

# EXHIBIT 9

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ELIZABETH D. LAPORTE, MAGISTRATE JUDGE

ORACLE CORPORATION, ET AL.,	)	
	)	
	)	
PLAINTIFFS,	)	
	)	
VS.	)	NO. C07-1658 PJH (EDL)
	)	
SAP AG, ET AL.,	)	
	)	SAN FRANCISCO, CALIFORNIA
	)	
DEFENDANTS.	)	THURSDAY
	)	AUGUST 28, 2008
	)	9:00 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES :

**FOR PLAINTIFFS:**

BINGHAM MCCUTCHEM LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4067  
BY: GEOFFREY M. HOWARD, ESQUIRE AND  
DONN PICKETT, ESQUIRE AND  
HOLLY HOUSE, ATTORNEY AT LAW  
262-9212

AND

JENNIFER GLOSS, SENIOR CORPORATE COUNSEL  
ORACLE  
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650-506-7114

FURTHER APPEARANCES ON NEXT PAGE

**REPORTED BY: KATHERINE WYATT, CSR #9866, RMR**  
**OFFICIAL REPORTER - U.S. DISTRICT COURT**

1 DIFFERENT STAGES, SO IT IS DIFFICULT TO UNDERSTAND HOW THEY ARE  
2 GOING TO SAY:

3 "WE HAD THIS BUSINESS PURPOSE FOR DOING THIS,"  
4 WHATEVER THAT MAY MEAN, ASIDE FROM LIABILITY.

5 AND FINALLY AND MOST IMPORTANTLY, IT DEPRIVES ORACLE  
6 OF A KEY -- AT LEAST ONE KEY ARGUMENT. WE'RE SEEKING, AMONG  
7 OTHER THINGS, PUNITIVE DAMAGES.

8 AND WE MAY LIKELY PORTRAY THIS CREATION OF A FIREWALL  
9 AS PART OF A DELIBERATE PLOT TO PRETEND IN BAD FAITH THAT THEY  
10 WERE TRYING TO PROTECT ORACLE'S IP RIGHTS AND WERE KEEPING THIS  
11 SEPARATE TO PROTECT ORACLE WHEN, IN FACT, THEY KNEW THAT  
12 TOMORROWNOW WAS OPERATING ILLEGALLY. AND THAT THEY, SAP, THAT  
13 SAP WOULD BE LIABLE FOR THAT ACTIVITY KNOWING THAT IT PERMITTED  
14 THAT ACTIVITY AND COULDN'T, IN FACT, PROTECT ITSELF THROUGH A  
15 FIREWALL.

16 SO WE'RE TRYING TO GET AT THAT INFORMATION FOR THAT  
17 REASON.

18 **THE COURT:** BUT TO ME THAT LAST ARGUMENT WOULD  
19 REQUIRE A CRIME FRAUD EXCEPTION.

20 **MR. PICKETT:** WELL, WE'RE NOT DOING THAT YET.

21 **THE COURT:** AND IF YOU'RE NOT GOING THAT FAR, I DON'T  
22 THINK THAT -- YES, OF COURSE, YOU WOULD LIKE TO HAVE PUNITIVE  
23 DAMAGES, BUT YOU DON'T NORMALLY GET TO HAVE THE LAWYERS RAT ON  
24 THEIR CLIENTS TO PROVE IT, UNLESS YOU PROVE CRIME OF FRAUD.

25 SO, YOU KNOW, BUT -- SO I TAKE IT YOU'RE TRYING TO

1 DRAW A LINE BETWEEN SAYING:

2 "PROOF OF THE PUDDING IS THE POLICY ITSELF, NOT  
3 WHY WE ADOPTED IT." I MEAN, I THINK YOU ARE SOMEWHAT  
4 INCONSISTENT AS THE BUSINESS ISN'T LEGAL. BUT THE FACT IS, I  
5 MEAN, BOARDS MAKE BIG DECISIONS ALL THE TIME WITH ADVICE OF  
6 COUNSEL.

7 AND THE DECISION, THE RESULT OF THE DECISION, THE  
8 POLICY ITSELF CAN BE REVEALED AND DISCUSSED AND USED IN THE  
9 LITIGATION WITHOUT TRANSLATING INTO OPENING, WAIVING THE  
10 PRIVILEGE IN ANY WAY.

11 AND I DON'T THINK THIS IS THE KIND OF THING LIKE IN A  
12 PATENT CASE WHERE YOU RELY ON THE ADVICE OF COUNSEL:

13 "THEY TOLD US WE WEREN'T INFRINGING."

14 INSTEAD, THEY ARE RELYING ON THEY HAD THIS FIREWALL.  
15 IT EITHER IS A POTESKIN VILLAGE, WHICH IS, YOU KNOW, FULL OF  
16 HOLES AND, YOU KNOW, TO MIX A LOT OF METAPHORS, THAT IT'S NO  
17 GOOD, AND YOU PROVE THAT -- AND SOUNDS LIKE YOU THINK YOU CAN --  
18 AND THAT IS THE BAD FAITH. THIS WAS A BIG PHONY THING THAT WAS.  
19 YOU KNOW. NEVER GOING TO WORK. AND THEY KNEW IT.

20 BUT YOU DON'T NEED THE LAWYERS' ASSISTANCE -- YOU'RE  
21 NOT ENTITLED TO LAWYERS' ASSISTANCE TO DO THAT.

22 IT SEEMS TO ME THE APPROPRIATE TIME TO MAKE SURE THAT  
23 THEY DON'T BLEED THAT DEFENSE OVER IS A MOTION IN LIMINE. I  
24 MEAN, I THINK YOU WILL HAVE TO LIVE BY THE RESTRICTIONS.

25 ULTIMATELY, JUDGE HAMILTON IS GOING TO HAVE TO DECIDE

1 IF THERE IS A GRAY AREA. PRESUMABLY, SHE WILL DECIDE, BECAUSE I  
2 THINK IT'S A MOTION-IN-LIMINE-TYPE ARGUMENT.

3 BUT THE MINUTE YOU TRY GOING BEYOND THAT AND SAY --  
4 LIKE IF THEY SAY:

5 "WELL, YOU KNOW, THIS POLICY WAS NO GOOD. THIS  
6 FIREWALL WAS FULL OF HOLES," AND YOU SAY:

7 "WELL, BUT WE ADOPTED IT IN GOOD FAITH BECAUSE  
8 OUR LAWYERS TOLD US IT WOULD WORK," YOU CAN'T SAY  
9 THAT. YOU'RE NOT GOING TO BE ABLE TO SAY ANYTHING LIKE THAT.

10 AND I'M SURE THEY ARE GOING TO JUMP DOWN YOUR THROAT  
11 THE MINUTE YOU TRY, AND YOU PROBABLY SHOULDN'T GET AWAY WITH  
12 THAT. BUT TO ME THAT'S THE ANSWER.

13 **MR. PICKETT:** THANK YOU.

14 **THE COURT:** OKAY. AND AS TO THE DOCUMENTS  
15 THEMSELVES --

16 **MR. PICKETT:** JUST ONE --

17 **THE COURT:** YES. OKAY.

18 **MR. PICKETT:** YOU'RE ALSO RULING ON THE SELECTIVE  
19 WAIVER ISSUE, WHICH I KNOW IS A VERY SLIPPERY ISSUE.

20 **THE COURT:** YEAH, I DON'T SEE A SELECTIVE WAIVER,  
21 EITHER. BUT I'M GOING THROUGH THE DOCUMENTS.

22 **MR. PICKETT:** I KNOW IT'S A DIFFICULT ISSUE, AND I  
23 WONDER THERE MAY NOT BE ENOUGH DATA POINTS. AND I KNOW THE  
24 CONCERN ABOUT TIME. WE MAY OR MAY NOT BRING BACK SOME MORE DATA  
25 POINTS TO YOU AT SOME POINT.

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CERTIFICATE OF REPORTER

I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 4TH DAY OF SEPTEMBER, 2008.

S/S KATHY WYATT