

# EXHIBIT 7

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

ORACLE CORPORATION, a )  
Delaware corporation, )  
ORACLE USA, INC., a )  
Colorado corporation, and )  
ORACLE INTERNATIONAL )  
CORPORATION, a California )  
corporation, )  
 )  
Plaintiffs, )  
 )  
vs. ) No. 07-CV-1658 (PJH)  
 )  
SAP AG, a German )  
corporation, SAP AMERICA, )  
INC., a Delaware )  
corporation, TOMORROWNOW, )  
INC., a Texas corporation, )  
and DOES 1-50, inclusive, )  
 )  
Defendants. )  
\_\_\_\_\_ )

VIDEOTAPED DEPOSITION OF  
STEPHEN K. CLARKE

\_\_\_\_\_

VOLUME 1; PAGES 1 - 323

TUESDAY, JUNE 8, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

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

(1-427117)

TEXT REMOVED - NOT RELEVANT TO MOTION

09:38:20	23	MR. PICKETT: Q. With reference to the
09:38:21	24	second supplemental report, 3201, that references
09:38:32	25	declarations of TomorrowNow customers produced to

09:38:36            1            Oracle for the first time on May 7. Correct?

09:38:42            2                      A. I don't know when the declarations were  
09:38:43            3            produced to you.

09:38:44            4                      Q. After the March 26 report?

09:38:48            5                      MR. McDONELL: Lack of foundation.

09:38:50            6                      THE WITNESS: I really don't know when  
09:38:51            7            they were produced to Oracle.

09:38:53            8                      MR. PICKETT: Q. Well, you do recall that  
09:38:54            9            some of the customers' declarations came in after  
09:38:58            10           your initial report. Correct?

09:39:00            11                     A. That's my understanding.

09:39:01            12                     Q. And do you know why they came in after you  
09:39:04            13            had submitted your report?

09:39:05            14                     A. No.

09:39:09            15                     Q. What did you do, if anything, to obtain  
09:39:14            16            declarations from customers?

09:39:19            17                     A. I don't recall doing anything to obtain  
09:39:22            18            declarations from customers.

09:39:23            19                     Q. So how did you receive customer  
09:39:24            20            declarations?

09:39:26            21                     A. They came from Jones Day.

09:39:29            22                     Q. So whatever declarations you refer to in  
09:39:33            23            your report were simply something that came to you  
09:39:37            24            from the SAP attorneys?

09:39:39            25                     MR. McDONELL: Misstates the testimony and

09:39:40 1 misstates the reality of what you know.

09:39:47 2 THE WITNESS: That's my understanding.

09:39:50 3 MR. McDONELL: Counsel, for the record,  
09:39:51 4 you're not intending to ignore the declarations  
09:39:54 5 that you produced, are you? Just -- I don't want  
09:39:57 6 it to be vague and ambiguous.

09:39:59 7 MR. PICKETT: I'm not. Let's go.

09:40:02 8 Q. If a customer didn't have a declaration,  
09:40:05 9 did you make inquiry?

09:40:08 10 MR. McDONELL: Vague and ambiguous.

09:40:09 11 THE WITNESS: Of the customers, no.

09:40:11 12 MR. PICKETT: Q. Of Jones Day?

09:40:16 13 MR. McDONELL: Don't disclose  
09:40:17 14 communications with counsel. I instruct you not to  
09:40:19 15 answer.

09:40:24 16 MR. PICKETT: Q. How did you distinguish  
09:40:26 17 in your mind customers for whom you had a  
09:40:28 18 declaration and those for whom you did not?

09:40:30 19 MR. McDONELL: Vague and ambiguous.

09:40:36 20 THE WITNESS: I don't understand that  
09:40:36 21 question.

09:40:37 22 MR. PICKETT: Q. Well, you had some  
09:40:38 23 statements from some of the customers, and you  
09:40:40 24 didn't have statements from some of the other  
09:40:41 25 customers. Did it make any difference to you?

09:40:46 1 A. It obviously made a difference in some  
09:40:49 2 instances. So I either had a declaration that I  
09:40:57 3 used or I didn't have a declaration.

09:41:01 4 Q. And when you didn't have a declaration,  
09:41:03 5 did you seek to get a declaration?

09:41:05 6 MR. McDONELL: Again, don't disclose  
09:41:06 7 communications with counsel.

09:41:09 8 THE WITNESS: I can't answer that  
09:41:10 9 question.

09:41:18 10 MR. PICKETT: Q. The customers who  
09:41:20 11 submitted declarations after your March 26 report  
09:41:24 12 are not new to the case. Correct?

09:41:31 13 A. I don't know what you mean.

09:41:32 14 Q. Well, they didn't just suddenly pop up  
09:41:36 15 after March 26, did they?

09:41:37 16 MR. McDONELL: Vague and ambiguous.  
09:41:38 17 Argumentative. Object to the form.

09:41:41 18 THE WITNESS: You mean the customer didn't  
09:41:44 19 pop up, or the declaration didn't pop up?

09:41:47 20 MR. PICKETT: Q. Well, the declaration  
09:41:47 21 popped up. The customer, I'm talking about.

09:41:50 22 MR. McDONELL: Argumentative, vague and  
09:41:51 23 ambiguous.

09:41:53 24 THE WITNESS: Well, I think the customers  
09:41:55 25 at issue have been known for quite some time.

09:41:59            1                      MR. PICKETT:    Q.    Was there any reason  
09:42:00            2                      that SAP or you could not have obtained a  
09:42:06            3                      declaration prior to the March 26 report being  
09:42:09            4                      submitted?

09:42:11            5                      MR. McDONELL:    Lack of foundation,  
09:42:12            6                      compound.    Don't disclose communications with  
09:42:14            7                      counsel.

09:42:15            8                      THE WITNESS:    I can't answer that  
09:42:16            9                      question.

09:42:20            10                     MR. PICKETT:    Q.    Do you know of any  
09:42:20            11                     attempts to secure additional customer declarations  
09:42:23            12                     that failed?

09:42:25            13                     MR. McDONELL:    Same instruction.    Don't  
09:42:26            14                     disclose communications with counsel.    If you can  
09:42:28            15                     answer without disclosing communications with  
09:42:30            16                     counsel, you may do so.

09:42:33            17                     THE WITNESS:    I can't answer that  
09:42:33            18                     question.

TEXT REMOVED - NOT RELEVANT TO MOTION

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11:53:19            3                      MR. PICKETT:    Q.    Why do you need a  
11:53:23            4                      discussion of legal cases for purposes of your  
11:53:27            5                      analysis?

11:53:30            6                      MR. McDONELL:    Vague and ambiguous.

11:53:33            7                      THE WITNESS:    As I tried to explain  
11:53:35            8                      previously a number of times, the -- the law deals  
11:53:41            9                      with the legal aspects of a case.    Mr. Meyer and I  
11:53:45            10                     deal with the economic aspects of a case.

11:53:49            11                     But we don't do the economics in a vacuum.  
11:53:54            12                     We do them within the context of the law.    And  
11:53:57            13                     there's an intersection between those two  
11:53:59            14                     interests, the legal and the economic.    And in  
11:54:03            15                     order to do a good job in that process, you have to  
11:54:07            16                     have an understanding of both sides of the  
11:54:11            17                     equation.

11:54:12            18                     So I'm not an expert in law, I'm not a  
11:54:15            19                     lawyer, but I do have to understand what the  
11:54:20            20                     appropriate approach from an economic point of view  
11:54:23            21                     is under the law.

11:54:26            22                     And frequently, to be honest, I look at  
11:54:29            23                     the law, and I feel that, from an economic point of  
11:54:32            24                     view, there's conflict, that the guidance that the  
11:54:38            25                     law gives me isn't necessarily right on point with



11:54:40            1            what the economics of a situation might be. But  
11:54:43            2            I'm guided by the law, as I assume Mr. Meyer is.

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11:58:23            2                      MR. PICKETT:    Q.    Do you intend to offer  
11:58:26            3                      your summaries of the various cases as part of your  
11:58:30            4                      expert opinions in this case?

11:58:33            5                      MR. McDONELL:    Lacks foundation, calls for  
11:58:35            6                      a legal conclusion.    Reserve all rights.

11:58:40            7                      THE WITNESS:    They are part of my report,  
11:58:42            8                      so I think they are part of my opinion.

11:58:46            9                      MR. PICKETT:    Q.    And do you intend to  
11:58:48            10                     testify about them?

11:58:50            11                     A.    I --

11:58:51            12                     MR. McDONELL:    Same objections.

11:58:52            13                     THE WITNESS:    I have not made any  
11:58:53            14                     determinations as yet how I will testify in the  
11:58:56            15                     case.

11:59:09            16                     MR. PICKETT:    Q.    What expertise do you  
11:59:10            17                     have to testify about a legal interpretation of a  
11:59:15            18                     case?

11:59:16            19                     MR. McDONELL:    Asked and answered  
11:59:17            20                     repeatedly.    Vague and ambiguous.    Lacks  
11:59:19            21                     foundation.

11:59:23            22                     THE WITNESS:    I'm not sure I can give you  
11:59:24            23                     any better answers than I have already given you.  
11:59:29            24                     I -- I don't look at cases in order to determine  
11:59:39            25                     purely legal matters.    I look at them as a guide to

11:59:45            1            how I ought to apply the law to the economics that  
11:59:48            2            I'm confronted with.

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12:05:37 1 MR. PICKETT: Q. Let me represent to you  
12:05:38 2 that the Court held, quote, "Common sense dictates  
12:05:41 3 that an expert may confer with the copyright holder  
12:05:44 4 and that the background data may be factored into  
12:05:47 5 calculations of actual damages."  
12:05:49 6 Were you aware of that?  
12:05:50 7 MR. McDONELL: Assumes facts not in  
12:05:50 8 evidence, lack of foundation.  
12:05:54 9 THE WITNESS: I don't recall that.  
12:05:55 10 MR. PICKETT: Q. Now, you criticized  
12:05:56 11 Mr. Meyer for conferring with the owner of the  
12:06:00 12 copyrights in this case. Right?  
12:06:03 13 MR. McDONELL: Misstates the testimony.  
12:06:07 14 THE WITNESS: No. I don't believe I  
12:06:09 15 criticized him for conferring.  
12:06:11 16 MR. PICKETT: Q. And using the  
12:06:12 17 information he learned in valuing the case?  
12:06:18 18 MR. McDONELL: Same objection.  
12:06:19 19 THE WITNESS: There were --  
12:06:20 20 MR. PICKETT: Q. You did or did not do  
12:06:21 21 that?  
12:06:22 22 MR. McDONELL: Same objection.  
12:06:26 23 THE WITNESS: Could we read that back?  
12:06:28 24 MR. PICKETT: Q. You criticized him for  
12:06:30 25 talking with the Oracle executives about their

12:06:32            1            opinions with respect to the value of the stolen  
12:06:37            2            IP. Right?

12:06:38            3                            MR. McDONELL: Same objections.

12:06:39            4                            THE WITNESS: I didn't criticize him for  
12:06:41            5            conferring. I criticized him for the way in which  
12:06:44            6            he used what he learned, and I think I've been very  
12:06:49            7            clear that there were aspects of what they told him  
12:06:54            8            that I think have no place in his report. And for  
12:07:00            9            them to do math of the highest speculative order  
12:07:08            10           and call that a methodology I think is particularly  
12:07:12            11           inappropriate.

12:07:14            12                            But, there are quite a few pages and  
12:07:17            13            iterations of my criticism of that approach of his  
12:07:23            14            in the report. I don't think that's appropriate.

12:07:27            15                            So speaking with his client? Of course,  
12:07:31            16            that's perfectly acceptable.

12:07:34            17                            MR. PICKETT: Q. Well, did you --

12:07:34            18                            A. It's how you use what you learn that I  
12:07:36            19            think is inappropriate.

12:07:37            20                            Q. Was it appropriate for Mr. Meyer to  
12:07:39            21            include the damages opinions of his client's senior  
12:07:44            22            executives in his expert report?

12:07:46            23                            MR. McDONELL: Asked and answered. Vague  
12:07:47            24            and ambiguous.

12:07:48            25                            THE WITNESS: I think --

12:07:49 1 MR. McDONELL: Incomplete. You're not  
12:07:49 2 pointing out exactly what you're talking about in  
12:07:52 3 Mr. Meyer's report.

12:07:54 4 THE WITNESS: I recollect that there were  
12:08:00 5 several places in his report where he said, this is  
12:08:06 6 what we think the damages might be, "we" being the  
12:08:11 7 senior executives of the company.

12:08:17 8 I think it's inappropriate for an expert  
12:08:22 9 to bring that information into his report without  
12:08:26 10 some critical evaluation that says, this makes  
12:08:31 11 sense. If it doesn't make sense -- and clearly  
12:08:36 12 there are statements by the senior executives that  
12:08:41 13 make no sense whatsoever -- then I think the expert  
12:08:46 14 should apply his standards of control and quality,  
12:08:50 15 and common sense, frankly, to say, they may think  
12:08:55 16 that, but that's not what I'm going to put into my  
12:08:59 17 report.

12:09:00 18 If they think it, they can testify about  
12:09:03 19 it at trial. But it doesn't and shouldn't form a  
12:09:07 20 basis for me to do my analysis in the case.

12:09:11 21 MR. PICKETT: Q. So what you're saying  
12:09:12 22 is, it's appropriate for an expert to bring into  
12:09:18 23 his report, consider the senior executives' views,  
12:09:21 24 but he has to review them for their reasonability?

12:09:32 25 A. I think that's the job of every expert in

12:09:34            1            every case. If -- just a moment.

12:09:36            2                            The defendants frequently think that there  
12:09:43            3            are no damages and might try to pressure an expert  
12:09:48            4            into giving that opinion.

12:09:50            5                            If the expert thinks that there are  
12:09:52            6            damages, I don't think it's appropriate for them to  
12:09:56            7            include in their report, the defendants think there  
12:10:01            8            are no damages here, because he doesn't believe  
12:10:03            9            that. So that's important.

12:10:06            10                            Frequently, Plaintiffs will think that the  
12:10:10            11            damage number is exceptionally high. In this  
12:10:14            12            particular case, as I recall, Ms. Catz was quoted  
12:10:21            13            as saying that she thought the damage would be in  
12:10:23            14            excess of 12 billion dollars. I don't think that  
12:10:27            15            was -- made any sense whatsoever. Mr. Meyer didn't  
12:10:30            16            actually include that, but there were statements on  
12:10:32            17            that vein that he did include. I don't think they  
12:10:36            18            belong in there.

12:10:37            19                            I think what belongs in the expert's  
12:10:40            20            report is the expert's opinion, and that's what it  
12:10:44            21            should be limited to. That's my view. I  
12:10:46            22            understand that you and he differ on that. And  
12:10:50            23            that's fine.

12:10:51            24                            Q. Well, you do agree that an expert may  
12:10:54            25            factor that information into the calculations of

12:10:57            1            actual damages. Right?

12:10:58            2                            MR. McDONELL: Are you reading from his  
12:10:59            3            report, Counsel, and do you want to point it out to  
12:11:02            4            him?

12:11:03            5                            MR. PICKETT: No and no.

12:11:12            6                            THE WITNESS: It depends. It depends on  
12:11:16            7            whether what you're hearing makes any sense in the  
12:11:19            8            context of what you know as an economics expert.  
12:11:25            9            And if it doesn't make sense, then I don't think it  
12:11:28            10            is right to factor it in. You have to withstand  
12:11:32            11            the pressure from your client to do what they want  
12:11:36            12            you to do, whether that's the defense or the  
12:11:39            13            plaintiff. You have to do what you think is right.

TEXT REMOVED - NOT RELEVANT TO MOTION



12:20:47            1                      MR. PICKETT:    Q.    Well, you understand SAP  
12:20:48            2                      has infringed all kind of intellectual property,  
12:20:51            3                      don't you?

12:20:52            4                      MR. McDONELL:    Objection.    Same  
12:20:53            5                      objections.    Argumentative.

12:20:55            6                      MR. PICKETT:    Q.    Please answer the  
12:20:56            7                      question.

12:20:59            8                      THE WITNESS:    I understand that that is an  
12:21:00            9                      allegation.    I don't have an understanding -- I  
12:21:04            10                     didn't need an understanding as to whether the  
12:21:07            11                     allegations will ultimately be found to be proven.

12:21:10            12                     MR. PICKETT:    Q.    Well, don't you  
12:21:11            13                     understand -- I'm sorry, I didn't mean --

12:21:13            14                     MR. McDONELL:    Don't interrupt, please,  
12:21:14            15                     Counsel.

12:21:15            16                     MR. PICKETT:    Q.    Go ahead.

12:21:17            17                     A.    Sorry, I've lost my train.    Where did I  
12:21:33            18                     end up?

12:21:34            19                     (Record read as follows:

12:21:35            20                     Answer:    I understand that that is an  
12:21:35            21                     allegation.    I don't have an understanding --  
12:21:35            22                     I didn't need an understanding as to whether  
12:21:35            23                     the allegations will ultimately be found to  
12:21:35            24                     be proven.)

12:21:35            25                     THE WITNESS:    Where I was heading next is

12:21:37            1            that I have made certain assumptions about the  
12:21:39            2            liability in the case. And I have done so within  
12:21:46            3            the context of certain other expert reports that  
12:21:51            4            I've referenced in my report to try to determine  
12:22:00            5            what the subject IP is, because, as I understand  
12:22:05            6            it, what's at issue here is the value of that use  
12:22:10            7            of that subject IP.

12:22:12            8                      So without a proper understanding of that,  
12:22:16            9            we can't begin to do the next thing.

12:22:19            10                     So I didn't blindly assume, which is I  
12:22:22            11            think what your question implied, that all of the  
12:22:27            12            PeopleSoft, all of the JD Edwards, all of the  
12:22:30            13            Siebel software had been, to use your words, stolen  
12:22:35            14            by SAP. I -- that's not my area, and I don't think  
12:22:40            15            there are any -- there's any acceptance that that  
12:22:43            16            is as yet a proven fact.

12:22:47            17                     So I've done what I think is the  
12:22:49            18            appropriate economic analysis, based upon the  
12:22:53            19            subject IP as I've defined it, which I think is the  
12:22:57            20            appropriate definition to apply in this case.

12:23:03            21                     MR. PICKETT: Q. Tell me --

12:23:04            22                     A. And I understand that Mr. Meyer calculated  
12:23:06            23            the value of something else, and no doubt we'll  
12:23:11            24            argue about that over the next couple of days and  
12:23:13            25            possibly at trial.

12:23:15 1 Q. Tell me every assumption you made with  
12:23:18 2 respect to the liability.

12:23:20 3 MR. McDONELL: Vague and ambiguous, overly  
12:23:21 4 broad.

12:23:23 5 THE WITNESS: I assumed that the alleged  
12:23:28 6 actions were proven to the extent that they applied  
12:23:37 7 to the facts of the case. So not everything that  
12:23:41 8 the plaintiffs say in their complaint do I accept  
12:23:46 9 to be true. And one of those things, as an  
12:23:51 10 example, was that -- Mr. Meyer used this  
12:24:00 11 terminology many times -- the entire business model  
12:24:03 12 was infringing.

12:24:05 13 I don't think that's true. And there's  
12:24:10 14 expert opinion on that that indicates that that's  
12:24:16 15 not true.

12:24:18 16 I also think that I did my own analysis of  
12:24:21 17 elements of how much of the intellectual property  
12:24:27 18 was infringed and for how long, and the manner in  
12:24:31 19 which it was used, as I've spent 300 pages here  
12:24:35 20 explaining to you.

12:24:38 21 And so I have assumed that there is  
12:24:42 22 liability, but I've not assumed that everything you  
12:24:46 23 say in the complaint is true.

12:24:51 24 MR. PICKETT: Q. So you've done your own  
12:24:54 25 analysis of what SAP infringed and what they did

12:24:56            1            not infringe?

12:24:58            2                            MR. McDONELL: Misstates the testimony,  
12:24:59            3            vague and ambiguous.

12:25:01            4                            THE WITNESS: No.

12:25:02            5                            MR. PICKETT: Q. You did your own  
12:25:03            6            analysis of how much IP was infringed and for how  
12:25:05            7            long and the manner in which it was used. Yes or  
12:25:08            8            no?

12:25:10            9                            MR. McDONELL: Vague and ambiguous --

12:25:12            10                           THE WITNESS: That's correct.

12:25:13            11                           MR. PICKETT: Q. How much -- on your  
12:25:15            12            analysis, how much IP was infringed?

12:25:18            13                           MR. McDONELL: Misstates the testimony.  
12:25:20            14            He has not -- he stated very clearly --

12:25:25            15                           MR. PICKETT: No speak being objections.  
12:25:29            16            Go ahead.

12:25:29            17                           MR. McDONELL: You're trying to mislead  
12:25:30            18            the witness.

12:25:31            19                           THE WITNESS: I incorporated expert  
12:25:32            20            opinion, as I've indicated to you now three or four  
12:25:35            21            times, that suggested, indicates, that certain  
12:25:43            22            intellectual property owned by Oracle was not used.  
12:25:49            23            I have relied upon that opinion to some extent.

12:25:57            24                           I've also, as I said, done my own analysis  
12:26:00            25            that said, infringement started at this point,

12:26:04            1            ended at this point. It took place -- and again,  
12:26:09            2            I'm accepting your liability argument here -- in  
12:26:13            3            certain geographic territories. That use was made  
12:26:20            4            by TomorrowNow and SAP of that subject IP for that  
12:26:28            5            period of time.

12:26:30            6                            And those limitations mean that what I  
12:26:38            7            have included does not -- is not equal to the  
12:26:42            8            entire intellectual property that was acquired by  
12:26:48            9            Oracle in the PeopleSoft and the Siebel  
12:26:51            10            transactions. Okay.

12:26:57            11                            MR. PICKETT: Q. On your own analysis,  
12:26:58            12            when did you determine the infringement started?

12:27:02            13                            MR. McDONELL: Same objections. This  
12:27:04            14            assumes facts not in evidence, misstates the  
12:27:05            15            testimony.

12:27:07            16                            THE WITNESS: The -- the way I did my  
12:27:10            17            analysis was on a customer-by-customer basis. So I  
12:27:15            18            looked at, when a particular customer was acquired  
12:27:21            19            by TomorrowNow on the one hand, I had a change in  
12:27:29            20            that -- not in the approach, but because of the  
12:27:33            21            involvement of SAP, starting in January of '05, I  
12:27:38            22            had the same approach, but I changed -- at least  
12:27:48            23            considered changing the analysis to account for  
12:27:49            24            SAP's involvement.

12:27:52            25                            So that was how the damage started. It

12:27:56            1            was formulated for each customer, one at a time.

12:28:00            2                      MR. PICKETT:    Q.    As soon as they signed

12:28:01            3            on to TomorrowNow?

12:28:02            4                      A.    As soon --

12:28:05            5                      MR. McDONELL:    Vague and ambiguous.

12:28:06            6                      THE WITNESS:    As soon as -- the damage

12:28:07            7            start date I assumed was the last date that they

12:28:10            8            were supported by Oracle.    Which is not actually

12:28:14            9            always the same time.

12:28:17            10                     MR. PICKETT:    Q.    And for what products

12:28:20            11            did you assume the infringement occurred?

12:28:26            12                     MR. McDONELL:    Same objections.

12:28:27            13                     THE WITNESS:    For PeopleSoft, JD Edwards,

12:28:34            14            and Siebel.

12:28:38            15                     MR. PICKETT:    Q.    This was on your own

12:28:39            16            analysis, or was this something else?

12:28:41            17                     MR. McDONELL:    Vague and ambiguous.

12:28:42            18            Compound.

12:28:45            19                     THE WITNESS:    I don't really understand

12:28:45            20            your question.

12:28:46            21                     MR. PICKETT:    Q.    Well, you just said --

12:28:47            22            you've testified for a few pages now about your own

12:28:50            23            analysis that you did of how much IP was infringed

12:28:53            24            and for how long and the manner in which it was

12:28:56            25            used.    And that's a quote from your testimony.

12:29:00            1                      So on your own analysis, did you determine  
12:29:03            2                      what products were infringed --

12:29:05            3                      MR. McDONELL: Same objections.

12:29:07            4                      MR. PICKETT: Q. -- on this  
12:29:09            5                      customer-by-customer basis you just mentioned?

12:29:11            6                      MR. McDONELL: Same objections. Vague and  
12:29:12            7                      ambiguous, assumes facts not in evidence, calls for  
12:29:13            8                      a legal conclusion. Object to the form.

12:29:15            9                      THE WITNESS: I don't think I did that on  
12:29:17            10                     my own analysis. I -- my understanding of the  
12:29:21            11                     allegations was that it was PeopleSoft, JD Edwards,  
12:29:25            12                     and Siebel.

12:29:27            13                     MR. PICKETT: Q. Well, what was your own  
12:29:29            14                     analysis of the manner in which the intellectual  
12:29:31            15                     property was used?

12:29:35            16                     MR. McDONELL: Assumes facts. Same  
12:29:36            17                     objections.

12:29:37            18                     THE WITNESS: As I described in my report,  
12:29:42            19                     I called it a delta. I did an analysis of the  
12:29:47            20                     market and found that there were certain actions  
12:29:54            21                     that third-party support companies could do without  
12:30:01            22                     infringing, in fact, as partners and licensees of  
12:30:06            23                     PeopleSoft predominantly, not Oracle.

12:30:10            24                     So there was an established ability for  
12:30:13            25                     certain companies to do certain things. And it was

12:30:16            1            different for many companies, and I have maybe 50  
12:30:22            2            or 60 pages of the report that address this.

12:30:24            3                            My understanding, my analysis of those  
12:30:28            4            agreements, was that there was a de minimus charge.  
12:30:36            5            I think I used that terminology. There were a few  
12:30:40            6            thousand dollars here and there that were levied by  
12:30:44            7            PeopleSoft to these companies.

12:30:48            8                            Companies who were customers of PeopleSoft  
12:30:52            9            and JD Edwards could do their own support. And  
12:30:56            10           they could do that legally. They could have third  
12:31:00            11           parties come in and help them to do that  
12:31:04            12           self-support activity.

12:31:08            13                            So what I defined as the delta was, since  
12:31:12            14           all of that was perfectly acceptable, de minimus or  
12:31:17            15           zero license fees required, not even a license  
12:31:20            16           required, just operating under the customer's  
12:31:23            17           license, that there was some delta. There was  
12:31:25            18           something else that the alleged actions brought  
12:31:30            19           into play. And those items were things like  
12:31:36            20           developing bug fixes for one customer and  
12:31:39            21           promulgating them to other customers. Keeping  
12:31:44            22           copies of a company's -- a customer's environment  
12:31:49            23           on their own computers. And I've delineated these  
12:31:54            24           items in the delta in my report.

12:31:56            25                            So it's that delta for that period of time



12:32:01 1 in that geographic location that I've developed and  
12:32:06 2 named the subject IP. And that's what I'm valuing,  
12:32:12 3 and I think that's a substantial difference between  
12:32:14 4 what I've done and what Mr. Meyer did.

12:32:18 5 MR. PICKETT: Q. Are you aware that  
12:32:19 6 TomorrowNow infringed software -- copyrighted  
12:32:24 7 software even in instances when it did not use it  
12:32:28 8 for a customer?

12:32:29 9 MR. McDONELL: Assumes facts not in  
12:32:29 10 evidence, vague and ambiguous, calls for a legal  
12:32:32 11 conclusion, object to the form.

12:32:34 12 THE WITNESS: Can you -- so long since I  
12:32:37 13 heard that question, could you read it back or say  
12:32:39 14 it again?

12:32:40 15 MR. PICKETT: Q. Do you assume that apart  
12:32:41 16 from TomorrowNow's use of the copyrighted software  
12:32:45 17 in connection with the customers, that there was no  
12:32:47 18 infringement?

12:32:49 19 MR. McDONELL: Vague and ambiguous. Same  
12:32:51 20 objections.

12:32:54 21 THE WITNESS: Do I assume that there was  
12:32:56 22 no infringement at TomorrowNow? Is that what  
12:32:59 23 you're asking me?

12:33:01 24 MR. PICKETT: Q. No.

12:33:01 25 A. Okay. Let's have another go. I'm not

12:33:04            1            hearing this question quite right.

12:33:06            2                            Q.    Do you assume that apart from

12:33:09            3            TomorrowNow's use of copyrighted software for its  
12:33:12            4            customers, there was no infringement?

12:33:15            5                            MR. McDONELL:    It's vague and ambiguous.  
12:33:16            6            Same objections as previously stated.

12:33:22            7                            THE WITNESS:    Now I think I get it.

12:33:23            8                            I think that is a legal question to a very  
12:33:30            9            large extent.    Whether a copyright infringement has  
12:33:35            10           occurred is not my area.

12:33:39            11                           MR. PICKETT:    Q.    What do you assume?

12:33:41            12                           MR. McDONELL:    You objected to his answer.  
12:33:43            13            I'm sorry, you interrupted his answer, I believe.

12:33:46            14                           Did he?

12:33:47            15                           THE WITNESS:    Yes.

12:33:47            16                           MR. McDONELL:    May he complete his answer,  
12:33:48            17            Counselor?

12:33:49            18                           MR. PICKETT:    He's answering a different  
12:33:51            19            question.

12:33:51            20                           Q.    I asked what you assume.    That's not a  
12:33:53            21            legal question at all.    What do you assume with  
12:33:54            22            respect to the infringement?

12:33:56            23                           MR. McDONELL:    Same objections.    Vague and  
12:33:57            24            ambiguous.    Please let him answer the question.

12:33:59            25            You really are restating it.

12:34:01            1                      THE WITNESS:    Could you read back the  
12:34:03            2                      question that's at issue in my -- the answer that  
12:34:06            3                      was interrupted?  
12:34:09            4                      MR. PICKETT:    Q.    I'll restate it.  
12:34:10            5                      A.    What do you assume -- no, I haven't  
12:34:12            6                      finished my answer.  
12:34:13            7                      Q.    No, I ask the questions.    You don't get  
12:34:14            8                      the right to do that.  
12:34:16            9                      A.    Could you read --  
12:34:16            10                     Q.    No.    Sir, you don't get the right to do  
12:34:19            11                     that.    You are a witness, you are not --  
12:34:21            12                     MR. McDONELL:    Don't point your finger at  
12:34:21            13                     the witness, Counsel.    Please.  
12:34:24            14                     MR. PICKETT:    You are only a witness in  
12:34:25            15                     this case.  
12:34:26            16                     MR. McDONELL:    Counsel, please.    Please.  
12:34:26            17                     MR. PICKETT:    So I have the right to ask  
12:34:27            18                     the questions.  
12:34:28            19                     MR. McDONELL:    You're going to withdraw  
12:34:30            20                     your prior question?  
12:34:31            21                     MR. PICKETT:    Yes.  
12:34:31            22                     MR. McDONELL:    Okay.    Then I move to  
12:34:32            23                     strike it.  
12:34:34            24                     And you accept the striking of that --  
12:34:37            25                     MR. PICKETT:    Sure.

12:34:37            1                      MR. McDONELL: Now, restate your question,  
12:34:39            2                      and please don't point your finger at this witness  
12:34:41            3                      any further. It's inappropriate, Counsel.

12:34:44            4                      MR. PICKETT: We're on tape. If there's  
12:34:46            5                      any problem with the tape, bring it to the court.

12:34:49            6                      MR. McDONELL: You're not on the tape,  
12:34:50            7                      Counsel.

12:34:51            8                      MR. PICKETT: Q. What did you assume  
12:34:52            9                      about infringement -- let me restate it.

12:34:55            10                     Did you assume there was any infringement  
12:34:56            11                     aside from TomorrowNow's use of copyrighted  
12:35:00            12                     software with its customers?

12:35:02            13                     MR. McDONELL: It's vague and ambiguous,  
12:35:03            14                     calls for a legal conclusion, lack of foundation,  
12:35:06            15                     and object to the form.

12:35:10            16                     THE WITNESS: I assumed for the purposes  
12:35:11            17                     of my calculations that all of TomorrowNow's  
12:35:16            18                     activities were caught up within the alleged  
12:35:21            19                     action. So I assumed everything was infringing.  
12:35:28            20                     Even the things that I later learned were not  
12:35:33            21                     copied, not used, not -- whatever Mr. Gray said  
12:35:38            22                     they weren't.

12:35:40            23                     I still included all of the activities of  
12:35:43            24                     TomorrowNow in my calculations.

12:35:46            25                     MR. PICKETT: Q. So if TomorrowNow made a

12:35:47            1            binder in a library of copyrighted software, you  
12:35:53            2            included that in the scope of use of your license?  
12:35:57            3                      MR. McDONELL: Vague and ambiguous.  
12:35:58            4                      MR. PICKETT: Q. Is that right or not?  
12:35:59            5                      MR. McDONELL: Vague and ambiguous,  
12:35:59            6            incomplete, calls for a legal conclusion, object to  
12:36:02            7            the form.  
12:36:05            8                      THE WITNESS: That is included in my  
12:36:08            9            calculations, yes.  
12:36:09            10                     MR. PICKETT: Q. So when you're valuing  
12:36:10            11            the reasonable royalty for the actual infringement,  
12:36:16            12            you're including a royalty for the library that  
12:36:20            13            TomorrowNow created?  
12:36:22            14                     MR. McDONELL: Vague and ambiguous, lacks  
12:36:24            15            foundation, misstates the testimony. Object to the  
12:36:26            16            form.  
12:36:28            17                     THE WITNESS: Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

13:28:58	20	MR. PICKETT: Q. What determines the
13:29:02	21	scope of the license being negotiated in the
13:29:04	22	hypothetical negotiation?
13:29:07	23	MR. McDONELL: Object to the form of the
13:29:07	24	question, calls for a legal conclusion.
13:29:14	25	THE WITNESS: The scope of the license has

13:29:19            1            some geographic and temporal issues. Is that what  
13:29:25            2            you're referring to?

13:29:27            3                            MR. PICKETT: Q. It --

13:29:28            4                            A. I'm just trying to define scope.

13:29:30            5                            Q. It does, but more with respect to the  
13:29:32            6            breadth of the license in terms of what products it  
13:29:35            7            covers.

13:29:38            8                            A. In this case, as in other cases that I've  
13:29:42            9            done this kind of analysis, it's the license that  
13:29:46            10           would apply to the accused conduct. The  
13:29:52            11           allegations -- the alleged actions in the case.

13:29:55            12                            And if I may, I'd just like to clarify  
13:29:58            13           something from the discussions immediately before  
13:30:01            14           lunch.

13:30:03            15                            You asked me about my assumptions  
13:30:09            16           regarding the reasonable royalty and the -- the use  
13:30:13            17           that that would apply to. And I said I hadn't  
13:30:18            18           parsed out the alleged actions and accused conduct  
13:30:25            19           versus the duration, the time, et cetera.

13:30:32            20                            I had assumed, for the purposes of  
13:30:36            21           calculating the royalty rate that I have opined to,  
13:30:40            22           that all of the actions were infringing. Even  
13:30:43            23           though I recognize that there are now elements of  
13:30:48            24           the case where that isn't -- that isn't the state  
13:30:51            25           of the argument.

13:30:54            1                      So I did that to come up with the royalty  
13:30:57            2                      rate. But when I applied the royalty rate, if  
13:31:01            3                      there was no accused conduct on the part of certain  
13:31:07            4                      customers of TomorrowNow, I did not apply that rate  
13:31:12            5                      to those revenues.

13:31:17            6                      And the same will be true on the  
13:31:19            7                      disgorgement side. If there were any  
13:31:21            8                      no-accused-conduct customers, then I didn't apply  
13:31:26            9                      the royalty rate on that side to them, either.  
13:31:29            10                     Although they were excluded for other reasons for  
13:31:32            11                     the most part.

13:31:35            12                     Q. No accused conduct based on Mr. Gray's  
13:31:37            13                     analysis?

13:31:38            14                     A. Correct. I just wanted to clarify that  
13:31:42            15                     for you.

TEXT REMOVED - NOT RELEVANT TO MOTION



TEXT REMOVED - NOT RELEVANT TO MOTION

13:57:32            17                            MR. PICKETT: Q. Well, your delta  
13:57:33            18                            consists of an analysis of what a third-party  
13:57:36            19                            provider or a consultant theoretically could have  
13:57:39            20                            done legally. Right?  
13:57:41            21                            MR. McDONELL: Object to the form.  
13:57:47            22                            THE WITNESS: That's part of the -- of the  
13:57:51            23                            floor of the delta.  
13:57:53            24                            MR. PICKETT: Q. But you also understand  
13:57:54            25                            that TomorrowNow did not do what you suggest a

13:57:56            1            third-party service provider could have done.

13:58:00            2            Right?

13:58:01            3                            MR. McDONELL: Assumes facts. Object to  
13:58:01            4            the form.

13:58:02            5                            THE WITNESS: Well, I understand that's  
13:58:03            6            the allegation, and I have assumed that those  
13:58:09            7            alleged actions are found -- they're found to be  
13:58:15            8            liable for those.

13:58:17            9                            MR. PICKETT: Q. So --

13:58:17            10                          A. But -- just a second.

13:58:19            11                          Q. Go ahead.

13:58:20            12                          A. I've not simply taken the allegations on  
13:58:24            13            blind faith. I've applied some economic analysis  
13:58:28            14            to it. I've taken some technical input from  
13:58:32            15            technical people who are other experts in the case  
13:58:35            16            and tried to define as clearly as I can the subject  
13:58:43            17            IP, and then try to value that actual use of the  
13:58:48            18            subject IP, as I've described in this report.

13:58:53            19                          Q. Your analysis of the potentially legal  
13:58:57            20            activities of a third-party support provider reduce  
13:59:03            21            the ultimate valuation in your analysis. Correct?

13:59:09            22                          MR. McDONELL: Assumes facts. Object to  
13:59:10            23            the form.

13:59:12            24                          THE WITNESS: Well, if you -- let me turn  
13:59:13            25            that around.

13:59:14            1                      If you assume that you couldn't do any  
13:59:14            2                      kind of assistance to an Oracle customer at all,  
13:59:24            3                      other than illegally, then I -- you might be right.

13:59:29            4                      But you know and I know that that's not  
13:59:31            5                      the way it works, and that there are many things  
13:59:35            6                      that a customer can receive in the form of  
13:59:40            7                      external -- external to the company, that is --  
13:59:43            8                      assistance. And you know that they're legal, I  
13:59:48            9                      know that they're legal. So TomorrowNow could have  
13:59:52            10                     done all of those things without a license.

13:59:56            11                     And I don't know what's hard to understand  
13:59:59            12                     about the delta. If we go up to everything that  
14:00:04            13                     was allowed to be done without a license, and then  
14:00:08            14                     look at the alleged actions in terms of  
14:00:10            15                     TomorrowNow, it's only that difference that we're  
14:00:14            16                     trying to calculate the license for. Because you  
14:00:16            17                     didn't need a license to do the first 10,000 things  
14:00:19            18                     that companies all over the world are doing every  
14:00:23            19                     day.

14:00:25            20                     MR. PICKETT: Q. Your analysis of what  
14:00:26            21                     you believe a party -- a provider could do legally  
14:00:31            22                     reduces the amount of damages, does it not?

14:00:37            23                     MR. McDONELL: Asked and answered  
14:00:37            24                     repeatedly. Object to the form.

14:00:40            25                     THE WITNESS: I don't think it reduces

14:00:41 1 damages at all. The damages are what I've  
14:00:43 2 calculated.

14:00:44 3 MR. PICKETT: Q. But -- go ahead.

14:00:45 4 A. There would be no -- there wouldn't be a  
14:00:47 5 damage for things that -- something like a systems  
14:00:52 6 integrator or a self-support customer bringing in a  
14:00:56 7 consultant to help on a specific problem. There  
14:01:00 8 wouldn't be a license required for any of those  
14:01:04 9 things. So it's not that there's a damage and I'm  
14:01:06 10 reducing it. There are no damages. It's just --  
14:01:09 11 the damage just relates to that delta, that  
14:01:11 12 difference, between what you've alleged as being  
14:01:16 13 inappropriate and what's perfectly legal and  
14:01:18 14 perfectly acceptable and done by thousands of firms  
14:01:21 15 all around the world every day.

14:01:24 16 Q. Whether or not TomorrowNow itself actually  
14:01:26 17 did it legally or not. Is that correct?

14:01:28 18 MR. McDONELL: Vague and ambiguous.

14:01:30 19 MR. PICKETT: Q. In other words, it makes  
14:01:30 20 no difference how TomorrowNow did it, so long as  
14:01:33 21 someone else would have done it legally?

14:01:36 22 MR. McDONELL: Misstates the testimony,  
14:01:37 23 vague and ambiguous, object to the form.

14:01:38 24 THE WITNESS: I'm sorry, but that question  
14:01:39 25 doesn't make any sense to me.

14:01:41 1 MR. PICKETT: Q. Well, let's try it  
14:01:42 2 again.  
14:01:43 3 A. Okay.  
14:01:43 4 Q. You're assuming there's certain activity  
14:01:44 5 which is perfectly proper on the part of  
14:01:47 6 third-party service providers. Correct?  
14:01:49 7 A. Correct.  
14:01:49 8 Q. And you worked that into your delta.  
14:01:51 9 Correct?  
14:01:52 10 A. Correct.  
14:01:52 11 Q. And I'm saying that the delta is the  
14:01:55 12 delta, regardless of the particular way in which  
14:01:59 13 TomorrowNow performed its business activities.  
14:02:04 14 MR. McDONELL: Object to the form.  
14:02:06 15 MR. PICKETT: Q. Is that right?  
14:02:07 16 A. Well, there may have been other ways  
14:02:12 17 TomorrowNow could have acted that would still have  
14:02:15 18 been appropriate under the -- the -- so they would  
14:02:19 19 be under the floor of the delta.  
14:02:22 20 Q. And there would be ways that would be  
14:02:24 21 above it. Right?  
14:02:25 22 MR. McDONELL: Don't interrupt, Counsel,  
14:02:27 23 please.  
14:02:27 24 THE WITNESS: That's where I was going to  
14:02:28 25 go next.

14:02:29            1                      There are activities that will be above  
14:02:31            2                      the floor of the delta, and that's what is  
14:02:34            3                      relevant. That's what Mr. Meyer should have  
14:02:37            4                      calculated; it's what I have calculated.

14:02:46            5                      MR. PICKETT: Q. Aren't you assuming that  
14:02:49            6                      TomorrowNow will do everything it could do legally,  
14:02:56            7                      and -- let me rephrase that.

14:02:59            8                      Your license is limited to the three  
14:03:01            9                      numbered paragraphs on page 116. Right? The  
14:03:03            10                     nature and scope of the license.

14:03:05            11                     MR. McDONELL: Object to the form.

14:03:09            12                     THE WITNESS: No. You mean just the  
14:03:12            13                     bulleted points 1, 2, and 3?

14:03:15            14                     MR. PICKETT: Q. The delta consisted of  
14:03:17            15                     the following three bulleted points. Correct?

14:03:20            16                     A. Yes.

14:03:20            17                     Q. And the nature and scope of the license is  
14:03:22            18                     the delta. Right?

14:03:25            19                     MR. McDONELL: Object to the form.

14:03:30            20                     THE WITNESS: Yeah, I think -- I think  
14:03:32            21                     that's a fairly -- that's a decent summing up of  
14:03:34            22                     what I'm getting at here.

14:03:38            23                     It's the difference between what will be  
14:03:40            24                     legally allowed and what I am interpreting the  
14:03:46            25                     complaint to say TomorrowNow did.

18:32:28 1 a significant part of my analysis of Mr. Meyer's  
18:32:31 2 opinion.

18:32:31 3 MR. PICKETT: Q. But they're not part of  
18:32:33 4 your affirmative case?

18:32:34 5 A. That's correct.

18:32:35 6 MR. McDONELL: I believe we're --

18:32:37 7 MR. PICKETT: Let's take a break.

18:32:39 8 THE VIDEO OPERATOR: Going off the record,  
18:32:40 9 the time is 6:32.

18:32:42 10 (Time noted, 6:32 p.m.)

18:32:52 11 --o0o--

18:32:52 12 I declare under penalty of perjury that  
18:32:52 13 the foregoing is true and correct. Subscribed at

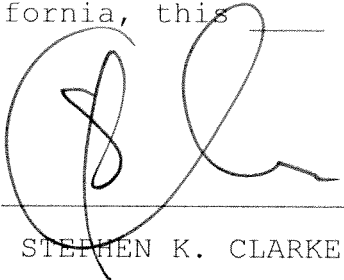
18:32:52 14 \_\_\_\_\_, California, this \_\_\_\_\_ day of

18:32:52 15 \_\_\_\_\_ 2010.

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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 [] 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 17, 2010  
Holly Thuman  
HOLLY THUMAN, CSR