

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.

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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.

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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

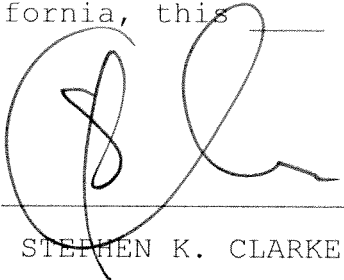
18:32:52 14 _____, California, this _____ day of

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