

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
STEPHEN K. CLARKE

VOLUME 1; PAGES 1 - 323

TUESDAY, JUNE 8, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

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

(1-427117)

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Page 18	Page 20
<p>09:27:42 09:27:50 09:27:52 09:27:52 09:27:53 09:27:57 09:28:01 09:28:04 09:28:05 09:28:09 09:28:11 09:28:16 09:28:17 09:28:20 09:28:22 09:28:27 09:28:30 09:28:33 09:28:33 09:28:34 09:28:36 09:28:39 09:28:42 09:28:43 09:28:44</p>	<p>09:29:55 09:29:57 09:29:58 09:30:02 09:30:06 09:30:10 09:30:14 09:30:27 8 Q. The purpose of the March 26, 2010 report 09:30:31 9 was to provide all the opinions that you had in 09:30:37 10 rebuttal to Mr. Meyer? 09:30:40 11 MR. McDONELL: Vague and ambiguous. 09:30:44 12 THE WITNESS: I don't think that was the 09:30:46 13 sole purpose. 09:30:48 14 MR. PICKETT: Q. Well, what was the 09:30:49 15 purpose of the March 26, 2010 report? 09:30:52 16 A. It was to comment upon Mr. Meyer's report, 09:30:59 17 and also to do my own analysis and convey, or 09:31:04 18 report, the elements of that analysis and the 09:31:07 19 results of that analysis. 09:31:08 20 Q. And you intended to submit a final report 09:31:12 21 on March 26, did you not? 09:31:14 22 A. That was my intention.</p>
Page 19	Page 21
<p>09:28:46 09:28:49 09:28:53 09:28:55 09:28:56 09:28:57 09:28:59 09:29:01 09:29:02 09:29:04 09:29:05 09:29:07 09:29:10 09:29:13 09:29:14 09:29:18 09:29:20 09:29:24 09:29:29 09:29:31 09:29:36 09:29:42 09:29:45 09:29:52 09:29:53</p>	<p>09:31:24 09:31:27 09:31:29 09:31:33 09:31:37 09:31:38 09:31:40 09:31:42 09:31:44 09:31:47 09:31:47 09:31:51 09:31:54 09:32:00 09:32:05 09:32:08 09:32:13 09:32:18 09:32:22 09:32:25 09:32:29 09:32:35 09:32:38 09:32:40 09:32:42</p>

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09:32:46		09:35:03
09:32:47		09:35:07
09:32:51		09:37:24
09:32:53		09:37:24
09:32:55		09:37:26
09:32:59		09:37:26
09:33:03		09:37:30
09:33:04		09:37:31
09:33:05		09:37:35
09:33:06		09:37:39
09:33:07		09:37:40
09:33:10		09:37:43
09:33:12	13 Q. Now, you understood that your March 26,	09:37:47
09:33:14	14 2010 report was a rebuttal report. Correct?	09:37:48
09:33:16	15 A. Yes.	09:37:51
09:33:17	16 Q. And by that, you were responding to	09:37:53
09:33:21	17 Mr. Meyers, you weren't providing affirmative	09:37:58
09:33:26	18 opinions of your own. Correct?	09:38:00
09:33:28	19 MR. McDONELL: Vague and ambiguous, calls	09:38:05
09:33:28	20 for a legal conclusion.	09:38:05
09:33:30	21 THE WITNESS: I don't think that's	09:38:08
09:33:30	22 correct.	09:38:13
09:33:31	23 MR. PICKETT: Q. What's wrong with that?	09:38:20
09:33:33	24 A. Well, while it was a rebuttal report, as a	09:38:21
09:33:36	25 general proposition, and a decent way to describe	09:38:32
Page 23		Page 25
09:33:44	1 it, that wasn't the sole purpose, as I indicated in	09:38:36
09:33:47	2 my previous answer.	09:38:42
09:33:47	3 I did do my own analysis of what I thought	09:38:43
09:33:51	4 the damages were in the case and included those,	09:38:44
09:33:55	5 and I -- you're using the term, an affirmative	09:38:48
09:33:59	6 opinion. I think that would count as an	09:38:50
09:34:01	7 affirmative opinion.	09:38:51
09:34:02		09:38:53
09:34:04		09:38:54
09:34:09		09:38:58
09:34:14		09:39:00
09:34:17		09:39:01
09:34:22		09:39:04
09:34:23		09:39:05
09:34:29		09:39:09
09:34:33		09:39:14
09:34:43		09:39:19
09:34:45		09:39:22
09:34:48		09:39:23
09:34:49		09:39:24
09:34:51		09:39:26
09:34:54		09:39:29
09:34:56		09:39:33
09:34:59		09:39:37
09:35:02		09:39:39

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Page 26		Page 28	
09:39:40		09:41:59	1 MR. PICKETT: Q. Was there any reason
09:39:47		09:42:00	2 that SAP or you could not have obtained a
09:39:50		09:42:06	3 declaration prior to the March 26 report being
09:39:51		09:42:09	4 submitted?
09:39:54		09:42:11	5 MR. McDONELL: Lack of foundation,
09:39:57		09:42:12	6 compound. Don't disclose communications with
09:39:59		09:42:14	7 counsel.
09:40:02		09:42:15	8 THE WITNESS: I can't answer that
09:40:05		09:42:16	9 question.
09:40:08		09:42:20	10 MR. PICKETT: Q. Do you know of any
09:40:09		09:42:20	11 attempts to secure additional customer declarations
09:40:11		09:42:23	12 that failed?
09:40:16		09:42:25	13 MR. McDONELL: Same instruction. Don't
09:40:17		09:42:26	14 disclose communications with counsel. If you can
09:40:19		09:42:28	15 answer without disclosing communications with
09:40:24		09:42:30	16 counsel, you may do so.
09:40:26		09:42:33	17 THE WITNESS: I can't answer that
09:40:28		09:42:33	18 question.
09:40:30		09:42:44	19 MR. PICKETT: Q. And as you sit here
09:40:36		09:42:45	20 today, you have no plans to further supplement the
09:40:36		09:42:50	21 May 7 and June 4 reports. Right?
09:40:37		09:42:53	22 A. That's correct.
09:40:38		09:43:02	23 Q. Can you summarize the changes in the
09:40:40		09:43:07	24 report that was submitted Friday?
09:40:41		09:43:11	25 MR. McDONELL: Calls for a narrative,
Page 27		Page 29	
09:40:46		09:43:13	1 vague and ambiguous, compound.
09:40:49		09:43:17	2 THE WITNESS: I can.
09:40:57		09:43:18	3 MR. PICKETT: Q. You can?
09:41:01		09:43:18	4 A. I can.
09:41:03		09:43:19	5 Q. Please.
09:41:05		09:43:21	6 A. I had noticed that the service gap
09:41:06		09:43:26	7 question for the Hyundai Motor UK customer we had
09:41:09		09:43:33	8 handled inappropriately. We hadn't properly
09:41:10		09:43:36	9 quantified that gap. Mr. Meyer confirmed that, and
09:41:18	10 MR. PICKETT: Q. The customers who	09:43:44	10 so I wanted to correct that, which is why I made
09:41:20	11 submitted declarations after your March 26 report	09:43:48	11 the change that you see on the June 4th supplement
09:41:24	12 are not new to the case. Correct?	09:43:54	12 to Hyundai Motor UK.
09:41:31	13 A. I don't know what you mean.	09:43:58	13 And that change was to now calculate
09:41:32	14 Q. Well, they didn't just suddenly pop up	09:44:04	14 damages related to that customer when I had
09:41:36	15 after March 26, did they?	09:44:07	15 previously not calculated damages, because I had
09:41:37	16 MR. McDONELL: Vague and ambiguous.	09:44:09	16 excluded it.
09:41:38	17 Argumentative. Object to the form.	09:44:11	17 The declaration from Mr. Birrenbach,
09:41:41	18 THE WITNESS: You mean the customer didn't	09:44:15	18 B-I-R-R-E-N-B-A-C-H, and I'm going to take a shot
09:41:44	19 pop up, or the declaration didn't pop up?	09:44:21	19 at this German word, Rotkappchen Sektellerei,
09:41:47	20 MR. PICKETT: Q. Well, the declaration	09:44:27	20 R-O-T-K-A, with an umlaut, -P-P-C-H-E-N, then a new
09:41:47	21 popped up. The customer, I'm talking about.	09:44:34	21 word, S-E-K-T-K-E-L-L-E-R-E-I.
09:41:50	22 MR. McDONELL: Argumentative, vague and	09:44:41	22 In that declaration, he made some
09:41:51	23 ambiguous.	09:44:44	23 statements that indicated that he should now be --
09:41:53	24 THE WITNESS: Well, I think the customers	09:44:49	24 or his company should be excluded from the
09:41:55	25 at issue have been known for quite some time.	09:44:53	25 disgorgement analysis, which I did, and for a

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Page 30		Page 32
09:44:57	1 number of reasons. And I've adjusted the	09:47:45
09:45:04	2 disgorgement analysis accordingly.	09:47:49
09:45:07	3 Because I then took him -- his company out	09:47:51
09:45:11	4 of the disgorgement analysis, that meant it ought	09:47:56
09:45:16	5 to go back into the lost profits analysis, and I	09:47:59
09:45:19	6 did that, too.	09:48:03
09:45:21		09:48:05
09:45:23		09:48:07
09:45:28		09:48:08
09:45:29		09:48:09
09:45:32		09:48:14
09:45:34		09:48:15
09:45:38		09:48:18
09:45:39		09:48:24
09:45:44		09:48:26
09:45:48		09:48:28
09:45:49		09:48:30
09:45:49		09:48:32
09:45:51		09:48:33
09:45:52		09:48:37
09:45:54		09:48:41
09:45:56		09:48:47
09:45:59		09:48:52
09:46:04		09:48:58
09:46:06		09:49:02
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09:46:08		09:49:06
09:46:11		09:49:09
09:46:16		09:49:10
09:46:21		09:49:13
09:46:21		09:49:15
09:46:28		09:49:20
09:46:30		09:49:22
09:46:38		09:49:24
09:46:40		09:49:26
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09:46:45		09:49:30
09:46:50		09:49:31
09:46:53		09:49:34
09:46:55		09:49:36
09:46:57		09:49:39
09:47:08		09:49:43
09:47:14		09:49:48
09:47:20		09:49:49
09:47:23		09:49:51
09:47:29		09:49:54
09:47:35		09:49:57
09:47:36		09:49:58
09:47:37		09:49:59
09:47:38		09:50:00
09:47:41		09:50:06

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10:15:02		10:33:01	
10:15:10		10:33:04	
10:15:12		10:33:07	
10:15:14		10:33:09	
10:15:14		10:33:11	
10:15:16		10:33:13	
10:15:17		10:33:16	
10:15:17		10:33:24	
10:15:19		10:33:31	
10:15:20		10:33:38	
10:15:23		10:33:46	
10:15:31		10:33:47	
10:15:35		10:33:49	
10:15:39		10:33:54	
10:15:42		10:33:56	
10:15:46		10:33:57	16
10:15:50		10:33:58	17
10:15:54		10:34:10	18
10:15:58		10:34:13	19
10:16:03		10:34:16	20
10:16:06		10:34:17	21
10:16:08		10:34:19	22
10:16:11		10:34:23	23
10:16:14		10:34:26	24
10:16:18		10:34:29	25

		MR. PICKETT: Q. Thank you. Now, turning	
		to 3202, your resume, your education is in	
		accounting, and you're a certified accountant.	
		Correct?	
		MR. McDONELL: Compound.	
		THE WITNESS: I am a certified accountant.	
		I do have training in accounting. But I wouldn't	
		say that was what my education was in.	
		MR. PICKETT: Q. Well, your degree was in	
		management sciences?	
Page 55		Page 57	
10:16:23		10:34:30	1
10:16:27		10:34:31	2
10:16:39		10:34:34	3
10:16:40		10:34:35	4
10:16:43		10:34:36	5
10:16:45		10:34:41	6
10:16:46		10:34:44	7
10:16:48		10:34:45	8
10:30:15		10:34:47	9
10:32:08		10:34:48	10
10:32:09		10:34:49	11
10:32:12		10:34:49	12
10:32:14		10:34:52	13
10:32:15		10:34:56	14
10:32:19		10:35:02	15
10:32:21		10:35:05	16
10:32:22		10:35:07	17
10:32:28		10:35:10	18
10:32:32		10:35:17	19
10:32:34		10:35:20	20
10:32:38		10:35:35	
10:32:41		10:35:38	
10:32:45		10:35:43	
10:32:49		10:35:44	
10:32:53		10:35:52	
		A. Correct.	
		Q. And you had postgraduate studies in	
		accounting. Correct?	
		A. Yes.	
		Q. You have no training as a lawyer, do you?	
		A. I --	
		MR. McDONELL: Vague and ambiguous.	
		THE WITNESS: I don't have any training as	
		a lawyer.	
		MR. PICKETT: Q. You're not a lawyer, are	
		you?	
		A. I'm not a lawyer. I did a law class in my	
		first year at college, so that was my hesitation.	
		Contract law. British. Fascinating.	
		Q. Are you -- did you receive any degrees as	
		an economist?	
		A. I -- my Bachelor of Science degree in	
		management sciences was -- my major was economics.	
		Q. What type of economics?	
		A. Macro and micro.	

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Page 82		Page 84	
11:11:28		11:14:14	1 for a legal conclusion.
11:11:30		11:14:16	2 THE WITNESS: Yes.
11:11:33		11:14:17	3 MR. PICKETT: Q. What is the expertise
11:11:36		11:14:18	4 you have in that topic?
11:11:37		11:14:21	5 A. The ability to analyze a market and gather
11:11:41		11:14:27	6 data about a market, make determinations about a
11:11:45		11:14:31	7 market, look at players in a market, look at the
11:11:50		11:14:37	8 development of a market over time. There are
11:11:52		11:14:41	9 probably many other things, but those are a start,
11:11:55		11:14:44	10 at least.
11:11:59		11:14:44	11 Q. Prior to this case, have you ever done
11:12:04		11:14:46	12 such an analysis with respect to support of
11:12:10		11:14:51	13 software?
11:12:17		11:14:52	14 MR. McDONELL: Vague and ambiguous,
11:12:29		11:14:55	15 lacks --
11:12:31		11:14:57	16 THE WITNESS: No, I've not studied -- I've
11:12:33		11:15:02	17 not studied the support software market previously.
11:12:37		11:15:19	
11:12:38		11:15:21	
11:12:39		11:15:23	
11:12:40		11:15:26	
11:12:41		11:15:33	
11:12:42		11:15:35	
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11:12:50		11:15:49	
11:12:53		11:15:55	
11:12:58		11:16:00	
11:13:03		11:16:05	
11:13:13		11:16:11	
11:13:16		11:16:16	
11:13:18	8 Q. Do you have any expertise specific to ERP	11:16:23	
11:13:23	9 application software?	11:16:28	
11:13:25	10 MR. McDONELL: Vague and ambiguous.	11:16:31	
11:13:35	11 THE WITNESS: I know a lot more about it	11:16:32	
11:13:37	12 now than I used to, but I don't -- I don't hold	11:16:34	
11:13:40	13 myself out as an expert in ERP software.	11:16:37	
11:13:46	14 MR. PICKETT: Q. Do you have any	11:16:41	
11:13:47	15 expertise that provide a basis for you to opine on	11:16:44	
11:13:55	16 what support alternatives are available for ERP	11:16:46	
11:13:58	17 applications?	11:16:53	
11:13:59	18 MR. McDONELL: Vague and ambiguous. Calls	11:16:56	
11:14:00	19 for a legal conclusion.	11:17:03	
11:14:02	20 THE WITNESS: Could you read that back?	11:17:04	
11:14:04	21 MR. PICKETT: Q. Do you have any	11:17:09	
11:14:05	22 expertise that provides a basis for you to opine on	11:17:14	
11:14:09	23 what support alternatives are available for ERP	11:17:19	
11:14:12	24 applications?	11:17:25	
11:14:13	25 MR. McDONELL: Vague and ambiguous, calls	11:17:28	

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11:17:31		11:20:01	1 for a legal conclusion.
11:17:35		11:20:03	2 THE WITNESS: Well of course, I'm not a
11:17:37		11:20:05	3 lawyer, so some people would claim I didn't have
11:17:42		11:20:10	4 very much expertise in that.
11:17:47		11:20:12	5 MR. PICKETT: Q. Your first-year course
11:17:50		11:20:14	6 in contract law didn't involve copyright law, did
11:17:55		11:20:17	7 it?
11:17:57		11:20:19	8 A. I don't recall. Probably not. But I was
11:18:01		11:20:22	9 in the process of answering your question.
11:18:03		11:20:25	10 Over the years that I've been doing this,
11:18:07		11:20:29	11 working with lawyers of all kinds from all kinds of
11:18:09		11:20:32	12 firms in many cases, I've picked up a lot of
11:18:12		11:20:36	13 understanding of the law. I've applied that
11:18:15		11:20:40	14 understanding in cases that I've worked upon. I
11:18:18		11:20:45	15 have also read extensively on the law related to
11:18:20		11:20:50	16 not just copyrights, but much broader areas. I
11:18:22		11:20:56	17 have access to an extensive library of books on the
11:18:27		11:21:02	18 law. And the intersection of the law on economics,
11:18:32		11:21:11	19 where it comes together in the calculation of
11:18:32		11:21:14	20 damages, I clearly hold myself out as an expert in
11:18:36		11:21:17	21 that area.
11:18:36		11:21:22	22 Q. Are you or do you hold yourself out to be
11:18:37		11:21:25	23 an expert in copyright law?
11:18:39		11:21:27	24 MR. McDONELL: Asked and answered. That's
11:18:42		11:21:30	25 the exact question he just answered.
Page 87		Page 89	
11:18:45		11:21:32	1 THE WITNESS: I don't know how to describe
11:18:48		11:21:33	2 it any other way than --
11:18:52		11:21:35	3 MR. PICKETT: Q. I didn't understand your
11:18:53		11:21:36	4 answer, frankly. Was it yes or no? Are you an
11:18:56		11:21:39	5 expert in copyright law or are you not?
11:18:57		11:21:41	6 MR. McDONELL: I object. The question is
11:19:01		11:21:42	7 vague and ambiguous, calls for a legal conclusion,
11:19:03		11:21:43	8 calls for a narrative, and it's been asked and
11:19:06		11:21:45	9 answered.
11:19:12		11:21:46	10 THE WITNESS: I am a expert in the
11:19:13		11:21:49	11 intersection of copyright law with economics, such
11:19:14		11:21:53	12 that I can apply the law to the economics of a
11:19:16		11:21:57	13 situation, as I have done in this case.
11:19:19		11:22:01	14 If I -- I would not hold myself out as an
11:19:23		11:22:07	15 expert on the law of any kind. I rely on the
11:19:25		11:22:13	16 lawyers and their expertise and the judges and
11:19:26		11:22:16	17 their analysis to inform me as to what the law is
11:19:27		11:22:20	18 in any particular case.
11:19:38		11:22:22	19 MR. PICKETT: Q. Are you an expert in
11:19:42		11:22:24	20 researching law?
11:19:43		11:22:25	21 MR. McDONELL: Vague and ambiguous, asked
11:19:46		11:22:26	22 and answered.
11:19:53	23 MR. PICKETT: Q. What expertise do you	11:22:28	23 THE WITNESS: Well, I have researched the
11:19:54	24 have, if any, on copyright law?	11:22:30	24 law extensively -- just hang on -- and -- but I
11:20:00	25 MR. McDONELL: Vague and ambiguous, calls	11:22:40	25 would not say -- I would not hold myself out as an

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11:22:43	1 expert legal researcher, no.	11:25:17	
11:22:47		11:25:18	
11:22:49		11:25:19	
11:22:52		11:25:21	
11:22:56		11:25:23	
11:22:59		11:25:24	
11:23:09		11:25:26	
11:23:12		11:25:27	
11:23:18		11:25:28	
11:23:23		11:25:32	
11:23:30		11:25:35	
11:23:35		11:25:37	
11:23:37		11:25:39	
11:23:43		11:25:41	
11:23:47		11:25:42	
11:23:53		11:25:45	
11:23:57		11:37:41	
11:24:01		11:38:30	
11:24:07		11:38:31	
11:24:12		11:38:35	
11:24:15		11:38:38	
11:24:20		11:38:39	
11:24:26		11:38:40	
11:24:28		11:38:44	
11:24:29		11:38:49	
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11:24:33		11:38:51	
11:24:34		11:38:52	
11:24:36		11:38:59	
11:24:38		11:39:03	
11:24:42		11:39:05	
11:24:46		11:39:08	
11:24:49		11:39:13	
11:24:53		11:39:15	
11:24:54		11:39:19	
11:24:56		11:39:23	
11:24:58		11:39:27	
11:24:59		11:39:32	
11:25:00		11:39:36	
11:25:01		11:39:40	
11:25:02		11:39:44	
11:25:03		11:39:51	
11:25:04		11:39:54	
11:25:06		11:39:58	
11:25:10		11:40:02	
11:25:11		11:40:07	
11:25:12		11:40:11	
11:25:13		11:40:14	
11:25:14		11:40:17	
11:25:15		11:40:23	
11:25:16		11:40:26	

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Page 94		Page 96
11:40:28		11:43:49
11:40:33		11:43:52
11:40:35		11:43:54
11:40:38		11:43:56
11:40:45		11:43:58
11:40:48		11:44:00
11:40:56		11:44:01
11:41:00		11:44:04
11:41:05		11:44:06
11:41:13		11:44:08
11:41:18		11:44:11
11:41:22		11:44:14
11:41:25		11:44:18
11:41:28		11:44:22
11:41:31		11:44:26
11:41:34		11:44:30
11:41:39		11:44:33
11:41:40		11:44:36
11:41:43		11:44:40
11:41:45	20	11:44:42
11:41:47	21	11:44:45
11:42:03	22	11:44:51
11:42:15	23	11:44:57
11:42:17	24	11:44:58
11:42:25	25	11:44:59
Page 95		Page 97
11:42:28	1	11:45:02
11:42:30	2	11:45:03
11:42:30	3	11:45:05
11:42:33	4	11:45:08
11:42:36	5	11:45:09
11:42:44	6	11:45:10
11:42:52	7	11:45:14
11:42:53	8	11:45:17
11:42:55	9	11:45:18
11:42:56	10	11:45:20
11:43:01	11	11:45:29
11:43:02	12	11:45:32
11:43:03	13	11:45:34
11:43:05	14	11:45:35
11:43:06	15	11:45:37
11:43:08	16	11:45:40
11:43:10	17	11:45:41
11:43:11		11:45:43
11:43:13		11:45:43
11:43:19		11:45:44
11:43:21		11:45:45
11:43:28		11:45:47
11:43:33		11:45:48
11:43:40		11:45:50
11:43:45		11:45:51

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Page 106		Page 108	
11:57:04		11:59:45	
11:57:06		11:59:48	
11:57:07		11:59:53	
11:57:09		11:59:54	
11:57:10		11:59:57	
11:57:11		11:59:58	
11:57:12		11:59:58	
11:57:13		12:00:00	
11:57:18		12:00:04	
11:57:25		12:00:06	
11:57:28		12:00:26	
11:57:36		12:00:30	
11:57:42		12:00:33	
11:57:47		12:00:36	
11:57:52		12:00:37	
11:57:54		12:00:42	
11:57:56		12:00:43	
11:57:59		12:01:01	
11:58:01		12:01:04	19 MR. PICKETT: Q. What were you trying to
11:58:02		12:01:05	20 cover when you put the five cases in this part of
11:58:04		12:01:07	21 the record?
11:58:06		12:01:08	22 MR. McDONELL: Vague and ambiguous.
11:58:07		12:01:09	23 MR. PICKETT: Q. Were there -- the one
11:58:10		12:01:10	24 case had to do with infringement. You've already
11:58:10		12:01:12	25 discussed that.
Page 107		Page 109	
11:58:12		12:01:12	1 Were you trying to cover all aspects of
11:58:23	2 MR. PICKETT: Q. Do you intend to offer	12:01:14	2 the opinion?
11:58:26	3 your summaries of the various cases as part of your	12:01:15	3 MR. McDONELL: Vague and ambiguous, lack
11:58:30	4 expert opinions in this case?	12:01:15	4 of foundation.
11:58:33	5 MR. McDONELL: Lacks foundation, calls for	12:01:17	5 THE WITNESS: I was trying to understand
11:58:35	6 a legal conclusion. Reserve all rights.	12:01:20	6 how this intersection of the law and economics
11:58:40	7 THE WITNESS: They are part of my report,	12:01:25	7 should be understood in the context of this case.
11:58:42	8 so I think they are part of my opinion.	12:01:31	8 I was doing that downstream of looking at
11:58:46		12:01:35	9 Mr. Meyer's report and identifying elements in his
11:58:48		12:01:41	10 report that didn't seem to be quite right or didn't
11:58:50		12:01:45	11 seem to apply the legal economics appropriately.
11:58:51		12:01:52	12 So as part of developing that
11:58:52		12:01:53	13 understanding, in the context of his opinion, I
11:58:53		12:01:59	14 identified cases that I felt were instructive.
11:58:56		12:02:03	15 MR. PICKETT: Q. Is it your opinion that
11:59:09		12:02:04	16 Mr. Meyer's opinion does not fit these five cases?
11:59:10		12:02:09	17 MR. McDONELL: Vague and ambiguous.
11:59:15		12:02:11	18 MR. PICKETT: Q. Does not follow them?
11:59:16		12:02:12	19 MR. McDONELL: Vague and ambiguous, calls
11:59:17		12:02:13	20 for a legal conclusion, lack of foundation.
11:59:19		12:02:15	21 THE WITNESS: I think for sure that there
11:59:23		12:02:17	22 are elements of his opinions that don't follow
11:59:24		12:02:21	23 these cases. But I don't think these cases are
11:59:29		12:02:28	24 dispositive necessarily of his report in its
11:59:39		12:02:30	25 entirety. It's 280 pages long. And I just think

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Page 110		Page 112
12:02:37	1 that these cases, along with other knowledge of	12:05:37
12:02:42	2 economics and the way I should apply the economics	12:05:38
12:02:48	3 to cases like this, that taken together, these	12:05:41
12:02:52	4 cases show that -- along with that other analysis,	12:05:44
12:02:56	5 show that Mr. Meyer's opinion is inappropriate for	12:05:47
12:03:01	6 the purposes he intended it.	12:05:49
12:03:05	7 MR. PICKETT: Q. How is your opinion that	12:05:50
12:03:06	8 there are elements of Mr. Meyer's opinions that	12:05:50
12:03:08	9 don't follow the cases that you cite here different	12:05:54
12:03:13	10 from a legal opinion?	12:05:55
12:03:15	11 MR. McDONELL: Vague and ambiguous, overly	12:05:56
12:03:16	12 broad.	12:06:00
12:03:21	13 THE WITNESS: I tried very much to stay	12:06:03
12:03:23	14 out of the legal opinion arena. That's the job of	12:06:07
12:03:28	15 counsel and the judiciary.	12:06:09
12:03:31	16 What I've tried to do is apply the	12:06:11
12:03:35	17 appropriate economic principles to the facts as	12:06:12
12:03:38	18 they present themselves in this case. And one	12:06:18
12:03:42	19 element of that appropriateness is, do those	12:06:19
12:03:47	20 applications fit within the body of the law, as I	12:06:20
12:03:51	21 understand it.	12:06:21
12:03:57	22 MR. PICKETT: Q. How is that different	12:06:22
12:03:59	23 than a legal opinion as to whether the applications	12:06:26
12:04:01	24 fit within the body of law?	12:06:28
12:04:03	25 MR. McDONELL: Vague and ambiguous, calls	12:06:30
Page 111		Page 113
12:04:04	1 for a legal conclusion. Object to the form.	12:06:32
12:04:09	2 THE WITNESS: Well, I -- I don't think	12:06:37
12:04:10	3 it's a legal opinion. I think it's an economic	12:06:38
12:04:13	4 one. But I have to apply the economics in the	12:06:39
12:04:20	5 context of the law and the way I understand it.	12:06:41
12:04:23	6 And that's what I'm giving you here.	12:06:44
12:04:32		12:06:49
12:04:33		12:06:54
12:04:39		12:07:00
12:04:45		12:07:08
12:04:54		12:07:12
12:04:57		12:07:14
12:05:02		12:07:17
12:05:04		12:07:23
12:05:07		12:07:27
12:05:12		12:07:31
12:05:15		12:07:34
12:05:19		12:07:34
12:05:21		12:07:36
12:05:24		12:07:37
12:05:26		12:07:39
12:05:28		12:07:44
12:05:28		12:07:46
12:05:30		12:07:47
12:05:35		12:07:48

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Page 126		Page 128
12:23:15	1 Q. Tell me every assumption you made with	12:26:04
12:23:18	2 respect to the liability.	12:26:09
12:23:20	3 MR. McDONELL: Vague and ambiguous, overly	12:26:13
12:23:21	4 broad.	12:26:20
12:23:23	5 THE WITNESS: I assumed that the alleged	12:26:28
12:23:28	6 actions were proven to the extent that they applied	12:26:30
12:23:37	7 to the facts of the case. So not everything that	12:26:38
12:23:41	8 the plaintiffs say in their complaint do I accept	12:26:42
12:23:46	9 to be true. And one of those things, as an	12:26:48
12:23:51	10 example, was that -- Mr. Meyer used this	12:26:51
12:24:00	11 terminology many times -- the entire business model	12:26:57
12:24:03	12 was infringing.	12:26:58
12:24:05	13 I don't think that's true. And there's	12:27:02
12:24:10	14 expert opinion on that that indicates that that's	12:27:04
12:24:16	15 not true.	12:27:05
12:24:18	16 I also think that I did my own analysis of	12:27:07
12:24:21	17 elements of how much of the intellectual property	12:27:10
12:24:27	18 was infringed and for how long, and the manner in	12:27:15
12:24:31	19 which it was used, as I've spent 300 pages here	12:27:21
12:24:35	20 explaining to you.	12:27:29
12:24:38	21 And so I have assumed that there is	12:27:33
12:24:42	22 liability, but I've not assumed that everything you	12:27:38
12:24:46	23 say in the complaint is true.	12:27:48
12:24:51	24 MR. PICKETT: Q. So you've done your own	12:27:49
12:24:54	25 analysis of what SAP infringed and what they did	12:27:52
Page 127		Page 129
12:24:56	1 not infringe?	12:27:56
12:24:58	2 MR. McDONELL: Misstates the testimony,	12:28:00
12:24:59	3 vague and ambiguous.	12:28:01
12:25:01	4 THE WITNESS: No.	12:28:02
12:25:02	5 MR. PICKETT: Q. You did your own	12:28:05
12:25:03	6 analysis of how much IP was infringed and for how	12:28:06
12:25:05	7 long and the manner in which it was used. Yes or	12:28:07
12:25:08	8 no?	12:28:10
12:25:10	9 MR. McDONELL: Vague and ambiguous --	12:28:14
12:25:12	10 THE WITNESS: That's correct.	12:28:17
12:25:13	11	12:28:20
12:25:15	12	12:28:26
12:25:18	13	12:28:27
12:25:20	14	12:28:34
12:25:25	15	12:28:38
12:25:29	16	12:28:39
12:25:29	17	12:28:41
12:25:30	18	12:28:42
12:25:31	19	12:28:45
12:25:32	20	12:28:45
12:25:35	21	12:28:46
12:25:43	22	12:28:47
12:25:49	23	12:28:50
12:25:57	24	12:28:53
12:26:00	25	12:28:56

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Page 130		Page 132	
12:29:00		12:32:01	1 in that geographic location that I've developed and
12:29:03		12:32:06	2 named the subject IP. And that's what I'm valuing,
12:29:05		12:32:12	3 and I think that's a substantial difference between
12:29:07		12:32:14	4 what I've done and what Mr. Meyer did.
12:29:09		12:32:18	
12:29:11		12:32:19	
12:29:12		12:32:24	
12:29:13		12:32:28	
12:29:15		12:32:29	
12:29:17		12:32:29	
12:29:21		12:32:32	
12:29:25		12:32:34	
12:29:27	13	12:32:37	
12:29:29	14	12:32:39	
12:29:31	15	12:32:40	
12:29:35	16	12:32:41	
12:29:36	17	12:32:45	
12:29:37	18	12:32:47	
12:29:42	19	12:32:49	
12:29:47	20	12:32:51	
12:29:54	21	12:32:54	
12:30:01	22	12:32:56	
12:30:06	23	12:32:59	
12:30:10	24	12:33:01	
12:30:13	25	12:33:01	
Page 131		Page 133	
12:30:16	1	12:33:04	
12:30:22	2	12:33:06	
12:30:24	3	12:33:09	
12:30:28	4	12:33:12	
12:30:36	5	12:33:15	
12:30:40	6	12:33:16	
12:30:44	7	12:33:22	
12:30:48	8	12:33:23	
12:30:52	9	12:33:30	
12:30:56	10	12:33:35	
12:31:00	11	12:33:39	
12:31:04	12	12:33:41	
12:31:08	13	12:33:43	
12:31:12	14	12:33:46	
12:31:17	15	12:33:47	
12:31:20	16	12:33:47	
12:31:23	17	12:33:48	
12:31:25	18	12:33:49	
12:31:30	19	12:33:51	
12:31:36	20	12:33:51	
12:31:39	21	12:33:53	
12:31:44	22	12:33:54	
12:31:49	23	12:33:56	
12:31:54	24	12:33:57	
12:31:56	25	12:33:59	

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Page 138		Page 140	
12:38:03		13:29:19	1 some geographic and temporal issues. Is that what
12:38:04		13:29:25	2 you're referring to?
12:38:08		13:29:27	3 MR. PICKETT: Q. It --
12:38:12		13:29:28	4 A. I'm just trying to define scope.
12:38:15		13:29:30	5 Q. It does, but more with respect to the
12:38:17		13:29:32	6 breadth of the license in terms of what products it
12:38:18		13:29:35	7 covers.
12:38:20		13:29:38	8 A. In this case, as in other cases that I've
12:38:21		13:29:42	9 done this kind of analysis, it's the license that
12:38:22		13:29:46	10 would apply to the accused conduct. The
12:38:24		13:29:52	11 allegations -- the alleged actions in the case.
12:38:26		13:29:55	12 And if I may, I'd just like to clarify
12:38:29		13:29:58	13 something from the discussions immediately before
12:38:32		13:30:01	14 lunch.
12:38:33		13:30:03	15 You asked me about my assumptions
12:38:35		13:30:09	16 regarding the reasonable royalty and the -- the use
12:38:36		13:30:13	17 that that would apply to. And I said I hadn't
12:38:38		13:30:18	18 parsed out the alleged actions and accused conduct
12:38:41		13:30:25	19 versus the duration, the time, et cetera.
12:38:45		13:30:32	20 I had assumed, for the purposes of
12:38:47		13:30:36	21 calculating the royalty rate that I have opined to,
12:38:49		13:30:40	22 that all of the actions were infringing. Even
12:38:51		13:30:43	23 though I recognize that there are now elements of
12:38:52		13:30:48	24 the case where that isn't -- that isn't the state
12:38:57		13:30:51	25 of the argument.
Page 139		Page 141	
12:38:59		13:30:54	1 So I did that to come up with the royalty
12:39:00		13:30:57	2 rate. But when I applied the royalty rate, if
12:39:05		13:31:01	3 there was no accused conduct on the part of certain
12:39:08		13:31:07	4 customers of TomorrowNow, I did not apply that rate
12:39:13		13:31:12	5 to those revenues.
12:39:18		13:31:17	6 And the same will be true on the
12:39:25		13:31:19	7 disgorgement side. If there were any
12:39:27		13:31:21	8 no-accused-conduct customers, then I didn't apply
12:39:28		13:31:26	9 the royalty rate on that side to them, either.
12:39:31		13:31:29	10 Although they were excluded for other reasons for
12:39:33		13:31:32	11 the most part.
12:39:35	12 THE VIDEO OPERATOR: Going off the record,	13:31:35	12 Q. No accused conduct based on Mr. Gray's
12:39:36	13 the time now is 12:39.	13:31:37	13 analysis?
13:20:28	14 (Lunch recess from 12:39 p.m. to 1:28	13:31:38	14 A. Correct. I just wanted to clarify that
13:27:55	15 p.m.)	13:31:42	15 for you.
13:42:45	16 --o0o--	13:31:46	16 Q. Now, when you said in response to my
	17 AFTERNOON SESSION	13:31:49	17 question just now that the license applies to all
13:28:49	18 THE VIDEO OPERATOR: The time now is 1:28	13:31:53	18 accused conduct, what did you mean? The scope of
13:28:53	19 and we are back on the videotape record.	13:31:57	19 the --
13:28:58	20 MR. PICKETT: Q. What determines the	13:31:57	20 A. Well, you asked me --
13:29:02	21 scope of the license being negotiated in the	13:31:59	21 Q. We're talking about scope of use?
13:29:04	22 hypothetical negotiation?	13:32:01	22 MR. McDONELL: Misstates testimony.
13:29:07	23 MR. McDONELL: Object to the form of the	13:32:02	23 THE WITNESS: You asked me about scope.
13:29:07	24 question, calls for a legal conclusion.	13:32:03	24 And it will be the license required to cover what
13:29:14	25 THE WITNESS: The scope of the license has	13:32:07	25 was the inappropriate activity that is being

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Page 142		Page 144
13:32:12	1 complained of.	13:35:37
13:32:19	2 MR. PICKETT: Q. Well, all allegedly	13:35:42
13:32:22	3 inappropriate activity, or some portion thereof?	13:35:48
13:32:26	4 MR. McDONELL: Vague and ambiguous.	13:35:54
13:32:32	5 THE WITNESS: My starting point would be	13:36:02
13:32:35	6 everything that is alleged. But there are elements	13:36:04
13:32:41	7 of the case and the facts in this particular case	13:36:08
13:32:46	8 that suggest that the scope of the license will be	13:36:13
13:32:50	9 something less than is alleged in the complaint.	13:36:17
13:32:54	10 And so I -- where there's expert testimony	13:36:21
13:32:58	11 involved, I've incorporated that into my analysis.	13:36:25
13:33:02	12 But as -- your question was I don't think	13:36:30
13:33:06	13 specifically aimed at the facts in this particular	13:36:31
13:33:09	14 case. It was more of a general nature.	13:36:36
13:33:14	15 MR. PICKETT: Q. Well, let me aim it at	13:36:43
13:33:15	16 this case.	13:36:46
13:33:17	17 What's the scope of use of the license	13:36:52
13:33:18	18 that you have assumed as hypothetically negotiated	13:36:56
13:33:23	19 between Oracle and SAP?	13:37:02
13:33:25	20 A. I'll have to refer to my report to give	13:37:06
13:33:27	21 you a precise answer to that.	13:37:09
13:33:59	22 If you care to, you could turn to page 116	13:37:11
13:34:03	23 in the report. And in that section, I deal with	13:37:14
13:34:13	24 the nature and scope, which is how the	13:37:18
13:34:17	25 Georgia-Pacific factor is written. And the license	13:37:22
Page 143		Page 145
13:34:21	1 must cover the unauthorized use TomorrowNow	13:37:25
13:34:24	2 allegedly made of the subject IP.	13:37:26
13:34:28	3 Q. Your delta.	13:37:30
13:34:29	4 A. My delta.	13:37:32
13:34:32		13:37:39
13:34:35		13:37:43
13:34:40		13:37:47
13:34:42		13:37:50
13:34:44		13:37:56
13:34:46		13:37:59
13:34:48		13:38:02
13:34:53		13:38:05
13:34:54		13:38:08
13:34:59		13:38:11
13:35:02		13:38:14
13:35:05		13:38:18
13:35:09		13:38:21
13:35:11		13:38:23
13:35:13		13:38:25
13:35:17		13:38:30
13:35:19		13:38:33
13:35:23		13:38:34
13:35:28		13:38:37
13:35:32		13:38:40
13:35:36		13:38:45

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Page 146		Page 148
13:38:48		13:43:02
13:38:53		13:43:04
13:38:57		13:43:10
13:39:05		13:43:14
13:39:10		13:43:18
13:39:22	6 MR. PICKETT: Q. Well, I'm trying to get	13:43:18
13:39:23	7 to your definition of subject IP, though, and you	13:43:30
13:39:26	8 keep falling back on that term. And I'm trying to	13:43:33
13:39:29	9 understand what's in the subject IP as you've	13:43:40
13:39:31	10 defined it.	13:43:44
13:39:31	11 So let's try it this way: What is your	13:43:47
13:39:34	12 definition of subject IP?	13:43:53
13:40:02	13 A. The subject IP, my definition of it,	13:44:02
13:40:11	14 really begins on page 23 of my report.	13:44:04
13:40:34	15 Q. And ends where?	13:44:06
13:40:36	16 A. Just a moment.	13:44:10
13:41:37	17 Q. Take a look at page 2, Footnote 10. You	13:44:16
13:41:39	18 define subject IP as the portion of the software	13:44:17
13:41:41	19 and support materials allegedly infringed and	13:44:21
13:41:44	20 actually used by TomorrowNow.	13:44:22
13:41:46	21 Is that a good definition?	13:44:27
13:41:48	22 A. That's the definition I'm searching for	13:44:34
13:41:49	23 right now.	13:44:38
13:41:51	24 Q. So it must both be actually infringed and	13:44:40
13:41:53	25 actually used?	13:44:45
Page 147		Page 149
13:41:57	1 A. Yes.	13:44:52
13:42:03	2 Q. And the value of use should be based on	13:44:57
13:42:05	3 the actual use TomorrowNow made of the subject IP,	13:45:01
13:42:07	4 which is best measured by actual revenues generated	13:45:07
13:42:09	5 from customers?	13:45:11
13:42:11	6 A. Are you referencing a particular line of	13:45:18
13:42:14	7 my report?	13:45:21
13:42:15	8 Q. Yes. Can you answer the question?	13:45:24
13:42:20	9 A. What was the question?	13:45:25
13:42:21	10 Q. The value of use should be based on the	13:45:28
13:42:23	11 actual use TomorrowNow made of the subject IP,	13:45:30
13:42:27	12 which is best measured by the actual revenues	13:45:33
13:42:29	13 generated from customers?	13:45:35
13:42:33	14 A. Yes. I did say that.	13:45:35
13:42:35	15 Q. So the actual use is related to actual	13:45:41
13:42:37	16 revenues. Right?	13:45:43
13:42:40	17 A. They're related.	13:45:47
13:42:41		13:45:48
13:42:44		13:45:52
13:42:45		13:45:59
13:42:47		13:46:03
13:42:51		13:46:06
13:42:56		13:46:13
13:42:56		13:46:18
13:42:58		13:46:25

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Page 158		Page 160	
13:56:40		13:59:14	1 If you assume that you couldn't do any
13:56:41		13:59:14	2 kind of assistance to an Oracle customer at all,
13:56:43		13:59:24	3 other than illegally, then I -- you might be right.
13:56:46		13:59:29	4 But you know and I know that that's not
13:56:46		13:59:31	5 the way it works, and that there are many things
13:56:47		13:59:35	6 that a customer can receive in the form of
13:56:50		13:59:40	7 external -- external to the company, that is --
13:56:51		13:59:43	8 assistance. And you know that they're legal, I
13:56:55		13:59:48	9 know that they're legal. So TomorrowNow could have
13:56:58		13:59:52	10 done all of those things without a license.
13:57:01		13:59:56	11 And I don't know what's hard to understand
13:57:04		13:59:59	12 about the delta. If we go up to everything that
13:57:10		14:00:04	13 was allowed to be done without a license, and then
13:57:16		14:00:08	14 look at the alleged actions in terms of
13:57:25		14:00:10	15 TomorrowNow, it's only that difference that we're
13:57:30		14:00:14	16 trying to calculate the license for. Because you
13:57:32	17 MR. PICKETT: Q. Well, your delta	14:00:16	17 didn't need a license to do the first 10,000 things
13:57:33	18 consists of an analysis of what a third-party	14:00:19	18 that companies all over the world are doing every
13:57:36	19 provider or a consultant theoretically could have	14:00:23	19 day.
13:57:39	20 done legally. Right?	14:00:25	20 MR. PICKETT: Q. Your analysis of what
13:57:41	21 MR. McDONELL: Object to the form.	14:00:26	21 you believe a party -- a provider could do legally
13:57:47	22 THE WITNESS: That's part of the -- of the	14:00:31	22 reduces the amount of damages, does it not?
13:57:51	23 floor of the delta.	14:00:37	23 MR. McDONELL: Asked and answered
13:57:53	24 MR. PICKETT: Q. But you also understand	14:00:37	24 repeatedly. Object to the form.
13:57:54	25 that TomorrowNow did not do what you suggest a	14:00:40	25 THE WITNESS: I don't think it reduces
Page 159		Page 161	
13:57:56	1 third-party service provider could have done.	14:00:41	1 damages at all. The damages are what I've
13:58:00	2 Right?	14:00:43	2 calculated.
13:58:01	3 MR. McDONELL: Assumes facts. Object to	14:00:44	3 MR. PICKETT: Q. But -- go ahead.
13:58:01	4 the form.	14:00:45	4 A. There would be no -- there wouldn't be a
13:58:02	5 THE WITNESS: Well, I understand that's	14:00:47	5 damage for things that -- something like a systems
13:58:03	6 the allegation, and I have assumed that those	14:00:52	6 integrator or a self-support customer bringing in a
13:58:09	7 alleged actions are found -- they're found to be	14:00:56	7 consultant to help on a specific problem. There
13:58:15	8 liable for those.	14:01:00	8 wouldn't be a license required for any of those
13:58:17	9 MR. PICKETT: Q. So --	14:01:04	9 things. So it's not that there's a damage and I'm
13:58:17	10 A. But -- just a second.	14:01:06	10 reducing it. There are no damages. It's just --
13:58:19	11 Q. Go ahead.	14:01:09	11 the damage just relates to that delta, that
13:58:20	12 A. I've not simply taken the allegations on	14:01:11	12 difference, between what you've alleged as being
13:58:24	13 blind faith. I've applied some economic analysis	14:01:16	13 inappropriate and what's perfectly legal and
13:58:28	14 to it. I've taken some technical input from	14:01:18	14 perfectly acceptable and done by thousands of firms
13:58:32	15 technical people who are other experts in the case	14:01:21	15 all around the world every day.
13:58:35	16 and tried to define as clearly as I can the subject	14:01:24	
13:58:43	17 IP, and then try to value that actual use of the	14:01:26	
13:58:48	18 subject IP, as I've described in this report.	14:01:28	
13:58:53	19 Q. Your analysis of the potentially legal	14:01:30	
13:58:57	20 activities of a third-party support provider reduce	14:01:30	
13:59:03	21 the ultimate valuation in your analysis. Correct?	14:01:33	
13:59:09	22 MR. McDONELL: Assumes facts. Object to	14:01:36	
13:59:10	23 the form.	14:01:37	
13:59:12	24 THE WITNESS: Well, if you -- let me turn	14:01:38	
13:59:13	25 that around.	14:01:39	

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14:01:41		14:03:49	
14:01:42		14:03:51	
14:01:43		14:03:54	
14:01:43	4 Q. You're assuming there's certain activity	14:03:57	
14:01:44	5 which is perfectly proper on the part of	14:03:57	
14:01:47	6 third-party service providers. Correct?	14:03:59	
14:01:49	7 A. Correct.	14:04:04	
14:01:49	8 Q. And you worked that into your delta.	14:04:06	
14:01:51	9 Correct?	14:04:09	
14:01:52	10 A. Correct.	14:04:13	
14:01:52		14:04:18	
14:01:55		14:04:22	
14:01:59		14:04:25	
14:02:04		14:04:25	
14:02:06		14:04:29	
14:02:07		14:04:31	
14:02:12		14:04:34	
14:02:15		14:04:36	
14:02:19		14:04:38	
14:02:22		14:04:41	
14:02:24		14:04:43	
14:02:25		14:04:46	
14:02:27		14:04:47	
14:02:27		14:04:48	
14:02:28		14:04:51	
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14:02:29		14:04:54	
14:02:31		14:04:57	
14:02:34		14:04:59	
14:02:37		14:05:05	
14:02:46		14:05:09	
14:02:49		14:05:12	
14:02:56		14:05:17	
14:02:59		14:05:21	
14:03:01		14:05:24	
14:03:03		14:05:26	
14:03:05		14:05:28	
14:03:09		14:05:29	
14:03:12		14:05:30	
14:03:15		14:05:31	
14:03:17		14:05:31	
14:03:20		14:05:33	
14:03:20		14:05:34	
14:03:22		14:05:37	
14:03:25		14:05:38	
14:03:30		14:05:39	
14:03:32		14:05:41	
14:03:34		14:05:41	
14:03:38		14:05:44	
14:03:40		14:05:44	
14:03:46		14:05:45	

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14:05:46		14:07:57	
14:05:49		14:08:00	
14:05:50		14:08:03	
14:05:51		14:08:05	
14:05:53		14:08:07	
14:05:53		14:08:10	
14:05:54		14:08:12	
14:05:56		14:08:15	
14:05:59		14:08:16	
14:06:01		14:08:18	
14:06:06		14:08:19	
14:06:08		14:08:20	
14:06:09		14:08:25	
14:06:11		14:08:27	
14:06:11		14:08:32	
14:06:13		14:08:35	
14:06:14		14:08:36	
14:06:15		14:08:40	
14:06:18		14:08:42	
14:06:23		14:08:47	
14:06:25		14:08:49	
14:06:28		14:08:56	22 MR. PICKETT: Q. But is it your testimony
14:06:31		14:08:57	23 that -- or your understanding, rather, that
14:06:35		14:09:01	24 TomorrowNow did nothing illegal outside of the
14:06:35		14:09:06	25 three numbered paragraphs on page 116?
Page 167		Page 169	
14:06:38		14:09:09	1 MR. McDONELL: Object to the form, assumes
14:06:40		14:09:10	2 facts, asked and answered.
14:06:41		14:09:15	3 THE WITNESS: Whether or not TomorrowNow
14:06:42		14:09:18	4 did something illegal is not in my area at all.
14:06:43		14:09:23	5 I've assumed that these items here represent an
14:06:45		14:09:32	6 adequate description of the activities that are
14:06:47		14:09:36	7 alleged to have been inappropriate.
14:06:48		14:09:40	8 Whether or not they did it, I'm not going
14:06:51		14:09:41	9 down that road. That's for other people to
14:06:55		14:09:45	10 resolve.
14:06:58		14:09:46	11 But I think in terms of defining the
14:07:01		14:09:50	12 license that we're talking about, it is a very
14:07:06		14:09:53	13 limited license to do really not very much. And it
14:07:10		14:09:58	14 may well be that that not very much you might
14:07:14		14:10:03	15 allege is very important, but it's still not
14:07:18		14:10:06	16 actually very much that is going on here. Because
14:07:23		14:10:12	17 so much of what happens in this support market
14:07:28		14:10:16	18 outside of the original vendor of the software is
14:07:32		14:10:21	19 perfectly fine. So unless you get down into the
14:07:38		14:10:25	20 trenches right down to the nitty-gritty and figure
14:07:40		14:10:31	21 out what is it that this license covers, you're
14:07:42		14:10:35	22 going down the wrong direction.
14:07:45		14:10:38	23 And that's what I'm trying to do. I don't
14:07:52		14:10:40	24 expect you to agree with me. But that's what I've
14:07:55		14:10:43	25 done.

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Page 174		Page 176	
14:15:54		14:20:00	1 Mr. Meyer's scope. Vague and ambiguous, object to
14:16:01	2 MR. PICKETT: Q. Let me show you what's	14:20:03	2 the form.
14:16:02	3 been marked as Exhibit 3204.	14:20:05	3 THE WITNESS: Well, at a minimum, I'd say
14:16:04	4 (Deposition Exhibit 3204 was marked for	14:20:07	4 they're very close, and I think the piece that's
14:16:06	5 identification.)	14:20:15	5 missing from this is -- is the delta. So this --
14:16:18	6 MR. PICKETT: Q. Have you seen this	14:20:25	6 if this piece fits with 1, 2, and 3 from page 116,
14:16:18	7 before, Mr. Clarke?	14:20:30	7 I don't see how that was ever reflected in the
14:16:19	8 A. Yes.	14:20:33	8 calculations for the value of use that he had made.
14:16:20	9 Q. Can you identify it?	14:20:38	9 MR. PICKETT: Q. I'm trying to limit it
14:16:22	10 A. My recollection is, it was -- I can't	14:20:40	10 to scope of use at this point.
14:16:26	11 swear that it's an exact copy, but it was included	14:20:41	11 You're saying there's no meaningful
14:16:29	12 in papers we got from Mr. Meyer.	14:20:43	12 distinction between Mr. Meyer's 3204 description
14:16:33	13 Q. These are his notes of the scope of the	14:20:46	13 and your description on page 116?
14:16:35	14 license that he is analyzing. Correct?	14:20:50	14 MR. McDONELL: Asked and answered
14:16:39	15 A. Yes. I think so. I think that's what	14:20:50	15 repeatedly. Object to the form of the question.
14:16:41	16 this was intended to be.	14:20:53	16 THE WITNESS: I don't see -- I don't see
14:16:44	17 Q. Would you agree that Mr. Meyer's scope is	14:20:55	17 much difference between the two.
14:16:47	18 broader than the scope you suggest on page 116 of	14:20:57	
14:16:51	19 your report?	14:20:59	
14:16:52	20 MR. McDONELL: Take your time to read to	14:21:01	
14:16:53	21 the extent you need to.	14:21:06	
14:16:56	22 THE WITNESS: I'm going to read it	14:21:07	
14:16:57	23 carefully.	14:37:37	
14:17:00	24 (Examining document.)	14:37:41	
14:18:39	25 So the question is, does -- do these three	14:37:44	
Page 175		Page 177	
14:18:44	1 items in the delta cover these items on Mr. Meyer's	14:37:45	1 MR. PICKETT: Q. Could you please turn to
14:18:48	2 list?	14:37:46	2 page 51 of your report?
14:18:49	3 MR. PICKETT: Q. The question was, wasn't	14:37:59	3 A. At the bottom of the first full paragraph,
14:18:50	4 his broader than yours?	14:38:02	4 you state:
14:18:51	5 MR. McDONELL: Vague and ambiguous.	14:38:03	5 The value of use must be limited to the
14:18:54	6 THE WITNESS: Well, it's got more words in	14:38:06	6 actual use Defendants allegedly made of the
14:18:56	7 it, but actually, I think pretty much everything on	14:38:08	7 subject IP, which means the value must be
14:18:58	8 this list falls somewhere within these three items.	14:38:11	8 related to the actual customers, not the
14:19:03	9 MR. PICKETT: Q. Do you disagree with the	14:38:14	9 customers SAP hoped for in an unsupported
14:19:04	10 scope of use as defined by Mr. Meyer in	14:38:16	10 business case.
14:19:07	11 Exhibit 3204?	14:38:18	11 Is it fair to say that you limited the
14:19:10	12 MR. McDONELL: Vague and ambiguous.	14:38:21	12 value of use to the value related to the actual
14:19:12	13 Assumes facts. Object to the form.	14:38:25	13 customers that TomorrowNow was able to retain?
14:19:16	14 THE WITNESS: When I look at this listing,	14:38:29	14 MR. McDONELL: Objection. Misstates the
14:19:20	15 it's a document that I would never have prepared,	14:38:31	15 testimony, misstates the document. Object to the
14:19:23	16 so to that extent, I disagree with it, in that I	14:38:33	16 form.
14:19:28	17 think it's got some things that are just -- you	14:38:36	17 Counselor, can you tell me -- I didn't
14:19:34	18 know, they have a flavor of being pejorative, and I	14:38:37	18 quite follow what paragraph you were looking at.
14:19:38	19 don't think that's necessary.	14:38:41	19 MR. PICKETT: Q. It's the first full
14:19:41	20 As I read down these items, I think they	14:38:42	20 paragraph at the bottom. It has a number 2 in the
14:19:45	21 pretty much fall within 1, 2, and 3 here.	14:38:46	21 front.
14:19:52	22 MR. PICKETT: Q. So from your standpoint,	14:38:47	22 MR. McDONELL: Thank you.
14:19:53	23 there's -- at least on this issue, there's no	14:38:55	23 THE WITNESS: The -- there are two parts
14:19:56	24 dispute that is the scope of use?	14:39:05	24 to that answer.
14:19:58	25 MR. McDONELL: Assumes facts. This is	14:39:07	25 The first part is that addressing

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Page 178		Page 180
14:39:12	1 TomorrowNow at this point, the reasonable royalty	14:42:05
14:39:18	2 that I computed was based upon all of the	14:42:07
14:39:24	3 activities at TomorrowNow. I applied it to all of	14:42:11
14:39:29	4 the customers' revenues, except for those revenues	14:42:14
14:39:34	5 related to the no accused conduct.	14:42:16
14:39:38	6 So that's the answer to your question, I	14:42:16
14:39:42	7 believe.	14:42:19
14:39:43	8 MR. PICKETT: Q. So the value was limited	14:42:20
14:39:45	9 to those revenues you deemed to be related to the	14:42:31
14:39:48	10 accused conduct?	14:42:32
14:39:51	11 MR. McDONELL: Vague and ambiguous.	14:42:41
14:39:54	12 THE WITNESS: I'm sorry?	14:42:47
14:39:55	13 MR. McDONELL: I said vague and ambiguous.	14:42:50
14:39:56	14 That was my objection.	14:42:51
14:40:02	15 THE WITNESS: Yes. That's accurate,	14:42:54
14:40:03	16 because I took out the ones that had no accused	14:43:01
14:40:06	17 conduct. So yes, those that remained were the ones	14:43:03
14:40:09	18 with accused conduct.	14:43:10
14:40:13		14:43:14
14:40:15		14:43:17
14:40:22		14:43:20
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14:40:57		14:43:59
14:41:01		14:44:00
14:41:05		14:44:03
14:41:06		14:44:05
14:41:06		14:44:09
14:41:10		14:44:14
14:41:14		14:44:20
14:41:16		14:44:24
14:41:18		14:44:25
14:41:22		14:44:28
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14:41:31		14:44:35
14:41:36		14:44:37
14:41:38		14:44:40
14:41:40		14:44:42
14:41:48		14:44:43
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14:42:01		14:44:52
14:42:02		14:44:56
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14:45:02		14:48:00	
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14:45:18		14:48:10	
14:45:19		14:48:14	
14:45:23		14:48:17	
14:45:28		14:48:21	
14:45:30		14:48:25	
14:45:35		14:48:27	10
14:45:36		14:48:29	11
14:45:40		14:48:32	12
14:45:49		14:48:36	13
14:45:50		14:48:38	14
14:45:51		14:48:41	15
14:45:53		14:48:43	16
14:45:57		14:48:47	17
14:45:59		14:48:50	18
14:46:03		14:48:51	19
14:46:07		14:48:52	20
14:46:10		14:48:53	21
14:46:13		14:48:55	22
14:46:16		14:48:58	23
14:46:26		14:48:59	24
14:46:29		14:49:00	25
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14:46:34		14:49:01	1
14:46:36		14:49:06	2
14:46:38		14:49:10	3
14:46:40		14:49:21	4
14:46:47		14:49:32	5
14:46:49		14:49:34	6
14:46:54		14:49:36	7
14:46:57		14:49:46	8
14:47:01		14:49:58	9
14:47:03		14:50:02	10
14:47:08		14:50:07	11
14:47:13		14:50:12	12
14:47:14		14:50:13	13
14:47:18		14:50:16	14
14:47:19		14:50:21	15
14:47:20		14:50:24	16
14:47:24		14:50:28	17
14:47:29		14:50:30	18
14:47:31		14:50:45	
14:47:36		14:50:47	
14:47:41		14:50:55	
14:47:43		14:50:57	
14:47:44		14:50:59	
14:47:49		14:51:00	
14:47:56		14:51:02	

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16:29:17		16:32:32	
16:29:23		16:32:37	
16:29:26		16:32:41	
16:29:28		16:32:46	
16:29:29		16:32:50	
16:29:34		16:32:54	
16:29:38		16:32:59	
16:29:44		16:33:01	
16:29:47		16:33:04	
16:29:49		16:33:07	
16:29:54		16:33:08	
16:29:58		16:33:08	
16:30:02		16:33:10	
16:30:05		16:33:12	
16:30:10		16:33:13	
16:30:13		16:33:14	
16:30:18		16:33:16	
16:30:20		16:33:19	
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16:30:31		16:33:24	
16:30:33		16:33:24	
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16:30:37		16:33:29	
16:30:42		16:33:34	
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16:31:06		16:33:59	
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16:31:17		16:34:11	
16:31:22		16:34:12	
16:31:26		16:34:14	
16:31:28		16:34:23	
16:31:30		16:34:24	
16:31:32		16:34:25	
16:31:39		16:34:27	
16:31:42		16:34:29	
16:31:46		16:34:30	
16:31:50		16:34:30	
16:31:54		16:34:31	
16:31:57		16:34:35	
16:32:04		16:34:37	
16:32:11		16:34:38	
16:32:17		16:34:42	
16:32:20		16:34:44	
16:32:24		16:34:48	24 MR. PICKETT: Q. Then why wouldn't
16:32:30		16:34:49	25 they -- and it's your opinion, based on someone

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Page 250		Page 252
16:34:51	1 else, you accept the proposition that it's	16:37:18
16:34:54	2 impossible for SAP to replicate Oracle's software.	16:37:20
16:35:01	3 Right?	16:37:24
16:35:02	4 MR. McDONELL: Same objections.	16:37:28
16:35:02	5 THE WITNESS: Well, it's not just my	16:37:35
16:35:04	6 opinion. One of the other experts in the case,	16:37:38
16:35:07	7 Mr. Garmus, had the same opinion.	16:37:41
16:35:11	8 I had -- I had this vague idea in my mind	16:37:42
16:35:14	9 that that was true. I -- as soon as I saw	16:37:45
16:35:18	10 Mr. Meyer's analysis, I thought it was absurd. But	16:37:50
16:35:22	11 not being a technical expert myself, I relied on	16:37:55
16:35:28	12 Mr. Garmus for that aspect of my analysis.	16:37:56
16:35:32		16:38:01
16:35:33		16:38:02
16:35:39		16:38:03
16:35:42		16:38:08
16:35:42		16:38:09
16:35:44		16:38:13
16:35:47		16:38:18
16:35:48		16:38:21
16:35:54		16:38:23
16:35:57		16:38:26
16:35:59		16:38:29
16:36:05		16:38:30
16:36:08		16:38:34
Page 251		Page 253
16:36:13		16:38:36
16:36:16		16:38:37
16:36:19		16:38:49
16:36:23		16:38:50
16:36:23		16:38:55
16:36:25		16:39:05
16:36:26		16:39:08
16:36:31		16:39:09
16:36:34		16:39:11
16:36:44		16:39:13
16:36:46		16:39:15
16:36:50		16:39:15
16:36:51		16:39:18
16:36:54		16:39:21
16:36:56		16:39:23
16:36:58		16:39:24
16:37:00		16:39:29
16:37:01		16:39:34
16:37:04		16:39:37
16:37:07		16:39:41
16:37:10		16:39:44
16:37:10		16:39:46
16:37:13		16:39:47
16:37:14		16:39:52
16:37:14		16:39:54

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Page 294		Page 296	
17:46:28		17:59:31	1 analysis as well. Correct?
17:46:32		17:59:33	2 MR. McDONELL: Object to the
17:46:34		17:59:34	3 characterization of the Court's order. Objection,
17:46:35		17:59:37	4 vague and ambiguous.
17:46:40		17:59:39	5 THE WITNESS: I -- if you could show me
17:57:07		17:59:41	6 the order, if we're going to talk about it in
17:57:11		17:59:43	7 detail, I -- just a minute, I'm getting to your
17:57:13 8	MR. PICKETT: Q. Mr. Clarke, please turn	17:59:46	8 question -- if we're going to talk about it in
17:57:14 9	to page 3 of your report. I want to refer you to	17:59:50	9 detail, I'd like to refresh my recollection of it.
17:57:31 10	the last sentence of the second-to-the-last	17:59:53 10	But certainly when I read it, I thought,
17:57:33 11	paragraph, in which you state:	17:59:56 11	although these statements are true, and this is how
17:57:35 12	I interpret the Court's Order to mean	18:00:00 12	the order reads, it's not everything that's related
17:57:38 13	that Mr. Meyer will not be allowed to testify	18:00:04 13	to these issues, in that they fell within the
17:57:40 14	about the precluded damage claims even if he	18:00:08 14	boundaries of other elements of the order that
17:57:43 15	includes them in his "Value of Use" claim or	18:00:11 15	would still preclude the damages that Mr. Meyer has
17:57:46 16	in other portions of his overall damage	18:00:15 16	testified to.
17:57:50 17	analysis.	18:00:17	
17:57:57 18	So as you interpret the Court's order,	18:00:18	
17:58:02 19	Oracle's -- or Mr. Meyer's fair market value	18:00:20	
17:58:07 20	damages are limited by the Court's order on the	18:00:23	
17:58:12 21	lost profits?	18:00:26	
17:58:14 22	MR. McDONELL: I object to the form of the	18:00:27	
17:58:14 23	question. You may answer.	18:00:30	
17:58:18 24	THE WITNESS: That is the way I interpret	18:00:31	
17:58:19 25	the order. But I wanted to add -- I just waited to	18:00:33	
Page 295		Page 297	
17:58:24 1	get your question out -- I wanted to add before we	18:00:36	
17:58:28 2	left this document --	18:00:37	
17:58:30 3	MR. PICKETT: Q. We already have --	18:00:40	
17:58:31 4	A. -- that I did take a look at it -- that I	18:00:41	
17:58:34 5	took a look at it at the break. And after	18:00:43	
17:58:37 6	Statement 8, which we did talk about --	18:00:44	
17:58:40 7	Q. What document are you referring to, sir?	18:00:44	
17:58:42 8	A. I beg your pardon. I thought you would	18:00:45 8	Q. So the only basis for your opinion as to
17:58:45 9	recognize it. 3206.	18:00:50 9	the impact of the Court's order is your reading of
17:58:47		18:00:53 10	the Court's order. Correct?
17:58:50		18:00:55 11	MR. McDONELL: Object. Incomplete
17:58:55		18:00:56 12	statement. You declined to show the orders to the
17:58:57		18:00:59 13	witness.
17:59:00		18:01:02 14	THE WITNESS: I didn't speak with Judge
17:59:03		18:01:04 15	Laporte or Judge Hamilton about them. But I
17:59:06		18:01:09 16	certainly did my own analysis of them and reading
17:59:10		18:01:13 17	of them to see what they meant, and that's what
17:59:12		18:01:17 18	resulted in this paragraph here. At least in part.
17:59:15		18:01:23 19	MR. PICKETT: Q. And I simply want to
17:59:18		18:01:24 20	understand that when you state in your report, I
17:59:20		18:01:26 21	interpret the Court's order, that's what you did
17:59:22		18:01:28 22	personally. You didn't have someone assist you in
17:59:25		18:01:31 23	that effort.
17:59:26 24	Q. So you interpreted the Court's order on	18:01:32 24	A. No. I did this personally.
17:59:28 25	lost profits to apply to the fair market value	18:01:36	

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 time
9 and place therein state, and that the testimony of
10 said witness was thereafter reduced to typewriting,
11 by computer, under my direction and supervision;

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

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

22
23 DATED: June 17, 2010

24 Holly Thuman
25 HOLLY THUMAN, CSR

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
STEPHEN CLARKE

VOLUME 2; PAGES 324 - 651

WEDNESDAY, JUNE 9, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

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

(1-427119)

STEPHEN CLARKE June 9, 2010
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09:47:13		09:49:19	
09:47:15		09:49:20	
09:47:18		09:49:21	
09:47:21		09:49:24	
09:47:24		09:49:25	
09:47:24		09:49:27	
09:47:26		09:49:28	
09:47:27		09:49:28	
09:47:31		09:49:29	
09:47:34		09:49:32	
09:47:35		09:49:33	
09:47:36		09:49:33	
09:47:37		09:49:34	
09:47:38		09:49:39	
09:47:42		09:49:40	
09:47:45		09:49:41	
09:47:46		09:49:43	
09:47:49		09:49:45	
09:47:53		09:49:48	19 Q. A longer period would tend to put upward
09:47:53		09:49:50	20 pressure on a license fee but for the fact that you
09:47:55		09:49:53	21 have a profitability cap on the royalty ultimately.
09:47:56		09:49:58	22 Right?
09:48:00		09:49:58	23 MR. McDONELL: Vague and ambiguous.
09:48:02		09:50:01	24 THE WITNESS: I really don't know what you
09:48:02		09:50:02	25 mean by a profitability cap.
Page 362		Page 364	
09:48:03		09:50:04	1 MR. PICKETT: Q. Isn't it true that
09:48:04		09:50:05	2 damages experts are supposed to assume in the "but
09:48:09		09:50:07	3 for" world that TomorrowNow and SAP would continue
09:48:13		09:50:11	4 to operate exactly as they did, except that they
09:48:17		09:50:14	5 would have to pay a license fee to Oracle?
09:48:19		09:50:18	6 A. Yes.
09:48:22		09:50:20	
09:48:23		09:50:23	
09:48:24		09:50:26	
09:48:26		09:50:29	
09:48:28		09:50:30	
09:48:33		09:50:31	
09:48:36		09:50:34	
09:48:40		09:50:37	
09:48:45		09:50:40	
09:48:46		09:50:41	
09:48:48		09:50:43	
09:48:49		09:50:47	
09:48:53		09:50:48	
09:48:55		09:50:51	
09:49:00		09:50:54	
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09:49:05		09:50:58	
09:49:07		09:51:00	
09:49:15		09:51:02	

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Page 365		Page 367	
09:51:03		09:53:41	1 A. Okay. I --
09:51:06		09:53:43	2 Q. What would you call that?
09:51:10		09:53:45	3 A. It's not -- it's an inapt name but --
09:51:13		09:53:49	4 Q. What's your name for that piece of your
09:51:18		09:53:51	5 analysis?
09:51:21		09:53:51	6 A. I never gave it a name.
09:51:24		09:53:53	7 Q. Well, I'm asking you to do so now, if you
09:51:30		09:53:55	8 could, please.
09:51:35		09:54:02	9 A. Well, the -- it's really a selling price
09:51:39		09:54:04	10 issue.
09:51:44		09:54:05	11 Q. Selling price maximum?
09:51:46		09:54:08	12 MR. McDONELL: Vague and ambiguous.
09:51:50		09:54:09	13 THE WITNESS: I think I actually used that
09:51:55		09:54:10	14 word. So we can say -- call it the selling
09:51:59		09:54:13	15 price -- selling price maximum, if you like.
09:52:00		09:54:16	16 MR. PICKETT: Q. And just to pin that
09:52:08		09:54:17	17 down, you believe that in no event could
09:52:14		09:54:20	18 TomorrowNow charge more than 75 percent of Oracle's
09:52:15		09:54:23	19 price?
09:52:15		09:54:24	20 MR. McDONELL: Vague and ambiguous.
09:52:19		09:54:25	21 THE WITNESS: I think if they did, they
09:52:27		09:54:27	22 wouldn't get any customers.
09:52:31		09:54:42	23 MR. PICKETT: Q. Let me ask you, please.
09:52:36		09:54:44	24 to turn to page 82 of your report. Towards the
09:52:39		09:54:55	25 bottom of that page in the last paragraph, starting
Page 366		Page 368	
09:52:41		09:54:58	
09:52:42		09:55:04	
09:52:43		09:55:06	
09:52:45		09:55:09	
09:52:46		09:55:12	
09:52:47		09:55:14	
09:52:49		09:55:16	
09:52:50		09:55:19	
09:52:53		09:55:20	
09:52:55		09:55:25	
09:52:58		09:55:27	
09:53:01		09:55:29	
09:53:03		09:55:31	
09:53:04		09:55:37	
09:53:11		09:55:39	
09:53:13		09:55:47	
09:53:19		09:55:48	
09:53:21		09:55:50	
09:53:23		09:55:53	
09:53:27		09:55:54	
09:53:29		09:55:56	
09:53:31	22 Q. Sure. Because you say that you can't have	09:56:01	
09:53:33	23 a royalty over basically 75 -- you can't have a	09:56:04	
09:53:37	24 total cost, which is more than 75 percent of	09:56:05	
09:53:39	25 Oracle's price.	09:56:06	

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10:01:10		10:03:53	
10:01:11		10:03:56	
10:01:14		10:04:00	
10:01:17		10:04:02	
10:01:20		10:04:08	
10:01:22		10:04:09	
10:01:26		10:04:11	
10:01:31		10:04:15	
10:01:35		10:04:20	
10:01:37		10:04:21	
10:01:40		10:04:23	
10:01:43		10:04:25	
10:01:47		10:04:34	
10:01:49		10:04:35	
10:01:54		10:04:37	
10:01:56		10:04:39	
10:01:57		10:04:42	
10:02:01		10:04:47	
10:02:05		10:04:55	
10:02:08		10:04:58	
10:02:11		10:05:03	
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10:02:28		10:05:27	
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10:02:38		10:05:40	
10:02:41		10:05:43	
10:02:46		10:05:46	
10:02:50		10:05:51	
10:02:54		10:05:58	
10:02:55		10:06:00	
10:02:55		10:06:04	
10:03:03		10:06:08	
10:03:04		10:06:10	
10:03:07		10:06:13	
10:03:12		10:06:15	
10:03:17		10:06:17	
10:03:21		10:06:20	
10:03:21		10:06:24	
10:03:26		10:06:26	19 MR. PICKETT: Q. When you just testified
10:03:30		10:06:28	20 you felt you needed to go to the maximum royalty
10:03:34		10:06:30	21 rate, did you mean the selling point maximum
10:03:38		10:06:37	22 royalty rate?
10:03:43		10:06:38	23 MR. McDONELL: Vague and ambiguous.
10:03:45		10:06:39	24 THE WITNESS: Well, the selling point
10:03:48		10:06:40	25 maximum is the result of a selling price plus a

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Page 377			Page 379		
10:06:44	1	royalty. And so they're related, but they're not	10:28:20	1	So that's my assumption. That if we're
10:06:48	2	the same.	10:28:28	2	going to apply that to these customers, then that's
10:06:49	3	What -- if you remember, on my royalty	10:28:30	3	the most to you could have charged and still had
10:06:51	4	rate, I've said that the royalty rate will be 50	10:28:32	4	those customers.
10:06:55	5	percent of TomorrowNow's revenue. That is an	10:28:33	5	Q. What data is your judgment based upon?
10:06:59	6	absolutely astronomical rate to apply. 50 percent	10:28:38	6	A. Based upon years of experience, looking at
10:07:05	7	of revenues, I've really never come across that	10:28:43	7	pricing models and customer behavior, teaching
10:07:08	8	before. It would -- if you then apply that royalty	10:28:47	8	economics, micro and macro, about what drives
10:07:11	9	to the pricing, it would push TomorrowNow's pricing	10:28:53	9	behavior, looking at demand curves, the
10:07:14	10	to 75 percent of Oracle's rate.	10:28:57	10	relationship between price and the quantity
10:07:19	11	I've assumed no elasticity of demand in	10:28:59	11	demand.
10:07:23	12	that period. And if there's no elasticity, we can	10:29:04	12	Many years and many products, many
10:07:27	13	apply it to the same number of customers. I think	10:29:07	13	companies. So that's my -- there's a judgment.
10:07:30	14	that's the right thing to do. But there must come	10:29:11	14	There's no hard data, there's no table you can go
10:07:32	15	a point at which that royalty rate becomes so high,	10:29:15	15	and look that up in. Somebody has to make that
10:07:36	16	you can't any longer keep a straight face and say,	10:29:18	16	judgment.
10:07:39	17	this wouldn't have affected sales, because of	10:29:18	17	Q. Are there any specific facts you can cite
10:07:42	18	course, it would.	10:29:20	18	in support of that judgment?
10:07:44	19	So you've got this continuum on the	10:29:22	19	A. Well, I think that the totality of my
10:07:46	20	TomorrowNow side of the equation, and you've got	10:29:24	20	report, which talks about the factors that I think
10:07:48	21	the addition of SAP in January of '05.	10:29:28	21	are relevant to the hypothetical negotiation, gives
10:07:57	22	MR. PICKETT: This is a good point for a	10:29:32	22	good background as to what this market is all
10:07:58	23	break. Why don't we do that.	10:29:35	23	about, what drives customers to do what they do.
10:08:00	24	THE WITNESS: Sure.	10:29:41	24	So there's a lot of supporting information
10:08:02	25	THE VIDEO OPERATOR: Going off the record,	10:29:44	25	in here for looking at customers, looking at the
Page 378			Page 380		
10:08:02	1	the time now is 10:08.	10:29:49	1	market, looking at pricing. As I say, there's no
10:11:30	2	(Recess from 10:08 a.m. to 10:26 a.m.)	10:29:53	2	specific table that says, well, if the price was 76
10:26:57	3	THE VIDEO OPERATOR: Tape is rolling. The	10:29:56	3	percent, it will be zero or 99 percent. That's my
10:26:59	4	time now is 10:27, and we are back on the videotape	10:30:01	4	assumption for the purposes of doing the reasonable
10:27:03	5	record. Please proceed.	10:30:04	5	royalty rate calculation.
10:27:07	6	MR. PICKETT: Q. Mr. Clarke, I want to go	10:30:06	6	Q. Anything else?
10:27:09	7	back to the -- I think what we coined the selling	10:30:08	7	A. No. I don't believe so.
10:27:12	8	price maximum for TomorrowNow of 75 percent of	10:30:11	8	Q. When and where did you teach micro
10:27:16	9	Oracle.	10:30:14	9	economics?
10:27:16	10	A. Yes.	10:30:15	10	A. At Arizona State University, from about
10:27:19	11	Q. What's the basis for your conclusion that	10:30:20	11	2001 to I think 2005, maybe. Maybe -4.
10:27:23	12	the maximum is 75 percent?	10:30:28	12	Q. I hadn't covered that before.
10:27:29	13	A. To a very large extent, that's my	10:30:32	13	Did you teach any other courses in
10:27:31	14	judgment. I think that's the most it would be	10:30:34	14	economics?
10:27:34	15	without there being some falloff in sales. And so,	10:30:34	15	A. No. Econ 502.
10:27:42	16	you know, I recognize that there was a time when	10:30:37	16	Q. Now, the 75 percent maximum selling price
10:27:47	17	customers took TomorrowNow's service and retained	10:30:40	17	is the reason you settled on a 50 percent royalty
10:27:53	18	their Oracle service. So they were effectively	10:30:44	18	right. Right?
10:27:57	19	paying twice.	10:30:46	19	MR. McDONELL: Vague and ambiguous. Asked
10:27:59	20	But I didn't -- I -- in terms of the	10:30:47	20	and answered.
10:28:04	21	reasonable component of reasonable royalty, I think	10:30:48	21	THE WITNESS: I think that's the right way
10:28:08	22	the number of customers that were prepared to pay	10:30:49	22	around to look at it. Yes, I -- I was trying to
10:28:11	23	twice was very low, so I don't think you can assume	10:30:55	23	compute the maximum royalty rate that I thought
10:28:14	24	that there would be no effect on sales once you got	10:30:59	24	could still be reasonable and would be applicable
10:28:17	25	past 75 percent of the pricing.	10:31:03	25	to the customers that we -- actually are at issue

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10:31:07	1 in the case.	10:33:26	
10:31:08	2 So I think that was the way around that I	10:33:34	
10:31:09	3 did that.	10:33:36	
10:31:10		10:33:38	
10:31:12		10:33:40	
10:31:15		10:33:42	
10:31:16		10:33:44	
10:31:17		10:33:46	
10:31:19		10:33:47	
10:31:20		10:33:48	
10:31:23		10:33:50	
10:31:23		10:33:54	
10:31:25		10:33:58	
10:31:28		10:34:04	
10:31:33		10:34:07	
10:31:34		10:34:09	
10:31:35		10:34:10	
10:31:41		10:34:15	
10:31:43		10:34:19	
10:31:49		10:34:22	
10:31:55		10:34:27	
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10:32:05		10:34:35	
10:32:08		10:34:37	
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10:32:26		10:34:44	
10:32:28		10:34:45	
10:32:46		10:34:46	
10:32:47		10:34:48	
10:32:49		10:34:50	
10:32:51		10:34:52	
10:32:54		10:34:54	
10:32:56		10:34:57	
10:32:57		10:35:01	
10:33:01		10:35:02	
10:33:05		10:35:04	
10:33:07		10:35:06	
10:33:10		10:35:10	
10:33:12		10:35:14	
10:33:16		10:35:16	
10:33:19		10:35:17	
10:33:20		10:35:18	
10:33:21		10:35:23	
10:33:22		10:35:26	
10:33:23		10:35:26	
10:33:24		10:35:30	

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Page 389		Page 391	
10:41:04	1 assumes facts not in evidence.	10:44:02	1 read it already into the record.
10:41:08	2 THE WITNESS: I don't think they were	10:44:05	2 A. Oh, I see it. Okay.
10:41:10	3 motivated to do that. I think that they did absorb	10:44:12	3 Q. So if you assume that SAP will fund
10:41:13	4 losses, whether -- I don't -- I wouldn't describe	10:44:18	4 TomorrowNow, as you state here, your use of
10:41:16	5 that as their goal.	10:44:26	5 TomorrowNow's need to fund the fee is unnecessary.
10:41:19	6 MR. PICKETT: Q. Well, they had reasons	10:44:31	6 Correct?
10:41:20	7 for doing that, didn't they?	10:44:32	7 MR. McDONELL: Vague and ambiguous,
10:41:22	8 MR. McDONELL: Vague and ambiguous, overly	10:44:33	8 misstates the testimony, incomplete.
10:41:23	9 broad.	10:44:36	9 THE WITNESS: That completely misses the
10:41:26	10 THE WITNESS: I think the -- I don't think	10:44:40	10 point of this sentence, which is to say that we
10:41:29	11 anybody sets out to lose money in business. They	10:44:43	11 know TomorrowNow already made losses. If we
10:41:35	12 absorbed losses, so I presume they had business	10:44:47	12 superimpose a 50 percent of revenue fee on top of
10:41:41	13 reasons for doing what they did.	10:44:51	13 that, with no additional income, the losses will be
10:41:45		10:44:57	14 very much higher than they even were.
10:41:54		10:44:59	15 And in order to give Oracle the benefit of
10:42:01		10:45:03	16 the doubt in this analysis, I have to find some way
10:42:07		10:45:07	17 to fund that loss, that additional loss, and still
10:42:09		10:45:12	18 be reasonable.
10:42:14		10:45:14	19 And so what I've said here is that
10:42:16		10:45:20	20 TomorrowNow would have gone out of business if it
10:42:21		10:45:22	21 had to fund these things on its own. But SAP would
10:42:24		10:45:27	22 actually put in the extra money required to do
10:42:25		10:45:30	23 this. And so I -- I think your question misses the
10:42:31		10:45:35	24 point, which is, you would have killed TomorrowNow
10:42:35		10:45:39	25 if it had to fund these losses on its own. And so
Page 390		Page 392	
10:42:39		10:45:45	1 something had to give, and that's SAP would have
10:42:43		10:45:47	2 done the giving to keep TomorrowNow afloat.
10:42:44		10:45:52	3 MR. PICKETT: Q. That would be -- the
10:42:47		10:45:53	4 same would be true at 60 percent royalty. Right?
10:42:50		10:45:57	5 MR. McDONELL: Incomplete hypothetical.
10:42:51		10:45:58	6 THE WITNESS: 60 percent of revenue?
10:42:53		10:46:00	7 MR. PICKETT: Q. Rather than 50 percent.
10:42:56		10:46:04	8 A. It would have been true if SAP would have
10:43:01		10:46:06	9 funded that, then that would be true.
10:43:05		10:46:11	10 Q. If you please turn to your report at page
10:43:07		10:46:13	11 65.
10:43:10		10:46:33	12 At the second sentence of the last
10:43:14		10:46:34	13 paragraph, you state: From the TomorrowNow
10:43:18		10:46:36	14 customer base, SAP would hope to acquire customers
10:43:21		10:46:40	15 for its ERP applications it would not otherwise
10:43:23	16 MR. PICKETT: Q. If you would please turn	10:46:44	16 have acquired.
10:43:24	17 to page 91 of your report.	10:46:44	17 And that's one of the motivations SAP had
10:43:40	18 Reading from the last sentence in the	10:46:47	18 for funding TomorrowNow. Correct?
10:43:42	19 third paragraph: I assume SAP would fund its	10:46:50	19 A. Yes. I believe so.
10:43:46	20 subsidiary to the extent necessary to cover the	10:46:54	20 Q. And that's also one of the reasons that
10:43:48	21 reasonable royalty arising from both Defendants'	10:46:56	21 SAP offered service at no cost -- SAP allowed
10:43:51	22 use of the subject IP.	10:46:59	22 TomorrowNow to offer service at no cost.
10:43:57	23 A. Could you just tell me where you were	10:47:02	23 MR. McDONELL: Overly broad. Lack of
10:43:58	24 reading that? I couldn't find it.	10:47:03	24 foundation.
10:44:00	25 Q. End of the third paragraph: I assume -- I	10:47:04	25 THE WITNESS: I think that was their

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10:47:06	1 aspiration.	11:01:59	
10:47:07		11:02:05	
10:47:09		11:02:12	
10:47:13		11:02:18	
10:47:14		11:02:22	
10:47:14		11:02:30	
10:47:16		11:02:32	
10:47:17		11:02:34	
10:47:23		11:02:38	
10:47:25		11:02:43	
10:47:42		11:02:48	
10:47:43		11:02:51	
10:48:05		11:02:52	
10:48:07		11:02:54	
10:48:09		11:02:55	
10:48:13		11:02:57	
10:48:15		11:03:04	
11:00:23		11:03:06	
11:00:24		11:03:08	
11:00:27		11:03:10	
11:00:29		11:03:12	
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11:00:54		11:03:35	
11:00:56		11:03:37	
11:00:57		11:03:39	
11:00:59		11:03:41	
11:01:01		11:03:45	
11:01:02		11:03:47	
11:01:03		11:03:50	
11:01:05		11:03:51	10 Q. Turning back to your report and moving on
11:01:06		11:03:53	11 to page 205, in this section, you're describing how
11:01:09		11:03:59	12 you calculated the SAP royalty. Is that correct?
11:01:11		11:04:03	13 MR. McDONELL: The document speaks for
11:01:13		11:04:04	14 itself.
11:01:19		11:04:04	15 THE WITNESS: Yes.
11:01:24		11:04:06	16 MR. PICKETT: Q. And if I turn to the top
11:01:31		11:04:07	17 of 205, I want to point you to two sentences here.
11:01:34		11:04:14	18 The first sentence says: The approach in this case
11:01:37		11:04:16	19 yields a royalty of zero because SAP made no
11:01:37		11:04:18	20 additional margin on any sales made as a result of
11:01:40		11:04:21	21 the alleged actions. Therefore, the royalty rate
11:01:43		11:04:25	22 would be zero under the analytical approach.
11:01:47		11:04:28	23 And then you say: The reasonable royalty
11:01:51		11:04:29	24 for SAP would be half of the profits on any sales
11:01:57		11:04:32	25 it made that it would not have made absent the

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11:04:34	1	alleged allegations.	11:07:28	1	judgment, but I think it's a fair royalty, and as
11:04:38	2	Is the last sentence there, is that	11:07:33	2	high as you could make it and still say it would be
11:04:41	3	different than the first two sentences? I'm trying	11:07:35	3	fair to both sides.
11:04:46	4	to understand the distinction. Or is it just that	11:07:36	4	Q. And that's based on your experience that
11:04:48	5	half of the profits means half of zero, because	11:07:39	5	you've described?
11:04:50	6	they made no profits?	11:07:41	6	A. Well, I described a lot more than my
11:04:51	7	A. Let me explain the analytical approach.	11:07:43	7	experience. I described the contents of my report
11:04:54	8	Q. Sure.	11:07:45	8	and a lot of what's in these binders back here lead
11:04:55	9	A. Going back to Mr. Parr, he has this	11:07:50	9	me to that conclusion.
11:05:00	10	analytical approach in his book that says, if you	11:07:52	10	Q. Do you have any quantitative analysis that
11:05:04	11	have a patent -- remember, we're back in the patent	11:07:57	11	demonstrates 50 percent is the right royalty for
11:05:06	12	world now, so I'm going to use a product as opposed	11:08:00	12	SAP?
11:05:09	13	to a piece of software.	11:08:01	13	MR. McDONELL: Vague and ambiguous,
11:05:10	14	But if you have a patent that you	11:08:02	14	incomplete.
11:05:14	15	incorporate into your product lineup, and your	11:08:05	15	THE WITNESS: There isn't a table that you
11:05:20	16	normal margin, let's say, is 50 percent of your	11:08:06	16	can go to that would look -- you could look that up
11:05:23	17	selling price, but by including the patent, you can	11:08:08	17	in.
11:05:27	18	push that margin up to, say, 80 percent, that you	11:08:09	18	MR. PICKETT: Q. Do you have any specific
11:05:31	19	should disgorge that extra 30 percent of margin.	11:08:10	19	facts on which you rely to conclude that 50 percent
11:05:35	20	So you don't -- you make your normal margin, but	11:08:14	20	is the appropriate royalty?
11:05:39	21	you don't make any extra margin. That belongs to	11:08:16	21	MR. McDONELL: Overly broad, vague and
11:05:41	22	the patent holder.	11:08:17	22	ambiguous, object to the form.
11:05:43	23	And that seems to me to be an appropriate	11:08:21	23	THE WITNESS: I -- the specific facts are
11:05:45	24	way to come up with what should be disgorged. It's	11:08:25	24	embodied in these binders that are behind me, of
11:05:50	25	called the analytical approach.	11:08:29	25	which there are probably 35, and my report. So
Page 398			Page 400		
11:05:52	1	So because that is couched in terms of	11:08:35	1	there are an enormous quantity of facts that I've
11:05:54	2	margin, and there will be no additional margin on	11:08:38	2	considered in the course of this case, and taking
11:05:59	3	the SAP sales, you really can't apply the	11:08:39	3	all of those facts, as well as the Georgia-Pacific
11:06:02	4	analytical approach in that manner.	11:08:42	4	analysis and bringing all of that together, at the
11:06:06	5	What I've done is, I've sort of applied it	11:08:47	5	end of the day, what's reasonable is a bit of a
11:06:11	6	in a sense that I'm trying to use an analytical	11:08:50	6	judgment call. And I've done my best to synthesize
11:06:15	7	approach in saying, well, let's take the total	11:08:56	7	everything I know and come up with something I
11:06:18	8	profit, and let's divide that up 50/50 between the	11:08:58	8	think is reasonable at the end of the day.
11:06:22	9	parties. So it's an analytical approach, but	11:09:01	9	MR. PICKETT: Q. Can you point me to any
11:06:28	10	applied to a slightly different metric. And I	11:09:03	10	specific facts that support a 50 percent royalty
11:06:31	11	think it would come out to be higher than the	11:09:05	11	rather than a 40 or 60 percent royalty?
11:06:36	12	analytical approach, which I've shown you is zero,	11:09:07	12	MR. McDONELL: Asked and answered, same
11:06:39	13	because there's no extra margin.	11:09:08	13	objections.
11:06:41	14	I think that's an appropriate approach.	11:09:11	14	THE WITNESS: I don't think there's a
11:06:43	15	Q. What's the basis for the 50/50 split?	11:09:13	15	particular fact that I could point to that would
11:06:46	16	A. That's my judgment that it is an	11:09:15	16	say, it should be 40 percent or it should be 60
11:06:50	17	appropriate and very high royalty that will be paid	11:09:19	17	percent. I think my opinion is based upon the
11:06:56	18	on sales that SAP almost certainly would have made	11:09:25	18	highest rate it could be and still be reasonable to
11:07:00	19	anyway. And the royalty needs to reflect that the	11:09:27	19	the parties at the negotiating table.
11:07:06	20	reality is that customers don't migrate their ERP	11:09:32	20	And if I may, I've got a clarification I'd
11:07:11	21	systems to save a few thousand dollars on support,	11:09:34	21	like to make to you if we're going to move on to a
11:07:14	22	as the data show. And SAP wouldn't be wanting to	11:09:38	22	different topic.
11:07:19	23	pay royalties on sales it would have made anyway.	11:09:40	2	
11:07:23	24	Those wouldn't be part of the equation.	11:09:41	2	
11:07:26	25	So it's a -- it's got some elements of	11:09:42	2	

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12:44:34		12:47:08	
12:44:36		12:47:10	
12:44:38		12:47:14	
12:44:41		12:47:15	
12:44:44		12:47:18	
12:44:46		12:47:18	
12:44:48		12:47:20	
12:44:51		12:47:20	
12:44:52		12:47:21	
12:44:57		12:47:22	
12:45:02		12:47:23	
12:45:09		12:47:26	
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12:45:57		12:48:21	
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12:46:00		12:48:25	
12:46:03		12:48:27	
12:46:08		12:48:28	
12:46:10		12:48:31	
12:46:17		12:48:34	
12:46:21		12:48:38	
12:46:26		12:48:41	16 MR. PICKETT: Q. All right. Let's turn
12:46:27		12:48:42	17 to the -- a new topic.
12:46:30		12:48:47	18 The royalty on the database software. And
12:46:35		12:48:55	19 if you like, I can refer you to page 205 of your
12:46:38		12:48:58	20 report.
12:46:39		12:48:59	21 A. I was heading right there. It's where we
12:46:42		12:49:05	22 started this morning.
12:46:44		12:49:12	23 Q. And it's your opinion that the royalty for
12:46:51		12:49:21	24 the use of Oracle's database would be based on
12:46:54		12:49:23	25 market price?

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Page 453		Page 455
12:49:26	1 A. I believe so.	12:52:45
12:49:28	2 Q. The market price that you refer to is the	12:52:46
12:49:30	3 price paid to obtain an end-user full-use Oracle	12:52:49
12:49:33	4 Database license from Oracle. Correct?	12:52:52
12:49:37	5 MR. McDONELL: Vague and ambiguous.	12:52:54
12:49:45	6 I would encourage you to take your time to	12:52:59
12:49:48	7 read your report, if you need to.	12:53:02
12:49:50	8 THE WITNESS: Could you just repeat that	12:53:05
12:49:51	9 question? I wasn't clear about it.	12:53:05
12:49:52	10 MR. PICKETT: Q. The market price that	12:53:08
12:49:54	11 you use is the price that was paid to obtain an	12:53:11
12:50:03	12 end-user full-use Oracle Database license from	12:53:13
12:50:08	13 Oracle.	12:53:17
12:50:12	14 MR. McDONELL: Same objection.	12:53:19
12:50:13	15 THE WITNESS: I actually used two	12:53:23
12:50:14	16 different prices in doing my analysis, but they	12:53:27
12:50:16	17 were -- they were for licenses that were end-user	12:53:32
12:50:20	18 licenses.	12:53:33
12:50:21	19 MR. PICKETT: Q. Let me mark as	12:53:37
12:50:22	20 Exhibit -- or let me show you what's been marked as	12:53:46
12:50:25	21 Exhibit 3210, an Oracle License and Services	12:53:50
12:50:28	22 Agreement, Bates numbers ORCL00670717 through -726.	12:53:53
12:50:40	23 (Deposition Exhibit 3210 was marked for	12:53:54
12:50:43	24 identification.)	12:53:55
12:50:44	25 THE WITNESS: Thank you.	12:53:56
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12:50:52	1 MR. PICKETT: Q. Is this the type of	12:53:57
12:50:53	2 full-use database license that you have referenced	12:54:04
12:50:57	3 when you set a market price?	12:54:06
12:51:03	4 MR. McDONELL: Overly broad. Vague and	12:54:08
12:51:04	5 ambiguous. Lack of foundation.	12:54:10
12:51:22	6 THE WITNESS: Yes. I think this is -- if	12:54:16
12:51:25	7 it's not the actual agreement that I looked at,	12:54:23
12:51:29	8 it's very similar to it.	12:54:26
12:51:36		12:54:29
12:51:39		12:54:32
12:51:44		12:54:36
12:51:47		12:54:41
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12:52:03		12:54:56
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12:55:33		12:57:43	
12:55:36		12:57:48	
12:55:39		12:57:52	
12:55:43		12:57:54	
12:55:46		12:57:57	
12:55:46		12:58:00	
12:55:47		12:58:02	
12:55:49		12:58:04	
12:55:51		12:58:08	11 Q. Is it your opinion that the Oracle License
12:55:52		12:58:11	12 and Services Agreement would have allowed SAP and
12:55:53		12:58:14	13 TomorrowNow to use the Oracle Databases in the
12:55:55		12:58:19	14 infringing manner alleged in the lawsuit?
12:55:57		12:58:22	15 MR. McDONELL: Vague and ambiguous, calls
12:55:58		12:58:22	16 for a legal conclusion, overly broad. Object to
12:55:59		12:58:25	17 the form of the question.
12:55:59		12:58:28	18 THE WITNESS: The allegations, as I recall
12:56:01		12:58:31	19 them, don't include an allegation that the database
12:56:02		12:58:37	20 itself was used inappropriately. I understand that
12:56:04		12:58:41	21 your position is that the alleged actions indicate
12:56:05		12:58:47	22 TomorrowNow did some things with Oracle's other
12:56:08		12:58:50	23 software that it felt were inappropriate, but
12:56:12		12:58:53	24 the -- the use of the database itself was
12:56:15		12:58:58	25 essentially internal to TomorrowNow.
Page 458		Page 460	
12:56:15		12:59:02	
12:56:18		12:59:03	
12:56:19		12:59:07	
12:56:24		12:59:09	
12:56:29		12:59:12	
12:56:36		12:59:12	
12:56:38		12:59:19	
12:56:44		12:59:21	
12:56:47		12:59:24	
12:56:49		12:59:31	
12:56:52		12:59:34	
12:56:56		12:59:40	
12:56:57		12:59:46	
12:56:58		12:59:51	
12:57:01		12:59:56	
12:57:03		12:59:58	
12:57:08		13:00:02	
12:57:17		13:00:03	
12:57:23		13:00:08	
12:57:23		13:00:12	
12:57:25		13:00:17	
12:57:26		13:00:21	
12:57:29		13:00:24	
12:57:31		13:00:31	
12:57:32		13:00:36	

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Page 465		Page 467	
13:05:38		13:08:07	
13:05:42		13:08:09	
13:05:42		13:08:12	
13:05:44		13:08:16	
13:05:44		13:08:19	
13:05:49		13:08:23	
13:05:51		13:08:24	
13:05:55		13:08:26	
13:06:00		13:08:31	
13:06:04		13:08:35	
13:06:07		13:08:41	
13:06:08	12	13:08:43	
13:06:10	13	13:08:46	
13:06:15	14	13:08:48	
13:06:17	15	13:08:48	
13:06:20	16	13:08:50	
13:06:23	17	13:08:54	
13:06:24	18	13:08:55	
13:06:26	19	13:08:57	
13:06:26	20	13:09:02	
13:06:29	21	13:09:03	
13:06:32	22	13:09:15	
13:06:37	23	13:09:18	
13:06:43	24	13:09:20	
13:06:46	25	13:09:22	
Page 466		Page 468	
13:06:50		13:09:24	
13:06:54		13:09:29	
13:07:02		13:09:31	
13:07:03		13:09:36	
13:07:05		13:09:37	
13:07:06		13:09:41	
13:07:09		13:09:41	
13:07:10		13:09:43	
13:07:12		13:09:46	
13:07:18		13:09:52	
13:07:21		13:09:55	
13:07:24		13:09:57	
13:07:27		13:09:58	
13:07:30		13:10:00	
13:07:36		13:10:02	
13:07:37		13:10:06	
13:07:42		13:10:09	
13:07:44		13:10:13	
13:07:46		13:10:17	
13:07:49		13:10:22	
13:07:51		13:10:24	21
13:07:52		13:10:25	22
13:07:55		13:10:29	23
13:08:00		13:10:34	24
13:08:03		13:10:39	25
			MR. PICKETT: Q. You -- in specific
			reference to your comment that the number of
			databases the licensed user creates after the
			installation is irrelevant, what is the factual
			support for that?

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Page 469		Page 471	
13:10:43	1 A. You have to -- you have to understand what	13:13:10	1 research. First of all, I went onto the internet.
13:10:46	2 "database" means in this context. The database	13:13:13	2 I looked for the Oracle Database. It's fairly easy
13:10:51	3 software that we're talking about is a program, a	13:13:20	3 to find.
13:10:56	4 piece of software. You use that software to make	13:13:22	4 And then when you get onto the Database
13:11:02	5 or develop databases. So they have the same name.	13:13:24	5 site, there are a number of options for you to look
13:11:07	6 The software is known as a "Database," and what you	13:13:27	6 at, one of which is the license agreement, looks
13:11:10	7 use it create a database.	13:13:32	7 similar to this one, and I read that. I looked at
13:11:14	8 So if I could give you a parallel, which	13:13:40	8 other license agreements that I had in my office
13:11:18	9 might make it easier to understand, if you go and	13:13:45	9 for -- believe it or not -- for the -- my Excel
13:11:21	10 buy an Excel spreadsheet package, a piece of	13:13:50	10 spreadsheet, which is why I used that example. And
13:11:27	11 software that has Excel spreadsheet on it, you can	13:13:55	11 there's no -- I've never -- never seen any
13:11:30	12 make as many spreadsheets as you like once you have	13:13:58	12 limitation on how many times you can use the
13:11:33	13 bought that piece of software.	13:14:02	13 software to develop what is the ultimate goal of
13:11:36	14 So what I'm saying here is that once	13:14:06	14 the software, which will be a spreadsheet, or a
13:11:40	15 you've bought the license to the database software,	13:14:09	15 Word document if it were Word. My example was
13:11:43	16 you can use that software to make as many	13:14:15	16 Excel, just the one that happened to be handy.
13:11:46	17 databases, which is how you use the database	13:14:21	17 And this agreement is exactly parallel to
13:11:52	18 software, to make as many of those as you like.	13:14:23	18 that.
13:11:56	19 There's an infinite number that you could develop	13:14:24	19 MR. PICKETT: Q. So you not only
13:11:59	20 if you have enough memory to store where you	13:14:25	20 interpreted this agreement, you interpreted some
13:12:02	21 would -- wherever you would want to put it, then	13:14:27	21 Excel agreement you happened to have handy?
13:12:06	22 you could make them ad nauseam.	13:14:30	22 A. Why wouldn't I interpret those agreements?
13:12:09	23 Q. So that's based on your legal	13:14:32	23 I have signed them. I have agreed that I am going
13:12:11	24 interpretation of the Oracle license?	13:14:36	24 to be bound by them.
13:12:12	25 MR. McDONELL: Object to the form of the	13:14:37	25 Q. Please answer the question. Did you --
Page 470		Page 472	
13:12:13	1 question.	13:14:39	1 A. I am answering --
13:12:14	2 THE WITNESS: Well, as you know, I'm not a	13:14:40	2 Q. Did you look at the Excel agreement or
13:12:16	3 lawyer. But that is my understanding and	13:14:41	3 not?
13:12:23	4 interpretation of the license agreement.	13:14:41	4 A. I am answering -- don't browbeat me. I am
13:12:25	5 MR. PICKETT: Q. Is your understanding	13:14:44	5 answering your question. I looked at it. I've
13:12:25	6 based on anything other than your interpretation of	13:14:47	6 signed many of them. I have bought many of them
13:12:27	7 the agreement?	13:14:50	7 for the people in my office. I've spent a lot of
13:12:29	8 A. I've not been given any guidance by anyone	13:14:52	8 money buying these things. I've bought individual
13:12:32	9 else. I read it, I think I understood it. I find	13:14:56	9 licenses, I've bought group licenses.
13:12:38	10 it to be parallel to many other agreements that	13:14:58	10 And there's a parallel in all of them,
13:12:42	11 I've read and signed or accepted with a	13:15:03	11 which is exactly parallel to what we're talking
13:12:45	12 click-through.	13:15:05	12 about here, which is, once you have the license,
13:12:48	13 So it's entirely normal, as far as I am	13:15:10	13 you can use it as many times as you like to develop
13:12:54	14 concerned, that that would be how you would use it.	13:15:15	14 the purpose of that piece of software.
13:12:56	15 Q. Did you do anything other than interpret	13:15:18	15 If it's a Word program, you can write as
13:12:58	16 it yourself? Did you talk to anyone, did you do	13:15:22	16 many Word documents as you like. If it's an Excel
13:13:01	17 any independent research?	13:15:25	17 spreadsheet program, you can write as many
13:13:02	18 MR. McDONELL: Asked and answered.	13:15:28	18 spreadsheet programs as you like. I have never
13:13:03	19 MR. PICKETT: Q. Anything other than read	13:15:29	19 seen one of them that said, you're getting a
13:13:04	20 it and interpret it --	13:15:31	20 license here to Microsoft Excel spreadsheet
13:13:05	21 MR. McDONELL: Asked and answered.	13:15:34	21 program, and after you have done a thousand
13:13:05	22 MR. PICKETT: Q. -- to draw that	13:15:37	22 spreadsheets, it's going to evaporate. I've never
13:13:07	23 conclusion?	13:15:40	23 seen that.
13:13:08	24 MR. McDONELL: Asked and answered.	13:15:41	24 That's not what happened here, it's not
13:13:09	25 THE WITNESS: Well, I did do independent	13:15:43	25 what happened in any other case I've ever been

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Page 473		Page 475	
13:15:45	1 involved in where I was the consumer signing these	13:17:49	
13:15:48	2 things and agreeing to them.	13:17:53	
13:15:50	3 And, you know, if you can convince	13:17:55	
13:15:54	4 somebody that you're right about this, have at it.	13:18:00	4 MR. PICKETT: Q. Where do you cite
13:15:57	5 Q. Why did you look at the Excel agreement?	13:18:01	5 anything in support of the statement that the
13:15:59	6 A. Because I wanted to see whether there was	13:18:05	6 number of databases is irrelevant -- the number of
13:16:01	7 a parallel between this agreement and other	13:18:08	7 databases created after installation is irrelevant?
13:16:07	8 agreements.	13:18:14	8 A. I cite this paragraph.
13:16:07	9 And they're similar. They have similar	13:18:17	9 Q. You cite your own words.
13:16:10	10 characteristics. And the main characteristic I was	13:18:19	10 A. Yes.
13:16:12	11 looking for was, is there ever a limit on the use	13:18:23	
13:16:19	12 of the software for its intended purpose. I've	13:18:27	
13:16:24	13 never seen one.	13:18:29	
13:16:25	14 Q. Did you ever cite the Excel comparison	13:18:31	
13:16:27	15 that you apparently made in your report?	13:18:34	
13:16:30	16 A. No. Why would I ever need to cite that?	13:18:35	
13:16:33	17 Q. Because it's the only factual support you	13:18:36	
13:16:34	18 have for the proposition you make in the report.	13:18:36	
13:16:37	19 MR. McDONELL: Misstates the --	13:18:39	
13:16:38	20 MR. PICKETT: Isn't that right?	13:18:45	
13:16:39	21 MR. McDONELL: Absolutely misstates the	13:42:45	
13:16:41	22 testimony. Object to the form of the question.	14:00:02	
13:16:43	23 THE WITNESS: You know, the factual	14:00:03	
13:16:44	24 support for my position is right here. There is no	14:00:06	
13:16:49	25 limitation in this agreement that says how many		
Page 474		Page 476	
13:16:53	1 databases you can create once you've bought the	14:00:09	
13:16:56	2 software. I don't need any further factual	14:00:11	
13:17:01	3 support.	14:00:12	
13:17:01		14:00:13	
13:17:03		14:00:18	
13:17:06		14:00:22	
13:17:09		14:00:32	
13:17:13		14:00:34	
13:17:15		14:00:36	
13:17:19		14:00:36	
13:17:21		14:00:40	
13:17:22		14:00:42	
13:17:23		14:00:44	
13:17:25		14:00:47	
13:17:27		14:00:51	
13:17:28		14:00:55	
13:17:32		14:00:56	
13:17:34		14:00:57	
13:17:37		14:00:58	
13:17:38		14:00:58	
13:17:40		14:01:01	
13:17:43		14:01:03	
13:17:44		14:01:04	
13:17:46		14:01:05	
13:17:48		14:01:09	

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Page 477		Page 479	
14:01:10		14:04:08	1 TomorrowNow could have done rather than what they
14:01:11		14:04:10	2 actually did?
14:01:15		14:04:11	3 A. That's correct.
14:01:17		14:04:12	
14:01:20		14:04:16	
14:01:23		14:04:20	
14:01:28		14:04:23	
14:01:30		14:04:24	
14:01:30	9 Q. Did you provide any adjustments to the	14:04:32	
14:01:32	10 price list that you used, Exhibit 312 -- I'm sorry,	14:04:34	
14:01:35	11 3211 -- wow, I'm not even close again. All right.	14:04:37	
14:01:44	12 Let's try it a third time.	14:04:40	
14:01:46	13 Did you provide any adjustments to your	14:04:43	
14:01:48	14 price list to account for the fact that the Oracle	14:04:47	
14:01:54	15 Database was outside the scope of how customers	14:04:51	
14:02:02	16 ordering from that price list would use the	14:04:54	
14:02:05	17 software?	14:04:55	
14:02:06	18 MR. McDONELL: Assumes facts, vague and	14:04:57	
14:02:06	19 ambiguous, incomplete hypothetical. Calls for a	14:05:02	
14:02:10	20 legal conclusion.	14:05:05	
14:02:14	21 THE WITNESS: I didn't make any adjustment	14:05:12	
14:02:15	22 for any purpose.	14:05:19	
14:02:27	23 MR. PICKETT: Q. On page 208 of your	14:05:25	
14:02:29	24 report, you state below the first table:	14:05:30	
14:02:34	25 Alternatively, if forced to have a separate license	14:05:37	
Page 478		Page 480	
14:02:37	1 for each customer supported, TomorrowNow could have	14:05:44	
14:02:39	2 installed the Oracle Database on a single	14:05:47	
14:02:41	3 processor -- processor server.	14:05:48	
14:02:49	4 You agree that at no time did TomorrowNow	14:05:51	
14:02:51	5 actually have a database installed on just a single	14:05:52	
14:02:54	6 processor server. Right?	14:05:54	
14:02:56	7 A. That's correct.	14:05:56	
14:03:00	8 Q. So what's the relevance of this	14:05:57	
14:03:02	9 alternative analysis?	14:06:00	
14:03:05	10 A. The relevance was that based upon	14:06:00	
14:03:09	11 Mr. Gray's report, an alternative way of	14:06:02	
14:03:14	12 accomplishing the same thing would have been to	14:06:05	
14:03:18	13 acquire single processor servers, and if you had	14:06:07	
14:03:21	14 done that, then you would be in this other	14:06:09	
14:03:26	15 alternative realm where pricing could be done on	14:06:10	
14:03:30	16 the Standard Edition.	14:06:13	
14:03:32	17 And the reason for that was, Mr. Meyer had	14:06:16	
14:03:38	18 included 71 customers in his analysis. And if you	14:06:26	
14:03:44	19 assumed that each customer would have to have its	14:06:27	
14:03:51	20 own server and be kept separate, then you would	14:06:30	
14:03:53	21 need licenses for each one of those customers.	14:06:33	
14:03:57	22 So you take the Standard Edition license	14:06:35	
14:03:59	23 of \$15,000 per, multiply it by the 71, and you get	14:06:38	
14:04:03	24 the number that's here.	14:06:43	
14:04:05	25 Q. So this method is based on what	14:06:47	

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Page 525		Page 527	
15:21:52		15:24:29	1 period of time.
15:21:57		15:24:30	2 MR. PICKETT: Q. Was it vibrant in
15:22:00		15:24:32	3 January 2005, as you've used that word?
15:22:04		15:24:35	4 A. It was -- there were a few players in the
15:22:07		15:24:44	5 market at that point, and the market was vibrant in
15:22:10		15:24:47	6 that I think a lot of companies had recognized that
15:22:12		15:24:49	7 there was an opportunity and were in the process of
15:22:14		15:24:53	8 getting into the market.
15:22:16		15:24:55	9 So that over that period of time that you
15:22:18		15:24:59	10 referred to, there -- there was substantial growth.
15:22:20		15:25:03	11 That growth would have been the result of efforts
15:22:22		15:25:06	12 that would have preceded the actual announcement of
15:22:24		15:25:10	13 any particular third-party vendor's services.
15:22:24		15:25:15	14 Q. When you described the market as vibrant
15:22:29		15:25:16	15 in your report, what did you you mean?
15:22:34		15:25:18	16 MR. McDONELL: Asked and answered.
15:22:39		15:25:18	17 THE WITNESS: I meant that it was -- it
15:22:43		15:25:21	18 was developing, it was a developing market, it was
15:22:46		15:25:25	19 a market there were numerous players coming into.
15:22:47		15:25:31	20 And in my view, that's the definition of a vibrant
15:22:51		15:25:35	21 market.
15:22:54		15:25:35	
15:22:54		15:25:36	
15:22:55		15:25:40	
15:23:01		15:25:41	
Page 526		Page 528	
15:23:04		15:25:42	
15:23:07		15:25:46	
15:23:09		15:25:50	
15:23:10		15:25:56	
15:23:11		15:26:11	5 MR. PICKETT: Q. Did you or are you
15:23:12		15:26:15	6 purporting to provide a market survey of
15:23:19		15:26:17	7 third-party alternatives for the PeopleSoft,
15:23:20		15:26:20	8 JD Edwards, and Siebel products to demonstrate that
15:23:28		15:26:25	9 the market is vibrant?
15:23:30		15:26:27	10 MR. McDONELL: Vague and ambiguous.
15:23:35		15:26:29	11 THE WITNESS: No. I wasn't -- I'm sorry.
15:23:36		15:26:32	12 MR. McDONELL: And compound. Pardon me.
15:23:42		15:26:33	13 THE WITNESS: Did I -- I didn't try to --
15:23:54		15:26:37	14 I didn't do the analysis to try and demonstrate it
15:23:57		15:26:40	15 was a vibrant market. I did the analysis and
15:24:03		15:26:44	16 described what I found as a vibrant market.
15:24:04	17 Q. I didn't intend it to, just to clarify.	15:26:56	
15:24:07	18 And I'm sorry for interrupting, but maybe I can	15:26:57	
15:24:11	19 clarify.	15:26:59	
15:24:12	20 Your opinion is there was a vibrant market	15:26:59	
15:24:15	21 from January 2005 through the wind-down of	15:27:01	
15:24:18	22 TomorrowNow?	15:27:03	
15:24:20	23 MR. McDONELL: Misstates the testimony.	15:27:06	
15:24:23	24 THE WITNESS: There was a significant and	15:27:09	
15:24:26	25 growing market for third-party support during that	15:27:15	

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16:05:58		16:08:44	
16:06:04		16:08:47	
16:06:07		16:08:51	
16:06:11		16:08:54	
16:06:11		16:08:58	
16:06:31		16:08:59	
16:06:35		16:09:02	
16:06:42		16:09:06	
16:06:46		16:09:10	
16:06:47		16:09:11	
16:06:48		16:09:12	
16:06:49		16:09:14	
16:06:51		16:09:17	
16:06:53		16:09:18	
16:06:54		16:09:20	
16:06:59		16:09:21	
16:07:01		16:09:26	
16:07:03		16:09:27	
16:07:04		16:09:28	
16:07:06		16:09:31	
16:07:13		16:09:35	
16:07:15		16:09:37	
16:07:18		16:09:38	
16:07:20		16:09:43	
16:07:21		16:09:46	
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16:07:21		16:09:46	
16:07:24		16:09:47	
16:07:30		16:09:49	
16:07:34		16:09:52	
16:07:37		16:09:53	
16:07:43		16:09:56	
16:07:46		16:10:08	7 MR. PICKETT: Q. Let me ask you, please,
16:07:49		16:10:09	8 to turn to page 141.
16:07:59		16:10:16	9 The last sentence of the first paragraph
16:08:03		16:10:17	10 states:
16:08:04		16:10:18	11 Thus, while not every third-party vendor
16:08:07		16:10:21	12 is an acceptable substitute for a given
16:08:10		16:10:23	13 customer, many of these firms do have
16:08:12		16:10:25	14 reasonably similar product offerings
16:08:16		16:10:28	15 available to customers at any given point in
16:08:20		16:10:30	16 time, and several have been available
16:08:23		16:10:32	17 concurrently in the marketplace along with
16:08:24		16:10:35	18 TomorrowNow's product.
16:08:26		16:10:39	19 What expertise do you have of ERP vendor
16:08:29		16:10:44	20 product offerings that would allow you to provide
16:08:34		16:10:47	21 expert opinion on the reasonable similarity of
16:08:36		16:10:51	22 product offerings?
16:08:39		16:10:54	23 MR. McDONELL: Object to the form, asked
16:08:40		16:10:54	24 and answered.
16:08:42		16:10:56	25 THE WITNESS: I don't -- I don't believe I

57 (Pages 545 to 548)

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Page 549		Page 551
16:10:58	1 need that expertise to do what's being referenced	16:14:05
16:11:01	2 here. These are statements made by these vendors	16:14:10
16:11:08	3 themselves, and for the most part, the terminology	16:14:13
16:11:13	4 and vocabulary they use to describe their services	16:14:15
16:11:18	5 is similar if not identical one to the other.	16:14:20
16:11:26	6 So I'm able to read what they say about	16:14:26
16:11:31	7 themselves, and I've incorporated that into my	16:14:32
16:11:34	8 analysis.	16:14:35
16:11:35	9 MR. PICKETT: Q. What analysis did you	16:14:38
16:11:36	10 perform to determine that the firms had reasonably	16:14:38
16:11:40	11 similar product offerings?	16:14:39
16:11:42	12 MR. McDONELL: Asked and answered.	16:14:39
16:11:44	13 THE WITNESS: I read what they said they	16:14:41
16:11:46	14 were offering.	16:14:43
16:11:48		16:14:46
16:11:50		16:14:47
16:11:58		16:14:49
16:12:00		16:14:50
16:12:04		16:14:52
16:12:10		16:14:53
16:12:14		16:14:54
16:12:16		16:14:57
16:12:20		16:15:01
16:12:22		16:15:05
16:12:23		16:15:09
Page 550		Page 552
16:12:28		16:15:14
16:12:32		16:15:16
16:12:39		16:15:19
16:12:42	4 Q. Did you make sure that the third-party	16:15:22
16:12:47	5 service vendors available to a potential customer	16:15:26
16:12:51	6 at the time serviced all versions of all products	16:15:26
16:12:57	7 within the either PeopleSoft, JD Edwards, or Siebel	16:15:29
16:13:02	8 families?	16:15:35
16:13:03	9 MR. McDONELL: Object to the form of the	16:15:39
16:13:04	10 question. Compound, overly broad. Incomplete.	16:15:43
16:13:10	11 THE WITNESS: I didn't do that analysis.	16:15:47
16:13:12	12 I didn't think it was necessary. And as we know,	16:15:52
16:13:17	13 TomorrowNow didn't even support all of the	16:15:53
16:13:20	14 different elements, as a matter of fact.	16:15:56
16:13:24	15 MR. PICKETT: Q. So you haven't looked at	16:16:00
16:13:25	16 which particular elements, to use your word, each	16:16:03
16:13:31	17 of the third-party alternative vendors offered. Is	16:16:04
16:13:36	18 that correct?	16:16:05
16:13:37	19 MR. McDONELL: Same objections.	16:16:08
16:13:37	20 THE WITNESS: I think that's what I just	16:16:13
16:13:39	21 said.	16:16:18
16:13:52		16:16:22
16:13:53		16:16:22
16:13:57		16:16:24
16:14:01		16:16:25

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Page 577	Page 579
16:49:59 16:50:01 16:50:04 16:50:06 16:50:08 16:50:09 16:50:13 16:50:22 16:50:26 16:50:31 16:50:31 16:50:33 16:50:36 16:50:37 16:50:41 16:50:46 16:50:51 16:50:54 16:50:57 16:51:02 16:51:04 16:51:07 16:51:13 16:51:18 16:51:23	16:52:29 16:52:31 16:52:33 16:52:35 16:52:36 16:52:40 17:14:04 17:14:09 17:14:11 17:14:14 17:14:15 17:14:15 17:14:16 17:14:18 17:14:20 17:14:22 17:14:24 17:14:26 17:14:28 17:14:31 17:14:34 17:14:38 17:14:43 17:14:48 17:14:48
Page 578	Page 580
16:51:26 16:51:30 16:51:32 16:51:33 16:51:35 16:51:36 16:51:37 16:51:42 16:51:46 16:51:50 16:51:57 16:52:01 16:52:03 16:52:07 16:52:07 16:52:10 16:52:13 16:52:16 16:52:17 16:52:20 16:52:22 16:52:23 16:52:25 16:52:25 16:52:27	17:14:48 17:14:51 17:14:54 17:14:55 17:14:58 17:15:01 17:15:02 17:15:04 17:15:17 17:15:18 17:16:59 17:17:20 17:17:22 17:17:26 17:17:28 17:17:29 17:17:33 17:17:38 17:17:41 17:17:50 17:17:51 17:17:53 17:17:54 17:17:55 24 17:18:04 25

MR. PICKETT: Q. Similarly, Oracle
considered Versytec, at least as of this time, as a

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Page 581		Page 583
17:18:12	1 low threat level. Correct?	17:20:55
17:18:14	2 MR. McDONELL: Object to the form.	17:20:56
17:18:15	3 THE WITNESS: Again, that -- I'd say	17:21:05
17:18:17	4 that's what the slide deck says.	17:21:08
17:18:19	5 MR. PICKETT: Q. And Klee, also low	17:21:09
17:18:21	6 threat level?	17:21:14
17:18:23	7 MR. McDONELL: Object to the form.	17:21:18
17:18:25	8 THE WITNESS: That's what the deck says.	17:21:22
17:18:27	9 MR. PICKETT: Q. And finally, Conexus as	17:21:24
17:18:29	10 low to medium threat level. Correct?	17:21:30
17:18:31	11 MR. McDONELL: Object to the form.	17:21:35
17:18:32	12 THE WITNESS: Again, yes.	17:21:40
17:18:33	13 MR. PICKETT: Q. Now, you didn't rely on	17:21:44
17:18:36	14 this analysis of key third-party competitors in	17:21:48
17:18:44	15 your market study. Correct?	17:21:52
17:18:48	16 A. No. As I indicated, I did my own analysis	17:21:54
17:18:51	17 of the third-party market, and that was what I	17:21:56
17:19:01	18 thought I needed to do. I -- documents like this	17:21:58
17:19:06	19 tended to be all over the place, so I didn't rely	17:22:00
17:19:12	20 on them. What I did was my own analysis right out	17:22:05
17:19:16	21 of the starting box.	17:22:08
17:19:20	22 Q. Based on the internet?	17:22:10
17:19:22	23 A. That was one of the tools that we used.	17:22:12
17:19:26	24 Q. Now, did you talk to any customers about	17:22:13
17:19:28	25 customers' perceptions of third-party alternatives?	17:22:13
Page 582		Page 584
17:19:35	1 A. There were customer depositions, but I	17:22:15
17:19:39	2 personally didn't speak --	17:22:17
17:19:43	3 Q. Did you rely --	17:22:31
17:19:44	4 A. Speak to the customer.	17:22:34
17:19:45		17:22:37
17:19:47		17:22:41
17:19:51		17:22:42
17:19:54		17:22:43
17:20:02		17:22:49
17:20:04		17:22:55
17:20:07		17:22:59
17:20:09		17:23:03
17:20:13		17:23:07
17:20:17		17:23:11
17:20:21		17:23:14
17:20:24		17:23:16
17:20:31		17:23:19
17:20:34		17:23:22
17:20:34		17:23:27
17:20:35		17:23:30
17:20:40		17:23:35
17:20:42		17:23:38
17:20:45		17:23:40
17:20:47		17:23:43
17:20:51		17:23:48

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Page 601		Page 603	
17:47:40		17:50:31	1 A. Yes.
17:47:41		17:50:32	2 Q. How?
17:47:43		17:50:35	3 A. How was I able to do it?
17:47:48		17:50:37	4 Q. Yes.
17:47:52		17:50:38	5 A. I read it.
17:47:54		17:50:39	6 Q. So on their website in March 14, 2010,
17:47:55		17:50:42	7 what did you read that told you what services they
17:47:59		17:50:44	8 were providing in January of 2005?
17:48:02		17:50:49	9 MR. McDONELL: You should feel free to
17:48:04		17:50:50	10 reference your backup documentation if you need to.
17:48:08		17:50:54	11 THE WITNESS: The footnote at 707
17:48:12		17:50:59	12 references the solutions. And there, what it said
17:48:17		17:51:05	13 was that the company offers a comprehensive
17:48:17		17:51:08	14 portfolio of services, including PeopleSoft
17:48:18		17:51:10	15 consulting and implementation services,
17:48:21		17:51:13	16 customizations, application support, maintenance
17:48:23		17:51:16	17 and upgrade services, integration and migration
17:48:23		17:51:21	18 services, application hosting, product training,
17:48:25		17:51:24	19 and technology and infrastructure services.
17:48:26		17:51:29	20 It goes on to say that they do that for
17:48:27		17:51:31	21 all releases of Financials, Human Capital, Customer
17:48:29		17:51:35	22 Relationship Management, Supply Chain, and
17:48:29		17:51:39	23 Enterprise Performance Management.
17:48:30		17:51:44	24 MR. PICKETT: Q. So how do you know what
17:48:31		17:51:45	25 they were doing in 2005?
Page 602		Page 604	
17:48:32		17:51:55	1 A. Well, they were founded in December of
17:48:33		17:51:57	2 2004 by former PeopleSoft employees. I don't -- I
17:48:37		17:52:02	3 don't recall seeing anything there that suggested
17:48:41		17:52:05	4 their product offering had changed over time.
17:48:44		17:52:10	5 So my assumption is that it was a
17:48:48		17:52:15	6 consistent offering over time. That's the only
17:48:51		17:52:18	7 evidence there is.
17:48:55		17:52:19	8 Q. Well, there's no evidence at all, is
17:49:01	9	17:52:21	9 there? It doesn't say they have offered everything
17:49:02	10	17:52:24	10 since the inception of the company in December '04,
17:49:06	11	17:52:27	11 does it?
17:49:13	12	17:52:28	12 MR. McDONELL: Object to the form of the
17:49:32	13	17:52:28	13 question.
17:49:38	14	17:52:30	14 THE WITNESS: It's the best evidence that
17:49:48	15	17:52:31	15 I have, and I do believe it is evidence that says,
17:49:55	16	17:52:36	16 in one continuous document, that we offer all of
17:49:56	17	17:52:39	17 these services, and we started in December of '04.
17:49:57	18	17:52:43	18 MR. PICKETT: Q. So you think it's
17:49:58	19	17:52:44	19 reasonable to assume that if a company states it
17:50:05	20	17:52:49	20 offers a particular service in March 2010, that
17:50:09	21	17:52:53	21 it's fair to assume it's offered that service from
17:50:11	22	17:52:55	22 the second month it's been in operation back in
17:50:13	23	17:52:58	23 January '05?
17:50:17	24	17:52:59	24 MR. McDONELL: Object to the form.
17:50:22	25	17:53:00	25 MR. PICKETT: Q. Correct?

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Page 605		Page 607
17:53:00	1 A. That was my interpretation of the website.	17:55:59
17:53:03	2 Q. Is that based on your business experience?	17:55:59
17:53:06	3 MR. McDONELL: It's based on reading it.	17:56:03
17:53:11		17:56:07
17:53:12		17:56:11
17:53:16		17:56:15
17:53:21		17:56:19
17:53:24		17:56:22
17:53:32		17:56:24
17:53:35		17:56:27
17:53:37		17:56:29
17:53:41		17:56:34
17:53:44		17:56:36
17:53:45		17:56:36
17:53:48		17:56:39
17:53:59		17:56:43
17:54:00		17:56:50
17:54:01		17:56:52
17:54:05		17:56:55
17:54:08		17:56:57
17:54:10		17:56:58
17:54:11		17:57:00
17:54:13		17:57:02
17:54:14		17:57:07
17:54:17		17:57:12
Page 606		Page 608
17:54:24		17:57:14
17:54:28		17:57:17
17:54:31		17:57:20
17:54:48		17:57:22
17:54:51		17:57:26
17:54:56		17:57:31
17:55:00		17:57:31
17:55:00		17:57:33
17:55:05		17:57:34
17:55:09		17:57:36
17:55:10		17:57:37
17:55:16		17:57:39
17:55:17		17:57:40
17:55:17		17:57:43
17:55:19		17:57:47
17:55:23		17:57:50
17:55:24		17:57:58
17:55:29		17:58:03
17:55:32		17:58:07
17:55:36		17:58:07
17:55:37		17:58:09
17:55:40		17:58:10
17:55:42		17:58:13
17:55:49		17:58:18
17:55:51		17:58:23

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Page 617		Page 619	
18:26:17		18:29:01	
18:26:18		18:29:03	
18:26:20		18:29:05	
18:26:28		18:29:07	
18:26:30		18:29:07	
18:26:30		18:29:08	
18:26:31		18:29:11	
18:26:31		18:29:12	
18:26:33		18:29:12	
18:26:36		18:29:13	
18:26:38		18:29:14	
18:26:40		18:29:17	
18:26:47		18:29:19	
18:26:53		18:29:22	
18:26:55		18:29:27	
18:26:59		18:29:31	
18:27:02		18:29:35	
18:27:05		18:29:37	
18:27:09		18:29:41	
18:27:12		18:29:44	
18:27:17		18:29:49	
18:27:20		18:29:53	
18:27:22	23	18:29:57	
18:27:23	24	18:30:03	
18:27:29	25	18:30:05	
Page 618		Page 620	
18:27:32	1	18:30:10	
18:27:33	2	18:30:11	
18:27:37	3	18:30:17	
18:27:40	4	18:30:18	
18:27:41	5	18:30:22	
18:27:47	6	18:30:25	
18:27:51	7	18:30:29	
18:27:58	8	18:30:33	
18:28:00	9	18:30:35	
18:28:04	10	18:30:37	
18:28:08	11	18:30:39	
18:28:11	12	18:30:44	
18:28:14	13	18:30:46	
18:28:18	14	18:30:49	
18:28:23	15	18:30:54	15
18:28:26	16	18:30:55	16
18:28:29	17	18:30:58	17
18:28:35	18	18:31:03	18
18:28:38	19	18:31:03	19
18:28:42	20	18:31:07	20
18:28:46	21	18:31:07	21
18:28:48	22	18:31:08	22
18:28:51	23	18:31:12	23
18:28:55	24	18:31:15	24
18:29:00		18:31:17	25
<p>MR. McDONELL: Misstates the testimony.</p> <p>Object to the form of the question. Incomplete hypothetical.</p> <p>THE WITNESS: I wouldn't put it that way.</p> <p>I would -- just a minute -- I would say that in common with most people looking at advertising or marketing pieces, I would employ a healthy scepticism that says, well, does that make sense?</p> <p>Is that everything I need to know to make this decision? Is this person who's marketing their product telling me everything?</p> <p>And that a general rule, most marketing pieces would not do that. They have a certain bias towards their product or service, and the other guy's marketing pieces have a bias towards their product and services.</p> <p>If you disagree with that, then, you know, you're the perfect recipient of an ad. But I don't think that's -- I don't think that's reality. But that doesn't make any document unreliable. It's perfectly truthful. People do that all the time.</p> <p>I've been involved with many companies where we emphasize our strengths, but we didn't tell any lies in our documents, in our marketing materials.</p>		<p>MR. PICKETT: Q. So when you read a marketing piece, do you discount the statements understanding that they will be one-sided?</p> <p>MR. PICKETT: Q. Every single website of a third-party support provider that you examined was consisting entirely of marketing materials, was it not?</p> <p>MR. McDONELL: Object to the form.</p> <p>THE WITNESS: Yes.</p> <p>MR. PICKETT: Q. So every single thing that you read from the internet about these third-party servicers should have been subject to a healthy skepticism. Correct?</p> <p>MR. McDONELL: Object to the form of the</p>	

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Page 621		Page 623	
18:31:18	1 question. Misstates testimony.	18:34:06	1 or do you accept it at face value?
18:31:19	2 THE WITNESS: That's correct. And -- and,	18:34:08	2 MR. McDONELL: Asked and answered.
18:31:22	3 wait a minute, wait, wait.	18:34:09	3 THE WITNESS: No. I think if they say --
18:31:23	4 And that was why I did a market study.	18:34:11	4 "we offer this" statement -- I put that in the same
18:31:28	5 And I used the internet to verify what was offered.	18:34:14	5 category as, the price of this product is \$10.
18:31:36	6 And it's one thing to say one of these qualitative	18:34:17	6 MR. PICKETT: Q. Now, you know that
18:31:40	7 statements like, you know, the only really viable	18:34:18	7 TomorrowNow did not offer a full array of services
18:31:44	8 alternative is us and Oracle. That's a -- that's a	18:34:21	8 for every single PeopleSoft and JD Edwards product.
18:31:49	9 judgmental thing.	18:34:25	9 Correct?
18:31:50	10 But to -- if they were saying we offer	18:34:26	10 A. That's my understanding.
18:31:54	11 PeopleSoft support for their HR systems and didn't	18:34:28	11 Q. And yet you know their website said they
18:31:58	12 actually do that, that would be a statement of an	18:34:29	12 did. Correct?
18:32:01	13 entirely different order.	18:34:33	13 A. It may well have done -- wait, wait.
18:32:04	14 So yes, I didn't just rely on one	18:34:36	14 So we're looking at the reality of what
18:32:08	15 document. I did a study that tried to gather	18:34:38	15 they actually did. If somebody had come along --
18:32:13	16 information, pull that information together,	18:34:44	16 I'm fairly confident that this is what would have
18:32:17	17 present it in a presentation, and at the end of the	18:34:46	17 happened. If somebody had come along, a customer
18:32:20	18 day, cite to the particular documents that I relied	18:34:49	18 had said, we need support for this piece, my guess
18:32:25	19 upon to make that presentation.	18:34:52	19 is they could have provided that.
18:32:29	20 In the -- I think it was Citigus, we had a	18:34:54	20 So one is the reality of the delivery
18:32:32	21 whole series of documents that I pulled from the	18:34:57	21 versus the reality of the offer. They said we'll
18:32:36	22 website that I relied upon to show that the company	18:35:01	22 take care of everything, I think they will probably
18:32:41	23 was still in business. And I think that's pretty	18:35:04	23 have delivered on that promise.
18:32:46	24 strong evidence that that was true.	18:35:06	24 But as a matter of fact, they didn't
18:32:48	25 So I think at every step of the way, I	18:35:10	25 actually do that because some of their customers --
Page 622		Page 624	
18:32:52	1 relied on the most reliable information, and I've	18:35:13	1 none of their customers in particular wanted that
18:32:56	2 told you what it is. And if you find something	18:35:16	2 service.
18:33:00	3 that's disputes that, I'm sure you'll show it to me	18:35:20	
18:33:03	4 at some point.	18:35:22	
18:33:06	5 MR. PICKETT: Q. So it depends on the	18:35:24	
18:33:07	6 nature of the marketing statement whether you have	18:35:25	
18:33:09	7 healthy skepticism of it or not. Is that what	18:35:27	
18:33:12	8 you're saying?	18:35:28	
18:33:13	9 MR. McDONELL: Object to the form of the	18:35:29	
18:33:13	10 question, misstates the testimony.	18:35:32	
18:33:14	11 THE WITNESS: I think it does depend on	18:35:35	
18:33:16	12 the nature of the statement. For example, if an	18:35:36	
18:33:19	13 advert said, we sell our product at \$10 an item, I	18:35:37	
18:33:25	14 don't have a lot of skepticism about the \$10 an	18:35:39	
18:33:29	15 item. I can go to the store or I can call them up	18:35:44	
18:33:32	16 and say I want one. If they say the price is \$15,	18:35:45	
18:33:36	17 that would be a shock. But if they said, oh, a	18:35:50	
18:33:41	18 washing powder washes whiter than the other guy's	18:35:51	
18:33:44	19 washing powder, that's -- there's a term of art,	18:35:54	
18:33:47	20 it's puffery. It's the -- it's a statement that's	18:35:56	
18:33:52	21 got some unverifiable quality to it, whatever that	18:35:59	
18:33:55	22 might be. And saying we're better than the other	18:36:01	
18:34:01	23 guy is one of those things.	18:36:03	
18:34:03	24 MR. PICKETT: Q. Is the statement that "I	18:36:04	
18:34:04	25 offer this service" subject to healthy skepticism,	18:36:05	

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18:48:41		18:51:46	
18:48:48		18:51:50	
18:48:53		18:51:52	
18:49:00		18:51:55	
18:49:02		18:51:57	
18:49:07		18:52:01	
18:49:11		18:52:06	
18:49:12		18:52:09	
18:49:15		18:52:13	
18:49:16		18:52:17	
18:49:19		18:52:18	
18:49:20		18:52:20	
18:49:26		18:52:22	
18:49:27		18:52:24	
18:49:29		18:52:29	
18:49:31		18:52:33	
18:49:37		18:52:35	
18:49:39		18:52:45	
18:49:43		18:52:53	
18:49:53		18:52:56	
18:49:59		18:53:02	
18:50:06		18:53:06	
18:50:13		18:53:11	
18:50:18		18:53:14	
18:50:19		18:53:19	
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18:50:36		18:53:36	
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18:50:43		18:53:42	
18:50:46		18:53:50	
18:50:48		18:53:55	
18:50:49		18:53:58	
18:50:54		18:54:03	
18:51:01		18:54:07	
18:51:04		18:54:11	
18:51:10		18:54:13	
18:51:14		18:54:17	
18:51:19		18:54:20	
18:51:22		18:54:23	
18:51:25		18:54:27	
18:51:32		18:54:32	
18:51:34		18:54:36	19 Q. Is there any publication you're aware of
18:51:37		18:54:38	20 that supports your use of the joint exclusion
18:51:39		18:54:42	21 criteria methodology?
18:51:40		18:54:47	22 MR. McDONELL: Asked and answered. Object
18:51:42		18:54:47	23 to the form.
18:51:42		18:54:49	24 THE WITNESS: Yeah. Like I said, the--
18:51:44		18:54:51	25 the documents, books, treatises, publications,

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Page 637		Page 639
18:54:57	1 classes that you might do that talk about this	18:57:50
18:55:03	2 process, they're general. They don't say, this is	18:57:53
18:55:09	3 how you do this in every case. Because the -- it's	18:57:54
18:55:12	4 so fact-intensive.	18:57:58
18:55:15	5 As we found in this particular case, it's	18:58:04
18:55:17	6 very, very fact intensive. And it's -- the only	18:58:08
18:55:26	7 way to do this was on a customer-by-customer basis.	18:58:11
18:55:29	8 You couldn't apply some -- some, you know,	18:58:16
18:55:32	9 generalized notion as to why customers would do	18:58:19
18:55:36	10 what they did.	18:58:20
18:55:37	11 So we analyzed it for every single	18:58:25
18:55:42	12 customer and developed these pools as a way of	18:58:27
18:55:49	13 conveying what we found in an efficient manner.	18:58:31
18:55:55	14 If you care to, we can go through every	18:58:34
18:55:57	15 single customer one at a time. That would be fine	18:58:36
18:56:00	16 by me. I have all the data that I need to do that.	18:58:39
18:56:05		18:58:43
18:56:06		18:58:46
18:56:11		18:58:49
18:56:14		18:58:52
18:56:19		18:58:54
18:56:20		18:58:59
18:56:24		18:59:01
18:56:26		18:59:05
18:56:27		18:59:10
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18:56:28		18:59:15
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18:56:34		18:59:24
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18:56:37		18:59:34
18:56:40		18:59:37
18:56:44		18:59:41
18:56:48		18:59:44
18:56:52		18:59:47
18:56:53		18:59:51
18:56:54		18:59:55
18:56:58		18:59:59
18:57:02		19:00:03
18:57:02		19:00:04
18:57:05		19:00:10
18:57:08		19:00:13
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18:57:27		19:00:25
18:57:32		19:00:29
18:57:34		19:00:31
18:57:39		19:00:34
18:57:43		19:00:35
18:57:46		19:00:36

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Page 641		Page 643
19:00:38		19:03:22
19:00:39		19:03:24
19:00:40		19:03:30
19:00:40	4 Q. And have you seen any publication that	19:03:34
19:00:47	5 references a methodology that results in exclusion	19:03:39
19:00:51	6 for certain combinations of exclusion criteria?	19:03:43
19:00:55	7 MR. McDONELL: Asked and answered several	19:03:48
19:00:56	8 times now. I object to the form of the question	19:03:53
19:00:57	9 and the repeated asking of it.	19:03:56
19:01:03	10 THE WITNESS: I don't know what else I --	19:03:59
19:01:05	11 I'm getting hoarse talking to you about why I did	19:04:03
19:01:11	12 what I did.	19:04:06
19:01:12	13 MR. PICKETT: Q. Well, if you could	19:04:13
19:01:13	14 reference a publication, that could be helpful.	19:04:17
19:01:15	15 MR. McDONELL: Counsel, don't interrupt.	19:04:21
19:01:16	16 MR. PICKETT: You said you don't know what	19:04:24
19:01:16	17 you could do. I can tell you what you could do.	19:04:27
19:01:17	18 MR. McDONELL: Counsel, don't interrupt	19:04:28
19:01:17	19 the witness's answer, please.	19:04:32
19:01:19	20 THE WITNESS: I have said that there is no	19:04:35
19:01:21	21 treatise that would say that this is exactly how	19:04:39
19:01:27	22 you do it. The treatises say you have to do it.	19:04:44
19:01:30	23 This approach that I have developed here	19:04:47
19:01:34	24 is my effort to identify the behavior of the	19:04:50
19:01:40	25 customer. Why did the customer do what they did?	19:04:53
Page 642		Page 644
19:01:44	1 There isn't a treatise that tells you how	19:04:57
19:01:48	2 to go about that. You look at the evidence. I	19:05:00
19:01:53	3 think there are probably treatises that say experts	19:05:04
19:01:56	4 should look at the evidence. You gather up	19:05:04
19:01:59	5 relevant information. There's probably a treatise	19:05:08
19:02:02	6 that talks about that.	19:05:12
19:02:05	7 And then based upon the evidence that	19:05:15
19:02:07	8 you've gathered, you make a determination. I can't	19:05:19
19:02:12	9 think of a particular treatise that would deal with	19:05:23
19:02:17	10 that, but I'm sure there are treatises on causation	19:05:24
19:02:20	11 that would say, if you are going to make a claim to	19:05:26
19:02:27	12 have lost profits or whatever the damage remedy	19:05:30
19:02:31	13 might be, then you have to be able to show that	19:05:35
19:02:33	14 what you're complaining about, this illegal act	19:05:38
19:02:36	15 that you're complaining about, caused that loss.	19:05:41
19:02:42	16 And in this case, with this set of facts,	19:05:44
19:02:44	17 this is how you do it.	19:05:47
19:02:47	:	19:05:51
19:02:48	:	19:05:52
19:02:52	:	19:05:55
19:02:55	:	19:05:58
19:03:03	:	19:06:04
19:03:07	:	19:06:05
19:03:10	:	19:06:06
19:03:16	:	19:06:07

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19:06:09		19:08:29	
19:06:15		19:08:32	
19:06:18		19:08:36	3 MR. PICKETT: Q. Did you ever use a
19:06:22		19:08:37	4 formula that if a particular customer falls in
19:06:27		19:08:42	5 either the first or second category and there's at
19:06:30		19:08:45	6 least one more of a third group of categories,
19:06:34		19:08:48	7 that's in, but otherwise not?
19:06:37		19:08:50	8 MR. McDONELL: Object to the form. Asked
19:06:39		19:08:51	9 and answered repeatedly.
19:06:40		19:08:56	10 THE WITNESS: I don't think so.
19:06:41		19:09:00	
19:06:42		19:09:02	
19:06:43		19:09:07	
19:06:44		19:09:10	
19:06:45		19:09:14	
19:06:47		19:09:19	
19:06:49		19:09:24	
19:06:50		19:09:29	
19:06:51		19:09:33	
19:06:53		19:09:34	
19:06:54		19:09:39	
19:06:58		19:09:42	
19:07:04		19:09:46	
19:07:10		19:09:48	
19:07:13		19:09:49	
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19:07:18		19:09:54	
19:07:21		19:09:57	
19:07:25		19:10:03	
19:07:30		19:10:06	
19:07:34		19:10:10	
19:07:36		19:10:16	
19:07:37		19:10:19	
19:07:37		19:10:22	
19:07:39		19:10:29	
19:07:40		19:10:34	
19:07:42		19:10:37	
19:07:44		19:10:41	
19:07:49		19:10:46	
19:07:49		19:10:51	
19:07:51		19:10:57	
19:07:55		19:11:01	
19:08:02		19:11:04	
19:08:08		19:11:08	
19:08:11		19:11:14	
19:08:12		19:11:18	
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19:08:25		19:11:33	

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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 time
9 and place therein state, and that the testimony of
10 said witness was thereafter reduced to typewriting,
11 by computer, under my direction and supervision;

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

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

22
23 DATED: June 17th, 2010

24 Holly Thuman
25 HOLLY THUMAN, CSR

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
STEPHEN K. CLARKE

VOLUME 3; PAGES 652 - 969

THURSDAY, JUNE 10, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

REPORTED BY: HOLLY THUMAN, CSR No. 6834, RMR, CRR
(1-427123)

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09:06:41		09:10:02
09:06:41		09:10:07
16:29:58		09:10:11
09:06:43		09:10:12
09:06:43		09:10:15
09:06:45		09:10:18
09:06:46	9 Q. Did you rely on Mr. Sommer to decide on	09:10:21
09:06:50	10 which exclusion pools to create?	09:10:25
09:06:55	11 A. I don't think I relied on him for a	09:10:27
09:06:58	12 specific exclusion pool. But I did rely on him to	09:10:30
09:07:03	13 gain and develop my understanding of the market and	09:10:30
09:07:07	14 the customers in the market, what might motivate	09:10:32
09:07:11	15 them.	09:10:33
09:07:13		09:10:34
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09:07:23		09:10:38
09:07:24		09:10:40
09:07:25		09:10:46
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09:07:50		09:11:12
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09:07:59		09:11:16
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09:08:02		09:11:22
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09:08:53		09:11:42
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09:08:56		09:11:47
09:08:59		09:11:50
09:09:02		09:11:55
09:09:09		09:12:00
09:09:11		09:12:04
09:09:26		09:12:07
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09:09:47		09:12:21
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09:14:02		09:17:24	5
09:14:07		09:17:24	
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Page 665		Page 667	
09:18:48		09:21:29	1 Service evaluation is an automatic
09:18:53		09:21:31	2 excluder. Right?
09:18:55		09:21:33	3 A. Yes.
09:18:56		09:21:34	4 Q. So if a customer conducted an evaluation
09:18:59		09:21:40	5 of a third-party vendor before choosing
09:19:02		09:21:44	6 TomorrowNow, that would automatically exclude them
09:19:07		09:21:47	7 from the lost profits calculation. Correct?
09:19:14		09:21:49	8 A. Correct.
09:19:17		09:21:51	
09:19:22		09:21:55	
09:19:24		09:21:59	
09:19:26		09:21:59	
09:19:27		09:22:02	
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09:19:51		09:22:29	
09:19:56		09:22:32	
09:19:59		09:22:37	
09:20:02		09:22:41	
09:20:04		09:22:45	
09:20:07		09:22:49	
Page 666		Page 668	
09:20:11		09:22:52	
09:20:17		09:22:53	
09:20:19	3 MR. PICKETT: Q. Well, there's also	09:22:56	
09:20:20	4 judgment in deciding whether it's an automatic	09:22:57	
09:20:23	5 exclusion or a potential exclusion. Correct?	09:22:58	
09:20:26	6 A. There's no question that at that level,	09:23:04	
09:20:28	7 that's a judgment call, and it's a judgment based	09:23:07	
09:20:30	8 upon the evidence that the facts that I've gathered	09:23:11	
09:20:36	9 indicate that the change was not a result of the	09:23:13	
09:20:39	10 alleged actions.	09:23:15	
09:20:41	11 It's not judgment in the sense that, well,	09:23:18	11 Q. So can you describe for me why a
09:20:45	12 we should have a discount rate of 8 percent or we	09:23:25	12 customer's consideration of some third-party
09:20:49	13 should have a discount rate of 12 percent. It's	09:23:28	13 service prior to choosing TomorrowNow would put you
09:20:51	14 not quite like that. It's by looking at the	09:23:31	14 in the automatic exclusion, whereas a decision not
09:20:55	15 behavior itself and saying, this shows that the	09:23:35	15 to return to Oracle after you've used TomorrowNow
09:20:58	16 alleged actions were not the cause of the change.	09:23:38	16 puts you in the possible exclusion?
09:21:02	17 So there's a judgment involved in that,	09:23:41	17 How do you distinguish that for purposes
09:21:05	18 and there's a judgment involved in deciding whether	09:23:44	18 of your methodology?
09:21:09	19 they're specific or automatic exclusions versus	09:23:47	19 A. If a customer conducted a service
09:21:12	20 possible exclusions.	09:23:51	20 evaluation of multiple vendors and then acted upon
09:21:15	21 But it's a -- it's a judgment of a	09:23:56	21 that evaluation by leaving Oracle --
09:21:17	22 different nature, I think.	09:24:02	22 Q. Choosing TomorrowNow.
09:21:20	23 Q. Let me see if I can understand it better	09:24:03	23 A. In this particular case, they -- but I'm
09:21:24	24 if I give you your own examples. And let me pick	09:24:05	24 giving you the general approach to this pool, if
09:21:27	25 these two.	09:24:09	25 you like.

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09:24:43	8	09:27:24	8
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09:25:13		09:27:47	18
09:25:16		09:27:49	19
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09:26:00		09:28:21	6
09:26:03		09:28:24	7
09:26:07		09:28:31	8
09:26:10		09:28:35	9
09:26:13		09:28:40	10
09:26:16		09:28:44	11
09:26:20		09:28:48	12
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09:26:30		09:28:58	15
09:26:33		09:29:02	16
09:26:35		09:29:06	17
09:26:40		09:29:09	18
09:26:46		09:29:14	19
09:26:49		09:29:18	20
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09:34:49		09:37:39	
09:34:52		09:37:40	
09:34:55		09:37:42	
09:34:56		09:37:45	
09:34:59		09:37:49	
09:34:59		09:37:57	12 Q. You -- let me ask it this way: Did you
09:35:00		09:38:04	13 come across the fact that some of the customers
09:35:03		09:38:06	14 listed in Oracle's "At Risk" report never left
09:35:04		09:38:11	15 Oracle?
09:35:07		09:38:12	16 A. Did I come across that? Yes.
09:35:12		09:38:14	17 Q. And did you also notice that some of those
09:35:16		09:38:17	18 customers who never left exhibited some of the
09:35:23		09:38:20	19 behavior that would have put them into one or more
09:35:29		09:38:24	20 of your exclusion pools?
09:35:31		09:38:26	21 MR. McDONELL: Vague and ambiguous.
09:35:34		09:38:27	22 THE WITNESS: Yes. I think that's quite
09:35:38		09:38:29	23 possible. I couldn't name you one, because I
09:35:43		09:38:32	24 wasn't -- I didn't then do any further analysis of
09:35:48		09:38:35	25 those customers, because if they never left Oracle,
Page 678		Page 680	
09:35:50		09:38:39	1 I -- you never produced the information necessary
09:35:53		09:38:42	2 to do that.
09:35:55		09:38:43	3 So there would be smatterings of
09:36:00		09:38:45	4 information about the never-left-Oracle customers,
09:36:05		09:38:50	5 because many of these documents would name lots of
09:36:09		09:38:52	6 customers. They were -- they weren't specific to a
09:36:13		09:38:54	7 customer. So when I ran my searches, I'd get the
09:36:17		09:38:58	8 same document coming up a hundred times, because
09:36:20		09:39:01	9 there are a hundred customer names in it, and I was
09:36:23		09:39:05	10 searching on a customer name.
09:36:26		09:39:07	11 MR. PICKETT: Q. Did you also notice that
09:36:31		09:39:08	12 some of the customers who never left Oracle but
09:36:34		09:39:10	13 nonetheless were on the "At Risk" report exhibited
09:36:37		09:39:15	14 behavior that would place them in one of the
09:36:38		09:39:18	15 automatic exclusion pools, such as service
09:36:41		09:39:21	16 evaluation?
09:36:48		09:39:22	17 MR. McDONELL: It's vague and ambiguous,
09:36:52		09:39:23	18 incomplete without showing the document to the
09:36:55		09:39:24	19 witness.
09:36:58		09:39:28	20 THE WITNESS: I don't recall how the "At
09:37:01		09:39:32	21 Risk" report might have identified the risk factor
09:37:05		09:39:36	22 for specific customers who didn't leave. If they
09:37:11		09:39:40	23 didn't leave Oracle, I really didn't spend any time
09:37:17		09:39:44	24 studying them.
09:37:19		09:39:45	25 That wouldn't surprise me if that

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Page 681		Page 683
09:39:47	1 happened, but I couldn't tell you.	09:42:14
09:39:49		09:42:17
09:39:50		09:42:21
09:39:53		09:42:23
09:39:58		09:42:26
09:40:05		09:42:27
09:40:06		09:42:29
09:40:07		09:42:32
09:40:08		09:42:32
09:40:10		09:42:35
09:40:13		09:42:35
09:40:16		09:42:38
09:40:18		09:42:41
09:40:21	14 MR. PICKETT: Q. Right. Would you agree	09:42:59
09:40:23	15 that Oracle had some customers who would fit one or	09:43:02
09:40:33	16 more of your automatic exclusion pools, but	09:43:09
09:40:36	17 nonetheless, in the real world, never left?	09:43:14
09:40:39	18 MR. McDONELL: Asked and answered several	09:43:18
09:40:39	19 times. Object that the question is vague and	09:43:21
09:40:44	20 incomplete without showing the witness the document	09:43:24
09:40:45	21 you're referring to.	09:43:27
09:40:49	22 THE WITNESS: As I say, I don't remember	09:43:30
09:40:51	23 if that fact pattern arose. But it wouldn't	09:43:34
09:40:56	24 surprise me if it did.	09:43:39
09:40:58	25 But that -- that's the wrong test. The	09:43:41
Page 682		Page 684
09:41:03	1 right test is related to the customers that did	09:43:45
09:41:06	2 leave. And if they left and went to TomorrowNow,	09:43:50
09:41:12	3 then we're trying to identify the behavior that	09:43:51
09:41:15	4 caused that action.	09:43:53
09:41:19		09:43:56
09:41:24		09:43:58
09:41:28		09:44:01
09:41:33		09:44:02
09:41:36		09:44:05
09:41:37		09:44:06
09:41:39		09:44:09
09:41:43		09:44:09
09:41:48		09:44:17
09:41:50		09:44:21
09:41:52		09:44:30
09:41:52		09:44:33
09:41:53		09:44:35
09:41:53		09:44:36
09:41:56		09:44:40
09:41:59		09:44:50
09:42:00		09:44:52
09:42:01		09:44:54
09:42:05		09:44:55
09:42:07		09:44:57
09:42:09		09:45:00

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Page 709		Page 711	
10:33:48		10:36:46	
10:33:51		10:36:49	
10:33:54		10:36:52	
10:33:57		10:36:56	
10:33:59		10:37:03	
10:34:02		10:37:07	
10:34:05		10:37:13	
10:34:08		10:37:16	
10:34:12		10:37:20	
10:34:17		10:37:23	
10:34:25		10:37:24	
10:34:29		10:37:26	
10:34:33		10:37:30	
10:34:37		10:37:33	
10:34:41		10:37:35	
10:34:47		10:37:35	
10:34:55		10:37:38	
10:34:58		10:37:43	
10:35:00		10:37:46	
10:35:04		10:37:49	
10:35:08		10:37:53	
10:35:10		10:37:57	
10:35:12		10:37:59	
10:35:19		10:38:00	
10:35:22		10:38:01	
Page 710		Page 712	
10:35:23		10:38:02	
10:35:28		10:38:04	
10:35:29		10:38:07	
10:35:32		10:38:11	
10:35:34		10:38:14	
10:35:35		10:38:15	
10:35:39		10:38:18	
10:35:42		10:38:25	8 Q. So are you now saying that the customers
10:35:45		10:38:28	9 are in this pool not because there was evidence of
10:35:47		10:38:32	10 an evaluation of third-party alternatives, but
10:35:49		10:38:35	11 because you did a holistic approach analysis of all
10:35:49		10:38:39	12 the factors relating to these customers?
10:35:52		10:38:42	13 MR. McDONELL: Objection.
10:35:54		10:38:43	14 MR. PICKETT: Q. Which is it?
10:35:57		10:38:44	15 MR. McDONELL: Objection. Argumentative,
10:36:01		10:38:45	16 assumes facts not in evidence.
10:36:07		10:38:48	17 THE WITNESS: No.
10:36:08		10:38:50	18 MR. PICKETT: Q. Which -- what did you do
10:36:11		10:38:51	19 then? Was it because they evaluated or because of
10:36:16		10:38:54	20 all these other factors that you're now bringing
10:36:21		10:38:56	21 into the answer?
10:36:25		10:38:59	22 MR. McDONELL: Object to your
10:36:31		10:39:04	23 argumentative question, assumes facts not in
10:36:35		10:39:05	24 evidence, and misstates the testimony. This has
10:36:39		10:39:07	25 been asked and answered.

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Page 713		Page 715
10:39:08	1 THE WITNESS: You know, I don't know how	10:42:10
10:39:09	2 much more clear I can be.	10:42:12
10:39:11	3 MR. PICKETT: Q. Try, please.	10:42:19
10:39:13	4 A. I am about to. Try it again.	10:42:20
10:39:17	5 I gathered evidence. I'm going to take	10:42:22
10:39:21	6 you back to when I talked about there just being	10:42:24
10:39:24	7 one customer.	10:42:27
10:39:25	8 If there was only one customer, we	10:42:28
10:39:28	9 wouldn't have a pool. We wouldn't need a pool. If	10:42:29
10:39:32	10 there was only one customer, we would gather all of	10:42:33
10:39:35	11 the evidence related to that customer, and we'd	10:42:38
10:39:39	12 look at all of the evidence, and we'd say, this	10:42:41
10:39:42	13 customer should be excluded because here in the	10:42:44
10:39:46	14 body of evidence that we're looking at, there are	10:42:47
10:39:49	15 reasons to believe that it wasn't the alleged	10:42:53
10:39:53	16 actions that caused them to do what they did.	10:42:58
10:39:57	17 We don't have one customer. We have a lot	10:43:02
10:40:00	18 of customers. I have ten binders worth of	10:43:04
10:40:04	19 customers, and they're all 4 or 5 inches thick,	10:43:10
10:40:07	20 just like this one. We can go through them one at	10:43:11
10:40:10	21 a time. But in order to make the process more	10:43:13
10:40:14	22 efficient -- at least I thought it was going to be	10:43:16
10:40:17	23 more efficient; that turns out maybe it's not going	10:43:19
10:40:20	24 to be the case -- that we could talk about these	10:43:22
10:40:22	25 customers that exhibited certain characteristics as	10:43:25
Page 714		Page 716
10:40:27	1 a group.	10:43:29
10:40:30	2 Maybe that was a bad idea. But if taking	10:43:33
10:40:36	3 a look at the body of evidence for one customer at	10:43:39
10:40:39	4 a time they should be excluded, then they should be	10:43:41
10:40:47	5 excluded.	10:43:45
10:40:48	6 The characterization that I've made here	10:43:47
10:40:50	7 of grouping customers and talking about them as a	10:43:49
10:40:53	8 pool that says, if their parent owner said, you	10:43:53
10:40:58	9 will move your system to SAP or whatever, then	10:43:55
10:41:08	10 clearly the alleged actions didn't cause that move.	10:44:04
10:41:13	11 If that was the case for 20 customers, and	10:44:11
10:41:18	12 I gave you this example yesterday, it will be much	10:44:12
10:41:21	13 more efficient for us to say, if customers exhibit	10:44:18
10:41:24	14 that behavior, let's talk about them as a group.	10:44:19
10:41:31	15 I -- I'm sorry if the exclusion pools are	10:44:22
10:41:34	16 not helping the process be more efficient. I still	10:44:25
10:41:39	17 believe it will be more efficient. I understand	10:44:27
10:41:42	18 that in the process of classifying all of these,	10:44:29
10:41:52	19 some items may have slipped through the cracks.	10:44:35
10:41:55	20 Some of them I'm sure we'll differ on. But at the	10:44:37
10:41:58	21 end of the day, the question is, should this	10:44:41
10:42:01	22 customer be excluded because there are reasons to	10:44:43
10:42:03	23 believe it wasn't the alleged actions that caused	10:44:48
10:42:05	24 them to do what they did? And that's what I'm	10:44:54
10:42:08	25 trying to do.	10:45:00

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Page 725		Page 727	
10:55:10		10:57:20	
10:55:12		10:57:21	
10:55:14		10:57:24	
10:55:18		10:57:27	
10:55:20		10:57:33	
10:55:22		10:57:35	
10:55:25		10:57:38	
10:55:28		10:57:40	
10:55:32		10:57:43	
10:55:34		10:57:45	
10:55:40		10:57:47	
10:55:42		10:57:51	12 MR. PICKETT: Q. Let me move to the next
10:55:47		10:57:53	13 automatic exclusion pool, which is no accused
10:55:49		10:57:57	14 conduct, lost profits, on page 224.
10:55:53		10:58:01	15 Do you see that?
10:55:56		10:58:02	16 A. I do.
10:55:59		10:58:09	17 Q. How did you categorize customers into this
10:56:02		10:58:14	18 pool?
10:56:06		10:58:18	19 A. I had a list of customers that was
10:56:09		10:58:22	20 provided to me by Mr. Gray, and I relied upon that
10:56:11		10:58:31	21 list.
10:56:13		10:58:33	
10:56:16		10:58:34	
10:56:18		10:58:36	
10:56:19		10:58:39	
Page 726		Page 728	
10:56:20		10:58:45	
10:56:23		10:58:51	
10:56:25		10:58:58	
10:56:26		10:59:03	
10:56:29		10:59:06	
10:56:31		10:59:10	
10:56:32		10:59:16	
10:56:33		10:59:21	
10:56:34		10:59:25	
10:56:35		10:59:28	
10:56:38		10:59:34	
10:56:44		10:59:40	
10:56:47		10:59:42	
10:56:50		10:59:46	
10:56:55		10:59:49	
10:56:57		11:00:15	
10:57:01		11:00:15	
10:57:02		11:00:18	
10:57:06		11:00:20	
10:57:09		11:00:22	
10:57:11		11:00:24	
10:57:13		11:00:27	
10:57:15		11:00:28	
10:57:16		11:00:30	
10:57:17		11:00:32	

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1:00:34		11:03:04	1 it. It's the rough transcript -- why don't we mark
1:00:38		11:03:08	2 it as an exhibit, because it's a rough, not an
1:00:40		11:03:11	3 official transcript. So let's mark it as
1:00:43		11:03:14	4 Exhibit 3223.
1:00:45		11:03:16	5 (Deposition Exhibit 3223 was marked for
1:00:48		11:03:18	6 identification.)
1:00:50		11:03:32	7 MR. PICKETT: Q. And I'll -- for purposes
1:00:53		11:03:34	8 of efficiency, I will refer you to two pages of his
1:00:58		11:03:37	9 testimony, or two sections of his testimony.
1:00:58		11:03:41	10 The first is on page 276.
1:01:00		11:03:44	11 "Question: To be clear, you're list of 51
1:01:00		11:03:47	12 customers is not intended to be a summary of
1:01:00		11:03:49	13 all available evidence relating to
1:01:01		11:03:51	14 TomorrowNow's support of its customers?
1:01:01		11:03:54	15 "Answer: I didn't look for evidence
1:01:03		11:03:56	16 outside the Mandiant reports, identification
1:01:06		11:04:00	17 of improper conduct. I didn't look outside
1:01:11		11:04:03	18 that. My assignment was to analyze the
1:01:11		11:04:05	19 Mandiant report and offer comments relative
1:01:13		11:04:07	20 to the Mandiant report. So I didn't -- I
1:01:20	21 Q. In creating this list of I believe it's 51	11:04:09	21 didn't try to do what -- I mean, I didn't try
1:01:28	22 customers in Exhibit 3222, under the "no accused	11:04:11	22 to do that other thing, you know, the other
1:01:32	23 conduct" category, did you rely solely on Mr. Gray,	11:04:13	23 job."
1:01:38	24 or did you rely on something else to come up with	11:04:16	24 And then on page 277:
1:01:41	25 this list?	11:04:19	25 "Question: Sure. Would you agree that
Page 730		Page 732	
1:01:42	1 MR. McDONELL: Object to the form of the	11:04:21	1 the presence or absence of a customer on your
1:01:43	2 question.	11:04:23	2 list of 51 is not a basis for an assertion
1:01:44	3 THE WITNESS: I relied on Mr. Gray for	11:04:26	3 that a customer was or was not supported
1:01:47	4 this.	11:04:31	4 infringement -- well -- sorry, was not
1:01:55	5 MR. PICKETT: Q. Let me represent to you	11:04:37	5 supported in an infringing or an improper
1:01:55	6 that Mr. Gray testified yesterday -- there was	11:04:39	6 manner?
1:01:57	7 another deposition going on in the room just east	11:04:39	7 "Answer: Well, once again, I haven't done
1:02:00	8 of us -- that he testified at page 276 of the	11:04:42	8 that work. I mean, it's hard for me to say to
1:02:06	9 transcript that he hadn't done the work -- that's a	11:04:44	9 answer that question. So what I've done is
1:02:10	10 quote; this is not -- to test when, and then quote,	11:04:46	10 try to apply the Mandiant report's analysis to
1:02:14	11 the presence or absence of a customer on his list	11:04:49	11 the data and to -- and in that I have come up
1:02:16	12 of 51 is a basis for an assertion that the -- a	11:04:53	12 with a list of 51 customers for which there
1:02:20	13 customer was or was not supported in an infringing	11:04:56	13 appears to have not been the execution of what
1:02:23	14 or an improper manner.	11:04:59	14 Mandiant refers to as improper conduct. I
1:02:25	15 And if that were his testimony, does it	11:05:02	15 didn't try to look at other things. And so I
1:02:32	16 undermine your exclusion of the 51 no accused	11:05:04	16 mean, I didn't try to look outside that. So
1:02:37	17 conduct customers?	11:05:06	17 it's hard for me to make a declarative
1:02:38	18 MR. McDONELL: Object that the -- to the	11:05:09	18 statement about that. I don't feel
1:02:40	19 representation in that it creates an incomplete and	11:05:11	19 comfortable answering it. I just don't know.
1:02:42	20 misleading hypothetical, object to the form of the	11:05:15	20 "Question: Do you intend to testify in
1:02:44	21 question, vague and ambiguous, calls for a legal	11:05:16	21 trial that the list of 51 customers represents
1:02:48	22 conclusion.	11:05:18	22 a list of 51 customers for whom TomorrowNow
1:02:53	23 THE WITNESS: I'd have to see his	11:05:22	23 provided support properly and correctly?
1:02:55	24 testimony in context to be able to do that.	11:05:23	24 "Answer: I don't think I sitting here
1:03:02	25 MR. PICKETT: Q. Well, let me show you	11:05:25	25 today prepared to offer an -- that I'd

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11:05:30	1	necessarily offer an opinion that states that	11:07:23	1	and prevent him from giving meaningful testimony.
11:05:32	2	the 51 were or were not. That either the 51	11:07:25	2	MR. PICKETT: Q. No. Go ahead and
11:05:35	3	were or the 51 were customers for which there	11:07:26	3	answer.
11:05:38	4	was not improper activity. What I'm talking	11:07:27	4	MR. McDONELL: No, you're entitled to read
11:05:41	5	about is improper activity which Mandiant	11:07:28	5	it. Go ahead and read it. If you feel the need to
11:05:44	6	defines. I didn't look at that other. I	11:07:31	6	read some lead-in to get yourself comfortable that
11:05:46	7	didn't make a determination with regard to the	11:07:35	7	you're answering a question you're comfortable
11:05:48	8	other, so I don't think I can testify. But	11:07:38	8	with, you are entitled to read that document.
11:05:50	9	again, the list may grow, the list may shrink,	11:07:39	9	MR. PICKETT: I disagree. This time will
11:05:54	10	there may be some information that does	11:07:40	10	not be taken against the 7 hours, and we will go to
11:05:55	11	pertain. Just sitting here today, I don't	11:07:43	11	court over this.
11:05:58	12	plan to testify to that."	11:07:44	12	MR. McDONELL: It will be taken. And if
11:06:03	13	So, does that testimony at least cast some	11:07:45	13	you want to try to convince the Court that the
11:06:07	14	uncertainty on the list of 51 customers that you	11:07:47	14	witness is not entitled to read the document you
11:06:10	15	put into the "no accused conduct" category?	11:07:49	15	show him, go right ahead.
11:06:13	16	MR. McDONELL: I object to the form of the	11:07:52	16	MR. PICKETT: Q. Go ahead. The clock is
11:06:14	17	question. I object to the reading of partial	11:07:53	17	on.
11:06:16	18	testimony from a rough draft and excluding the	11:07:54	18	A. (Examining document.)
11:06:19	19	objections from your reading of it. I object that	11:08:36	19	Okay. What's the question?
11:06:23	20	it's incomplete as a hypothetical or as purported	11:08:39	20	Q. Does this undermine your reliance on the
11:06:25	21	testimony; that it's vague and ambiguous.	11:08:41	21	list?
11:06:32	22	THE WITNESS: Could I just read the three	11:08:42	22	MR. McDONELL: It's argumentative. Object
11:06:34	23	pages before 276 to give some lead-in to 276 that	11:08:43	23	to the form of the question. Object to your
11:06:40	24	you --	11:08:45	24	providing a partial --
11:06:40	25	MR. PICKETT: Why don't we take a break	11:08:48	25	MS. HOUSE: You already made those
Page 734			Page 736		
11:06:42	1	then.	11:08:49	1	objections. Just say "same objections."
11:06:42	2	MR. McDONELL: No, no.	11:08:51	2	MR. PICKETT: Counsel, you're not taking
11:06:43	3	THE WITNESS: No, I don't want to take a	11:08:52	3	this deposition.
11:06:44	4	break.	11:08:53	4	MS. HOUSE: You know, cut it out, Jason.
11:06:45	5	MR. McDONELL: The witness didn't have to	11:08:56	5	You're taking too long.
11:06:46	6	take a break.	11:08:57	6	MR. PICKETT: Counsel, you are not taking
11:06:47	7	THE WITNESS: Then I can't read it?	11:08:58	7	this deposition. Do we have an agreement on that,
11:06:49	8	MR. McDONELL: Then don't answer the	11:09:00	8	that only one attorney is taking this deposition?
11:06:49	9	question.	11:09:04	9	MR. PICKETT: Q. Please answer the
11:06:50	10	THE WITNESS: I'm not answering any	11:09:04	10	question.
11:06:51	11	questions about this.	11:09:05	11	MR. McDONELL: My objections are, you've
11:06:52	12	MR. McDONELL: Counsel, you got to be --	11:09:06	12	provided an incomplete transcript, and a rough
11:06:53	13	that's not appropriate. To not let the witness	11:09:08	13	transcript; you haven't included the objections;
11:06:56	14	read the document that you're asking him about?	11:09:09	14	it's vague, ambiguous, incomplete, and improper.
11:06:57	15	MR. PICKETT: Q. I've read you the	11:09:13	15	THE WITNESS: It does not.
11:06:59	16	relevant portions. If your lawyer once you to see	11:09:15		
11:07:01	17	something else, he can ask on redirect.	11:09:18		
11:07:04	18	In my examination of you, I want you to	11:09:22		
11:07:06	19	respond to the question I've given you.	11:09:26		
11:07:07	20	Does the testimony I have read to you	11:09:32		
11:07:09	21	alter in any way your ability to rely on Mr. Gray's	11:09:36		
11:07:12	22	list of 51 so-called non- -- no accused conduct?	11:09:41		
11:07:17	23	MR. McDONELL: The witness is entitled to	11:09:44		
11:07:18	24	read the entire document you provided to him before	11:09:50		
11:07:21	25	answering. You're trying to mislead the witness	11:09:53		

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11:09:56		11:12:38	
11:10:03		11:12:42	
11:10:09		11:12:43	
11:10:14		11:12:50	
11:10:18		11:12:51	
11:10:21		11:12:52	
11:10:26		11:12:53	
11:10:31		11:12:57	
11:10:35		11:20:07	
11:10:39		11:39:30	
11:10:42	11 Q. Is it your understanding that the	11:39:31	
11:10:44	12 defendants' conduct that's being challenged is only	11:39:37	
11:10:50	13 being challenged in the sense that Mr. Mandia	11:39:40	
11:10:54	14 analyzed it?	11:39:41	
11:10:55	15 MR. McDONELL: Object to the form of the	11:39:43	
11:10:55	16 question. Incomplete. Calls for a narrative.	11:39:47	
11:11:00	17 THE WITNESS: I think that's really beyond	11:39:59	
11:11:02	18 my scope of understanding. And all I can tell you	11:40:05	
11:11:07	19 is, looking at what you've given me here, it	11:40:11	
11:11:12	20 doesn't cause me to want to change this.	11:40:16	20 MR. PICKETT: Q. We've earlier talked
11:11:17	21 MR. PICKETT: Q. What was -- sorry, go	11:40:18	21 about your possible exclusion criteria. I think
11:11:18	22 ahead.	11:40:22	22 there were 26 of them. And I want to now talk
11:11:19	23 A. So that's the assumption I'm making, and	11:40:25	23 about your -- the way you combine them to exclude
11:11:21	24 that's as far as I can go in terms of the technical	11:40:30	24 customers.
11:11:24	25 elements of Mr. Mandia's work and Mr. Gray's work.	11:40:34	25 There is a formula that appears on the top
Page 738		Page 740	
11:11:28	1 I really don't understand what they did and how	11:40:38	1 of page 235 of your report, and that's the formula
11:11:31	2 they did it.	11:40:54	2 of combining the possible exclusion criteria to
11:11:32	3 Q. When you say that's the assumption I'm	11:40:58	3 reach a conclusion as to whether a customer is
11:11:33	4 making, what assumption were you referring to?	11:41:01	4 excluded or not for purposes of lost profits. Is
11:11:35	5 A. That if they're on the list of 51, that	11:41:04	5 that correct?
11:11:39	6 there's no accused conduct, that they should stay	11:41:05	6 A. Yes.
11:11:44	7 on the list of no accused conduct and be excluded.	11:41:06	7 Q. So just so I understand this, it's -- if I
11:11:51		11:41:11	8 call non-specific evaluation A and self-support B,
11:11:53		11:41:16	9 and then the 2a through h, the various items under
11:11:57		11:41:22	10 No. 2, I'll say they're C. Right?
11:12:00		11:41:28	11 A. Yes.
11:12:01		11:41:29	12 Q. Your formula is A or B plus at least one
11:12:02		11:41:32	13 of the Cs.
11:12:03		11:41:34	14 MR. McDONELL: Object to the form of the
11:12:04		11:41:35	15 question.
11:12:07		11:41:36	16 THE WITNESS: That's correct.
11:12:12		11:41:39	
11:12:17		11:41:49	
11:12:18		11:41:54	
11:12:20		11:42:00	
11:12:23		11:42:03	
11:12:27		11:42:05	
11:12:30		11:42:09	
11:12:34		11:42:10	
11:12:37		11:42:16	

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Page 741		Page 743	
11:42:19		11:45:31	
11:42:23		11:45:32	
11:42:26		11:45:33	
11:42:27		11:45:36	4 Q. Let me ask you, please, to turn to page
11:42:31		11:45:38	5 228. I'm sorry, before I do that, I had one more
11:42:36		11:45:43	6 question.
11:42:40		11:45:51	7 In devising the combinations that would
11:42:43		11:45:59	8 lead to exclusion under the possible exclusion
11:42:47		11:46:04	9 pools -- let me revise it.
11:42:54		11:46:06	10 In devising the combination, the formula,
11:42:59		11:46:09	11 for the analysis of the potentially excluding
11:43:07		11:46:16	12 categories, the potential exclusion pools, did you
11:43:15		11:46:19	13 consider other combinations that might lead you to
11:43:17		11:46:25	14 exclude customers? In other words, perhaps
11:43:20		11:46:35	15 requiring a customer to be in two of the C
11:43:23		11:46:41	16 categories rather than just one or some other
11:43:28		11:46:44	17 combination?
11:43:32		11:46:45	18 MR. McDONELL: Object. Compound.
11:43:34		11:46:49	19 THE WITNESS: I certainly considered other
11:43:40		11:46:53	20 reasons to classify customers, to identify their
11:43:45		11:46:59	21 behavior and see if it made sense from the point of
11:43:47		11:47:03	22 view of the alleged actions.
11:43:51		11:47:07	23 But this combination, I think, of having a
11:43:54		11:47:12	24 reason to consider leaving and then actually doing
11:43:58		11:47:16	25 something about it, was what I felt was the real
Page 742		Page 744	
11:44:00		11:47:22	1 viable combination. That if you had that
11:44:01		11:47:28	2 combination, then you had -- it was more likely
11:44:08		11:47:33	3 than not that they left for reasons other than the
11:44:13		11:47:36	4 alleged actions.
11:44:16		11:47:38	
11:44:22		11:47:40	
11:44:24		11:47:42	
11:44:29		11:47:44	
11:44:32		11:47:44	
11:44:38		11:47:45	
11:44:39		11:47:48	
11:44:41		11:47:54	
11:44:45		11:47:58	
11:44:46		11:47:59	
11:44:46		11:47:59	
11:44:50		11:48:00	
11:44:54		11:48:02	
11:44:58		11:48:05	
11:45:01		11:48:14	
11:45:06		11:48:16	
11:45:07		11:48:23	
11:45:13		11:48:26	
11:45:17		11:48:33	
11:45:21		11:48:34	
11:45:27		11:48:41	

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12:20:16		12:23:45	
12:20:20		12:23:47	
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12:20:41		12:24:02	
12:20:45		12:24:15	
12:20:50		12:24:17	
12:20:55		12:24:18	
12:20:58		12:24:21	
12:20:59		12:40:22	
12:21:00		12:40:24	
12:21:03		12:40:29	12
12:21:07		12:40:30	13
12:21:13		12:40:33	14
12:21:22		12:40:53	15
12:21:28		12:40:57	16
12:21:34		12:41:02	17
12:21:39		12:41:03	18
12:21:40		12:41:05	19
12:21:46		12:41:07	20
12:21:49		12:41:08	
12:21:54		12:41:10	
12:21:57		12:41:12	
12:21:59		12:41:16	
12:22:03		12:41:18	
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12:22:17		12:41:23	
12:22:19		12:41:26	
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12:22:27		12:41:32	
12:22:28		12:41:32	
12:22:31		12:41:34	
12:22:33		12:41:36	
12:22:35		12:41:38	
12:22:37		12:41:42	
12:22:40		12:41:48	
12:22:44		12:41:51	
12:22:45		12:41:54	
12:22:48		12:41:57	
12:22:49		12:42:04	
12:22:51		12:42:07	
12:23:00		12:42:11	
12:23:03		12:42:14	
12:23:08		12:42:17	
12:23:15		12:42:20	
12:23:17		12:42:22	
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14:05:09		14:07:42	
14:05:14		14:07:46	
14:05:18		14:07:49	
14:05:21		14:07:50	
14:05:23		14:07:51	
14:05:26		14:07:53	
14:05:30		14:07:55	
14:05:30		14:08:01	
14:05:35		14:08:07	
14:05:36		14:08:10	
14:05:38		14:08:14	
14:05:41		14:08:19	
14:05:50		14:08:25	
14:05:53		14:08:30	
14:05:59		14:08:34	
14:06:01		14:08:39	
14:06:06		14:08:42	
14:06:08		14:08:47	
14:06:14		14:08:50	
14:06:17		14:08:53	
14:06:21		14:09:00	
14:06:22		14:09:11	
14:06:24		14:09:13	
14:06:26		14:09:16	
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14:06:52		14:09:21	
14:06:52		14:09:22	
14:06:52		14:09:24	
14:06:52		14:09:25	
14:06:52		14:09:27	
14:06:52		14:09:28	
14:06:52		14:09:31	
14:06:52		14:09:31	
14:06:58		14:09:36	
14:06:59		14:09:37	
14:07:01		14:09:37	
14:07:03		14:09:39	13 MR. PICKETT: Q. Do you have any training
14:07:04		14:09:40	14 with respect to the preparation of statistical
14:07:05		14:09:42	15 regression analyses?
14:07:08		14:09:46	16 A. Yes.
14:07:10		14:09:47	17 Q. What is that?
14:07:14		14:09:50	18 A. I first did a regression analysis in 1969
14:07:16		14:09:57	19 when I studied statistics at college.
14:07:21		14:10:00	20 Q. You took an undergraduate course in
14:07:23		14:10:02	21 college in statistics?
14:07:25		14:10:04	22 A. Correct.
14:07:29		14:10:04	23 Q. Did you take any other courses in
14:07:31		14:10:07	24 statistics?
14:07:37		14:10:11	25 A. In my postgraduate studies for

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Page 809		Page 811	
14:10:15	1 accountancy, I did statistical analysis, regression	14:13:15	
14:10:18	2 analyses.	14:13:19	
14:10:19	3 Q. You took a course in regression analysis.	14:13:22	
14:10:22	4 Is that your testimony?	14:13:25	
14:10:23	5 A. Yes.	14:13:27	
14:10:23	6 Q. In connection with accounting?	14:13:28	
14:10:25	7 A. Correct.	14:13:30	
14:10:28		14:13:33	
14:10:32		14:13:36	
14:10:36		14:13:39	
14:10:38		14:13:43	
14:10:45		14:13:45	
14:10:49		14:13:51	
14:10:52		14:13:56	
14:10:56		14:13:57	
14:11:01		14:14:02	
14:11:04		14:14:04	
14:11:07		14:14:07	
14:11:10		14:14:10	
14:11:14		14:14:13	
14:11:19		14:14:17	
14:11:21		14:14:22	
14:11:24		14:14:26	
14:11:28		14:14:30	
14:11:32		14:14:35	
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14:11:41		14:14:44	
14:11:43		14:14:45	
14:12:02		14:14:48	
14:12:06		14:14:50	
14:12:09		14:14:51	
14:12:12		14:14:56	
14:12:16		14:15:00	
14:12:21		14:15:02	
14:12:24		14:15:04	
14:12:26		14:15:18	
14:12:28		14:15:19	
14:12:28		14:15:21	
14:12:31		14:15:23	
14:12:40		14:15:26	
14:12:43		14:15:30	
14:12:50		14:15:32	
14:12:53		14:15:34	
14:12:56		14:15:40	
14:12:58		14:15:45	
14:13:01		14:15:49	
14:13:05		14:15:53	
14:13:09		14:16:00	
14:13:12		14:16:05	
14:13:14		14:16:09	

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Page 925		Page 927
17:59:34	1 Q. Once you ran the regression analyses and	18:02:37
17:59:36	2 developed the relationship between the revenues and	18:02:41
17:59:42	3 costs, did you do any further investigation of that	18:02:42
17:59:48	4 relationship, or did you just -- not just, but did	18:02:46
17:59:51	5 you accept the results of the regressions?	18:02:49
17:59:55	6 MR. McDONELL: Assumes facts, vague and	18:02:54
17:59:55	7 ambiguous.	18:02:59
17:59:56	8 THE WITNESS: I assumed that the results	18:03:01
17:59:58	9 of my analysis were appropriate for my purposes.	18:03:06
18:00:01		18:03:08
18:00:02		18:03:11
18:00:05		18:03:14
18:00:06		18:03:16
18:00:12		18:03:18
18:00:14		18:03:19
18:00:17		18:03:21
18:00:44		18:03:25
18:00:46		18:03:28
18:00:48		18:03:31
18:00:55		18:03:34
18:01:00		18:03:37
18:01:02		18:03:44
18:01:05		18:03:46
18:01:09		18:03:49
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18:01:20		18:03:55
18:01:25		18:03:58
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18:01:35		18:04:08
18:01:40		18:04:12
18:01:46		18:04:13
18:01:50		18:04:13
18:01:54		18:04:14
18:01:57		18:04:18
18:02:02		18:04:21
18:02:05		18:04:25
18:02:10		18:04:28
18:02:13		18:04:31
18:02:15		18:04:35
18:02:17		18:04:39
18:02:19		18:04:42
18:02:22		18:04:44
18:02:24		18:04:49
18:02:25		18:04:51
18:02:27		18:04:53
18:02:28		18:05:00
18:02:30		18:05:02
18:02:32		18:05:06
18:02:33		18:05:07

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Page 933		Page 935	
18:10:13		18:12:34	1 A. With t scores and R-squareds like we had,
18:10:14		18:12:37	2 we didn't need to do that.
18:10:18		18:12:39	3 Q. Do you know what a fixed-effects model is?
18:10:21		18:12:43	4 A. I am not familiar with that term.
18:10:24		18:12:45	5 Q. Do you know what first differencing is?
18:10:27		18:12:53	6 A. I've used that term. I can't give you a
18:10:30		18:12:57	7 definition of it as I sit here.
18:10:32	8	18:13:00	
18:10:33	9	18:13:02	
18:10:36	10	18:13:04	
18:10:43	11	18:13:06	
18:10:46	12	18:13:09	12 Q. And what did you conclude with respect to
18:10:47	13	18:13:14	13 seasonality and its impact on the results?
18:10:49	14	18:13:18	14 A. If the t scores had been low and the
18:10:50	15	18:13:22	15 R-squared had been 50.54, I would have had to
18:10:52	16	18:13:27	16 adjust for the autocorrelation. But with the
18:10:53	17	18:13:32	17 R-squared and t's where they were, I didn't need to
18:10:57		18:13:35	18 make that adjustment.
18:10:59		18:13:40	
18:11:05		18:13:45	
18:11:13		18:13:52	
18:11:17		18:13:53	
18:11:19		18:13:59	
18:11:21	24	18:14:03	
18:11:23	25	18:14:04	
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18:11:25	1	18:14:04	
18:11:29	2	18:14:07	
18:11:34	3	18:14:07	
18:11:37	4	18:14:12	
18:11:40	5	18:14:16	
18:11:43	6	18:14:23	
18:11:44	7	18:14:28	
18:11:44	8	18:14:34	
18:11:46	9	18:14:37	
18:11:49	10	18:14:39	
18:11:53	11	18:14:42	
18:11:56	12	18:14:46	
18:12:01	13	18:14:47	
18:12:03	14	18:14:49	
18:12:07	15	18:14:50	
18:12:10	16	18:14:53	
18:12:11	17	18:14:57	
18:12:15	18	18:15:00	
18:12:19	19	18:15:03	
18:12:21		18:15:08	
18:12:22		18:15:10	
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Page 937		Page 939	
18:15:30		18:20:34	1 performed any of those tests?
18:15:31		18:20:36	2 MR. McDONELL: Counsel, just so I'm clear,
18:15:31		18:20:37	3 which tests are you referring to?
18:15:41		18:20:39	4 MR. PICKETT: Q. The witness --
18:15:46		18:20:40	5 A. I was just going to ask the same question.
18:15:48		18:20:43	6 Q. The ones listed in 5.7. Any of them.
18:15:49		18:20:46	7 A. Well, I didn't do an F-test, because we
18:15:52		18:20:49	8 only have one variable here, so an F-test wouldn't
18:15:53		18:20:52	9 apply.
18:15:54		18:20:54	10 The F looks at the whole equation that you
18:15:55		18:20:58	11 are specifying, which might have multiple
18:15:58		18:21:01	12 variables, so that will be a multivariate analysis.
18:16:00		18:21:07	13 When we only have one, we use t. So yes,
18:16:00		18:21:10	14 I did the equivalent of an F-test, but it was a
18:16:01		18:21:12	15 t-test.
18:16:12		18:21:13	16 Then I also ran tests to see whether there
18:16:21		18:21:19	17 was robustness in the formulation. And the way I
18:16:24		18:21:23	18 did that was, I ran the pre-'05, the post-'05
18:16:36		18:21:31	19 through time to see whether any variability
18:16:40		18:21:33	20 occurred.
18:16:43		18:21:34	21 So I also tested for autocorrelation,
18:16:47		18:21:40	22 because there was only one variable, there was no
18:16:51		18:21:42	23 multi-collinearity.
18:16:55		18:21:48	24 And so I think I ran all of the relevant
18:16:57		18:21:51	25 tests on this information. And they're -- they're
Page 938		Page 940	
18:16:59		18:21:54	1 all quoted, actually, in -- the results are in
18:17:01		18:22:01	2 M-9.1 and M-9.2, M-9.3, M-9.4. M-9.1 through -4.
18:17:05		18:22:18	3 Q. Thank you. Would an F-test apply for
18:17:08		18:22:20	4 checking which model is correct?
18:17:08		18:22:23	5 MR. McDONELL: Vague and ambiguous.
18:17:10		18:22:27	6 Incomplete.
18:17:17		18:22:28	7 THE WITNESS: No. Sorry. Not in this
18:17:21		18:22:31	8 case. We -- we're trying to identify the
18:17:22		18:22:35	9 relationship between the dependent variable and the
18:17:26	10 Q. There are a list there of various tests,	18:22:38	10 independent variable. So there's only one variable
18:17:32	11 starting with Informal Methods and then Formal	18:22:42	11 that we're dealing with. So no.
18:17:35	12 Statistical Tests, F-Test to Detect Changing	18:22:45	
18:17:38	13 Incremental Cost.	18:22:48	
18:17:39	14 Do you see that?	18:22:53	
18:17:45	15 A. Yes.	18:22:55	
18:17:46	16 Q. Did you perform any of those tests on your	18:22:58	
18:17:51	17 regression analyses?	18:23:04	
18:17:52	18 MR. McDONELL: I object again. The	18:23:10	
18:17:53	19 witness -- it appears to be a partial document of	18:23:11	
18:17:56	20 highly technical material without giving him a	18:23:13	
18:17:59	21 chance to look it over.	18:23:15	
18:18:02	22 MR. PICKETT: Q. Take a moment to -- or	18:23:18	
18:18:03	23 take whatever time you need to look at the test.	18:23:18	
18:18:43	24 A. (Examining document.)	18:23:18	
18:20:32	25 Q. Are you able to ascertain whether you	18:23:18	

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Page 941		Page 943	
18:23:21		18:26:55	
18:23:26		18:27:02	
18:23:28		18:27:05	
18:23:48		18:27:24	
18:23:48	5 Q. And that shows the regression output from	18:27:29	
18:23:50	6 the SAP regression?	18:27:32	
18:23:52	7 A. Correct.	18:27:35	
18:24:06	8 Q. The "Ln Real Revenue" figure of .95033,	18:27:39	
18:24:18	9 the coefficient for that, do you see that? It's in	18:27:42	
18:24:21	10 the first column, a little bit more than halfway	18:27:46	
18:24:25	11 down, .950329822?	18:27:51	
18:24:32	12 A. Yes, I see that.	18:27:54	
18:24:33	13 Q. Does that reflect your estimate of the	18:27:58	
18:24:34	14 value of B in your main regression formula?	18:28:03	
18:24:45		18:28:06	
18:24:46		18:28:08	
18:24:51		18:28:11	
18:24:55		18:28:15	
18:24:59		18:28:16	
18:25:01		18:28:21	
18:25:05		18:28:24	
18:25:08		18:28:27	
18:25:12		18:28:33	23 MR. PICKETT: Q. Are you familiar with
18:25:14		18:28:34	24 the use of fixed effects in a time series
18:25:16		18:28:37	25 cross-section regression?
Page 942		Page 944	
18:25:20		18:28:40	1 A. You asked me whether I had done that kind
18:25:26		18:28:43	2 of analysis, and the answer is no.
18:25:36		18:28:45	3 Q. Are you familiar -- but you're familiar
18:25:40		18:28:48	4 with it?
18:25:42		18:28:48	5 A. I've heard of it, but I've never done one,
18:25:46		18:28:51	6 so I -- no. I wouldn't describe my knowledge of
18:25:51		18:28:54	7 fixed-effects analysis as familiarity.
18:25:53		18:28:58	8 Q. Do you know whether the omission of
18:25:56		18:29:00	9 fixed-effects variables that should have been
18:25:58		18:29:04	10 included in your regression would bias your
18:25:59		18:29:06	11 estimates of the variable of interest, the real
18:26:02		18:29:14	12 revenue coefficient B?
18:26:07		18:29:16	13 MR. McDONELL: Assumes facts not in
18:26:09		18:29:16	14 evidence, object to the form of the question, vague
18:26:16		18:29:17	15 and ambiguous.
18:26:20		18:29:18	16 THE WITNESS: No. With t's, R-squareds
18:26:23		18:29:22	17 and the Ps like we've got here, I wasn't looking
18:26:27		18:29:25	18 for anything else.
18:26:31		18:29:28	
18:26:36		18:29:31	
18:26:39		18:29:33	
18:26:41		18:29:40	
18:26:44		18:29:48	
18:26:49		18:29:52	
18:26:53		18:29:55	

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Page 945		Page 947	
18:30:01		18:32:42	
18:30:02		18:32:43	
18:30:04		18:32:45	
18:30:10		18:32:48	
18:30:15		18:32:51	
18:30:23		18:32:53	
18:30:26		18:32:56	
18:30:29		18:33:00	
18:30:32		18:33:02	
18:30:37		18:33:06	
18:30:42		18:33:07	
18:30:44		18:33:13	
18:30:47		18:33:23	
18:30:48		18:33:25	
18:30:51		18:33:26	
18:30:55		18:33:28	
18:30:58		18:33:32	
18:31:06		18:33:34	
18:31:13		18:33:36	
18:31:17		18:33:38	
18:31:20		18:33:41	
18:31:23		18:33:43	
18:31:24		18:33:44	
18:31:27		18:33:44	
18:31:28		18:33:48	
Page 946		Page 948	
18:31:31		18:33:51	
18:31:34		18:33:54	
18:31:38		18:33:57	
18:31:40		18:34:00	
18:31:43		18:34:04	
18:31:46		18:34:08	
18:31:46		18:34:12	
18:31:50		18:34:17	
18:31:53	9 Q. Did you test for autocorrelations across	18:34:21	
18:31:56	10 countries in this set of SAP data?	18:34:24	10 Q. I apologize for going back in time -- in
18:31:58	11 A. I did not.	18:34:26	11 a -- to a prior topic, but let me make sure I have
18:31:59		18:34:30	12 this just -- I want to understand what happened.
18:32:01		18:34:33	13 You did discover some autocorrelation in
18:32:03		18:34:36	14 the Oracle regressions, but it was so small given
18:32:07		18:34:41	15 the t and R-squared stats that you didn't need to
18:32:10		18:34:44	16 correct for it?
18:32:17		18:34:45	17 A. That's correct. Merely having
18:32:20		18:34:48	18 autocorrelation in the data doesn't make it wrong.
18:32:23		18:34:51	19 It's just that it tends to overstate the R-squared
18:32:25		18:34:54	20 and the t score.
18:32:30		18:34:56	21 But when -- so if your t score is close to
18:32:33		18:35:02	22 1.96 and your R-squared is down in the 50s, then
18:32:36		18:35:08	23 you might have a problem. But with R-squareds and
18:32:39		18:35:11	24 t's like we had here, there's not an issue.
18:32:41		18:35:15	25 And even if you have the issue, when you

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Page 949		Page 951
18:35:17	1 plug the data in with the -- having corrected or	18:39:10
18:35:23	2 the autocorrelation, the output's the same. It	18:39:11
18:35:25	3 really makes no difference in the -- when you have	18:39:13
18:35:29	4 relationships like these.	18:39:14
18:35:32	5 Q. When the coefficient is smaller on the --	18:39:17
18:35:36	6 when the coefficient on the log of revenue is	18:39:21
18:35:39	7 smaller, does that mean that the variable costs are	18:39:25
18:35:42	8 lower? Is that the relationship?	18:39:29
18:35:46	9 A. I think you asked me that already. I	18:39:40
18:35:48	10 think -- you know, I don't have the ability to plug	18:39:43
18:35:51	11 all the numbers into the equation that I developed	18:39:47
18:35:55	12 and say that. But if the coefficient went down,	18:39:52
18:35:58	13 the resulting product of that -- of that piece of	18:39:57
18:36:03	14 the equation would go down, which would indicate	18:40:01
18:36:06	15 that there would be fewer total costs for a given	18:40:09
18:36:12	16 level of revenue. And if there were fewer total	18:40:14
18:36:15	17 costs, that might have an effect on the variable	18:40:18
18:36:17	18 costs.	18:40:26
18:36:18	19 But without actually plugging this	18:40:35
18:36:20	20 information into the model, I couldn't tell you for	18:40:36
18:36:25	21 certain. It makes sense, but not for certain.	18:40:39
18:36:57	22 Q. What's the confidence interval on your	18:40:42
18:37:00	23 predicted variable cost?	18:40:44
18:37:01	24 A. What is the what? I didn't hear.	18:40:45
18:37:03	25 Q. Confidence interval.	18:40:47
Page 950		Page 952
18:37:09	1 A. I think I did this at the 99 percent	18:40:53
18:37:14	2 level. But it's probably actually higher than	18:40:56
18:37:16	3 that.	18:40:58
18:37:17	4 Q. Where is that indicated?	18:41:01
18:37:20	5 A. I'm -- I don't think it is. But with a t	18:41:04
18:37:25	6 score so high and a P value so low, I think	18:41:06
18:37:30	7 we're -- we're up there.	18:41:09
18:37:43		18:41:12
18:37:56		18:41:16
18:38:04		18:41:22
18:38:15		18:41:24
18:38:16		18:41:24
18:38:17		18:41:26
18:38:21		18:41:27
18:38:22		18:41:29
18:38:30		18:41:31
18:38:36		18:41:33
18:38:40		18:41:35
18:38:45		18:41:37
18:38:48		18:41:39
18:38:50		18:41:41
18:38:56		18:41:42
18:38:58		18:41:43
18:39:01		18:41:44
18:39:04		18:41:46

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18:41:47	18:59:15
18:41:48	18:59:16
18:41:51	18:59:17
18:41:52	18:59:18
18:41:53	18:59:22
18:42:28	18:59:31
18:42:29	18:59:31
18:42:33	18:59:33
18:42:36	18:59:37
18:42:40	18:59:40
18:42:43	18:59:44
18:42:44	19:00:06
18:42:47	19:00:12
18:42:53	19:00:17
18:42:58	19:00:21
18:43:05	19:00:23
18:43:08	19:00:25
18:43:13	19:00:37
18:43:16	19:00:39
18:43:19	19:00:41 20 MR. PICKETT: Q. If you could please
18:43:23	19:00:43 21 refer to page 92 of the text.
18:43:26	19:01:21 22 Do you recognize the text or Professor
18:43:30	19:01:25 23 Maddala?
18:43:30	19:01:27 24 MR. McDONELL: I object to the presenting
18:43:38	19:01:28 25 this witness with a partial document that's very
Page 954	Page 956
18:43:39	19:01:32 1 dense without giving him ample time to read and
18:44:39	19:01:35 2 consider it.
18:44:41	19:01:39 3 THE WITNESS: I don't know who G.S.
18:44:47	19:01:41 4 Maddale is.
18:44:53	19:01:44 5 MR. PICKETT: Q. Nor do you recognize the
18:44:56	19:01:45 6 text?
18:45:02	19:01:46 7 A. That's correct.
18:45:06	19:01:46
18:45:11	19:01:49
18:45:12	19:01:56
18:45:16	19:01:59
18:45:17	19:02:00
18:45:21	19:02:03
18:45:26	19:02:06
18:45:34	19:02:10
18:45:39	19:02:16
18:45:45	19:02:19
18:45:47	19:02:20
18:45:48	19:02:22
18:46:01	19:02:23
18:58:50	19:02:27
18:58:53	19:02:30
18:59:07	19:02:32
18:59:08	19:02:50
18:59:12	19:02:51

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19:02:55		19:05:34	1 this data, with the t stat where it was, was that I
19:02:57		19:05:39	2 didn't need to do that.
19:02:59		19:05:42	
19:03:03		19:05:43	
19:03:11		19:05:45	
19:03:14		19:05:46	
19:03:19		19:05:46	
19:03:26		19:05:47	
19:03:29	9 Q. Well, did you estimate the regression	19:05:48	
19:03:31	10 equation in first differences?	19:05:52	
19:03:34	11 MR. McDONELL: Same objections.	19:05:53	
19:03:35	12 THE WITNESS: No. Why would I do that?	19:05:53	
19:03:44		19:05:56	
19:03:45		19:05:59	
19:03:49		19:06:00	
19:03:50		19:06:03	
19:03:51		19:06:10	
19:03:55		19:06:11	
19:04:01		19:06:14	
19:04:13		19:06:17	
19:04:21		19:06:22	
19:04:22		19:06:25	
19:04:23		19:06:27	
19:04:24		19:06:32	
19:04:24		19:06:36	
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19:04:25		19:06:41	
19:04:27		19:06:45	
19:04:31		19:06:49	
19:04:32		19:06:53	
19:04:33		19:06:58	5 MR. PICKETT: Q. Why did you include a
19:04:34		19:06:59	6 constant in the SAP regression but not in the OUSA
19:04:35		19:07:03	7 and OEMEA regressions?
19:04:37		19:07:06	8 MR. McDONELL: Asked and answered, object
19:04:39		19:07:07	9 to the form of the question.
19:04:41		19:07:10	10 THE WITNESS: Did you say why didn't I
19:04:44		19:07:11	11 include an intercept?
19:04:54		19:07:14	12 MR. PICKETT: Q. A constant.
19:04:57		19:07:15	13 MR. McDONELL: Same objection.
19:05:00		19:07:16	14 THE WITNESS: Which will be --
19:05:02	15 Q. When your Durbin-Watson statistic was 0.86	19:07:17	15 MR. PICKETT: Q. Same thing.
19:05:07	16 for the total Oracle regression, you did not	19:07:18	16 A. Same thing. Okay.
19:05:09	17 perform a quasi first difference analysis, did you?	19:07:20	17 I did explain this already.
19:05:12	18 MR. McDONELL: I object to the form of the	19:07:27	18 You're -- you have to remember what the
19:05:14	19 question. Repeat my objections about presenting	19:07:29	19 constant means. This will be a lot simpler if I
19:05:16	20 the witness with this document without giving him	19:07:32	20 could draw it for you and the court reporter could
19:05:18	21 sufficient time to read and consider it.	19:07:35	21 write this down.
19:05:23	22 THE WITNESS: That's correct.	19:07:37	22 But if you picture the two axes of the
19:05:24	23 MR. PICKETT: Q. Why not?	19:07:42	23 graph, and the origin, which is where the two axes
19:05:26	24 MR. McDONELL: Same objections.	19:07:47	24 meet, at that point, you have zero revenue and zero
19:05:28	25 THE WITNESS: Because my -- my reading of	19:07:53	25 expense in my formulation. If there were fixed

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19:07:57	1 expenses, there would be an intercept somewhere up	19:10:55	1 function. So I -- that -- your understanding is
19:08:01	2 the x axis, wherever that happened to be for that	19:11:00	2 simply incorrect.
19:08:05	3 particular business.	19:11:02	
19:08:09	4 So I explained to you that where you have	19:11:04	
19:08:14	5 data that are measured in the billions of dollars,	19:11:06	
19:08:20	6 and you're looking at data that covers a range, and	19:11:08	
19:08:24	7 I'm just giving you an example now, from, say, 10	19:11:10	
19:08:27	8 billion dollars to 15 billion dollars, that to	19:11:13	
19:08:32	9 extrapolate that graph to the intercept, wherever	19:11:16	
19:08:39	10 it may be, which would suggest that zero revenue,	19:11:19	
19:08:42	11 this is what the fixed cost will be, will be a	19:11:21	
19:08:45	12 totally inappropriate way to apply a regression	19:11:23	
19:08:48	13 analysis.	19:11:25	
19:08:49	14 You cannot extract to an area where there	19:11:26	
19:08:54	15 are no data points. So -- wait a minute; you asked	19:11:28	
19:08:59	16 me the question, I'm going to tell you the answer	19:11:29	
19:09:01	17 again.	19:11:31	
19:09:02	18 So you have this range of data, and you're	19:11:33	
19:09:05	19 saying, from the minimum point on my example that	19:11:34	
19:09:08	20 will be \$10 billion, to zero revenues, we have no	19:11:37	
19:09:13	21 data points. But you want, and your question	19:11:40	
19:09:21	22 requires, that we take that line that's suggested	19:11:41	
19:09:23	23 by those data points and extrapolate it all the way	19:11:42	
19:09:26	24 back to zero revenues.	19:11:43	
19:09:29	25 That, even to a layperson, must sound --	19:11:44	
Page 962		Page 964	
19:09:34	1 well, that would be kind of silly, because now	19:11:45	
19:09:37	2 we're at a point where there are no revenues. And	19:11:46	
19:09:41	3 if there were no revenues at Oracle, there would be	19:11:47	
19:09:45	4 no Oracle.	19:11:49	
19:09:46	5 So the intercept that's suggested by that	19:11:51	
19:09:49	6 line for the data points that you do have is	19:11:53	
19:09:53	7 meaningless.	19:11:55	
19:09:54	8 Q. But you used an intercept for SAP, which	19:11:55	
19:09:56	9 was my question.	19:11:56	
19:09:57	10 Why did you use the SAP intercept? That	19:11:57	
19:10:00	11 includes billions of dollars as well. Right?	19:11:58	
19:10:02	12 MR. McDONELL: Asked and answered. Object	19:12:01	
19:10:02	13 to the form of the question.	19:12:01	
19:10:05	14 THE WITNESS: The intercept that is in the	19:12:02	
19:10:08	15 SAP equation, the A, if you recall, was connected	19:12:04	
19:10:12	16 to a log function. It's not separable.	19:12:06	
19:10:17	17 And the way that works is, you have this	19:12:07	
19:10:21	18 curvilinear line, because we have -- we don't have	19:12:10	
19:10:24	19 a linear equation, and the -- although there's an	19:12:15	
19:10:30	20 intercept embodied in the calculation, that	19:12:18	
19:10:34	21 intercept has no meaning. There is no use in my	19:12:23	
19:10:39	22 analysis of an intercept value independent of its	19:12:25	
19:10:45	23 role in that log function.	19:12:26	
19:10:48	24 So no, I -- there's an A, but there's no	19:12:29	
19:10:51	25 meaning to A independent of its role in the	19:12:30	

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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 time
9 and place therein state, and that the testimony of
10 said witness was thereafter reduced to typewriting,
11 by computer, under my direction and supervision;

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

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

22
23 DATED: June 21, 2010

24 Holly Thuman
25 HOLLY THUMAN, CSR