Oracle Corporation et al v. SAP AG et al Doc. 865 Att. 8

EXHIBIT 8

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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. SAP AG, a German corporation, SAP AMERICA, INC., a Delaware corporation, TOMORROWNOW, INC., a Texas corporation, and DOES 1-50, inclusive, Defendants.	No. 07-CV-1658 (PJH)

VIDEOTAPED DEPOSITION OF

STEPHEN K. CLARKE

VOLUME 3; PAGES 652 - 969

THURSDAY, JUNE 10, 2010

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

(1-427123)

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09:10:38 MR. PICKETT: Q. So let's move on, then, to the ones that are in the methodology, specifically.

09:10:49 I want to turn to what you call the "Customer-Specific Exclusion Criteria," and they're listed on pages 221 and 222. Correct?

09:11:07 A. That's correct.

09:11:09 Q. 11 items?

09:11:10 A. And you didn't -- you left out of the
09:11:12 title that these are the lost profits-related
09:11:15 pools.
09:11:16 Q. Fair enough. We're going to spend the
09:11:17 first portion of today on lost profits.
09:11:22 A. Okay.
09:11:23 Q. Now, the first six of the 11 are
09:11:29 categories with which you and Mr. Meyer agree. In
09:11:38 other words, you both exclude those customers for
09:11:40 purposes of lost profits. Correct?
09:11:42 MR. McDONELL: It's vague and ambiguous.
09:11:44 You may answer, if you can.
09:11:47 THE WITNESS: Yes. Obviously, Mr. Meyer
09:11:50 had exclusion pools as well. I understand he
09:11:55 didn't call them exclusion pools, but he had these
09:12:00 pools where he grouped customers that exhibited
09:12:04 certain behavior, and I agreed with him on these
09:12:07 pools. I think he called them buckets.
09:12:12 MR. PICKETT: Q. That's 1 through 6.
09:12:13 Right?
09:12:14 A. Correct.
09:12:14 Q. And then the next five -- service
09:12:17 evaluation, parent mandate, service gap, no accused
09:12:21 conduct, and other -- are additional categories
09:12:25 that you created. Correct?

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MR. McDONELL: Object to the term --

THE WITNESS: That's correct.

MR. PICKETT: Q. And if I understand it right, if you identified a customer that fit into any one of those five customer-specific exclusion criteria, you automatically excluded that customer from your calculation of lost profits.

A. Yes. I should just clarify that I think the service gap, which is in 11.2.9, although I developed that pool independent of Mr. Meyer, ultimately he had -- he had customers that fell into that category. So he excluded them as well. It's our definition of what goes into that pool is slightly different.

Q. We'll get into that.

What was your methodology -- well first of all, this is in effect an on/off switch. If you're in the -- one of these pools, you're out of the lost profits methodology. Correct?

MR. McDONELL: Vague and ambiguous.

MR. PICKETT: Q. There's no additional analysis?

MR. McDONELL: Same objection.

THE WITNESS: No, I don't think there's an additional analysis. If you're -- if you fall into

09:13:54 one of these specific exclusion pools, then you
09:13:57 would be excluded.
09:13:58 MR. PICKETT: Q. What was your
09:13:59 methodology, generally, for picking the exclusion
09:14:02 pools that automatically eliminated you from the
09:14:07 lost profits calculation?
09:14:10 I know there are others that require some
09:14:11 more analysis.
09:14:14 A. What I was trying to identify was the
09:14:18 behavior and the motivation for a customer for
09:14:29 doing what they did. Doing what they did might be
09:14:31 terminating at Oracle and moving to TomorrowNow.
09:14:33 It might be terminating some or all of the services
09:14:38 at Oracle in doing that and possibly moving to SAP.
09:14:44 So I was trying to identify what was going
09:14:48 on at the customer level. And that's true of all
09:14:53 my exclusion pools.
09:14:56 So I looked at these pools really within
09:15:02 the context of what I learned from Mr. Sommer, and
09:15:07 my own analysis of volumes and volumes of data, to
09:15:12 try to see whether there were reasons other than
09:15:18 the alleged actions that caused the customer to
09:15:22 switch. To do whichever one of those alternatives
09:15:27 they chose to do.
09:15:28 And in a sense, I gathered the information

about the behavior for many of these pools before I gave a name to the pool, although some of the pools preexisted the gathering of data, because Oracle had identified certain risk characteristics of the typical customer that is about to leave.

So in that sense, I was looking for information that supported that position, Oracle's position. In the others, I named the pool and grouped the customers into a pool downstream of gathering the information.

Q. Were the -- and I'm speaking of the 11 customer-specific exclusion criteria. Were those categories identified in some other publication, or are these groupings that you made based on your analysis?

MR. McDONELL: Assumes facts.

THE WITNESS: No. These were groupings that I made based on my analysis as I just described it. The nomenclature that goes with a pool, even the existence of the nomenclature of "exclusion pool," is really just a semantic issue. Really got little to do with the precise words that we use.

As "exclusion pool" would be another example of that, where whatever we call them, they

09:17:08 1 are simply a grouping of customers that have
09:17:15 2 exhibited similar characteristics for their -- in
09:17:18 3 their behavior, and for -- as I described
09:17:21 4 yesterday, for ease of reference in our discussions
09:17:24 5 today.

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14:09:11 Q. Other than in this case, have you based
14:09:13 your calculation of incremental costs on a
14:09:16 statistical regression analysis?

14:09:19 MR. McDONELL: Vague and ambiguous.
14:09:21 Object to the form.
14:09:22 THE WITNESS: Did you say other than in
14:09:24 this case?
14:09:25 MR. PICKETT: Q. Other than in this case,
14:09:27 right.
14:09:28 A. I've used regression analyses a number of
14:09:31 times, yes.
14:09:31 Q. And used ones that you yourself created?
14:09:36 A. Right.
14:09:37 MR. McDONELL: Vague and ambiguous.
14:09:37 THE WITNESS: I'm sorry. Correct.
14:09:39 MR. PICKETT: Q. Do you have any training
14:09:40 with respect to the preparation of statistical
14:09:42 regression analyses?
14:09:46 A. Yes.
14:09:47 Q. What is that?
14:09:50 A. I first did a regression analysis in 1969
14:09:57 when I studied statistics at college.
14:10:00 Q. You took an undergraduate course in
14:10:02 college in statistics?
14:10:04 A. Correct.
14:10:04 Q. Did you take any other courses in
14:10:07 statistics?
14:10:11 A. In my postgraduate studies for

14:10:15 accountancy, I did statistical analysis, regression
14:10:18 analyses.
14:10:19 Q. You took a course in regression analysis.
14:10:22 Is that your testimony?
14:10:23 A. Yes.
14:10:23 Q. In connection with accounting?
14:10:25 A. Correct.
14:10:28 Q. What does a regression analysis have to do
14:10:32 with accounting? It must be some British concept.
14:10:36 A. Interesting question. In the United
14:10:38 Kingdom, we have a very rigorous accounting
14:10:45 program, with an exceptionally difficult exam
14:10:49 that's split into a number of different subject
14:10:52 areas. Similar to the subject areas that we have
14:10:56 in the United States for a CPA.
14:11:01 But one of those exams -- at least when I
14:11:04 did it; I don't know what they do today -- was
14:11:07 called Elements of Financial Decisions. And these
14:11:10 were techniques, some of them statistical, but
14:11:14 others -- other analytical techniques that an
14:11:19 accountant, who might be in the position of being
14:11:21 the Chief Financial Officer for a company or one of
14:11:24 their underlings, trying to decide whether the
14:11:28 company should invest in a project and so on, all
14:11:32 manner of financial decisions, one component of

14:11:37 1 that was a class on statistics.

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18:06:03 MR. PICKETT: Q. Did you use any textbooks or academic references when you developed your regression models?

18:06:11 A. Oh, my. I think I told you yesterday, I did the first one in probably about September 1969, so --

18:06:19 Q. I'm sorry, for -- let me clarify. I meant doing the -- in using the regression models, you used for your regression analyses in this case.

18:06:32 MR. McDONELL: Object to the form of the question.

18:06:35 THE WITNESS: I was -- I think I understood that question. I was trying to --

18:06:39 MR. PICKETT: Q. Okay. Go ahead.

18:06:40 A. If I'm doing a regression analysis these days, in the same way that I don't need to look up the double entry for a cash purchase, for example, I don't need to go to a book to do this regression analysis. So I was giving you sort of an old answer, because I've been doing them for such a long time.

18:07:01 Q. So you didn't need to look up how to do a regression analysis?

18:07:04 MR. McDONELL: Asked and answered.

18:07:05 THE WITNESS: That's correct.

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19:14:52 MR. PICKETT: Let's go back on the record.

19:14:54 MR. McDONELL: 30 seconds.

19:14:55 MR. PICKETT: Q. Last question: Would Oracle's fixed costs change if there were a 2 percent change in the number of support customers?

19:14:56 A. I think that's unlikely.

19:15:01 MR. PICKETT: Thank you. We're done.

19:15:02 THE VIDEO OPERATOR: Very good. Going off the record, the time now is 7:15. This also will be the conclusion of Tape 5, Volume 3, in the deposition of Stephen Clarke.

19:15:05 (Time noted, 7:15 p.m.)

19:15:09 --o0o--

19:15:12 I declare under penalty of perjury that the foregoing is true and correct. Subscribed at

19:15:14 _____, California, this ____ day of

19:15:14 _____ 2010.

19:15:14

19:15:14

19:15:14 _____

19:15:14 STEPHEN K. CLARKE

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CERTIFICATE OF REPORTER

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

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

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

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

DATED: June 21, 2010

HOLLY THUMAN, CSR