

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.)
)
PLAINTIFFS,)
)
VS.)
)
SAP AG, ET AL.,)
)
DEFENDANTS.)

NO. C 07-01658 PJH

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OAKLAND, CALIFORNIA
WEDNESDAY, SEPTEMBER 30, 2010

TRANSCRIPT OF PROCEEDINGS

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(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:

RAYNEE H. MERCADO, CSR NO. 8258

1 BE CHARACTERIZED. OF COURSE THAT'S PRECISELY WHAT JUDGE LAPORTE
2 WAS ASKING THEM ABOUT, INDEED, IN THIS -- AT THE TIME OF THE
3 SANCTIONS MOTION, SOME OF THE EVIDENCE THAT WE WERE CONCERNED
4 ABOUT WAS THIS VERY TESTIMONY OF MR. ELLISON THAT HE WAS
5 CONCERNED THAT ORACLE'S REPUTATION WAS BEING HARMED. BUT THEN
6 THEY SAID, BUT DON'T WORRY, WE WON'T BE QUANTIFYING THAT.

7 TO COME IN NOW AT THIS LATE HOUR AND SAY THAT --
8 IT'S -- IT'S JUST -- I'M NOT GOING TO USE THE ADJECTIVES I'M
9 THINKING OF, YOUR HONOR. IT'S NOT APPROPRIATE TO COME IN AND
10 SAY WE'RE NOT GOING TO DO THIS, NOTHING ON GOOD WILL, AND THEN
11 MONTHS LATER TURN AROUND AND SAY, WELL, WE ARE GOING TO TESTIFY
12 ABOUT HARM TO GOOD WILL BUT MAKE THIS TECHNICAL DISTINCTION THAT
13 WE WON'T HANG A NUMBER ON IT RIGHT HERE, BUT WHAT ELSE IS GOING
14 TO HAPPEN. OF COURSE, IT'S GOING TO HAVE A IMPACT ON THE JURY
15 AND THEIR ASSESSMENT OF DAMAGES.

16 I WOULD ALSO NOTE THAT THEIR EXPERT HASN'T QUANTIFIED
17 IT. THERE ISN'T -- IT'S LIKE FIGHTING AIR, YOUR HONOR. IT
18 CANNOT BE ALLOWED.

19 **MR. PICKETT: JUST A COUPLE OF QUICK POINTS. FIRST**
20 **OF ALL, I'VE SEEN NOTHING IN THE RECORD THAT JUDGE LAPORTE RULED**
21 **THAT EVERY SINGLE THING THAT COULD BE CONSIDERED EVIDENCE IN**
22 **SOME BROAD, BROAD WAY AS TO GOOD WILL WAS OUT OF THE CASE. SHE**
23 **NEVER RULED ON THAT. WE NEVER MADE A STATEMENT AS TO THAT.**

24 NO. 2, THEY SAY THIS IS LATE HOUR. FIRST OF ALL, IF
25 YOU READ -- GO BACK AND, IF YOU COULD -- MAYBE YOU HAVE IT IN

1 MIND BETTER THAN ME, BUT IF YOU READ THEIR MOTION IN LIMINE
2 NO. 1, IT DOESN'T SAY ANYTHING ABOUT REPUTATION. IT TALKS ABOUT
3 QUANTIFYING DAMAGES AND DAMAGES TO GOOD WILL, WHICH IS A MOOT
4 ISSUE, AS I SAY.

5 **THE COURT:** YEAH.

6 **MR. PICKETT:** AND THEY HAVE TAKEN MR. ELLISON'S
7 DEPOSITION, AND THEY'VE ASKED HIM ABOUT HIS REACTION TO THE PRESS
8 REPORTS AND SO ON AND WHAT IMPACT THAT HAS. SO THEY'VE HAD AN
9 OPPORTUNITY TO GET INTO THIS. THERE'S NOTHING LATE HOUR ABOUT
10 THIS. THEY KNOW ALL ABOUT IT. AND SO IF WE -- THIS IS NOT
11 GOING TO BE A BIG DEAL IN TRIAL, BUT IT'S GOING TO BE A LITTLE
12 PIECE, I THINK, OF MR. ELLISON'S TESTIMONY.

13 AND WHEN HE COMES ON AND YOU SEE IT COME ON, IF YOU
14 HAVE A PROBLEM WITH IT, I THINK YOU CAN RULE AT THAT TIME ABOUT
15 IT. IT IS -- IT IS THE TRUTH. IT IS WHAT HAPPENED. THEY --
16 AND THEY CLEARLY -- CLEARLY SAP -- THERE'S ALL KINDS OF INTERIM
17 DOCUMENTS AT THE TIME. THEY DID THIS. THEY ACQUIRED
18 TOMORROWNOW FOR THE VERY PURPOSE OF DAMAGING ORACLE'S
19 REPUTATION.

20 THERE'S ALL KINDS OF DOCUMENTS, AND SO THOSE ALL COME
21 IN.

22 **THE COURT:** OKAY.

23 **MR. PICKETT:** AND THEN YOU HAVE MR. ELLISON SAYING --

24 **THE COURT:** ALL RIGHT. I UNDERSTAND YOUR RESPECTIVE
25 POSITIONS. WHEN I AFFIRMED OR AND ADOPTED JUDGE LAPORTE'S

1 ORDER, IT WAS CERTAINLY MY INTENTION THAT THERE WOULD BE NO
2 EVIDENCE, NOT ONLY WAS THERE CLEARLY GOING TO BE NO CLAIM OF
3 DAMAGES FOR HARM TO GOOD WILL, BUT THERE WOULD ALSO BE NO
4 EVIDENCE OF GOOD WILL.

5 I UNDERSTAND THIS DISTINCTION THAT YOU'RE MAKING, BUT
6 I DON'T THINK THAT YOUR -- THE PROBATIVE VALUE OF THAT
7 SUBSTANTIALLY OUTWEIGHS THE POTENTIAL FOR THE KIND OF PREJUDICE
8 THAT COUNSEL HAS -- HAS JUST DESCRIBED. I MEAN, FOR A JURY TO
9 HEAR ALL OF THIS -- EVEN IF IT'S MINIMAL, IF IT'S GOING TO COME
10 FROM MR. ELLISON, IT'S GOING TO OBVIOUSLY HAVE SOME IMPACT.

11 BUT EVIDENCE AS TO HARM TO REPUTATION IN THE
12 MARKETPLACE, THEY'RE NOT GOING TO BE ABLE TO HEAR THAT
13 WITHOUT -- IF THEY ARE PERSUADED BY YOUR OVERALL PRESENTATION,
14 WITHOUT WANTING TO PUT SOME VALUE TO THAT, EVEN IN A VERY KIND
15 OF UNCONSCIOUS WAY. I THINK IT'S VERY, VERY DANGEROUS TO ALLOW
16 THAT IN, PARTICULARLY GIVEN THAT THE REASON IT WAS ALLOWED -- IT
17 WAS NOT -- IT WAS DISALLOWED IS BECAUSE THERE WASN'T ADEQUATE
18 DISCLOSURE AND THERE WASN'T -- OBVIOUSLY HASN'T BEEN ADEQUATE
19 DISCOVERY OF THIS ISSUE.

20 AS I UNDERSTAND IT, THE EXPERTS AREN'T -- AREN'T EVEN
21 GOING TO TESTIFY ON IT BECAUSE IT HASN'T BEEN EVALUATED IN ANY
22 WAY; IS THAT CORRECT? SO THE JURY WON'T HAVE ANY DIRECTION
23 WHATSOEVER ABOUT WHAT TO DO WITH THAT.

24 **MR. PICKETT:** THAT'S TRUE, BUT THE DAMAGE TO
25 REPUTATION WAS DISCLOSED. WHAT WASN'T DISCLOSED WAS THE

1 UP-SELL/CROSS-SELL OPPORTUNITIES -- AT LEAST THAT'S THE BASIS
2 FOR YOUR HONOR'S ORDER, SO IT WAS DISCLOSED.

3 THE COURT: I'LL THINK ABOUT IT. IT'S NOT LIKELY I'M
4 GOING TO ALLOW IT IN, BUT I'LL THINK ABOUT IT. I'LL GIVE HER
5 ORDER ANOTHER READ. BUT MY UNDERSTANDING AT THE TIME WAS THAT
6 IT WOULD -- THAT MY INTENT WAS TO PRECLUDE ALL EVIDENCE AS WELL
7 AS THE DAMAGES ON IT. BUT I'LL GIVE IT ANOTHER --

8 MR. PICKETT: AND IT MAY BE -- IT MAY BE ADMISSIBLE
9 OR RELEVANT FOR OTHER PURPOSES.

10 THE COURT: WHAT MAY BE --

11 (SIMULTANEOUS COLLOQUY.)

12 MR. McDONELL: THIS IS A GAME OF WHACK-A-MOLE.

13 MR. PICKETT: THE FACT THAT SAP INTENDED TO ATTACK
14 ORACLE, AND ORACLE SAYS, YEAH, ONE OF THE THINGS THEY DID, THEY
15 SUCCEEDED. THAT'S BACKGROUND TO THEIR KNOWLEDGE ABOUT WHAT THEY
16 WERE DOING WITH RESPECT TO PURCHASING TOMORROWNOW.

17 THE COURT: I DON'T UNDERSTAND WHAT YOU'RE -- WHAT
18 YOU'RE SAYING NOW. YOU'RE SAYING -- I DON'T UNDERSTAND WHAT
19 YOU'RE SAYING.

20 MR. PICKETT: PART OF -- LET ME TRY AGAIN, THEN.

21 THE COURT: WHEN YOU SAY IT MAY BE ADMISSIBLE FOR
22 OTHER PURPOSES WHAT'S THE "IT"?

23 MR. PICKETT: THAT ORACLE FELT ITS REPUTATION WAS
24 DAMAGED IN THE MARKETPLACE.

25 THE COURT: OKAY. ALL RIGHT. I'LL BE VERY CLEAR IN

1 THE ORDER AS TO WHETHER OR NOT I'M GOING TO PERMIT THAT KIND OF
2 TESTIMONY FOR ANY -- ANY PURPOSE.

3 ALL RIGHT. TURNING TO THE SECOND ONE -- WE NEED TO
4 MOVE THINGS ALONG, 'CAUSE WE HAVE A LOT OF THINGS TO GET
5 THROUGH -- AND THAT IS THE LOST PROFITS.

6 **MR. McDONELL:** YES. ON NO. 2, DEFENDANT'S MOTION IN
7 LIMINE NO. 2, YOUR HONOR, WE HAVE A SIMILAR PROBLEM. THE -- THE
8 BACKGROUND, AGAIN, IS JUDGE LAPORTE'S ORDER THAT WAS CRYSTAL
9 CLEAR IN EXCLUDING EVIDENCE OF CROSS-SELL AND UP-SELL
10 OPPORTUNITIES, AND THOSE ARE BASICALLY SALES OF SOFTWARE
11 LICENSES, AS WELL AS ANY SALES TO CUSTOMERS THAT HAD NEVER
12 BECOME CUSTOMERS OF TOMORROWNOW.

13 THEY APPEALED THAT ORDER TO YOUR HONOR AND ASKED THAT
14 THEIR WITNESSES BE ABLE TO TALK ABOUT THAT EXCLUDED EVIDENCE AS
15 A WAY OF EXPLAINING WHY THEIR OTHER DAMAGES CLAIMS MAY BE HIGH
16 AND THE LOST PROFITS CLAIM MAY BE LOW, AND THEY ALSO ASKED YOUR
17 HONOR SPECIFICALLY THAT THEIR WITNESSES BE ALLOWED TO TESTIFY TO
18 ALL THE IMPACTS THEY PERCEIVED FROM DEFENDANTS' UNLAWFUL
19 ACTIVITIES.

20 AND I CITE THERE TO THEIR APPLICATION TO YOU OR THEIR
21 OBJECTION TO YOU AT ECF499, PAGE 16.

22 WE OBJECTED, AND WE SAID NO, THIS IS JUST KIND OF A
23 ROUNDABOUT WAY OF GETTING VALUE OUT OF THE EVIDENCE THAT'S
24 ACTUALLY BEEN EXCLUDED TO PROP UP YOUR OTHER DAMAGES CLAIMS OR
25 TO OUTRIGHT COME OUT AND TALK ABOUT EXACTLY WHAT'S BEEN

1 PRECLUDED. AND YOUR HONOR'S ORDER WAS VERY CLEAR. NO, THAT
2 WON'T BE ALLOWED, EITHER DIRECTLY OR INDIRECTLY THROUGH THE BACK
3 DOOR. SO ISSUE SOLVED, OR SO WE THOUGHT, UNTIL RECENTLY AGAIN
4 IN THE -- IN THE -- FOR ONE EXAMPLE IN THE DAMAGES JURY
5 INSTRUCTIONS -- OR IN THEIR JURY INSTRUCTIONS, THEY NOW HAVE AN
6 INSTRUCTION SEEKING TO RECOVER FOR LOSSES TO PROSPECTIVE
7 CUSTOMERS UNDER THEIR INTERFERENCE CLAIM.

8 WELL, PROSPECTIVE CUSTOMERS WOULD BE THESE CUSTOMERS
9 THAT HAD NOT BEEN ORACLE CUSTOMERS AND BECAME -- WERE NEW
10 CUSTOMERS, EXACTLY WHAT WAS EXCLUDED BY JUDGE LAPORTE'S ORDER
11 THAT THERE WON'T BE EVIDENCE OR ARGUMENT OF LOST SALES TO THESE
12 COMPANIES OTHER THAN THE 358 THAT ARE AT ISSUE HERE.

13 AND THEN MORE SUBTLY THROUGH THE BACK DOOR, THEIR
14 DAMAGES EXPERT USES LOST CROSS-SELL AND UP-SELL OPPORTUNITIES AS
15 A FAIRLY IMPORTANT CENTERPIECE OF HIS FAIR-VALUE-OF-USE ANALYSIS
16 WHERE HE BASICALLY SAYS -- AND THIS GETS US BACK TO GOOD WILL A
17 LITTLE BIT -- THAT GOOD WILL IS LARGELY THESE CROSS-SELL AND
18 UP-SELL OPPORTUNITIES. SO ORACLE WAS GOING TO LOSE THAT VALUE,
19 TOO.

20 WE AGAIN THINK THAT'S JUST THE BACK DOOR AND HAS THE
21 EFFECT OF EVISCERATING THE SENSE OF JUDGE LAPORTE'S ORDER.

22 I WOULD SUBMIT WITH THAT, YOUR HONOR.

23 **MR. PICKETT:** THIS IS NOT ABOUT LOST PROFITS, YOUR
24 HONOR. IT IS ABOUT THE FAIR MARKET VALUE OF USE AND WHETHER OUR
25 EXPERT CAN -- CAN LOOK AT THE TOTAL VALUE ORACLE PAID FOR

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CERTIFICATE OF REPORTER

I, RAYNEE H. MERCADO, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658 PJH, ORACLE CORPORATION, ET AL. V. SAP AG, ET AL., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

Raynee H. Mercado

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

MONDAY, OCTOBER 4, 2010