- I've -- the
09:34:09 16 deal is, I visit with so many vendors.
09:34:12 17 MR. McDONELL: I object. The question is
09:34:13 18 overly broad.
09:34:28 19 THE WITNESS: Let's put NetSuite on that
09:34:31 20 list.
09:34:35 21 MS. HOUSE: Q. What is -- tell me what
09:34:37 22 NetSuite is. Tell me about the company first.
09:34:39 23 MR. McDONELL: Compound, vague.
09:34:41 24 THE WITNESS: NetSuite is an ERP vendor,
09:34:46 25 founded by -- or excuse me, funded by --

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09:34:51 1 MS. HOUSE: Q. Sometimes the same thing.
09:34:52 2 A. Yeah. By Larry Ellison personally, and I
09:34:58 3 believe NatWest Ventures -- I could be wrong on the
09:35:03 4 venture backer. It's based here in San Francisco
09:35:06 5 area. And it used to be called NetLedger. It's
09:35:10 6 been around for about 10 years. They started off
09:35:13 7 with -- with CRM and financial applications.
09:35:20 8 They've added other modules to their ERP suite,
09:35:25 9 some through organic growth and some through
09:35:27 10 inorganic acquisition.
09:35:32 11 Q. And what work have you done for NetSuite?
09:35:36 12 A. What I've done for them is, they've asked
09:35:39 13 me to come out and be a speaker at their
09:35:42 14 conference, one or two of their conferences.
09:35:46 15 They've had in me -- they've also licensed reprint
09:35:49 16 rights to probably one or two reports I've written
09:35:53 17 on them.
09:35:58 18 And I'm including them because they have
09:36:02 19 actually reimbursed me for travel expenses for when
09:36:06 20 I speak at their conference. So I'm not trying to
09:36:09 21 hide anything here.
09:36:10 22 Q. So the monies that you've received from
09:36:12 23 NetSuite were the reimbursement for your travel
09:36:15 24 expenses and for whatever the reprint rights were?
09:36:18 25 A. Yes.

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09:36:19 1 Q. You've never been commissioned by them to
09:36:21 2 do any particular work for the company. Is that
09:36:22 3 right?
09:36:23 4 A. That is correct. I have not.
09:36:26 5 Q. And the papers that they licensed from
09:36:29 6 you, do you know what they were on?
09:36:33 7 A. That's kind of like the Salesforce deal.
09:36:35 8 I've written a number of pieces, and I can't
09:36:37 9 remember which ones they licensed and which ones
09:36:40 10 they didn't.
09:36:40 11 Q. And when you spoke at their conferences,
09:36:43 12 you said that that was a couple times. Right?
09:36:46 13 A. I've spoken at two different events.
09:36:47 14 Q. When were those events?
09:36:49 15 A. One was earlier this year, called
09:36:53 16 SuiteCloud. And the other one would have been
09:37:01 17 probably either 2007 or 2008. I'm -- I know it's
09:37:07 18 been a couple years ago.
09:37:09 19 Q. And what did you speak on in that earlier
09:37:11 20 conference?
09:37:22 21 A. I think -- I think on that one I spoke
09:37:24 22 generally about the changing market for ERP
09:37:27 23 software.
09:37:32 24 Q. In the sense of the on-demand movement?
09:37:35 25 MR. McDONELL: Vague and ambiguous.

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09:37:36 1 THE WITNESS: Mostly, yes.
09:37:40 2 MS. HOUSE: Q. And in the SuiteCloud
09:37:43 3 conference, were you talking about cloud-related
09:37:47 4 issues in software?
09:37:48 5 A. Yes, I was.
09:37:50 6 Q. What -- did that have anything to do with
09:37:53 7 the purchase of ERP software or support?
09:38:00 8 MR. McDONELL: Vague and ambiguous.
09:38:04 9 THE WITNESS: Yes, it did.
09:38:06 10 MS. HOUSE: Q. In the sense of how it was
09:38:08 11 changing into a new model for cloud?
09:38:10 12 MR. McDONELL: Vague and ambiguous.
09:38:11 13 THE WITNESS: Yes. Exactly.
09:38:16 14 MS. HOUSE: Q. You weren't speaking about
09:38:17 15 how an individual buyer would purchase an ERP
09:38:20 16 application. Is that fair? In -- I guess the
09:38:25 17 old-fashioned way of -- let's try that again.
09:38:30 18 Your speech did not have to do with the
09:38:34 19 purchase of an ERP application by a company, for
09:38:40 20 instance, like an Oracle application?
09:38:46 21 MR. McDONELL: It's vague and ambiguous.
09:38:48 22 THE WITNESS: I touched on how the
09:38:50 23 economics are different between the on-premise and
09:38:54 24 the on-demand world.
09:39:02 25 MS. HOUSE: Q. All right. So now that

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09:39:02 1 we've added NetSuite, are there any other ERP
09:39:08 2 vendors for whom you have done any work?
09:39:11 3 MR. McDONELL: Overly broad.
09:39:15 4 THE WITNESS: Off the top of my head, I'm
09:39:16 5 not recalling anything right away.
09:39:21 6 MS. HOUSE: Q. Let's show you your expert
09:39:25 7 report, which we've marked 3243.
09:39:29 8 (Deposition Exhibit 3243 was marked for
09:39:31 9 identification.)
09:39:33 10 MS. HOUSE: And let me mark the one that
09:39:34 11 you brought this morning as 3245.
09:39:37 12 (Deposition Exhibit 3245 was marked for
09:39:39 13 identification.)
09:40:06 14 MS. HOUSE: Q. And can you point to the
09:40:09 15 pages in 3245 where there were notes?
09:40:15 16 A. I believe that's pages 3 and 4. Yes.
09:40:20 17 Q. And looking at those pages, it looks like
09:40:23 18 you've made some margin notes with paragraphs from
09:40:25 19 the Meyer report. Is that correct?
09:40:28 20 A. That would be correct.
09:40:30 21 Q. And other than those margin notes about
09:40:32 22 the Meyer report, there are no other notes that
09:40:36 23 you're relying on for purposes of today's
09:40:38 24 deposition?
09:40:40 25 A. That is correct.

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09:40:53 1 Q. Let's see. Let's -- I don't care which
09:40:57 2 one we use. Why don't we use the one with your
09:41:00 3 notes on it since, you know, that's the one you
09:41:02 4 brought with you.
09:41:03 5 On page 1 of your report -- first of all,
09:41:08 6 does this report contain the opinions you intend to
09:41:11 7 offer at trial?
09:41:12 8 MR. McDONELL: Calls for a legal
09:41:12 9 conclusion.
09:41:15 10 THE WITNESS: Yes.
09:41:16 11 MS. HOUSE: Q. And does it contain the
09:41:17 12 bases for those opinions?
09:41:19 13 A. Yes.
09:41:20 14 Q. And all the experience on which you intend
09:41:23 15 to rely for those opinions is listed in your
09:41:25 16 report. Is that correct?
09:41:27 17 MR. McDONELL: To the extent required by
09:41:28 18 the rules, that is correct.
09:41:31 19 MS. HOUSE: I would prefer if you not
09:41:32 20 answer for the witness. Cut it out, Jason.
09:41:36 21 MR. McDONELL: I'm sorry.
09:41:36 22 MS. HOUSE: Don't do it again.
09:41:38 23 MR. McDONELL: It's just that this witness
09:41:39 24 is not a professional witness, so I'm trying to be
09:41:42 25 somewhat helpful.

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09:41:44 1 MS. HOUSE: You know, then object.
09:41:45 2 Q. All the experience on which you intend to
09:41:47 3 rely on for your opinions is listed on your report.
09:41:49 4 Correct?
09:41:50 5 MR. McDONELL: Object to the legal --
09:41:51 6 calls for a legal conclusion.
09:41:51 7 THE WITNESS: I've written the document,
09:41:56 8 this -- as well as I could. And there may be other
09:42:00 9 experience that I've gleaned from my 20-, 30-odd
09:42:03 10 years working in the space that I've represented in
09:42:07 11 here as well. But this is my testimony, this is my
09:42:10 12 report, and this is -- these are -- this is --
09:42:14 13 well, this is it.
09:42:15 14 MS. HOUSE: Q. Okay. And the factual
09:42:16 15 material that you rely on which support -- you
09:42:19 16 believe supports your opinions, you've included it
09:42:21 17 in your report. Correct?
09:42:22 18 MR. McDONELL: Asked and answered.
09:42:24 19 THE WITNESS: Yeah. There's a big
09:42:25 20 appendix I put down here, Appendix C, that lists
09:42:28 21 those.
09:42:29 22 MS. HOUSE: Q. And also, you've listed
09:42:31 23 things in footnotes. Correct?
09:42:32 24 A. Yes.
09:42:34 25 Q. And all the materials that are in your

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09:42:36 1 footnotes are also contained in Exhibit -- or
09:42:38 2 Appendix C. Correct?
09:42:40 3 A. I believe that's correct.
09:42:42 4 Q. Now, let's move on to page 1 of your
09:42:44 5 report. Under "Qualifications," the second
09:42:56 6 paragraph reads:
09:42:58 7 I have spent a considerable portion of my
09:43:00 8 career assisting clients in evaluating,
09:43:03 9 choosing, implementing and modifying
09:43:06 10 application software products and negotiating
09:43:08 11 software purchases.
09:43:12 12 Now, that doesn't -- that sentence
09:43:15 13 explicitly does not reference assisting clients
09:43:17 14 with the purchase of ERP follow-on support. Do you
09:43:23 15 see that it doesn't say that?
09:43:25 16 MR. McDONELL: The document speaks for
09:43:25 17 itself.
09:43:26 18 THE WITNESS: I see that.
09:43:28 19 MS. HOUSE: Q. Have you spent a
09:43:29 20 considerable portion of your career assisting
09:43:31 21 clients in evaluating choosing -- evaluating or
09:43:35 22 choosing follow-on ERP support?
09:43:37 23 MR. McDONELL: Vague and ambiguous.
09:43:40 24 THE WITNESS: For follow-on support, this
09:43:42 25 is the support not provided by the software vendor

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09:43:46 1 directly.
09:43:47 2 MS. HOUSE: Q. Well, that would be one --
09:43:49 3 A. Okay.
09:43:50 4 Q. Let's start with the idea that you --
09:43:51 5 you've described in your report how there is
09:43:54 6 initial support that's purchased when an
09:43:56 7 application is purchased. You understand that's
09:43:58 8 part of the entirety of the initial purchase.
09:44:01 9 Right?
09:44:02 10 MR. McDONELL: Object as overly broad,
09:44:04 11 vague and ambiguous.
09:44:04 12 THE WITNESS: I understand that.
09:44:06 13 MS. HOUSE: Q. So there's -- this is
09:44:08 14 after-market support?
09:44:10 15 A. Understood.
09:44:10 16 Q. Okay.
09:44:11 17 MR. McDONELL: Excuse me.
09:44:13 18 MS. HOUSE: Q. Have you spent --
09:44:14 19 MR. McDONELL: Excuse me, Counsel.
09:44:15 20 You've got to pause for a second. You're
09:44:17 21 answering instantaneously, and I don't have time to
09:44:20 22 object.
09:44:20 23 THE WITNESS: Okay. My apologies.
09:44:23 24 MS. HOUSE: Q. Have you spent a
09:44:24 25 considerable portion of your career assisting

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09:44:25 1 clients in the purchase of after-market support?
09:44:28 2 MR. McDONELL: Vague and ambiguous.
09:44:33 3 THE WITNESS: Under the qualifier of
09:44:35 4 "considerable," the answer would be no.
09:44:37 5 MS. HOUSE: Q. Okay. How -- name me a
09:44:42 6 client that you have assisted with the purchase of
09:44:45 7 after-market support.
09:44:46 8 MR. McDONELL: Vague and ambiguous.
09:44:51 9 THE WITNESS: I'm -- I'm thinking about
09:44:52 10 that. I'm not -- I'm not thinking of one that
09:44:55 11 comes to mind.
09:44:56 12 MS. HOUSE: Q. Okay. Do you believe you
09:45:00 13 have actually helped anybody with the purchase of
09:45:02 14 after-market support?
09:45:03 15 MR. McDONELL: Vague and ambiguous.
09:45:05 16 THE WITNESS: I don't believe I have.
09:45:09 17 MS. HOUSE: Q. Do you understand that
09:45:10 18 you're purporting to be an expert in the purchase
09:45:12 19 of after-market ERP support?
09:45:14 20 MR. McDONELL: Argumentative, calls for a
09:45:15 21 legal conclusion, object to the form of the
09:45:16 22 question.
09:45:19 23 THE WITNESS: I was -- my assignment on
09:45:20 24 this report was to look at the general dynamics of
09:45:23 25 what's going on in this space for both application

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09:45:26 1 software, for maintenance, both vendor-provided and
09:45:31 2 otherwise. And I have run into these vendors who
09:45:34 3 provide this support on a repeated basis at
09:45:37 4 different kind of industry venues.
09:45:40 5 I am not -- I am a market expert on what
09:45:43 6 goes on in the ERP space.
09:45:46 7 MS. HOUSE: Q. Let's try it this way:
09:45:48 8 Would you believe -- do you hold yourself out to
09:45:50 9 be, based on your experience, an expert in the
09:45:53 10 purchase of after-market ERP support?
09:45:56 11 MR. McDONELL: Calls for a legal
09:45:56 12 conclusion, object to the form of the question,
09:45:59 13 vague and ambiguous.
09:46:08 14 THE WITNESS: I would probably be about as
09:46:10 15 good of an expert as there is in that space, for as
09:46:13 16 small of a market as it is.
09:46:15 17 MS. HOUSE: Q. So you -- based on your
09:46:19 18 experience, you believe that you're an expert in
09:46:21 19 the purchase of after-market ERP support?
09:46:24 20 MR. McDONELL: Asked and answered,
09:46:25 21 argumentative, vague and ambiguous, calls for a
09:46:27 22 legal conclusion.
09:46:30 23 THE WITNESS: Again, I'm here to discuss
09:46:33 24 how the ERP marketplace works. And this is a small
09:46:37 25 component of that space.

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09:46:40 1 MS. HOUSE: Q. And a portion of that ERP
09:46:42 2 market, you understand, is the purchase of
09:46:44 3 after-market support. Correct?
09:46:45 4 MR. McDONELL: Same objections. Vague and
09:46:47 5 ambiguous. Doesn't really define your terms.
09:46:52 6 THE WITNESS: I am aware that that is a
09:46:53 7 component of some deals in some situations for some
09:46:57 8 clients at some point in time for some of those
09:47:00 9 customers, yes.
09:47:01 10 MS. HOUSE: Q. And you have never
09:47:01 11 assisted any such clients in such purchases.
09:47:05 12 Correct?
09:47:05 13 MR. McDONELL: Asked and answered, vague
09:47:05 14 and ambiguous, incomplete, object to the form.
09:47:09 15 THE WITNESS: No, I haven't, because
09:47:11 16 frankly, it's such a small little deal, they don't
09:47:14 17 need my help for something like that.
09:47:18 18 MS. HOUSE: Q. And you say that as to all
09:47:21 19 clients across the globe? Is that your --
09:47:25 20 MR. McDONELL: Vague and ambiguous.
09:47:25 21 Object to the form of the question.
09:47:28 22 THE WITNESS: I'm saying that generally.
09:47:32 23 MS. HOUSE: Q. Let's talk about -- I want
09:47:35 24 to make sure I understand when you say that you've
09:47:37 25 never assisted a client with a purchase of

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09:47:40 1 after-market support.
09:47:41 2 I also now want to expand that into, have
09:47:44 3 you ever assisted a client with the purchase or
09:47:47 4 consideration of whether to self-support in the
09:47:50 5 after-market?
09:47:51 6 MR. McDONELL: Object to the form of the
09:47:52 7 question.
09:47:59 8 THE WITNESS: I have had conversations
09:48:00 9 with CIOs who wonder whether they should drop
09:48:04 10 support altogether and self-support or stay with
09:48:09 11 vendor maintenance.
09:48:10 12 MS. HOUSE: Q. Have you been hired to
09:48:12 13 assist in that decision-making?
09:48:14 14 MR. McDONELL: Same objections.
09:48:15 15 THE WITNESS: No, I have not been hired to
09:48:17 16 do that.
09:48:19 17 MS. HOUSE: Q. The conversation that you
09:48:20 18 just mentioned with the CIO, can you name the
09:48:24 19 company?
09:48:25 20 MR. McDONELL: Object to the form.
09:48:30 21 THE WITNESS: All I remember was, it was a
09:48:32 22 Midwest manufacturer.
09:48:35 23 MS. HOUSE: Q. Is it one conversation
09:48:36 24 that you're recalling?
09:48:38 25 MR. McDONELL: Same objections.

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09:48:39 1 THE WITNESS: Well, that's -- that's what
09:48:40 2 you asked about that particular one, yes, that's
09:48:42 3 the one I'm referring to.
09:48:44 4 MS. HOUSE: Q. And you don't recall who
09:48:45 5 that was with?
09:48:46 6 MR. McDONELL: Asked and answered.
09:48:48 7 THE WITNESS: Again, I just remember it
09:48:49 8 was a Midwest manufacturer.
09:48:52 9 MS. HOUSE: Q. How long ago was that?
09:48:53 10 A. About a year ago.
09:48:57 11 Q. Was this in casual conversation, or was
09:49:02 12 this part of an engagement that you had for that
09:49:04 13 company?
09:49:05 14 MR. McDONELL: Assumes facts, vague and
09:49:05 15 ambiguous.
09:49:08 16 THE WITNESS: It was on a sales call with
09:49:09 17 them.
09:49:16 18 MS. HOUSE: Q. Other than this one sales
09:49:18 19 call where you discussed this rumination of this
09:49:23 20 Midwest manufacturer, have you assisted in any
09:49:26 21 other even discussion of whether to engage in
09:49:31 22 self-support in the after-market for ERP software?
09:49:34 23 MR. McDONELL: Object to the form of the
09:49:35 24 question, object to the preamble.
09:49:39 25 THE WITNESS: I have had a lot of

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09:49:41 1 conversations about this space. And --
09:49:44 2 MS. HOUSE: Q. I'm talking about
09:49:44 3 self-support, not this space.
09:49:46 4 A. Okay. On self-support. Nothing I recall
09:49:55 5 in recent time.
09:50:02 6 Q. So going back to the sentence that we
09:50:04 7 started with, where you talk about your
09:50:08 8 considerable portion of your career assisting
09:50:10 9 clients in evaluating, choosing, implementing and
09:50:13 10 modifying application software products and
09:50:16 11 negotiating software purchases, those were -- that
09:50:20 12 experience that you're talking about all had to do
09:50:22 13 with purchasing the ERP application in the initial
09:50:26 14 instance. Correct?
09:50:27 15 MR. McDONELL: Object to the form of the
09:50:28 16 question, overly broad.
09:50:38 17 THE WITNESS: It was your phrasing on "in
09:50:40 18 the initial instance." Can you clarify that?
09:50:44 19 MS. HOUSE: Q. We've been talking about
09:50:45 20 in our prior questions that there's an after-market
09:50:47 21 for support and self-support.
09:50:49 22 And I'm talking about your sentence and
09:50:51 23 what it's referring to. Are you talking about your
09:50:54 24 work in connection with helping somebody decide
09:50:57 25 what ERP applications to buy in the first place?

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09:51:00 1 MR. McDONELL: Object to the form of the
09:51:01 2 question.
09:51:03 3 THE WITNESS: Most of that sentence would
09:51:05 4 be correct. And as far as how you look at -- at
09:51:09 5 the time frame of when someone's initially buying a
09:51:12 6 piece of software.
09:51:14 7 But the part here where it says, and
09:51:17 8 modifying software application products, that would
09:51:18 9 be something that would happen during the
09:51:20 10 implementation.
09:51:21 11 MS. HOUSE: Q. So have you spent a
09:51:22 12 considerable portion of your career negotiating
09:51:24 13 software purchases?
09:51:26 14 MR. McDONELL: Object to the form.
09:51:28 15 THE WITNESS: I have advised clients on
09:51:29 16 software negotiations informally for years, and
09:51:35 17 then I've actually done some software negotiation
09:51:41 18 projects recently.
09:51:46 19 MS. HOUSE: Q. All right. So you said
09:51:47 20 you've done it informally for years, and more
09:51:50 21 formally recently. Right?
09:51:52 22 MR. McDONELL: Asked and answered. The
09:51:54 23 record speaks for itself.
09:51:56 24 THE WITNESS: Yes.
09:51:57 25 MS. HOUSE: Q. So when you say software

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09:51:59 1 purchasing, is that larger than ERP applications
09:52:04 2 software, or is it just ERP applications software?
09:52:07 3 MR. McDONELL: Object to the form.
09:52:14 4 THE WITNESS: The vast majority of this
09:52:16 5 would be for ERP software purchases.
09:52:26 6 MS. HOUSE: Q. And when you say
09:52:29 7 informally that you've talked to people about this
09:52:33 8 for years, does that mean that you were not
09:52:36 9 formally engaged to assist in that evaluation?
09:52:41 10 A. That is because many of those
09:52:46 11 conversations occurred when I was with Accenture,
09:52:49 12 and we were not permitted to provide that type of
09:52:54 13 service.
09:53:02 14 Q. And I don't understand that answer. Why
09:53:04 15 weren't you permitted to provide that service?
09:53:07 16 A. We were permitted to do software
09:53:09 17 selections. But as far as to do deal negotiation
09:53:12 18 work, that we were -- that wasn't -- that was a
09:53:16 19 policy the firm had.
09:53:19 20 Q. Okay. So we'll get into -- so you did --
09:53:26 21 at Accenture -- we'll get into this, but while you
09:53:30 22 didn't actually participate in the negotiation
09:53:33 23 while at Accenture, did you assist in the
09:53:35 24 evaluation?
09:53:37 25 MR. McDONELL: Object to the form.

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09:53:37 1 THE WITNESS: Absolutely.
09:53:37 2 MS. HOUSE: Q. And then in terms of
09:53:38 3 assisting with negotiations, you mentioned that you
09:53:41 4 have assisted in this formally more recently.
09:53:46 5 Correct?
09:53:46 6 A. Correct.
09:53:48 7 Q. In what way?
09:53:51 8 A. I've actually -- I was asked to help a
09:53:57 9 higher education entity negotiate a fairly large
09:54:05 10 ERP deal for them.
09:54:13 11 Q. And when was that?
09:54:16 12 A. In either '08 or '09.
09:54:23 13 Q. And what entity was that?
09:54:26 14 A. I've got a client non-disclosure on that.
09:54:29 15 I can't discuss that.
09:54:30 16 Q. That's fine.
09:54:32 17 Can you disclose what ERP software was
09:54:36 18 being considered?
09:54:40 19 A. I believe I can tell you that.
09:54:41 20 Q. What?
09:54:43 21 A. One was called Campus Management. And the
09:54:46 22 other is called SunGard Higher Ed, Higher
09:54:53 23 Education.
09:54:55 24 Q. Are either of those products of the
09:55:00 25 parties of this lawsuit?

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09:55:02 1 A. They are not parties to this lawsuit.
09:55:04 2 Q. So they're not Oracle or SAP or PeopleSoft
09:55:06 3 or JDE products. Right?
09:55:08 4 A. No. PeopleSoft has its own higher
09:55:14 5 education solution.
09:55:16 6 Q. And other than this work with negotiating
09:55:21 7 for this higher education entity, have you done any
09:55:25 8 other ERP negotiation?
09:55:28 9 MR. McDONELL: Vague, overbroad.
09:55:30 10 MS. HOUSE: Q. ERP purchase negotiations?
09:55:31 11 MR. McDONELL: I'm sorry. Vague and
09:55:33 12 overbroad, object to the form.
09:55:37 13 THE WITNESS: I have -- in the spirit of
09:55:38 14 full disclosure, I have an open proposal to do
09:55:41 15 another one right now, another higher education
09:55:44 16 one.
09:55:48 17 MS. HOUSE: Q. Did the deal for the
09:55:50 18 higher education entity, did the negotiation
09:55:53 19 actually take place?
09:55:54 20 A. The one that I completed?
09:55:55 21 Q. I didn't know if it was completed or not.
09:55:57 22 I know you were engaged.
09:55:59 23 A. The first one that you asked me about?
09:56:01 24 Q. Yes. Did that get completed?
09:56:02 25 A. Yes, it did.

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09:56:03 1 Q. And what was your role in connection with
09:56:05 2 it?
09:56:08 3 A. My job was to lead the negotiations
09:56:12 4 regarding -- I'd say many of the economic terms of
09:56:19 5 the deal.
09:56:35 6 Q. Have you ever -- were you involved with
09:56:38 7 any of the customers, the TomorrowNow customers, at
09:56:45 8 issue in this case in their purchase of ERP
09:56:48 9 applications?
09:56:51 10 MR. McDONELL: Object to the form of the
09:56:51 11 question.
09:56:55 12 THE WITNESS: Are you referring to the
09:56:56 13 customers on the list of like 358 or 360, something
09:57:01 14 like that?
09:57:02 15 MS. HOUSE: Q. Yes.
09:57:03 16 A. Yes. In my career, I have been to at
09:57:05 17 least two of those that I can recall.
09:57:08 18 Q. You've been to? What does that mean?
09:57:10 19 Sales calls?
09:57:11 20 A. I was there in some type of advisory or
09:57:15 21 sales role.
09:57:16 22 Q. So two customers on the list of 358?
09:57:20 23 A. That I immediately recall.
09:57:23 24 Q. Who are they?
09:57:25 25 A. I believe A.O. Smith is on that list. And

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09:57:30 1 I believe Harley-Davidson is on that list.
09:57:35 2 Now, if you want a more exact answer, I'd
09:57:37 3 have to look over that list. But those two stand
09:57:40 4 out in my mind.
09:57:42 5 Q. Let me give you the list. Let me mark it
09:57:56 6 3246.
09:57:57 7 (Deposition Exhibit 3246 was marked for
09:57:59 8 identification.)
09:58:00 9 THE WITNESS: Thank you.
09:58:11 10 MS. HOUSE: Q. For the record, while he's
09:58:12 11 looking, 3246 is Defendant TomorrowNow's Second
09:58:15 12 Supplemental Exhibit 1 to its First Set of Requests
09:58:18 13 for Production and Interrogatories to Plaintiffs.
09:58:50 14 A. (Examining document.) Okay.
10:01:26 15 Q. You've looked at this before, and now
10:01:29 16 you've looked at it again.
10:01:30 17 Do you see any other customers that you've
10:01:31 18 done any work for besides A.O. Smith or
10:01:35 19 Harley-Davidson?
10:01:36 20 A. Yeah, let me -- I know I've visited with
10:01:39 21 Rockwell Automation. And some of these go back a
10:01:41 22 long, long time ago, so I can't say -- you know,
10:01:45 23 these would go back into the 1990s, so I can't give
10:01:48 24 you much detail on them.
10:01:50 25 But I -- I do see Progress Software is on

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10:01:53	1 this list, and that is -- that has been someone	10:05:52	1 MS. HOUSE: Q. Have you -- was any of the
10:01:56	2 I've done client work for frequently in the last 10	10:05:53	2 work that you've done with any customer, whether
10:02:00	3 years.	10:05:57	3 they're on the list of 358 or not, was any of the
10:02:01	4 Q. And which one again was that?	10:06:01	4 work that you've ever done been to assist a
10:02:03	5 A. Progress Software Corporation.	10:06:04	5 customer considering whether to take a Safe Passage
10:02:56	6 I have been to see companies like	10:06:09	6 offer?
10:02:57	7 Manugistics and Ariba, but not as clients. Those	10:06:12	7 MR. McDONELL: Vague and ambiguous.
10:03:03	8 are just software companies that I have visited	10:06:14	8 MS. HOUSE: Q. Well, I don't want to say
10:03:04	9 with or had conversations with their executives.	10:06:15	9 "take." Let's try it again.
10:03:11	10 Q. I really want to focus on clients that	10:06:17	10 Have you ever assisted a client in
10:03:13	11 you've done any work for.	10:06:18	11 evaluating the purchase of SAP software through the
10:03:16	12 A. Understood. And a long, long time ago, I	10:06:27	12 Safe Passage program?
10:03:33	13 did some work for Safeway.	10:06:28	13 MR. McDONELL: Same objection.
10:03:36	14 Q. All right. Well, let's start with the	10:06:29	14 THE WITNESS: No.
10:03:38	15 ones that you first mentioned, A.O. Smith first.	10:06:33	15 MS. HOUSE: Q. Before this case, had you
10:03:41	16 What work have you done for A.O. Smith?	10:06:35	16 even heard of the Safe Passage program?
10:03:44	17 A. That was a long time ago in the '90s. And	10:06:37	17 A. Yes.
10:03:48	18 as I recall, they were just doing a -- they were	10:06:40	18 Q. But not from any personal experience with
10:03:51	19 doing an ERP software selection, and I came out	10:06:43	19 working with a client on it?
10:03:53	20 there to do about a day-long briefing with them.	10:06:45	20 MR. McDONELL: Vague and ambiguous.
10:04:04	21 Q. How about Harley-Davidson?	10:06:45	21 THE WITNESS: That is correct.
10:04:07	22 A. Similar situation. That was in the --	10:06:48	22 MS. HOUSE: Q. Just from knowledge of the
10:04:11	23 probably the mid '90s, and I went out there to meet	10:06:50	23 market. Right?
10:04:15	24 with the CIO and his team, and they were doing a	10:06:51	24 A. Press releases, news -- newsletter -- or
10:04:20	25 software selection at that time.	10:06:55	25 excuse me, trade magazines, those kind of things,
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10:04:30	1 Q. And you mentioned you visited with	10:07:00	1 analyst reports, yes.
10:04:33	2 Rockwell Automation. Did you do work for them?	10:07:08	2 Q. Now, are you relying on your work with
10:04:36	3 A. I don't recall if we had an engagement	10:07:13	3 A.O. Smith or Harley-Davidson in connection with
10:04:38	4 with them or not. I know I went there and I did a	10:07:16	4 the opinions in your report?
10:04:41	5 briefing. That's all I can recall.	10:07:17	5 A. No.
10:04:44	6 Q. Progress Software?	10:07:33	6 Q. Let's go back to your report on Section 2
10:04:46	7 A. Progress is a client of mine that I do	10:07:36	7 on page 1.
10:04:49	8 mostly training for their -- either for their	10:07:37	8 This is a summary of your qualifications
10:04:54	9 resellers or for some of their own executives.	10:07:40	9 relating to the report you're sponsoring in this
10:04:58	10 Q. So you didn't --	10:07:44	10 case. Correct?
10:05:02	11 A. It had nothing to do with a software	10:07:45	11 A. Yes.
10:05:04	12 evaluation.	10:07:45	12 MR. McDONELL: The document speaks for
10:05:05	13 Q. Safeway?	10:07:45	13 itself.
10:05:06	14 A. I believe all I did for them was a vendor	10:07:46	14 MS. HOUSE: Q. And is Appendix A your
10:05:12	15 evaluation or market evaluation. And again, that	10:07:49	15 current CV?
10:05:15	16 would have been in the '90s.	10:07:58	16 A. I'd say A is a resume, but yes, it's
10:05:17	17 Q. And do you -- for A.O. Smith and	10:08:02	17 current, relatively current.
10:05:21	18 Harley-Davidson, is it your recollection that you	10:08:06	18 Q. Okay. A resume is different than a CV?
10:05:23	19 were actually engaged to assist in their evaluation	10:08:08	19 A. Well, I think Appendix B is closer to a
10:05:26	20 of the ERP software that they were considering?	10:08:11	20 CV, but I'm not a --
10:05:30	21 MR. McDONELL: Compound, vague and	10:08:12	21 Q. All right. That's fine. But in terms of
10:05:31	22 ambiguous.	10:08:15	22 your work experience, you would say that Appendix A
10:05:32	23 THE WITNESS: I believe those were	10:08:19	23 captures that?
10:05:33	24 Andersen consulting engagements, and I was the	10:08:21	24 MR. McDONELL: Object to the form of the
10:05:36	25 subject matter expert who came in for those.	10:08:21	25 question.

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10:08:24 1 THE WITNESS: Yes, it captures that pretty
10:08:26 2 closely.
10:08:28 3 MS. HOUSE: Q. And it looks like from
10:08:29 4 January 1981 to October 1999 you worked at
10:08:34 5 Accenture, which was formerly Andersen Consulting.
10:08:38 6 Is that right?
10:08:39 7 A. Yes. And at times it was even called
10:08:41 8 Arthur Andersen.
10:08:43 9 Q. You're dating yourself. Those were the
10:08:48 10 days, huh?
10:08:49 11 Now, based on your -- let's call it based
10:08:51 12 on Appendix A, since I don't want to call it a CV,
10:08:56 13 based on Appendix A, you've held four positions
10:08:59 14 with Accenture. Is that right?
10:09:01 15 A. I had four major responsibilities, yes.
10:09:03 16 But I was there for 18 years. I had a lot of
10:09:06 17 different roles.
10:09:07 18 Q. Okay. Does the way that this resume
10:09:11 19 works, is the most recent position the one that you
10:09:15 20 first list, Partner-in-Charge: Worldwide Software
10:09:18 21 Intelligence Unit?
10:09:22 22 A. I was holding most of those positions
10:09:27 23 right up till the very end. But the software
10:09:31 24 intelligence one is the one I held the longest.
10:09:38 25 Q. Well, let's -- I guess we'll just take it

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10:09:41 1 this way:
10:09:42 2 The one -- let's start at the bottom,
10:09:44 3 because I had assumed that was your earliest, the
10:09:46 4 Partner-in-Charge: Worldwide Finance & Performance
10:09:49 5 Center of Excellence.
10:09:51 6 For what period of time did you hold that
10:09:53 7 position?
10:10:01 8 A. I've got to think. I was doing that for
10:10:07 9 probably the last 5 years I was with the firm.
10:10:13 10 Q. Does that job have any role in assisting
10:10:17 11 companies with ERP software purchasing decisions?
10:10:22 12 A. It does, in the extent that it did covered
10:10:26 13 shared-service engagements, which was a big part of
10:10:28 14 what we were doing at that time.
10:10:30 15 Q. Can you explain that, please?
10:10:33 16 A. A shared-servicing situation involves a
10:10:36 17 company deciding to collapse a number of redundant
10:10:39 18 data centers and/or functional processing areas
10:10:45 19 like a finance accounting operation they may have.
10:10:51 20 A typical example would be somebody -- a company
10:10:53 21 that might have different ones in every country
10:10:55 22 that they operate in.
10:10:56 23 And what the company would want to do is
10:10:58 24 create a -- one or a few shared centers where they
10:11:02 25 would bring the people and the technology often

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10:11:05 1 together to achieve operating efficiencies and
10:11:07 2 process improvements.
10:11:13 3 Q. So that's in some ways a paring down from
10:11:16 4 a larger group of applications and functions into a
10:11:21 5 more efficient shared functionality?
10:11:24 6 MR. McDONELL: Vague and ambiguous, asked
10:11:25 7 and answered.
10:11:26 8 THE WITNESS: It would often result in the
10:11:29 9 reduction in the numbers of ERP systems as well as
10:11:34 10 the movement of maybe people, work, technology,
10:11:37 11 whatever, to a single -- often to a single center.
10:11:48 12 MS. HOUSE: Q. The next title is,
10:11:53 13 Partner: Process Competency (Business Process
10:11:56 14 Reengineering).
10:11:57 15 When was that job?
10:12:01 16 A. I was doing that probably in the last 2 or
10:12:06 17 3 years that I was with the company. Business
10:12:09 18 Process Reengineering really didn't come into its
10:12:12 19 own until about that time.
10:12:13 20 Q. And what is Business Process
10:12:15 21 Reengineering?
10:12:16 22 A. In involves helping clients -- well first
10:12:21 23 of all, you would go in and benchmark clients'
10:12:25 24 performance in a lot of areas, oftentimes in
10:12:28 25 functions like accounting, human resources, maybe

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10:12:31 1 even some manufacturing areas, with the intent to
10:12:34 2 come in and identify more efficient processes and
10:12:38 3 more efficient ways and effective ways for them to
10:12:41 4 do business.
10:12:43 5 The objective in business process
10:12:44 6 reengineering is to eliminate non-value-added
10:12:49 7 activities, waste, and inefficiency.
10:12:51 8 Q. Did this position have anything to do with
10:12:53 9 the assistance of purchasing of ERP software?
10:12:58 10 MR. McDONELL: Vague and ambiguous.
10:13:01 11 THE WITNESS: Sometimes it could. It
10:13:02 12 would be much more tangential than what it would
10:13:05 13 have been with the other one we were just
10:13:07 14 discussing, the Finance & Performance Center --
10:13:11 15 performance and financial center of excellence.
10:13:14 16 MS. HOUSE: Q. And neither of the two
10:13:15 17 jobs that we've talked about had anything to do
10:13:17 18 with the purchase of after-market ERP support. Is
10:13:19 19 that correct?
10:13:20 20 MR. McDONELL: Vague and ambiguous.
10:13:21 21 THE WITNESS: Correct.
10:13:23 22 MS. HOUSE: Q. The third item you list is
10:13:26 23 Partner-in-Charge of Worldwide Human Resources
10:13:29 24 Center of Excellence.
10:13:32 25 When was that job?

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10:13:38 1 A. That probably picked up around as early as
10:13:42 2 1992.
10:13:49 3 Q. Okay. And when did it go through?
10:13:51 4 A. Until the end. Until 1999.
10:13:55 5 MS. HOUSE: I'm sorry, somebody said they
10:13:58 6 need a bathroom break, so can we take one.
10:14:02 7 THE VIDEO OPERATOR: Going off the record,
10:14:03 8 the time now is 10:13.
10:14:05 9 (Recess from 10:13 a.m. to 10:28 a.m.)
10:28:13 10 THE VIDEO OPERATOR: The time now is
10:28:14 11 10:28, and we're back on the videotape record.
10:28:18 12 MS. HOUSE: Q. Okay. We were talking
10:28:19 13 about your job at Accenture as Partner-in-Charge of
10:28:22 14 Worldwide Human Resources Center of Excellence.
10:28:26 15 Did that position entail advising on the
10:28:29 16 purchase of ERP software?
10:28:32 17 A. Yes, it would.
10:28:34 18 Q. How?
10:28:35 19 A. Because some of those clients were going
10:28:38 20 to need new human resource solutions, and I think
10:28:44 21 I -- yes, I actually reference like three of them
10:28:47 22 right there: PeopleSoft, Integral, Tesseract.
10:28:55 23 Those would be some examples -- or could be other
10:28:57 24 products in there, too.
10:28:58 25 Q. Where that part of your resume says,

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10:29:02 1 developed initial relationship or alliance between
10:29:04 2 Andersen Consulting and various HRMS vendors:
10:29:07 3 PeopleSoft, integral and Tesseract, that doesn't
10:29:11 4 sound like assisting in the purchase of ERP
10:29:14 5 software.
10:29:15 6 MR. McDONELL: The document --
10:29:16 7 MS. HOUSE: Q. Is it a different --
10:29:18 8 A. Well, those are two different points, and
10:29:20 9 they're both valid. I did both. I would -- you
10:29:22 10 know, I would visit with clients, and they would
10:29:25 11 ask about what kind of solutions they might need to
10:29:28 12 mitigate whatever kind of business problems they
10:29:30 13 were having in those functional areas.
10:29:32 14 Q. In this position, did you assist clients
10:29:35 15 in the evaluation and purchase of ERP software?
10:29:39 16 MR. McDONELL: Asked and answered.
10:29:40 17 THE WITNESS: It was part of the role.
10:29:43 18 MS. HOUSE: Q. You actually performed
10:29:45 19 assistance as the -- I want to make sure you were
10:29:51 20 engaged in assist clients in the purchase of ERP
10:29:54 21 software in connection with this role at Accenture.
10:29:57 22 Is that right?
10:29:57 23 MR. McDONELL: Asked and answered.
10:29:59 24 THE WITNESS: I had many -- I wore many
10:30:01 25 hats. And when I went on a client engagement, I

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10:30:04 1 didn't necessarily just wear one. So yes, I could
10:30:08 2 be at a client doing human resource software --
10:30:11 3 human resource, excuse me, center of excellence
10:30:14 4 work, and the subject of new software would come
10:30:16 5 up, and we may even have a software selection
10:30:19 6 project underway at that client.
10:30:22 7 MS. HOUSE: Q. Which position at
10:30:24 8 Accenture that you list is the one in which you
10:30:26 9 assisted clients in the purchase of ERP software?
10:30:31 10 MR. McDONELL: Asked and answered.
10:30:34 11 THE WITNESS: I did a lot of that with my
10:30:35 12 software intelligence unit expertise. But I also
10:30:40 13 did that even before I was transferred to
10:30:42 14 headquarters into that role.
10:30:46 15 And that would have been as a regular line
10:30:49 16 employee of Accenture or Andersen Consulting or
10:30:53 17 Arthur Andersen, whatever name.
10:30:57 18 MS. HOUSE: Q. You do not list -- you do
10:30:59 19 not provide a list of clients with whom you have
10:31:02 20 assisted the purchase of ERP software, do you?
10:31:09 21 MR. McDONELL: In the resume, Counsel? Is
10:31:10 22 that what you're asking?
10:31:12 23 MS. HOUSE: Q. Anywhere in his report.
10:31:13 24 A. I think on page 1 I even mentioned that I
10:31:16 25 had -- I said by way of example, I have advised

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10:31:19 1 clients such as Novartis Pharma, Tenneco, McDonnell
10:31:22 2 Douglas, AstraZeneca, Boise Cascade -- I put on the
10:31:30 3 very last line of page 1, I stated: I have advised
10:31:33 4 clients such as Novartis Pharma, Tenneco, McDonnell
10:31:38 5 Douglas, AstraZeneca and Boise Cascade on their ERP
10:31:44 6 software selection efforts.
10:31:47 7 Q. Those clients that you list, is that a
10:31:49 8 comprehensive list?
10:31:50 9 A. No.
10:31:52 10 Q. Are you relying on any other client
10:31:55 11 assistance in providing your opinions here?
10:32:00 12 MR. McDONELL: Object. Vague and
10:32:00 13 ambiguous. Object to the form of the question.
10:32:03 14 THE WITNESS: I've done -- it would be
10:32:06 15 hard for me to not rely on matters that I -- or
10:32:12 16 things that I've picked up over the years in doing
10:32:15 17 software selections for dozens of companies.
10:32:19 18 That's part of the reason I'm here as an
10:32:22 19 expert witness, I believe.
10:32:24 20 MS. HOUSE: Q. Okay. So you've listed
10:32:27 21 Novartis Pharma, Tenneco, McDonnell Douglas,
10:32:32 22 AstraZeneca, and Boise Cascade as companies that
10:32:35 23 you assisted in their ERP software selection
10:32:37 24 efforts.
10:32:38 25 Were those all in conjunction with your

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10:32:40 1 work for Accenture?
10:32:41 2 A. Yes, they were.
10:32:42 3 Q. Have you done any assistance in this area
10:32:45 4 since leaving Accenture?
10:32:47 5 MR. McDONELL: Vague and ambiguous.
10:32:49 6 MS. HOUSE: Q. Other -- I'm sorry, we
10:32:50 7 know that you assisted in the negotiation on the
10:32:54 8 higher education entity.
10:32:57 9 A. For the most part, since leaving
10:32:59 10 Accenture, I've worked with software companies, not
10:33:03 11 so much with the buyers.
10:33:05 12 Q. So other than the software negotiation
10:33:10 13 that you did with the higher education entity that
10:33:13 14 we previously discussed, since leaving Accenture,
10:33:16 15 have you assisted in the evaluation and purchase of
10:33:19 16 any ERP software?
10:33:21 17 MR. McDONELL: Asked and answered, object
10:33:22 18 to the form.
10:33:28 19 THE WITNESS: I'm -- I'm sorry, I got
10:33:30 20 distracted by the objection. Can you repeat the
10:33:32 21 question? My apologies.
10:33:35 22 MS. HOUSE: Q. Okay. Once you left
10:33:37 23 Accenture, which was in -- what year, 1999?
10:33:42 24 A. Yes.
10:33:43 25 Q. Since 1999, what if any assistance have

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10:33:51 1 you provided to a client in connection with the
10:33:53 2 purchase of ERP software?
10:33:58 3 A. Well, there was a big thing I did right
10:34:00 4 after Accenture called IQ4Hire, and it was a dot
10:34:05 5 com that I founded with an old competitor of mine
10:34:09 6 over at PriceWaterhouse, and it helped companies
10:34:13 7 structure and negotiate lower-cost services bids
10:34:18 8 for ERP products that were going to be implemented.
10:34:23 9 So we did that for -- I did that for a
10:34:25 10 couple of years, and we assisted customers on
10:34:27 11 acquiring low-cost service -- or lower-cost
10:34:30 12 services for software implementations.
10:34:35 13 Q. Okay. So that's different, though, than
10:34:37 14 assisting in a client's evaluation and purchase of
10:34:41 15 ERP application software. Correct?
10:34:45 16 MR. McDONELL: Argumentative, vague and
10:34:45 17 ambiguous.
10:34:46 18 THE WITNESS: For the most part -- yes, I
10:34:48 19 would say that is a little bit different. But it
10:34:51 20 was -- all I'm stating is, it was a neutral
10:34:56 21 marketplace.
10:34:57 22 MS. HOUSE: Q. I'm just trying to -- it's
10:34:59 23 real simple. I'm just trying to figure out what
10:35:01 24 you've done since Accenture that has anything to do
10:35:04 25 with assisting a client in the evaluation and

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10:35:06 1 purchase of ERP software.
10:35:09 2 And you -- IQ -- we'll go over IQ4Hire,
10:35:13 3 but that's not what that job was. Correct?
10:35:16 4 MR. McDONELL: Vague and ambiguous, asked
10:35:17 5 and answered.
10:35:18 6 THE WITNESS: It was not about selecting.
10:35:19 7 It was about getting a good -- a good price for the
10:35:23 8 implementation service.
10:35:25 9 MS. HOUSE: Q. Okay. I'm talking now
10:35:27 10 about assisting a client in selecting and
10:35:32 11 purchasing ERP software.
10:35:36 12 What have you done since Accenture with a
10:35:40 13 client, if anything, in that area?
10:35:43 14 MR. McDONELL: Asked and answered.
10:35:46 15 THE WITNESS: I've referenced I went to
10:35:47 16 a -- earlier, I had talked about going to -- having
10:35:50 17 a meeting with a mid-market -- excuse me, a Midwest
10:35:53 18 manufacturer and discussing different -- we
10:35:57 19 discussed different software options in addition to
10:36:02 20 the other item that we were talking about a minute
10:36:04 21 ago involving that company.
10:36:06 22 But I have -- you know, the key thing here
10:36:10 23 is, I continued to interview and discuss these
10:36:14 24 matters with CIOs all the time as part of research
10:36:17 25 reports that I do and part of research efforts

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10:36:19 1 to -- so I can advise software vendors on what
10:36:22 2 customers are thinking and doing and buying.
10:36:29 3 MS. HOUSE: Q. So is the answer to my
10:36:30 4 question that you have not assisted a client in the
10:36:35 5 selection of an ERP applications package since
10:36:40 6 Accenture?
10:36:41 7 MR. McDONELL: Asked and answered,
10:36:42 8 misstates the testimony.
10:36:48 9 THE WITNESS: I have done a lot of
10:36:49 10 advisory things, but not the client -- if you're
10:36:53 11 going to put it in the context of, it's a paying
10:36:58 12 client, no.
10:37:01 13 MR. McDONELL: Counsel, I hate to
10:37:02 14 interrupt, but did you mean to exclude the
10:37:04 15 hospital -- or the higher educations --
10:37:06 16 MS. HOUSE: No. Cut it out, Jason --
10:37:08 17 MR. McDONELL: I'm --
10:37:09 18 MS. HOUSE: Cut it out.
10:37:10 19 MR. McDONELL: Just -- it's your record.
10:37:12 20 MS. HOUSE: No. That's coaching. You
10:37:14 21 know what that is.
10:37:16 22 Q. All right. Back to my questions.
10:37:24 23 Did any of the work you did for Accenture
10:37:27 24 involve working on any marketing programs for any
10:37:30 25 ERP vendors?

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10:37:31 1 MR. McDONELL: Vague and ambiguous.
10:37:36 2 THE WITNESS: Any work that I did for
10:37:38 3 Accenture -- and I assume you mean its predecessor
10:37:42 4 names as well?
10:37:43 5 MS. HOUSE: Q. Yes.
10:37:46 6 A. Did any of the work I did for them have
10:37:47 7 anything to do with marketing programs.
10:37:50 8 Q. Yes.
10:37:50 9 A. Yes.
10:37:54 10 Q. Was one of your roles to assist in
10:37:57 11 marketing programs for ERP vendors while at
10:38:00 12 Accenture?
10:38:01 13 MR. McDONELL: Vague and ambiguous.
10:38:03 14 THE WITNESS: I wouldn't classify it that
10:38:05 15 way. We created marketing events for our clients
10:38:08 16 that ERP vendors attended.
10:38:12 17 MS. HOUSE: Q. That's -- my question to
10:38:13 18 you is -- let's think of Safe Passage as an
10:38:15 19 example.
10:38:16 20 Did you ever assist a client in developing
10:38:22 21 a marketing program akin to Safe Passage while
10:38:25 22 working at Accenture?
10:38:26 23 A. No.
10:38:36 24 Q. Did any of your work at Accenture have to
10:38:39 25 do with evaluating the success or failure of any

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10:38:42 1 ERP vendor's marketing programs?
10:38:45 2 MR. McDONELL: Object to the form.
10:38:46 3 THE WITNESS: Specifically to the success
10:38:54 4 or failure of those programs? No.
10:39:01 5 MS. HOUSE: Q. After working at
10:39:02 6 Accenture, you worked for a company you've
10:39:06 7 previously discussed called IQ4Hire. Right?
10:39:10 8 A. Yes.
10:39:11 9 Q. Than was October '99 through May 2001. Is
10:39:14 10 that right?
10:39:16 11 A. That looks correct.
10:39:17 12 Q. And was IQ4Hire an online exchange for
10:39:22 13 professional IT services?
10:39:24 14 A. It was an online exchange for IT services
10:39:28 15 related to implementation of ERP products.
10:39:35 16 Q. And just so the record's clear,
10:39:38 17 implementation of ERP products is, after the ERP
10:39:41 18 product has been selected, it's the process of
10:39:45 19 getting it up and running. Is that a fair
10:39:47 20 description?
10:39:48 21 MR. McDONELL: Object to the form.
10:39:49 22 THE WITNESS: In general terms. I don't
10:39:51 23 know that every customer that went through our
10:39:54 24 service -- I would -- well, I assume they already
10:39:56 25 had completed the licensing and negotiation. They

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10:40:00 1 may or may not; I don't know. But I would assume
10:40:02 2 such.
10:40:03 3 MS. HOUSE: Q. But you weren't involved
10:40:04 4 in the licensing and negotiation in connection with
10:40:07 5 IQ4Hire. Right?
10:40:08 6 A. That is correct, I was not.
10:40:13 7 Q. Did IQ4Hire provide advice for any clients
10:40:16 8 concerning which ERP vendor to contract with?
10:40:22 9 A. No. That wasn't the nature of its
10:40:24 10 business.
10:40:25 11 Q. Okay. Did IQ4Hire provide advice for any
10:40:28 12 clients concerning which third-party after-market
10:40:31 13 support provider to contract with?
10:40:33 14 MR. McDONELL: Vague and ambiguous, object
10:40:34 15 to the form.
10:40:35 16 THE WITNESS: No, it did not. We did not
10:40:37 17 get into that issue.
10:40:40 18 MS. HOUSE: Q. Did any of your work for
10:40:41 19 IQ4Hire involve working on any marketing programs
10:40:45 20 of any ERP vendors?
10:40:47 21 MR. McDONELL: Same objections.
10:40:49 22 THE WITNESS: No. Not that I recall.
10:40:53 23 MS. HOUSE: Q. Did any of your work with
10:40:54 24 IQ4Hire deal with assessing the success or failure
10:40:58 25 of any ERP vendor's marketing programs?

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10:41:01 1 A. No.
10:41:05 2 Q. Now, from May 2001 to the present you've
10:41:11 3 worked for a firm that you founded called
10:41:13 4 TechVentive.
10:41:15 5 A. Correct.
10:41:15 6 Q. Are you relying on any specific
10:41:17 7 engagements that TechVentive has participated in to
10:41:21 8 support any of your opinions in this case?
10:41:23 9 MR. McDONELL: Vague and ambiguous.
10:41:29 10 THE WITNESS: Relying on engagements? I
10:41:34 11 don't think so. Again, I want to just point out, I
10:41:38 12 can't separate all of the stuff I pick up, you
10:41:45 13 know, over time as part of, you know, just watching
10:41:48 14 the market. So I could have picked up any number
10:41:51 15 of like insights along the way that are there.
10:41:58 16 MS. HOUSE: Q. Well, you've produced no
10:42:02 17 backup in connection with your report that has to
10:42:05 18 do with any of your work while at TechVentive. Is
10:42:09 19 that correct?
10:42:11 20 MR. McDONELL: Object to the form.
10:42:12 21 THE WITNESS: I don't think that's correct
10:42:12 22 at all. I believe I've produced a number of
10:42:17 23 newsletters and other publications that I've
10:42:20 24 produced.
10:42:21 25 MS. HOUSE: Q. So the newsletters and

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10:42:23 1 publications that you specifically reference in
10:42:26 2 this report are the only materials that you're
10:42:31 3 relying on for purposes of the report from your
10:42:34 4 work at TechVentive. Is that right?
10:42:36 5 MR. McDONELL: Object to the form, overly
10:42:37 6 broad, compound.
10:42:41 7 THE WITNESS: If I understand your
10:42:43 8 question, I think I've produced for this case
10:42:46 9 pretty much everything I've published in the last
10:42:49 10 10 years. So I don't know what else I could
10:42:53 11 produce, you know. So that would include all these
10:42:57 12 TechVentive reports. So I don't know how else to
10:43:00 13 respond to that question.
10:43:04 14 MS. HOUSE: Q. And could you describe
10:43:08 15 generally your work at TechVentive?
10:43:12 16 A. Generally, I do a lot more work for
10:43:16 17 software companies than end-users at this stage of
10:43:20 18 my career. I spend a lot of time polling and
10:43:24 19 focusing on what customers are doing and thinking
10:43:27 20 and buying in the marketplace, and I help
10:43:31 21 clients -- that is, software companies -- figure
10:43:34 22 out how to to best better succeed in the
10:43:37 23 marketplace.
10:43:38 24 Q. And again, we've covered the fact that you
10:43:40 25 have -- you've given us the ERP of related

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10:43:45 1 companies that you've done work for. Correct?
10:43:48 2 MR. McDONELL: Asked and answered. Object
10:43:49 3 to the form.
10:43:49 4 THE WITNESS: We did talk about that. And
10:43:51 5 I do want to point out that I did think of one that
10:43:54 6 we haven't covered. And I'm not trying to derail
10:43:58 7 your train of thought, but at some point we should
10:44:01 8 talk about Deltek.
10:44:03 9 Q. Deltek?
10:44:05 10 A. D-E-L-T-E-K.
10:44:08 11 Q. What is Deltek?
10:44:08 12 A. It's an ERP vendor that caters
10:44:10 13 predominantly to the government contractor and
10:44:15 14 not-for-profit space. They're based out of the
10:44:20 15 Washington, DC area.
10:44:23 16 Q. And are they -- they have a --
10:44:27 17 applications?
10:44:28 18 A. Yes. They have a -- they've been around
10:44:30 19 for probably -- I'd guess probably 30 years. They
10:44:33 20 have a line of financial software and a number of
10:44:39 21 project accounting and project management tools
10:44:41 22 that help those, like defense contractors and the
10:44:45 23 like, stay in compliance with different government
10:44:50 24 defense and other type of reporting requirements.
10:44:54 25 Q. And have you done work for Deltek?

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10:44:57 1 A. I did some work for them --
10:45:00 2 Q. What work?
10:45:00 3 A. -- quite a few years ago. Well, I don't
10:45:03 4 want to say quite a few. I did it earlier in this
10:45:06 5 decade, let's put it that way. And it was some
10:45:10 6 market assessment work for them.
10:45:14 7 Q. Can you describe that work?
10:45:16 8 A. They were coming out with some new
10:45:18 9 products, and they asked me to tell them what I
10:45:20 10 thought they're -- you know, who they should market
10:45:23 11 them to and what kind of messages would resonate in
10:45:27 12 the marketplace.
10:45:30 13 Q. Is it fair to say that you were not in
10:45:32 14 that role doing any assistance in the purchase of
10:45:37 15 ERP applications?
10:45:41 16 A. That would be a correct characterization.
10:45:45 17 Q. And the work that you did for Deltek had
10:45:47 18 nothing to do with after-market support for their
10:45:50 19 product or any other ERP product?
10:45:52 20 MR. McDONELL: Vague and ambiguous, object
10:45:52 21 to the form.
10:45:55 22 THE WITNESS: I just want to be real
10:45:57 23 clear. When we're talking after-market, it's not
10:45:59 24 just -- it's not a continuation of renewal of the
10:46:02 25 vendor-supplied maintenance. We're talking about

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10:46:05 1 anything else, whether it's like self-support or a
10:46:08 2 third-party vendor. That's when you mean
10:46:10 3 after-market?
10:46:11 4 MS. HOUSE: Q. Yes.
10:46:12 5 A. Okay. Not after the sale.
10:46:15 6 In that case, I think you asked me, did it
10:46:17 7 have anything to do with that? No.
10:46:24 8 Q. Any other ERP vendor work that you've
10:46:27 9 recalled in the break?
10:46:30 10 A. Again, off -- off the top of my head, no.
10:46:33 11 But I just wanted to make sure I shared that one
10:46:36 12 with you. And if I do think of something else,
10:46:38 13 I'll point that out as well.
10:46:43 14 Q. So you mentioned, I believe, that you at
10:46:48 15 TechVentive engaged in polling of customers. Is
10:46:52 16 that right?
10:46:53 17 A. Polling, interviewing, yes.
10:46:55 18 Q. Okay. So you're familiar with how that
10:46:59 19 would work. Correct?
10:47:01 20 A. Yes. I've interviewed lots of software --
10:47:06 21 software buyers and software executives.
10:47:10 22 Q. Did you do any polling or interviewing of
10:47:11 23 any of the 358 customers on the list that we looked
10:47:15 24 at, Exhibit 3246?
10:47:24 25 A. I did interview one individual.

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10:47:27 1 Q. Okay. And we'll go over that particular
10:47:29 2 one. But my question was -- I guess it wasn't
10:47:33 3 clear enough.
10:47:35 4 Is that the only interview that you
10:47:36 5 conducted of any of the 358 customers on that list?
10:47:40 6 A. I believe so.
10:47:48 7 Q. And in your polling of customers in
10:47:50 8 connection with your TechVentive work, you have not
10:47:54 9 polled any SAP customers specifically. Correct?
10:47:59 10 MR. McDONELL: Lack of foundation, vague
10:48:00 11 and ambiguous, object to the form.
10:48:05 12 THE WITNESS: I have -- I have talked to
10:48:08 13 companies who had SAP products. Or talked to
10:48:12 14 executives in companies with SAP products.
10:48:14 15 MS. HOUSE: Q. But you haven't done any
10:48:15 16 polling of customers for SAP to figure out what
10:48:19 17 would drive them to an SAP purchase, have you?
10:48:22 18 A. For SAP? No.
10:48:32 19 Q. You've never been engaged to figure out
10:48:36 20 what would appeal to an SAP target audience.
10:48:41 21 Correct?
10:48:41 22 MR. McDONELL: Vague and ambiguous.
10:48:44 23 THE WITNESS: I kind of know what would
10:48:45 24 appeal to --
10:48:46 25 MS. HOUSE: Q. That's not what I'm

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10:48:48 1 asking. I'm asking, have you been engaged?
10:48:50 2 MR. McDONELL: Don't interrupt. You
10:48:51 3 interrupted the witness's answer, Counsel. Please
10:48:53 4 refrain from doing that.
10:48:56 5 Could you restate the question, please, so
10:48:58 6 we have a more clear record?
10:49:00 7 MS. HOUSE: Q. Have you ever been engaged
10:49:02 8 to poll customers to figure out what SAP product or
10:49:12 9 offering would appeal to them?
10:49:14 10 MR. McDONELL: Vague and ambiguous, asked
10:49:15 11 and answered.
10:49:20 12 THE WITNESS: I think in that context,
10:49:22 13 that answer would be no.
10:49:29 14 MS. HOUSE: Q. And the same would be true
10:49:30 15 for an Oracle customer. Correct?
10:49:33 16 MR. McDONELL: Same objections.
10:49:37 17 THE WITNESS: Again, under -- under the
10:49:38 18 context of the way I think you're explaining it,
10:49:40 19 no.
10:50:01 20 MS. HOUSE: Q. What work if any at
10:50:02 21 TechVentive are you relying on for your opinions
10:50:05 22 related to third-party vendor options for the
10:50:08 23 customers at issue in this case?
10:50:11 24 MR. McDONELL: Vague and ambiguous. Asked
10:50:19 25 and answered.

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10:50:22 1 THE WITNESS: Again, other than the
10:50:23 2 general -- what I've already provided I guess in
10:50:28 3 Appendix C and whatever these appendices on my
10:50:34 4 prior publications, I have that, and what I've
10:50:37 5 captured in the past.
10:50:38 6 MS. HOUSE: Q. Okay. I need to be more
10:50:39 7 specific, though. You've got -- as you mentioned,
10:50:42 8 you've got a long career, and you've done many
10:50:44 9 publications and engagements.
10:50:47 10 I want to know what work specifically at
10:50:49 11 TechVentive, if any, you're relying on for your
10:50:52 12 opinions related to third-party vendor options for
10:50:54 13 the customers at issue in this case.
10:51:01 14 A. For the customers in this case. Okay.
10:51:04 15 Well, all I can speak to is what I've
10:51:07 16 written in this report, and I'll give you an
10:51:09 17 example.
10:51:10 18 I discussed in here options around, for
10:51:12 19 example, on page 44 -- well, let's go 43 through
10:51:17 20 45, and I talk about companies like Vertex and
10:51:20 21 Sabrix and others.
10:51:21 22 And I run into these companies frequently
10:51:24 23 at different software events and trade shows and
10:51:28 24 those kind of things. I -- I -- you know, I know
10:51:31 25 about this stuff, because I see them all the time,

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10:51:34 1 and I talk to people at shows and like. That's how
10:51:37 2 I know this information.
10:51:40 3 And that -- a lot of that information has
10:51:42 4 come up since I left Accenture.
10:51:47 5 Q. Is there a specific -- you mentioned
10:51:49 6 you've done work polling customers, et cetera.
10:51:52 7 Is there a specific engagement -- specific
10:51:55 8 engagement; not just running into somebody or going
10:51:58 9 to a trade show.
10:51:59 10 Is there a specific engagement that you're
10:52:01 11 relying on that you've engaged in from TechVentive
10:52:05 12 that you're relying on to -- for your opinion
10:52:09 13 related to third-party vendor options for the
10:52:11 14 customers at issue in this case?
10:52:13 15 MR. McDONELL: Asked and answered. Object
10:52:14 16 to the form.
10:52:17 17 THE WITNESS: For this specific case and
10:52:20 18 these specific customers, no.
10:52:23 19 MS. HOUSE: Q. What work, if any, are you
10:52:25 20 relying on from your work at TechVentive related to
10:52:30 21 your opinions about the reasonableness of SAP's
10:52:32 22 expectations for its Safe Passage program?
10:52:36 23 MR. McDONELL: Vague and ambiguous,
10:52:37 24 assumes facts not in evidence. I object to the
10:52:39 25 form of the question.

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10:52:43 1 THE WITNESS: I'm relying on documents
10:52:46 2 like -- I think I referenced Paul Hamerman's
10:52:52 3 report, where he -- for Forrester, where he talked
10:52:56 4 about these type of programs generally are not very
10:52:59 5 effective. And I believe I reference that on
10:53:03 6 around page 48 of my report.
10:53:07 7 MS. HOUSE: Q. Okay. That's not your
10:53:08 8 work, though. Right?
10:53:09 9 A. No, didn't -- I just said, that was Jim
10:53:12 10 Sheppard's -- excuse me, I should have said Jim
10:53:15 11 Sheppard, not Paul Hamerman. I mixed up my
10:53:18 12 analysts. But yes, he's the one that said that
10:53:22 13 this.
10:53:22 14 But I also know of these programs from
10:53:24 15 Microsoft, QAD, Lawson and others that I also
10:53:27 16 referenced in the report, and I cited a number of
10:53:29 17 external references to those.
10:53:31 18 Q. Okay. I understand that you have a
10:53:33 19 variety of articles and website printouts.
10:53:40 20 I'm asking about your particular work that
10:53:42 21 you've engaged in in your career. What are you
10:53:44 22 relying on, if anything, from your own personal
10:53:47 23 work to support your opinions about the
10:53:51 24 reasonableness of SAP's expectations for its Safe
10:53:54 25 Passage program?

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10:53:55 1 MR. McDONELL: Asked and answered, object
10:53:57 2 to the form of the question.
10:54:07 3 THE WITNESS: When couched under the --
10:54:09 4 under what specific engagements, I either cannot
10:54:13 5 give you specific engagements, or it's been part
10:54:17 6 and parcel of my job to watch the market. That's
10:54:20 7 what a market, you know, analyst does. So I -- I
10:54:24 8 have that knowledge from -- that's how I pick up
10:54:27 9 that expertise.
10:54:29 10 MS. HOUSE: Q. Why --
10:54:30 11 A. It's not necessarily engagement-based.
10:54:32 12 Q. Okay. Well, then let's expand it to, what
10:54:34 13 publications are you relying on that are your
10:54:37 14 publications, not an interview of Jim Sheppard or
10:54:41 15 whatever.
10:54:42 16 I want to talk about what publications
10:54:44 17 that you have written yourself, are you relying on
10:54:47 18 related to your opinions about the reasonableness
10:54:50 19 of SAP's expectations for its Safe Passage program?
10:54:54 20 MR. McDONELL: Object to the form.
10:55:05 21 THE WITNESS: As to which ones of my
10:55:06 22 publications I'm relying on, I am not sure that I
10:55:10 23 specifically address that in any one of them.
10:55:13 24 MS. HOUSE: Q. You don't cite any, so I'm
10:55:15 25 asking, you know, if it's not cited, do I assume

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10:55:18 1 that you're not relying on it?
10:55:20 2 MR. McDONELL: Object to the form of the
10:55:21 3 question.
10:55:22 4 THE WITNESS: I put in here -- I cited a
10:55:24 5 number of things, and then I also included other
10:55:27 6 materials in Appendix C that I referenced and
10:55:30 7 referred to, and that's what I used in developing
10:55:32 8 my expert report.
10:55:35 9 MS. HOUSE: Q. So what I'm trying to do
10:55:38 10 now is just explore your personal experience and
10:55:41 11 your personal work and how that supports the
10:55:46 12 opinions that you offer on the reasonableness of
10:55:50 13 SAP's expectations for its Safe Passage program.
10:55:55 14 Just so the record's clear, you cannot
10:55:56 15 cite to me a publication that you wrote that you're
10:56:00 16 relying on. Is that correct?
10:56:01 17 MR. McDONELL: Object to the form of the
10:56:02 18 question, asked and answered.
10:56:05 19 THE WITNESS: I believe that is correct.
10:56:07 20 Based on what -- how I understand your question,
10:56:10 21 yes.
10:56:11 22 MS. HOUSE: Q. And you cannot cite to an
10:56:13 23 engagement that you've personally been involved in
10:56:16 24 that you're relying on to support your opinions on
10:56:20 25 the reasonableness of SAP's expectations for its

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10:56:23 1 Safe Passage program. Correct?
10:56:24 2 MR. McDONELL: Same objections.
10:56:32 3 THE WITNESS: I think under that -- under
10:56:34 4 the way you asked the question, that would be a
10:56:36 5 yes.
10:56:38 6 MS. HOUSE: Q. And same questions now --
10:56:40 7 we're going to move on to the opinions that you
10:56:43 8 offer related to third-party vendor options for the
10:56:46 9 customers at issue in this case.
10:56:48 10 So the record's clear, can you cite to
10:56:51 11 me -- or let's put it this way: So the record's
10:56:54 12 clear, you're not relying on any publication that
10:56:56 13 you have authored that supports your opinions on
10:57:00 14 the third-party vendor options for the customers at
10:57:03 15 issue in this case. Correct?
10:57:05 16 A. That I have authored, other than this
10:57:08 17 expert report, no, I'm not offering anything else
10:57:12 18 up.
10:57:13 19 Q. And you are not relying on any engagement
10:57:17 20 that you have personally been in to support your
10:57:20 21 opinions related to the third-party vendor options
10:57:22 22 for the customers at issue in this case. Correct?
10:57:25 23 MR. McDONELL: Asked and answered, object
10:57:26 24 to the form.
10:57:28 25 THE WITNESS: Based on that -- the way you

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10:57:30 1 phrased that question, yes. I'm not offering --
10:57:34 2 I'm not producing anything in that regard.
10:57:36 3 MS. HOUSE: Q. Okay. When were you first
10:57:40 4 approached by any representative of SAP to provide
10:57:42 5 service in this matter?
10:57:45 6 A. I have never discussed this with anyone
10:57:47 7 from SAP.
10:57:48 8 Q. Okay. How about their attorneys?
10:57:52 9 A. I was called by Jones Day --
10:58:00 10 MR. McDONELL: That's fine. The question
10:58:01 11 is date.
10:58:03 12 THE WITNESS: The date would be early
10:58:07 13 2009.
10:58:10 14 MS. HOUSE: Q. Do you have a retention
10:58:11 15 letter?
10:58:12 16 A. I did get a retention letter from them,
10:58:14 17 and I believe -- I believe it starts in like May of
10:58:20 18 20 -- not May, March of 2009, excuse me.
10:58:26 19 Q. And were you retained by defendants as a
10:58:30 20 testifying witness?
10:58:31 21 MR. McDONELL: Object. Lack of
10:58:32 22 foundation. I will instruct you not to answer
10:58:34 23 under the stipulation.
10:58:38 24 MS. HOUSE: Q. Have you done any
10:58:39 25 additional consulting work for the case?

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10:58:42 1 A. Yes, I have.
10:58:45 2 Q. And that would be work that you are not
10:58:47 3 including in your expert report. Is that right?
10:58:50 4 A. That would be correct.
10:58:54 5 Q. How much total time have you spent
10:58:56 6 generating your report?
10:59:00 7 MR. McDONELL: Lack of foundation, vague
10:59:01 8 and ambiguous.
10:59:04 9 THE WITNESS: Generating the report, I --
10:59:09 10 it's hard for me to tell, and only because I did
10:59:13 11 not break out my time on -- just for the report
10:59:17 12 versus other things I was doing with Jones Day.
10:59:23 13 MS. HOUSE: Q. Do you know how many hours
10:59:24 14 you have into this that you've billed Jones Day?
10:59:27 15 A. Approximately -- approximately 1000 hours.
10:59:34 16 Q. And does that 1000 hours include the 7
10:59:36 17 days of deposition preparation?
10:59:38 18 A. No, that does not. That all happened in
10:59:41 19 the last few weeks.
10:59:44 20 Q. And are those thousand hours exclusively
10:59:47 21 by you, or are there others that have also billed
10:59:52 22 on this matter?
10:59:54 23 A. I have a group that works under my
10:59:58 24 direction, three people, and they billed their time
11:00:03 25 independently of mine.

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11:00:05 1 Q. So is the thousand hours just you?
11:00:06 2 A. That's just me.
11:00:08 3 Q. And do you know how much your other three
11:00:12 4 people have put into the work?
11:00:15 5 A. They've -- they should have put in less
11:00:18 6 than I did.
11:00:23 7 Q. And did the other three individuals assist
11:00:27 8 in the writing of your report?
11:00:31 9 A. Only to the extent that I asked them to
11:00:33 10 review it for typos and those kind of things.
11:00:42 11 Q. So the report is your work product,
11:00:47 12 entirely?
11:00:47 13 A. It is my work product. I wrote it. And I
11:00:51 14 did ask for people to -- people on my team to look
11:00:57 15 at it for -- again, for any kind of typos, those
11:01:00 16 kind of matters. But I wrote it. This is my --
11:01:03 17 this represents my thinking on this matter.
11:01:13 18 Q. What is the total amount that you have
11:01:16 19 billed to date, in terms of dollars?
11:01:20 20 A. It would be approximately \$250,000, since
11:01:24 21 my billing rate is \$250 an hour.
11:01:27 22 Q. Even I can do that math.
11:01:29 23 A. Well, Counselor, if we get into some more
11:01:32 24 complicated math, then we may have an issue, but I
11:01:35 25 could do that one.

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11:01:40 1 Q. From your report and from Mr. Clarke's
11:01:43 2 report and testimony, it appears that you and
11:01:46 3 Mr. Clarke have conferred. Is that correct?
11:01:49 4 A. That is correct.
11:01:51 5 Q. Now, before we get into that, let me -- I
11:01:53 6 had forgotten to ask this in connection with your
11:01:56 7 deposition preparation.
11:01:57 8 Did you speak with Mr. Clarke in
11:01:59 9 connection with preparing for your deposition?
11:02:01 10 A. No, I haven't.
11:02:03 11 Q. So you looked at his -- you looked at his
11:02:05 12 testimony and you read his report --
11:02:06 13 A. Yeah, I watched his -- I watched his depo.
11:02:09 14 Yes, I did do that.
11:02:11 15 MR. McDONELL: Please don't speak over
11:02:12 16 counsel --
11:02:13 17 THE WITNESS: Sorry.
11:02:13 18 MR. McDONELL: -- as you just
11:02:14 19 inadvertently did, and please give me a chance to
11:02:17 20 object before you answer. Thank you.
11:02:19 21 MS. HOUSE: Q. Did you speak with any
11:02:19 22 other experts in connection with preparing for your
11:02:23 23 deposition?
11:02:24 24 A. No.
11:02:26 25 Q. How about in connection with preparing

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11:02:27 1 your report?
11:02:29 2 A. Any other experts?
11:02:31 3 Q. Yeah.
11:02:31 4 A. No.
11:02:32 5 Q. Okay. Did you speak with anyone at SAP in
11:02:36 6 connection -- I mean, not a Jones Day person, but
11:02:41 7 an actual employee of SAP --
11:02:44 8 MR. McDONELL: Asked and answered.
11:02:45 9 MS. HOUSE: I haven't even finished the
11:02:47 10 question.
11:02:47 11 MR. McDONELL: Sorry.
11:02:47 12 MS. HOUSE: So I doubt it's been asked and
11:02:49 13 answered.
11:02:50 14 Q. Have you spoken with any SAP employee in
11:02:54 15 connection with preparing for your deposition?
11:02:56 16 MR. McDONELL: Asked and answered.
11:02:58 17 THE WITNESS: I haven't spoken to anyone
11:02:59 18 at SAP at any time about this case.
11:03:03 19 MS. HOUSE: Q. And the same would be true
11:03:05 20 for TomorrowNow?
11:03:06 21 A. Absolutely.
11:03:10 22 Q. Now, let's go back to your work with
11:03:13 23 Mr. Clarke.
11:03:16 24 What -- first I want to ask about how you
11:03:19 25 assisted him. What did Mr. Clarke ask you about in

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11:03:23 1 connection with preparing his report?
11:03:28 2 MR. McDONELL: Overly broad, vague and
11:03:29 3 ambiguous. Object to the form.
11:03:34 4 THE WITNESS: We had a number of
11:03:35 5 conversations over the last year about how software
11:03:39 6 buyers buy and what they buy. And, you know, these
11:03:51 7 were questions about how that all worked.
11:03:59 8 Occasionally, I even got questions from
11:04:01 9 him about, do you know what this means on a -- like
11:04:05 10 a -- if -- you know, I'm guessing he was looking at
11:04:10 11 a contract, and he goes, what does this SAP module
11:04:12 12 mean, and I would answer a question like that.
11:04:16 13 MS. HOUSE: Q. And do you understand that
11:04:21 14 he was relying on you because he didn't have
11:04:25 15 personal experience in the ERP space?
11:04:28 16 MR. McDONELL: Lack of foundation, calls
11:04:29 17 for a legal conclusion. Object to the form.
11:04:33 18 THE WITNESS: I don't know what he -- his
11:04:35 19 expertise was. But I know that -- you know, I know
11:04:43 20 he had questions, and I know I was -- you know,
11:04:46 21 I -- I helped him answer those questions.
11:04:52 22 MS. HOUSE: Q. And can you tell me what
11:04:53 23 questions he had?
11:04:56 24 MR. McDONELL: Overly broad, object to the
11:04:56 25 form of the question. Asked and answered.

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11:05:00 1 MS. HOUSE: Q. You said before that it
11:05:01 2 was how software buyers buy and what they buy. Is
11:05:03 3 that a general description of what you discussed
11:05:05 4 with him?
11:05:06 5 A. That would be a general.
11:05:09 6 Q. And when you say software buyers, are
11:05:10 7 you -- is that shorthand for ERP applications
11:05:15 8 buyers?
11:05:17 9 A. It definitely applies to ERP buyers. But
11:05:24 10 it could be to other -- it could be to other
11:05:26 11 applications as well. It's really hard, Counselor,
11:05:30 12 to -- for me to pin down exactly what ERP even
11:05:35 13 means in the market. It's been a changing term.
11:05:44 14 Q. Did you discuss the Safe Passage program
11:05:46 15 with Mr. Clarke?
11:05:57 16 A. I'm sure the name came up somewhere in
11:05:59 17 those conversations, but I don't recall any
11:06:01 18 questions or anything -- anything specific about
11:06:04 19 Safe Passage that we covered.
11:06:19 20 Q. How did you communicate with Mr. Clarke?
11:06:23 21 A. I saw him sometimes here in San Francisco
11:06:27 22 at the Jones Day office. I spoke to him mostly --
11:06:31 23 we'd have a few quick phone calls. That was the
11:06:34 24 main method. And I did actually see him -- I think
11:06:39 25 briefly in Phoenix, because I was doing a guest

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11:06:42 1 lecture at Arizona State, so I stopped by to say
11:06:45 2 hello.
11:06:46 3 Q. Did you ever provide him anything in
11:06:47 4 writing?
11:06:49 5 A. Did I provide him anything in writing? I
11:06:51 6 don't --
11:06:51 7 MR. McDONELL: No. I object that -- well,
11:06:55 8 to the extent that you've written anything for
11:06:58 9 counsel, you're to exclude that.
11:07:02 10 THE WITNESS: Then the answer would be no.
11:07:05 11 MS. HOUSE: Q. Did you provide him
11:07:06 12 anything in writing, is my question.
11:07:09 13 MR. McDONELL: Same instruction.
11:07:09 14 MS. HOUSE: Q. Not qualified in any way.
11:07:13 15 Did you provide him anything in writing?
11:07:15 16 MR. McDONELL: Same instruction.
11:07:20 17 THE WITNESS: Can I confer?
11:07:22 18 MR. McDONELL: Yeah. We need to confer.
11:07:23 19 There's a --
11:07:27 20 THE VIDEO OPERATOR: Going off the record,
11:07:28 21 the time now is 11:07. This also will be the
11:07:34 22 conclusion of Tape 1.
11:07:35 23 (Recess from 11:07 a.m. to 11:15 a.m.)
11:15:30 24 THE VIDEO OPERATOR: Tape is rolling. The
11:15:32 25 time now is 11:15, we're back on the videotape

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11:15:35 1 record.
11:15:35 2 This also marks the beginning of Tape 2 of
11:15:40 3 Sommer. Please continue.
11:15:41 4 MS. HOUSE: Q. Did you provide Mr. Clarke
11:15:42 5 anything in writing?
11:15:44 6 A. Yes.
11:15:46 7 Q. What did you provide him?
11:15:50 8 A. The bulk of what he got from my team and I
11:15:52 9 were documents that we had sourced that were
11:15:57 10 publicly available that involved companies on the
11:16:01 11 list of 358 or so.
11:16:12 12 Q. What were they about?
11:16:15 13 A. Generally, they were about the software
11:16:21 14 products used by those companies, timetables when
11:16:26 15 they may have publicly spoken about when they
11:16:30 16 changed software products or acquired new ones or
11:16:33 17 what have you, and other kind of business strategy
11:16:37 18 points that those companies may have articulated
11:16:40 19 publicly about why they made the decisions they
11:16:43 20 did.
11:16:47 21 Q. What did you understand that was for?
11:16:52 22 A. That was an assignment that we had from
11:16:57 23 Jones Day to find public records about those
11:17:03 24 companies and their software buying habits.
11:17:11 25 Q. Did you provide any other written

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11:17:12 1 materials to Mr. Clarke?
11:17:14 2 A. Steve did invite me to his birthday party,
11:17:18 3 and I got a couple emails like this, but I was very
11:17:21 4 careful not to do really anything else beyond that.
11:17:24 5 There were some correspondence I had with counsel,
11:17:29 6 and some of those may or may not --
11:17:32 7 MR. McDONELL: Don't disclose content of
11:17:33 8 communications with counsel outside the scope of
11:17:35 9 what you've relied on in your report, please.
11:17:38 10 THE WITNESS: Okay. As far as relying for
11:17:40 11 the report, no. Nothing else.
11:17:42 12 MS. HOUSE: Q. Besides providing the
11:17:43 13 publicly available documents, did you actually do
11:17:46 14 any summary or work product related to those?
11:17:50 15 Like that's an independent creation from the
11:17:55 16 physical materials that you found on the web?
11:17:57 17 MR. McDONELL: Don't disclose any work
11:17:59 18 relating to your consulting. So exclude from any
11:18:06 19 answer you give any work you may or may not have
11:18:08 20 done in your consulting engagement separate and
11:18:11 21 apart from the report.
11:18:13 22 THE WITNESS: It wasn't part of my report.
11:18:16 23 MS. HOUSE: Q. And any work that you
11:18:18 24 provided to him related to his report, do you have
11:18:22 25 any understanding what if anything that you

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11:18:24 1 provided to him he then relied on?
11:18:27 2 A. I do not know.
11:18:30 3 Q. In looking at his report, which you now
11:18:34 4 have done, do you recognize any of that product as
11:18:36 5 from your team?
11:18:40 6 A. Sadly, all I -- when I looked through his
11:18:43 7 report, I didn't see my fingerprints on anything.
11:18:49 8 So that answer would be no.
11:18:52 9 Q. You didn't see where you were cited?
11:18:54 10 A. I saw where I was cited in there a couple
11:18:56 11 of times, and it was mostly where he referenced a
11:18:59 12 conversation that the two of us may have had about
11:19:02 13 some matter. But not specific to those documents
11:19:05 14 you just asked me about.
11:19:10 15 Q. On page 1, Footnote 1 of your report, you
11:19:14 16 state, quote:
11:19:17 17 "Separately, I assisted Mr. Clarke by
11:19:20 18 collecting documents related to TomorrowNow
11:19:21 19 customers and their ERP license and support
11:19:24 20 services choices."
11:19:27 21 Is that the work that you just described?
11:19:28 22 A. Yes, that is correct.
11:19:29 23 Q. Then you continue:
11:19:31 24 "Additionally, I interviewed one former
11:19:33 25 TomorrowNow customer, Computer Associates, to

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11:19:38 1 assist Mr. Clarke."
11:19:45 2 Well, before we go there, back to the
11:19:48 3 first part of the sentence, are you relying in any
11:19:50 4 way on the work that you did for Mr. Clarke for
11:19:54 5 those 358 customers in your report?
11:19:58 6 A. No, I'm not. And that's because --
11:20:00 7 MR. McDONELL: Just answer the question.
11:20:02 8 THE WITNESS: No, I'm not.
11:20:03 9 MS. HOUSE: Q. Why is that?
11:20:06 10 A. Because the -- the only way one could
11:20:12 11 do -- my job was not to do a customer-by-customer
11:20:15 12 review of the companies involved, or the
11:20:20 13 TomorrowNow customers.
11:20:21 14 My work product was to focus on the
11:20:25 15 general market trends and buying issues, the
11:20:28 16 dynamics I think was the word I used, in the
11:20:31 17 marketplace, not on the specific customers.
11:20:39 18 Q. Your interview of Computer Associates was
11:20:41 19 not for the purpose of your expert report. Is that
11:20:43 20 right?
11:20:46 21 A. That would be correct.
11:20:49 22 Q. Your report's not in any way based on your
11:20:51 23 interview of Computer Associates. Is that right?
11:20:54 24 A. That's correct. I did not even reference
11:20:56 25 it, other than just to disclose that I had done

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11:20:59 1 that here on this first page.
11:21:00 2 Q. Why did you interview Computer Associates?
11:21:03 3 A. I was asked by counsel to do so.
11:21:06 4 Q. With whom did you speak?
11:21:09 5 A. Jason McDonell.
11:21:11 6 Q. I'm sorry, I guess I was unclear there.
11:21:13 7 So Jason McDonell asked you to interview
11:21:16 8 Computer Associates. And what was your assignment?
11:21:21 9 A. My assignment was to discuss -- it was to
11:21:27 10 ask him about four main questions. And I'd have to
11:21:34 11 go look at my interview notes on that to even
11:21:36 12 refresh what the questions were, but they involved
11:21:40 13 essentially why did you go to SAP or why did you
11:21:43 14 choose TomorrowNow, things of that nature.
11:21:48 15 Q. And those notes were not something that
11:21:50 16 you relied on in connection with your report.
11:21:52 17 Correct?
11:21:54 18 A. That is correct.
11:21:55 19 Q. Do you understand whether those notes were
11:21:57 20 ever produced in this action?
11:22:00 21 A. I don't know one way or the other.
11:22:02 22 Q. What did Computer Associates say?
11:22:05 23 A. I spoke with a fellow there, and I
11:22:08 24 remember his last name was Lucchese, I believe, Ben
11:22:12 25 or -- it was -- he had an interesting first name,

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11:22:17 1 but let's call him Ben Lucchese.
11:22:21 2 We had a short conversation. He told me a
11:22:23 3 little bit about how they were under a number of
11:22:28 4 changes being mandated on them by the Department of
11:22:31 5 Justice. Computer Associates has also been known
11:22:35 6 by the name CA or Computer Associates International
11:22:39 7 or CAI, and I think they just changed their name
11:22:44 8 once more in the last few weeks.
11:22:45 9 But he talked about how when they had --
11:22:49 10 when their former CEO -- the name -- I've just
11:22:57 11 forgotten his name, but talked a little bit about
11:23:01 12 how the Department of Justice required that they
11:23:03 13 change out their different and diverse ERP systems
11:23:05 14 and go with a single book of record worldwide
11:23:09 15 because they had a revenue recognition problem.
11:23:12 16 And they chose SAP. And I remember him also
11:23:16 17 telling me that they used Accenture to do the
11:23:19 18 implementation work.
11:23:21 19 When I asked him specifically about
11:23:22 20 TomorrowNow, he said, who's TomorrowNow?
11:23:34 21 Q. And what was the purpose of of this
11:23:35 22 interview? Did you understand what if anything
11:23:38 23 that interview was used for in this case?
11:23:40 24 MR. McDONELL: Lack of foundation, beyond
11:23:41 25 the scope.

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11:23:42 1 THE WITNESS: I called him up because
11:23:45 2 Counsel asked me to call him up and find out what
11:23:48 3 their thought process was, and that's all I know.
11:23:50 4 I can't speak to why they had me do that.
11:23:53 5 MS. HOUSE: Q. And in providing your
11:23:55 6 opinions in this case, have you completely divorced
11:23:59 7 your opinions from any information that you learned
11:24:01 8 in that interview?
11:24:02 9 MR. McDONELL: Beyond the scope.
11:24:05 10 THE WITNESS: I knew a lot about what
11:24:06 11 happened at CIA before I even called this guy,
11:24:10 12 because I knew about Sanjay Kumar, and he was the
11:24:14 13 former CEO, and all the DOJ stuff. I knew about
11:24:17 14 that.
11:24:17 15 Q. You didn't know about the four questions
11:24:19 16 that you asked them, did you?
11:24:20 17 A. No, I didn't necessarily know those.
11:24:23 18 Q. And in writing your report, did you
11:24:26 19 consider that in coming up with your opinions?
11:24:29 20 MR. McDONELL: Asked and answered.
11:24:30 21 THE WITNESS: No.
11:24:42 22 MS. HOUSE: Q. Were you asked to
11:24:42 23 interview any other customers?
11:24:48 24 MR. McDONELL: Don't disclose
11:24:49 25 communications with counsel that you did not rely

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11:24:52 1 on or consider for use in your report.
11:24:55 2 So if there's anything you can answer
11:24:56 3 beyond that, or -- well, keeping with that
11:24:58 4 instruction, you may answer.
11:25:01 5 THE WITNESS: I can't answer that
11:25:01 6 question.
11:25:05 7 MS. HOUSE: Q. Did you provide your
11:25:06 8 writeup from the interview to anybody?
11:25:09 9 A. To Mr. McDonell.
11:25:14 10 MS. HOUSE: I'm going to object insofar as
11:25:16 11 they have never been produced.
11:25:20 12 Q. Now, your report makes no mention of any
11:25:23 13 other communications between you and any other
11:25:25 14 customer in this case.
11:25:26 15 You didn't speak with any other customers
11:25:28 16 in this case in preparation of your report.
11:25:30 17 Correct?
11:25:31 18 A. Correct.
11:25:33 19 Q. Did you perform or attend any other
11:25:35 20 customer interviews?
11:25:38 21 A. Perform or attend any other customer
11:25:41 22 interviews. The only thing I did was attend the
11:25:48 23 Pepsi deposition.
11:25:51 24 Q. I remember. I was there. I met you
11:25:53 25 there.

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11:25:54 1 Other than the attending of the Pepsi
11:25:56 2 deposition, did you attend any other customer
11:26:01 3 depositions?
11:26:01 4 A. No.
11:26:03 5 Q. Did you attend any other customer
11:26:04 6 interviews?
11:26:06 7 MR. McDONELL: Assumes facts not in
11:26:06 8 evidence.
11:26:08 9 THE WITNESS: No.
11:26:09 10 MS. HOUSE: Q. And you didn't perform
11:26:10 11 any, or your people, either. Correct?
11:26:13 12 A. That is correct.
11:26:13 13 MR. McDONELL: Asked and answered. Sorry.
11:26:14 14 THE WITNESS: Sorry.
11:26:17 15 MS. HOUSE: Q. In your "Summary of
11:26:18 16 Opinions" on page 3, at the end of your second
11:26:26 17 point, you state: I provided a general overview of
11:26:31 18 alternatives to Oracle-provided support.
11:26:35 19 Do you see that?
11:26:36 20 A. Yes.
11:26:37 21 Q. And who did you provide that to?
11:26:39 22 A. It's in this report. It says, I provide a
11:26:44 23 general overview of alternatives to Oracle-provided
11:26:49 24 support. And those are essentially --
11:26:51 25 MR. McDONELL: Counsel, can you tell me --

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11:26:52 1 I've fallen behind. Where exactly are you
11:26:54 2 referring to in the report? Page 3? And which --
11:27:00 3 MS. HOUSE: Q. And you say: I provide a
11:27:01 4 general overview of alternatives to Oracle-provided
11:27:04 5 support.
11:27:05 6 Do you see that?
11:27:06 7 MR. McDONELL: I'm sorry, I'm being slow
11:27:08 8 here. Oh, paragraph 2, sorry.
11:27:11 9 THE WITNESS: Second-to-the-last sentence,
11:27:12 10 I believe.
11:27:13 11 MR. McDONELL: Thank you.
11:27:16 12 MS. HOUSE: Q. Let me make -- my
11:27:18 13 question, the first one, is, did you provide that
11:27:21 14 to Mr. Clarke, or is that what you're describing
11:27:24 15 you did in connection with this report?
11:27:26 16 A. In connection with this report.
11:27:32 17 Q. Are you able to say whether TomorrowNow's
11:27:34 18 actions were not very different from the actions
11:27:37 19 many third-party support vendors offered?
11:27:40 20 MR. McDONELL: Vague and ambiguous.
11:27:42 21 THE WITNESS: What do you mean by
11:27:44 22 "actions"?
11:27:47 23 MS. HOUSE: Q. That the provision of
11:27:48 24 support that TomorrowNow gave was not very
11:27:52 25 different from the provision of support by other

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11:27:54 1 third-party vendors.
11:27:58 2 A. I --
11:27:59 3 MR. McDONELL: That's vague and ambiguous.
11:28:00 4 Object to the form of the question, lack of
11:28:02 5 foundation.
11:28:03 6 THE WITNESS: I'm not trying to spar.
11:28:05 7 When you talk about provisioning, are we talking
11:28:08 8 about the scope of service, or how the service was
11:28:10 9 delivered?
11:28:11 10 MS. HOUSE: Q. Well, why don't we just
11:28:13 11 back up a little.
11:28:14 12 Are you in a position to be able to
11:28:16 13 compare and contrast what TomorrowNow's support
11:28:19 14 offering was with the support offering of any other
11:28:23 15 vendor?
11:28:24 16 MR. McDONELL: Same objections.
11:28:25 17 THE WITNESS: I can generally speak to
11:28:26 18 what other -- what TomorrowNow and other support
11:28:29 19 vendors offered as well as what vendors generally
11:28:32 20 offer. And that's what's in my report.
11:28:35 21 MS. HOUSE: Q. Nowhere in your report do
11:28:36 22 you describe what the TomorrowNow support offering
11:28:40 23 is. Is that a fair statement?
11:28:46 24 MR. McDONELL: The document speaks for
11:28:48 25 itself, Counsel.

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11:28:49 1 MS. HOUSE: Q. I'll represent to you that
11:28:50 2 it's not in there.
11:28:51 3 A. I was going to -- I know I speak about the
11:28:54 4 stuff generally, but --
11:28:56 5 Q. You don't talk about TomorrowNow at all?
11:28:58 6 MR. McDONELL: Counsel, you interrupted
11:28:59 7 the witness. Please restate the question.
11:29:03 8 MS. HOUSE: Q. In your report, you do not
11:29:05 9 pretend to know or opine about what it was that
11:29:09 10 TomorrowNow provided in the way of support. Is
11:29:12 11 that a fair statement?
11:29:13 12 MR. McDONELL: Argumentative, the document
11:29:14 13 speaks for itself, object to the form of the
11:29:16 14 question.
11:29:19 15 THE WITNESS: Just as the sentence below
11:29:20 16 the one we just quoted from, it says, I understand
11:29:23 17 that Mr. Clarke has conducted a detailed market
11:29:25 18 survey of third-party alternatives, I did not cover
11:29:27 19 that in my report. I did not go into any
11:29:29 20 exhaustive review of either what TomorrowNow
11:29:32 21 offered or how it offered it, nor did I do that for
11:29:36 22 other service providers as well.
11:29:39 23 MS. HOUSE: Q. So you are not intending
11:29:41 24 to provide a compare-and-contrast between what
11:29:45 25 TomorrowNow offered and what any other service

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11:29:47 1 vendor offered. Is that fair?
11:29:49 2 MR. McDONELL: Object to the form of the
11:29:49 3 question. The report speaks for itself.
11:29:53 4 THE WITNESS: I believe that's correct.
11:29:53 5 And again, I'll state, Mr. Clarke or other experts
11:29:57 6 on this case either did or should have done that
11:30:00 7 analysis.
11:30:02 8 MS. HOUSE: Q. So you are not in a
11:30:03 9 position to say how, if at all, TomorrowNow's
11:30:07 10 support offering differed from any other
11:30:10 11 alternative support vendor. Is that correct?
11:30:14 12 MR. McDONELL: Object to the form of the
11:30:15 13 question.
11:30:17 14 THE WITNESS: I'll only speak to that in
11:30:18 15 general terms.
11:30:21 16 MS. HOUSE: Q. That's not my question,
11:30:22 17 though.
11:30:22 18 Are you intending to provide any
11:30:25 19 comparison between what TomorrowNow offered by way
11:30:29 20 of support and what any other alternative offered
11:30:32 21 by way of support to the customers at issue in this
11:30:35 22 lawsuit?
11:30:35 23 MR. McDONELL: The report speaks for
11:30:36 24 itself. Object to the form.
11:30:43 25 THE WITNESS: If I understand your

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11:30:44 1 question correctly, no, I'm not doing that in this
11:30:46 2 report. And I think I made that clear, in just the
11:30:49 3 way I even phrased the report language, that others
11:30:51 4 would do that.
11:30:53 5 I would also state, though, that it
11:30:55 6 doesn't really matter what the individual
11:30:57 7 assessments of one product or vendor -- service
11:31:01 8 offering to the next are. What really matters is
11:31:02 9 how the customers perceive it. And that's the key
11:31:05 10 point I think this case is all about.
11:31:07 11 MS. HOUSE: Q. And I would agree. But
11:31:10 12 sir, did you interview any customers to get that
11:31:12 13 perception?
11:31:13 14 MR. McDONELL: Asked and answered. Object
11:31:14 15 to the form of the question.
11:31:18 16 THE WITNESS: No.
11:31:29 17 MS. HOUSE: Q. Do you agree with the
11:31:30 18 statement: When viewed as a list and stripped down
11:31:34 19 to the bare realities, it's clear that
11:31:36 20 TomorrowNow's actions were not very different from
11:31:39 21 the actions many third-party support vendors
11:31:43 22 offered?
11:31:44 23 MR. McDONELL: Vague and ambiguous, object
11:31:45 24 to the form.
11:31:49 25 THE WITNESS: Can you repeat that again?

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11:31:53 1 MS. HOUSE: Q. When stripped down to the
11:31:54 2 bare realities, it is clear that TomorrowNow's
11:31:58 3 actions were not very different from the actions
11:32:01 4 many third-party support vendors offered.
11:32:05 5 Would you agree or not agree, or would you
11:32:08 6 have no opinion on that?
11:32:10 7 MR. McDONELL: It's vague and ambiguous,
11:32:11 8 object to the form.
11:32:11 9 THE WITNESS: I'll take a -- I'll go no
11:32:13 10 opinion on that.
11:32:18 11 MS. HOUSE: Q. So I believe that you've
11:32:19 12 previously answered this, but just so it's a clear
11:32:24 13 record, did you perform any analysis of other
11:32:26 14 third-party vendors and the services that they
11:32:28 15 provided as compared to TomorrowNow's?
11:32:31 16 MR. McDONELL: Asked and answered. Object
11:32:32 17 to the form.
11:32:35 18 THE WITNESS: As relates to this report,
11:32:37 19 no.
11:32:53 20 MS. HOUSE: Q. In provide -- do you need
11:32:56 21 to --
11:32:56 22 A. I was going to say, could I take 5 just
11:32:59 23 for myself for just a moment?
11:33:01 24 Q. We've been taking a awful lot of breaks.
11:33:04 25 A. Okay. In that case, let's keep going.

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11:33:07 1 MR. McDONELL: If this is a bathroom
11:33:09 2 break, Counsel --
11:33:10 3 MS. HOUSE: Oh, if you --
11:33:10 4 THE WITNESS: Actually, I just want to
11:33:11 5 refill my glass of water and -- but we'll keep
11:33:20 6 going. Let's keep going.
11:33:20 7 MS. HOUSE: Q. In talking to Mr. Clarke
11:33:22 8 about -- and I'm using your language -- how
11:33:24 9 software buyers buy and what they buy, did you have
11:33:29 10 any discussion about the alternative support
11:33:33 11 available to the particular customers at issue in
11:33:37 12 this case?
11:33:39 13 MR. McDONELL: Vague and ambiguous, asked
11:33:40 14 and answered.
11:33:43 15 THE WITNESS: Did we have any conversation
11:33:44 16 about the different vendors in that space?
11:33:48 17 MS. HOUSE: Q. Yep.
11:34:03 18 A. It's possible, but most of our
11:34:04 19 conversation dealt with, again, the factors, not --
11:34:07 20 we weren't really talking about the -- the direct
11:34:10 21 competitors.
11:34:13 22 Q. You did discuss with Mr. Clarke the --
11:34:17 23 your opinions about alternative support available
11:34:20 24 in the market. Correct?
11:34:24 25 A. Yes, I did discuss with him some of my

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11:34:27 1 opinions in that regard.
11:34:30 2 Q. And in those discussions, did you ever
11:34:33 3 discuss how those alternatives compared to
11:34:38 4 TomorrowNow?
11:34:53 5 MR. McDONELL: Asked and answered. Object
11:34:53 6 to the form of the question.
11:34:54 7 THE WITNESS: And in those discussions,
11:34:56 8 did we cover how those -- what was the last part of
11:34:58 9 that question?
11:34:59 10 MS. HOUSE: Q. How those alternatives
11:35:01 11 compared --
11:35:02 12 A. To TomorrowNow.
11:35:02 13 Q. -- to TomorrowNow?
11:35:03 14 MR. McDONELL: Could you please restate
11:35:04 15 the whole question? Because it's now broken up
11:35:07 16 over --
11:35:09 17 MS. HOUSE: Q. In your discussions with
11:35:10 18 Mr. Clarke about alternative support options, did
11:35:14 19 you discuss how any of those options actually
11:35:16 20 compared to TomorrowNow?
11:35:19 21 A. I don't believe we ever did have that
11:35:21 22 discussion. Let me qualify that. With one
11:35:30 23 exception.
11:35:32 24 We did talk about generally what was meant
11:35:35 25 by "business process outsourcing." We did have a

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11:35:39 1 long conversation about that.
11:35:45 2 Q. And how -- what conversation did you have
11:35:47 3 that related to that as compared to TomorrowNow?
11:35:52 4 A. Well, it wasn't so much related to
11:35:54 5 TomorrowNow. It was just as an option for a
11:35:56 6 customer to use in lieu of either software
11:36:03 7 maintenance or just an ERP solution in general.
11:36:06 8 And he and I did have a discussion about, should
11:36:09 9 that be considered an alternative support option or
11:36:14 10 not.
11:36:16 11 Q. And what did you conclude?
11:36:19 12 A. I can't tell you what he concluded, but I
11:36:21 13 concluded that some BPO solutions generally should
11:36:26 14 be considered as substitute products or
11:36:28 15 alternatives in this space.
11:36:31 16 Q. At what point in time?
11:36:33 17 A. At --
11:36:34 18 MR. McDONELL: Vague and ambiguous.
11:36:35 19 THE WITNESS: At what point in time what?
11:36:37 20 MS. HOUSE: Q. At what point in time were
11:36:39 21 BPO solutions alternative to TomorrowNow support?
11:36:44 22 MR. McDONELL: Same objection.
11:36:46 23 THE WITNESS: What -- at what time did he
11:36:48 24 and I talk about this, or --
11:36:50 25 MS. HOUSE: Q. No.

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11:36:50 1 A. -- at what time did I reach that
11:36:52 2 conclusion?
11:36:54 3 Q. BPO has evolved over time. Correct?
11:36:56 4 A. It's been around a few years, yes.
11:36:58 5 Q. Do you have any understanding what the BPO
11:37:00 6 options were in January 2005?
11:37:02 7 A. I have a fair idea of what was available
11:37:04 8 back then.
11:37:05 9 Q. And do you have any understanding whether
11:37:07 10 any of the customers at issue in this case ever
11:37:10 11 considered BPO as an alternative to TomorrowNow?
11:37:14 12 MR. McDONELL: Objection. Beyond the
11:37:16 13 scope.
11:37:17 14 THE WITNESS: I didn't do the
11:37:17 15 customer-by-customer assessment.
11:37:21 16 MS. HOUSE: Q. So you don't know?
11:37:22 17 A. I don't know.
11:37:26 18 Q. And did you provide a detailed survey of
11:37:30 19 the BPO options over the relevant period of the
11:37:32 20 case?
11:37:33 21 MR. McDONELL: Vague and ambiguous, object
11:37:33 22 to the form.
11:37:35 23 THE WITNESS: I did not give him a
11:37:37 24 detailed, you know, survey of those. We talked
11:37:40 25 about the concept in general, whether that should

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11:37:42 1 be -- excuse me, should be viewed as a -- either a
11:37:50 2 competitor or an alternate solution or substitute
11:37:54 3 product, whatever words you want to use. That was
11:37:57 4 the main gist of it.
11:37:58 5 I did reference some companies as examples
11:38:01 6 that he and his team could go look at.
11:38:12 7 MS. HOUSE: Q. Looking back to your
11:38:13 8 report, in your summary of opinions on page 3, you
11:38:21 9 note at the end of 2, quote, "I understand that
11:38:26 10 Mr. Clarke has conducted a detailed market survey
11:38:29 11 of third-party alternatives."
11:38:33 12 A. Yes, I see that.
11:38:34 13 Q. Did you review Mr. Clarke's report before
11:38:36 14 making that assertion?
11:38:39 15 A. No, I did not review that. Or I did
11:38:43 16 not -- I didn't review what he did or anything
11:38:45 17 else. I just -- it was my understanding that he
11:38:47 18 was going to do that.
11:38:49 19 Q. What's your definition of a market survey,
11:38:51 20 a detailed market survey?
11:38:55 21 A. That -- my definition of that would mean
11:38:58 22 that he would go and -- or his team -- you know,
11:39:01 23 I'm speaking more collectively, I guess, of LECC --
11:39:04 24 would research the market, find out who the
11:39:08 25 different players were in that space, and identify

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11:39:12 1 some of the interesting characteristics or pricing
11:39:14 2 points, whatever, of those different kinds of
11:39:16 3 solutions.
11:39:17 4 Q. Did you assist in any way in his conduct
11:39:19 5 of that -- his conduct of whatever he did?
11:39:24 6 A. No, I did not.
11:39:25 7 Q. Did you review it?
11:39:26 8 A. No, I did not.
11:39:28 9 Q. Have you reviewed it now that you've
11:39:29 10 looked at his report?
11:39:30 11 A. I have read his report, and I have seen
11:39:32 12 that, yes.
11:39:34 13 Q. Do you intend to offer any opinions about
11:39:35 14 the quality of his analysis?
11:39:40 15 MR. McDONELL: Object to the form. Calls
11:39:41 16 for a legal conclusion. Lack of foundation.
11:39:47 17 THE WITNESS: Am I going to offer an
11:39:48 18 opinion on that, or did I?
11:39:51 19 MS. HOUSE: Q. Well, it doesn't sound
11:39:53 20 like you did, since you didn't review it before --
11:39:55 21 A. That's correct.
11:39:56 22 Q. And you're not intending to now. Correct?
11:39:58 23 MR. McDONELL: Same objections.
11:40:00 24 THE WITNESS: It's not my intent nor
11:40:03 25 really in the structure of my report to -- I'm not

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11:40:05 1 going to rebut Mr. Clarke, I guess, if that's what
11:40:08 2 you're asking.
11:40:10 3 MS. HOUSE: Q. Have you ever performed a
11:40:11 4 market study?
11:40:13 5 MR. McDONELL: Object to the form of the
11:40:14 6 question as vague and ambiguous.
11:40:16 7 THE WITNESS: I have done some -- I have
11:40:18 8 done some market studies and market assessments,
11:40:22 9 yes.
11:40:22 10 MS. HOUSE: Q. What are the parameters
11:40:23 11 for performing such assessments?
11:40:26 12 MR. McDONELL: Vague and ambiguous, overly
11:40:26 13 broad, object to the form.
11:40:29 14 THE WITNESS: I've done some interesting
11:40:30 15 things over the years. These things can vary
11:40:34 16 widely in scope. And they can be very limited and
11:40:38 17 very narrow, or they can be very broad.
11:40:41 18 In my past, I actually did radio station
11:40:45 19 programming market assessment work, and I would
11:40:47 20 find out what makes, for example, women 18 to 34
11:40:50 21 really tick in certain markets in different parts
11:40:54 22 of the country.
11:40:55 23 Q. You should test your wife on that.
11:40:57 24 A. Thankfully, I did all that before I met
11:41:01 25 her. Actually, that has -- for all that sordid

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11:41:04 1 nature of that --
11:41:05 2 MR. McDONELL: Is there a question pending
11:41:06 3 on that --
11:41:06 4 MS. HOUSE: No.
11:41:08 5 MR. McDONELL: I'm sorry, Counsel. You
11:41:09 6 said something, and I don't want him to be speaking
11:41:12 7 if he's not responding to a question. If you're
11:41:14 8 completing your answer --
11:41:16 9 MS. HOUSE: Q. What are the parameters
11:41:16 10 for performing a market study?
11:41:19 11 MR. McDONELL: It's beyond the scope, and
11:41:20 12 it's vague and ambiguous. Object to the form.
11:41:21 13 THE WITNESS: Parameters generally would
11:41:23 14 include a review of some of the different products
11:41:25 15 in the market. It might include pricing points, it
11:41:31 16 would include a review possibly of some of the
11:41:35 17 services or solutions or products or whatever go in
11:41:40 18 with that and how they're bundled, and even maybe
11:41:43 19 as far as like marketing messages. It's just -- it
11:41:45 20 depends. It's an engagement-specific deal based on
11:41:48 21 the business need and what's behind -- what's
11:41:51 22 driving that study.
11:41:53 23 MS. HOUSE: Q. Do you always assume that
11:41:54 24 marketing materials are truthful?
11:41:55 25 A. Are credible?

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11:41:56 1 MR. McDONELL: Object to the form of the
11:41:56 2 question.
11:41:57 3 MS. HOUSE: Q. Are truthful.
11:42:07 4 A. I think -- I think marketing materials
11:42:12 5 have a kernel of truth in them, or they should, and
11:42:17 6 it may vary a lot based on what the message is and
11:42:20 7 who's making it.
11:42:23 8 Q. Before making conclusions in a market
11:42:25 9 study, would it be preferable to go beyond
11:42:28 10 marketing materials?
11:42:29 11 MR. McDONELL: Vague and ambiguous, object
11:42:30 12 to the form, beyond the scope.
11:42:35 13 THE WITNESS: I would recommend that
11:42:36 14 someone try and find other forms -- other ways to
11:42:39 15 validate the information to make sure it's as close
11:42:42 16 to reality as it can be.
11:42:45 17 MS. HOUSE: Q. So for instance, would it
11:42:46 18 be a good idea to interview the individuals who are
11:42:52 19 being the topic of the study?
11:42:55 20 MR. McDONELL: Beyond the scope, object to
11:42:55 21 the form, vague and ambiguous.
11:42:59 22 THE WITNESS: They would be one of many
11:43:01 23 groups of people probably that you would want to
11:43:03 24 interview.
11:43:05 25 MS. HOUSE: Q. And would it be good to

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11:43:07 1 talk to analysts who have studied that particular
11:43:13 2 industry?
11:43:14 3 MR. McDONELL: Vague and ambiguous, object
11:43:14 4 to the form, beyond the scope.
11:43:17 5 THE WITNESS: If that's relevant in that
11:43:19 6 particular kind of study or industry, yes.
11:43:23 7 MS. HOUSE: Q. And if there is, for
11:43:25 8 instance, testimony that's been given under oath,
11:43:28 9 would that be something that you would want to
11:43:30 10 evaluate before making a conclusion about a study?
11:43:32 11 MR. McDONELL: Beyond the scope, object to
11:43:33 12 the form. Vague and ambiguous. Assumes facts.
11:43:38 13 THE WITNESS: Yes, I'd want to look at
11:43:40 14 that.
11:43:40 15 MS. HOUSE: Q. And if there have been,
11:43:43 16 you know, materials that have been produced by a
11:43:46 17 company on the very topic, would that be something
11:43:49 18 that you'd want to look at before making
11:43:51 19 conclusions in a market study?
11:43:53 20 MR. McDONELL: Beyond the scope, object to
11:43:53 21 the form, vague and ambiguous.
11:43:56 22 THE WITNESS: Yes, I'd want to look at
11:43:58 23 that, and I'd want to look at everything that would
11:44:00 24 help paint the full picture of what was going on.
11:44:08 25 MS. HOUSE: Q. Do you know of any

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11:44:09 1 particular -- I don't know, treatise or instruction
11:44:16 2 manual that you would be able to point to in doing
11:44:19 3 a market study yourself?
11:44:22 4 MR. McDONELL: Object to the form, beyond
11:44:22 5 the scope, vague and ambiguous.
11:44:24 6 THE WITNESS: I'm not aware of one, no.
11:44:27 7 MS. HOUSE: Q. And when you've done
11:44:28 8 market studies, have you used any particular
11:44:30 9 parameters or treatises that assist you in devising
11:44:35 10 your studies?
11:44:36 11 MR. McDONELL: Beyond the scope, compound,
11:44:37 12 vague and ambiguous, object to the form.
11:44:43 13 THE WITNESS: No, I'm not using -- I don't
11:44:44 14 use any one type of treatise or form, whatever
11:44:50 15 you're describing.
11:44:51 16 MS. HOUSE: Q. And you didn't use any
11:44:52 17 treatise yourself in connection with creating your
11:44:54 18 report. Is that right?
11:44:56 19 MR. McDONELL: Asked and answered, vague
11:44:57 20 and ambiguous, object to the form.
11:45:00 21 THE WITNESS: That is correct.
11:45:05 22 MS. HOUSE: Q. Now, in connection with
11:45:06 23 the opinions in your report, first of all, have we
11:45:12 24 covered all the work that you've done with
11:45:13 25 Mr. Clarke?

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11:45:15 1 MR. McDONELL: Vague and ambiguous, asked
11:45:15 2 and answered, object to the form. Overly broad.
11:45:19 3 THE WITNESS: I believe we have.
11:45:22 4 MS. HOUSE: Q. Okay. In connection with
11:45:23 5 the opinions in your own report, you state, under
11:45:27 6 "Information Considered," on page 2, that you
11:45:34 7 conferred with Defendants' expert Mr. Clarke in
11:45:37 8 preparing your expert report.
11:45:38 9 Do you see that?
11:45:40 10 MR. McDONELL: Can you point us to a line
11:45:41 11 item, Counsel?
11:45:43 12 MS. HOUSE: The last --
11:45:44 13 MR. McDONELL: In that paragraph -- I see.
11:45:47 14 MS. HOUSE: Q. The last sentence says: I
11:45:49 15 have also conferred with Stephen K. Clarke, another
11:45:52 16 expert retained by the Defendants, in preparing my
11:45:56 17 report.
11:45:59 18 What information did he provide to you for
11:46:02 19 your report?
11:46:04 20 MR. McDONELL: Assumes facts not in
11:46:04 21 evidence. Object to the form.
11:46:10 22 THE WITNESS: He didn't provide me
11:46:12 23 information for my report.
11:46:16 24 MS. HOUSE: Q. Do you rely on any of the
11:46:18 25 conversations that you had with Mr. Clarke in

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11:46:21 1 connection with your report?
11:46:23 2 MR. McDONELL: Vague and ambiguous, object
11:46:23 3 to the form.
11:46:25 4 THE WITNESS: No. I developed my
11:46:26 5 report -- as I said before, it's my own material,
11:46:30 6 and I relied on my own information for that.
11:46:33 7 MS. HOUSE: Q. So though you reference
11:46:36 8 that in this sentence, was there anything from
11:46:40 9 Mr. Clarke that you rely on in connection with the
11:46:44 10 opinions in your report?
11:46:45 11 MR. McDONELL: Asked and answered, object
11:46:46 12 to the form.
11:46:49 13 THE WITNESS: No. And that's because my
11:46:51 14 understanding was -- well --
11:46:56 15 MS. HOUSE: Q. Why?
11:46:56 16 A. He was going to cover more the financial
11:46:59 17 aspects of the case, and that wasn't my assignment.
11:47:02 18 My assignment was to provide the general market
11:47:06 19 dynamics that impact the software buying decision
11:47:14 20 and make decisions and so forth.
11:47:16 21 Q. And did you take any notes of any of your
11:47:18 22 conversations with Mr. Clarke?
11:47:19 23 A. No.
11:47:23 24 Q. On page 2 of your report, you list all the
11:47:26 25 information you considered in rendering your

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11:47:29 1 opinions, correct, and you reference Appendix C?
11:47:32 2 A. Yes.
11:47:33 3 Q. Is Appendix C a comprehensive list of all
11:47:36 4 the material you considered in rendering your
11:47:38 5 expert report?
11:47:45 6 MR. McDONELL: Vague and ambiguous, object
11:47:45 7 to the form.
11:47:46 8 THE WITNESS: I believe Appendix C to be
11:47:48 9 complete. I did my very best to try and collect
11:47:52 10 everything that I looked at, considered, what have
11:47:54 11 you, for this case, and I've listed it there.
11:47:59 12 MS. HOUSE: Q. Is "considered" different
11:48:01 13 than "relied on"?
11:48:03 14 MR. McDONELL: Calls for a legal
11:48:03 15 conclusion. Object to the form.
11:48:06 16 MS. HOUSE: Q. You can consider something
11:48:07 17 and not rely on it. Do you understand that
11:48:09 18 distinction?
11:48:10 19 A. I understand that distinction.
11:48:12 20 Q. So you use the word "considered," and I
11:48:15 21 want to figure out, is there a subset of material
11:48:17 22 that you relied on?
11:48:20 23 MR. McDONELL: Object to the form.
11:48:22 24 THE WITNESS: If I relied on something, I
11:48:23 25 footnoted it in this report, and there's like -- I

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11:48:26 1 think there's like 80-something footnotes,
11:48:29 2 whatever, in this document.
11:48:31 3 MS. HOUSE: Q. That was going to be my
11:48:33 4 next question.
11:48:33 5 A. 92 footnotes, something like that, yeah.
11:48:35 6 Q. So the materials that you relied on were
11:48:37 7 the materials that you footnoted. Correct?
11:48:39 8 A. That is correct.
11:48:47 9 Q. Now, Mr. Clarke's expert report is neither
11:48:50 10 listed on page 2 in your "Information Considered"
11:48:54 11 or listed in Appendix C.
11:48:57 12 So nothing in Mr. Clarke's report is
11:48:59 13 something that you considered or relied on for your
11:49:02 14 opinions. Correct?
11:49:03 15 MR. McDONELL: Asked and answered.
11:49:05 16 THE WITNESS: Yes, that is correct.
11:49:07 17 MS. HOUSE: Q. On page 2, you indicate
11:49:09 18 that you did review Mr. Meyer's report. Correct?
11:49:15 19 A. I -- I think I reference that a few times
11:49:17 20 in here, yes.
11:49:18 21 Q. Okay. And then in Appendix C, you also
11:49:21 22 say that you considered the expert report of Kevin
11:49:23 23 Mandia. Do you see that?
11:49:26 24 A. Yes, I did.
11:49:28 25 Q. In your report, you say nothing about

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11:49:30 1 Mr. Mandia's report or opinions.
11:49:33 2 Are you offering any opinions in rebuttal
11:49:35 3 to Mr. Mandia?
11:49:37 4 MR. McDONELL: The report speaks for
11:49:38 5 itself.
11:49:40 6 THE WITNESS: No, I am not offering
11:49:41 7 anything in rebuttal to Mr. Mandia's report.
11:49:46 8 MS. HOUSE: Q. In your report, you do
11:49:47 9 reference specific portions of the Meyer report
11:49:50 10 that you are rebutting. Correct?
11:49:52 11 A. Yes.
11:49:54 12 Q. And other than what you reference in your
11:49:56 13 report, are you intending to offer any other
11:50:00 14 opinions or evidence in rebuttal to Mr. Meyer?
11:50:04 15 I mean, he's got a very long report, so
11:50:07 16 you've specified certain paragraphs that you're
11:50:09 17 addressing. I want to make sure that I understand
11:50:12 18 that you've identified the paragraphs that you're
11:50:14 19 addressing.
11:50:15 20 MR. McDONELL: Object. Vague and
11:50:16 21 confusing question. Object to the form.
11:50:19 22 THE WITNESS: I've put some notes -- is
11:50:21 23 that what you're referring to?
11:50:22 24 Yes, I did put some notes in here just as
11:50:25 25 like a summary mental tickler, if you will.

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11:50:32 1 One of the challenges -- well, these are
11:50:37 2 the ones -- these are I think the most germane,
11:50:41 3 let's put it that way, sections within his report.
11:50:43 4 Q. So within your report, you actually have
11:50:46 5 some footnotes to which you cite paragraphs from
11:50:49 6 Mr. Meyer. Correct?
11:50:50 7 A. I also have that in there, yes.
11:50:52 8 Q. Okay. So those footnotes -- well, we'll
11:50:56 9 get to the footnotes. But you -- in 3245, which is
11:51:00 10 the copy of your report that has your notes, you
11:51:03 11 reference Meyer 439 and 440 in connection with your
11:51:11 12 summary of Opinion 1. Is that correct?
11:51:14 13 A. That's a note I made to myself, yes.
11:51:16 14 Q. So those are the portions of the Meyer
11:51:20 15 report that you believe your Section 1 covers. Is
11:51:22 16 that right?
11:51:23 17 MR. McDONELL: Object to the form. Overly
11:51:24 18 broad.
11:51:27 19 THE WITNESS: I wrote that note to myself
11:51:29 20 in case we got into a question about that
11:51:31 21 particular point, I could go to Mr. Meyer's report
11:51:33 22 to those paragraphs if we needed to do that.
11:51:36 23 MS. HOUSE: Q. Okay. So again, you
11:51:37 24 believe that your opinion as summarized on page 3,
11:51:43 25 Bullet 1, would be rebutting the opinions in Meyer

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11:51:47 1 439 and 440?
11:51:50 2 MR. McDONELL: Object to the form.
11:51:51 3 THE WITNESS: And -- yes, at a minimum,
11:51:52 4 yes.
11:51:55 5 MS. HOUSE: Q. Well, I have to understand
11:51:56 6 what you're rebutting, and that's why I'm asking
11:51:58 7 you.
11:51:59 8 Did you intend to put down the paragraphs
11:52:01 9 that you were rebutting?
11:52:02 10 MR. McDONELL: Asked and answered. Object
11:52:03 11 to the form.
11:52:05 12 THE WITNESS: These are -- again, these
11:52:07 13 are specific pieces in his report that I think
11:52:11 14 warrant a rebuttal.
11:52:14 15 MS. HOUSE: Q. And I'm trying to make
11:52:15 16 sure I have the universe of what you're going to be
11:52:17 17 rebutting.
11:52:18 18 Did you attempt to capture the paragraphs
11:52:21 19 that you are going to be rebutting in Mr. Meyer's
11:52:24 20 report?
11:52:25 21 MR. McDONELL: Asked and answered
11:52:25 22 repeatedly. Object to the form.
11:52:28 23 THE WITNESS: These were intended to help
11:52:30 24 me remember where in his report, because it -- if I
11:52:34 25 remember, it's like 300 pages long or something --

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11:52:36 1 it was long, I know that. And I just wanted a
11:52:39 2 quick way to find some specific points if I were
11:52:42 3 going to be asked, what specifically are you
11:52:45 4 rebutting in the Meyer report on this particular
11:52:47 5 point. That's why I put those in here.
11:52:49 6 So I think my answer to your question is,
11:52:51 7 yes, I'm rebutting those sections.
11:52:58 8 MS. HOUSE: Q. And then the next
11:52:59 9 paragraph, 2, summary point, you believe you're
11:53:02 10 rebutting Meyer 364. Is that right?
11:53:06 11 A. His paragraph 364, yes.
11:53:08 12 Q. And then paragraph 3, you're rebutting
11:53:10 13 Meyer 361.
11:53:12 14 MR. McDONELL: Object to the form.
11:53:13 15 Incomplete.
11:53:14 16 MS. HOUSE: Q. Is that right?
11:53:14 17 A. Yes.
11:53:14 18 Q. And then paragraph 4, or Opinion 4,
11:53:17 19 it's -- you're rebutting Meyer 364. Is that right?
11:53:20 20 MR. McDONELL: Object to the form.
11:53:21 21 THE WITNESS: Correct.
11:53:22 22 MS. HOUSE: Q. You have nothing in
11:53:23 23 paragraph 5. What portions of Mr. Meyer's report
11:53:26 24 are you rebutting with your Opinion 5?
11:53:28 25 A. Well, that's an interesting question,

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11:53:30 1 because I don't think Mr. Meyer ever considered
11:53:33 2 that whole area. And I think -- I can't rebut the
11:53:39 3 absence of something, I guess, other than to say, I
11:53:42 4 don't think he covered it.
11:53:44 5 Q. Okay. And then Opinion 6, you're
11:53:48 6 rebutting paragraphs 30 and 62 of Mr. Meyer. Is
11:53:52 7 that right?
11:53:53 8 A. I believe, yes.
11:53:55 9 Q. And those were not citations that you
11:53:57 10 provided in your original report. Correct?
11:53:59 11 MR. McDONELL: The document speaks for
11:54:00 12 itself. Object to the form.
11:54:03 13 THE WITNESS: I think some of those may be
11:54:04 14 referenced further back. But again, you asked me
11:54:10 15 earlier, had I done any -- you know, what
11:54:13 16 preparation had I done, and I went back and reread
11:54:16 17 things, and I read Mr. Meyer's report, and I wanted
11:54:19 18 to tie it back to my summary.
11:54:32 19 MS. HOUSE: Q. You've indicated you
11:54:33 20 reviewed Mr. Meyer's report.
11:54:35 21 Did you review any of his accompanying
11:54:37 22 schedules?
11:54:38 23 A. No, I did not.
11:54:40 24 Q. Did you review any of the evidence he
11:54:42 25 cited?

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11:54:48 1 A. Other than what he put in his report,
11:54:50 2 like --
11:54:50 3 Q. In the text?
11:54:51 4 A. -- in the text? That's all I saw.
11:54:53 5 Q. You didn't review any of the backup
11:54:55 6 materials?
11:54:56 7 A. No, I did not.
11:55:03 8 Q. Did you think that it would be appropriate
11:55:05 9 before rebutting Mr. Meyer to consider the material
11:55:09 10 that he cites?
11:55:11 11 MR. McDONELL: Object to the form.
11:55:12 12 Argumentative.
11:55:17 13 THE WITNESS: Given that my report is to
11:55:20 14 look at the general trends and what's going on in
11:55:22 15 the market and how customers buy, if he didn't
11:55:24 16 cover it in his summary document, I didn't go into
11:55:27 17 the detailed economic calculations he had in the
11:55:30 18 attachments.
11:55:30 19 MS. HOUSE: Q. Were you instructed not to
11:55:33 20 do that?
11:55:34 21 A. No, I wasn't instructed not to do it.
11:55:37 22 Q. That was your decision?
11:55:42 23 A. Yes.
11:55:43 24 Q. Going back to page 2 of your report, under
11:55:47 25 "Information Considered," you mentioned here that

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11:55:52 1 "I and staff members working at my direction also
11:56:01 2 considered certain case pleadings."
11:56:04 3 Do you see that?
11:56:05 4 A. Yes.
11:56:06 5 Q. On Appendix C, the only pleading you list
11:56:09 6 is the Fourth Amended Complaint. Do you see that's
11:56:21 7 the first bulleted item on your Appendix C?
11:56:24 8 A. Yes, I do.
11:56:25 9 Q. Is that the only pleading that you
11:56:31 10 considered?
11:56:31 11 A. That would be -- and that's my
11:56:33 12 understanding of a case pleading, yes, that would
11:56:35 13 be it.
11:56:37 14 Q. Did you accept as true the allegations of
11:56:39 15 the scope and manner of infringement by Defendants
11:56:43 16 in the First Amended -- or the Fourth Amended
11:56:46 17 Complaint?
11:56:47 18 MR. McDONELL: Lack of foundation, object
11:56:47 19 to the form of the question, calls for legal
11:56:48 20 conclusions. Beyond the scope.
11:56:52 21 THE WITNESS: I'm not a lawyer. I don't
11:56:54 22 know -- I don't even know how to answer the
11:56:56 23 question. So I -- I'll have to pass on that.
11:57:02 24 MS. HOUSE: Q. Are you making any
11:57:03 25 assumptions about whether or not the allegations

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11:57:06 1 about how TomorrowNow provided its business are
11:57:09 2 true or not in assessing the market?
11:57:12 3 MR. McDONELL: Object to the form of the
11:57:13 4 question. Calls for a legal conclusion. Beyond
11:57:15 5 the scope.
11:57:17 6 THE WITNESS: I'm not offering any opinion
11:57:18 7 about that aspect of their operations. That's
11:57:21 8 not -- that was not within the scope of my
11:57:23 9 assignment for this expert report.
11:57:27 10 MS. HOUSE: Q. And you're not intending
11:57:30 11 to opine that the alleged scope and manner of
11:57:33 12 Defendants' infringement is not accurate. That's
11:57:35 13 not your area. Right?
11:57:37 14 MR. McDONELL: Vague and ambiguous, object
11:57:38 15 to the form.
11:57:40 16 THE WITNESS: I'm sorry, what -- say that
11:57:42 17 again?
11:57:45 18 MS. HOUSE: Q. You're not intending to
11:57:47 19 opine that the alleged scope and manner of
11:57:50 20 infringement by Defendants is inaccurate?
11:57:58 21 MR. McDONELL: Lacks of foundation, calls
11:57:58 22 for a legal conclusion, object to the form, vague
11:58:00 23 and ambiguous.
11:58:01 24 THE WITNESS: Again, I'm not a lawyer.
11:58:02 25 And secondly, that was not part of the scope of my

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11:58:05 1 report to look into that aspect of this case.
11:58:08 2 MS. HOUSE: Q. Okay. Are you opining
11:58:10 3 that any other purported third-party option
11:58:13 4 provided support comparable to that TomorrowNow was
11:58:17 5 able to provide through infringement?
11:58:21 6 MR. McDONELL: Object to the form of the
11:58:22 7 question. Assumes facts not in evidence, calls for
11:58:24 8 legal conclusions, vague and ambiguous, beyond the
11:58:26 9 scope.
11:58:28 10 THE WITNESS: I never touched on the issue
11:58:30 11 of infringement in my report. That was outside the
11:58:33 12 scope of what I was asked to do.
11:58:44 13 MS. HOUSE: Q. Going back to Appendix C,
11:58:47 14 which hopefully you're still looking at, you list
11:58:53 15 only two SAP depositions that you considered:
11:58:57 16 Mr. Hurst's and Mr. Graf's.
11:59:00 17 Do you see that?
11:59:01 18 A. Yes.
11:59:02 19 Q. Did you review the entirety of those
11:59:04 20 depositions?
11:59:09 21 A. I would say I did not read the entire
11:59:12 22 deposition of either one of those two. I read most
11:59:15 23 of them, I believe. Most of each of them, excuse
11:59:18 24 me.
11:59:19 25 Q. And did you read those in connection with

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11:59:22 1 the Safe Passage part of your report?
11:59:25 2 MR. McDONELL: Object to the form.
11:59:25 3 MS. HOUSE: Q. Or do you not know?
11:59:30 4 A. I believe I even referenced that some of
11:59:34 5 my knowledge I got from the Safe Passage stuff. I
11:59:37 6 think I even referenced the Hurst report in a
11:59:41 7 footnote. I think it was the Hurst one.
11:59:44 8 Q. So you reviewed no other SAP testimony in
11:59:47 9 the case about Safe Passage. Is that correct?
11:59:51 10 A. For SAP testimony?
11:59:53 11 Q. Yep.
11:59:54 12 A. I don't believe -- I don't believe I did.
11:59:56 13 Q. None of the SAP Board testimony on Safe
11:59:59 14 Passage? You didn't review any of that?
12:00:02 15 A. If -- the only thing I saw were documents
12:00:04 16 that were related to the -- to those depositions.
12:00:07 17 So I did see the exhibits. Is that what you're
12:00:10 18 asking me about?
12:00:11 19 Q. I'm talking about the testimony itself.
12:00:13 20 You didn't look at any other SAP witnesses'
12:00:18 21 testimony on the Safe Passage program but that of
12:00:20 22 Mr. Hurst and that of Mr. Graf. Is that correct?
12:00:25 23 A. In the preparation of this report, no, I
12:00:27 24 don't believe I did.
12:00:28 25 Q. Okay. And you didn't review Mr. Ziemens

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12:00:30	1 testimony on the Safe Passage program or on SAP's	12:02:26	1 MR. McDONELL: Argumentative, asked and
12:00:33	2 expectations for it?	12:02:27	2 answered.
12:00:35	3 A. Mr. Ziemens's?	12:02:28	3 THE WITNESS: I think I've already stated
12:00:36	4 Q. Didn't look at that. Right?	12:02:29	4 that I did look at some evidence in that regard,
12:00:39	5 A. I don't believe so.	12:02:32	5 particularly related to those depositions of --
12:00:40	6 Q. And you didn't review any Oracle testimony	12:02:34	6 like the Hurst deposition.
12:00:42	7 on the impact of Safe Passage on Oracle. Didn't	12:02:37	7 MS. HOUSE: Q. But you didn't review any
12:00:46	8 review any of that either. Right?	12:02:38	8 of the material that we've just covered from Oracle
12:00:48	9 MR. McDONELL: Assumes facts. Object to	12:02:41	9 or from the SAP Board or from any of the other SAP
12:00:49	10 the form.	12:02:44	10 witnesses. Correct?
12:00:50	11 THE WITNESS: Unless it was part of --	12:02:47	11 MR. McDONELL: Asked and answered,
12:00:50	12 like if it was cited maybe in either Mr. Meyer or	12:02:47	12 argumentative, object to the form.
12:00:54	13 Mr. Clarke's report, I don't believe I saw that	12:02:48	13 THE WITNESS: I think I've already
12:00:58	14 either.	12:02:50	14 answered that, yes. I did not consider all of that
12:00:58	15 MS. HOUSE: Q. And you reviewed none of	12:02:52	15 information.
12:01:00	16 the customer testimony about the role of the Safe	12:02:54	16 MS. HOUSE: Q. And can you point to me
12:01:01	17 Passage program in their decision making either.	12:02:57	17 where you cite to the depositions of even Mr. Hurst
12:01:04	18 Right?	12:03:01	18 or Mr. Graf?
12:01:07	19 A. No, not in preparation of this report.	12:03:05	19 A. Well, let's see. Hold on a second.
12:01:10	20 Q. Before opining about Safe Passage, didn't	12:03:24	20 Well again, I want to point out, I talked
12:01:13	21 you think it would be important to review all the	12:03:26	21 about -- the things on Appendix C reference what
12:01:15	22 evidence in the record on the Safe Passage program?	12:03:29	22 I -- excuse me, not considered -- what's the
12:01:18	23 MR. McDONELL: Argumentative, object to	12:03:37	23 word -- yes.
12:01:19	24 the form. Beyond the scope.	12:03:45	24 Appendix C talks about things that I
12:01:24	25 THE WITNESS: Again, back to -- I would	12:03:47	25 considered. But what I've referenced, and you'll
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12:01:32	1 have -- again, my report was about the general --	12:03:49	1 see Footnote 73 on page 50, I discuss how my
12:01:41	2 my charter for this report was to discuss the	12:03:54	2 opinions are offered in a review of the stated
12:01:43	3 general dynamics of what's going on in the	12:03:56	3 goals and marketing of Safe Passage.
12:01:45	4 marketplace and how these different kinds of	12:04:00	4 And as far as you won't see -- you won't
12:01:48	5 software decisions are made by customers.	12:04:06	5 see those specific depositions referenced in here
12:01:51	6 MS. HOUSE: Q. That's part of your	12:04:09	6 because they were in the "considered" stack, not on
12:01:52	7 report. But the end part of your report, pages 49	12:04:12	7 the -- not on the "cited" stack.
12:01:55	8 through 56, have to do with the Safe Passage	12:04:18	8 Q. So but again, we've covered what was in
12:01:57	9 program. Right?	12:04:20	9 your stack, and we've covered what wasn't in your
12:01:58	10 A. That is correct.	12:04:23	10 stack. Right?
12:01:59	11 Q. And before --	12:04:26	11 MR. McDONELL: I object. Asked and
12:02:00	12 A. Or I believe that is correct, excuse me.	12:04:27	12 answered, argumentative.
12:02:05	13 Q. And before opining about the Safe Passage	12:04:28	13 THE WITNESS: I think so.
12:02:06	14 program, you didn't think it was important to	12:04:32	14 MS. HOUSE: Q. Was there some -- who
12:02:08	15 review all of the evidence in the record on the	12:04:34	15 decided to give you the Hurst and the Graf only?
12:02:10	16 program. Correct?	12:04:38	16 MR. McDONELL: Lack of foundation, object
12:02:11	17 MR. McDONELL: Asked and answered, object	12:04:39	17 to the form. Argumentative.
12:02:12	18 to the form, argumentative.	12:04:45	18 THE WITNESS: I don't even remember where
12:02:13	19 THE WITNESS: I believe I pulled together	12:04:47	19 or when I even came across those.
12:02:14	20 a pretty fair piece of information about that	12:04:49	20 MS. HOUSE: Q. Did you ask, could I
12:02:17	21 program and other programs.	12:04:50	21 please have all the Safe Passage evidence?
12:02:20	22 MS. HOUSE: Q. But that's not my	12:04:53	22 MR. McDONELL: Object to the form.
12:02:21	23 question.	12:04:54	23 Argumentative.
12:02:22	24 My question is, you didn't review the	12:05:07	24 THE WITNESS: I probably did ask from
12:02:23	25 evidence in the case on that program, did you?	12:05:10	25 counsel to get these depositions. But I'm -- some

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12:05:27 1 things, like the Fourth Amended Complaint, were
12:05:30 2 just -- Counsel was good enough to second them to
12:05:32 3 me so -- you know, as they were coming through, so
12:05:35 4 I could have them for reference.
12:05:36 5 I believe I asked for the depositions of
12:05:39 6 Terry Hurst and Peter Graf.
12:05:42 7 MS. HOUSE: Q. How did you identify them?
12:05:53 8 A. I don't recall.
12:05:57 9 Q. Did you have any understanding that there
12:05:58 10 were significantly more witnesses who testified
12:06:01 11 about Safe Passage than Mr. Hurst and Mr. Graf?
12:06:05 12 MR. McDONELL: Lack of foundation.
12:06:07 13 THE WITNESS: It would not surprise me.
12:06:10 14 MS. HOUSE: Q. And yet you feel
12:06:11 15 comfortable talking about Safe Passage having never
12:06:14 16 considered that. Correct?
12:06:15 17 MR. McDONELL: Asked and answered
12:06:15 18 repeatedly. Define the scope of what he looked at.
12:06:20 19 THE WITNESS: Again, that wasn't the main
12:06:22 20 purpose of my expert report.
12:06:24 21 MS. HOUSE: Q. And the stated goals and
12:06:26 22 marketing of Safe Passage that you referenced in
12:06:29 23 Footnote 73, is that what you cover at the top of
12:06:36 24 page 50, which is the description of the program,
12:06:42 25 or what is it?

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12:06:44 1 A. Well, you --
12:06:45 2 MR. McDONELL: Compound. Object to the
12:06:46 3 form of the question.
12:06:49 4 THE WITNESS: You can see I reference some
12:06:52 5 outside parties on what their general understanding
12:06:54 6 of the Safe Passage program was.
12:06:56 7 And given the fact that my report is to
12:06:59 8 cover more of a general market overview, I knew
12:07:03 9 that -- or I suspected that this program may have a
12:07:09 10 bunch of little subtleties. All I was trying to do
12:07:11 11 was capture the essence of what this program was
12:07:14 12 about.
12:07:14 13 And that was by design, because I had to
12:07:18 14 respond to what other companies offered, and I
12:07:20 15 covered their programs in the preceding pages, and
12:07:23 16 I tried to carry them at a similar level of detail.
12:07:27 17 MS. HOUSE: Q. Okay. Let's talk about
12:07:28 18 your Footnote 73.
12:07:29 19 You say your opinions are offered on a
12:07:32 20 review of the stated goals.
12:07:34 21 A. That's correct.
12:07:35 22 Q. And marketing. What stated goals?
12:07:47 23 A. Stated as they were discussed publicly.
12:07:52 24 Q. Did you look at any of the internal goals
12:07:53 25 for Safe Passage of SAP?

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12:07:56 1 A. I saw the stuff that was in those two
12:07:59 2 depositions we've been talking about, the Hurst
12:08:01 3 and -- deposition and the other one, and I felt
12:08:07 4 that the only reasonable approach I could take was
12:08:10 5 to go with what was stated publicly in the
12:08:12 6 marketplace and what customers would know.
12:08:14 7 And again, I want to point out, my report
12:08:16 8 has -- is looking at this market from the view of
12:08:19 9 the customer, I believe, is the only really
12:08:22 10 relevant view one should focus on, because it's how
12:08:25 11 customers perceive programs like Safe Passage and
12:08:27 12 competing programs. That's what really matters.
12:08:32 13 MS. HOUSE: I'll move to strike.
12:08:34 14 Q. My question is, when you say the stated
12:08:36 15 goals, could you tell me the stated goals and where
12:08:38 16 you got those goals?
12:08:40 17 A. They're at the top of page 50, right
12:08:42 18 there, the license credit reference to Footnote 71
12:08:45 19 and the -- the maintenance support comment
12:08:49 20 referenced by Footnote 72.
12:08:51 21 Q. And those are the only stated goals that
12:08:53 22 you mean in your reference in 73?
12:08:58 23 A. Those were two -- two important ones that
12:09:01 24 I chose that were -- that would line up -- line
12:09:04 25 up's not the right word -- that were of a similar

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12:09:07 1 level of detail in understanding the programs that
12:09:10 2 other companies had around that same time frame or
12:09:12 3 in the effective time period.
12:09:17 4 Q. And are your opinions offered in
12:09:18 5 connection with any of the internal goals that SAP
12:09:22 6 articulated for the Safe Passage program?
12:09:24 7 MR. McDONELL: Vague and ambiguous, object
12:09:25 8 to the form of the question.
12:09:44 9 THE WITNESS: I'm not quite sure how to
12:09:45 10 answer that question. The -- I'm working off the
12:09:50 11 stated goals. That's what I'm working off of. And
12:09:53 12 I did draw some conclusions that said things like,
12:09:57 13 you know, it would offer little incentive for a
12:10:00 14 customer to move, or that a support-only option
12:10:05 15 would possibly keep somebody on SAP.
12:10:07 16 And again, those are from a customer
12:10:09 17 perspective. So actually, I'd say I'm working off
12:10:13 18 the stated goals.
12:10:14 19 MS. HOUSE: Q. Okay. So one can state
12:10:16 20 something and it can be public, or it can be
12:10:19 21 internal to the company.
12:10:21 22 Are you only talking about publicly stated
12:10:24 23 goals?
12:10:27 24 A. Again, I'm taking a customer-focused view
12:10:30 25 of this. And as far as the customer is concerned,

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12:10:32 1 the stated goals are the ones that matter. And if
12:10:36 2 there were others, that -- other goals and
12:10:39 3 objectives that were expressed, either other
12:10:44 4 experts should have covered that or that wasn't
12:10:46 5 part of the scope of my report.
12:10:49 6 Q. So you're not intending to offer any
12:10:51 7 opinion on whether the internal goals of SAP in
12:10:54 8 connection with the Safe Passage program were
12:10:56 9 unreasonable or reasonable?
12:11:08 10 MR. McDONELL: Object to the form of the
12:11:16 11 question. His report speaks for itself.
12:11:17 12 THE WITNESS: I've rendered some opinions
12:11:19 13 about whether I thought the program would be
12:11:21 14 successful or not. And that's in my report.
12:11:26 15 MS. HOUSE: Q. Okay. I'm asking you
12:11:28 16 about the specific language here, and I'm asking
12:11:32 17 you whether or not, when you're offering your
12:11:35 18 opinions -- it seems very murky at this point to
12:11:39 19 me.
12:11:39 20 Are you talking about the external,
12:11:42 21 publicly stated goals; or are you also reviewing
12:11:46 22 and commenting on SAP's internal goals and strategy
12:11:52 23 in connection with the Safe Passage program?
12:11:54 24 MR. McDONELL: Argumentative, object to
12:11:56 25 the form of the question, assumes facts not in

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12:11:59 1 evidence, object to the form.
12:12:03 2 THE WITNESS: For the most part, my report
12:12:05 3 is discussing the -- is dealing with the stated
12:12:10 4 goals.
12:12:13 5 And I'd like to suggest if we're getting
12:12:15 6 close to a topic change or anything, I'd like to
12:12:18 7 take a lunch break soon. But I'm open.
12:12:22 8 MS. HOUSE: Q. I think we should keep
12:12:24 9 going, because we've had a lot of breaks, it's only
12:12:27 10 12:10, and we are never going to get through this
12:12:30 11 by 7 o'clock if we don't continue.
12:12:32 12 MR. McDONELL: The witness has asked for a
12:12:33 13 break. He's been going for over an hour. Let's
12:12:37 14 take a short one. We don't have to do lunch right
12:12:40 15 now.
12:12:45 16 THE VIDEO OPERATOR: Going off the record,
12:12:45 17 the time now is 12:12.
12:12:51 18 (Recess from 12:12 p.m. to 12:28 p.m.)
12:28:20 19 THE VIDEO OPERATOR: Back on the record,
12:28:21 20 the time now is 12:28. Please continue.
12:28:25 21 MS. HOUSE: Q. We're on Footnote 73 of
12:28:27 22 your report, where you state: My opinions are
12:28:29 23 offered on a review of the stated goals and
12:28:31 24 marketing of Safe Passage.
12:28:33 25 Could you please tell me what the stated

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12:28:35 1 goals of SAP were from a financial standpoint for
12:28:40 2 Safe Passage?
12:28:41 3 MR. McDONELL: Vague and ambiguous, object
12:28:42 4 to the form, misstates the testimony.
12:28:45 5 THE WITNESS: I believe I listed them at
12:28:47 6 the top of page 50. And generally what those were,
12:28:50 7 were a license credit of up to 75 percent on a
12:28:53 8 customer's license, in this case I guess with
12:28:55 9 SAP -- I mean, excuse me, with Oracle. And as I
12:28:58 10 noted on here, at some point it could have gone as
12:29:00 11 much as a hundred percent. And that would be
12:29:03 12 applied against a new SAP license.
12:29:05 13 The second bullet point referenced that
12:29:08 14 maintenance support for three of the product
12:29:13 15 lines -- PeopleSoft, JD Edwards, and Siebel --
12:29:15 16 would be provided by TomorrowNow at 50 percent of
12:29:18 17 the fee previously paid to Oracle or PeopleSoft.
12:29:22 18 MS. HOUSE: Q. What you've just described
12:29:24 19 or what you've just read are descriptors of the
12:29:26 20 program, Safe Passage. Right?
12:29:28 21 MR. McDONELL: Vague and ambiguous.
12:29:28 22 Object to the form of the question.
12:29:32 23 THE WITNESS: I guess --
12:29:33 24 MS. HOUSE: Q. Program parameters.
12:29:34 25 Right?

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12:29:34 1 A. Yeah, I guess they could be described as
12:29:36 2 such, yes.
12:29:37 3 Q. Do you understand that's different than
12:29:38 4 what SAP's goals were in implementing the program?
12:29:44 5 MR. McDONELL: Vague and ambiguous.
12:29:45 6 Object to the form.
12:29:47 7 THE WITNESS: Do I understand those were
12:29:49 8 different from SAP's goals?
12:29:50 9 MS. HOUSE: Q. Yes. Do you understand a
12:29:52 10 goal is different than a description of a program?
12:29:54 11 A. I understand the two are different.
12:29:56 12 Q. What were the goals that SAP stated that
12:29:59 13 you are providing opinions on?
12:30:03 14 MR. McDONELL: Same objections.
12:30:07 15 THE WITNESS: That would be on the
12:30:07 16 preceding page, where it says, SAP introduced a
12:30:11 17 switching program called Safe Passage for users of
12:30:14 18 those products. And the goal obviously would be to
12:30:19 19 move customers from one product line to the next.
12:30:22 20 That would be the goal.
12:30:24 21 MS. HOUSE: Q. Okay. Do you have any
12:30:26 22 understanding about the amount of customers that
12:30:30 23 SAP was intending to move?
12:30:33 24 MR. McDONELL: Assumes facts not in
12:30:33 25 evidence. Object to the form.

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12:30:36 1 THE WITNESS: That wasn't part of the
12:30:37 2 scope. The part of my report -- but I did see some
12:30:41 3 of those kind of materials I believe in one of
12:30:44 4 those depositions.
12:30:45 5 MS. HOUSE: Q. Did you have any
12:30:46 6 understanding about the amount of revenue that SAP
12:30:52 7 expected to get from the Safe Passage program?
12:30:55 8 MR. McDONELL: Beyond the scope, object to
12:30:56 9 the form.
12:30:57 10 THE WITNESS: Again, that wasn't part of
12:30:58 11 my report, but I did see some claims like that, I
12:31:02 12 believe, in some of those deposition documents.
12:31:07 13 MS. HOUSE: Q. Do you -- so you are not
12:31:09 14 intending to provide any opinions about the
12:31:12 15 specific financial goals that SAP had for Safe
12:31:15 16 Passage?
12:31:16 17 MR. McDONELL: Same objections.
12:31:19 18 THE WITNESS: My report was to cover the
12:31:20 19 general effects of -- or the general activities of
12:31:24 20 software buyers and what would cause them to move
12:31:26 21 from one product to the next. I believe other
12:31:29 22 experts in this case, Messrs. Clarke and Meyer,
12:31:32 23 have already opined on that from a monetary or
12:31:36 24 numerical perspective.
12:31:38 25 MS. HOUSE: Q. You -- in Footnote 73 --

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12:31:40 1 I'm just trying to understand the lay of the land,
12:31:42 2 sir.
12:31:43 3 You're talking about how your opinions in
12:31:44 4 this particular section of your report on Safe
12:31:47 5 Passage are offered on a review of the stated goals
12:31:49 6 and marketing of Safe Passage.
12:31:51 7 I want to make sure I understand what
12:31:53 8 goals it is that you think you're talking about so
12:31:55 9 that I -- if you're not talking about other goals,
12:31:57 10 we don't have to worry about them. But I need to
12:32:00 11 understand, are you talking about the specific
12:32:02 12 financial goals that SAP articulated for Safe
12:32:06 13 Passage?
12:32:06 14 Are you going to be offering any opinions
12:32:08 15 about the reasonableness of those financial goals?
12:32:12 16 MR. McDONELL: Object. Asked and
12:32:12 17 answered.
12:32:16 18 THE WITNESS: I don't believe my report
12:32:17 19 discussed the financial goals that SAP had for
12:32:21 20 that, other than to say that it did -- that I did
12:32:24 21 discuss some of the financial issues around what
12:32:29 22 difficulties customers have with software
12:32:33 23 implementations, total cost of ownership, and those
12:32:36 24 kind of matters.
12:32:37 25 MS. HOUSE: Q. Are you going to be

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12:32:38 1 offering any opinions on the reasonableness of
12:32:39 2 SAP's financial goals for the Safe Passage program?
12:32:43 3 MR. McDONELL: Assumes facts, beyond the
12:32:44 4 scope, object to the form. Asked and answered.
12:32:49 5 THE WITNESS: In the way that I'm
12:32:50 6 understanding your question, I think the answer is
12:32:52 7 possibly no.
12:32:54 8 MS. HOUSE: Q. You don't even know what
12:32:55 9 those financial goals are, do you?
12:32:57 10 MR. McDONELL: Same objections.
12:32:58 11 THE WITNESS: I didn't say that.
12:32:59 12 MS. HOUSE: Q. Do you know what the
12:33:00 13 financial goals were for -- that SAP had for Safe
12:33:04 14 Passage?
12:33:04 15 A. I indicated that I saw some documents like
12:33:07 16 that, I believe, in like the Hurst -- or one of
12:33:10 17 those two depositions I referenced in my Appendix
12:33:13 18 C.
12:33:13 19 Q. Are you intending to offer an opinion that
12:33:15 20 those financial goals of SAP for the Safe Passage
12:33:19 21 program were unreasonable?
12:33:21 22 MR. McDONELL: Vague and ambiguous, object
12:33:21 23 to the form, asked and answered.
12:33:24 24 THE WITNESS: My report already has
12:33:25 25 some --

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12:33:27 1 MS. HOUSE: Q. It's a yes or no question.
12:33:28 2 MR. McDONELL: Don't interrupt please,
12:33:29 3 Counsel.
12:33:30 4 MS. HOUSE: No, I need a clear answer,
12:33:31 5 because I need a clear record. Let's try it again.
12:33:35 6 Can you read back the question, Holly?
12:33:36 7 (Record read as follows:
12:33:49 8 Question: Are you intending to offer an
12:33:49 9 opinion that those financial goals of SAP for
12:33:49 10 the Safe Passage program were unreasonable?)
12:33:50 11 MR. McDONELL: Object to the form of the
12:33:50 12 question, asked and answered, beyond the scope,
12:33:51 13 vague and ambiguous.
12:33:56 14 THE WITNESS: From about page 50 on, I
12:33:57 15 have some opinions here I've stated, and they are
12:34:00 16 what they are. And if -- I don't know what you
12:34:02 17 mean by a financial deal, because I could see
12:34:04 18 someone arguing that I -- that my discussion of
12:34:08 19 total cost of ownership is a financial factor.
12:34:11 20 So I guess if you're -- in the purest
12:34:14 21 sense, yes. I would probably say no, but --
12:34:18 22 MS. HOUSE: Q. Well, let's figure it so
12:34:20 23 we can get a clean record.
12:34:21 24 Do you understand that SAP had financial
12:34:24 25 goals for the Safe Passage program?

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12:34:27 1 MR. McDONELL: Lack of foundation, object
12:34:28 2 to the form.
12:34:30 3 THE WITNESS: I believe they did.
12:34:32 4 MS. HOUSE: Q. Okay. Are you intending
12:34:35 5 to offer an opinion that the financial goals that
12:34:38 6 SAP had for the Safe Passage program were
12:34:40 7 unreasonable?
12:34:42 8 MR. McDONELL: Asked and answered, object
12:34:42 9 to the form.
12:35:32 10 THE WITNESS: Generally, my report is not
12:35:34 11 making an assessment of the financial goals of Safe
12:35:39 12 Passage, other than how customers would perceive
12:35:45 13 these programs.
12:35:46 14 MS. HOUSE: Q. So the answer is no.
12:35:47 15 Correct?
12:35:48 16 MR. McDONELL: Asked and answered. Object
12:35:49 17 to the form of the question.
12:35:51 18 THE WITNESS: Under the criteria I just
12:35:54 19 answered, that would be correct.
12:35:56 20 MS. HOUSE: Q. And do you understand that
12:35:57 21 SAP also had other strategic goals for the Safe
12:36:01 22 Passage program?
12:36:03 23 MR. McDONELL: Vague and ambiguous, lack
12:36:04 24 of foundation, object to the form. Beyond the
12:36:06 25 scope.

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12:36:09 1 THE WITNESS: Define "strategic goals."
12:36:13 2 MS. HOUSE: Q. Well, do you understand
12:36:15 3 what any of the strategic goals SAP had for the
12:36:18 4 Safe Passage program were?
12:36:20 5 MR. McDONELL: Object to the form. Vague
12:36:21 6 and ambiguous.
12:36:28 7 THE WITNESS: Because SAP wanted to move
12:36:32 8 customers from Oracle to SAP, one of their
12:36:34 9 strategic goals must have been to increase market
12:36:37 10 share.
12:36:40 11 Is that what you mean by a strategic goal?
12:36:42 12 MS. HOUSE: Q. I'm asking you if you
12:36:44 13 understood what SAP's strategic goals for Safe
12:36:47 14 Passage were.
12:36:50 15 MR. McDONELL: Asked and answered. Object
12:36:50 16 to the form. Vague and ambiguous.
12:36:53 17 THE WITNESS: Again, that wasn't part of
12:36:55 18 my scope of my report or my assignment. I was not
12:36:58 19 to look at what SAP thought or Oracle thought. I
12:37:01 20 looked at this from the perspective of how this was
12:37:04 21 perceived by clients or customers of the firms.
12:37:07 22 MS. HOUSE: Q. And so you are not
12:37:08 23 intending to offer an opinion that any of the
12:37:11 24 strategic goals that SAP had for the Safe Passage
12:37:14 25 program was unreasonable. Is that right?

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12:37:17 1 MR. McDONELL: Asked and answered. Object
12:37:18 2 to the form.
12:37:29 3 THE WITNESS: Again, I'm not trying to be
12:37:31 4 difficult.
12:37:31 5 What I wrote is what I wrote, and it
12:37:34 6 speaks to some matters that could be considered
12:37:37 7 either strategic or financial. But I think it was
12:37:40 8 very clear about the opinions I expressed in my
12:37:42 9 report.
12:37:46 10 MS. HOUSE: Q. Unfortunately, it's not.
12:37:48 11 And unfortunately, we have to get a clear record.
12:37:51 12 It's a simple question.
12:37:52 13 Are you -- first of all, do you even know
12:37:55 14 what the strategic goals of SAP were for the Safe
12:37:57 15 Passage program?
12:37:58 16 MR. McDONELL: Asked and answered
12:37:59 17 repeatedly. At this point, you're harassing the
12:38:02 18 witness. Object to the form.
12:38:05 19 THE WITNESS: I know what was available
12:38:06 20 publicly, and I know -- and I reference that in my
12:38:10 21 report, and I know what was in those two
12:38:12 22 depositions generally.
12:38:14 23 And again, my report focuses on what the
12:38:17 24 customers would see, so I have a general idea of
12:38:21 25 that.

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12:38:21 1 MS. HOUSE: Q. You're not intending to
12:38:23 2 offer any opinion that SAP's strategic goals for
12:38:28 3 the Safe Passage program were unreasonable. Is
12:38:30 4 that fair?
12:38:31 5 MR. McDONELL: Object to the form of the
12:38:32 6 question. Asked and answered repeatedly. Vague
12:38:35 7 and ambiguous.
12:38:40 8 THE WITNESS: That was not part of my
12:38:41 9 assignment. So no, I'm not going to be answering
12:38:44 10 that type of a question.
12:38:56 11 MS. HOUSE: Q. Could you look at page 50?
12:39:05 12 You say -- in the sentence under little
12:39:09 13 ii, you say:
12:39:11 14 I note, however, that Mr. Meyer offers
12:39:14 15 scant if any support for opinions about the
12:39:17 16 merits of Safe Passage and whether the
12:39:18 17 Defendants' goals for Safe Passage were
12:39:19 18 reasonable or realistic.
12:39:25 19 Are you intending to opine that
12:39:28 20 Defendants' goals for Safe Passage were not
12:39:30 21 reasonable or realistic?
12:39:32 22 MR. McDONELL: Object to the form. Asked
12:39:32 23 and answered repeatedly.
12:40:09 24 THE WITNESS: Well, as I said before, I
12:40:11 25 offer these -- I think it's three points about this

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12:40:14 1 program. And -- yes, three points. And -- about
12:40:22 2 this program.
12:40:23 3 I also want to note that in that sentence
12:40:25 4 you just quoted about the support for opinions
12:40:31 5 about the merits of the program, what I provided in
12:40:36 6 my report was additional support or things that
12:40:40 7 Mr. Meyer should have considered in his discussions
12:40:44 8 about whether those goals for Safe Passage were
12:40:47 9 reasonable or realistic.
12:40:50 10 MS. HOUSE: Q. Okay. That's not my
12:40:52 11 question.
12:40:53 12 I think you've said that you're not
12:40:55 13 intending to opine whether or not SAP's strategic
12:40:59 14 goals were reasonable. Just because of the
12:41:02 15 language in this sentence, I want to make sure
12:41:05 16 that's not what you intend to opine.
12:41:08 17 A. In an earlier answer, I said that what I
12:41:12 18 put here were my opinions about this, and did it
12:41:15 19 from a customer perspective, and that's still
12:41:18 20 consistent with what I've got here in this report.
12:41:24 21 Q. Are you aware that at the time SAP created
12:41:26 22 its goals and financial projections for the Safe
12:41:28 23 Passage program, that SAP was the world's largest
12:41:32 24 ERP application vendor?
12:41:34 25 MR. McDONELL: Vague and ambiguous, object

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12:41:35 1 to the form.
12:41:39 2 THE WITNESS: If it wasn't the biggest, it
12:41:40 3 was one of the biggest.
12:41:44 4 MS. HOUSE: Q. Would you agree that SAP
12:41:46 5 had expertise at making projections related to ERP
12:41:49 6 purchasing behavior?
12:41:51 7 MR. McDONELL: Object to the form. Lack
12:41:52 8 of foundation, vague and ambiguous, incomplete
12:41:54 9 hypothetical.
12:41:58 10 THE WITNESS: I would find it hard to
12:42:00 11 believe that they wouldn't have that sort of
12:42:02 12 expertise, either in-house or under contract.
12:42:05 13 MS. HOUSE: Q. And would you agree that
12:42:06 14 SAP had expertise at setting strategic goals?
12:42:09 15 MR. McDONELL: Vague and ambiguous,
12:42:11 16 undefined terms. Object to the form. Incomplete
12:42:13 17 hypothetical and beyond the scope.
12:42:20 18 THE WITNESS: I would -- again, I would
12:42:21 19 imagine that they would have that sort of expertise
12:42:23 20 available to them.
12:42:25 21 MS. HOUSE: Q. And you have no reason to
12:42:26 22 believe that they didn't apply that expertise in
12:42:29 23 creating the Safe Passage program, do you?
12:42:31 24 MR. McDONELL: Beyond the scope, calls for
12:42:32 25 a legal conclusion, object to the form. Vague and

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12:42:36 1 ambiguous.
12:42:38 2 THE WITNESS: Well again, all of these
12:42:39 3 last few questions are all speculative about --
12:42:42 4 that I would imagine that they would have some
12:42:44 5 ability to come up with those kind of estimates and
12:42:47 6 plans and --
12:42:48 7 MS. HOUSE: Q. No, I didn't ask you about
12:42:50 8 imagining anything. I asked you if you knew of
12:42:52 9 anything that would indicate that SAP did not apply
12:42:54 10 that expertise in creating the Safe Passage
12:42:56 11 program.
12:42:57 12 MR. McDONELL: Object to the form. Lack
12:42:58 13 of foundation, beyond the scope, incomplete
12:43:01 14 hypothetical, vague and ambiguous.
12:43:06 15 THE WITNESS: I'm not aware of any -- I'm
12:43:08 16 not aware of any -- I have no reason to believe
12:43:11 17 they lacked that capability.
12:43:15 18 MS. HOUSE: Q. Do you understand that SAP
12:43:16 19 believed that their acquisition of TomorrowNow and
12:43:20 20 offering of Safe Passage could have a detrimental
12:43:22 21 effect on whether or not Oracle realized the return
12:43:26 22 on its investment in PeopleSoft?
12:43:29 23 MR. McDONELL: Lack of foundation, beyond
12:43:30 24 the scope, object to the form. Vague and
12:43:33 25 ambiguous.

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12:43:35 1 THE WITNESS: Can you just read the last
12:43:36 2 little bit of that again, or I guess reread the
12:43:39 3 question -- or can you --
12:43:41 4 MS. HOUSE: Q. I can do that.
12:43:42 5 Do you understand that SAP believed that
12:43:43 6 their acquisition of TomorrowNow and offering of
12:43:46 7 Safe Passage could have a detrimental effect on
12:43:49 8 whether or not Oracle realized the return on its
12:43:52 9 investment in PeopleSoft?
12:43:55 10 MR. McDONELL: Lack of foundation, calls
12:43:56 11 for speculation, beyond the scope, vague and
12:43:59 12 ambiguous, object to the form.
12:44:02 13 THE WITNESS: That was -- that wasn't
12:44:04 14 exactly part of my report, but here's my answer on
12:44:08 15 it:
12:44:10 16 I believe that someone put together a
12:44:12 17 business plan in all likelihood for this, and they
12:44:15 18 probably had assumptions about market share growth
12:44:17 19 and penetration estimates. Whether those
12:44:19 20 assumptions covered what competitors would do also
12:44:22 21 in response or other kinds of assumptions I don't
12:44:27 22 know, and I don't know how or what was in those
12:44:29 23 plans. So --
12:44:31 24 MS. HOUSE: Q. Assuming it's true, do you
12:44:32 25 intend to opine that that was unreasonable goal for

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12:44:35 1 SAP?
12:44:36 2 MR. McDONELL: Object to the form,
12:44:36 3 incomplete hypothetical, beyond the scope, vague
12:44:39 4 and ambiguous. Object to the form.
12:44:42 5 THE WITNESS: That they were going -- when
12:44:44 6 you said that that was an unreasonable, that --
12:44:47 7 what is the "that"?
12:44:49 8 MS. HOUSE: Q. That is using TomorrowNow
12:44:51 9 and the Safe Passage to have a detrimental effect
12:44:54 10 on Oracle's ability to get a return on investment
12:44:57 11 on PeopleSoft.
12:44:58 12 MR. McDONELL: Same objection. Vague as
12:44:59 13 to undefined terms, object to the form, beyond the
12:45:02 14 scope, vague and ambiguous.
12:45:04 15 THE WITNESS: I believe that -- it's hard
12:45:13 16 for me to imagine what somebody thought or did
12:45:16 17 since I wasn't there.
12:45:17 18 But as to its reasonableness, every day
12:45:23 19 there's probably a couple of dozen companies
12:45:27 20 pitching a business plan somewhere here in the Bay
12:45:29 21 Area for a new startup, and somebody probably
12:45:33 22 thinks it's going to work and it's going to be very
12:45:35 23 viable and so forth, and not all those pan out. In
12:45:38 24 fact, very few.
12:45:39 25 MS. HOUSE: Q. That's not my question.

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12:45:40 1 I'm asking assuming that that was a
12:45:42 2 strategic goal for SAP, are you intending to opine
12:45:45 3 that that was an unreasonable goal?
12:45:47 4 MR. McDONELL: Object to the form, beyond
12:45:48 5 the scope, calls for speculation, lack of
12:45:50 6 foundation, vague and ambiguous.
12:45:57 7 THE WITNESS: I'm saying that -- again,
12:46:17 8 this is not part of my overall assignment to deal
12:46:21 9 with this market generally -- that if someone had
12:46:25 10 made certain assumptions, whether those came true
12:46:29 11 or not, I don't know, and I'm not going to -- but I
12:46:32 12 am saying in this report, I have three key points:
12:46:34 13 That marketing by these large vendors
12:46:37 14 generally isn't as effective, that -- and there's
12:46:40 15 more detail on that.
12:46:41 16 That Safe Passage didn't offer enough
12:46:43 17 incentive, and I had a number of points regarding
12:46:46 18 TCL and why that's tough to do.
12:46:48 19 And the third point, that a support option
12:46:50 20 with TomorrowNow might actually keep customers on
12:46:52 21 older products.
12:46:53 22 Those were the opinions I put in there,
12:46:54 23 and that's what I've rendered an opinion of in my
12:46:58 24 expert report.
12:47:02 25 MS. HOUSE: Q. So from your answer, it's

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12:47:04 1 clear that you're not going to be intending --
12:47:08 2 you're not going to be offering an opinion that if
12:47:11 3 that was a goal of SAP, that that was an
12:47:14 4 unreasonable goal?
12:47:16 5 MR. McDONELL: Counsel, you keep asking
12:47:17 6 the same question. You're badgering the witness.
12:47:20 7 MS. HOUSE: I'm trying to get a clean
12:47:21 8 answer.
12:47:21 9 MR. McDONELL: Well, he's giving you the
12:47:22 10 answer. You apparently --
12:47:27 11 MS. MacDONALD: The witness is being very
12:47:28 12 evasive and not responding to the question. So --
12:47:30 13 MR. McDONELL: Counsel, we can only have
12:47:32 14 one attorney speaking.
12:47:33 15 MS. HOUSE: Just let's keep going. We're
12:47:33 16 trying to get clean answers.
12:47:33 17 Q. It's very simple. You've said, I've only
12:47:37 18 got it in my report. So the simple answer is -- do
12:47:39 19 you intend to opine that -- if having a detrimental
12:47:43 20 effect on whether Oracle realized its return on
12:47:46 21 investment for PeopleSoft was a goal of SAP, do you
12:47:49 22 intend to opine that that was an unreasonable goal?
12:47:51 23 MR. McDONELL: It's been asked and
12:47:52 24 answered repeatedly. You're now harassing the
12:47:54 25 witness. I repeat all my prior objections.

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12:47:58 1 THE WITNESS: I -- my opinions are what's
12:47:59 2 in my report. And you're asking me if I'm going to
12:48:03 3 opine on some things that may or may not be in my
12:48:06 4 report. That's my understanding of your question.
12:48:08 5 And that's why I'm struggling with your
12:48:11 6 question, is because you're asking, am I going to
12:48:13 7 give an opinion about whether the -- whether some
12:48:17 8 goals about SAP's program were reasonable or not.
12:48:21 9 And all I could do is talk about the ones that I
12:48:23 10 put in this particular report, particularly those
12:48:26 11 that have a customer -- a significant customer
12:48:29 12 impact and focus.
12:48:31 13 MS. HOUSE: Q. Your report, sir, is what
12:48:33 14 triggered this. You have language in there where
12:48:35 15 you criticize Mr. Meyer about not considering
12:48:38 16 things that you say, whether the defendants' goals
12:48:42 17 for Safe Passage were reasonable or realistic.
12:48:45 18 That is your language, sir. Correct?
12:48:47 19 MR. McDONELL: The document speaks for
12:48:47 20 itself. You're arguing with the witness.
12:48:49 21 MS. HOUSE: Q. Yes?
12:48:50 22 A. Yes.
12:48:51 23 MR. McDONELL: Object.
12:48:52 24 MS. HOUSE: Q. Okay. So I'm asking you,
12:48:53 25 sir: Are you intending to opine whether any of the

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12:48:56 1 goals that SAP had for Safe Passage were reasonable
12:49:01 2 or unreasonable -- or I'm sorry.
12:49:03 3 Are you intending to opine whether any of
12:49:05 4 the goals that SAP had for Safe Passage were
12:49:08 5 unreasonable or unrealistic? And if the answer is
12:49:10 6 no, then we can move on.
12:49:12 7 MR. McDONELL: Object to the form of the
12:49:12 8 question. It's been asked and answered repeatedly.
12:49:15 9 He's given you an answer, and I reincorporate all
12:49:20 10 of my prior objections.
12:49:21 11 THE WITNESS: I'm only going to opine on
12:49:23 12 the three opinions that I have right here. That's
12:49:25 13 it. That's the limit of my opinions. And these
12:49:27 14 are the things that I thought were things that
12:49:30 15 Mr. Meyer needed to include in his report, and
12:49:33 16 that's why I put them in mine.
12:49:36 17 MS. HOUSE: Q. So -- so we have a clean
12:49:38 18 record, you don't intend to talk about SAP's goals.
12:49:45 19 Is that right? You're not going to opine about
12:49:46 20 whether they were realistic or unrealistic for Safe
12:49:50 21 Passage. Is that correct?
12:49:50 22 MR. McDONELL: Asked and answered
12:49:51 23 repeatedly. Object. Incorporate all my prior
12:49:54 24 objections.
12:50:00 25 THE WITNESS: I'm only going to opine on

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12:50:02 1 these points that are already in my report. That's
12:50:04 2 the limit of what I'm talking about --
12:50:07 3 MS. HOUSE: Q. And you don't articulate
12:50:08 4 what any of the goals are for SAP, do you, in this
12:50:11 5 section of your report. Right?
12:50:13 6 MR. McDONELL: The document --
12:50:14 7 MS. HOUSE: Let's try it this way.
12:50:15 8 MR. McDONELL: The document speaks for
12:50:16 9 itself.
12:50:16 10 MS. HOUSE: Q. Do you articulate what any
12:50:18 11 of SAP's goals are for the Safe Passage program?
12:50:20 12 MR. McDONELL: The document speaks for
12:50:20 13 itself. You're arguing with the witness. Object
12:50:23 14 to the form. And it's been asked and answered.
12:51:43 15 MS. HOUSE: Q. Now you've read it for the
12:51:45 16 third time, do you see whether you articulate any
12:51:48 17 goals of SAP? And if you do, are you intending to
12:51:51 18 opine if any of those goals are unreasonable?
12:51:53 19 MR. McDONELL: Compound, object to the
12:51:54 20 form. You're arguing with the witness. Assumes
12:51:55 21 facts not in evidence, and it's been asked and
12:51:59 22 answered repeatedly.
12:52:00 23 THE WITNESS: On page 49, I state here
12:52:03 24 that I will reiterate the program's two primary
12:52:06 25 incentives.

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12:52:07 1 I did not use the word "goals" there. I
12:52:09 2 used the word "incentives."
12:52:11 3 And you're right, on the next page, page
12:52:13 4 50, under -- in this section we've been going back
12:52:16 5 and forth on, about the -- and whether the
12:52:21 6 defendants' goals for Safe Passage were reasonable
12:52:24 7 or unrealistic, while I do not explicitly state in
12:52:29 8 this -- in my report those -- whatever goals there
12:52:32 9 were for Safe Passage, I did discuss and did create
12:52:36 10 three opinions on three different subjects in this
12:52:39 11 section of the report.
12:52:43 12 MS. HOUSE: Q. And so we're clean, you're
12:52:44 13 not intending to articulate what the goals of SAP
12:52:48 14 were for the Safe Passage program. That's not part
12:52:52 15 of your opinion. Right?
12:52:53 16 MR. McDONELL: He's asked and answered
12:52:54 17 this question repeatedly. Object to the form.
12:52:56 18 MS. HOUSE: Can you answer it yes or no?
12:52:58 19 MR. McDONELL: Counsel, don't cut me off.
12:52:59 20 I'm entitled to state my objections.
12:53:01 21 It's been asked and answered to the best
12:53:02 22 of his ability. Your badgering the witness. The
12:53:04 23 question is vague and ambiguous.
12:53:07 24 THE WITNESS: I think I've answered that
12:53:08 25 question many times.

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12:53:17 1 MS. HOUSE: Q. So the answer is no,
12:53:18 2 you're not intending to articulate the goals that
12:53:20 3 SAP had for the Safe Passage program. Right?
12:53:23 4 MR. McDONELL: Object to the form of the
12:53:23 5 question. It's been asked and answered repeatedly,
12:53:26 6 it's vague and ambiguous, you're confusing the way
12:53:30 7 you're putting the question.
12:53:35 8 THE WITNESS: I'm only offering opinions
12:53:37 9 about what's in my report.
12:53:39 10 MS. HOUSE: Q. That language is in your
12:53:40 11 report. That's why we're spending this much time
12:53:42 12 on it. It's very simple, sir. Can you please try
12:53:46 13 to answer the question:
12:53:47 14 Are you or are you not intending to opine
12:53:49 15 about the reasonableness of SAP's goals for the
12:53:52 16 Safe Passage program?
12:53:54 17 MR. McDONELL: Object to the form of the
12:53:55 18 question. Asked and answered. You're badgering
12:53:57 19 the witness. It's vague and ambiguous.
12:54:00 20 Incorporate all my prior objections.
12:54:08 21 THE WITNESS: I just don't know any other
12:54:10 22 way to answer it other than the way I've answered
12:54:12 23 it before. I have three main opinions about Safe
12:54:14 24 Passage, and they're right here in these pages in
12:54:17 25 this report.

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12:54:17 1 MS. HOUSE: Q. And none of them are about
12:54:19 2 SAP's goals and the reasonableness of them, are
12:54:21 3 they?
12:54:22 4 MR. McDONELL: Object to the form. Asked
12:54:23 5 and answered repeatedly. Incorporate all my prior
12:54:26 6 objections.
12:54:37 7 MS. HOUSE: Q. You've read it three
12:54:38 8 times. Yes or no?
12:54:40 9 MR. McDONELL: Counsel, he's answering
12:54:41 10 your questions. You may not be happy with the
12:54:44 11 answer, but he's answered --
12:54:45 12 MS. HOUSE: I'm going to ask for more time
12:54:47 13 if you keep this up.
12:54:49 14 Q. Come on. Answer the question. Answer the
12:54:51 15 question.
12:54:53 16 MR. McDONELL: Incorporate all my prior
12:54:54 17 objections. You're arguing with and badgering the
12:54:56 18 witness.
12:55:00 19 THE WITNESS: I don't know -- I just don't
12:55:03 20 either -- I'm sorry if we're not communicating, but
12:55:06 21 I'm not offering any opinions other than the three
12:55:08 22 that are right here in the report. And I don't
12:55:11 23 know how much clearer I can make that for you.
12:55:15 24 MS. HOUSE: Q. So if you know what the
12:55:16 25 three are, then you can say whether or not the one

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12:55:19 1 I'm asking about is part of those three.
12:55:22 2 You're very comfortable knowing what the
12:55:24 3 three are. Let's try to say that the other ones
12:55:27 4 are excluded from those three. Very simple.
12:55:29 5 Are you intending to opine about SAP's
12:55:32 6 goals and whether they were unreasonable?
12:55:36 7 MR. McDONELL: Object to the form. It's
12:55:37 8 been asked and answered. Incorporate all my prior
12:55:39 9 objections. You just -- you don't like the answer,
12:55:42 10 Counsel, but he's answered it.
12:55:55 11 THE WITNESS: I'm just really
12:55:56 12 uncomfortable with your question in the way you're
12:55:59 13 talking about, am I going to opine about something
12:56:01 14 that -- about somebody's goals.
12:56:04 15 We haven't even really covered what those
12:56:07 16 are. So how can I answer yes or no on that, other
12:56:10 17 than to tell you, what I'm going to give you an
12:56:12 18 opinion on is what's in my report?
12:56:14 19 MR. McDONELL: We're going to take a lunch
12:56:16 20 break, Counsel. Maybe we can smooth this over and
12:56:20 21 make things move along faster this afternoon,
12:56:22 22 because you're clearly just repeating yourself.
12:56:25 23 MS. HOUSE: This is ridiculous. I'm
12:56:25 24 really -- off the record.
12:56:26 25 (Discussion off the record.)

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12:56:41 1 THE VIDEO OPERATOR: Going off the record,
12:56:41 2 the time now is 12:56. This also is the conclusion
12:56:45 3 of Tape 2.
12:56:56 4 (Lunch recess from 12:56 p.m. to 2:01
14:00:52 5 p.m.)
13:42:45 6 --o0o--
7 AFTERNOON SESSION
14:01:29 8 THE VIDEO OPERATOR: The time now is 2:01.
9 We are back on the videotape record. This also
10 marks the beginning of Tape 3. Please proceed.
11 MS. HOUSE: Q. Going back to Appendix C
12 of your report, you list only two Oracle documents
13 that you considered. Is that correct?
14 A. Yes, that's correct.
15 Q. Who gave you those documents; who selected
16 those from the millions of Oracle documents for you
17 to review?
18 A. Counsel.
19 Q. Did he tell you why?
20 MR. McDONELL: Don't disclose. Object.
21 MS. HOUSE: And I -- there's no Oracle
22 testimony that you have reviewed or considered in
23 connection with your report. Is that correct?
24 THE WITNESS: That's correct.
25 MS. HOUSE: Q. And nowhere on your

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14:02:25 1 Appendix C are there any customer depositions or
14:02:29 2 declarations that you considered. Is that correct?
14:02:30 3 MR. McDONELL: The document speaks for
14:02:31 4 itself.
14:02:32 5 THE WITNESS: I believe that's correct.
14:02:33 6 MS. HOUSE: Q. So you did not review or
14:02:35 7 rely on any of the volumes of customers'
14:02:41 8 depositions or -- let me try that again.
14:02:43 9 So you didn't rely on either customer
14:02:45 10 depositions or customer declarations in providing
14:02:47 11 your opinion. Is that correct?
14:02:49 12 MR. McDONELL: Asked and answered.
14:02:50 13 THE WITNESS: That is correct.
14:02:51 14 MS. HOUSE: Q. And you also did not
14:02:52 15 review or rely on any of the customer-specific
14:02:55 16 evidence that has been produced in this case in
14:02:59 17 providing your opinions. Is that correct?
14:03:01 18 MR. McDONELL: Asked and answered.
14:03:02 19 THE WITNESS: That is correct.
20 MS. HOUSE: Q. Now, I know you attended
21 at least one customer deposition that I took, John
22 Kreul of PepsiAmerica. You had to get on a plane
23 and go to that deposition. Right?
24 A. That is incorrect.
25 Q. You didn't have to get on a plane?

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14:03:19 1 A. No. I'm based in Chicago, and that was I
14:03:22 2 believe in like -- I remember it was near Woodfield
14:03:25 3 Mall in the Chicago area, near Schaumburg.
14:03:30 4 Q. And you attended the entirety of that
14:03:32 5 deposition. Right?
14:03:33 6 A. Yeah, I believe I was there for all of it.
14:03:35 7 Q. But you don't rely on it even though you
14:03:37 8 were there. Correct?
14:03:38 9 A. That's correct.
14:03:58 10 Q. Let me show you some excerpts of that
14:04:00 11 deposition, sir. And let me point you first to
14:04:12 12 page 48. Lines 21 through 49, 2. And that's where
14:04:25 13 Mr. Kreul testified that when Pepsi switched from
14:04:28 14 Oracle to TomorrowNow, from Pepsi's perspective
14:04:30 15 there were no other viable alternative third-party
14:04:32 16 support options for Pepsi's PeopleSoft applications
14:04:35 17 other than TomorrowNow.
14:04:36 18 You heard that testimony. Right?
14:04:43 19 A. I -- I'm sure I did, yeah.
14:04:45 20 Q. Could you turn to 58, 1 through 11?
14:04:50 21 A. 58?
14:04:51 22 Q. 58. And in 58 1 through 11, Mr. Kreul
14:05:02 23 confirms that he noted in writing to others in his
14:05:05 24 organization that TomorrowNow is the leading
14:05:07 25 third-party support company.

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14:05:08 1 Do you remember that?
14:05:10 2 MR. McDONELL: Object to the use of the
14:05:10 3 partial document. Object to the form of the
14:05:12 4 question. Object to the highlighting.
14:05:17 5 THE WITNESS: I don't specifically recall
14:05:17 6 that exact quote, but I'm sure if that's in the
14:05:19 7 deposition, I'm sure I heard it. I was there.
14:05:22 8 MS. HOUSE: Q. And do you recall that he
14:05:24 9 also testified that he included the fact that
14:05:26 10 TomorrowNow was the leading third-party support
14:05:29 11 company in his writeup of TomorrowNow to his
14:05:31 12 management?
14:05:32 13 MR. McDONELL: Same objections.
14:05:35 14 THE WITNESS: I recall him saying that he
14:05:36 15 did a writeup to management about third-party
14:05:40 16 support. And until I'm seeing this, I didn't -- I
14:05:46 17 didn't even recall that he said it was the leading
14:05:48 18 third-party support.
14:05:51 19 MS. HOUSE: Q. Now, Mr. Kreul also
14:05:52 20 testified that Pepsi didn't have a proposal from an
14:05:55 21 alternative support vendor other than TomorrowNow.
14:05:57 22 Do you remember that?
14:05:58 23 MR. McDONELL: Objection. Object to the
14:06:01 24 use of a partial document, object to the form of
14:06:03 25 the question.

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14:06:03 1 MS. HOUSE: Q. That's on that page we're
14:06:05 2 just looking at right now, right, page 58?
14:06:09 3 A. I believe he did discuss that.
14:06:12 4 Q. And do you remember him also testifying
14:06:14 5 that Pepsi didn't seriously consider the two other
14:06:17 6 firms he had researched, Conexus and ContinuServ?
14:06:21 7 MR. McDONELL: Same objections.
14:06:22 8 MS. HOUSE: Q. If you look on page 59,
14:06:24 9 maybe that will help you remember.
14:06:37 10 A. I remember him discussing that they did
14:06:39 11 look at some other options, and I did generally --
14:06:42 12 and I generally remember him saying he didn't
14:06:45 13 really look that hard or whatever, he didn't -- he
14:06:48 14 didn't evaluate the others that carefully or
14:06:50 15 whatever.
14:06:51 16 But there was something about -- I
14:06:52 17 remember him saying they did look at some other
14:06:54 18 vendors. That much I do recall.
14:06:57 19 Q. Okay. And could you look at 130 of this
14:07:03 20 excerpt of deposition?
14:07:10 21 MR. McDONELL: Unless it's out of order --
14:07:12 22 MS. HOUSE: Q. 136, I apologize. Where
14:07:15 23 Mr. McDonell asked Mr. Kreul: What did you do to
14:07:18 24 evaluate whether Conexus Partners was a potential
14:07:22 25 alternative?

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14:07:22 1 And he answered: We did a quick, a quick
14:07:25 2 review with our research company, Forrester,
14:07:27 3 whether or not that they were viable.
14:07:29 4 Question from Mr. McDonell: What did you
14:07:31 5 learn?
14:07:32 6 Answer: We learned that there really
14:07:33 7 wasn't a lot of alternatives back then.
14:07:35 8 MR. McDONELL: Object. Repeat my same
14:07:37 9 objections.
14:07:39 10 MS. HOUSE: Q. Do you remember those
14:07:40 11 questions and answers being given in that
14:07:42 12 deposition?
14:07:42 13 A. I remember something like this, yes.
14:07:44 14 Q. And you've relied on Forrester in your
14:07:47 15 report, have you not?
14:07:48 16 A. Yes, I have.
14:07:48 17 Q. And so you would believe that they are
14:07:50 18 pretty knowledgeable in the area, wouldn't you
14:07:52 19 agree?
14:07:53 20 MR. McDONELL: Object to the form of the
14:07:53 21 question.
14:07:55 22 THE WITNESS: Generally, several Forrester
14:08:00 23 analysts are quite good.
14:08:02 24 MS. HOUSE: Q. Do you disagree with the
14:08:04 25 assessment of Forrester that was provided to

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14:08:07 1 PepsiAmerica?
14:08:08 2 MR. McDONELL: Object to the form of the
14:08:08 3 question. Beyond the scope.
14:08:10 4 THE WITNESS: Well, this is what he said
14:08:13 5 Forrester said to him. And if that's what he
14:08:19 6 heard, and that's what Forrester said, I'm -- I
14:08:23 7 can't dispute that.
14:08:26 8 MS. HOUSE: Q. Could you look at page 49,
14:08:28 9 please? And I asked the witness: Did the fact
14:08:38 10 that TomorrowNow had been acquired by SAP give
14:08:41 11 Pepsi any comfort in making the switch from Oracle?
14:08:44 12 And he answered: Yes.
14:08:46 13 And I asked: Why is that?
14:08:47 14 And he answered: Financial stability.
14:08:50 15 And on page 50, I asked: Did having SAP's
14:08:52 16 financial backing -- can you explain again what
14:08:55 17 that -- what that impact -- let's try it again.
14:08:58 18 Can you explain again why it was that
14:09:00 19 having SAP as the backer of TomorrowNow mattered to
14:09:04 20 Pepsi?
14:09:05 21 And the witness answered: It matters from
14:09:06 22 the point of view that TomorrowNow was a smaller
14:09:08 23 company from a vendor viability. And to have SAP,
14:09:11 24 which had more financial strength, to make sure
14:09:13 25 that that vendor stayed viable throughout the term

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14:09:17 1 of the contract.
14:09:18 2 Do you remember him testifying to that,
14:09:19 3 sir?
14:09:20 4 MR. McDONELL: Object to the form of the
14:09:20 5 question.
14:09:21 6 THE WITNESS: In general, yes, I do.
14:09:23 7 MS. HOUSE: Q. And you're not -- you have
14:09:24 8 no reason to believe that Mr. Kreul was not telling
14:09:27 9 the truth when he was answering all these
14:09:29 10 questions. Right?
14:09:30 11 MR. McDONELL: Same objection.
14:09:31 12 THE WITNESS: I didn't have any reason to
14:09:32 13 believe otherwise.
14:09:33 14 MS. HOUSE: Q. And do you recall that
14:09:34 15 Mr. Kreul included in the writeup about TomorrowNow
14:09:37 16 the fact that they were owned by SAP to his
14:09:40 17 management, and that that was something that was to
14:09:42 18 give the management comfort?
14:09:43 19 MR. McDONELL: Object to the form of the
14:09:44 20 question.
14:09:51 21 THE WITNESS: I believe he did indicate
14:09:52 22 that, but I'd have to go back and look at the
14:09:55 23 deposition record on that point.
14:09:58 24 MS. HOUSE: Q. Well, you can see it on
14:09:59 25 page 58, sir.

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14:10:07 1 Now, if you could turn to page 51. On
14:10:17 2 page -- lines 15 through 23. You see that Pepsi
14:10:24 3 switched from Oracle to TomorrowNow as a
14:10:25 4 cost-saving opportunity, and that for Mr. Kreul,
14:10:31 5 huge cost savings was the number one reason why he
14:10:33 6 recommended the switch? Do you see that?
14:10:37 7 MR. McDONELL: Object to the form of the
14:10:38 8 question.
14:10:38 9 MS. HOUSE: Q. Do you see that on 51 and
14:10:41 10 page 54, sir?
14:10:43 11 A. 51 -- okay. I see that on 54, yes.
14:10:55 12 Q. And finally, if you would turn to page 64,
14:10:57 13 sir, and look at the highlighted testimony, does it
14:11:02 14 refresh your recollection that Mr. Kreul evaluated
14:11:04 15 self-support but never seriously considered it?
14:11:08 16 MR. McDONELL: Misstates the actual
14:11:09 17 record. Object to the form.
14:11:34 18 THE WITNESS: Your question was, did he --
14:11:38 19 I'm sorry, I just finished reading. What was your
14:11:41 20 question again?
14:11:42 21 MS. HOUSE: Q. Do you remember that
14:11:43 22 Mr. Kreul evaluated self-support but never
14:11:46 23 seriously considered it?
14:11:47 24 MR. McDONELL: Misstates the document.
14:11:48 25 Object to the form.

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14:11:49 1 THE WITNESS: I remember this -- a -- I
14:11:51 2 remember this discussion thread in that deposition.
14:11:54 3 And he did discuss self-support, and I didn't
14:11:58 4 recall his comments about whether they
14:12:00 5 significantly considered it or not. I remember he
14:12:02 6 did say something about --
14:12:04 7 MS. HOUSE: Q. Do you see that on line
14:12:05 8 13 --
14:12:06 9 MR. McDONELL: Don't interrupt the
14:12:06 10 witness, please.
14:12:07 11 You can complete your answer.
14:12:08 12 THE WITNESS: I did recall him saying that
14:12:10 13 they did evaluate it, and I know he said they
14:12:13 14 didn't really go that far down in that evaluation,
14:12:16 15 words to that effect, yes.
14:12:18 16 MS. HOUSE: Q. So it says:
14:12:19 17 "Question: Did you ever significantly
14:12:20 18 consider it?
14:12:21 19 "Answer: No."
14:12:22 20 Does that refresh your recollection?
14:12:24 21 MR. McDONELL: Same objections.
14:12:25 22 THE WITNESS: It -- yes.
14:12:26 23 MS. HOUSE: Q. But you, having sat
14:12:28 24 through this deposition, do not consider it or rely
14:12:31 25 on it in any fashion providing the opinions in your

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14:12:34 1 report. Correct?
14:12:35 2 MR. McDONELL: Asked and answered.
14:12:36 3 THE WITNESS: That's correct.
14:12:40 4 MS. HOUSE: Q. And you also don't
14:12:41 5 consider the testimony of TravelCenters, do you?
14:12:44 6 MR. McDONELL: Asked and answered.
14:12:56 7 MS. HOUSE: Q. Let me show you an excerpt
14:12:58 8 from that deposition.
14:13:06 9 And Mr. Mark Anderson of TravelCenters
14:13:11 10 testifies on page 67 and 68 that when he switched
14:13:14 11 to TomorrowNow -- I'm sorry, I gave you the wrong
14:13:17 12 number -- that on page 172 and 173, that when
14:13:23 13 switching from Oracle to TomorrowNow, TravelCenters
14:13:26 14 also didn't consider any other third party but
14:13:29 15 TomorrowNow to be acceptable. Right?
14:13:31 16 MR. McDONELL: I object to the form of the
14:13:32 17 question. Object to the incomplete document and
14:13:34 18 the highlighting.
14:13:46 19 You're entitled to read --
14:13:49 20 THE WITNESS: I was just -- which page
14:13:50 21 number?
14:13:51 22 MS. HOUSE: 172, he says: When evaluating
14:13:53 23 whether to go to TomorrowNow, to your knowledge,
14:13:55 24 did TravelCenters ever consider any other options
14:13:57 25 at all besides maintaining Oracle support or taking

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14:14:00 1 the TomorrowNow offer?
14:14:02 2 And his answer was, no.
14:14:03 3 You didn't consider that in your opinion.
14:14:05 4 Right?
14:14:06 5 MR. McDONELL: Asked and answered.
14:14:07 6 THE WITNESS: No, I didn't.
14:14:10 7 MS. HOUSE: Q. And then below that on
14:14:11 8 page 173, he talks about what he thought his
14:14:14 9 options were. And he said:
14:14:15 10 We had three options at the time. We had
14:14:17 11 either to stay with Oracle, we could go to
14:14:19 12 TomorrowNow, or we could go to a company by the
14:14:21 13 name of Rimini Street, which is another third-party
14:14:23 14 provider of PeopleSoft services.
14:14:25 15 And he says: I take it from your prior
14:14:27 16 answer you didn't contact Rimini Street?
14:14:30 17 And he says: No. Rimini Street
14:14:31 18 continually contacts us, and I disregard them.
14:14:34 19 And then there's the question: Did
14:14:36 20 TravelCenters ever consider self-support as an
14:14:39 21 option?
14:14:40 22 He said: No. Let me clarify that. We
14:14:42 23 considered it, but considered the options of
14:14:44 24 maintaining -- we would have to have contracted
14:14:46 25 with another company to provide tax support for us,

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14:14:48 1 and that precluded it from being a viable solution.
14:14:51 2 Do you see that?
14:14:52 3 A. I see that.
14:14:53 4 Q. And that option that was just discussed in
14:14:55 5 that last answer was one of the options that you
14:14:57 6 discussed in your report, isn't it?
14:15:00 7 MR. McDONELL: Objection. Object to the
14:15:00 8 form of the question.
14:15:02 9 THE WITNESS: I did talk -- I do talk in
14:15:04 10 my report about the fact there are providers for
14:15:08 11 tax and regulatory support for products, yes.
14:15:10 12 MS. HOUSE: Q. But you didn't consider
14:15:11 13 the testimony of any of the customers at issue in
14:15:14 14 this case as to whether they actually saw that as a
14:15:16 15 viable option, did you?
14:15:17 16 MR. McDONELL: Asked and answered.
14:15:18 17 THE WITNESS: That is correct.
14:15:24 18 MS. HOUSE: Q. Do you understand that
14:15:25 19 there were declarations that were secured from
14:15:27 20 TomorrowNow customers in this action?
14:15:30 21 MR. McDONELL: Lack of foundation.
14:15:37 22 THE WITNESS: Is a declaration like a
14:15:38 23 sworn statement, an affidavit, something like that?
14:15:41 24 MS. HOUSE: Q. Yeah. I take it you've
14:15:43 25 never seen any of them?

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14:15:44 1 A. I don't recall seeing any of them.
14:15:46 2 MS. HOUSE: Okay. Let me first of all --
14:15:48 3 I think, for the record, so that we have a clear
14:15:51 4 record, we should probably mark the exhibits that
14:15:55 5 we've done so far. So I'm going to mark the
14:16:00 6 testimony of Mr. Kreul 3247; and of Mr. Anderson,
14:16:11 7 of TravelCenters, as 3248.
14:16:14 8 (Deposition Exhibits 3247 and 3248 were
14:16:18 9 marked for identification.)
14:16:20 10 MS. HOUSE: Q. Let's now look at the
14:16:23 11 declaration of Spokane County, Washington. We'll
14:16:29 12 mark that 3249.
14:16:32 13 (Deposition Exhibit 3249 was marked for
14:16:34 14 identification.)
14:16:44 15 MS. HOUSE: Q. And if you look at that,
14:16:46 16 you'll see -- I'd like you to look at paragraph 9,
14:16:49 17 sir, where the witness testified:
14:16:54 18 There was no other third-party service
14:16:56 19 provider for Spokane's PeopleSoft software
14:16:58 20 that Spokane would have contracted with other
14:17:00 21 than TomorrowNow in June 2007. Spokane also
14:17:04 22 did not have the skills or interest to
14:17:06 23 self-support, and it would never have taken
14:17:08 24 the risk of no support during that period of
14:17:10 25 time.

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14:17:10 1 Do you see that?
14:17:12 2 A. I do.
14:17:13 3 Q. Does that seem like a reasonable position
14:17:14 4 for that customer to take?
14:17:16 5 MR. McDONELL: Objection. Lack of
14:17:17 6 foundation, calls for speculation. Object to the
14:17:20 7 form of the question. Argumentative.
14:17:30 8 THE WITNESS: As to its reasonableness,
14:17:34 9 I'm sure there is a measure of that in here, and
14:17:37 10 that's certainly probably what this individual,
14:17:41 11 William Fiedler, has sworn a statement on.
14:17:46 12 I think it would be -- if I were assigned
14:17:48 13 a chance to do the customer-by-customer review, I'd
14:17:52 14 want to see more documentation than just this. But
14:17:55 15 yes, I do see that in here, and I'm sure he
14:17:59 16 believes that.
14:18:00 17 MS. HOUSE: Q. Nobody stopped you from
14:18:01 18 doing that, sir, did they?
14:18:03 19 MR. McDONELL: Pardon? I object to the
14:18:05 20 form. Argumentative.
14:18:07 21 MS. HOUSE: Q. Did anybody stop you from
14:18:08 22 looking at any of the customer evidence in this
14:18:10 23 case?
14:18:10 24 MR. McDONELL: Object to the form.
14:18:11 25 Argumentative, Counsel.

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14:18:12 1 THE WITNESS: No.
14:18:14 2 MS. HOUSE: Q. I'd like you to look at
14:18:16 3 what we'll mark 3250, which is a declaration of the
14:18:19 4 BrainLAB company.
14:18:21 5 (Deposition Exhibit 3250 was marked for
14:18:23 6 identification.)
14:18:35 7 MS. HOUSE: Q. And if you look at
14:18:36 8 paragraph 7, Stefan Vilsmeier declares:
14:18:44 9 There was no other third-party service
14:18:46 10 provider for BrainLAB's JDE services that
14:18:49 11 BrainLAB considered for that transition
14:18:51 12 period before its SAP applications were fully
14:18:55 13 functioning other than TN, TomorrowNow. Had
14:18:58 14 TN not been an available option to BrainLAB
14:19:01 15 for that transitional service on its JDE
14:19:04 16 applications (including because BrainLAB
14:19:06 17 would not have contracted with TN if in fact
14:19:09 18 TN was infringing Oracle-owned intellectual
14:19:11 19 property as alleged by Oracle and BrainLAB
14:19:15 20 knew of such infringement) BrainLAB likely
14:19:18 21 would have continued to contract with Oracle
14:19:20 22 for support services on its JDE applications
14:19:23 23 until its SAP applications were up and
14:19:26 24 running. BrainLAB had not identified or
14:19:29 25 received proposals from any other third-party

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14:19:31 1 servicer, it had chosen TN because it was
14:19:35 2 free, it did not have the skills or interest
14:19:37 3 to self-support, and it would never have
14:19:39 4 taken the risk of no support during the
14:19:41 5 migration period.
14:19:43 6 You've never seen that before, have you,
14:19:45 7 sir?
14:19:45 8 A. No, I have not.
14:19:46 9 Q. Is that relevant to your opinion, sir?
14:19:48 10 MR. McDONELL: Object to the form of the
14:19:48 11 question. Argumentative.
14:19:57 12 THE WITNESS: It's interesting
14:19:57 13 information. And were I doing a
14:20:01 14 customer-by-customer review, that would definitely
14:20:03 15 be an interesting document. But as far as my --
14:20:07 16 the general nature of my report, it doesn't change
14:20:09 17 what I have there.
14:20:15 18 MS. HOUSE: Q. Finally, I want to show
14:20:16 19 you the declaration of Harley-Davidson, because you
14:20:18 20 mentioned that you had actually worked with them
14:20:20 21 before, some time ago.
14:20:24 22 And I'm going to mark that as
14:20:25 23 Exhibit 3251.
14:20:27 24 (Deposition Exhibit 3251 was marked for
14:20:29 25 identification.)

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14:20:43 1 MS. HOUSE: Q. And Mr. Jeff Scheele -- do
14:20:49 2 you know who he is, by any chance?
14:20:52 3 A. I don't recall the name.
14:20:54 4 Q. If you look at what Mr. Scheele has
14:20:58 5 declared in this declaration, he notes, for
14:21:00 6 instance, in paragraph 5, that:
14:21:01 7 TomorrowNow promised equal or better
14:21:04 8 service to the service we were receiving from
14:21:05 9 Oracle at a lesser cost. TomorrowNow also
14:21:09 10 represented that they were affiliated with
14:21:12 11 SAP.
14:21:15 12 And you have no reason to believe that
14:21:16 13 those weren't representations that TomorrowNow made
14:21:19 14 not only to Harley-Davidson, but to other
14:21:22 15 customers. Right?
14:21:23 16 MR. McDONELL: Object to the form of the
14:21:23 17 question.
14:21:24 18 THE WITNESS: I don't have any reason to
14:21:26 19 agree or disagree with that.
14:21:27 20 MS. HOUSE: Q. Okay. He continues:
14:21:30 21 Harley-Davidson did not have and did not
14:21:32 22 seriously consider any other service options
14:21:34 23 for the PeopleSoft applications Oracle was
14:21:36 24 servicing at that time in 2006 besides Oracle
14:21:39 25 and TomorrowNow. In addition,

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14:21:41 1 Harley-Davidson did not seriously consider
14:21:44 2 self-support for its PeopleSoft applications.
14:21:47 3 Again, this is information that would be
14:21:50 4 interesting to you, would it not, in providing your
14:21:52 5 opinions?
14:21:53 6 MR. McDONELL: Object to the form of the
14:21:53 7 question.
14:21:56 8 THE WITNESS: Yes, it would be
14:21:57 9 interesting. And again, if I were doing
14:21:59 10 customer-by-customer reviews, this would be very
14:22:02 11 interesting.
14:22:03 12 MS. HOUSE: Q. I also want to point you
14:22:04 13 to paragraph 8, where Mr. Scheele of
14:22:08 14 Harley-Davidson says:
14:22:09 15 Had TomorrowNow not been an available
14:22:10 16 option to Harley-Davidson for service on its
14:22:13 17 PeopleSoft applications (including because
14:22:14 18 Harley-Davidson would not have contracted
14:22:17 19 with TomorrowNow if in fact TomorrowNow was
14:22:19 20 infringing Oracle-owned intellectual property
14:22:22 21 as alleged by Oracle and Harley-Davidson knew
14:22:24 22 of such infringement), Harley-Davidson likely
14:22:27 23 would have continued to contract with Oracle
14:22:28 24 for support services on its PeopleSoft
14:22:31 25 applications.

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14:22:32 1 And you have no reasons to disbelieve
14:22:34 2 that, do you, sir?
14:22:36 3 MR. McDONELL: Object to the form of the
14:22:36 4 question.
14:22:37 5 THE WITNESS: I must say, though, I find
14:22:38 6 it really interesting that the last two documents I
14:22:42 7 believe have the same wording in it, you know, that
14:22:46 8 this stuff like, and, fill in the customer name,
14:22:49 9 knew of such infringement. That just seems -- it
14:22:54 10 just seems odd, you know, that two companies would
14:22:58 11 use that exact phrase.
14:23:00 12 MS. HOUSE: Q. Do you have any reason to
14:23:01 13 disbelieve whether or not Mr. Scheele of
14:23:04 14 Harley-Davidson, who signed the declaration,
14:23:10 15 declared it under penalty of perjury, that he was
14:23:12 16 not being truthful in his statement, sir?
14:23:14 17 MR. McDONELL: Object to the form of the
14:23:15 18 question.
14:23:15 19 THE WITNESS: I'm just -- you know, I
14:23:16 20 thought that was interesting.
14:23:18 21 The -- no, I have no reason to believe he
14:23:23 22 wasn't being truthful.
14:23:24 23 MS. HOUSE: Q. Okay, thank you. Going
14:23:26 24 back to your report, and Appendix C, both include
14:23:31 25 references to information from company websites and

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14:23:35 1 news articles from the internet. Right?
14:23:38 2 MR. McDONELL: Compound.
14:23:38 3 THE WITNESS: That's probably the bulk of
14:23:40 4 what's in that beginning and ending document.
14:23:42 5 MS. HOUSE: Q. And you read and relied on
14:23:44 6 those materials. Correct?
14:23:47 7 A. I considered those materials, yes.
14:23:49 8 Q. Do you accept the representations in the
14:23:51 9 items you cite as being fact?
14:23:54 10 MR. McDONELL: Object to the form of the
14:23:55 11 question. Overly broad.
14:24:01 12 THE WITNESS: I believe those are all
14:24:02 13 interesting data points to just help paint a fuller
14:24:05 14 picture of what's going on.
14:24:07 15 MS. HOUSE: Q. So did you take the
14:24:08 16 information as fact or not?
14:24:09 17 MR. McDONELL: Asked and answered. He
14:24:10 18 gave you his answer. Object to the form of the
14:24:12 19 question.
14:24:15 20 THE WITNESS: I looked at all of this
14:24:17 21 material with a -- if you will, with a careful eye.
14:24:23 22 And I don't accept every single thing that I read
14:24:26 23 in print as the gospel truth.
14:24:31 24 MS. HOUSE: Q. You didn't do any personal
14:24:32 25 interviews with any of the authors, did you?

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14:24:34 1 MR. McDONELL: Object to the form of the
14:24:34 2 question. Overly broad.
14:24:38 3 THE WITNESS: No, I didn't do personal
14:24:39 4 interviews with them.
14:24:41 5 MS. HOUSE: Q. Did you undertake any
14:24:42 6 independent investigation to verify whether the
14:24:45 7 facts in the materials that you cite were accurate
14:24:47 8 or not?
14:24:48 9 MR. McDONELL: Asked and answered, object
14:24:49 10 to the form of the question.
14:24:57 11 THE WITNESS: The independent work that I
14:24:59 12 did was actually going out and collecting this
14:25:02 13 information and pulling it together into this
14:25:06 14 report.
14:25:07 15 MS. HOUSE: Q. That's information that
14:25:08 16 you're talking about from Mr. Clarke. Right?
14:25:10 17 A. No. That was information I had. If you
14:25:13 18 look like, of these considered documents, a number
14:25:15 19 of those were actually original documents from my
14:25:20 20 own files. I mean, I've been keeping up with this
14:25:24 21 stuff, keeping up with this part of the industry
14:25:26 22 for years.
14:25:27 23 Q. But other than actually reading the
14:25:28 24 material, you haven't done anything to
14:25:30 25 independently verify whether the material and the

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14:25:32 1 statements within it is accurate. Right?
14:25:34 2 MR. McDONELL: Asked and answered, object
14:25:35 3 to the form of the question, overly broad.
14:25:39 4 THE WITNESS: I would say I do verify
14:25:42 5 material frequently with regard to what vendors
14:25:44 6 say, because I'm at a lot of vendor venues and
14:25:49 7 events, and I have an opportunity to double-check
14:25:51 8 things with both vendor management and with
14:25:52 9 customers.
14:25:53 10 MS. HOUSE: Q. In connection with your
14:25:54 11 report here, sir, did you do any independent
14:25:58 12 investigation as to any of the third-party material
14:26:01 13 that you rely on?
14:26:02 14 Did you go out and check on any of it,
14:26:04 15 independently?
14:26:05 16 MR. McDONELL: Asked and answered. Object
14:26:06 17 to the form of the question.
14:26:07 18 THE WITNESS: In the context of the
14:26:08 19 preparation of this report, no.
14:26:11 20 MS. HOUSE: Q. Let's go to the summary of
14:26:13 21 your opinions, on page 3. And in paragraph 1, you
14:26:22 22 state your opinion that, quote, "Software customers
14:26:25 23 do not select their future ERP software vendor
14:26:29 24 simply because of a lower-cost support offering on
14:26:32 25 their existing ERP software." Correct?

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14:26:35 1 A. Correct.
14:26:36 2 Q. And this opinion relates to what part of
14:26:38 3 Mr. Meyer's report?
14:26:43 4 A. I made a note that it -- it applies to
14:26:49 5 paragraphs 439 to 440.
14:26:54 6 Q. Let me hand you his report. And you can
14:27:01 7 turn to page -- to paragraphs 439 and 440.
14:27:30 8 And this paragraph, 439, discusses
14:27:34 9 evidence in the case. Do you see that?
14:27:52 10 MR. McDONELL: Vague and ambiguous.
14:27:55 11 THE WITNESS: I see that.
14:27:57 12 MS. HOUSE: Q. And that's material that
14:27:59 13 you yourself did not review. Correct?
14:28:01 14 MR. McDONELL: Vague and ambiguous.
14:28:05 15 THE WITNESS: Excuse me?
14:28:06 16 MS. HOUSE: Q. That's material that you
14:28:07 17 did not yourself review. Correct?
14:28:09 18 MR. McDONELL: It's vague and ambiguous
14:28:10 19 the way you're phrasing the question.
14:28:13 20 THE WITNESS: I read Mr. Meyer's report.
14:28:14 21 Are you asking about the specific footnoted items
14:28:17 22 that he has below? Is that what you're referring
14:28:19 23 to?
14:28:20 24 MS. HOUSE: Q. And the quotes, yes.
14:28:21 25 Other than reading what was a paraphrase

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14:28:23 1 in the report, you didn't go to the source
14:28:25 2 documents yourself. Right?
14:28:27 3 A. That's correct.
14:28:36 4 Q. And these look like some of SAP's goals
14:28:38 5 for the Safe Passage program, don't they?
14:28:41 6 MR. McDONELL: Vague and ambiguous.
14:28:42 7 Object to the form.
14:28:45 8 THE WITNESS: And it's -- Mr. Meyer's
14:28:47 9 words here say SAP's goal was to convert 50 percent
14:28:50 10 of Oracle's PeopleSoft and JD Edwards customers to
14:28:52 11 SAP, and he continues on with other -- another
14:28:55 12 primary goal. So yes, these look like goals.
14:28:58 13 MS. HOUSE: Q. Okay. And are you
14:29:01 14 intending to opine about the reasonableness of
14:29:04 15 these goals, sir?
14:29:06 16 MR. McDONELL: Object to the form of the
14:29:06 17 question. Asked and answered repeatedly.
14:29:12 18 THE WITNESS: I am going to give an
14:29:14 19 opinion about the reasonableness of these
14:29:17 20 generally, yes.
14:29:19 21 MS. HOUSE: Q. Is that something that you
14:29:20 22 came to over lunch, sir?
14:29:23 23 MR. McDONELL: Object to the form.
14:29:24 24 Argumentative.
14:29:27 25 THE WITNESS: I think over lunch I came to

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14:29:28 1 better understand maybe where you and I weren't
14:29:33 2 communicating I guess on our question-and-answer
14:29:35 3 session.
14:29:37 4 MS. HOUSE: Q. Looking at paragraph 439,
14:29:39 5 which goal that is listed in that paragraph do you
14:29:41 6 intend to offer an opinion on?
14:29:44 7 MR. McDONELL: Object to the form of the
14:29:45 8 question. Asked and answered.
14:29:55 9 THE WITNESS: In particular, this one that
14:29:57 10 says: SAP's goal was to convert 50 percent of
14:30:00 11 Oracle's PeopleSoft and JD Edwards customers to
14:30:02 12 SAP.
14:30:04 13 That one I discuss in a couple of spots in
14:30:15 14 the report that --
14:30:18 15 MS. HOUSE: Q. Where do you reference
14:30:19 16 that goal?
14:30:19 17 MR. McDONELL: Well, don't cut him off,
14:30:20 18 Counsel.
14:30:23 19 THE WITNESS: I'm sorry, I'm done. What
14:30:25 20 was --
14:30:26 21 MS. HOUSE: Q. Where in your report? You
14:30:27 22 said you reference it in the report. I have not
14:30:29 23 seen that cite in your report, sir. Where do you
14:30:31 24 cite that goal of SAP?
14:30:33 25 A. I didn't cite that goal.

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14:30:37 1 Q. Is this the first time that you decided
14:30:38 2 that you're going to be opining about it?
14:30:40 3 MR. McDONELL: Counsel, you're arguing
14:30:42 4 with the witness. He's explained his position and
14:30:44 5 the scope of his opinion.
14:30:45 6 MS. HOUSE: Q. Do you understand that
14:30:46 7 your report was supposed to tell us what you were
14:30:48 8 going to be testifying about, sir?
14:30:50 9 MR. McDONELL: Object. You're arguing
14:30:51 10 with the witness.
14:30:52 11 THE WITNESS: Yes.
14:30:53 12 MS. HOUSE: Q. Okay. And you don't
14:30:54 13 reference that goal that SAP had to convert 50
14:30:58 14 percent of Oracle's PeopleSoft and JD Edwards
14:30:59 15 customers to SAP anywhere in your report, do you,
14:31:03 16 sir?
14:31:03 17 MR. McDONELL: Same objection. Asked and
14:31:04 18 answered.
14:31:17 19 MS. HOUSE: Q. There's a question
14:31:17 20 pending. Yes or no?
14:31:23 21 A. Please say the question again.
14:31:26 22 Q. You do not reference the goal of SAP to
14:31:29 23 convert 50 percent of Oracle's PeopleSoft and
14:31:31 24 JD Edwards customers to SAP anywhere in your
14:31:34 25 report, sir, do you?

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14:31:36 1 A. I do not explicitly express that or state
14:31:39 2 that goal, that is correct.
14:31:43 3 Q. And do you even know where that goal is
14:31:45 4 articulated?
14:31:47 5 MR. McDONELL: Vague and ambiguous.
14:31:48 6 MS. HOUSE: Q. By SAP?
14:31:49 7 MR. McDONELL: Vague --
14:31:50 8 MS. HOUSE: Q. Or what any of the
14:31:50 9 witnesses said about it?
14:31:52 10 MR. McDONELL: Compound, vague and
14:31:52 11 ambiguous.
14:31:59 12 THE WITNESS: I know it's right here in
14:32:00 13 Mr. Meyer's report.
14:32:02 14 MS. HOUSE: Q. So other than the
14:32:02 15 reference in Mr. Meyer's report, you have no other
14:32:04 16 information about that goal of SAP. Is that
14:32:06 17 correct?
14:32:07 18 MR. McDONELL: Misstates the testimony.
14:32:08 19 Object to the form of the question.
14:32:15 20 THE WITNESS: Can you repeat that?
14:32:25 21 (Record read as follows:
14:32:26 22 Question: So other than the reference in
14:32:26 23 Mr. Meyer's report, you have no other
14:32:26 24 information about that goal of SAP. Is that
14:32:26 25 correct?)

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14:32:28 1 THE WITNESS: I believe that may be
14:32:29 2 correct, unless it was already indicated in one of
14:32:31 3 the other two depositions that I had listed at the
14:32:34 4 top of Appendix C.
14:32:41 5 MS. HOUSE: Q. And what are you intending
14:32:44 6 to opine about that goal now?
14:32:46 7 MR. McDONELL: Object to the form of the
14:32:47 8 question.
14:32:48 9 MS. HOUSE: Q. With my objection about
14:32:50 10 whether it's appropriate to be doing so, having not
14:32:52 11 disclosed it --
14:32:54 12 MR. McDONELL: You're arguing with the
14:32:55 13 witness.
14:32:56 14 MS. HOUSE: I'm reserving our rights here.
14:32:57 15 MR. McDONELL: That's fine. But don't
14:32:59 16 argue with him. Ask your questions.
14:33:01 17 MS. HOUSE: Q. What do you intend to
14:33:02 18 opine about that goal, sir?
14:33:04 19 A. I'm --
14:33:04 20 MR. McDONELL: And you're misstating his
14:33:06 21 testimony. I object.
14:33:09 22 THE WITNESS: What I have already included
14:33:10 23 in my report is that when customers go to make
14:33:13 24 software-changing -- software change decisions,
14:33:16 25 that they -- as I stated in my report, they often

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14:33:19 1 have these software products installed for many
14:33:21 2 years, and that these are very expensive projects
14:33:26 3 to change out one package to another.
14:33:30 4 That -- I also state somewhere in my
14:33:32 5 report that most of these programs aren't going to
14:33:36 6 work unless they happen to catch customers who are
14:33:39 7 already motivated or in the market for new
14:33:43 8 solutions.
14:33:44 9 So for someone to convert 50 percent of
14:33:48 10 the installed base of another vendor's product in
14:33:51 11 any kind of short order, that would be an
14:33:53 12 exceptionally aggressive deal, because a lot of
14:33:56 13 those customers, in my expert opinion, would not be
14:33:59 14 in the market for a solution at that point in time.
14:34:03 15 They may get there eventually over a
14:34:05 16 period of many years, but not in a short order --
14:34:09 17 short amount of time.
14:34:11 18 MS. HOUSE: Q. So are you going to be
14:34:12 19 opining that that was an unreasonable goal?
14:34:15 20 MR. McDONELL: Object to the form of the
14:34:16 21 question. He's asked and answered it.
14:34:20 22 THE WITNESS: A goal to convert 50 percent
14:34:22 23 of the PeopleSoft/JD Edwards customers to SAP in a
14:34:26 24 short amount of time, yes, I'm opining that would
14:34:28 25 be -- that would not be a reasonable goal.

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14:34:31 1 MS. HOUSE: Q. And are you opining that
14:34:33 2 as of the moment in time that SAP was creating that
14:34:36 3 goal?
14:34:37 4 MR. McDONELL: Object to the --
14:34:38 5 MS. HOUSE: Q. In other words, right
14:34:38 6 after the acquisition of TomorrowNow and right
14:34:41 7 after the acquisition of PeopleSoft by Oracle?
14:34:44 8 MR. McDONELL: Assumes facts not in
14:34:44 9 evidence, object to the form of the question, asked
14:34:46 10 and answered. Beyond the scope.
14:34:52 11 THE WITNESS: If I'm being asked, would I
14:34:54 12 say that was a reasonable goal in January 2005, I
14:34:58 13 believe is the window you're looking at, right, as
14:35:01 14 this acquisition occurred, I would have said then
14:35:04 15 that would not have been a reasonable goal.
14:35:06 16 MS. HOUSE: Q. And have you come to that
14:35:08 17 conclusion having evaluated all of the
14:35:10 18 circumstances around that creation of the goal?
14:35:15 19 MR. McDONELL: Object to the form of the
14:35:15 20 question. Incomplete, beyond the scope. Vague and
14:35:19 21 ambiguous.
14:35:22 22 THE WITNESS: I believe I would have had
14:35:24 23 that opinion -- let me phrase this better.
14:35:30 24 I believe that these programs, as my
14:35:33 25 report states, are generally not very effective,

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14:35:36 1 and I would have had that opinion in January 2005
14:35:39 2 or March 26 of this year when I turned in my
14:35:43 3 report.
14:35:45 4 MS. HOUSE: Q. We'll get into the
14:35:45 5 circumstances of the specifics of that particular
14:35:47 6 program in a bit.
14:35:49 7 Are there any other goals that are listed
14:35:52 8 in Mr. Meyer's report that you're now going to be
14:35:54 9 providing an opinion on?
14:35:57 10 MR. McDONELL: Object. Argumentative,
14:35:58 11 misstates the testimony.
14:36:00 12 THE WITNESS: Give me just a second.
14:36:36 13 There's two sentences in here that stand
14:36:38 14 out that I would like to discuss. One is near the
14:36:45 15 end of 439, that says, in an effort -- the last
14:36:52 16 sentence: In an effort to achieve these goals, SAP
14:36:55 17 offered TomorrowNow service as a loss leader in
14:36:58 18 order to gain more Safe Passage program customers.
14:37:02 19 And --
14:37:07 20 MS. HOUSE: Q. Do you understand that to
14:37:08 21 be the case, or are you disagreeing that that
14:37:10 22 happened, or what's your point?
14:37:12 23 MR. McDONELL: Compound, object to the
14:37:13 24 form of the question.
14:37:15 25 MS. HOUSE: Q. Do you disagree with that

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14:37:17 1 as having happened?
14:37:18 2 MR. McDONELL: Object to the form of the
14:37:18 3 question. Beyond the scope.
14:37:20 4 THE WITNESS: That they offered it as a
14:37:21 5 loss leader? I generally do not disagree with that
14:37:26 6 concept, in some cases. But I don't have the
14:37:29 7 customer-by-customer analysis to know if they did
14:37:32 8 that in every customer.
14:37:35 9 MS. HOUSE: Q. And do you understand that
14:37:37 10 SAP had business reasons for having chosen to take
14:37:42 11 that strategy?
14:37:43 12 MR. McDONELL: Object to the form of the
14:37:43 13 question.
14:37:46 14 THE WITNESS: I would assume they
14:37:47 15 absolutely had a business reason behind that.
14:37:50 16 MS. HOUSE: Q. And do you have any reason
14:37:51 17 to believe that they didn't use all of the
14:37:53 18 expertise that they had in the ERP vendor space in
14:37:56 19 order to come up with that strategy?
14:37:58 20 MR. McDONELL: Foundation, object to the
14:37:59 21 form of the question.
14:38:02 22 THE WITNESS: I wouldn't doubt that they
14:38:03 23 applied expertise. I -- I think you said all of
14:38:06 24 their expertise. I don't know if they used all of
14:38:08 25 it, but I'm sure they applied some of their

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14:38:11 1 expertise in there, for sure.
14:38:14 2 MS. HOUSE: Q. And are you going to be
14:38:15 3 attesting that that decision was an unreasonable
14:38:18 4 decision?
14:38:19 5 MR. McDONELL: Object to the form of the
14:38:19 6 question.
14:38:21 7 THE WITNESS: No. What I'm going to be
14:38:23 8 discussing is a little bit -- I'm going to tune
14:38:25 9 that a little bit.
14:38:26 10 I talked about how that using TomorrowNow
14:38:32 11 has -- may actually have caused some customers to
14:38:36 12 stay on the use of Oracle's software products and
14:38:40 13 not move over to SAP.
14:38:43 14 MS. HOUSE: Q. Have you done an analysis
14:38:43 15 of that?
14:38:45 16 MR. McDONELL: Asked -- well, object to
14:38:46 17 the form of the question.
14:38:49 18 THE WITNESS: No. I did not do any, if
14:38:52 19 you will, independent analysis on that particular
14:38:53 20 point.
14:38:54 21 MS. HOUSE: Q. You don't know from
14:38:55 22 looking at the actual evidence in the case whether
14:38:57 23 that happened or not, do you?
14:38:58 24 A. I did not do that customer-by-customer
14:39:00 25 assessment. I believe Mr. Clarke did that, or

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14:39:02 1 Mr. Meyer, one -- one of the other experts.
14:39:09 2 Q. So what will you -- so you've already told
14:39:13 3 me the section of your report that you believe
14:39:15 4 deals with that sentence. Is that right?
14:39:17 5 A. That would be this -- I think Section 3 on
14:39:21 6 page 56 of my report.
14:39:25 7 Q. Anything else about paragraphs 439 or 440
14:39:28 8 you intend to opine about?
14:39:32 9 A. A little bit of 439 is a bit redundant. I
14:39:36 10 mean, he talks about the goals, and then he kind of
14:39:38 11 talks about them a little bit more. But let me
14:39:40 12 just double-check it one more time.
14:40:23 13 Yes, those would be the main ones.
14:40:32 14 Q. Do you have -- have you done any sort of
14:40:34 15 analysis about what percentage of customers you
14:40:37 16 believe would be a reasonable amount for SAP at
14:40:40 17 that point in time to have expected to convert?
14:40:44 18 MR. McDONELL: Object to the form of the
14:40:45 19 question.
14:40:46 20 THE WITNESS: I did not do an analysis on
14:40:48 21 that for this particular case, no.
14:40:53 22 MS. HOUSE: Q. And you're not intending
14:40:54 23 to offer an opinion about what percentage would be
14:40:56 24 a reasonable percentage for SAP to have predicted
14:41:01 25 at that point in time, are you?

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14:41:03 1 A. I believe my report does state some
14:41:05 2 experience I had back in my Accenture days where we
14:41:09 3 would evaluate how many customers would change
14:41:14 4 software solutions on a year-to-year basis, and I
14:41:17 5 might refer to that as part of an opinion in this
14:41:20 6 matter.
14:41:21 7 Q. I'm asking about whether you're intending
14:41:23 8 to offer a specific alternative percentage to the
14:41:26 9 50 percent that we've just been talking about.
14:41:32 10 It's not in your report.
14:41:36 11 A. Again, just generally, I'm going to only
14:41:39 12 respond generally on that, and I'm not offering a
14:41:41 13 specific percentage in my report.
14:41:47 14 Q. Going back to your report, you don't know
14:41:53 15 for any of the specific customers at issue in this
14:41:55 16 case who purchased SAP applications and also
14:41:59 17 received support from TomorrowNow what role
14:42:02 18 TomorrowNow's support pricing played in their
14:42:05 19 decision-making, do you?
14:42:09 20 A. I did not do that customer-by-customer
14:42:11 21 analysis, so I guess the answer to that would be
14:42:13 22 no.
14:42:23 23 Q. And you can't provide any insight from the
14:42:25 24 facts on a specific TomorrowNow customer whether
14:42:28 25 the timing -- we're talking timing now -- the

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14:42:31 1 timing of that customer's decision to switch to SAP
14:42:34 2 was impacted by the TomorrowNow aspect of the
14:42:37 3 customer's Safe Passage offering?
14:42:39 4 MR. McDONELL: Objection. Vague and
14:42:39 5 ambiguous.
14:42:43 6 THE WITNESS: I was listening real careful
14:42:46 7 with you on the first part of that, and I'm not
14:42:48 8 trying to irritate you, but just because there was
14:42:51 9 a lot in there, and --
14:42:53 10 MS. HOUSE: Q. I understand.
14:42:53 11 A. -- I apologize. Could you -- I hate to do
14:42:55 12 that to you. Could you give it again?
14:42:57 13 Q. No worries, no worries.
14:42:58 14 You can't provide us any insight from the
14:43:00 15 facts in the case on a specific customer at issue,
14:43:03 16 right --
14:43:04 17 A. Right.
14:43:04 18 Q. -- whether the timing of that customer's
14:43:06 19 decision to switch to SAP was impacted by the
14:43:08 20 TomorrowNow offering in Safe Passage. Right?
14:43:13 21 MR. McDONELL: Vague and ambiguous, asked
14:43:13 22 and answered.
14:43:15 23 THE WITNESS: Relative to the timing of
14:43:17 24 these decisions, the only thing I really discuss in
14:43:22 25 here, it's only tangentially related to timing

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14:43:25 1 matters.
14:43:26 2 So the only thing I'm going to opine
14:43:30 3 that -- that's actually in my report is more
14:43:34 4 around, there was one discussion about how long
14:43:38 5 somebody might have been off maintenance. I do
14:43:41 6 have a small discussion about that in the report.
14:43:43 7 But I'm just trying to think off the top of my head
14:43:46 8 what kind of other timing issues I have in there.
14:43:49 9 I don't think I'm really offering a lot of other
14:43:51 10 input on that particular matter.
14:43:53 11 MS. HOUSE: Q. Okay. In your summary of
14:43:58 12 your first opinion, you criticize Mr. Meyer's
14:44:00 13 purported, quote, "assumption that a reduction in
14:44:03 14 support costs of a customer" -- excuse me, "a
14:44:07 15 customer's preexisting ERP software would likely
14:44:11 16 trigger a large-scale replacement with a
14:44:13 17 competitor's ERP software."
14:44:15 18 Do you see that?
14:44:19 19 A. Where -- where did you read that from, I'm
14:44:21 20 sorry?
14:44:22 21 Q. Your report, summary of the first opinion.
14:44:26 22 A. Oh, I'm sorry. I've got it. I've caught
14:44:29 23 up. Okay. Hold on.
14:44:31 24 Q. It's the first line.
14:44:35 25 A. Yes, I remember that, yes.

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14:44:38 1 Q. And you believe Mr. Meyer made such an
14:44:41 2 assumption. Is that right?
14:44:43 3 A. My reading of Mr. Meyer's report is -- and
14:44:48 4 again, as a layperson, my reading is that he's
14:44:51 5 trying to show a causal connection that because
14:44:54 6 somebody was offered a discounted piece of
14:44:56 7 maintenance from TomorrowNow on their existing
14:45:00 8 Oracle applications, that somehow that would
14:45:02 9 trigger them to want to go through a very expensive
14:45:05 10 software implementation and the purchase of new
14:45:09 11 software.
14:45:11 12 Q. Would your opinion change if I told you
14:45:13 13 that Mr. Meyer instead assumed that a reduction in
14:45:17 14 support costs of a customer's preexisting ERP
14:45:20 15 software was simply a factor? It wasn't a trigger,
14:45:23 16 but was simply a factor in the customer's decision
14:45:26 17 to switch?
14:45:26 18 MR. McDONELL: Vague and --
14:45:27 19 MS. HOUSE: Q. Would that change your
14:45:28 20 opinion?
14:45:29 21 MR. McDONELL: Incomplete hypothetical,
14:45:30 22 vague and ambiguous, object to the form of the
14:45:31 23 question.
14:45:34 24 THE WITNESS: If I've misread his report,
14:45:37 25 I would -- I would certainly modify mine to reflect

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14:45:41 1 that different wording. And if I misinterpreted
14:45:46 2 what he said, then I would certainly change my
14:45:48 3 opinion.
14:45:49 4 MS. HOUSE: Q. You understand that a
14:45:50 5 factor is a very different standard than triggering
14:45:53 6 something. Right?
14:45:54 7 MR. McDONELL: Vague and ambiguous.
14:45:54 8 Object to the form of the question.
14:45:59 9 THE WITNESS: I understand that a factor
14:46:01 10 would be different than a trigger.
14:46:03 11 MS. HOUSE: Q. Are you opining that it
14:46:05 12 would be unreasonable for Mr. Meyer to assume that
14:46:08 13 a reduction in support costs of a customer's
14:46:11 14 preexisting ERP software was simply a factor?
14:46:15 15 Do you think that's an unreasonable
14:46:16 16 assumption?
14:46:18 17 MR. McDONELL: Incomplete hypothetical,
14:46:19 18 vague and ambiguous, object to the form of the
14:46:21 19 question. Calls for a legal conclusion.
14:46:30 20 THE WITNESS: I think there may be --
14:46:32 21 there is a possibility there is a customer where
14:46:35 22 that could have been a case. I also think there
14:46:37 23 could have been other factors that could have --
14:46:40 24 whatever, caused someone to change solutions.
14:46:43 25 But am I disallowing the possibility that

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14:46:46 1 it ever happened or ever could have happened? No,
14:46:50 2 I'm not disallowing that.
14:46:52 3 MS. HOUSE: Q. No, but your report in
14:46:53 4 fact talks about multiple factors that influence a
14:46:56 5 purchasing decision. Right?
14:46:57 6 A. To my point, yes.
14:46:58 7 Q. And so it's not an unreasonable to assume
14:47:01 8 if you're getting free support on the existing ERP
14:47:03 9 swear, that that would be a factor in your decision
14:47:06 10 to choose that particular option. Right? Just a
14:47:08 11 factor; not the reason, but a factor.
14:47:11 12 MR. McDONELL: Vague and ambiguous, asked
14:47:12 13 and answered.
14:47:17 14 THE WITNESS: Again, I think it could be a
14:47:19 15 factor for some -- for the -- let's call it the
14:47:22 16 right customer in the right situation with the
14:47:24 17 right set of parameters, it could be a factor for
14:47:27 18 somebody.
14:47:28 19 MS. HOUSE: Q. And you don't know from
14:47:29 20 looking at the actual facts of the case for the
14:47:31 21 particular customers at issue here whether or not
14:47:34 22 it was a factor for any of them, do you?
14:47:37 23 MR. McDONELL: Asked and answered. Object
14:47:37 24 to the form of the question.
14:47:40 25 THE WITNESS: I don't know if it was a

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14:47:40 1 factor for any of them or many of them. I didn't
14:47:44 2 do that customer-by-customer analysis.
14:47:48 3 MS. HOUSE: Q. Okay. And you also didn't
14:47:49 4 do any kind of analysis to see whether the
14:47:52 5 TomorrowNow support offering was a factor in the
14:47:54 6 timing of a customer's decision to leave Oracle
14:47:59 7 support. Right?
14:48:01 8 MR. McDONELL: Vague and ambiguous, calls
14:48:02 9 for a legal conclusion, object to the form of the
14:48:04 10 question.
14:48:06 11 THE WITNESS: Outside of the question
14:48:07 12 about like where I talk timing about maintenance, I
14:48:10 13 know it's another matter, no, I don't think I
14:48:12 14 covered that issue in this report.
14:48:20 15 MS. HOUSE: Q. Now, is it true that by
14:48:23 16 offering a discount on the current application
14:48:26 17 support, that TomorrowNow was reducing the total
14:48:29 18 cost of ownership related to the customer's
14:48:33 19 assessment of the cost to buy the SAP application
14:48:36 20 versus the cost to buy a competing product?
14:48:39 21 That's part of the whole financial
14:48:40 22 package. Right?
14:48:41 23 MR. McDONELL: Object to the form.
14:48:42 24 THE WITNESS: It is -- it may be addressed
14:48:47 25 by some customers in some of their

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14:48:50 1 total-cost-of-ownership analyses.
14:48:52 2 Some don't look at the cost of the -- some
14:48:57 3 of the TCO calculations I've seen only look at a --
14:49:01 4 things from like a going-forward basis on what the
14:49:04 5 new system is going to cost and what its hardware,
14:49:07 6 software, implementations cost, so forth.
14:49:09 7 Some actually will look at the sunset
14:49:11 8 plans, I believe I discussed that in my report, on
14:49:14 9 the other products.
14:49:15 10 So it can be a line item in some of those.
14:49:17 11 It may not be a big one, but it will be a line item
14:49:20 12 in some of those analyses.
14:49:21 13 MS. HOUSE: Q. And are you aware of any
14:49:23 14 of the materials, the marketing materials that SAP
14:49:25 15 and TomorrowNow used to essentially highlight that
14:49:27 16 savings to customers as part of the incentive of
14:49:30 17 the Safe Passage program?
14:49:32 18 A. I am generally and absolutely aware that
14:49:34 19 they highlighted that.
14:49:39 20 Q. And you have no reason to believe that
14:49:43 21 certain customers did not react to that as an
14:49:45 22 incentive, do you?
14:49:47 23 MR. McDONELL: Object to the form of the
14:49:47 24 question. Vague and ambiguous.
14:49:51 25 THE WITNESS: As I said before, I don't

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14:49:54 1 doubt that it didn't come up in somebody's
14:49:56 2 calculations in some cases. And again, that would
14:49:58 3 have to be determined on a customer-by-customer
14:50:00 4 basis.
14:50:09 5 MS. HOUSE: Q. So you're not saying that
14:50:10 6 the cost of TomorrowNow's support would never be a
14:50:13 7 factor in the decision-making of a customer
14:50:16 8 switching to SAP. Correct?
14:50:17 9 MR. McDONELL: Asked and answered. Object
14:50:18 10 to the form.
14:50:21 11 THE WITNESS: I'm careful about words like
14:50:22 12 "never," "always." So I -- I'm not sure I would
14:50:26 13 agree with the "never."
14:50:35 14 MS. HOUSE: Q. Now let's go into the
14:50:36 15 second opinion in your report, on page 3, which is
14:50:47 16 that at some point in a customer's relationship
14:50:49 17 with its ERP software vendor, the customer will
14:50:51 18 evaluate its support options.
14:50:54 19 A. I see that.
14:50:56 20 Q. What's your definition of "evaluate"?
14:51:03 21 A. They're going to -- "evaluate" could mean
14:51:05 22 anything from look at this from a budget review
14:51:08 23 perspective to do everything from a formal
14:51:11 24 evaluation and selection of an alternative to
14:51:14 25 actually doing the deal with someone else. Or

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14:51:17 1 continuing with the vendor.
14:51:19 2 An evaluation doesn't have to be terribly
14:51:22 3 specific. It could just be, we looked at that.
14:51:25 4 Q. Are you assuming that an evaluation
14:51:26 5 results in identifying a specific company which
14:51:28 6 would serve all the customers' needs as a
14:51:31 7 replacement to the vendor's service offerings?
14:51:34 8 MR. McDONELL: Objection to the form of
14:51:34 9 the question. Vague, ambiguous, incomplete
14:51:36 10 hypothetical.
14:51:37 11 MS. HOUSE: Q. In other words, does
14:51:38 12 "evaluate" always equal a match?
14:51:43 13 MR. McDONELL: That's vague and ambiguous,
14:51:44 14 object to the form of the question, incomplete.
14:51:45 15 THE WITNESS: I wouldn't necessarily say
14:51:47 16 it equates to a match.
14:51:49 17 MS. HOUSE: Q. Sometimes you can look
14:51:50 18 around and you don't find what you need. Right?
14:51:52 19 MR. McDONELL: Object to the form of the
14:51:52 20 question, vague and ambiguous.
14:51:54 21 THE WITNESS: Absolutely.
14:51:55 22 MS. HOUSE: Q. And we saw that in some of
14:51:57 23 the customer testimony that we just looked at.
14:51:59 24 Right?
14:52:00 25 MR. McDONELL: Same objection.

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14:52:03 1 THE WITNESS: Some of those customers that
14:52:05 2 you just were talking about on these affidavit
14:52:09 3 things, or declarations, excuse me, would indicate
14:52:12 4 to me they didn't look at that. That's what they
14:52:15 5 swore to. That they just did a very quick -- or
14:52:19 6 excuse me, not quick -- they did different levels
14:52:22 7 of due diligence, I guess, in looking at new
14:52:24 8 options.
14:52:25 9 MS. HOUSE: Q. And so whether they looked
14:52:26 10 around and they found -- certainly looking around
14:52:29 11 doesn't mean that you're going to switch to another
14:52:31 12 vendor. Right?
14:52:32 13 A. That's correct.
14:52:33 14 MR. McDONELL: Object to the form.
14:52:40 15 MS. HOUSE: Q. Would you also agree that
14:52:41 16 customers can and do evaluate other options as a
14:52:45 17 means of providing leverage against their existing
14:52:48 18 provider, sort of a negotiation tool?
14:52:54 19 MR. McDONELL: Object to the form.
14:52:55 20 THE WITNESS: I will agree that some
14:52:56 21 customers will do that.
14:52:57 22 MS. HOUSE: Q. And they can do that with
14:52:58 23 no intention of ever actually switching. Right?
14:53:00 24 MR. McDONELL: Object to the form.
14:53:01 25 THE WITNESS: Yes, they can do that, too.

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14:53:06 1 MS. HOUSE: Q. And you'd agree you can't
14:53:09 2 generalize about whether a customer would switch
14:53:11 3 from manufacturer support based on whether they
14:53:14 4 just evaluate another alternative. Right?
14:53:17 5 MR. McDONELL: Vague and ambiguous.
14:53:18 6 Object to the form of the question. Incomplete
14:53:21 7 hypothetical.
14:53:23 8 THE WITNESS: If I were doing the
14:53:24 9 customer-by-customer review, I would want to see
14:53:26 10 something else in addition to that possibly, unless
14:53:30 11 there was just some -- I mean, somebody -- if
14:53:33 12 someone did a really, really detailed evaluation, I
14:53:36 13 would think that was somebody who was probably very
14:53:38 14 serious. If all they did was some very cursory,
14:53:42 15 well, I made a phone call, I'd need to see
14:53:45 16 something else.
14:53:46 17 This was all sort of a judgment call, and
14:53:48 18 this was outside of the scope of my piece of the
14:53:50 19 report or --
14:53:50 20 MS. HOUSE: Q. And you can't say whether
14:53:52 21 any TomorrowNow customer who ever evaluated another
14:53:54 22 third-party vendor would have actually chosen that
14:53:56 23 vendor. Right?
14:53:58 24 MR. McDONELL: Object to the form of the
14:53:58 25 question.

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14:54:01 1 THE WITNESS: That any customer who looked
14:54:03 2 at something -- I'm sorry, just --
14:54:10 3 MS. HOUSE: Q. You're not saying whether
14:54:12 4 any TomorrowNow customer who ever evaluated another
14:54:15 5 third-party vendor would have actually chosen that
14:54:18 6 vendor if TomorrowNow wasn't around?
14:54:20 7 MR. McDONELL: Objection. Lack of
14:54:20 8 foundation, beyond the scope of this witness's
14:54:22 9 opinion.
14:54:25 10 THE WITNESS: I can't say with certainty
14:54:26 11 what they would have done or what they would have
14:54:28 12 found out if TomorrowNow was or wasn't there.
14:54:31 13 If TomorrowNow wasn't there, they may have
14:54:33 14 done, let's say, additional due diligence with
14:54:35 15 another vendor or provider. I don't know. That's
14:54:39 16 kind of an interesting hypothetical.
14:54:43 17 MS. HOUSE: Q. And you're not intending
14:54:44 18 to opine that any TomorrowNow customer who ever
14:54:47 19 considered or mentioned self-support actually would
14:54:49 20 have chosen self-support over TomorrowNow. Right?
14:54:51 21 MR. McDONELL: Object to the form of the
14:54:52 22 question.
14:54:54 23 THE WITNESS: I'm not saying that just
14:54:55 24 because they considered it, they would have gone
14:54:57 25 with it, just as I'm not saying that just because

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14:55:00 1 they considered it, they could have done -- they
14:55:02 2 could have done it, too. I -- you know, I don't
14:55:04 3 know. You'd have to do a customer-by-customer
14:55:09 4 assessment.
14:55:10 5 MS. HOUSE: Q. On page 3, in paragraph 2
14:55:11 6 of your report, you also identify as an opinion
14:55:14 7 that you intend to offer that, quote, "Self-support
14:55:17 8 is a vibrant alternate support option given the
14:55:21 9 maturity of the vendors that help customers with
14:55:23 10 tax and regulatory updates."
14:55:25 11 That's one of the opinions you intend to
14:55:27 12 offer. Right?
14:55:28 13 A. Yes.
14:55:31 14 Q. And why did you restrict this caveat to
14:55:34 15 customers needing tax and regulatory updates?
14:55:38 16 A. Because some of those vendors that have
14:55:41 17 been out there, companies like Vertex, Sabrix,
14:55:46 18 Taxware, have been around -- they've been around 20
14:55:53 19 or 30 years, and I've seen them at a lot of
14:55:56 20 different venues and events. They're well known,
14:55:58 21 and they're -- you know, they're a -- I don't know
14:56:02 22 any way to describe it. They're definitely in the
14:56:05 23 ecosystem. There's no two ways about it.
14:56:08 24 Q. Do you understand that all the
14:56:09 25 SAP/TomorrowNow customers at issue fit the

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14:56:13 1 description of customers who need tax and
14:56:15 2 regulatory updates?
14:56:16 3 MR. McDONELL: Misstates the testimony,
14:56:18 4 incomplete hypothetical, object to the form of the
14:56:19 5 question. Assumes facts not in evidence.
14:56:24 6 THE WITNESS: Well, if they all needed it,
14:56:26 7 then they -- then I guess -- I don't know if that
14:56:31 8 changes anything in my report, other than to say
14:56:33 9 that it looks like they all could have had an
14:56:35 10 option here.
14:56:36 11 MS. HOUSE: Q. Do you know what the
14:56:37 12 makeup was of which customers in TomorrowNow's
14:56:40 13 portfolio actually had tax and regulatory update
14:56:43 14 needs --
14:56:44 15 MR. McDONELL: Object to the form.
14:56:45 16 MS. HOUSE: Q. -- versus others?
14:56:46 17 A. No, I do not know that, no. I didn't --
14:56:47 18 again, I didn't do that customer-specific review.
14:56:51 19 Q. But you did -- your opining about
14:56:53 20 self-support as a vibrant alternative support
14:56:55 21 option, is it just limited to the customers who
14:56:57 22 have tax and regulatory update needs, or is it --
14:57:01 23 are there some customers that aren't covered?
14:57:08 24 A. Okay, good question.
14:57:09 25 So is it just limited to certain

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14:57:12	1 functional applications? To some extent, yes. It	14:59:35	1 MS. HOUSE: Q. Talking about support on
14:57:15	2 would cover the -- for example, payroll	14:59:36	2 the PeopleSoft, JD Edwards, and Siebel
14:57:18	3 applications would be one that people usually think	14:59:39	3 applications --
14:57:21	4 of because of all the different wage and tax,	14:59:40	4 MR. McDONELL: Same objection.
14:57:25	5 income tax type of bodies around the country, or	14:59:41	5 MS. HOUSE: Q. -- that TomorrowNow
14:57:28	6 overseas.	14:59:42	6 supported?
14:57:29	7 It also applies to property -- excuse me,	14:59:43	7 MR. McDONELL: Same objection.
14:57:32	8 to use and sales tax, which would impact	14:59:44	8 THE WITNESS: For tax table maintenance,
14:57:35	9 applications like CRM modules where orders can be	14:59:46	9 those type of things, I am referring to those
14:57:40	10 taken and placed. It could affect accounts payable	14:59:49	10 products. If you're asking -- are you referring to
14:57:42	11 modules and accounts receivable, maybe even credit	14:59:52	11 something broader than that?
14:57:45	12 collection modules.	14:59:54	12 MS. HOUSE: Q. I'm trying to understand
14:57:47	13 Some of these vendors I think have some ad	14:59:55	13 your opinion. You talk about, self-support is a
14:57:50	14 valorem and property tax capabilities. Some have	14:59:57	14 vibrant alternative support option.
14:57:53	15 better support in some parts of the world than	14:59:59	15 Are you talking just talking about
14:57:57	16 others. So different things like T4 payroll tax	15:00:01	16 self-support in connection with the support option
14:58:02	17 rates in Canada, you would need that kind of	15:00:03	17 for the three products at issue here, the product
14:58:05	18 support as well.	15:00:07	18 lines?
14:58:06	19 So it affects a fair number of	15:00:08	19 A. I'm talking about these three products --
14:58:08	20 applications, but there are some applications that	15:00:10	20 product lines, excuse me, in this case. That's
14:58:12	21 are not impacted at all really -- or rarely, I'll	15:00:14	21 what I'm giving an opinion on.
14:58:15	22 say, impacted by tax -- tax table kinds of updates.	15:00:16	22 Q. And did -- in doing your work, did you
14:58:18	23 And that can be something as -- it could be a	15:00:18	23 attempt to limit the evaluation to the time frames
14:58:23	24 fairly mundane application like design engineering	15:00:23	24 at issue in this case?
14:58:27	25 functionality on a -- for a manufacturer.	15:00:24	25 MR. McDONELL: Object to the form.
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14:58:30	1 Q. Are you restricting your opinions about	15:00:26	1 THE WITNESS: In general, yes, I did.
14:58:32	2 the products in this case to just the products in	15:00:30	2 MS. HOUSE: Q. And what do you understand
14:58:36	3 this case, sir?	15:00:32	3 those time frames to be?
14:58:38	4 MR. McDONELL: Object to the form.	15:00:34	4 A. Roughly January 2005 through about October
14:58:39	5 THE WITNESS: To the products like	15:00:39	5 2008.
14:58:41	6 JD Edwards, PeopleSoft, Siebel type of products?	15:00:43	6 Q. And so none of your opinions or backup
14:58:44	7 MS. HOUSE: Q. Yes.	15:00:47	7 relate to any period outside of that time frame.
14:58:46	8 A. I think my comment would be, the overall	15:00:50	8 Is that right?
14:58:51	9 comment about someone may reevaluate the	15:00:50	9 MR. McDONELL: Misstates the testimony,
14:58:54	10 relationship would be true regardless of the	15:00:51	10 object to the form.
14:58:55	11 vendors involved in this case. It would apply to	15:00:53	11 THE WITNESS: I'm not saying that. Some
14:58:58	12 other ERP vendors as well, is what I'm saying.	15:00:54	12 of the -- I believe even some of the references I
14:59:02	13 Q. Your answer seemed to go beyond the	15:00:57	13 have in here may go back further. I may even have
14:59:04	14 products at issue in this case, and I want to make	15:01:00	14 a couple from 2009 in this report.
14:59:06	15 sure that -- are you intending to opine about	15:01:03	15 MS. HOUSE: Q. And the ones for after
14:59:09	16 products beyond the products in this case?	15:01:05	16 January 2008, 2009, do you understand -- I'm sorry,
14:59:12	17 A. No. I'm saying, this point is absolutely	15:01:09	17 after October 2008, do you understand that those
14:59:15	18 valid for the products in this case. And it may	15:01:13	18 would be relevant to this case?
14:59:18	19 also apply -- just happens that it may apply to	15:01:15	19 MR. McDONELL: Object to the form.
14:59:21	20 other ERP vendors' products as well.	15:01:18	20 THE WITNESS: I think it depends on what
14:59:24	21 Q. And the vibrant alternative support	15:01:20	21 we're looking at. If it was someone's report that
14:59:26	22 options, are you trying to just limit them to the	15:01:22	22 covered things that happened in that time frame,
14:59:29	23 support required in this case?	15:01:24	23 even though it was published in 2009, it still may
14:59:32	24 MR. McDONELL: Asked and answered,	15:01:27	24 be relevant.
14:59:33	25 incomplete hypothetical. Overly broad.	15:01:29	25 MS. HOUSE: Q. Well, we'll get to them.

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15:01:33 1 Now, in coming to your conclusions about
15:01:35 2 the purportedly vibrant support options available
15:01:37 3 in this time frame for the products at issue, you
15:01:41 4 didn't yourself do any survey or study of those
15:01:44 5 purported options. Right?
15:01:45 6 MR. McDONELL: Object to the form.
15:01:46 7 Argumentative.
15:01:47 8 THE WITNESS: I didn't do a formal survey,
15:01:49 9 no.
15:01:50 10 MS. HOUSE: Q. That was Mr. Clarke's job?
15:01:52 11 MR. McDONELL: Same objection.
15:01:53 12 THE WITNESS: For the self-support
15:01:56 13 options?
15:01:57 14 MS. HOUSE: Q. For any of the support
15:01:58 15 options that are in this purportedly vibrant
15:02:02 16 market?
15:02:02 17 MR. McDONELL: Same objections.
15:02:13 18 THE WITNESS: My report covers a bit more
15:02:15 19 detail in the self-support area than -- but I do
15:02:22 20 not go into great detail on the other third-party
15:02:26 21 maintenance options.
15:02:27 22 MS. HOUSE: Q. You don't purport to offer
15:02:28 23 a full description of all the available support
15:02:30 24 options to Oracle support at the relevant time, do
15:02:32 25 you?

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15:02:34 1 MR. McDONELL: Vague and ambiguous.
15:02:37 2 THE WITNESS: I gave a general overview of
15:02:39 3 what the options were at that -- during roughly
15:02:42 4 that same time frame.
15:02:44 5 MS. HOUSE: Q. You don't claim knowledge
15:02:45 6 about all the specifics of any of the purported
15:02:48 7 alternative support vendors, do you?
15:02:51 8 MR. McDONELL: Vague and ambiguous.
15:02:52 9 THE WITNESS: That was not the -- within
15:02:54 10 the scope of my assignment.
15:02:55 11 MS. HOUSE: Q. You don't know what
15:02:56 12 products they cover. Correct?
15:02:59 13 A. I have some general understanding.
15:03:03 14 Q. Do you know what geography they cover?
15:03:06 15 You don't cover that, do you?
15:03:07 16 A. That was, again, outside the scope of my
15:03:10 17 report.
15:03:11 18 Q. Did you investigate or relay as part of
15:03:16 19 your report the financial viability of the other
15:03:19 20 alternatives that you reference?
15:03:20 21 A. I did not do a financial assessment of
15:03:23 22 these other alternatives.
15:03:26 23 Q. Did you provide any analysis of what the
15:03:28 24 pricing was on the offers that they have?
15:03:34 25 A. No. I did not do a formal analysis on

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15:03:36 1 that.
15:03:39 2 Q. And you didn't compare and contrast any
15:03:42 3 offer of any alternative support vendor to the
15:03:45 4 offers at the time of TomorrowNow, did you?
15:03:54 5 A. I did not do --
15:04:01 6 MR. McDONELL: Could we have the question
15:04:02 7 back, please?
15:04:04 8 THE WITNESS: Yes, please, I'm sorry.
15:04:05 9 MS. HOUSE: Q. You did not provide
15:04:07 10 information that would allow one to consider the
15:04:12 11 offering of TomorrowNow at the time versus the
15:04:16 12 offering of any other alternative vendor at the
15:04:18 13 time. Right?
15:04:19 14 A. I did not provide that research in my
15:04:22 15 report.
15:04:23 16 Q. You indicate at the end of this summary --
15:04:27 17 and I've already asked you that. Yay.
15:04:33 18 Now, your report doesn't cite any of the
15:04:35 19 documents or testimony in this case from SAP or
15:04:38 20 TomorrowNow or Oracle assessing the third-party or
15:04:43 21 self-support alternatives to TomorrowNow that they
15:04:45 22 did. Right?
15:04:47 23 MR. McDONELL: The document speaks for
15:04:48 24 itself.
15:04:49 25 THE WITNESS: In general, that would be

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15:04:50 1 correct.
15:04:50 2 MS. HOUSE: Q. So you didn't rely on any
15:04:52 3 of the evidence -- the contemporaneous evidence
15:04:57 4 from the people actually in the market?
15:05:00 5 A. If you're referring to the individual
15:05:01 6 customers, no.
15:05:02 7 Q. Or the companies.
15:05:05 8 A. Oh, from SAP and Oracle?
15:05:07 9 Q. Or TomorrowNow.
15:05:09 10 A. Outside of what I've slowed on the
15:05:10 11 Appendix C, no, I didn't.
15:05:13 12 Q. So do you understand that they were living
15:05:16 13 this on a daily basis?
15:05:18 14 MR. McDONELL: Vague and ambiguous.
15:05:19 15 Object to the form.
15:05:20 16 MS. HOUSE: Q. They were living the
15:05:21 17 competition for the support services that
15:05:23 18 TomorrowNow offered, they were out there facing it.
15:05:26 19 Right?
15:05:27 20 MR. McDONELL: Object to the form.
15:05:29 21 THE WITNESS: Yes, I'm aware of that.
15:05:30 22 MS. HOUSE: Q. And do you understand that
15:05:33 23 they might have a better understanding of what was
15:05:35 24 actually their competition than you?
15:05:38 25 MR. McDONELL: Argumentative, object to

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15:05:39 1 the form of the question.
15:05:41 2 THE WITNESS: I have no doubt that they
15:05:42 3 had people, feet on the street, if you will, that
15:05:47 4 were close to individual customers. And my
15:05:52 5 viewpoint and the viewpoint in my report is to take
15:05:55 6 a more macro view of what was going on in the
15:05:59 7 marketplace. And that's what my report's all
15:06:01 8 about.
15:06:02 9 MS. HOUSE: Q. But when you're trying to
15:06:03 10 opine about the vibrancy of the alternative support
15:06:07 11 market for the very services of TomorrowNow, why
15:06:12 12 wouldn't you look at what TomorrowNow thought its
15:06:14 13 competition was?
15:06:16 14 MR. McDONELL: Beyond the scope of his
15:06:17 15 report. Object to the form.
15:06:21 16 THE WITNESS: I think when I used the term
15:06:22 17 vibrant, I was referring to the self-support
15:06:25 18 option.
15:06:26 19 Yeah, the self-support option is a vibrant
15:06:29 20 alternative support option.
15:06:30 21 That's all I was referring to with regard
15:06:33 22 to vibrancy, I guess.
15:06:35 23 MS. HOUSE: Q. Okay. So you're not
15:06:36 24 opining that the third-party support market itself
15:06:38 25 was vibrant?

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15:06:39 1 MR. McDONELL: Object to the form.
15:06:43 2 THE WITNESS: In my report, I'm not
15:06:45 3 offering an opinion about the -- the robustness or
15:06:52 4 whatever of that particular market.
15:06:53 5 MS. HOUSE: Q. And in your opinions about
15:06:56 6 the self-support option, you did not consider any
15:07:00 7 of the evidence of Oracle or TomorrowNow about
15:07:03 8 whether self-support was a realistic option to
15:07:06 9 TomorrowNow. Right?
15:07:07 10 MR. McDONELL: Same objections.
15:07:12 11 THE WITNESS: I didn't consider those --
15:07:13 12 like -- you're talking about like these type of
15:07:16 13 documents? No, I did not consider them.
15:07:23 14 MS. HOUSE: Q. In coming to your
15:07:25 15 conclusions, do you understand that SAP conducted
15:07:30 16 an analysis before acquiring TomorrowNow about
15:07:34 17 TomorrowNow's role in the alternative support
15:07:37 18 market for Oracle applications?
15:07:40 19 MR. McDONELL: Beyond the scope of his
15:07:41 20 report, object to the form.
15:07:45 21 THE WITNESS: I believe in one of those
15:07:47 22 depositions, there was a -- excuse me, there was
15:07:50 23 either a business plan or a market assessment or
15:07:53 24 something that they did that was referenced in one
15:07:55 25 of those depositions.

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15:07:56 1 MS. HOUSE: Q. And do you have any doubt
15:07:58 2 that SAP knows how to do business research and
15:08:01 3 figure out where TomorrowNow fits into the market
15:08:05 4 for alternative support on Oracle-owned
15:08:08 5 applications?
15:08:09 6 MR. McDONELL: Object to the form. Vague
15:08:10 7 and ambiguous. Beyond the scope.
15:08:13 8 THE WITNESS: I don't -- I don't doubt
15:08:16 9 that they did their own due diligence on this.
15:08:19 10 MS. HOUSE: Q. And would it surprise you
15:08:21 11 to learn that SAP concluded that TomorrowNow was
15:08:24 12 the only meaningful North American competitor for
15:08:28 13 the service of PeopleSoft and JD Edwards products?
15:08:32 14 MR. McDONELL: Object to the form.
15:08:33 15 Incomplete hypothetical, vague as to time, beyond
15:08:36 16 the scope.
15:08:38 17 THE WITNESS: I believe that someone
15:08:42 18 probably prepared an assessment like that, and
15:08:44 19 somebody may have actually come to that opinion. I
15:08:47 20 can -- I guess I -- if you had a document like
15:08:55 21 that, I wouldn't be surprised.
15:08:57 22 MS. HOUSE: Q. And based on your
15:09:01 23 experience in the industry, does that surprise you,
15:09:04 24 that conclusion?
15:09:06 25 Would you have any reason to disagree that

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15:09:08 1 as of January 2005, TomorrowNow was the only
15:09:11 2 meaningful North American competitor for the
15:09:13 3 support of PeopleSoft and JD Edwards products?
15:09:16 4 MR. McDONELL: Vague and ambiguous term,
15:09:17 5 objection, beyond the scope.
15:09:20 6 THE WITNESS: And again, not part of my
15:09:21 7 report, but I'll answer your question.
15:09:23 8 Do I -- would I be surprised? No. And
15:09:27 9 that's mostly because they may have been one of the
15:09:33 10 bigger fish in the pond at that time, and there's a
15:09:36 11 little twist on your question about in North
15:09:38 12 America.
15:09:39 13 I know there -- I'm pretty sure there was
15:09:42 14 another vendor out there that may have had Indian
15:09:47 15 roots that may have also been providing some
15:09:49 16 support in that space as well. So how they define
15:09:51 17 that market, that would be up to whoever wrote that
15:09:53 18 document, but it wouldn't surprise me that they
15:09:55 19 would be listed as one of the top players in that
15:09:59 20 space.
15:09:59 21 MS. HOUSE: Q. And, you know, you're in
15:10:01 22 this space. That's one of the reasons --
15:10:04 23 A. Right.
15:10:04 24 Q. -- that you're purporting to be an expert
15:10:06 25 here.

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15:10:07 1 In your experience at that point in time,
15:10:10 2 wasn't TomorrowNow the only viable support option
15:10:11 3 for alternatives to vendor support on PeopleSoft
15:10:16 4 and JD Edwards products?
15:10:18 5 MR. McDONELL: Vague and ambiguous, object
15:10:19 6 to the term "viable."
15:10:22 7 THE WITNESS: I wouldn't say it was the
15:10:22 8 only option. There were independent consultants
15:10:27 9 and small little consultancies, probably not as big
15:10:31 10 as TomorrowNow, but there were others out there
15:10:33 11 that I'm aware of and I believe -- now that I think
15:10:36 12 about it, I think it was a company called Hexaware
15:10:37 13 was the one that I think had an office in the US,
15:10:41 14 but it had most of its people in India, and that
15:10:44 15 may have been another option.
15:10:45 16 So I am generally aware that there were
15:10:47 17 some options out there, but I'm also saying, I'm
15:10:50 18 also aware that TomorrowNow was probably one of the
15:10:52 19 better known and probably one of the bigger ones
15:10:55 20 that was available at that time.
15:10:56 21 So I'm not disagreeing with -- I'm not
15:10:58 22 totally disagreeing with what this SAP person has
15:11:01 23 written in -- you know, involving that time frame.
15:11:05 24 MS. HOUSE: Q. And if TomorrowNow wrote
15:11:09 25 in July of 2006 that their competition, the number

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15:11:15 1 one competition that TomorrowNow faced was Oracle,
15:11:17 2 with no close second, would that surprise you?
15:11:20 3 MR. McDONELL: Object to the form of the
15:11:21 4 question. Assumes facts not in evidence.
15:11:28 5 THE WITNESS: Again, with the -- with the
15:11:32 6 only caveat around that one company I was
15:11:35 7 mentioning before, possibly Hexaware, no, that
15:11:37 8 wouldn't -- that wouldn't give me a real big
15:11:40 9 surprise at all.
15:11:49 10 MS. HOUSE: Q. Now, you also didn't
15:11:52 11 consider any of the evidence that Oracle had about
15:11:56 12 assessing the market for support on the PeopleSoft
15:11:59 13 and JD Edwards and Siebel products that it had
15:12:02 14 acquired. Right?
15:12:04 15 A. That I did not consider that. That is
15:12:06 16 correct.
15:12:11 17 Q. And would you believe that Oracle would
15:12:13 18 know better than you who its support competition
15:12:18 19 actually was?
15:12:19 20 MR. McDONELL: Calls for speculation,
15:12:19 21 object to the form of the question.
15:12:22 22 THE WITNESS: I think Oracle would have
15:12:23 23 more precise data points than I would, because they
15:12:29 24 know their customers and their customer records and
15:12:31 25 so forth.

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15:12:35 1 MS. HOUSE: Q. And in coming to your
15:12:37 2 conclusions about the support options available at
15:12:40 3 the relevant time on the relevant products, you
15:12:43 4 didn't do any analysis of the attractiveness of any
15:12:47 5 particular option to the customers at issue in the
15:12:50 6 case. Right?
15:12:51 7 MR. McDONELL: Beyond the scope, object to
15:12:52 8 the form.
15:12:56 9 THE WITNESS: Specific to individual
15:12:57 10 customers, no. But I did speak, though, to -- in
15:12:59 11 the report about how different customers at
15:13:04 12 different times in their relationship may want
15:13:06 13 different things out of a support arrangement with
15:13:09 14 a third party or what have you.
15:13:11 15 And so I do talk about, the needs do
15:13:14 16 change over time. And in that respect, I would say
15:13:16 17 I did cover that. But otherwise, down to
15:13:19 18 individual customers, no.
15:13:21 19 MS. HOUSE: Q. You don't know if any
15:13:22 20 particular TomorrowNow customer even knew about any
15:13:25 21 alternative options, do you?
15:13:26 22 MR. McDONELL: Same objection.
15:13:37 23 THE WITNESS: I guess in general, I don't
15:13:38 24 know what these individual customers knew. I mean,
15:13:42 25 in general, no.

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15:13:43 1 MS. HOUSE: Q. And you don't know what
15:13:44 2 any TomorrowNow customer thought about any
15:13:46 3 potential alternatives to TomorrowNow.
15:13:49 4 MR. McDONELL: Same objection.
15:13:50 5 MS. HOUSE: Q. Right?
15:13:50 6 MR. McDONELL: Same objection.
15:13:56 7 THE WITNESS: I'm sorry, I was getting --
15:13:57 8 I was focusing on not spilling any water. Sorry
15:14:01 9 about that.
15:14:04 10 MS. HOUSE: Q. And you don't know what
15:14:05 11 any TomorrowNow customer thought about any
15:14:06 12 potential alternatives to TomorrowNow, do you?
15:14:09 13 A. No. I don't.
15:14:12 14 Q. But you are aware that the specific
15:14:14 15 customers at issue didn't choose any other vendor;
15:14:19 16 they chose TomorrowNow. Right?
15:14:20 17 MR. McDONELL: Vague as to time, Counsel.
15:14:23 18 Object to the form of the question.
15:14:24 19 MS. HOUSE: Q. When they left Oracle or
15:14:26 20 PeopleSoft support, they didn't go anywhere else.
15:14:29 21 They went to TomorrowNow. Right?
15:14:29 22 MR. McDONELL: Same objections.
15:14:31 23 THE WITNESS: Well, I would assume that
15:14:34 24 would be true of all the customers that we looked
15:14:36 25 at in that one declaration, because they're the

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15:14:41 1 ones that are subject to this case. So I think in
15:14:44 2 that regard, you would have to assume that from
15:14:48 3 your question.
15:14:53 4 MS. HOUSE: Q. So we know the vendor that
15:14:55 5 they chose. Right?
15:14:56 6 MR. McDONELL: Objection -- asked and
15:14:57 7 answered. Object to the form.
15:14:59 8 THE WITNESS: Yes. That vendor would be
15:15:01 9 TomorrowNow.
15:15:06 10 MS. HOUSE: Q. Now, going back to your
15:15:07 11 summary of opinions, in paragraph 2 on page 3, you
15:15:14 12 state that -- and it's about midway -- Mr. Meyer
15:15:20 13 incorrectly assumes that all ERP customers want the
15:15:23 14 same level of vendor-provided support throughout
15:15:26 15 the useful life of the software.
15:15:28 16 Do you see that?
15:15:29 17 A. Yes.
15:15:31 18 Q. Is that what you understand Mr. Meyer
15:15:34 19 assumed?
15:15:34 20 A. I didn't see -- in my reading of his
15:15:37 21 report, I didn't see anything that would suggest
15:15:39 22 otherwise.
15:15:39 23 Q. So do you not understand that Mr. Meyer,
15:15:42 24 using these customers, assumed that they wanted the
15:15:48 25 level of support that they got when they went to

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15:15:50 1 TomorrowNow?
15:16:02 2 MR. McDONELL: Object to the form of the
15:16:02 3 question. Vague and confusing.
15:16:05 4 THE WITNESS: I'm referring to a few
15:16:07 5 things here. One was, I'm not sure Mr. Meyer
15:16:11 6 looked at -- did the customer really want future
15:16:18 7 product upgrades and releases after they -- or as
15:16:22 8 part of their decision to move away from Oracle
15:16:26 9 support. So that was one of the issues that I was
15:16:30 10 focusing in on here.
15:16:33 11 MS. HOUSE: Q. And do you understand that
15:16:35 12 Mr. Meyer actually looked at the customer evidence?
15:16:38 13 A. I understand that he did.
15:16:39 14 Q. And you didn't. Right?
15:16:41 15 A. I didn't --
15:16:43 16 MR. McDONELL: Calls for speculation about
15:16:45 17 what Mr. Meyer -- well, I withdraw the objection.
15:16:49 18 MS. HOUSE: Q. Now, do you understand
15:16:50 19 that TomorrowNow claimed to provide equal or better
15:16:54 20 service to Oracle on the Oracle -- I'm sorry.
15:16:59 21 Do you understand that TomorrowNow claimed
15:17:01 22 to provide equal or better service to Oracle?
15:17:05 23 MR. McDONELL: Vague as to time, vague and
15:17:07 24 ambiguous.
15:17:08 25 THE WITNESS: Equal or better service to

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15:17:10 1 Oracle customers. Is that what you mean?
15:17:12 2 MS. HOUSE: Q. No, to the Oracle support.
15:17:15 3 A. Oh, equal or better to Oracle support.
15:17:17 4 Okay.
15:17:17 5 MR. McDONELL: Can you restate, Counsel,
15:17:18 6 please?
15:17:19 7 MS. HOUSE: Q. Do you understand -- this
15:17:19 8 was the big marketing thing of TomorrowNow. I hope
15:17:21 9 you understand that they were claiming to provide
15:17:24 10 equal or better support to Oracle. Do you
15:17:26 11 understand that?
15:17:28 12 MR. McDONELL: Argumentative. Object to
15:17:28 13 the form of the question.
15:17:29 14 THE WITNESS: Yes. I -- they made -- they
15:17:33 15 made claims that they could provide better support.
15:17:35 16 MS. HOUSE: Q. And do you understand that
15:17:39 17 customers went to them with those expectations? We
15:17:44 18 saw that in some of the declarations. Right?
15:17:47 19 MR. McDONELL: Beyond the scope, object to
15:17:47 20 the form.
15:17:53 21 THE WITNESS: The declarations, some of
15:17:55 22 those, I think, did indicate they went to
15:17:57 23 TomorrowNow, and they believed, or whatever they
15:17:59 24 perceived they were going to get, equal or better
15:18:03 25 support.

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15:18:04 1 As far as -- but does it cover the
15:18:08 2 question about what did the customers think about
15:18:11 3 needing new product upgrades, releases, we haven't
15:18:15 4 talked about that.
15:18:15 5 MS. HOUSE: Q. Okay. But let's just talk
15:18:18 6 about the -- whether they would have accepted
15:18:20 7 lesser support.
15:18:21 8 Do you have any understanding whether any
15:18:23 9 of the customers who went to the vendor who's
15:18:25 10 offering equal or better support, whether they
15:18:28 11 would have gone to a vendor who provided less than
15:18:30 12 equal support?
15:18:32 13 MR. McDONELL: Object to the form of the
15:18:32 14 question. Vague and ambiguous.
15:18:36 15 THE WITNESS: If there's a company -- a
15:18:38 16 customer who has, for example, heavily modified
15:18:42 17 software, is on a really old release of the
15:18:44 18 product, they're not probably a good candidate for
15:18:47 19 staying on vendor-provided support, because they're
15:18:50 20 just not getting a lot of usefulness out of it, and
15:18:52 21 they may consider another option.
15:18:54 22 MS. HOUSE: Q. But you don't know whether
15:18:55 23 any of the customers at issue in this case who were
15:18:58 24 enticed with marketing that said, we're going to
15:19:01 25 provide you equal or better support, you don't know

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15:19:04 1 whether any of them would have accepted
15:19:06 2 TomorrowNow's offer if it hadn't been for equal or
15:19:09 3 better support. Right?
15:19:10 4 MR. McDONELL: Object to the form, beyond
15:19:11 5 the scope.
15:19:12 6 THE WITNESS: And again, I understand the
15:19:14 7 question. And if you didn't -- I didn't do the
15:19:17 8 customer-by-customer analysis, so can't answer what
15:19:20 9 specific customers in this case did -- or were
15:19:22 10 influenced by, let's put it that way.
15:19:25 11 MS. HOUSE: Q. You would agree that some
15:19:26 12 of the alternatives that you posit provide for
15:19:28 13 lesser support than what TomorrowNow was marketing.
15:19:31 14 Right?
15:19:32 15 MR. McDONELL: Vague and ambiguous.
15:19:33 16 Object to the form.
15:19:37 17 THE WITNESS: Well, lesser is a bit of a
15:19:39 18 qualitative word. I will -- I'll run with that for
15:19:42 19 a moment and say that some of these other options,
15:19:44 20 like tax table upgrade, if that's all you got from
15:19:48 21 somebody like Sabrix, it would be less than what
15:19:51 22 Oracle or TomorrowNow would have offered.
15:19:53 23 If you did self-support, that's a little
15:19:56 24 harder for me to validate one way or the other,
15:19:59 25 because some companies could have just unbelievable

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15:20:02 1 technology teams.
15:20:03 2 But generally, if you wanted -- if a
15:20:08 3 customer wanted the full gamut of things, they
15:20:13 4 probably couldn't get it all from someone -- and
15:20:15 5 that full gamut would include new product upgrades
15:20:18 6 releases, they'd have to probably get that from the
15:20:21 7 vendor themselves.
15:20:22 8 MS. HOUSE: Q. But just looking at the
15:20:23 9 support piece, not the upgrades. Okay?
15:20:26 10 A. All right.
15:20:26 11 Q. Do you have any way -- do you intend to
15:20:29 12 opine that any of the customers at issue here
15:20:32 13 actually would have chosen something that was
15:20:35 14 lesser than what TomorrowNow offered then instead
15:20:40 15 of TomorrowNow?
15:20:41 16 MR. McDONELL: Object to the question as
15:20:42 17 vague and confusing, assumes facts not in evidence,
15:20:46 18 ambiguous as to the use of your term "support" in
15:20:49 19 this context.
15:20:51 20 THE WITNESS: In the question you asked me
15:20:53 21 and the way I understand it, I'm -- I don't think
15:20:55 22 I'm going to be offering an opinion about that --
15:20:58 23 where there's a lesser level of capability of
15:21:01 24 service than TomorrowNow, but I may not be
15:21:03 25 understanding the -- the full parameters of what

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15:21:06 1 you're asking me right now. That's all.
15:21:08 2 MS. HOUSE: Q. Let's see if I can do it
15:21:09 3 better in another question.
15:21:11 4 You don't know whether the customers at
15:21:14 5 issue in this case specifically wanted a level of
15:21:17 6 support that was comparable to Oracle's, do you?
15:21:20 7 MR. McDONELL: Object to the form of the
15:21:21 8 question, vague and ambiguous, beyond the scope.
15:21:24 9 THE WITNESS: I don't know -- I didn't do
15:21:26 10 the customer-by-customer analysis. So no, I don't
15:21:28 11 know what any one individual customer wanted from a
15:21:31 12 level-of-service perspective.
15:21:33 13 MS. HOUSE: Q. You know that that's what
15:21:35 14 they were provided by TomorrowNow, but you don't
15:21:38 15 know whether they would have accepted less. Right?
15:21:41 16 MR. McDONELL: Same objections. Asked and
15:21:42 17 answered.
15:21:44 18 THE WITNESS: That's somewhat speculative.
15:21:45 19 But yes, I don't know what they would have
15:21:48 20 accepted -- what they would have or could have or
15:21:50 21 what their financial points were on that. I don't
15:21:52 22 know. I didn't do that analysis.
15:21:54 23 MS. HOUSE: Q. Okay. The third summary
15:21:56 24 opinion that you intend to offer is that, quote:
15:22:00 25 "Competitive switching marketing programs

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15:22:02 1 are not unusual in the ERP industry and
15:22:05 2 generally do not produce significant gains,
15:22:06 3 especially among well-known competitors with
15:22:10 4 large market shares."
15:22:11 5 Correct?
15:22:12 6 A. Correct.
15:22:13 7 MR. McDONELL: Counsel, because I see
15:22:15 8 you're moving to a topic, we've been going quite a
15:22:21 9 while. If we could take a short break.
15:22:23 10 THE VIDEO OPERATOR: Going off the record,
15:22:24 11 the time now is 3:22. This also will be the
15:22:31 12 conclusion of Tape 3.
15:22:32 13 (Recess from 3:22 p.m. to 3:45 p.m.)
15:45:47 14 THE VIDEO OPERATOR: The time now is 3:45,
15:45:49 15 we're back on the videotape record. This also
15:45:52 16 marks the beginning of Tape 4. Please proceed.
15:45:56 17 MS. HOUSE: And before we broke, we were
15:45:58 18 moving into your third summary opinion on
15:46:00 19 competitive switching programs.
15:46:01 20 In your report, you list all the programs
15:46:03 21 you intend to rely on to support your opinion about
15:46:07 22 switching programs?
15:46:09 23 THE WITNESS: I put -- well, 3 to 7 in
15:46:13 24 there, and yes, those are the ones I'm relying on,
15:46:16 25 yes.

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15:46:16 1 MS. HOUSE: Q. Okay. On page 48, you
15:46:18 2 list three programs. Correct?
15:46:20 3 A. Correct.
15:46:22 4 Q. And those are the ones around the time
15:46:24 5 that Oracle acquired PeopleSoft. Is that right?
15:46:26 6 A. Yes.
15:46:28 7 Q. And they're by Microsoft, QAD and Lawson.
15:46:31 8 Is that right?
15:46:32 9 A. Yes.
15:46:33 10 Q. What analysis if any did you undertake to
15:46:36 11 determine whether any of these three programs was
15:46:37 12 similar to Safe Passage?
15:46:43 13 A. What I did was try and find out some of
15:46:46 14 the economic particulars of the deals -- for
15:46:49 15 example, like discounts or trade-in credits, those
15:46:52 16 kind of things -- or whether there would be any
15:46:54 17 sort of implementation -- not implementation --
15:47:01 18 migration support, excuse me, if any of that
15:47:04 19 applied.
15:47:05 20 Q. Did any of the three programs that you
15:47:07 21 list have a TomorrowNow-type alternative support on
15:47:11 22 the existing PeopleSoft or JD Edwards applications
15:47:14 23 piece that was in the SAP Safe Passage program?
15:47:19 24 A. One that I referenced here was a program
15:47:21 25 that Lawson and CIBER did, and I found indications

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15:47:25 1 that -- or some mention in a press document that
15:47:29 2 they would offer maintenance support available at a
15:47:33 3 favorable discount.
15:47:35 4 Q. And where is that support?
15:47:37 5 A. That was in this document, Footnote 66.
15:47:43 6 Q. And did you understand that the -- is
15:47:46 7 Footnote 66 the only support for your belief that
15:47:50 8 there may have been a support element to that
15:47:52 9 offering?
15:47:54 10 A. That was the only one that I either
15:47:56 11 referenced or the only one I found or what have
15:47:59 12 you. But yes, that is the reference for it.
15:48:01 13 Q. And do you have any understanding what the
15:48:04 14 favorable discount was?
15:48:05 15 A. No, I do not.
15:48:07 16 Q. Do you know if it was 50 percent or more?
15:48:13 17 MR. McDONELL: Asked and answered.
15:48:14 18 THE WITNESS: I don't know the exact terms
15:48:16 19 on that. I just know what I read.
15:48:18 20 MS. HOUSE: Q. And you understand that
15:48:20 21 SAP offered customers who would switch to SAP free
15:48:24 22 service from TomorrowNow. Right?
15:48:26 23 MR. McDONELL: Incomplete hypothetical,
15:48:28 24 object to the form.
15:48:30 25 THE WITNESS: It was my understanding that

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15:48:33 1 they would offer pricing I believe at 50 percent,
15:48:36 2 although they may have discounted it down to zero.
15:48:40 3 I don't know any of the particulars on individual
15:48:43 4 deals. But I think generally, and that's what I
15:48:45 5 refer to in my report, that they offered it -- as I
15:48:49 6 said on here on page 50, that it was provided by
15:48:52 7 TomorrowNow at 50 percent of the fee previously
15:48:55 8 paid to Oracle or PeopleSoft.
15:48:58 9 MS. HOUSE: Q. So did you not know that
15:49:00 10 there were modules of the Safe Passage program
15:49:06 11 where the TomorrowNow option was offered free to
15:49:09 12 customers who agreed to migrate to SAP?
15:49:14 13 MR. McDONELL: Asked and answered, object
15:49:14 14 to the form. Misstates the testimony, assumes
15:49:17 15 facts.
15:49:18 16 THE WITNESS: If those were in particular
15:49:20 17 customer deals, I didn't have access to that, or I
15:49:22 18 didn't see it. And so I don't know if they did
15:49:27 19 that or not.
15:49:28 20 MS. HOUSE: Q. And would you agree that
15:49:31 21 free is even better than 50 percent off?
15:49:34 22 MR. McDONELL: Object to the form.
15:49:36 23 THE WITNESS: I think any consumer of
15:49:38 24 anything either on the consumer or business level
15:49:41 25 would find "free" a very compelling kind of term.

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15:49:44 1 MS. HOUSE: Q. And if you have a
15:49:45 2 migration that's going to go between 6 and 24
15:49:49 3 months, getting free service over that period's
15:49:51 4 pretty good. Right?
15:49:53 5 MR. McDONELL: Vague and ambiguous, object
15:49:53 6 to the form.
15:49:57 7 THE WITNESS: That term -- excuse me, that
15:50:00 8 discount, or -- whatever you want to call that,
15:50:02 9 that free service, would be interesting, but I
15:50:06 10 think you'd want to take a look at that in light of
15:50:08 11 the total economics of the deal, if that was part
15:50:12 12 of one of these switching transactions to
15:50:15 13 another -- like to SAP's product.
15:50:20 14 MS. HOUSE: Q. And you didn't do that,
15:50:22 15 though. Right?
15:50:23 16 A. I didn't do that on a customer-by-customer
15:50:25 17 basis, no.
15:50:28 18 Q. So when you were making your opinions
15:50:31 19 about the Safe Passage program, you did not
15:50:34 20 understand that a portion of the program involved
15:50:38 21 offering TomorrowNow's service for free. Is that
15:50:41 22 correct?
15:50:41 23 MR. McDONELL: Asked and answered.
15:50:45 24 THE WITNESS: I did not -- regardless of
15:50:49 25 the discount offered, my report takes the view that

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15:50:52 1 a customer is going to take a look at all of the
15:50:55 2 economics and the total cost of ownership. Whether
15:50:58 3 that component was discounted down to zero or
15:51:01 4 whether someone got a better discount on the
15:51:04 5 license price or something else would all have to
15:51:06 6 be factored in the economics of the deal.
15:51:10 7 MS. HOUSE: Q. But before we sat down a
15:51:11 8 few minutes ago, you didn't understand that a point
15:51:15 9 of the Safe Passage program involved offering
15:51:17 10 TomorrowNow support for free to customers migrating
15:51:19 11 to SAP, did you?
15:51:20 12 MR. McDONELL: Argumentative, assumes
15:51:21 13 facts not in evidence, incomplete hypothetical.
15:51:24 14 Object to the form.
15:51:27 15 THE WITNESS: Before we got in here, I
15:51:29 16 was -- I wrote my report on the stated goals, which
15:51:33 17 I referenced I believe on 50, page 50, that it was
15:51:37 18 going to be a 50 percent discount against what the
15:51:40 19 customer was paying to Oracle. So no, I did not
15:51:44 20 know about that zero offering.
15:51:48 21 MS. HOUSE: Q. And other -- the switching
15:52:02 22 programs that you list on page 49, we've already
15:52:06 23 talked about the three.
15:52:07 24 A. Yes.
15:52:07 25 Q. Okay. The ones that you list on page 49

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15:52:10 1 are not related to the customers or products at
15:52:12 2 issue in this case. Right?
15:52:14 3 MR. McDONELL: Object to the form of the
15:52:14 4 question. It's vague and ambiguous.
15:52:17 5 THE WITNESS: For the most part, they
15:52:19 6 are -- well, they're kind of an amalgam. The
15:52:26 7 Oracle OFF SAP program is relevant, and the
15:52:31 8 NetSuite deal is tangentially relevant, because it
15:52:34 9 does involve SAP, although it's outside the date
15:52:38 10 range.
15:52:38 11 MS. HOUSE: Q. I'm talking about the
15:52:39 12 products that are Siebel, PeopleSoft and
15:52:41 13 JD Edwards.
15:52:41 14 A. Under that definition, those four cover
15:52:45 15 different products.
15:52:46 16 Q. And the only information that you provide
15:52:54 17 on the programs that are competing with Safe
15:52:56 18 Passage that you cite on the prior page is the
15:53:00 19 information that's listed in Footnote 63 through
15:53:03 20 66. Is that right?
15:53:06 21 A. Yes.
15:53:07 22 Q. And that's an article by Debra Kelly, and
15:53:10 23 then the Microsoft and Lawson company releases on
15:53:13 24 their offerings. Right?
15:53:15 25 A. Yes.

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15:53:36 1 Q. I'm going to show you the Debra Kelly one.
15:53:38 2 If you could show me what portion of the article
15:53:40 3 leads you to you believe that CIBER is offering
15:53:42 4 support, I'd appreciate it.
15:53:45 5 A. Okay.
15:53:47 6 MR. McDONELL: Copy for us, Counsel?
15:53:49 7 MS. HOUSE: No, sorry.
15:53:59 8 MS. MacDONALD: Actually, we have a
15:54:00 9 non-Bates numbered copy.
15:54:01 10 MR. McDONELL: That would be fine.
15:54:02 11 MS. HOUSE: I don't even have a copy.
15:54:16 12 (Discussion off the record.)
15:54:25 13 MS. MacDONALD: I had notes on it, I'm
15:54:25 14 sorry.
15:54:27 15 MR. McDONELL: Okay. Are you going to at
15:54:28 16 least mark it as an exhibit?
15:54:30 17 MS. HOUSE: I will after he -- I'm happy
15:54:31 18 to do so.
15:54:33 19 MR. McDONELL: Whatever you want. It
15:54:35 20 would just be normal.
15:54:37 21 MS. HOUSE: Okay. I don't want to be
15:54:38 22 abnormal. At least not in here.
15:54:40 23 Let's mark it as 3252.
15:54:44 24 (Deposition Exhibit 3252 was marked for
15:54:47 25 identification.)

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15:55:00 1 THE WITNESS: I think that the article we
15:55:03 2 want actually is -- is the Footnote 66 article, if
15:55:09 3 you want to know where it said that -- the one
15:55:14 4 about the migration?
15:55:17 5 MS. HOUSE: Q. Okay. Here, let me --
15:55:22 6 A. Sorry, I just put your sticker on there.
15:55:27 7 Q. It's all right. Watch, watch, no worries.
15:55:29 8 This magically transforms into 3252.
15:55:33 9 A. Okay. It says right here in the third
15:56:08 10 paragraph: Migrations will typically be completed
15:56:11 11 in less than 12 months, during which time
15:56:14 12 PeopleSoft World and OneWorld maintenance support
15:56:16 13 will be available at a favorable discount.
15:56:24 14 Q. And do you understand anything more about
15:56:26 15 it than that?
15:56:28 16 MR. McDONELL: Vague and ambiguous.
15:56:31 17 THE WITNESS: No, I don't. I don't have
15:56:32 18 any more details on that particular program than
15:56:36 19 what I have -- what I have -- what I saw in that
15:56:39 20 Lawson press release.
15:56:45 21 MS. HOUSE: Q. Do you know how long it
15:56:45 22 ran?
15:56:46 23 A. No, I don't.
15:56:54 24 Q. Now, you've provided no materials from
15:56:57 25 which one could gauge the program's success.

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15:57:01 1 Correct?
15:57:02 2 MR. McDONELL: Vague and ambiguous.
15:57:03 3 Object to the form.
15:57:05 4 THE WITNESS: The Lawson program?
15:57:07 5 MS. HOUSE: Q. Any of the programs.
15:57:09 6 A. That is correct. I did not provide that
15:57:10 7 detail.
15:57:11 8 Q. Do you have it?
15:57:14 9 A. No. That was not part of the scope of my
15:57:16 10 assignment.
15:57:16 11 Q. So you have nothing to show the actual
15:57:19 12 conversion rates on any of the programs that you've
15:57:22 13 cited. Correct?
15:57:26 14 A. No, I do not.
15:57:30 15 Q. Do you have anything on the conversion
15:57:31 16 rates related to Safe Passage?
15:57:34 17 A. No, I do not.
15:57:38 18 Q. Do you have anything that shows success
15:57:40 19 measured on another metric, like PR value or
15:57:45 20 anything else?
15:57:47 21 A. No, I don't believe I do.
15:57:51 22 Q. So when you say that these programs have,
15:57:55 23 quote-unquote, "limited success," you don't have
15:57:59 24 any metrics that we can test that. Correct?
15:58:04 25 A. That would be correct.

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15:58:10 1 Q. You don't have any analyst reports on that
15:58:12 2 either. Right?
15:58:13 3 MR. McDONELL: Misstates the testimony.
15:58:14 4 Object to the form.
15:58:16 5 THE WITNESS: I did refer to, on page 48,
15:58:20 6 Jim Shepherd, a vice president of research at AMR
15:58:25 7 Research, and he said that conversion programs have
15:58:30 8 traditionally had limited success, because
15:58:33 9 regardless of how unsatisfied customers are, they
15:58:35 10 aren't unhappy enough to rip out business systems
15:58:38 11 and put in new ones. I did reference that.
15:58:41 12 MS. HOUSE: Q. And that's the only
15:58:43 13 statement that you have in support of your limited
15:58:47 14 success point. Correct?
15:58:50 15 A. That's the only one I cited in this
15:58:51 16 report.
15:58:53 17 Q. And you're not intending to rely on any
15:58:56 18 others. Right?
15:58:57 19 MR. McDONELL: Object to the form of the
15:58:58 20 question.
15:59:02 21 THE WITNESS: No, because Jim's experience
15:59:05 22 matches what I've seen in the industry, and I felt
15:59:08 23 that just the one footnote would be adequate.
15:59:12 24 MS. HOUSE: Q. Well, what you've seen in
15:59:13 25 the industry, what -- I have to be able to test

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15:59:17 1 that, sir.
15:59:17 2 Do you have any metrics or any results of
15:59:21 3 marketing programs that you can point to where we
15:59:23 4 can test whether in fact these switching programs,
15:59:28 5 what the success rates are?
15:59:30 6 MR. McDONELL: Vague and ambiguous, object
15:59:31 7 to the form of the question. Compound.
15:59:35 8 THE WITNESS: In my experience, when
15:59:36 9 customers are confronted with a new marketing
15:59:39 10 campaign from a software vendor, generally the
15:59:43 11 campaign is not going to be very successful unless,
15:59:46 12 A, the customer was already in the market for new
15:59:49 13 solutions, that the total economics of the deal,
15:59:54 14 when you add everything together, kind of makes
15:59:56 15 sense for that customer, and it's a strong
15:59:59 16 functional fit for what the customer needs. There
16:00:01 17 are many other factors that go into those
16:00:03 18 decisions.
16:00:04 19 So just because there is an incentive or
16:00:06 20 there's a marketing campaign in and of itself
16:00:09 21 doesn't necessarily mean that it's going to be a
16:00:12 22 success. That's what I'm opining.
16:00:15 23 MS. HOUSE: Q. You understand that at the
16:00:17 24 time that it launched Safe Passage, that SAP was
16:00:21 25 the dominant ERP vendor by far?

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16:00:24 1 MR. McDONELL: Object. Argumentative,
16:00:25 2 vague and ambiguous, and asked and answered.
16:00:27 3 THE WITNESS: At that time, both SAP and
16:00:29 4 Oracle were very big players in their -- in the ERP
16:00:33 5 space.
16:00:35 6 MS. HOUSE: Q. And you have a belief that
16:00:43 7 they've engaged in marketing in the past. Correct?
16:00:46 8 A. Yes.
16:00:48 9 Q. And that they know what they're doing?
16:00:50 10 MR. McDONELL: Vague and ambiguous.
16:00:58 11 THE WITNESS: They both do a lot of
16:01:00 12 marketing. Marketing is very broad. So at some
16:01:04 13 level, your statement would have to be true. They
16:01:06 14 otherwise wouldn't have obtained the market success
16:01:10 15 they have had if they weren't somewhat successful
16:01:13 16 in -- or very successful in marketing in some
16:01:16 17 areas.
16:01:18 18 MS. HOUSE: Q. Including converting
16:01:19 19 customers. Right?
16:01:22 20 A. Yes. And I even talk about in my report
16:01:25 21 just how successful they've been, when I -- if you
16:01:28 22 look at like page 51, where I talk about Oracle's
16:01:31 23 success in the market with how many companies
16:01:34 24 they've captured and how much penetration they have
16:01:37 25 with Fortune 500, same thing with SAP.

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16:01:40 1 So yes, they have had successes in
16:01:42 2 marketing in the past.
16:01:45 3 Q. And the material that you're talking about
16:01:46 4 on those pages, that's material that is current.
16:01:48 5 Right?
16:01:49 6 MR. McDONELL: Vague and ambiguous.
16:01:49 7 Object to the form.
16:01:53 8 THE WITNESS: That would be reasonably --
16:01:55 9 yes. It was pulled off this year.
16:01:57 10 MS. HOUSE: Q. So that has nothing to do
16:02:00 11 with the 2005 time frame. Right?
16:02:01 12 MR. McDONELL: Argumentative, vague and
16:02:02 13 ambiguous, object to the form.
16:02:06 14 THE WITNESS: I believe I tried looking
16:02:07 15 for that material or those statistics for that time
16:02:10 16 frame and I don't believe I had any success finding
16:02:13 17 anything like that at that time. So I went with
16:02:15 18 what I could get my hands on.
16:02:17 19 I still stand by my point, though, that
16:02:20 20 both of these two companies were successful
16:02:22 21 software companies.
16:02:31 22 MS. HOUSE: Q. In paragraph 3 on page 3,
16:02:35 23 in your third summary of opinion, you reference --
16:02:41 24 tell me when you're there --
16:02:43 25 A. I'm there.

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16:02:43 1 Q. -- you reference what industry analysts
16:02:45 2 and other knowledgeable observers had predicted for
16:02:48 3 these programs.
16:02:48 4 Do you see that?
16:02:49 5 A. Yes.
16:02:50 6 Q. Did you provide all the backup you relied
16:02:53 7 on for this assertion?
16:03:40 8 A. I'd have to go back and look at each one
16:03:43 9 of these -- like for example, these seven that we
16:03:46 10 referred, and look back at the source documents to
16:03:49 11 see if they did reference other experts. But
16:03:52 12 what -- whoever's in there, I've referenced in
16:03:54 13 the -- or excuse me, the articles I refer to are
16:03:57 14 referenced in the footnotes, and that's what I
16:03:59 15 relied on.
16:04:03 16 Q. Did any of the material you relied on have
16:04:06 17 to do with the contemporaneous expectations of
16:04:09 18 analysts after having reviewed the Safe Passage
16:04:12 19 program?
16:04:13 20 MR. McDONELL: Vague and ambiguous.
16:04:14 21 MS. HOUSE: Q. So let me try again.
16:04:17 22 Nothing there has to do with an analyst's
16:04:19 23 reaction to Safe Passage. Right?
16:04:23 24 MR. McDONELL: Vague and --
16:04:24 25 MS. HOUSE: Q. Those are all analysts'

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16:04:26 1 reactions --
16:04:27 2 A. To the programs.
16:04:28 3 Q. Insofar as there's anything there, it's
16:04:30 4 about the other programs. Right?
16:04:32 5 MR. McDONELL: Vague and ambiguous.
16:04:32 6 THE WITNESS: Yes, that is correct. It's
16:04:34 7 about the other programs.
16:04:35 8 MS. HOUSE: Q. Did you do any
16:04:37 9 investigation to see how analysts reacted to Safe
16:04:40 10 Passage?
16:04:44 11 A. Over what I've already covered in -- or
16:04:47 12 cited and referenced in this report, no, there was
16:04:52 13 nothing else that I did.
16:04:53 14 MS. HOUSE: Q. So you don't understand
16:04:55 15 that the reviews of the program were highly
16:04:57 16 favorable?
16:04:58 17 MR. McDONELL: Assumes facts, object to
16:04:58 18 the form.
16:04:59 19 THE WITNESS: That the reviews of the
16:05:00 20 program were highly favorable.
16:05:02 21 MS. HOUSE: Q. Yeah.
16:05:03 22 A. By who?
16:05:04 23 Q. Analysts. The press. The people who look
16:05:07 24 at the industry and say whether it's a good or a
16:05:09 25 bad program.

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16:05:12 1 A. I didn't see those documents.
16:05:15 2 Q. Let me show you what's previously been
16:05:16 3 marked Exhibit 595. And this is a document
16:05:32 4 entitled "Safe Passage: Winning Customers and
16:05:37 5 Markets from Oracle-PeopleSoft-JD Edwards." It's
16:05:39 6 dated January 20th, 2004, but witnesses have
16:05:42 7 confirmed it's January 20th, 2005.
16:05:44 8 A. I was going to say, that looked a little
16:05:46 9 odd. Okay.
16:05:47 10 Q. It's an SAP document. I take it you
16:05:50 11 haven't seen this document before?
16:05:51 12 A. No.
16:05:54 13 Q. So this was created by SAP the day after
16:05:56 14 they announced the Safe Passage program.
16:05:58 15 I'd like you to turn to the first page.
16:06:03 16 And it's titled, analyst support. And the first
16:06:08 17 analyst is, AMR, Bruce Richardson and Jim Sheppard,
16:06:13 18 people that you rely on. Correct?
16:06:15 19 A. I know them both well, yes.
16:06:17 20 Q. In fact, you cite them. Right?
16:06:19 21 A. I know I cite Jim. I don't know if -- I
16:06:21 22 don't remember if I've cited Bruce, but I know
16:06:23 23 them, yes.
16:06:24 24 Q. You rely on them, and you think they're
16:06:27 25 reasonable?

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16:06:27 1 A. I would -- I would rely on them, yes.
16:06:31 2 Q. Okay. Well, they said about the Safe
16:06:33 3 Passage program and TomorrowNow acquisition, quote,
16:06:37 4 "We knew that you would make a move, but not like
16:06:40 5 this, great strategy, great acquisition, toast to
16:06:43 6 you."
16:06:43 7 Second quote: "This is a great option for
16:06:45 8 mid-market companies. You will see some traction
16:06:49 9 on this."
16:06:51 10 Okay. Next quote is from Barry Wilderman
16:06:54 11 of Meta Group. Quote: "Brilliant strategy.
16:06:58 12 TomorrowNow was a great acquisition.
16:06:59 13 Congratulations."
16:07:02 14 Then the next is from Gartner. That's
16:07:04 15 also -- first of all, do you ever rely on Meta
16:07:08 16 Group?
16:07:10 17 A. I know Barry -- well, Barry's since moved
16:07:13 18 on from Meta, but I know Barry -- Meta has since
16:07:19 19 been acquired by -- I believe by Gartner.
16:07:22 20 Q. And you rely on Gartner?
16:07:24 21 A. Yes. I -- I have no general problem with
16:07:26 22 these analyst firms.
16:07:27 23 Q. Okay. And looking at the second quote
16:07:31 24 from the Gartner folks, Yvonne Genovese and Lee
16:07:36 25 Geishecker:

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16:07:36 1 "Acquiring TomorrowNow was a great move.
16:07:39 2 The increase in customers based on our calls
16:07:41 3 independently looking at them as an
16:07:43 4 alternative for support has been dramatic
16:07:46 5 over the past three weeks. The strategy on
16:07:48 6 migration and maintenance is solid and very
16:07:50 7 well thought through."
16:07:52 8 Do you see that?
16:07:52 9 A. I see that.
16:07:53 10 Q. Did you rely on any of that in determining
16:07:57 11 whether or not analysts would -- let's see, what
16:08:02 12 was your language -- what industry analysts and
16:08:06 13 other knowledgeable observers had predicted for
16:08:09 14 these programs?
16:08:10 15 MR. McDONELL: Asked and answered, and you
16:08:11 16 haven't given the witness -- I object you haven't
16:08:13 17 given the witness a chance to read the entire
16:08:15 18 document.
16:08:28 19 THE WITNESS: Well, for SAP to have gotten
16:08:31 20 these documents, again, January -- or gotten those
16:08:34 21 quotes by January 20th of 2005, if that's when they
16:08:38 22 got them, they would have gotten these quotes
16:08:40 23 almost immediately after the deal was done.
16:08:43 24 So I don't dispute that these analysts
16:08:48 25 wrote these comments. I -- if they -- if someone

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16:08:51 1 here has verified that, then I have no reason to
16:08:54 2 dispute it.
16:08:55 3 But whether they still felt the same way
16:08:58 4 in the weeks and months that followed, I don't
16:09:00 5 know. And these quotes are a mix between whether
16:09:04 6 buying TomorrowNow was a great idea or buying -- or
16:09:07 7 doing the -- or trying to acquire customers like
16:09:10 8 through Safe Passage, which I think is what the
16:09:12 9 last paragraph -- or last quote is referring to.
16:09:15 10 MS. HOUSE: Q. In proffering an opinion
16:09:23 11 about what industry analysts and other
16:09:26 12 knowledgeable observers have to say about switching
16:09:30 13 programs, don't you think it would have been
16:09:32 14 appropriate to consider the industry analysts and
16:09:36 15 other knowledgeable observers and what they
16:09:38 16 predicted about Safe Passage?
16:09:40 17 MR. McDONELL: Object to the form of the
16:09:41 18 question. Argumentative.
16:09:50 19 THE WITNESS: In the time I had allowed
16:09:53 20 and the materials that I had surfaced, I didn't run
16:09:59 21 across these documents. But if I had a chance, I
16:10:02 22 would have factored them in.
16:10:04 23 MS. HOUSE: Q. Okay. Looking at page 23
16:10:08 24 of your report, you say: In developing this
16:10:17 25 rebuttal report, I have considered many of the

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16:10:19 1 resources ERP software customers consider when
16:10:23 2 making ERP software and support purchase decisions.
16:10:26 3 And then you say: These firms include but
16:10:28 4 are not limited to: Gartner Group -- and that was
16:10:32 5 one of the groups we've just covered in this
16:10:34 6 exhibit. Correct?
16:10:35 7 A. Corrected.
16:10:36 8 Q. And Forrester Research. And that was one
16:10:39 9 that was mentioned by Mr. Kreul in his deposition.
16:10:41 10 Correct?
16:10:42 11 A. Uh-huh.
16:10:42 12 Q. And AMR Research. That's also mentioned
16:10:45 13 in the writeup of the analysts' reactions to Safe
16:10:50 14 Passage?
16:10:52 15 A. Yes.
16:10:55 16 Q. So do you have any reason to believe that
16:11:00 17 customers didn't consider the writings of these
16:11:04 18 analysts when they were considering whether to
16:11:07 19 switch using the Safe Passage program?
16:11:10 20 MR. McDONELL: Object to the form of the
16:11:10 21 question.
16:11:14 22 THE WITNESS: Not every customer
16:11:15 23 subscribes to every one of these research services.
16:11:18 24 In general, if they were a subscriber, they may
16:11:22 25 have read these reports and may have considered

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16:11:24 1 them.
16:11:26 2 MS. HOUSE: Q. Well, you -- I'm using
16:11:28 3 your language, sir. You say: I have considered
16:11:30 4 many of the resources ERP software customers
16:11:33 5 consider.
16:11:35 6 A. Yes.
16:11:41 7 Q. Do you have any reason to believe that
16:11:43 8 customers would not have considered the writeups of
16:11:47 9 the contemporaneous -- the contemporaneous writeups
16:11:52 10 of the analysts and their reaction to Safe Passage
16:11:54 11 at the time that they were considering whether to
16:11:57 12 take the Safe Passage?
16:11:58 13 MR. McDONELL: Object to the form.
16:12:00 14 THE WITNESS: If I understood correct your
16:12:02 15 question, they would have read many of the --
16:12:05 16 whether they read it in a research report or they
16:12:08 17 read maybe a sound bite that was a quote in an
16:12:10 18 article where one of these market watchers is
16:12:13 19 quoted in, they would have seen those comments, and
16:12:15 20 I'm sure they would have had some sort of impact on
16:12:20 21 some decisions. But again, you'd have to do that
16:12:22 22 on a case-by-case basis.
16:12:26 23 MS. HOUSE: Q. Are you aware of any
16:12:28 24 document at or around the beginning of 2005 that
16:12:32 25 said that Safe Passage wasn't a good idea?

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16:12:34 1 MR. McDONELL: Object to the form of the
16:12:35 2 question.
16:12:39 3 THE WITNESS: I don't know of one right
16:12:40 4 off the top of my head.
16:12:42 5 MS. HOUSE: Q. You're not relying on any
16:12:44 6 such documents, are you?
16:12:46 7 A. No.
16:12:49 8 Q. And you're not aware of any evidence that
16:12:51 9 said that SAP shouldn't go forward with using
16:12:55 10 TomorrowNow as a cornerstone of Safe Passage
16:12:57 11 because these programs just don't work?
16:12:59 12 MR. McDONELL: Object to the form of the
16:13:00 13 question. Argumentative.
16:13:04 14 THE WITNESS: I'm not aware of a -- of an
16:13:08 15 announcement immediately after that deal that
16:13:10 16 called into question why SAP was doing this. If
16:13:17 17 that's what you're asking.
16:13:19 18 MS. HOUSE: Q. Yeah.
16:13:20 19 A. Okay.
16:13:29 20 Q. I'm done with that document.
16:13:31 21 Going back to your report, on page 4,
16:13:34 22 paragraph 4, your fourth summary opinion is that
16:13:45 23 ERP vendors' one-size-fits-all approach to support
16:13:49 24 creates incentives for customers to consider
16:13:51 25 alternative support solutions. Correct?

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16:13:54 1 A. Correct.
16:13:55 2 Q. If that's the case, doesn't that validate
16:13:58 3 SAP's expectation of using TomorrowNow with its
16:14:02 4 low-cost support offering to exploit that very
16:14:04 5 opportunity?
16:14:06 6 MR. McDONELL: Vague and ambiguous,
16:14:07 7 argumentative. Misstates his testimony.
16:14:16 8 THE WITNESS: It's my opinion, my expert
16:14:18 9 opinion, that TomorrowNow's collection of services,
16:14:21 10 its pricing, its whatever, would appeal to some
16:14:25 11 group of customers, and that may have been part of
16:14:30 12 the reason why SAP did the deal.
16:14:33 13 I can't speak to SAP executives' motives
16:14:36 14 entirely. But yes, and that could have been a
16:14:39 15 factor.
16:14:41 16 MS. HOUSE: Q. In paragraph 5 of your --
16:14:49 17 paragraph 5 of your report, in your fifth summary
16:14:53 18 of opinion, you state that, quote: "ERP software
16:14:57 19 license and support contracts tend to charge
16:15:00 20 customers ever greater sums of money regardless of
16:15:03 21 the direction of the customer's business."
16:15:07 22 Right?
16:15:07 23 A. Correct.
16:15:08 24 Q. Now, if that's the case, doesn't that also
16:15:10 25 support as being reasonable SAP's expectation that

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16:15:13 1 TomorrowNow's low-cost offering would lure such
16:15:17 2 customers away?
16:15:19 3 MR. McDONELL: Argumentative, vague and
16:15:20 4 ambiguous, object to the form.
16:15:37 5 THE WITNESS: TomorrowNow's pricing would
16:15:39 6 be -- would I think be a bit attractive to someone
16:15:44 7 who has experienced some collection of issues, and
16:15:47 8 it could be like this ever-increasing maintenance,
16:15:50 9 particularly if their business has contracted, they
16:15:53 10 would find the TomorrowNow offering one they would
16:15:56 11 want to probably evaluate.
16:16:13 12 MS. HOUSE: Q. Now, in paragraph 6 on
16:16:15 13 page 4 of your report, you state -- let's see --
16:16:22 14 where ERP companies acquire or merge with other ERP
16:16:26 15 companies, customer concern about the extent to
16:16:30 16 which their installed software and related support
16:16:32 17 services will be disrupted inevitably follows.
16:16:36 18 Correct?
16:16:36 19 A. Correct.
16:16:39 20 Q. And that's essentially the point that
16:16:43 21 you're making on pages 58 and 59 of your report?
16:16:54 22 A. I believe that's where I have the most
16:16:55 23 dialogue on that point, yes.
16:17:06 24 Q. And on 58 and 59, you discuss the impact
16:17:11 25 of fear, uncertainty, and doubt on support

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16:17:14 1 switching. Right?
16:17:16 2 A. Yes.
16:17:17 3 Q. In the context of mergers and
16:17:19 4 acquisitions. Right?
16:17:20 5 MR. McDONELL: The document speaks for
16:17:20 6 itself.
16:17:22 7 THE WITNESS: Yes, I am.
16:17:29 8 MS. HOUSE: Q. And on page 59, you say,
16:17:31 9 quote:
16:17:31 10 "When Oracle acquired PeopleSoft, some
16:17:36 11 customers openly stated their dissatisfaction
16:17:39 12 with Oracle. PeopleSoft and JD Edwards users
16:17:45 13 were opposed to the acquisition. The
16:17:49 14 presidents of both user groups went on record
16:17:52 15 to oppose the deal."
16:17:53 16 Right?
16:17:53 17 A. Yes. That's Footnote 86.
16:17:55 18 Q. And you also cite on page 59 a series --
16:18:00 19 and -- I'm sorry, before I go to that thing.
16:18:04 20 So isn't that an opportunity that SAP saw
16:18:10 21 and took advantage of with the Safe Passage
16:18:12 22 program?
16:18:14 23 MR. McDONELL: Object to the form.
16:18:17 24 THE WITNESS: I don't think there's any
16:18:18 25 argument on that. And in fact, it's also the same

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16:18:21 1 reason, when I discussed those other options on
16:18:23 2 pages 48 and 49, particularly the ones on 48, that
16:18:28 3 other vendors saw that as an opportunity as well.
16:18:31 4 That this is, I believe, part of the nature of the
16:18:34 5 competitive beast in the software market. And what
16:18:38 6 I'm describing here isn't necessarily any one issue
16:18:42 7 about just Oracle and their acquisitions, but
16:18:44 8 things that have happened to companies like Sage,
16:18:48 9 Enfour and others that have made a number of
16:18:53 10 mergers.
16:18:54 11 MS. HOUSE: Q. And so when you have an
16:18:55 12 acquired customer base and a hostile acquisition,
16:18:58 13 you'd understand that they were probably pretty
16:19:00 14 uncertain and maybe even hostile to Oracle, as you
16:19:02 15 talked about. Right?
16:19:05 16 A. The -- if it's a hostile deal that just --
16:19:07 17 I'm sure that adds to some of the anxiety among the
16:19:10 18 customers.
16:19:11 19 Q. And does that make the Safe Passage
16:19:14 20 program sort of a unique opportunity at that point
16:19:19 21 in time?
16:19:21 22 MR. McDONELL: Vague and ambiguous, object
16:19:22 23 to the form.
16:19:26 24 THE WITNESS: Safe Passage may have had
16:19:29 25 some appeal to some customers. And in some of

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16:19:33 1 these merger situations, some company -- some
16:19:37 2 customers liked the fact that they had a lot of
16:19:39 3 influence maybe with product direction, and they
16:19:42 4 may not feel they're going to get that with the new
16:19:45 5 vendor, because now they're part of a much bigger
16:19:47 6 beast.
16:19:48 7 Would Safe Passage have been attractive?
16:19:50 8 It could have for some companies. Maybe for those
16:19:53 9 who, let's say, already had some SAP product. That
16:19:56 10 could be an example. If somebody's thought, well,
16:19:59 11 this may or may not have an issue, and maybe Safe
16:20:02 12 Passage looks like an okay option.
16:20:04 13 It may have the opposite effect for some
16:20:08 14 others. It may actually drive them into some
16:20:11 15 smaller firms, smaller ERP vendors, where they may
16:20:14 16 have more influence.
16:20:15 17 It could be a factor, is what I'm saying.
16:20:17 18 MS. HOUSE: Q. And my point, though, is
16:20:18 19 talking about the sort of unique crucible that was
16:20:21 20 the post-acquisition of PeopleSoft by Oracle,
16:20:25 21 which, as you probably know, was a very long and
16:20:27 22 drawn-out hostile acquisition. Right?
16:20:29 23 A. Yes, it was very long and drawn-out.
16:20:32 24 Q. And do you understand that the Safe
16:20:34 25 Passage program was created in that context, where

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16:20:38 1 there was in fact a concern that the customer base
16:20:41 2 was not as loyal to Oracle and may be up for grabs
16:20:47 3 in a way that was somewhat unique?
16:20:50 4 MR. McDONELL: Vague, ambiguous. Object
16:20:51 5 to the form.
16:20:56 6 THE WITNESS: My recollection what was
16:20:57 7 going on in that time frame, you're right. It was
16:21:00 8 a contentious case, or merger, excuse me, and that
16:21:06 9 it was -- it was even pursued in litigation between
16:21:08 10 the two parties, and even I think the Department of
16:21:11 11 Justice got in the middle of that.
16:21:14 12 And that had a -- I know that had to have
16:21:16 13 a disquieting effect on some customers, because I
16:21:19 14 recall seeing articles and things about that in the
16:21:22 15 trade press.
16:21:24 16 The idea that Safe Passage comes out was
16:21:27 17 going to be -- I don't think Safe Passage was the
16:21:29 18 only program SAP had. I think they had some other
16:21:33 19 discount programs they might have been using even
16:21:34 20 before they were able to acquire TomorrowNow and
16:21:37 21 announce even Safe Passage.
16:21:38 22 So there were other programs, there were
16:21:40 23 other vendors who had other programs. But yes, the
16:21:42 24 dynamics of what was going on here created an
16:21:46 25 environment where I think a number of customers

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16:21:49 1 were nervous about what was going to happen post
16:21:52 2 merger. And I think some of the early
16:21:56 3 pronouncements back at the beginning of the merger
16:21:58 4 attempt, like in 2003, if I recall right, didn't
16:22:02 5 exactly go down well with some of the --
16:22:04 6 particularly the PeopleSoft customers, and I think
16:22:06 7 some of the JD Edwards customers, who had just been
16:22:09 8 acquired, now find themselves being acquired again,
16:22:12 9 added to that.
16:22:13 10 SAP I don't think was alone in trying
16:22:15 11 to -- I guess the word I would use is, seize the
16:22:21 12 opportunity, or the phrase I would use.
16:22:24 13 MS. HOUSE: Q. But wasn't SAP unique in
16:22:25 14 having an alternative support provider for the
16:22:28 15 existing PeopleSoft and JD Edwards products?
16:22:33 16 A. I don't know that I can say unique,
16:22:35 17 because of what we talked about a few minutes ago
16:22:37 18 about that Lawson program, and I don't know the
16:22:39 19 details in full on that one.
16:22:41 20 It would have been either -- it's either
16:22:44 21 the only one or the only one of maybe two that I'm
16:22:47 22 aware of that had that capability.
16:22:49 23 And Oracle even had its own program called
16:22:51 24 off SAP, and I believe they came up with a --
16:22:55 25 MS. HOUSE: Q. We're just talking about

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16:22:56 1 the PeopleSoft and JD Edwards.
16:22:57 2 MR. McDONELL: Please don't cut him off
16:22:58 3 when he's answering a question, Counsel. I object.
16:23:01 4 THE WITNESS: I'm just filling in the
16:23:02 5 picture, that's all. I'm sorry.
16:23:04 6 MS. HOUSE: Q. No worries. So other than
16:23:06 7 the reference in that exhibit that we talked about,
16:23:11 8 the Lawson press release --
16:23:13 9 A. Yes.
16:23:13 10 Q. -- you're not aware of any other switching
16:23:16 11 program where the target was the
16:23:18 12 PeopleSoft/JD Edwards customer base that had the
16:23:22 13 components of support offering that SAP offered
16:23:26 14 through the Safe Passage program with TomorrowNow.
16:23:29 15 Right?
16:23:29 16 MR. McDONELL: Asked and answered. Object
16:23:30 17 to the form.
16:23:33 18 THE WITNESS: Beyond the Lawson one, no,
16:23:35 19 I'm not aware of another one like that.
16:23:43 20 MS. HOUSE: Q. Now, on page 59, you have
16:23:46 21 three other bullets, each of which starts with
16:23:50 22 "Will." You say: Software customers whose
16:23:53 23 products have been acquired by other software
16:23:55 24 companies are often concerned about the future of
16:23:57 25 their products. In particular, they're concerned

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16:23:59 1 about:
16:24:00 2 Will their products be orphaned and no
16:24:02 3 longer actively supported?
16:24:03 4 Will they be forced to migrate to a
16:24:06 5 completely different product line as their current
16:24:08 6 product will be desupported?
16:24:10 7 Will the application's original product
16:24:13 8 roadmap -- I think you mean "be discarded" as
16:24:16 9 opposed to "being" --
16:24:18 10 A. Sorry.
16:24:19 11 Q. That's all right. See, your friends
16:24:19 12 didn't catch that typo -- be discarded and replaced
16:24:22 13 with a different one from the acquiring vendor.
16:24:24 14 And aren't all of those uncertainties
16:24:26 15 exactly the sort of thing that would make it
16:24:28 16 reasonable for SAP to engage in the Safe Passage
16:24:32 17 program?
16:24:33 18 MR. McDONELL: Object to the form of the
16:24:34 19 question.
16:24:38 20 THE WITNESS: If I were any ERP vendor,
16:24:40 21 I'd be putting questions like this out in front of
16:24:42 22 any of the PeopleSoft and JD Edwards customers.
16:24:47 23 MS. HOUSE: Q. And given these concerns,
16:24:49 24 particularly in the unique situation that followed
16:24:52 25 the acquisition of PeopleSoft by Oracle, would it

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16:24:56 1 be reasonable for SAP to predict success for its
16:25:01 2 Safe Passage program?
16:25:02 3 MR. McDONELL: Object to the form of the
16:25:02 4 question, asked and answered.
16:25:07 5 THE WITNESS: Well, it might be reasonable
16:25:13 6 to predict some measure of success. However, you
16:25:16 7 need to caveat that with, it depends on what other
16:25:20 8 competitors do. Another competitor can have
16:25:23 9 surfaced that could have offered a better deal,
16:25:25 10 possibly.
16:25:26 11 It also depends on what customers wanted
16:25:28 12 to do at the time. As I've discussed in my paper,
16:25:31 13 that for those customers who had maybe recently
16:25:35 14 just finished a big ERP implementation, they may
16:25:38 15 not be in the market for another solution for
16:25:40 16 several years.
16:25:42 17 The other -- there may be other qualifiers
16:25:46 18 there, but would a customer -- would a company, I
16:25:51 19 guess, be interested in this kind of a program from
16:25:55 20 SAP, they would definitely look at that. Whether
16:25:58 21 SAP could be -- you know, how successful they would
16:26:01 22 be depends on a lot of external factors.
16:26:08 23 MS. HOUSE: Q. But at least as we've
16:26:09 24 seen, analysts were reacting favorably to the
16:26:13 25 announcement. Correct?

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16:26:14 1 MR. McDONELL: Asked and answered. Object
16:26:16 2 to the form.
16:26:18 3 THE WITNESS: Based on that document you
16:26:19 4 just showed me from January 20th of 2005, they
16:26:23 5 were -- I would say they were generally supportive
16:26:28 6 of the idea of buying TomorrowNow.
16:26:31 7 MS. HOUSE: Q. And you also saw that they
16:26:34 8 were supportive of the idea that this would create
16:26:37 9 some traction, right, and the customers would be
16:26:39 10 interested.
16:26:41 11 MR. McDONELL: Overly broad. Object to
16:26:42 12 the form. Vague and ambiguous.
16:26:43 13 THE WITNESS: That was what that one quote
16:26:45 14 I believe from Lee from Gartner commented on. But
16:26:49 15 not having read her entire body of what she wrote
16:26:52 16 in her research note or something, I don't know
16:26:54 17 what else she said. But from that one quote, yes,
16:26:56 18 you could draw that inference.
16:27:00 19 MS. HOUSE: Q. Did you read the analyst
16:27:02 20 call that SAP had with the analysts in connection
16:27:06 21 with its announcement of Safe Passage?
16:27:08 22 A. No, I did not.
16:27:17 23 Q. All right. Do you have any specific
16:27:28 24 evidence that any of the 358 customers that
16:27:33 25 TomorrowNow serviced would still have switched

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16:27:37 1 support services to TomorrowNow if TomorrowNow had
16:27:40 2 not been able to offer vendor or better service?
16:27:44 3 MR. McDONELL: Object to the form of the
16:27:45 4 question. Asked and answered.
16:27:48 5 THE WITNESS: And when you mean vendor or
16:27:50 6 better, that's what -- you're talking about
16:27:52 7 Oracle's servicing components or better?
16:27:56 8 MS. HOUSE: Q. Or PeopleSoft, since it
16:27:57 9 started --
16:27:58 10 A. Okay. PeopleSoft or JD Edwards. Just for
16:28:00 11 the record, I've been kind of assuming PeopleSoft
16:28:02 12 was the main PeopleSoft products, JD Edwards is
16:28:04 13 JD Edwards, and Oracle is kind of everything here.
16:28:07 14 Q. Right.
16:28:08 15 A. Okay. Sorry, now I got lost on the
16:28:12 16 question.
16:28:13 17 Q. Do you have any specific evidence that any
16:28:14 18 of the TomorrowNow customers would still have
16:28:16 19 switched support services to TomorrowNow if
16:28:20 20 TomorrowNow had not been able to cover vendor or
16:28:23 21 better service at 50 percent or less of Oracle's
16:28:27 22 price?
16:28:28 23 MR. McDONELL: Same objections.
16:28:30 24 THE WITNESS: I didn't do the
16:28:31 25 customer-by-customer analysis. I don't have that

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16:28:34 1 information.
16:28:36 2 MS. HOUSE: Q. Do you have any specific
16:28:37 3 evidence that any of the TomorrowNow customers
16:28:40 4 would -- who left after Safe Passage was announced
16:28:44 5 would have done so if SAP wasn't backing
16:28:50 6 TomorrowNow?
16:28:51 7 MR. McDONELL: Same objections.
16:28:53 8 THE WITNESS: And again, the -- I didn't
16:28:56 9 do the customer-by-customer analysis.
16:28:59 10 MS. HOUSE: Q. You'd agree that for
16:29:01 11 customers, having the backing of SAP would be an
16:29:06 12 attractive feature, gives a sense of not being as
16:29:10 13 risky a move?
16:29:12 14 MR. McDONELL: Overly broad, object to the
16:29:14 15 question. Object to the form of the question.
16:29:16 16 THE WITNESS: I would agree that SAP's
16:29:21 17 backing, if you want to call it, or ownership, that
16:29:25 18 may be a better way to describe it, of TomorrowNow,
16:29:28 19 may have been perceived by some customers as a
16:29:29 20 positive. But again, I didn't do a
16:29:31 21 customer-by-customer review.
16:29:33 22 MS. HOUSE: Q. And you don't know that
16:29:34 23 that was in fact a selling feature of TomorrowNow?
16:29:38 24 MR. McDONELL: Vague and ambiguous.
16:29:40 25 THE WITNESS: It would surprise me if SAP

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16:29:41 1 or TomorrowNow didn't make that a selling feature.
16:29:46 2 MS. HOUSE: Q. Because it's a
16:29:46 3 differentiator of the SAP -- of the SAP/TomorrowNow
16:29:50 4 support offering over the other support offerings.
16:29:54 5 Right?
16:29:54 6 MR. McDONELL: Vague and ambiguous.
16:29:56 7 THE WITNESS: Yes, it would be a -- it
16:29:58 8 would be a competitive differentiator for them.
16:30:03 9 MS. HOUSE: Q. On page 8 of your report,
16:30:12 10 you describe the following table as a guide to,
16:30:16 11 quote, "the current ERP marketplace." Correct?
16:30:24 12 A. Right down there on No. 2, and I reference
16:30:27 13 this document from IT Business Edge, yes.
16:30:31 14 Q. And you understand that the only ERP
16:30:34 15 marketplace that matters for the case is the market
16:30:37 16 at the time that TomorrowNow was acquired and then
16:30:40 17 was in operation?
16:30:42 18 MR. McDONELL: Calls for a legal
16:30:42 19 conclusion, vague and ambiguous, object to the form
16:30:45 20 of the question.
16:30:51 21 THE WITNESS: I understand who the parties
16:30:52 22 are involved in this case, yes. And my intent on
16:30:55 23 this wasn't to necessarily cast a view of it for
16:30:58 24 the year -- for the time period of the case, but
16:31:01 25 just to provide a general understanding who some of

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16:31:03 1 the players are in the market.
16:31:07 2 MS. HOUSE: Q. You don't provide tables
16:31:08 3 showing the markets in early January 2005, do you?
16:31:14 4 MR. McDONELL: Object to the form of the
16:31:15 5 question. The document speaks for itself. You're
16:31:17 6 also misreading it, in part.
16:31:20 7 THE WITNESS: I did not provide any
16:31:22 8 specific one there. I do make a note, though,
16:31:24 9 that -- it says here on the top of page 9 that
16:31:29 10 generally speaking, the companies identified in
16:31:32 11 this table and the companies that they have
16:31:33 12 acquired -- and I even referenced Oracle's
16:31:35 13 acquisition of PeopleSoft -- encompassed the major
16:31:38 14 players in the market during the period 2002 to the
16:31:41 15 present.
16:31:42 16 MS. HOUSE: Q. Under Oracle, you list
16:31:44 17 four primary product brands?
16:31:46 18 A. I didn't. IT Business Edge did.
16:31:51 19 Q. Okay. And the asterisks, are those your
16:31:58 20 asterisks, or are those asterisks from IT Business?
16:32:01 21 A. I believe those are theirs.
16:32:07 22 Q. And those asterisks of the four primary
16:32:11 23 product bands are listed as having deep
16:32:15 24 functionality. Do you see that?
16:32:18 25 A. Again, that's their opinion, not mine.

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16:32:22 1 Q. Do you have an opinion whether or not the
16:32:25 2 PeopleSoft Enterprise and the JD Edwards brands
16:32:31 3 have the deepest functionality of the Oracle
16:32:36 4 grouping?
16:32:37 5 MR. McDONELL: Vague and ambiguous, lack
16:32:38 6 of foundation, object to the form.
16:32:42 7 THE WITNESS: I'd actually say that all of
16:32:44 8 those Oracle products are relatively mature,
16:32:47 9 robust, products. And each one has done well in
16:32:53 10 the marketplace over the years.
16:32:59 11 MS. HOUSE: Q. At the time that Oracle
16:32:59 12 acquired PeopleSoft, what did you understand was
16:33:01 13 the primary product of PeopleSoft that it was
16:33:06 14 acquiring?
16:33:07 15 MR. McDONELL: Object to the form.
16:33:10 16 THE WITNESS: At that time, PeopleSoft had
16:33:13 17 a significant number of human resource management
16:33:16 18 system customers, because that was the first
16:33:19 19 product line that it introduced, and the way the
16:33:22 20 company started.
16:33:23 21 I'd say its next largest set of products
16:33:26 22 it had were financial applications, because those
16:33:28 23 were the second set of -- or cluster of
16:33:30 24 applications they developed.
16:33:32 25 They subsequently acquired or built

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16:33:35 1 applications in the supply chain, services
16:33:38 2 procurement, and some manufacturing applications.
16:33:42 3 Some of that was helped with an acquisition they
16:33:44 4 made with a company called Red Pepper.
16:33:51 5 MS. HOUSE: Q. Now, do you agree that the
16:33:55 6 Siebel CRM product was the primary product that was
16:33:58 7 acquired in connection with the Siebel acquisition
16:34:02 8 that was sort of the crown jewel of the Siebel
16:34:05 9 offering?
16:34:06 10 MR. McDONELL: Vague and ambiguous, object
16:34:07 11 to the form.
16:34:09 12 THE WITNESS: Their acquisition of Siebel
16:34:10 13 brought with them the Siebel CRM suite of
16:34:14 14 applications, and those were a very high-end set of
16:34:20 15 CRM apps.
16:34:59 16 MS. HOUSE: Q. On page 10 of your report,
16:35:11 17 you talk about the market consolidation trend. And
16:35:17 18 you state that the Meyer report lacks analysis of
16:35:19 19 the changes in the ERP vendor landscape.
16:35:23 20 Do you see that?
16:35:24 21 A. Yes.
16:35:25 22 Q. How did Mr. Meyer's report fail to -- fail
16:35:30 23 in that way, in your opinion?
16:35:34 24 A. Well, the main issue here, and it's
16:35:38 25 related to what we discussed a few minutes ago

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16:35:41 1 about the fear, uncertainty, and doubt in mergers
16:35:43 2 and acquisitions, and that's covered in more detail
16:35:46 3 later in my -- further back in the report.
16:35:49 4 But there have been some other
16:35:50 5 acquisitions that have occurred before the
16:35:51 6 PeopleSoft, JD Edwards, and Oracle/Siebel, you
16:35:57 7 know, acquisitions. And they've kind of -- they
16:36:01 8 kind of sowed some ideas in customers' minds about
16:36:06 9 what happens in an acquisition. And whether Oracle
16:36:09 10 was going to do the same thing some of those other
16:36:12 11 customers did or not, it still had created almost
16:36:16 12 instantly doubts in people's minds about what's
16:36:18 13 going to happen to their product line because of
16:36:21 14 some of these other acquisitions.
16:36:24 15 And I just listed three or four of them
16:36:26 16 here. And I'm just pointing out that he didn't --
16:36:29 17 I don't think he discussed or factored in what that
16:36:32 18 does from a fear, uncertainty, and doubt
16:36:35 19 perspective, and why that makes some of these
16:36:38 20 customers a little more nervous or vulnerable or
16:36:41 21 whatever you want to call it to switching a program
16:36:44 22 or something else.
16:36:52 23 Q. On -- let's move to page 18. At the top
16:37:05 24 of page 18, you reference Oracle having a 6-month
16:37:12 25 support cessation time frame in connection with its

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16:37:15 1 support reinstatement policies. Correct?
16:37:20 2 A. Yeah, yes. They -- I do mention that.
16:37:22 3 Q. And how are you aware of that program; how
16:37:25 4 are you familiar with it?
16:37:27 5 A. I was -- I thought a lot as part of
16:37:33 6 developing my expert report about, well, how long
16:37:35 7 should a -- would you consider a company being out
16:37:39 8 or off support before you determined that they are
16:37:41 9 probably not interested in support any more from
16:37:44 10 the vendor?
16:37:46 11 And I came to my own conclusion, around 6
16:37:49 12 months. And then it dawned on me, maybe I ought to
16:37:52 13 go look online and see what Oracle has to say about
16:37:57 14 it. So I did just that. I went on line to see if
16:38:00 15 Oracle had something on their website about that.
16:38:02 16 And that's what I referenced on Footnote No. 9.
16:38:05 17 Q. And that's a February 2010 piece of data.
16:38:09 18 Right?
16:38:10 19 A. I accessed that, that is correct, when I
16:38:13 20 was preparing my report, yes.
16:38:18 21 Q. Do you know what the period was at the
16:38:19 22 time relevant to the lawsuit?
16:38:21 23 A. I do not --
16:38:23 24 MR. McDONELL: Asked and answered.
16:38:23 25 THE WITNESS: I do not know.

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16:38:24 1 MS. HOUSE: Q. And then you continue:
16:38:26 2 Alternatively, if a customer goes beyond
16:38:27 3 a 6-month window without reinstating, it's a
16:38:31 4 strong indication that the customer has
16:38:32 5 decided to go off support altogether or forgo
16:38:37 6 vendor-provided support for a multi-year
16:38:40 7 period.
16:38:40 8 Right?
16:38:40 9 A. That's what I wrote, yes.
16:38:42 10 Q. What is -- you provide no basis for that
16:38:45 11 statement. There's no cite whatsoever.
16:38:47 12 Do you have any evidentiary basis for
16:38:49 13 that, sir?
16:38:50 14 MR. McDONELL: Argumentative, object to
16:38:50 15 the form.
16:38:53 16 THE WITNESS: This was from my own
16:38:55 17 opinion, or my own, you know, expertise.
16:38:59 18 Customer -- excuse me, customers and
16:39:01 19 software vendors, they are going to have some
16:39:05 20 reinstatement issues with -- from time to time.
16:39:08 21 And it could just be they're tussling over a new
16:39:12 22 module they want to buy and what that does to
16:39:17 23 maintenance, on there's an incremental license fee
16:39:19 24 in the middle of it all that they're fighting over.
16:39:21 25 And for them to go a quarter over into the next

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16:39:24 1 maintenance year, because these are annual
16:39:26 2 contracts, would not surprise me. And it could be
16:39:28 3 just gummed up because it's hung up with one side's
16:39:31 4 attorneys or in-house counsel, whatever or the
16:39:33 5 other.
16:39:34 6 But to go beyond two quarters, two
16:39:37 7 financial quarters, which would be 6 months, would
16:39:39 8 I think start creating problems for the vendor that
16:39:42 9 they would have a period of time where they --
16:39:44 10 they're going to have some revenue recognition
16:39:47 11 issues and some other things, and I think a vendor
16:39:49 12 would really want to push for a quick and rapid
16:39:53 13 decision.
16:39:53 14 I'm not saying that you can absolutely
16:39:55 15 agree that 6 months is the cutoff. I don't think
16:39:57 16 there is anything like that. But I think from a
16:40:00 17 practical business perspective, both the customer
16:40:02 18 and the vendor halfway into that year of
16:40:05 19 maintenance would have to consider that this may
16:40:08 20 not be some -- a transaction that's going to go
16:40:10 21 down. That's why I came to that conclusion.
16:40:14 22 MS. HOUSE: Q. And the -- what you've
16:40:16 23 referenced in your answer was the revenue
16:40:17 24 recognition issues that have to do with the
16:40:21 25 software vendor. Right?

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16:40:22 1 MR. McDONELL: Object to the form of the
16:40:23 2 question.
16:40:24 3 THE WITNESS: Yes, that would -- that is
16:40:25 4 what I'm referring to.
16:40:26 5 MS. HOUSE: Q. And that would explain why
16:40:28 6 it is that Oracle or another software vendor would
16:40:31 7 have a 6-month period for its reinstatement
16:40:35 8 policies. Right?
16:40:37 9 MR. McDONELL: Object to the form.
16:40:38 10 THE WITNESS: I'm not an accountant, so I
16:40:40 11 can't say that with absolute certainty. I'm just
16:40:43 12 saying, as a practical matter, from what I've
16:40:47 13 observed, yes, they seem to be very focused on
16:40:50 14 getting things done, because -- and Oracle is a
16:40:52 15 publicly traded firm. They couldn't afford to be
16:40:55 16 explaining a lot of why they're having all these
16:40:57 17 back in, back out kind of transactions. So yes,
16:41:00 18 there's going to be incentive there to get it done.
16:41:02 19 MS. HOUSE: Q. Okay. Well, I really want
16:41:03 20 to focus on the part of your analysis where you
16:41:05 21 conclude that essentially a customer is lost
16:41:08 22 forever to the vendor if there is a length of
16:41:11 23 service gap that exceeds 6 months. And I want to
16:41:15 24 ask what your support if any is for that
16:41:17 25 conclusion.

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16:41:18 1 MR. McDONELL: Misstates the testimony,
16:41:19 2 misstates the report. It's also been asked and
16:41:20 3 answered.
16:41:21 4 THE WITNESS: Well, I can't lay my fingers
16:41:24 5 right on it, but I know somewhere in here in my
16:41:27 6 report I talked about the penalties that occur if
16:41:29 7 someone has to reinstate their maintenance. And
16:41:32 8 it's not cheap. They have to pay back all the back
16:41:34 9 maintenance, they may have to pay a 50 percent
16:41:37 10 penalty, and I've seen situations where contracts
16:41:39 11 say, and you will now do it on the then-current
16:41:42 12 pricing of the software, not on the negotiated
16:41:44 13 price.
16:41:45 14 So it's -- there's a contractual incentive
16:41:48 15 for companies if they really want to stay on
16:41:51 16 maintenance, they're going to try and do what they
16:41:53 17 can, I think, to -- for the most part, reasonable
16:41:56 18 business people are going to try to do what they
16:41:58 19 can to get it resolved, and that'll try and get it
16:42:01 20 done within approximately 6 months.
16:42:03 21 MS. HOUSE: Q. Are you aware of any
16:42:05 22 analysis to prove what length of service gap
16:42:07 23 indicates that a customer is lost forever?
16:42:10 24 MR. McDONELL: Asked and answered, object
16:42:10 25 to the form. And also misstates the testimony and

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16:42:14 1 misstates the report.
16:42:16 2 THE WITNESS: I'm not aware of a -- some
16:42:19 3 kind of research or analysis in that regard. And I
16:42:23 4 think it would be tough to do what you just
16:42:25 5 described, because you said forever, lost forever.
16:42:28 6 So I -- I -- you know, that's an indefinite time
16:42:32 7 frame. I don't know who could create a study that
16:42:35 8 could cover infinity.
16:42:36 9 MS. HOUSE: Q. Well, they may come back
16:42:38 10 after that 6-month period. Right?
16:42:40 11 MR. McDONELL: Asked and answered, object
16:42:40 12 to the form.
16:42:41 13 THE WITNESS: Yes. It is possible someone
16:42:43 14 could come back after a 6-month window.
16:42:47 15 MS. HOUSE: Q. Do you understand that
16:42:47 16 actually there are customers in this case who came
16:42:50 17 back after more than 6 months?
16:42:52 18 MR. McDONELL: Asked and answered.
16:42:56 19 THE WITNESS: Since you've got a list of
16:42:59 20 300 and something customers who's gone off
16:43:02 21 maintenance, it wouldn't surprise me that some of
16:43:05 22 them came back.
16:43:06 23 MS. HOUSE: Q. Do you understand that
16:43:07 24 Mr. Clarke relied on your 6-month service gap
16:43:13 25 assessment in excluding customers from damages?

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16:43:18 1 MR. McDONELL: Object to the form.
16:43:19 2 Misstates the testimony.
16:43:27 3 THE WITNESS: While I don't recall that in
16:43:28 4 his summary piece -- summary report, which is what
16:43:31 5 I read, that wouldn't surprise me that he did that.
16:43:34 6 MS. HOUSE: Q. Did you discuss this
16:43:36 7 6-month service gap issue with him?
16:43:42 8 A. I believe Mr. Meyer did talk about this
16:43:44 9 question.
16:43:45 10 MR. McDONELL: I think you mis --
16:43:48 11 MS. HOUSE: Q. Probably not Mr. Meyer.
16:43:50 12 A. I'm sorry, not Mr. Meyer. I'm sorry.
16:43:51 13 MR. McDONELL: Could you please restate
16:43:53 14 the question for purposes of the record, Counsel?
16:43:55 15 MS. HOUSE: Q. If you are, we've got some
16:43:57 16 talking to do.
16:43:58 17 A. We're getting to -- it's been a fun day
16:44:01 18 already. A long one.
16:44:03 19 Q. Did you and Mr. Clarke discuss your
16:44:05 20 opinion concerning the 6-month service gap and its
16:44:09 21 implications?
16:44:10 22 A. I believe we did.
16:44:12 23 Q. Did he ask you for a cutoff? Was that one
16:44:17 24 of the things he asked you to provide him?
16:44:19 25 MR. McDONELL: Vague and ambiguous.

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16:44:20 1 Object to the way you've stated the question.
16:44:26 2 THE WITNESS: I remember us having a
16:44:27 3 general conversation about this. And I remember
16:44:31 4 telling him specifically that I didn't think a
16:44:33 5 period as short as, say, like 3 months or one
16:44:38 6 quarter was appropriate. And I told him that
16:44:41 7 really long periods out, like more than a year, I
16:44:43 8 thought were inappropriate.
16:44:48 9 And I believe I told him pretty much the
16:44:51 10 same rationale I just explained on this deposition
16:44:53 11 that why 6 months I thought was an appropriate time
16:44:55 12 frame.
16:44:57 13 MS. HOUSE: Q. And are you aware of any
16:44:58 14 customer who has ever self-supported for longer
16:45:02 15 than 6 months, realized, gee, this isn't as easy as
16:45:06 16 I thought it might be, I'd better go back to
16:45:09 17 support?
16:45:10 18 A. Specific to customers in this case, I
16:45:12 19 have -- I didn't do that analysis, so no, I don't
16:45:14 20 know them.
16:45:15 21 Q. How about any customer?
16:45:16 22 MR. McDONELL: Incomplete hypothetical,
16:45:17 23 object to the form of the question.
16:45:22 24 THE WITNESS: I am aware of customers in
16:45:23 25 my career who have had heavily modified products

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16:45:26 1 who have gone off maintenance and have stayed off
16:45:28 2 maintenance for years. I'm not aware of one who
16:45:33 3 decided to go back afterwards.
16:45:54 4 MS. HOUSE: Q. Did your discussion with
16:45:55 5 Mr. Clarke about the 6-month service gap occur
16:45:59 6 after Mr. Meyer's report was issued?
16:46:03 7 MR. McDONELL: Object. Assumes facts not
16:46:06 8 in evidence.
16:46:11 9 THE WITNESS: I believe we spoke about
16:46:12 10 that issue a long time ago. And it would have been
16:46:16 11 before I would have -- I believe that would have
16:46:18 12 been well before I did see anything from Mr. Meyer.
16:46:23 13 MR. McDONELL: Counsel, can we take a
16:46:24 14 break, because we've been going a while, and it's
16:46:27 15 getting late in the day?
16:46:29 16 MS. HOUSE: Sure.
16:46:32 17 THE VIDEO OPERATOR: Going off the record,
16:46:32 18 the time now is 4:46.
16:46:36 19 (Recess from 4:46 p.m. to 5:26 p.m.)
17:26:49 20 THE VIDEO OPERATOR: Tape is it rolling.
17:26:50 21 The time now is 5:26. This also is the
17:26:54 22 conclusion -- it's also the beginning of Tape No. 5
17:26:57 23 in the deposition of Sommer. Please continue.
17:27:01 24 MS. HOUSE: Q. Sir, are you aware that in
17:27:02 25 the fall of 2005, TomorrowNow asked

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17:27:05 1 Enterprise Applications Consulting to examine
17:27:09 2 TomorrowNow's business model and help delineate the
17:27:13 3 specific value add that TomorrowNow could provide
17:27:15 4 enterprise software customers?
17:27:19 5 A. I don't recall that.
17:27:20 6 Q. Let me show you a document we've marked
17:27:23 7 Exhibit 3253.
17:27:26 8 (Deposition Exhibit 3253 was marked for
17:27:28 9 identification.)
17:27:34 10 MS. HOUSE: Q. Which is a document titled
17:27:35 11 "Lowering the Cost of Enterprise Software
17:27:37 12 Maintenance and Support Services: The Advantage of
17:27:40 13 the TomorrowNow Model," by Joshua Greenbaum,
17:27:43 14 Enterprise Applications Consulting, Fall 2005,
17:27:47 15 Bates numbers TN-OR 00005081 through -5095.
17:27:59 16 Have you seen that document before, sir?
17:28:01 17 A. It doesn't look familiar.
17:28:02 18 MR. McDONELL: I encourage you to take
17:28:04 19 your time to look it over.
17:28:06 20 THE WITNESS: Okay.
17:28:06 21 MS. HOUSE: Q. I'll ask you a couple
17:28:07 22 specific questions.
17:28:08 23 First of all, are you familiar with Joshua
17:28:10 24 Greenbaum?
17:28:11 25 A. Yes, I know Joshua.

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17:28:13 1 Q. And in your experience, have you relied on
17:28:16 2 any of his work product?
17:28:24 3 A. I know I've read a lot of stuff that he's
17:28:27 4 produced, and I mean, he's a prolific writer in the
17:28:31 5 application space.
17:28:33 6 Q. Do you have any -- do you think that he
17:28:35 7 would be somebody who would be knowledgeable about
17:28:37 8 ERP support?
17:28:39 9 A. I know he would be very knowledgeable
17:28:41 10 about ERP. I can't -- I've never had a
17:28:45 11 conversation with him about his knowledge in the
17:28:47 12 third-party support market.
17:28:49 13 Q. Could you look at page 2 of this document?
17:28:53 14 It's highlighted for you.
17:28:55 15 A. Okay.
17:28:58 16 Q. The final sentence in the highlighted -- I
17:29:02 17 guess -- the first sentence in highlighted
17:29:05 18 paragraph shows the request from TomorrowNow to EAC
17:29:09 19 to do the work that I was talking to you about.
17:29:11 20 Right?
17:29:13 21 A. To examine their business model, yes.
17:29:15 22 Okay.
17:29:16 23 MR. McDONELL: Mr. Sommer, if you feel the
17:29:18 24 need to review this document that you haven't seen
17:29:20 25 before asking questions on it, I encourage you to

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17:29:23 1 do so.
17:29:24 2 MS. HOUSE: Well, I'm not asking him --
17:29:25 3 I'm going to ask him a very specific question.
17:29:27 4 MR. McDONELL: Yeah, but it may be taken
17:29:29 5 out of context if you do that.
17:29:31 6 MS. HOUSE: Then you can object at that
17:29:33 7 point.
17:29:33 8 Q. The second sentence indicates EAC
17:29:37 9 conducted interviews with TomorrowNow customers to
17:29:39 10 arrive at its conclusions.
17:29:41 11 That's something that you have not done.
17:29:43 12 Right?
17:29:46 13 MR. McDONELL: Asked and answered.
17:29:46 14 THE WITNESS: That would be correct.
17:29:47 15 MS. HOUSE: Q. And the final sentence in
17:29:48 16 the highlighted paragraph says:
17:29:50 17 While the TomorrowNow solution is it not
17:29:53 18 applicable to every enterprise software
17:29:54 19 customer, the ability to lower overall
17:29:57 20 maintenance and support costs by up to 50
17:29:59 21 percent while freeing up working capital for
17:30:02 22 customer-specific innovation or cost-savings
17:30:05 23 can significantly change the cost structure
17:30:07 24 of a given enterprise software implementation
17:30:10 25 while in many cases improving the overall

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17:30:13 1 service and support for end-users.
17:30:14 2 MR. McDONELL: Object that you haven't
17:30:15 3 given the witness the opportunity to read the whole
17:30:17 4 document. Object to the form of the question.
17:30:19 5 MS. HOUSE: I haven't had a question yet.
17:30:22 6 Q. Do you agree with his conclusion, sir?
17:30:24 7 MR. McDONELL: Same objection. You're
17:30:25 8 taking it out of context and haven't allowed the
17:30:27 9 witness to read the document.
17:30:29 10 THE WITNESS: I agree with the first part
17:30:31 11 that says the solution is not applicable to every
17:30:35 12 enterprise software customer.
17:30:39 13 The second part, where he talks about the
17:30:43 14 ability to lower overall maintenance and support
17:30:45 15 costs by up to 50 percent while freeing up working
17:30:49 16 capital for customer-specific innovation or
17:30:52 17 cost-savings, I agree, that sounds factually
17:30:57 18 correct.
17:30:58 19 But the next part, where it says, can
17:30:59 20 significantly change the cost structure of a given
17:31:01 21 enterprise software implementation while in many
17:31:05 22 cases improving -- I can't speak to the service
17:31:08 23 levels, because I didn't interview the customers.
17:31:09 24 I don't necessarily agree with that one piece right
17:31:14 25 in the middle where it says, you can significantly

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17:31:17 1 change the cost structure of a given software
17:31:20 2 implementation, though.
17:31:22 3 MS. HOUSE: Q. Well, so at least
17:31:23 4 Mr. Greenbaum and -- of EAC is opining that that's
17:31:27 5 the case. Correct?
17:31:29 6 MR. McDONELL: Object. The document
17:31:30 7 speaks for itself. And you've not allowed the
17:31:32 8 witness to read it, so the witness lacks foundation
17:31:34 9 to comment. Object to the form.
17:31:37 10 MS. HOUSE: Q. That sentence says that,
17:31:38 11 sir. Right?
17:31:39 12 MR. McDONELL: Same objection.
17:31:39 13 THE WITNESS: The sentence may say that,
17:31:41 14 and I -- I would like to read the whole thing, but
17:31:44 15 if we don't have time --
17:31:46 16 MS. HOUSE: Q. We don't have time.
17:31:47 17 MR. McDONELL: Same objections.
17:31:52 18 MS. HOUSE: Q. Now turning to page 8, if
17:31:54 19 you would. There's a highlighted section that
17:32:05 20 notes the many benefits that TomorrowNow's
17:32:08 21 ownership by SAP provides to TomorrowNow's
17:32:10 22 customers.
17:32:11 23 Do you see that?
17:32:12 24 A. Yes.
17:32:13 25 Q. And again, in your report, you don't

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17:32:15 1 include any opinion about that aspect of
17:32:17 2 TomorrowNow in your analysis of its attractiveness
17:32:21 3 to customers. Right?
17:32:22 4 MR. McDONELL: The document speaks for
17:32:23 5 itself. Object to the form.
17:32:32 6 THE WITNESS: I don't believe I discussed
17:32:33 7 this issue in my report about SAP's -- as Joshua
17:32:39 8 calls it, SAP's deep pockets. I don't believe I
17:32:42 9 discussed that in my report. And that's because
17:32:44 10 it's my opinion that customers aren't going to make
17:32:48 11 a decision entirely to change to a new product just
17:32:51 12 because of a difference in -- or a new option or
17:32:56 13 lower-cost option on maintenance on the existing
17:32:59 14 application software. In fact, I kind of argue
17:33:02 15 that those decisions to move to a new piece of
17:33:04 16 software are expensive, they're risky, they are
17:33:08 17 costly, they come with a lot of other challenges,
17:33:12 18 and that the -- my opinion is differing from his,
17:33:17 19 in that I don't believe that the cost differences
17:33:20 20 here on the support on the old product are enough
17:33:23 21 to offset the rather significant kinds of cost that
17:33:26 22 are incurred in implementations of product support.
17:33:30 23 And specifically to that end, I even
17:33:31 24 included a study in my report from PeopleSoft
17:33:34 25 themselves that showed how large those other costs

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17:33:37 1 can be.
17:33:40 2 MS. HOUSE: So I'm going to move to strike
17:33:42 3 as nonresponsive.
17:33:44 4 MR. McDONELL: It's responsive.
17:33:45 5 MS. HOUSE: Q. My question to you, sir,
17:33:46 6 is: You do not consider in any way the fact that
17:33:52 7 SAP owned TomorrowNow as a differentiator of
17:33:57 8 TomorrowNow as a support alternative to customers
17:34:02 9 at the relevant point of time. Right?
17:34:04 10 MR. McDONELL: Object to the form of the
17:34:05 11 question. Vague and ambiguous.
17:34:08 12 THE WITNESS: I did not consider that
17:34:10 13 ownership aspect, or I did not discuss that issue
17:34:15 14 in my report, but I also don't believe that that
17:34:19 15 particular issue is, if you will, superior to some
17:34:26 16 of the other points that I made in my report.
17:34:29 17 MS. HOUSE: Q. And you've done no
17:34:30 18 analysis with any of the customers in play to
17:34:32 19 actually assess what difference it made to them
17:34:35 20 that the support offering that they were going to
17:34:37 21 offer vendor support was owned by SAP. Right?
17:34:43 22 MR. McDONELL: Asked and answered
17:34:43 23 repeatedly. Object to the form of the question.
17:34:46 24 THE WITNESS: I have not done that
17:34:47 25 individual analysis on the individual customers.

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17:34:57 1 MS. HOUSE: Q. Let's move to page 28 of
17:34:59 2 your report.
17:35:03 3 A. Are we coming back to this document?
17:35:05 4 Q. No.
17:35:06 5 A. Okay.
17:35:22 6 Q. Actually, I guess it starts at page 24.
17:35:28 7 This is on your ERP license purchasing. And I
17:35:32 8 guess the -- your opinion is that there are a
17:35:35 9 number of factors in a company's decision of which
17:35:38 10 ERP system they choose to buy. Right?
17:35:44 11 MR. McDONELL: This -- I mean, the
17:35:45 12 document speaks for itself, and vague and
17:35:47 13 ambiguous. Object to the form.
17:35:48 14 THE WITNESS: I list a number of buyer
17:35:51 15 motivations or decision factors that ERP software
17:35:54 16 providers look at.
17:35:56 17 MS. HOUSE: Q. And you list what you
17:35:57 18 consider to be those factors in this section.
17:35:59 19 Right?
17:36:00 20 MR. McDONELL: Same objection.
17:36:01 21 THE WITNESS: I've listed a number of them
17:36:02 22 in this section, yes.
17:36:06 23 MS. HOUSE: Q. And did you intend to be
17:36:09 24 all-inclusive?
17:36:12 25 A. It says here in the very first paragraph:

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17:36:14 1 The list I offer below is not exhaustive,
17:36:17 2 but it is sufficient to show that the Meyer
17:36:20 3 report was inaccurate in emphasizing only
17:36:22 4 support cost on the to-be-replaced software
17:36:24 5 as a factor in the customer's ERP license
17:36:27 6 selection.
17:36:29 7 Q. Okay. Ultimately, on page 28, you opine,
17:36:35 8 at the end of the paragraph before 2:
17:36:39 9 At no time have I seen software buyers
17:36:40 10 select a new ERP software vendor because they
17:36:43 11 could get lower-priced support on their
17:36:46 12 to-be-replaced ERP software from a third
17:36:49 13 party.
17:36:52 14 Again, do you understand that that is the
17:36:54 15 standard that you are supposed to be evaluating
17:36:57 16 here, that the support offering had to be the
17:36:58 17 reason for the selection?
17:37:00 18 MR. McDONELL: Calls for a legal
17:37:00 19 conclusion, lack of foundation, beyond the scope.
17:37:04 20 Object to the form.
17:37:06 21 THE WITNESS: Did I understand that as the
17:37:08 22 standard that I'm being -- I don't know that I
17:37:10 23 understand that question.
17:37:12 24 MS. HOUSE: Q. You -- the way that this
17:37:14 25 is phrased is that this is it a cause and effect,

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17:37:18 1 sir. Right?
17:37:20 2 MR. McDONELL: The document speaks for
17:37:20 3 itself. Object to the form.
17:37:23 4 MS. HOUSE: Q. Do you understand that you
17:37:24 5 are supposed to be finding a trigger, or whether
17:37:27 6 you're supposed to be establishing whether or not
17:37:29 7 there is a factor?
17:37:30 8 MR. McDONELL: Object to the form. Calls
17:37:31 9 for a legal conclusion.
17:37:33 10 THE WITNESS: I believe I listed -- I
17:37:35 11 don't know that I made that clear of a distinction
17:37:38 12 between factor and trigger, but I believe these
17:37:40 13 are -- I describe these as a variety of reasons,
17:37:43 14 and they're under a section called "Buyer
17:37:46 15 Motivations."
17:37:47 16 MS. HOUSE: Q. I'm talking about this one
17:37:48 17 sentence that we're focusing on here. Okay?
17:37:51 18 Are you opining that low- or no-cost
17:37:54 19 support on existing ERP applications would simply
17:37:59 20 never factor into a customer's purchasing decision?
17:38:03 21 MR. McDONELL: Vague and ambiguous,
17:38:04 22 incomplete hypothetical, calls for a legal
17:38:05 23 conclusion, object to the form. Also misstates the
17:38:10 24 statement in the report.
17:38:11 25 THE WITNESS: I didn't say "never." And I

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17:38:14 1 just said, at no time have I seen this happen.
17:38:18 2 MS. HOUSE: Q. Okay. And sir, we've
17:38:19 3 already established that you've never worked with
17:38:21 4 any customer who was even evaluating Safe Passage.
17:38:24 5 Right?
17:38:25 6 MR. McDONELL: Asked and answered.
17:38:25 7 Argumentative.
17:38:28 8 THE WITNESS: I believe we've already
17:38:29 9 covered that, yes.
17:38:30 10 MS. HOUSE: Q. And you've never worked
17:38:32 11 with any customer who was considering any offering
17:38:35 12 of ERP software that included a component of free
17:38:40 13 service for the existing support.
17:38:45 14 MR. McDONELL: Asked and answered.
17:38:45 15 MS. HOUSE: Q. Right?
17:38:47 16 MR. McDONELL: Asked and answered,
17:38:48 17 argumentative.
17:38:48 18 THE WITNESS: I believe that's correct.
17:38:50 19 MS. HOUSE: Q. So if you haven't ever
17:38:52 20 worked with any of the programs where this would be
17:38:54 21 an issue, why is it not a surprise that you've not
17:38:57 22 seen this in the decision-making?
17:39:00 23 MR. McDONELL: Argumentative, object to
17:39:01 24 the form of the question.
17:39:05 25 THE WITNESS: It could be that the reason

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17:39:06 1 I didn't see it is because it doesn't -- these type
17:39:12 2 of programs, as I've written before, just aren't
17:39:15 3 that terribly successful. So if they're not
17:39:18 4 terribly successful and they don't come up in
17:39:21 5 conversation, how could I have seen it come up?
17:39:28 6 MS. HOUSE: Q. So you haven't seen it
17:39:30 7 come up because you've never been in a situation
17:39:32 8 where any of the people that you've been working
17:39:35 9 with were considering such a program. Right?
17:39:37 10 MR. McDONELL: Asked and answered.
17:39:38 11 Misstates the response. Object to the form of the
17:39:41 12 question.
17:39:44 13 THE WITNESS: Again, I don't -- I don't --
17:39:49 14 I haven't seen that. I haven't seen that
17:39:51 15 phenomenon occur, and I don't see that happen --
17:39:56 16 and it could be because of what I just described in
17:39:58 17 my report, that these programs aren't that terribly
17:40:02 18 successful or common -- well, not common, but that
17:40:05 19 they run for a time period and then they're gone.
17:40:08 20 And it's just a timing question of when I would run
17:40:10 21 into these situations.
17:40:11 22 MS. HOUSE: Q. Well, you don't remember
17:40:12 23 ever running into such a situation. Right?
17:40:14 24 MR. McDONELL: Asked and answered. Object
17:40:15 25 to the form of the question.

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17:40:17 1 THE WITNESS: And that is correct.
17:40:21 2 MS. HOUSE: Q. Now, going back to your
17:40:23 3 list of the ERP buyer motivations on pages 24
17:40:26 4 through 28, none of your analysis is based on
17:40:30 5 reviewing any purchasing decisions for the
17:40:32 6 customers that left Oracle support for TomorrowNow
17:40:35 7 service. Correct?
17:40:36 8 MR. McDONELL: Asked and answered
17:40:36 9 repeatedly, object to the form.
17:40:38 10 THE WITNESS: I -- that left customers --
17:40:41 11 excuse me, that left Oracle support for
17:40:43 12 TomorrowNow? That was part of your question?
17:40:48 13 MS. HOUSE: Q. Yes.
17:40:48 14 A. These -- my report was to look at
17:40:50 15 generally why customers make the decisions they do
17:40:53 16 relative to ERP purchases. It wasn't necessarily
17:40:56 17 restricted to just those kind of decisions or that
17:40:59 18 time frame or what have you.
17:41:01 19 Q. So you don't know for any of the customers
17:41:03 20 at issue in this case what if any of these
17:41:05 21 considerations were a factor in their decision to
17:41:08 22 buy products from SAP. Correct?
17:41:10 23 MR. McDONELL: Asked and answered. Object
17:41:10 24 to the form.
17:41:12 25 THE WITNESS: Again, that wasn't the scope

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17:41:14 1 of my assignment for this expert report.
17:41:17 2 MS. HOUSE: Q. Do you agree that once a
17:41:19 3 customer has made a decision and deployed to
17:41:23 4 another ERP product, that it's very difficult for
17:41:26 5 them to change directions?
17:41:29 6 MR. McDONELL: Object to the form of the
17:41:30 7 question as vague and ambiguous.
17:41:36 8 THE WITNESS: Could you state that in an
17:41:38 9 example or hypothetical for me?
17:41:40 10 MS. HOUSE: Q. No. Let's listen to it
17:41:44 11 again.
17:41:44 12 Do you agree that once a customer has made
17:41:46 13 a decision and deployed to another ERP product,
17:41:49 14 that it's very difficult for them to change
17:41:51 15 direction?
17:41:52 16 MR. McDONELL: Incomplete hypothetical,
17:41:52 17 object to the form, vague and ambiguous.
17:42:05 18 THE WITNESS: Well, could you at least
17:42:06 19 tell me what you mean, has deployed, what that
17:42:09 20 means? Because it means they've selected, or
17:42:13 21 they've actually implemented?
17:42:15 22 MS. HOUSE: Q. Selected.
17:42:17 23 MR. McDONELL: Same objections. Still
17:42:18 24 incomplete, vague and ambiguous.
17:42:21 25 THE WITNESS: So if I understand your

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17:42:22 1 question correct, once -- you're saying -- asking
17:42:25 2 me, if someone has selected a piece of software,
17:42:27 3 that it's difficult for them to change gears and go
17:42:31 4 to another software product?
17:42:35 5 MR. McDONELL: Incomplete hypothetical,
17:42:36 6 object to the form.
17:42:40 7 THE WITNESS: It can be in some
17:42:41 8 situations.
17:42:44 9 MS. HOUSE: Q. Do you agree that one of
17:42:46 10 the reasons that the ERP vendors value customers is
17:42:51 11 because once they are on that ERP vendor's
17:42:54 12 platform, it is hard for somebody to dislodge them?
17:42:59 13 MR. McDONELL: Object to the form of the
17:42:59 14 question. Incomplete hypothetical.
17:43:03 15 THE WITNESS: In some situations that
17:43:05 16 could be the case. But in others, where a company
17:43:08 17 is, for example, standardizing on something
17:43:13 18 globally, then what they have technically in a
17:43:16 19 given like division or plant may not be that
17:43:18 20 material to to that decision and may not be an
17:43:20 21 issue.
17:43:21 22 MS. HOUSE: Q. Other than that, would you
17:43:22 23 agree?
17:43:22 24 MR. McDONELL: Same objections.
17:43:24 25 Incomplete hypothetical.

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17:43:28 1 THE WITNESS: Changing architectures,
17:43:30 2 technical architectures, is expensive and sometimes
17:43:33 3 difficult, and I think I've written about that in
17:43:36 4 this report.
17:43:52 5 MS. HOUSE: Q. Could you turn to Section
17:43:55 6 D, which is on page 35? Support purchasing.
17:44:06 7 A. Okay.
17:44:13 8 Q. Now, in this part of your report, you're
17:44:16 9 discussing software support purchasing, not in the
17:44:19 10 context of the initial purchase, but in the context
17:44:22 11 of the after-market. Correct?
17:44:24 12 MR. McDONELL: Vague and ambiguous.
17:44:26 13 MS. HOUSE: Q. Post deal?
17:44:37 14 A. I'm discussing some of the activity that
17:44:40 15 happens after the initial contracting period has
17:44:45 16 gone through, and I'm assuming this is after the
17:44:47 17 license and the first-year maintenance has
17:44:49 18 transpired. I think we're on the same definition
17:44:53 19 there.
17:44:53 20 Q. Great. And your first section is D1, Post
17:44:58 21 Deal Decisions. And D1 is entirely without any
17:45:04 22 citation. Correct? There's no support you cite
17:45:15 23 for D1. Correct?
17:45:19 24 A. Other than to the Meyer report, that's
17:45:20 25 correct.

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17:45:20 1 Q. And D2, which is titled "Why a customer
17:45:24 2 will reconsider its maintenance offering," that,
17:45:29 3 too, has no support cited. Correct?
17:45:31 4 A. That appears to be the case.
17:45:33 5 Q. And D3, "Factors that may influence a
17:45:36 6 support decision," also no citations in support.
17:45:41 7 Correct?
17:45:44 8 MR. McDONELL: The document speaks for
17:45:44 9 itself.
17:46:00 10 THE WITNESS: Well, 3 continues all the
17:46:02 11 way down to pages -- 41, and there are citations
17:46:06 12 under part (d) of that.
17:46:11 13 MS. HOUSE: Q. That's under 4. Sorry,
17:46:13 14 you're right. There is one citation at -- so just
17:46:16 15 up through 3 -- through (c), there are no
17:46:19 16 citations. Right?
17:46:21 17 A. Through 3(c) --
17:46:23 18 MR. McDONELL: Objection. Form of the
17:46:24 19 question. Vague and ambiguous.
17:46:25 20 THE WITNESS: Through 3(c), at the top --
17:46:28 21 through the top of page 40, it looks like that
17:46:31 22 would be correct.
17:46:32 23 MS. HOUSE: Q. Okay. What are -- what's
17:46:34 24 your basis for all of this opinion?
17:46:38 25 A. I've been -- I've been in the ERP

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17:46:41 1 consulting space for 20, almost 30 years. And this
17:46:47 2 comes from my dealings and interviews with CEOs and
17:46:53 3 other software buyers over that entire time frame.
17:46:58 4 It's my expertise in this space that's the
17:47:00 5 basis for these points.
17:47:02 6 Q. Sir, we've already -- you've already
17:47:05 7 testified that you never assisted any customer with
17:47:08 8 the purchase of post-deal support in the ERP space.
17:47:13 9 Right?
17:47:13 10 MR. McDONELL: Argumentative. Asked and
17:47:14 11 answered. Object to the form.
17:47:17 12 MS. HOUSE: Q. Correct?
17:47:19 13 MR. McDONELL: Same objections.
17:47:23 14 THE WITNESS: I've testified that I
17:47:24 15 haven't done paying client gigs with customers in
17:47:28 16 this area.
17:47:29 17 MS. HOUSE: Q. Have you ever lectured on
17:47:30 18 this?
17:47:32 19 A. I have spoken about maintenance, yes, in
17:47:36 20 some -- in some presentations.
17:47:39 21 Q. What presentation?
17:47:43 22 A. I've done talks -- I've done hundreds of
17:47:45 23 talks. I don't know -- I can't specify where I've
17:47:47 24 covered it specifically, but I have talked about
17:47:50 25 software maintenance in presentations.

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17:47:53 1 Q. Post-deal purchasing in the after-market?
17:47:56 2 Have you ever talked about that?
17:48:06 3 A. Post-deal maintenance, yes, I have.
17:48:12 4 Q. To whom?
17:48:13 5 A. To a graduate -- a group of graduate
17:48:16 6 students at Arizona State a couple of years ago.
17:48:18 7 Q. In what context?
17:48:20 8 A. Just in the context of what's going on in
17:48:21 9 the ERP space. I remember -- I remember we had --
17:48:26 10 I had maybe one tiny bit of that presentation or
17:48:33 11 one small piece of that presentation, but I did
17:48:36 12 talk about that.
17:48:37 13 Q. Is that listed in your CV?
17:48:39 14 A. I think I did list that I've given
17:48:42 15 presentations at universities.
17:48:47 16 Q. Anything else?
17:48:59 17 A. The main focus for where I get this is
17:49:02 18 from talking to CIOs. I talk to CIOs a lot. I've
17:49:07 19 probably had interviews with one to two dozen
17:49:14 20 already this year. And these would be in the
17:49:16 21 context of many different kind of research reports.
17:49:19 22 Q. CIOs. Are you talking to CIOs and giving
17:49:23 23 them advice in connection with the purchase of --
17:49:26 24 in the ERP space, we're talking, okay, not other
17:49:31 25 space -- in the ERP space, these talks with CIOs,

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17:49:37 1 are you giving them advice on whether and what to
17:49:40 2 purchase in terms of support in the after-market?
17:49:45 3 MR. McDONELL: Asked and answered. Object
17:49:45 4 to the form.
17:49:49 5 THE WITNESS: Most of these conversations
17:49:50 6 are more general about what are they going to do or
17:49:53 7 how much it's costing them. And the cost question
17:49:57 8 is one that I hear frequently.
17:50:01 9 MS. HOUSE: Q. Because the cost of
17:50:02 10 support can be something that would drive somebody
17:50:04 11 to a third-party vendor. Correct?
17:50:06 12 MR. McDONELL: Asked and answered. Object
17:50:06 13 to the form. Incomplete hypothetical.
17:50:10 14 THE WITNESS: As I've discussed I think
17:50:14 15 previously and in my report, cost is one of the
17:50:16 16 factors that someone may consider in a change in
17:50:21 17 maintenance. In fact, it's on page 37, I believe.
17:50:27 18 MS. HOUSE: Q. And would you agree that
17:50:28 19 for some customers, it can be the most important
17:50:30 20 factor?
17:50:32 21 MR. McDONELL: Object to the form of the
17:50:32 22 question. Calls for speculation.
17:50:37 23 THE WITNESS: I identified these factors
17:50:41 24 as being things that I have heard generally, but I
17:50:43 25 have no -- I did not do any customer-specific

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17:50:46 1 analysis to know whether any one of these is a --
17:50:50 2 you know, the biggest, a big, whatever. I just
17:50:52 3 know these are factors that are out there.
17:50:56 4 MS. HOUSE: Q. From talking to CIOs.
17:50:58 5 Right?
17:50:59 6 MR. McDONELL: Asked and answered,
17:50:59 7 argumentative. Object to the form.
17:51:04 8 MS. HOUSE: Q. Can you tell me which CIOs
17:51:06 9 you spoke to in the time frame between January 2005
17:51:09 10 and October 2008 specific to the products at issue
17:51:17 11 in this case?
17:51:18 12 A. I don't --
17:51:18 13 MR. McDONELL: Overly broad. Object to
17:51:19 14 the form.
17:51:21 15 THE WITNESS: I don't recall any of them
17:51:22 16 by name. I can give you other sources I have
17:51:26 17 spoken with recently.
17:51:28 18 MS. HOUSE: Q. I don't want recently. I
17:51:30 19 want at the time, sir.
17:51:31 20 A. Then no, I can't give you any specifics.
17:51:42 21 Q. Looking at the second bullet under D2 --
17:51:55 22 well, D2 is titled "Why a customer will reconsider
17:51:58 23 its maintenance offering." Right?
17:52:02 24 A. Yes.
17:52:02 25 Q. And you talk about how a customer may not

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17:52:04 1 want to do an expensive vendor upgrade. Correct?
17:52:11 2 A. Yes.
17:52:12 3 Q. And that's a factor related to the
17:52:14 4 customer's sensitivity to cost. Right?
17:52:19 5 A. It even says there, forced upgrades are
17:52:23 6 expensive and disruptive to customers.
17:52:25 7 Q. That's right. And the first bullet on the
17:52:28 8 next page reads: The customer believes they're
17:52:32 9 paying too much for maintenance.
17:52:34 10 Do you see that at the top of 37?
17:52:35 11 A. Yes, I do.
17:52:36 12 Q. And that's also a factor that would lead
17:52:42 13 somebody to consider an alternative vendor. Right?
17:52:46 14 MR. McDONELL: Object to the form.
17:52:50 15 THE WITNESS: Yes. If it wasn't a factor,
17:52:52 16 I wouldn't have had it on this list.
17:52:55 17 MS. HOUSE: Q. But it's a cost-related
17:52:57 18 factor. Right?
17:52:58 19 A. Yes. It has a very significant cost
17:53:01 20 aspect to it.
17:53:04 21 Q. And the next bullet about a customer who's
17:53:09 22 close to the end of life, where you talked about
17:53:11 23 the value the customer would receive from an
17:53:13 24 all-inclusive maintenance contract may be overkill
17:53:16 25 for this situation, that's also a cost-related

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17:53:18 1 factor. Correct?
17:53:20 2 MR. McDONELL: Object to the form.
17:53:21 3 THE WITNESS: Actually, in my
17:53:23 4 interpretation of that, it's -- they've got a
17:53:26 5 product that's pretty much at end of life, which
17:53:30 6 means it's probably already not on a current
17:53:33 7 release of the product, may not be getting much
17:53:35 8 support, may not need much support. Therefore, an
17:53:39 9 all-inclusive maintenance contract for a product
17:53:41 10 that's not going to be around much longer, you
17:53:46 11 know, is -- I said it's overkill, but the key
17:53:49 12 thing, the reason it's overkill is, the customer
17:53:52 13 may not want any new upgrade or new versions of the
17:53:55 14 product.
17:53:56 15 I don't know if that's really cost. I
17:53:57 16 think that's more, they're going a different
17:54:00 17 direction with their -- with their software
17:54:02 18 solutions in that business.
17:54:03 19 MS. HOUSE: Q. And you're not saying that
17:54:04 20 that person would be overpaying for a full-service
17:54:08 21 contract when they don't need it. Isn't that part
17:54:11 22 of the point of your bullet?
17:54:13 23 MR. McDONELL: Vague and ambiguous, object
17:54:13 24 to the form.
17:54:15 25 THE WITNESS: I'm saying that they may be

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17:54:16 1 paying for additional rights or capabilities that
17:54:20 2 they may not need.
17:54:22 3 MS. HOUSE: Q. The third-to-last bullet
17:54:26 4 says: The customer cannot afford support due to
17:54:29 5 bankruptcy or other economic hardship.
17:54:31 6 That's also having to do with the cost of
17:54:36 7 maintenance. Correct?
17:54:38 8 A. I would assume that any customer in that
17:54:41 9 kind of financial situation would be definitely
17:54:43 10 thinking of a cost-related matter.
17:54:49 11 Q. And in your next section on "Factors that
17:54:51 12 may influence a support decision," your Section
17:54:55 13 (b), on "Little perceived value," that has to do
17:55:01 14 with cost as well. Right?
17:55:03 15 A. Just a second. So (b), on 38?
17:55:06 16 Q. Yeah. It's titled "Little perceived value
17:55:09 17 or need for vendor-provided support."
17:55:12 18 MR. McDONELL: Compound. You've changed
17:55:13 19 the question. Object to the form.
17:55:15 20 MS. HOUSE: Q. That topic also has to do
17:55:18 21 with cost. Correct?
17:55:20 22 MR. McDONELL: It's vague and ambiguous,
17:55:22 23 compound.
17:55:25 24 THE WITNESS: Well, to some extent I've
17:55:27 25 already addressed that when we were talking about

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17:55:30 1 the second bullet point on the top of page 37.
17:55:39 2 But --
17:55:47 3 MS. HOUSE: Q. So you're not opining that
17:55:49 4 cost is not a factor in an ERP maintenance
17:55:52 5 customer's decision whether to leave vendor
17:55:55 6 support, are you?
17:55:56 7 MR. McDONELL: Asked and answered. Object
17:55:56 8 to the form.
17:56:00 9 THE WITNESS: Please repeat that? I'm not
17:56:02 10 opining --
17:56:03 11 MS. HOUSE: Q. That cost is not -- you're
17:56:05 12 not opining that cost is not a factor in an ERP
17:56:09 13 maintenance customer's decision whether to leave
17:56:11 14 vendor support?
17:56:12 15 MR. McDONELL: Object to the form of the
17:56:12 16 question. Asked and answered.
17:56:14 17 THE WITNESS: I am saying that cost is one
17:56:17 18 of the factors in these decisions, yes.
17:56:22 19 MS. HOUSE: Q. And if a customer could
17:56:23 20 get the same or better than vendor service at half
17:56:28 21 price or less, would you agree that would be an
17:56:30 22 attractive opportunity?
17:56:32 23 MR. McDONELL: Vague and ambiguous,
17:56:33 24 incomplete hypothetical. Object to the form.
17:56:38 25 THE WITNESS: In a hypothetical, if a

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17:56:41 1 customer could get the same or better service or --
17:56:43 2 the whole solution set, and at better or -- the
17:56:49 3 same or -- excuse me, at a better or lower cost
17:56:53 4 point, would that be a factor, is your question.
17:56:56 5 And I think it's one of many of the issues
17:56:57 6 that are brought out here that we're focusing on.
17:57:01 7 I'm not saying it's the only one, but it could be a
17:57:04 8 factor.
17:57:06 9 MS. HOUSE: Q. On page 40, in subpart
17:57:09 10 (d), which is titled "The third-party support
17:57:21 11 market may influence a support decision."
17:57:24 12 A. Yes.
17:57:25 13 Q. You start by saying that:
17:57:27 14 Customer awareness of other maintenance
17:57:30 15 providers may influence their decisions
17:57:33 16 regarding their support. Software customers
17:57:37 17 have access to a market of
17:57:38 18 non-vendor-provided support options as they
17:57:41 19 are frequently present at customer and
17:57:43 20 software events. These providers are
17:57:45 21 well-publicized, appearing in major
17:57:48 22 technology, accounting, and business
17:57:49 23 publications.
17:57:50 24 And that's an opinion you intend to offer.
17:57:54 25 Correct?

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17:57:55 1 A. Yes.
17:57:55 2 Q. When you opine that customer awareness of
17:57:57 3 other maintenance providers may influence their
17:58:00 4 decisions regarding their support, that would hold
17:58:02 5 true as to customers aware of TomorrowNow. Right?
17:58:06 6 A. Yes, that would be true, I believe.
17:58:09 7 Q. You would agree that TomorrowNow's
17:58:11 8 presence in the market as competition for Oracle
17:58:14 9 support influence customers' decisions regarding
17:58:17 10 their support, because they're in the market.
17:58:19 11 Right?
17:58:20 12 MR. McDONELL: Vague and ambiguous,
17:58:20 13 incomplete hypothetical.
17:58:22 14 THE WITNESS: They were in the market,
17:58:24 15 they were well-known, and -- but that wasn't the
17:58:28 16 only reason or the reason, you know, for why they
17:58:31 17 succeeded or not in the market.
17:58:34 18 MS. HOUSE: Q. That's what this lawsuit's
17:58:36 19 about.
17:58:37 20 And we know that they were successful
17:58:40 21 insofar as they secured customers. Right?
17:58:46 22 MR. McDONELL: Vague and ambiguous.
17:58:47 23 Object to the form. Incomplete hypothetical.
17:58:48 24 THE WITNESS: It wasn't part of my report
17:58:49 25 to analyze the -- whatever the success or

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18:58:53 1 profitability or whatever of TomorrowNow. That
18:58:55 2 wasn't part of my assignment.
18:59:00 3 MS. HOUSE: Q. Now, do you know for a
18:59:01 4 fact whether any of the customers at issue in this
18:59:04 5 case attended any of the conferences or meetings or
18:59:07 6 venues that you're referencing here?
18:59:10 7 A. I do not know that. I will offer, though,
18:59:19 8 that some of these events, like Oracle OpenWorld,
18:59:23 9 some of the PeopleSoft meetings I think that are
18:59:26 10 referenced here, like the Alliance show, those are
18:59:33 11 very, very large and well-attended events.
18:59:39 12 Q. Why did you choose the companies that you
18:59:42 13 identified on pages 40 and 41 of your report?
18:59:51 14 A. Because I know they are in the third-party
18:59:54 15 maintenance support business. Or --
18:59:59 16 Q. Are they --
18:59:59 17 A. Or in the case of -- this says Sapienta --
18:00:02 18 I can't pronounce it correctly; it's
18:00:03 19 S-A-P-I-E-N-T-A -- they're just a trade show, but
18:00:09 20 these I know are, you know, related to the
18:00:11 21 industry.
18:00:12 22 Q. Okay. But the focus should be only on the
18:00:15 23 support providers for the PeopleSoft, JD Edwards,
18:00:19 24 and Siebel customers. Right?
18:00:22 25 MR. McDONELL: Object to the form of the

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18:00:22 1 question. Vague and ambiguous, argumentative.
18:00:25 2 MS. HOUSE: Q. You understand that's what
18:00:26 3 we're talking about in this case?
18:00:30 4 MR. McDONELL: Same objections.
18:00:31 5 THE WITNESS: And my assignment was to
18:00:32 6 cover the third-party marketplace and the ERP
18:00:35 7 marketplace generally. I provided some examples
18:00:38 8 here, and I believe most of the companies I
18:00:42 9 referenced here were related to the -- or were
18:00:48 10 germane to this case.
18:00:50 11 MS. HOUSE: Q. Well, you agree the first
18:00:52 12 one you referenced, Sapienta, has nothing do with
18:00:55 13 the customers at issue here. Right?
18:00:57 14 MR. McDONELL: Argumentative.
18:00:57 15 THE WITNESS: As I said, they were a
18:00:59 16 consulting firm that ran a show. That's what they
18:01:01 17 do.
18:01:06 18 MS. HOUSE: Q. Are you intending to opine
18:01:08 19 that any of the alternative support providers that
18:01:11 20 you have listed offer comparable or better service
18:01:13 21 than Oracle or TomorrowNow in the time period
18:01:17 22 January 19th, 2005 to October 30th, 2008?
18:01:24 23 MR. McDONELL: Asked and answered. Object
18:01:24 24 to the form.
18:01:27 25 THE WITNESS: I do not believe -- well,

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18:01:28 1 that was not part of my assignment. I believe that
18:01:31 2 was the responsibility of one of the experts on
18:01:33 3 this case. Specifically, I believe Mr. Steve
18:01:36 4 Clarke did that.
18:01:37 5 MS. HOUSE: Q. So you're not intending to
18:01:39 6 offer that opinion. Is that correct?
18:01:41 7 MR. McDONELL: Asked and answered.
18:01:41 8 THE WITNESS: If I understand your
18:01:43 9 question correct, that is correct.
18:01:46 10 MS. HOUSE: Q. You're not intending to?
18:01:47 11 I know I'm double-doing this --
18:01:51 12 A. That's why I sometimes struggle with the
18:01:53 13 questions, sorry.
18:01:53 14 Q. You agree that you are not intending to
18:01:56 15 offer an opinion that any of the alternative
18:01:58 16 support providers you list offer comparable or
18:02:01 17 better support than Oracle or TomorrowNow in the
18:02:04 18 time period of the case. Correct?
18:02:07 19 MR. McDONELL: Vague and ambiguous, asked
18:02:07 20 and answered.
18:02:09 21 THE WITNESS: I'm saying that my report
18:02:11 22 speaks generally of what's going on in the
18:02:13 23 marketplace, and that other experts did a more
18:02:15 24 detailed analysis of that space. Or should have
18:02:18 25 done that.

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18:02:26 1 MS. HOUSE: Q. Did any of the support
18:02:27 2 alternatives that you identify have the backing of
18:02:29 3 a major software provider such as SAP?
18:02:32 4 MR. McDONELL: Vague and ambiguous.
18:02:32 5 Incomplete hypothetical. Object to the form.
18:02:36 6 THE WITNESS: One sticks out in mind very
18:02:38 7 clearly. And that would be, I believe it's
18:02:41 8 Taxware, I think is owned by ADP, a huge payroll
18:02:49 9 service provider and HR process outsourcer.
18:02:53 10 And let me double-check that. I believe
18:02:56 11 that's correct.
18:03:00 12 Yes. Taxware, now part of ADP. I
18:03:03 13 reference that on Footnote 56.
18:03:07 14 MS. HOUSE: Q. Do you understand that
18:03:08 15 Taxware provided the same support portfolio that
18:03:13 16 TomorrowNow did?
18:03:14 17 MR. McDONELL: Object to the form.
18:03:15 18 THE WITNESS: I think they provided a fair
18:03:16 19 number of capabilities that would be appealing to
18:03:19 20 some of the customers possibly out there who needed
18:03:24 21 particularly tax and tax table type of updates.
18:03:28 22 MS. HOUSE: Q. Are you -- you do
18:03:30 23 understand that it is a different and -- subset of
18:03:34 24 the support that TomorrowNow offered?
18:03:39 25 MR. McDONELL: Asked and answered.

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18:03:40 1 THE WITNESS: I understand that -- I would
18:03:43 2 expect that every vendor that I mentioned in this
18:03:47 3 report would have some differences, some subtle,
18:03:49 4 some material, in how they compare to either Oracle
18:03:54 5 support or to TomorrowNow.
18:03:55 6 What my report was trying to point out is
18:03:57 7 that other experts in this case, as they did a
18:04:01 8 customer-by-customer review, were to look at what
18:04:04 9 mattered to that specific customer at that specific
18:04:07 10 point in time to determine whether those
18:04:09 11 differences made any impact on them at that point
18:04:11 12 in time.
18:04:11 13 Beyond -- and going beyond that into
18:04:13 14 individual customers was again outside the scope of
18:04:17 15 my report.
18:04:19 16 MS. HOUSE: Q. So you don't have any idea
18:04:20 17 as to how many if any customers seriously
18:04:23 18 considered any of these alternative support
18:04:25 19 providers as a reasonable alternative to
18:04:27 20 TomorrowNow. Correct?
18:04:28 21 MR. McDONELL: Asked and answered. Object
18:04:31 22 to the form.
18:04:34 23 THE WITNESS: I believe that answer would
18:04:35 24 be yes. I do not -- I did not do a
18:04:39 25 customer-specific analysis.

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18:04:42 1 MS. HOUSE: Q. Do you know if Oracle ever
18:04:43 2 saw any of the alternative support vendors that you
18:04:46 3 identify as a threat to its support of PeopleSoft,
18:04:52 4 JD Edwards, or Siebel?
18:04:54 5 MR. McDONELL: Vague and ambiguous, lack
18:04:54 6 of foundation. Object to the form. Beyond the
18:04:59 7 scope.
18:05:00 8 THE WITNESS: Are we stipulating, except
18:05:02 9 for TomorrowNow?
18:05:03 10 MS. HOUSE: Q. No -- except for
18:05:04 11 TomorrowNow, correct.
18:05:06 12 MR. McDONELL: Same objections.
18:05:08 13 THE WITNESS: I don't know what Oracle may
18:05:09 14 have thought about some of those other companies.
18:05:11 15 MS. HOUSE: Q. Do you know if SAP or
18:05:12 16 TomorrowNow ever saw any of the companies you
18:05:16 17 identify as a meaningful -- as meaningful
18:05:19 18 competitors for TomorrowNow?
18:05:22 19 MR. McDONELL: Object to the -- object to
18:05:23 20 the question as vague and ambiguous, lack of
18:05:24 21 foundation, beyond the scope, vague as to time
18:05:28 22 frame, vague as to terminology.
18:05:30 23 THE WITNESS: The word "meaningful," do
18:05:32 24 you want to -- do you mean, what, market share,
18:05:36 25 or -- what kind of definition are you using on

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18:05:38 1 that?
18:05:43 2 MS. HOUSE: Q. Meaningful. They're
18:05:45 3 serious competition.
18:05:47 4 MR. McDONELL: Same objections.
18:05:49 5 THE WITNESS: For Oracle maintenance?
18:05:51 6 MS. HOUSE: Q. For --
18:05:52 7 A. Or for SAP?
18:05:53 8 Q. -- their maintenance -- do you know if SAP
18:05:56 9 or TomorrowNow ever saw any of the alternative
18:05:58 10 support providers that you identify as competition
18:06:03 11 for customers they were trying to get for
18:06:06 12 TomorrowNow?
18:06:07 13 MR. McDONELL: Object to the form of the
18:06:08 14 question. Compound, vague and ambiguous, beyond
18:06:10 15 the scope.
18:06:14 16 THE WITNESS: It wasn't part of the scope
18:06:15 17 of this report, but I would believe that Rimini
18:06:17 18 Street would be one of those that Oracle probably
18:06:21 19 has some concerns about.
18:06:24 20 MS. HOUSE: Q. Do you know?
18:06:26 21 MR. McDONELL: Same objections.
18:06:27 22 THE WITNESS: I would assume they wouldn't
18:06:28 23 have initiated litigation with them if they didn't
18:06:31 24 have a concern.
18:06:32 25 MS. HOUSE: Q. Other than that?

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18:06:34 1 MR. McDONELL: Same objections. Lack of
18:06:39 2 foundation.
18:06:41 3 THE WITNESS: Other than that, I don't
18:06:42 4 think I have anything else.
18:06:45 5 MS. HOUSE: Q. Rimini Street is actually
18:06:47 6 not mentioned in your report, is it, sir?
18:06:49 7 A. I don't think -- I don't think I mention
18:06:50 8 them in here.
18:06:52 9 Q. In fact, if you look at the third-party
18:06:53 10 support section, you don't identify any third-party
18:06:56 11 vendor, do you?
18:06:58 12 MR. McDONELL: Object to the form of the
18:07:00 13 question.
18:07:01 14 MS. HOUSE: Q. Under (c) on page 45?
18:07:03 15 A. I'm looking at page 40, and I mention
18:07:05 16 CedarCrestone, Hexaware, Reliasys, Andy Klee's
18:07:12 17 company, or Andy Klee, but he's got a -- he has his
18:07:16 18 own firm that -- I think he's got the JDE Tips
18:07:19 19 business.
18:07:20 20 There are some in this report I've
18:07:22 21 mentioned. And then again, of course, there's
18:07:27 22 Vertex, Avirax, Taxware, those.
18:07:30 23 Q. Do you know if Mr. Klee is still providing
18:07:32 24 support, or when he did?
18:07:34 25 MR. McDONELL: Beyond the scope.

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18:07:36 1 THE WITNESS: I don't have specific dates.
18:07:37 2 And again, that isn't part of my charter. But I do
18:07:41 3 believe that Mr. Klee was in the business of doing
18:07:45 4 support on some of the -- you know, it's in the
18:07:47 5 AS/400 kind of JD Edwards market. And I believe he
18:07:52 6 was doing some of this maintenance years ago, but I
18:07:54 7 can't tell you for sure if it was consultative or
18:07:58 8 real true application maintenance.
18:08:01 9 MS. HOUSE: Q. And you haven't reviewed
18:08:02 10 any of the actual evidence in the case on Mr. Klee,
18:08:05 11 have you?
18:08:07 12 MR. McDONELL: Object to the form, asked
18:08:07 13 and answered.
18:08:08 14 THE WITNESS: On Mr. Klee -- what was the
18:08:10 15 last --
18:08:11 16 MS. HOUSE: Q. Have you?
18:08:12 17 A. Oh, have you.
18:08:12 18 MR. McDONELL: Same objection.
18:08:13 19 THE WITNESS: No.
18:08:13 20 MS. HOUSE: Q. Okay.
18:08:14 21 A. No, I have not.
18:08:15 22 Q. On page 41 of your report, you conclude
18:08:26 23 that software customers could have read about
18:08:32 24 third-party support providers in hundreds of
18:08:34 25 published magazine reports, analyst reports and

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18:08:38 1 blog postings on the internet, and that the
18:08:40 2 presence of third-party support providers in the
18:08:43 3 application software market space is a well-known
18:08:46 4 fact.
18:08:47 5 Do you see that?
18:08:47 6 A. Roughly that's what I said, yes.
18:08:49 7 Q. You don't cite to any evidence supporting
18:08:50 8 this conclusion, do you, sir?
18:08:52 9 A. I believe there's a -- you'll see those
18:08:55 10 names pop up in a bunch of these other documents
18:08:57 11 that were like considered, but it's there. I mean,
18:09:01 12 you can go out on the internet, and you can find
18:09:04 13 all kinds of documents about these companies.
18:09:06 14 Q. What do you know about what you could find
18:09:08 15 on the internet back in 2005, sir?
18:09:11 16 You haven't done any analysis of that,
18:09:13 17 have you?
18:09:15 18 MR. McDONELL: Object to the form. Beyond
18:09:15 19 the scope.
18:09:19 20 THE WITNESS: That wasn't part of my
18:09:20 21 assignment to do an in-depth or -- you know,
18:09:23 22 analysis of the individual vendors. I believe that
18:09:25 23 was Mr. Clarke's responsibility as part of his
18:09:28 24 expert report.
18:09:29 25 MS. HOUSE: Q. So your opinions are not

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18:09:32 1 specific to the time period in this case. Is that
18:09:34 2 right?
18:09:35 3 MR. McDONELL: Misstates the testimony,
18:09:37 4 object to the form.
18:09:43 5 THE WITNESS: My remarks are generally on
18:09:46 6 target with what's going on in that time frame.
18:09:52 7 MS. HOUSE: Q. Your remarks are also not
18:09:54 8 limited to just the products at issue. We've
18:09:56 9 already seen that. Right?
18:09:57 10 MR. McDONELL: Asked and answered. Object
18:09:58 11 to the form.
18:10:01 12 THE WITNESS: There are spots in this
18:10:02 13 report where I've referenced, for example, like
18:10:05 14 Lawson Software, other vendors, yes.
18:10:07 15 MS. HOUSE: Q. And your opinions are not
18:10:09 16 limited to the -- only the alternative support for
18:10:12 17 the products at issue in this case. Right?
18:10:17 18 MR. McDONELL: Object to the form.
18:10:28 19 THE WITNESS: For the most part, they are.
18:10:30 20 Although I know that when I discuss like Sabrix,
18:10:35 21 for example, I do -- yes, on page 45, I do mention
18:10:39 22 some other products, like Microsoft Dynamics, just
18:10:43 23 other examples of other things that these companies
18:10:45 24 provide.
18:10:46 25 But the context for those comments had

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18:10:48 1 more to do with just proving again how -- how well
18:10:53 2 established these kind of products are and how much
18:10:55 3 of the market, the ERP market, they can support.
18:10:59 4 MS. HOUSE: Q. And your opinions aren't
18:11:02 5 restricted to just those support vendors who were
18:11:06 6 comparable to TomorrowNow. Right?
18:11:07 7 MR. McDONELL: Asked and answered. Object
18:11:08 8 to the form.
18:11:10 9 THE WITNESS: Again, I took a look at this
18:11:12 10 from -- my view on this report was that different
18:11:15 11 customers at different points of time might value
18:11:18 12 different things. So I tried to cover as
18:11:20 13 comprehensively as I could for the court what are
18:11:23 14 all the different kinds of factors and decisions
18:11:25 15 someone would look at in evaluating choices at
18:11:27 16 different times.
18:11:28 17 And that was one of my points in this
18:11:29 18 report, is that customers make different decisions
18:11:33 19 at different times.
18:11:43 20 MS. HOUSE: Q. Your next section, called
18:11:45 21 "Support options," on the next page, Section 4, you
18:11:49 22 opine:
18:11:50 23 If a software customer decides that
18:11:52 24 vendor-provided support provides questionable
18:11:55 25 value for their firm, they will likely

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18:11:58 1 examine several alternatives, including
18:12:00 2 self-support and third-party maintenance.
18:12:02 3 Do you see that?
18:12:02 4 A. Yes, I do.
18:12:04 5 Q. What basis do you have to conclude that
18:12:06 6 any Oracle ERP customer will likely examine several
18:12:10 7 alternatives including self-support and third-party
18:12:13 8 maintenance?
18:12:15 9 A. I think the decision to move off of vendor
18:12:18 10 maintenance is a serious decision, and -- that a
18:12:21 11 company would undertake. That if they're going to
18:12:25 12 make a serious business decision, that they're
18:12:28 13 going to take some time to evaluate alternatives
18:12:31 14 and make sure they're making a good one.
18:12:35 15 Q. Have you done any Oracle customer studies
18:12:37 16 to come to the conclusion about what an Oracle ERP
18:12:40 17 customer will likely do or examine?
18:12:43 18 MR. McDONELL: Vague and ambiguous, object
18:12:44 19 to the form.
18:12:46 20 THE WITNESS: Again, that wasn't part of
18:12:48 21 my assignment for this case.
18:12:50 22 MS. HOUSE: Q. Have you ever seen any
18:12:50 23 analysis providing such a conclusion as to any
18:12:52 24 Oracle customers?
18:12:54 25 MR. McDONELL: Same objection.

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18:12:55 1 THE WITNESS: Outside of Mr. Meyer's
18:12:56 2 report that I -- not Mr. Meyer's -- well, yes,
18:13:00 3 Mr. Meyer's and Mr. Clarke's reports, that's about
18:13:03 4 really it.
18:13:07 5 MS. HOUSE: Q. So again, you cite no
18:13:15 6 evidence in this case from pages 41 to 46 in your
18:13:19 7 report. Is that correct?
18:13:22 8 MR. McDONELL: Misstates the testimony. I
18:13:24 9 mean, misstates the document.
18:13:30 10 THE WITNESS: 41 has cites. But --
18:13:34 11 MS. HOUSE: Q. To evidence in the case,
18:13:35 12 sir.
18:13:36 13 MR. McDONELL: That's vague and ambiguous.
18:13:38 14 Object to the form of the question.
18:13:38 15 THE WITNESS: I'm sorry, did I
18:13:38 16 misunderstand --
18:13:39 17 MS. HOUSE: Q. Produced by the parties,
18:13:39 18 by the customers, actually in the case.
18:13:45 19 MR. McDONELL: Same objection.
18:13:45 20 THE WITNESS: No. The
18:13:48 21 customer-by-customer analysis was done by Mr. Steve
18:13:52 22 Clarke.
18:13:54 23 MS. HOUSE: Q. Well, there's -- do you
18:13:55 24 understand there's been evidence produced beyond
18:13:57 25 just customers. There's been a variety of evidence

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18:13:59 1 on the third-party market, there's been a variety
18:14:02 2 of evidence on what the parties felt about that
18:14:05 3 market at the time?
18:14:06 4 It's not just customer-by-customer stuff.
18:14:09 5 You haven't looked at any of it. Right?
18:14:11 6 MR. McDONELL: Object to the form,
18:14:12 7 argumentative, vague and ambiguous.
18:14:15 8 THE WITNESS: I have provided a whole --
18:14:18 9 there's like -- I'm guessing about 4500 pages
18:14:22 10 worth, or 4000-, I guess, odd pages, maybe more, of
18:14:27 11 stuff I referenced in Appendix C that were things
18:14:30 12 that I considered.
18:14:31 13 The fact that, you know, I actually did
18:14:34 14 some -- I did quite a bit of work actually getting
18:14:37 15 prepared and focused for this report.
18:14:39 16 So did I consider some other things? Yes.
18:14:43 17 MS. HOUSE: Q. But not in stuff that was
18:14:44 18 produced by the parties or in this case. Right?
18:14:47 19 MR. McDONELL: Asked and answered
18:14:47 20 repeatedly. Object to the form of the question.
18:14:49 21 Argumentative.
18:14:51 22 THE WITNESS: By about the individual
18:14:54 23 parties, we're talking about the customers in this
18:14:56 24 case --
18:14:57 25 MS. HOUSE: Q. No, I'm talking about

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18:14:59 1 SAP --
18:14:59 2 A. We're talking about Oracle and SAP? No.
18:15:02 3 Q. Could you look at the detail -- in subpart
18:15:03 4 (a), you're talking about consultants as being an
18:15:06 5 alternative to vendor-provided support. Right?
18:15:09 6 A. Yes.
18:15:09 7 Q. And while you used the plural,
18:15:10 8 "consultants," you only identify one firm, S&I
18:15:13 9 Technologies. Correct?
18:15:16 10 A. It says right there, as an example, yes, I
18:15:19 11 identify them.
18:15:20 12 Q. And all the information that you have
18:15:22 13 relay about S&I is from the marketing brochure that
18:15:26 14 you got off the internet which you identify in
18:15:29 15 Footnote 41. Right?
18:15:30 16 A. Yes. I did get that off the internet.
18:15:33 17 Q. And the title of that is, "Why S&I Should
18:15:36 18 Be Your Preferred Oracle's JD Edwards Service
18:15:40 19 Partner in China and Asia." Right?
18:15:43 20 A. Yes.
18:15:45 21 Q. How many TomorrowNow customers were in
18:15:48 22 China and Asia, sir?
18:15:50 23 MR. McDONELL: Lack of foundation, beyond
18:15:52 24 the scope, object to the form.
18:15:56 25 THE WITNESS: That wasn't part of the

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18:15:57 1 scope of my report, or part of my assignment,
18:16:00 2 excuse me.
18:16:00 3 MS. HOUSE: Q. And from this article, do
18:16:02 4 you draw the conclusion that S&I could provide
18:16:05 5 comparable support to TomorrowNow?
18:16:07 6 MR. McDONELL: Asked and answered, beyond
18:16:08 7 the scope, object to the form.
18:16:10 8 THE WITNESS: I just include them as an
18:16:11 9 example of what a consulting firm could do. And
18:16:14 10 I've run into S&I people at software shows. That's
18:16:17 11 one of the reasons I thought of them and why I went
18:16:22 12 to look them up on their website.
18:16:24 13 MS. HOUSE: Q. What support did they
18:16:25 14 provide on what products that was comparable to
18:16:27 15 TomorrowNow's?
18:16:29 16 MR. McDONELL: Assumes facts --
18:16:30 17 MS. HOUSE: Q. And during what period in
18:16:31 18 what geography?
18:16:32 19 MR. McDONELL: Compound, object to the
18:16:33 20 form.
18:16:33 21 MS. HOUSE: Q. You don't know, do you?
18:16:35 22 MR. McDONELL: Compound, argumentative,
18:16:36 23 object to the form, asked and answered.
18:16:40 24 THE WITNESS: All I can say is, generally
18:16:42 25 I've known that S&I has had capabilities around --

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18:16:45 1 excuse me, around the JD Edwards product for a
18:16:47 2 number of years. And that's one of the reasons I
18:16:49 3 chose them for this example. But I don't know the
18:16:53 4 specific dates around that.
18:16:55 5 MS. HOUSE: Q. From the material that you
18:16:56 6 cite in this section, are you intending to draw
18:17:00 7 conclusions about Oracle-related support services
18:17:03 8 of other consultants?
18:17:04 9 MR. McDONELL: Vague and ambiguous.
18:17:05 10 Object to the form.
18:17:18 11 THE WITNESS: As with any of my
18:17:19 12 discussions in my report about different support
18:17:23 13 options, the options vary by provider. And all I'm
18:17:29 14 offering here is an example of one provider and
18:17:31 15 what they offered. That's it.
18:17:35 16 MS. HOUSE: Q. And you don't know what
18:17:36 17 customers in this case ever even considered using
18:17:40 18 consultants, let alone S&I Technologies, do you?
18:17:45 19 MR. McDONELL: Object to the form, asked
18:17:45 20 and answered.
18:17:46 21 THE WITNESS: Again, that wasn't part of
18:17:47 22 my assignment to do the customer-by-customer
18:17:49 23 reviews.
18:17:51 24 MS. HOUSE: Q. Your next listed support
18:17:52 25 alternative is self-support. Correct?

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18:17:54 1 A. Correct. On page 42.
18:17:56 2 Q. Yes. And your overview lists certain
18:18:03 3 attributes that you opine might make a customer
18:18:06 4 capable of self-support. Right?
18:18:09 5 MR. McDONELL: Document speaks for itself.
18:18:10 6 Object to the form.
18:18:14 7 THE WITNESS: Yes. These three general
18:18:19 8 types of customers can do this, yes.
18:18:21 9 MS. HOUSE: Q. You have no idea which if
18:18:22 10 any of the TomorrowNow customers fit any of your
18:18:25 11 profile. Right?
18:18:26 12 MR. McDONELL: Asked and answered, object
18:18:26 13 to the form.
18:18:27 14 THE WITNESS: Again, this was not part of
18:18:28 15 my assignment. My assignment was to do what I did
18:18:31 16 in this report, to provide the general guidance as
18:18:34 17 to what these kind of factors might be, and I
18:18:36 18 believe Mr. Clarke has already done or has -- well,
18:18:40 19 he has done the analysis along these lines.
18:18:45 20 MS. HOUSE: Q. You'd agree that being
18:18:46 21 potentially able to do self-support doesn't equate
18:18:49 22 with deciding to actually do self-support.
18:18:52 23 Correct?
18:18:52 24 MR. McDONELL: Argumentative, object to
18:18:55 25 the form.

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18:18:56 1 THE WITNESS: I would agree that just
18:18:57 2 because one has the capability of doing it, it
18:19:00 3 doesn't necessarily mean that they're going to do
18:19:03 4 it.
18:19:03 5 MS. HOUSE: Q. You state in the first
18:19:04 6 sentence under "Overview" on page 42 that for
18:19:07 7 those, quote, customers who possess the ability to
18:19:10 8 self-support their ERP software, that self-support
18:19:12 9 is a viable alternative. Right?
18:19:18 10 MR. McDONELL: Can you point out exactly
18:19:19 11 where you're reading from, Counsel, so I can catch
18:19:21 12 up? It's the bottom of page 42?
18:19:26 13 THE WITNESS: I think it's --
18:19:28 14 MS. HOUSE: Q. Maybe I got it wrong.
18:19:30 15 "Overview."
18:19:31 16 A. I think you were reading -- paraphrasing
18:19:33 17 the first two sentences of that "Overview"
18:19:36 18 section --
18:19:38 19 MS. HOUSE: Maybe so.
18:19:39 20 MR. McDONELL: Let her ask the questions.
18:19:40 21 MS. HOUSE: Q. All right. The customers
18:19:41 22 who possess the ability to self-support -- where is
18:19:45 23 that --
18:19:48 24 THE WITNESS: I've got it.
18:19:49 25 MS. HOUSE: Q. Where is it? Tell me?

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18:19:51 1 A. First sentence, under "Overview."
18:19:53 2 Q. That's what I said.
18:19:54 3 Okay. So looking at that first sentence,
18:19:58 4 that some customers possess the ability to
18:20:00 5 self-support their ERP software, do you understand
18:20:02 6 this to be a large or a small percentage of ERP
18:20:06 7 customers?
18:20:07 8 MR. McDONELL: Vague and ambiguous, object
18:20:08 9 to the form.
18:20:12 10 THE WITNESS: I can't answer it with any
18:20:13 11 kind of specificity, because some of the -- for
18:20:17 12 example, some PeopleSoft customers may be very
18:20:19 13 large organizations for the most part, and some
18:20:22 14 JD Edwards customers, particularly those on the
18:20:24 15 older AS/400 platforms, may be much smaller -- have
18:20:29 16 much smaller IT organizations and smaller
18:20:31 17 businesses.
18:20:31 18 So the answer is somewhat
18:20:33 19 customer-specific, and it may be a little bit
18:20:36 20 product-specific there.
18:20:37 21 Again, the only way you can determine the
18:20:39 22 ability to do self-support, you'd have to look at
18:20:41 23 like the record on every single customer to make
18:20:44 24 that determination.
18:20:45 25 MS. HOUSE: Q. Okay. You note on page

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18:20:47 1 43, self-supporting customers -- ah, it's the last
18:20:57 2 paragraph before ii --
18:21:00 3 Self-supporting customers can take
18:21:02 4 advantage of other resources to assist them,
18:21:04 5 if needed. These software companies can
18:21:08 6 retain the services of software product
18:21:10 7 experts on a contract or permanent hire
18:21:14 8 basis. The cost to bring these individuals
18:21:16 9 in-house may be substantially less than what
18:21:19 10 a company is paying a software vendor for an
18:21:21 11 annual maintenance arrangement.
18:21:24 12 So you don't know if these other resources
18:21:27 13 are more expensive or not. Right?
18:21:30 14 MR. McDONELL: Object to the form of the
18:21:30 15 question.
18:21:38 16 THE WITNESS: First let me just correct
18:21:39 17 something.
18:21:40 18 I think I have a misstated word here. It
18:21:43 19 says, these software -- in the second sentence,
18:21:45 20 "these software companies." I think that should be
18:21:47 21 "customers," and my apologies on not catching that.
18:21:53 22 I think that's what it's supposed to say.
18:21:56 23 MS. HOUSE: Q. Okay.
18:21:59 24 A. And your question was, would those
18:22:00 25 retained experts necessarily cost more or less than

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18:22:03 1 what comes from a software company?
18:22:05 2 Q. Right. Do you know?
18:22:08 3 A. I don't know.
18:22:09 4 Q. You don't know if they would be more or
18:22:10 5 less expensive than TomorrowNow, do you?
18:22:13 6 MR. McDONELL: Object to the form of the
18:22:14 7 question.
18:22:15 8 THE WITNESS: Again, I think that's going
18:22:17 9 to be on a case-by-case basis based on what kind
18:22:20 10 of people skills, whether independent, whether they
18:22:25 11 come from a very large consulting firm, what kind
18:22:27 12 of overhead rates and everything else they have.
18:22:29 13 I think that's again customer-specific and
18:22:32 14 outside the scope of my report.
18:22:33 15 MS. HOUSE: Q. And looking at subpart ii,
18:22:35 16 titled "Companies that assist customers with
18:22:38 17 self-support," there you claim that a -- quote, "A
18:22:40 18 number of tax and regulatory information sources
18:22:43 19 have been available for software customers to
18:22:45 20 utilize if they wished to self-support." Correct?
18:22:48 21 A. Correct.
18:22:49 22 Q. And for this analysis, you focused on
18:22:52 23 Vertex; Sabrix, which you say is now part of
18:22:56 24 Thomson Reuters; and Taxware. Correct?
18:22:59 25 A. Correct.

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18:23:02 1 Q. Let's look at Vertex. That's on -- is the
18:23:06 2 entirety of your opinion on Vertex based on the
18:23:12 3 materials listed in Footnotes 43 through 53 of your
18:23:15 4 report?
18:23:25 5 A. If those are the cites that I referenced
18:23:27 6 in putting this together, yes.
18:23:29 7 Q. Do you know how Vertex support was
18:23:33 8 delivered on the products relevant to this case
18:23:35 9 during the relevant time period?
18:23:43 10 A. I know generally they had these vendor
18:23:45 11 toolkits, and that's what's referenced in the first
18:23:47 12 paragraph of page 44. And these were specific to
18:23:51 13 individual ERP applications.
18:23:54 14 Q. Do you know how Vertex' price compared to
18:23:57 15 TomorrowNow?
18:23:59 16 A. No, I do not.
18:24:02 17 Q. Looking at Sabrix, is the entirety of your
18:24:05 18 opinion on Sabrix based on the materials in
18:24:08 19 Footnotes 54 through 55 of your report, or 54 and
18:24:11 20 55 of your report?
18:24:14 21 A. That seems to be correct.
18:24:17 22 Q. And do you know how Sabrix support was
18:24:20 23 delivered on the products relevant to this case
18:24:22 24 during the relevant time period?
18:24:25 25 A. They had a thing called SabrixConnection,

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18:24:27 1 and it would help populate tax table updates into
18:24:32 2 some of these systems that are referenced here in
18:24:34 3 my report.
18:24:35 4 Q. Do you know how the price of Sabrix
18:24:37 5 compared to the price that TomorrowNow was
18:24:40 6 charging?
18:24:41 7 A. I do not. And I would also suggest that
18:24:48 8 this would be another matter that would need to be
18:24:50 9 looked at on a customer-by-customer basis.
18:24:54 10 Q. Finally, let's look at Taxware.
18:24:58 11 Is your entirety of your opinion on
18:24:59 12 Taxware based on the article about ADP that you
18:25:03 13 cite in Footnote 54 of your report?
18:25:08 14 A. Think we're talking about 56, but --
18:25:10 15 Q. I apologize, 56.
18:25:11 16 A. And I believe that's correct.
18:25:15 17 Q. Now, you talk about Taxware's capabilities
18:25:18 18 in that single sentence that you include on
18:25:21 19 Taxware.
18:25:22 20 What were those capabilities for the
18:25:24 21 relevant products at the relevant time frames, sir?
18:25:27 22 MR. McDONELL: Object to the form of the
18:25:28 23 question.
18:25:30 24 THE WITNESS: I don't know about the --
18:25:33 25 exactly about the relevant time frame. I'm

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18:25:35 1 aware -- I am aware of them, and I am aware that
18:25:38 2 they had capabilities in that time frame.
18:25:42 3 MS. HOUSE: Q. But you don't know the
18:25:43 4 parameters of those capabilities on the products at
18:25:45 5 issue in the case?
18:25:46 6 MR. McDONELL: Asked and answered. Object
18:25:47 7 to the form.
18:25:51 8 THE WITNESS: Again, I -- that was not the
18:25:55 9 main focus of my assignment. I just referenced the
18:25:58 10 fact that Taxware was there and they had a
18:26:00 11 significant customer following.
18:26:03 12 MS. HOUSE: Q. And you don't know how
18:26:04 13 Taxware prices compare to the TomorrowNow prices.
18:26:07 14 Correct?
18:26:08 15 MR. McDONELL: Asked and answered. Object
18:26:11 16 to the form.
18:26:13 17 THE WITNESS: I do not know how they
18:26:14 18 priced. And again, that would be something someone
18:26:16 19 needed to look at on a customer-by-customer basis.
18:26:19 20 MS. HOUSE: Q. Okay. Finally, you
18:26:20 21 conclude this self-support section by claiming
18:26:23 22 that, quote, "Beyond Vertex, Sabrix and Taxware,
18:26:29 23 software customers can take advantage of less
18:26:33 24 automated resources to keep their software current
18:26:36 25 with evolving tax and regulatory changes," unquote.

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18:26:40 1 And then you reference a \$75 guide on
18:26:44 2 sales taxes by state, by RIA, and publications by
18:26:50 3 CCH and Thomson Reuters.
18:26:52 4 Do you see that?
18:26:53 5 A. Yes.
18:26:54 6 Q. Are you opining that a company depending
18:26:56 7 on getting its payroll out using its Oracle-owned
18:27:00 8 ERP software would risk doing so based on this type
18:27:03 9 of information?
18:27:05 10 MR. McDONELL: Object to the form of the
18:27:06 11 question. Beyond the scope.
18:27:10 12 THE WITNESS: That wasn't the example that
18:27:11 13 I would have used. But a small company that has
18:27:17 14 operations in one location in one state with very
18:27:20 15 simple payroll tax requirements, they might be able
18:27:23 16 to do just that.
18:27:25 17 MS. HOUSE: Q. Do you know if any
18:27:28 18 TomorrowNow customer fits that profile?
18:27:30 19 MR. McDONELL: Asked and answered. Object
18:27:30 20 to the form.
18:27:31 21 THE WITNESS: I do not, because it was
18:27:33 22 not my -- or not my assignment to do the
18:27:37 23 customer-by-customer review.
18:27:38 24 MS. HOUSE: Q. Are you aware of any
18:27:39 25 company who's ever done that?

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18:27:41 1 MR. McDONELL: Same objection.
18:27:42 2 THE WITNESS: I am aware of companies that
18:27:44 3 do their own tax table maintenance.
18:27:46 4 MS. HOUSE: Q. Have you ever advised a
18:27:47 5 company to do so?
18:27:48 6 MR. McDONELL: Same -- object to the form.
18:27:50 7 THE WITNESS: I have not advised a company
18:27:51 8 to do that.
18:27:59 9 MS. HOUSE: Q. Okay. Let's turn to your
18:28:00 10 final section on support alternatives Section C on
18:28:03 11 page 45, titled "Third party support."
18:28:09 12 And as we discussed, there are no names at
18:28:13 13 least in this section of actual third-party support
18:28:16 14 vendors. Correct?
18:28:19 15 MR. McDONELL: The document speaks for
18:28:19 16 itself. Object to the form.
18:28:28 17 THE WITNESS: That's -- that appears to be
18:28:29 18 correct in Section C.
18:28:30 19 MS. HOUSE: Q. And no analysis of what
18:28:32 20 any third-party vendor actually offered. Is that
18:28:34 21 right?
18:28:36 22 A. And again, that was not my assignment.
18:28:38 23 That was I believe Mr. Clarke's responsibility for
18:28:40 24 this case.
18:28:42 25 Q. Okay. And you provide no data that would

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18:28:46 1 allow a comparison of any third-party vendor with
18:28:49 2 what TomorrowNow offered. Correct?
18:28:52 3 A. My answer is the same as the last
18:28:54 4 question. That is correct.
18:28:57 5 Q. In your summary, you state, quote:
18:29:03 6 "The Meyer errs by inferring from the
18:29:07 7 assumption that no third party could provide
18:29:08 8 the same level of support as Oracle or TN and
18:29:11 9 that there are no alternatives to
18:29:13 10 vendor-provided support."
18:29:15 11 Do you see that?
18:29:20 12 A. Yes, I do.
18:29:21 13 Q. Would you agree that you provide no
18:29:22 14 analysis to be able to determine what level of
18:29:24 15 support any third-party support vendor provided
18:29:27 16 during the relevant time?
18:29:29 17 MR. McDONELL: Misstates the testimony,
18:29:30 18 argumentative, object to the form of the question.
18:29:35 19 Asked and answered.
18:29:39 20 THE WITNESS: Could you repeat the
18:29:40 21 question, please?
18:29:40 22 MS. HOUSE: Q. Would you agree that you
18:29:41 23 provide no analysis to be able to determine what
18:29:43 24 level of support any third-party support vendor
18:29:45 25 provided during the relevant time?

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18:29:47 1 MR. McDONELL: Same objections.
18:29:48 2 THE WITNESS: Again, that was not the --
18:29:51 3 that was not my assignment in the preparation of
18:29:53 4 this report. I believe that was Mr. Clarke's
18:29:55 5 responsibility.
18:30:00 6 MS. HOUSE: Q. Okay. On 46 of your
18:30:03 7 report, you have a part (d) that's titled "Other
18:30:06 8 options." Correct?
18:30:08 9 A. Yes.
18:30:10 10 Q. And you only discuss business process
18:30:13 11 outsourcing in this section. Correct?
18:30:17 12 MR. McDONELL: The document speaks for
18:30:18 13 itself. Take a moment to review your report.
18:30:31 14 THE WITNESS: Actually, it does -- in the
18:30:33 15 last paragraph, it does mention, again, independent
18:30:35 16 contractors, specialty technology services firms or
18:30:37 17 some system integrators, and it even talks about
18:30:40 18 software resellers in that last sentence.
18:30:42 19 But the bulk of that section is about
18:30:43 20 business process outsourcers.
18:30:47 21 MS. HOUSE: Q. And the other part that
18:30:49 22 you've just referenced has no citation or analysis.
18:30:52 23 Correct?
18:30:54 24 MR. McDONELL: Argumentative, the document
18:30:56 25 speaks for itself. Object to the form.

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18:30:58 1 THE WITNESS: The ADP reference, I
18:31:00 2 believe, is cited. But other parts of that, no.
18:31:10 3 If I'm looking at this correctly.
18:31:12 4 MS. HOUSE: Q. Do you understand that
18:31:12 5 customers in this case had already -- they all had
18:31:14 6 licenses. Right? They already had PeopleSoft and
18:31:17 7 JD Edwards and Siebel software. Do you understand
18:31:19 8 that?
18:31:19 9 MR. McDONELL: Misstates the testimony,
18:31:20 10 object to the form, incomplete hypothetical.
18:31:23 11 THE WITNESS: I want to correct my
18:31:24 12 previous answer.
18:31:25 13 There are at least three footnotes in this
18:31:28 14 Section D. And -- that talk about my reference
18:31:33 15 Genpact, ADP, and there's an Accenture
18:31:37 16 cross-reference in there as well.
18:31:40 17 And I'm sorry, can you repeat your last
18:31:42 18 question?
18:31:44 19 MS. HOUSE: Q. You're talking about
18:31:45 20 business process outsourcing. But do you
18:31:48 21 understand that the customers here have licenses
18:31:51 22 already. Right?
18:31:52 23 MR. McDONELL: Object to the form of the
18:31:53 24 question. Overly broad, no foundation.
18:31:57 25 MS. HOUSE: Q. They have already paid for

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18:31:58 1 them?
18:31:58 2 MR. McDONELL: Same objections. Calls for
18:32:00 3 speculation, lack of foundation.
18:32:01 4 THE WITNESS: I understand these
18:32:02 5 customers, these Oracle customers, and that's
18:32:05 6 Oracle broadly, these customers had licenses with
18:32:08 7 Oracle.
18:32:09 8 MS. HOUSE: Q. And do you understand that
18:32:11 9 these customers who already have licenses are not
18:32:15 10 the -- they're not looking for business outsourcing
18:32:20 11 where they don't have to pay for a license. Right?
18:32:23 12 MR. McDONELL: Misstates the testimony.
18:32:24 13 Object to the form of the question.
18:32:27 14 THE WITNESS: I have no way of knowing
18:32:30 15 what they were interested in looking at
18:32:32 16 individually. And again, that's a
18:32:33 17 customer-by-customer view. And the fact of the
18:32:35 18 matter is, if some of these customers were getting
18:32:39 19 near the end of the life with their software
18:32:42 20 arrangements, they would be looking at possibly
18:32:47 21 re-upping their license with Oracle, they could
18:32:50 22 have looked to move to some other vendor, they
18:32:52 23 could have looked at some substitute product like
18:32:54 24 an outsource -- excuse me, an outsource deal or a
18:32:57 25 process outsourcing solution. There were other

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18:32:59 1 options available to them. Or they could have even
18:33:02 2 gone third-party maintenance and continued with
18:33:03 3 Oracle.
18:33:04 4 There was a wealth of options they had
18:33:05 5 available to them.
18:33:07 6 MS. HOUSE: Q. You're not aware of any
18:33:08 7 customer in this case who ever considered business
18:33:11 8 process outsourcing as an alternative to their
18:33:14 9 license and support arrangements with Oracle or
18:33:18 10 TomorrowNow. Correct?
18:33:19 11 MR. McDONELL: Calls for speculation,
18:33:20 12 beyond the scope, object to the form of the
18:33:22 13 question.
18:33:23 14 THE WITNESS: While that wasn't part of my
18:33:25 15 assignment to do this on a customer-by-customer
18:33:28 16 basis, I would professionally, or my expert opinion
18:33:32 17 would be, I would be surprised if some of them
18:33:34 18 didn't utilize services from payroll service
18:33:37 19 providers like ADP, Ceridian, Paychex or other
18:33:41 20 firms like that.
18:33:42 21 MS. HOUSE: Q. But you don't know?
18:33:43 22 MR. McDONELL: Same objection.
18:33:44 23 Argumentative.
18:33:45 24 THE WITNESS: I don't know for a fact.
18:33:47 25 MS. HOUSE: Q. You provide no information

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18:33:49 1 at all about who the outsourcing vendors were at
18:33:52 2 the relevant time, do you?
18:33:53 3 MR. McDONELL: The document speaks for
18:33:54 4 itself. Object to the form. Also misstates the
18:34:00 5 testimony.
18:34:05 6 THE WITNESS: I know that three that I
18:34:07 7 referenced here -- Accenture, ADP and Genpact --
18:34:12 8 were in business during that relevant time frame,
18:34:14 9 and they were offered an outsourced, process
18:34:17 10 outsourced solution.
18:34:18 11 MS. HOUSE: Q. Do you tell us what they
18:34:19 12 offered at what price and how it compared to
18:34:21 13 TomorrowNow?
18:34:22 14 MR. McDONELL: The document speaks for
18:34:22 15 itself. Object to the form.
18:34:23 16 THE WITNESS: No, I did not. And again,
18:34:25 17 that was not the scope of my assignment. My
18:34:28 18 assignment was to discuss these general options and
18:34:32 19 trends in the industry, and that others would do a
18:34:35 20 more detailed evaluation.
18:34:44 21 MS. HOUSE: Q. Going to pages 51 and 52
18:34:46 22 of your report -- it's actually page 52.
18:35:14 23 At the bottom, you say -- in a sentence,
18:35:19 24 you say: This explains why most marketing programs
18:35:22 25 by either of these two firms -- those two firms are

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18:35:25 1 SAP and Oracle. Correct?
18:35:29 2 A. Yes. That would be the two firms I'm
18:35:31 3 referring to.
18:35:31 4 Q. -- have had a limited impact on their
18:35:33 5 customers.
18:35:35 6 What data do you have to show that most
18:35:38 7 marketing programs by either Oracle or SAP have had
18:35:44 8 limited impact on their customers?
18:35:46 9 MR. McDONELL: Asked and answered. Object
18:35:48 10 to the form of the question.
18:36:01 11 THE WITNESS: I base that from my
18:36:03 12 experience in the market and watching the ERP space
18:36:06 13 for years, and that had a particular marketing
18:36:11 14 program that one vendor had introduced had
18:36:14 15 significant -- created significant changes in
18:36:15 16 market share, it would have been -- it would have
18:36:16 17 been of note.
18:36:18 18 And I don't -- I have yet to see one of
18:36:21 19 those in my career.
18:36:27 20 MS. HOUSE: Q. You don't have any data or
18:36:30 21 analysis of any of the marketing programs of either
18:36:34 22 Oracle or SAP to support this statement, do you?
18:36:37 23 MR. McDONELL: Asked and answered. Object
18:36:38 24 to the form of the question. Compound.
18:36:41 25 THE WITNESS: I think when I have -- on

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18:36:44 1 the previous page, 51 and 52, points out very
18:36:47 2 clearly from the -- from Oracle alone that they've
18:36:51 3 experienced -- that they have a considerable amount
18:36:56 4 of presence already in the market, and so has SAP,
18:36:59 5 and the two vendors have a tremendous overlap in
18:37:07 6 the market shares of each other, and that they have
18:37:09 7 significant account penetration in each other's
18:37:12 8 businesses.
18:37:13 9 And what my report was trying to point out
18:37:15 10 is, just because someone comes out with a new
18:37:18 11 program doesn't mean it's going to be a -- I think
18:37:21 12 the word would be a fait accompli, where it's going
18:37:26 13 to be successful. If they already have a lot of
18:37:30 14 the customers together, how many more can they get?
18:37:32 15 Let's look at that one line alone I have
18:37:36 16 at the top of 51 where Oracle boasts having 97
18:37:39 17 percent coverage withing the Fortune 500.
18:37:42 18 I find it hard to figure out how any
18:37:44 19 marketing program could get them more Fortune 500
18:37:48 20 accounts. That would be very difficult to do. And
18:37:50 21 that's really the point of what I'm making here, is
18:37:52 22 that these two are successful companies, but the
18:37:55 23 incremental amount of marketing effort that they
18:37:58 24 put into a new program is going to be difficult for
18:38:01 25 them to get additional new business.

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18:38:02 1 MS. HOUSE: Q. A couple things. The 97
18:38:06 2 percent, you already agreed that that's in February
18:38:08 3 of 2010, not January 2005. Right?
18:38:14 4 MR. McDONELL: Asked and answered. Object
18:38:14 5 to the form.
18:38:15 6 THE WITNESS: Yes, I believe that was
18:38:17 7 correct.
18:38:21 8 MS. HOUSE: Q. And you -- what I really
18:38:22 9 want is a clear answer that you don't have any data
18:38:25 10 on the particular marketing programs of either
18:38:29 11 Oracle or SAP in which you can say they have had
18:38:34 12 limited success?
18:38:35 13 MR. McDONELL: Asked and answered
18:38:35 14 repeatedly. Object to the form. He's explained
18:38:38 15 his reasons.
18:38:39 16 THE WITNESS: Beyond what I have in my
18:38:40 17 report and my experience in being an industry
18:38:43 18 watcher for 20 or 30 -- almost 30 years, that's all
18:38:46 19 I have to offer you.
18:38:54 20 MS. HOUSE: Q. And when you reference at
18:38:57 21 the -- the data -- let me try again.
18:39:06 22 The bottom line says: The programs
18:39:08 23 generally repackage or reprice what customers have
18:39:11 24 already come to know and expect of either firm.
18:39:14 25 Do you understand that TomorrowNow was a

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18:39:15 1 new offering that had never been offered by SAP
18:39:20 2 before?
18:39:22 3 A. My understanding was, it was a new
18:39:24 4 marketing term, or program. I know they had
18:39:27 5 another thing before that called, I believe it was
18:39:29 6 called something similar to that, like -- I believe
18:39:34 7 it was Safe Harbor, I believe. The difference
18:39:37 8 between the two being the TomorrowNow ingredient.
18:39:42 9 Q. So that was new. Right?
18:39:44 10 MR. McDONELL: Object to the form.
18:39:47 11 THE WITNESS: That was a new ingredient,
18:39:50 12 yes.
18:39:51 13 MS. HOUSE: Q. Now, on page 53 of your
18:39:54 14 report you say that Safe Passage could not
18:39:55 15 meaningfully lower the TCO for customers that used
18:39:59 16 the program to migrate onto SAP products from
18:40:01 17 Oracle beyond what a customer could accomplish by
18:40:04 18 negotiating with SAP outside of the Safe Passage
18:40:07 19 program. Correct?
18:40:10 20 A. That is correct.
18:40:12 21 Q. Do you know who Henning Kagermann is?
18:40:15 22 A. Yes. Henning was at one time co-CEO of
18:40:20 23 SAP.
18:40:21 24 Q. Did you read his deposition testimony in
18:40:23 25 this case?

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18:40:24 1 A. No, I did not.
18:40:25 2 MR. McDONELL: Asked and answered.
18:40:26 3 MS. HOUSE: Q. Let me show you an
18:40:27 4 excerpt.
18:40:33 5 We'll mark this 3254.
18:40:35 6 (Deposition Exhibit 3254 was marked for
18:40:40 7 identification.)
18:40:51 8 MS. HOUSE: Q. Mr. Kagermann testified on
18:40:53 9 130 that at the time of SAP's acquisition of
18:41:02 10 TomorrowNow, SAP was trying to make it clear to
18:41:06 11 their customers that SAP was customer-focused.
18:41:08 12 Do you see that?
18:41:10 13 MR. McDONELL: Objection. It's vague and
18:41:11 14 ambiguous. And you're giving an incomplete
18:41:17 15 document to the witness.
18:41:23 16 THE WITNESS: I see that.
18:41:25 17 MS. HOUSE: Q. Do you have any reason to
18:41:26 18 disbelieve the testimony of the CEO of SAP?
18:41:30 19 MR. McDONELL: Object to the form of the
18:41:30 20 question. Argumentative, vague and ambiguous.
18:41:33 21 Incomplete document.
18:41:35 22 THE WITNESS: That's what they wanted to
18:41:36 23 communicate, and that's what he believed they were
18:41:38 24 doing, and I don't have any reason to dispute that.
18:41:41 25 MS. HOUSE: Q. And then he testifies on

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18:41:43 1 page 131 that during SAP's earnings calls, he
18:41:47 2 indicated that the TomorrowNow acquisition was an
18:41:51 3 important development related to Safe Passage.
18:41:53 4 Do you see that?
18:41:55 5 MR. McDONELL: Slow down. I want to make
18:41:56 6 sure --
18:41:57 7 THE WITNESS: I'm catching up to you.
18:42:00 8 MR. McDONELL: Take your time and read it,
18:42:01 9 Mr. Sommer.
18:42:03 10 MS. HOUSE: Q. Try looking at line 18 on
18:42:05 11 131.
18:42:08 12 MR. McDONELL: You've misstated the
18:42:09 13 document.
18:42:13 14 MS. HOUSE: Q. "Question: You
18:42:15 15 identified TomorrowNow, the TomorrowNow
18:42:17 16 acquisition, as an important development on
18:42:19 17 your earnings call.
18:42:20 18 "Answer: That's quite possible.
18:42:22 19 "Question: And you said that the Safe
18:42:23 20 Passage program demonstrates your commitment
18:42:25 21 to doing what is best for the customer?
18:42:27 22 "Answer: Yes."
18:42:29 23 Do you see that?
18:42:30 24 A. I see that.
18:42:34 25 Q. And if you turn to pages 133 and -34 --

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18:42:39 1 MR. McDONELL: We don't have those.
18:42:41 2 MS. HOUSE: You don't. Okay. No problem.
18:42:46 3 So if you're right about Safe Passage not
18:42:49 4 being a good deal, then Mr. Kagermann wasn't doing
18:42:54 5 what was best for his customers. Right?
18:42:56 6 MR. McDONELL: Argumentative, Counsel. I
18:42:57 7 object to the form of the question.
18:42:59 8 THE WITNESS: Well, that's an interesting
18:43:00 9 interpretation. I don't know that I would agree
18:43:02 10 with that.
18:43:04 11 MS. HOUSE: Q. Is it your position that
18:43:05 12 Mr. Kagermann was using the Safe Passage program to
18:43:07 13 charge the customer more than they otherwise would
18:43:10 14 have paid?
18:43:12 15 MR. McDONELL: Object to the form.
18:43:13 16 MS. HOUSE: Q. Isn't that what your
18:43:14 17 testimony says in your report?
18:43:15 18 MR. McDONELL: You're arguing. It's
18:43:15 19 argumentative, misstates the testimony, object to
18:43:17 20 the form of the question. You never really have
18:43:23 21 asked Mr. Sommer to explain his report.
18:43:26 22 THE WITNESS: I don't think I'm saying --
18:43:29 23 maybe I'm misunderstanding you, but I'm not seeing
18:43:32 24 where I'm saying that I've identified that Safe
18:43:35 25 Passage was going to cost somebody more.

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18:43:38 1 MS. HOUSE: Q. That's not your opinion?
18:43:41 2 A. I'm trying to figure out how -- there is
18:43:51 3 only this one section in here where Shai Agassi
18:43:54 4 gave these examples how if you didn't use Safe
18:43:58 5 Passage, you may come out with a better deal. If
18:44:01 6 that's what you're referring to, then yes, I do
18:44:04 7 have that discussion in my report.
18:44:06 8 Q. Is that the only basis for concluding that
18:44:09 9 a Safe Passage deal might have a higher TCO than a
18:44:15 10 non-Safe Passage deal?
18:44:16 11 MR. McDONELL: Misstates the report,
18:44:18 12 misstates the testimony, object to the form of the
18:44:19 13 question.
18:44:21 14 THE WITNESS: I'm not saying that Safe
18:44:23 15 Passage caused the price to go up or down. I just
18:44:28 16 said it's going to have a minimal effect on the
18:44:30 17 customer's total cost of ownership. And that's
18:44:33 18 even in my heading at the top of page 53.
18:44:37 19 MS. HOUSE: Q. And when you talk about
18:44:40 20 the savings that were coming off of Oracle's
18:44:42 21 support fees, you were using a 50 percent figure.
18:44:45 22 Correct? Not a zero percent figure?
18:44:48 23 MR. McDONELL: Asked and answered. Object
18:44:49 24 to the form of the question.
18:44:52 25 THE WITNESS: Further down on that page

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18:44:53 1 53, yes, I went and referred to the 50 percent off
18:44:56 2 number, yes. In that example.
18:45:01 3 MS. HOUSE: Q. You never did any
18:45:02 4 calculations using a free service from TomorrowNow.
18:45:04 5 Right?
18:45:05 6 MR. McDONELL: Object to the form of the
18:45:05 7 question. Asked and answered several times.
18:45:09 8 THE WITNESS: No, I did not. And as my
18:45:11 9 report said, I kind of went -- I based my stuff on
18:45:14 10 the stated claims of the program as I understood
18:45:20 11 them in the marketplace.
18:45:24 12 MS. HOUSE: Q. Could you turn to
18:45:26 13 paragraph 3 on page 56?
18:45:35 14 A. Third full paragraph?
18:45:37 15 Q. It's the -- 3, where you say, a
18:45:39 16 support-only option with TomorrowNow --
18:45:41 17 A. Oh, I'm sorry, okay.
18:45:42 18 Q. -- would keep customers on old products,
18:45:44 19 not move them to SAP. And your first sentence is,
18:45:48 20 quote, "A standalone TomorrowNow support offering
18:45:50 21 was a flawed strategy." Correct?
18:45:55 22 A. For SAP.
18:45:56 23 Q. You're opining that in hindsight?
18:46:01 24 MR. McDONELL: Misstates the testimony.
18:46:03 25 Asked and answered. Object to the form of the

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18:46:04 1 question.
18:46:06 2 THE WITNESS: I'm saying that --
18:46:09 3 MS. HOUSE: Q. It's important that we
18:46:10 4 figure out what your time period is when you're
18:46:12 5 saying it. Was it a flawed strategy going in, or
18:46:17 6 was it a flawed strategy looking back at the
18:46:19 7 results?
18:46:20 8 MR. McDONELL: He's asked and answered
18:46:21 9 that question. Looking back from the --
18:46:24 10 MS. HOUSE: You know what? Cut it out.
18:46:25 11 MR. McDONELL: Counsel, you keep asking
18:46:26 12 the question, and that's the nature of my
18:46:28 13 objection.
18:46:29 14 MS. HOUSE: Cut it out. You know, that's
18:46:31 15 not an objection, and you know it.
18:46:35 16 THE WITNESS: I didn't write this report
18:46:37 17 until this spring. And I wrote it based on what I
18:46:41 18 knew was going on the marketplace from roughly
18:46:45 19 January '05 to I guess the end of October in '08.
18:46:49 20 That was kind of the time frame I was
18:46:51 21 using.
18:46:52 22 I didn't write the report, like I said,
18:46:54 23 until the spring. So what time frame was I looking
18:46:56 24 at on this, this -- this question about, it was a
18:47:02 25 flawed strategy, nobody asked me that question in

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18:47:06 1 '05 or '06 or '07, so I didn't have an opinion that
18:47:10 2 I gave anyone at that time frame, so I don't know
18:47:13 3 how I can answer your question other than to tell
18:47:15 4 you that I wrote this report a few months ago, and
18:47:18 5 that was my opinion at that point in time.
18:47:21 6 MS. HOUSE: Q. Okay. I'm asking, though,
18:47:22 7 so your opinion from what you've just stated, it
18:47:25 8 sounds like you were applying hindsight to come to
18:47:27 9 the conclusion that a stand-alone TomorrowNow
18:47:30 10 support offering was a flawed strategy. Correct?
18:47:33 11 MR. McDONELL: Misstates the testimony,
18:47:34 12 object to the form of the question. Asked and
18:47:37 13 answered.
18:47:46 14 THE WITNESS: I don't know that I would
18:47:46 15 have had a different conclusion a few years ago
18:47:50 16 either, from what I wrote in this report. So I
18:47:52 17 don't know if that -- I don't know that I could
18:47:54 18 call that hindsight either.
18:47:57 19 MS. HOUSE: Q. Okay. So are you
18:47:57 20 intending to opine that that at the time that
18:48:00 21 TomorrowNow was adopted as the cornerstone of Safe
18:48:03 22 Passage, that SAP's decision to do so was a flawed
18:48:06 23 strategy?
18:48:06 24 MR. McDONELL: Argumentative, misstates
18:48:07 25 the testimony, object to the form of the question,

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18:48:10 1 it's been asked and answered.
18:48:13 2 THE WITNESS: I don't know about that
18:48:15 3 phrase, a cornerstone. And as I said earlier in
18:48:19 4 this deposition, I have -- I believe SAP executives
18:48:26 5 believed it was going to be a good deal, or a good
18:48:29 6 deal for them to do this.
18:48:32 7 But I still believe what I've written
18:48:35 8 here: That this idea of a stand-alone TomorrowNow
18:48:39 9 offering was probably not a good idea.
18:48:43 10 MS. HOUSE: Q. Have you looked at any of
18:48:44 11 the evidence in the case about the benefits that
18:48:47 12 SAP foresaw by having stand-alone TomorrowNow
18:48:51 13 deals?
18:48:52 14 MR. McDONELL: Object to the form of the
18:48:52 15 question. Asked and answered repeatedly.
18:48:56 16 THE WITNESS: Are you talking about items
18:48:57 17 that were in like -- like the Hurst deposition?
18:49:00 18 MS. HOUSE: Q. Yes.
18:49:00 19 A. If it was --
18:49:01 20 MR. McDONELL: Asked and answered -- asked
18:49:02 21 and answered, object to the form of the question.
18:49:11 22 MS. HOUSE: Q. You're aware that -- for
18:49:12 23 instance, you've referenced Mr. Hurst. Are you
18:49:14 24 aware that he talked about -- testified about in
18:49:18 25 his deposition, it's one of the exhibits, a

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18:49:21 1 document from April of 2006 from the Apollo
18:49:24 2 marketing organization.
18:49:25 3 Do you remember that was the marketing
18:49:26 4 organization for SAP?
18:49:29 5 A. I don't remember that name, but I remember
18:49:31 6 in his deposition documents he did discuss -- I
18:49:35 7 think it was in his deposition, that he did discuss
18:49:39 8 some goals they may have had.
18:49:41 9 Q. And I'll represent to you that one of the
18:49:44 10 Frequently Asked Questions that the Apollo
18:49:48 11 marketing group put out in response to the
18:49:50 12 question, quote, "What should I lead with in
18:49:52 13 talking to these JD Edwards customers?"
18:49:56 14 And SAP recommends, quote:
18:49:59 15 "By leading are TomorrowNow, SAP can offer
18:50:01 16 these customers immediate savings of up to 50
18:50:03 17 percent on their maintenance and support, and these
18:50:06 18 customers will eventually migrate. Until then, SAP
18:50:09 19 builds credibility and loyalty with the customer by
18:50:12 20 providing immediate savings."
18:50:14 21 Do you remember that sort of thing in
18:50:16 22 looking at Mr. Hurst's deposition?
18:50:19 23 A. That's not --
18:50:20 24 MR. McDONELL: Object to the form of the
18:50:20 25 question. That's exactly what his opinion

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18:50:24 1 addressed.
18:50:25 2 THE WITNESS: That sounds familiar.
18:50:26 3 MS. HOUSE: Q. And are you saying that
18:50:27 4 that was an irrational expectation?
18:50:30 5 MR. McDONELL: Argumentative, vague and
18:50:31 6 ambiguous, what you mean by the term "irrational
18:50:34 7 expectation," object to the form of the question.
18:50:37 8 THE WITNESS: It may have been an
18:50:37 9 expectation of Mr. Hurst or someone in that Apollo
18:50:41 10 organization. I don't know -- I didn't compare
18:50:43 11 those documents -- the documents that he's
18:50:47 12 referring to or you're referring to in his
18:50:49 13 deposition.
18:50:51 14 As far as, is it necessarily a decision I
18:50:55 15 would have agreed with at that time? It may not
18:50:58 16 have been.
18:50:59 17 MS. HOUSE: Q. But you don't know?
18:51:01 18 A. Well, I didn't get asked that question at
18:51:03 19 that point in time.
18:51:06 20 MR. McDONELL: Could I get a quick time
18:51:07 21 check? Because I think we're done.
18:51:10 22 THE VIDEO OPERATOR: 5 more minutes.
18:51:14 23 MS. HOUSE: Q. Now, finally, if you look
18:51:16 24 at other factors on page 57.
18:51:23 25 All of these are talking about costs.

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18:51:25 1 Right?
18:51:25 2 MR. McDONELL: Take your time to look over
18:51:27 3 the material. Don't just take it on its face.
18:51:58 4 MS. HOUSE: Q. I'm talking about A.
18:52:01 5 A. Just A.
18:52:02 6 MR. McDONELL: Pages 57 to 58, Counsel.
18:52:04 7 MS. HOUSE: Q. Yes?
18:52:04 8 A. I believe your question was, all these
18:52:06 9 paragraphs are discussing some factor of cost, and
18:52:08 10 I would agree with that general assessment.
18:52:13 11 Q. So SAP was right that low-cost supported
18:52:15 12 by TomorrowNow could act as an incentive to lure
18:52:17 13 away Oracle's customers. Correct?
18:52:19 14 MR. McDONELL: Object to the form of the
18:52:20 15 question, overly broad, misstates his entire report
18:52:23 16 and his analysis on that issue.
18:52:31 17 THE WITNESS: It does state that cost is a
18:52:33 18 factor. But again, as my report states, there are
18:52:35 19 lots of factors that someone could consider -- that
18:52:38 20 may come into consideration for some of these
18:52:40 21 decisions.
18:52:41 22 MS. HOUSE: Thank you, sir. We're done.
18:52:43 23 THE WITNESS: That's it?
18:52:44 24 MS. HOUSE: That's it.
18:52:45 25 MR. McDONELL: Okay.

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18:53:02 1 THE VIDEO OPERATOR: Going off the record,
18:53:03 2 the time now is 6:52. This also will be the
18:53:07 3 conclusion of Tape 5.
18:53:09 4 (Time noted, 6:52 p.m.)
18:53:09 5 --o0o--
18:53:09 6 I declare under penalty of perjury that
18:53:09 7 the foregoing is true and correct. Subscribed at
18:53:09 8 _____, California, this ____ day of
18:53:09 9 _____ 2010.
18:53:09 10
18:53:09 11 _____
18:53:09 12 BRIAN S. SOMMER
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1 CERTIFICATE OF REPORTER
2 I, HOLLY THUMAN, a Certified Shorthand
3 Reporter, hereby certify that the witness in the
4 foregoing deposition was by me duly sworn to tell
5 the truth, the whole truth, and nothing but the
6 truth in the within-entitled cause;
7 That said deposition was taken down in
8 shorthand by me, a disinterested person, at the
9 time and place therein stated, and that the
10 testimony of said witness was thereafter reduced to
11 typewriting, by computer, under my direction and
12 supervision;
13 That before completion of the deposition
14 review of the transcript [X] was [] was not
15 requested. If requested, any changes made by the
16 deponent (and provided to the reporter) during the
17 period allowed are appended hereto.
18 I further certify that I am not of counsel or
19 attorney for either or any of the parties to the
20 said deposition, nor in any way interested in the
21 event of this cause, and that I am not related to
22 any of the parties thereto.
23
24 DATED: _____
25 _____
HOLLY THUMAN, CSR

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1 July 1, 2010
2 BRIAN S. SOMMER
3 c/o: JASON McDONELL, Attorney at Law
4 JONES DAY
5 555 California Street, 26th Floor
6 San Francisco, California 94104
7 RE: Oracle vs. SAP
8 Dear Mr. Sommer:
9 Please be advised that the original transcript of
10 your deposition taken June 25, 2010 in the
11 above-entitled matter is available for reading and
12 signing. The original transcript will be held at
13 the offices of:
14 Merrill Legal Solutions
15 135 Main Street, 4th Floor
16 San Francisco, CA 94105
17 (415) 357-4300
18 for thirty (30) days in accordance with Federal
19 Rules of Civil Procedure Section 30(e). If you do
20 not sign your deposition within 30 days, it may be
21 used as fully as though signed.
22 If you are represented by counsel in this matter,
23 you may wish to ask your attorney how to proceed.
24 If you are not represented by counsel and wish to
25 review your transcript, please contact our office
for a mutually convenient appointment to review
your deposition.
Thank you for your cooperation in this matter.
Sincerely yours,
Holly Thuman, CSR 6834
cc: Original Transcript
All counsel

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CERTIFICATE OF REPORTER

I, HOLLY THUMAN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein state, and that the testimony of said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

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

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

DATED: July 1st, 2010
Holly Thuman
HOLLY THUMAN, CSR