

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE CORPORATION, a Delaware
Corporation; ORACLE, USA,
INC., a Colorado Corporation,
and ORACLE INTERNATIONAL
CORPORATION, a California
Corporation,

Plaintiffs,

vs.

No. 07-CV-01658-PJH (EDL)

SAP AG, a German Corporation,
SAP AMERICA, INC., a Delaware
Corporation, TOMORROWNOW, INC.,
a Texas Corporation, and DOES
1-50, Inclusive,

Defendants.

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DEPOSITION OF STEPHEN GRAY

VOLUME I

(Page 1 - 315)

June 8, 2010

Reported by:
Natalie Y. Botelho
CSR No. 9897

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 10 | | Page 12 | |
|----------|---|----------|--|
| 09:17:52 | | 09:20:32 | |
| 09:17:57 | | 09:20:34 | |
| 09:18:00 | | 09:20:40 | |
| 09:18:04 | | 09:20:43 | |
| 09:18:05 | | 09:20:46 | |
| 09:18:07 | | 09:20:51 | |
| 09:18:10 | | 09:20:52 | |
| 09:18:12 | | 09:20:52 | |
| 09:18:21 | | 09:20:54 | |
| 09:18:23 | | 09:20:56 | |
| 09:18:26 | | 09:20:58 | |
| 09:18:41 | | 09:20:59 | |
| 09:18:43 | | 09:21:01 | |
| 09:18:46 | | 09:21:03 | |
| 09:18:56 | | 09:21:05 | |
| 09:18:59 | | 09:21:09 | |
| 09:19:01 | | 09:21:11 | |
| 09:19:02 | | 09:21:12 | |
| 09:19:03 | | 09:21:14 | |
| 09:19:03 | | 09:21:19 | |
| 09:19:04 | | 09:21:21 | |
| 09:19:05 | | 09:21:24 | |
| 09:19:08 | | 09:21:29 | |
| 09:19:11 | | 09:21:31 | |
| 09:19:12 | | 09:21:34 | |
| Page 11 | | Page 13 | |
| 09:19:14 | | 09:21:34 | |
| 09:19:16 | | 09:21:36 | |
| 09:19:19 | | 09:21:38 | |
| 09:19:23 | | 09:21:40 | |
| 09:19:25 | | 09:21:44 | |
| 09:19:26 | | 09:21:46 | |
| 09:19:28 | | 09:21:48 | |
| 09:19:31 | | 09:21:53 | |
| 09:19:32 | | 09:21:55 | |
| 09:19:34 | | 09:21:59 | |
| 09:19:37 | | 09:22:01 | |
| 09:19:38 | | 09:22:03 | |
| 09:19:49 | | 09:22:04 | |
| 09:19:53 | | 09:22:07 | |
| 09:19:55 | | 09:22:11 | |
| 09:19:57 | | 09:22:13 | |
| 09:20:00 | | 09:22:15 | |
| 09:20:04 | | 09:22:17 | |
| 09:20:07 | 19 Q. And with whom did you meet, if you | 09:22:18 | |
| 09:20:09 | 20 remember? | 09:22:21 | |
| 09:20:10 | 21 A. I met with Mr. Fuchs, I met with Scott | 09:22:23 | |
| 09:20:17 | 22 Cowan, I met with Laurens Wilkes. | 09:22:28 | |
| 09:20:25 | 23 Q. Anyone else? | 09:22:30 | |
| 09:20:29 | 24 A. No, I think those were the attorneys that | 09:22:33 | |
| 09:20:31 | 25 I met with. | 09:22:37 | |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 30 | | Page 32 | |
|----------|---|----------|--|
| 09:41:16 | | 09:44:16 | |
| 09:41:21 | | 09:44:18 | |
| 09:41:27 | | 09:44:23 | |
| 09:41:28 | | 09:44:24 | |
| 09:41:31 | | 09:44:27 | |
| 09:41:34 | | 09:44:29 | |
| 09:41:35 | | 09:44:35 | |
| 09:41:36 | | 09:44:37 | |
| 09:41:39 | | 09:44:38 | |
| 09:41:40 | | 09:44:46 | |
| 09:41:45 | | 09:44:47 | |
| 09:41:47 | | 09:44:49 | |
| 09:41:52 | | 09:44:50 | |
| 09:41:54 | | 09:44:51 | |
| 09:41:56 | | 09:44:52 | |
| 09:41:56 | | 09:44:55 | |
| 09:41:58 | | 09:44:59 | |
| 09:42:07 | | 09:45:00 | |
| 09:42:10 | | 09:45:05 | |
| 09:42:18 | | 09:45:05 | |
| 09:42:30 | | 09:45:10 | |
| 09:42:39 | | 09:45:13 | |
| 09:42:41 | | 09:45:18 | |
| 09:42:45 | | 09:45:21 | |
| 09:42:48 | | 09:45:23 | |
| Page 31 | | Page 33 | |
| 09:43:00 | | 09:45:28 | |
| 09:43:05 | | 09:45:28 | |
| 09:43:09 | | 09:45:30 | |
| 09:43:16 | | 09:45:40 | |
| 09:43:16 | | 09:45:42 | |
| 09:43:18 | | 09:45:45 | |
| 09:43:21 | | 09:45:48 | |
| 09:43:22 | | 09:45:49 | |
| 09:43:24 | | 09:45:50 | |
| 09:43:25 | | 09:45:55 | |
| 09:43:26 | | 09:45:59 | |
| 09:43:27 | | 09:46:04 | |
| 09:43:31 | | 09:46:07 | |
| 09:43:33 | | 09:46:12 | |
| 09:43:34 | | 09:46:14 | |
| 09:43:35 | | 09:46:17 | |
| 09:43:37 | | 09:46:18 | |
| 09:43:38 | | 09:46:20 | |
| 09:43:43 | | 09:46:24 | |
| 09:43:46 | | 09:46:28 | |
| 09:43:52 | | 09:46:33 | |
| 09:43:52 | 22 Q. Okay. Are you a lawyer, Mr. Gray? | 09:46:36 | |
| 09:44:11 | 23 A. I am not a lawyer. | 09:46:38 | |
| 09:44:12 | 24 Q. Did you go to law school? | 09:46:40 | |
| 09:44:14 | 25 A. I did not go to law school. | 09:46:43 | |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 82 | | Page 84 | |
|----------|--|----------|--|
| 10:48:17 | | 11:15:15 | |
| 10:48:19 | | 11:15:16 | |
| 10:48:20 | | 11:15:16 | |
| 10:48:23 | | 11:15:28 | |
| 10:48:26 | | 11:15:31 | |
| 10:48:28 | | 11:15:39 | |
| 10:48:31 | | 11:15:43 | |
| 10:48:37 | | 11:15:49 | |
| 10:48:40 | | 11:15:53 | |
| 10:48:43 | | 11:15:56 | |
| 10:48:47 | | 11:15:59 | |
| 10:48:50 | 12 Q. In your professional opinion, you could | 11:16:05 | |
| 10:48:53 | 13 not determine -- you cannot determine what is | 11:16:12 | |
| 10:48:56 | 14 protected expression in this case absent that | 11:16:20 | |
| 10:49:00 | 15 guidance; is that correct? | 11:16:28 | |
| 10:49:01 | 16 A. I think absent the guidance, it would | 11:16:33 | |
| 10:49:05 | 17 be -- yeah, I don't know that I -- let me say it | 11:16:36 | |
| 10:49:09 | 18 differently. I don't know that I would be | 11:16:36 | |
| 10:49:11 | 19 comfortable providing that analysis -- that | 11:16:39 | |
| 10:49:12 | 20 technical analysis to determine what was protected | 11:16:41 | |
| 10:49:16 | 21 expression absent some guidance from the attorneys. | 11:16:44 | |
| 10:49:22 | | 11:16:47 | |
| 10:49:24 | | 11:16:55 | |
| 10:49:25 | | 11:16:56 | |
| 10:49:26 | | 11:16:57 | |
| Page 83 | | Page 85 | |
| 10:49:27 | | 11:17:00 | |
| 10:49:29 | | 11:17:09 | |
| 11:14:03 | | 11:17:14 | |
| 11:14:03 | | 11:17:19 | |
| 11:14:11 | | 11:17:21 | |
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| 11:14:22 | | 11:17:51 | |
| 11:14:23 | | 11:17:56 | |
| 11:14:24 | | 11:17:58 | |
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| 11:14:26 | | 11:18:03 | |
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| 11:14:51 | | 11:18:06 | |
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| 11:15:12 | | 11:18:26 | |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 106 | Page 108 |
|--|--|
| 11:45:23 11:45:26 11:45:30 11:45:32 11:45:34 11:45:38 11:45:45 11:45:48 11:45:51 11:45:54 11:45:56 11:45:58 11:46:01 11:46:03 11:46:05 11:46:10 11:46:12 11:46:15 11:46:17 11:46:18 11:46:22 11:46:24 11:46:27 11:46:29 11:46:34 | 11:47:56 11:48:00 11:48:03 11:48:08 11:48:10 11:48:23 11:48:32 11:48:40 11:48:41 11:48:43 11:48:46 11:48:47 11:48:48 11:48:52 11:48:53 11:48:55 11:48:59 11:49:06 11:49:10 11:49:12 11:49:14 11:49:18 11:49:21 11:49:22 11:49:24 |
| Page 107 | Page 109 |
| 11:46:37 11:46:41 11:46:46 11:46:48 11:46:53 11:46:57 11:46:59 11:47:01 11:47:02 11:47:08 11:47:10 11:47:14 11:47:18 11:47:19 11:47:20 11:47:21 11:47:22 11:47:26 11:47:28 11:47:34 11:47:38 11:47:42 11:47:46 11:47:49 11:47:54 | 11:49:34 11:49:38 11:49:43 11:49:47 11:49:50 11:49:53 11:49:55 11:49:59 11:50:02 11:50:05 11:50:09 11:50:11 11:50:15 11:50:19 11:50:22 11:50:24 11:50:27 11:50:31 11:50:35 11:50:39 11:50:42 11:50:43 11:50:46 11:50:49 11:50:50 19 Q. And so in that -- in the list of cases 20 that you've participated in where copyright was the 21 central issue, is it correct that there are two 22 cases in your history as an expert, one being the 23 MathWorks case, and one being the second case? 24 A. That's -- I think that's -- yeah, I think 25 that's correct. |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 198 | | Page 200 | |
|----------|---|----------|--|
| 14:36:10 | | 14:39:12 | |
| 14:36:11 | | 14:39:13 | |
| 14:36:14 | | 14:39:20 | |
| 14:36:17 | | 14:39:24 | |
| 14:36:20 | | 14:39:31 | |
| 14:36:35 | | 14:39:36 | |
| 14:36:42 | | 14:39:40 | |
| 14:36:43 | | 14:39:47 | |
| 14:36:51 | | 14:39:49 | |
| 14:36:55 | | 14:39:51 | |
| 14:36:57 | | 14:39:54 | |
| 14:36:59 | | 14:39:56 | |
| 14:37:02 | | 14:39:58 | |
| 14:37:05 | | 14:40:00 | |
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| 14:37:12 | | 14:40:05 | |
| 14:37:15 | | 14:40:09 | |
| 14:37:17 | | 14:40:10 | |
| 14:37:21 | | 14:40:11 | |
| 14:37:25 | | 14:40:12 | |
| 14:37:30 | | 14:40:15 | |
| 14:37:37 | 22 Q. Do you -- have you ever held yourself out | 14:40:18 | |
| 14:37:38 | 23 as an expert in the interpretation of software | 14:40:18 | |
| 14:37:41 | 24 licenses? | 14:40:22 | |
| 14:37:43 | 25 A. Well, I would not have said so. I suppose | 14:40:24 | |
| Page 199 | | Page 201 | |
| 14:37:51 | 1 there's an interpretation in this report that maybe | 14:40:27 | |
| 14:37:54 | 2 I should reread, but I never would have thought so | 14:40:33 | |
| 14:37:57 | 3 prior to being reminded of it in this particular | 14:40:35 | |
| 14:38:00 | 4 context. So other than that, I can't think of | 14:40:37 | |
| 14:38:02 | 5 anything. | 14:40:42 | |
| 14:38:07 | | 14:40:44 | |
| 14:38:10 | | 14:40:46 | |
| 14:38:15 | | 14:40:48 | |
| 14:38:21 | | 14:40:50 | |
| 14:38:28 | | 14:40:53 | |
| 14:38:30 | | 14:40:56 | |
| 14:38:33 | | 14:41:00 | |
| 14:38:34 | | 14:41:03 | |
| 14:38:38 | | 14:41:06 | |
| 14:38:42 | | 14:41:09 | |
| 14:38:44 | | 14:41:10 | |
| 14:38:46 | | 14:41:13 | |
| 14:38:49 | | 14:41:15 | |
| 14:38:51 | | 14:41:18 | |
| 14:38:52 | | 14:41:21 | |
| 14:38:54 | | 14:41:24 | |
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| 14:39:05 | | 14:41:29 | |
| 14:39:08 | | 14:41:33 | |
| 14:39:09 | | 14:41:37 | |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 206 | | Page 208 | |
|----------|--|----------|---|
| 14:46:48 | | 14:49:43 | 1 procedures for their Web site usage. Might ask me |
| 14:46:52 | | 14:49:47 | 2 to assist. They might ask me dimensions about that |
| 14:46:54 | | 14:49:51 | 3 question. But I don't think they would ask me |
| 14:46:56 | | 14:49:53 | 4 specifically to conduct the -- to produce -- provide |
| 14:46:57 | | 14:49:57 | 5 them a series of policies or terms of use. |
| 14:47:02 | | 14:50:01 | 6 Q. Do you intend to offer an opinion about |
| 14:47:05 | | 14:50:03 | 7 the interpretation of any of the terms of use or |
| 14:47:07 | | 14:50:07 | 8 policies at issue in this case? |
| 14:47:09 | | 14:50:09 | 9 MR. FUCHS: Objection; form. |
| 14:47:14 | | 14:50:13 | 10 THE WITNESS: Well, only to the extent |
| 14:47:17 | | 14:50:15 | 11 that my experience with the variety of terms of use |
| 14:47:23 | | 14:50:19 | 12 reads on my -- on some of the things that are in my |
| 14:47:32 | | 14:50:23 | 13 report. |
| 14:47:34 | | 14:50:24 | 14 MR. POLITO: Q. And other than your |
| 14:47:36 | | 14:50:26 | 15 observation that terms of use vary at different Web |
| 14:47:41 | | 14:50:28 | 16 sites, is there anything else to which you're |
| 14:47:44 | | 14:50:30 | 17 referring in that statement, Mr. Gray? |
| 14:47:49 | | 14:50:32 | 18 MR. FUCHS: Objection; form, |
| 14:47:56 | | 14:50:32 | 19 mischaracterizes his testimony. |
| 14:47:58 | | 14:50:35 | 20 THE WITNESS: What I'm really referring to |
| 14:48:05 | | 14:50:37 | 21 is the -- is the aspects of my report where I have |
| 14:48:08 | | 14:50:40 | 22 commented on terms of use. And there are a few |
| 14:48:11 | | 14:50:44 | 23 comments in my report about that, and I've relied on |
| 14:48:14 | | 14:50:47 | 24 my experience with terms of use and the variety and |
| 14:48:15 | | 14:50:50 | 25 range of terms of use and policies in -- that help |
| Page 207 | | Page 209 | |
| 14:48:18 | | 14:50:56 | 1 inform my comments, but that's all. |
| 14:48:20 | | 14:51:27 | 2 MR. POLITO: Q. Do you refer to any terms |
| 14:48:23 | | 14:51:28 | 3 of use in your report? |
| 14:48:28 | | 14:51:43 | 4 A. I don't -- you mean do I -- any -- I don't |
| 14:48:32 | | 14:51:46 | 5 refer to any specific set of terms of use in my |
| 14:48:36 | | 14:51:50 | 6 report, if that's what you're asking. |
| 14:48:38 | | 14:51:53 | 7 Q. That is what I'm asking. |
| 14:48:39 | | 14:51:54 | 8 A. Okay. I don't think so. Not that I |
| 14:48:42 | | 14:51:56 | 9 recollect sitting here right now. |
| 14:48:47 | | 14:52:02 | |
| 14:48:51 | | 14:52:03 | |
| 14:48:55 | | 14:52:06 | |
| 14:49:01 | | 14:52:07 | |
| 14:49:07 | | 14:52:12 | |
| 14:49:15 | 15 MR. POLITO: Q. Do you hold yourself out | 14:52:17 | |
| 14:49:16 | 16 as an expert in industry practices about Web site | 14:52:20 | |
| 14:49:19 | 17 policies in terms of use? | 14:52:22 | |
| 14:49:21 | 18 MR. FUCHS: Objection; form, compound | 14:52:24 | |
| 14:49:22 | 19 question. | 14:52:27 | |
| 14:49:28 | 20 THE WITNESS: Just as a general industry | 14:52:31 | |
| 14:49:30 | 21 expert? | 14:52:34 | |
| 14:49:31 | 22 MR. POLITO: Q. (Nods head.) | 14:52:37 | |
| 14:49:37 | 23 A. I don't think someone -- well, let me say | 14:52:41 | |
| 14:49:38 | 24 it differently. I don't think someone would come to | 14:52:45 | |
| 14:49:40 | 25 me and ask me to define a set of policies and | 14:52:47 | |

| Page 226 | Page 228 |
|---|--|
| 15:30:17 15:31:26 15:31:28 15:31:31 15:31:37 15:31:44 15:31:48 15:32:34 15:32:41 15:32:42 15:32:44 15:32:48 15:32:52 15:32:56 15:32:58 15:33:02 15:33:15 15:33:17 15:33:20 15:33:23 15:33:25 15:33:27 15:33:34 15:33:37 15:33:40 | 15:35:24 1 to the list. But that's the intent. Yes, that's 15:35:26 2 the intent of Exhibit 3, is to provide the list of 15:35:30 3 the documents that I have relied on or considered. 15:35:47 15:35:50 15:35:56 15:36:01 15:36:03 15:36:09 15:36:12 15:36:16 15:36:19 15:36:24 15:36:27 15:36:29 15:36:32 15:36:34 15:36:37 15:36:42 15:36:53 15:36:55 15:36:58 15:37:00 15:37:02 15:37:05 |
| Page 227 | Page 229 |
| 15:33:42 15:33:46 15:33:48 15:33:49 15:33:51 15:33:53 15:33:57 15:34:00 15:34:16 15:34:18 15:34:18 15:34:33 15:34:33 12 Q. And is it correct that Appendix 3 is the 15:34:42 13 list of materials that you considered or relied 15:34:45 14 upon? 15:34:49 15 A. Yes, I think so. 15:34:50 16 Q. You think so? You're not sure? 15:34:53 17 A. Well, there's lots of documents here, and 15:34:59 18 I guess -- I guess what you're -- the way you're 15:35:04 19 asking me the question, "Is this the list," I 15:35:07 20 wouldn't be -- I would be dismayed, but not shocked, 15:35:10 21 if -- to find that something didn't make it on the 15:35:13 22 list. I have done the best I can to make that list 15:35:16 23 as complete as I can, but I would be, you know, 15:35:19 24 upset, but not shocked, if I -- there was something 15:35:22 25 that maybe I read or considered that didn't make it | 15:37:07 15:37:07 15:37:09 15:37:12 15:37:16 15:37:19 15:37:22 15:37:25 15:37:28 15:37:30 15:37:33 15:37:34 15:37:39 15:37:40 15:37:44 15 Q. That's fine. How did you decide whether a 15:37:45 16 document should be on this list or not? 15:37:52 17 A. I think it's -- the qualification is 15:37:54 18 whether I considered it or relied on it in the 15:37:58 19 development of my report, with probably a bias 15:38:02 20 towards over-inclusion. By that I mean with a bias 15:38:07 21 towards -- if there was a document that I may or may 15:38:10 22 not have considered very carefully or that was 15:38:13 23 cumulative to some other document that was on there, 15:38:15 24 I think it -- the list should reflect -- have a bias 15:38:19 25 towards over-inclusion, meaning that it should |

| Page 230 | | Page 232 | |
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| 15:38:22 | 1 reflect documents, even though there may be some | 15:40:50 | 1 all of which are also documents. So I relied on |
| 15:38:24 | 2 cumulative aspect of -- or -- but I don't -- and -- | 15:40:55 | 2 that document, Plaintiffs' Exhibit -- Deposition |
| 15:38:30 | 3 no, that's -- that's sufficient. | 15:40:59 | 3 Exhibits 1 through 1880. However, I don't know that |
| 15:38:32 | 4 Q. So, for instance, on Page 4 of Appendix 3, | 15:41:04 | 4 I touched each individual file in there. |
| 15:38:38 | 5 you state that you considered or relied upon | 15:41:08 | |
| 15:38:41 | 6 Plaintiffs' Deposition Exhibits 1 through 1,880. Is | 15:41:09 | |
| 15:38:45 | 7 that accurate, Mr. Gray? | 15:41:12 | |
| 15:38:48 | 8 A. Where are we looking? | 15:41:18 | |
| 15:38:49 | 9 Q. It's if -- they're not page numbered. I'm | 15:41:20 | |
| 15:38:51 | 10 sorry. But so the fourth page of your Appendix 3, | 15:41:23 | |
| 15:38:54 | 11 under "Deposition Exhibits." | 15:41:24 | |
| 15:38:57 | 12 A. Are you counting the Appendix 3 page or -- | 15:41:31 | |
| 15:38:59 | 13 Q. No, I'm not. I'm not. | 15:41:34 | |
| 15:39:00 | 14 A. First page of text. | 15:41:37 | |
| 15:39:02 | 15 Q. First page of context other than the words | 15:41:42 | |
| 15:39:05 | 16 "Appendix 3." | 15:41:43 | |
| 15:39:08 | 17 A. And now I think I'm on the fourth page. | 15:41:46 | |
| 15:39:11 | 18 Q. It starts with -- under "Description," it | 15:41:49 | |
| 15:39:12 | 19 starts with "Daniel Vardell" at the top of that | 15:41:53 | 19 Q. Is it your professional opinion that this |
| 15:39:14 | 20 page. | 15:41:55 | 20 reference identifies the documents that you |
| 15:39:14 | 21 A. Yes, we're on the same page. | 15:42:00 | 21 considered in a way that's intelligible to anybody |
| 15:39:16 | 22 Q. If you go -- so there's a white space, | 15:42:02 | 22 but you? |
| 15:39:17 | 23 then it says, "Deposition Exhibits, Plaintiffs' | 15:42:05 | 23 MR. FUCHS: Objection; form, |
| 15:39:19 | 24 Deposition Exhibits 1 through 1,880." Do you see | 15:42:06 | 24 argumentative. |
| 15:39:23 | 25 that, Mr. Gray? | 15:42:14 | 25 THE WITNESS: I can't -- I can't sit here |
| Page 231 | | Page 233 | |
| 15:39:25 | 1 A. Yes, right above the white space. | 15:42:15 | 1 and try to assure you that anybody who looked at it |
| 15:39:28 | 2 Q. And below, yeah, at the title "Deposition | 15:42:18 | 2 would necessarily know it in the same way that I |
| 15:39:31 | 3 Exhibits," yes. Is it accurate that you considered | 15:42:21 | 3 know it. |
| 15:39:33 | 4 1,000 -- well, I think there are a few Bates numbers | 15:42:23 | 4 MR. POLITO: Q. How many of the exhibits |
| 15:39:36 | 5 that are skipped, but let's say Exhibits 1 through | 15:42:24 | 5 between Exhibit 1 and Exhibit 1,880 did you rely |
| 15:39:38 | 6 1,880, in preparation for your report or...? | 15:42:28 | 6 upon or consider, Mr. Gray? |
| 15:39:47 | 7 A. Would I have seen all -- would I have | 15:42:30 | 7 MR. FUCHS: Objection; form. |
| 15:39:51 | 8 necessarily touched all those documents? I think | 15:42:31 | 8 THE WITNESS: Well, that's kind of a |
| 15:39:54 | 9 what it is that this is a -- this is a document, | 15:42:32 | 9 different question, right. Now you're asking me did |
| 15:39:59 | 10 Plaintiffs' Deposition Exhibits 1 through 1,180. | 15:42:35 | 10 I -- essentially the analog is did I look at -- did |
| 15:40:04 | 11 Well, so let me -- let me say what I think it is, | 15:42:40 | 11 I -- I think -- skip that. You're not asking me |
| 15:40:05 | 12 and you can tell me if I'm wrong. It's -- that's | 15:42:43 | 12 about analogs. You're asking specifically did I |
| 15:40:10 | 13 how it came to me, not as a hard document, but as a | 15:42:46 | 13 look at each of those files. |
| 15:40:12 | 14 soft document. | 15:42:47 | 14 MR. POLITO: Q. I'm asking about how many |
| 15:40:13 | 15 So that is -- it was called "Plaintiffs' | 15:42:48 | 15 of them. |
| 15:40:16 | 16 Deposition Exhibits 1 to 1,180." And there are in | 15:42:49 | 16 A. And -- well, I mean, implicit in your |
| 15:40:20 | 17 that Plaintiffs' Exhibit 1, Plaintiffs' Exhibit 2, | 15:42:50 | 17 question is how many of those files. I did not look |
| 15:40:22 | 18 Plaintiffs' -- all the way through Plaintiffs' | 15:42:55 | 18 at each and every -- I don't think that I've looked |
| 15:40:24 | 19 Exhibit -- it's all one long -- it must have been a | 15:42:58 | 19 at each and every file. |
| 15:40:29 | 20 DVD or something that it came on. It was all on | 15:42:59 | |
| 15:40:32 | 21 one, and that was what it was named. | 15:43:00 | |
| 15:40:34 | 22 So this document, Plaintiffs' Deposition | 15:43:04 | |
| 15:40:38 | 23 Exhibits 1 through 1880, is a document within which | 15:43:06 | |
| 15:40:43 | 24 there are -- like you say, there's 1880, less | 15:43:08 | |
| 15:40:47 | 25 whatever sequence numbers are not in there, files, | 15:43:12 | |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 234 | | Page 236 | |
|----------|--|----------|---|
| 15:43:19 | | 15:45:25 | |
| 15:43:20 | | 15:45:27 | |
| 15:43:22 | | 15:45:30 | |
| 15:43:28 | | 15:45:31 | |
| 15:43:32 | | 15:45:31 | |
| 15:43:34 | 6 Q. How many hours did you spend looking at | 15:45:32 | |
| 15:43:36 | 7 the document that you claimed exists called | 15:45:34 | |
| 15:43:42 | 8 Plaintiffs' Exhibit 1-1880? | 15:45:37 | |
| 15:43:45 | 9 MR. FUCHS: Objection; form, | 15:45:39 | |
| 15:43:46 | 10 mischaracterizes witness's testimony. | 15:45:39 | |
| 15:43:49 | 11 THE WITNESS: And I've tried to tell you, | 15:45:45 | |
| 15:43:50 | 12 I don't know how many hours, but it's hours. And it | 15:45:49 | |
| 15:43:54 | 13 wasn't -- so there's hours spent doing it. I don't | 15:45:50 | |
| 15:43:58 | 14 know how many -- I don't know how to calculate the | 15:45:51 | |
| 15:44:00 | 15 number of hours. | 15:45:52 | |
| 15:44:02 | 16 MR. POLITO: Q. Hours and not days? | 15:50:01 | |
| 15:44:09 | 17 A. I don't know. I wouldn't -- I wouldn't | 15:50:01 | |
| 15:44:12 | 18 think it was day -- I wouldn't think it was -- I | 15:50:03 | |
| 15:44:16 | 19 mean, 20 hours maybe. It's hard to calculate. | 15:50:04 | |
| 15:44:24 | 20 Q. And do you think you looked at more than | 15:50:06 | |
| 15:44:26 | 21 50 exhibits? | 15:54:50 | |
| 15:44:30 | 22 A. Yes. | 15:55:13 | |
| 15:44:32 | 23 Q. Do you think you looked at more than 100 | 15:55:14 | |
| 15:44:34 | 24 exhibits? | 15:55:16 | |
| 15:44:36 | 25 A. Yes. | 15:55:19 | |
| Page 235 | | Page 237 | |
| 15:44:37 | | 15:55:21 | |
| 15:44:40 | | 15:55:22 | |
| 15:44:44 | | 15:55:22 | |
| 15:44:46 | | 15:55:24 | |
| 15:44:48 | | 15:55:24 | |
| 15:44:48 | | 15:55:27 | 6 Q. Mr. Gray, is it accurate that the |
| 15:44:51 | | 15:55:29 | 7 description Plaintiffs' Deposition Exhibits 1 |
| 15:44:53 | | 15:55:31 | 8 through 1,880 is a description of the materials that |
| 15:44:56 | | 15:55:34 | 9 you received and not necessarily of the materials |
| 15:44:57 | | 15:55:39 | 10 that you considered? |
| 15:45:01 | | 15:55:41 | 11 MR. FUCHS: Objection; form. |
| 15:45:04 | | 15:55:44 | 12 THE WITNESS: I think the way that I would |
| 15:45:04 | | 15:55:46 | 13 propose saying that was -- and see if this is |
| 15:45:05 | | 15:55:49 | 14 satisfactory -- it's the mater -- it is the material |
| 15:45:06 | | 15:55:54 | 15 that I received, and I may or may not have looked at |
| 15:45:08 | | 15:55:57 | 16 every one of those files in there, that are within |
| 15:45:09 | | 15:56:00 | 17 there, that are within that, but it is the material |
| 15:45:11 | | 15:56:02 | 18 that I received. |
| 15:45:12 | | 15:56:03 | 19 MR. POLITO: Q. Is there any way for |
| 15:45:13 | | 15:56:05 | 20 anyone to tell which ones you considered? |
| 15:45:15 | | 15:56:17 | 21 A. I didn't really log the information that |
| 15:45:15 | | 15:56:20 | 22 way. I didn't record when or which documents I |
| 15:45:17 | | 15:56:25 | 23 necessarily looked at within that -- those 1880, |
| 15:45:19 | | 15:56:28 | 24 less, whatever sequence numbers are skipped, |
| 15:45:23 | | 15:56:32 | 25 whichever you alluded to before. |

| Page 238 | | Page 240 | |
|----------|---|----------|---|
| 15:56:34 | 1 Q. So would you agree that there's no way for | 15:59:16 | |
| 15:56:35 | 2 anyone to determine which of the Exhibits 1 through | 15:59:18 | |
| 15:56:38 | 3 1,880 you actually considered in creating your | 15:59:24 | |
| 15:56:43 | 4 report? | 15:59:28 | |
| 15:56:43 | 5 MR. FUCHS: Objection; form. | 15:59:30 | |
| 15:56:46 | 6 THE WITNESS: I don't know that -- I don't | 15:59:34 | |
| 15:56:47 | 7 know of a way other than to -- I mean, these are | 15:59:34 | |
| 15:56:53 | 8 exhibits to depositions. The depositions refer to | 15:59:36 | |
| 15:56:57 | 9 the plaintiffs' exhibits, and I've read -- there's a | 15:59:39 | |
| 15:57:01 | 10 lot of depositions that I've read, and so one way to | 15:59:42 | |
| 15:57:03 | 11 get a better feel for it would be based upon the | 15:59:44 | |
| 15:57:06 | 12 depositions that I've read, which point to the | 15:59:46 | |
| 15:57:09 | 13 plaintiffs' exhibits, which would give some | 15:59:49 | |
| 15:57:11 | 14 indication of which of the files I had opened or | 15:59:51 | |
| 15:57:16 | 15 read or not, and so on. That would be a better | 15:59:54 | |
| 15:57:19 | 16 way -- that might be a way to approximate it. But | 15:59:58 | |
| 15:57:23 | 17 even at that, I don't think it's going to be | 16:00:00 | 17 Thank you. Is it your position that you considered |
| 15:57:25 | 18 conclusive, but it would be a way of getting closer | 16:00:01 | 18 or relied upon every log file that's found on TN |
| 15:57:27 | 19 to understanding that. | 16:00:05 | 19 Disk 82? |
| 15:57:29 | | 16:00:10 | 20 A. I don't know that I would neces -- I don't |
| 15:57:31 | | 16:00:14 | 21 know that I necessarily looked at every log file. I |
| 15:57:40 | | 16:00:17 | 22 remember having done things like search for certain |
| 15:57:47 | | 16:00:19 | 23 terms in a large collection of log files. It would |
| 15:57:50 | | 16:00:23 | 24 not surprise me to find that that was all of the log |
| 15:57:53 | | 16:00:26 | 25 files that were there, but I don't remember if I |
| Page 239 | | Page 241 | |
| 15:58:00 | | 16:00:28 | 1 necessarily looked at or, you know, specifically |
| 15:58:02 | | 16:00:34 | 2 analyzed each of the log files that's in there, but |
| 15:58:05 | | 16:00:38 | 3 I remember searching those log files. |
| 15:58:10 | | 16:00:41 | |
| 15:58:12 | | 16:00:44 | |
| 15:58:15 | | 16:00:47 | |
| 15:58:19 | | 16:00:52 | |
| 15:58:22 | | 16:00:57 | |
| 15:58:23 | | 16:01:00 | |
| 15:58:29 | | 16:01:03 | 10 Q. Did you keep a list of the search terms |
| 15:58:30 | | 16:01:04 | 11 that you ran, and the results? |
| 15:58:33 | | 16:01:07 | 12 A. No, I probably -- no, I did not do that. |
| 15:58:34 | | 16:01:09 | 13 Q. Without that list, can we tell what you |
| 15:58:36 | | 16:01:11 | 14 actually searched for? |
| 15:58:42 | | 16:01:14 | 15 A. Not without -- not without -- well, not |
| 15:58:44 | | 16:01:19 | 16 with precision. |
| 15:58:47 | | 16:01:22 | 17 Q. Similarly, with the Titan source code, as |
| 15:58:49 | | 16:01:23 | 18 you sit here today, do you believe that you looked |
| 15:58:53 | | 16:01:26 | 19 at every piece of source code that's on TN Disk 39? |
| 15:58:54 | | 16:01:35 | 20 A. My recollection is there were a lot of |
| 15:58:57 | | 16:01:37 | 21 versions on that disk. It probably was a similar |
| 15:59:02 | | 16:01:44 | 22 kind of thing, of searching through that list of |
| 15:59:05 | | 16:01:48 | 23 materials. Whether or not I looked at each one of |
| 15:59:08 | | 16:01:51 | 24 them, I don't recollect. |
| 15:59:12 | | 16:01:53 | 25 Q. And did you keep a list of the searches |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 242 | | Page 244 | |
|----------|----|---|----------|
| 16:01:54 | 1 | you ran and the results? | 16:05:28 |
| 16:01:58 | 2 | A. No, I wouldn't have kept a list of the | 16:05:30 |
| 16:02:00 | 3 | searches. | 16:05:32 |
| 16:02:02 | 4 | Q. So would you agree -- | 16:05:34 |
| 16:02:03 | 5 | A. Or the results. | 16:05:35 |
| 16:02:04 | 6 | Q. -- that there's no conclusive way to | 16:05:36 |
| 16:02:05 | 7 | determine which files you actually considered on | 16:05:40 |
| 16:02:07 | 8 | Disk 39? | 16:05:42 |
| 16:02:14 | 9 | A. Well, I don't know that how -- I don't | 16:05:46 |
| 16:02:15 | 10 | know how we could identify which ones I did or | 16:05:49 |
| 16:02:20 | 11 | didn't consider in any conclusive way, unless -- | 16:05:50 |
| 16:02:27 | 12 | unless we agree that, you know, searching through | 16:05:52 |
| 16:02:30 | 13 | them looking for certain key terms is -- rises | 16:05:54 |
| 16:02:37 | 14 | somehow to the level of considering them. I don't | 16:05:58 |
| 16:02:38 | 15 | know. I don't know any other way. But I remember | 16:05:59 |
| 16:02:40 | 16 | doing searches on both the source code and on the | 16:06:02 |
| 16:02:43 | 17 | logs. | 16:06:13 |
| 16:02:43 | 18 | Q. Are the key terms that you searched for | 16:06:21 |
| 16:02:45 | 19 | listed anywhere in your report or appendices? | 16:06:25 |
| 16:02:49 | 20 | A. No, I don't think that they are. | 16:06:28 |
| 16:02:51 | 21 | Q. Do you remember what the key terms were | 16:06:31 |
| 16:02:52 | 22 | that you searched for on Disk 39? | 16:06:34 |
| 16:02:58 | 23 | A. No, I don't remember off -- off the top of | 16:06:41 |
| 16:03:01 | 24 | my head what those -- those key terms would have | 16:06:44 |
| 16:03:03 | 25 | been. It would have been related -- I just don't | 16:06:47 |
| Page 243 | | Page 245 | |
| 16:03:06 | 1 | know what they would have been. | 16:06:48 |
| 16:03:11 | | | 16:06:54 |
| 16:03:13 | | | 16:06:57 |
| 16:03:17 | | | 16:07:00 |
| 16:04:15 | | | 16:07:03 |
| 16:04:19 | | | 16:07:06 |
| 16:04:23 | | | 16:07:08 |
| 16:04:30 | | | 16:07:12 |
| 16:04:37 | | | 16:07:15 |
| 16:04:41 | | | 16:07:19 |
| 16:04:44 | | | 16:07:19 |
| 16:04:46 | | | 16:07:19 |
| 16:04:50 | 13 | Q. My question is slightly different, which | 16:07:21 |
| 16:04:51 | 14 | is, would you agree that Appendix 3 contains a list | 16:07:23 |
| 16:04:54 | 15 | of materials that you received, regardless of | 16:07:24 |
| 16:04:58 | 16 | whether you looked at them or not? | 16:07:27 |
| 16:05:02 | 17 | A. Yes, I do believe that -- that's what I | 16:07:31 |
| 16:05:04 | 18 | say I was looking for. I was looking for things | 16:07:33 |
| 16:05:06 | 19 | that I put on the list that I didn't -- hadn't | 16:07:34 |
| 16:05:08 | 20 | received, and I don't remember any. I've only spent | 16:07:37 |
| 16:05:12 | 21 | a minute looking at it, but I don't remember any. | 16:07:39 |
| 16:05:13 | | | 16:07:41 |
| 16:05:19 | | | 16:07:43 |
| 16:05:21 | | | 16:07:45 |
| 16:05:26 | | | 16:07:48 |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 258 | | Page 260 | |
|----------|---|----------|---|
| 16:28:47 | | 16:31:35 | |
| 16:28:50 | | 16:31:38 | |
| 16:28:56 | | 16:31:42 | |
| 16:29:01 | | 16:31:44 | |
| 16:29:04 | | 16:31:49 | |
| 16:29:06 | | 16:31:52 | |
| 16:29:09 | | 16:31:53 | |
| 16:29:10 | | 16:31:55 | |
| 16:29:12 | | 16:31:56 | |
| 16:29:15 | | 16:31:56 | 10 Q. Was it your intent in listing the 51 |
| 16:29:17 | | 16:31:59 | 11 customers to list the customers that you believe did |
| 16:29:19 | | 16:32:05 | 12 not come within the scope of any of the behavior |
| 16:29:22 | | 16:32:08 | 13 that Mr. Mandiant described in his report and |
| 16:29:25 | | 16:32:10 | 14 appendices? |
| 16:29:26 | | 16:32:12 | 15 A. Yes, that's -- that was the intent of that |
| 16:29:31 | | 16:32:14 | 16 list of 51 customers. Those are TomorrowNow |
| 16:29:34 | | 16:32:17 | 17 customers for which product support was provided |
| 16:29:36 | | 16:32:21 | 18 which did not fall within the Mandiant rules, for |
| 16:29:39 | | 16:32:27 | 19 lack of a better term. |
| 16:29:48 | | 16:32:28 | 20 Q. Did you make any effort to determine |
| 16:29:51 | | 16:32:29 | 21 whether there was any other basis as to whether the |
| 16:29:57 | | 16:32:34 | 22 support for those 51 customers was appropriate or |
| 16:30:01 | | 16:32:38 | 23 inappropriate, according to the Mandiant rules? |
| 16:30:03 | | 16:32:44 | 24 A. I don't know that I understand that, that |
| 16:30:05 | | 16:32:47 | 25 question. Did I -- |
| Page 259 | | Page 261 | |
| 16:30:08 | | 16:32:48 | 1 Q. Sure. More generally, did you make any |
| 16:30:10 | | 16:32:51 | 2 effort to investigate the support for those 51 |
| 16:30:11 | | 16:32:53 | 3 customers generally? |
| 16:30:12 | | 16:32:54 | 4 MR. FUCHS: Objection; form. |
| 16:30:17 | | 16:32:56 | 5 THE WITNESS: Only to the extent that I |
| 16:30:19 | | 16:32:59 | 6 analyzed their -- the support that they were |
| 16:30:21 | | 16:33:04 | 7 provided generally within that list of customers |
| 16:30:26 | | 16:33:07 | 8 that TomorrowNow had over their history. I mean, I |
| 16:30:29 | | 16:33:14 | 9 analyzed them in that context. |
| 16:30:35 | | 16:33:16 | 10 MR. POLITO: Q. Did you analyze their |
| 16:30:37 | | 16:33:17 | 11 support for TomorrowNow over the lifetime of each |
| 16:30:45 | | 16:33:19 | 12 customer? |
| 16:30:49 | | 16:33:21 | 13 A. Oh. You mean did I look outside of what |
| 16:30:53 | | 16:33:25 | 14 I've just termed the Mandiant rules with respect to |
| 16:30:55 | | 16:33:27 | 15 their -- |
| 16:30:57 | | 16:33:29 | 16 Q. (Nods head.) |
| 16:30:59 | | 16:33:29 | 17 A. No, I -- no, that was not my analysis -- |
| 16:31:04 | | 16:33:32 | 18 that was not what I was asked to analyze. |
| 16:31:06 | 19 MR. POLITO: Q. Do you -- what opinions | 16:33:34 | 19 Q. So the universe of information that you |
| 16:31:11 | 20 do you have regarding that group of 51 customers, | 16:33:35 | 20 looked at was the information described in |
| 16:31:15 | 21 Mr. Gray? | 16:33:37 | 21 Mr. Mandia's report? |
| 16:31:17 | 22 A. Well, that they are -- the 51 customers | 16:33:40 | 22 A. To the -- yes, that is -- that was the |
| 16:31:22 | 23 are customers that my analysis shows did not have | 16:33:42 | 23 intent. |
| 16:31:29 | 24 supplied to them the conduct that was accused in the | 16:33:44 | 24 Q. What do you mean when you say "the |
| 16:31:32 | 25 Mandiant report. | 16:33:46 | 25 Mandiant rule" or "the Mandia rules"? |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 262 | | Page 264 |
|----------|--|----------|
| 16:33:49 | 1 A. Well, again, what -- I think what's | 16:36:36 |
| 16:33:53 | 2 intended is, is the accusations that the Mandiant | 16:36:43 |
| 16:33:57 | 3 report makes regarding TomorrowNow's behavior, and | 16:36:48 |
| 16:34:00 | 4 trying to apply those accusations to the collection | 16:36:48 |
| 16:34:05 | 5 of customers that represent the population for which | 16:36:50 |
| 16:34:08 | 6 TomorrowNow provided services, product support | 16:36:50 |
| 16:34:10 | 7 services. | 16:36:51 |
| 16:34:11 | | 16:36:55 |
| 16:34:12 | | 16:36:58 |
| 16:34:19 | | 16:37:01 |
| 16:34:20 | | 16:37:03 |
| 16:34:25 | | 16:37:07 |
| 16:34:28 | | 16:37:10 |
| 16:34:30 | | 16:37:12 |
| 16:34:35 | | 16:37:15 |
| 16:34:37 | | 16:37:18 |
| 16:34:42 | | 16:37:50 |
| 16:34:44 | | 16:37:51 |
| 16:34:48 | | 16:37:54 |
| 16:34:50 | | 16:37:56 |
| 16:34:52 | | 16:38:01 |
| 16:34:54 | | 16:38:05 |
| 16:34:57 | | 16:38:07 |
| 16:35:01 | | 16:38:08 |
| 16:35:04 | | 16:38:08 |
| Page 263 | | Page 265 |
| 16:35:05 | | 16:38:09 |
| 16:35:08 | | 16:38:14 |
| 16:35:11 | | 16:38:18 |
| 16:35:21 | | 16:38:22 |
| 16:35:24 | | 16:38:26 |
| 16:35:29 | | 16:38:29 |
| 16:35:29 | | 16:38:34 |
| 16:35:29 | | 16:38:44 |
| 16:35:30 | | 16:38:48 |
| 16:35:39 | | 16:38:49 |
| 16:35:51 | | 16:38:51 |
| 16:35:53 | | 16:38:54 |
| 16:35:55 | | 16:38:55 |
| 16:36:00 | | 16:38:55 |
| 16:36:02 | | 16:38:56 |
| 16:36:05 | | 16:38:58 |
| 16:36:06 | | 16:39:03 |
| 16:36:12 | | 16:39:06 |
| 16:36:15 | | 16:39:07 |
| 16:36:18 | | 16:39:08 |
| 16:36:20 | | 16:39:15 |
| 16:36:23 | | 16:39:15 |
| 16:36:29 | | 16:39:16 |
| 16:36:30 | | 16:39:17 |
| 16:36:35 | | 16:39:20 |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 274 | | Page 276 |
|----------|--|----------|
| 16:54:37 | | 16:56:54 |
| 16:54:43 | | 16:56:56 |
| 16:54:47 | | 16:57:00 |
| 16:54:51 | | 16:57:04 |
| 16:54:51 | | 16:57:08 |
| 16:54:52 | | 16:57:08 |
| 16:54:53 | | 16:57:10 |
| 16:54:54 | | 16:57:13 |
| 16:55:02 | 9 MR. POLITO: Mark as Exhibit 3120. | 16:57:15 |
| 16:55:14 | 10 (Whereupon Exhibit 3120 was marked for | 16:57:18 |
| 16:55:14 | 11 identification.) | 16:57:20 |
| 16:55:14 | 12 MR. POLITO: Q. Mr. Gray, can I point out | 16:57:25 |
| 16:55:15 | 13 that the short description of this e-mail is | 16:57:28 |
| 16:55:17 | 14 "Simulated Test in PraxAir"? Do you see that, | 16:57:32 |
| 16:55:23 | 15 Mr. Gray? | 16:57:46 |
| 16:55:27 | 16 MR. FUCHS: Is that a question? | 16:57:49 |
| 16:55:27 | 17 MR. POLITO: Yes, that's a question. | 16:57:52 |
| 16:55:29 | 18 Q. Do you see that, Mr. Gray? | 16:57:54 |
| 16:55:32 | 19 A. Do I -- do I see what? Say it again. | 16:57:55 |
| 16:55:34 | 20 Q. That the short description is | 16:58:00 |
| 16:55:35 | 21 "0815066674," semicolon, "R24119P Simulated Test in | 16:58:07 |
| 16:55:44 | 22 PraxAir"? | 16:58:10 |
| 16:55:44 | 23 A. I see that line. | 16:58:21 |
| 16:55:45 | 24 Q. Would you agree that it is reasonable to | 16:58:27 |
| 16:55:47 | 25 deduce from that subject line that the e-mail is | 16:58:29 |
| Page 275 | | Page 277 |
| 16:55:49 | 1 about a simulated test in PraxAir? | 16:58:36 |
| 16:55:56 | 2 A. There is a -- | 16:58:37 |
| 16:55:58 | 3 MR. FUCHS: Objection, form. Go ahead. | 16:58:40 |
| 16:56:01 | 4 THE WITNESS: I -- you know, what it says | 16:58:43 |
| 16:56:03 | 5 is what it says. | 16:58:52 |
| 16:56:05 | 6 MR. POLITO: Q. Do you see that the | 16:58:53 |
| 16:56:05 | 7 header of this says, "BBS Electronics"? | 16:59:02 |
| 16:56:08 | 8 A. I do. | 16:59:07 |
| 16:56:09 | 9 Q. Do you see that the distribution case | 16:59:09 |
| 16:56:10 | 10 number is 0815066674? | 16:59:11 |
| 16:56:17 | 11 A. Yes, 081 -- yes. | 16:59:13 |
| 16:56:20 | 12 Q. Would you agree with me that that is the | 16:59:15 |
| 16:56:21 | 13 case in support of BBS Electronics as has been | 16:59:24 |
| 16:56:25 | 14 established by Exhibits 3117 and so on? | 16:59:26 |
| 16:56:28 | 15 A. I believe that -- | 16:59:33 |
| 16:56:29 | 16 MR. FUCHS: Objection, form. | 16:59:35 |
| 16:56:30 | 17 THE WITNESS: I believe, yes, that's the | 16:59:37 |
| 16:56:31 | 18 same case number. | 16:59:42 |
| 16:56:33 | | 16:59:50 |
| 16:56:33 | | 16:59:54 |
| 16:56:38 | | 17:00:02 |
| 16:56:41 | | 17:00:07 |
| 16:56:45 | | 17:00:09 |
| 16:56:49 | | 17:00:12 |
| 16:56:51 | | 17:00:14 |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 282 | Page 284 |
|--|---|
| 17:07:20 17:07:23 17:07:29 17:07:32 17:07:36 17:07:41 17:07:44 17:07:48 17:07:50 17:07:55 17:07:56 17:07:59 17:08:01 17:08:03 17:08:06 17:08:07 17:08:11 17:08:13 17:08:15 17:08:17 17:08:24 17:08:29 17:08:36 17:08:38 17:08:39 | 17:10:04 17:10:07 17:10:10 17:10:15 17:10:17 17:10:21 17:10:26 7 Q. If it were true that the PraxAir local 17:10:30 8 environment had been used to support BBS Electronics 17:10:34 9 in this particular instance, would you take BBS 17:10:37 10 Electronics off of your list of 51 customers? 17:10:41 11 MR. FUCHS: Objection; form. 17:10:45 12 THE WITNESS: Well, my list of 51 17:10:48 13 customers is derived from what the Mandiant report 17:10:53 14 identifies as the -- what it identifies and accuses 17:10:58 15 of proscribed behavior by TomorrowNow. So that's my 17:11:03 16 list. My list is not -- my list of 51 -- well, it's 17:11:07 17 the list in my report, but it's also in my 17:11:09 18 non-accused -- non-accused conduct spreadsheet. 17:11:12 19 So that's my list. My list isn't analysis 17:11:15 20 that falls outside of what Mr. Mandia attempted to 17:11:20 21 identify. So it wouldn't be necessarily appropriate 17:11:24 22 for me to take them off the list of customers for 17:11:28 23 which Mandia's analysis did not show there was 17:11:33 24 improper support. 17:11:37 |
| Page 283 | Page 285 |
| 17:08:41 17:08:42 17:08:46 17:08:47 17:08:48 17:08:53 17:08:56 17:09:00 17:09:08 17:09:09 17:09:14 17:09:19 17:09:23 17:09:26 17:09:29 17:09:32 17:09:36 17:09:38 17:09:41 17:09:46 17:09:51 17:09:53 17:09:54 17:09:54 17:09:59 | 17:11:38 17:11:42 17:11:48 17:11:53 17:11:58 17:12:00 17:12:05 17:12:16 17:12:17 17:12:22 17:12:36 17:12:40 17:12:43 17:12:47 17:12:51 17:12:54 16 Q. To be clear, your list of 51 customers is 17:12:57 17 not intended to be a summary of all available 17:13:00 18 evidence relating to TomorrowNow's support of its 17:13:04 19 customers? 17:13:06 20 MR. FUCHS: Objection; form. 17:13:14 21 THE WITNESS: I didn't look for evidence 17:13:17 22 outside the Mandiant report's identification of 17:13:25 23 improper conduct. I didn't look outside that. My 17:13:28 24 assignment was to analyze the Mandiant report and 17:13:33 25 offer comments relative to the Mandiant report. So |

STEPHEN GRAY June 8, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 286 | | Page 288 | |
|----------|----|--|----------|
| 17:13:36 | 1 | I didn't -- I didn't try to do what -- I mean, I | 17:16:48 |
| 17:13:40 | 2 | didn't try to do that other thing that -- you know, | 17:16:48 |
| 17:13:42 | 3 | the other job. | 17:51:52 |
| 17:13:43 | | | 17:51:52 |
| 17:13:45 | | | 17:51:52 |
| 17:13:49 | | | 17:51:57 |
| 17:13:53 | | | 17:51:57 |
| 17:13:59 | | | 17:52:01 |
| 17:14:03 | | | 17:52:04 |
| 17:14:04 | | | 17:52:05 |
| 17:14:06 | 11 | MR. POLITO: Q. Sure. Would you agree | 17:52:07 |
| 17:14:06 | 12 | that the presence or absence of a customer on your | 17:52:08 |
| 17:14:09 | 13 | list of 51 is not a basis for an assertion that a | 17:52:09 |
| 17:14:15 | 14 | customer was -- was or was not supported in an | 17:52:11 |
| 17:14:18 | 15 | infringing or an improper manner? | 17:52:32 |
| 17:14:23 | 16 | MR. FUCHS: Objection; form. | 17:52:36 |
| 17:14:29 | 17 | THE WITNESS: Well, once again, I haven't | 17:52:39 |
| 17:14:30 | 18 | done that work. I mean, it's hard for me to say -- | 17:52:53 |
| 17:14:33 | 19 | to answer that question. So what I've done is try | 17:52:57 |
| 17:14:36 | 20 | to apply the Mandiant report's analysis to the data | 17:52:58 |
| 17:14:43 | 21 | and to -- and in that I have come up with a list of | 17:53:01 |
| 17:14:46 | 22 | 51 customers for which there appears to have not | 17:53:03 |
| 17:14:48 | 23 | been the execution of what Mandiant refers to as | 17:53:06 |
| 17:14:57 | 24 | improper conduct. I didn't try to look at other | 17:53:11 |
| 17:15:02 | 25 | things. And so -- I mean, I didn't try to look | 17:53:14 |
| Page 287 | | Page 289 | |
| 17:15:04 | 1 | outside that. So it's hard for me to make a | 17:53:20 |
| 17:15:07 | 2 | declarative statement about that. I know -- I don't | 17:53:24 |
| 17:15:09 | 3 | feel comfortable answering it. I just don't know. | 17:53:28 |
| 17:15:12 | 4 | MR. POLITO: Q. Do you intend to testify | 17:53:28 |
| 17:15:14 | 5 | in trial that the list of 51 customers represents a | 17:53:28 |
| 17:15:18 | 6 | list of 51 customers for whom TomorrowNow provided | 17:53:31 |
| 17:15:22 | 7 | support properly and correctly? | 17:53:32 |
| 17:15:27 | 8 | MR. FUCHS: Objection; form. | 17:53:32 |
| 17:15:36 | 9 | THE WITNESS: I don't think I, sitting | 17:53:33 |
| 17:15:38 | 10 | here today, prepared to offer an -- that I'd | 17:53:34 |
| 17:15:47 | 11 | necessarily offer an opinion that states that the 51 | 17:53:36 |
| 17:15:50 | 12 | were or were not -- that either the 51 were or -- | 17:53:42 |
| 17:16:01 | 13 | the 51 were customers for which there was not | 17:53:45 |
| 17:16:08 | 14 | improper activity. What I am talking about is | 17:53:55 |
| 17:16:11 | 15 | improper activity which Mandiant defines. I didn't | 17:53:56 |
| 17:16:14 | 16 | look at that other -- I didn't make a determination | 17:53:58 |
| 17:16:16 | 17 | with regard to the other, so I don't think I can | 17:53:59 |
| 17:16:18 | 18 | testify about it. | 17:54:03 |
| 17:16:20 | 19 | But again, the list may grow; the list may | 17:54:07 |
| 17:16:23 | 20 | shrink; there may be some information that does | 17:54:10 |
| 17:16:29 | 21 | pertain. Just sitting here today, I don't plan to | 17:54:14 |
| 17:16:34 | 22 | testify to that. | 17:54:20 |
| 17:16:38 | | | 17:54:23 |
| 17:16:40 | | | 17:54:27 |
| 17:16:46 | | | 17:54:30 |

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE CORPORATION, a Delaware
Corporation; ORACLE, USA,
INC., a Colorado Corporation,
and ORACLE INTERNATIONAL
CORPORATION, a California
Corporation,

Plaintiffs,

vs.

No. 07-CV-01658-PJH (EDL)

SAP AG, a German Corporation,
SAP AMERICA, INC., a Delaware
Corporation, TOMORROWNOW, INC.,
a Texas Corporation, and DOES
1-50, Inclusive,

Defendants.

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DEPOSITION OF STEPHEN GRAY

VOLUME II

(Pages 316 - 601)

June 9, 2010

Reported by:
Natalie Y. Botelho
CSR No. 9897

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 321 | | Page 323 | |
|----------|----|----------|---|
| 08:37:09 | | 08:41:14 | |
| 08:38:22 | | 08:41:19 | |
| 08:38:36 | | 08:41:20 | |
| 08:38:36 | | 08:41:25 | |
| 08:38:39 | 5 | 08:41:28 | |
| 08:38:40 | 6 | 08:41:40 | |
| 08:38:43 | 7 | 08:41:45 | |
| 08:38:46 | 8 | 08:41:47 | |
| 08:38:51 | 9 | 08:41:48 | |
| 08:38:54 | 10 | 08:41:51 | |
| 08:38:56 | 11 | 08:41:55 | |
| 08:39:08 | 12 | 08:41:59 | |
| 08:39:20 | 13 | 08:42:02 | |
| 08:39:25 | 14 | 08:42:05 | |
| 08:39:31 | 15 | 08:42:08 | |
| 08:39:33 | 16 | 08:42:12 | |
| 08:39:34 | 17 | 08:42:14 | |
| 08:39:37 | 18 | 08:42:32 | |
| 08:39:39 | 19 | 08:42:34 | |
| 08:39:43 | 20 | 08:42:37 | |
| 08:39:44 | 21 | 08:42:41 | |
| 08:39:47 | 22 | 08:42:44 | |
| 08:39:50 | 23 | 08:42:49 | |
| 08:39:51 | 24 | 08:42:53 | |
| 08:39:53 | 25 | 08:42:56 | |
| | | | |
| Page 322 | | Page 324 | |
| 08:39:54 | 1 | 08:42:59 | |
| 08:39:56 | 2 | 08:43:01 | |
| 08:40:00 | | 08:43:03 | |
| 08:40:02 | | 08:43:05 | |
| 08:40:06 | | 08:43:07 | |
| 08:40:07 | | 08:43:09 | |
| 08:40:19 | | 08:43:12 | |
| 08:40:21 | | 08:43:13 | |
| 08:40:24 | | 08:44:48 | |
| 08:40:28 | | 08:44:52 | |
| 08:40:31 | | 08:44:58 | |
| 08:40:34 | | 08:45:02 | |
| 08:40:34 | | 08:45:03 | |
| 08:40:38 | | 08:45:05 | |
| 08:40:41 | | 08:45:09 | |
| 08:40:41 | | 08:45:14 | |
| 08:40:45 | | 08:45:19 | |
| 08:40:49 | | 08:45:21 | |
| 08:40:52 | | 08:45:22 | 19 Q. Sure. So same question, but for Appendix |
| 08:40:53 | | 08:45:23 | 20 4. Is there -- and I'm not asking again for things |
| 08:41:01 | | 08:45:27 | 21 that you dictated and were written down verbatim. |
| 08:41:02 | | 08:45:33 | 22 I'm asking where text was contributed by someone |
| 08:41:04 | | 08:45:36 | 23 else. |
| 08:41:09 | | 08:45:37 | 24 A. Right. And Appendix 4 is -- we're |
| 08:41:13 | | 08:45:40 | 25 referring to the spreadsheet? |

| Page 325 | | Page 327 | |
|----------|--|----------|---|
| 08:45:41 | 1 Q. Yeah, that -- | 08:48:41 | |
| 08:45:42 | 2 A. That's the Appendix 4, right, that we're | 08:48:42 | |
| 08:45:44 | 3 referring to? | 08:48:56 | |
| 08:45:45 | 4 Q. Yes. | 08:49:02 | |
| 08:45:46 | 5 A. The spreadsheet was -- let's see. How | 08:49:05 | |
| 08:45:49 | 6 would I characterize that. That was jointly | 08:49:09 | |
| 08:45:52 | 7 developed, and I ended up, you know, asking for | 08:49:15 | |
| 08:45:57 | 8 certain columns and certain analysis to be | 08:49:16 | 8 Q. Next is the column labeled "Customer." |
| 08:45:59 | 9 performed, and so that contributed to the columns | 08:49:20 | 9 And you, I believe, have already testified that |
| 08:46:02 | 10 that are in the spreadsheet. | 08:49:23 | 10 someone else created or populated that column; is |
| 08:46:04 | | 08:49:27 | 11 that correct? |
| 08:46:06 | | 08:49:31 | 12 A. Yes, that -- I did not type in all of |
| 08:46:09 | | 08:49:33 | 13 those names. |
| 08:46:12 | | 08:49:34 | 14 Q. And asking specifically on the last page |
| 08:46:18 | | 08:49:37 | 15 of Defendant's Exhibit 2089, after Customer 357, |
| 08:46:21 | | 08:49:47 | 16 there is a bold item "Footnotes," and then there are |
| 08:46:28 | | 08:49:50 | 17 six footnotes? |
| 08:46:31 | | 08:49:53 | 18 A. Yes. |
| 08:46:34 | | 08:49:54 | 19 Q. Did you direct someone to determine which |
| 08:46:43 | | 08:49:58 | 20 customers were the consulting-only customers? |
| 08:46:47 | | 08:50:02 | 21 A. Yes, I was -- well, did I direct -- yes, I |
| 08:46:51 | | 08:50:06 | 22 mean, I wanted to identify those customers that were |
| 08:46:56 | | 08:50:08 | 23 consulting-only customers. |
| 08:46:59 | | 08:50:09 | |
| 08:47:00 | | 08:50:11 | |
| Page 326 | | Page 328 | |
| 08:47:03 | | 08:50:14 | |
| 08:47:07 | | 08:50:17 | |
| 08:47:07 | | 08:50:19 | |
| 08:47:09 | | 08:50:21 | |
| 08:47:11 | | 08:50:23 | |
| 08:47:13 | 6 Q. In your answer you said that you asked for | 08:50:25 | |
| 08:47:15 | 7 certain columns and certain analysis to be | 08:50:29 | |
| 08:47:17 | 8 performed. Whom did you ask? | 08:50:32 | |
| 08:47:28 | 9 A. I guess the -- I guess the people that I | 08:50:35 | |
| 08:47:32 | 10 had -- I think that I asked -- I asked Mr. Fuchs | 08:50:38 | |
| 08:47:42 | 11 here, who had -- I think he was the one who I first | 08:50:40 | |
| 08:47:46 | 12 talked to this about. I would imagine that's the | 08:50:43 | |
| 08:47:49 | 13 first place that it started. I think that is. | 08:50:46 | |
| 08:47:51 | 14 That's my best recollection. | 08:50:49 | |
| 08:47:54 | 15 Q. To be clear, you asked Mr. Fuchs to create | 08:50:51 | |
| 08:47:58 | 16 certain columns and to perform certain analyses for | 08:50:53 | |
| 08:48:02 | 17 your Appendix 4? | 08:50:55 | |
| 08:48:03 | 18 A. Well, that's where it started, and then | 08:50:57 | |
| 08:48:06 | 19 there was a collaborative effort that went back and | 08:51:01 | |
| 08:48:09 | 20 forth to actually, you know, identify exactly what | 08:51:06 | |
| 08:48:11 | 21 was going to be in each column and so on. But | 08:51:11 | |
| 08:48:14 | 22 that's where it started, yeah. | 08:51:14 | |
| 08:48:18 | | 08:51:15 | |
| 08:48:23 | | 08:51:17 | |
| 08:48:29 | | 08:51:19 | |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 329 | | Page 331 | |
|----------|---|----------|--|
| 08:51:19 | | 08:53:52 | 1 you had directed Mr. Fuchs to perform certain |
| 08:51:21 | | 08:53:55 | 2 analyses. Is there -- is that not correct for this |
| 08:51:21 | | 08:54:00 | 3 column? |
| 08:51:22 | | 08:54:00 | 4 A. Oh, I don't -- I'm sorry. Maybe I'm -- |
| 08:51:26 | | 08:54:03 | 5 maybe I got confused. What I thought we were |
| 08:51:30 | | 08:54:05 | 6 talking about is did I want certain columns to be in |
| 08:51:32 | | 08:54:10 | 7 the report, in which case -- that's what I thought |
| 08:51:36 | | 08:54:13 | 8 we were talking about. So that's the column that I |
| 08:51:38 | | 08:54:15 | 9 wanted to have. That is a column I wanted to have |
| 08:51:42 | | 08:54:19 | 10 in the report or this exhibit. |
| 08:51:43 | | 08:54:20 | 11 Q. Did you -- |
| 08:51:46 | | 08:54:21 | 12 A. The question of populating it is then a |
| 08:51:48 | | 08:54:23 | 13 secondary -- the second question, but I mean -- or |
| 08:51:51 | | 08:54:26 | 14 unless you want me to combine those two things. |
| 08:51:55 | | 08:54:28 | 15 Q. No, we can keep them separate. |
| 08:51:57 | | 08:54:29 | 16 A. I thought you were -- I thought you had |
| 08:51:59 | | 08:54:30 | 17 separated them. So sorry. Maybe I misunderstood |
| 08:52:03 | | 08:54:33 | 18 you. |
| 08:52:07 | | 08:54:33 | 19 Q. Did you populate this column? |
| 08:52:09 | | 08:54:34 | 20 A. I -- in -- yeah, I mean, I went through |
| 08:52:11 | | 08:54:38 | 21 the data to make a determination as to these -- |
| 08:52:13 | | 08:54:41 | 22 whether these customers were PeopleSoft -- any of |
| 08:52:14 | | 08:54:46 | 23 these customers were PeopleSoft customers. I did |
| 08:52:18 | | 08:54:48 | 24 perform that. Others contributed to that as well. |
| 08:52:20 | | 08:54:52 | 25 Q. Which others contributed to that? |
| Page 330 | | Page 332 | |
| 08:52:28 | 1 Q. Moving on to the next column that says | 08:54:53 | 1 A. I think -- well, I don't know |
| 08:52:31 | 2 "PeopleSoft Customer" in the second row. Did you | 08:54:59 | 2 specifically, but I would -- my best recollection is |
| 08:52:38 | 3 ask for certain -- or did you ask for this column to | 08:55:06 | 3 that it would have been Briana, Sean. That's my |
| 08:52:43 | 4 be created or for a certain analysis to be performed | 08:55:16 | 4 best recollection. Myself. |
| 08:52:45 | 5 in support of this column? | 08:55:18 | 5 Q. Both of whom are Jones Day attorneys that |
| 08:52:48 | 6 A. Yes. I wanted to know which customers | 08:55:22 | 6 you identified earlier? |
| 08:52:53 | 7 were supported or were -- TomorrowNow was supporting | 08:55:23 | 7 A. That's correct. |
| 08:52:59 | 8 with which product lines. So those are columns | 08:55:26 | |
| 08:53:02 | 9 that -- you know, the "PeopleSoft Customer" column | 08:55:28 | |
| 08:53:07 | 10 is certainly one that I wanted to have populated. | 08:55:31 | |
| 08:53:11 | 11 Q. And is it your recollection that you | 08:55:39 | |
| 08:53:13 | 12 directed Mr. Fuchs to do that? | 08:55:42 | |
| 08:53:18 | 13 A. Well, no, no. I don't know that I | 08:55:46 | |
| 08:53:20 | 14 direct -- I don't think I directed Mr. Fuchs to | 08:55:50 | |
| 08:53:23 | 15 do -- to perform that, but I said I think that | 08:55:50 | |
| 08:53:26 | 16 would -- we're talking about how the initial | 08:55:52 | |
| 08:53:29 | 17 spreadsheet was formed, and so the identification of | 08:55:55 | |
| 08:53:32 | 18 the columns. I thought -- I think in the | 08:55:58 | |
| 08:53:35 | 19 conversation, I thought that would be a good column. | 08:56:01 | |
| 08:53:39 | 20 Q. Okay. When you said in an earlier | 08:56:03 | |
| 08:53:41 | 21 response that you asked for certain columns and | 08:56:07 | |
| 08:53:43 | 22 certain analysis to be performed, do you recall that | 08:56:10 | |
| 08:53:47 | 23 testimony? | 08:56:13 | |
| 08:53:48 | 24 A. I do. | 08:56:16 | |
| 08:53:48 | 25 Q. And I think that you had further said that | 08:56:18 | |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 333 | Page 335 |
|--|---|
| 08:56:21 08:56:23 08:56:24 08:56:26 08:56:29 08:56:34 08:56:36 08:56:37 08:56:41 08:56:45 08:56:49 08:56:51 08:56:55 08:56:57 08:56:59 08:57:02 08:57:04 08:57:10 08:57:13 08:57:17 08:57:19 08:57:22 08:57:25 08:57:28 08:57:31 | 08:58:46 1 inside of the PeopleSoft collection of views you 08:58:48 2 looked at to get this information? 08:58:52 3 A. I think it is "customers" and then "all." 08:58:58 4 I mean, I think that's the selection criteria. If 08:59:02 5 you recollect, on SAS, it's set up with a window on 08:59:05 6 the right-hand -- for lack of a better term, frame 08:59:09 7 or a window on the left-hand side of the screen that 08:59:12 8 allows you to select, kind of drill down into the 08:59:15 9 data. So that's my best recollection. I mean, 08:59:18 10 that's a long time ago, but that's my best 08:59:21 11 recollection. 08:59:22 12 Q. Your Appendix 3 says that you reviewed 08:59:24 13 only four TomorrowNow customer contracts. Do you 08:59:28 14 recall that, Mr. Gray? 08:59:33 15 A. I don't recall, but I'll -- but that's 08:59:36 16 probably -- 08:59:38 17 Q. Okay. 08:59:38 18 A. -- correct. 08:59:40 08:59:45 08:59:47 08:59:55 08:59:57 09:00:00 09:00:03 |
| Page 334 | Page 336 |
| 08:57:32 08:57:36 08:57:40 08:57:42 08:57:44 08:57:47 08:57:50 08:57:52 08:57:57 08:58:02 08:58:05 08:58:08 08:58:11 08:58:15 08:58:16 08:58:20 08:58:23 08:58:28 08:58:30 08:58:33 08:58:36 08:58:38 08:58:40 08:58:41 08:58:43 | 09:00:04 09:00:08 09:00:08 09:00:10 09:00:12 09:00:19 09:00:22 09:00:24 09:00:29 09:00:30 09:00:33 09:00:36 09:00:39 09:00:41 09:00:42 09:00:43 09:00:46 09:00:48 09:00:50 09:00:53 09:00:55 09:01:00 09:01:03 09:01:08 09:01:10 |
| 25 Q. And do you recall which view specifically | |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| | |
|--|--|
| <p style="text-align: right;">Page 341</p> <p>09:06:32 09:06:33 09:06:34 09:06:35 09:06:38 09:06:41 09:06:43 09:06:44 09:06:48 09:06:50 09:06:53 09:06:55 09:06:56 09:06:57 09:07:02 09:07:06 09:07:11 09:07:16 09:07:21 09:07:29 09:07:32 09:07:34 09:07:35 09:07:40 09:07:43</p> | <p style="text-align: right;">Page 343</p> <p>09:09:02 09:09:05 09:09:07 09:09:08 09:09:09 09:09:09 09:09:12 09:09:13 09:09:16 09:09:19 09:09:22 09:09:24 09:09:29 09:09:32 09:09:34 09:09:36 09:09:38 09:09:39 09:09:39 09:09:40 09:09:41 09:09:46 09:09:50 09:09:53 09:09:58</p> |
| <p style="text-align: right;">Page 342</p> <p>09:07:46 09:07:49 09:07:51 09:07:53 09:07:57 09:08:01 09:08:05 09:08:09 09:08:13 09:08:15 09:08:17 09:08:19 09:08:22 09:08:27 09:08:29 09:08:33 09:08:36 09:08:38 09:08:40 09:08:42 09:08:44 09:08:49 09:08:52 09:08:55 09:08:57</p> | <p style="text-align: right;">Page 344</p> <p>09:09:59 09:10:02 09:10:04 09:10:12 09:10:20 09:10:21 09:10:21 09:10:25 09:10:29 09:10:29 09:10:54 09:11:04 09:11:08 09:11:11 09:11:18 09:11:23 09:11:26 09:11:27 09:11:30 09:11:34 09:11:38 09:11:41 09:11:45 09:11:48 09:11:52</p> <p style="text-align: right;">25 MR. POLITO: Q. Understanding that SAS is</p> |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 345 | | Page 347 |
|----------|--|----------|
| 09:11:55 | 1 the basis for this column or data within SAS, did | 09:15:27 |
| 09:12:03 | 2 Sean or Briana contribute data to Defendant's | 09:15:31 |
| 09:12:08 | 3 Exhibit 2089 with respect to the "PeopleSoft | 09:15:32 |
| 09:12:10 | 4 Customer" column? | 09:15:34 |
| 09:12:14 | 5 MR. FUCHS: Objection; form. | 09:15:36 |
| 09:12:29 | 6 THE WITNESS: They -- they -- yeah, I | 09:15:38 |
| 09:12:35 | 7 mean, they populated some of the dots in the column, | 09:15:40 |
| 09:12:42 | 8 as did I. I'm not quite sure. Is that what you | 09:15:42 |
| 09:12:47 | 9 mean? | 09:15:46 |
| 09:12:47 | | 09:15:53 |
| 09:12:48 | | 09:15:56 |
| 09:12:50 | | 09:16:00 |
| 09:12:52 | | 09:16:02 |
| 09:12:54 | | 09:16:04 |
| 09:12:58 | | 09:16:10 |
| 09:13:03 | | 09:16:13 |
| 09:13:05 | | 09:16:16 |
| 09:13:10 | | 09:16:40 |
| 09:13:13 | | 09:16:41 |
| 09:13:19 | | 09:16:41 |
| 09:13:25 | | 09:16:49 |
| 09:13:30 | | 09:16:51 |
| 09:13:36 | | 09:16:54 |
| 09:13:38 | | 09:16:58 |
| 09:13:39 | 25 Q. I do. Would your answers be any different | 09:17:01 |
| Page 346 | | Page 348 |
| 09:13:42 | 1 if I asked you about the "JD Edwards World Customer" | 09:17:03 |
| 09:13:44 | 2 column with regard to who generated -- or who took | 09:17:05 |
| 09:13:50 | 3 the information from SAS, analyzed it, and put it in | 09:17:09 |
| 09:13:55 | 4 Defendant's Exhibit 2089? | 09:17:11 |
| 09:13:56 | 5 MR. FUCHS: Objection; form. | 09:17:12 |
| 09:14:03 | 6 THE WITNESS: There are some, kind of, | 09:17:16 |
| 09:14:06 | 7 exceptions throughout this report. I just want to | 09:17:17 |
| 09:14:07 | 8 make sure I'm answering accurately. I don't believe | 09:17:18 |
| 09:14:22 | 9 that I would have a different answer for any column. | 09:17:19 |
| 09:14:31 | 10 In the columns that we're talking about here, which | 09:17:22 |
| 09:14:33 | 11 are the products serviced by TN, at all I don't | 09:17:24 |
| 09:14:44 | 12 think I would have any difference in the way that I | 09:17:25 |
| 09:14:46 | 13 would answer the question. | 09:17:28 |
| 09:14:49 | 14 The columns were -- you know, it was my | 09:17:30 |
| 09:14:53 | 15 decision to try to make a determination -- I | 09:17:32 |
| 09:14:56 | 16 suspect -- let me be fair -- let me be clear about | 09:17:36 |
| 09:14:58 | 17 that. The column that is labeled -- each -- well, | 09:17:38 |
| 09:15:04 | 18 the columns labeled "PeopleSoft Customer," "JDE | 09:17:39 |
| 09:15:08 | 19 World Customer," "JDE OneWorld Customer," and | 09:17:41 |
| 09:15:11 | 20 "Siebel Customer," those are the columns we're | 09:17:42 |
| 09:15:14 | 21 referring to at the moment, and those I would have | 09:17:45 |
| 09:15:17 | 22 the same answer, I think, if we -- if we were to | 09:17:46 |
| 09:15:20 | 23 look at those, where there was contributions made | 09:17:47 |
| 09:15:23 | 24 and then I verified each of those contributions. | 09:17:52 |
| 09:15:25 | | 09:17:53 |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 349 | Page 351 |
|--|---|
| 09:17:55 09:17:55 09:17:58 09:18:27 09:18:35 09:18:44 09:18:49 09:18:54 09:18:58 09:19:02 09:19:06 09:19:09 09:19:11 09:19:12 09:19:13 09:19:16 09:19:17 09:19:17 09:19:21 09:19:23 09:19:31 09:19:43 09:19:47 09:20:07 09:20:09 | 09:21:31 09:21:31 09:21:32 09:21:37 09:21:41 09:21:44 09:21:47 09:21:48 09:21:51 09:21:54 09:21:58 09:22:02 09:22:07 09:22:09 09:22:14 09:22:17 09:22:22 09:22:26 09:22:30 09:22:34 09:22:34 21 Q. Okay. So you testified yesterday that 22 you're not a lawyer, Mr. Gray; is that correct? 23 A. I did testify to that. 09:22:38 09:22:42 09:22:45 09:22:52 |
| Page 350 | Page 352 |
| 09:20:09 09:20:12 09:20:13 09:20:15 09:20:27 09:20:29 09:20:31 09:20:34 09:20:36 09:20:39 09:20:41 09:20:44 09:20:45 09:20:47 09:20:52 09:20:54 09:20:55 09:20:58 09:20:59 09:21:10 09:21:21 09:21:23 09:21:28 09:21:29 09:21:30 | 09:22:53 09:22:57 09:23:00 09:23:00 09:23:01 09:23:03 09:23:05 09:23:07 09:23:10 09:23:14 09:23:17 09:23:19 09:23:21 09:23:24 09:23:29 09:23:32 09:23:39 09:23:43 09:23:45 09:23:49 09:23:52 09:23:56 09:24:00 09:24:01 09:24:03 |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 437 | Page 439 |
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| 11:54:21 11:54:23 11:54:25 11:54:26 11:54:28 11:54:31 11:54:32 11:54:34 11:54:36 11:54:38 11:54:48 11:54:54 11:54:57 11:55:04 11:55:44 11:55:46 11:56:00 11:56:01 11:56:20 11:56:28 11:56:35 11:56:39 11:56:41 11:56:42 11:56:44 | 11:58:08 11:58:10 11:58:48 11:58:52 11:58:55 11:59:05 11:59:10 11:59:12 11:59:16 11:59:16 11:59:17 11:59:18 11:59:20 11:59:22 11:59:27 11:59:30 11:59:36 11:59:39 11:59:40 11:59:48 11:59:49 11:59:57 12:00:00 12:00:02 12:00:05 |
| Page 438 | Page 440 |
| 11:56:46 11:56:49 11:56:51 11:56:54 11:56:55 11:56:57 11:57:01 11:57:03 11:57:06 11:57:09 11:57:24 11:57:26 11:57:34 11:57:37 11:57:37 11:57:41 11:57:44 11:57:46 11:57:51 11:57:54 11:57:56 11:57:58 11:57:59 11:58:04 11:58:07 | 12:00:06 12:00:08 12:00:13 12:00:15 12:00:18 12:00:21 12:00:24 12:00:25 12:00:28 12:00:30 12:00:34 12:00:36 12 MR. POLITO: Q. Do you have an opinion 12:00:37 13 one way or another as to whether a customer can 12:00:43 14 permissibly be given software and support material 12:00:47 15 downloaded using another customer's credentials 12:00:50 16 under any circumstance? 12:00:51 17 MR. FUCHS: Objection; form, calls for a 12:00:52 18 legal conclusion. 12:01:02 19 THE WITNESS: Would it be permissible, 12:01:03 20 you're saying. It's not -- this isn't a legal 12:01:06 21 question? I mean -- what do you mean when you're 12:01:11 22 asking me, "Is it permissible?" Would it -- help me 12:01:15 23 with what you meant by that. 12:01:29 24 MR. POLITO: Q. Do you have any opinion 12:01:31 25 about what activity that TomorrowNow performed was |

Page 441

12:01:33 1 proper or improper with respect to supporting its
12:01:35 2 own customers?
12:01:39 3 MR. FUCHS: Objection; form.
12:01:44 4 THE WITNESS: My report and my analysis is
12:01:47 5 really related to the Mandiant report and the
12:01:51 6 analysis and so on performed therein, you know, in
12:01:55 7 his report and his appendices and so on, the
12:01:58 8 material that he provided. I'm -- you know, I don't
12:02:02 9 have an opinion -- I'm not intending in my report to
12:02:05 10 try and talk about the general case of how
12:02:09 11 TomorrowNow dealt with their customers or the
12:02:13 12 propriety or impropriety of their behaviors.
12:02:17 13 What I am focused on in my report really
12:02:20 14 has to do with response to the Mandiant report and
12:02:23 15 the work that the Mandiant report performed and
12:02:27 16 whether or not sufficient work was performed and so
12:02:29 17 on. So I have a lot of comments about that, but I
12:02:31 18 don't really have opinions one way or the other
12:02:35 19 regarding the broader question of TomorrowNow's
12:02:38 20 treatment of their -- of their customers.
12:02:40 21 MR. POLITO: Q. So it's correct to say
12:02:43 22 that you do not intend to testify at trial whether
12:02:48 23 TomorrowNow's support of its customers was
12:02:52 24 appropriate or permissible?
12:02:55 25 MR. FUCHS: Objection; form.

Page 442

12:02:58 1 THE WITNESS: So within -- sort of within
12:03:04 2 the boundaries of information which has become
12:03:09 3 available as of late, which we talked a little bit
12:03:13 4 about yesterday, which I haven't fully had a chance
12:03:15 5 to analyze, given that that may change my opinion in
12:03:25 6 some way, I don't within -- I don't sitting here
12:03:27 7 today have an opinion or have an intention to
12:03:30 8 testify at trial about the more general questions
12:03:34 9 regarding how TomorrowNow behaved. But there is new
12:03:38 10 inform -- you know what I'm saying? So assuming
12:03:41 11 that there's nothing in that new information that
12:03:43 12 has become available that changes my opinion, then I
12:03:48 13 don't intend to, but...
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Page 443

12:04:29
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12:04:54
12:04:57 9 MR. POLITO: Q. Do you presently have an
12:04:58 10 opinion that any conduct by TomorrowNow was proper
12:05:05 11 or improper?
12:05:08 12 MR. FUCHS: Objection; form, could call
12:05:14 13 for a legal conclusion.
12:05:17 14 THE WITNESS: It's -- I don't mean to be
12:05:18 15 glib, but I imagine they must have stumbled into
12:05:21 16 something that was proper, I mean, if that's what
12:05:22 17 you mean. I don't have an opinion -- you're asking
12:05:24 18 me the opinion -- the way you asked that question is
12:05:26 19 very difficult to answer.
12:05:27 20 I don't have an opinion -- I don't have an
12:05:30 21 opinion regarding the proprietor -- propriety or
12:05:35 22 impropriety or permissibility in a general sense of
12:05:39 23 how TomorrowNow conducted their affairs with their
12:05:41 24 customers or conducted their business with their
12:05:43 25 customers. I don't have an opinion about the

Page 444

12:05:45 1 general -- the broader question.
12:05:47 2 My opinions are confined to the Mandiant
12:05:52 3 report and appendices and work that he did and
12:05:55 4 comments and critiques of his report, is really what
12:05:58 5 my opinions in my report pertain to. That's what I
12:06:01 6 mean. So I don't think I do have an opinion outside
12:06:04 7 that, again, given the proviso that there's new
12:06:07 8 stuff that I got to absorb.
12:06:09 9 MR. POLITO: Q. Do you presently have an
12:06:10 10 opinion about whether TomorrowNow's downloading from
12:06:13 11 Customer Connection was permissible under any
12:06:16 12 applicable licenses or terms of use?
12:06:19 13 MR. FUCHS: Objection; form.
12:06:23 14 THE WITNESS: So I think, like Mr. Mandia
12:06:27 15 and in the Mandiant report, I haven't looked at
12:06:32 16 terms of use agreements, and so I don't -- I don't
12:06:37 17 have an opinion regarding the permissibility or
12:06:41 18 impermissibility of downloading materials.
12:06:44 19 MR. POLITO: Q. Do you presently have an
12:06:46 20 opinion as to whether the local environments on
12:06:52 21 TomorrowNow's machines were permitted under the
12:06:55 22 applicable customer licenses?
12:06:59 23 MR. FUCHS: Objection; form.
12:07:17 24 THE WITNESS: Well, like -- again, like
12:07:18 25 Mr. Mandia and the Mandiant report, I haven't

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 445 | | Page 447 | |
|----------|--|----------|--|
| 12:07:22 | 1 reviewed customer licenses or been provided with any | 12:10:38 | |
| 12:07:26 | 2 guidance with respect to the customer licenses. And | 12:10:41 | |
| 12:07:30 | 3 consequently, I don't think I have -- I'm in a | 12:10:42 | |
| 12:07:32 | 4 position to have an opinion regarding whether or not | 12:10:45 | |
| 12:07:35 | 5 the environments that are -- that are identified as | 12:10:48 | |
| 12:07:41 | 6 having been present on TomorrowNow's systems were | 12:10:49 | |
| 12:07:44 | 7 permitted or not permitted. I don't have an opinion | 12:10:53 | |
| 12:07:48 | 8 about that at this point. Because I -- again, like | 12:10:56 | |
| 12:07:53 | 9 Mr. Mandia and the Mandiant report, I haven't read | 12:10:59 | |
| 12:07:55 | 10 the license agreements and so on. | 12:11:02 | |
| 12:07:57 | | 12:11:07 | |
| 12:07:58 | | 12:11:12 | |
| 12:08:02 | | 12:11:15 | |
| 12:08:10 | | 12:11:19 | |
| 12:08:20 | | 12:11:24 | |
| 12:08:21 | | 12:11:25 | |
| 12:08:29 | | 12:11:29 | |
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| 12:08:38 | | 12:11:35 | |
| 12:08:41 | | 12:11:38 | |
| 12:08:50 | | 12:11:39 | |
| 12:08:52 | | 12:11:41 | |
| 12:08:55 | | 12:12:23 | |
| 12:08:58 | | 12:12:24 | |
| 12:09:00 | | 12:12:25 | |
| Page 446 | | Page 448 | |
| 12:09:03 | | 12:12:30 | |
| 12:09:09 | | 12:12:34 | |
| 12:09:10 | | 12:12:40 | |
| 12:09:15 | | 12:12:43 | |
| 12:09:22 | | 12:12:47 | |
| 12:09:25 | | 12:12:51 | |
| 12:09:26 | | 12:12:53 | |
| 12:09:27 | | 12:12:55 | |
| 12:09:30 | | 12:13:05 | |
| 12:09:31 | | 12:13:07 | |
| 12:09:40 | | 12:13:10 | |
| 12:09:52 | | 12:13:25 | |
| 12:09:57 | | 12:13:32 | |
| 12:09:57 | | 12:13:39 | |
| 12:09:58 | | 12:13:46 | |
| 12:09:59 | | 12:13:52 | |
| 12:10:03 | | 12:13:54 | |
| 12:10:06 | | 12:13:57 | |
| 12:10:09 | | 12:14:01 | |
| 12:10:12 | | 12:14:03 | |
| 12:10:16 | | 12:14:09 | |
| 12:10:19 | | 12:14:13 | |
| 12:10:24 | | 12:14:16 | |
| 12:10:31 | | 12:14:19 | |
| 12:10:34 | | 12:14:25 | |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 469 | Page 471 |
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| 13:44:47 | 13:47:30 |
| 13:44:50 | 13:47:34 |
| 13:44:51 | 13:47:40 |
| 13:44:58 | 13:47:44 |
| 13:45:02 | 13:47:45 |
| 13:45:06 | 13:47:49 |
| 13:45:10 | 13:47:52 |
| 13:45:13 | 13:47:54 |
| 13:45:17 | 13:47:55 |
| 13:45:19 | 13:47:57 |
| 13:45:21 | 13:48:12 |
| 13:45:24 | 13:48:14 |
| 13:45:26 | 13:48:19 |
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| 13:45:55 | 13:48:58 |
| 13:45:59 | 13:49:01 |
| 13:46:01 | 13:49:04 |
| 13:46:04 | 13:49:08 |
| Page 470 | Page 472 |
| 13:46:06 | 13:49:13 |
| 13:46:09 | 13:49:18 |
| 13:46:12 | 13:49:18 |
| 13:46:14 | 13:49:23 |
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| 13:46:45 | 13:49:45 |
| 13:46:49 | 13:49:50 |
| 13:46:52 | 13:50:05 |
| 13:46:55 | 13:50:10 |
| 13:46:57 | 13:50:15 |
| 13:47:00 | 13:50:18 |
| 13:47:04 | 13:50:22 |
| 13:47:08 | 13:50:24 |
| 13:47:14 | 13:50:28 |
| 13:47:20 | 13:50:30 |
| 13:47:26 | 13:50:32 |
| 13:47:27 | 13:50:39 |
| | 11 Q. Mr. Gray, are you competent to determine |
| | 12 whether the act of downloading on behalf of Customer |
| | 13 A, using Customer B's credentials from an Oracle Web |
| | 14 site, would violate Customer B's customer license? |
| | 15 MR. FUCHS: Objection; form. |
| | 16 THE WITNESS: I think that kind of puts me |
| | 17 into the terms of use or license arena, which I have |
| | 18 suggested so -- to -- you know, suggested on a |
| | 19 couple of occasions over the last two days that I am |
| | 20 not an expert in that matter or am not competent |
| | 21 really to analyze those things, which is a slightly |
| | 22 different answer than what you're asking. |
| | 23 If I were to be given some guidance with |
| | 24 respect to terms of use or license arrangements that |
| | 25 would provide me some ability to analyze a |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 473 | | Page 475 | |
|----------|----|--|----------|
| 13:50:42 | 1 | certain -- certain set of data, for example, that | 13:53:41 |
| 13:50:46 | 2 | was related or identified in the terms of use or | 13:53:42 |
| 13:50:49 | 3 | license agreement -- and I know you're referring to | 13:53:48 |
| 13:50:52 | 4 | licenses in this particular case -- then I think I | 13:53:53 |
| 13:50:53 | 5 | would be competent to do such a thing. | 13:53:56 |
| 13:50:55 | 6 | MR. POLITO: Q. First, I think you | 13:53:57 |
| 13:51:01 | 7 | answered the question, but if I change from a | 13:54:10 |
| 13:51:04 | 8 | customer license to customer license or terms of | 13:54:12 |
| 13:51:07 | 9 | use, B's customer license or terms of use, does that | 13:54:14 |
| 13:51:12 | 10 | change your prior answer? | 13:54:16 |
| 13:51:14 | 11 | MR. FUCHS: Object to form. | 13:54:20 |
| 13:51:15 | 12 | THE WITNESS: No, it -- no, it does not. | 13:54:22 |
| 13:51:17 | 13 | MR. POLITO: Q. Did you request any | 13:54:23 |
| 13:51:18 | 14 | guidance such that you could determine whether | 13:54:24 |
| 13:51:24 | 15 | downloading on behalf of Customer A from an Oracle | 13:54:25 |
| 13:51:30 | 16 | Web site using Customer B's credentials would | 13:54:28 |
| 13:51:35 | 17 | violate Customer B's license or the terms of use? | 13:54:30 |
| 13:51:38 | 18 | MR. FUCHS: Objection; form. | 13:54:31 |
| 13:51:40 | 19 | THE WITNESS: Did I ask for any guidance, | 13:54:32 |
| 13:51:40 | 20 | is the question. No, I don't remember asking for | 13:54:35 |
| 13:51:50 | 21 | any guidance along those lines. | 13:54:38 |
| 13:51:57 | 22 | MR. POLITO: Q. Why not? Why didn't you | 13:54:40 |
| 13:51:58 | 23 | ask? | 13:54:49 |
| 13:51:59 | 24 | MR. FUCHS: Objection; form. | 13:54:53 |
| 13:52:01 | 25 | THE WITNESS: Well, again, my -- the | 13:54:59 |
| Page 474 | | Page 476 | |
| 13:52:04 | 1 | analysis that I performed was analysis of the | 13:55:02 |
| 13:52:09 | 2 | Mandiant report and appendices and data associated | 13:55:07 |
| 13:52:13 | 3 | with the Mandiant report, and the critique and | 13:55:10 |
| 13:52:16 | 4 | commentary I offer is based upon that report. And | 13:55:12 |
| 13:52:20 | 5 | in the process of producing that, that commentary, | 13:55:16 |
| 13:52:23 | 6 | that was not part of my assignment. | 13:55:19 |
| 13:52:39 | 7 | MR. POLITO: Q. Did you request any | 13:55:21 |
| 13:52:40 | 8 | guidance so that you could determine whether | 13:55:24 |
| 13:52:42 | 9 | downloading on behalf of Customer A from an Oracle | 13:55:24 |
| 13:52:45 | 10 | Web site using Customer B's credentials would | 13:55:25 |
| 13:52:49 | 11 | violate Customer A's license? | 13:55:28 |
| 13:52:51 | 12 | MR. FUCHS: Objection; form. | 13:55:39 |
| 13:53:04 | 13 | THE WITNESS: I don't remember doing any | 13:55:45 |
| 13:53:06 | 14 | analysis -- doing any license analysis regarding the | 13:55:49 |
| 13:53:10 | 15 | downloading of materials using another customer's | 13:55:55 |
| 13:53:15 | 16 | credentials. I don't remember doing any -- I didn't | 13:55:57 |
| 13:53:18 | 17 | do any license analysis or -- along those lines. So | 13:56:01 |
| 13:53:22 | 18 | I don't know -- I guess I didn't do any of that | 13:56:08 |
| 13:53:25 | 19 | work. | 13:56:09 |
| 13:53:25 | 20 | MR. POLITO: Q. My question is, did you | 13:56:11 |
| 13:53:26 | 21 | seek any guidance that would have helped you perform | 13:56:15 |
| 13:53:29 | 22 | that work? | 13:56:19 |
| 13:53:31 | 23 | MR. FUCHS: Objection; form. | 13:56:22 |
| 13:53:32 | 24 | THE WITNESS: No, I didn't do any -- I | 13:56:26 |
| 13:53:34 | 25 | didn't seek any guidance in that regard. | 13:56:30 |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 489 | Page 491 |
|--|--|
| <p>14:13:55 14:13:59 14:13:59 14:14:00 14:14:02 14:14:06 14:14:07 14:14:09 14:14:13 14:14:15 14:14:18 14:14:18 14:14:19 14:14:22 14:14:25 14:14:28 14:14:32 14:14:38 14:14:40 14:14:43 14:14:45 14:14:51 14:14:54 14:15:00 14:15:01</p> | <p>14:17:22 1 second sentence says, "I was asked by Defendants to 14:17:24 2 review and respond as appropriate to a report 14:17:27 3 entitled 'Analysis of SAP TN's Collection and Use of 14:17:30 4 Oracle Software and Related Materials'?" 14:17:33 5 A. I see that sentence, yes. 14:17:35 6 Q. Is it fair to assume that if you did not 14:17:36 7 perform certain analysis, it's because you did not 14:17:39 8 believe it an appropriate response to Mr. Mandia's 14:17:43 9 report? 14:17:45 10 A. Well, what -- my reading of that sentence 14:17:48 11 is a little different. "I was asked by Defendants 14:17:50 12 to review and respond as appropriate to a report 14:17:54 13 entitled..." And so it's the appropriateness of -- 14:17:58 14 and the definition of the response is what I'm 14:18:00 15 referring to here. The appropriateness is -- was, 14:18:06 16 you know, determined by information that I was 14:18:13 17 interested in and the attorneys were interested in 14:18:15 18 and so on. So the response -- the appropriateness 14:18:19 19 of the response was -- had -- was provided -- it was 14:18:23 20 a communal effort, if you will. It was 14:18:26 21 appropriately defined. 14:18:29 22 Q. Who determined what was an appropriate 14:18:30 23 response? 14:18:31 24 A. Well -- 14:18:33 25 MR. FUCHS: Don't reveal the</p> |
| Page 490 | Page 492 |
| <p>14:15:02 14:15:11 14:15:18 14:15:21 14:15:32 14:15:34 14:15:39 14:15:43 14:15:47 14:15:51 14:16:16 14:16:17 14:16:22 14:16:26 14:16:31 14:16:34 14:16:36 14:16:40 14:16:52 14:16:53 14:16:55 14:16:56 22 MR. POLITO: Q. Mr. Gray, can you turn to 14:16:58 23 Page 1 of your report. 14:17:17 24 A. I'm there. 14:17:20 25 Q. Do you see that the second paragraph,</p> | <p>14:18:34 1 communications between counsel and you in responding 14:18:38 2 to that question unless they formed the basis of 14:18:44 3 your opinion or it's something you relied on. 14:18:51 4 THE WITNESS: I think with that 14:18:51 5 instruction, I probably ought not to answer the 14:18:53 6 question. 14:18:54 7 MR. POLITO: Q. Did you rely on the 14:18:55 8 definition of "appropriate" to determine the scope 14:18:57 9 of your report, Mr. Gray, as far as the sentence 14:19:00 10 that we're reviewing goes? 14:19:03 11 MR. FUCHS: Objection; form. 14:19:09 12 THE WITNESS: Did I rely on the definition 14:19:11 13 of "appropriate." I guess at some level. I mean, I 14:19:17 14 have an understanding, I think, of what 14:19:19 15 "appropriate" means. 14:19:20 16 MR. POLITO: Q. Who determined what was 14:19:22 17 an appropriate response as the phrase "appropriate 14:19:25 18 response" is used in that sentence? 14:19:28 19 A. Who determined what was appropriate? 14:19:30 20 Q. (Nods head.) 14:19:31 21 A. Well, it -- I mean, at the end of the day, 14:19:32 22 this is my report, and I was the one who ultimately 14:19:36 23 made the decision as to what was appropriate and 14:19:38 24 what was not appropriate. 14:19:40 25 Q. Who else had input into what was</p> |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 493 | | Page 495 |
|----------|---|----------|
| 14:19:42 | 1 appropriate and not appropriate? | 14:22:31 |
| 14:19:45 | 2 MR. FUCHS: You can name names, nothing | 14:22:37 |
| 14:19:47 | 3 else. | 14:22:40 |
| 14:19:48 | 4 THE WITNESS: So I would say Mr. Fuchs, | 14:22:42 |
| 14:19:54 | 5 Laurens Wilkes. Might even have to implicate | 14:22:44 |
| 14:20:01 | 6 Mr. Cowan here. But I think those would be the | 14:22:46 |
| 14:20:05 | 7 three people that I am aware of that -- for -- that | 14:22:49 |
| 14:20:11 | 8 might have been involved in that. | 14:22:52 |
| 14:20:16 | | 14:22:55 |
| 14:20:17 | | 14:22:59 |
| 14:20:20 | | 14:23:08 |
| 14:20:23 | | 14:23:11 |
| 14:20:33 | | 14:23:14 |
| 14:20:34 | | 14:23:17 |
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| 14:20:38 | | 14:23:21 |
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| 14:20:41 | | 14:23:23 |
| 14:20:41 | | 14:40:58 |
| 14:20:42 | | 14:42:06 |
| 14:20:48 | | 14:42:07 |
| 14:20:52 | | 14:42:10 |
| 14:20:58 | | 14:42:11 |
| 14:21:00 | | 14:42:13 |
| Page 494 | | Page 496 |
| 14:21:02 | | 14:42:13 |
| 14:21:05 | | 14:42:16 |
| 14:21:06 | | 14:42:18 |
| 14:21:12 | | 14:42:22 |
| 14:21:17 | | 14:42:26 |
| 14:21:17 | | 14:42:27 |
| 14:21:28 | | 14:42:29 |
| 14:21:29 | | 14:42:37 |
| 14:21:32 | | 14:42:38 |
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| 14:21:47 | | 14:42:42 |
| 14:21:49 | | 14:42:44 |
| 14:21:51 | | 14:42:48 |
| 14:21:54 | | 14:42:49 |
| 14:21:58 | | 14:42:54 |
| 14:22:02 | | 14:42:56 |
| 14:22:04 | | 14:43:02 |
| 14:22:08 | | 14:43:05 |
| 14:22:13 | | 14:43:09 |
| 14:22:18 | | 14:43:12 |
| 14:22:20 | | 14:43:14 |
| 14:22:22 | | 14:43:18 |
| 14:22:25 | | 14:43:19 |
| 14:22:28 | | 14:43:23 |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 549 | Page 551 |
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| 16:21:32 | 16:26:37 1 is written, could be read to -- could be read in |
| 16:21:34 | 16:26:46 2 such a way that it broadens the Mandiant findings in |
| 16:21:37 | 16:26:51 3 such a way that it -- that it -- that it -- that the |
| 16:22:19 | 16:26:58 4 evidence that there is 51, I believe it is, |
| 16:22:23 | 16:27:00 5 TomorrowNow customers who were -- who are not |
| 16:22:29 | 16:27:05 6 accused based upon the Mandiant rules might not -- |
| 16:22:34 | 16:27:08 7 might be ignored. |
| 16:22:37 | 16:27:10 8 In other words, it's kind of written in |
| 16:22:40 | 16:27:12 9 such a way as though it's -- it seems as though it |
| 16:22:41 | 16:27:14 10 could be read in such a way that it is expanded and |
| 16:22:44 | 16:27:18 11 sort of smears across all of TomorrowNow's |
| 16:22:55 | 16:27:20 12 activities, when in reality, 2089 identifies, in my |
| 16:22:58 | 16:27:24 13 opinion, some customers, 51 of them, TomorrowNow |
| 16:23:05 | 16:27:29 14 customers, to which the accusations that are |
| 16:23:08 | 16:27:33 15 identified in the Mandiant report do not apply. |
| 16:23:09 | 16:27:37 16 So I guess that's the place where I kind |
| 16:23:13 | 16:27:41 17 of started and ended, right, with the -- with |
| 16:23:15 | 16:27:42 18 this -- with the report, was to say, hmm, that seems |
| 16:23:30 | 16:27:46 19 like it's -- seems like there's a lot of |
| 16:23:33 | 16:27:50 20 generalization here, doesn't really pertain, and |
| 16:23:37 | 16:27:55 21 therefore, it seemed more appropriate for me to try |
| 16:23:42 | 16:27:58 22 to go identify those customers to which the accused |
| 16:23:45 | 16:28:00 23 conduct could actually somehow be mapped. That's -- |
| 16:23:47 | 16:28:02 24 that was the genesis of the non-accused conduct. |
| 16:23:49 | 16:28:05 25 So I think with respect to Section X, |
| Page 550 | Page 552 |
| 16:23:53 | 16:28:07 1 Roman numeral X, a reading could be that it's -- oh, |
| 16:24:06 | 16:28:13 2 there you go -- reading could be such that it is -- |
| 16:24:09 | 16:28:19 3 that is broader than I think is necessarily correct. |
| 16:24:11 | 16:28:24 4 Other than that -- well I guess that's sufficient. |
| 16:24:15 | 16:28:30 5 That was in a mouthful, so you're going to have to |
| 16:24:19 | 16:28:33 6 ask me some questions about that. Sorry. |
| 16:24:25 | 16:28:34 |
| 16:24:27 | 16:28:36 |
| 16:24:33 | 16:28:40 |
| 16:24:38 | 16:28:45 |
| 16:24:41 | 16:28:47 |
| 16:24:42 | 16:29:01 |
| 16:24:46 | 16:29:03 |
| 16:24:50 | 16:29:09 |
| 16:24:52 | 16:29:12 |
| 16:24:55 | 16:29:15 |
| 16:24:58 | 16:29:20 |
| 16:25:05 | 16:29:23 |
| 16:25:08 | 16:29:26 |
| 16:25:18 20 Q. Mr. Gray, does Appendix 4 to your report, | 16:29:29 |
| 16:25:24 21 which is Defendant's Exhibit 2089, contradict or | 16:29:34 |
| 16:25:28 22 rebut any of Mr. Mandia's opinions or conclusions? | 16:29:36 |
| 16:26:16 23 A. So I think to -- well, how to say this. | 16:29:39 |
| 16:26:28 24 Section X of the Mandiant report, or Section X, | 16:29:39 |
| 16:26:32 25 Roman numeral X, Page 100, in the manner in which it | 16:29:41 |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 557 | Page 559 |
|--|---|
| <p>16:35:42</p> <p>16:35:44</p> <p>16:35:46</p> <p>16:35:48</p> <p>16:35:51</p> <p>16:35:55</p> <p>16:35:57</p> <p>16:36:00</p> <p>16:36:02</p> <p>16:36:06</p> <p>16:36:08</p> <p>16:36:11</p> <p>16:36:13</p> <p>16:36:15</p> <p>16:36:18 15 Q. Mr. Gray, I'm talking about Appendix 4.</p> <p>16:36:19 16 I'm not talking about the rest of your report. Do</p> <p>16:36:22 17 you believe that there are commentary and critiques</p> <p>16:36:25 18 contained within the four corners of Appendix 4?</p> <p>16:36:34 19 MR. FUCHS: Objection; form.</p> <p>16:36:36 20 MR. POLITO: Q. That rebut or contradict</p> <p>16:36:48 21 any conclusion in Mr. Mandia's report.</p> <p>16:36:58 22 MR. FUCHS: Objection; form.</p> <p>16:37:02 23 THE WITNESS: You're right, I answered a</p> <p>16:37:03 24 different question. And I think that Appendix 4 is</p> <p>16:37:09 25 intended actually to reflect an analysis of the --</p> | <p>16:38:52</p> <p>16:38:55</p> <p>16:38:59</p> <p>16:39:13</p> <p>16:39:15</p> <p>16:39:39</p> <p>16:39:42</p> <p>16:39:44</p> <p>16:39:45</p> <p>16:39:59</p> <p>16:40:01</p> <p>16:40:11</p> <p>16:40:12</p> <p>16:40:17</p> <p>16:40:20</p> <p>16:40:24</p> <p>16:40:30</p> <p>16:40:33</p> <p>16:40:35</p> <p>16:40:36</p> <p>16:40:37</p> <p>16:40:38</p> <p>16:40:38</p> <p>16:40:42</p> <p>16:40:46</p> |
| Page 558 | Page 560 |
| <p>16:37:14 1 of TomorrowNow's -- of the behavior with respect to</p> <p>16:37:16 2 TomorrowNow's customers that is contained within the</p> <p>16:37:19 3 Mandiant report. So I don't intend it necessarily</p> <p>16:37:22 4 to rebut, only to the extent that it provides some</p> <p>16:37:30 5 limitation and perhaps an insight into that data.</p> <p>16:37:34 6 MR. POLITO: Q. So would you agree that</p> <p>16:37:36 7 Appendix 4 provides context, but does not contradict</p> <p>16:37:38 8 or rebut the conclusions in Mr. Mandia's report?</p> <p>16:37:42 9 MR. FUCHS: Objection; form,</p> <p>16:37:42 10 mischaracterizes the witness's prior testimony.</p> <p>16:37:55 11 THE WITNESS: I don't think the purpose of</p> <p>16:37:57 12 intent of Exhibit 4 is to contradict or rebut. It</p> <p>16:38:08 13 is rather to provide some insights in -- I think I'd</p> <p>16:38:15 14 use that word -- provide insights into the</p> <p>16:38:17 15 conclusions that he has.</p> <p>16:38:19 16 Again, with respect to Section X of the</p> <p>16:38:21 17 Mandiant report, again, as I say, there are some</p> <p>16:38:26 18 broad asser -- some things that can be read as broad</p> <p>16:38:29 19 assertions here, or broad opinions, and to that</p> <p>16:38:31 20 extent, it might limit some of that. But there's</p> <p>16:38:34 21 nothing specific other than that that I can think</p> <p>16:38:38 22 of. And as a matter of fact, it is intended to try</p> <p>16:38:41 23 and provide insights and adopt what the Mandiant</p> <p>16:38:45 24 report reported.</p> <p>16:38:51</p> | <p>16:40:52</p> <p>16:40:53</p> <p>16:40:56</p> <p>16:40:56</p> <p>16:41:06</p> <p>16:41:09</p> <p>16:41:12</p> <p>16:41:17</p> <p>16:41:18</p> <p>16:41:19</p> <p>16:41:23</p> <p>16:41:28</p> <p>16:41:28</p> <p>16:41:28</p> <p>16:41:30</p> <p>16:41:31</p> <p>16:41:32</p> <p>16:41:32</p> <p>16:41:34</p> <p>16:41:36</p> <p>16:41:37</p> <p>16:41:39</p> <p>16:41:43</p> <p>16:41:44</p> <p>16:41:45</p> |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 581 | | Page 583 | |
|----------|--|----------|--|
| 17:50:19 | | 17:53:26 | 1 Oracle's Web sites? |
| 17:50:25 | | 17:53:30 | 2 MR. FUCHS: Objection, form. |
| 17:50:26 | | 17:53:36 | 3 THE WITNESS: The idea of propriety here, |
| 17:50:30 | | 17:53:39 | 4 whether it was -- whether the behavior was proper or |
| 17:50:32 | | 17:53:42 | 5 improper, to me has to do with terms of use and |
| 17:50:41 | | 17:53:48 | 6 potentially licenses and so on. And as I think |
| 17:50:43 | | 17:53:50 | 7 we've talked about on a couple of -- numerous |
| 17:50:48 | | 17:53:53 | 8 occasions during the last couple of days, I have not |
| 17:50:54 | | 17:53:57 | 9 looked at the terms of use agreements or the |
| 17:51:06 | | 17:53:59 | 10 licenses -- nor has Mr. Mandia, I might add -- and |
| 17:51:07 | | 17:54:03 | 11 so I don't have an opinion one way or the other |
| 17:51:17 | | 17:54:07 | 12 about any alleged improper downloading of data |
| 17:51:26 | | 17:54:12 | 13 from -- by TomorrowNow from Oracle's Web sites. |
| 17:51:31 | | 17:54:16 | |
| 17:51:33 | | 17:54:18 | |
| 17:51:38 | | 17:54:20 | |
| 17:51:40 | | 17:54:24 | |
| 17:51:44 | | 17:54:26 | |
| 17:51:46 | | 17:54:38 | |
| 17:51:49 | | 17:54:40 | |
| 17:51:52 | | 17:54:46 | |
| 17:51:56 | | 17:54:50 | |
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| 17:52:04 | | 17:54:57 | |
| Page 582 | | Page 584 | |
| 17:52:06 | | 17:55:00 | |
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| 17:52:12 | | 17:55:07 | |
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| 17:53:14 | | 17:56:07 | |
| 17:53:18 | | 17:56:11 | |
| 17:53:21 | 24 MR. POLITO: Q. Do you agree with | 17:56:14 | |
| 17:53:22 | 25 Mr. Mandia that TomorrowNow improperly accessed | 17:56:15 | |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 589 | Page 591 |
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| 18:01:47 18:01:51 18:01:56 18:01:57 18:02:04 18:02:06 18:02:06 18:02:10 18:02:11 18:02:13 18:02:18 18:02:21 18:02:26 18:02:34 18:02:36 18:02:39 18:02:45 18:02:51 18:02:54 18:02:57 18:03:00 18:03:06 18:04:30 18:04:31 18:04:43 | 18:06:33 18:06:39 18:06:41 18:06:45 18:06:49 18:06:53 18:06:58 18:07:02 18:07:04 18:07:06 18:07:10 18:07:14 18:07:17 18:07:18 18:07:18 18:07:19 18:07:20 18:07:20 18:16:49 18:17:31 18:17:31 18:17:39 18:17:40 18:17:41 18:17:43 |
| Page 590 | Page 592 |
| 18:04:48 18:04:52 18:04:56 18:05:01 18:05:05 18:05:06 18:05:09 18:05:17 18:05:23 18:05:29 18:05:38 18:05:44 18:05:51 18:05:53 18:05:55 18:05:57 18:06:01 18:06:06 18:06:11 18:06:14 18:06:17 18:06:19 18:06:25 18:06:25 18:06:28 | 18:17:45 18:17:53 18:18:00 18:18:06 18:18:10 18:18:10 18:18:12 18:18:14 18:18:17 18:18:19 18:18:25 18:18:27 18:18:33 18:18:36 18:18:37 18:18:39 18:18:39 18:18:40 18:18:42 18:18:43 18:18:46 18:18:48 18:18:49 18:19:03 18:19:06 6 Q. How many hours have you spent on this case 7 in total? 8 A. That's a question I can't answer with a 9 great deal of precision, but I think someplace 10 between 5- and 600 hours, is my best estimate as of, 11 you know, today. |

STEPHEN GRAY June 9, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

| Page 593 | Page 595 |
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| 18:19:08 | 18:21:38 |
| 18:19:14 | 18:21:40 |
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| 18:20:24 | 18:23:33 |
| Page 594 | Page 596 |
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CERTIFICATE OF REPORTER

I, Natalie Y. Botelho, 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.

The said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, 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 [X] 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: June 18, 2010


Natalie Y. Botelho, CSR No. 9897