

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ELIZABETH D. LAPORTE, MAGISTRATE

ORACLE CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 SAP AG, ET AL., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

NO. C 07-1658 PJH (EDL)

San Francisco, California  
Tuesday, July 1, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(Appearances continued, next page)

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BY: SCOTT W. COWAN, ESQ.

Also Present:                        KEVIN HEMEL, ESQ.

Reported By:                        BELLE BALL, CSR, RMR, CRR  
   Official Reporter

1 **TUESDAY, JULY 1, 2008**

2 **1:28 P.M.**

3 **P R O C E E D I N G S**

4 **THE CLERK:** Calling Civil 07-1658, Oracle Corporation  
5 versus SAP AG, et al. Counsel, please state your appearances  
6 for the Record.

7 **MR. MCDONNELL:** Jason McDonnell for Defendants, Your  
8 Honor. Also appearing today is Scott Cowan and Martha Boersch.  
9 And also present from our law firm, Jones Day, is Elaine  
10 Wallace, and from the SAP Legal Department is Mr. Kevin Hemel.

11 **THE COURT:** Thank you.

12 **MS. HOUSE:** Holly House from Bingham McCutcheon for  
13 Oracle Corporation. Also here today, Geoff Howard and Zach  
14 Alinger from Bingham McCutcheon, and in-house counsel, Jennifer  
15 Gloss.

16 **THE COURT:** All right. Good afternoon.

17 Let's start with the objections and move on to the  
18 conference. And let me give you my tentative thoughts on that,  
19 on the objections.

20 First, on the Grand Jury documents, I am inclined to  
21 reach the same conclusion as -- as your former Special Master,  
22 Judge Legge. I -- I think the threshold question of whether  
23 SAP as -- providing documents in response to Government  
24 requests is even covered by the Grand Jury secrecy rule, which  
25 applies, for example, to Government attorneys, and that's what

1 some of the cases are talking about, where there is an issue of  
2 Grand Jury secrecy being violated, potentially.

3 We don't have that here. If anything, it's akin to a  
4 witness, I think. A non-testifying witness, at least as far as  
5 I know. So we're talking about document provisions. The  
6 original request didn't even call for Grand Jury documents,  
7 specifically.

8 Now, I guess Judge Legge modified it to some degree  
9 in response to a U.S. Attorney's subpoena, and I don't know if  
10 that was specifically a Grand Jury subpoena or what, exactly.  
11 But certainly, that wasn't what the original request called  
12 for.

13 I also think, you know, the leading case that I would  
14 apply from the Ninth Circuit is Dynavac. And I must say,  
15 looking at Page 5 of Defendants' objections, the paragraph that  
16 deals with the touchstone -- starts with the Benjamin case and  
17 then the rest of the paragraph deals with Dynavac -- somewhat  
18 takes the quotations out of context.

19 It quotes Dynavac as saying (As read), "Although  
20 disclosure of business" -- well, it summarizes, "Although  
21 disclosure of business records independently generated and  
22 sought for legitimate purposes for their own sake ordinarily  
23 does not compromise the secrecy of Grand Jury proceedings,"  
24 which is really the main point of the Dynavac case, then it  
25 quotes out, it says, quote, "which documents were subpoenaed by

1 the Grand Jury may disclose the Grand Jury's deliberative  
2 process," leaving out the phrase that goes right beforehand,  
3 "in the rare and unusual case." That's a somewhat surprising  
4 thing.

5 And then it goes on to make it look as if Dynavac is  
6 quoting with approval In re Grand Jury Proceedings, which it  
7 does quote, that is, "'when documents are considered in the  
8 aggregate in their relationship to one another, make possible  
9 inferences about the nature and direction of the Grand Jury  
10 inquiry.'"

11 But in fact, the Court led into that, was saying  
12 we're aware that other courts have gone in a different  
13 direction than we are.

14 And it says -- you know, it's basically citing  
15 opposing or somewhat differing views, and says, "We think the  
16 concerns seem a bit exaggerated," in the case of a business  
17 record -- in the case of business records.

18 So in other words, far from endorsing that principal,  
19 it's saying "We think those cases are expressing undue alarm at  
20 the mere production of business records."

21 So, I am troubled by that way of discussing the  
22 Dynavac case. Even if arguably the privilege or the secrecy is  
23 at issue, I don't think that -- that this is the rare and  
24 unusual case where that would happen.

25 But, on top of that, what I'm inclined to do is order

1 any documents that have not already been produced in some other  
2 way, but that were produced to these Government agencies be  
3 produced.

4 And, that would make it unclear as to what, among all  
5 the others, were produced to the Grand Jury. So if there even  
6 were a legitimate issue, I think this would completely take it  
7 out of the rare and unusual case.

8 So, those are my thoughts. Obviously I've given it a  
9 lot of thought. I'm certainly willing to hear argument about  
10 it. And if there's something that changes my mind, I will  
11 change my mind. But I have paid a lot of attention to it.

12 So, Ms. Boersch, is this yours?

13 **MS. BOERSCH:** Yes, this is mine, Your Honor.

14 Let me just address briefly, with respect to Dynavac,  
15 the point from our perspective on Dynavac is that we read  
16 Dynavac as adopting the effects test in terms of when you have  
17 a request for production of documents produced to the Grand  
18 Jury, what test do you apply.

19 **THE COURT:** Uh-huh.

20 **MS. BOERSCH:** We think Judge Legge erred in adopting  
21 the per se approach, which says that documents which are  
22 independently generated can never be documents that are Grand  
23 Jury matter or constitute Grand Jury matter.

24 **THE COURT:** Okay, and I don't -- I mean, I would  
25 agree with you that it's not a never test.

1           **MS. BOERSCH:** Right. So --

2           **THE COURT:** However, what about the threshold --  
3 well, okay, go ahead. But you need to get to the threshold  
4 issue, too. But on Dynavac, I really --

5           **MS. BOERSCH:** Well, I guess I read Dynavac  
6 differently. I think, and I agree, the discussion in Dynavac  
7 is fairly complex.

8           But I read Dynavac as saying -- and I think this is  
9 the rare case where -- and the other cases that we cited,  
10 Admiral Heating and the a few of the other cases, make it clear  
11 that when you have a request for documents that identify  
12 specific documents and says, "Please give us all these  
13 documents," that would not reveal the inner workings of the  
14 grand jury, even if those documents had coincidentally been  
15 produced to the Grand Jury.

16           Instead, what we are dealing with here is a blanket  
17 request for all documents produced to the Grand Jury.

18           **THE COURT:** Well, that's not what the request was.  
19 It was for all documents produced to government agencies.

20           **MS. BOERSCH:** Right. But in this context, there is  
21 nothing other than all documents produced to the Grand Jury.

22           **THE COURT:** Well, there was nothing? Or is it  
23 because of what Judge Legge narrowed it to?

24           **MS. BOERSCH:** Well, it's -- Judge Legge narrowed it  
25 in the sense that he said you don't have to produce the

1 subpoena and you don't have to produce any covering letters  
2 accompanying the documents. But other than that, it's just  
3 documents produced to a Grand Jury.

4 **THE COURT:** Uh-huh.

5 **MS. BOERSCH:** So we're not talking about anything  
6 else. So in effect, that request is for all documents  
7 produced to the Grand Jury.

8 And that, under Admiral Heating and some of those  
9 other cases, is in fact one of those rare cases where the  
10 production in a package of what was produced to the Grand Jury  
11 would reveal the direction, nature and scope of the Grand Jury  
12 proceedings.

13 **THE COURT:** What is the status of the Grand Jury  
14 proceedings now?

15 **MS. BOERSCH:** They are ongoing.

16 **THE COURT:** Uh-huh.

17 **MS. BOERSCH:** So --

18 **THE COURT:** And how long have they been going on?

19 **MS. BOERSCH:** Since -- well, I don't know for sure,  
20 but we have been on notice of them since -- we've got the first  
21 subpoena in June.

22 **THE COURT:** And have there been more subpoenas since  
23 then?

24 **MS. BOERSCH:** Yes.

25 **THE COURT:** So, are we talking about multiple



1 subpoena here, then?

2 **MS. BOERSCH:** Yes. Three, total.

3 **THE COURT:** Uh-huh. Well, I think Dynavac actually,  
4 I mean, it -- it goes into great detail about the various  
5 tests, and I don't think it forthrightly adopts any one of  
6 them. It essentially ducks the question at the end.

7 And it says -- you know, and it is distinguishable in  
8 the sense that there, the proceedings weren't ongoing. And  
9 here, they are.

10 **MS. BOERSCH:** Correct.

11 **THE COURT:** But, it is on point to the extent,  
12 if --if -- if this whole issue applies at all in this context,  
13 where we're not talking -- I mean, that was a case where it was  
14 the Government was producing -- was producing, right? And  
15 requesting?

16 **MS. BOERSCH:** It was an IRS summons, right.

17 **THE COURT:** Yeah. The IRS was asking -- it was  
18 getting the records from the prosecutors, right? Directly.

19 **MS. BOERSCH:** Correct.

20 **THE COURT:** Okay. So I mean, they're clearly  
21 implicated by the Rule 6.

22 **MS. BOERSCH:** Yeah. And I don't --

23 **THE COURT:** And this is not the case here, though.  
24 Which category does SAP fall under?

25 **MS. BOERSCH:** SAP would fall, if anything, under the

1 witness category, and we agree, where there's no dispute that  
2 Rule 6(e) does not prohibit witnesses from disclosing what  
3 occurs before a Grand Jury.

4 But that doesn't necessarily mean that the converse  
5 is true, which is that witnesses can be compelled to disclose  
6 what occurred before a Grand Jury.

7 **THE COURT:** No. Well, I find completely persuasive  
8 the reasoning of that case, which says that makes no sense in  
9 terms of the goal of -- or the alleged goal of protecting Grand  
10 Jury secrecy, that it could be a one-way street like that,  
11 where the witness can use it to, you know, frustrate someone  
12 else's discovery, but they can also voluntarily disclose it.

13 Well, how does that protect Grand Jury secrecy? It  
14 doesn't.

15 **MS. BOERSCH:** Well, that case is different, because  
16 in that case, there was not a blanket request for discovery.  
17 And the party in that case was refusing -- there was a request  
18 for a particular document, and the party was refusing to  
19 produce those documents because they had coincidentally been  
20 produced to the Grand Jury. We're not doing that.

21 **THE COURT:** That is a little bit different, but I  
22 think the basic policy point is exactly the same, though. I  
23 mean, I agree with you that the context is different.

24 **MS. BOERSCH:** No, I think the policy point is  
25 different, because where you have, as you have here, Oracle's

1 ability to propound to us legitimate discovery requests.

2 And we are complying with those discovery requests,  
3 we are producing documents, we are not withholding any  
4 particular documents solely on the grounds that it was produced  
5 to the Grand Jury.

6 **THE COURT:** Uh-huh.

7 **MS. BOERSCH:** So we are not using Rule 6(e) as a  
8 shield to avoid producing documents. We have produced very  
9 many, and most, if not all, of what the Grand Jury may have  
10 culled over.

11 **THE COURT:** Well, what if you -- if, as I indicated,  
12 I order you to produce anything that you haven't already  
13 otherwise produced?

14 **MS. BOERSCH:** That definitely makes it more  
15 palatable.

16 **THE COURT:** Uh-huh.

17 **MS. BOERSCH:** Our concern with upholding Judge  
18 Legge's ruling, and ruling that Grand Jury secrecy does not  
19 apply to a blanket request for all documents produced to the  
20 Grand Jury, is that it will allow any litigant in parallel  
21 civil proceedings to essentially serve a civil subpoena on any  
22 witness or anybody who appears or produces documents to the  
23 Grand Jury, to get from that witness what they either said to  
24 the Grand Jury or produced to the Grand Jury.

25 And, because there is no threshold test that Judge

1 Legge applied that would compel the party trying to get that  
2 information from the witness to show either the relevance of  
3 the documents or that they had no other way to get the  
4 documents, or any sort of compelling need, or that disclosure  
5 of that information would not somehow reveal --

6 **THE COURT:** Well, but here, okay, you are not  
7 claiming that they are not relevant, are you? I mean, you're  
8 not saying the investigation is so differently focused from  
9 this case? I mean, it was instigated in response to this --

10 (Court and Counsel speaking simultaneously)

11 **MS. BOERSCH:** -- that's a deduction.

12 **THE COURT:** That's not true?

13 **MS. BOERSCH:** That's an assumption that one might  
14 draw from the timing of the first subpoena, but --

15 **THE COURT:** Well, is there anything to suggest  
16 otherwise?

17 **MS. BOERSCH:** Not that I'm aware of. I mean, all we  
18 have is the subpoena.

19 So I can -- you can draw some conclusions, I suppose,  
20 from the existence of a subpoena, but the Government hasn't  
21 announced, so far as I was aware, what exactly their  
22 investigation concerns.

23 There are -- Oracle has made a number of allegations.  
24 We don't know if the Government's investigation includes all of  
25 those allegations, some portion of those allegations. We don't

1 know if their investigation is focused on particular  
2 individuals or other individuals.

3 **THE COURT:** But when you say "a number of  
4 allegations," you mean any that are not in -- also made in this  
5 lawsuit? They have made a number of allegations in this  
6 lawsuit, as well.

7 **MS. BOERSCH:** Yes. That's what I'm saying, yeah.

8 **THE COURT:** And are making even more.

9 **MS. BOERSCH:** Right, yes.

10 **THE COURT:** As time marches on.

11 **MS. BOERSCH:** No, I'm referring to the ones they are  
12 making in this. So we don't know if the Government's  
13 investigation includes all of those, some subset of those, more  
14 than those. We just don't know that. Because the Government  
15 hasn't announced it.

16 **THE COURT:** And you haven't been in some kind of  
17 negotiations yet with the Government?

18 **MS. BOERSCH:** No. We are not waiving our  
19 attorney/client privilege or work product privileges with  
20 respect to the Government. So, no.

21 **THE COURT:** Uh-huh. Okay.

22 **MS. BOERSCH:** The other concern we have is that  
23 because of the -- when the Government is investigating, it may  
24 ask for -- I'll just give an example -- for e-mails for  
25 individuals without regard to any showing of relevance to any

1 particular claim, because they're investigating -- we don't  
2 know, but they may be investigating other things.

3 To allow that then to be produced to Oracle what was  
4 produced to the Government, which may include information from  
5 individual employees at SAP and TomorrowNow, that is not  
6 relevant to the lawsuit, that may be private information,  
7 there's just no reason that Oracle should have that information  
8 that's not in fact relevant to any of their claims.

9 **THE COURT:** Well, but is that in fact the case? Have  
10 you looked at --

11 **MS. BOERSCH:** It may be.

12 **THE COURT:** Well, may be, or is?

13 **MS. BOERSCH:** It is.

14 **THE COURT:** You know of specific documents?

15 **MS. BOERSCH:** Because e-mails have been produced  
16 wholesale.

17 **THE COURT:** Well, okay. Well, first of all -- and  
18 I'll let the other side speak as well -- as I've said, I'm  
19 inclined, I -- I agree that in rare and unusual circumstances,  
20 it can be the case that asking for everything that was  
21 subpoenaed could reveal the inner workings of the Grand Jury.  
22 I'm very dubious that that's the case here.

23 In addition, I'm not at all sure the privilege  
24 applies -- whatever we want to call -- the secrecy rule applies  
25 at all, because we are talking about a witness.

1           But even if -- even if all the things were true, I  
2 think that limiting it to documents that were not already  
3 produced would put a veil of secrecy over much of it, and make  
4 it unclear what actually was produced or subpoenaed, even more  
5 so.

6           Then, among that subset, if there are documents that  
7 are completely irrelevant -- and I said I think you are not  
8 claiming privilege because you are not waiving the privilege in  
9 any event, but if they are completely irrelevant, I would allow  
10 you to withhold them maybe with some kind of an equivalent of a  
11 privilege log or something like that. In other words, if you  
12 did some kind of a wholesale production.

13           And certainly if they were valid -- if they are  
14 completely irrelevant, there's no reason to produce them. I  
15 suppose there could be some privacy issues that could be  
16 negotiated or handled with redactions or something like that,  
17 if -- if appropriate.

18           **MS. BOERSCH:** There are privacy issues. And in  
19 addition to that, I assume we would be able to make whatever  
20 other appropriate objections we may have in the civil context  
21 to the production of the documents. Either that they're not  
22 relevant, or they're privileged.

23           **THE COURT:** Yes. If you haven't somehow -- I mean, I  
24 don't know, I haven't even thought about it, if there's any  
25 waiver of privilege involved. You just said you weren't

1 waiving any privileges with respect to the Government.

2 **MS. BOERSCH:** Correct.

3 **THE COURT:** So if that's true, I don't know how you  
4 could assert a privilege for something you produced to them. I  
5 don't think you could. But you might have a privacy objection,  
6 possibly, or something like that. I don't know.

7 And relevancy, I can see your point, although that  
8 would mean essentially, I don't know, they'd over-request it or  
9 you'd over-produced to the Government, but that is possible, I  
10 suppose.

11 **MS. BOERSCH:** On the threshold issue that the Court  
12 raised, whether or not the -- did the rule of Grand Jury  
13 secrecy generally applies when you are talking about a witness  
14 to the Grand Jury proceedings, and I think the case law is --  
15 it's not entirely clear, but I think there's plenty of support  
16 in the case law for the notion that there is a general  
17 principle of Grand Jury secrecy, which means you can't compel a  
18 witness to disclose.

19 **THE COURT:** Well, I mean, there's -- I think there  
20 are cases that go in both directions. And I don't know that  
21 the Ninth Circuit has resolved that, which is what we are  
22 talking about. But certainly, that out-of-district case that I  
23 agree with the reasoning of goes the other way.

24 But, in the Ninth Circuit cases I think that you  
25 cited, they all didn't involve the situation, they involved the



1 Government turning over documents. And, which is, of course,  
2 it is one of the prohibited.

3 I mean, I don't think this was analyzed sufficiently  
4 in the papers. But -- so I might have missed some cases that  
5 are on point.

6 **MS. BOERSCH:** No, well, the -- there are no -- I'm  
7 not aware of any cases in the Ninth Circuit that are on point  
8 as to whether or not Rule 6(e), the general rule of Grand Jury  
9 secrecy, applies to when you are talking about a witness who's  
10 being forced to disclose what happened in front of the Grand  
11 Jury.

12 But there's cases from other circuits that say that,  
13 certainly.

14 **THE COURT:** Right. And cases from other circuits  
15 that go the other way, as well.

16 **MS. BOERSCH:** Well, one.

17 **THE COURT:** Well, I think that one was extremely  
18 persuasive, in my mind. But, in any event, I think by limiting  
19 what I ordered to what I said, that even if I'm wrong on those  
20 things, it would still protect the secrecy.

21 And I do think -- as I say, I'm raising this because  
22 I hope never to see it again by any party, what I think was not  
23 a fair statement of Dynavac, --

24 **MS. BOERSCH:** Well, Your Honor, I --

25 **THE COURT:** -- which is the Ninth Circuit case most

1 on point. And really, to leave out -- in quoting from it  
2 extensively, to leave out the rare-and-unusual-case  
3 qualification, for example, I mean, it just -- you know.

4 **MS. BOERSCH:** Well, Your Honor, I apologize if you  
5 think that we have misled you on that. My view is that this  
6 is -- this is in fact the rare and unusual case. And I did not  
7 see that as taking it out of context, by any means.

8 And I think if you read the Dynavac case, it does in  
9 fact support the notion that there are cases in which the  
10 revelation or a request, a blanket request for what was  
11 produced to a Grand Jury, would reveal the direction and scope  
12 of the Grand Jury. I think that's the overall thrust of the  
13 case.

14 And I do not think that -- I apologize if the Court  
15 found it to be misleading, but I certainly didn't mean to  
16 mislead the Court.

17 **THE COURT:** I'm not assuming that you did mean to,  
18 but I just want more careful editing in the future of selective  
19 quotations.

20 I mean, you know, because, I mean, I think it would  
21 have been -- I am not assuming any bad intent, but I'm just  
22 saying, you know, to leave out "in a rare and unusual case,"  
23 the argument should have been "in a rare and unusual case," and  
24 then, "this is such a case, for the following reasons."

25 I don't think it's a rare and unusual case. I mean,

1 it's a case that just like in Dynavac, to some -- we think the  
2 disclosure of business records independently generated and  
3 sought for legitimate purposes wouldn't seriously compromise.

4 Now, I agree there are some factual distinctions with  
5 Dynavac. But anyway, I think that would be the better, the  
6 better approach to it. And so, that's all I'm saying.  
7 Because, I mean, we are going to have, I'm afraid, a lot of  
8 hearings in this case.

9 You may or may not keep participating, with your  
10 expertise in the criminal side of things.

11 **MS. BOERSCH:** Yeah. I appreciate the comments, Your  
12 Honor. And I -- once again, I'm sorry if the Court found it to  
13 be misleading.

14 **THE COURT:** Okay. What would you like to cite?

15 **MS. HOUSE:** Obviously, we agree with your reading of  
16 Dynavac. And we were also dismayed at the missing language.

17 This is exactly the situation where it's corporate  
18 books and records that are being called for. And it's exactly  
19 the case where Dynavac looked at some of the parade of  
20 horrors that the Defendants said were going to happen, and  
21 said, "We don't think so in the case." So, we obviously agree  
22 with you.

23 What concerns me with your solution, Your Honor, is  
24 the timing. We have a situation here where we feel that we are  
25 getting documents way too slowly. You know that we had that

1 problem when we went before Judge Legge, Judge Legge raised as  
2 one of the first things to present to Your Honor.

3 And we have a concern that with this additional layer  
4 of review that you have now added, that God knows when we are  
5 going to get those documents. The reality is that the  
6 documents that are called for by these subpoenas relate to the  
7 allegations of these complaints.

8 **THE COURT:** Well, I hope you have -- I mean, you  
9 should be able to do that relatively quickly, if you have Bates  
10 stamped everything you gave to the Government and to Oracle,  
11 right?

12 You should be able to just -- I'm not going to -- I  
13 don't want the review to separate out all the things you  
14 haven't already turned over to take very long, but I don't see  
15 why it would. Because presumably you Bates stamp both  
16 productions.

17 **MR. COWAN:** Yes, Your Honor. We have Bates stamped  
18 both productions. The problem is there may not be a readily  
19 electronic way to say what has been given to them versus what  
20 hasn't.

21 I mean, we know substantively, for example, the  
22 e-mail example that Ms. Boersch provided to you, where to look.  
23 But that process could take a number of weeks to do that.

24 But we're not talking months, we're talking a number  
25 of weeks.

1           **THE COURT:** Well, I would allow one or two weeks.  
2 And if you can't do it perfectly, you can't. I don't think  
3 that -- personally, my own view of the law is that none of --  
4 that there's no reason to hide any of this.

5           But in case I'm wrong, because there's certainly  
6 some, you know, ambiguity and conflicting authorities, I'm  
7 allowing some time to do that. But if you do it imperfectly, I  
8 think it's still going to veil somewhat what the production was  
9 to the Grand Jury.

10          **MR. COWAN:** Understood, Your Honor. And our  
11 discussion and our answers to the Court on this obviously are  
12 preserving the rights of the objections we have made, because  
13 regardless of how the Court rules, we, depending on our client  
14 direction, may take further appeal from this. So I didn't want  
15 to --

16          **THE COURT:** You are entitled to appeal me. I think  
17 Judge Hamilton has made clear to you her views, but you can --  
18 I mean, you have that right, and it's perfectly fine with me.

19          **MR. COWAN:** I just want to make clear that the  
20 discussion we are having regarding the answer to the Court  
21 wasn't a negotiation process in terms of trying to resolve the  
22 dispute. I mean, obviously we will answer the Court's  
23 directive, but I didn't want you to walk away --

24          **THE COURT:** It's a negotiation about how much time  
25 I'm going to give you.

1           **MR. COWAN:** Understood.

2           **THE COURT:** All right. So, two weeks.

3           **MS. HOUSE:** And especially, as we are talking, we are  
4 going to move into some time the issue about their request that  
5 they limit discovery. This is an additional safety net that we  
6 see, because we have a hard time believing that anything  
7 relevant would have been withheld from the Government, and so  
8 provide you another fallback.

9           **THE COURT:** Well, you've won this. So, is there  
10 anything else you --

11          **MS. HOUSE:** Not on this one. Thank you. I'll sit  
12 down.

13          **THE COURT:** Don't -- yeah, don't jeopardize your win,  
14 there.

15                 All right. Now, the second issue is the employee  
16 communication discovery. I agree with Judge Legge that it was  
17 extremely overbroad.

18                 On the other hand, I'm not certain that the  
19 compromise that was reached is sufficient, because as I  
20 understand it, those original custodians, their documents  
21 weren't culled with this purpose in mind. So, given that, it  
22 would be just a coincidence, if my understanding is correct,  
23 that anything turned up.

24                 I'm wondering whether we know yet what is going to be  
25 yielded by those preexisting custodians, rather than

1 speculating.

2 **MS. HOUSE:** There are custodians.

3 **THE COURT:** Right.

4 **MS. HOUSE:** Do you want to hear from --

5 **THE COURT:** Well, have you actually now gone through  
6 this process that he ordered you to do, and see if there's  
7 anything in those custodians' documents that is responsive?

8 **MS. HOUSE:** If there is responsive materials, we have  
9 produced them. That is how some of materials that they are  
10 using as examples of why they need this came to light.

11 But just so you will understand, our understanding is  
12 that on a going-forward basis, any custodian that gets named,  
13 we would be looking for TomorrowNow-related communications as  
14 to any of those custodians. So that's no different --

15 **THE COURT:** So the next 100 and whatever --

16 **MS. HOUSE:** Whatever it is that Oracle's ordered to  
17 produce, when we look at those custodians' records, we will  
18 look for communications with TomorrowNow as part of that.

19 And that was what Judge Legge ordered. He wasn't --  
20 he was just saying that he understood that's what we were  
21 agreeing to do.

22 If they want to designate a particular custodian, and  
23 add them to the list because they think that person may or may  
24 not have communications with TomorrowNow, we asked them from  
25 the beginning to give us the list of who they thought would

1 have had these communications so they could have a limited  
2 search.

3 **THE COURT:** Let met hear from you, first.

4 **MR. MCDONNELL:** Yes, Your Honor. In answer to your  
5 first question, our normal process of looking for the, quote,  
6 hot documents in production, to my knowledge, has not turned up  
7 communications between Oracle and TomorrowNow of the type we're  
8 looking for in this document request.

9 We have, however, been identifying examples of such  
10 communications in our own documents. Some of those were cited  
11 in the briefing. Additional documents have come to light just  
12 recently. So, we know for certainty there are communications  
13 between Oracle and TomorrowNow in the past, that are relevant  
14 to the issues in this case.

15 Going back to your point, however, I think Your Honor  
16 is spot-on that all we are asking for is that this be treated  
17 as a targeted search, and that Oracle do what everyone else has  
18 to do, when they get a document request.

19 They stop, think about it, think about whether there  
20 are reasonable places to go look for such documents in the  
21 company, whether there are logical people to ask the question  
22 whether such documents might exist, and where they might be  
23 located, and do a reasonable search for those documents.

24 **THE COURT:** But I agree with Judge Legge, that it was  
25 vastly overbroad. So, so far, you haven't told me any



1 parameters.

2 Secondly, though, more specifically -- I want to get  
3 back to that, but what Oracle just represented about they're  
4 going to include all the future custodians, was that your  
5 understanding?

6 **MR. MCDONNELL:** Now that they have said it that way,  
7 it's certainly implicit in what Judge Legge had ruled.

8 **THE COURT:** But as I understood the papers, you  
9 thought you were being confined to previously, original set of  
10 custodians.

11 **MR. MCDONNELL:** Well, that was a little unclear. And  
12 now that they're making that concession, I think that's  
13 helpful.

14 **THE COURT:** You accept that. Because that goes a  
15 long way, it's a lot better than what my impression was.

16 **MR. MCDONNELL:** It does, but it's blurring custodian  
17 and targeted-search type discovery.

18 **THE COURT:** Right. But the problem is "targeted  
19 search" to me means something that is a lot more targeted than  
20 all communications between TN and Oracle. That, you are not  
21 going to get.

22 So, unless you suggest to me something that's much  
23 more targeted, you know, I find that that is -- I totally agree  
24 with Judge Legge. It's overbroad.

25 **MR. MCDONNELL:** Okay. What I think is getting lost

1 in this is Judge Legge accepted Oracle's argument that we were  
2 asking them to go search 69,000 employees.

3 I thought we were crystal clear. And if we weren't  
4 before, I will be now. What we agreed to do before Judge Legge  
5 ruled, and what we agreed to here today, is that we simply ask  
6 Oracle to make reasonable inquiry within the company. And they  
7 would know how to do that, more than we would.

8 **THE COURT:** Well, I think that's a good point. And I  
9 don't think that it's really fair for Oracle to say, "Well, we  
10 asked you to tell us what to do, and we're waiting for that."

11 I agree with you that, you know, that's sort of the  
12 bad version of after UL Fonts (Phonetic). I mean, it doesn't  
13 make any sense.

14 **MR. MCDONNELL:** Exactly. But -- but -- but having  
15 said that it's -- I can't quite tell, and who to ask. I can  
16 suggest departments. For example, we know that there are --  
17 there have been some communications in the past between the  
18 support department at Oracle and TomorrowNow.

19 We believe that there is a whole department at Oracle  
20 that's involved with competitive intelligence. They may have  
21 made inquiries of TomorrowNow, to find out --

22 **THE COURT:** Let me throw one other thing out there.  
23 I mean, one of the ironies of this is that in theory, you would  
24 have equal access to communications with your own people, as  
25 them.

1           **MR. MCDONNELL:** That's true. But it certainly does  
2 not alleviate their obligation to do the same on their end.  
3 And we are doing it --

4           **THE COURT:** That's not really true. It's a basic  
5 rule of discovery, if there's a communication, by definition,  
6 there ought to be copies in both places. Because it was  
7 communicated.

8           **MR. MCDONNELL:** Maybe, maybe not.

9           **THE COURT:** So if it's as easily found in your own  
10 operation as by them, the discovery does relieve the other  
11 party of --

12           **MR. MCDONNELL:** I assure you, we are looking for  
13 these documents, as we process custodians. I have here  
14 (Indicating) the handful that were readily at my disposal that  
15 I can turn over to Oracle, as additional examples of this kind  
16 of discovery, and give them further leads.

17           But discovery is a two-way street. Knowing that they  
18 have these documents is important to us.

19           **THE COURT:** Well, I think that there should be some  
20 additional searching by Oracle, although I think it has to be  
21 much more targeted than really has been suggested. And this is  
22 the kind of thing that, really, that you ought to be able to  
23 meet and confer about, and come up with something.

24           In other words, I think that beyond the custodians,  
25 there's some targeted searching. And possibly the support and

1 intelligence gathering units, if there is such a thing, at  
2 Oracle would be the place to start. Maybe with whatever you  
3 found, you look at people who are similarly situated to those  
4 people, or at least look at those people to see if there's  
5 anything more.

6 But, I -- you know, I don't think that a huge,  
7 major -- you know, giantly disproportionate effort should be  
8 made. If you are not finding any, maybe that's because there  
9 wasn't very much of it. Because, you know, it is a two-way  
10 street of communication.

11 **MR. MCDONNELL:** Sure.

12 **THE COURT:** Now, true, your side could have lost some  
13 things that they kept. But that is really the only reason for  
14 it. So, therefore, it can't be pushed very far.

15 **MR. MCDONNELL:** Let's all bear in mind that the  
16 absence of such documents could have independent significance  
17 as well.

18 So, for example, if there are a handful of documents  
19 which I can show that show Oracle openly and knowingly dealing  
20 with TomorrowNow, in the way that TomorrowNow is delivering  
21 support, and not objecting to it at that time, if there are no  
22 follow-on documents that then object, that's significant to us,  
23 too.

24 **THE COURT:** Well, but if that's true, then you should  
25 just asks for are there any follow-on documents with respect to

1 this handful, as opposed to, you know, what you did, all  
2 communications, which I -- again, I completely agree with Judge  
3 Legge, was vastly overbroad.

4 **MR. MCDONNELL:** Okay. Let me take you up on your  
5 suggestion. Your suggestion of further meeting and conferring  
6 is an excellent one. We are happy to do that. We will try to  
7 be more concrete with Oracle about what more we think they can  
8 and should do.

9 What stuck in our craw was this notion that what they  
10 were going to do was limit their production to custodians that  
11 they knew darn well had never been selected as --

12 **THE COURT:** Right. But I think either that was a  
13 misapprehension, or they have changed what they are doing. But  
14 it's going to be all custodians. Okay. So, Oracle, all  
15 custodians at any time, not just the initial set.

16 Plus, I'm ordering, although I can't define the exact  
17 parameters, but some additional targeted search that includes  
18 logical places, that will include followup on the particular  
19 communications that they found, relevant followup before or  
20 after.

21 Is there anything -- maybe look at some of the  
22 people, if you found a certain type of person -- a certain sort  
23 of salesperson or in a certain sector -- was having these  
24 communications, maybe you look at people similarly situated.  
25 You know, draw some logical lines around it.

1 I don't think it should be a gigantic, hugely  
2 expensive effort. In anything like this, if you do some  
3 looking, and you hit pay dirt, then maybe that would then open  
4 the door to more. But, you know, I think that you should be  
5 able to agree that doing something more than -- I mean, I am  
6 saying there should be some. Some more targeted search. But I  
7 think with very specific parameters, which you ought to be able  
8 to work out.

9 **MS. HOUSE:** And we are happy to continue meeting and  
10 conferring, Your Honor. But again, this is the exact sort of  
11 thing that is not appropriate for targeted search, saying "Go  
12 to the Service Department," which is made of up of thousands of  
13 employees.

14 If they have a basis -- you know, the four documents  
15 they provided Your Honor is the basis. If they want us to  
16 provide followup inquiry as to those, we're happy to look and  
17 see if there's anything related to that.

18 **THE COURT:** To those, and then you can -- I don't  
19 know if there's any pattern on those people. Is there an  
20 intelligence-gathering -- competitive intelligence operation?

21 **MS. HOUSE:** There is in fact a competitive  
22 intelligence. And as we've already told -- we looked at  
23 competitive intelligence. There is no communication with  
24 TomorrowNow in our competitive intelligence group.

25 **THE COURT:** So, I think it should be limited, which

1 is what I've said. So, I'm not ordering very much more, but  
2 I'm ordering something more. And I think you ought to work it  
3 out.

4 **MS. HOUSE:** That's fine.

5 **MR. MCDONNELL:** Thank you, Your Honor.

6 **THE COURT:** Okay. Now, let's turn to the case  
7 management or discovery management.

8 Now, I'm not quite sure what -- a lot of  
9 disagreements are presented. I think that I can shed some  
10 light on sort of general thoughts. I think the parties, you  
11 seem to be contemplating that then there would be motion  
12 practice on all of these issues. I would certainly like to  
13 avoid or at least minimize that, to some degree.

14 On the other hand, it's true that I don't have enough  
15 information in some cases to really make a firm determination.  
16 I mean, for example, on the custodian limits, I do need  
17 documentation of the actual costs.

18 So I have been, you know, taking your word for it,  
19 but if I'm actually going to impose a limit I will need to have  
20 it documented. On the other hand, I don't know that I need a  
21 lot more briefing on that issue.

22 **MR. COWAN:** Your Honor, if I could address one issue.

23 **THE COURT:** Yeah.

24 **MR. COWAN:** In our meet-and-confer process on that,  
25 the real question is what do you -- we have been asking Oracle

1 what do they want in terms of documentation.

2 Obviously, we've come up with a calculated cost that  
3 is actually slightly in excess of 100,000 per custodian. You  
4 know, there's things as far back as -- if you go into -- how  
5 deep you go into our own bills our clients, et cetera, invoices  
6 from vendors, those kind of things, or what level of details.

7 So I guess that's the question that we would have for  
8 the Court. We are more than happy to substantiate our claim.  
9 The question is, at what level of particularity would you like?

10 **THE COURT:** What does Oracle want?

11 **MS. HOUSE:** We -- we are meeting and conferring on  
12 what additional information we need. It may very well be that  
13 if they provide whatever materials they give about what the  
14 cost is, we won't necessarily attack it.

15 The most important thing for you to understand and  
16 that we want to make sure gets briefed to you -- we gave a  
17 flavor of it in the discovery conference statement -- is that  
18 the cost of production is just one of several factors that  
19 needs to be balanced.

20 **THE COURT:** No, I understand that. You know, as a  
21 matter of fact, I'm extremely familiar with those things.

22 **MS. HOUSE:** It just got so much attention at the last  
23 discovery conference, and I want to make sure that it doesn't  
24 get over -- much attention under the law. It doesn't.

25 There's many times when an expensive production is



1 ordered where the facts of the case and the issues in the case  
2 or the amount in controversy warrant it. And in a case with --  
3 you know, relevant discovery shouldn't --

4 **THE COURT:** You know what? I just -- I don't want  
5 any more briefing on that.

6 **MS. HOUSE:** Okay.

7 **THE COURT:** I don't even want more argument on that.  
8 I'm actually -- it's not that I'm cavalier about it. It's just  
9 that I have thought about it, I have strong -- I mean, I think,  
10 very well-informed fam- -- a deep familiarity with this. It's  
11 my job, it has been for ten years, to apply proportionality  
12 analysis.

13 And when something is costing \$16 million for one  
14 piece of discovery in one case, I don't think you could find  
15 another judge in the federal system who wouldn't say that  
16 raises serious questions, even in a very important case with  
17 huge, earth-shaking issues that could affect the future of the  
18 planet and so forth. So --

19 **MS. HOUSE:** I would invite Your Honor, we have  
20 provided them with the second amended complaint today. We are  
21 waiting for confirmation whether they will allow us to file it  
22 without opposition.

23 The second amended complaint will be very  
24 illustrative to you of what we have discovered, since the first  
25 one, and will give you more of a scope of what we're talking

1 about here.

2 **THE COURT:** Again, if this were a case, you know,  
3 involving national security, global warming, and some other  
4 things, just possibly I could just say, well, you know, \$16  
5 million for one piece of discovery in the case, that's just --  
6 it's not a problem. You know.

7 And my -- I used to hear the quote, I remember, was  
8 it Senator Dirksen? You know, "A billion here, a billion  
9 there, pretty soon you're spending real money." That used to  
10 be repeated in my household.

11 But, you know, that's not what we are talking about.  
12 I know this is a very important case between the parties.  
13 These are two huge companies, major competitors. There's --  
14 you know, you are alleging massive fraud.

15 Nonetheless, discovery is still just discovery. It  
16 is not the merits of the case. And I'm not going to let it run  
17 up into the hundreds of millions of dollars. I just -- I find  
18 that offensive. I don't think that our legal system is meant  
19 to impose enormous costs in discovering the facts. I just --  
20 you know.

21 So, you really are not going to be able to persuade  
22 me that -- that millions and millions of dollars is not  
23 something I should take seriously.

24 **MS. HOUSE:** I'm not saying -- we are paying millions  
25 of dollars as well, Your Honor. And I'm certainly not saying

1 that you should -- we don't take it lightly, nor should you.

2 But it's very important that when you look at all of  
3 the elements for 26, --

4 **THE COURT:** I'm aware of all the other elements. I'm  
5 very aware of them.

6 **MS. HOUSE:** And we are happy to provide you with any  
7 case law that you think would be helpful.

8 **THE COURT:** I don't -- yeah. You know, I really -- I  
9 think that I'm extremely familiar with the case law. I -- you  
10 know.

11 **MS. HOUSE:** That's fine. We just want to make sure  
12 that --

13 **THE COURT:** I'm familiar up to my ears in the case  
14 law. You know. And so -- and it isn't all that complicated,  
15 you know. It's really not that complicated. And I know what  
16 it is. And I still think that Defendants have raised some very  
17 strong arguments.

18 And I -- I do not believe -- you know, I think the  
19 discovery -- we've got a year to get this case to trial. It's  
20 got to be done in a fashion that both does not, you know, just  
21 burn up millions and millions and millions of dollars. I mean,  
22 it's going to burn up millions, but not tens and tens and tens  
23 of millions.

24 And, it's going to be done in time. Otherwise you  
25 can't have a trial. You will never get to the merits. So, --

1           **MS. HOUSE:** Is there anything else that you didn't  
2 feel like you got adequate information on in the discovery  
3 statement, that you would like us to provide further  
4 information on?

5           **THE COURT:** Well, let's see. We are talking about  
6 the custodians. I mean, I definitely want -- you know,  
7 ideally, you could provide them whatever they want that  
8 convinces them that the estimate is solid. But if it's a  
9 question of convincing me, I would normally want a declaration.

10          **MR. COWAN:** And Your Honor, --

11          **THE COURT:** Or several declarations, you know? But  
12 that --

13          **MR. COWAN:** Understood. And I was the one that stood  
14 up in the previous hearing and told the Court that it cost  
15 100,000 per custodian. And I made sure before I said that,  
16 originally, that that was true.

17                 We have gone back since, and I've made sure that  
18 folks in our organization understand it likely would be me that  
19 would be the declarant. And so, we have documented it.

20                 The question comes to down to how you would like us  
21 to do that. We're quite familiar with the Court's expertise on  
22 electronic discovery. And certainly --

23          **THE COURT:** I don't mean that you all have to flatter  
24 me.

25          **MR. COWAN:** No, no, no.

1           **THE COURT:** I do know a lot about it, but --

2           **MR. COWAN:** No, I understand. But we can put it in  
3 whatever format you want. What we do want to do, we do want to  
4 move things along with this, and we don't want to have  
5 iterative submissions on this. We want to give you what you  
6 want the first time, and are prepared to do that.

7           If we get that direction from Oracle or the Court, it  
8 really doesn't matter. We prepare the document.

9           **THE COURT:** Can you be specific? I don't think this  
10 needs a whole lot of meeting and conferring. Why don't you  
11 just tell him what you want to see?

12           **MS. HOUSE:** And, my understanding is that we are  
13 telling them. But that's a separate meet-and-confer, and we  
14 owe them an e-mail on it. That's not been --

15           **THE COURT:** Has someone --

16           **MR. COWAN:** The last conversation we had, they asked  
17 for additional information from us. I said, "Tell us what you  
18 want." They said they'd get an e-mail, and that's what we are  
19 waiting on.

20           So, I've got a file here with all kinds of --

21           **THE COURT:** Well, is there somebody who is not in the  
22 room who is writing that e-mail? Or is there somebody here  
23 that can answer that question in real time?

24           **MS. HOUSE:** There is an associate who's been  
25 responsible for that. I don't think we need a whole lot of

1 additional backup, Your Honor. We just want to make sure that  
2 it's just part of the whole mix.

3 **THE COURT:** Okay. Because, I mean, I am -- you know,  
4 I believe in trying to resolve issues, and not having to go  
5 back and back over them. So, you know, if -- if we have more  
6 of these, I would like to have answers specific at the time, so  
7 we can put that issue to rest. But, okay.

8 **MS. HOUSE:** I understand they have an obligation to  
9 provide you with a declaration. They provided us a short  
10 e-mail. If that e-mail is adequate for you, then --

11 **THE COURT:** Well, I don't know what's in the e-mail.  
12 I haven't seen anything.

13 **MR. COWAN:** I have got a copy of the e-mail if the  
14 Court would like that.

15 **THE COURT:** Okay.

16 (The Court examines document)

17 **MR. COWAN:** And we can -- those three components we  
18 can break down any -- further, in any number of ways. That's  
19 the -- that's the question.

20 **THE COURT:** So, you --

21 **MS. HOUSE:** You have a clear idea of what you think  
22 is necessary for demonstrating costs. If you think that this  
23 is an adequate demonstration of costs, then I don't want to  
24 intrude on your expertise.

25 **THE COURT:** I'm not saying that. I'm saying, if you

1 can be satisfied, yourself, then you don't even have to bring  
2 it to my expertise. Then it's not a fight any more. Okay?

3 **MS. HOUSE:** Well, the cost is -- there is a fight in  
4 the sense that cost is not the only thing.

5 **THE COURT:** Right.

6 **MS. HOUSE:** We are fighting about how much has to be  
7 disclosed here.

8 **THE COURT:** Right.

9 **MS. HOUSE:** Whether the cost is an issue in that  
10 fight is -- is -- depends on whether that is an adequate  
11 issue -- demonstration of the costs for you.

12 We are concerned because we see, as was indicated in  
13 the discovery conference statement, that we are getting a whole  
14 lot of dreck. There's a lot of stuff coming through the  
15 pipeline that they are claiming in their many millions of  
16 document hits that shouldn't be here.

17 **THE COURT:** Okay. I think that this is not quite  
18 enough. You need to provide some additional background. I  
19 would say you need a declaration. Probably -- you know, there  
20 is a paragraph. Probably a few pages.

21 **MR. COWAN:** Okay.

22 **THE COURT:** And if there's anything that Oracle  
23 wants, you know, within reason, they should notify you by  
24 e-mail by tomorrow morning. And you should include that in the  
25 declaration.

1           **MR. COWAN:** Thank you, Your Honor.

2           **THE COURT:** Okay. So in terms of custodians --

3           **MS. HOUSE:** I think we've -- we've told you the  
4 number that we came down from since the last discovery  
5 conference.

6           **THE COURT:** Uh-huh. Uh-huh. Uh-huh.

7           **MS. HOUSE:** We have told you that there's been no  
8 movement on the other side.

9           **THE COURT:** Uh-huh.

10          **MS. HOUSE:** We have told you that coming down to that  
11 number is also based on putting into play certain safeguards to  
12 protect --

13          **THE COURT:** Uh-huh.

14          **MS. HOUSE:** -- because of the very fact that we are  
15 getting such a small, you know, percent of the potentially  
16 relevant custodians' potentially relevant material.

17                 So, part of what we are asking Your Honor to do is to  
18 impose those safeguards to make sure that if we are going to  
19 be, you know, stuck with a much more limited production of  
20 relevant materials and relevant custodians, that we get  
21 safeguards to compensate for that.

22                 And one of the safeguards is one that you talked  
23 about several times, and that we think makes a lot of sense,  
24 which is extrapolation. Particularly in connection with the  
25 vast amount, terabytes of data related to the infringing



1 environment.

2 **THE COURT:** Let's talk about extrapolation. First of  
3 all, the one -- that's the one you want, is infringing  
4 environments. And I understand you're saying that you have  
5 produced 100 percent of the infringing environments? Or what  
6 are you saying?

7 **MR. MCDONNELL:** They either are produced or will be  
8 produced in native form.

9 **MR. COWAN:** Yes, Your Honor. We have a data  
10 warehouse, and we can talk about that separately, where we're  
11 making the physical computers available for them to inspect,  
12 and tell us which portions, if any, of those environments they  
13 want copies of.

14 But yes, we are making those available.

15 **MS. HOUSE:** But access is not production. That's  
16 sort of a very false impression there.

17 The whole point of giving us access instead of just  
18 producing all of the material to begin is with is because the  
19 material is so vast and would be so expensive to give us  
20 copies, that they requested that we do it this way.

21 So, what we are really in is a staged situation,  
22 where we first get to look at this stuff, go through it in a  
23 live sort of fashion, and then request copies that they will  
24 decide whether or not and when they are going to produce to us.  
25 So this is, again, something that is going to take months to

1 achieve. And at the end of this, we won't have the entire set.

2 So, this is a perfect situation where you would be  
3 wanting to take some of that vast amount of material and agree  
4 to extrapolation, because that's the only way that we are going  
5 to be able to adopt this approach and do it within the time  
6 frame of this existing schedule.

7 So, again, we are getting nothing but push-back on  
8 the safeguards that we are asking for that allows us to have  
9 access to the necessary material.

10 **THE COURT:** Okay, all right. Okay. I think you are  
11 getting a little overwrought about what is, after all, just a  
12 discovery issue.

13 I mean, I will -- all right.

14 **MR. MCDONNELL:** Would you like me to speak to  
15 extrapolation and sampling?

16 **THE COURT:** Yes.

17 **MR. MCDONNELL:** We have not refused it. What we have  
18 said is that it may have a place in this case. We're mindful  
19 of the Court's suggestion that the parties consider that.  
20 We're mindful of the idea that it might have a place where  
21 there's voluminous data.

22 But we think the very first step is a specific  
23 proposal about how it would be done so that we can evaluate  
24 whether or not to agree to it. Because we are talking about a  
25 serious case.

1           **THE COURT:** Uh-huh.

2           **MR. MCDONNELL:** And a serious question of doing  
3 sampling to look at evidence, as opposed to looking at all of  
4 the evidence.

5           So all we have asked for is that there be concrete  
6 proposals, not just theoretical concepts.

7           **THE COURT:** Uh-huh.

8           **MR. MCDONNELL:** And that whatever be done be  
9 reasonably fair and mutual, --

10          **THE COURT:** Uh-huh.

11          **MR. MCDONNELL:** -- as well.

12          **THE COURT:** Well, on the environments, how would that  
13 be mutual? I mean, damages might be a different issue, or --

14          **MR. MCDONNELL:** Well, it may be that the results are  
15 quite favorable to our way of thinking. I don't know.

16          **THE COURT:** Well, have you had any discussion about  
17 proposals, how you would do this? Have either side started to  
18 talk to your experts about it? I mean, has there been any  
19 development at all?

20          **MR. MCDONNELL:** We have asked. We have asked them to  
21 make a specific proposal for us to consider, since they were  
22 the proponent of the concept.

23          **THE COURT:** Well, okay. I mean, I have some ideas,  
24 but I don't know if they are good ones. And I don't have any  
25 experts to talk to. But I think -- I think the environments

1 probably does make sense.

2           You know, you agree on some kind of subset, some kind  
3 of random sampling of some percent, I don't know what it is, if  
4 it's 10 percent of the universe, if it's 1 percent. I mean,  
5 something that at least looks like it ideally would provide  
6 statistical validity.

7           And you agree to the protocol on it, and then you --  
8 each side's experts can then draw their own conclusions,  
9 perhaps, from that, but could not attack -- neither side could  
10 attack whether the sample was adequate to draw conclusions  
11 from, or was representative, or things like that.

12           In other words, you can place your own spin on the  
13 results to extrapolate, but you couldn't attack whether the  
14 fundamental process up to that point that was agreed on was  
15 valid.

16           That's a very high-level concept of it, but --

17           **MR. MCDONNELL:** And, I appreciate that. But let me  
18 tell you, in the interest of candor, what my concern is.

19           My concern is there is a notion in science of a  
20 statistically valid sample. Not everything is samplable, and  
21 not every statistical sample is valid. I don't ever want to be  
22 painted into a corner where we are being forced to accept as  
23 statistically valid something that is not.

24           And the devil is going to be in the details here,  
25 which is why we have got to get a proposal on the table, so

1 that both sides can vet it with their experts and statisticians  
2 and industry experts, and make sure that we're not doing  
3 something that's sophistry, that could come back to produce an  
4 unfair result.

5 So, I'm very open-minded to the process.

6 **THE COURT:** Well, but the thing is -- and I'm not  
7 sure -- I mean, ideally, it would all be statistically valid.  
8 I don't know if it was an attempt to reduce the costs of  
9 production, that it necessarily would have to be.

10 In other words, I mean, I think that there's some  
11 validity to the point they are making, that the reason you're  
12 making this whole warehouse accessible to them is it's too  
13 voluminous for you to go through, and search, and find what's  
14 relevant in the first place.

15 And -- but even if they do it on a wholesale basis,  
16 then you have got to review it all. It's also going to be too  
17 expensive for you. Even if they make the first cut.

18 **MR. MCDONNELL:** Thereby my open-mindedness to this  
19 process.

20 **THE COURT:** Right. So, it's got to be something less  
21 than 100 percent.

22 **MR. MCDONNELL:** Again, the devil may very well be in  
23 the details. We're happy to look at a proposal.

24 **THE COURT:** But I will tell you that the problem with  
25 that, that comment, is that we're not choosing between a devil

1 and a non-devil. We're choosing between different devils.

2 **MR. MCDONNELL:** Okay. The lesser --

3 **THE COURT:** Yeah. So, you are going to have to find  
4 the lesser evil. And if there isn't a perfect solution, then  
5 you are going to have to make an agreement around it.

6 I mean, you know, in other words, you agree on what  
7 looks like it's going to be an appropriate sample that is  
8 not -- that is less than 100 percent, in order to save time and  
9 money on both sides. And then you are going to all just have  
10 to live with the consequences.

11 And, you know, it's like John Ralls, you're under a  
12 veil of ignorance. Nobody will know who it's going to favor,  
13 and it shouldn't be skewed to favor anybody. But the chips  
14 will fall where they may. Which is essentially how real trials  
15 operate, even when 100 percent of the evidence comes in.

16 It's just -- you know.

17 **MR. HOWARD:** Your Honor, since I did the technology  
18 tutorial, and there is kind of a missing piece here, and I was  
19 hoping to address it briefly, we've talked about the  
20 environments. And the environments are the copies of the  
21 software that are resident on the TomorrowNow computers.

22 We also, if you recall, talked about the support  
23 materials, the derivative works that are created from those  
24 environments. And so, we're not -- in a sense, we're not  
25 talking about either environments or support materials, in and

1 of themselves. And this is part of what makes this  
2 complicated, is we're talking about --

3 (Audible interruption)

4 **THE COURT:** Whose -- does somebody have a --

5 **MR. HOWARD:** That may be mine, Your Honor.

6 **THE COURT:** Yeah.

7 **MR. HOWARD:** We are talking about a process. And the  
8 process was done by people.

9 **THE COURT:** You're talking about the creation of  
10 derivative works.

11 **MR. HOWARD:** The creation of derivative works, using  
12 a process that includes several copies of the environments that  
13 result in a derivative work, that then goes out to multiple  
14 customers.

15 And the people are the one -- this is why the  
16 custodians in some ways are so important to us -- the people  
17 are the ones that can tell you, "I took three copies of the  
18 environment, I used them to create this derivative work. We  
19 see it in documentation, and it went out to this group of  
20 customers."

21 So our concern is and a large part of our concern on  
22 the TomorrowNow side of the case in restricting custodians is  
23 that there are thousands of those derivative works. And they  
24 were each created, and we believe now all of them were created,  
25 using some number of copies of these environments.

1           And so, our proposal which we have made,  
2 understanding that we are not going to be able to talk to each  
3 custodian to document in trial evidence form the process that  
4 was gone through for each of those thousand derivative works,  
5 we have made a proposal, at least in a skeleton form, which is,  
6 let's take some of those derivative works that we see  
7 documented, let's understand the process, by deposition and by  
8 other means, what was done to create those derivative works  
9 using this number of copies from this number of environments,  
10 and then we will have something we can extrapolate.

11           Each of those derivative works was created using ten  
12 copies of an environment. And for each of this type of fix, it  
13 went out to, on average, this number of clients. And you get  
14 to a point where you can with some precision -- or an expert  
15 can -- calculate the number of instances of infringement.

16           But it's because of this human element to the  
17 process, that simply inspecting through remote access or adding  
18 up or inspecting environments is not going to be the complete  
19 solution.

20           So, I wanted to offer that to the Court. And we have  
21 had that discussion in meet-and-confers.

22           **MR. MCDONNELL:** So, again, we are open-minded to  
23 looking at this. That is the clearest I've ever heard the  
24 proposal.

25           And I still don't know which individuals and which



1 files, and how the data would be selected, but we are happy to  
2 work with them.

3 **THE COURT:** Well, I think you should work with them.  
4 I mean, obviously, neither side -- I mean, maybe you each get  
5 to pick an equal number of what you think are the exemplars.

6 So that you pick the ones that you think just use  
7 tons of these things, and replicated them like mad, and you  
8 pick the ones that you think are completely innocent or barely,  
9 barely used it. And the average is what comes out. I mean,  
10 you've got to come up with some kind of a fair process.

11 But I think -- I want you to start today, and refine  
12 this, talk to your experts. And it seems to me you ought to be  
13 able to do this in a week or something like that.

14 I mean, in other words, what I don't like is just all  
15 this -- when you're back here a month later, you still just  
16 have not -- you're sort of inching along. But there's no time  
17 for that. I mean, you know.

18 What I normally do, I'm tempted to do, which is lock  
19 you in the jury room now until you come out with a proposal. I  
20 mean, I just -- you know, I just don't think this is --  
21 nobody's -- nobody's getting down to brass tacks in the way  
22 that I think you have to do.

23 **MR. HOWARD:** What I might suggest, Your Honor, with  
24 the holiday -- and I'm actually in deposition, traveling the  
25 next two weeks. But I think that we've had -- we both are

1 going to need to have our experts with us in having this  
2 discussion.

3 If the Court would think about maybe three weeks, and  
4 with an expert -- experts involved in that process, then I  
5 think we should come back to you with either a joint proposal  
6 or with our respective proposals, and see if we can make some  
7 progress.

8 **THE COURT:** Well, I think the one week I have  
9 available in July is, what, the week around the twenties? When  
10 is it?

11 **THE CLERK:** The week of the 21st, Your Honor. July  
12 21st.

13 **THE COURT:** Which is three weeks from now. Because  
14 after that, then I'm gone for a week at the Ninth Circuit  
15 conference.

16 So, can you file something by Friday, the 18th?

17 **MR. HOWARD:** We will if that's what works for you,  
18 Your Honor.

19 **THE COURT:** Okay. But you know, I would like to see  
20 you agree on something. And really, you know, I mean, it ought  
21 to just -- you know, I think -- I've given you as many ideas as  
22 I can, but I don't know if I'm reinventing the wheel that  
23 someone else has already invented somewhere. I don't know.

24 **MR. HOWARD:** The only caution I would raise is we did  
25 a deposition last week, and it was really only in that

1 deposition -- this is complicated.

2           It was only in that deposition for the first time  
3 that we understood, for example, that in the testing process,  
4 as separate from the development process, these generic  
5 environments were reused over and over again to create these  
6 derivative works. So, this is iterative.

7           And one thing that I would ask the Court to recognize  
8 is that we are in some ways late in discovery, but we are also  
9 early in discovery. And we're only now understanding exactly  
10 how, in all the different silos that it occurred, these  
11 derivative works were created.

12           And so there is some -- there is some uncertainty  
13 that we still have in terms of exactly how the protocol would  
14 need to look in order to pick up each of these infringing uses.  
15 But I think we know more than we did six months ago, and we can  
16 take a shot at putting a proposal together.

17           **THE COURT:** Well, I mean, the proposal can include  
18 within reasonable limits, if some new information comes up, you  
19 know, adding some later, of further -- you know, further  
20 sampling.

21           I mean, that one sounds to me like you're talking  
22 about, you know, "We would have been sampling just this type of  
23 thing, but now we're also going to sample this." I mean, it's  
24 just adding a new category, but not necessarily a different  
25 protocol.

1           **MR. HOWARD:** It is, although it involves a whole  
2 different set of uses and a whole different set of copies of  
3 the environments in the overall process from inception to  
4 delivery to a customer.

5           **THE COURT:** Okay. But I think -- I'm not opposed to  
6 reasonable modifications, but the iterative process, it can't  
7 be too reiterative, or there just isn't going to be time. I  
8 mean, there's one year. The Judge has said she's not changing  
9 it.

10           And ultimately Oracle -- I mean, I understand the  
11 basic principle that, you know, the bigger the crime shouldn't  
12 mean the more you get away with it. On the other hand, there's  
13 just going to be a limit to how much you are going to be able  
14 to put in front of a judge or a jury.

15           And you're going to have to pick your best shots, and  
16 you're not going to be able to -- you know, you are going to  
17 have to put in summaries and examples, and that's just the way  
18 it's going to have to be. There's no doubt about it.

19           **MR. HOWARD:** And as long as we have got the accepted  
20 statistical evidence where there can't be this attack because  
21 we haven't been able to do it piece by piece, but we've been  
22 able to do it by sample, we can put in a compilation --

23           **THE COURT:** Yeah.

24           **MR. HOWARD:** And we can say it's everything, I think  
25 that that's --

1           **THE COURT:** Well, it's going to be fair. I mean, in  
2 other words, it shouldn't make you any better off or worse off  
3 than you would have been, but -- and it should be, you know, at  
4 least -- with everyone not knowing how it's going to turn out,  
5 it should be structured to just give as fair a shot. And  
6 then -- but then, everybody's got to live with the results.

7           And that's why I'm saying what you have to then do is  
8 put off-limits certain kind of attacks by each other's experts.  
9 I mean, your experts can still reach different conclusions, as  
10 they always do, but there's -- certain fundamental validity of  
11 this approach will have to be not attacked, because it would be  
12 something that's agreed to as a reason to limit discovery,  
13 limit the expense, come up with a fair extrapolation, whether  
14 it's perfect or not. Few things in life are.

15           **MR. HOWARD:** I think we understand your direction,  
16 Your Honor. Thank you.

17           **THE COURT:** Okay. So let's -- so, I mean, on the  
18 number of custodians, I mean, I'm inclined to allow 120. And  
19 that would be the total. You can reserve as many as you want.  
20 I'm -- unlikely, but not impossible that I would increase that.  
21 I mean, very unlikely.

22           But there might be, you know, some showing of  
23 extremely good cause. I'm not ruling that out. But, but you  
24 certainly, absolutely can't count on that. I mean, the idea  
25 ought to be that's your budget; figure out how you want to

1 spend it.

2 **MR. MCDONNELL:** Very well.

3 **MS. HOUSE:** And there's some additional safeguards --

4 **THE COURT:** But that's obviously subject to the proof  
5 that it is costing what you said it was going to cost.

6 **MR. COWAN:** And that was the only question I had,  
7 Your Honor. You said they had a day to get us what -- any  
8 additional questions. When do you want our declaration filed?

9 **THE COURT:** When can you get it?

10 **MR. COWAN:** Tuesday, Wednesday of next week?

11 **THE COURT:** All right.

12 **MR. COWAN:** Thank you.

13 **MS. HOUSE:** I just -- one of the things that I think  
14 you understood is that there have to be additional safeguards.

15 **THE COURT:** Right.

16 **MS. HOUSE:** We just talked about one.

17 **THE COURT:** Yes.

18 **MS. HOUSE:** But there's more that are on our list.

19 **THE COURT:** I know. I mean, it's -- we're an hour  
20 and ten minutes into the conference, and we've only covered one  
21 or two issues in this. So, I'm going to go through all of  
22 them.

23 **MS. HOUSE:** Okay. I just was going to move on to the  
24 next safeguard so that we could maybe make comparable progress  
25 on that one.

1           **THE COURT:** Okay.

2           **MS. HOUSE:** And it was what you called the  
3 goose-and-gander one, last time, which is the idea that, look,  
4 we have provided this very detailed causation evidence related  
5 to customers. It happens to be conveniently compiled in  
6 summary reports.

7           Now, with the situation at hand with the limited  
8 amount of custodians, we're not going to be able to get the  
9 same type of information from these guys. And so we need to  
10 figure out a way that -- either that's off the table, or if  
11 it's on the table, then it's going to have to be on top of the  
12 custodians.

13           **THE COURT:** All right. You are talking about  
14 causation evidence. The damages causation evidence?

15           **MS. HOUSE:** Right, exactly.

16           **THE COURT:** Well, it's not going to be off the table.  
17 We made that clear. So the question is what you are going to  
18 produce.

19           Now, they are claiming that -- I want to hear from  
20 you -- that Oracle is incorrect, you are doing more than what  
21 they say you are.

22           **MR. MCDONNELL:** We are doing -- let me keep it a  
23 thing -- the things that are more difficult than you hope they  
24 are. We are in the process of identifying and collecting  
25 documents which we think are comparable to the types of

1 documents Oracle is referring to, that they have produced, at  
2 least in part.

3           These would include such things as win/loss reports,  
4 which are summary reports about customers that were won or  
5 lost; customer survey data about what customers thought about  
6 their decision to take a new software product. There is at  
7 least one electronic customer relations management database  
8 that we're trying to get our arms around and mine for what it's  
9 worth.

10           And with that data, we are hoping to give exemplars  
11 to Oracle shortly, and tell them that "This is the kind of data  
12 that we think is comparable to what you are producing to us,"  
13 and then continue to talk through the issue, to see if each  
14 side is satisfied with going to those common sources of data,  
15 as opposed to custodial searches.

16           As a fallback -- and I think this would be mutual --  
17 as a fallback, if necessary, to supplement that kind of  
18 production, we think one approach might be to go, as opposed to  
19 doing full custodial searches where you run all the search  
20 terms on the custodians, try to identify the primary or key  
21 salesperson related to a particular customer sale or  
22 transaction, and then run a limited search that is more of the  
23 old-fashioned go to that person, have that person pull out all  
24 documents relating to communications with a customer about the  
25 customer's decision, and then make that kind of production,



1 which we think can be both effective and vastly less  
2 time-consuming than these full custodial searches where you  
3 have to download the entire e-mail folder and upload it with a  
4 vendor and so forth.

5 So we have talked this through with Counsel. They  
6 are understandably anxious to see the color of our money on  
7 that one, if you will, and see exactly what it is we are  
8 proposing. We think, a week or two, we should have in their  
9 hands the types of exemplars we are talking about, and hope to  
10 make substantial progress on that.

11 **THE COURT:** So in other words, examples of the  
12 win/loss report, of the customer survey data, and the database?

13 **MR. MCDONNELL:** Precisely.

14 **THE COURT:** And why is it taking so long?

15 **MR. MCDONNELL:** It's a big world. Some of these are  
16 in the language of countries all over the world.

17 Part of the analysis is, we do believe there needs to  
18 be a limit here, on which customers we're looking at. I think  
19 Oracle is in agreement with this, but if not, we do need to  
20 settle this.

21 There are the TomorrowNow customers. And those are,  
22 as we understand it, all in play. So Oracle contends that all  
23 of the TomorrowNow customers are relevant. We have produced  
24 all the TomorrowNow customer contracts. We will be producing  
25 the lead salespersons for the whole company.

1           **THE COURT:** Lead --

2           **MR. MCDONNELL:** The single top-level sales manager,  
3 who we believe had something to do with every sale.

4           We've not gotten to the point of deciding whether we  
5 have to produce sales custodians beyond that individual, but  
6 that will be part of this discussion.

7           **THE COURT:** But what are you doing with respect to  
8 that top sales manager?

9           **MR. MCDONNELL:** Producing.

10          **THE COURT:** Producing all documents?

11          **MR. MCDONNELL:** Full custodial production. It's on  
12 the list.

13          **THE COURT:** So full custodial on this and every issue  
14 that -- on your complete list of search terms, or what?

15          **MR. MCDONNELL:** Yes. It's a full custodian  
16 production.

17          **THE COURT:** Okay.

18          **MR. MCDONNELL:** Bob Geib, G-E-I-B, is his name.

19                 Turning from TomorrowNow to the SAP side of the  
20 equation is different. As we understand it, Oracle contends  
21 that if a customer took a TomorrowNow sales contract, and then  
22 that was used as a springboard to sell that customer an SAP  
23 license, that Oracle's going to challenge that SAP license, as  
24 a potential item of damage.

25          **THE COURT:** So it's sort of a convoyed sales --

1           **MR. MCDONNELL:** Convoyed sale. They haven't used  
2 that term, but that's the general concept.

3           And they've refined it somewhat by saying and there  
4 may be old TomorrowNow customers who were customers of  
5 TomorrowNow before SAP even acquired TomorrowNow, and they  
6 would want to think about that as making argument that that's a  
7 similar type of sale. In other words, there was a TomorrowNow  
8 contract, and at some point in time there was also an SAP  
9 contract.

10           We're willing to look for that type of data and  
11 conduct this discovery plan about that. Where we draw the  
12 line, and we think it's a bright line, is there are going to be  
13 customers who are replaced, who left Oracle and went to SAP,  
14 who never touched TomorrowNow. Never had a TomorrowNow  
15 contract. Now, sure, a piece of marketing material may have  
16 been waved in front of their face, saying "We have TomorrowNow  
17 service too," but they never had a TomorrowNow contract.

18           We are not looking to produce evidence of all those  
19 other customers, because they did not have a TomorrowNow  
20 contract, and we think that's out of bounds. As I understand  
21 what Oracle's saying, they agree with that. But I want to make  
22 sure that it's clear that that's our position.

23           **THE COURT:** Okay. Do you agree with that?

24           **MS. HOUSE:** We agree that that appears to be a group  
25 of customers that wouldn't be relevant. But we're very

1 frustrated. They keep saying it's such a limited subset,  
2 there's only this many that actually bought SAP applications,  
3 there's only this many that upgraded from TomorrowNow.

4 Yet, we have not even been given a list of names yet.  
5 So we don't even know the universe that we are bargaining for.  
6 Is it 30 customers? Is it 19, is it 100?

7 That seems like they clearly know who they think the  
8 target customers are on top of the TomorrowNow customers. And  
9 yet, everything takes forever.

10 **THE COURT:** You mean the --

11 **MR. MCDONNELL:** This is a part of the hearing where I  
12 would like to disappear, Your Honor. It has taken more time.  
13 They are entitled to this information. We are working on it.

14 We know it's -- that this class of customers are more  
15 than 20. We believe --

16 **THE COURT:** How many is it?

17 **MR. MCDONNELL:** If I -- based on the best information  
18 I have right now, roughly 70. But even then --

19 **THE COURT:** Seventy who are in the categories of --

20 **MR. MCDONNELL:** They had a TomorrowNow contract, and  
21 they had a SAP contract. But there are shades of gray, even  
22 with that, which is part of the complexity of it. There might  
23 very well be customers who had a TomorrowNow contract before  
24 SAP bought the company, on Product X.

25 And completely independent of that, and much later,

1 without any connection to that TomorrowNow contract or  
2 TomorrowNow at all, some other division might have bought an  
3 SAP product. Unrelated to TomorrowNow. That's a gray area.

4 **THE COURT:** Why don't you give them a list that  
5 includes the black-and-white area and the gray area, and then  
6 annotate it with you're not certain about some of these people,  
7 so they at least have a starting point.

8 And then, why don't you do it in that order. Start  
9 with the more clearly in the ballpark, black and white, and  
10 then after you have done that, get to the gray. And you can  
11 have further discussions.

12 **MR. MCDONNELL:** That we will do, Your Honor.

13 **THE COURT:** Are we talking about a majority are in  
14 the more clear-cut area? We are only talking 60 to 70?

15 **MR. MCDONNELL:** I couldn't tell you truthfully that I  
16 know the answer to that.

17 **THE COURT:** All right. I mean, it's going to have to  
18 be found out. And really, it's -- you know, unless there's a  
19 very complex -- which could be argued each either way, it's in  
20 both sides' interest to eliminate the people who are not  
21 relevant. It's just going to waste everybody's time and money.  
22 You're equal. I think you have some overlap in your interest  
23 here.

24 **MS. HOUSE:** Where the safeguard issue comes in, Your  
25 Honor, is that insofar as we do that, need to do targeted

1 searches for the material that we have, as we say, in our  
2 at-risk reports, but that they would then need to go to a sales  
3 custodian to get the specific information about whatever  
4 communications, whatever marketing about TomorrowNow was  
5 provided to that customer, that may or may not have influenced  
6 their decision to purchase.

7 They want that to be part of the limited 120. That  
8 will eat up what we have got. We have got to have a safeguard  
9 so that those -- that's not part of the 120.

10 **THE COURT:** All right.

11 **MR. MCDONNELL:** We're not saying that. There's  
12 miscommunication.

13 We are saying that type of search, that is limited,  
14 the old-fashioned manual type, to go to the sales  
15 representative at SAP and say, "Give us your documents relating  
16 to how this customer made their decision," we're not counting  
17 that against the 120.

18 I'm sorry if there's been confusion on that point.  
19 So, this is a two-way street. We are intensely interested in  
20 Oracle information about their customer losses.

21 **THE COURT:** Okay. All right. So, I think that's an  
22 important clarification. And I think it should be a two-way  
23 street.

24 But, on this win/loss customer survey and electronic  
25 relations database, I think you should give them exemplars

1 within a week. I think it shouldn't have taken this long. And  
2 things need to move a lot faster on that.

3 **MR. MCDONNELL:** Can we say a week from Friday, given  
4 the Fourth and the shortened week?

5 **THE COURT:** All right. All right. And then, you  
6 know, the faster you can get back to them, you know, start --  
7 get that moving, because that ought to cover a lot of ground,  
8 if they are what you say they are.

9 Now, there was something about depositions can't even  
10 start until November. I mean, can some depositions start? In  
11 other words, this sort of rolling production, is there going to  
12 be the ability to --

13 **MS. HOUSE:** There are some -- and essentially what's  
14 happening is there are people who have been produced that are  
15 just now getting produced.

16 What's happened is we said "Hey, wait a second. With  
17 the limited amount of custodians, we've took your advice and  
18 said, 'Put these guys at the front of the queue.'"

19 **THE COURT:** Right.

20 **MS. HOUSE:** And so as a result of that, we've -- they  
21 said "Okay, well, we've stopped the aircraft carrier, and now  
22 we're starting it up again." And so, they are producing now  
23 the ones that we actually want.

24 **THE COURT:** Right.

25 **MS. HOUSE:** That -- what they are complaining about

1 is that a lot of those individuals happen to have the most  
2 documents.

3 **THE COURT:** Right.

4 **MS. HOUSE:** So, I -- we have gotten dates, but they  
5 have stretched all the way out to the end of Thanksgiving.  
6 And, we have to have enough time when they do produce it out  
7 the end of the pipe, we have to then look at the material, and  
8 then prepare for the deposition.

9 **THE COURT:** Right. I'm just wondering whether, in  
10 other words, there can be no depositions until Thanksgiving,  
11 and then all the depositions start, or whether you could start  
12 some depositions of the people whose production's been  
13 completed.

14 **MS. HOUSE:** And we have been doing that.

15 **MR. COWAN:** And we are, Your Honor. They sent us  
16 notice for the ten that they focused on. Four or five of them  
17 were executive board members, who have a huge quantity of  
18 documents, as you might expect, to be reviewed. A relatively  
19 small portion that will be relevant and responsive. But, we  
20 gave them specific lists.

21 When they noticed the depositions, they noticed them  
22 for beginning on July 9th. All the way through December. And,  
23 in two-week steps. A deposition every two weeks. We are  
24 meeting that notice schedule in terms of time spirit. We're  
25 not meeting the actual dates, as you might expect, because



1 there wasn't any meet-and-confer about the dates.

2 And we are producing -- plan to produce a couple of  
3 witnesses in July, a few witnesses in August, several witnesses  
4 in September, October, and hope to have them done either by the  
5 end of October or before Thanksgiving. That's what we have  
6 communicated to them. So that's -- we still expect to be on  
7 that schedule. We still expect to be rolling documents out to  
8 meet that schedule.

9 As we have explained, as you can imagine, with the  
10 quantity of data we're dealing with, every day presents a new  
11 technical challenge. But we work through those, and keep them  
12 advised of where we are on those issues.

13 But right now, that's our best estimate. We are  
14 confirming -- as early as this morning, confirmed another  
15 deposition for them.

16 **THE COURT:** Okay, all right. So, I just wanted to be  
17 sure that there wasn't some kind of --

18 **MS. HOUSE:** But we did caution Your Honor, as part of  
19 our observations in the discovery statement, that even with the  
20 limited amount of custodians that they're willing to produce,  
21 things are going slower than we would like.

22 As you are seeing, things seem to take an awful long  
23 time. And we would hope that we could actually get some  
24 minimum number of --

25 **THE COURT:** Okay, you asked for ten, ten per month.

1 And you're saying you can't do that because these are the  
2 heaviest --

3 **MR. COWAN:** And the real issue, you think about the  
4 document production flow in terms of a pipeline. You don't  
5 measure it in terms of orders for delivery on the pipeline. You  
6 measure it in terms of throughput.

7 The throughput on electronic discovery is documents.  
8 You're averaging about 500,000 documents reviewed per month.  
9 That historically has equated to 47, 48, 49,000 per custodian,  
10 which gets you ten custodians.

11 After the last hearing, they sent us a list of ten  
12 custodians, and they said, "Okay, give us those custodians in  
13 June." And they happen to be ones that had anywhere from two  
14 to six times the average number of documents.

15 So, that's the issue. We're happy to continue to  
16 keep them posted, based on their priority of what we anticipate  
17 our delivery schedule is, based on that throughput of documents  
18 per month. But putting a -- you know, "You will get these" --

19 **THE COURT:** So, should we impose  
20 a minimum-documents-per-month production?

21 **MR. COWAN:** Yeah. We're fine with living with our  
22 current throughput, which is about 500,000 documents per month  
23 reviewed. And keep in mind, the output of that process is what  
24 it is, based on the review.

25 **MS. HOUSE:** This is somewhat circular, though. I

1 mean, one of the things that you've seen, hopefully, is that --  
2 you know, they haven't yet employed a search term of things.  
3 So if it's taking this long, or if we --

4 **THE COURT:** Well, let's -- okay. I'm going to take a  
5 break, and then we'll come back, and we'll talk about search  
6 terms.

7 And I want everyone -- we've already spent a great  
8 deal of time, and we're not through all the issues. I think we  
9 have to proceed in a very orderly, efficient process for the  
10 rest of this.

11 **MS. HOUSE:** Okay.

12 **THE COURT:** Okay.

13 (Recess taken from 2:45 to 2:58 p.m.)

14 **THE COURT:** All right. Shall we take up search  
15 terms?

16 **MR. COWAN:** Sure.

17 **THE COURT:** Okay. So, what is the situation now?

18 There was some disconnect between what each side was  
19 characterizing as the hit rate and the percentage of documents,  
20 you know, that could be ignored, and therefore culled down, and  
21 so forth and so on. So, where do things stand?

22 **MR. COWAN:** I think we are still making good progress  
23 on that. The issue I think originally was the different  
24 methodologies the parties were using to try to winnow down the  
25 search terms, but yet get some efficiency by using those,

1 versus the manual review.

2 As we've discussed, our -- the volume of data that we  
3 are looking at and producing is significantly larger. We have  
4 done extensive sampling, we have provided them data.

5 Mr. Alinder and I just spoke in the hall in continuing our  
6 meeting and conferring on additional data that he wants from  
7 us. We are going to provide that to him.

8 I would hope within the next week we will have either  
9 an agreement or an understanding of precisely what additional  
10 information we need to get to an agreement.

11 The real issue, Your Honor, is simply to find that  
12 sweet spot, if you will, of how many documents can be  
13 eliminated in the review process.

14 In other words, how many documents go into that  
15 500,000-document-per-month pipeline.

16 **THE COURT:** Right.

17 **MR. COWAN:** And, we are working hard to do that. In  
18 the last meet-and-confer, they acknowledged that we likely,  
19 given our data, will never get to zero in terms of the search  
20 captures, everything on manual review.

21 We are trying to get something in a reasonable range.  
22 We have made significant progress. We need to keep working  
23 together to do that.

24 **THE COURT:** Okay.

25 **MS. HOUSE:** Well, Oracle has developed a search term

1 list that's hitting. We're getting to zero. So we're going  
2 forward with it. We think it does cut things down.

3 This isn't rocket science. People use search terms  
4 all the time. They are apparently spending a lot of money on  
5 vendors. And again, you've got to understand that this is  
6 slowing things down. We don't want it to slow things down.  
7 And it's increasing costs, apparently.

8 So, while we -- we've actually coached them on how to  
9 develop the search term list.

10 **THE COURT:** Okay. Well, are you using -- what -- are  
11 you using strict search terms? Or what are you using?

12 **MR. COWAN:** No, they're connectors that include  
13 things, this word, or a portion of this word, and this  
14 within -- you know, boolean type searches, that are inclusive  
15 and exclusive. And we are continuing to tweak the terms.

16 The real issue comes not in the -- you know, the  
17 parties' relative expertise. There's two different systems.  
18 We have a different system than they have, so it's not --

19 **THE COURT:** Your system being --

20 **MR. COWAN:** We are using -- Attenex is the system  
21 that they're using. I think they have a different document  
22 review tool and search capability. And so it takes -- that's  
23 where the exchange of information between us and them is coming  
24 from, not an education process, if you will. We know how to do  
25 that.

1           **THE COURT:** Uh-huh.

2           **MR. COWAN:** But we are working with them and gaining  
3 from the information they provided us to do that. That --  
4 again, I think another week or two, and we will be able to do  
5 that. Our client is --

6           **THE COURT:** Well, I agree that 100 percent is not  
7 essential to reach. I just don't think that's realistic, in  
8 most cases. I'm surprised that you have been able to do that.  
9 But I don't know why that is. I doubt it's just superior  
10 expertise, but it might have to do with what documents you  
11 actually have, or your search tools, or what. I don't know.

12           But, given that they have a different set of  
13 documents, that doesn't -- one doesn't necessarily imply that  
14 they should be able to do the other. And I think that if it is  
15 only eliminating a small percent of documents for review, then  
16 I agree that there's a tradeoff there, and it shouldn't be 100  
17 -- it doesn't need to be 100 percent. You know, whether it  
18 should be 95 percent, you know, or -- you know, it really  
19 depends on what the tradeoff is.

20           So -- and, you know, if you want to get started, I  
21 think, you know, this ought to be resolved right away. I would  
22 say it should be resolved by the end of next week.

23           **MR. COWAN:** I think that's doable, Your Honor.

24           **THE COURT:** And you ought to reach an agreement. And  
25 I agree that doesn't have to be 100 percent. I think it should

1 be high, but, you know, if you're not eliminating -- if you're  
2 ending up it's only culling two or five percent of the  
3 documents, that's -- you know, it's going to be too expensive.  
4 Because the real cost, of course, is in review. And,  
5 everybody's costs. I'm going to have to read this stuff, too.

6 **MR. COWAN:** We got, from zero, it's up in the small  
7 single digits. And we'd like to keep it there.

8 What we have to get up is the percentage of documents  
9 that it reduces, that we don't have to look at.

10 **THE COURT:** Right.

11 **MR. COWAN:** And that's what we're working on.

12 **THE COURT:** Right. Right. And that's important.

13 All right, what else do we have to talk about?

14 **MS. HOUSE:** There's an issue related to the timing of  
15 targeted searches. I think that the parties have agreed that  
16 coming up with true targeted searches, and as you indicated,  
17 there are certain things that are more amenable to targeted  
18 searching than others.

19 When you go to look for board documents, that's an  
20 obvious targeted search, because you can go to a repository.  
21 If you want summary type of financial information, you go and  
22 you look for that type of summary financial information, not to  
23 a particular custodian.

24 You know, our frustration with the TN communications  
25 is that that's not a targeted search. And so, the point is

1 that once we arrive at the truly targeted searches, we want to  
2 make sure that those are also put into the queue.

3 What we have been getting pushback from is, "Well, if  
4 you want that, then you have to give up this custodian."  
5 Or, "Gosh, we're not going to get you that database that we've  
6 promised to you until at the end of December, you know, pick  
7 what you want."

8 And, it's a frustrating situation because we're--  
9 part of this is that there was this gap in time when we weren't  
10 getting anything, and now we're being crowded because of  
11 decisions that were made on the other side.

12 And so, what we would ask is that you put a time  
13 certain for targeted searches to be done.

14 **MR. COWAN:** And, and in response, Your Honor, we're  
15 fine with having time proposals and guidelines on that, and I  
16 think the parties could do that without the Court imposing on  
17 it.

18 We have the production capacity on the custodians  
19 that we've explained, 500,000 documents. In addition to that,  
20 we have other lawyers and other folks within the client that  
21 are helping us on the targeted collection. So it's not an  
22 either/or, it's really a priority. "What do you want first?"

23 And I think, the way the Court has ordered us to meet  
24 and confer on a number of these issues, and get back to the  
25 Court by the 18th with a specific plan, we can come back on the



1 18th with a plan on timing as well.

2 **THE COURT:** Okay. Well, I think you should include  
3 timing. And I do want to set dates.

4 What is Project Blue?

5 **MR. COWAN:** Project Blue is -- was the project by  
6 TomorrowNow to take the environments that they had in-house,  
7 the development environments that they had on premises at  
8 TomorrowNow, and move those back to the customer location.  
9 That was ongoing, after the SAP acquisition, up through the  
10 time of the filing of the lawsuit.

11 We have agreed that what -- we're happy to include  
12 that in the targeted search. It's not that we have said we  
13 won't include that in the targeted search. What we've told  
14 them is that the bulk of the documents that they are going to  
15 get on that issue are already contained in the custodians that  
16 have been or will be produced in this case.

17 But we said, "Look, if there's going to be numeric  
18 limits on targeted searches and you want to burn one of your  
19 targeted searches on that, that's fine." And we're happy to do  
20 that.

21 **THE COURT:** All right. So ten each, ten each  
22 targeted searches is what -- what I think everybody's agreed  
23 on.

24 **MR. COWAN:** Okay. Yes.

25 **THE COURT:** Now, are there any targeted searches that

1 are still in dispute? I've already addressed the one having to  
2 do with communications.

3 **MR. COWAN:** To our knowledge, Your Honor, those are  
4 the only two that we have listed.

5 **THE COURT:** Two. What's the other?

6 **MR. COWAN:** The other, the customer-related  
7 communications that you've already dealt with, and the Project  
8 Blue that the Court just asked me for.

9 **THE COURT:** And Project Blue, you're not objecting  
10 to, as long as it counts as one of their ten.

11 **MR. COWAN:** (Nods head)

12 **THE COURT:** Okay. So, what about on your side? Is  
13 there something you're objecting to?

14 **MS. HOUSE:** I'm having to look at the page here to  
15 see where the targeted search discussion is.

16 **THE COURT:** I think customer files was at issue.

17 **MS. HOUSE:** Yeah. So, yeah, customer files is sort  
18 of the same problem that we have, that we've talked about, in  
19 connection with the sales custodians. I mean, that is  
20 different. That's a huge amount of data. You don't just go  
21 for customer files.

22 They've gotten the contracts for the customers, and  
23 that's -- and they have gotten more than that, insofar as the  
24 files contain it. But it's a very overbroad statement,  
25 "Customer files." That would cover just vast reams of data.

1           **THE COURT:** Okay. Well, on Page 8 you say that, that  
2 it's not a targeted search. But also, though, in the footnote,  
3 that you've done it, that you have given it to them.

4           **MS. HOUSE:** From the central repositories. Insofar  
5 as there are central repositories, we have given them those  
6 customer files. But you can conceive of "Customer files" would  
7 cover much more than that. Every sales custodian, that is a  
8 customer file.

9           **THE COURT:** So what, if anything, were you looking  
10 for other than what's from the central repository?

11           **MR. COWAN:** Well, given that their targeted searches  
12 are limited to a quantity of ten, as Mr. McDonnell mentioned,  
13 we would expect targeted searches would include the old-style  
14 manual process of going and talking to selected custodians who  
15 would have the most knowledge, in conducting specific manual  
16 searches of their data, with their involvement. That's the  
17 additional thing we're talking about.

18           **THE COURT:** What do we mean by "targeted searches"?

19           **MR. COWAN:** The way we're interpreting that, Your  
20 Honor, would be going to look for caches of either electronic  
21 or -- in this day and age it's mostly electronic, but  
22 electronic or paper documents that exist independent from a  
23 custodian. First and primary source of a targeted search.

24           The other --

25           **THE COURT:** So normally it would be central

1 repositories. But you're talking going beyond that.

2 **MR. COWAN:** Correct. Because there will be  
3 custodians, because of the custodial limits, that would be  
4 outside of those custodians that would fall in the limits, who  
5 also would need to be queried if they have any responsive  
6 documents.

7 **THE COURT:** Well, something like "customer files"  
8 is -- I agree with them, that's overbroad, then. I mean, you  
9 can't conduct -- it's sort of an oxymoron to talk about a  
10 targeted search for a customer files.

11 **MR. COWAN:** It's really the corollary to what they're  
12 looking for from us, in terms of the customers they're focused  
13 on that Mr. McDonnell just talked about, where you have the  
14 TomorrowNow -- the customers that have the contracts that  
15 ultimately --

16 **THE COURT:** Okay. So, maybe what you need to do is  
17 agree on what you're both going to do, the identical,  
18 essentially, type of process, although you may have, you know,  
19 different sources as it ends, different people, on whatever  
20 subset of that 70 or so customers is.

21 And, you know, you probably ought to prioritize them  
22 by size. I mean, if -- I -- you know, I have no idea. If  
23 they're all huge, then they're all worth going after. If some  
24 of them account for tons of business, and others very little,  
25 you may either not do them at all, or certainly do them last.

1           So I think with that list, you ought to also put some  
2 number about, you know, volume of annual revenue or something  
3 like that, that prioritizes in terms of magnitude of dollar --  
4 dollar values that are at stake.

5           **MR. COWAN:** And I think we can do that, and I think  
6 it's doable by the 18th, to provide the Court with. Hopefully  
7 with the parties' agreement.

8           **THE COURT:** So, add that part to that list of, you  
9 know, something for the dollar magnitude. And, then you ought  
10 to agree on what you're going to do.

11           I mean, you know, you are going to go to one top  
12 salesperson in each company, or, you know, the top ten  
13 salespeople or something like that, about, you know, who did  
14 what to win over these customers.

15           **MR. COWAN:** And that's been our big concern on the  
16 targeted searches. We want to make sure not only that they're  
17 limited, as the Court has already done, but that the parties  
18 are very clear as to what they're doing, and by implication,  
19 what they're not doing.

20           **THE COURT:** Right.

21           **MR. COWAN:** To do these targeted searches.

22           **THE COURT:** I think that is what's you -- you know, I  
23 think you ought to spell out a written protocol on exactly what  
24 you're searching, and why.

25           And, you know, obviously you have different people

1 doing different things at each company, so it's not going to be  
2 completely identical. But the concept ought to be you're  
3 making the same degree of effort.

4 **MR. COWAN:** Correct. That's fine with us, Your  
5 Honor.

6 **THE COURT:** Is that something -- any thoughts on  
7 that?

8 **MS. HOUSE:** I think that's okay.

9 **THE COURT:** All right. So, what else do we have to  
10 talk about?

11 **MR. COWAN:** Your Honor, we briefed the Court on the  
12 data warehouse. I don't know if you need anything more on  
13 that. I'm prepared to discuss that if you would like.

14 **THE COURT:** Well, I mean, I think it's just --  
15 it's -- the problem is, it's just got to get going on it, and  
16 see how that works.

17 But I think we talked about the fact that even with  
18 that, there's ideally going to be some kind of sampling of  
19 that. Because it -- otherwise, it's just going to be too huge.

20 **MR. COWAN:** It technically is up and running. They  
21 just need to get on it, drive it, and make sure that it does  
22 what it is we have claimed to them that it does, and see if it  
23 provides a vehicle.

24 But, hopefully, that will also feed in to the  
25 discussions we have between now and the 18th.

1           **MS. HOUSE:** There was another issue, Your Honor.

2           **THE COURT:** Uh-huh?

3           **MS. HOUSE:** That is, as it's pretty apparent because  
4 of the way that this conversation has been going, the bulk of  
5 the material, the bulk of the discovery -- which isn't  
6 surprising -- was coming from Defendants. In other words,  
7 you've stated they have all this.

8           **THE COURT:** Oh, yeah. I'm not going to impose  
9 unequal limits of some kind. Judge Hamilton opposed the same,  
10 the Federal Rules oppose the same.

11           Now, that doesn't mean that necessarily the result is  
12 going to be equal levels of production. It may not. But I'm  
13 not going to come up with some ratio in advance, based on that  
14 argument.

15           **MS. HOUSE:** Okay. If we think that they've gone afar  
16 in the custodial limits or a -- far afield from what's at issue  
17 in the case, we'll bring it up with you.

18           **THE COURT:** Well, to a limited degree. There's going  
19 to be -- you know, this -- this, our discovery system won't  
20 work if, in a big case like this, you fight over everything.  
21 It's just not going to work.

22           So you're going to have to choose your battles,  
23 you're going to have to cooperate, you're going to have to  
24 compromise, both sides. I mean, this is -- and you're not  
25 going to be able to revisit everything constantly. You're

1 going to have to decide what is worth bringing up with me.

2 And, you know, if anybody falls into the role of the  
3 boy who cried wolf, that will not be a good role to be in,  
4 because you sort of will use up your credibility.

5 And, so, I'm not going to -- I have no way of  
6 assuming in advance, some kind of ratio. The Federal Rules  
7 didn't provide that; Judge Hamilton didn't provide that. The  
8 proportionality principles apply to both sides.

9 If I actually have to decide what's too much that  
10 they're asking from Oracle, then, you know, I will need some  
11 chapter and verse on exactly how much is at stake among all the  
12 other factors.

13 Just being told millions and millions of dollars is  
14 at stake gives me nothing to work with. Just being told  
15 100,000 on average per custodian is a lot more specific than  
16 that, if it's true. It has to be backed up, but assuming it's  
17 true.

18 So, you know, I'll listen to that, if it's necessary.  
19 But, you know, I mean, all of you are going to have to -- have  
20 to figure out how to work together, and expedite this. And it  
21 really has to be expedited.

22 But at the same time, you know, this case can't be  
23 full employment for the entire planet, or even the continent of  
24 India or -- you know, I guess there are some places like that  
25 in the United States that have been discovered.



1           But you know, it is -- it is one case among many.  
2           It's an important case, a big case, a big business dispute,  
3           there's a lot of money at stake. I'm sure that's true. But  
4           I'm going to be trying to apply the rule of proportionality.

5           **MS. HOUSE:** Well, one thing we could do that could  
6           cut through and expedite it quickly on one issue, which I think  
7           you might have gotten a flavor from from the footnote that we  
8           provided, is the gross over-designation of Confidential and  
9           Highly Confidential. It's really slowing down our ability to  
10          work with our client.

11          **THE COURT:** Uh-huh.

12          **MS. HOUSE:** And just the five examples we gave you,  
13          that is standard fare. It seems to be that the presumption is  
14          to mark something Highly Confidential or Confidential, and then  
15          work backwards, and not apply forwards.

16                 And if you could give some instruction --

17          **THE COURT:** Which footnote is that?

18          **MS. HOUSE:** I believe it's Footnote 5 or 7. Let's  
19          see. It's the one that talks about the various documents that  
20          have been produced that are utterly irrelevant in this matter,  
21          which clearly --

22          **THE COURT:** Okay, then they have a completing  
23          footnote saying they're not all utterly irrelevant. I haven't  
24          seen any of the documents, I haven't read what they are, so  
25          that I can actually take sides.

1 I think you're talking about Footnote 7, which --  
2 but, so I can't -- I can't really comment on any of those  
3 particulars, because you have competing footnotes.

4 **MS. HOUSE:** Uh-huh.

5 **THE COURT:** And I think, you know, what the parties  
6 don't really fully realize -- and I'll ask you to try to do  
7 this before you come back here -- is put yourself in my shoes,  
8 instead of your shoes.

9 Coming in here and talking about, you know, Footnote  
10 7, about five documents that were outrageous that you  
11 characterize one way and you characterize another, I haven't  
12 seen any of them. You know, a judge -- and with a lot of  
13 adjectives, you know. They were very frustrated, and a lot of  
14 foot-dragging, or, you know, it's costing too much or whatever.  
15 That is not terribly helpful for a judge making a decision.  
16 Just -- it just doesn't.

17 I mean, try to -- I -- you know, your role is  
18 different than mine. But if you're going to be persuading me  
19 to do something, you have to put yourself in any other judge's  
20 shoes. I don't think I'm speaking from my own -- hopefully not  
21 individual bizarre quirks, but just, you know, the way I'm  
22 going to have to decide this.

23 I will say, of course, I am extremely against  
24 over-designation. I don't like it, I think it's wrong, I think  
25 it's incredibly inefficient, I think parties do it too much.

1 It bothers me a lot. And if it's proven to me in chapter and  
2 verse, I will come down very hard on it.

3 And this may be good examples of it. I just can't  
4 say, because I haven't seen the documents. I don't understand  
5 your arguments about why it really shows where some important  
6 executive was on such-and-such a date, and therefore it is  
7 relevant. I mean, I have to get down to that.

8 Whether it's highly confidential or not wasn't the  
9 main thrust of this, but that was the last sentence of this  
10 single-spaced footnote. Most of it was focused on whether it  
11 was relevant. If it's not highly confidential, you have got to  
12 de-designate it. And, you know, especially the Highly  
13 Confidential designation is just -- you know, causes a huge  
14 amount of trouble for both sides. And shouldn't be.

15 **MR. COWAN:** We couldn't agree more, Your Honor. And  
16 as you can imagine, we, I think, as of today, are at 2.8  
17 million documents.

18 We have a training program for our contract lawyers  
19 who are, as you know, the first line of defense, if you will,  
20 on terms of reviewing these documents. And, they are  
21 counseled, when we get specific examples like this we go back  
22 to the individuals where it looks like totally irrelevant and  
23 unresponsive documents were produced, and make sure they  
24 understand that can't happen again. So --

25 **THE COURT:** Or if they're just getting out their

1 stamp, and stamping --

2 **MR. COWAN:** Exactly.

3 **THE COURT:** You know. And I've seen it in cases,  
4 newspaper articles and all the rest. And I'm very opposed to  
5 that.

6 But, if you're saying how am I supposed to -- you  
7 know, what we're doing about that, you would have to come up  
8 with a concrete proposal about what to do about that.

9 **MR. COWAN:** In cases where -- particularly with  
10 deposition testimony and other documents, they've provided a  
11 specific list, these have been over-designated. We look at  
12 them, and we respond.

13 In the past, we have been able to resolve that by  
14 agreement. And I expect we'll be able to do so in the future.

15 **THE COURT:** Well, I would give priority especially to  
16 the highly confidential, because that really makes operation  
17 difficult and much more expensive.

18 And, you know, it's -- if it's not documents about,  
19 you know, current marketing strategy or financial projections  
20 and things like that, I mean, how highly confidential can it  
21 be? You know?

22 And you could redesignate upwards if you really need  
23 to, later. But, I mean, unless there's some huge danger of it,  
24 Confidential ought to be good enough. I don't believe in  
25 over-designating Confidential either, but at least it doesn't

1 cause these extra expenses of only showing it to your, you  
2 know, outside counsel, and not involving your inside counsel,  
3 and all of those sort of things.

4 **MR. COWAN:** There may be one issue on that, if you  
5 will just give me one moment to talk to Mr. McDonnell.

6 (Off-the-Record discussion)

7 **MR. COWAN:** Just as a placeholder, Your Honor, there  
8 may not be a dispute on this. With respect to highly  
9 confidential documents, there is one category that we believe  
10 is super highly confidential, which is the board meeting  
11 minutes of SAP AG.

12 They requested those. We've talked, we've brought  
13 that up in a meet-and-confer with them. And the issue really  
14 there is, as you know, traditionally, if there's  
15 non-responsive, irrelevant data on a document, but  
16 non-privileged in the privilege context, you go ahead and  
17 produce the whole document.

18 Board meeting minutes are something that have  
19 sensitive information on them, that are highly sensitive, and  
20 ordinarily might be labeled as Highly Confidential where their  
21 in-house lawyers can see that. That's one category that we may  
22 be back to you on.

23 I just -- I didn't want to have this discussion about  
24 highly confidential documents without mentioning that.  
25 Hopefully we'll resolve it.

1           **THE COURT:** Well, would you have mutual vulnerability  
2 on that issue? I mean --

3           **MR. COWAN:** I think so.

4           **THE COURT:** I would think that you both would have  
5 equal concerns about your board minutes.

6           **MR. COWAN:** Yes.

7           **THE COURT:** So you ought to be able to resolve that.

8           **MR. COWAN:** And, we hope so, too. What we hope to do  
9 is redact those for things that are not relevant, not  
10 responsive, and produce the relevant and responsive portions.  
11 But if we can't resolve that, we'll be back to you on the 18th  
12 on that as well.

13           **THE COURT:** All right.

14           **MS. HOUSE:** The only other question is you had at one  
15 point indicated you thought it might make sense for us to have  
16 more regularly-scheduled appointments.

17           Maybe now that you have a sense of the scope, I don't  
18 know if you think that's a good idea or not a good idea, but I  
19 raise it because you had raised it before, and it may be  
20 helpful.

21           **THE COURT:** I don't know if it's a good idea or not.  
22 I mean, what is that one thing?

23           **MR. COWAN:** Our thought is, you know, depending on  
24 how we agendize that and what submissions we provide to you in  
25 advance of that, it probably makes sense, at least for the next

1 few months, as you might expect given the level of advocacy on  
2 both sides, putting these prehearing submissions together, is  
3 time-consuming, involving clients, et cetera.

4 If there's a way to do that with a neutral,  
5 non-advocacy style agenda, that would speed-line the process,  
6 we would endorse it, at least for the next several months.

7 **THE COURT:** I mean, I would certainly like to -- I  
8 mean, the thing about what I want to be able to do, what I  
9 would hope to do, is head off having you file 20 motions, by  
10 giving you a lot of feedback and advice like I've been trying  
11 do today, so that -- because I don't think there's any reason  
12 why all these should turn into full-blown motions.

13 That -- that would be the advantage of something like  
14 that, if there is one.

15 **MR. COWAN:** And the only thing we would caution  
16 against, which I think Judge Hamilton took exception to, was  
17 with a process we had with Judge White, kind of a standing  
18 hearing.

19 **THE COURT:** Well, that's probably -- well, I think  
20 she took exception, I think she thought it made it too easy to  
21 you to just proliferate issues.

22 **MR. COWAN:** Agree --

23 **THE COURT:** And that's the question. I would want --  
24 I would want a process that reduces the number of issues you  
25 bring to me, not amplifies it. And I think that's what she's

1 concerned about.

2 And ultimately, she's concerned about how many issues  
3 you bring to her. So, I think that's the most important issue  
4 that we have to face. And I guess she's going to be stuck with  
5 the Grand Jury.

6 But other than that, hopefully there won't be too  
7 many. And that's certainly more of a legal issue more than --  
8 you know, most of these, which are judgment calls, I think.

9 **MR. COWAN:** We could try it for a couple of months,  
10 and if the Court thinks they're productive, then -- then maybe  
11 that's --

12 **THE COURT:** Uh-huh. All right. Well, when would you  
13 propose to have the next discovery case management, so to  
14 speak?

15 **MR. COWAN:** We already were talking about at least  
16 having something on the 21st, where we are going to be  
17 reporting back to you. And then maybe another one --

18 **THE COURT:** The 21st, though, are we doing that in  
19 person or in writing?

20 **MS. HOUSE:** You had said the 18th for a submission,  
21 and I wasn't sure, we didn't have a date selected yet for that.

22 **THE COURT:** Yeah. I don't have my calendar in front  
23 of me.

24 **MR. COWAN:** When I said -- the week of the 21st is  
25 the --



1           **THE COURT:** Yeah, uh-huh.

2           I'm going to have to go look at my calendar and see.  
3 I don't know. That's a very busy week. So --

4                           (A pause in the proceedings)

5           **THE COURT:** Okay. I think we said July 24th, Lili,  
6 at 2:30?

7           **THE CLERK:** Yes.

8           **THE COURT:** And then, if we want to have a further  
9 discovery case management or management type of thing,  
10 discovery conference like today, but hopefully less  
11 adversarial, would be -- what'd I say? The 28th of August?

12           **THE CLERK:** Yes, August 28th.

13           **THE COURT:** And, we can do that at 10:00 a.m., I  
14 think?

15           **THE CLERK:** Yes, Your Honor.

16           **THE COURT:** Yeah. Will that work for everybody?

17           **MS. HOUSE:** That's fine.

18           **MR. COWAN:** Sure, Your Honor. So, July 24th at 2:30  
19 p.m., and August 28th at 10:00 a.m.

20           **THE COURT:** All right. And then, I guess, prepare  
21 some kind of a joint statement -- what did I have you do, a  
22 week in advance this time?

23           **MS. HOUSE:** Yes.

24           **MR. COWAN:** Yes.

25           **THE COURT:** Yeah. But the more -- I mean, what I'm

1 looking for is concrete proposals as to how to resolve things  
2 fairly and efficiently, and keep the case moving forward.

3 So that's -- that's the tone that I want to establish  
4 from everybody. You may have your disagreements, but that's my  
5 goal, on all sides. All right?

6 **MR. HOWARD:** Yes.

7 **MS. HOUSE:** Thank you.

8 **MR. COWAN:** Thank you.

9 **MR. MCDONNELL:** Thank you, Your Honor.

10 **THE COURT:** Thank you.

11 (Proceedings concluded at 3:31 p.m.)

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**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 07-1658 PJH (EDL), Oracle v SAP AG, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a 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.

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Belle Ball, CSR 8785, RMR, CRR

Thursday, July 3, 2008