

EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

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

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

Defendants.

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*** HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY ***

DEPOSITION OF STEPHEN GRAY

VOLUME II

(Pages 316 - 601)

June 9, 2010

Reported by:
Natalie Y. Botelho
CSR No. 9897

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08:45:03 13 Q. I don't think there's a table of contents
08:45:05 14 for your appendices, but are you able to tell me,
08:45:09 15 for instance, in Appendix 4 it was their content
08:45:14 16 that was not written by you in Appendix 4?
08:45:19 17 A. I don't know if I've -- didn't quite
08:45:21 18 follow the question.
08:45:22 19 Q. Sure. So same question, but for Appendix
08:45:23 20 4. Is there -- and I'm not asking again for things
08:45:27 21 that you dictated and were written down verbatim.
08:45:33 22 I'm asking where text was contributed by someone
08:45:36 23 else.
08:45:37 24 A. Right. And Appendix 4 is -- we're
08:45:40 25 referring to the spreadsheet?

08:45:41 1 Q. Yeah, that --

08:45:42 2 A. That's the Appendix 4, right, that we're
08:45:44 3 referring to?

08:45:45 4 Q. Yes.

08:45:46 5 A. The spreadsheet was -- let's see. How
08:45:49 6 would I characterize that. That was jointly
08:45:52 7 developed, and I ended up, you know, asking for
08:45:57 8 certain columns and certain analysis to be
08:45:59 9 performed, and so that contributed to the columns
08:46:02 10 that are in the spreadsheet.

08:46:04 11 I suppose that some of the text in the
08:46:06 12 headings of the columns, for example, would -- that
08:46:09 13 was probably text that I would suggest was
08:46:12 14 contributed. And I think the list of the names of
08:46:18 15 the customers is not something that I typed in, for
08:46:21 16 example, on Appendix 4.

08:46:28 17 I think there was a preliminary version
08:46:31 18 of -- and I don't know if I'm entitled to talk --
08:46:34 19 shouldn't talk about that. Okay. There was -- it's
08:46:43 20 probably -- that's probably it in Appendix 4.

08:46:47 21 Q. Anything else in Appendix 4 other than
08:46:51 22 some of the text in the headings of the columns and
08:46:56 23 the list of customer names being typed by someone
08:46:59 24 else?

08:47:00 25 A. And I'm not entirely sure they were typed.

08:47:03 1 Q. Or copied and pasted, sure.

08:47:07 2 A. However they got there.

08:47:07 3 Q. Anything other than those two?

08:47:09 4 A. Not that I'm -- not that I'm aware of now,
08:47:11 5 sitting here right now.

08:47:13 6 Q. In your answer you said that you asked for
08:47:15 7 certain columns and certain analysis to be
08:47:17 8 performed. Whom did you ask?

08:47:28 9 A. I guess the -- I guess the people that I
08:47:32 10 had -- I think that I asked -- I asked Mr. Fuchs
08:47:42 11 here, who had -- I think he was the one who I first
08:47:46 12 talked to this about. I would imagine that's the
08:47:49 13 first place that it started. I think that is.
08:47:51 14 That's my best recollection.

08:47:54 15 Q. To be clear, you asked Mr. Fuchs to create
08:47:58 16 certain columns and to perform certain analyses for
08:48:02 17 your Appendix 4?

08:48:03 18 A. Well, that's where it started, and then
08:48:06 19 there was a collaborative effort that went back and
08:48:09 20 forth to actually, you know, identify exactly what
08:48:11 21 was going to be in each column and so on. But
08:48:14 22 that's where it started, yeah.

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08:49:54 19 Q. Did you direct someone to determine which
08:49:58 20 customers were the consulting-only customers?
08:50:02 21 A. Yes, I was -- well, did I direct -- yes, I
08:50:06 22 mean, I wanted to identify those customers that were
08:50:08 23 consulting-only customers.

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08:52:28 1 Q. Moving on to the next column that says
08:52:31 2 "PeopleSoft Customer" in the second row. Did you
08:52:38 3 ask for certain -- or did you ask for this column to
08:52:43 4 be created or for a certain analysis to be performed
08:52:45 5 in support of this column?

08:52:48 6 A. Yes. I wanted to know which customers
08:52:53 7 were supported or were -- TomorrowNow was supporting
08:52:59 8 with which product lines. So those are columns
08:53:02 9 that -- you know, the "PeopleSoft Customer" column
08:53:07 10 is certainly one that I wanted to have populated.

08:53:11 11 Q. And is it your recollection that you
08:53:13 12 directed Mr. Fuchs to do that?

08:53:18 13 A. Well, no, no. I don't know that I
08:53:20 14 direct -- I don't think I directed Mr. Fuchs to
08:53:23 15 do -- to perform that, but I said I think that
08:53:26 16 would -- we're talking about how the initial
08:53:29 17 spreadsheet was formed, and so the identification of
08:53:32 18 the columns. I thought -- I think in the
08:53:35 19 conversation, I thought that would be a good column.

08:53:39 20 Q. Okay. When you said in an earlier
08:53:41 21 response that you asked for certain columns and
08:53:43 22 certain analysis to be performed, do you recall that
08:53:47 23 testimony?

08:53:48 24 A. I do.

08:53:48 25 Q. And I think that you had further said that

08:53:52 1 you had directed Mr. Fuchs to perform certain
08:53:55 2 analyses. Is there -- is that not correct for this
08:54:00 3 column?
08:54:00 4 A. Oh, I don't -- I'm sorry. Maybe I'm --
08:54:03 5 maybe I got confused. What I thought we were
08:54:05 6 talking about is did I want certain columns to be in
08:54:10 7 the report, in which case -- that's what I thought
08:54:13 8 we were talking about. So that's the column that I
08:54:15 9 wanted to have. That is a column I wanted to have
08:54:19 10 in the report or this exhibit.
08:54:20 11 Q. Did you --
08:54:21 12 A. The question of populating it is then a
08:54:23 13 secondary -- the second question, but I mean -- or
08:54:26 14 unless you want me to combine those two things.
08:54:28 15 Q. No, we can keep them separate.
08:54:29 16 A. I thought you were -- I thought you had
08:54:30 17 separated them. So sorry. Maybe I misunderstood
08:54:33 18 you.
08:54:33 19 Q. Did you populate this column?
08:54:34 20 A. I -- in -- yeah, I mean, I went through
08:54:38 21 the data to make a determination as to these --
08:54:41 22 whether these customers were PeopleSoft -- any of
08:54:46 23 these customers were PeopleSoft customers. I did
08:54:48 24 perform that. Others contributed to that as well.
08:54:52 25 Q. Which others contributed to that?

08:54:53 1 A. I think -- well, I don't know
08:54:59 2 specifically, but I would -- my best recollection is
08:55:06 3 that it would have been Briana, Sean. That's my
08:55:16 4 best recollection. Myself.
08:55:18 5 Q. Both of whom are Jones Day attorneys that
08:55:22 6 you identified earlier?
08:55:23 7 A. That's correct.
08:55:26 8 Q. And what data did you personally review in
08:55:28 9 the course of populating the "PeopleSoft Customer"
08:55:31 10 column?
08:55:39 11 A. There is a -- well, SAS is the -- where
08:55:42 12 the data originates. I believe also there is a
08:55:46 13 spreadsheet that identifies it, but I think it's
08:55:50 14 SAS.
08:55:50 15 Q. Did you personally review each of the
08:55:52 16 customer records in SAS to make this determination?
08:55:55 17 A. Oh, well, yes, I have personally reviewed
08:55:58 18 each of the -- well, each of the customer records in
08:56:01 19 SAS for these customers, yes, to determine whether
08:56:03 20 or not they were -- they had PeopleSoft, or whether
08:56:07 21 they were PeopleSoft customers, mm-hmm, yes, I have.

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09:11:52

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MR. POLITO: Q. Understanding that SAS is

09:11:55 1 the basis for this column or data within SAS, did
09:12:03 2 Sean or Briana contribute data to Defendant's
09:12:08 3 Exhibit 2089 with respect to the "PeopleSoft
09:12:10 4 Customer" column?

09:12:14 5 MR. FUCHS: Objection; form.

09:12:29 6 THE WITNESS: They -- they -- yeah, I
09:12:35 7 mean, they populated some of the dots in the column,
09:12:42 8 as did I. I'm not quite sure. Is that what you
09:12:47 9 mean?

09:12:47 10 MR. POLITO: Q. Yeah. Do you recall
09:12:48 11 which dots they populated, as opposed to which dots
09:12:50 12 you populated? Could you answer the question if I
09:12:52 13 asked you who populated a particular dot in the
09:12:54 14 "PeopleSoft" column?

09:12:58 15 A. No, but the -- it's kind of -- the reason
09:13:03 16 I'm being a little hesitant there, I can't identify
09:13:05 17 it, but it's not -- there is an endpoint here. I
09:13:10 18 looked at each of the -- at the end -- at the end of
09:13:13 19 the day, to use that term, these are all my dots,
09:13:19 20 right. So these are -- any dots that were -- any
09:13:25 21 dots that were dotted by either Sean or Briana were
09:13:30 22 interim dots. The final dots are all my dots.
09:13:36 23 Sounds silly, but I think you follow what I'm
09:13:38 24 saying.

09:13:39 25 Q. I do. Would your answers be any different

09:13:42 1 if I asked you about the "JD Edwards World Customer"
09:13:44 2 column with regard to who generated -- or who took
09:13:50 3 the information from SAS, analyzed it, and put it in
09:13:55 4 Defendant's Exhibit 2089?

09:13:56 5 MR. FUCHS: Objection; form.

09:14:03 6 THE WITNESS: There are some, kind of,
09:14:06 7 exceptions throughout this report. I just want to
09:14:07 8 make sure I'm answering accurately. I don't believe
09:14:22 9 that I would have a different answer for any column.
09:14:31 10 In the columns that we're talking about here, which
09:14:33 11 are the products serviced by TN, at all I don't
09:14:44 12 think I would have any difference in the way that I
09:14:46 13 would answer the question.

09:14:49 14 The columns were -- you know, it was my
09:14:53 15 decision to try to make a determination -- I
09:14:56 16 suspect -- let me be fair -- let me be clear about
09:14:58 17 that. The column that is labeled -- each -- well,
09:15:04 18 the columns labeled "PeopleSoft Customer," "JDE
09:15:08 19 World Customer," "JDE OneWorld Customer," and
09:15:11 20 "Siebel Customer," those are the columns we're
09:15:14 21 referring to at the moment, and those I would have
09:15:17 22 the same answer, I think, if we -- if we were to
09:15:20 23 look at those, where there was contributions made
09:15:23 24 and then I verified each of those contributions.

09:15:25 25 MR. POLITO: Q. Is that because all JDE

09:15:27 1 customers is just an "and" function on the World and
09:15:31 2 OneWorld?

09:15:32 3 A. Well, that and, I mean -- at least that,
09:15:34 4 yeah. I mean, it's just a -- correct, that's an
09:15:36 5 "and" function.

09:15:38 6 Q. In an earlier answer, you had said that
09:15:40 7 you had asked for certain columns and certain
09:15:42 8 analyses to be performed. Are there any columns on
09:15:46 9 Exhibit 2089 that you did not ask for?

09:15:53 10 A. Are we talking about all of 2089 or are we
09:15:56 11 just talking about the section that's products
09:16:00 12 Serviced by TN?

09:16:02 13 Q. All of the columns on 2089.

09:16:04 14 A. Oh. Need to get my glasses fixed. I'm
09:16:10 15 finding that all day yesterday and today, I've had
09:16:13 16 to take my glasses off to read things. So sorry.
09:16:16 17 Let me look at it.

09:16:40 18 (Pause.)

09:16:41 19 THE WITNESS: Yeah, I don't know of any of
09:16:41 20 the columns that I didn't ask for. The only one
09:16:49 21 that -- the only one that is a possible candidate
09:16:51 22 there is the one that's labeled "All JDE Customers."
09:16:54 23 It turned out that that column was convenient for
09:16:58 24 some of the analysis, just to have all the JDE
09:17:01 25 customers in one column.

09:17:03 1 So I'm not so sure that I asked for that.

09:17:05 2 I think that might have -- someone else might have
09:17:09 3 said, "Oh, by the way, let's put that in there."

09:17:11 4 But I think everything else, I mean, I would have
09:17:12 5 been -- there was debate and discussion about --

09:17:16 6 MR. FUCHS: Don't reveal the debate and
09:17:17 7 discussion.

09:17:18 8 THE WITNESS: No, I won't. I won't reveal
09:17:19 9 the content of it. I mean, but there was discussion
09:17:22 10 about the columns and so on, but --

09:17:24 11 MR. FUCHS: Unless you relied on the
09:17:25 12 debate and the discussion. If you did, you can
09:17:28 13 reveal it. But under the stipulation from
09:17:30 14 February 11th, don't reveal the debate and
09:17:32 15 discussion unless you relied on it, or that forms
09:17:36 16 the basis of your opinions.

09:17:38 17 THE WITNESS: I understand.

09:17:39 18 No, I didn't rely on it. As to which
09:17:41 19 columns -- you know, what the columns were going to
09:17:42 20 be, but no, there was -- all of these columns were
09:17:45 21 columns that I asked to have put in there. And
09:17:46 22 again, the only one that might have been
09:17:47 23 volunteered, the "All JDE Customers."

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10:06:11 2 Q. Do you recall testifying yesterday that
10:06:12 3 the citations in the body of the report identified
10:06:15 4 the materials that you relied upon?
10:06:17 5 A. Among other things.
10:06:19 6 Q. Is it your testimony today that, in fact,
10:06:21 7 we can't tell what you relied upon simply by
10:06:24 8 reviewing the citations in your report?
10:06:26 9 MR. FUCHS: Objection; form,
10:06:27 10 argumentative, mischaracterizes prior testimony.
10:06:34 11 THE WITNESS: I'm not quite sure what
10:06:35 12 you're asking. Why don't you be a little bit more
10:06:39 13 clear about what you're asking. I'm not --
10:06:42 14 MR. POLITO: Q. Is it your testimony that
10:06:48 15 just because you cited something in your report
10:06:51 16 doesn't mean that you relied upon it?
10:06:54 17 MR. FUCHS: Objection; form.
10:06:57 18 THE WITNESS: Just because I -- just
10:06:59 19 because I cited something in my report doesn't mean
10:07:02 20 that I relied upon it. You mean because there's a
10:07:04 21 citation in my report that it -- that I relied upon
10:07:08 22 it for the formation of my opinion? I certainly
10:07:11 23 would rely upon it to confirm -- I mean, I relied
10:07:14 24 upon it to confirm my opinion.
10:07:16 25 I mean, so I -- it certainly is ident --

10:07:18 1 and I'm not sure where we're going or why we're
10:07:23 2 going there, but that's your problem, not mine. I
10:07:26 3 mean, only thing I'm trying to do is to say that
10:07:30 4 there is -- that the information that is in my
10:07:31 5 report is information that I -- or the citations
10:07:37 6 that are in the body of my report are things that I
10:07:39 7 relied upon. I may have relied upon them to -- as
10:07:42 8 facts upon which I formed an opinion. I may have
10:07:44 9 relied upon them as evidence that supports an
10:07:50 10 opinion I already had, but I rely upon them to that
10:07:53 11 extent.

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12:00:06 1 MR. POLITO: Q. No, I'm asking you, does
12:00:08 2 your report assume that so long as material was
12:00:13 3 available on Customer Connection prior to a
12:00:15 4 customer's maintenance end date, that that customer
12:00:18 5 was entitled to that software and support material?

12:00:21 6 MR. FUCHS: Objection; form.

12:00:24 7 THE WITNESS: I don't have an opinion
12:00:25 8 about that one way or the other. I have not -- I
12:00:28 9 don't know what it says or what the agreements say
12:00:30 10 or so on. So I don't have an opinion that it does
12:00:34 11 one way or the other.

12:00:36 12 MR. POLITO: Q. Do you have an opinion
12:00:37 13 one way or another as to whether a customer can
12:00:43 14 permissibly be given software and support material
12:00:47 15 downloaded using another customer's credentials
12:00:50 16 under any circumstance?

12:00:51 17 MR. FUCHS: Objection; form, calls for a
12:00:52 18 legal conclusion.

12:01:02 19 THE WITNESS: Would it be permissible,
12:01:03 20 you're saying. It's not -- this isn't a legal
12:01:06 21 question? I mean -- what do you mean when you're
12:01:11 22 asking me, "Is it permissible?" Would it -- help me
12:01:15 23 with what you meant by that.

12:01:29 24 MR. POLITO: Q. Do you have any opinion
12:01:31 25 about what activity that TomorrowNow performed was

12:01:33 1 proper or improper with respect to supporting its
12:01:35 2 own customers?

12:01:39 3 MR. FUCHS: Objection; form.

12:01:44 4 THE WITNESS: My report and my analysis is
12:01:47 5 really related to the Mandiant report and the
12:01:51 6 analysis and so on performed therein, you know, in
12:01:55 7 his report and his appendices and so on, the
12:01:58 8 material that he provided. I'm -- you know, I don't
12:02:02 9 have an opinion -- I'm not intending in my report to
12:02:05 10 try and talk about the general case of how
12:02:09 11 TomorrowNow dealt with their customers or the
12:02:13 12 propriety or impropriety of their behaviors.

12:02:17 13 What I am focused on in my report really
12:02:20 14 has to do with response to the Mandiant report and
12:02:23 15 the work that the Mandiant report performed and
12:02:27 16 whether or not sufficient work was performed and so
12:02:29 17 on. So I have a lot of comments about that, but I
12:02:31 18 don't really have opinions one way or the other
12:02:35 19 regarding the broader question of TomorrowNow's
12:02:38 20 treatment of their -- of their customers.

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12:04:19	22	As you sit here today, do you have an
12:04:21	23	opinion about whether TomorrowNow is liable for
12:04:24	24	copyright infringement in this matter?
12:04:27	25	MR. FUCHS: Objection; form, calls for a

12:04:29 1 legal conclusion.

12:04:36 2 THE WITNESS: I don't have -- I don't
12:04:37 3 think I have the -- I don't think I have the
12:04:42 4 background to make an assessment regarding -- to
12:04:45 5 make that kind of a statement with respect to
12:04:47 6 liability. I think that gets into a more legal
12:04:52 7 domain, which I don't intend and is not the purpose
12:04:54 8 of my report or not the intent of my report.

12:04:57 9 MR. POLITO: Q. Do you presently have an
12:04:58 10 opinion that any conduct by TomorrowNow was proper
12:05:05 11 or improper?

12:05:08 12 MR. FUCHS: Objection; form, could call
12:05:14 13 for a legal conclusion.

12:05:17 14 THE WITNESS: It's -- I don't mean to be
12:05:18 15 glib, but I imagine they must have stumbled into
12:05:21 16 something that was proper, I mean, if that's what
12:05:22 17 you mean. I don't have an opinion -- you're asking
12:05:24 18 me the opinion -- the way you asked that question is
12:05:26 19 very difficult to answer.

12:05:27 20 I don't have an opinion -- I don't have an
12:05:30 21 opinion regarding the proprietor -- propriety or
12:05:35 22 impropriety or permissibility in a general sense of
12:05:39 23 how TomorrowNow conducted their affairs with their
12:05:41 24 customers or conducted their business with their
12:05:43 25 customers. I don't have an opinion about the

12:05:45 1 general -- the broader question.

12:05:47 2 My opinions are confined to the Mandiant
12:05:52 3 report and appendices and work that he did and
12:05:55 4 comments and critiques of his report, is really what
12:05:58 5 my opinions in my report pertain to. That's what I
12:06:01 6 mean. So I don't think I do have an opinion outside
12:06:04 7 that, again, given the proviso that there's new
12:06:07 8 stuff that I got to absorb.

12:06:09 9 MR. POLITO: Q. Do you presently have an
12:06:10 10 opinion about whether TomorrowNow's downloading from
12:06:13 11 Customer Connection was permissible under any
12:06:16 12 applicable licenses or terms of use?

12:06:19 13 MR. FUCHS: Objection; form.

12:06:23 14 THE WITNESS: So I think, like Mr. Mandia
12:06:27 15 and in the Mandiant report, I haven't looked at
12:06:32 16 terms of use agreements, and so I don't -- I don't
12:06:37 17 have an opinion regarding the permissibility or
12:06:41 18 impermissibility of downloading materials.

12:06:44 19 MR. POLITO: Q. Do you presently have an
12:06:46 20 opinion as to whether the local environments on
12:06:52 21 TomorrowNow's machines were permitted under the
12:06:55 22 applicable customer licenses?

12:06:59 23 MR. FUCHS: Objection; form.

12:07:17 24 THE WITNESS: Well, like -- again, like
12:07:18 25 Mr. Mandia and the Mandiant report, I haven't

12:07:22 1 reviewed customer licenses or been provided with any
12:07:26 2 guidance with respect to the customer licenses. And
12:07:30 3 consequently, I don't think I have -- I'm in a
12:07:32 4 position to have an opinion regarding whether or not
12:07:35 5 the environments that are -- that are identified as
12:07:41 6 having been present on TomorrowNow's systems were
12:07:44 7 permitted or not permitted. I don't have an opinion
12:07:48 8 about that at this point. Because I -- again, like
12:07:53 9 Mr. Mandia and the Mandiant report, I haven't read
12:07:55 10 the license agreements and so on.

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13:49:34 11 Q. Mr. Gray, are you competent to determine
13:49:37 12 whether the act of downloading on behalf of Customer
13:49:39 13 A, using Customer B's credentials from an Oracle Web
13:49:45 14 site, would violate Customer B's customer license?
13:49:50 15 MR. FUCHS: Objection; form.
13:50:05 16 THE WITNESS: I think that kind of puts me
13:50:10 17 into the terms of use or license arena, which I have
13:50:15 18 suggested so -- to -- you know, suggested on a
13:50:18 19 couple of occasions over the last two days that I am
13:50:22 20 not an expert in that matter or am not competent
13:50:24 21 really to analyze those things, which is a slightly
13:50:28 22 different answer than what you're asking.
13:50:30 23 If I were to be given some guidance with
13:50:32 24 respect to terms of use or license arrangements that
13:50:39 25 would provide me some ability to analyze a

13:50:42 1 certain -- certain set of data, for example, that
13:50:46 2 was related or identified in the terms of use or
13:50:49 3 license agreement -- and I know you're referring to
13:50:52 4 licenses in this particular case -- then I think I
13:50:53 5 would be competent to do such a thing.

13:50:55 6 MR. POLITO: Q. First, I think you
13:51:01 7 answered the question, but if I change from a
13:51:04 8 customer license to customer license or terms of
13:51:07 9 use, B's customer license or terms of use, does that
13:51:12 10 change your prior answer?

13:51:14 11 MR. FUCHS: Object to form.

13:51:15 12 THE WITNESS: No, it -- no, it does not.

13:51:17 13 MR. POLITO: Q. Did you request any
13:51:18 14 guidance such that you could determine whether
13:51:24 15 downloading on behalf of Customer A from an Oracle
13:51:30 16 Web site using Customer B's credentials would
13:51:35 17 violate Customer B's license or the terms of use?

13:51:38 18 MR. FUCHS: Objection; form.

13:51:40 19 THE WITNESS: Did I ask for any guidance,
13:51:40 20 is the question. No, I don't remember asking for
13:51:50 21 any guidance along those lines.

13:51:57 22 MR. POLITO: Q. Why not? Why didn't you
13:51:58 23 ask?

13:51:59 24 MR. FUCHS: Objection; form.

13:52:01 25 THE WITNESS: Well, again, my -- the

13:52:04 1 analysis that I performed was analysis of the
13:52:09 2 Mandiant report and appendices and data associated
13:52:13 3 with the Mandiant report, and the critique and
13:52:16 4 commentary I offer is based upon that report. And
13:52:20 5 in the process of producing that, that commentary,
13:52:23 6 that was not part of my assignment.

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13:57:07 13 Do you have an opinion that TomorrowNow
13:57:09 14 did not use Oracle's software and support materials
13:57:15 15 to support any portion of its support enterprise?
13:57:23 16 MR. FUCHS: Objection; form.
13:57:29 17 THE WITNESS: I don't have an opinion
13:57:31 18 really one way or the other regarding TomorrowNow's
13:57:36 19 use of Oracle's software and support materials in
13:57:41 20 the operation of their -- of TomorrowNow's support
13:57:45 21 enterprise. I don't have an opinion one way or the
13:57:47 22 other.
13:57:47 23 MR. POLITO: Q. Do you have an opinion as
13:57:50 24 to how TomorrowNow used Oracle's software and
13:57:55 25 support materials in any way?

13:57:57 1 MR. FUCHS: Objection; form.

13:58:07 2 THE WITNESS: I think I have an opinion --
13:58:12 3 an opinion. I think I have seen some evidence that
13:58:15 4 discusses the manner in which Oracle's software and
13:58:22 5 support materials might have been used on occasion
13:58:25 6 by TomorrowNow. I think I have an opinion or some
13:58:30 7 knowledge about that.

13:58:33 8 MR. POLITO: Q. So above the level of
13:58:34 9 knowledge, do you have an opinion, an expert
13:58:38 10 opinion, regarding any use that TomorrowNow made of
13:58:42 11 Oracle's software and support materials?

13:58:45 12 MR. FUCHS: Objection; form.

13:58:46 13 THE WITNESS: I mean, other than what's in
13:58:53 14 my report, with respect to potential use of or -- of
13:59:01 15 the software and support materials, I don't have any
13:59:05 16 opinions -- I don't hold any opinions one way or the
13:59:10 17 other regarding TomorrowNow's use of Oracle's
13:59:12 18 software and support materials in pursuit of their
13:59:16 19 business.

13:59:16 20 MR. POLITO: Q. What are you referring to
13:59:18 21 in your report when you say "in my report"?

13:59:20 22 A. Well, just some -- the commentary that is
13:59:22 23 related to the Mandiant report in the critique. So
13:59:28 24 there may be some things there that have
13:59:30 25 implications with respect to the manner in which

13:59:32 1 TomorrowNow used some materials. I'm just not
13:59:37 2 precluding what's in -- I don't want to say -- I'm
13:59:39 3 not disavowing anything that's in my report, is what
13:59:42 4 I'm trying not to do.

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14:19:20 16 MR. POLITO: Q. Who determined what was
14:19:22 17 an appropriate response as the phrase "appropriate
14:19:25 18 response" is used in that sentence?
14:19:28 19 A. Who determined what was appropriate?
14:19:30 20 Q. (Nods head.)
14:19:31 21 A. Well, it -- I mean, at the end of the day,
14:19:32 22 this is my report, and I was the one who ultimately
14:19:36 23 made the decision as to what was appropriate and
14:19:38 24 what was not appropriate.

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14:22:44 5 MR. POLITO: Q. Was there a response to
14:22:46 6 Mr. Mandia's report that you deemed an appropriate
14:22:49 7 response that the Jones Day lawyers did not deem an
14:22:52 8 appropriate response?
14:22:55 9 MR. FUCHS: Same instruction.
14:22:59 10 THE WITNESS: I -- there was nothing --
14:23:08 11 there was nothing that I -- well, so it didn't form
14:23:11 12 the basis -- I can't -- so it didn't form the basis
14:23:14 13 of my opinion, so therefore -- okay. I think I'm
14:23:17 14 all right. No, I didn't. There was nothing that I
14:23:19 15 deemed an appropriate response that they deemed
14:23:21 16 inappropriate.

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14:42:41 11 Q. Mr. Gray, are you competent to determine
14:42:42 12 whether the creation of a local environment on
14:42:44 13 TomorrowNow's systems would violate any customer
14:42:48 14 licenses?
14:42:49 15 MR. FUCHS: Objection; form.
14:42:54 16 THE WITNESS: Seems to me that that's a
14:42:56 17 legal matter. I don't know that I would be -- I
14:43:02 18 mean, I think that it would require some guidance,
14:43:05 19 and maybe even to the point of saying -- of just
14:43:09 20 making a determination based upon a license. So I
14:43:12 21 don't think I'm competent to do that. Seems to me
14:43:14 22 like that's a legal issue, not a technical issue.
14:43:18 23 MR. POLITO: Q. If you had sought
14:43:19 24 guidance from counsel to assist you, would you have
14:43:23 25 been able to determine whether the creation of an

14:43:27 1 Oracle enterprise application software local
14:43:30 2 environment for a particular customer on
14:43:32 3 TomorrowNow's systems would have violated that
14:43:34 4 customer's license?

14:43:37 5 MR. FUCHS: Objection; form.

14:43:40 6 THE WITNESS: I think that I am
14:43:43 7 probably -- I mean, I don't think it's a technical
14:43:45 8 matter. It seems to me that's a legal matter, and I
14:43:48 9 don't know that I would be competent or qualified to
14:43:52 10 render an opinion with or without counsel as to
14:43:56 11 whether or not a particular action violated
14:43:59 12 somebody's license agreement.

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14:59:22 20 MR. POLITO: Q. And does your report
14:59:47 21 reflect any data that you compiled regarding the use
14:59:57 22 of environments to generate tests or develop fixes?
15:00:04 23 MR. FUCHS: Objection; form.
15:00:14 24 THE WITNESS: My -- well, let me just --
15:00:17 25 so at least the non-accused conduct spreadsheet

15:00:22 1 reflects the -- reflects information that is found
15:00:27 2 in the Mandiant report which accuses TomorrowNow of
15:00:31 3 such conduct.

15:00:33 4 MR. POLITO: Q. You're referring to your
15:00:34 5 Appendix 4, which was Defendant's Exhibit -- hang
15:00:38 6 on -- 2089?

15:00:43 7 A. Yes.

15:00:48 8 Q. And that is a reflection of Mr. Mandia's
15:00:51 9 analysis and not your own independent analysis; is
15:00:53 10 that correct?

15:01:00 11 A. I really wasn't quite finished with the
15:01:01 12 first answer, but I'll answer this question, then
15:01:04 13 I'll come back to the previous answer, if that's
15:01:06 14 okay. Well, it's my work, and in trying to apply
15:01:13 15 the findings in the Mandiant report to the data at
15:01:17 16 hand and trying to do some comparisons with that
15:01:19 17 data. So it's my data in that sense, but it
15:01:23 18 originates from a reading and understanding of the
15:01:26 19 Mandiant report.

15:01:27 20 Q. So to clarify, what's in Appendix 4 to
15:01:29 21 your report, which is Defendant's Exhibit 2089, is
15:01:33 22 the result of your application of rules laid out in
15:01:39 23 the Mandia report to the data produced by
15:01:43 24 TomorrowNow in this case?

15:01:46 25 A. Accusation -- to the basis for the

15:01:48

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accusations that Mandia makes in his report.

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16:00:31 17 Q. Yes. And now that we've established the
16:00:46 18 scope, my question is, did you spend more than five
16:00:48 19 hours reviewing the combined depositions of the
16:00:54 20 seven employees to whom we're referring, with the
16:00:57 21 caveat that one of those employees had a two-day
16:01:00 22 deposition? Make that eight. Sorry. My math is
16:01:04 23 off. Eight.
16:01:08 24 A. So I -- yeah, I think it would be -- once
16:01:11 25 again, I don't -- I don't record that kind of data.

16:01:17 1 When I do my -- when I do my time recording, I
16:01:19 2 generally don't break it down in that final level
16:01:23 3 unless -- I just don't. And so I don't -- I'm kind
16:01:27 4 of speculating about that. What I'm going to do
16:01:29 5 instead is tell you that given the eight
16:01:32 6 depositions, and it's probably closer to nine or ten
16:01:36 7 days of -- nine days of deposition, I probably
16:01:42 8 wouldn't have spent -- I probably -- just again,
16:01:49 9 just how much it generally takes me to get through
16:01:51 10 the parts of a deposition that I think are
16:01:54 11 important -- and again, that varies substantially in
16:01:57 12 time. Sometimes it's a lot more. Sometimes more
16:01:59 13 interesting stuff to read, for me. I don't mean
16:02:02 14 it's -- I don't mean depositions are ever
16:02:03 15 interesting or uninteresting. I just mean sometimes
16:02:05 16 the data that's interesting to me. So I would say
16:02:08 17 that it would probably have been -- probably more
16:02:13 18 than ten, less than 20, something in that range
16:02:18 19 would have been -- that just generally about how
16:02:23 20 long it would take me to get through depositions
16:02:25 21 like this.

16:02:25 22 Q. More than ten hours, less than 20 hours?

16:02:30 23 A. That's correct.

16:02:30 24 Q. Thank you.

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16:25:18 20 Q. Mr. Gray, does Appendix 4 to your report,
16:25:24 21 which is Defendant's Exhibit 2089, contradict or
16:25:28 22 rebut any of Mr. Mandia's opinions or conclusions?
16:26:16 23 A. So I think to -- well, how to say this.
16:26:28 24 Section X of the Mandiant report, or Section X,
16:26:32 25 Roman numeral X, Page 100, in the manner in which it

16:26:37 1 is written, could be read to -- could be read in
16:26:46 2 such a way that it broadens the Mandiant findings in
16:26:51 3 such a way that it -- that it -- that it -- that the
16:26:58 4 evidence that there is 51, I believe it is,
16:27:00 5 TomorrowNow customers who were -- who are not
16:27:05 6 accused based upon the Mandiant rules might not --
16:27:08 7 might be ignored.

16:27:10 8 In other words, it's kind of written in
16:27:12 9 such a way as though it's -- it seems as though it
16:27:14 10 could be read in such a way that it is expanded and
16:27:18 11 sort of smears across all of TomorrowNow's
16:27:20 12 activities, when in reality, 2089 identifies, in my
16:27:24 13 opinion, some customers, 51 of them, TomorrowNow
16:27:29 14 customers, to which the accusations that are
16:27:33 15 identified in the Mandiant report do not apply.

16:27:37 16 So I guess that's the place where I kind
16:27:41 17 of started and ended, right, with the -- with
16:27:42 18 this -- with the report, was to say, hmm, that seems
16:27:46 19 like it's -- seems like there's a lot of
16:27:50 20 generalization here, doesn't really pertain, and
16:27:55 21 therefore, it seemed more appropriate for me to try
16:27:58 22 to go identify those customers to which the accused
16:28:00 23 conduct could actually somehow be mapped. That's --
16:28:02 24 that was the genesis of the non-accused conduct.

16:28:05 25 So I think with respect to Section X,

16:28:07 1 Roman numeral X, a reading could be that it's -- oh,
16:28:13 2 there you go -- reading could be such that it is --
16:28:19 3 that is broader than I think is necessarily correct.

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16:28:34 7 Q. What specifically in Section X can you
16:28:36 8 direct me to to which you believe Appendix 4 of your
16:28:40 9 report serves as rebuttal or contradiction?
16:28:45 10 A. Well, for example, if we take the first
16:28:47 11 sentence, "SAP TN" -- "SAP TN created thousands of
16:29:01 12 Environments, Environment backups, and copies of
16:29:03 13 Install Media." Well, what the Mandiant report, I
16:29:09 14 think, shows is that there were some environments,
16:29:12 15 environment backups, and copies of install media
16:29:15 16 that -- you know, he's shown that that has occurred,
16:29:20 17 but there's also customers for which there wasn't an
16:29:23 18 instance of an environment, environment backup, or a
16:29:26 19 copy of the install media. It's -- the way that the
16:29:29 20 sentence is written, it seems to me to be -- to go
16:29:34 21 beyond the scope of what he actually demonstrates in
16:29:36 22 his report. That's the kind of thing that I'm
16:29:39 23 referring to.

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16:33:56 21 Q. Is it accurate to characterize Appendix 4
16:33:58 22 to your report as additional information that
16:34:00 23 provides context but does not contradict or rebut
16:34:03 24 any specific assertion in the Mandia report?
16:34:07 25 MR. FUCHS: Objection; form.

16:34:13 1 THE WITNESS: Use -- contradict or rebut
16:34:16 2 any?
16:34:17 3 MR. POLITO: Q. (Nods head.)
16:34:18 4 A. Well, hmm. I don't know sitting here
16:34:30 5 right now of any specific -- specific -- I mean,
16:34:40 6 there's four conclusions or so, and I don't know
16:34:42 7 that any of -- the 2089 directly rebuts the entirety
16:34:48 8 of the conclusion, but may rebut certain aspects of
16:34:52 9 the conclusion that was drawn -- that is in the
16:34:55 10 Mandiant report.

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16:37:34 6 MR. POLITO: Q. So would you agree that
16:37:36 7 Appendix 4 provides context, but does not contradict
16:37:38 8 or rebut the conclusions in Mr. Mandia's report?

16:37:42 9 MR. FUCHS: Objection; form,
16:37:42 10 mischaracterizes the witness's prior testimony.

16:37:55 11 THE WITNESS: I don't think the purpose of
16:37:57 12 intent of Exhibit 4 is to contradict or rebut. It
16:38:08 13 is rather to provide some insights in -- I think I'd
16:38:15 14 use that word -- provide insights into the
16:38:17 15 conclusions that he has.

16:38:19 16 Again, with respect to Section X of the
16:38:21 17 Mandiant report, again, as I say, there are some
16:38:26 18 broad asser -- some things that can be read as broad
16:38:29 19 assertions here, or broad opinions, and to that
16:38:31 20 extent, it might limit some of that. But there's
16:38:34 21 nothing specific other than that that I can think
16:38:38 22 of. And as a matter of fact, it is intended to try
16:38:41 23 and provide insights and adopt what the Mandiant
16:38:45 24 report reported.

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17:53:21 24 MR. POLITO: Q. Do you agree with
17:53:22 25 Mr. Mandia that TomorrowNow improperly accessed

17:53:26 1 Oracle's Web sites?
17:53:30 2 MR. FUCHS: Objection; form.
17:53:36 3 THE WITNESS: The idea of propriety here,
17:53:39 4 whether it was -- whether the behavior was proper or
17:53:42 5 improper, to me has to do with terms of use and
17:53:48 6 potentially licenses and so on. And as I think
17:53:50 7 we've talked about on a couple of -- numerous
17:53:53 8 occasions during the last couple of days, I have not
17:53:57 9 looked at the terms of use agreements or the
17:53:59 10 licenses -- nor has Mr. Mandia, I might add -- and
17:54:03 11 so I don't have an opinion one way or the other
17:54:07 12 about any alleged improper downloading of data
17:54:12 13 from -- by TomorrowNow from Oracle's Web sites.

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18:00:14 1 Q. Your Appendix 4. Mr. Gray, was it your
18:00:17 2 practice in your report to identify the portions of
18:00:20 3 Mr. Mandia's report that you were rebutting or
18:00:22 4 contradicting?
18:00:23 5 A. I think that my report and Exhibit 4 in
18:00:41 6 particular identify areas which are being rebutted
18:00:46 7 or contradicted or limited by -- yeah, in the
18:00:51 8 Mandiant report.

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1 I declare under penalty of perjury, under
2 the laws of the United States, that the foregoing is
3 true and correct. Subscribed at
4 SOLANA BEACH _____, California, this
5 16th day of JULY _____ 2010.
6
7
8
9

Stephen Gray

10 Witness

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