EXHIBIT 3

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)

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09:47:45 MR. PICKETT: Q. So you're making a
09:47:46 change in TomorrowNow's conduct from the real world
09:47:49 to the "but for" world. Correct?
09:47:53 MR. McDONELL: Vague and ambiguous,
09:47:53 incomplete.
09:47:55 THE WITNESS: I'm doing what's necessary
09:47:56 to value the actual use that we're trying to
09:48:00 quantify.
09:48:02 MR. PICKETT: Q. Under that --
09:48:02 A. And that --

09:48:03 Q. Sorry.
09:48:04 A. That is different from what happened in
09:48:09 the actual world. But of course, in the actual
09:48:13 world, there was no license. So it's inappropriate
09:48:17 to say, well, there can't be any differences
09:48:19 between the actual world and the hypothetical
09:48:22 world.
09:48:23 Of course, there's a big difference.
09:48:24 There's a license in place in the hypothetical
09:48:26 world.

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10:04:21 MR. PICKETT: Q. Does the fact that the parties may not agree to a license in the real world impact any of the actual estimates of reasonable royalties?

10:04:35 MR. McDONELL: Vague and ambiguous, calls for a legal conclusion.

10:04:39 THE WITNESS: I think it influenced me in my development of the royalties. Because of the situation with Oracle, I felt that I needed to go to the maximum royalty rate that I could still say was reasonable. So in both cases, for the SAP royalty and the TomorrowNow royalty, I've gone to the maximum.

10:05:08 And it's important to remember throughout this conversation, yesterday and today, we focused on a January 2005 negotiation date. But let's not

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10:05:23 forget that I have two calculations. There's a
10:05:27 period before 2005, which I think would have a
10:05:32 significantly lower royalty rate in the real world,
10:05:36 but I've not assumed that in this "but for" world.
10:05:40 I've applied the same royalty rate throughout.
10:05:43 But I think that is a very meaningful
10:05:46 metric in a way where -- when we get to January
10:05:51 '05, on the second negotiation, we are only talking
10:05:58 about the difference. It's another delta, if you
10:06:00 like, where we had a royalty rate before, now we
10:06:04 have to come up with a royalty rate that is
10:06:08 applicable after this date.
10:06:10 And that's when I brought in the SAP
10:06:13 component of the royalty.
10:06:15 What TomorrowNow was doing was essentially
10:06:17 the same before and after, so I left that royalty
10:06:20 rate the same. But we have ignored that first --
10:06:24 to date, we've ignored that first negotiation.
10:06:26 MR. PICKETT: Q. When you just testified
10:06:28 you felt you needed to go to the maximum royalty
10:06:30 rate, did you mean the selling point maximum
10:06:37 royalty rate?
10:06:38 MR. McDONELL: Vague and ambiguous.
10:06:39 THE WITNESS: Well, the selling point
10:06:40 maximum is the result of a selling price plus a

10:06:44 royalty. And so they're related, but they're not
10:06:48 the same.
10:06:49 What -- if you remember, on my royalty
10:06:51 rate, I've said that the royalty rate will be 50
10:06:55 percent of TomorrowNow's revenue. That is an
10:06:59 absolutely astronomical rate to apply. 50 percent
10:07:05 of revenues, I've really never come across that
10:07:08 before. It would -- if you then apply that royalty
10:07:11 to the pricing, it would push TomorrowNow's pricing
10:07:14 to 75 percent of Oracle's rate.
10:07:19 I've assumed no elasticity of demand in
10:07:23 that period. And if there's no elasticity, we can
10:07:27 apply it to the same number of customers. I think
10:07:30 that's the right thing to do. But there must come
10:07:32 a point at which that royalty rate becomes so high,
10:07:36 you can't any longer keep a straight face and say,
10:07:39 this wouldn't have affected sales, because of
10:07:42 course, it would.
10:07:44 So you've got this continuum on the
10:07:46 TomorrowNow side of the equation, and you've got
10:07:48 the addition of SAP in January of '05.
10:07:57 MR. PICKETT: This is a good point for a
10:07:58 break. Why don't we do that.
10:08:00 THE WITNESS: Sure.
10:08:02 THE VIDEO OPERATOR: Going off the record,

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10:08:02 the time now is 10:08.

10:11:30 (Recess from 10:08 a.m. to 10:26 a.m.)

10:26:57 THE VIDEO OPERATOR: Tape is rolling. The
10:26:59 time now is 10:27, and we are back on the videotape
10:27:03 record. Please proceed.

10:27:07 MR. PICKETT: Q. Mr. Clarke, I want to go
10:27:09 back to the -- I think what we coined the selling
10:27:12 price maximum for TomorrowNow of 75 percent of
10:27:16 Oracle.

10:27:16 A. Yes.

10:27:19 Q. What's the basis for your conclusion that
10:27:23 the maximum is 75 percent?

10:27:29 A. To a very large extent, that's my
10:27:31 judgment. I think that's the most it would be
10:27:34 without there being some falloff in sales. And so,
10:27:42 you know, I recognize that there was a time when
10:27:47 customers took TomorrowNow's service and retained
10:27:53 their Oracle service. So they were effectively
10:27:57 paying twice.

10:27:59 But I didn't -- I -- in terms of the
10:28:04 reasonable component of reasonable royalty, I think
10:28:08 the number of customers that were prepared to pay
10:28:11 twice was very low, so I don't think you can assume
10:28:14 that there would be no effect on sales once you got
10:28:17 past 75 percent of the pricing.

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So that's my assumption. That if we're going to apply that to these customers, then that's the most to you could have charged and still had those customers.

Q. What data is your judgment based upon?

A. Based upon years of experience, looking at pricing models and customer behavior, teaching economics, micro and macro, about what drives behavior, looking at demand curves, the relationship between price and the quantity demanded.

Many years and many products, many companies. So that's my -- there's a judgment. There's no hard data, there's no table you can go and look that up in. Somebody has to make that judgment.

Q. Are there any specific facts you can cite in support of that judgment?

A. Well, I think that the totality of my report, which talks about the factors that I think are relevant to the hypothetical negotiation, gives good background as to what this market is all about, what drives customers to do what they do.

So there's a lot of supporting information in here for looking at customers, looking at the

10:29:49 market, looking at pricing. As I say, there's no
10:29:53 specific table that says, well, if the price was 76
10:29:56 percent, it will be zero or 99 percent. That's my
10:30:01 assumption for the purposes of doing the reasonable
10:30:04 royalty rate calculation.
10:30:06 Q. Anything else?
10:30:08 A. No. I don't believe so.
10:30:11 Q. When and where did you teach micro
10:30:14 economics?
10:30:15 A. At Arizona State University, from about
10:30:20 2001 to I think 2005, maybe. Maybe -4.
10:30:28 Q. I hadn't covered that before.
10:30:32 Did you teach any other courses in
10:30:34 economics?
10:30:34 A. No. Econ 502.
10:30:37 Q. Now, the 75 percent maximum selling price
10:30:40 is the reason you settled on a 50 percent royalty
10:30:44 right. Right?
10:30:46 MR. McDONELL: Vague and ambiguous. Asked
10:30:47 and answered.
10:30:48 THE WITNESS: I think that's the right way
10:30:49 around to look at it. Yes, I -- I was trying to
10:30:55 compute the maximum royalty rate that I thought
10:30:59 could still be reasonable and would be applicable
10:31:03 to the customers that we -- actually are at issue

10:31:07 in the case.
10:31:08 So I think that was the way around that I did that.
10:31:10 MR. PICKETT: Q. It's not based on the benchmark of some other 50 percent royalty rate, is it?
10:31:16 MR. McDONELL: Vague and ambiguous. Asked and answered.
10:31:19 THE WITNESS: No. I've never seen a royalty rate at 50 percent of revenue in any other case.
10:31:23 MR. PICKETT: Q. Was there any other quantitative metric other than the maximum selling price that points to a 50 percent royalty rate as reasonable?
10:31:34 MR. McDONELL: Vague and ambiguous, overly broad, asked and answered.
10:31:41 THE WITNESS: No. I think that what I have done is compute the maximum royalty that could possibly be construed as being rational and reasonable.

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10:36:48 Q. And you're -- you're aware that SAP

10:36:51 offered TomorrowNow service as a loss leader?

10:36:54 MR. McDONELL: Misstates the testimony.
10:36:56 Assumes facts not in evidence.

10:36:59 THE WITNESS: I think the reality is that
10:37:03 SAP allowed customers to get support from
10:37:07 TomorrowNow and not charge them anything. It's
10:37:11 got -- that's got loss leader qualities to it. I
10:37:14 don't know that they ever defined it that way. So
10:37:18 we should be careful about what we're saying SAP
10:37:21 thought and did.

10:37:23 But certainly, if you look at the zero
10:37:26 cost deals, the zero dollar deals, they were acting
10:37:31 as a loss leader at that point.

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Q. Turning back to your report and moving on to page 205, in this section, you're describing how you calculated the SAP royalty. Is that correct?

MR. McDONELL: The document speaks for itself.

THE WITNESS: Yes.

MR. PICKETT: Q. And if I turn to the top of 205, I want to point you to two sentences here. The first sentence says: The approach in this case yields a royalty of zero because SAP made no additional margin on any sales made as a result of the alleged actions. Therefore, the royalty rate would be zero under the analytical approach.

And then you say: The reasonable royalty for SAP would be half of the profits on any sales it made that it would not have made absent the

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11:04:34 alleged allegations.
11:04:38 Is the last sentence there, is that
11:04:41 different than the first two sentences? I'm trying
11:04:46 to understand the distinction. Or is it just that
11:04:48 half of the profits means half of zero, because
11:04:50 they made no profits?
11:04:51 A. Let me explain the analytical approach.
11:04:54 Q. Sure.
11:04:55 A. Going back to Mr. Parr, he has this
11:05:00 analytical approach in his book that says, if you
11:05:04 have a patent -- remember, we're back in the patent
11:05:06 world now, so I'm going to use a product as opposed
11:05:09 to a piece of software.
11:05:10 But if you have a patent that you
11:05:14 incorporate into your product lineup, and your
11:05:20 normal margin, let's say, is 50 percent of your
11:05:23 selling price, but by including the patent, you can
11:05:27 push that margin up to, say, 80 percent, that you
11:05:31 should disgorge that extra 30 percent of margin.
11:05:35 So you don't -- you make your normal margin, but
11:05:39 you don't make any extra margin. That belongs to
11:05:41 the patent holder.
11:05:43 And that seems to me to be an appropriate
11:05:45 way to come up with what should be disgorged. It's
11:05:50 called the analytical approach.

11:05:52 So because that is couched in terms of margin, and there will be no additional margin on the SAP sales, you really can't apply the analytical approach in that manner.

11:06:06 What I've done is, I've sort of applied it in a sense that I'm trying to use an analytical approach in saying, well, let's take the total profit, and let's divide that up 50/50 between the parties. So it's an analytical approach, but applied to a slightly different metric. And I think it would come out to be higher than the analytical approach, which I've shown you is zero, because there's no extra margin.

11:06:41 I think that's an appropriate approach.

11:06:43 Q. What's the basis for the 50/50 split?

11:06:46 A. That's my judgment that it is an appropriate and very high royalty that will be paid on sales that SAP almost certainly would have made anyway. And the royalty needs to reflect that the reality is that customers don't migrate their ERP systems to save a few thousand dollars on support, as the data show. And SAP wouldn't be wanting to pay royalties on sales it would have made anyway. Those wouldn't be part of the equation.

11:07:26 So it's a -- it's got some elements of

11:07:28 judgment, but I think it's a fair royalty, and as high as you could make it and still say it would be fair to both sides.

11:07:36 Q. And that's based on your experience that you've described?

11:07:41 A. Well, I described a lot more than my experience. I described the contents of my report and a lot of what's in these binders back here lead me to that conclusion.

11:07:52 Q. Do you have any quantitative analysis that demonstrates 50 percent is the right royalty for SAP?

11:08:01 MR. McDONELL: Vague and ambiguous, incomplete.

11:08:05 THE WITNESS: There isn't a table that you can go to that would look -- you could look that up in.

11:08:09 MR. PICKETT: Q. Do you have any specific facts on which you rely to conclude that 50 percent is the appropriate royalty?

11:08:16 MR. McDONELL: Overly broad, vague and ambiguous, object to the form.

11:08:21 THE WITNESS: I -- the specific facts are embodied in these binders that are behind me, of which there are probably 35, and my report. So

11:08:35 there are an enormous quantity of facts that I've
11:08:38 considered in the course of this case, and taking
11:08:39 all of those facts, as well as the Georgia-Pacific
11:08:42 analysis and bringing all of that together, at the
11:08:47 end of the day, what's reasonable is a bit of a
11:08:50 judgment call. And I've done my best to synthesize
11:08:56 everything I know and come up with something I
11:08:58 think is reasonable at the end of the day.
11:09:01 MR. PICKETT: Q. Can you point me to any
11:09:03 specific facts that support a 50 percent royalty
11:09:05 rather than a a 40 or 60 percent royalty?
11:09:07 MR. McDONELL: Asked and answered, same
11:09:08 objections.
11:09:11 THE WITNESS: I don't think there's a
11:09:13 particular fact that I could point to that would
11:09:15 say, it should be 40 percent or it should be 60
11:09:19 percent. I think my opinion is based upon the
11:09:25 highest rate it could be and still be reasonable to
11:09:27 the parties at the negotiating table.

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12:48:41 MR. PICKETT: Q. All right. Let's turn to the -- a new topic.
12:48:47 The royalty on the database software. And if you like, I can refer you to page 205 of your report.
12:48:59 A. I was heading right there. It's where we started this morning.
12:49:12 Q. And it's your opinion that the royalty for the use of Oracle's database would be based on market price?

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12:49:26 A. I believe so.
12:49:28 Q. The market price that you refer to is the price paid to obtain an end-user full-use Oracle Database license from Oracle. Correct?
12:49:37 MR. McDONELL: Vague and ambiguous.
12:49:45 I would encourage you to take your time to read your report, if you need to.
12:49:50 THE WITNESS: Could you just repeat that question? I wasn't clear about it.
12:49:52 MR. PICKETT: Q. The market price that you use is the price that was paid to obtain an end-user full-use Oracle Database license from Oracle.
12:50:12 MR. McDONELL: Same objection.
12:50:13 THE WITNESS: I actually used two different prices in doing my analysis, but they were -- they were for licenses that were end-user licenses.
12:50:21 MR. PICKETT: Q. Let me mark as Exhibit -- or let me show you what's been marked as Exhibit 3210, an Oracle License and Services Agreement, Bates numbers ORCL00670717 through -726.
12:50:40 (Deposition Exhibit 3210 was marked for identification.)
12:50:44 THE WITNESS: Thank you.

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12:50:52 MR. PICKETT: Q. Is this the type of full-use database license that you have referenced when you set a market price?
12:50:53
12:50:57

12:51:03 MR. McDONELL: Overly broad. Vague and ambiguous. Lack of foundation.
12:51:04

12:51:22 THE WITNESS: Yes. I think this is -- if it's not the actual agreement that I looked at, it's very similar to it.
12:51:25
12:51:29

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12:58:08 Q. Is it your opinion that the Oracle License
12:58:11 and Services Agreement would have allowed SAP and
12:58:14 TomorrowNow to use the Oracle Databases in the
12:58:19 infringing manner alleged in the lawsuit?
12:58:22 MR. McDONELL: Vague and ambiguous, calls
12:58:22 for a legal conclusion, overly broad. Object to
12:58:25 the form of the question.
12:58:28 THE WITNESS: The allegations, as I recall
12:58:31 them, don't include an allegation that the database
12:58:37 itself was used inappropriately. I understand that
12:58:41 your position is that the alleged actions indicate
12:58:47 TomorrowNow did some things with Oracle's other
12:58:50 software that it felt were inappropriate, but
12:58:53 the -- the use of the database itself was
12:58:58 essentially internal to TomorrowNow.

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18:44:17 MR. PICKETT: Q. Did you apply any
18:44:22 methodology to lost profits that was utilized in
18:44:30 some authoritative text?
18:44:33 MR. McDONELL: Vague and ambiguous, object
18:44:33 to the form.
18:44:40 THE WITNESS: I calculated lost profits by
18:44:43 looking at the losses Oracle made for the customers
18:44:49 that they lost as a result of the alleged actions
18:44:56 and applied mathematical techniques.
18:44:59 Now there are numerous treatises and
18:45:03 analyses, books, that teach how to do that, the
18:45:10 math portion of that. I'm not aware of there being
18:45:15 any definitive treatise on how you would calculate
18:45:20 the difference between the "but for" and the actual
18:45:23 other than doing the math. And I think as a
18:45:30 general proposition, the development of the art of

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18:45:40 explaining how you do a lost profits calculation is
18:45:45 such that it has to be very specific, and therefore
18:45:52 the descriptions you might find in what would be --
18:45:56 would tend to be very general, because they can't
18:45:59 apply themselves to the specific facts of a
18:46:01 specific case.

18:46:03 MR. PICKETT: Q. You created exclusion
18:46:04 pools. Correct?

18:46:05 A. I did.

18:46:06 Q. Customer-specific exclusion pools. Right?

18:46:09 A. Yes.

18:46:10 Q. And are you familiar with any published --
18:46:17 any publication that recommends the use of
18:46:19 exclusion pools in connection with a lost profits
18:46:23 analysis?

18:46:24 MR. McDONELL: Incomplete, vague and
18:46:25 ambiguous.

18:46:26 THE WITNESS: I think the -- I wouldn't
18:46:29 expect to find a treatise that used the term
18:46:33 "exclusion pools." I think there are numerous
18:46:37 cases and numerous textbooks, even some that you've
18:46:41 referenced in the last couple of days, that talk
18:46:45 very clearly about the need to identify the
18:46:50 causation that results in a loss arising because of
18:46:56 the alleged actions. There are any number of

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18:47:00 those, some of which you've referenced.
18:47:04 So that process, establishing the economic causation for your analysis, is well established. Whether there's one other that said, well, let's take a look at that causation on a customer-by-customer basis, and then for ease of discussion, let's pool those, let's group them in some coherent manner that we can describe that will save us doing this 358 times, I don't think I've seen something on that.
18:47:47 But the methodology flows from the requirement to do a proper analysis of causation.
18:47:58 MR. PICKETT: Q. Have you seen any methodology that groups causation into categories and then concludes that I find causation based on whether Group A is listed or Group B plus 1 of C? Anything along those lines, your use of exclusion pools?
18:48:20 MR. McDONELL: Asked and answered, incomplete hypothetical. Object to the form.
18:48:23 THE WITNESS: No. For all the reasons that I just described to you. I think the precise manner of doing an appropriate causation analysis, the methodology that you would adopt, has to be tailored to the facts of the case. And the pools

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18:48:41 in this case, they are convenient ways of thinking
18:48:48 about a common thread that runs through a number of
18:48:53 customers. And they could all have been handled
18:49:00 one customer at a time, but that would have been a
18:49:02 much clumsier, much more time-consuming, a much
18:49:07 more paper-intensive approach than we have here.
18:49:11 MR. PICKETT: Q. Why did you decide to
18:49:12 use an exclusion pool formula rather than an
18:49:15 individual analysis?
18:49:16 MR. McDONELL: Asked and answered.
18:49:19 THE WITNESS: I think I just told you
18:49:20 that. Didn't I? I didn't?
18:49:26 MR. PICKETT: Q. Go ahead, please.
18:49:27 A. Let me tell you again.
18:49:29 MR. McDONELL: It also misstates the --
18:49:31 also assumes facts not in evidence.
18:49:37 THE WITNESS: First of all, the causation
18:49:39 analysis itself is done on a customer-by-customer
18:49:43 basis. The -- I am going to use an example. Take
18:49:53 the parent mandate pool. I have certain customers
18:49:59 that I have analyzed that show that the reason they
18:50:06 terminated at Oracle and perhaps went to SAP, but
18:50:13 certainly went to TomorrowNow, was the result of an
18:50:18 acquisition.
18:50:19 So the new parent says, we are an SAP

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18:50:23 shop, you need to comply with our accounting
18:50:27 mechanisms and our HR mechanisms, so you have to
18:50:31 become an SAP shop too.

18:50:36 Clearly, in that case, that customer
18:50:39 didn't leave Oracle as a result of the alleged
18:50:43 actions. They left as a result of this mandate
18:50:46 from the parent.

18:50:48 I did that analysis on a
18:50:49 customer-by-customer basis for the purpose of
18:50:54 presenting that so that we could talk about it,
18:51:01 hopefully -- this was certainly my intent -- in
18:51:04 a -- in an efficient, coherent way, not one
18:51:10 customer at a time. But if you -- if we can make
18:51:14 the argument to you that it is appropriate to
18:51:19 exclude those customers for causation reasons, for
18:51:22 your inability to say it was the alleged actions
18:51:25 that caused the loss to Oracle, then -- I don't
18:51:32 know how many there are in that group, let's say
18:51:34 there are 10 in there --

18:51:37 MR. PICKETT: Q. I think there's one, but
18:51:39 go ahead.

18:51:40 A. It doesn't matter. I'm just using it as
18:51:42 an example.

18:51:42 If there were 10 in there and we
18:51:44 established the principle that that was an

18:51:46 acceptable and appropriate thing for me to do, we
18:51:50 could talk about the pool, you could agree to the
18:51:52 principle, and we wouldn't have to spend any more
18:51:55 time looking at them.

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19:11:40 named when I found that common thread.
19:11:43 MR. McDONELL: We're done, Counsel.
19:11:44 MR. PICKETT: All right. Let's break
19:11:45 then.
19:11:46 THE VIDEO OPERATOR: Very good. Going off
19:11:47 the record, the time now is 7:11. This also marks
19:11:50 the end of Videotape No. 5, Volume 2 of Stephen
19:11:54 Clarke.
19:11:54 (Time noted, 7:11 p.m.)
19:11:54 --o0o--
19:11:54 I declare under penalty of perjury that
19:11:54 the foregoing is true and correct. Subscribed at
19:11:54 ________________, California, this ____ day of
19:11:54 ___________ 2010.
19:11:54
19:11:54 ______________________________
19:11:54 STEPHEN K. CLARKE

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CERTIFICATE OF REPORTER

I, HOLLY THUMAN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein state, and that the testimony of said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

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

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

DATED: June 17th, 2010

Holly Thuman

HOLLY THUMAN, CSR