

EXHIBIT 6

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

BEFORE: CHARLES A. LEGGE, JUDGE (Ret.)

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ORACLE CORPORATION, a Delaware)
 corporation; ORACLE, USA, INC.,)
 a Colorado corporation, and)
 ORACLE INTERNATIONAL)
 CORPORATION, a California) No. 07-CV-01658-MJJ
 corporation,)
)
 Plaintiffs,)
)
 vs.)
)

SAP AG, a German corporation,
 SAP AMERICA, INC., a Delaware
 corporation, TOMORROWNOW, INC.,
 a Texas corporation, and DOES
 1-50, inclusive,
 Defendants.

HEARING IN RE DISCOVERY ISSUES

Wednesday, February 13, 2008

At:

JAMS
 2 Embarcadero Center, 14th Floor
 San Francisco, California

Reported by:
 GEORGE SCHUMER, CSR 3326 (406308)

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1 get that, and they want more specific ways to get to that.
 2 we haven't objected to continue to work with them to guide
 3 them where they need to go. But if they are wanting our
 4 pointing them to every specific that proves their claims
 5 for them, that's not appropriate discovery.
 6 JUDGE LEGGE: No, it would be a highly improper
 7 question, but where is the evidence that a Honeywell
 8 download here stayed there; where is the evidence the
 9 Honeywell download got sent to Honeywell, or was made and
 10 used as a patch that was sent, or where is the evidence
 11 that you, TN, used the download for some other purpose?
 12 Those are specific "where" questions.
 13 MR. COWAN: Right. And all of that, to the
 14 extent it is recorded, is in SAS, or in the e-mail traffic
 15 between the engineers and the developers.
 16 MR. HOWARD: That's just like saying, "For every
 17 interrogatory, just look at our entire multiple-terabyte
 18 document production."
 19 MS. HOUSE: And again, facts are not work
 20 product.
 21 JUDGE LEGGE: You are repeating yourselves. I
 22 think we have gone about as far as we can go with this.
 23 So let's take another recess here, and we'll come back on
 24 the other ones that I think we can talk about today.
 25 The motions regarding the governmental material

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1 by Oracle: the questions regarding third-party support;
 2 questions regarding copyright -- I have to confess
 3 copyright stuff is kind of late in the day, so I need a
 4 better definition from the defendants as to what it is
 5 they really want to get with respect to copyright. And
 6 then the damages information and the requests for
 7 information from the antitrust case involving Oracle.
 8 Those are the remaining ones I see there. I'm
 9 sure you've probably got a few others, but those are the
 10 remaining ones I'm focusing on.
 11 MS. HOUSE: Do you have a hard stop at noon?
 12 JUDGE LEGGE: No. Do you?
 13 MS. HOUSE: No, I just want to keep going.
 14 JUDGE LEGGE: Let's take a break, and we'll get
 15 started on these others.
 16 (Recess taken, 11:26-11:43 a.m.)
 17 JUDGE LEGGE: I would like to take up next
 18 Oracle's motion for the production of the governmental
 19 material.
 20 If you get your interrogatories answered -- just
 21 a hypothetical -- if you got them answered, and the
 22 documents you requested from them -- that is, the TN
 23 documents, were produced -- why do you want that stuff?
 24 What is the point?
 25 MS. HOUSE: One of the points, Your Honor, is

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1 that presumably they have been cooperative with the
 2 government, presumably, like most of us --
 3 JUDGE LEGGE: I am not stating my question
 4 properly.
 5 Why do you need them? Why do you want to even
 6 fiddle around with it?
 7 You will have everything -- I think you would
 8 have everything you need to know with respect to
 9 liability, except for possible issues of the relationship
 10 between the defendants.
 11 MS. HOUSE: You have not heard them in their
 12 opposition say, or I doubt they will say today, whether
 13 they have or will produce to us all of the documents that
 14 are relevant to the investigation.
 15 You have to understand this isn't a classic
 16 situation where you have a follow-on investigation to an
 17 initial investigation. The investigation was a follow-on
 18 to our complaint.
 19 JUDGE LEGGE: If you got from them the answers to
 20 the interrogatories and the document production we have
 21 just been talking about, why do you even want to rummage
 22 through all that stuff? What is the point of it?
 23 MS. HOUSE: At this point, Your Honor, we have
 24 gotten so little, and indeed nothing from SAP at all, from
 25 either the American or the German entity.

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1 In addition to the historic documents that
 2 presumably have been produced -- mind you, we haven't even
 3 been told yet whether or not there actually is a grand
 4 jury subpoena.
 5 JUDGE LEGGE: You are missing my point. Let's
 6 assume that it is; that there has been a subpoena, and
 7 let's assume they have a truckload of material they are
 8 about to deliver to the US attorney for ultimate
 9 production to the grand jury -- let's assume that.
 10 Why go through all that, if you are going to get
 11 the answers to the questions you want answered by methods
 12 that we have been talking about this morning?
 13 MS. HOUSE: As Your Honor knows, and your
 14 colleague, Judge Breyer, has found, there's a whole lot of
 15 information that isn't even -- not the documents
 16 themselves, but let's say that have been presentations
 17 making these kinds of clear delineations between what they
 18 say happened, and who did it, and the scope.
 19 Their opposition doesn't even touch on those
 20 which are clearly not -- anything that you could even
 21 pretend to be covered by the Rule 6(e) protection.
 22 Anything that has been produced to the government
 23 voluntarily --
 24 JUDGE LEGGE: But if you get it from them --
 25 everything you need to know to prove your liability

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1 case -- why do you want to fiddle around with the
 2 government stuff?
 3 MS. HOUSE: If there is a nice presentation to
 4 the government that talks about the facts and history, and
 5 lays it all out in a nice, easy way, that is an admission
 6 that obviously is very useful.
 7 JUDGE LEGGE: Corroboration and possible
 8 impeachment.
 9 MS. HOUSE: And clarity. What you have heard
 10 today, and what you have seen today, is nothing but obtuse
 11 and vague references. We have no indication at all that
 12 we have gotten all -- or how much -- of the production
 13 that has been done to the government, let alone we clearly
 14 haven't been produced any of the voluntarily created
 15 documents, and communications with the government -- none
 16 of which would be remotely covered by Rule 6(e).
 17 You've got to understand Rule 6(e) -- this is a
 18 backstop for us. We're allowed to check against -- this
 19 is pretty serious stuff, and we're allowed to check
 20 against what they have produced to us, and the historical
 21 documents that they have produced to the government. The
 22 problems of not having a reply brief is we had never seen
 23 any of these authorities before. I would like to hand
 24 you --
 25 JUDGE LEGGE: I'll get to that issue whether

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1 there is a privilege here or not. I'm starting with --
 2 MS. HOUSE: It is relevant to --
 3 JUDGE LEGGE: Relevant, yes, there's no doubt
 4 about it. But if you get the answers the other way, why
 5 do you burden them or us with producing such stuff?
 6 MS. HOUSE: They don't make a burden because they
 7 can't. It is not a burden.
 8 What they have produced is probably already on
 9 burned CD's; there's no burden, and they don't even object
 10 on burden grounds, because that's clearly not a credible
 11 response to that particular request.
 12 JUDGE LEGGE: Aren't they better off spending
 13 their time trying to massage the data to give to you in
 14 direct response to the interrogatories? Indirectly by
 15 shipping another truckload of stuff over to you --
 16 MS. HOUSE: We'll take the truckload, because we
 17 believe they will have massaged that data in a way that is
 18 very easily understood and comprehensive. And we don't
 19 have that. And we don't have the time to wait while, you
 20 know, we get this stuff trickled in, and you make a
 21 decision, and it gets appealed, and two months more down
 22 the line.
 23 JUDGE LEGGE: You say two months down the line;
 24 wait a minute.
 25 In every one of these things, I'm going to try to

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1 have my recommendation to the judge out in just a few
 2 days, and then you've got -- what is it; 10-day time
 3 frame; 11-day -- something like that. You are only
 4 talking a couple of weeks.
 5 MR. HOWARD: But where we are now is already
 6 months down the line from where we started, based on how
 7 hard it was to get agreements about procedures about Your
 8 Honor; whatever. It is taking more time.
 9 Nonetheless, in addition to time, this is
 10 material that's clearly relevant, that is already in
 11 existence, that could easily be produced. And if it is
 12 duplicative, we'll take that risk, because we think it is
 13 worth it to see, because it is clearly relevant to our
 14 case. There's no doubt about the relevance.
 15 There is absolutely nothing in the case law that
 16 prohibits disclosure of materials. There's no automatic
 17 veil of secrecy, because there has to be --
 18 JUDGE LEGGE: Different issue. That's enough.
 19 Where are you in this production business? Have
 20 you received a subpoena from somebody, or have you
 21 received a civil investigative demand? Or what have you
 22 gotten from --
 23 MS. BOERSCH: We have stated publicly that we
 24 have received a request for documents from DOJ, and it is
 25 a grand jury subpoena.

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1 JUDGE LEGGE: You have received a subpoena, okay?
 2 Where are you in the process of responding to that?
 3 MS. BOERSCH: We are in the process of
 4 responding.
 5 JUDGE LEGGE: Have you responded yet?
 6 MS. BOERSCH: We have.
 7 JUDGE LEGGE: Totally, or in part?
 8 MS. BOERSCH: In part. It is ongoing. As we
 9 understand it, the investigation is ongoing.
 10 JUDGE LEGGE: And you have submitted your
 11 material to DOJ?
 12 MS. BOERSCH: Yes.
 13 JUDGE LEGGE: Do you have any more to do?
 14 MS. BOERSCH: Yes.
 15 JUDGE LEGGE: You haven't quite finished?
 16 MS. BOERSCH: Right.
 17 JUDGE LEGGE: What form? Do you send paper
 18 copies? Do you send the client copies? Or what?
 19 MS. BOERSCH: Yes, and I'm a little hesitant,
 20 because I do think to the extent any detail about how we
 21 have responded, or what we have produced to the grand
 22 jury, is in effect grand jury information that shouldn't
 23 be disclosed under Rule 6(e).
 24 But yes, we have provided document requests to
 25 the Government; we have produced documents both in

1 electronic and paper form.

2 I just want to emphasize a couple of points.
3 First of all, the defendants have not, and do not intend
4 to, refuse to provide any particular document, or any
5 particular information, solely on the ground that it was
6 also produced to the grand jury. Anything that was
7 produced to the grand jury, if they ask for it separately,
8 then they will have gotten it, and will get it. We are
9 not refusing to produce any particular information just
10 because it was also produced to the grand jury.

11 But what they are seeking is, in our view,
12 quintessentially grand jury information. They are trying
13 to determine the scope of the grand jury investigation,
14 and the nature of the grand jury investigation, and that's
15 what 6(e) protects.

16 JUDGE LEGGE: I have a difficult time with the
17 claim that information requested from a third party about
18 what is said to a grand jury is grand jury protection.
19 Rule 6 exists primarily to protect what goes on within the
20 grand jury: what witnesses are called; what the witnesses
21 said; who took the Fifth or who didn't take the Fifth;
22 what are they going to do next; the deliberations; their
23 arguments with one another; the arguments the US attorneys
24 make to them, and their response to the US attorneys.

25 That is what Rule 6 is about.

1 MS. BOERSCH: Correct.

2 JUDGE LEGGE: And I don't think a person
3 supplying information to a grand jury -- that information
4 is cloaked by a grand jury privilege.

5 MS. BOERSCH: I think the case law actually
6 suggests that it is. If you look at the Sulfuric Acid
7 case, and a couple of the other cases we cite, the courts
8 have said, "Look, if all you are asking for is you don't
9 want the documents for their own intrinsic value; all you
10 want to know is what is it the grand jury is asking
11 for" -- that's Grand Jury information; that tells you what
12 direction the Grand Jury is considering, what direction
13 they are going, and where they might go in the future, and
14 that's what is protected by 6(e). If there is a request
15 for a particular document, like I said, we're not going to
16 object to producing any particular document on that
17 ground.

18 It is the question of what is it that the grand
19 jury asks you for that would reveal grand jury
20 information, and we're objecting to having to provide a
21 road map to what the grand jury is seeking from us, to the
22 plaintiffs in this case.

23 JUDGE LEGGE: How long ago did you get the
24 subpoena?

25 MS. BOERSCH: The first one we got in June, I

1 believe.

2 JUDGE LEGGE: Anything further?

3 MS. HOUSE: Yes. I was about to say -- hand you,
4 because we didn't do a reply -- here is a case you may be
5 even very familiar with, the Dresser case, and I think it
6 has a nice summary about what the Rule 6(e) protection is

7 JUDGE LEGGE: The cite is 628 Fed 2nd, 1368.

8 MS. HOUSE: If you turn to Page 17 of 28, using
9 that top -- I'll read it. At the very bottom of that page
10 it says, "We note that the rule prohibits disclosures of
11 matters occurring before" --

12 JUDGE LEGGE: 17?

13 MS. HOUSE: Down at the bottom.

14 JUDGE LEGGE: I don't find that on 17.

15 MS. HOUSE: You might have a different version.

16 JUDGE LEGGE: "We note that the rule prohibits
17 disclosure of matters occurring before the grand jury.
18 This serves to protect the identity of witnesses or
19 jurors, the subsequent testimony, the strategy or
20 direction of the investigation, the deliberation and
21 questions of the jurors and the like. It does not
22 require, however, that a veil of secrecy be drawn on all
23 matters occurring in the world that happen to be
24 investigated by the grand jury."

25 MS. HOUSE: That's essentially -- what you have

1 here is an attempt to essentially explode what is the --
2 6(e) has a specific restriction, which says that no
3 obligation of secrecy except in accordance with this rule.

4 It is a limited scope of secrecy. And you
5 understand it well, and the notion here that historic
6 documents -- documents that were created, and are highly
7 relevant to the very complaint that precipitated this
8 investigation -- those are clearly not matters that were
9 created for, or unique to, the process of the grand jury.
10 They are the historic documents; they are the facts. They
11 are the facts that relate to our complaint.

12 I don't know; presumably they are the facts that
13 relate to the grand jury, but the fact that they overlap
14 doesn't mean that they get to hide them.

15 Moreover, anything beyond that, for instance --
16 and I point you to Judge Breyer's ruling in the Reyes
17 case. That makes it very clear that anything that was
18 produced to the government as a matter of informal
19 meeting; a volunteer disclosure; a presentation --
20 obviously that is not anything that was solicited by a
21 grand jury subpoena; it is not covered. And it is
22 obviously something that would be very relevant to both
23 the facts of the case and the claims about defenses, and
24 the claims about the scope of the wrongdoing, and what was
25 done.

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1 So any of that material is fair game. And they
 2 clearly haven't produced it. They are not volunteering to
 3 produce it. And absent an order that they do -- they have
 4 just flatly stonewalled us on all of this.
 5 What you are hearing is they are saying, "Well,
 6 maybe if they have asked it here, we'll give them a
 7 piece," or, "Maybe if they have asked it here, and it
 8 overlaps, we'll give them a piece." They are not telling
 9 you, and they won't tell you, they are going to produce to
 10 us every historic document they have given to the
 11 Government; they will produce to us every presentation
 12 they have made to the Government, because they haven't
 13 agreed to do that, and they are not agreeing to do it
 14 today. And yet each of those is relevant and not
 15 protected.
 16 There is no reason not to, especially when we're
 17 on a time frame like we are. Here we are months later;
 18 something that was presumably initially produced months
 19 ago in a nice, contained format, historic documents
 20 totally relevant to the issues at hand. They are not
 21 telling you we have them. You notice that.
 22 It is relevant, and we're entitled to it. It is
 23 not implicating any of the secrecy concerns that you have
 24 talked about in Rule 6(e).
 25 JUDGE LEGGE: Do you want to reply?

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1 MS. BOERSCH: Again, we are not refusing to
 2 produce any relevant document merely on the grounds that
 3 it was produced to the grand jury. If a document was
 4 produced to the grand jury, and they also want it, we will
 5 give it to them if they give us a proper discovery
 6 request. But they cannot use the grand jury in order to
 7 subvert the civil discovery rules.
 8 The only information we have provided to the
 9 Government is information that we have provided in
 10 response to a grand jury subpoena, so we're not talking
 11 about the sort of information that was at issue in Reyes
 12 or Rigonzies [phonetic]. And those cases, at any rate,
 13 involve the work product privilege, not 6(e), because
 14 those were presented to the Government, not to the grand
 15 jury.
 16 But I just want to emphasize again that it is
 17 clear, from what they are saying, that they are not
 18 seeking any particular document or information for its own
 19 intrinsic value. Instead, what they want to know is the
 20 direction of the grand jury investigation.
 21 And I would just again rely on the case law we
 22 cited, which is Dynavac and some district court cases,
 23 that clearly state that disclosure of which documents
 24 subpoenaed by the grand jury may disclose the Grand Jury's
 25 deliberative process -- even when documents are sought for

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1 their own sake, disclosure may --
 2 JUDGE LEGGE: What are you reading from, at the
 3 moment?
 4 MS. BOERSCH: I'm reading from Page 3 of our
 5 letter brief.
 6 JUDGE LEGGE: Which cases?
 7 MS. BOERSCH: Dynavac, a 9th Circuit case.
 8 When the documents are considered in the
 9 aggregate, and in their relationship to one another --
 10 make possible inferences about the nature and direction of
 11 the grand jury inquiry. And it is clear from the case law
 12 that 6(e) protects disclosure of that sort of
 13 information -- and that is all we're objecting to with
 14 these two requests that they have served.
 15 One other thing I want to address briefly, which
 16 is Oracle's speculation that the criminal investigation is
 17 an investigation of the allegations in their complaint.
 18 That is, I think -- has to be speculation, because the
 19 Government does not tell anybody the nature of their
 20 investigation, or what exactly they are investigating.
 21 You might be able to deduce it; you might be able to make
 22 an educated guess, but it is still a guess.
 23 So their requests are overbroad, because they
 24 seek information that is potentially irrelevant.
 25 JUDGE LEGGE: What about the subpoena itself? Or

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1 any cover letter from Justice to your clients, with
 2 respect -- does that in any way define the scope of their
 3 investigation?
 4 MS. BOERSCH: The documents requested would
 5 definitely reveal the scope of the grand jury
 6 investigation.
 7 JUDGE LEGGE: I'll say it point blank: We're
 8 examining into whether TN or SAP made improper downloads
 9 of Oracle --
 10 MS. BOERSCH: No, the grand jury subpoena itself
 11 would not include any of that sort of information.
 12 JUDGE LEGGE: What about the cover letter from
 13 Justice?
 14 MS. BOERSCH: No. As far as I know, we don't
 15 have a cover letter from Justice; we just have a subpoena.
 16 MS. HOUSE: We're welcome to have you review any
 17 of that in camera, if we need to do that, to make such
 18 determination.
 19 JUDGE LEGGE: Apparently there is nothing for me
 20 to review -- unless I review the subpoena itself.
 21 MS. HOUSE: The complaint created the
 22 allegations. That's what their own public relations spin
 23 on it has been. There is no doubt about that that's just
 24 sophistry.
 25 This is about the same activities. You heard it

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1 again: They are not saying that they produced to us the
 2 materials that are clearly relevant, that are all
 3 generated out of the very complaint that started the
 4 investigation.
 5 You didn't hear them say they produced the
 6 underlying historic materials to us. They are saying,
 7 "Well, maybe if there's an interrogatory or a document
 8 request that we're not going to object to, then we agree
 9 to produce to, then we'll produce it." But they don't
 10 say they have produced it, or when they are going to
 11 produce it.
 12 Dynavac -- I would like you to look at that 9th
 13 Circuit case. It specifically found that matters
 14 occurring before the grand jury did not include records
 15 that were independently generated and sought for
 16 legitimate purposes.
 17 The legitimate purpose here -- again, going back
 18 to that Dresser case -- it couldn't be clearer. They say
 19 intrinsic value the only issue you have to worry about in
 20 terms of checking out if somebody is looking for the
 21 documents for their own sake; you are not trying to learn
 22 what took place before the grand jury.
 23 We don't care what took place before the grand
 24 jury. We want the intrinsic -- the reason that we're
 25 doing this; that we're seeking this -- is because we want

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1 to see the historic underlying data, and in addition, any
 2 kind of voluntary submissions or presentations, or
 3 whatever materials were done voluntarily with the
 4 government -- we're entitled to that. That doesn't even
 5 get covered under the Rule 6(e).
 6 The other quote that they have from Dynavac: I
 7 invite you to look at the second half of the sentence,
 8 which talks about how rare and unusual it is to put Rule
 9 6(e) secrecy around anything; that these are the kinds of
 10 concerns and the kinds of policies that are implicated by
 11 6(e) -- are rarely invoked or rarely threatened.
 12 So every one of the cases that they cite, Your
 13 Honor, has to do with the very core grand jury type of
 14 materials you are talking about, whether it is actually
 15 seeking transcripts; whether it is trying to interview
 16 witnesses about what they did and said to the grand jury;
 17 whether -- it is getting at the core; what goes on in the
 18 room.
 19 That's not what we're talking about here. We're
 20 looking for the very historic documents that go to the
 21 claims that created the need for the investigation in the
 22 first place.
 23 They agree they haven't produced them to us; they
 24 have them compiled, easily ready, out the door, and we
 25 would be so much farther along in our production in this

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1 case if we got those than if we continue to get this
 2 trickle-out, roll-out position that we are in now.
 3 MS. BOERSCH: If I could just briefly emphasize:
 4 We don't agree that we haven't produced to Oracle the same
 5 documents that we produced to the government. That's not
 6 the issue.
 7 And again, we are not refusing to provide any
 8 document that Oracle claims is relevant; any historical
 9 document that they claim is relevant. If they believe
 10 they need that document for some intrinsic value, we're
 11 producing it if they ask for it, subject to other
 12 objections. That's not the issue. That's not, actually,
 13 what they seek.
 14 Instead, what they seek, as they admit in their
 15 letter: "We want to compare, how does the government
 16 investigation differ from ours? We want to know which
 17 documents the government subpoenaed; we want to know how,
 18 exactly, you responded to that request from the
 19 government."
 20 Why? Because they want to know the nature and
 21 scope of the Government's investigation. Not because they
 22 want to know, "Hey, what is in the SAS database?" If they
 23 ask us for the SAS database, and we produce the SAS
 24 database to the government, we're not saying, "Hey, we
 25 can't give it to you; it is grand jury information." We

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1 give it to them.
 2 It is not grand jury information; we admit that,
 3 and it is a pre-existing historical document, and they are
 4 seeking it for some intrinsic value, they can have it.
 5 What we are objecting to is their request, because it
 6 actually seeks to know the scope and direction of the
 7 Government's investigation, and that is, under the cases
 8 we have cited, protected by 6(e).
 9 MS. HOUSE: You got it exactly backwards. What we
 10 want to know is the facts; that is all.
 11 JUDGE LEGGE: You are repeating yourself, so I'll
 12 just have to take that one under submission.
 13 Next is the defendant's motion with respect to
 14 the issue of third-party support. My concern with that
 15 one is it seems to me that you are going beyond core
 16 nature of the dispute in this case, and doing a lot of
 17 discovery with an issue that I think is tangential, and
 18 that is what is the relationship between Oracle and other
 19 third-party service suppliers, or whatever you call those
 20 people.
 21 Why do we need that?
 22 MR. McDONELL: May I, Your Honor?
 23 JUDGE LEGGE: Sure.
 24 MR. McDONELL: First of all, I would note that
 25 Oracle itself has agreed to produce some of this