

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.)	JURY TRIAL
)	
PLAINTIFFS,)	NO. C 07-01658 PJH
)	
VS.)	VOLUME 12
)	
SAP AG, ET AL.,)	PAGES 2021 - 2230
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
-----)	MONDAY, NOVEMBER 22, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

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RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

2022

1 A P P E A R A N C E S

2

3 FOR DEFENDANTS: JONES DAY
4 SILICON VALLEY OFFICE
5 1755 EMBARCADERO ROAD
6 PALO ALTO, CALIFORNIA 94303
7 BY: THARAN GREGORY LANIER,
8 JACQUELINE LEE, ATTORNEYS AT LAW

JONES DAY
555 CALIFORNIA STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
BY: ROBERT A. MITTELSTAEDT,
JASON MCDONELL, ATTORNEYS AT LAW

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JONES DAY
717 TEXAS, SUITE 3300
HOUSTON, TEXAS 77002-2712
BY: SCOTT W. COWAN,
NICOLE M. PERRY, ATTORNEYS AT LAW

ALSO PRESENT: CHRISTOPHER H. GILLESPIE
MICHAEL A. PHARO
ALAN RUFFIER
DAVID SCHLAIFER

--000--

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2024

1 MONDAY, NOVEMBER 22, 2010 8:22 A.M.
2 PROCEEDINGS
3 (THE FOLLOWING PROCEEDINGS WERE HEARD OUT OF THE
4 PRESENCE OF THE JURY:)
5 THE CLERK: CALLING CIVIL CASE NO. 07-1658, ORACLE,
6 U.S.A., ET AL. VS. SAP AG, ET AL.
7 THE COURT: ALL RIGHT. GOOD MORNING, COUNSEL.
8 MR. LANIER: MORNING, YOUR HONOR.
9 MR. BOIES: MORNING, YOUR HONOR.
10 ALL RIGHT. I DIDN'T GET AN OPPORTUNITY TO -- I
11 LOOKED ON PACER LAST NIGHT ABOUT 4:30. YOU ALL HADN'T FILED THE
12 JURY INSTRUCTIONS. I DID GET THE VERDICT FORMS, SO I READ THEM
13 THIS MORNING. AND I'VE GONE OVER EVERYTHING. I'M PREPARED TO
14 RULE ON IT. YOU ALL HAVE SUBMITTED YOUR OBJECTIONS.
15 IS THERE ANYTHING ELSE YOU WISH TO SAY FOR THE RECORD
16 BEFORE I TELL YOU WHICH ONES WE'RE GOING TO USE?
17 MR. LANIER: NO, WE'RE PREPARED TO SUBMIT UNLESS YOUR
18 HONOR HAS QUESTIONS.
19 MR. BOIES: NOTHING -- NOTHING FURTHER, YOUR HONOR.
20 THE COURT: ALL RIGHT. WITH REGARD TO THE JURY
21 INSTRUCTIONS, THE MAIN DISPUTE BEING WHETHER OR NOT THE WORD
22 "FULL" SHOULD GO IN. GIVEN THAT THAT WAS LANGUAGE QUOTED THAT I
23 SAID ON FRIDAY AND IT DOESN'T APPEAR TO BE IN THE JURY
24 INSTRUCTION, I'M NOT GOING TO SERVE AS THE MODEL FOR JURY
25 INSTRUCTIONS. I'M SIMPLY GOING TO GIVE IT AS WRITTEN BY THE
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1 DEFENDANTS WITHOUT THAT INSERTION.

2 WITH REGARD TO THE SPECIAL VERDICT FORMS, I THINK
3 YOU'RE PRETTY MUCH BOTH SAYING THE SAME THING. I THINK THE
4 DEFENDANTS' IS CLEAR. IT WILL BE EASIER FOR THE JURY TO FOLLOW,
5 SO I'M GOING TO USE THE DEFENSE VERDICT FORM.

6 ALL RIGHT. IS THERE ANYTHING ELSE THIS MORNING?

7 MR. LANIER: THERE WERE A COUPLE OF OBJECTIONS THAT
8 EACH SIDE HAD TO THE OTHERS' SLIDES OR DEMONSTRATIVES FOR
9 CLOSING. AND WE'RE PREPARED TO ADDRESS -- NOT ALL OF THEM BUT
10 JUST A COUPLE OF THE MAJOR ONES, AND THEY MAY HAVE SOME AS WELL.

11 THE COURT: OKAY. LET'S DO THAT.

12 MR. LANIER: ALL RIGHT.

13 MR. BOIES: YOUR HONOR, COULD I JUST -- I DON'T WANT
14 THIS TO SLIP BY INADVERTENTLY. WE HAD AN ISSUE -- WE HAD PUT IN
15 OUR INSTRUCTIONS THE LANGUAGE IN TERMS OF THE FAIR MARKET VALUE
16 LICENSE AS PRESENTED BY PLAINTIFFS.

17 THE COURT: YEAH. I DON'T -- I'M NOT GOING TO GIVE
18 THAT ONE. I DON'T THINK THAT'S AT ALL NECESSARY.

19 MR. BOIES: OKAY. THE COURT DOES UNDERSTAND THE
20 EFFECT OF COMBINING THAT WITH TAKING THE DEFENDANTS' VERDICT
21 FORM?

22 THE COURT: YEAH.

23 MR. BOIES: OKAY.

24 THE COURT: YEAH. OKAY. ANYTHING ELSE?

25 LET'S TALK ABOUT THE EXHIBITS SO WE CAN GET STARTED
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1 ON TIME. ARE THERE ANY PROBLEMS WITH THE DEMONSTRATIVE
2 EXHIBITS?

3 MR. LANIER: VERY BRIEFLY, YOUR HONOR, ON OUR END,
4 JUST THREE MAJOR ISSUES. ONE IS WE OBJECT -- AND I'M DOING THIS
5 FOR THE RECORD. WE OBJECT TO THE CONTINUED SLIDES AND ARGUMENT
6 WITH RESPECT TO WILLINGNESS TO INFRINGE AS EVIDENCE OF
7 VALUATION. WE'VE MADE THAT OBJECTION BEFORE, YOUR HONOR HAS
8 RULED. WE'D LIKE TO PRESERVE THAT OBJECTION.

9 SECOND THING, A VARIETY OF SLIDES USE THE WORDS

10 "THEFT" AND "STOLE," THINGS LIKE THAT. YOUR HONOR HAD GIVEN
11 GUIDANCE ABOUT THAT WITH RESPECT TO THE OPENING. THIS IS NOT A
12 CRIMINAL CASE. IT'S NOT A THEFT CASE. WE OBJECT TO THOSE
13 SLIDES AS WELL. WE DON'T THINK THOSE TERMS ARE APPROPRIATE IN
14 THIS CASE.

15 AND THEN THE THIRD MAJOR ISSUE HAS TO DO WITH THE
16 SO-CALLED LIST OF 86, THE CHARACTERIZATION THAT THE LIST WAS
17 CHOSEN BY COUNSEL. IT WAS ACTUALLY CHOSEN AS A RESULT OF A
18 JUDICIALLY SUPERVISED PROCESS SUPERVISED BY MAGISTRATE JUDGE
19 LAPORTE. THERE'S NO EVIDENCE THAT THE LIST OF 86 CUSTOMERS WAS
20 ACTUALLY CHOSEN BY COUNSEL. THAT'S WHO MR. CLARKE GOT IT FROM,
21 BUT THAT'S A DIFFERENT THING.

22 SO THE CHARACTERIZATION THAT THIS LIST OF 86
23 CUSTOMERS THAT BOTH EXPERTS STARTED FROM TO DETERMINE
24 INFRINGER'S PROFITS, WE THINK, IS INAPPROPRIATE TO SAY IT WAS
25 CHOSEN BY SAP'S COUNSEL.

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2027

1 THOSE ARE OUR THREE MAJOR OBJECTIONS.

2 THE COURT: OKAY.

3 MR. BOIES: THE COURT HAS OUR VIEW AND HAS ALREADY
4 RULED ON THE FIRST OBJECTION.

5 WITH RESPECT TO THE SECOND OBJECTION, THERE ARE ABOUT
6 HALF A DOZEN CHARTS THAT USE A WORD LIKE "THEFT" OR "GUILT."
7 WHATEVER MAY BE TRUE AT THE OPENING STATEMENT, THAT IS NOT AN
8 ARGUMENT. IT IS CERTAINLY, WE BELIEVE, PERMISSIBLE TO ARGUE ON
9 THE RECORD THAT HAS BEEN MADE THAT THIS STUFF WAS STOLEN,
10 THAT -- THAT PEOPLE TOOK IT ILLEGALLY.

11 ONE OF THE OBJECTIONS THEY HAVE IS EVEN TO REFERRING
12 TO SAP AS THE GUILTY PARTY, WHICH IS SOMETHING THAT IS USED IN
13 CIVIL CONTEXT ALL THE TIME.

14 THE -- THE POINT OF THIS IS WHEN THEY TAKE ON A RISK,
15 IT'S IMPORTANT TO KNOW THE NATURE OF THE RISK THAT THEY ARE
16 TAKING ON. AND THEY ARE TAKING ON THE RISK OF BEING FOUND TO
17 HAVE STOLEN COPYRIGHTS. AND THAT IS SOMETHING THAT WE THINK IS
18 DIRECTLY RELEVANT TO THE DAMAGES ISSUES THAT ARE HERE.

19 NOW, WITH RESPECT TO THE 86, THE LETTER THAT SETS
20 FORTH HOW THE 86 WERE SELECTED IS IN EVIDENCE. THAT CAME IN AS
21 EVIDENCE WITHOUT OBJECTION. IT IS SOMETHING THAT WAS DONE BASED
22 ON THE INFORMATION PROVIDED BY SAP COUNSEL. THE LETTER STATES
23 THE ISSUES, AND WE ARE REALLY JUST REFERRING TO THE ISSUES THAT
24 ARE STATED IN THAT LETTER BY JONES DAY THAT IS IN EVIDENCE.

25 THERE WAS NEVER A STIPULATION THAT THOSE 86 CUSTOMERS
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2028

1 REPRESENTED THE UNIVERSE OF DAMAGES. THE PROBLEM IS THAT WHEN
2 YOU USE EITHER LOST PROFITS OR INFRINGER'S PROFITS OR RUNNING
3 ROYALTY, YOU'RE DEALING WITH A UNIVERSE OF CUSTOMERS THAT IS, WE
4 ALL KNOW, INCOMPLETE. AND THAT'S THE ONLY POINT WE'RE MAKING.

5 THE COURT: WHAT IS THE LANGUAGE THAT IS OFFENSIVE?
6 IS IT THAT THE LIST OF 86 WAS CHOSEN BY SAP'S COUNSEL.

7 MR. LANIER: THAT'S CORRECT, YOUR HONOR.

8 THE COURT: ALL RIGHT. WHAT EVIDENCE IS THERE IN THE
9 RECORD THAT IT WAS CHOSEN BY COUNSEL AS OPPOSED TO BY SAP?

10 MR. BOIES: IT COMES FROM THE LETTER ITSELF, WHICH
11 WAS WRITTEN BY JONES DAY. NOW, IF --

12 THE COURT: BUT JONES DAY DIDN'T DECIDE ON THE NUMBER
13 OF CUSTOMERS. IF THEY DID, THERE CERTAINLY HAS BEEN NO EVIDENCE
14 THAT IT WAS THE LAW FIRM THAT MADE THE DECISION.

15 MR. BOIES: YOUR HONOR, COULD I HAVE JUST A MOMENT TO
16 SEE -- IT ACTUALLY DOESN'T MATTER THAT MUCH TO ME WHETHER IT'S
17 COUNSEL OR SAP THAT MADE THE DECISION. I JUST WANT TO SEE
18 WHETHER I CAN CHANGE MY CHART.

19 THE COURT: WELL, I WOULDN'T APPROVE YOU ATTRIBUTING
20 ANY OF THE CONDUCT AT ISSUE IN THIS CASE TO THE LAW FIRM
21 REPRESENTING SAP. THERE'S BEEN NO EVIDENCE OF THAT.

22 SO -- SO IF, INDEED, IT WAS -- SAP GENERATED THE
23 LIST, YOU CAN REFER TO SAP, BUT NOT TO SAP'S COUNSEL. I MEAN,
24 WHY IS THAT A PROBLEM?

25 MR. BOIES: WELL, YOUR HONOR, THE REASON IT'S A
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2029

1 PROBLEM IS BECAUSE THE LETTER WAS WRITTEN BY SAP'S COUNSEL. WE
2 THOUGHT WE HAD A RIGHT TO RELY ON THAT. WE'VE PREPARED OUR
3 CHARTS THAT WAY. SO I MEAN, THAT'S WHY IT'S A PROBLEM.

4 THE COURT: CAN YOU SHOW ME WHAT THE LETTER LOOKS
5 LIKE?

6 MR. LANIER: YOUR HONOR, INTERROGATORY RESPONSES ARE
7 SIGNED BY LAWYERS. THAT DOESN'T MAKE THEM LAWYERS' RESPONSES.
8 THEY'RE THE COMPANY'S RESPONSES. IT'S THE SAME THING.

9 THE COURT: ALL RIGHT.

10 MR. LANIER: COMMUNICATING INFORMATION AND MAKING THE
11 CHOICE.

12 THE COURT: DOES ANYBODY --

13 CAN YOU SHOW ME THE LETTER?

14 MR. LANIER: AND MR. MITTELSTAEDT POINTS OUT TO ME
15 THAT, IN FACT, THE EVIDENCE THAT'S IN THE RECORD -- THE EXHIBIT
16 THAT'S IN THE RECORD WAS BY AGREEMENT OF COUNSEL. THE FACT THAT
17 IT CAME FROM COUNSEL, THE LAWYERS' NAMES WERE, IN FACT, REDACTED
18 OUT. SO THAT'S EXACTLY NOT THE POINT. THE EXHIBIT THAT'S IN
19 THE RECORD, WHICH IS EXHIBIT -- OH, BOY.

20 GOT TO GET MY GLASSES.

21 7035.

22 THE COURT: OKAY. 7035.

23 MR. LANIER: 7035.

24 THE COURT: AND THE LAWYERS NAMES ARE REDACTED?

25 MR. LANIER: YEP. AND THE FIRM NAME AND ALL THAT.

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2030

1 THAT WAS BY AGREEMENT OF COUNSEL.

2 I HAVE A DEMONSTRATIVE THAT HAS IT ON IT. IN FACT,
3 HERE'S A COPY OF THE EXHIBIT. IT JUST DOESN'T HAVE THE EXHIBIT
4 STAMP ON IT.

5 (PAUSE IN THE PROCEEDINGS.)

6 THE COURT: OKAY. IS THERE SOMETHING ELSE,
7 MR. BOIES?

8 MR. BOIES: NO, YOUR HONOR. WE DID NOT MENTION JONES
9 DAY. WE MENTIONED SAP COUNSEL. I --

10 THE COURT: YOU CAN ATTRIBUTE IT TO SAP, NOT TO THE
11 LAWYERS.

12 MR. BOIES: MAY WE HAVE ABOUT TEN MINUTES TO TRY TO
13 CHANGE THE SLIDES?

14 THE COURT: OKAY.

15 NOW, WITH REGARD, THEN, TO THE -- THERE WERE THREE
16 OBJECTIONS THAT YOU RAISE. WITH REGARD TO THE FIRST ONE, I'VE
17 ALREADY RULED ON THAT. THE EVIDENCE HAS ALREADY COME IN. SO,
18 OBVIOUSLY, I'M NOT GOING TO CHANGE MY VIEW ON THAT NOW.

19 WITH REGARD TO THE CHARACTERIZATION OF COPYRIGHT
20 INFRINGEMENT AS THEFT OR STEALING, I INDICATED TO YOU ALL FOR
21 OPENINGS THAT YOU COULDN'T USE IT THROUGHOUT THE COURSE OF THE
22 TRIAL. YOU'VE BEEN VERY GOOD. YOU HAVEN'T -- NONE OF THE
23 WITNESSES HAVE USED THAT LANGUAGE. IN MY VIEW, THAT LANGUAGE IS
24 INFLAMMATORY, UNNECESSARY.

25 THIS IS A COPYRIGHT CASE. "COPYRIGHT INFRINGEMENT"
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2031

1 IS A TERM OF ART THAT IS WHAT HAS BEEN STIPULATED TO. AND NO,
2 YOU MAY NOT USE THE LANGUAGE -- WORDS SUCH AS "THEFT" OR
3 "STEALING."

4 THROUGHOUT THE COURSE OF THE TRIAL, WITNESSES HAVE
5 USED LANGUAGE SUCH AS "TAKING OUR SOFTWARE," AND, OBVIOUSLY, YOU
6 CAN CONTINUE TO USE THAT. BUT KEEP IN MIND THE BASIS FOR MY
7 RULING WAS TWO-FOLD, NOT JUST THAT I DID NOT WANT THE JURY TO BE
8 MISLED INTO THINKING THAT THERE WERE ANY KIND OF CRIMINAL --
9 CRIMINAL UNDERTONES HERE. BUT ADDITIONALLY, IT WAS ON THE BASIS
10 OF MY DETERMINATION THAT THE LANGUAGE IS JUST INFLAMMATORY.
11 IT'S NOT NECESSARY.

12 SO THAT OBJECTION IS SUSTAINED.

13 AND I'VE ALREADY INDICATED WITH REGARD TO THE LAST
14 ONE, SAP CAN BE REFERRED TO BUT NOT ITS COUNSEL.

15 ALL RIGHT. WERE THERE ANY OTHER OBJECTIONS TO
16 DEMONSTRATIVES?

17 MR. LANIER: IT'S FINE FROM US, YOUR HONOR.

18 THE COURT: FROM YOU ALL?

19 MR. HOWARD: YES, YOUR HONOR. THERE'S -- THERE'S

20 ONLY A COUPLE ON OUR SIDE. THERE'S TWO EXHIBITS. THEY'RE SLIDE
21 42 AND THEY'RE SLIDE 74 WHICH SHOW EVIDENCE -- WHICH HAS ONLY
22 BEEN ADMITTED FOR A LIMITED PURPOSE RELATED TO THE EXPERTS'
23 RELIANCE AND NOT FOR THE TRUTH.

24 APPEARS TO US THAT IT'S BEING IN THE SLIDE DECK FOR
25 THE TRUTH OF THE CONTENTS OF THE DOCUMENT. WE OBJECT TO THAT.

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1 THE COURT: AND IS THAT THE COWLITZ COUNTY --

2 MR. HOWARD: ONE OF THEM IS THE COWLITZ COUNTY. THE
3 OTHER IS EXHIBIT A9329. I CAN PUT IT UP ON THE BOARD.

4 MR. MITTELSTAEDT: CAN I SEE WHICH ONE --

5 MR. LANIER: AND, YOUR HONOR, WHILE WE'RE DOING THAT,
6 WE DON'T INTEND TO OFFER THEM TO THE TRUTH. WE UNDERSTAND THE
7 COURT'S RULING ADMITTING THEM FOR THE LIMITED PURPOSE, AND
8 THAT'S THE ONLY PURPOSE FOR WHICH THEY'D BE DISCUSSED.

9 FOR EXAMPLE, IT'S APPROPRIATE TO SAY HERE'S SOMETHING
10 THE EXPERT RELIED ON AS YOU'RE THINKING ABOUT HOW TO VALUE
11 MR. MEYER'S OPINION, FOR EXAMPLE. THAT'S THE PURPOSE FOR WHICH
12 WE'D OFFER THEM.

13 MR. MITTELSTAEDT: I'M NOT GOING TO USE THE COWLITZ
14 COUNTY ONE.

15 THE COURT: AT ALL.

16 MR. MITTELSTAEDT: IN CLOSING.

17 MR. HOWARD: CAN WE PUT UP SLIDE 42.

18 (DEMONSTRATIVE PUBLISHED TO COURT.)

19 MR. HOWARD: THIS IS -- THIS IS THE OTHER ONE, YOUR
20 HONOR. AND THAT JUST DOES NOT APPEAR TO US TO BE OFFERED TO
21 DISCUSS RELIANCE. THAT APPEARS TO US TO BE OFFERED FOR THE
22 TRUTH OF ITS CONTENTS.

23 THE COURT: WHAT IS THIS?

24 MR. HOWARD: THIS IS AN EMAIL FROM MR. MACKEY AND
25 PERHAPS COUNSEL CAN EXPLAIN HOW THEY INTEND TO USE IT.

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2033

1 MR. MITTELSTAEDT: I'M GOING TO USE THIS TO CRITICIZE
2 MR. MEYERS (SIC) FOR NOT CONSIDERING THIS DOCUMENT AND NOT
3 GIVING IT ENOUGH WEIGHT IN HIS OPINION. SO IT'S NOT FOR THE
4 TRUTH OF THE MATTER IT'S TO SHOW THAT HE DID NOT CONDUCT A
5 PROPER EXAMINATION.

6 THE COURT: OKAY. ALL RIGHT.

7 MR. HOWARD: IF IT'S CLEAR.

8 THE COURT: THAT'S FINE.

9 MR. HOWARD: CLEAR IN THE ARGUMENT, YOUR HONOR, THAT
10 IS FINE.

11 AND COULD YOU PUT UP 43, PLEASE.

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 MR. HOWARD: NOW, THE LAST CATEGORY OF OBJECTION,
14 YOUR HONOR, IS TWO SLIDES WHERE THE IMPRESSION THAT'S BEING
15 GIVEN IS THAT THIS INFORMATION APPEARS IN THE SLIDE, WHICH IT
16 DOES NOT. THESE NUMBERS ARE NOWHERE IN THIS DOCUMENT. AND
17 SO -- WE DON'T EVEN KNOW WHERE THE NUMBERS CAME FROM.

18 MR. MITTELSTAEDT: IT'S --

19 THE COURT: WAIT. WHICH -- THE CIRCLED NUMBERS?

20 MR. HOWARD: THE ROW, THE ENTIRE ROW WHERE IT SAYS
21 "CUSTOMERS."

22 THE COURT: YEAH.

23 MR. HOWARD: CAN YOUR HONOR SEE IT WITH COUNSEL
24 STANDING THERE?

25 THE COURT: NO, I CAN SEE IT.

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1 MR. HOWARD: WHERE IT SAYS "CUSTOMERS," AND THEN A
2 SERIES OF NUMBERS GOING ACROSS WHERE IT APPEARS THAT THERE'S A
3 ROW OF NUMBERS GOING ACROSS THE DOCUMENTS.

4 THE COURT: RIGHT.

5 MR. HOWARD: NONE OF THOSE NUMBERS ARE IN THE
6 DOCUMENT. WHERE THERE'S A RED CIRCLE ABOVE IN THE RIGHT-HAND
7 COLUMN AT THE TOP AND THEN A CORRESPONDING CIRCLE AROUND "297"
8 IN RED AT THE BOTTOM, THAT NUMBER DOES NOT APPEAR IN THE
9 DOCUMENT.

10 THE COURT: OKAY.

11 MR. MITTELSTAEDT: AND I'M NOT GOING TO SAY IT DOES.
12 IT'S A MATHEMATICAL COMPUTATION. SO THIS IS IN THE FORM OF A
13 DEMONSTRATIVE. IT'S JUST THE NUMBER DIVIDED BY THE \$50,000
14 AVERAGE DEAL SIZE.

15 THE COURT: OKAY. AND YOUR OBJECTION IS...?

16 MR. HOWARD: OBJECTION IS THAT IT'S MISLEADING. IT'S
17 VERY MISLEADING TO SHOW THE DOCUMENT AND GIVE THE IMPRESSION
18 THAT THE DOCUMENT CONTAINS THESE NUMBERS AND --

19 THE COURT: WHAT IS THE OVERALL DOCUMENT?

20 MR. MITTELSTAEDT: THIS IS ONE OF THE BUSINESS PLANS
21 FOR TOMORROWNOW. AND I -- I AGREE IF I JUST PUT THAT UP THERE
22 AND LET THE JURY STARE AT IT, IT COULD BE MISLEADING. I'M GOING
23 TO EXPLAIN IT IN A WAY SO IT'S NOT MISLEADING.

24 THE COURT: OKAY.

25 MR. HOWARD: YOUR HONOR, WHAT'S THE EVIDENTIARY BASIS
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2035

1 FOR THE NUMBERS THAT ARE UP HERE?

2 (SIMULTANEOUS COLLOQUY.)

3 THE COURT: AS LONG AS THE EVIDENCE IS IN THE TRIAL
4 RECORD, THE DEMONSTRATIVE IS FINE.

5 MR. HOWARD: WHAT'S THE -- WHAT'S THE EVIDENCE THAT
6 297 RELATES TO THE FORECAST OF 2008 UP THERE? THERE'S NO
7 EVIDENCE THAT WE'RE AWARE OF THAT THERE'S A NUMBER 297 --

8 THE COURT: I'M NOT EVEN SURE WHAT THE NUMBERS REFER
9 TO.

10 WHAT'S THE 297?

11 MR. MITTELSTAEDT: IT'S THE REVENUES FORECASTED FOR
12 THAT YEAR DIVIDED BY 50,000 TO DERIVE THE NUMBER OF CUSTOMERS.
13 WE DID -- THERE ARE TWO BUSINESS PLANS. WE DID THIS WITH
14 MR. MEYER FOR ONE OF THE BUSINESS PLANS, AND THIS IS SIMPLY THE
15 SAME CALCULATION FOR A BUSINESS PLAN A DAY EARLIER.

16 THE COURT: HMM. OKAY.

17 MR. HOWARD: THE ORIGINAL NUMBER, IF YOUR HONOR CAN
18 SEE IT BEHIND THERE IS, YOU KNOW, 15,000. IT'S NOT 297. AND
19 "297" IS NOT IN EVIDENCE.

20 MR. MITTELSTAEDT: I DIDN'T SAY 297 WAS IN EVIDENCE.
21 297 IS A CALCULATION DIVIDING THAT FORECAST BY \$50,000, JUST
22 LIKE WE DID MR. MEYER ON THE STAND FOR ANOTHER DOCUMENT. IT'S
23 JUST MATH.

24 THE COURT: BUT IT APPEARS THAT IT'S HIGHLIGHTED.

25 MR. MITTELSTAEDT: WELL --

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1 THE COURT: I MEAN, IT APPEARS LIKE IT COMES FROM THE
2 FORM. I MEAN, I THINK THAT'S PARTLY PART OF THE OBJECTION.

3 WHY IS IT ON THIS DOCUMENT IN THAT WAY?

4 MR. MITTELSTAEDT: TO SHOW WHERE IT REFERS TO.

5 BUT I -- YOUR HONOR, I WILL EXPLAIN IT SO IT'S NOT
6 MISLEADING. I WILL MAKE CRYSTAL CLEAR THAT THAT LINE IS NOT
7 FROM THE DOCUMENT. IT'S NOT HIGHLIGHTED FROM THE DOCUMENT.
8 IT'S SIMPLY THE RESULT OF ARITHMETIC.

9 MR. HOWARD: YOUR HONOR, WE'RE TAKING A FEW MINUTES
10 TO MAKE SOME CHANGES TO SLIDES. WE REQUEST THAT THIS SLIDE ALSO
11 BE CHANGED TO REMOVE THE HIGHLIGHTED ROW SO THAT IT DOES NOT
12 APPEAR AS IF THIS IS COMING FROM THE DOCUMENT WITH NUMBERS THAT
13 ARE NOT IN EVIDENCE.

14 THE COURT: YEAH, IT DOES APPEAR THAT IT'S COMING
15 FROM IT. CAN YOU JUST PERHAPS MOVE THAT SECTION OFF OF THE FACE
16 OF THE DOCUMENT?

17 MR. MITTELSTAEDT: YES.

18 THE COURT: OKAY. ALL RIGHT. THAT TAKES CARE OF
19 THAT.

20 MR. HOWARD: THANK YOU, YOUR HONOR.

21 THE COURT: IS THAT IT?

22 MR. LANIER: THAT'S IT FROM US.

23 MR. HOWARD: YEAH, THERE ARE TWO SLIDES WHICH HAVE
24 THE SAME HIGHLIGHTING AND THE SAME IMPRESSION.

25 THE COURT: OKAY. JUST --

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1 (SIMULTANEOUS COLLOQUY.)

2 THE COURT: -- MOVE THE HIGHLIGHT SECTION OFF THE
3 FACE.

4 MR. HOWARD: SLIDES 43 AND 45.

5 MR. LANIER: THAT WAS IT FROM US.

6 THE COURT: IS THAT IT? ARE WE READY TO GO?

7 MR. HOWARD: JUST A FEW MINUTES FOR THE SLIDES, AND
8 THEN WE'RE READY TO GO.

9 THE COURT: OKAY.

10 MR. BOIES: LIKE FIVE MINUTES.

11 THE COURT: LIKE FIVE MINUTES?

12 OKAY. WE'LL TAKE FIVE MINUTES.

13 (OFF-THE-RECORD DISCUSSION.)

14 THE COURT: ALL RIGHT. WE'LL TAKE FIVE MINUTES, THEN
15 WE'LL GET STARTED.

16 (RECESS TAKEN AT 8:39 A.M.)

17 (PROCEEDINGS RESUMED AT 8:50 A.M.)

18 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
19 OF THE JURY:)

20 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.

21 THE COURT: ALL RIGHT. GOOD MORNING, LADIES AND
22 GENTLEMEN.

23 ALL RIGHT, COUNSEL. WE ARE READY FOR CLOSING
24 ARGUMENTS.

25 MR. BOIES?

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2038

1 MR. BOIES: THANK YOU, YOUR HONOR.

2 CLOSING ARGUMENT

3 MR. BOIES: GOOD MORNING, LADIES AND GENTLEMEN.

4 SEEMS LIKE I'VE BEEN WAITING A LONG TIME TO BE ABLE
5 TO TALK TO YOU. AND I APPRECIATE THE OPPORTUNITY NOW.

6 I WANT TO BEGIN BY THANKING FOR YOUR SERVICE, YOUR
7 TIME, AND YOUR -- JURIES REALLY ARE -- WHEN WE SAY THAT A LOT.

8 WE REALLY MEAN THAT. AND THOSE OF US WHO SPEND OUR LIVES IN THE
9 JUSTICE SYSTEM TRULY APPRECIATE THE CONTRIBUTION YOU MAKE.

10 EVERY LAWSUIT -- THE PARTIES AND THE LAWYERS -- BUT I

11 HOPE AFTER THE LAST TWO WEEKS, YOU'VE COME TO REALIZE THAT THIS
12 LAWSUIT HAS IMPORTANCE BEYOND THE TWO LARGE CORPORATIONS THAT
13 YOU SEE IN FRONT OF YOU, BECAUSE THIS LAWSUIT GOES TO THE VERY
14 HEART OF THE SOFTWARE INDUSTRY, ONE OF OUR COUNTRY'S MOST
15 IMPORTANT INDUSTRIES, AND CONDUCT THAT WE EXPECT FROM LARGE
16 CORPORATIONS, HOW WE EXPECT THEM TO TREAT EACH OTHER AND
17 OURSELVES.

18 AND THE REASON THAT IT'S SO IMPORTANT IS BECAUSE
19 PROTECTION FOR INTELLECTUAL PROPERTY IS AT THE HEART OF THE
20 SOFTWARE INDUSTRY. YOU'VE HEARD MR. ELLISON SAY THAT, AND
21 YOU'VE HEARD MR. APOTHEKER SAY THAT AS WELL. MR. APOTHEKER, OF
22 COURSE, IS THE CHIEF EXECUTIVE OFFICER SAP, FORMER MEMBER OF THE
23 BOARD. I HAVE A CHART, IF WE CAN MANAGE TO GET THE TECHNOLOGY
24 TO PUT IT UP, WHERE MR. APOTHEKER TESTIFIES THAT THE ENTIRE
25 SOFTWARE INDUSTRY WAS FOUNDED ON --

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1 CLOSING ARGUMENT \ BOIES
(DEMONSTRATIVE PUBLISHED TO JURY.)

2 MR. BOIES: -- INTELLECTUAL PROPERTY PROTECTION.

3 MR. SCREVEN, WHO WAS, OF COURSE, ORACLE'S CHIEF
4 CORPORATE ARCHITECT SAID THE SAME THING.

5 (DEMONSTRATIVE PUBLISHED TO JURY.)

6 MR. BOIES: IF ORACLE DID NOT HAVE INTELLECTUAL
7 PROPERTY RIGHTS, THEN THERE'S NO WAY THAT ORACLE COULD HAVE --
8 TO MAKE THE ORACLE DATABASE FOR THIS TODAY AND TO BUILD THE
9 ADDITIONAL PRODUCTS THAT ORACLE BUILDS.

10 NOW, WHY IS THAT SO? I WANT TO SPEND A MINUTE ON WHY
11 THAT'S SO, BECAUSE IT'S RELEVANT NOT ONLY TO THE IMPORTANCE OF
12 PROTECTING INTELLECTUAL PROPERTY, BUT IT'S RELEVANT TO THE
13 DAMAGES ISSUE IN THIS CASE, WHICH IS THE CRITICAL ISSUE.

14 AND THAT'S BECAUSE IN THE SOFTWARE INDUSTRY, THE GAIN
15 OR LOSS OF A SMALL PERCENTAGE OF CUSTOMERS -- AND AGAIN, I HAVE
16 A CHART IF I CAN --

17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 MR. BOIES: THAT'S DEMONSTRATES THIS --

19 (OFF-THE-RECORD DISCUSSION.)

20 MR. BOIES: -- AND CONTINUOUSLY IMPROVING THAT

21 SOFTWARE IS VASTLY MORE EXPENSIVE THAN THE COST OF --

22 THE COURT: DO YOU HAVE YOUR MICROPHONE ON?

23 MR. BOIES: I DO, YOUR HONOR.

24 MAYBE I'M JUST TOO SOFT-SPOKEN.

25 THE COURT: YEAH.

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1 CLOSING ARGUMENT \ BOIES
YEAH, MOVE IT UP HIGHER.

2 MR. BOIES: THAT WORK BETTER?

3 (OFF-THE-RECORD DISCUSSION.)

4 MR. BOIES: THE COST OF THE DEVELOPING SOFTWARE AND
5 CONTINUOUSLY IMPROVING THAT SOFTWARE IS VERY EXPENSIVE.

6 NOW, BECAUSE THE COST ASSOCIATED WITH SERVICING
7 ADDITIONAL CUSTOMERS IS LOW, SOFTWARE SUPPORT IS A VERY, VERY
8 HIGH-MARGIN BUSINESS. YOU HEARD MR. ELLISON SAY THAT. YOU'VE
9 HEARD SEVERAL WITNESSES, INCLUDING THE DEFENDANTS' WITNESSES,
10 SAY THIS.

11 THIS MEANS THAT THE PROFITS THAT YOU GET FROM
12 INDIVIDUAL CUSTOMERS, THE ADDITIONAL CUSTOMERS IS VERY HIGH.
13 YOU NEED THAT PROFIT TO PAY FOR THE RESEARCH AND DEVELOPMENT
14 THAT GOES INTO BUILDING SOFTWARE IN THE FIRST PLACE. ONCE YOU
15 DESIGN, DEVELOP, TEST SOFTWARE, THE ADDITIONAL COST OF
16 DELIVERING IT IS VERY SMALL. THE REASON THAT THAT'S IMPORTANT
17 IS IT MEANS EACH INCREMENTAL CUSTOMER, EACH ADDITIONAL CUSTOMER,
18 IS VERY, VERY VALUABLE.

19 IF CUSTOMERS ARE LOST, THE SUPPLIER LOSES THE PROFIT
20 FROM THOSE CUSTOMERS. AND IF ALL CUSTOMERS WERE THE SAME --
21 LIKE, FOR EXAMPLE, IF YOU'RE BUILDING AN AUTOMOBILE, BECAUSE SO
22 MUCH OF THE COST OF THE AUTOMOBILE GOES INTO EACH CAR THAT'S
23 MANUFACTURED, IF YOU LOSE A CUSTOMER, AN ADDITIONAL CUSTOMER IN
24 THE AUTOMOBILE INDUSTRY, YOU SIMPLY LOSE THE PROFIT FROM THAT
25 ONE CAR.

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1 CLOSING ARGUMENT \ BOIES
IN THIS INDUSTRY, BECAUSE THE COST OF DELIVERING THAT

2 EXTRA COPY OF THE SOFTWARE IS SO SMALL, YOU LOSE THAT ADDITIONAL
3 CUSTOMER, AND YOU'VE LOST A LOT OF THE PROFIT THAT YOU NEED TO
4 PAY BACK FOR THE INVESTMENT THAT YOU MADE IN DEVELOPING THE
5 SOFTWARE IN THE FIRST PLACE.

6 NOW, BECAUSE THE TOTAL COST INCURRED IN PRODUCING
7 REVENUES FROM THESE INCREMENTAL CUSTOMERS IS LOW AND THE PROFITS
8 CORRESPONDINGLY HIGH, SUCH CUSTOMERS' GAIN OR LOSS DRAMATICALLY
9 AFFECTS THE PROFITS OF THE COMPANY INVOLVED.

10 SO WHAT HAPPENS IF YOU HAVE A CUSTOMER THAT YOU LOSE
11 BECAUSE SOMEBODY HAS TAKEN YOUR INTELLECTUAL PROPERTY AND USED
12 IT AGAINST YOU? YOU LOSE THAT CUSTOMER AND YOU LOSE THE PROFIT.

13 NOW, THE DEFENDANTS IN THIS CASE ADMITTED THEIR
14 INFRINGEMENT WAS MASSIVE AND PROLONGED, GOING TO THE VERY CORE
15 OF WHAT ORACLE HAD PAID, ONE POINT -- \$11.1 BILLION FOR
16 PEOPLESOFT AND \$6.1 BILLION FOR SIEBEL.

17 THE DEFENDANTS HAVE SUBMITTED INFRINGING 120 SEPARATE
18 COPYRIGHTS, WHICH COVER VIRTUALLY ALL OF THE PEOPLESOFT, SIEBEL
19 AND JD EDWARDS DATABASE PRODUCT FAMILIES. THE COURT READ THE
20 FOLLOWING STIPULATION, QUOTE, TOMORROWNOW COUNTED APPROXIMATELY
21 5 MILLION ORACLE SUPPORT FILES ON ITS SYSTEMS IN 2008.

22 MR. MANDIA -- REMEMBER MR. MANDIA? HE WAS THE
23 COMPUTER EXPERT THAT CAME IN. HE TESTIFIED THAT TOMORROWNOW
24 RELIED ON MASS DOWNLOADING OF ORACLE SOFTWARE AND SUPPORT
25 MATERIALS FROM THE ORACLE WEBSITE AND IMPROPER ACCESS TO THAT
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CLOSING ARGUMENT \ BOIES
1 SITE.

2 I'M GOING TO COME BACK TO THAT ISSUE WHEN WE TALK
3 ABOUT THE FAIR MARKET VALUE LICENSE BECAUSE THE SCOPE OF THE
4 TAKING, THE SCOPE OF WHAT WAS TAKEN IS VERY IMPORTANT TO
5 EVALUATE ANY DAMAGES ISSUES, BUT I WANT YOU TO HAVE IN -- AT
6 YOUR -- IN YOUR MIND AT THE OUTSET HOW MASSIVE THIS WAS.

7 YOU HEARD IN THE OPENING STATEMENT COUNSEL FOR SAP
8 SAYING IT'S A VERY, VERY SMALL ROLE THAT TOMORROWNOW PLAYS.
9 THIS, LADIES AND GENTLEMEN, IS NOT A VERY, VERY SMALL ROLE.

10 NOW, WHY WOULD A LARGE COMPANY LIKE SAP ENGAGE IN
11 THIS MASSIVE COPYRIGHT INFRINGEMENT? WHY WOULD IT PERMIT ITS

12 WHOLLY OWNED SUBSIDIARY TOMORROWNOW TO DO THAT? I SUGGEST THERE
13 WERE THREE REASONS. I WANT TO GO THROUGH EACH OF THOSE REASONS.

14 FIRST, SAP FELT THREATENED BY ORACLE'S ACQUISITION OF
15 PEOPLESOFT, AND THE INFRINGEMENT WAS SAP'S RESPONSE. SECOND,
16 SAP'S BOARD AND TOP EXECUTIVES EXPECTED THAT THE INFRINGEMENT
17 WOULD BE WORTH BILLIONS OF DOLLARS. THIRD, SAP BELIEVED IT
18 COULD HIDE BEHIND TOMORROWNOW AS A LIABILITY SHIELD AND LET
19 TOMORROWNOW TAKE THE FALL WHEN IT WAS CAUGHT.

20 LET ME GO THROUGH EACH OF THOSE ONE BY ONE. FIRST,
21 THE THREAT. UP UNTIL 2005, SAP'S --

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: -- DOMINANCE OF THE ENTERPRISE
24 APPLICATION BUSINESS WAS VIRTUALLY UNCHALLENGED. ORACLE AT
25 12 PERCENT WAS SECOND, A DISTANT SECOND, TO THE 57 PERCENT THAT
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CLOSING ARGUMENT \ BOIES

1 SAP HAD.

2 HOWEVER, AFTER ORACLE ACQUIRED PEOPLESOFT, ALTHOUGH
3 IT STILL WAS ONLY LESS THAN HALF THE SIZE OF SAP IN THE
4 APPLICATION SOFTWARE MARKET, IT HAD DOUBLED ITS SIZE. THEY FELT
5 THAT WAS VERY THREATENING.

6 SAME THING WITH RESPECT TO SIEBEL IN THE CRM MARKET.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 MR. BOIES: SIEBEL WAS THE LEADER. ORACLE AND SAP
9 WERE ABOUT THE SAME, NOT TOO FAR BACK BEFORE THE ACQUISITION.
10 AFTER THE ACQUISITION, ORACLE ACTUALLY BECAME THE LEADER IN THIS
11 AREA, AGAIN, SOMETHING THAT WAS VERY THREATENING TO SAP.

12 SAP'S DOCUMENTS REFLECTED THIS.

13 SLIDE 43.

14 (DEMONSTRATIVE PUBLISHED TO JURY.)

15 MR. BOIES: SAP BELIEVED THAT AS A RESULT OF ORACLE'S
16 ACQUISITION OF PEOPLESOFT -- AND THIS IS THEIR LANGUAGE FROM
17 PTX171. AND THROUGHOUT THIS, I'M GOING TO BE TELLING YOU
18 EXACTLY WHERE THIS EVIDENCE COMES FROM SO THAT YOU CAN MAKE NOTE
19 OF IT IF YOU WISH AND YOU CAN LOOK IT UP WHEN YOU GET INTO THE
20 JURY ROOM BECAUSE I WANT YOU TO LOOK AT THE ACTUAL EVIDENCE THAT

21 WE HAVE IN THIS CASE.
22 PTX171, QUOTING, FEBRUARY 3, 2005, MARKET
23 CONSOLIDATION HAS CHANGED THE COMPETITION LANDSCAPE. ORACLE IS
24 POSITIONING ITSELF TO AGGRESSIVELY CHALLENGE SAP.
25 THAT'S WHAT SAP WAS CONCERNED ABOUT.
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CLOSING ARGUMENT \ BOIES
1 SAME THING WITH RESPECT TO SIEBEL. PTX245. "SAP'S,"
2 QUOTE, "COMPETITIVE EDGE," CLOSED QUOTE, "IN CRM PRODUCTS
3 WAS" -- AND THIS IS THEIR LANGUAGE, QUOTE -- "DIMINISHED BY
4 40 PERCENT, RESULTING IN A 1.52 BILLION EUROS OF SAP SOFTWARE
5 BEING AT RISK OVER THREE YEARS.
6 AND EURO'S EVEN A LITTLE MORE EXPENSIVE THAN A DOLLAR
7 SO THAT YOU SEE HOW IMPORTANT THE SIEBEL POSITIONAL (SIC)
8 CHALLENGE WAS.
9 SO WHAT HAPPENED WAS THEY CAME UP WITH TOMORROWNOW --
10 (DEMONSTRATIVE PUBLISHED TO JURY.)
11 MR. BOIES: -- AS A RESPONSE. THEY USED IT -- THEY
12 ACQUIRED IT IN 2005 TO DEAL WITH THE PEOPLESOFT ACQUISITION, AND
13 THEN THEY APPLIED IT TO THE SIEBEL ACQUISITION AS WELL.
14 NOW --
15 (DEMONSTRATIVE PUBLISHED TO JURY.)
16 MR. BOIES: -- SECOND POINT, AND THIS IS -- THIS IS
17 MR. BRANDT, WHO YOU HEARD TESTIFYING ABOUT ORACLE'S ACQUISITION
18 OF SIEBEL INFLUENCED THE DECISION TO EXPAND THE SAFE PASSAGE
19 PROGRAM TO SIEBEL. NOW, THAT WAS THE FIRST POINT, THE THREAT.
20 SECOND POINT, SAP EXPECTED TO GAIN BILLIONS OF
21 DOLLARS AS A RESULT OF THE INFRINGEMENT.
22 (DEMONSTRATIVE PUBLISHED TO JURY.)
23 MR. BOIES: NOW, ONE WAY OF LOOKING AT THAT IS TO
24 TAKE THEIR OWN EXHIBIT -- THIS IS PTX12. AND WE'RE GOING TO
25 KEEP COMING BACK TO PTX12 A NUMBER OF TIMES. AND THAT ESTIMATED
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CLOSING ARGUMENT \ BOIES
1 WHAT THEIR REVENUE WOULD BE JUST OVER THREE YEARS 2005, 2006,
2 2007.

3 NOW, YOU KNOW, THAT 2008, THEY ALSO INFRINGED. AND
4 SO WE HAVE TO ESTIMATE THAT, AND WE HAVE TWO DIFFERENT WAYS OF
5 ESTIMATING. ONE IS TO ESTIMATE THERE WAS NO GROWTH IN 2007 AND
6 2008, WHICH WE KNOW UNDERSTATES IT BECAUSE THE CURVE WAS GOING
7 UP. YOU CAN SEE JUST FROM 2005, 2006, AND 2007, HOW EVERY YEAR
8 IT'S GOING UP.

9 THE OTHER WAY IS TO ASSUME THAT IT GROWS AT THE SAME
10 RATE AS IT GREW IN 2007. THAT COMES UP WITH EITHER 1.3 BILLION
11 OR \$1.7 BILLION.

12 ANOTHER WAY TO LOOK AT IT IS TO LOOK AT AN ESTIMATE
13 THAT WAS PREPARED AS TO WHAT -- BY MR. MEYER AS TO WHAT THE
14 3,000 MAINTENANCE CUSTOMERS AND 2,000 CONVERTED CUSTOMERS TO SAP
15 WOULD REPRESENT. THAT'S \$1.2 BILLION.

16 ANOTHER WAY IS TO TAKE THE NUMBER OF CUSTOMERS --
17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 MR. BOIES: -- THAT SAP EXPECTED TO GET -- AND WE
19 KNOW WHAT THEY EXPECTED TO GET FROM THEIR DOCUMENTS -- AND THEN
20 APPLY A VALUE TO THOSE CUSTOMERS.

21 THIS PARTICULAR SLIDE, 247, APPLIES A VALUE OF
22 \$1.9 MILLION, WHICH WAS THE AVERAGE REVENUE THAT SAP'S EXPERT,
23 MR. CLARKE CALCULATED THAT THE CUSTOMERS THAT HE CALCULATED HAD
24 BEEN TAKEN BY SAP GAVE TO SAP AS A RESULT OF THE TOMORROWNOW
25 ACQUISITION.

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CLOSING ARGUMENT \ BOIES
1 ANOTHER WAY TO DO IT IS TO TAKE --

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 MR. BOIES: I HAVE A -- ANOTHER CHART THAT DOES
4 THAT -- IS TO TAKE 286 -- IS TO COMPARE THAT WITH WHAT WOULD
5 HAPPEN IF YOU TOOK MR. MEYER'S CALCULATION OF \$1 MILLION PER
6 VALUE OF CUSTOMER. AND THEN YOU SEE HOW MANY CUSTOMERS THERE
7 ARE, AND WHAT THE TOTAL VALUATION WAS.

8 FROM MR. MEYERS (SIC), IT WOULD BE 1.375 BILLION,
9 2 BILLION, OR 3 BILLION, DEPENDING ON THE NUMBER OF CUSTOMERS.
10 SO HOWEVER YOU COME OUT AFTER THAT -- AND WE'RE GOING TO COME TO
11 SOME PRECISE DAMAGE CALCULATIONS -- IT'S CLEAR THAT THERE WERE

12 BILLIONS OF DOLLARS AT STAKE HERE FOR SAP.
13 NOW, THE THIRD REASON THAT I SUBMIT SAP WAS PREPARED
14 TO DO THIS WAS SAP PLANNED ALL ALONG TO HIDE BEHIND TOMORROWNOW
15 IF IT WAS CAUGHT. EVEN BEFORE SAP ACQUIRED TOMORROWNOW, THE
16 BUSINESS CASE FOR THE ACQUISITION -- AND THIS IS PLAINTIFFS'
17 EXHIBIT 19 -- WARNED THAT PAST OPERATING ISSUES MAY BE A SERIOUS
18 LIABILITY AND SAID, SAP WILL LEAVE THE TEXAS CORPORATION IN
19 EXISTENCE AS A LIABILITY SHIELD.

20 MR. BRANDT, THE ONLY MEMBER OF THE EXECUTIVE BOARD TO
21 TESTIFY LIVE HERE -- THE ONLY MEMBER OF THE EXECUTIVE BOARD WHO
22 WAS A MEMBER OF EXECUTIVE BOARD AT THE TIME TO TESTIFY LIVE
23 AGREED THAT THE USE OF TOMORROWNOW AS A LIABILITY SHIELD WAS
24 BECAUSE SAP WAS CONCERNED ABOUT THIS LIABILITY.

25 AFTER THE ACQUISITION, SAP AGAIN CONFIRMED, QUOTE,
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CLOSING ARGUMENT \ BOIES
1 SAP WILL LEAVE TEXAS CORPORATION IN EXISTENCE AS A LIABILITY
2 SHIELD."

3 AND PTX183, QUOTE, TOMORROWNOW, IS A SEPARATE ENTITY
4 DUE TO THE THREAT OF LITIGATION.

5 LET ME SHOW YOU JUST ONE EXAMPLE OF THIS.

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 MR. BOIES: THIS IS FROM PTX19. THIS IS AN ACTUAL
8 PAGE FROM THE DOCUMENT. AND WHAT YOU SEE THERE IS SAP'S PLAN,
9 AND THIS IS THE BUSINESS CASE FOR TOMORROWNOW. AND IT SAYS,
10 "SAP WILL LEAVE TEXAS CORPORATION IN EXISTENCE AS A LIABILITY
11 SHIELD FOR ANY POTENTIAL CLAIMS."

12 CAN YOU GO TO 55?

13 (DEMONSTRATIVE PUBLISHED TO JURY.)

14 MR. BOIES: I WANT TO FOCUS ON MR. BRANDT AGAIN,
15 BECAUSE HE TESTIFIED AT THE TRIAL STILL TRYING TO HIDE BEHIND
16 TOMORROWNOW, QUOTE, TOMORROWNOW HAS ADMITTED TO HAVING VIOLATED
17 COPYRIGHTS. BUT NOT SAP. AGAIN, TRYING TO HIDE BEHIND
18 TOMORROWNOW. AND YOU'LL REMEMBER THAT THE COURT ISSUED YOU AN
19 INSTRUCTION THAT SAID THAT ANY TESTIMONY, QUESTION, OR ARGUMENT
20 THAT STATES OR SUGGESTS THAT SAP AG, INCLUDING MEMBERS OF ITS
21 EXECUTIVE BOARD, EITHER DID NOT KNOW OR HAVE REASON TO KNOW OF

22 THE INFRINGEMENT OR DID NOT INTENTIONALLY MATERIALLY CONTRIBUTE
23 TO INFRINGEMENT IS INCONSISTENT WITH SAP'S STIPULATION TO
24 CONTRIBUTORY INFRINGEMENT.

25 SO ALTHOUGH THEY THOUGHT THEY COULD HIDE BEHIND IT,
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CLOSING ARGUMENT \ BOIES
1 IN FACT, THEY'VE BEEN CAUGHT AND THEY CAN'T.

2 NOW, LET ME TURN TO THE SUBJECT OF FAIR MARKET VALUE
3 LICENSES THAT YOU'VE HEARD A LOT ABOUT FROM ALL THE EXPERTS.

4 IN ORDER TO HAVE HAD THE RIGHT TO DO WHAT THEY DID --
5 (DEMONSTRATIVE PUBLISHED TO JURY.)

6 MR. BOIES: -- DEFENDANTS NEEDED A LICENSE FROM
7 ORACLE, WHICH, OF COURSE, THEY NEVER GOT, THEY NEVER EVEN TRIED
8 TO GET. THE FAIR MARKET VALUE OF THAT LICENSE IS WHAT
9 DEFENDANTS IMPROPERLY TOOK AND WHAT THEY NOW MUST PAY ORACLE AND
10 THE COURT WILL GIVE YOU INSTRUCTIONS ON THIS VERY QUESTION. THE
11 FAIR MARKET VALUE OF A LICENSE IS WHAT A WILLING BUYER -- A
12 WILLING AND PRUDENT BUYER AND A WILLING AND PRUDENT SELLER WOULD
13 HAVE AGREED UPON AT THE TIME THE INFRINGEMENT BEGAN.

14 AND I'M GOING TO COME BACK TO THAT AGAIN, BUT I WANT
15 TO EMPHASIZE AT THE TIME THE INFRINGEMENT BEGAN. THIS IS THE
16 REAL-WORLD VALUE OF WHAT DEFENDANTS TOOK. BUT DEFENDANTS WOULD
17 HAVE HAD TO PAY ON JANUARY 19TH, 2005, TO GET THE RIGHT TO USE
18 THE COPYRIGHTED MATERIAL THAT THEY TOOK.

19 WE CALL THIS A HYPOTHETICAL LICENSE, BUT IT'S ONLY
20 HYPOTHETICAL BECAUSE DEFENDANTS DID NOT, AS THEY SHOULD HAVE,
21 ACTUALLY NEGOTIATE THE LICENSE IN JANUARY OF 2005.

22 NOW, THE COURT WILL INSTRUCT YOU THAT THE VALUE OF A
23 HYPOTHETICAL LICENSE IS NOT NECESSARILY THE AMOUNT THE
24 DEFENDANTS IN THIS CASE WOULD HAVE PAID OR THAT ORACLE WOULD
25 HAVE ACTUALLY AGREED TO ACCEPT.

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CLOSING ARGUMENT \ BOIES
1 WHAT HAPPENS IS YOU TAKE A WILLING BUYER AND A
2 WILLING SELLER AND YOU SAY WHAT WOULD THEY HAVE PAID? WHAT

3 WOULD ORACLE AND SAP HAVE PAID IF YOU PUT THEM IN A COURTROOM
4 AND SAID, YOU GOT TO AGREE. WHAT WOULD THEY HAVE PAID BACK IN
5 JANUARY 19TH OF 2005?

6 NOW, CAN WE GO TO NO. 70?

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 MR. BOIES: DEFENDANTS CANNOT NOW SAY AFTER THEY'VE
9 BEEN CAUGHT THAT THEY DON'T WANT A LICENSE BECAUSE THE LICENSE
10 IS TOO EXPENSIVE. THE LAW DOESN'T GIVE THEM THAT CHOICE.
11 DEFENDANTS ARE IN THE POSITION THAT THEY ARE BECAUSE THEY
12 ILLEGALLY TOOK AND USED SOMEONE ELSE'S PROPERTY. AND THEY MUST
13 PAY WHAT IT WOULD HAVE COST TO HAVE THE RIGHT TO USE IT
14 PROPERLY.

15 NOR CAN DEFENDANTS SAY THAT THEY SHOULD NOT HAVE TO
16 PAY THE FULL VALUE OF A LICENSE BECAUSE THEY WERE NOT AS
17 SUCCESSFUL AS THEY PLANNED. YOU HEARD A LOT OF TALK ABOUT THE
18 FACT THAT THEY THOUGHT THEY WERE GOING TO GET THOUSANDS OF
19 CUSTOMERS BUT THEY ONLY GOT 258.

20 THE LICENSE THAT THE COURT WILL TELL YOU GETS
21 NEGOTIATED BACK ON JANUARY 19TH. WHAT THEY KNEW THEN, NOT WHAT
22 THEY PROJECTED LATER, NOT WHAT THEY LATER BELIEVED, NOT EVEN
23 WHAT THEY LATER LEARNED.

24 PEOPLE TALK ABOUT REALITY TESTING. THE REALITY
25 TESTING HAS GOT TO GO ON IN JANUARY OF 2005. YOU'VE GOT TO LOOK
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CLOSING ARGUMENT \ BOIES
1 AT THE OBJECTIVE FACTS IN JANUARY 2005, NOT WHAT HAPPENED
2 AFTERWARDS. AND THE COURT WILL SO INSTRUCT YOU.

3 NOW, LET'S -- LET'S GO TO THAT FAIR MARKET VALUE
4 LICENSE. AND I SAID I WANTED TO FOCUS ON THE FACT OF WHEN IT --
5 WHEN YOU HAD TO ACTUALLY LOOK AT THE TIME, AND THIS ACTUALLY WAS
6 AGREED TO BY BOTH MR. CLARKE AND MR. MEYER.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 MR. BOIES: MR. MEYER SAID THAT HE FOCUSED ON WHAT
9 WAS KNOWN AT THE TIME OF THE NEGOTIATION. THAT'S AT TRANSCRIPT
10 908. AND MR. CLARKE WAFFLED AROUND ON THIS A LITTLE BIT,
11 PARTICULARLY ON DIRECT EXAMINATION. BUT ON CROSS-EXAMINATION, I
12 PINNED HIM DOWN, AND I ASKED HIM THESE QUESTIONS.

13 "Q. NOW, THE VALUATION DATE FOR THAT
14 LICENSE WOULD HAVE BEEN EITHER JANUARY 18TH OR
15 JANUARY 19TH OF 2005?

16 "A. YES.

17 "AND WHEN YOU ARE VALUING SOMETHING AS OF A
18 VALUATION DATE, YOU NEED TO LOOK AT THE STATE OF
19 AFFAIRS THAT EXISTS AT THAT TIME, NOT SOME OTHER
20 TIME. FAIR?

21 "A. YES.

22 "SO WHAT YOU WOULD BE LOOKING AT IS WHAT WOULD
23 HAVE BEEN IN THE MINDS OF SAP AND ORACLE ON
24 JANUARY 18TH OR JANUARY 19TH, CORRECT?

25 "A. YES."

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CLOSING ARGUMENT \ BOIES
1 THAT'S VERY IMPORTANT BECAUSE WHAT THAT MEANS IS THAT
2 YOU'VE GOT TO LOOK AT WHAT IS IN EFFECT AT THAT TIME, AND --
3 CAN WE PUT UP THE COURT'S INSTRUCTION NO. 9?
4 THIS IS AN INSTRUCTION THAT THE COURT IS GOING TO
5 GIVE YOU.

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 MR. BOIES: AND IF WE CAN -- IF WE CAN BLOW UP THE
8 FIRST PARAGRAPH SO MAYBE WE CAN READ IT.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: IT SAYS THAT THE FAIR MARKET VALUE IS AN
11 OBJECTIVE MEASURE -- AND THIS IS WHAT THE COURT'S GOING TO
12 INSTRUCT YOU -- OF ORACLE'S DAMAGES THAT IS MEANT TO APPROXIMATE
13 THE FAIR MARKET VALUE OF A LICENSE FOR ALL OF THE COPYRIGHTS
14 DEFENDANTS INFRINGED CALCULATED AT THE TIME THE INFRINGEMENT
15 COMMENCED, WHICH THE PARTIES AGREE IS JANUARY 19TH, 2005, FOR
16 PEOPLESOFT, JD EDWARDS, AND DATABASE COPYRIGHTS INFRINGED AND
17 SEPTEMBER 29, 2006 FOR THE SIEBEL COPYRIGHTS INFRINGED.

18 SO THAT'S THE TIME THAT YOU HAVE TO LOOK AT. YOU
19 HAVE TO LOOK AT WHAT EXISTS AT THE TIME.

20 NOW, CAN WE BLOW UP THE NEXT PARAGRAPH?

21 (DEMONSTRATIVE PUBLISHED TO JURY.)

22 MR. BOIES: AND THE NEXT ONE, TOO.
23 (DEMONSTRATIVE PUBLISHED TO JURY.)
24 MR. BOIES: YOU MAY CONSIDER EVIDENCE OF EVENTS AND
25 FACTS THAT HAPPENED AFTER THE DATE OF THE HYPOTHETICAL
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CLOSING ARGUMENT \ BOIES
1 NEGOTIATION ONLY TO THE EXTENT THAT IT PROVIDES INSIGHT INTO THE
2 EXPECTATION OF THE PARTIES AT THE TIME THE INFRINGEMENT FIRST
3 BEGAN OR INSIGHT INTO THE AMOUNT A WILLING BUYER WOULD HAVE BEEN
4 REASONABLY REQUIRED TO PAY A WILLING SELLER AT THE TIME OF THE
5 INFRINGEMENT.

6 THAT IS, YOU CAN LOOK AT SOME DOCUMENTS DATED LATER
7 AS THEY TALK ABOUT WHAT THEIR EXPECTATIONS WERE OR WHAT THE
8 FACTS WERE BACK IN JANUARY OF 2005 FOR PEOPLESOFT. BUT YOU
9 CAN'T SAY, WELL, THEIR EXPECTATIONS IN JANUARY WERE WRONG. YOU
10 CAN'T SAY WE NOW KNOW MORE BECAUSE THE LICENSE WOULD HAVE BEEN
11 NEGOTIATED BACK IN JANUARY OF 2005. AND AS THE COURT WILL
12 INSTRUCT YOU, THAT IS THE TIME PERIOD YOU HAVE TO LOOK AT.

13 AND THE REASON THAT'S SO CRITICAL AND THE REASON I
14 KEEP TALKING ABOUT THAT IS BECAUSE YOU'VE HEARD A LOT OF, QUOTE,
15 REALITY TESTING ARGUMENTS FROM THE OTHER SIDE TO TRY TO CONFUSE
16 TWO THINGS.

17 OF COURSE, YOU LOOK AT THE REALITY AT THE TIME OF THE
18 NEGOTIATION. THOSE KIND OF REALITY CHECKS, YOU MUST MAKE. YOU
19 MUST LOOK AT WHAT PEOPLE REALLY EXPECTED, WHAT THE FACTS REALLY
20 WERE IN JANUARY. BUT YOU DO NOT TAKE FACTS THAT YOU BELIEVE OR
21 KNEW IN 2006, 2007, 2008, OR 2009 AND TRY TO IMPORT THEM BACK
22 INTO JANUARY. THAT'S EXACTLY WHAT MR. MEYER AND MR. CLARKE AND
23 ON CROSS-EXAMINATION SAID YOU DIDN'T DO, AND IT'S EXACTLY WHAT
24 THE COURT WILL INSTRUCT YOU IS NOT TO BE DONE.

25 NOW, LET ME TURN TO WHAT THE FAIR MARKET VALUE
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2053

CLOSING ARGUMENT \ BOIES
1 FACTORS ARE.
2 (DEMONSTRATIVE PUBLISHED TO JURY.)
3 MR. BOIES: FIRST, IT'S IMPORTANT TO KEEP IN MIND

4 THAT THE FAIR MARKET VALUE LICENSE HAS TO TAKE INTO ACCOUNT ALL
5 OF THE OBJECTIVES THAT SAP HAD. NOT JUST SOME OF THEM, ALL OF
6 THE OBJECTIVES.

7 TO THE EXTENT THAT SAP HAD GOALS OTHER THAN SIMPLY
8 GAINING CUSTOMERS OR REVENUE -- AND I'VE GOT A CHART, NO. 80,
9 THAT TALKS ABOUT THIS.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 MR. BOIES: FOR EXAMPLE, DISRUPTING AND DISCREDITING
12 ORACLE BY USING ORACLE'S OWN SOFTWARE AGAINST IT. THOSE
13 OBJECTIVES ALSO HELP VALUE THE REQUIRED LICENSE BECAUSE THEY
14 AFFECT WHAT A WILLING BUYER WOULD PAY. LOOK AT WHAT SAP SAID
15 INTERNALLY IN CONFIDENTIAL PRESENTATIONS, CONFIDENTIAL ANALYSES
16 AS TO WHY THEY WANTED TO DO THIS.

17 THAT'S WHAT'S GOING TO INFORM YOUR JUDGMENT AS TO
18 WHAT THE VALUE THEY PUT ON THIS INFRINGEMENT WAS.

19 AND IF YOU SEE THEM SAYING, WELL, ONLY THING WE CARE
20 ABOUT IS REVENUE, THEN YOU LOOK AT REVENUE. BUT IF THEY SAY WE
21 WANT REVENUE, YES, BUT WE WANT CUSTOMERS EVEN MORE, EVEN IF THEY
22 DON'T GIVE US REVENUE. THEN YOU'VE GOT TO TAKE INTO ACCOUNT THE
23 NUMBER OF CUSTOMERS.

24 AND IF THEY SAY WE WANT TO DISRUPT ORACLE -- INDEED,
25 SOMETIMES WE WANT TO DISRUPT ORACLE EVEN MORE THAN WE WANT THE
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2054

CLOSING ARGUMENT \ BOIES
1 REVENUE -- THEN YOU'VE GOT TO TAKE INTO ACCOUNT THE DISRUPTION
2 OF ORACLE IN TERMS OF WHAT IS THE VALUE THAT SAP -- BECAUSE WHEN
3 YOU HAVE ORACLE AND SAP SITTING DOWN TO NEGOTIATE THIS
4 HYPOTHETICAL LICENSE, AS MR. MEYER SAID, AS MR. CLARKE SAID,
5 WHAT'S IN THEIR MINDS IS WHAT'S -- WHAT IS THE VALUE THAT SAP
6 THINKS IT'S GOING TO GET? WHAT'S THE THREAT THAT ORACLE HAS?
7 WHAT IS ORACLE GIVING UP? THOSE TWO THINGS. YOU GOT TO VALUE
8 THOSE AS OF THE 19TH OF JANUARY, 2005.

9 NOW, THE FACTORS, WHAT ARE SOME OF THE FACTORS?

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 MR. BOIES: WELL, YOU'VE HEARD THESE FACTORS FROM
12 BOTH OF THE EXPERT WITNESSES. ONE FACTOR IS SCOPE AND DURATION

13 OF LICENSE. ANOTHER FACTOR IS EACH PARTY'S NEED FOR THE
14 COPYRIGHTED PROPERTY. ANOTHER FACTOR IS THAT SAP'S WILLINGNESS
15 TO ASSUME RISK OF INFRINGEMENT LIABILITY IS AN ADMISSION OF
16 VALUE.

17 ANOTHER FACTOR IS THE COMPETITIVE RELATIONSHIP OF THE
18 PARTIES. ANOTHER FACTOR IS WHAT WERE THEIR GOALS AND BUSINESS
19 PLANS RELATED TO THE COPYRIGHTED PROPERTY.

20 ANOTHER FACTOR IS WHAT FINANCIAL BENEFITS DID THEY
21 EXPECT. AND ANOTHER FACTOR IS WHAT NON-FINANCIAL BENEFITS DID
22 THEY EXPECT. SO THESE ARE WHAT THEY WOULD BE TAKING INTO
23 ACCOUNT.

24 AND I WANT TO GO THROUGH THESE FACTORS WITH YOU
25 BECAUSE I THINK THAT WILL HELP YOU UNDERSTAND WHY THE VALUE OF
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2055

CLOSING ARGUMENT \ BOIES
1 THIS FAIR MARKET VALUE LICENSE IS SO HIGH.

2 AND LET ME GO TO 129.

3 (DEMONSTRATIVE PUBLISHED TO JURY.)

4 MR. BOIES: LET ME STAY WITH ONE -- LET ME STAY WITH
5 THAT ONE THAT YOU PUT UP. LET ME STAY THERE BECAUSE THIS TALKS
6 ABOUT THE INFRINGEMENT WAS SO MASSIVE.

7 AND THIS IS KEVIN MANDIA TESTIFYING. AND FOR FIXES
8 THAT PREDOMINATED AFTER JANUARY 1ST OF 2005, THE CROSS-USE --
9 AND THAT'S ILLEGAL -- ACTUALLY GOES UP FROM PRIOR TO JANUARY OF
10 2005 TO AFTER -- GOES FROM 90 PERCENT, WHICH WAS PRETTY HIGH, TO
11 94 PERCENT.

12 NOW, THERE ARE TWO THINGS TO KEEP IN MIND ABOUT THAT.
13 ONE IS THAT'S A LOT OF INFRINGEMENT. TWO, THE LEVEL OF
14 INFRINGEMENT IS ACTUALLY GOING UP AFTER SAP ACQUIRED IT. YOU'RE
15 GOING TO HEAR SOME TALK ABOUT HOW SAP DIDN'T REALLY WANT THEM TO
16 INFRINGE. WE'RE GOING TO COME TO THAT IN DETAIL, BUT FOCUS ON
17 THE FACT THAT THE EXTENT OF THE INFRINGEMENT WAS ACTUALLY GOING
18 UP AFTER SAP ACQUIRED TOMORROWNOW.

19 NOW, LET ME GO TO 120.

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 MR. BOIES: NEITHER ORACLE NOR SAP WOULD EVER HAVE
22 LICENSED A MAJOR COMPETITOR TO USE THEIR OWN SOFTWARE TO TAKE

23 AWAY THEIR CUSTOMERS EXCEPT FOR A VERY LARGE LUMP-SUM PAYMENT.

24 NOW, YOU REMEMBER I ASKED MR. BRANDT --

25 (DEMONSTRATIVE PUBLISHED TO JURY.)

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2056

CLOSING ARGUMENT \ BOIES

1 MR. BOIES: -- WHETHER HE WAS AWARE OF ANYONE AT SAP
2 EVER TRYING TO LICENSE THE BASIC SOFTWARE OF A COMPETITOR TO USE
3 TO COMPETE WITH THAT COMPETITOR FOR MAINTENANCE? AND HE'S NOT
4 FAMILIAR WITH ANY EXAMPLE OF THAT. THAT TELLS YOU HOW UNIQUE
5 THIS LICENSE WAS.

6 AND I ALSO ASKED HIM WHETHER HE HAD ANY IDEA OR
7 UNDERSTANDING AS TO HOW MUCH SAP WOULD CHARGE FOR THAT LICENSE.
8 SAP CAME IN AND TOOK ORACLE'S SOFTWARE TO USE AGAINST IT WITHOUT
9 A LICENSE. AND NOW THEY'VE GOT TO PAY FOR THAT LICENSE.

10 AND SO ONE OF THE THINGS I WAS ASKING HIM WAS, WELL,
11 REVERSE THE SITUATION. SUPPOSE ORACLE WAS TAKING YOUR SOFTWARE,
12 HOW MUCH WOULD YOU WANT FOR THAT? NO ANSWER. SAYS HE DOESN'T
13 HAVE AN ANSWER, AND HE'S THE CHIEF FINANCIAL OFFICER OF SAP. IF
14 THE CHIEF FINANCIAL OFFICER DOESN'T HAVE AN ANSWER, WHO WOULD?

15 NOW, I ALSO ASKED MR. CLARKE --

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 MR. BOIES: -- WHETHER HE HAD EVER INVESTIGATED WHAT
18 SAP WOULD HAVE DEMANDED IF IT WERE TO GIVE ORACLE THE SAME
19 LICENSE THAT IT NEEDED FROM ORACLE TO DO WHAT IT DID.

20 NO. HE NEVER EVEN INVESTIGATED THAT.

21 DID YOU EVER HAVE ANY CONVERSATIONS WITH ANYONE FROM
22 SAP AS TO HOW MUCH SAP WOULD DEMAND FOR A LICENSE TO ALLOW ITS
23 COMPETITOR ORACLE TO MAINTAIN SAP'S SOFTWARE?

24 AGAIN, NO. HE NEVER EVEN INVESTIGATED THAT.

25 NOW, THERE WAS SOME TALK, MOSTLY IN THE FORM OF

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2057

CLOSING ARGUMENT \ BOIES

1 QUESTIONS AS OPPOSED TO TESTIMONY THAT SOMEHOW THE DATABASE
2 LICENSE, THE RESELLERS' LICENSE THAT EXISTED, WAS SOMEHOW
3 COMPARABLE TO THIS. SO I ASKED MR. MCDERMOTT, WHO, WHEN HE

4 TESTIFIED, WAS THE CHIEF EXECUTIVE OFFICER OF SAP.

5 I ASKED HIM,

6 "THE DATABASE LICENSE THAT YOU REFER TO IS
7 SOMETHING THAT DOES NOT INVOLVE YOU, SAP, TRYING TO
8 USE THAT SOFTWARE TO TAKE AWAY ORACLE'S CUSTOMERS,
9 CORRECT, SIR?

10 "OF COURSE NOT."

11 THAT'S WHAT THEIR OWN CHIEF EXECUTIVE OFFICER SAYS.

12 OF COURSE THAT'S DIFFERENT.

13 AND I ASKED HIM WHETHER OR NOT HE SAW ANY DISTINCTION
14 BETWEEN A WIN/WIN SITUATION LIKE THE DATABASE SITUATION WHERE --
15 AND THE SITUATION WHERE YOU'RE ACTUALLY TRYING TO TAKE AWAY
16 ORACLE'S CUSTOMERS.

17 AND HE SAID YES.

18 AND I SAID,

19 "NOW, FOCUSING ON THE SITUATION WHERE YOU'RE
20 ACTUALLY USING COMPETITOR SOFTWARE TO TRY TO TAKE
21 AWAY THEIR CUSTOMERS, DO YOU HAVE ANY LICENSES LIKE
22 THAT?

23 "A. I DON'T."

24 SO IF YOU HEAR ARGUMENT THAT SOMEHOW THERE ARE OTHER
25 LICENSES LIKE THE LICENSE THAT SAP PROPOSES IN THIS CASE, THINK
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2058

CLOSING ARGUMENT \ BOIES

1 ABOUT MR. MCDERMOTT'S TESTIMONY ON THAT VERY SUBJECT, BECAUSE
2 WHAT MR. MCDERMOTT IS SAYING IS EXACTLY WHAT THE ORACLE
3 WITNESSES HAVE SAID, WHICH IS THAT THIS IS A VERY UNIQUE AND
4 WOULD HAVE TO BE A VERY EXPENSIVE LICENSE, BECAUSE IT'S TAKING
5 THEIR OWN SOFTWARE TO USE AGAINST THEM TO TAKE AWAY THEIR
6 CUSTOMERS.

7 NOW, YOU REMEMBER ANOTHER ONE OF THE FACTORS WAS WHAT
8 WAS THE VALUE TO ORACLE OF WHAT ORACLE WAS GIVING UP.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: AND START WITH THE FACT THAT ORACLE HAD
11 JUST PAID \$11.1 BILLION TO ACQUIRE PEOPLESOFT AND \$6.1 BILLION
12 TO ACQUIRE SIEBEL. AND WE KNOW FROM THEIR CONTEMPORANEOUS
13 DOCUMENTS SOME OF THE THINGS THAT WERE IMPORTANT TO ORACLE IN

14 THAT CASE.

15 (DEMONSTRATIVE PUBLISHED TO JURY.)

16 MR. BOIES: THIS IS PTX4809. AND AT THE BOTTOM, YOU
17 CAUGHT -- YOU SEE THEY'RE TALKING ABOUT THE PEOPLESOFT
18 1.2 BILLION REVENUE IN SUPPORT BUSINESS OVER THE LAST FOUR
19 QUARTERS THAT'S GOING TO GROW 8 PERCENT A YEAR. THAT'S WHAT
20 THEY'RE COUNTING ON.

21 NOW, \$1.2 BILLION IN REVENUE DRAWING 8 PERCENT A YEAR
22 OVER THE FIRST FOUR YEARS IS \$5.4 BILLION, AS IS INDICATED ON
23 CHART 146.

24 IF PERMITTING SAP AND TOMORROWNOW TO COMPETE FOR
25 THOSE REVENUES, USING ORACLE'S OWN SOFTWARE PUT EVEN HALF OF
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2059

CLOSING ARGUMENT \ BOIES
1 THOSE REVENUES AT RISK, THAT LICENSE WOULD HAVE TO BE
2 \$2.7 BILLION FOR THIS COMPONENT ALONE.

3 THAT'S WHAT ORACLE WAS COUNTING ON. THAT'S WHAT
4 ORACLE WAS GIVING UP. THAT'S WHAT ORACLE IN THIS HYPOTHETICAL
5 LICENSE SITUATION WOULD BE SAYING. WE COUNTED ON \$5.4 BILLION
6 OF MAINTENANCE REVENUE IN DOING THIS DEAL. IF YOU WANT US TO
7 ALLOW YOU TO TAKE A LOT OF THAT BY COMPETING WITH US, YOU'VE GOT
8 TO PAY US FOR IT.

9 NOW, IN ADDITION TO THAT, THEY HAD OTHER OBJECTIVES.

10 (DEMONSTRATIVE EXHIBIT PUBLISHED TO JURY.)

11 MR. BOIES: THEY WANTED AN EXPANDED CUSTOMER BASE
12 WITH GREATER SCALE AND LARGER R & D BUDGET. THESE WERE ALSO
13 ORACLE'S OBJECTIVES IN THE PEOPLESOFT AND SIEBEL ACQUISITIONS,
14 AND THOSE WERE EXACTLY THE OBJECTIVES THAT SAP SAID IT PLANNED
15 TO DISRUPT.

16 FOR EXAMPLE, IF YOU LOOK AT PAGE 150, CHART 150, IN
17 TERMS --

18 (DEMONSTRATIVE PUBLISHED TO JURY.)

19 MR. BOIES: THIS IS AGAIN THE ORACLE DOCUMENT AT THE
20 TIME. THIS IS THE ORACLE DOCUMENT AT THE TIME OF THE
21 ACQUISITION, AND THIS IS TALKING ABOUT THE RATIONALE FOR THE
22 PEOPLESOFT ACQUI- -- TRANSACTION, EXPANDED CUSTOMER BASE WITH

23 GREATER SCALE, LARGER R & D BUDGET, AND ACCELERATED INNOVATION.
24 THAT'S WHAT THEY'RE EXPECTING TO GET.
25 AND YOU REMEMBER MS. CATZ TESTIFIED THAT THESE
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2060

CLOSING ARGUMENT \ BOIES
1 WERE -- THIS WAS THE BASIS UPON WHICH THIS TRANSACTION WAS DONE.

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 MR. BOIES: NOW, LET ME TURN TO THE SCOPE. AND LET
4 ME START WITH NUMBER TEN JUST TO SHOW YOU THE DIFFERENT WAYS
5 THAT THIS --

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 MR. BOIES: -- ILLEGAL COPYING TOOK PLACE.

8 YOU HAD DOWNLOAD, YOU HAD SOFTWARE CD, YOU HAD THE
9 DEVELOPMENT ENVIRONMENTS.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 MR. BOIES: THEY USED IT TO CONSTRUCT THE LIBRARY AND
12 THEN TO MARKET AND PROVIDE MAINTENANCE AND SUPPORT INCLUDING
13 FIXES AND UPDATES BASED ON THAT LIBRARY.

14 NOW, THIS WAS A MASSIVE UNDERTAKING. YOU HEARD BY
15 VIDEOTAPE JOHN RITCHIE, TOMORROWNOW'S SENIOR SERVICE AUTOMATION
16 DEVELOPER, TESTIFY ABOUT SOMETHING CALLED TITAN. AND TITAN WAS
17 ONE OF THESE SCRAPERS THAT WENT OUT AND TOOK ALL OF THE ORACLE
18 DATABASE, ALL OF THE ORACLE PEOPLESOFT, ALL OF THE ORACLE
19 JD EDWARDS SOFTWARE THAT IT COULD GET.

20 AND IT SAID -- HE SAYS,

21 "TITAN WAS HAMMERING THEIR SERVICE SO HARD,
22 DOWNLOADING THOUSANDS OF THOUSANDS OF DOCUMENTS, I
23 COULD SEE MANY TIMES THE SERVERS WOULD CRASH. THEY
24 WERE SUCKING THE SOFTWARE OUT SO HARD, SO FAST, SO
25 EXTENSIVELY THAT THEY WOULD ACTUALLY CRASH THE ORACLE
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2061

CLOSING ARGUMENT \ BOIES
1 SERVER."

2 NOW, THE -- TOMORROWNOW EMPLOYEES THAT WERE DOING
3 THIS OPENLY, ADMITTED THAT THIS WAS UNLAWFUL. THEY KNEW THIS.
4 THESE ARE THE INSTANT MESSAGES WE'VE SEEN BEFORE.

5 (DEMONSTRATIVE PUBLISHED TO JURY.)
6 MR. BOIES: THIS IS THE TIME -- THIS IS THE DATE THAT
7 THE COMPLAINT IN THIS CASE BECOMES PUBLIC. WHAT DO THEY SAY?

8 "I THINK THEY CAUGHT US. I WONDER WHO ON THE
9 INSIDE TOLD."

10 AND YOU SEE THEM WORRYING WHAT'S GOING TO HAPPEN TO
11 THEM.

12 "I HOPE NO ONE GETS BLAMED FOR THIS. EVERYONE
13 WAS JUST FOLLOWING ORDERS FROM ABOVE."

14 NOW, THIS ILLEGAL INFRINGEMENT STARTED JANUARY 19TH,
15 2008 (SIC), AND CONTINUED AS WE INDICATE ON 1-2-3, UNTIL OCTOBER
16 OF 2008, THE BROAD SCOPE OF REQUIRED LICENSE IS NOW ADMITTED BY
17 DEFENDANTS AND THEIR EXPERTS.

18 AND ONE OF THE DOCUMENTS THAT I'D ASKED YOU TO TAKE A
19 LOOK AT IN YOUR DELIBERATIONS, PTX7028 --

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 MR. BOIES: -- WHICH I'VE GOT ON THE SCREEN HERE.
22 AND IT'S VERY HARD TO READ. I'M NOT GOING TO TRY TO BLOW IT UP
23 ENOUGH FOR YOU TO READ IT HERE. BUT THIS IS SOMETHING THAT
24 SHOWS THE SCOPE OF THE LICENSE, AND THIS WAS AGREED TO BY BOTH
25 EXPERTS. BOTH EXPERTS, MR. MEYER, MR. CLARKE -- YOU WON'T HEAR
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2062

CLOSING ARGUMENT \ BOIES
1 ANY DISAGREEMENT FROM THE DEFENSE COUNSEL IN THEIR -- IN THEIR
2 ARGUMENT TO YOU ON THIS POINT -- AGREED THAT THIS WAS THE SCOPE.

3 I WANT YOU TO LOOK AT HOW BROAD THIS SCOPE IS.
4 BECAUSE THAT IS SCOPE OF THE LICENSE THAT THEY'VE GOT TO PAY
5 FOR.

6 AND MR. MANDIA -- THIS IS AT CHART 137.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 MR. BOIES: -- TALKED ABOUT THE SCOPE OF LICENSE THAT
9 WAS REQUIRED. HE TALKED ABOUT HOW TN HAD OVER A MILLION
10 INFRINGING DOWNLOADS OF ORACLE'S SUPPORT MATERIALS. OVER A
11 MILLION INFRINGING DOWNLOADS. HE TALKED ABOUT HOW TOMORROWNOW
12 COPIED MILLIONS OF UPDATES AND SUPPORT MATERIALS.

13 HE TALKED ABOUT HOW TOMORROWNOW COUNTED APPROXIMATELY

14 5 MILLION ORACLE SUPPORT FILES ON ITS SYSTEM IN 2008.

15 NOW, WE PRESENTED MR. MANDIA, WHO'S ONE OF THE
16 COUNTRY'S LEADING EXPERTS ON IMPROPER COMPUTING -- COMPUTER
17 TAKING, AND HE TALKED ABOUT THE INVESTIGATION HE DID.

18 I WANT YOU TO THINK ABOUT WHEN YOU GO INTO THE JURY
19 ROOM WHY WE'RE THE ONLY PEOPLE THAT BROUGHT INTO COURT SOMEBODY
20 TO TALK ABOUT THE ACTUAL EXTENT OF THE COPYING, THE ACTUAL
21 EXTENT OF THE USE OF THE IMPROPER USE. THEY DIDN'T TRY TO
22 ADDRESS THIS.

23 AND I SUGGEST TO YOU, LADIES AND GENTLEMEN OF THE
24 JURY, THAT WHEN THEY DON'T DISPUTE WHAT MR. MANDIA DOES, THAT
25 SPEAKS VOLUME (SIC) AS TO THE TRUTH AND ACCURACY OF WHAT
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2063

CLOSING ARGUMENT \ BOIES

1 MR. MANDIA WAS TELLING YOU. I THINK YOU THOUGHT MR. MANDIA -- I
2 HOPE YOU THOUGHT MR. MANDIA WAS A VERY CREDIBLE WITNESS. HE'S
3 CERTAINLY A VERY ACCOMPLISHED PERSON, PERSON WITH GREAT
4 INTEGRITY. THAT'S WHY HE WAS HIRED TO INVESTIGATE THIS ISSUE.
5 BUT YOU DON'T EVEN HAVE ANY CONFLICT BETWEEN HIM AND ANYBODY
6 ELSE, 'CAUSE THEY NEVER BROUGHT ANYBODY TO DISPUTE WHAT
7 MR. MANDIA SAID ABOUT THE EXTENSIVE, EXTENSIVE USE.

8 AND FOR EXAMPLE, AT 136 --

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: -- WE TALK ABOUT WHAT MR. MANDIA --
11 MANDIA FOUND WHEN HE DID HIS INVESTIGATION.

12 WE FOUND -- THIS IS A, QUOTE -- OVER 10 MILLION
13 ORACLE FILES HAD BEEN DOWNLOADED BY TOMORROWNOW. THAT'S WHAT
14 HAPPENED TO BE THERE WHEN WE DID OUR INVESTIGATION AND REACHED
15 INTO TOMORROWNOW'S SERVERS.

16 NOW, WE ALSO DID THE TRIAL STIPULATION. THESE ARE
17 STIPULATED FACTS. YOU'VE HAD THEM IN YOUR JURY NOTEBOOKS.
18 YOU'LL HAVE THEM IN YOUR STIPULATION. THIS IS TRIAL STIPULATION
19 ORDER NO. 3, JOINT TRIAL EXHIBIT NO. 2. IT TALKS ABOUT COPIES
20 OF CERTAIN ORACLE SOFTWARE. IT TALKS ABOUT 6189 COPIES OF
21 ORACLE'S PEOPLESFT SOFTWARE. EACH COPY CONSTITUTED AN
22 INFRINGEMENT. THAT'S 6189 INFRINGEMENTS. THAT'S IN PARAGRAPH
23 16.

24 BUT PARAGRAPH 11 IS IMPORTANT, TOO, BECAUSE IT SAYS
25 THE COUNTS OF SOFTWARE COPIES AND DOWNLOADS REFLECTED IN THE
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2064

CLOSING ARGUMENT \ BOIES
1 STIPULATION ARE MINIMUM NUMBERS. THE ACTUAL NUMBERS MAY BE
2 HIGHER. AND THAT'S IMPORTANT BECAUSE WE CAN'T GO BACK AND
3 RE-CREATE EVERYTHING THAT EXISTED. ALL WE CAN DO IS FIND
4 PARTICULAR THINGS THAT WE CAN PROVE. WE CAN PROVE SOME OF THE
5 THINGS THEY DID. WE CAN'T PROVE ALL OF THE THINGS THEY DID. SO
6 WHAT YOU'RE HEARING IS ONLY PART OF THE ILLEGAL CONDUCT THAT
7 WENT ON.

8 BUT EVEN THAT PART IS PRETTY MASSIVE.

9 AND HOW DID THEY USE THIS?

10 GO TO 128.

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: TOMORROWNOW USED ORACLE SOFTWARE TO
13 CREATE AND STORE A MASTER LIBRARY OF THOUSANDS OF COPIES OF
14 INFRINGING COPIES OF ORACLE ENTERPRISE APPLICATION SOFTWARE ON
15 ITS SERVERS. SO CREATE -- USED THE SOFTWARE TO CREATE THIS
16 LIBRARY. THEY THEN USED THAT SOFTWARE TO BUILD A MASTER LIBRARY
17 OF MILLIONS OF COPIES OF ORACLE'S DOWNLOADED SUPPORT MATERIALS.

18 THEY THEN USED THOSE LIBRARIES TO SERVICE CUSTOMERS
19 THAT THEY WERE ABLE TO GET AND TO OFFER THIS SERVICE TO
20 THOUSANDS OF ADDITIONAL CUSTOMERS. THAT'S HOW THEY USED IT.

21 AND LET ME GO TO 250.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: THEY USED IT TO PROVIDE TECHNICAL SUPPORT
24 MAINTENANCE. THEY USED IT TO LURE ORACLE CUSTOMERS TO SAP.
25 THEY USED IT TO ESTABLISH CUSTOMER RELATIONSHIPS. THEY USED IT
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2065

CLOSING ARGUMENT \ BOIES
1 TO START CONVERSATIONS WITH CUSTOMERS. AND YOU REMEMBER
2 MR. MCDERMOTT TESTIFYING HOW IMPORTANT THAT WAS TO GET THE
3 CUSTOMER IN THE CONVERSATION SO THAT YOU CAN SELL THEM THE SAP
4 SOFTWARE.

15 MAINTENANCE IS ONE OF THREE FUNDAMENTAL ELEMENTS.
16 PTX119 -- PTX23, WHICH WAS JANUARY 19TH, 2005, SAYS
17 THE OFFERING OF MAINTENANCE IS ONE OF THREE KEY COMPONENTS
18 THEY'RE TALKING ABOUT AS FUNDAMENTAL ELEMENTS. KEY COMPONENTS.
19 MR. BRANDT'S WORD, VERY IMPORTANT.
20 THOSE WORDS, THOSE PHRASES, THOSE CONCLUSIONS DO NOT
21 EQUATE TO VERY, VERY SMALL, LADIES AND GENTLEMEN.
22 NOW, LET ME GO TO ONE -- 156. 155. 155.
23 IF MAINTENANCE IS IMPORTANT, DOES THAT MEAN
24 TOMORROWNOW IS IMPORTANT? WELL, LET'S SEE WHAT SAP SAID.
25 (DEMONSTRATIVE PUBLISHED TO JURY.)
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2067

CLOSING ARGUMENT \ BOIES
1 MR. BOIES: SAP SAID DECEMBER 17TH BEFORE THEY
2 ACQUIRED TOMORROWNOW, OUR RESEARCH HAS NOT PROVIDED US WITH ANY
3 MEANINGFUL COMPETITORS FOR TOMORROWNOW IN THIS SPACE. IN FACT,
4 THE ONLY VENDOR RECOMMENDED BY GARTNER FOR THIS THIRD-PARTY
5 MAINTENANCE IS TOMORROWNOW. THAT'S WHY TOMORROWNOW WAS
6 IMPORTANT.
7 GO TO THE NEXT CHART. PTX19 AND PTX24 SAY THE SAME
8 THING.
9 (DEMONSTRATIVE PUBLISHED TO JURY.)
10 MR. BOIES: PTX19, TOMORROWNOW IS THE ONLY MEANINGFUL
11 NORTH AMERICAN PROVIDER, PEOPLESOFT MAINTENANCE SERVICES.
12 (DEMONSTRATIVE PUBLISHED TO JURY.)
13 MR. BOIES: PTX24, SAFE PASSAGE WAS PREMISED ON SAP
14 BEING ABLE TO OFFER FULL PRODUCT MAINTENANCE AND SUPPORT THROUGH
15 TOMORROWNOW.
16 LET ME GO TO 158 AND GO DOWN TO THE PTX23.
17 (DEMONSTRATIVE PUBLISHED TO JURY.)
18 MR. BOIES: THE TOMORROWNOW ACQUISITION REALLY HELPS
19 US HOLD OVER THE PEOPLESOFT JD EDWARDS CUSTOMERS. QUOTE.
20 THAT'S WHAT SAP WAS SAYING ON JANUARY 19TH, 2005, JANUARY 19TH,
21 2005, THE EXACT DATE OF THE HYPOTHETICAL LICENSE NEGOTIATION.
22 NOW, LET'S LOOK AT SOME OTHER DOCUMENTS, SAP
23 DOCUMENTS. LET'S SEE WHETHER THEY'RE SAYING TOMORROWNOW IS A

24 VERY, VERY SMALL PART OF SAFE PASSAGE.
25 PTX404. JANUARY 11TH ABOUT 8 DAYS BEFORE THE
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2068

CLOSING ARGUMENT \ BOIES
1 ACQUISITION.
2 (DEMONSTRATIVE PUBLISHED TO JURY.)
3 MR. BOIES: QUOTE, TOMORROWNOW ESTABLISHED AS THE
4 CORNERSTONE OF THE SAFE PASSAGE PROGRAM, CLOSED QUOTE. THE
5 CORNERSTONE OF THE SAFE PASSAGE PROGRAM. EXHIBIT 404.
6 (DEMONSTRATIVE PUBLISHED TO JURY.)
7 MR. BOIES: THEY SAID THE SAME THING IN PTX
8 EXHIBIT 161 ABOUT EIGHT DAYS AFTERWARDS -- SIX DAYS AFTERWARDS
9 IN -- TOMORROWNOW WILL SERVE AS A MAJOR CORNERSTONE.
10 AND MR. HURST, WHO WAS THEIR CORPORATE
11 REPRESENTATIVE, THEIR DESIGNATED CORPORATE REPRESENTATIVE TO
12 TESTIFY ABOUT SAFE PASSAGE. HE TESTIFIED IT WAS A KEY PART, A
13 KEY PART.
14 IF YOU GO TO 161.
15 (DEMONSTRATIVE PUBLISHED TO JURY.)
16 MR. BOIES: MR. ZIEMEN, VICE-PRESIDENT OF SAP
17 TESTIFIED THAT TOMORROWNOW WAS THE CORNERSTONE AND A KEY PART OF
18 THE SAFE PASSAGE PROGRAM AND WAS A STRONGER WEAPON THAN SAFE
19 PASSAGE. THAT'S WHAT HE TESTIFIED TO AT PAGE 514 OF THE -- OF
20 THE TRIAL TRANSCRIPT. THAT'S WHEN IT WAS -- HIS DEPOSITION
21 WAS --
22 PTX404, TOMORROWNOW ESTABLISHED AS A CORNERSTONE.
23 AND LET ME JUST SHOW YOU A DOCUMENT, PTX43 FROM
24 FEBRUARY OF 2007.
25 (DEMONSTRATIVE PUBLISHED TO JURY.)
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2069

CLOSING ARGUMENT \ BOIES
1 MR. BOIES: THIS IS HARD TO READ, BUT I ASK YOU TO
2 TAKE A LOOK AT THIS IN THE JURY ROOM BECAUSE WHAT IT SAYS IS
3 TOMORROWNOW ESTABLISHES CORNERSTONE OF THE SAFE PASSAGE PROGRAM.
4 AND IT SAYS TOMORROWNOW IS A STRATEGIC INVESTMENT AND SERVES AS
5 STRATEGIC WEAPON AGAINST ORACLE.

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 MR. BOIES: NOW, THOSE, LADIES AND GENTLEMEN, I
8 SUGGEST ARE NOT TO DESCRIPTIONS OF A COMPANY WHO HE BELIEVES
9 THAT TOMORROWNOW IS A VERY, VERY SMALL PART OF THE SAFE PASSAGE
10 PROGRAM.

11 NOW, IN ADDITION TO THE IMPORTANCE AND THE NEED FOR
12 TOMORROWNOW AND THE INFRINGEMENT, THE VALUE TO SAP OF THIS
13 LICENSE AND THE VALUE TO SAP OF THE INFRINGEMENT IS EVIDENCED BY
14 THE REVENUE THAT SAP PLANNED TO EARN.

15 AND IN THAT CONNECTION, I WANT TO GO FIRST TO 166,
16 WHICH IS THE CHART THAT YOU'VE SEEN A NUMBER OF TIMES. THIS IS
17 FROM PTX4814, PAGE 11.

18 (DEMONSTRATIVE PUBLISHED TO JURY.)

19 MR. BOIES: AND IT SHOWS THEIR EXPECTATION OF GETTING
20 \$897 MILLION IN REVENUE.

21 THIS IS THE SAP ANALYSIS ON 12/23/04, THE SAP
22 BUSINESS OPPORTUNITY.

23 (DEMONSTRATIVE PUBLISHED TO JURY.)

24 MR. BOIES: NOW, YOU HEARD SOME ATTEMPT TO SAY, WELL,
25 THAT REALLY WASN'T WHAT THEY WERE REALLY THINKING. THAT WAS
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2070

CLOSING ARGUMENT \ BOIES
1 JUST SOMETHING PUT TOGETHER BY MR. ZIEMEN, AND HE'S ONLY A
2 VICE-PRESIDENT.

3 WELL, HE WAS THE VICE-PRESIDENT IN CHARGE OF THIS
4 KIND OF ANALYSIS. BUT BEYOND THAT, IF YOU GO TO 165, PTX4814.

5 MR. BOIES: AND I DON'T KNOW WHETHER IT'S POSSIBLE TO
6 BLOW THAT UP ANY MORE THAN IT'S ALREADY BLOWN UP, BUT IT'S
7 REALLY HARD TO READ. BUT THIS IS MAYBE ONE OF THE MOST
8 IMPORTANT DOCUMENTS IN THE CASE.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: AND THE REASON IT'S SO IMPORTANT IS
11 BECAUSE IT TALKS HOW THAT \$897 MILLION FIGURE WAS ARRIVED AT.
12 AND IT SAYS, "HENNING, LEO, GERD AND SHAI HAVE GIVEN INPUT AND
13 EXTENSIVE GUIDANCE ON IT." THOSE WERE THE FOUR MEMBERS OF THE
14 EXECUTIVE BOARD, THE VERY TOP PEOPLE. THIS IS A DOCUMENT THAT

15 WAS PREPARED BY THE VERY TOP PEOPLE.

16 AND -- GO TO 167.

17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 MR. BOIES: WE ASKED MR. ZIEMEN WHETHER HE ATTEMPTED
19 TO MAKE REASONABLE ASSUMPTIONS. HE SAID THAT HE DID.

20 WE ASKED MR. AGASSI DID HE HAVE REASON TO QUESTION
21 THE ASSUMPTIONS. THIS IS 169.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: HE SAID HE THOUGHT THEY COULD DO BETTER.
24 HE THOUGHT THEY COULD DO BETTER.

25 WHEN MR. MCDERMOTT WAS HERE, I ASKED HIM ABOUT THEIR
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2071

CLOSING ARGUMENT \ BOIES
1 GOALS. AND HE TALKED ABOUT --

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 MR. BOIES: -- A GOAL THAT THEY WOULD HAVE A
4 FAVORABLE RESPONSE TO TOMORROWNOW. AND I SAID,

5 "Q. AND NOT ONLY WAS THAT THE GOAL, BUT YOU
6 BELIEVE THAT BASED ON EARLY INDICATIONS THAT THE
7 RECEPTION TO THE OFFER WOULD BE ASTRONOMICAL.
8 REMEMBER SAYING THAT ANSWER?

9 "A. I'M SURE I DID."

10 THAT'S THEIR CHIEF EXECUTIVE OFFICER TODAY. THAT'S
11 THE PERSON WHO WAS THE CHIEF EXECUTIVE OFFICER OF SAP AMERICAS
12 BACK THEN.

13 SO YOU HAVE ALL OF THESE PEOPLE SAYING WE BELIEVE
14 THIS IS GOING TO BE A TREMENDOUS SUCCESS, AND THAT IS WHAT WE
15 WERE TAKING INTO ACCOUNT IN TERMS OF WHAT THEY WOULD HAVE TO PAY
16 FOR THIS FAIR MARKET VALUE LICENSE BACK THEN.

17 NOW, THEY DIDN'T JUST WANT REVENUE. IN FACT, I'M
18 GOING TO SHOW YOU RIGHT NOW THAT REVENUE, EVEN THAT \$897 MILLION
19 WHICH, REMEMBER, WAS ONLY FOR THREE YEARS. YOU'VE GOT TO EXTEND
20 IT FOR THE FOURTH YEAR IF YOU KNOW EXACTLY WHAT THEY THINK
21 THEY'RE GOING TO GET IN FOUR YEARS.

22 BUT EVEN ALL THAT REVENUE WAS NOT WHAT THEY WERE
23 PRIMARILY INTERESTED IN. THEY WERE MORE INTERESTED IN CUSTOMERS
24 THAN REVENUE BECAUSE THEY KNEW CUSTOMERS WOULD HELP THEM DOWN

25 THE LINE.

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2072

CLOSING ARGUMENT \ BOIES

1 AND IF WE GO TO 197. THIS IS PTX154, WHICH IS THEIR
2 EXECUTIVE BOARD MINUTES.

3 (DEMONSTRATIVE PUBLISHED TO JURY.)

4 MR. BOIES: THEIR EXECUTIVE BOARD MINUTES, LADIES AND
5 GENTLEMEN.

6 AND THEY'RE TALKING ABOUT THE SAFE PASSAGE PROGRAM.

7 AND THEY SAY THE GUIDELINE, QUOTE, SHOULD BE MEASURED IN
8 REVENUES RATHER THAN NUMBERS OF CONVERTED CUSTOMERS.

9 AND WE ASKED MR. AGASSI, THE EXECUTIVE BOARD
10 MEMBER --

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: 186.

13 "Q. IT WAS MORE IMPORTANT TO GET THE
14 CUSTOMERS CONVERTED RATHER THAN THE MAINTENANCE
15 REVENUES?

16 "A. YES.

17 SO WHEN YOU SEE MR. CLARKE AND SAP COMING UP WITH A
18 FAIR MARKET VALUE LICENSE BASED JUST ON REVENUES AND PROFITS, OR
19 YOU SEE THEM ARGUING THAT YOU OUGHT TO LOOK JUST AT LOST
20 PROFITS, THINK ABOUT THIS TESTIMONY AND THOSE BOARD MINUTES THAT
21 TELL YOU THAT CUSTOMERS -- THE NUMBER OF CUSTOMERS THAT THEY
22 THOUGHT THEY WERE GOING TO GET IN JANUARY WAS EVEN MORE
23 IMPORTANT THAN REVENUE.

24 AND THEY THOUGHT THEY WERE GOING TO GET A LOT OF
25 CUSTOMERS. IF WE GO TO CHART 170, WHICH IS PTX141.

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2073

CLOSING ARGUMENT \ BOIES

1 (DEMONSTRATIVE PUBLISHED TO JURY.)

2 MR. BOIES: THEIR GOAL WAS TO DIVERT MAJORITY OF THE
3 PEOPLESFT AND JD EDWARDS CUSTOMER BASE. AND THEY THOUGHT THEY
4 COULD DO THAT BECAUSE THEY WERE THE LEADING SUPPLIER, STILL MORE
5 THAN TWICE AS LARGE IN THE ENTERPRISE APPLICATION FIELD AS

6 ORACLE AT THE TIME. THEY HAD SOMEBODY WITH EXPERIENCE.
7 THEY WERE ACTUALLY DOING MAINTENANCE BEFORE ORACLE
8 WAS DOING MAINTENANCE 'CAUSE TOMORROWNOW HAD STARTED BEFORE
9 ORACLE ACQUIRED PEOPLESOFT. SO THEY THOUGHT THEY COULD CONVERT
10 THE MAJORITY -- AND THIS IS JANUARY 16TH, THREE DAYS BEFORE THE
11 DATE OF THE HYPOTHETICAL NEGOTIATION. THIS IS PRECISELY WHAT IS
12 IN THEIR MIND WHEN THEY ARE SITTING DOWN TO NEGOTIATE THIS
13 HYPOTHETICAL LICENSE.

14 AND IF YOU GO TO PTX141.

15 (DEMONSTRATIVE PUBLISHED TO JURY.)

16 MR. BOIES: THIS IS THE JANUARY 20TH, PRESENTATION
17 APPROVED BY THE SAP BOARD. HERE, THE GOAL IS CONVERT
18 APPROXIMATELY 50 PERCENT OF THE PEOPLESOFT CUSTOMERS.

19 THAT'S THEIR OFFICIAL EXPECTATION ONE DAY AFTER THE
20 ACQUISITION.

21 NOW, THIS IS NOT JUST SOMETHING THAT'S REFLECTED IN
22 THIS BOARD PRESENTATION, ALTHOUGH I WOULD SUGGEST TO YOU THAT
23 THAT WOULDN'T BE ENOUGH. THIS IS WHAT PEOPLE TESTIFIED TO.

24 SHAI AGASSI TESTIFIES THAT THE GOAL WAS TO CONVERT
25 APPROXIMATELY 50 PERCENT. AND HE GOES ON --

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2074

CLOSING ARGUMENT \ BOIES
(DEMONSTRATIVE PUBLISHED TO JURY.)

1
2 MR. BOIES: -- AT 256 TO SAY THAT THEY ACTUALLY HAD
3 MORE EXPENSE IN SERVICING PEOPLESOFT CUSTOMERS THAN ORACLE DID
4 AT THAT PARTICULAR POINT IN TIME. SO HE THOUGHT THEY WOULD HAVE
5 MOMENTUM TO ACCOMPLISH THAT.

6 IF YOU GO ON THE 175, MR. BRANDT.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 MR. BOIES: HE ALSO TESTIFIES THAT THE GOAL, HIS GOAL
9 WAS TO CONVERT APPROXIMATELY 50 PERCENT OF PEOPLESOFT CUSTOMERS.

10 SO YOU -- WHAT YOU SEE IS YOU SEE DOCUMENT AFTER
11 DOCUMENT, AND LET ME SUMMARIZE IT IN 180.

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 MR. BOIES: DOCUMENT AFTER DOCUMENT THAT IS
14 DEMONSTRATING THE EXTENT TO WHICH THEY THOUGHT THEY WERE GOING
15 TO GET CUSTOMERS. AND THESE ARE ALL AROUND THE TIME OF THE

16 HYPOTHETICAL NEGOTIATION. PTX4814, PTX141, PTX24, PTX161.
17 YOU'LL SEE ESTIMATES OF 3,000, 5,000, 4900, 2,000 TO
18 4,000, 1375, ALL OF THESE INVOLVING THE TOP EXECUTIVES OF THE
19 CORPORATION. ALL OF THESE THE MATERIAL INDICATING WHAT THEY
20 REALLY THOUGHT, WHAT THE OBJECTIVE FACTS DEMONSTRATE THAT THEY
21 REALLY THOUGHT WAS GOING TO BE THE RESULT OF ACQUIRING.

22 NOW, THEY DIDN'T -- THEY DIDN'T MAKE THESE NUMBERS.
23 NOW, THERE ARE A LOT OF REASONS FOR THAT.

24 GO TO 268.

25 (DEMONSTRATIVE PUBLISHED TO JURY.)

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2075

CLOSING ARGUMENT \ BOIES

1 MR. BOIES: THEY HAD A LOT OF IMPLEMENTATION
2 PROBLEMS. MR. NELSON TESTIFIED ABOUT THOSE IMPLEMENTATION
3 PROBLEMS. YOU REMEMBER THAT. THAT'S AT 164 OF THE TRANSCRIPT.

4 MR. HURST AT CHART 267 TESTIFIED ABOUT THAT, ABOUT
5 HOW THEY HAD DIFFICULTY GETTING TRACTION WITH ANY SAP SALES
6 FORCE. SO THEY HAD SOME IMPLEMENTATION PROBLEMS.

7 BUT WITH REGARDLESS OF WHY IT DIDN'T WORK, THE FACT
8 OF THE MATTER IS THEY THOUGHT IN JANUARY THAT THERE WAS A
9 TREMENDOUS OPPORTUNITY, AND THAT IS WHAT DEFINES THE VALUE OF
10 WHAT THEY TOOK.

11 THEY DON'T GET TO SAY, WE TOOK THIS VERY VALUABLE
12 PRODUCT AND WE SCREWED IT UP OR WE WEREN'T SUCCESSFUL OR WE
13 WEREN'T AS SUCCESSFUL AS WE THOUGHT WE WERE GOING TO BE. WHEN
14 THEY TAKE IT, THEY OWN IT, AND THEY'VE GOT TO PAY FOR IT.
15 REGARDLESS OF WHETHER THEY USED IT WELL OR NOT WELL.

16 NOW, THAT'S PARTICULARLY TRUE BECAUSE THEY WERE NOT
17 JUST LOOKING TO SEE HOW CAN WE BENEFIT SAP. THEY WERE LOOKING
18 TO SEE --

19 IF WE GO TO 183.

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 MR. BOIES: -- HOW CAN WE DISRUPT ORACLE. AND FROM
22 THE VERY BEGINNING, PTX15, ONE OF THE RECOGNIZED PURPOSES WAS TO
23 BE DISRUPTIVE TO ORACLE.

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 MR. BOIES: THE BUSINESS CASE, THE JANUARY 7TH
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2076

CLOSING ARGUMENT \ BOIES
1 DOCUMENT. THE BUSINESS CASE FOR TOMORROWNOW SAYS, IT WOULD
2 CREATE -- AN ACQUISITION BY SAP WOULD CREATE A GOOD LEVEL OF
3 MARKET DISRUPTION. THE JANUARY 20 -- 20TH PRESENTATION TO THE
4 BOARD, THE GOAL OF THE PROGRAM WAS DISRUPT ORACLE'S ABILITY TO
5 PAY FOR THE ACQUISITION OUT OF CASH FLOW, DISCREDIT THEIR
6 EFFORTS.

7 THAT'S WHAT WAS GOING ON.

8 AND I ASKED MR. BRANDT -- THIS IS AT 181 AND PAGE 464
9 OF THE TRANSCRIPT. I ASKED HIM.

10 "Q. IN ADDITION TO THE REVENUE THAT SAP
11 EXPECTED TO GET FROM THIS PROGRAM, SAP ALSO
12 EXPECTED TO BENEFIT THE DISRUPTION THAT THE
13 PROGRAM WOULD CAUSE ORACLE, CORRECT, SIR?

14 AND HE ANSWER, "CORRECT."

15 (DEMONSTRATIVE PUBLISHED TO JURY.)

16 MR. BOIES: LET ME GO TO 184.

17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 MR. BOIES: IN 2006, THEY CAME UP WITH A -- A ORACLE
19 DISRUPTION PLAN. AND OFFER NUMBER ONE WAS TOTAL TOMORROWNOW
20 LIFETIME SUPPORT WITH FREE MAINTENANCE.

21 NOW, WHAT DID MR. MCDERMOTT AND MR. APOTHEKER SAY
22 ABOUT THAT? REMEMBER, THESE ARE TWO -- APOTHEKER FORMER,
23 MCDERMOTT PRESENT -- C.E.O.'S OF SAP. EXCELLENT PLAN. WE ARE
24 EXCITED TO EXECUTE THIS PLAN.

25 MR. OSWALD, AT 271 --

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2077

CLOSING ARGUMENT \ BOIES
1 (DEMONSTRATIVE PUBLISHED TO JURY.)

2 MR. BOIES: -- TALKED ABOUT EVEN THOUGH THEY EXPECTED
3 TO HAVE NEGATIVE RETURNS FOR THE FIRST FEW YEARS, THEY STILL
4 THOUGHT THIS WAS GREAT BECAUSE SAP HAD OTHER REASONS BESIDES
5 REVENUE FOR DOING THE TOMORROWNOW DEAL.

6 AND MR. ZIEMEN TALKS ABOUT THAT. ONE OF THOSE --

7 (DEMONSTRATIVE PUBLISHED TO JURY.)
8 MR. BOIES: -- WAS -- IT WAS A STRATEGIC WEAPON
9 AGAINST ORACLE. A STRATEGIC WEAPON AGAINST ORACLE.

10 THAT'S MR. ZIEMEN, VICE-PRESIDENT, ZIEMEN'S
11 TESTIMONY.

12 AND MR. OSWALD TESTIFIES THAT ANOTHER GOAL WAS TO
13 DISCREDIT ORACLE'S EFFORTS TO CREATE A NEXT-GENERATION
14 APPLICATION PLATFORM. DISCREDIT ORACLE.

15 (DEMONSTRATIVE PUBLISHED TO JURY.)

16 MR. BOIES: SO YOU SEE THESE ARE NOT JUST A QUESTION
17 OF IS THE FAIR MARKET VALUE LICENSE VALUABLE TO SAP BECAUSE
18 THEY'RE GOING TO GET SOMETHING FOR IT? IT'S ALSO VALUABLE TO
19 SAP BECAUSE IT'S GOING TO DISRUPT AND DISCREDIT THEIR BIGGEST
20 COMPETITOR.

21 AND, INDEED, SAP -- IF WE GO TO 185 -- WAS MORE
22 INTERESTED IN DISRUPTING ORACLE THAN IN EARNING MAINTENANCE
23 REVENUE FOR ITSELF.

24 DECEMBER 13TH, PTX2, THE IDEA -- AND THIS IS THEIR
25 DOCUMENT -- IS TO TAKE AWAY THE MAINTENANCE STREAM FROM ORACLE.

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2078

1 CLOSING ARGUMENT \ BOIES
193?

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 MR. BOIES: I'VE ALREADY TALKED ABOUT HOW THE MINUTES
4 ON JANUARY 20TH SAID THE GOALS ARE NOT REVENUES BUT CONVERTED
5 CUSTOMERS. BUT ON JANUARY 7TH, THEY SAID THAT THE OPPORTUNITIES
6 INCLUDED ORACLE LOSING SUPPORT REVENUE STREAM.

7 AND GO TO 195.

8 (DEMONSTRATIVE PUBLISHED TO JURY.)

9 MR. BOIES: WHEN THEY GAVE BONUSES AND PERFORMANCE
10 REVIEWS TO PEOPLE, THEY USE THESE THINGS CALLED KEY PERFORMANCE
11 INDICATORS OR KPI. HOW DID THEY JUDGE PEOPLE? DID THEY JUDGE
12 THEM ABOUT HOW MUCH REVENUE THEY WERE GETTING, HOW MUCH PROFITS
13 THEY WERE GETTING? NO. THEY JUDGED THEM BY HOW MUCH REVENUE
14 WAS TAKEN AWAY FROM ORACLE.

15 THIS IS PTX43, PAGE 5.

16 (DEMONSTRATIVE PUBLISHED TO JURY.)
17 MR. BOIES: NOW I SUGGEST TO YOU, LADIES AND
18 GENTLEMEN, THAT WHEN A BIG COMPANY WANTS TO ACCOMPLISH
19 SOMETHING, IT GIVES INCENTIVES TO DO THAT. AND YOU CAN TELL A
20 LOT ABOUT WHAT THE COMPANY REALLY WANTS TO ACCOMPLISH BY WHAT
21 DOES IT PAY ITS PEOPLE TO DO. WHEN IT PAYS ITS PEOPLE TO TAKE
22 IT AWAY, THAT'S HOW YOU KNOW.

23 AND PTX28, THIS IS FROM MR. APOTHEKER.

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 MR. BOIES: WE NEED TO INFLICT SOME PAIN ON ORACLE.
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2079

CLOSING ARGUMENT \ BOIES
1 IS THERE A CHANCE TO CLOSE A FEW TOMORROWNOW DEALS IN THE NEXT
2 COMING DAYS AT EXTRAORDINARY CONDITIONS? EXTRAORDINARY
3 CONDITIONS MEAN A VERY LOW PRICE.

4 THAT'S MARCH 9TH, 2005. HE'S NOT SAYING, IS THERE A
5 WAY TO CLOSE SOME TOMORROWNOW DEALS TO GET US SOME MORE MONEY.
6 HE'S NOT SAYING CAN WE CLOSE TOMORROWNOW DEALS TO INCREASE OUR
7 REVENUES AND PROFITS. HE'S SAYING WE WANT TO CLOSE SOME
8 TOMORROWNOW DEALS TO INFLICT SOME PAIN ON ORACLE.

9 AND THEY KNEW -- GO TO 196 -- THAT BY OFFERING
10 MAINTENANCE TO TOMORROWNOW, THEY COULD SIPHON OFF CASH FLOW --

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: -- THAT ORACLE NEEDS TO BUILD OR ACQUIRE
13 ITS NEXT-GENERATION APPLICATIONS. THEY SOUGHT TO INTERRUPT
14 ORACLE'S MAINTENANCE AND REVENUE STREAM FOR THE EXPRESS PURPOSE
15 OF REDUCING ORACLE'S ABILITY TO INVEST IN RESEARCH AND
16 DEVELOPMENT.

17 AND HERE AT PTX141, THAT'S EXACTLY WHAT THEY'RE
18 SAYING.

19 (DEMONSTRATIVE PUBLISHED TO JURY.)

20 MR. BOIES: AND AT PTX171, AT CHART 202.

21 (DEMONSTRATIVE PUBLISHED TO JURY.)

22 MR. BOIES: THIS IS FEBRUARY 3, 2005, THEY SAY THE
23 SAME THING. THEY WANT TO DISRUPT ORACLE'S PLANNED MAINTENANCE
24 INCOME STREAM FROM PEOPLESFT CUSTOMERS MAKING IT MORE DIFFICULT
25 FOR THEM TO DELIVER ON THEIR PROMISES TO THE ^ STREETS THESE THE

2080

CLOSING ARGUMENT \ BOIES

1 FINANCIAL AND CUSTOMER BASE THAT'S THEIR NEW PRODUCTS. THAT IS
2 THE EXACTLY WHAT THEY WERE TRYING TO DO. AND THAT IS HOW YOU
3 HAVE TO VALUE THE FAIR MARKET VALUE LICENSE.

4 NOW, IN ADDITION, THE RISKS THAT THEY WERE PREPARED
5 TO TAKE CONFIRMS HOW VALUABLE THEY THOUGHT THIS WAS.

6 NOW, REMEMBER -- GO TO 206.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 MR. BOIES: -- I ASKED MR. BRANDT AND HE TESTIFIED TO
9 THIS ON THE STAND HERE, THAT SAP WOULD NOT LIKELY UNDERTAKE A
10 PROGRAM THAT HAD SERIOUS LIABILITY RISKS. NOW, THAT'S TO BE
11 EXPECTED. BIG COMPANY -- CORPORATION DOESN'T WANT TO LIGHTLY
12 UNDERTAKE SERIOUS LIABILITY RISK. BUT HERE, HE ADMITS EXPRESSLY
13 THAT SAP WOULD NOT HAVE DONE THIS LIGHTLY.

14 NOW, THEY KNEW THERE WERE SERIOUS LIABILITY RISKS.
15 WHY DID THEY TAKE IT ON? THEY TOOK IT ON BECAUSE OF THE VALUE
16 OF THE PROGRAM. THERE'S NO OTHER EXPLANATION. BECAUSE
17 CERTAINLY, THEY KNEW THAT TOMORROWNOW HAD PAST OPERATING ISSUES
18 THAT MAY BE A SERIOUS LIABILITY.

19 CERTAINLY THEY KNEW IF IT WAS INAPPROPRIATE IT WAS
20 WRONG FOR TOMORROWNOW TO PROVIDE SUPPORT FOR CUSTOMERS ON
21 COMPUTERS OF TOMORROWNOW. THEY ADMITTED THAT. BRANDT ADMITTED
22 THAT AT 703 OF THE TRIAL TRANSCRIPT.

23 BUT SAP CONTINUED TO OPERATE TOMORROWNOW THAT WAY FOR
24 FOUR YEARS. THEY KNEW THAT TOMORROWNOW HAD NO --

25 IF WE GO TO 207.

2081

CLOSING ARGUMENT \ BOIES
(DEMONSTRATIVE PUBLISHED TO JURY.)

1 MR. BOIES: THEY KNEW THAT TOMORROWNOW HAD NO
2 RESEARCH AND DEVELOPMENT EMPLOYEES.

3 PTX266 MAKES THAT CLEAR.

4 (DEMONSTRATIVE PUBLISHED TO JURY.)

5 MR. BOIES: WHICH NECESSARILY MEANT THAT IT COULD NOT
6

7 ITSELF HAVE DEVELOPED FIXES AND PATCHES. BUT THEY WENT AHEAD
8 AND DID IT ANYWAY.

9 THEY KNEW THAT THEY WERE NOT GETTING THE INTELLECTUAL
10 PROPERTY WHICH MEANT THAT THEY HAD TO BE USING SOMEBODY ELSE'S
11 INTELLECTUAL PROPERTY. AND YET THEY WENT AHEAD AND DID THAT
12 ANYWAY.

13 SO THEY KNEW THOSE LIABILITY RISKS, AND THEY WENT
14 AHEAD AND THEY WENT AHEAD KNOWING FULL WELL WHAT WAS HAPPENING.

15 FOR EXAMPLE, LET ME GO TO 24.

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 MR. BOIES: DECEMBER 21, VICE-PRESIDENT JOHN ZEPECKI
18 TO MR. AGASSI, EXECUTIVE BOARD MEMBER. IT IS VERY LIKELY THAT
19 TOMORROWNOW IS USING THE SOFTWARE OUTSIDE THE CONTRACTUAL TERMS.
20 GRANTED THAT.

21 ON JANUARY 7PTX19, THE BUSINESS CASE.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: ON PAGE 7, WHICH IS CHART 19.

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 MR. BOIES: THE ACCESS RIGHTS TO THE PEOPLESOFT
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2082

CLOSING ARGUMENT \ BOIES
1 SOFTWARE IS VERY LIKELY TO BE CHALLENGED BY ORACLE, AND PAST
2 OPERATING ISSUES MAY BE A SERIOUS LIABILITY IF ORACLE
3 CHALLENGES.

4 (DEMONSTRATIVE PUBLISHED TO JURY.)

5 MR. BOIES: PTX266. THIS IS THE CHART THAT SHOWS
6 THAT IN 2005, THEY KNEW THAT TOMORROWNOW HAD ZERO R & D
7 EMPLOYEES. ZERO R & D EMPLOYEES.

8 I ASKED MR. MCDERMOTT -- THIS IS AT CHART 21 --
9 WHETHER HE UNDERSTOOD THAT IN ORDER TO COME UP LEGALLY WITH BUG
10 FIXES, LEGAL FIXES, COMPLIANCE REQUIREMENTS, THAT WOULD TAKE
11 R & D PERSONNEL, CORRECT?

12 "YES, OF COURSE THEY WOULD."

13 AND HE SAYS --

14 (DEMONSTRATIVE PUBLISHED TO JURY.)

15 MR. BOIES: -- HE KNOWS THAT THEY DIDN'T HAVE ANY
16 R & D PEOPLE. HE KNOWS THAT NOW, AND HE SAID IF HE'D KNOWN IT

17 THEN, HE WOULD HAVE KNOWN THAT THEY WERE OPERATING IMPROPERLY.
18 AND OF COURSE, HE -- EVEN THOUGH HE CLAIMS HE DIDN'T KNOW THAT,
19 SAP EXECUTIVE BOARD KNEW THAT.

20 AND I ASKED MR. BRANDT,

21 "Q. DID YOU EVER INQUIRE OF ANYBODY AS TO
22 HOW IN THE WORLD PEOPLESOFT SUPPORT WAS BEING
23 PREPARED AND PATCHES AND FIXES FOR COMPLICATED
24 SOFTWARE WAS BEING PREPARED WITHOUT ANY R & D
25 EMPLOYEES? DID YOU EVER ASK ANYBODY THAT, SIR?

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2083

CLOSING ARGUMENT \ BOIES

1 "A. NO."

2 MR. BOIES: AND ON JANUARY 13TH, LESS THAN A WEEK
3 BEFORE THE ACQUISITION, LESS THAN A WEEK BEFORE THE HYPOTHETICAL
4 LICENSE NEGOTIATION, SAP RECOGNIZED THERE IS NO INTELLECTUAL
5 PROPERTY BEING ACQUIRED. THAT'S IN PTX20.

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 MR. BOIES: SO THEY KNEW THEY WERE NOT GETTING
8 INTELLECTUAL PROPERTY. THEY KNEW THEY DIDN'T HAVE ANY R & D
9 EMPLOYEES. THEY KNEW THAT THE ONLY -- ONLY BY INFRINGING COULD
10 THIS HAVE BEEN HAPPENING. AND YET -- LET ME GO TO 33.

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: THEY KNOWINGLY DECIDED THAT TOMORROWNOW
13 WAS SO VALUABLE THAT SAP WOULD INQUIRE TOMORROWNOW DESPITE ITS
14 INFRINGEMENT. THESE ARE THE FIVE MEMBERS OF THE SAP EXECUTIVE
15 BOARD, ALL OF WHOM SUPPORTED THE ACQUISITION OF TOMORROWNOW.

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 MR. BOIES: LET'S GO THROUGH THEM.

18 MR. BRANDT, SAP ACQUIRED TOMORROWNOW, QUOTE, WITH THE
19 UNDERSTANDING THERE COULD BE SUBSTANTIAL LEGAL ISSUES WITH
20 TOMORROWNOW'S SERVICE DELIVERY PROCESS. THAT'S WHAT HE KNEW
21 WHEN THEY TOOK IT.

22 MR. KAGERMANN, QUOTE, THE RISK OF LEGAL ACTION BY
23 ORACLE TO TOMORROWNOW'S ACCESS RIGHTS TO PEOPLESOFT SOFTWARE WAS
24 NEVERTHELESS A RISK THAT SAP KNOWINGLY UNDERTOOK WHEN IT DECIDED
25 TO BUY TOMORROWNOW.

CLOSING ARGUMENT \ BOIES

1 MR. OSWALD, QUOTE, DURING THE BUSINESS CASE, THEY
2 LISTED POTENTIAL RISKS, BUT IT IS CORRECT WE LOOKED AT THOSE
3 RISKS AND BE DECIDED TO ACQUIRE, CLOSED QUOTE.

4 MR. AGASSI, QUOTE,

5 "Q. DIDN'T YOU ACQUIRE TOMORROWNOW WITH A
6 KNOWLEDGE THAT THERE WAS A RISK THAT ORACLE
7 WOULD SUE?

8 "A. YES.

9 SAP HAD A CHOICE. IF I CAN GO TO 72.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 MR. BOIES: IN JANUARY, ORACLE TOOK THE RISK OF
12 INVESTING \$11.1 BILLION IN PEOPLESFT. THE SAME MONTH, THE RISK
13 SAP TOOK WAS FOR LIABILITY IF IT WAS CAUGHT INFRINGING. SAP
14 CHOSE TO TAKE THAT RISK BECAUSE THEY DIDN'T WANT TO PAY AT THE
15 TIME BILLIONS OF DOLLARS TO BUY THE LICENSE. AND THEY THOUGHT
16 IF THEY COULD -- GOT CAUGHT, THEY MIGHT BE ABLE TO HIDE BEHIND
17 TOMORROWNOW.

18 AND IF WE GO TO 11 --

19 (DEMONSTRATIVE PUBLISHED TO JURY.)

20 MR. BOIES: -- WE SEE THAT SAP NOT ONLY DIDN'T STOP
21 THE INFRINGEMENT. IT ACTUALLY INCREASED IT, INCREASING IT FROM
22 90 PERCENT TO 94 PERCENT. AND MR. NELSON TESTIFIED THAT WHEN HE
23 TALKED TO THE -- MR. OSWALD OF THE SAP BOARD --

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 MR. BOIES: -- AFTERWARDS, HE WAS ENCOURAGED TO PUT
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CLOSING ARGUMENT \ BOIES

1 TOMORROWNOW IN AS MANY PLACES AS POSSIBLE, IN AS MANY NEW
2 MARKETS AS POSSIBLE.

3 AND GOING TO 130.

4 (DEMONSTRATIVE PUBLISHED TO JURY.)

5 MR. BOIES: IT WAS AFTER TOMORROWNOW WAS ACQUIRED BY
6 SAP THAT THEY DESIGNED THESE COMPUTER PROGRAMS CALLED SCRAPERS,
7 SUCH AS TITAN, SPECIFICALLY TO GO OUT AND DOWNLOAD MILLIONS OF

8 DOWNLOADS OF ORACLE. INFRINGING COPY.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: NOW, THE VALUE -- GO TO 210 -- THE VALUE
11 OF THE SAP TOMORROWNOW INFRINGEMENT IS SO GREAT DEFENDANTS
12 CONTINUED TO INFRINGE EVEN AFTER THEY WERE CAUGHT.

13 WE'VE LOOKED AT INSTANT MESSAGES. BUT I WANT TO GO
14 TO 212, BECAUSE WHILE THOSE INSTANT MESSAGES I THINK ARE VERY
15 INFORMATIVE, I WANT TO GO TO WHAT MR. WILLIAM MCDERMOTT, THE
16 C.E.O. OF SAP, SAID.

17 "Q. WHEN DID YOU FIRST BECOME AWARE THAT
18 SAP HAD ENGAGED IN CONTRIBUTORY INFRINGEMENT OF
19 ORACLE SOFTWARE?

20 "A. WHEN THE ORACLE LAWSUIT WAS ANNOUNCED."
21 MARCH OF 2007.

22 THAT'S WHAT HE TESTIFIED TO AT 1469 OF THIS TRIAL
23 TRANSCRIPT.

24 NEVERTHELESS, SAP CONTINUED ITS INFRINGEMENT FOR
25 ANOTHER 18 MONTHS. I SUGGEST TO YOU, LADIES AND GENTLEMEN OF
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2086

CLOSING ARGUMENT \ BOIES
1 THE JURY, THAT IS SOMETHING THAT CANNOT BE EXPLAINED EXCEPT IN
2 TERMS OF HOW VALUABLE THIS WAS.

3 NOW, I WANT TO SPEND A LITTLE WHILE TALKING ABOUT THE
4 FORM OF THIS FAIR MARKET VALUE LICENSE. WHATEVER THE FORM OF
5 THE LICENSE, IT'S GOT TO TAKE INTO ACCOUNT ALL THE FACTORS THAT
6 WE'VE JUST GONE THROUGH. AND THERE HAVE BEEN TWO FORMS THAT HAD
7 BEEN SUGGESTED TO YOU. ONE, A LUMP SUM, AND THE OTHER A
8 SO-CALLED RUNNING ROYALTY.

9 NOW, I WANT TO COMPARE THOSE FOR YOU. A LUMP-SUM
10 ROYALTY VALUES WHAT WAS TAKEN AND USED. IT VALUES THE SOFTWARE
11 THAT WAS TAKEN AND USED.

12 A RUNNING ROYALTY VALUES ONE AND ONLY ONE OF THE
13 RESULTS OF THAT TAKING AND USE, THAT IS, REVENUES AND, TO THE
14 EXTENT THEY GET THEM, PROFITS.

15 A LUMP-SUM ROYALTY CAN BE BASED ON ALL THE BENEFITS
16 TO SAP AND DETRIMENTS TO ORACLE, BUT A ROYALTY BASED ON REVENUES

17 AND PROFITS OR ACTUAL CUSTOMERS TAKEN FAILS TO ACCOUNT FOR THE
18 OTHER BENEFITS TO THE LICENSEE -- THE OTHER BENEFITS TO SAP,
19 LIKE DISRUPTING ORACLE, DISCREDITING ORACLE, TAKING ORACLE'S
20 CUSTOMERS AWAY FROM IT, DEVELOPING CUSTOMER RELATIONS SAP TO
21 THOSE PEOPLE THEMSELVES. IT FAILS TO TAKE INTO ACCOUNT ALL OF
22 THOSE VALUES. SO THE RUNNING ROYALTY JUST DOESN'T TAKE THOSE
23 ASPECTS INTO ACCOUNT.

24 A LUMP-SUM ROYALTY ALSO SHARES THE RISK.

25 IF WE COULD GO TO 82.

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2087

CLOSING ARGUMENT \ BOIES
(DEMONSTRATIVE PUBLISHED TO JURY.)

1

2 MR. BOIES: BECAUSE IF YOU ACCEPT A RUNNING ROYALTY,
3 ALL THE RISK IS ON ORACLE. ALL THE RISK -- AND THIS IS
4 MR. MEYER, 913 OF THE TRANSCRIPT. BECAUSE THEY -- SAP GETS ALL
5 THE SOFTWARE. ORACLE HAS ALL THE RISK BUT DOESN'T HAVE ANY
6 GUARANTEE OF GETTING ANY MONEY FOR IT.

7 NOW, IF WE GO TO 83, REMEMBER MR. PHILLIPS
8 TESTIFYING?

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: TESTIFIED IF HE PAYS SOMEBODY \$11 BILLION
11 AND HIS COMPETITOR WANTS IT, HE EXPECTS THEM TO PAY BILLIONS OF
12 DOLLARS FOR IT AS WELL. AND WITH SIEBEL THE SAME THING.

13 AND THAT'S WHY IF YOU GO TO PAGE 84, LICENSES FOR
14 INTELLECTUAL PROPERTY THAT WILL BE USED TO DIRECTLY COMPETE WITH
15 THE LICENSOR ON A LUMP-SUM ROYALTY, TO THE EXTENT ROYALTY IS
16 BASED ON ACTUALLY ROYALTY AND PROFITS USED, THEY ARE GENERALLY
17 USED FOR THE LICENSE TO EXPAND THE CUSTOMER BASE. IT'S A KIND
18 OF WIN/WIN SITUATION, AS IN THE RESELLER LICENSE.

19 GO TO 85.

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 MR. BOIES: A ROYAL -- ROYALTY BASED ON CUSTOMERS,
22 REVENUES, AND PROFITS ALLEGEDLY GAINED OR LOST AS THE RESULT OF
23 THE INTELLECTUAL PROPERTY BEING TAKEN IS IMPOSSIBLY DIFFICULT TO
24 ADMINISTER. THIS IS VERY IMPORTANT.

25 THEY WANT A -- THEY PROPOSE A RUNNING ROYALTY THAT
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CLOSING ARGUMENT \ BOIES

1 WOULD BE LIMITED JUST TO REVENUES AND PROFITS, IGNORE ALL THE
2 OTHER STUFF, AND THAT WOULD REQUIRE YOU TO FIGURE OUT WHY A
3 PARTICULAR CUSTOMER LEFT AND WHY A PARTICULAR CUSTOMER BOUGHT A
4 PARTICULAR PIECE OF SOFTWARE.

5 YOU GOT TO GO INTO THE CUSTOMER'S MIND, FIGURE ALL
6 THAT OUT. NOW, NO ONE, NEITHER ANY EXPERT WITNESS NOR ANY FACT
7 WITNESS, COULD IDENTIFY A SINGLE LICENSE WHOSE ROYALTY, LIKE THE
8 ROYALTY DEFENDANTS PROPOSE HERE, DEPENDED ON DETERMINING WHY A
9 PARTICULAR CUSTOMER PURCHASED A PARTICULAR PRODUCT OR SERVICE OR
10 LEFT A PARTICULAR SUPPLIER LIKE ORACLE.

11 THERE'S NO EVIDENCE -- AND I'M SURE THAT IF COUNSEL
12 FOR THE DEFENDANTS HAVE A LICENSE LIKE THAT THAT'S IN EVIDENCE,
13 THEY WILL TELL YOU ALL ABOUT IT. BUT THE FACT OF THE MATTER IS
14 THAT DOESN'T EXIST.

15 AND THIS LUMP-SUM ROYALTY DOES NOT REQUIRE -- IF YOU
16 GO TO 86.

17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 MR. BOIES: -- THE PARTIES TO ENGAGE IN DISPUTES.
19 IT'S SIMPLE TO ADMINISTER, BUT A RUNNING ROYALTY WOULD JUST
20 GENERATE LITIGATION LIKE THIS EVERY TIME. WHY DID PARTICULAR
21 CUSTOMERS GO TO TOMORROWNOW? WHY DID THOSE CUSTOMERS PURCHASE
22 SOFT -- SAP SOFTWARE? WHY -- WHAT SHOULD THE COMPLICATED COST
23 ALLOCATIONS AND PROFIT ALLOCATIONS BE TO COME UP WITH AN
24 INFRINGER'S PROFIT OR A PROFIT FOR THE ROYALTY.

25 ALL OF THESE KIND OF ISSUES, VERY COMPLICATED, VERY
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CLOSING ARGUMENT \ BOIES

1 DIFFICULT.

2 NOW, YOU HAD TWO EXPERTS HERE.

3 (DEMONSTRATIVE PUBLISHED TO JURY.)

4 MR. BOIES: GO TO 87.

5 MR. MEYER AND MR. CLARKE. AND THE TWO PARTIES PAID
6 THEM MILLIONS OF DOLLARS TO ANALYZE THIS ISSUE. AND THEY
7 DISAGREE. THEY COULDN'T COME UP WITH THE SAME ANSWER.

8 MR. CLARKE'S CALCULATION -- MR. CLARKE GOT \$14 MILLION FOR WHAT
9 HE WAS DOING, THEIR EXPERT. HE REVIEWED 12 AND A HALF MILLION
10 PAGES, AND HE STILL COULDN'T COME UP WITH A CLEAR ANSWER AS TO
11 WHAT THE LUMP SUM OR RUNNING ROYALTY SHOULD BE.

12 GO TO 88. AFTER MORE THAN 30 MONTHS OF WORK,
13 \$14 MILLION OF FEES, HE WAS STILL CHANGING EVEN DURING TRIAL.

14 (DEMONSTRATIVE PUBLISHED TO JURY.)

15 MR. BOIES: NOW, WHAT THAT MEANS IS IF YOU HAD THAT
16 KIND OF ROYALTY, YOU COULD NEVER FIGURE IT OUT WITH PRECISION.
17 ORACLE WOULD NEVER KNOW.

18 IF YOU HAD -- IF YOU HAD THAT KIND OF A ROYALTY WHAT
19 YOU WOULD HAVE IS EVERY TIME YOU HAD A YEAR OVER, YOU'D HAVE TO
20 HAVE A LITIGATION LIKE THIS. YOU'D HAVE TO BRING A JURY IN,
21 HAVE TWO COMPETING EXPERTS, EACH PAID MILLION OF DOLLARS TO
22 ANALYZE IT, ARGUE ABOUT WHY DID THIS CUSTOMER LEAVE, WHAT
23 CUSTOMERS LEFT, WHAT WERE THEIR COSTS, WHAT WERE THEIR PROFITS,
24 ALL THE KINDS OF THINGS THAT GOES INTO THEIR CALCULATION.

25 NOW, COMPARE THAT WITH A LUMP-SUM ROYALTY. A
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2090

CLOSING ARGUMENT \ BOIES

1 LUMP-SUM ROYALTY TAKES INTO ACCOUNT ORACLE'S RISK, AND IT'S
2 \$11.1 BILLION ACQUISITION. IT CREATES A LEVEL PLAYING FIELD.
3 IT RECOGNIZES THE TWO COMPANIES AND COMPETITORS.

4 IT RECOGNIZES THAT SAP MAY SELL THE SUPPORT AS A LOSS
5 LEADER. IT PREVENTS SAP FROM MANIPULATING ROYALTY PAYMENTS
6 THROUGH TRACKING DISPUTES, AND IT RECOGNIZES THAT SAP INTENDED
7 TO CAUSE ORACLE FINANCIAL AND OTHER HARM BEYOND CUSTOMERS.

8 LET ME GO TO 93.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: YOU HEARD TESTIMONY ABOUT A NUMBER OF
11 LUMP-SUM ROYALTY LICENSES. SAP'S JAVA LICENSE, SAP'S OUTSIDE IN
12 LICENSE, SAP'S SYBASE LICENSE WHERE THEY ARE LICENSING IT
13 THEMSELVES. THE QUALCOMM SAMSUNG LICENSE FOR OVER A BILLION
14 DOLLARS, ALL LUMP-SUM ROYALTY MARKETS.

15 THIS IS COMMON IN HIGH-TECH MARKETS. AND IT IS
16 EXACTLY THE KIND OF THING THAT PEOPLE WOULD HAVE ARRIVED AT IF
17 THEY WERE IN A HYPOTHETICAL NEGOTIATION.

18 NOW, WHAT ARE SOME OF THE REASONS WHY NOT TO ACCEPT
19 THE RUNNING ROYALTY LICENSE PROPOSED BY SAP?

20 LET'S GO TO 91.

21 FIRST, MR. CLARKE ADMITTED -- AND THIS IS AT 1684.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: -- THAT HE DIDN'T REALLY COMPLETE THE
24 WORK THAT HE WOULD HAVE NEEDED TO DO TO DETERMINE WHETHER OR NOT
25 THERE WERE COMPARABLE LUMP-SUM ROYALTY PAYMENTS. HE ADMITTED AT
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2091

CLOSING ARGUMENT \ BOIES
1 CHART 105 THAT IF TOMORROWNOW HAD DOWNLOADED 20 TIMES AS MANY
2 LEGAL COPIES, THAT WOULD NOT INCREASE THE ROYALTY PAYMENTS AT
3 ALL.

4 THAT IS, DOESN'T MAKE ANY DIFFERENCE HOW MUCH THEY
5 USE IT. DOESN'T MAKE ANY DIFFERENCE HOW MUCH THEY TAKE. ALL
6 THAT MAKES A DIFFERENCE IS WHAT ARE THEIR REVENUES, WHAT ARE
7 THEIR PROFITS?

8 NOW, LET ME GO TO 100.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. BOIES: IN ADDITION TO NOT REFLECTING FAIR MARKET
11 VALUE, CLARKE'S RUNNING ROYALTY WOULD NECESSARILY LEAD TO ORACLE
12 LOSSES. AND REMEMBER MS. CATZ TALKED ABOUT THIS, TOO.

13 BECAUSE THE WAY SAP DOES THIS LICENSE, THEY ONLY
14 CHARGE REVENUE AT HALF ORACLE'S REVENUE, AND THEY ONLY GIVE
15 ORACLE HALF OF THE REVENUE THAT IT GETS. SO FOR EVERY DOLLAR OF
16 ORACLE CUSTOMER REVENUE, THEY ONLY GET BACK 25 CENTS.

17 THAT MEANS THEY'RE LOSING BETWEEN 65 CENTS AND 70
18 CENTS IN PROFITS EVERY DOLLAR OF SUPPORT REVENUE THAT THEY LOSE.

19 NOBODY WOULD ENTER INTO THAT KIND OF A LICENSE,
20 LADIES AND GENTLEMEN. THEY LOSE MONEY ON EACH ONE OF THESE
21 TRANSACTIONS, AND IF YOU WERE TRYING TO MAKE THAT UP BY PEOPLE
22 WHO LEFT TO GO TO TOMORROWNOW, WHO WOULD NOT HAVE STAYED WITH
23 ORACLE, YOU'D HAVE TO HAVE THREE TIMES AS MANY PEOPLE.

24 THERE'S NO EVIDENCE THAT THAT WAS REMOTELY
25 CONTEMPLATED BY ANYBODY, SO WHAT THE SAP RUNNING ROYALTY
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CLOSING ARGUMENT \ BOIES

1 WOULD -- WOULD DO IS SAY, LET'S SUPPOSE THAT ORACLE IS GOING TO
2 ENTER INTO THIS LICENSE KNOWING THAT THEY'RE GOING TO LOSE
3 MONEY. I SUGGEST TO YOU, ORACLE DIDN'T GET TO WHERE IT IS BY
4 DOING THOSE KIND OF DEALS.

5 NOW, LET ME GO TO 98.

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 MR. BOIES: AND THIS IS JUST A SUMMARY WHY A LUMP-SUM
8 ROYALTY LICENSE, AND IT COMPARES A LUMP-SUM ROYALTY WITH A
9 RUNNING ROYALTY.

10 DOES THE ROYALTY VALUE WHAT WAS ACTUALLY TAKEN?
11 LUMP-SUM, YES; RUNNING, NO.

12 DOES IT CONSIDER BENEFITS AND IMPACTS BEYOND CUSTOMER
13 REVENUES? LUMP SUM, YES; RUNNING, NO.

14 DOES IT VALUE LICENSE AT THE TIME, WHICH IS WHAT THE
15 COURT IS GOING TO INSTRUCT YOU NEEDS TO BE DONE. ANSWER "YES"
16 FOR LUMP SUM, "NO" FOR RUNNING.

17 DOES IT VALUE RISK TO BOTH PARTIES? LUMP SUM, YES;
18 RUNNING, NO.

19 DOES IT CONSIDER THE VALUE -- THE COST OF THE
20 SOFTWARE, THE \$17 BILLION COST OF THE SOFTWARE? LUMP SUM, YES;
21 RUNNING, NO.

22 DOES IT AVOID THESE KIND OF DISPUTES? LUMP SUM, YES;
23 RUNNING, NO.

24 DOES IT REFLECT THE PARTIES' DIRECT COMPETITIVE
25 RELATIONSHIP? LUMP SUM, YES; RUNNING, NO.

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CLOSING ARGUMENT \ BOIES

1 NOW, WHAT IS SAP'S RESPONSE?

2 GO TO 241.

3 (DEMONSTRATIVE PUBLISHED TO JURY.)

4 MR. BOIES: WELL, SAP SAYS -- THIS IS THE OPENING
5 STATEMENT -- TOMORROWNOW IS WAS A VERY, VERY SMALL PART OF SAFE
6 PASSAGE. BUT WHAT DID SAP SAY BEFORE THIS TRIAL? THEY CALLED
7 IT A KEY COMPONENT, A MAJOR CORNERSTONE, INSTRUMENTAL IN THE
8 SUCCESS OF SAFE PASSAGE, THE ONLY COMPANY IN NORTH AMERICA THAT

9 HAS THE CAPACITY TO DO WHAT NEEDED TO BE DONE. OVER AND OVER
10 AGAIN, A KEY PART, A KEY COMPONENT, AN (SIC) INSTRUMENTAL IN THE
11 SUCCESS, A CORNERSTONE -- A MAJOR CORNERSTONE. THAT'S ALL OF
12 WHAT SAP WAS SAYING BEFORE THIS TRIAL.

13 NOW, LET ME SPEND A MOMENT ON -- ON LOST PROFITS
14 AND -- AND WHY LOST PROFITS DOESN'T INCLUDE ALL THAT NEEDS TO BE
15 INCLUDED IN TERMS OF THE LOSS. AND WHY WE'RE SEEKING FAIR
16 MARKET VALUE LICENSE AS OPPOSED TO LOST PROFITS. I WANT YOU TO
17 UNDERSTAND.

18 102?

19 (DEMONSTRATIVE PUBLISHED TO JURY.)

20 MR. BOIES: FIRST, LOST PROFITS DOES NOT CONSIDER THE
21 RISK ASSOCIATED WITH ORACLE'S SIGNIFICANT INVESTMENTS IN
22 PEOPLESOFT. SECOND, LOST PROFITS DOES NOT APPROPRIATELY MEASURE
23 THE VALUE OF THE IP TAKEN, BASED ON THE EXPECTATIONS OF THE
24 PARTY AT THE TIME, WHICH IS THE LEGAL STANDARD. THIRD, LOST
25 PROFITS ARE INCONSISTENT WITH SAP'S INTENT TO DISRUPT ORACLE'S
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2094

CLOSING ARGUMENT \ BOIES
1 BUSINESS RELATIONSHIPS. THAT WAS PART OF THE PURPOSE OF DOING
2 IT. AND FOURTH, IT DOES NOT FULLY COMPENSATE ORACLE BASED ON --
3 JUST LOOKING AT THE MAINTENANCE REVENUE.

4 NOW, I ALSO WANT TO TALK JUST FOR A MOMENT ABOUT
5 SOMETHING CALLED INFRINGER'S PROFITS, WHICH YOU MAY OR MAY NOT
6 GET TO DEPENDING ON HOW YOU ANSWER SOME OF THE OTHER QUESTIONS
7 ON THE JURY -- BUT I DO WANT TO TALK TO YOU ABOUT INFRINGER'S
8 PROFITS.

9 FIRST, INFRINGER PROFITS ARE THE PROFITS THAT THEY
10 MAKE. AND IF YOU GO TO 287 --

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: -- MR. MEYER CAME UP WITH AN ESTIMATE OF
13 \$288 MILLION FOR INFRINGER PROFITS. AND HE SAID THAT'S
14 INCOMPLETE. HE SAID IT'S MORE THAN THAT, BUT I CAN'T TELL YOU
15 HOW MUCH MORE THAN THAT 'CAUSE I DON'T HAVE THE DATA. AND ONE
16 OF THE PROBLEMS WITH THE INFRINGER'S PROFITS IS THAT THE DATA IS
17 NOT ALL AVAILABLE.

18 BUT WHAT WE KNOW IS WE KNOW IT'S SUBSTANTIALLY ABOVE
19 \$288 MILLION. NOW, HOW DO WE KNOW THAT?

20 AND LET ME GO TO PAGE 110.

21 (DEMONSTRATIVE PUBLISHED TO JURY.)

22 MR. BOIES: YOU REMEMBER I DREW ON -- ON THE BOARD
23 OVER HERE A -- WHEN I WAS EXAMINING MR. CLARKE, I TALKED ABOUT
24 HOW SAP HAD IDENTIFIED 86 CUSTOMERS WHERE SAP HAD REVENUE AFTER
25 THE CUSTOMERS BECAME A TOMORROWNOW CUSTOMER. AND THAT WAS
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2095

CLOSING ARGUMENT \ BOIES
1 \$885 MILLION. AND THEY HAD ONGOING -- WHAT SAP CALLED ONGOING
2 REVENUES. THAT MEANS THAT THEY WERE REVENUES THAT STARTED
3 BEFORE, BUT CONTINUED AFTER -- AND HE CONCLUDED THEY OUGHT TO BE
4 SUBTRACTED. THAT CAME UP WITH \$689 MILLION.

5 NOW, THERE ARE TWO ISSUES. FIRST, HE SAYS, WELL, NOT
6 ALL 86 CUSTOMERS REALLY WENT TO SAP BECAUSE OF TOMORROWNOW EVEN
7 THOUGH THEY WENT TO SAP AFTER TOMORROWNOW. AND THE QUESTION IS
8 HOW DO YOU FIGURE THAT OUT. AND THAT'S ONE OF THE PROBLEMS WITH
9 USING THIS APPROACH, IS IT'S HARD TO FIGURE THAT OUT.

10 THE SECOND THING IS HE SAYS, WELL, THAT'S NOT ALL
11 PROFIT. AND IT'S TRUE IT'S NOT ALL PROFIT. BUT HOW MUCH OF IT
12 IS PROFIT IN TERMS OF THE INFRINGER'S PROFIT? IT'S THEIR BURDEN
13 TO PROVE AND THEY SIMPLY HAVE NOT CARRIED THAT BURDEN.

14 THEY HAVEN'T BEGUN TO COME FORWARD WITH EVIDENCE,
15 ACTUAL EVIDENCE OF WHAT THE COST OF SERVING THESE ADDITIONAL
16 CUSTOMERS WERE.

17 SO YOU STARTED WITH \$689 MILLION, CONCEDED REVENUES
18 ON JUST THESE 86 CUSTOMERS -- THAT'S JUST 86 CUSTOMERS. THESE
19 ARE 86 ACTUAL CUSTOMERS. THAT SAYS \$689 MILLION OF ACTUAL
20 REVENUE FROM ACTUAL CUSTOMERS. BECAUSE IN INFRINGER'S PROFITS,
21 YOU ARE LOOKING AT WHAT HAPPENS AFTER THE FACT. HOW MUCH OF
22 THAT IS INFRINGER PROFITS?

23 SINCE THEY HAVE THE BURDEN, IT'S THAT AMOUNTS MINUS
24 WHATEVER THEY SHOW YOU THE RIGHT EVIDENCE IS FOR THEIR COST.

25 I WANTED YOU TO KEEP IN MIND WHEN YOU'RE THINKING
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CLOSING ARGUMENT \ BOIES

1 ABOUT THESE NUMBERS THAT --

2 AND LET'S GO TO 204.

3 (DEMONSTRATIVE PUBLISHED TO JURY.)

4 MR. BOIES: THIS IS PLAINTIFFS' EXHIBIT 37. OVER THE
5 LONG TERM, SAP RECOGNIZED THAT EVERY DOLLAR OF TOMORROWNOW
6 STAND-ALONE REVENUE IN 2005 REPRESENTED \$18 MILLION -- OR \$18 --
7 EVERY \$1 REPRESENTS 18 -- EVERY MILLION DOLLARS REPRESENTS
8 \$18 MILLION OF ORIGINALLY EXPECTED ORACLE REVENUE.

9 SO IT HAS THIS MULTIPLIER EFFECT, AND THE MULTIPLIER
10 EFFECT WORKED BOTH WAYS. IT WORKED TO HURT ORACLE AND HELP SAP.

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: GO TO 288, WHICH IS EXHIBIT 373.

13 \$1 OF TOMORROWNOW STAND-ALONE REVENUE EQUALS \$10 OF
14 SAP'S LICENSE REVENUE PIPELINE. SO WHEN YOU LOOK AT THE
15 REVENUES OF TOMORROWNOW, YOU'VE GOT TO TAKE INTO ACCOUNT THE
16 FACT THAT IT HAS THIS MULTIPLYING EFFECT, THAT EVERY DOLLAR THAT
17 TOMORROWNOW GETS HURTS ORACLE MUCH MORE THAN A DOLLAR AND HELPS
18 SAP MUCH MORE THAN A DOLLAR.

19 SO IF YOU SIMPLY LOOK AT SAP'S AND TOMORROWNOW'S
20 REVENUE FROM THOSE CUSTOMERS, MAINTENANCE REVENUES FROM THOSE
21 CUSTOMERS, THAT GREATLY UNDERSTATES THE VALUE OF WHAT'S GOING
22 ON, FOR BOTH SAP AND FOR ORACLE.

23 NOW, IF YOU WANTED TO DO SOME REALITY TESTING, YOU
24 WANT TO DO THAT REALITY TESTING BASED ON WHAT PEOPLE KNEW AT THE
25 TIME.

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CLOSING ARGUMENT \ BOIES

1 AND LET'S GO TO 225. THIS IS PLAINTIFFS' EXHIBIT 23.

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 MR. BOIES: THIS IS A CONFERENCE CALL, JANUARY 19TH,
4 THE DAY OF THE HYPOTHETICAL NEGOTIATION. THIS IS WHAT
5 MR. AGASSI, THE SAP BOARD MEMBER, SAYS: HE'S ASKED ABOUT THE
6 VALUES. SAYS IF YOU WANT TO LOOK AT IT FROM A FINANCIALS
7 PERSPECTIVE, THE RATIONALE IS MORE AROUND THE VALUE THAT THESE
8 CUSTOMERS REPRESENT AS POTENTIAL FUTURE CUSTOMERS OF SAP.

9 AND THE CUSTOMERS OF -- PEOPLESFT CUSTOMERS. AND HE
10 GOES ON. AND THIS IS MR. AGASSI'S WORDS AT THE TIME. AND IT'S
11 THE VALUE WAS ESTIMATED BY ORACLE RIGHTLY OR WRONGLY AS
12 \$10 BILLION.

13 WE BELIEVE THAT THIS CUSTOMER BASE IS NOT NECESSARILY
14 CAPTIVE (SIC) BY ORACLE. I THINK THIS CUSTOMER BASE HAS TO MAKE
15 A CHOICE RIGHT NOW. AND THE REASON THEY HAD TO MAKE A CHOICE
16 RIGHT NOW WAS BECAUSE OF TOMORROWNOW. BECAUSE WITHOUT
17 TOMORROWNOW, YOU'VE SEEN THEY HAD NO MAINTENANCE OFFERING.

18 MR. CLARKE TESTIFIED THAT SAP ON ITS OWN COULD NEVER
19 HAVE COME UP WITH A SOFTWARE NECESSARY TO SERVICE ORACLE
20 CUSTOMERS. THEY COULD NOT HAVE DONE IT ON THEIR OWN. ALSO
21 TESTIFIED THAT TOMORROWNOW COULDN'T HAVE DONE IT LEGALLY. BUT
22 THEY NEEDED TOMORROWNOW, THEY NEEDED THESE INFRINGING COPIES IN
23 ORDER TO COMPETE. THEY COULD ONLY GIVE THESE CUSTOMERS WORTH
24 \$10 BILLION A CHOICE THROUGH THE INFRINGEMENT, AND THAT SHOWS
25 YOU THE VALUE OF THE INFRINGEMENT.

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2098

1 CLOSING ARGUMENT \ BOIES
AND PLAINTIFFS' EXHIBIT 4850.

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 MR. BOIES: QUOTE, THERE IS A LOT AT STAKE. 9200
4 PEOPLESFT AND JD EDWARDS CUSTOMERS, 1.3 BILLION IN ANNUAL
5 MAINTENANCE REVENUE, AND ORACLE'S \$10.3 BILLION ACQUISITION
6 COSTS.

7 PLAINTIFFS' EXHIBIT 4850.

8 (DEMONSTRATIVE PUBLISHED TO JURY.)

9 MR. BOIES: AND JANUARY 16TH, 2005, PLAINTIFFS'
10 EXHIBIT 18, THIS IS LESS THAN TWO WEEKS BEFORE THE ACQUISITION,
11 LESS THAN TWO WEEKS BEFORE THE HYPOTHETICAL LICENSE NEGOTIATION.
12 SAP EXECUTIVE BOARD MEMBER AGASSI WRITES --

13 (DEMONSTRATIVE PUBLISHED TO JURY.)

14 MR. BOIES: -- THE PRESS RELEASE ON THIS DEAL WILL BE
15 THE CHEAPEST ADVERTISING WE HAVE EVER GOT, AND ORACLE'S SHARE
16 PRICE WILL PROBABLY GO DOWN BY 10 PERCENT THAT MINUTE. ORACLE'S
17 MARKET CAPITALIZATION ON JANUARY 6, 2005, WAS APPROXIMATELY
18 \$70 MILLION. A 10 PERCENT DROP WOULD BE A \$7 BILLION LOSS IN

19 VALUE.
20 BUT THAT'S NOT A DAMAGE CALCULATION, LADIES AND
21 GENTLEMEN, BUT IT IS SOMETHING THAT SHOWS YOU THE MAGNITUDE OF
22 WHAT WE'RE DEALING WITH.
23 AND TO PUT THAT MAGNITUDE IN PERSPECTIVE, GO TO -- GO
24 TO 75.
25 (DEMONSTRATIVE PUBLISHED TO JURY.)
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2099

CLOSING ARGUMENT \ BOIES
1 MR. BOIES: I WANT TO REMIND YOU OF WHO TESTIFIED IN
2 THIS TRIAL AND WHAT THEY SAID ABOUT THE VALUE OF A FAIR MARKET
3 VALUE LICENSE. ALL RIGHT?
4 MR. PHILLIPS, FORMER PRESIDENT OF ORACLE; MS. CATZ,
5 CURRENT PRESIDENT OF ORACLE --
6 (DEMONSTRATIVE PUBLISHED TO JURY.)
7 MR. BOIES: -- MR. ELLISON, ORACLE'S C.E.O., ALL
8 TESTIFIED THAT THE FAIR MARKET VALUE LICENSE WOULD HAVE A VALUE
9 IN THE BILLIONS OF DOLLARS. MAYBE 4 BILLION, MAYBE 4 AND A
10 HALF, MAYBE \$5 BILLION BUT BILLIONS OF DOLLARS.
11 MR. MEYER, OUR EXPERT, CAME IN AND HE QUANTIFIED IT
12 AT 1.65 BILLION, SAYING THAT WAS A MINIMUM NUMBER. THERE WERE
13 OTHER ELEMENTS THAT HE COULDN'T QUANTIFY, BUT IT WAS \$1.656
14 BILLION.
15 NOBODY -- NO FACT WITNESS FROM SAP CAME IN TO GIVE
16 CONTRARY TESTIMONY. NOT A SINGLE FACT WITNESS GOT ON THE STAND
17 FROM SAP TO TELL YOU WHAT THEY BELIEVED THE FAIR MARKET VALUE OF
18 THIS LICENSE WAS. NOT A SINGLE FACT WITNESS WOULD COME INTO
19 THIS COURTROOM, SUBJECT THEMSELVES TO CROSS-EXAMINATION, AS
20 MR. ELLISON, AND MR. PHILLIPS AND MS. CATZ DID, AND TRY TO
21 DEFEND A NUMBER FOR YOU. THE BUSINESS TESTIMONY IS UNDISPUTED.
22 YOU HAVE THE ORACLE TESTIMONY. AND YOU HAVE NOTHING FROM SAP
23 ABOUT WHAT THE VALUE WAS OF THIS FAIR MARKET VALUE LICENSE.
24 WHAT THEY DID DO WAS THEY BROUGHT IN MR. CLARKE, WHO
25 SAYS IT'S \$40 MILLION. NOW, YOU HEARD THE CROSS-EXAMINATION OF
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CLOSING ARGUMENT \ BOIES

1 MR. CLARKE. AND YOU HEARD ALL THE PROBLEMS WITH THAT ANALYSIS.

2 YOU HEARD ALL THE THINGS HE DIDN'T TAKE INTO ACCOUNT.

3 YOU'VE SEEN SOME OF THOSE THINGS TODAY, BUT YOU HAVE

4 THEIR EXPERT AT 40, OUR EXPERT AT 1.656 BILLION, AND YOU HAVE

5 FACT WITNESS TESTIMONY, BUSINESS TESTIMONY FROM OUR WITNESSES

6 GIVING YOU A VALUATION. YOU HAVE NOTHING FROM THEM.

7 NOW, THIS IS 237 --

8 (DEMONSTRATIVE PUBLISHED TO JURY.)

9 MR. BOIES: -- MR. MEYER'S CALCULATION. THAT COMES

10 UP WITH A \$1.655.6 BILLION (SIC), \$1,655,600,000. AND IT'S GOT

11 THE THREE COMPONENTS, THE PEOPLESOFT LICENSE, THE SIEBEL

12 LICENSE, AND THE DATABASE LICENSE. THE VAST MAJORITY OF IT IS

13 THE PEOPLESOFT LICENSE.

14 AND THERE, WHAT HE SAID WAS, THIS IS A MINIMUM

15 NUMBER. IT'S LARGER. I CAN'T TELL YOU HOW MUCH LARGER BECAUSE

16 THE DATA ISN'T THERE.

17 SO ONE OF THE -- ONE OF THE PROBLEMS WE'RE CONFRONTED

18 WITH HERE IS A QUESTION OF WHAT CAN BE QUANTIFIED AND WHAT DO

19 YOU HAVE TO ESTIMATE? AND THIS WAS HIS QUANTIFICATION.

20 NOW, LET ME GO TO 239 BECAUSE I WANT TO JUST COMPARE

21 THAT QUANTIFICATION.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: YOU HAVE MR. PHILLIPS' VALUATION, YOU

24 HAVE MR. ELLISON'S VALUATION OF LICENSE. YOU HAVE WHAT A

25 LICENSE AT 20 PERCENT OF THE PEOPLESOFT AND SIEBEL ACQUISITIONS

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CLOSING ARGUMENT \ BOIES

1 WOULD BE. YOU HAVE THE VALUE OF 3,000 CUSTOMERS, JUST

2 \$1 MILLION PER CUSTOMER.

3 YOU HAVE THE MEYER'S INDICATION VALUE AT 2.86

4 BILLION. YOU HAVE SAP'S ROAD MAP REVENUE THROUGH 2007 EXTENDED

5 FOR THE TEN MONTHS IN 2008, AT 1.7 -- 1.77 --

6 YOU HAVE 10 PERCENT OF PEOPLESOFT AND SIEBEL

7 ACQUISITION PRICE, WHICH WOULD BE 1.72 BILLION, AND ON AND ON

8 AND ON, EXAMPLE AFTER EXAMPLE AFTER EXAMPLE.

9 YOU HAVE MR. MEYER'S AT 1.65 BILLION, AND YOU HAVE

10 MR. CLARK AT 40 MILLION.

11 AND LET ME GO TO 240. AND MAYBE THIS IS A CHART TO
12 LEAVE YOU WITH.

13 (DEMONSTRATIVE PUBLISHED TO JURY.)

14 MR. BOIES: THIS IS A GRAPHIC DEPICTION OF THE
15 VARIOUS VALUATIONS -- FAIR MARKET VALUE LICENSE THAT YOU'VE
16 HEARD. NO. 9 IS MR. MEYER'S VALUATION, WHICH, AS YOU SEE IS IN
17 THE LOWER HALF, BUT IN THE RANGE OF A NUMBER OF THOSE
18 VALUATIONS.

19 NO. 14, WHICH YOU CAN BARELY SEE, IS MR. CLARKE'S
20 VALUATION, VIRTUALLY OFF THE CHART. HE'S NOT EVEN IN THE
21 BALLPARK. AND THE REASON HE'S NOT EVEN IN THE BALLPARK IS THE
22 REASONS YOU HEARD ON CROSS-EXAMINATION AND THE EVIDENCE THAT
23 I -- THAT I'M SHOWING YOU TODAY.

24 NOW, I'LL GET ANOTHER CHANCE TO TALK TO YOU -- NOT AS
25 LONG AS I JUST HAD -- AFTER COUNSEL FOR SAP HAS TALKED TO YOU,
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CLOSING ARGUMENT \ BOIES

1 BUT I WANT TO LEAVE YOU RIGHT NOW WITH THESE THOUGHTS. AND I'D
2 LIKE YOU TO KEEP THEM IN MIND AS YOU LISTEN TO WHAT YOU'RE GOING
3 TO HEAR FROM DEFENSE COUNSEL.

4 I WANT YOU TO ASK YOURSELF WHY, IF THIS WAS A VERY,
5 VERY SMALL THING, IF IT WAS VERY LIMITED -- WHY DID THEY HAVE IT
6 REPORT DIRECTLY TO THE EXECUTIVE BOARD.

7 REMEMBER MR. MCDERMOTT SAYING -- REPORTED DIRECTLY TO
8 THE EXECUTIVE BOARD, NOT THE WAY IT USUALLY HAPPENS WHERE THEY
9 REPORT THROUGH SAP AMERICA, BUT DIRECTLY TO THE EXECUTIVE BOARD.

10 WHY ARE ALL OF THE CONTEMPORANEOUS ESTIMATES OF WHAT
11 WAS GOING TO HAPPEN AFTER THE ACQUISITION SO OPTIMISTIC, SO HIGH
12 IF IT WAS A VERY, VERY SMALL --

13 WHY IF IT WAS A VERY, VERY SMALL PART DID THEY CALL
14 IT A KEY COMPONENT, A CORNERSTONE, A MAJOR CORNERSTONE,
15 SOMETHING THAT WAS INSTRUMENTAL IN SAFE PASSAGE'S SUCCESS IF IT
16 WAS A VERY, VERY SMALL PART?

17 AND WHY DID THEY GET \$689 MILLION IN REVENUE FROM
18 JUST 86 CUSTOMERS IF THIS DIDN'T HAPPEN?

19 AND PERHAPS MOST IMPORTANTLY, WHY WOULD THIS COMPANY
20 TAKE ON THE SERIOUS RISKS THAT IT HAS ADMITTED OVER AND OVER
21 AGAIN IN -- INTERNAL DOCUMENTS THAT IT DID, IF THIS WASN'T
22 SOMETHING THAT WAS VERY VALUABLE? EVERY ONE OF THOSE BOARD
23 MEMBERS KNEW HOW SERIOUS THIS WAS -- EVERY ONE OF THOSE BOARD
24 MEMBERS KNEW WHAT THEY WERE EXPOSING THEMSELVES TO IF THEY GOT
25 CAUGHT. WHY WOULD THEY TAKE THAT RISK IF THIS WASN'T SOMETHING
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CLOSING ARGUMENT \ BOIES
1 THAT WAS REALLY VALUABLE?

2 THANK YOU.

3 THE COURT: ALL RIGHT. THANK YOU, MR. BOIES.

4 LADIES AND GENTLEMEN, WE'RE GOING TO TAKE OUR
5 MORNING -- OUR FIRST MORNING BREAK FOR 15 MINUTES, AND THEN
6 WE'LL COME BACK FOR THE DEFENSE CLOSING.

7 (RECESS TAKEN AT 10:38 A.M.)

8 (CONTINUED NEXT PAGE; NOTHING OMITTED.)

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 (PROCEEDINGS RESUMED AT 10:55 A.M.)

2 (PROCEEDINGS HELD IN THE PRESENCE OF THE JURY.)

3 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.

4 THE COURT: MR. MITTELSTAEDT?

5 CLOSING ARGUMENT

6 MR. MITTELSTAEDT: IF IT PLEASE THE COURT, LADIES
7 AND GENTLEMEN OF THE JURY.

8 IF TRUTH BE TOLD, THIS HAS NOT BEEN A GOOD MONTH OR
9 A GOOD WEEK OR A GOOD DAY FOR EITHER COMPANY. IT HASN'T BEEN
10 GOOD FOR SAP BECAUSE IT HAS OWNED UP TO COPYRIGHT INFRINGEMENT
11 BY TOMORROWNOW AND COPYRIGHT INFRINGEMENT INDIRECTLY BY ITSELF.

12 WHEN I STOOD UP HERE, WHAT IS IT THREE OR FOUR WEEKS
13 AGO, I TOLD YOU THAT SAP TOOK RESPONSIBILITY FOR THAT AND WAS
14 PREPARED AND HAS STOOD WILLING AND CONTINUES TO STAND WILLING
15 TO PAY ORACLE FOR REASONABLE COMPENSATION.

16 WHY HASN'T IT BEEN A GOOD TRIAL OR A GOOD DAY OR A
17 GOOD SHOWING FOR ORACLE?

18 THEY HAVE HAD THEIR CHANCE TO PUT ON ALL THIS
19 EVIDENCE OF STUFF THAT WE HAVE ALREADY ADMITTED TO. MAYBE THEY
20 THOUGHT THAT WAS GOOD FOR CUSTOMERS, MAYBE THEY THOUGHT THAT
21 WAS GOOD FOR COMPETITION, MAYBE THEY THOUGHT THAT WOULD BE
22 PICKED UP AND HELP THEM.

23 BUT I THINK THE EVIDENCE AND THE WAY ORACLE HAS
24 PRESENTED ITS CASE AND THE DAMAGES ITS ASKING FOR SHOW THEY
25 HAVE BEEN OVERREACHING. THEY ARE ASKING FOR FAR MORE THAN THEY

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 ARE ENTITLED TO, AND THEY ARE TRYING TO TRICK YOU IN DOING
2 THAT. AND I WILL EXPLAIN EXACTLY THE TRICKS THEY ARE USING.

3 THIS CASE REALLY COMES DOWN TO WHAT'S THE BEST
4 MEASURE OF COMPENSATION. JUDGE HAMILTON WILL INSTRUCT YOU THAT
5 IT IS UP TO YOU TO DECIDE THE BEST MEASURE. IS IT BASED ON --
6 AND YOU HAVE TWO CHOICES.

7 ONE WAY IS BASED ON GUESSWORK. THE OTHER WAY IS

8 BASED ON REALITY. ONE WAY IS BASED ON HOPES AND ASPIRATIONS
9 THAT SOMEBODY PUT DOWN ON A PIECE OF PAPER, THE OTHER IS BASED
10 ON WHAT ACTUALLY HAPPENED. ONE IS BASED ON WHAT MS. CATZ TOLD
11 YOU ME AND LARRY DEMAND. THE OTHER IS BASED ON WHAT A VERY
12 EXPERIENCED EXPERT IN HYPOTHETICAL NEGOTIATIONS SAID IS THE
13 RIGHT RESULT TAKEN INTO ACCOUNT NOT JUST THE INTEREST OF
14 ORACLE, BUT THE INTEREST OF BOTH PARTIES. A COMPROMISE. AND
15 ONE WOULD GIVE ORACLE A WINDFALL, A BONANZA, A JACKPOT AND THE
16 OTHER WOULD GIVE ORACLE WHAT ORACLE IS ENTITLED TO.

17 IN TRYING TO COME UP WITH A NUMBER IN THE BILLIONS,
18 ORACLE IS USING TWO BASIC TRICKS. FIRST OF ALL, THEY ARE
19 TRYING TO TURN WHAT SOMEBODY WROTE DOWN AS A GOAL OR A TARGET
20 INTO AN EXPECTATION; INTO AN EXPECTATION SO FIRM THAT A COMPANY
21 WOULD BE WILLING JUST BASED ON THAT PIECE OF PAPER, JUST BASED
22 ON THAT BOLD TO WRITE A CHECK AS BIG AS THEY WANT WITHOUT ANY
23 FURTHER WORK, WITHOUT ANY FURTHER ANALYSIS. THAT'S ONE TRICK.

24 IT'S WHAT MR. MEYER DID WITH HIS CHARTS. AND YOU
25 REMEMBER HIS CHART, AND I WILL SHOW IT TO YOU IN A BIT. CHART

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 21 WHERE HE SAYS UP AT THE TOP, "SAP'S EXPECTATION" AS IF THAT
2 IS WHAT SAP WOULD EXPECT TO GET SO FIRMLY THAT THEY WOULD BE
3 WILLING TO WRITE A CHECK FOR IT. BUT WHEN YOU WENT DOWN THOSE
4 COLUMNS, THERE WERE NO EXPECTATIONS. THERE WERE ASSUMPTIONS,
5 GOALS, PROJECTIONS, SCENARIOS, AND SO FORTH.

6 COUNSEL IS DOING THE SAME TRICK A LITTLE MORE
7 CLEVERLY, BUT I WILL SHOW YOU HOW, BASED ON THE CHARTS THEY'VE
8 USED, THEY ARE STILL TRYING TO TURN GOALS INTO EXPECTATIONS.
9 THAT'S ONE TRICK.

10 THE OTHER TRICK IS WHEN THEY SHOW YOU THESE
11 DOCUMENTS ABOUT THE VALUE OR THE -- NOT THE EXPECTATIONS, THE
12 GOALS OR THE TARGETS OF SAFE PASSAGE, THEY PRETEND THAT'S JUST
13 THE GOAL OR THE TARGET FOR TOMORROWNOW.

14 AND SO WHAT -- UNDER THEIR FAIR MARKET VALUE
15 APPROACH, WHAT THEY NEED TO DO IS PUT A VALUE ON TOMORROWNOW,
16 NOT A VALUE ON EVERYTHING THAT SAP DID AS PART OF SAFE PASSAGE.

17 AND AN EXAMPLE IS THIS CHART WITH 86 CUSTOMERS.
18 (SLIDE DISPLAYED ON SCREEN.)
19 THEY ACT LIKE THEY ARE ENTITLED TO REVENUE FOR ALL
20 86 CUSTOMERS. FIRST OF ALL, I THINK EVERYBODY AGREES ON BOTH
21 SIDES, MR. MEYER AND MR. CLARKE, THAT UNDER THE INFRINGERS'
22 PROFITS, ALL THEY ARE ENTITLED TO IS THE PROFIT, NOT THE
23 REVENUE. AND DESPITE WHAT COUNSEL MAY SAY, BOTH EXPERTS AGREE
24 THAT THE PROFIT MARGIN IS 50 PERCENT.
25 SO THIS IS VERY MISLEADING BECAUSE HE DOESN'T COME

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 DOWN AND TAKE OFF 50 PERCENT OF IT.

2 MORE THAN THAT, THESE 86 CUSTOMERS ARE THE CUSTOMERS
3 THAT BOUGHT SOMETHING FROM SAP DURING THE TIME THAT THEY WERE
4 TOMORROWNOW CUSTOMERS. SO THEY WERE GETTING MAINTENANCE ON
5 THEIR PEOPLESOFT SOFTWARE FROM TOMORROWNOW AND THEY WERE ALSO
6 BUYING SOMETHING FROM SAP.

7 THAT DOESN'T MEAN THEY BOUGHT FROM SAP BECAUSE OF
8 TOMORROWNOW. SOME OF THESE, INDEED, HAVE BEEN CUSTOMERS OF SAP
9 LONG BEFORE TOMORROWNOW EVER CAME ALONG, AND THEY JUST BOUGHT
10 SOMETHING, EXTRA SOMETHING ADDITIONAL FROM SAP AFTERWARDS.

11 SO WHEN WE GET TO THE INFRINGERS' PROFITS, THE
12 IMPORTANT THING IS IT'S NOT HOW MANY CUSTOMERS BOUGHT SOFTWARE
13 FROM SAP, IT'S HOW MANY BOUGHT SOFTWARE FROM SAP BECAUSE OF THE
14 INFRINGING ACT BY TOMORROWNOW.

15 YOU HEARD A LOT OF THINGS THAT WERE VERY MISLEADING.
16 LET ME JUST GIVE YOU A COUPLE OF EXAMPLES RIGHT AT THE START TO
17 TRY AND SET THE FRAMEWORK HERE.

18 YOU WERE SHOWN THIS CHART OR THIS E-MAIL WHERE
19 MR. AGASSI SAYS, WHEN WE ANNOUNCE THE TOMORROWNOW ACQUISITION,
20 ORACLE'S SHARE PRICE WILL PROBABLY GO DOWN BY 10 PERCENT THAT
21 SAME MINUTE.

22 YOU WILL REMEMBER THAT.

23 AND UP AT THE TOP, THEY TOLD YOU SAP'S DOCUMENTS
24 CONFIRM THE MAGNITUDE OF ORACLE'S DAMAGES.

25

SO WHAT THEY ARE SAYING IS THIS E-MAIL WHERE

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MR. AGASSI SAYS, STOCK PRICE WILL PROBABLY GO DOWN BY
2 10 PERCENT THAT SAME MINUTE, AND THEN THEY SAY THE VALUE OF THE
3 STOCK WAS WORTH \$70 BILLION ON THAT DAY, AND 10 PERCENT OF
4 7 BILLION -- 70 BILLION IS \$7 BILLION? THEY ACT LIKE THAT
5 SHOWS THE MAGNITUDE OF ORACLE'S DAMAGES.

6 IF THERE WERE ANYTHING TO THIS, IF THE PROPER WAY TO
7 MEASURE DAMAGES IN THIS CASE WAS THE EFFECT ON ORACLE'S STOCK
8 PRICE, MR. MEYER WOULD HAVE SAID IT, MR. BOIES WOULD HAVE SAID
9 IT, SOMEBODY WOULD HAVE SAID IT. BUT THEY JUST THROW THIS OUT
10 THERE AS IF THIS WOULD LEAD YOU TO THINK THE DAMAGES HERE OUGHT
11 TO BE IN THE BILLIONS.

12 AGAIN, IF THERE WERE ANYTHING TO THIS, THEY WOULD
13 TELL YOU WHAT, IN FACT, HAPPENED TO ORACLE'S STOCK PRICE.
14 THERE IS NO EVIDENCE OF WHAT HAPPENED TO ORACLE'S STOCK PRICE
15 AND YOU CAN IMAGINE IF ORACLE'S STOCK PRICE WENT DOWN
16 10 PERCENT, AND STAYED DOWN 10 PERCENT THE WHOLE TIME
17 TOMORROWNOW IS IN BUSINESS, AND IF THIS WERE A LEGITIMATE WAY
18 TO MEASURE DAMAGES, THEY WOULD TELL YOU ABOUT IT.

19 WHY DIDN'T THEY? THIS IS WHAT I CALL A HIT-AND-RUN
20 TACTIC. THEY JUST PUT IT UP THERE, HOPE IT MAKES SOME AFFECT
21 ON YOU, RILE YOU UP, BUT IT DOESN'T MEAN ANYTHING. AND THEY
22 PROVE IT DOESN'T MEAN ANYTHING BY NOT FOLLOWING UP ON IT.

23 THEY HAVE OFFERED SOME ANALOGIES. ONE OF THE
24 ANALOGIES THEY OFFERED WAS IF SOMEONE STOLE MS. CATZ'S WATCH
25 AND THEN HOCKED IT AND THEN GAVE HER BACK THE MONEY. TRICK.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 NOTHING TO DO WITH THE CASE. MS. CATZ HAS HER WATCH. NOBODY
2 TOOK THE WATCH FROM HER.

3 WHAT WE ARE TALKING ABOUT IN THIS CASE IS MAKING A
4 COPY. SO A CLOSER ANALOGY WOULD BE IF SOMEBODY MADE A COPY OF

5 HER WATCH, AND THEN YOU'D FIGURE OUT THE VALUE OF THAT, I
6 SUPPOSE. BUT NOBODY TOOK A WATCH. NOBODY TOOK A CROWBAR AND
7 BROKE INTO A HOME AND STOLE THE CONTENTS OF A \$10 MILLION HOME.
8 THAT DOESN'T FIT.

9 THE CLOSEST THEY HAVE COME TO AN ANALOGY THAT MIGHT
10 HELP YOU THINK ABOUT THIS IS SOMEBODY GOING OUT AND MAKING A
11 COPY OF A MOVIE, AND THEN SELLING IT OR HAVING SOMEBODY WATCH
12 IT FOR \$2. SO YOU START SHOWING THE MOVIE TO SOMEBODY AND YOU
13 MAKE \$2.

14 LET'S SAY THAT PERSON WHO TOOK THE MOVIE, MADE THE
15 COPY OF THE MOVIE WENT HOME AND HE HAD THIS ELABORATE BUSINESS
16 PLAN. AND THE BUSINESS PLAN WAS, I AM GOING TO MAKE A COPY
17 THEN I AM GOING TO MAKE A MILLION COPIES. THEN I AM GOING TO
18 SHOW THAT MOVIE TO EVERYBODY IN THE WORLD. AND I AM GOING TO
19 MAKE \$2 A MOVIE. AND I AM GOING -- HOWEVER MANY BILLIONS OF
20 PEOPLE IN THE WORLD AND I AM GOING TO BECOME RICHER THAN
21 ANYBODY.

22 LET'S SAY WHAT ACTUALLY HAPPENS IS HE GOES OUT AND
23 HE CAN FIND ONE PERSON WHO WANTS TO WATCH THIS BOOTLEG COPY OF
24 HIS MOVIE.

25 ORACLE WOULD COME IN AND SAY -- IF THEY OWN THE

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MOVIE, THEY ARE ENTITLED TO THE WORLD -- THE VALUE OF THE
2 WORLDWIDE DISTRIBUTION RIGHTS OF THIS MOVIE. THAT'S WHAT THEY
3 ARE TRYING TO SELL YOU.

4 WHAT THEY ARE REALLY ENTITLED TO IS THE PROFIT THEY
5 LOST ON SHOWING THAT MOVIE TO ONE CUSTOMER, OR THE PROFIT THE
6 INFRINGER MADE ON SHOWING THAT MOVIE TO ONE CUSTOMER. THAT, I
7 THINK, GIVES YOU AN IDEA OF WHAT'S GOING ON HERE.

8 THEY ALSO SAID AT THE START WHY DIDN'T WE BRING IN
9 WITNESSES TO -- WHY DIDN'T WE BRING IN A WITNESS TO TALK ABOUT
10 THE INFRINGEMENT? THEY BROUGHT IN MANDIA, THEY BROUGHT IN
11 OTHER PEOPLE TO TALK ABOUT THE INFRINGEMENT.

12 THE REAL QUESTION IS, WHY DID THEY SPEND SO MUCH

13 TIME TALKING ABOUT THE INFRINGEMENT? WE STIPULATED TO IT.
14 THERE'S A STIPULATION OF FACT. THEY SHOWED YOU PART OF IT
15 ABOUT HOW MUCH WAS DOWNLOADED AND WHAT WAS DONE WITH IT.

16 THE REASON WE DIDN'T BRING ANY WITNESSES ON THAT IS
17 WE ADMITTED IT. WE STIPULATED TO IT.

18 THEN THEY SAID, WELL, WHY DIDN'T SAP -- AND BY THE
19 WAY, IT IS SAP. IT STANDS FOR SYSTEMS APPLICATIONS AND
20 PROGRAMS. THAT'S THE WAY IT IS PRONOUNCED. WHY DIDN'T WE
21 BRING IN ANY WITNESSES TO TALK ABOUT HOW MUCH WE WOULD HAVE
22 WANTED TO PAY FOR A LICENSE?

23 WELL, THAT'S A REAL HARD THING TO HAVE IN MIND.
24 WHAT WOULD YOU HAVE WANTED TO DO FIVE YEARS AGO IF SOMETHING
25 HAD BEEN DIFFERENT?

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WHEN THEY ASKED MR. BRANDT, HE JUST SAID, WELL, I
2 WOULDN'T HAVE GIVEN A LICENSE, SO I CAN'T REALLY THINK ABOUT
3 THAT.

4 THEY MISUNDERSTAND THIS FAIR MARKET VALUE
5 HYPOTHETICAL NEGOTIATION. IT IS NOT ABOUT ASKING MS. CATZ OR
6 MR. ELLISON OR MR. PHILLIPS HOW MUCH THEY WOULD DEMAND. WE
7 KNOW THE ANSWER TO THAT. IT'S A LOT OF MONEY. THEY CAN'T EVEN
8 AGREE ON WHAT IT IS. IT'S A HUGE RANGE, BUT IT HAS ONE THING
9 IN COMMON. IT'S A LOT OF MONEY.

10 SO IF WE ASK SOMEBODY FROM SAP FOR PURPOSES OF TRIAL
11 LIKE THEY ASKED THEIR PEOPLE FOR PURPOSES OF THIS TRIAL, HOW
12 MUCH WOULD YOU LIKE TO PAY FOR A LICENSE? IT WOULDN'T BE VERY
13 MUCH. SO THAT DOESN'T GET YOU VERY MUCH -- VERY FAR. THAT'S
14 WHY BOTH SIDES HAVE EXPERTS WHO GET UP THERE AND THEY ARE
15 SUPPOSED TO TELL YOU WHAT IT WOULD BE LIKE IF YOU CONDUCTED A
16 HYPOTHETICAL NEGOTIATION WHERE YOU HAD NOT PEOPLE WITH THE
17 MINDSET OF THE PARTIES HERE, BUT PEOPLE WHO WERE REASONABLE,
18 PEOPLE WHO WERE PRUDENT, PEOPLE WHO WANTED TO REACH AN
19 AGREEMENT, AND PEOPLE WHO WANTED TO BE FAIR TO BOTH SIDES.

20 THE REAL QUESTION ABOUT WITNESSES HERE IS THIS CASE
21 IS ABOUT CUSTOMERS. IT'S ABOUT HOW MANY CUSTOMERS LEFT ORACLE

22 AND WENT TO TOMORROWNOW BECAUSE OF THE INFRINGING, AND HOW MANY
23 PEOPLE WENT ON TO SAP BECAUSE OF THE INFRINGING.

24 WE PUT ON TESTIMONY FROM CUSTOMERS. WE HAD AN
25 EXPERT WHO REVIEWED A LOT OF PAGES OF DOCUMENTS AND OFFERED HIS
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OPINION ON HOW MANY CUSTOMERS ARE IN PLAY HERE. ORACLE DID NOT
2 BRING A SINGLE CUSTOMER AS A WITNESS, NOT A SINGLE WITNESS AS A
3 WITNESS. THIS CASE IS ABOUT CUSTOMERS AND THEY DIDN'T BRING IN
4 ANYBODY.

5 OKAY. AT THE START, ORACLE KEPT ACTING LIKE IT WAS
6 SAP WHO TOOK THE SOFTWARE AND WHO USED THE SOFTWARE. WITH
7 ALMOST EVERY WITNESS WE HAD TO FIGHT ABOUT THAT. AND
8 EVENTUALLY EVERY WITNESS AGREED THAT, NO, WE'RE REALLY JUST
9 TALKING ABOUT TOMORROWNOW.

10 SAP IS INDIRECTLY RESPONSIBLE, BUT IT DIDN'T USE THE
11 SOFTWARE THAT WAS DOWNLOADED BY TOMORROWNOW. AND EVEN TODAY
12 THEY STILL TALK ABOUT SAP TAKING THE SOFTWARE.

13 SO LET'S GO TO MY FIRST SLIDE, THAT'S THE SECOND
14 SLIDE -- FIRST SLIDE IS MR. ELLISON.

15 (SLIDE DISPLAYED ON SCREEN.)

16 AND, YOUR HONOR, COULD YOU INQUIRE IF THE JURY CAN
17 SEE ME IF I STAY BACK ON THIS SIDE?

18 THE COURT: LADIES AND GENTLEMEN, YOU CAN'T SEE THE
19 SCREEN?

20 JURORS: NO.

21 THE COURT: NO, OKAY.

22 MR. MITTELSTAEDT: THIS IS MR. ELLISON, THE FIRST
23 DAY OF TRIAL -- WHENEVER HE TESTIFIED.

24 "AND SO YOU UNDERSTAND THAT TO THE EXTENT
25 LICENSE SHOULD BE PART OF THIS CASE, IT'S BASED

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 ON TOMORROWNOW'S LIMITED USE AND ACCESS,

2 CORRECT?

3 "I DO".

4 (SLIDE DISPLAYED ON SCREEN.)

5 WHEN MR. MANDIA TESTIFIED, WE TALKED ABOUT WHAT WAS
6 IT THAT TOMORROWNOW DID. AND HERE WAS AN EXAMPLE. THIS WAS ON
7 CROSS-EXAMINATION.

8 ON THE LEFT WAS A CD THAT WAS SOLD BY ORACLE TO ONE
9 CUSTOMER, PARK ASSOCIATES, AND ORACLE SOLD THE SAME SOFTWARE TO
10 GENERAL CHEMICAL, ANOTHER COMPANY -- ANOTHER CUSTOMER.

11 WHAT TOMORROWNOW SHOULD HAVE DONE WAS USE THIS, THE
12 CD ON THE LEFT TO SERVICE THAT CUSTOMER AND THE CD ON THE RIGHT
13 TO SERVICE THE OTHER CUSTOMER. BUT WHAT IT DID, ONE OF THE
14 THINGS IT DID WRONG IS IT TOOK A SHORTCUT, AND IT USED ONE CD
15 ON THE LEFT TO SERVICE THE CUSTOMER ON THE RIGHT.

16 THAT'S COPYRIGHT INFRINGEMENT BECAUSE IT VIOLATED
17 ORACLE'S LICENSE WITH THOSE CUSTOMERS, BUT THAT'S AN EXAMPLE OF
18 WHAT TOMORROWNOW DID. TOMORROWNOW.

19 (SLIDE DISPLAYED ON SCREEN.)

20 AND, FINALLY, WE HAD AN ADMISSION OF THAT JUST NOW
21 WHEN THEY SHOWED YOU THE SLIDE, THIS IS SLIDE 10 ON
22 TOMORROWNOW'S ILLEGAL COPYING. IT'S TOMORROWNOW MAKING
23 IMPROPER COPIES UNDER ORACLE'S LICENSE, DOWNLOADING THINGS THEY
24 SHOULDN'T HAVE, MAKING COPIES OF CD'S, AND MAKING DEVELOPMENT
25 ENVIRONMENTS. BUT ALL OF THIS -- AND REMEMBER HOW MUCH WE HAD

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 TO FIGHT WITH MR. MEYER AND SOME OF THE WITNESSES, ALL OF THIS
2 THEY SAY TO PROVIDE MAINTENANCE AND SUPPORT.

3 SO TOMORROWNOW IS MAKING COPIES AND USING COPIES OF
4 ONE CUSTOMER FOR ANOTHER AND SO FORTH AND DOWNLOADING MORE THAN
5 THEY ARE SUPPOSED TO, NOT TO GO OUT AND SELL IT TO SOMEBODY,
6 BUT TO USE IT TO SUPPORT THOSE CUSTOMERS.

7 THAT DOESN'T MAKE IT RIGHT, BUT IT PUTS IT IN
8 CONTEXT.

9 (SLIDE DISPLAYED ON SCREEN.)

10 YOU'VE HEARD ABOUT THIS STIPULATION OF LIABILITY.
11 AND THIS IS WHERE TOMORROWNOW AND SAP STIPULATE TO THIS
12 LIABILITY. THERE ARE A COUPLE OF OTHER PARTS TO THAT.
13 AS PART OF THAT, ORACLE DISMISSED ALL CLAIMS AGAINST
14 SAP EXCEPT THE COPYRIGHT INFRINGEMENT. SAP AND TOMORROWNOW
15 RETAINED ALL DEFENSES AS TO DAMAGES. AND THE JURY IS TO
16 CONSIDER ONLY DAMAGES AVAILABLE UNDER THE COPYRIGHT ACT.
17 LET ME COME TO, AS WE DID IT WITH ALMOST ALL OF THE
18 WITNESSES, I AM GOING TO TALK ABOUT THE HYPOTHETICAL
19 NEGOTIATION AND THEN ABOUT LOST PROFITS AND INFRINGERS'
20 PROFITS.
21 AS I SAY, THE COURT WILL GIVE YOU THE CHOICE WHAT'S
22 THE BEST WAY TO LOOK AT THIS: HYPOTHETICAL NEGOTIATION OR WHAT
23 ACTUALLY HAPPENED WITH THE LOST SUPPORT PROFITS AND THE
24 INFRINGERS' PROFITS.
25 LET ME SET THE STAGE FOR THIS HYPOTHETICAL

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 NEGOTIATION.
2 YOU HEARD FROM MR. CLARKE HOW IT IS SUPPOSED TO
3 WORK. MR. MEYER AND MR. CLARKE, AS EXPERTS IN THIS AREA, ARE
4 SUPPOSED TO OFFER OPINIONS ON HOW REASONABLE AND WILLING BUYERS
5 AND SELLERS WOULD REACH A NEGOTIATED RESOLUTION.
6 IT'S NOT UP TO THE LAWYERS TO TELL YOU BASED ON
7 LOOKING AT DOCUMENTS WHAT THE PARTIES WOULD COME TO, IT'S UP TO
8 EXPERTS TO TELL YOU HOW THIS WOULD COME OUT AND THEN FOR YOU TO
9 USE COMMON SENSE.
10 (SLIDE DISPLAYED ON SCREEN.)
11 THIS IS WHAT MR. MEYER SAID. HE AGREED THAT THIS
12 HYPOTHETICAL NEGOTIATION CANNOT BE PUNITIVE. WE ARE JUST
13 TALKING ABOUT COPYRIGHT DAMAGES HERE. THE PURPOSE IS NOT TO
14 PUNISH ANYBODY.
15 AND SO WHEN THEY KEEP SAYING, IT'S THE AMOUNT THAT
16 SAP HAD TO AGREE TO BECAUSE THEY INFRINGED COPYRIGHTS, THAT'S
17 NOT IT. IT'S WHAT REASONABLE PEOPLE WOULD COME TO AS A

18 COMPROMISE.

19 MR. MEYER ALSO AGREED, YOU DON'T JUST ASK THE SELLER
20 HOW MUCH SHE WANTS. HE ADMITTED WHAT WOULD HAPPEN IF YOU DID
21 THAT. IT WOULD PROBABLY BE TOO HIGH, WAY TOO HIGH.

22 I THINK THE EVIDENCE SHOWS THAT THIS HYPOTHETICAL
23 NEGOTIATION FOR A LUMP SUM PAYMENT WOULD BE TOO SPECULATIVE.
24 AND THE COURT WILL INSTRUCT YOU THAT IF YOU FIND THE EVIDENCE
25 TOO SPECULATIVE, YOU CAN DISREGARD THIS METHOD OF DAMAGES.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WHY IS IT CAN TOO SPECULATIVE?

2 THIS ISN'T THE COMPLETE ANSWER, BUT THIS IS THE
3 BACKGROUND. WE ALL KNOW IT NEVER HAPPENED. WE ALL HEARD THE
4 TESTIMONY FROM WITNESSES THAT IT NEVER WOULD HAPPEN. AND MORE
5 IMPORTANT, MORE IMPORTANT THERE ARE NO COMPARABLES.

6 IN MOST HYPOTHETICAL NEGOTIATIONS YOU GO LOOK FOR
7 COMPARABLES, YOU KNOW, ANOTHER LICENSE WHERE THE COMPANY HAS
8 LICENSED THE SAME PATENT OR SAME COPYRIGHT, AND THEN YOU CAN
9 KIND OF ADJUST FROM THERE. BUT THERE IS NO COMPARABLE HERE.

10 MR. PHILLIPS: WOULD THIS LICENSE HAVE HAPPENED?

11 NO, IT WOULD BE UNTHINKABLE.

12 MR. ELLISON -- ALLISON, ANOTHER ORACLE EMPLOYEE:

13 "WOULD GRANTING A COMPETITOR SUCH A LICENSE MAKE
14 BUSINESS SENSE?

15 "NO.

16 "WHY NOT?

17 "IT DOESN'T MAKE SENSE TO PROVIDE A LICENSE TO A
18 COMPETITOR TO TRY AND TAKE YOUR CUSTOMERS AWAY
19 FROM YOU."

20 THAT'S ONE REASON IT IS SPECULATIVE. IT WOULD NEVER
21 HAPPEN. WE DON'T HAVE ANY COMPARABLES TO SAY WHERE IT HAS
22 HAPPENED. BUT MORE IMPORTANT THAN THAT IS, WITHOUT ANY
23 COMPARABLES, WITHOUT ANY HISTORY HERE, YOU ARE BEING ASKED TO
24 GUESS OR TO SPECULATE AS TO WHAT THE OUTCOME WOULD BE.

25 (SLIDE DISPLAYED ON SCREEN.)

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 AT ONE POINT THEY SUGGESTED THAT, WELL MAYBE YOU
2 OUGHT TO JUST LOOK TO THE -- THEIR ACQUISITION OF ORACLE -- OF
3 PEOPLESOFT, AND THAT WOULD GIVE YOU SOME HELP.

4 BUYING A COMPANY IS DIFFERENT FROM LICENSING
5 SOFTWARE. WHEN YOU BUY A COMPANY, ON THE LEFT-HAND SIDE, YOU
6 GET EVERYTHING. THIS IS SO OBVIOUS I DON'T KNOW WHY THEY ARE
7 TRYING TO MAKE THE COMPARISON. BUT YOU'RE BUYING EVERYTHING.
8 YOU GET THE EMPLOYEES, YOU GET THE CUSTOMER, YOU GET THE REAL
9 ESTATE, YOU GET THE INTELLECTUAL PROPERTY, YOU GET FULL
10 OWNERSHIP OF THE SOFTWARE. YOU CAN DO WHATEVER YOU WANT WITH
11 IT.

12 THE LICENSE WE ARE TALKING ABOUT WE WOULD ONLY GET A
13 LIMITED RIGHT TO USE IT FOR A LIMITED PURPOSE OF PROVIDING
14 SUPPORT.

15 ORACLE CAN SELL THE SOFTWARE; WE CAN'T SELL THE
16 SOFTWARE CAN UNDER THIS LICENSE. THEY DON'T HAVE ANY TIME
17 LIMIT ON OWNING ALL OF THE ASSETS OF THE COMPANY; WE HAVE A
18 TIME LIMIT OF THE THREE YEARS THAT TOMORROWNOW IS IN BUSINESS.
19 AND THE SAME FOR GEOGRAPHIC LIMITS.

20 SO THE ACQUISITION DOESN'T HELP US AT ALL.

21 THEY HAD A VALUATION DONE OF THEIR -- OF PEOPLESOFT
22 WHEN THEY BOUGHT IT. AND I WOULD ENCOURAGE YOU TO LOOK AT IT.
23 IT'S PLAINTIFFS' EXHIBIT 13. AND IT SHOWS THAT THEY VALUED --
24 THEY, STANDARD & POOR VALUED THE CUSTOMER CONTRACTS AND
25 RELATIONSHIPS AT \$2.1 BILLION. NOT AT \$11 BILLION.

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THAT'S FOR ALL OF THE CUSTOMER CONTRACTS AND ALL OF
2 THE RELATIONSHIPS. AND AS MS. CATZ CONFIRMED, THE VALUE OF THE
3 IP WAS LESS.

4 OKAY. LET'S LOOK IN THIS HYPOTHETICAL NEGOTIATION,
5 LET'S LOOK AT ORACLE'S SIDE FIRST.

6 MR. ELLISON CAME IN AND HE TESTIFIED THAT THE TIME
7 BEFORE, WHEN HE HAD TALKED TO MR. MEYER, HE SAID MAYBE THEY
8 COULD LOSE 30 TO 50 PERCENT OF THE CUSTOMERS. AND WHY ARE WE
9 TALKING ABOUT CUSTOMERS? BECAUSE THAT'S WHAT EVERYBODY USES TO
10 TRY TO PUT A VALUE ON THE LICENSE.

11 BUT MR. ELLISON SAID HE COULD LOSE POTENTIALLY 30 TO
12 50 PERCENT. HE NEVER SAID WHAT HE EXPECTED TO LOSE. IT WAS
13 JUST, YOU KNOW, THE UPPER LIMIT, WHAT THEY COULD LOSE.

14 WHEN HE COMES INTO THIS COURT, HE CHANGES. AND HE
15 SAYS, WELL, 20 TO 30 PERCENT WE COULD HAVE LOST.

16 SO WHEN MR. MEYER DID HIS CHART AND HIS ANALYSIS,
17 AND REMEMBER HE HAD THE SAP EXPECTATION AND THEN THE ORACLE
18 EXPECTATION? WHEN HE GETS TO THE ORACLE EXPECTATION, HE
19 DEFAULTS. HE GIVES UP.

20 AND I THOUGHT HE WAS GOING TO SAY, WELL, I AM GOING
21 TO USE MR. ELLISON'S COULD HAVE BEEN, MIGHT HAVE BEEN, BUT HE
22 DIDN'T. AND WHY DIDN'T HE DO THAT? WELL, ONE REASON IS HE
23 KNEW MR. ELLISON WAS UNRELIABLE. MR. ELLISON JUST CAME IN HERE
24 AND SAID, YOU KNOW, WE COULD LOSE 20 TO 30 PERCENT OF OUR
25 CUSTOMERS TO TOMORROW AND SAFE PASSAGE. BUT HE NEVER

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OFFERED ANY EXPLANATION OF WHY THAT WAS SO. HE JUST SAID IT AS
2 IF WHEN HE SAID SOMETHING, YOU HAVE TO BELIEVE IT.

3 THE OTHER THING IS HE DIDN'T DO ANY PAPERWORK. I AM
4 NOT TALKING ABOUT NOT DOING PAPERWORK BACK IN 2005. THEY
5 DIDN'T HAVE ANY REASON TO. WHAT I AM TALKING ABOUT IS BEFORE
6 COMING INTO THIS JURY, THIS COURT, AND SWEARING UNDER OATH,
7 WHAT HE WOULD HAVE EXPECTED TO LOSE, YOU WOULD THINK THEY WOULD
8 HAVE SOME OF THE PEOPLE AT ORACLE, THEIR RESEARCHERS, THEIR
9 DEVELOPERS, THEIR ANALYSTS SIT DOWN AND REALLY TRY AND FIGURE
10 OUT, YOU KNOW, WHAT WOULD WE HAVE BEEN THINKING BACK IN 2005
11 ABOUT HOW MANY CUSTOMERS WE WOULD LOSE. AND WHAT KIND OF
12 ANALYSIS WOULD WE HAVE GONE THROUGH TO FIGURE OUT WHAT WE WOULD
13 WANT FOR THIS LICENSE?

14 THEY BROUGHT IN ZERO, ZERO BACKUP, ZERO PAPERWORK,

15 ZERO REPORTS. YOU HEARD MS. CATZ TESTIFY THE OTHER DAY ABOUT
16 HOW THEY GOT ALL THESE BUSINESS CASES AND ALL THESE BUSINESS
17 PLANS AND SHE'S REVIEWED ALL OF THEM AND ALL OF THAT.

18 WHY DON'T THEY HAVE SOME KIND OF PLAN LIKE THAT OR
19 FORECAST OR BUSINESS CASE OVER WHAT THEY WOULD HAVE EXPECTED TO
20 GET OUT OF THIS LICENSE? INSTEAD, THEY JUST COME UP ON THE
21 STAND AND SAY ANY NUMBER THEY WANT.

22 YOU CAN TELL THAT WHEN THEY SHOW THE BIG CHART WHERE
23 PHILLIP SAYS, WELL, I WOULD TAKE 4 BILLION. ELLISON SAYS, I'LL
24 TAKE 3 BILLION. OTHER PEOPLE SAY THEY'LL TAKE A DIFFERENT
25 AMOUNT. THOSE ARE JUST NUMBERS OUT OF THE AIR. AND THAT'S WHY

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MR. MEYER DIDN'T RELY ON THEM.

2 I WANT TO SAY A WORD ABOUT MR. MEYER. THIS, I DON'T
3 THINK THIS IS COMPLETELY HIS FAULT. I THINK WHAT HAPPENED WAS
4 ORACLE PUT AN IMPOSSIBLE BURDEN ON HIS SHOULDERS. IF ONE
5 THING'S CLEAR IS THEY WANT A REALLY BIG NUMBER.

6 SO THEY HAVE AN EXPERT, AND THEY WANT THE EXPERT TO
7 COME IN WITH A REAL BIG NUMBER. HE CAN'T DO IT BECAUSE NOT
8 EVEN HE TRUSTS ORACLE'S STATEMENTS ABOUT HOW MANY CUSTOMERS
9 THEY THINK THEY COULD HAVE LOST OR WHAT WOULD HAVE BEEN IN
10 THEIR MIND AT THE TIME OF THE HYPOTHETICAL NEGOTIATION.

11 SO MR. MEYER, HE'S A VERY EXPERIENCED TESTIFIER. HE
12 TOLD YOU HE TESTIFIED WHAT, 70 TIMES. AND AN -- YOU SAW A LOT
13 OF WITNESSES ON THE STAND. SOME WERE MORE EVASIVE THAN OTHERS.
14 SOME WERE NERVOUS, SOME HADN'T TESTIFIED BEFORE, SOME WERE
15 YOUNG, YOU CAN UNDERSTAND THAT, BUT MR. MEYER IS NONE OF THAT.
16 HE IS AN EXPERIENCED TESTIFIER. AND WHAT DOES IT TELL YOU THAT
17 HE WAS AS EVASIVE AND AS UNCOOPERATIVE AS HE WAS.

18 I THINK IT TELLS YOU THAT HE FELT VERY UNCOMFORTABLE
19 WITH THE TASK THESE PEOPLE HAD GIVEN HIM. YOU HAVE TO DECIDE
20 THAT FOR YOURSELF.

21 BUT IN ANY EVENT, WHAT WE DO KNOW IS WHEN MR. MEYER
22 WAS ON THE STAND, HE SAID, YOU KNOW, I KNOW I AM SUPPOSED TO

23 TELL YOU AS PART OF THIS NEGOTIATION WHAT ORACLE'S EXPECTATIONS
24 WERE IN TERMS OF NUMBER OF CUSTOMERS THAT THEY WOULD LOSE, BUT
25 REMEMBER, THAT'S THE WAY HE STARTED OFF. THE WAY HE ENDED WAS,

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OH, WELL, I'LL JUST USE SAP'S NUMBER. AND SO HE STUCK THE SAME
2 3,000 NUMBER IN THERE. THAT TELLS YOU A LOT ABOUT WHAT HE
3 THOUGHT OF THE RELIABILITY OF THEIR ESTIMATES.

4 OKAY. THE OTHER REASON ORACLE'S ESTIMATES ARE
5 UNRELIABLE IS BECAUSE OF WHAT THEY WERE SAYING AT THE TIME.
6 LET ME GIVE YOU A COUPLE OF EXAMPLES.

7 (SLIDE DISPLAYED ON SCREEN.)

8 RIGHT AT THE START THEY SAY THIS ACQUISITION IS A
9 POSITIVE FOR ORACLE, REFERRING TO SAP'S ACQUISITION OF
10 TOMORROWNOW. SINCE CUSTOMERS THAT WANT THIRD PARTY SUPPORT
11 WANTED SUPPORT, NOT MIGRATION PRESSURE. THEY JUST GO TO
12 TOMORROWNOW FOR SUPPORT, BUT NOT ON TO SAP.

13 MR. PHILLIPS, MARCH: I DON'T THINK IT WILL WORK BUT
14 WILL TRACK IT.

15 MR. JONES: DON'T OVERREACT TO THESE GNATS.

16 DECEMBER OF THAT YEAR: TOMORROWNOW HAS CAPTURED
17 LESS THAN 1 PERCENT OF OUR SUPPORT REVENUE, ABOUT 30 CUSTOMERS.
18 THIS IS MINIMAL. SOME OF THESE CUSTOMERS WOULD PROBABLY HAVE
19 LEFT ORACLE ANYWAY.

20 AND THEN IN FEBRUARY OF 2007 JUST BEFORE THEY SUED,
21 WHEN THEY KNEW OR WHEN THEY SUSPECTED THAT THEIR IP RIGHTS WERE
22 BEING VIOLATED, MR. ROTTLER SAYS: THEY ARE A MARGINAL PLAYER,
23 MARGINAL TRACK RECORD. AND THAT'S A451.

24 AND SO MR. MEYER WOULD HAVE A HARD TIME COMING IN
25 AND JUSTIFYING ORACLE'S BELIEF THAT TOMORROWNOW WAS REALLY A

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 PROBLEM. SO THAT'S WHY HE DEFAULTS.

2 OKAY. THE OTHER THING WRONG WITH THIS LUMP SUM

3 APPROACH HERE IS IT IS TOO RISKY. IT'S TOO RISKY BECAUSE
4 TOMORROWNOW HAD A NEW METHOD OF DOING BUSINESS. SAP BUYING
5 THEM WAS BRAND NEW. THIS IDEA THAT IT WOULD HELP SAP SELL
6 SOFTWARE WAS UNTESTED. NOBODY KNEW IF IT WOULD WORK.

7 SO WHEN THESE PARTIES COME INTO THIS HYPOTHETICAL
8 NEGOTIATION, SAP WOULDN'T BE WILLING TO PAY VERY MUCH MONEY
9 BECAUSE IT DIDN'T KNOW HOW IT WAS GOING TO TURN OUT. ORACLE,
10 ON THE OTHER HAND, WOULD BE AFRAID OF SETTING A PRICE TOO LOW.
11 THEY WOULDN'T MIND IF IT WAS TOO HIGH, BUT IF IT WAS TOO LOW
12 AND THE IDEA REALLY TOOK OFF, THEY WOULD BE LEFT SHORT.

13 THE ONLY REASON ORACLE IS HAPPY TO USE THIS 3,000
14 CUSTOMER NUMBER AS A BASIS FOR THE HYPOTHETICAL NEGOTIATION,
15 ONLY REASON THEY ARE WILLING TO USE 3,000 IS THEY KNOW HOW IT
16 TURNS OUT. AND USING 3,000 AS THE BASIS FOR THE FAIR MARKET
17 VALUE LICENSE IS A LOT BETTER THAN USING 358.

18 BUT ASK YOURSELF, IF ALL OF OUR DOCUMENTS, WHICH
19 THEY DIDN'T HAVE AT THE TIME, BUT ALL OF OUR DOCUMENTS HAD
20 SAID, JUST LIKE THE BUSINESS CASE SAYS, WE THINK WE ARE GOING
21 TO GET 358 CUSTOMERS OR 350 OR 400, YOU KNOW, WHAT KIND OF --
22 WOULD ORACLE BE WILLING TO DO A FAIR MARKET VALUE LICENSE BASED
23 ON THAT AND RUN THE RISK THAT THE PROGRAM IS GOING TO DO BETTER
24 AND RUN THE RISK THEY ARE GOING TO LOSE A LOT OF MONEY?

25 A PROBLEM WITH LUMP SUM ROYALTIES IN A BRAND NEW

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MARKET WHERE THE PRODUCT IS UNTESTED IS ONE SIDE OR THE OTHER
2 IS GOING TO GET HURT. THE ONE, IF YOU SET IT TOO LOW, ONE SIDE
3 IS GOING TO GET HURT. IF YOU SET IT TOO HIGH, THE OTHER SIDE
4 IS GOING TO GET HURT. THAT IS THE BEAUTY OF A RUNNING ROYALTY;
5 YOU SET THE ROYALTY RATE AT THE TIME AND THEN YOU PAY OFF,
6 DEPENDING ON HOW MANY SALES YOU MAKE. I WILL COME TO THAT A
7 LITTLE BIT MORE.

8 SO THAT'S WHY THIS WHOLE THING IS TOO RISKY.
9 THERE'S ALSO NO BASIS FOR WHAT THEY ARE SAYING ON THE SAP SIDE.
10 AND I WANT TO WALK THROUGH THIS IN THIS WAY.

11 (SLIDE DISPLAYED ON SCREEN.)
12 LET'S GO BACK TO WHEN MR. MEYER WAS TESTIFYING. I
13 HAVE ADDED THE RED CIRCLES. AND THIS IS HIS SLIDE 21 WHERE HE
14 TAKES ALL THESE GOALS, THE GOAL IS TO CONVERT 50 PERCENT, THE
15 TARGET IS 4,000, OUR GOAL IS TO CONVERT THE MAJORITY, AND SO
16 FORTH. AND THIS IS THE CHART WHERE HE PERFORMS MAGIC AND TAKES
17 A GOAL AND HE MAKES IT INTO EXPECTED GAINS.

18 AND YOU HEARD MORE OF THAT, MORE OF THAT TODAY.
19 SLIDE 42, SAYS SAP'S BOARD EXPECTED THAT THE INFRINGEMENT WOULD
20 BE WORTH BILLIONS OF DOLLARS. AND THAT'S REFERRING TO THE
21 ZIEMEN DOCUMENT, WHICH I WILL COME TO. THERE IS NOTHING IN
22 THAT DOCUMENT THAT SAYS ANYTHING ABOUT EXPECTED. THAT'S
23 JUST -- THAT FIRST COLUMN UP THERE WHERE IT'S THE 3,000
24 MAINTENANCE CUSTOMERS, AND THAT IS BASED ON THAT DOCUMENT THAT
25 SAYS ASSUMPTIONS. IT DOESN'T SAY EXPECTATIONS, IT SAYS

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 ASSUMPTIONS.

2 YOU WERE SHOWN ANOTHER CHART BY THEM. THIS WAS
3 SLIDE 52. AND IT SAID AT THE TOP, SAP'S EXPECTED TO GAIN,
4 SAP'S EXPECTED REVENUE. BUT IT'S REFERRING TO THE SAME
5 DOCUMENT. AGAIN, NOTHING ABOUT EXPECTATIONS.

6 THEY DID IT AGAIN. SLIDE 247. THEY SAY AT THE TOP,
7 SAP EXPECTED TO GAIN. IN THE FIRST COLUMN, NUMBER OF CUSTOMERS
8 THAT SAP EXPECTED. AGAIN, THIS IS BASED ON THE ZIEMEN
9 DOCUMENT. NOTHING IN THE DOCUMENT ABOUT EXPECTATIONS.

10 AND THEN, THIS IS THE ONE THAT RILES ME UP MORE THAN
11 ANYTHING. ACTUALLY I WILL COME TO THIS AFTER I DO THE ZIEMEN
12 DOCUMENT.

13 LET'S GO TO THE ZIEMEN DOCUMENT. THIS IS THE
14 DOCUMENT THAT THEY BASE THEIR CASE ON. THIS IS THE ONE THEY
15 HAVE TALKED ABOUT THE MOST AND THIS IS THE ONE THEY ARE RESTING
16 ON.

17 (SLIDE DISPLAYED ON SCREEN.)

18 BUT WE NEVER REALLY WALKED THROUGH IT. BEFORE I
19 LEAVE THE ZIEMEN DOCUMENT, THIS IS -- THIS IS ONE EARLIER ONE.

20 THIS IS THE ONE THAT IS ENTITLED "SAFE PASSAGE". AND THEN IT
21 EXPLAINS THE SITUATION; THAT ORACLE HAD ANNOUNCED FUSION.
22 THERE IS UNCERTAINTY AMONG THE CUSTOMERS. ORACLE FORCED
23 DISRUPTION -- ORACLE FORCING DISRUPTION ON THE MARKET. EXTENDS
24 SAP'S LEADERSHIP OPPORTUNITY.

25 THEY KEEP TALKING ABOUT HOW ORACLE BUYING PEOPLESOFT

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WAS A BIG THREAT. MOST OF SAP'S DOCUMENTS VIEW THAT AS AN
2 OPPORTUNITY, AN OPPORTUNITY TO SELL SOFTWARE TO PEOPLESOFT
3 CUSTOMERS THAT ARE WORRIED ABOUT WHAT ORACLE IS GOING TO DO
4 WITH PEOPLESOFT PRODUCTS. THIS IS THE ONE THAT SAYS GOAL. THE
5 GOAL IS TO CONVERT APPROXIMATELY 50 PERCENT. NOTHING ABOUT
6 WHAT THEY ACTUALLY EXPECT TO DO.

7 THEIR THEORY, AGAIN, IS BASED ON YOU THINKING THAT
8 BECAUSE SOMEBODY SAYS A GOAL OF THE WHOLE SAFE PASSAGE PROGRAM
9 IS TO CONVERT 50 PERCENT, THAT MEANS THAT AT THE TIME SAP WOULD
10 HAVE BEEN WILLING TO TAKE OUT ITS CHECKBOOK, WRITE A BIG CHECK
11 FOR THE VALUE OF OPERATING TOMORROWNOW WITHOUT INFRINGEMENT.
12 AND IT JUST DOESN'T COMPUTE.

13 AND HERE IS WHAT MEYER DID:

14 NOW, WHAT YOU HAVE DONE IS TAKE A SERIES OF
15 STATEMENTS ABOUT GOALS THAT MIGHT BE SUBJECT --
16 GOALS, THINGS THAT MIGHT BE SUBJECT TO
17 CONVERSION AND THE LIKE AND TRANSFORM THOSE INTO
18 THE TYPE OF EXPECTATION YOU SAY A COMPANY WOULD
19 BE WILLING TO PAY BILLIONS OF DOLLARS BASED ON,
20 RIGHT?

21 HE KNEW THAT WOULD GET HIM IN TROUBLE IF HE ADMITTED
22 THAT.

23 HE SAID: THAT'S NOT RIGHT.

24 THEN I ASKED HIM: BUT YOU HAVE TAKEN DOCUMENTS
25 THAT SAY GOAL AND YOU'VE PUT THAT UNDER YOUR

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 HEADING CALLED EXPECTATIONS OR EXPECTED, RIGHT?
2 AND HE ADMITTED IT. I HAVE DONE THAT. THAT'S
3 CORRECT.

4 (SLIDE DISPLAYED ON SCREEN.)

5 NOW WE COME TO THE ZIEMEN DOCUMENT. THIS IS THE
6 DECEMBER 23, 2004 DOCUMENT. AND LET'S WALK THROUGH IT. I AM
7 GOING TO WALK THROUGH THIS SLOWLY AND I ENCOURAGE YOU TO LOOK
8 AT IT WHEN YOU GO TO DELIBERATE BECAUSE IT DOESN'T SAY WHAT
9 THEY SAY.

10 FIRST PAGE TALKS ABOUT WHAT THEY ARE DOING. THIS IS
11 THE PEOPLESOFT ATTACK PROGRAM TO TRY AND CONVERT PEOPLESOFT
12 CUSTOMERS. FIRST THING THEY WANT TO DO -- OR SECOND THING HERE
13 IS CUSTOMER BASE ANALYSIS, TRYING TO FIGURE OUT HOW MANY JOINT
14 CUSTOMERS, WHAT APPLICATIONS THEY ARE USING. AND THAT'S IN
15 PROGRESS. SO THEY HAVEN'T DONE THAT, COMPLETED THAT YET.

16 DEFINE MAINTENANCE OFFERING PACKAGE. DEVELOP
17 SERVICE CONTRACT. THAT'S IN PROGRESS. THEY ARE TRYING TO
18 FIGURE OUT A SPECIFICATION OF THE SERVICE OFFERING.

19 THEN THEY WANT TO DEFINE THE MIGRATION SERVICES.
20 AND THEN THEY WANT TO IDENTIFY APPROPRIATE PARTNERS FOR
21 LEVERAGING. HERE IS WHERE THEY SAY IT'S IN PROGRESS AND
22 THEY'RE GOING TO CHECK WITH TOMORROWNOW AND OTHER VENDORS. SO
23 THIS IS REALLY EARLY IN THE STAGE.

24 WELL, OKAY. WHAT'S THE SITUATION AND THE
25 OPPORTUNITY? ORACLE AND PEOPLESOFT WILL MERGE. ORACLE TRIES

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 TO CAPTURE MAINTENANCE REVENUE. ORACLE TRIES TO MIGRATE
2 CUSTOMERS TO ORACLE APPLICATIONS.

3 AND SAP, WHAT'S IT GOING TO DO? IT'S RUNNING A
4 PEOPLESOFT WIN-BACK CAMPAIGN IN THE U.S. AND THAT WAS SAFE
5 HARBOR BEFORE SAFE PASSAGE.

6 THERE'S ANOTHER OPPORTUNITY IS THAT THEY ARE
7 INDEPENDENT, THESE THIRD PARTY SERVICE PROVIDERS. THEY STARTED

8 TO OFFER MAINTENANCE FOR PEOPLESFT. TOMORROWNOW IS THE MOST
9 AGGRESSIVE, BUT MANY MORE ARE BEING FOUNDED.

10 WHAT'S THE PROPOSED SOLUTION AT THIS POINT? THE
11 FIRST PART IS TO HAVE A PEOPLESFT SERVICE OFFERING FOR
12 MAINTENANCE FOR PEOPLESFT CUSTOMERS, INCLUDING STANDARD
13 ADDITIONAL SERVICES FOR 17 PERCENT MAINTENANCE FEE.

14 WHY DO THEY WANT A 17 PERCENT MAINTENANCE FEE AS
15 PART OF THIS PROPOSED PROGRAM? IT'S SO THEY DON'T KILL OUR
16 COMMON BUSINESS MODEL. AND THE COMMON BUSINESS MODEL OF SAP
17 AND ORACLE WAS TO CHARGE 19 TO 22 PERCENT FOR SUPPORT.

18 AND SO NOBODY IS THINKING HERE ABOUT HAVING
19 TOMORROWNOW OFFER 10 PERCENT, HALF PRICE MAINTENANCE, BECAUSE
20 THAT WOULD KILL OUR COMMON BUSINESS MODEL. WE KNOW THAT'S
21 WHERE IT EVENTUALLY ENDED UP, BUT MY POINT IS WHAT'S THIS
22 DOCUMENT ABOUT? THIS DOCUMENT, DECEMBER OF 2004, IS NOT ABOUT
23 A TOMORROWNOW DISCOUNT PROGRAM.

24 MORE THAN THAT, THE NEXT PART OF THIS PROGRAM IS TO
25 SELL MYSAP ERP. THAT'S SAP SOFTWARE. AND THE IDEA THERE IS TO
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 LEVERAGE THE CURRENT PEOPLESFT INVESTMENT AND TO REPLACE IT BY
2 MYSAP LATER. AND THE KEY POINT HERE IS THE LICENSE FEES FOR
3 PEOPLESFT WILL BE RECOGNIZED WHEN CUTTING MYSAP DEAL. THAT
4 WAS KIND OF THE TRADE-IN, THE 75 PERCENT CREDIT.

5 AND THEN IT SAYS HERE AT THE SECOND BULLET:
6 CUSTOMERS MUST LICENSE MYSAP ERP TO GIVE THE MAINTENANCE TO THE
7 PEOPLESFT SOLUTION.

8 SO THE IDEA HERE WAS YOU HAD TO KEEP PEOPLESFT
9 MAINTENANCE, YOU HAD TO LICENSE SAP APPLICATION IN ORDER TO GET
10 THAT MAINTENANCE, AND THEN CUSTOMERS ARE REQUIRED TO FIRST
11 DEPLOY NETWEAVER. THAT'S THE WEB-BASED INTEGRATION TOOL AS
12 PART OF THEIR ERP DEAL.

13 SO WHAT WE KNOW, AND EVERYBODY AGREES ON THIS, IS
14 THESE THREE ASPECTS OF THE PROGRAM WERE NOT WHAT ENDED UP IN
15 SAFE PASSAGE. UNDER SAFE PASSAGE, YOU CAN GET SAP'S

16 APPLICATION WITHOUT GOING INTO TOMORROW AND YOU DIDN'T NEED
17 TO USE NETWEAVER. THIS IS A DIFFERENT PROPOSED PROGRAM.

18 (SLIDE DISPLAYED ON SCREEN.)

19 THIS CHART SHOWS IT. THE IDEA UNDER THIS ZIEMEN
20 PROPOSAL WAS TO -- YOU SIGN SAP CONTRACT AND YOU RECEIVE
21 MAINTENANCE FROM 2005 UNTIL 2009, AND ONLY IN 2009 WOULD YOU
22 SWITCH.

23 THIS DOCUMENT GOES ON TO TALK ABOUT SAP OFFERING
24 SOFTWARE MAINTENANCE FOR PEOPLESOFT VIA THE SAP CONTRACT.
25 TALKED -- IT LOOKS LIKE IT IS TALKING ABOUT DOING IT INTERNALLY

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 BECAUSE IT SAYS "SAP HAS AN ACTIVE GLOBAL SUPPORT GROUP OF OVER
2 3,000 PEOPLE."

3 OKAY. SO WITH THAT PROGRAM, ZIEMEN IS NOW GIVING US
4 THE SIZE OF THE BUSINESS OPPORTUNITY FOR THAT PROGRAM. AND HE
5 STARTS OFF MAKING ASSUMPTIONS.

6 THIS IS OUT OF BATTERY.

7 HE STARTS OFF MAKING ASSUMPTIONS. AND HE'S ASSUMING
8 NUMBER OF CUSTOMERS, AT 250, AND HE IS ASSUMING THE REVENUE,
9 AND THEN HE'S ASSUMING 500 AS AN ADDITIONAL NUMBER OF CUSTOMERS
10 THAT ARE GOING TO BUY SAP APPLICATIONS. AND THEN OF THOSE 500
11 OR 750 CUSTOMERS, HE'S ASSUMING THAT 500 ARE GOING TO GET
12 MAINTENANCE AT 17 PERCENT.

13 AND THEN HE GOES ON TO WORK THAT OUT OVER TIME AND
14 HE SAYS HOW MUCH THE MAINTENANCE REVENUE IS GOING TO BE OVER
15 THOSE YEARS.

16 OKAY. SO, WHAT WE KNOW ABOUT THIS DOCUMENT IS EVEN
17 THOUGH THEY HAD TOMORROW IN MIND ON THE RADAR SCREEN AT THE
18 TIME, THAT DOCUMENT IS NOT BASED ON A CALCULATION OF 10 PERCENT
19 MAINTENANCE. IT'S A DIFFERENT PROGRAM. AND PERHAPS MOST
20 IMPORTANT OF ALL, NOWHERE IN THIS DOCUMENT, EVEN IF THIS
21 DOCUMENT WERE ABOUT TOMORROW AS PART OF THE SAFE PASSAGE, IT
22 DOESN'T ATTEMPT TO ISOLATE THE VALUE OF TOMORROW. IT IS
23 PUTTING A BUSINESS OPPORTUNITY SIZING ON THIS WHOLE PROGRAM.
24 NOT JUST ON THE VALUE OF THE MAINTENANCE FEES, NOT JUST ON THE

25 VALUE OF TOMORROWNOW.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 REMEMBER, MR. MEYER TESTIFIED THAT HE WAS THE EXPERT
2 FOR BOEING AIRLINE IN A PATENT INFRINGEMENT CASE BROUGHT BY THE
3 FEDERAL GOVERNMENT AGAINST BOEING FOR USING A LITTLE PIECE OF
4 SOMETHING IN THE SPACE SHUTTLE.

5 AND IN THAT CASE, MR. MEYER TRIED TO FIGURE OUT
6 WHAT'S THE VALUE OF THIS LITTLE PIECE OF THING THAT WAS USED IN
7 THE SPACE SHUTTLE. HE SAID, WELL, IT SHOULD BE A RUNNING
8 ROYALTY AND IT SHOULD BE, HE SAID, 3.75 PERCENT. THE JUDGE
9 SAID THAT WAS THREE TIMES TOO HIGH AND IT WAS INFLATED, AND ALL
10 OF THAT. BUT THE KEY POINT IS EVEN IN THAT CASE, MR. MEYER
11 DIDN'T SAY, WELL, LET'S TRY AND VALUE THE VALUE OF THE SPACE
12 SHUTTLE PROGRAM. IN THAT CASE, HE RECOGNIZED HE COULD ONLY --
13 ALL HE COULD DO WAS PUT A VALUE ON THE THING THAT WAS
14 INFRINGED.

15 IN THIS CASE, BY USING DOCUMENTS LIKE THIS,
16 (INDICATING) THEY ARE TRYING TO PUT A VALUE ON THE WHOLE SAFE
17 PASSAGE PROGRAM, NOT JUST ON THE VALUE OF A LICENSE THAT SAP
18 WOULD HAVE PAID TO OPERATE TOMORROWNOW.

19 WHAT THEY ARE BASICALLY ASSUMING IS WITHOUT
20 TOMORROWNOW, THESE NUMBERS WOULD HAVE BEEN ZERO. THEY WOULD
21 HAVE BEEN ZERO BECAUSE THERE'S NO VALUE TO SAFE PASSAGE, NO
22 VALUE TO THIS EARLY PROPOSAL UNDER SAFE PASSAGE OTHER THAN
23 TOMORROWNOW, SO THE NUMBERS WOULD BE ZERO. THAT'S OBVIOUSLY
24 NOT RIGHT. A LOT OF PEOPLE BUY A LOT OF SOFTWARE FROM SAP
25 WITHOUT ANYTHING TO DO WITH TOMORROWNOW.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 (SLIDE DISPLAYED ON SCREEN.)
2 OKAY. THIS IS MR. ZIEMEN WHO WROTE THE DOCUMENT.
3 AND WHAT HE SAYS -- THE QUESTION IS:

4 YOU DON'T KNOW IF THE ABILITY OF SAP TO OFFER
5 CUSTOMERS THE ABILITY TO GET OFF ORACLE
6 MAINTENANCE WITH TOMORROWNOW AND THEN BE WELL
7 POSITIONED WITH AN EXISTING LOWER RISK SAP
8 RELATIONSHIP WAS AN ATTRACTIVE FEATURE OF THE
9 DEAL?

10 AND MR. ZIEMEN SAYS: THAT WASN'T PROVEN AT THE
11 TIME.

12 HE HAD HOPES THAT TOMORROWNOW WOULD HELP THE SAFE
13 PASSAGE PROGRAM, BUT IT CERTAINLY WASN'T PROVEN AT THE TIME.
14 AND IF IT WASN'T PROVEN AT THE TIME, WHY WOULD A REASONABLE
15 BUYER OF A LICENSE IN SAP'S POSITION HAD BEEN WILLING TO PAY
16 THE KIND OF MONEY THEY ARE TALKING ABOUT?

17 OKAY. IN ADDITION TO REALLY, REALLY BADLY
18 MISCHARACTERIZING THAT ZIEMEN DOCUMENT, WHAT ELSE DID MR. MEYER
19 DO WRONG? ONE OF THE THINGS IS HE IGNORED THE OTHER DOCUMENTS
20 IN SAP'S FILES AT THE TIME.

21 (SLIDE DISPLAYED ON SCREEN.)

22 THIS IS THE ZEPECKI DOCUMENT, PLAINTIFFS' EXHIBIT 7.
23 THIS LEADS UP TO THE BUSINESS PLAN, THE ACTUAL BUSINESS PLAN
24 FOR TOMORROWNOW. AND IN HERE MR. ZEPECKI SAYS, TOMORROWNOW'S
25 MODEL, HE CALLS IT THE NO FRILLS MODEL, MAKES SENSE FOR A

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 SEGMENT OF CUSTOMERS, PROVIDED TOMORROWNOW CAN MANAGE TO
2 CONTINUE TO OPERATE AS STRUCTURED TODAY -- AND WE KNOW THERE'S
3 PROBLEMS WITH THAT -- IT CAN BE A PROFITABLE NICHE BUSINESS,
4 UNCLEAR IF IT'S 5 PERCENT NICHE OR BIGGER.

5 SO WHAT ZEPECKI IS TALKING ABOUT AT THE TIME IS A
6 MARKET THAT MAY BE 5 PERCENT OR BIGGER. AND 5 PERCENT OF
7 10,000 IS 500. IT'S NOT THE 3,000 THAT'S IN THE ZIEMEN
8 DOCUMENT.

9 AND THEN ZEPECKI, WHEN HE TESTIFIED HERE, HE'S ASKED
10 ABOUT THE -- HIS DOCUMENT WHERE HE SAYS:

11 IT MAKES SENSE, THIS TOMORROWNOW IDEA, HALF RATE
12 MAINTENANCE, MAKES SENSE FOR A SEGMENT OF

13 CUSTOMERS.
14 DID YOU HAVE A SEGMENT OF CUSTOMERS IN MIND?
15 I THOUGHT THAT ONLY SOME CUSTOMERS WOULD
16 CONSIDER THIS TO BE APPEALING. BECAUSE IT WAS
17 LIMITED, IT ONLY DID A FEW THINGS THAT I
18 THOUGHT -- THAT I ONLY THOUGHT SOME CUSTOMERS
19 MIGHT EVEN CONSIDER.
20 AND AT THE BOTTOM:
21 MY BEST ESTIMATE WAS THAT ROUGHLY 5 PERCENT OF
22 THE PEOPLESOFT ENTERPRISE CUSTOMERS MIGHT FIND
23 THIS TOMORROWNOW APPROACH APPEALING.
24 MR. MEYER IGNORED THAT.
25 (SLIDE DISPLAYED ON SCREEN.)

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 HE ALSO IGNORED THIS DOCUMENT. THIS IS A DOCUMENT
2 WHICH IS ONE OF THE FIRST TWO BUSINESS CASES FOR TOMORROWNOW.
3 IT SAYS, WE HAVEN'T RECEIVED MUCH FORWARD-LOOKING FINANCIAL
4 INFORMATION, BUT TOMORROWNOW'S THOUGHTS ON THE RATIONALE ARE
5 FAIRLY PRESENTED.
6 THIS IS WHAT MEYER SHOULD HAVE CONSIDERED.
7 AND THE NEXT DOCUMENT HE SHOULD HAVE CONSIDERED WAS
8 WHERE HE TOOK TOMORROWNOW'S NUMBERS AND SAID, WE NEED TO ADJUST
9 THOSE DOWN TO REALITY, REVISE REALITY.
10 (SLIDE DISPLAYED ON SCREEN.)
11 AND THIS, I ENCOURAGE YOU TO LOOK AT. IT'S A9329.
12 AND THIS IS THE DOCUMENT THAT IS ATTACHED TO THE E-MAIL WE JUST
13 SAW. AND THESE ARE TOMORROWNOW'S NUMBERS.
14 AND IF YOU DO THE MATH, WHICH WE HAVE DONE UP AT THE
15 TOP, THE PART AT THE TOP LISTING THE CUSTOMER IS NOT IN THE
16 DOCUMENT. THAT'S SIMPLY DIVIDING THE EXPECTED REVENUES BY
17 50,000, AND 50,000 -- I WILL COME TO THAT -- \$50,000 IS THE
18 AVERAGE BUSINESS DEAL SIZE. AND IF YOU DO THAT MATH AND YOU
19 CONVERT FROM EUROS TO DOLLARS, FOR 2008 THE -- THIS PROJECTION
20 OF CUSTOMERS WOULD GIVE TOMORROWNOW 297 CUSTOMERS.

21 (SLIDE DISPLAYED ON SCREEN.)
22 THIS IS THE NEXT DOCUMENT, THE BUSINESS CASE A DAY
23 LATER. IT IS BASED ON AVERAGE DEAL SIZES OF \$50,000.

24 (SLIDE DISPLAYED ON SCREEN.)
25 WHAT IT SHOWS, AND NOW THEY HAVE REVISED IT

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 SLIGHTLY. SO THESE ARE NO LONGER TOMORROWNOW'S NUMBERS, THEY
2 ARE TOMORROWNOW'S NUMBERS REVISED FOR REALITY, AND THAT GOES TO
3 308.

4 AND WHEN YOU STUDY THIS DOCUMENT, YOU CAN COMPARE
5 THE LAST DOCUMENT AND THIS DOCUMENT WITH THE NET INCOME LINE,
6 AND YOU WILL SEE THAT WHEN IT WAS REVISED TO REALITY FROM
7 TOMORROWNOW'S NUMBERS TO SAP'S NUMBERS, THESE NET INCOME
8 NUMBERS GO DOWN. THAT'S BECAUSE THE COSTS WERE GOING UP.

9 AGAIN, MEYER IGNORED THAT IN HIS RUSH TO FIND A
10 NUMBER LIKE 3,000, HE LOOKS AT THE ZIEMEN DOCUMENT WHICH IS
11 APPLES AND ORANGES, AND HE NOT ONLY MAKES A MISTAKE OF USING
12 3,000 FOR SAP'S EXPECTATIONS, BUT HE USES THE SAME NUMBER FOR
13 ORACLE'S EXPECTATIONS.

14 THEIR LUMP SUM APPROACH IS ALSO TOO UNREASONABLE.
15 AND THIS IS WHERE WE GET INTO THE REALITY CHECK, THE BOOK OF
16 WISDOM.

17 THE COURT WILL INSTRUCT YOU THAT YOU CAN USE WHAT
18 ACTUALLY HAPPENED IF IT PROVIDES AN INSIGHT INTO WHAT THE
19 PARTIES WOULD HAVE BEEN THINKING AT THE TIME. WHAT THEY WOULD
20 HAVE BEEN THINKING AT THE TIME.

21 AND THINK ABOUT IT THIS WAY. WHEN MR. ELLISON COMES
22 IN AND SAYS, YOU KNOW, WE COULD HAVE LOST 2,000 TO 3,000
23 CUSTOMERS, THE QUESTION FOR HIM UNDER THE REALITY CHECK IS,
24 YOU'VE GOT A VERY SUCCESSFUL COMPANY. YOU HAVE GOT REALLY
25 SMART FORECASTERS DOWN THERE. ARE WE REALLY TO BELIEVE YOU

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WHEN YOU SAY YOU THINK YOU WOULD HAVE THOUGHT THAT YOU COULD
2 HAVE LOST 3,000 CUSTOMERS WHEN WE KNOW YOU ONLY LOST 358? HOW
3 COULD YOU BE SO WRONG? THAT'S THE REALITY CHECK.

4 THEY HAVE NEVER EXPLAINED WHAT THEY WERE THINKING OR
5 IF THEY WOULD HAVE BEEN THINKING THEY WOULD LOSE 3,000
6 CUSTOMERS. HOW COULD THEY BE SO WRONG? AND THE FACT THAT
7 3,000 IS SO DIFFERENT FROM 358 SUGGESTS THAT MAYBE YOU
8 SHOULDN'T GIVE TOO MUCH CREDIT, TOO MUCH CREDENCE TO THEM WHEN
9 THEY COME IN AND SAY WE THOUGHT WE WOULD HAVE -- COULD HAVE
10 LOST 20 TO 30 PERCENT. YOU USE REALITY TO PROVIDE INSIGHT INTO
11 WHAT THEY REALLY WOULD HAVE BEEN THINKING AT THE TIME.

12 SO, MR. MEYER SAYS:

13 THERE'S NO REASON TO HAVE TO DO A REALITY CHECK.

14 I DON'T HAVE TO DO A REALITY CHECK GOING PASSED
15 THE DATE OF THE HYPOTHETICAL.

16 AND HE'S SAYING THAT BECAUSE IF YOU DO A REALITY
17 CHECK, THERE IS NO WAY YOU CAN SELL 3,000 CUSTOMERS WHEN ONLY
18 358 ACTUALLY BOUGHT.

19 DURING THIS TRIAL HE TESTIFIED UP AT THE TOP, I
20 ASKED HIM:

21 "SO NO MONDAY MORNING QUARTERBACKING, NO
22 HINDSIGHT TO HELP US OUT; THAT'S YOUR POSITION?"

23 HE SAYS: "THAT'S MY POSITION ABOUT THE FAIR
24 MARKET VALUE OF THE LICENSE."

25 WELL, I ASKED HIM THAT QUESTION BECAUSE I KNEW WHAT

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 HE TESTIFIED THREE YEARS AGO WHEN HE WAS ON THE OTHER SIDE.
2 AND IN THIS OTHER CASE, HE TESTIFIED WHEN HE'S STILL DOING THE
3 FAIR MARKET VALUE HYPOTHETICAL NEGOTIATION, THIS IS WHAT HE
4 TESTIFIED.

5 "YOU WANT TO BE AWARE OF WHAT HAPPENS IN THE
6 FUTURE TO MAKE SURE YOU GET THE PROPER RESULT AT
7 THE TIME OF THE HYPOTHETICAL."
8 COMMON SENSE. IT PROVIDES AN INSIGHT.

9 "SO WE ARE SORT OF USING SOME MONDAY MORNING
10 QUARTERBACKING AND HINDSIGHT TO HELP US, BUT
11 WE'RE ABLE TO DO THAT IF WE DO IT IN A WAY
12 THAT'S REASONABLE."

13 SO IN THAT CASE WHERE IT HELPED HIM, HE DID WHAT WAS
14 RIGHT, HE USED A REALITY CHECK. IN THIS CASE WHERE HE KNOWS IT
15 WOULDN'T HELP HIM, HE DIDN'T USE A REALITY CHECK.

16 IN THE BOEING CASE, I ASKED HIM THIS. REMEMBER, IN
17 THE BOEING CASE, INSTEAD OF COMING IN AND SAYING YOU CAN ONLY
18 DO THIS ON A LUMP SUM BECAUSE ONE COMPANY -- THE GOVERNMENT HAD
19 ALREADY PAID FOR THE PATENT AND SO IT WOULD HAVE A LOT OF
20 UNCERTAINTY IF IT DIDN'T KNOW HOW MUCH IT WAS GOING TO GET AND
21 IT HAD ALREADY INVESTED ALL THIS MONEY, SO HE JUST WOULD HAVE
22 TO HAVE A LUMP SUM. HE DIDN'T SAY THAT.

23 IN BOEING HE SAID: "A RUNNING ROYALTY IS THE ONLY
24 THING THAT MAKES SENSE."

25 AND HIS RUNNING ROYALTY WAS 3.75 PERCENT OF SALES

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 AND THE COURT FOUND HE WAS THREE TIMES TOO HIGH.

2 THIS IS WHAT HAPPENED.

3 "DO YOU REMEMBER IN THE BOEING CASE, THE COURT SAID
4 THAT BECAUSE YOUR BASELINE WAS LITTLE MORE THAN CONJECTURE, IT
5 MATTERS LITTLE HOW YOU APPLIED THE OTHER GEORGIA-PACIFIC
6 FACTORS BECAUSE PLUS OR MINUS A GUESS IS, AFTER ALL, STILL A
7 GUESS?"

8 AND HE SAID -- "DO YOU REMEMBER THAT?"

9 "I RECALL READING THE JUDGE'S DECISION."

10 DO YOU REMEMBER READING THAT PART?

11 "I JUST SAID THAT."

12 BUT ON THE ROYALTY RATE THE COURT FOUND YOUR
13 OPINION WAS TOO SPECULATIVE TO STAND.

14 WELL HE, HE DID SAY THAT HE DIDN'T LIKE THE
15 ROYALTY RATE AND HE USED LANGUAGE THAT YOU HAVE.

16 AND HE SAID IT BORE LITTLE RELATIONSHIP TO WHAT
17 A WILLING BUYER AND A WILLING SELLER WOULD USE

18 IN THE REAL WORLD. I DON'T HAVE IT IN FRONT OF
19 ME, BUT IF THAT'S WHAT YOU HAVE IN THE OPINION,
20 HE SAID A FEW THINGS LIKE THAT.
21 AND, WELL, HE REJECTED YOUR ROYALTY RATE AS
22 THREE TIMES TOO HIGH?
23 I'VE ALREADY SAID THAT.
24 AND HE FOUND YOUR APPROACH ON THIS ROYALTY RATE
25 WAS CAPRICIOUS, CORRECT?

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WE CAN LOOK AT HIS LANGUAGE, BUT HE WAS PRETTY
2 AGGRESSIVE IN HIS LANGUAGE, THAT'S CORRECT.
3 WHERE THERE HE WAS ARBITRARY, HE SPECULATED AND HE
4 CAME AND PUT THE ROYALTY RATE THAT WAS THREE TIMES TOO HIGH.
5 WHAT HE DID IN THAT CASE MAKES WHAT HE DID HERE LOOK LIKE
6 CHILD'S PLAY.
7 HE IS WAY, WAY TOO HIGH. IF ONLY HE HAD DONE A
8 REALITY CHECK.
9 WHAT DOES MR. MEYER (SIC) SAY? MR. MEYER (SIC)
10 SAYS:
11 "I THINK IT'S IMPERATIVE IN THESE CASES THAT YOU
12 SEE WHETHER THE ANSWERS YOU'RE COMING UP WITH
13 MAKE SENSE WHEN YOU KNOW WHAT YOU KNOW
14 DOWNSTREAM. THAT'S VERY MUCH THE CASE HERE.
15 AND I THINK THAT MY LICENSE MAKES SENSE WHEN YOU
16 CONSIDER WHAT THE ACTUAL USE WAS AND HOW
17 SUCCESSFUL OR UNSUCCESSFUL THESE PROGRAMS
18 ACTUALLY WERE."
19 THAT'S THE BEAUTY OF A RUNNING ROYAL. BEAUTY OF A
20 RUNNING ROYALTY IS YOU SET THE RATE, THE VALUE AT THE TIME, AND
21 THEN YOU SEE HOW IT PLAYS OUT.
22 NOW, ORACLE SAYS THAT THE WAY WE KNOW THIS VALUE ON
23 THIS LUMP SUM IS SUPPOSED TO BE REALLY HIGH IS BECAUSE SAP TOOK
24 THIS REALLY BIG RISK.
25 WHAT IS WRONG WITH THAT ARGUMENT? IT IS A CIRCULAR

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 ARGUMENT. THEY ARE SAYING AND I HAVE GOT THEIR CHART HERE.

2 HERE IS MY FAVORITE CHART. THIS IS 72.

3 (SLIDE DISPLAYED ON SCREEN.)

4 THEY SAY SAP CHOSE TO TAKE THE RISK BECAUSE IT KNEW

5 THAT IT WOULD COST BILLIONS OF DOLLARS TO BUY A LICENSE. SO WE

6 TOOK THIS ENORMOUS RISK BECAUSE IT WAS GOING TO COST US

7 BILLIONS OF DOLLARS TO BUY A LICENSE.

8 WHERE DOES THAT COME FROM? HOW ABOUT YOU PUT IN

9 THERE 40 MILLION, WHICH IS CLARKE'S NUMBER. THIS IS CIRCULAR.

10 THEY SAY IT'S AN ENORMOUS RISK BECAUSE THEY SAY IT'S A HIGH

11 NUMBER. IT'S SELF-FULFILLING. THEY JUST STICK BILLIONS OF

12 DOLLARS IN THERE AS IF THAT MAKES IT LOOK LIKE WE TOOK THIS

13 ENORMOUS RISK.

14 I AM NOT PROUD OF THIS AND SAP SHOULDN'T BE PROUD OF

15 THIS. YOU SAW THAT EARLY DOCUMENT WHERE THEY SAID WE ARE GOING

16 TO USE TOMORROWNOW AS A LIABILITY SHIELD. THEY'LL STAY

17 INCORPORATED IN TEXAS AND THEY WILL HAVE THE LIABILITY. BAD

18 IDEA. WE ARE NOT STANDING BEHIND THAT. SAP IS HERE TO PAY THE

19 DAMAGES AWARDED AGAINST TOMORROWNOW, BUT THAT TELLS YOU

20 SOMETHING ABOUT WHAT THEY THOUGHT THE RISK WAS AT THE TIME.

21 AGAIN, BAD IDEA. THAT WAS NOT A GOOD WAY TO DO IT,

22 BUT IT SORT OF PROVIDES A LITTLE OFFSET TO THEIR ARGUMENT THAT,

23 WELL, THERE WAS THIS ENORMOUS RISK BECAUSE THERE WAS GOING TO

24 BE THIS HUGE JUDGMENT.

25 IF YOU WILL FORGIVE ME, I WANT TO GO BACK ONE STEP.

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WHEN THEY ARE TRYING TO TALK ABOUT SAP'S

2 EXPECTATIONS AND THEY'RE TRYING TO TURN ZIEMEN'S ASSUMPTIONS

3 INTO EXPECTATIONS SO FIRM THAT WE WOULD WRITE A BILLION DOLLAR

4 CHECK ON IT? THE ONE THAT GOT ME GOING WHEN THEY WERE QUIZZING

5 MEYER AND ALSO JUST A COUPLE OF HOURS AGO, WAS THIS ONE, CHART

6 169.

7 (SLIDE DISPLAYED ON SCREEN.)

8 THE ZIEMEN DOCUMENT, EVERYBODY KNOWS BY NOW IS
9 DECEMBER 23, 2004. AND THAT'S THE DOCUMENT WITH THE 3,000
10 ASSUMED CUSTOMERS. EVERYBODY ALSO KNOWS THAT THE BUSINESS CASE
11 IS JANUARY 7, AND THAT'S THE ONE THAT HAS 300 CUSTOMERS.

12 SO THEY SHOW, JUST NOW, WHEN HE WAS GIVING YOU HIS
13 TALK, HE SAID, AND MR. AGASSI SAID, THEY COULD DO EVEN BETTER
14 THAN ZIEMEN'S NUMBERS. BUT I WILL SHOW THIS TO YOU AGAIN.

15 THE QUESTION TO AGASSI IS:

16 "DID YOU HAVE ANY REASON TO QUESTION THE
17 PROJECTIONS EITHER IN THE ONE PRESENTED IN THE
18 JANUARY 7, 2000 (SIC) BUSINESS PLAN OR," AND
19 THEN THEY STUCK IN 50 PERCENT CUSTOMER GOAL,
20 THAT IS NOT IN THE TESTIMONY, "OR SUBSEQUENTLY?"
21 "I THOUGHT WE COULD, WE COULD DO BETTER."

22 HE'S SAYING WE COULD DO BETTER THAN THE JANUARY 7,
23 2005 PLAN FOR 300 CUSTOMERS, WHICH WAS BEFORE IT. HE'S NOT
24 SAYING WE COULD DO BETTER THAN THE 3,000 THAT WAS IN ZIEMEN'S
25 DOCUMENT.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OKAY. I AM COMING NOW TO THE RUNNING ROYALTY. IF
2 THE HYPOTHETICAL LICENSE APPROACH WERE GOING TO WORK AT ALL, IT
3 WOULD ONLY WORK ON A RUNNING ROYALTY BASIS. WHY IS THAT?
4 BECAUSE THAT'S THE ONLY ONE THAT SHARES THE RISK. IT DOESN'T
5 GIVE ORACLE EVERYTHING THEY WANT. IT DOESN'T GIVE TOMORROWNOW
6 EVERYTHING IT WANTS, BUT IT SHARES THE RISK.

7 UNLIKE A LUMP SUM WHICH PUTS THE RISK ON ONE PARTY
8 IF THEY ARE TOO HIGH OR TOO LOW, THIS ONE YOU SET THE RATE AND
9 THEN YOU SEE HOW IT PLAYS OUT.

10 NOW, THEY SAY THEY DON'T LIKE THE RUNNING ROYALTY
11 BECAUSE THEY WOULD LOSE MONEY. THEY WOULDN'T MAKE AS MUCH
12 MONEY ON THE RUNNING ROYALTY AS IF THEY HAD KEPT THE CUSTOMER.

13 BUT WHAT THE MISTAKE THEY MADE IS THEY ARE

14 ASSUMING -- THEY MADE TWO MISTAKES. ONE IS THEY MISUNDERSTAND
15 WHAT MR. CLARKE TESTIFIED VERY CLEARLY. HE IS GIVING THEM
16 50 PERCENT OF ALL OF TOMORROWNOW'S REVENUES. NOT THE PROFIT
17 BECAUSE THEY DIDN'T MAKE PROFIT. HE IS BEING GENEROUS IN
18 GIVING THEM 50 PERCENT OF ALL OF TOMORROWNOW'S REVENUES. HE IS
19 NOT JUST GIVING HIM -- GIVING THEM THE 50 PERCENT ON CUSTOMERS
20 THAT WOULDN'T HAVE LEFT ORACLE ANYWAY.

21 SO, WE HAVE ALL AGREED THAT OUT OF THE 358
22 TOMORROWNOW CUSTOMERS, THERE ARE SOME CUSTOMERS IN THERE THAT
23 WOULD HAVE LEFT ORACLE ANYWAY. SO THEY WERE GOING TO LOSE THE
24 PROFIT ON THEM ANYWAY.

25 MR. MEYER AND MR. CLARKE DISAGREE ON HOW MANY OF
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THOSE CUSTOMERS ARE. IT'S IN THE TWO HUNDREDS, BUT THERE'S UP
2 TO A HALF OF TOMORROWNOW CUSTOMERS WHO WERE GOING TO LEAVE
3 ORACLE ANYWAY.

4 MR. CLARKE HAS AN ATTRITION NUMBER OF 22 PERCENT OF
5 THE HIGH RISK CUSTOMERS. THAT'S UNCHALLENGED IN THIS RECORD.
6 SO, OF THE HIGH RISK CUSTOMERS, THE PEOPLE WHO HAD PROFILES
7 LIKE THE ONE THAT WENT TO TOMORROWNOW, 23 PERCENT WITHIN A YEAR
8 WERE GOING TO LEAVE ANYWAY.

9 ORACLE IS NOT ENTITLED TO ANY MONEY ON THOSE. THEY
10 WERE GOING TO LOSE THEM. BUT MR. CLARKE'S RUNNING ROYALTY
11 GIVES THEM 50 PERCENT OF THE REVENUE ON ALL OF THOSE CUSTOMERS.

12 AND SO WHEN THEY SAY WELL, THERE'S A BIG -- YOU'RE
13 GOING TO HAVE TO HAVE A BIG JURY TRIAL EVERY YEAR OR SO TO
14 FIGURE OUT WHICH OF THOSE CUSTOMERS WOULDN'T HAVE LEFT, THAT IS
15 NOT APPLICABLE ON TOMORROWNOW. WE ARE GIVING THEM 50 PERCENT
16 OF ALL THE REVENUE.

17 WHEN THEY SAY, WELL, YOU KNOW, FOR CUSTOMERS WHO
18 WOULD HAVE STAYED WITH THEM, THEY REALLY DESERVE A HUNDRED
19 PERCENT. WHAT THEY ARE MISSING IS, WELL, BUT THEY ARE GETTING
20 THE 50 PERCENT ON EACH AND EVERY CUSTOMER, EVEN CUSTOMERS WHO
21 WERE GOING TO LEAVE.

22 ANOTHER THING THEY SAY, AND THIS IS MORE -- WHERE

23 DID MY CLICKER GO? HERE IT IS.

24 (SLIDE DISPLAYED ON SCREEN.)

25 THIS IS THE REALITY CHECK. ORACLE HAS 370

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 CUSTOMERS, 1400 PEOPLESOFT AND SIEBEL, AND ZIEMEN'S ASSUMPTIONS
2 WERE DIFFERENT PROGRAMS 300, ZEPECKI 5 PERCENT IS 500, ACTUAL
3 TOMORROWNOW CUSTOMERS 358, AND TOMORROWNOW BUSINESS CASE THAT
4 WE SAW IS 297 OR 308, DEPENDING ON THE BUSINESS CASE.

5 HERE IS WHAT MR. MEYER SAID ON THE RUNNING ROYALTY.
6 HE SAID, IT CAN BE APPROPRIATE BETWEEN SOFTWARE COMPANIES. HE
7 ADMITTED THAT HE HAS TESTIFIED IN FAVOR OF A RUNNING ROYALTY IN
8 A CASE BETWEEN SOFTWARE COMPETITORS, AND THERE HE CAME UP WITH
9 1 PERCENT OF THE ACTUAL REVENUES. AND HE TESTIFIED HE'S
10 FAVORED RUNNING ROYALTIES IN OTHER CASES.

11 ONE OF THE JURY INSTRUCTIONS WITH ASK YOU, AND THIS
12 IS AN EXCERPT OF IT, JURY INSTRUCTION 7: "TO FIGURE OUT THE
13 AMOUNT A WILLING BUYER WOULD HAVE REASONABLY -- WOULD HAVE BEEN
14 REASONABLY REQUIRED TO PAY A WILLING SELLER AT THE TIME OF THE
15 INFRINGEMENT FOR THE ACTUAL USE MADE BY DEFENDANTS OF ORACLE'S
16 WORKS. ACTUAL USE IS TIED TO THE RUNNING ROYALTY. IT'S BASED
17 ON THE ACTUAL USE.

18 BECAUSE WHAT DOES ACTUAL USE TRANSLATE INTO? AS
19 MS. CATZ SAID: AND THE VALUE THAT ORACLE ULTIMATELY GETS FOR
20 THIS INTELLECTUAL PROPERTY IT ACQUIRES IS WHAT IT GETS FROM
21 SELLING IT TO CUSTOMERS, MAINTENANCE STREAMS, ET CETERA, RIGHT?

22 SO THE VALUE, THE ONLY WAY IT TURNS INTO ANY VALUE
23 IS IF YOU GET REVENUES FROM CUSTOMERS. AND WE HAVE ALREADY
24 SEEN THIS, HOW THE ACTUAL IS SO MUCH SMALLER THAN ALL THEIR
25 CUSTOMERS. OKAY.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 (SLIDE DISPLAYED ON SCREEN.)

2 ON THIS RUNNING ROYALTY, THIS IS ANOTHER ONE OF
3 THESE HIT-AND-RUN TACTICS. THEY ASK MR. MCDERMOTT WITHOUT
4 SHOWING HIM A DOCUMENT:

5 YOU'RE FAMILIAR WITH THE WAY THAT YOU PAY FOR
6 LICENSES FOR SUN'S JAVA?

7 "I KNOW WE HAVE SOME KIND OF ARRANGEMENT. I
8 DON'T KNOW SPECIFICALLY WHAT IT IS."

9 INSTEAD OF SHOWING HIM THE DOCUMENT:

10 "WELL, YOU KNOW IT IS NOT BASED ON USAGE?"

11 "IT IS BASED ON A LICENSE."

12 "IT'S BASED ON A LICENSE BUT IT'S LUMP SUM PER
13 YEAR, CORRECT?"

14 "IT WOULD BE AT A MUCH SMALLER FACTOR."

15 "LUMP SUM PER YEAR, CORRECT?"

16 "YES, I THINK IT IS."

17 THE APPROPRIATE THING AT THAT POINT WOULD BE TO
18 BRING OUT THE CONTRACT, THE LICENSE AND LOOK AT IT.

19 AND WE WILL GET TO THAT.

20 THEN WHEN HE QUESTIONED, WHEN MR. CLARKE WAS
21 QUESTIONED:

22 WOULD YOU DESCRIBE SOMETHING IN EXCESS OF A
23 BILLION DOLLARS AS VERY SUBSTANTIAL?

24 YES, I THINK THAT WOULD BE PRETTY SUBSTANTIAL.

25 IS IT YOUR TESTIMONY YOU ARE NOT AWARE OF ANY

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 LUMP SUM ROYALTY PAYMENTS OF MORE THAN A BILLION
2 DOLLARS?

3 NONE THAT I CAN THINK OF THAT WOULD BE COMPARABLE.

4 AND I WAS WAITING FOR THEM TO PULL OUT THIS BILLION
5 DOLLAR CONTRACT THAT THEY SAY IS COMPARABLE. BUT THEY DIDN'T
6 DO THAT. NO MENTION OF THAT UNTIL THE LAST FIVE MINUTES OF

7 MS. CATZ'S TESTIMONY WHERE SHE SAYS:

8 I AM SURPRISED BECAUSE I KNOW QUALCOMM LICENSED
9 TO SAMSUNG FOR WELL OVER A BILLION DOLLARS
10 TECHNOLOGY.

11 THEY SAY THAT BECAUSE THEY WANT YOU TO THINK THAT IF
12 QUALCOMM AND SAMSUNG HAVE A DEAL FOR A BILLION DOLLARS OR OVER
13 A BILLION DOLLARS, YOU OUGHT TO AWARD THEM THE SAME THING.

14 WHY DIDN'T THEY SHOW YOU THE CONTRACT? WHY DIDN'T
15 THEY TELL YOU WHAT IT WAS ABOUT? WHY DIDN'T THEY TELL YOU ITS
16 TERMS? WHY DID THEY JUST FLOAT OUT THERE AND WHY DO THEY WAIT
17 UNTIL THE LAST MINUTE? WHY DIDN'T THEIR EXPERT SAY SOMETHING
18 ABOUT IT? WHY DON'T THEY GIVE US A CHANCE TO LOOK FOR THE
19 CONTRACT AND COME IN AND DO WHAT WE DID FOR THE JAVA CONTRACT?

20 BECAUSE WHEN YOU LOOK AT THE JAVA CONTRACT, DESPITE
21 THE SUGGESTION THAT THIS IS A HUGE LUMP SUM PAYMENT SIMILAR TO
22 WHAT THEY ARE ASKING FOR HERE, WE FIND OUT THAT IT IS A
23 NONREFUNDABLE, NONTRANSFERABLE SUM OF -- OR A PREPAYMENT OF
24 1.5 MILLION.

25 REMEMBER, THEY SAY THIS IS A BUSINESS OF BILLIONS AS

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 IF THAT'S THE ONLY DENOMINATION THEY OPERATE IN. THIS IS
2 1.5 MILLION PREPAYMENT TO BE CREDITED AGAINST THE ROYALTY OWED
3 WITH RESPECT TO PRODUCTS.

4 SO THAT'S NOT REALLY AN UPFRONT LUMP SUM. IT'S A
5 PREPAYMENT TO BE CREDITED AGAINST ROYALTY. MORE IMPORTANT, IT
6 DOESN'T HAVE ANYTHING TO DO WITH ANYTHING IN THIS CASE. THEIR
7 EXPERT DOESN'T SAY IT DOES. IT'S SOMETHING THEY JUST FLOWED
8 OUT AS IF THERE IS THIS LUMP SUM PAYMENT THAT OUGHT TO MAKE YOU
9 MORE COMFORTABLE ACCEPTING THEIR VIEW HERE.

10 OKAY. FINAL POINT ON THE RUNNING ROYALTY IS IF THEY
11 ARE RIGHT THAT A RUNNING ROYALTY IS NO GOOD FOR THEM AND THEY
12 WOULDN'T ENTER INTO ONE IN THIS HYPOTHETICAL NEGOTIATION, ALL
13 THAT PROVES IS THE HYPOTHETICAL NEGOTIATION IS NOT THE RIGHT
14 WAY TO DO IT.

15 WE HAVE SEEN THAT A LUMP SUM IS TOO SPECULATIVE, TOO
16 RISKY, THEY HAVE MISCONSTRUED THE DOCUMENT, SO THAT DOESN'T
17 WORK. AND IF THEY ARE RIGHT THAT A RUNNING ROYALTY DOESN'T
18 WORK, THEN IT DOESN'T WORK, AND WE GO TO THE BEST METHOD OF

19 PROOF.
20 BEFORE WE DO THAT, LET ME JUST REMIND YOU THAT
21 MR. CLARKE'S APPROACH WOULD GIVE A RUNNING ROYALTY OF
22 34.9 MILLION TO TOMORROWNOW. THAT'S BASED ON ALL OF THE
23 TOMORROWNOW CUSTOMERS. SAP WOULD OWE 3.8 MILLION. THAT'S
24 BASED ON THE FOUR CUSTOMERS OUT OF THE 86 WHO BOUGHT FROM -- WE
25 CAN'T DISPROVE THAT THEY BOUGHT FROM SAP BECAUSE OF

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 TOMORROWNOW. AND ON THE DATABASE OF 1.9. THEY DIDN'T SAY
2 ANYTHING ABOUT THE DATABASE EXCEPT TO PUT UP THEIR \$55 MILLION
3 NUMBER. AND I ONLY WANT TO SAY ONE OR TWO THINGS ABOUT THAT.

4 MR. MEYER DID NOT DO A HYPOTHETICAL NEGOTIATION FOR
5 THE LICENSE. HE SIMPLY TOOK THE WORD OF MR. ALLISON ABOUT
6 WHAT -- MR. ALLISON OF ORACLE SUPPORT, ABOUT WHAT HE WOULD WANT
7 TO CHARGE. MR. MEYER EVENTUALLY ADMITTED ON THE STAND THAT IF
8 ALLISON SAID HE WANTED TWICE AS HIGH, THAT'S THE NUMBER MEYER
9 WOULD HAVE USED. IF HE WANTED HALF AS MUCH, THAT'S THE NUMBER
10 MEYER WOULD USE. THEY DIDN'T DO THE HYPOTHETICAL NEGOTIATION;
11 IT'S JUST WHAT THEY WOULD WANT TO CHARGE.

12 BUT MORE IMPORTANT, WITH THIS DATABASE, THE CUSTOMER
13 ALREADY HAS THE DATABASE. THEY HAVE ALREADY BOUGHT IT.
14 TOMORROWNOW NEEDS A LICENSE FOR THE DATABASE IT HAS THAT IT IS
15 USING TO HELP THE CUSTOMER.

16 THEIR APPROACH IS THAT IF YOU'VE GOT A DATABASE AND
17 YOU'RE USING IT TO SERVE MORE THAN ONE CUSTOMER, YOU NEED A
18 SEPARATE \$40,000 LICENSE FOR EACH CUSTOMER WHOSE INFORMATION
19 YOU ENTER ON YOUR DATABASE. THAT'S CRAZY. THEY PRESENTED NO
20 EVIDENCE THAT THAT'S HOW THEY DO IT.

21 MR. CLARKE'S NUMBER, 1.9 MILLION, IS NOT BAD FOR A
22 DATABASE THAT ORACLE ALREADY SOLD TO EACH CUSTOMER AND THAT
23 TOMORROWNOW IS USING ONLY TO PROVIDE SERVICE TO A CUSTOMER.

24 SO MR. CLARKE'S TOTAL FOR THE RUNNING ROYALTY IS
25 40.6.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OKAY. LET ME TURN TO WHAT WE SAY IS THE BEST WAY TO
2 DETERMINE COMPENSATION. AND IT IS THE WAY THAT IS TIED TO
3 REALITY, TIED TO WHAT ACTUALLY HAPPENED.

4 HOW MANY MAINTENANCE CUSTOMERS, SUPPORT CUSTOMERS
5 DID ORACLE LOSE AS A RESULT OF TOMORROWNOW?

6 WE START WITH THAT'S THAT. EVERYBODY AGREES THAT WE
7 START WITH 358. EVERYBODY AGREES THAT WE EXCLUDE THOSE WHO
8 WERE GOING TO LEAVE ORACLE ANYWAY. MR. MEYER AGREES,
9 MR. CLARKE AGREES, MS. CATZ AGREES.

10 YOU NEED TO GO CUSTOMER BY CUSTOMER. WHO IS GOING
11 TO LEAVE ORACLE ANYWAY? ORACLE DEFAULTED ON THAT. MS. RANSOM
12 TESTIFIED THAT SHE HASN'T DONE A CUSTOMER-BY-CUSTOMER ANALYSIS.
13 MR. ELLISON AGREED THAT IF YOU WANT TO KNOW WHY CUSTOMERS LEFT,
14 OR DID A PARTICULAR THING, YOU NEED TO ASK THE CUSTOMERS.

15 WHY WERE CUSTOMERS LOOSE IN THE SADDLE AT THE TIME?
16 WHY WERE THEY LIKELY TO LEAVE ORACLE?

17 (SLIDE DISPLAYED ON SCREEN.)

18 WE TALKED DURING THE TRIAL ABOUT THE AT RISK
19 PROFILE. HERE ARE THE TYPES OF CUSTOMERS THAT WERE GOING TO
20 LEAVE OR WERE IN HIGH RISK OF LEAVING ORACLE. THEY HAD
21 UNCERTAINTY ABOUT THE ACQUISITION, ABOUT ORACLE'S NEW FUSION
22 PROGRAM. THEY DIDN'T WANT TO UPGRADE. FINANCIAL DISTRESS.
23 THEY HAD JUST BEEN BOUGHT OR MERGED WITH ANOTHER COMPANY THAT
24 DIDN'T WANT TO USE ORACLE ANYMORE.

25 (SLIDE DISPLAYED ON SCREEN.)

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THIS IS MR. KREUEL FROM PEPSI. HE TALKED ABOUT THE
2 UNCERTAINTY, AND HE SAID AT THE BOTTOM:

3 WE DIDN'T WANT TO FUND FUTURE LICENSE OR FUTURE
4 RIGHTS TO UPGRADED VERSIONS THAT WE MOST LIKELY
5 WOULD NOT USE.

6 ALL OF THESE CUSTOMERS WERE LIKELY TO LEAVE.

7 MR. CUMMINS AT ORACLE ADMITTED THEY'VE GOT A HUGE
8 HOLE IN BEING ABLE TO ARTICULATE THEIR FUSION STORY. WHAT'S
9 GOING TO HAPPEN TO THE PEOPLESOFT CUSTOMERS?

10 MR. PHILLIPS ADMITTED THAT ORACLE COMPOUNDED THE
11 PROBLEM WITH LJE, THAT'S MR. ELLISON, LARRY ELLISON'S EARLY
12 STATEMENT THAT CAUSED CUSTOMERS TO BE CONCERNED.

13 MR. CUMMINS ADMITTED THAT CUSTOMERS COULD LEAVE
14 ORACLE WHETHER OR NOT TOMORROWNOW WAS IN EXISTENCE.

15 MR. CUMMINS ALSO ACKNOWLEDGED THAT A PARTICULAR
16 CONCERN IS THE LARGE NUMBER OF CUSTOMERS ON OLD RELEASES. THEY
17 WERE AT RISK OF LEAVING REGARDLESS OF TOMORROWNOW.

18 AND THEN THIS IS THE ONE ABOUT WHEN YOU'RE ACQUIRED
19 BY SOMEBODY ELSE AND THEY MANDATE A MOVE.

20 SO WHAT MR. CLARKE DID WAS TO LOOK CUSTOMER BY
21 CUSTOMER AND FIGURE OUT WHICH ONES WERE GOING TO LEAVE ORACLE
22 ANYWAY, AND HE CONCLUDED THAT THE NUMBER OF THE -- THE LOST
23 PROFITS ON THE CUSTOMERS THAT LEFT BECAUSE OF TOMORROWNOW WAS
24 \$19.3 MILLION.

25 AND THE WAY HE DID IT WAS BOTH HE AND CLARKE, MEYER
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 AND CLARKE STARTED WITH THE SAME NUMBER. THEY AGREED ON POOLS
2 TO EXCLUDE PEOPLE. THEY DISAGREED ON THE NUMBERS, BUT EVEN
3 MEYER AGREED THAT SOME NEEDED TO BE EXCLUDED. CLARKE HAD SOME
4 OTHER EXCLUSION POOLS, AND CLARKE WOULD AWARD DAMAGES BASED ON
5 206 CUSTOMERS; MEYER 253.

6 (SLIDE DISPLAYED ON SCREEN.)

7 AND LET'S JUST WALK THROUGH VERY QUICKLY THE WAY
8 THAT MR. CLARKE EXCLUDED CUSTOMERS FROM THIS DAMAGE POOL. AND
9 THESE, BEAR IN MIND, ARE CUSTOMERS WHO WERE GOING TO LEAVE
10 ORACLE ANYWAY, SO THEY DON'T HAVE ANY RIGHT TO EXPECT US TO
11 COMPENSATE THEM FOR THAT.

12 MEYER AND CLARKE AGREE ON THE TOP SIX. THEY AGREE
13 THAT IF ON SERVICE GAP, IF A CUSTOMER HAD BEEN GONE, THE
14 CUSTOMER LEFT ORACLE AND THEN WAITED A CERTAIN PERIOD OF TIME
15 BEFORE GOING TO TOMORROWNOW AND IN BETWEEN WAS ON SELF-SUPPORT

16 OR WENT TO ANOTHER THIRD PARTY PROVIDER, THEY WERE GOING TO
17 LEAVE ORACLE ANYWAY.

18 (SLIDE DISPLAYED ON SCREEN.)

19 AND YOU WILL REMEMBER, YOU WILL REMEMBER THIS CHART
20 FROM MR. CLARKE. IT SHOWS THE LENGTH OF TIME THAT CUSTOMERS
21 WERE GONE FROM ORACLE BEFORE THEY STARTED BUYING FROM
22 TOMORROWNOW. AND MR. CLARKE SAID, AND THIS STARTS AT SIX
23 MONTHS. HE SAID LOOK, IF THEY HAVE BEEN GONE SIX MONTHS, IT'S
24 NOT FAIR TO REQUIRE SAP TO PAY ORACLE FOR THOSE CUSTOMERS.

25 MR. MEYER ACTUALLY PICKED FOUR YEARS. AND HE SAID,

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 YOU KNOW, EVEN IF YOU HAD BEEN GONE THREE YEARS OR TWO YEARS, I
2 AM STILL GOING TO REQUIRE YOU TO PAY ORACLE FOR THAT.

3 YOU REMEMBER ON THE STAND HE WON'T OWN UP TO THAT
4 BECAUSE FOUR YEARS IS JUST WAY TOO LONG. WE WENT BACK AND
5 FORTH. BUT WHEN YOU LOOK AT THE CHART AND HE EVENTUALLY
6 ADMITTED HE USED FOUR YEARS.

7 THESE ARE THE CUSTOMERS THAT MR. CLARKE CONCLUDED
8 SHOULD BE EXCLUDED UNDER THE SERVICE GAP. THESE ARE THE ONES
9 HE SAID SHOULD BE EXCLUDED UNDER THE SERVICE EVALUATION. THESE
10 ARE THE ONES WHO HAD REASON TO LEAVE AND WENT OUT AND EVALUATED
11 THE MARKET. THESE ARE ONES THAT FELL INTO THE POOL WHERE THEIR
12 PARENT TOLD THEM TO LEAVE.

13 AND THIS IS ANOTHER BUCKET WHERE CUSTOMERS HAD
14 REASON TO LEAVE ORACLE AND THEN WENT AHEAD AND EVALUATED THEIR
15 ALTERNATIVES AND LEFT, AND HE PUT 38 CUSTOMERS IN THAT
16 CATEGORY.

17 WHAT'S SLIDE 86?

18 (SLIDE DISPLAYED ON SCREEN.)

19 OKAY. THIS IS THAT JOINT EXCLUDE CATEGORY.

20 AND THEN WE GO BACK?

21 (SLIDE DISPLAYED ON SCREEN.)

22 AND THIS IS ANOTHER CATEGORY -- THAT'S OKAY. THIS
23 IS ANOTHER CATEGORY WHERE AFTER LEAVING TOMORROWNOW THEY WENT

24 BACK TO ORACLE AND REINSTATED. THESE ARE ONES THAT NEVER LEFT
25 ORACLE. THEY CONTINUE TO PAY ORACLE FOR SUPPORT AND PAID

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 ADDITIONALLY TO TOMORROWNOW SO ORACLE WASN'T OUT ANY PROFITS.
2 OKAY. SO WHEN YOU GET THROUGH WITH ALL OF THAT, FOR
3 THOSE CUSTOMERS MR. CLARKE ADDED UP THE REVENUES THROUGH
4 OCTOBER OF 2008, BECAUSE AFTER 2008 THE CUSTOMER WAS FREE TO GO
5 BACK TO ORACLE IF THEY WANTED. HE ADDED A GROWTH FOR THE
6 REVENUE OF 3 PERCENT A YEAR. EVERYBODY HAS AGREED ON THAT
7 NUMBER. HE SAID, 23 PERCENT WERE GOING TO LEAVE ANYHOW OR THE
8 REVENUES WERE GOING TO BE DECREASED 23 PERCENT. THERE'S
9 NOTHING IN THE RECORD CHALLENGING THAT AMOUNT. THEN HE APPLIES
10 A PROFIT MARGIN OF 95 PERCENT.

11 (SLIDE DISPLAYED ON SCREEN.)

12 I AM GOING TO DO THIS QUICKLY, BUT THIS IS THE LIST
13 OF ALL THE CUSTOMERS HE EXCLUDED. IT'S TOO SMALL TO READ. THE
14 IMPORTANT POINT IS MR. MEYER NEVER DISPUTED ANY OF THESE
15 CUSTOMERS. MR. BOIES ASKED HIM QUESTION ABOUT THREE OF THESE.

16 AND HERE ARE THE THREE. ABITIBI: CLARKE EXCLUDED
17 THEM BECAUSE OF FINANCIAL DISTRESS LEADING HIM TO THINK THEY
18 WOULD HAVE LEFT ORACLE ANYWAY BECAUSE THEY COULDN'T AFFORD IT.

19 ON THE OTHER TWO, UNDER LOST SUPPORT, LOST PROFITS
20 THAT HE WAS QUESTIONED ON, ARVIN MERITOR AND SARA LEE BOTH
21 MEYER AND CLARKE EXCLUDED. SO I DON'T KNOW WHERE THE
22 QUESTIONING WAS GOING BECAUSE THEIR OWN EXPERT SAID THOSE
23 CUSTOMERS OUGHT TO BE EXCLUDED.

24 SO WHEN YOU GET DONE WITH ALL 206 CUSTOMERS, THE
25 LOST SUPPORT PROFITS AT THE TIME OF TRIAL IS \$19.3 MILLION.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THAT BRINGS US FINALLY TO INFRINGERS' PROFITS.
2 BEFORE I GO TO INFRINGERS' PROFITS, LET ME JUST ADD THIS.
3 YOU KNOW AT THE END OF THE TRIAL, AFTER MR. CLARKE

4 HAD TESTIFIED AND HE PUT FORWARD HIS ANALYSIS THAT HE SPENT A
5 LOT OF TIME, A LOT OF HIS TIME AND SAP'S MONEY ON, THEY COULD
6 HAVE CALLED MR. MEYER BACK TO THE STAND. THEY COULD HAVE
7 CALLED HIM BACK TO THE STAND TO TESTIFY, WELL, I DISAGREE WITH
8 CLARKE ON THIS, THAT OR THE OTHER CUSTOMER.

9 THEY COULD HAVE CALLED HIM BACK TO THE STAND TO TRY
10 AND JUSTIFY HIS USING 253 CUSTOMERS INSTEAD OF 206. THEY
11 DECIDED NOT TO DO THAT FOR REASONS OF THEIR OWN.

12 THEY DID CALL ONE REBUTTAL WITNESS, MS. CATZ. AND
13 SHE DIDN'T TESTIFY ABOUT THIS AT ALL. AND SHE HAS SAID SHE HAS
14 NEVER MADE A CUSTOMER-BY-CUSTOMER ANALYSIS AND SHE CAN'T SAY
15 WHY ANY PARTICULAR CUSTOMER LEFT.

16 ANOTHER CUSTOMER THAT ILLUSTRATES THIS PROCESS OF
17 FIGURING OUT WHETHER THEY SHOULD BE IN OR OUT IS COWLITZ
18 COUNTY. I WENT OVER IT WITH MR. MEYER. I'M NOT GOING TO TAKE
19 YOUR TIME AGAIN. IF YOU LOOK AT EXHIBIT A2049, A2049. THAT'S
20 THE COWLITZ COUNTY DECLARATIONS. AND THAT WILL EXPLAIN THE
21 KIND OF INFORMATION THAT WAS BEFORE THE EXPERTS. AND AT THE
22 END OF THE DAY, BOTH OF THEM AGREED TO EXCLUDE COWLITZ COUNTY.

23 OKAY. FINALLY INFRINGERS' PROFITS.

24 (SLIDE DISPLAYED ON SCREEN.)

25 WE START WITH THE LIST OF 86. THE LIST OF 86 ARE

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 NOT CUSTOMERS THAT BOUGHT FROM SAP BECAUSE OF TOMORROWNOW.
2 IT'S JUST THE LIST OF CUSTOMERS THAT BOUGHT FROM SAP WHILE THEY
3 WERE TOMORROWNOW CUSTOMERS.

4 AND THE ISSUE IS HOW MANY OF THEM BOUGHT FROM SAP
5 BECAUSE OF TOMORROWNOW.

6 SO, MEYER AGREES HE STARTS AT 86. HE REMOVES ABOUT
7 20, AND THAT'S BECAUSE HE CONCLUDED THAT ORACLE'S LOSS OF THOSE
8 CUSTOMERS TO SAP COULD NOT BE ATTRIBUTED TO TOMORROWNOW'S
9 INFRINGEMENT.

10 SO EVERYBODY AGREES YOU START WITH THE 86 AND YOU
11 HAVE TO EXCLUDE PEOPLE WHO WERE GOING TO LEAVE ANYWAY.

12 (SLIDE DISPLAYED ON SCREEN.)
13 THIS IS MR. CLARKE'S CHART. HE STARTS WITH THE 86.
14 HE AND MEYER AGREES TO TAKE OUT 22. MEYER PUTS BACK 20 BECAUSE
15 THEY WERE SAFE PASSAGE CUSTOMERS. I WILL COME TO THAT. CLARKE
16 EXCLUDES FOR REASONS HE'S EXPLAINED 40 OTHERS, WHICH ENDS HIM
17 UP AT FOUR.

18 OKAY. THIS IS ONE OF THE MOST IMPORTANT CONCEPTS
19 AND IT IS THE SECOND TRICK THAT THEY DID THAT I DESCRIBED AT
20 THE START.

21 (SLIDE DISPLAYED ON SCREEN.)
22 THIS IS FROM PTX404. AND IT SHOWS THE SAFE
23 PASSAGE/TOMORROWNOW BASE. AND OVER HERE ARE SAFE PASSAGE
24 CUSTOMERS. THESE ARE CUSTOMERS THAT BOUGHT SOFTWARE
25 APPLICATIONS FROM SAP. AND THEIR CHARACTERISTICS: THEY ARE

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THE LARGER CUSTOMERS, THEY PLAN TO DO UPGRADES, SOME OF THEM
2 HAVE SAP EXPERIENCE, THEY ARE ALREADY AN SAP CUSTOMER, THEY
3 HAVE A STRATEGY OF NO ORACLE, THEY DON'T LIKE ORACLE, THEY HAVE
4 SHORT PROJECT CYCLES AND THEY HAVE HIGH SUPPORT RISK AVERSION,
5 MEANING THEY WANT GOOD SUPPORT AND THEY DON'T WANT HALF PRICE
6 SUPPORT.

7 THESE ARE CUSTOMERS WHO, UNDER SAFE PASSAGE, BOUGHT
8 FROM SAP WITHOUT HAVING ANYTHING TO DO WITH TOMORROWNOW. THESE
9 CUSTOMERS OVER HERE ON THE RIGHT ARE CUSTOMERS WHO WERE OF
10 TOMORROWNOW. THESE NUMBERS AREN'T EXACTLY THE SAME BECAUSE
11 THIS IS DATED DECEMBER 2006, BUT IT ILLUSTRATES THE CONCEPT.

12 TOMORROWNOW'S CUSTOMERS, THEIR CHARACTERISTICS ARE:
13 THEY ARE SMALLER, THEY'RE NOT SAP-MINDED, THEY DON'T HAVE ANY
14 SAP EXPERIENCE, THEY'RE RUNNING ON OLD RELEASES, THEY DON'T
15 WANT ANY UPGRADES OR HAVEN'T DECIDED YET.

16 SO, UNDER SAFE PASSAGE WE HAD SOME CUSTOMERS WHO
17 ONLY WENT TO TOMORROWNOW. WE HAD SOME CUSTOMERS WHO ONLY WENT
18 TO SAP, AND THEN WE HAD SOME JOINT CUSTOMERS IN THE MIDDLE.
19 AND THESE ARE CUSTOMERS WHO BOUGHT FROM SAP WHILE THEY WERE
20 TOMORROWNOW CUSTOMERS.

21 DOESN'T MEAN THEY BOUGHT FROM SAP BECAUSE OF
22 TOMORROWNOW, BUT THIS IS THE STARTING POINT WITH THE JOINT
23 CUSTOMERS. AND YOU WILL SEE THAT THERE ARE 216 AS OF THIS
24 POINT IN TIME TOMORROWNOW ONLY, 266 SAP ONLY, AND 26 JOINT
25 CUSTOMERS.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THEY POINTED TO SOME DOCUMENTS WHERE PEOPLE REFERRED
2 TO TOMORROWNOW AS THE CORNERSTONE. THERE'S A BIG PART. BUT
3 HERE'S THE OTHER SIDE OF THAT STORY.

4 (SLIDE DISPLAYED ON SCREEN.)

5 MS. CATZ: THIS WHOLE SAFE PASSAGE THING, IT'S
6 NOT A TOMORROWNOW PROGRAM.

7 I THINK SHE MEANT IT IS NOT A TOMORROWNOW ONLY
8 PROGRAM, BUT THE CONCEPT IS RIGHT.

9 MR. MEYER: CUSTOMERS WENT FROM PEOPLESOFT TO
10 TOMORROWNOW FOR SUPPORT ON THEIR PEOPLESOFT
11 SOFTWARE WITHOUT EVER BUYING ANY SOFTWARE FROM
12 SAP. CORRECT.

13 MR. KAGERMANN: A LARGE PART OF SAFE PASSAGE IS
14 A PROGRAM THAT WAS ESTABLISHED INDEPENDENT OF
15 TOMORROWNOW.

16 AND MR. HURST WHO YOU HEARD SAID: HE BELIEVED A
17 MAJORITY OF THE DEALS WOULD STILL HAVE BEEN WON
18 BUT THERE MAY HAVE BEEN A COUPLE THAT
19 TOMORROWNOW WOULD HAVE BEEN INFLUENTIAL IN.

20 HOW DO WE KNOW, WHAT FURTHER EVIDENCE DO WE HAVE
21 THAT TOMORROWNOW WAS NOT RESPONSIBLE FOR THE WHOLE SAFE
22 PASSAGE? AND THIS IS IMPORTANT BECAUSE YOU REMEMBER, WHAT THEY
23 ARE TRYING TO DO IN THEIR, IN THEIR REASONABLE ROYALTY
24 NEGOTIATION AND ALSO ON THEIR INFRINGERS' PROFITS IS SAY
25 EVERYBODY WHO WENT TO SAP WENT BECAUSE OF TOMORROWNOW.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 SO YOU CAN VALUE THE TOMORROWNOW LITTLE INFRINGEMENT
2 PIECE, BIG INFRINGEMENT, LITTLE PIECE OF SAFE PASSAGE, YOU CAN
3 VALUE THAT BY LOOKING AT THE DOCUMENTS ABOUT SAFE PASSAGE.

4 (SLIDE DISPLAYED ON SCREEN.)

5 BUT JUST TO PROVE SAFE PASSAGE IS SEPARATE FROM
6 TOMORROWNOW, TOMORROWNOW IS A SEPARATE PART FROM BUYING THE SAP
7 SOFTWARE. THE BEST THING ABOUT SAFE PASSAGE OTHER THAN YOU'VE
8 GOT SAP SOFTWARE WAS THE CUSTOMER RECEIVES 75 PERCENT CREDIT
9 FOR THOSE LICENSES THEY CONVERT. SO THAT'S A PRETTY GOOD DEAL.
10 THAT CAN KIND OF EXPLAIN WHY A CUSTOMER MIGHT CONVERT.

11 THEN IT MAKES CLEAR THAT PURCHASING THE SAP LICENSE
12 AND PURCHASING MAINTENANCE FROM TOMORROWNOW ARE TWO SEPARATE
13 DECISIONS. THIS TELLS YOU THIS IS THE WAY SAFE PASSAGE WORKED
14 OUT. IT'S DIFFERENT FROM THE ZIEMEN DOCUMENT, WHICH SAID YOU
15 HAD TO DO ALL THIS STUFF AT THE SAME TIME.

16 (SLIDE DISPLAYED ON SCREEN.)

17 THIS IS A CHART WE PUT UP WITH MR. CLARKE.

18 THIS IS OVER TIME. AND OF ALL THE CUSTOMERS WHO
19 CONSIDERED SAFE PASSAGE, 561 ONLY BOUGHT FROM SAP. NEVER
20 BOUGHT FROM TOMORROWNOW. 228 ONLY BOUGHT FROM TOMORROWNOW.
21 AND THERE WERE ONLY 64 JOINT CUSTOMERS.

22 AND SO THAT SHOWS YOU THAT TOMORROWNOW -- PEOPLE CAN
23 CALL THEM A CORNERSTONE UNTIL THEY ARE BLUE IN THE FACE, BUT
24 MOST OF THE CUSTOMERS UNDER SAFE PASSAGE DID NOT HAVE ANYTHING
25 TO DO WITH TOMORROWNOW.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 AND WHY IS THAT? PART OF THE REASON IS IN THE
2 DOCUMENTS. IT TALKS ABOUT THE FUNDAMENTAL CONFLICT BETWEEN SAP
3 AND TOMORROWNOW.

4 (SLIDE DISPLAYED ON SCREEN.)

5 TOMORROWNOW HAD A LOW FRILL LOWER COST MODEL AND
6 IT'S IN CONFLICT WITH SAP'S DESIRE TO MOVE CUSTOMERS TO MYSAP.

7 SURE, THE WAY THAT SAP HOPED THIS WAS GOING TO TURN
8 OUT IS PEOPLE WOULD MOVE FROM TOMORROWNOW FIRST TO SAP. BUT

9 WHAT THIS RECOGNIZES, AND THIS IS RIGHT AT THE TIME IN
10 DECEMBER, JANUARY, I THINK THIS IS ZEPECKI, THAT'S A CONFLICT.
11 HE SAYS IT IS UNCLEAR HOW SUPPORT FITS INTO SAP'S OVERALL PLAN
12 TO DRIVE PEOPLESOFT CUSTOMERS TO SAP.

13 AND THEN MR. HURST SAYS: A LOT OF SAP SALES
14 REPS WERE HESITANT TO BRING TOMORROWNOW INTO
15 THEIR DEALS FOR FEAR OF STALLING SALES CYCLES.

16 AND THE IDEA THERE WAS IF YOU COULD GO ON SUPPORT AT
17 TOMORROWNOW FOR YOUR OLD PEOPLESOFT STUFF, YOU MIGHT NEVER HAVE
18 TO CONVERT TO EITHER ORACLE OR SAP. SO THAT WOULDN'T
19 NECESSARILY DRIVE SALES. SO THAT'S A FUNDAMENTAL CONFLICT.

20 AND MR. JONES POINTED THAT OUT WHERE HE SAYS:
21 SAP FACES A FUNDAMENTAL CONFLICT BETWEEN THE
22 TOMORROWNOW BUSINESS AND ITS OWN SOFTWARE
23 LICENSE BUSINESS.

24 NOW, THEY SAY, WELL, THE WAY YOU CAN EXPLAIN WHY WE
25 DIDN'T HIT 3,000 AND ONLY GOT 358 IS THE VERY SAME THING.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THERE WAS A FUNDAMENTAL CONFLICT. THAT'S WHY IT DIDN'T WORK
2 OUT.

3 THAT'S NOT AN AFTERTHOUGHT. THAT'S NOT A FAILURE OF
4 EXECUTION. THIS IS WHAT THEY KNEW AT THE TIME. THIS IS WHAT
5 MR. ZEPECKI SAID IN WORDS:

6 I DON'T CARE WHAT ZIEMEN IS PUTTING IN HIS
7 DOCUMENT ABOUT SOMETHING ELSE. I DON'T CARE
8 WHAT PEOPLE'S GOALS ARE. WHAT I KNOW IS THAT
9 THERE IS A FUNDAMENTAL CONFLICT.

10 AND MR. JONES SAW THAT FUNDAMENTAL CONFLICT AS WELL.
11 AND MR. JONES EVEN CALLED IT THE SILLIEST -- MR. JONES CALLED
12 THE IDEA THAT PEOPLE WOULD GO SAVE ON SUPPORT AND THEN MOVE TO
13 SAP, THE SILLIEST ARGUMENT I HAVE EVER HEARD.

14 THAT ARGUMENT IS NOW WHAT ORACLE'S CASE IS BASED ON;
15 THAT PEOPLE MOVED TO SAP FOR INFRINGERS' PROFITS BECAUSE OF
16 TOMORROWNOW. SILLIEST ARGUMENT I'VE EVER HEARD.

17 EVERYBODY ADMITTED THAT IT TAKES A LOT TO GET
18 SOMEBODY TO MOVE TO SAP SALES.
19 MR. PHILLIPS: CUSTOMERS CAN'T SWITCH THAT
20 QUICKLY. THESE ARE VERY COMPLICATED PRODUCTS.
21 IT TAKES YEARS TO INSTALL. THEY ARE NOT GOING
22 TO CHANGE WITHOUT A VERY GOOD REASON. AND
23 GETTING HALF PRICE SUPPORT FOR A YEAR OR TWO
24 WHILE YOU ARE CONVERTING IS NOT A VERY GOOD
25 REASON.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MR. PHILLIPS: "THIS IS A CAREER-MAKING DECISION
2 FOR THEM." END QUOTE.
3 MR. MCDERMOTT WENT ON AT LENGTH: IT IS REALLY A
4 BIG DEAL TO SWITCH ERP SYSTEMS.
5 (SLIDE DISPLAYED ON SCREEN.)
6 HERE'S A CHART THAT I THINK TELLS IT ALL AND WAS
7 UNREFUTED BY MS. CATZ, UNREFUTED BY MR. MEYER, UNMENTIONED BY
8 COUNSEL.
9 THIS IS WHERE MR. CLARKE WALKS THROUGH THE
10 HYPOTHETICAL SITUATION TO SHOW WHAT EFFECT THE SAVINGS AT
11 TOMORROWNOW WOULD HAVE ON THE OVERALL COST OF MIGRATING.
12 AND HE'S ASSUMING THE LICENSE FROM ORACLE OR
13 PEOPLESOFT WAS A MILLION DOLLARS AND YOU ARE PAYING 20 PERCENT
14 THERE, SO TOTAL SUPPORT IS \$200,000.
15 AND THEN THE IDEA IS, WELL, YOU GO TO TOMORROWNOW.
16 THE IDEA IS YOU GO TO TOMORROWNOW AND YOU SAVE HALF. SO YOU
17 PAY A HUNDRED THOUSAND WHILE YOU ARE MIGRATING TO SAP.
18 SAP, OVER THE YEARS THE PRICE HAS GONE UP FOR THE
19 SOFTWARE TO 2 MILLION.
20 MR. MCDERMOTT TESTIFIED THAT THE COST OF
21 IMPLEMENTATION OVER AND ABOVE THE LICENSE COST WOULD BE, I
22 THINK HE SAID FOUR TIMES OR TEN TIMES. HERE, MR. CLARKE IS
23 USING TEN TIMES. SO THE COST OF IMPLEMENTATION WOULD BE
24 \$20 MILLION. OR \$8 MILLION IF IT'S JUST 4 PERCENT.
25 SO THE TOTAL OUTLAY WOULD BE 8 MILLION -- NO, IT

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WOULD BE 10 MILLION TO 22 MILLION.

2 SO IF YOU ARE THINKING ABOUT MIGRATING FROM ORACLE
3 OR PEOPLESOFT TO SAP, YOU ARE LOOKING AT A DECISION IN THAT
4 MAGNITUDE. AND WHAT YOU STAND TO SAVE BY GOING TO TOMORROWNOW
5 FOR A YEAR IS A HUNDRED THOUSAND, TWO YEARS, 200,000.

6 SO THE QUESTION IS, WHY WOULD ANYBODY WHO WASN'T
7 GOING TO DO IT ANYWAY CHOOSE TO SPEND \$22 MILLION JUST TO SAVE
8 A HUNDRED THOUSAND DOLLARS?

9 WHAT THIS SHOWS, I THINK VERY GRAPHICALLY, IS THAT
10 WHEN SAP GOT 86 CUSTOMERS TO BUY SOFTWARE FROM IT, IT WASN'T
11 BECAUSE OF TOMORROWNOW. PEOPLE DON'T BUY SOFTWARE, WHATEVER
12 SOMEBODY MIGHT HAVE HOPED IN WRITING THE SAFE PASSAGE
13 DOCUMENTS, THEY DON'T DO IT FOR THAT MONEY.

14 SO, FINALLY, THE ISSUE IS, OKAY, WE NEED TO DECIDE
15 HOW MANY OF THOSE 86 CUSTOMERS WOULD HAVE LEFT ORACLE ANYWAY:
16 DIDN'T LEAVE ORACLE TO BUY SAP SOFTWARE BECAUSE OF TOMORROWNOW.
17 AND MEYER AND CLARKE AGREE. WELL, IF THEY DECIDED TO BUY FROM
18 SAP BEFORE TOMORROWNOW, YOU WOULD EXCLUDE THEM. CLARKE
19 EXCLUDES 33 PEOPLE.

20 PRODUCT EXTENSIONS; THEY ARE JUST BUYING SOMETHING
21 MORE FROM SAP BUT THEY WERE ALREADY SAP CUSTOMERS.

22 PARENT COMPANY MANDATE; THAT'S WHERE THE PARENT
23 TELLS THEM THE NEW COMPANY ACQUIRES THEM, TELLS THEM YOU HAVE
24 TO GO TO SAP BECAUSE THE REST OF THE COMPANY IS ON THAT. NO
25 REASON WE HAVE TO PAY ORACLE FOR THAT. AND THE OTHER

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 CATEGORIES THAT HE TALKED ABOUT ON THE STAND.

2 (SLIDE DISPLAYED ON SCREEN.)

3 WE WALKED THROUGH THESE ON THE STAND. THESE ARE THE
4 COMPANIES AND THE VARIOUS CATEGORIES.

5 SPECIFIC FUNCTIONALITY IS ONE I WANT TO PAUSE ON.
6 THIS IS WHERE ORACLE OR PEOPLESOFT PROMISED TO DEVELOP SOME
7 SOFTWARE SPECIFIC FOR AN INDUSTRY AND THEN ORACLE CHANGED
8 PEOPLESOFT'S MIND OR J.D. EDWARDS' MIND AND DIDN'T ACTUALLY DO
9 IT. THAT'S WHY THE CUSTOMER LEFT.

10 THEY CAN'T BLAME US FOR THAT. THEY CAN'T SAY WE
11 NEED TO PAY THEM FOR CUSTOMERS WHO LEFT THEM BECAUSE THEY
12 DIDN'T DEVELOP THE SOFTWARE.

13 OF ALL THE CUSTOMERS THAT MR. CLARKE EXCLUDED, HE
14 WAS QUESTIONED ONLY ON FOUR. AGAIN, MEYER NEVER CAME BACK AND
15 DISAGREED WITH ANY OF THIS. AS FAR AS MEYER GOES, THIS IS
16 UNREFUTED.

17 IF YOU CONSIDER CROSS-EXAMINATION REFUTING AN EXPERT
18 STUDY, THERE WERE ONLY FOUR. ABITIBI CLARKE EXCLUDE BECAUSE
19 SAP PROVIDED SPECIFIC PULP AND PAPER FUNCTION THAT J.D. EDWARDS
20 PROMISED AND ORACLE DIDN'T DELIVER.

21 HE EXCLUDED THE NEXT ONE BECAUSE THEY WERE
22 STANDARDIZING THEIR SOFTWARE.

23 HE EXCLUDED NATIONAL FOODS BECAUSE THEY WANTED A
24 SPECIFIC CHOICE OF SOFTWARE.

25 AND ON SARA LEE, WHICH YOU HEARD A LOT ABOUT ON
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 CROSS-EXAMINATION, THERE'S NO POINT BECAUSE EVEN MR. MEYER
2 AGREED THAT SARA LEE SHOULD BE EXCLUDED BECAUSE THEY LEFT
3 ORACLE FOR REASONS UNRELATED TO TOMORROWNOW.

4 (SLIDE DISPLAYED ON SCREEN.)

5 SO, THIS IS THE WAY THAT MR. CLARKE CALCULATED THIS.
6 IT WAS THE SAP REVENUES AFTER THE TOMORROWNOW START DATE LESS
7 ONGOING REVENUE. ONGOING REVENUE WAS THE REVENUE THAT HAD BEEN
8 PRE-COMMITTED BEFORE TOMORROWNOW. SO THERE'S NO WAY YOU CAN
9 CHARGE US FOR THAT. AND MR. MEYER AGREES WITH THAT. SO THEY
10 AGREE ON THAT STARTING NUMBER.

11 AND THEN THE BIG DEDUCTION IS FOR ALL OF THOSE
12 CUSTOMERS WHO WOULD HAVE LEFT ANYWAY.

13 THE SUBTOTAL. AND THEN ON THE PROFITS, THE

14 7.6 MILLION OUT OF THE 13 MILLION, THAT'S 50 PERCENT. AND
15 THAT'S A NUMBER THAT MR. MEYER AGREED WITH. HE'S -- MR. MEYER
16 ALSO AGREED WITH THE TIME PERIOD.

17 AND HERE'S TO SHOW THAT SAP AND ORACLE AGREE THAT
18 THE PROFIT MARGIN THAT SHOULD BE USED FOR THIS CALCULATION
19 SHOULD BE 50 PERCENT.

20 MS. CATZ: EVEN MR. MEYER AGREES THAT WOULDN'T
21 BE ORACLE'S DAMAGE CLAIM; HE'D ONLY GIVE YOU
22 50 PERCENT OF THAT, CORRECT?

23 YEAH, I WASN'T DOING THE DAMAGES CALCULATION.

24 MR. CLARKE: "WHAT FIGURE DID MR. MEYER USE IN
25 HIS SIMILAR CALCULATION?"

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 "50 PERCENT."

2 "WHAT TIME PERIOD DID HE USE?"

3 "THE SAME AS ME, THE END OF 2008."

4 THAT IS UNDISPUTED. THEY DIDN'T CALL MR. MEYER
5 BACK.

6 AND SO WHEN THEY GET UP HERE AND SAY IT SHOULD BE
7 SOME NUMBER OTHER THAN 50 PERCENT, THEY HAVE A PROBLEM BECAUSE
8 THEIR OWN EXPERT USED 50 PERCENT AND HE USED THE SAME TIME
9 PERIOD.

10 NOW, THEY ALSO SAID THAT MR. MEYER SAID WELL, HIS
11 INFRINGERS' PROFIT NUMBER WOULDN'T DO IT. IT WOULDN'T BE
12 ENOUGH. BUT HERE'S WHAT HE SAID. THIS IS BASED ON USING 63
13 CUSTOMERS, SO HE'S GOT 288 MILLION.

14 YOU REMEMBER HE WOULDN'T AGREE WITH THIS WHEN HE WAS
15 ON THE STAND, AND THEN I IMPEACHED HIM BY READING FROM HIS
16 DEPOSITION. IMPEACHING MEANING SHOWING THAT HE TOLD SOMETHING
17 DIFFERENT BEFORE. HERE IS FROM HIS DEPOSITION.

18 "THE 288 MILLION OF INFRINGERS' PROFITS THAT YOU
19 CALCULATED, IS IT YOUR POSITION THAT BUT FOR THE
20 ACTIVITIES OF TOMORROWNOW, SAP WOULD NOT HAVE
21 RECEIVED ANY OF THOSE PROFITS?"

22 AND HIS ANSWER: "IT IS MY POSITION THAT THE
23 288 MILLION IS A CALCULATION OF BENEFITS THAT
24 SAP RECEIVED FROM THE ALLEGED INFRINGEMENT. AND
25 FROM MY PERSPECTIVE, I HAVE LOOKED AT THOSE

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 CUSTOMERS AND DETERMINED THAT THE 288 MILLION IS
2 A REASONABLE CALCULATION OF THAT VALUE," MEANING
3 BENEFITS THAT SAP RECEIVED FROM THE ALLEGED
4 INFRINGEMENT.
5 "I STAND BY THAT TESTIMONY. I STAND BY THAT.
6 THAT'S EXACTLY WHAT I SAID."
7 NOT QUITE, BECAUSE IN THE OPENING STATEMENT I
8 REFERRED TO THREE CUSTOMERS WHERE IT WAS JUST OBVIOUS THEY LEFT
9 SAP -- THEY LEFT ORACLE FOR SAP FOR REASONS UNRELATED. BASF,
10 THEIR PARENT TOLD THEM TO, AMGEN, THEY LEFT, AND THERE WAS ONE
11 OTHER. HE TOOK THOSE OUT AND HE AGREED THAT HIS NUMBER 288
12 DROPPED DOWN TO 236.

13 (SLIDE DISPLAYED ON SCREEN.)

14 SO THIS IS THE COMPARISON OF THE CALCULATION BETWEEN
15 THE TWO EXPERTS.

16 ON LOST PROFITS, MEYER USES 253 CUSTOMERS; CLARKE
17 USES 206. AND FOR TOMORROWNOW TIME PERIOD, MEYER'S NUMBER IS
18 36. IF HE RUNS THAT OUT TO 2015, IT'S A BIGGER NUMBER. BUT
19 THE 36 COMPARES TO CLARKE'S 19.3.

20 ON INFRINGERS' PROFITS, PROFITS SAP MADE ON SOFTWARE
21 SALES. MEYER USES 63 CUSTOMERS AND COMES TO 236; CLARKE USES
22 FOUR AND COMES TO 8.7. AND THIS IS A BIG DIFFERENCE. FOUR TO
23 63. BUT BEAR IN MIND, WE ARE TALKING ABOUT WHY CUSTOMERS WOULD
24 SWITCH FROM ORACLE TO SAP FOR SOFTWARE, AND WOULD IT HAVE
25 ANYTHING TO DO WITH TOMORROWNOW.

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 AND AS WE HAVE SEEN IN ALL THESE NUMBERS, THERE'S NO

2 REASON TO THINK THAT ANY CUSTOMER SWITCHED FROM ORACLE TO SAP
3 FOR SOFTWARE BECAUSE OF THE LITTLE SAVINGS AT TOMORROWNOW. SO
4 MEYER'S TOTAL WOULD BE 272 FOR THE SAME TIME PERIOD; CLARK'S
5 TOTAL IS 28 MILLION.

6 THEY HAVE TALKED ABOUT THE GOAL OF DISRUPTING
7 ORACLE. THEY HAVE PUT ON NO EVIDENCE THAT THERE WAS ANY HARM
8 TO THEM FROM DISRUPTION.

9 THEY TALKED ABOUT, WELL, THEY HAVE GOT \$4 BILLION IN
10 R&D THAT THEY SPEND EVERY YEAR. THEY HAVE NOT SAID ANYTHING
11 ABOUT HOW LOSING FOUR CUSTOMERS OR \$19 MILLION HAD ANY EFFECT
12 WHATSOEVER ON THEIR \$4 BILLION RESEARCH AND DEVELOPMENT BUDGET.
13 AGAIN, IT'S HIT AND RUN. THEY SAY IT, BUT THEY DON'T TRY AND
14 PROVE IT.

15 ((COUNSEL AT EASEL.))

16 ANDREW NELSON. LET ME JUST TAKE ONE MINUTE ON
17 ANDREW NELSON AND HIS \$1 AND \$18 IN CASE THAT COMES BACK ON
18 REBUTTAL.

19 THEY HAVE A CHANCE TO TALK TO YOU AGAIN. I DON'T
20 GET TO GET UP AND GIVE AN ANSWER. I AM PRETTY SURE I WOULD
21 HAVE AN ANSWER. AND I ASK YOU TO THINK WHAT THAT ANSWER WOULD
22 BE AND EVALUATE THAT.

23 ALL ANDREW NELSON DID, I WILL JUST HAVE TO HOLD IT,
24 ALL ANDREW NELSON DID WAS TO SAY THAT IF ORACLE CHARGES \$2 FOR
25 SUPPORT, AND TOMORROWNOW CHARGES \$1 FOR SUPPORT, AND IF YOU RUN

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THAT OUT NINE YEARS, THAT TURNS OUT TO BE \$18.

2 AND SO WHAT HE SAYS, YOU CAN EVALUATE WHETHER THIS
3 MATH MAKES ANY SENSE OR WHETHER SAP WOULD EVER RELY ON THIS.
4 WHAT HE SAYS, IF WE GET A CUSTOMER AND GET \$1, THAT'S WORTH \$18
5 TO ORACLE.

6 NOT QUITE BECAUSE YOU REALLY HAVE TO DO \$1 EVERY
7 YEAR, SO IT COMES OUT TWO TO ONE. FOR EVERY DOLLAR THAT WE
8 GET, IT COST ORACLE IN SUPPORT \$2. SO THAT CALCULATION THAT
9 THEY USE ONE OUT OF 18 JUST DOESN'T HAVE ANYTHING TO DO WITH

10 THIS, AND IT'S CERTAINLY NO WAY TO CALCULATE DAMAGES.
11 OKAY. I AM ALMOST DONE. WHY VALUE CLARKE'S
12 APPROACH OVER MEYER'S? CLARKE STUDIED THE CUSTOMERS ONE BY
13 ONE. MEYER DIDN'T.
14 DON'T TRUST SOMEBODY WHO DOESN'T BELIEVE IN REALITY
15 CHECKS.
16 DON'T TRUST SOMEBODY WHO DOESN'T LET YOU LOOK UNDER
17 THE HOOD.
18 DON'T TRUST SOMEBODY WHO USES A FOUR-YEAR GAP AND
19 THEN DENIES IT.
20 DON'T TRUST SOMEBODY WHEN HE'S PUT IN A REALLY TOUGH
21 POSITION IN HIS CLIENT TO COME UP WITH A BIGGER NUMBER THAN
22 THERE'S ANY BASIS IN REALITY FOR.
23 DON'T TRUST SOMEBODY LIKE IN THE BOEING CASE WHERE
24 THE COURT CRITICIZED HIM FOR STARTING WITH A GUESS, STARTING
25 WITH AN ASSUMPTION AND THEN ADDING PLUS OR MINUS TO IT. YOU

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 STILL END UP WITH AN ASSUMPTION.
2 MY CROSS-EXAMINATION OF MEYER FOCUSED ON THE
3 IMPORTANT ISSUES; THE USE OF THE BOOK OF WISDOM, HIS USE OF
4 RUNNING ROYALTIES IN OTHER CASES, AND SO FORTH.
5 THE CROSS-EXAMINATION OF CLARKE DIDN'T. THERE WAS A
6 LOT OF TALK ABOUT CEDARCRESTONE AND WHETHER THEY WERE IN
7 BUSINESS IN 2005. EVEN IF CEDARCRESTONE WASN'T IN BUSINESS IN
8 2005, ON THAT CHART IT SHOWED PLENTY OF OTHERS WHO WERE.
9 WHAT DID IT MATTER ABOUT CEDARCRESTONE? AS IT
10 TURNED OUT, THE DOCUMENT SHOWED CEDARCRESTONE WAS IN BUSINESS
11 FOR UP TO FIVE YEARS BEFORE 2008. YOU REMEMBER THE
12 CROSS-EXAMINATION ON THAT.
13 YOU WILL ALSO REMEMBER WHEN HE WAS QUESTIONED ABOUT
14 SUN DOCUMENTS AND WHERE HE GOT THE INFORMATION. AND THE
15 QUESTION WAS, WELL, IT WOULD BE WRONG, WOULDN'T IT, IT WOULD BE
16 WRONG, WOULDN'T IT, IF YOU DIDN'T HAVE THAT IN YOUR BINDER?
17 I AM SITTING THERE THINKING WELL NEXT THING HE'S
18 GOING TO DO IS PULL OUT THE BINDER. HE DIDN'T. THAT WAS JUST

19 INNUENDO. IT WAS AN INSINUATION THAT THERE'S SOMETHING WRONG
20 WITH THE WITNESS' TESTIMONY. AND IT'S NITPICKING ON CUSTOMERS
21 LIKE SARA LEE THAT BOTH SIDES HAVE EXCLUDED.

22 THE CONCLUSION ON THE DAMAGE SUMMARY ARE THESE
23 NUMBERS.

24 IF WE CAN SWITCH TO THE ELMO.

25 (DOCUMENT DISPLAYED ON ELMO.)

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THIS IS GOING TO BE THE VERDICT FORM THAT THE COURT
2 GIVES YOU.

3 AND THE FIRST QUESTION WILL BE ACTUAL DAMAGES FOR
4 COPYRIGHT INFRINGEMENT. AND IT SAYS:

5 WHAT IS THE DOLLAR AMOUNT THAT ORACLE IS ENTITLED TO
6 FROM DEFENDANTS TO COMPENSATE ORACLE FOR ITS ACTUAL DAMAGES
7 UNDER THE COPYRIGHT INFRINGEMENT CLAIM IN THE FORM OF" AND
8 HERE'S WHERE YOU HAVE YOUR CHOICE. EITHER A FAIR MARKET VALUE
9 LICENSE FOR COPYRIGHT INFRINGEMENT OR LOST PROFITS?

10 AND SO ONE WAY TO FILL THIS OUT, AND I DON'T MEAN TO
11 BE PRESUMPTUOUS, I'M JUST SAYING WHERE OUR NUMBERS WOULD COME
12 OUT. IT'S UP TO YOU TO DECIDE.

13 ONE WAY TO FILL THIS OUT WOULD BE TO PUT IN CLARKE'S
14 NUMBER FOR LOSS PROFITS, 19.3 MILLION.

15 AND THEN IT SAYS: "IF YOU ASSIGNED ACTUAL DAMAGES
16 IN THE FORM OF FAIR MARKET VALUE, PLEASE PROCEED TO THE END."
17 SO THAT WOULD BE IT.

18 "IF YOU ASSIGNED ACTUAL DAMAGES IN THE FORM OF LOST
19 PROFITS," WHICH I HAVE, "PLEASE PROCEED TO THE NEXT." AND THE
20 NEXT IS: INFRINGERS' PROFITS. THESE ARE THE SOFTWARE SALES.

21 "WHAT IS THE DOLLAR AMOUNT THAT ORACLE IS ENTITLED
22 TO FROM DEFENDANTS AS INFRINGERS' PROFITS FOR THE COPYRIGHT
23 INFRINGEMENT?"

24 AND HERE CLARKE'S NUMBER IS 8.7 MILLION. AND THAT
25 INCLUDES, LET ME WRITE THIS WITH A SMALLER PEN, THAT INCLUDES

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 7.6 FOR SAP AND 1.1 FOR TOMORROWNOW.

2 SO THAT WOULD BE ONE WAY OF DOING IT. THAT IS THE
3 WAY THAT WE SAY GIVES THEM COMPENSATION FOR THE CUSTOMERS THEY
4 ACTUALLY LOST. AND ALL OF THIS IS ABOUT CUSTOMERS JUST LIKE
5 THEIR ANALOGY TO MAKING A COPY OF THE MOVIE. IF YOU DON'T SHOW
6 IT TO ANYBODY, THERE'S NO ACTUAL USE. HARD TO SAY THEY ARE OUT
7 OF POCKET.

8 THE OTHER WAY OF DOING THIS WOULD BE IF YOU
9 ANSWERED, IF YOU WANTED DO THE HYPOTHETICAL NEGOTIATION POINT.
10 AND THERE YOU HAVE A CHOICE BETWEEN THEIR NUMBER, WHICH I THINK
11 HAS BEEN THOROUGHLY DISCREDITED, OR CLARKE'S NUMBER.

12 AND CLARKE'S NUMBER IS BASED ON THE RUNNING ROYALTY.
13 IT'S BASED ON THE ROYALTY RATE OF 50 PERCENT OF REVENUE FOR
14 TOMORROWNOW, 50 PERCENT OF PROFIT FOR SAP. WE KNOW WHAT THAT
15 NUMBER IS NOW BECAUSE WE KNOW WHAT THE HISTORY HAS BEEN, WE ARE
16 LOOKING BACK. AND THAT NUMBER, AS WE HAVE SEEN, IS
17 40.6 MILLION. SO, THAT WOULD BE THE OTHER CHOICE IF YOU
18 CONSIDER DOING IT THAT WAY.

19 I AM GOING TO END AS I STARTED. THIS HAS BEEN AN
20 UNFORTUNATE INCIDENT FOR SAP. IT STEPPED FORWARD. IT STOOD
21 READY TO PAY COMPENSATION, AND WE ASK YOU TO DO WHAT ORACLE, IN
22 OUR VIEW THUS FAR, HAS REFUSED TO DO AND THAT IS RESOLVE THIS
23 DISPUTE IN A REASONABLE WAY.

24 WHEN -- I WANT TO END ON REALITY. WHAT DO WE KNOW
25 ABOUT REALITY? WHEN ORACLE BOUGHT PEOPLESOFT -- COULD YOU TURN

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THAT BACK ON, CHRIS?

2 (SLIDE DISPLAYED ON SCREEN.)

3 WHEN ORACLE BOUGHT PEOPLESOFT, IT GOT BUILDINGS, IT
4 GOT EMPLOYEES, IT GOT PATENTS, IT GOT TECHNOLOGIES, CUSTOMERS,
5 AND A LOT OF THINGS. AND IT INCLUDED ALMOST 10,000 CUSTOMERS.

6 AS A FINANCIAL MATTER, THAT ACQUISITION TURNED OUT

7 WELL FOR ORACLE.

8 THIS IS MS. CATZ SAYING THAT THEY DID

9 101 PERCENT ON MAINTENANCE REVENUE COMPARED TO

10 WHAT THEY PREDICTED TO THE BOARD.

11 SO, THEY DID JUST FINE DESPITE THE GNAT OF

12 TOMORROWNOW. THEIR RENEWAL RATES, THE RATES OF MAINTENANCE

13 CUSTOMERS THAT CAME BACK TO THEM YEAR AND YEAR WERE JUST FINE.

14 THIS IS MR. CUMMINS: OUR RENEWAL RATES ARE ON A

15 PAR WITH HISTORICAL RENEWAL RATES EVEN WITH A

16 THIRD PARTY THREAT. OUR SALES MANAGERS ARE VERY

17 WELL EQUIPPED WITH THE VALUE PROPOSITION, VERY

18 STRONG IN NEGOTIATIONS. THIS IS EVIDENCED BY

19 OUR EXTREMELY STRONG RENEWAL RATES.

20 AND THEN IN '07: WE ARE NOT SEEING -- SO THIS IS

21 AFTER THEY HAVE SUED, OR JUST ABOUT THE TIME THEY ARE SUING:

22 WE ARE NOT SEEING ANY SIGNIFICANT DIFFERENCE IN

23 RENEWAL RATES NOW COMPARED TO PRE-ACQUISITION BY

24 ORACLE.

25 SO THE 358 CUSTOMERS THAT WENT TO TOMORROWNOW, DID

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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 NOT MAKE ANY SIGNIFICANT DIFFERENCE IN RENEWAL RATES. WE

2 HAVEN'T SEEN A LOT OF CUSTOMER DEFECTS. THIS IS '07 AGAIN. IN

3 THOSE SITUATIONS A CUSTOMER IS MORE LIKELY TO SUPPORT ITSELF

4 THAN TO GO TO SOMEONE LIKE TOMORROWNOW.

5 SO, WE KNOW AS A FINANCIAL MATTER, THE ACQUISITION

6 TURNED OUT FINE FOR ORACLE. THEY KEPT MORE CUSTOMERS OR ABOUT

7 THE SAME NUMBER OF CUSTOMERS THAT THEY THOUGHT THEY WOULD. OF

8 THE ALMOST 10,000 CUSTOMERS PEOPLESOFT HAD, ONLY 358 WENT TO

9 TOMORROWNOW, INCLUDING SOME WHO WENT BEFORE AND SOME WHO WOULD

10 HAVE GONE REGARDLESS.

11 LADIES AND GENTLEMEN, I SUBMIT TO YOU THAT KIND OF

12 REALITY DOES NOT TRANSLATE INTO OR SUPPORT THE KIND OF MONEY

13 THAT ORACLE IS ASKING FOR IN THIS CASE.

14 THANK YOU VERY MUCH.

15 THE COURT: ALL RIGHT, THANK YOU.
16 WE ARE GOING TO TAKE OUR SECOND 15-MINUTE BREAK AND
17 THEN WE'LL COME BACK AND CONCLUDE WITH THE REBUTTAL AND THEN
18 THE COURT'S INSTRUCTIONS.

19 ALL RIGHT. LADIES AND GENTLEMEN, YOU ARE EXCUSED
20 FOR 15 MINUTES.

21 (RECESS TAKEN AT 12:40 P.M.)

22 (PROCEEDINGS RESUMED AT 12:53 P.M.)

23 (PROCEEDINGS HELD IN THE PRESENCE OF THE JURY.)

24 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.

25 THE COURT: MR. BOIES?

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 MR. BOIES: THANK YOU, YOUR HONOR.

2 REBUTTAL CLOSING ARGUMENT

3 MR. BOIES: GOOD AFTERNOON, LADIES AND GENTLEMEN.

4 I AM NOT GOING TO ACCUSE COUNSEL OF SOME OF THE
5 WORDS YOU HEARD ABOUT TRICKS AND DECEPTION AND THE LIKE, BUT I
6 DO WANT TO POINT OUT A FEW OF THE THINGS THAT HE DIDN'T SHOW
7 YOU. AND I WANT TO POINT OUT SOME OF THE DIFFERENCES BETWEEN
8 WHAT HE DID SAY AND WHAT IS REALLY IN THE RECORD.

9 LET ME BEGIN WITH HIS TESTIMONY THAT HE SHOWED YOU
10 ABOUT MS. CATZ. AND CAN WE PUT UP 88A?

11 (SLIDE DISPLAYED ON SCREEN.)

12 AND YOU WILL RECALL THAT WE GOT INTO THIS BECAUSE HE
13 SAID THAT WE HAD SHOWN YOU ALL OF THE DOCUMENTS ABOUT
14 TOMORROWNOW BEING THE CORNERSTONE ABOUT A KEY ELEMENT, A KEY
15 COMPONENT. AND SO HE SAID, LET ME RESPOND TO THAT.

16 NOW I POINT OUT TO YOU THAT HE DID NOT RESPOND TO
17 THAT BY SHOWING YOU ANY DOCUMENTS FROM SAP AT THE TIME, WHICH
18 IS WHAT THE COURT WILL TELL YOU IS RELEVANT, HE DID NOT SHOW
19 YOU ANY OF THOSE THINGS.

20 HE SAID, NO, LET ME SHOW YOU SOME TESTIMONY. AND HE
21 SHOWS YOU TESTIMONY NOT FROM SOMEBODY TALKING ABOUT WHAT WAS
22 ACTUALLY GOING ON, BUT HE SHOWS YOU MS. CATZ. AND HE SAYS,
23 MS. CATZ SAID THIS WHOLE SAFE PASSAGE THING, IT'S NOT A

24 TOMORROWNOW PROGRAM, MEANING FOR YOU TO THINK THAT MS. CATZ WAS
25 SAYING, OH, SAFE PASSAGE WAS ENTIRELY SEPARATE FROM

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 TOMORROWNOW.

2 WELL, LET'S LOOK AT WHAT MS. CATZ WAS ACTUALLY
3 TALKING ABOUT.

4 THE LINE, THIS WHOLE SAFE PASSAGE THING, IT'S A NOT
5 A TOMORROWNOW PROGRAM IS PART OF A PARAGRAPH, IT'S PART OF A
6 SENTENCE.

7 WHAT SHE IS SAYING THERE, AS YOU SEE:

8 "IT IS NOT A TOMORROWNOW PROGRAM, IT'S A
9 SAP/TOMORROWNOW PROGRAM."

10 SHE IS NOT DISTINGUISHING TOMORROWNOW FROM SAFE
11 PASSAGE. SHE'S SAYING THAT IT IS NOT JUST TOMORROWNOW THAT IS
12 DOING IT, IT IS SAP THAT IS DOING IT.

13 THIS HAS NOTHING TO DO WITH THE QUESTION OF WHETHER
14 TOMORROWNOW WAS, IN FACT, THE CORNERSTONE, THE KEY ELEMENT, THE
15 KEY PART OF THE SAFE PASSAGE PROGRAM WHICH IS WHAT ALL OF THOSE
16 CONTEMPORANEOUS DOCUMENTS SAY.

17 HE ALSO SPENT A LOT OF TIME TELLING YOU THINGS THAT
18 MR. MEYER HAD CONCEDED WITHOUT SHOWING YOU WHERE MR. MEYER SAID
19 THAT. AND IF HE DIDN'T SHOW YOU WHERE HE SAID IT, PROBABLY NOT
20 SO. AND PARTICULARLY WHEN HE SHOWS YOU OTHER PEOPLE TESTIFYING
21 ABOUT WHAT MR. MEYER SUPPOSEDLY SAID.

22 FOR EXAMPLE, HE SAYS THAT MR. MEYER AGREED ON THE
23 PROFIT RATIO. HE DOESN'T SHOW YOU MR. MEYER SAYING THAT. HE
24 SHOWS YOU MR. CLARKE SAYING THAT THAT'S WHAT MR. MEYER SAID.

25 HE REPEATEDLY TOLD YOU THINGS THAT SIMPLY ARE NOT

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 ACCURATE IN CONTEXT FOR MR. MEYER'S TESTIMONY. I ASK YOU TO
2 LOOK AT YOUR NOTES, THINK ABOUT WHAT MR. MEYER ACTUALLY SAID,

3 BECAUSE WHAT HE ACTUALLY SAID WAS QUITE DIFFERENT THAN WHAT YOU
4 HEARD TODAY.

5 HE ALSO SAID THAT WE HAD NOT BROUGHT MR. MEYER BACK
6 FOR REBUTTAL. NOW, IF YOU BROUGHT BACK EVERY WITNESS FOR
7 REBUTTAL THAT YOU HAD DURING YOUR REGULAR CASE, THE CASE WOULD
8 NEVER END BECAUSE YOU SIMPLY WOULD GO ON AND ON. YOU BRING
9 BACK ONLY PEOPLE FOR REBUTTAL THAT YOU NEED TO SAY SOMETHING.
10 WE DIDN'T NEED TO HAVE ANYTHING MORE THAN WHAT MR. MEYER
11 ALREADY SAID.

12 NOW, I THINK THE MORE INTERESTING QUESTION IS WHY
13 THEY NEVER CALLED MARK WHITE, WHO IS SITTING OVER THERE AT
14 COUNSEL TABLE. HE WAS THE HEAD OF TOMORROWNOW. HE WAS THE
15 CHAIRMAN OF THE BOARD. HE WAS ON THE BOARD OF TOMORROWNOW.
16 HE'S THEIR CORPORATE --

17 MR. MITTELSTAEDT: YOUR HONOR, EXCUSE ME. THIS IS
18 IMPROPER ARGUMENT. THEY WERE ABLE TO CALL MR. WHITE IF THEY
19 WANTED TO. HE'S AVAILABLE TO BOTH SIDES AND HIS DEPOSITION WAS
20 TAKEN.

21 THE COURT: EXACTLY, AND THAT'S THE POINT HE'S
22 MAKING.

23 MR. BOIES: THEY COULD HAVE CALLED --

24 THE COURT: OBJECTION IS OVERRULED.

25 GO AHEAD.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 MR. BOIES: THANK YOU.

2 THEY COULD HAVE CALLED MR. WHITE. HE'S THEIR
3 PERSON.

4 IN FACT, COUNSEL FOR SAP, I BELIEVE, TOLD YOU IN THE
5 OPENING STATEMENT THAT YOU WOULD HEAR FROM MR. WHITE. HE TOLD
6 YOU THAT. NOW, WHAT LED HIM TO CHANGE HIS MIND? WHAT LED HIM
7 TO CONCLUDE I BETTER NOT PUT MR. WHITE ON THE STAND?

8 I DON'T KNOW THE ANSWER TO THAT QUESTION, BUT I
9 THINK IT'S A LOT MORE RELEVANT QUESTION THAN WHY YOU DIDN'T
10 HEAR FROM MR. MEYER A SECOND TIME AFTER WE SPENT TWO OR THREE
11 DAYS WITH HIM THE FIRST TIME.

12 MR. -- YOU ALSO HEARD FROM SAP COUNSEL, A LOT OF
13 RELIANCE ON SOMEBODY NAMED JUAN JONES FROM AN E-MAIL IN 2006.
14 DID YOU EVER HEAR OF JUAN JONES BEFORE IN THIS CASE? DID YOU
15 EVER SEE HIS DEPOSITION? DID YOU EVER SEE HIM CALLED AS A
16 WITNESS?

17 ALL OF A SUDDEN IN CLOSING ARGUMENT YOU HEAR ABOUT
18 SOMEBODY THAT NOW BECOMES TERRIBLY IMPORTANT TO THEIR DEFENSE,
19 WHICH YOU NEVER HEARD ABOUT BEFORE, YOU'VE NEVER SEEN ANYTHING
20 ABOUT, YOU DON'T EVEN KNOW WHAT HIS POSITION IS. BUT THAT'S
21 THE DESPERATION THAT THEY ARE DOWN TO IN TRYING TO PULL OUT
22 SOMETHING THAT WILL CONTRADICT THEIR OWN CONTEMPORANEOUS
23 DOCUMENTS.

24 I WANT TO TAKE YOU THROUGH THE KEY POINTS THAT THEY
25 DID NOT TELL YOU ABOUT SOME OF THE EVIDENCE THAT THEY SHOWED

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 YOU. AND LET ME BEGIN BY MR. NELSON.

2 YOU RECALL THAT COUNSEL WENT UP ON THE BOARD AND
3 DREW YOU A LOT OF ONES RELATING TO MR. NELSON. WHAT HE DIDN'T
4 SHOW YOU IS WHAT MR. NELSON'S ACTUAL DOCUMENT SAID. HE DIDN'T
5 SHOW YOU THAT AT ALL BECAUSE -- LET ME SHOW YOU PTX EXHIBIT 37.
6 IT'S 204, CHART 204.

7 THIS IS MR. NELSON'S ACTUAL DOCUMENT IN WHICH HE
8 TALKS ABOUT THE VERY ISSUE THAT WE ARE DISCUSSING. IF WE CAN
9 GET IT UP ON THE SCREEN AND PERHAPS IF WE CAN'T, I WILL
10 DESCRIBE IT FOR YOU.

11 (SLIDE DISPLAYED ON SCREEN.)

12 WHAT HE SAYS IS QUOTE: "OVER THE LONG TERM,
13 EVERY \$1 OF TOMORROWNOW STAND-ALONE REVENUE THIS
14 YEAR REPRESENTS \$18 OF ORIGINALLY EXPECTED
15 ORACLE REVENUE."

16 THAT'S WHAT HE SAID.

17 LET ME GO TO 288, WHICH IS PLAINTIFFS' EXHIBIT 373.

18 ANOTHER DOCUMENT. ANOTHER SAP DOCUMENT.

19 (SLIDE DISPLAYED ON SCREEN.)

20 SAYS: "USE TOMORROWNOW AS A PIPELINE GENERATOR.
21 \$1 OF TOMORROWNOW STAND-ALONE REVENUE EQUALS \$10
22 OF SAP LICENSE REVENUE IN THE PIPELINE."
23 THOSE ARE THE DOCUMENTS, NOT WHAT WE WRITE ON THE
24 BUTCHER BLOCK PAPER WITHOUT SHOWING YOU THE DOCUMENT. THOSE
25 ARE THE DOCUMENTS.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 LET ME GO TO 244.
2 (SLIDE DISPLAYED ON SCREEN.)
3 THIS IS THE SAME DOCUMENT, PLAINTIFFS' EXHIBIT 37,
4 FROM ANDREW NELSON. AND MR. CLARKE SAYS HAS NO FINANCIAL
5 EFFECT WHATSOEVER. AND YET THE DOCUMENT WAS WRITTEN BY
6 TOMORROWNOW'S FOUNDER AND CEO WHO WAS ALSO AN SAP AMERICA VICE
7 PRESIDENT AT THE TIME. IT WAS SENT TO MR. APOTHEKER AND
8 OTHERS. AND MAYBE MOST IMPORTANT OF ALL, NO ONE EVER DISAGREED
9 WITH NELSON'S ANALYSIS. IN FACT, OTHER ANALYSES CONFIRMED
10 NELSON'S ANALYSIS, AND WE CITE PLAINTIFFS' EXHIBIT 373.

11 THIS IS VERY IMPORTANT, LADIES AND GENTLEMEN,
12 BECAUSE I ASK YOU TO LOOK AT THE EVIDENCE. I ASK YOU TO LOOK
13 AT WHAT IS ACTUALLY SAID, WHAT THE WITNESSES ACTUALLY SAID, NOT
14 WHAT COUNSEL SAYS THEY SAY. LOOK AT WHAT THE DOCUMENTS
15 ACTUALLY SAY, NOT WHAT COUNSEL SUGGESTS THEY MIGHT SAY. LOOK
16 AT THE ACTUAL DOCUMENTS THAT ARE INVOLVED.

17 LET ME GIVE YOU ANOTHER ONE.

18 COUNSEL TALKED TO YOU ABOUT INFRINGER PROFITS AND
19 CUSTOMERS. AND HE SAID, WELL, MR. MEYER AGREES THAT SOME OF
20 THESE 86 CUSTOMERS SHOULDN'T BE THERE. HE SAYS MR. MEYER
21 AGREES ON ABOUT 20, 23 OF THOSE CUSTOMERS.

22 WHAT HE DIDN'T TELL YOU IS WHAT MR. MEYER SAYS IS
23 THAT CALCULATION, THIS CALCULATION IS NOT THE BEST WAY TO LOOK
24 AT DAMAGES BECAUSE IT IS NOT COMPLETE. HE COULD NOT COMPLETE
25 IT WITH THE DATA THAT WAS AVAILABLE. NOBODY COULD COMPLETE IT

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 WITH THE DATA THAT WAS AVAILABLE.

2 THAT'S WHY HE SAID THAT THE RIGHT WAY TO LOOK AT IT
3 IS THE FAIR MARKET VALUE LICENSE THAT THE COURT IS GOING TO
4 INSTRUCT YOU ABOUT. IT WAS NOT TO FOLLOW THIS APPROACH.

5 IF YOU DID FOLLOW THIS APPROACH, YOU STILL GET A
6 NUMBER THAT'S HUNDREDS OF MILLIONS OF DOLLARS HIGHER THAN THE
7 NUMBER THAT THEY SUGGEST.

8 BECAUSE ONE OF THE THINGS THAT THE COURT WILL
9 INSTRUCT YOU IS THAT ON INFRINGER PROFITS, THEY HAVE THE BURDEN
10 OF PROOF, NOT ASSERTION, NOT SAYING, WELL, THE COST OF
11 50 PERCENT. THAT'S NOT PROOF, THAT IS NOT EVIDENCE. THEY HAVE
12 THE BURDEN OF PROVING WHAT THEIR COSTS ARE. IF THEY DON'T,
13 THEN UNDER THE LAW YOU AWARD THE TOTAL AMOUNT OF THE REVENUE.
14 AND THE JUDGE IS GOING TO GIVE YOU INSTRUCTIONS ON THAT ISSUE.

15 SO I ASK YOU TO LOOK AT THE ACTUAL EVIDENCE THAT YOU
16 HAVE AND COMPARE THE EVIDENCE THAT YOU HAVE WITH THE ARGUMENTS
17 THAT THEY ARE MAKING, AND THEN LOOK AT IT ALL IN THE CONTEXT OF
18 WHAT THE JUDGE IS GOING TO INSTRUCT YOU THE LAW IS AND THE
19 RULES THAT YOU HAVE TO FOLLOW.

20 NOW, WITH RESPECT TO THESE CUSTOMERS, THERE WAS AN
21 INTERESTING SUGGESTION THAT BECAUSE I HAD NOT CROSS-EXAMINED
22 MR. MEYER (SIC) ABOUT ALL 358 CUSTOMERS, SOMEHOW WE HAD
23 CONCEDED MR. MEYER -- MR. CLARKE WAS RIGHT ABOUT THOSE. OF
24 COURSE COUNSEL DIDN'T CROSS-EXAMINE MR. MEYER ABOUT THOSE 358
25 EITHER.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 IN FACT, WHAT WE DID WAS WE TOOK YOU THROUGH ENOUGH
2 EXAMPLES SO THAT YOU UNDERSTOOD HOW THE DIFFERENT WITNESSES
3 WERE APPROACHING THE ISSUE. FOR EXAMPLE, TAKE MR. CLARKE. AND
4 TAKE THE EXAMPLE OF NATIONAL FOODS. 113.

5 (SLIDE DISPLAYED ON SCREEN.)

6 AND THIS IS IMPORTANT BECAUSE IT GIVES YOU AN IDEA,
7 GOOD IDEA OF HOW FLAWED MR. CLARKE'S ANALYSIS IS. HE EXCLUDES

8 NATIONAL FOODS BECAUSE HE SAYS THERE IS NO EVIDENCE THAT WHAT
9 SAP GOT WAS RELATED TO TOMORROWNOW. NO EVIDENCE.

10 WELL, IF THERE WAS NO EVIDENCE YOU COULD LOOK AT IT
11 ONE OF TWO WAYS. DO I LEAVE THEM IN BECAUSE THERE IS NO
12 EVIDENCE ON IT OR DO I TAKE THEM OUT BECAUSE THERE'S NO
13 EVIDENCE? BUT YOU DON'T HAVE TO REACH THAT ISSUE BECAUSE THERE
14 IS EVIDENCE.

15 LOOK AT PLAINTIFFS' EXHIBIT 7027. TOMORROWNOW WAS
16 ABLE TO GIVE SUBSTANTIAL TEETH TO THE SAP LICENSE BID. ALSO,
17 ORACLE MOUNTED AN INTENSE CAMPAIGN TO MAINTAIN THIS CLIENT,
18 HOWEVER THE JOINT SAP AND TOMORROWNOW OFFERING WAS SIMPLY TOO
19 STRONG.

20 THOSE ARE SAP'S STATEMENTS. THAT'S WHAT SAP IS
21 SAYING AT THE TIME IS THE REASON THEY GOT THIS CUSTOMER.

22 BUT MR. CLARKE WOULD IGNORE IT EVEN IN THE FACE OF
23 THAT EVIDENCE.

24 LET'S GO TO 114.

25 BUT THERE'S EVEN MORE THAN THAT EXHIBIT.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 THE TECHNOLOGY DOES NOT SEEM TO BE WORKING, BUT
2 MAYBE THE ELMO WILL. DO IT THE OLD FASHION WAY.

3 (SLIDE DISPLAYED ON ELMO.)

4 THIS IS MR. HURST, THEIR CORPORATE REPRESENTATIVE ON
5 SAFE PASSAGE. HE TESTIFIED THAT TOMORROWNOW'S SUPPORT OFFERING
6 WAS INSTRUMENTAL IN ACHIEVEMENT OF THIS CUSTOMER WIN.

7 NOW THAT'S THE EVIDENCE. THAT'S THE EVIDENCE IN THE
8 FACE OF WHICH MR. CLARKE STILL EXCLUDES NATIONAL FOODS.

9 NOW, HE ALSO EXCLUDED PEPSI, AND YOU HEARD COUNSEL
10 PUT UP SOME TESTIMONY FROM PEPSI. YOU WILL RECALL THAT PEPSI
11 TESTIFIED THAT THEY WOULD NOT HAVE LEFT ORACLE IF THEY HAD
12 KNOWN THAT TOMORROWNOW WAS INFRINGING. AND YET MR. CLARKE
13 EXCLUDES THEM. THEY EXCLUDE THEM FROM THE DAMAGE CALCULATION.

14 IT'S THOSE KINDS OF EXCLUSIONS THAT SHOW TWO THINGS.
15 FIRST, IT SHOWS HOW UNRELIABLE THIS APPROACH TO DAMAGES IS.
16 THAT IS HOW UNRELIABLE THE APPROACH OF LOOKING AT THESE KIND OF

17 DECISIONS ON LOST PROFITS AND LOST CUSTOMERS.
18 THAT'S NOT ALWAYS SO. SOMETIMES YOU HAVE WAYS OF
19 CALCULATING LOST PROFITS OR INFRINGERS' PROFITS THAT DO NOT
20 DEPEND ON SUBJECTIVE DETERMINATION. WHY DID A CUSTOMER LEAVE?
21 WHY DID A CUSTOMER GO TO SAP? WHY DID A CUSTOMER TAKE THIS
22 PRODUCT FROM SAP?

23 WHEN YOU HAVE THOSE KIND OF SUBJECTIVE JUDGMENTS
24 THAT ARE NECESSARY TO MAKE FOR A LOST PROFITS OR AN INFRINGER
25 PROFIT ANALYSIS, OR RUNNING ROYALTY ANALYSIS, WHICH IS THE SAME

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 THING THE WAY THEY DO IT, YOU HAVE A RECIPE FOR EXACTLY THE
2 KIND OF PROLONGED DISPUTE THAT YOU SAW BETWEEN MEYER AND
3 CLARKE. THIS IS A SITUATION IN WHICH IF YOU HAD AN OBJECTIVE
4 WAY TO DETERMINE THIS, THAT WOULD BE A PRACTICAL ALTERNATIVE.

5 BUT THE REASON THAT WE ARE SEEKING A FAIR MARKET
6 VALUE ANALYSIS IS TO AVOID THOSE EXACT KIND OF SUBJECTIVE
7 JUDGMENTS. AND IF YOU WERE TO APPROACH IT THIS WAY, WHAT WE
8 WOULD BE ENTITLED TO IS EITHER THIS NUMBER, IF THEY CAN'T PROVE
9 PROFITS OR IF THEY PROVE THEIR COSTS, WHATEVER THE DIFFERENCE
10 IS BETWEEN THIS NUMBER AND THEIR COST, WHICH, AS I SAY, THERE
11 IS SIMPLY NO EVIDENCE OF OTHER THAN THE ASSERTION ABOUT THIS
12 SUPPOSED 50 PERCENT NUMBER.

13 LET ME ALSO DEAL WITH SOMETHING A RELATIVELY SMALL
14 PART OF DAMAGES, BUT IT IS A SIGNIFICANT PART, AND THAT IS THE
15 DATABASE DAMAGES. FIRST LET ME GO TO 218.

16 (SLIDE DISPLAYED ON SCREEN.)

17 AND THIS IS A DESCRIPTION OF HOW YOU GET TO THE
18 \$55 MILLION NUMBER THAT MR. MEYER USED IN TERMS OF TAKING THE
19 172 CUSTOMERS, TAKING THE LICENSE FEE PER CUSTOMER, AND THEN
20 ADDING THE MAINTENANCE FEE PER CUSTOMER TIMES THE NUMBER OF
21 YEARS UNDER TOMORROWNOW SERVICE.

22 NOW, MR. MITTELSTAEDT SAID THAT THERE WAS NO
23 EVIDENCE, THAT WE PRESENTED NO EVIDENCE ABOUT THIS DATABASE. I
24 THINK HE MUST HAVE MISSPOKE BECAUSE -- IF YOU PUT UP 217 --

25 MR. RICHARD ALLISON, ORACLE'S SENIOR VICE PRESIDENT OF GLOBAL
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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 PRACTICES AND RISK MANAGEMENT TESTIFIED ABOUT THAT.

2 (SLIDE DISPLAYED ON SCREEN.)

3 HE TESTIFIED AT 657 OF THE TRANSCRIPT, EXACTLY WHY
4 YOU WOULD GO ABOUT VALUING LICENSES THIS WAY.

5 AND HE SAYS FINALLY AT THE END: "I THINK THE
6 PROPER WAY TO LICENSE WOULD BE BASED ON THE
7 VALUE, WHOSE RECEIVING VALUE FOR IT, AND THAT
8 WOULD BE THE PEOPLE THEY'RE PROVIDING SERVICES
9 TO. SO IT WOULD BE EACH OF THE INDIVIDUAL
10 CUSTOMERS THAT ARE RECEIVING THE BENEFIT OF THAT
11 SERVICE."

12 THAT'S EXACTLY THE TESTIMONY. THAT WAS UNREBUTTED.
13 THAT WAS UNDISPUTED. NOBODY CAME IN AND DISAGREED WITH THAT.
14 NOBODY CAME IN AND DISAGREED WITH THAT -- NO BUSINESS PERSON
15 CAME IN AND DISAGREED WITH THAT APPROACH.

16 AND ONE OF THE ANOMALIES HERE IS YOU HEARD SAP
17 COUNSEL SAY THAT WE DIDN'T BRING IN ENOUGH ANALYSES, WE DIDN'T
18 BRING IN ENOUGH PEOPLE. WELL, THE ONLY BUSINESS PEOPLE THAT
19 YOU HEARD FROM ABOUT THE VALUE OF THE LICENSE WERE ORACLE
20 PEOPLE. YOU DIDN'T HEAR FROM ANY SAP PEOPLE ABOUT THE VALUE OF
21 THE LICENSE.

22 THE ONLY ANALYSES, CONTEMPORANEOUS ANALYSIS OF WHAT
23 THE VALUE OF THIS WAS THAT WAS PRESENTED WERE PRESENTED BY US.
24 WHAT YOU HAD FROM SAP WERE LATER CRITICISMS OF THAT. YOU HAD
25 FROM THEM PEOPLE TESTIFYING THAT THE THING WAS DIFFERENT, BUT

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 YOU DIDN'T HAVE DIFFERENT CONTEMPORANEOUS DOCUMENTATION. AND
2 THE COURT -- I ASK YOU TO LOOK AT THIS INSTRUCTION CAREFULLY.
3 THE COURT IS GOING TO SAY IT IS ONLY IF WHAT COMES LATER
4 INFORMS YOU ABOUT WHAT WOULD HAVE BEEN IN PEOPLE'S MINDS BACK

5 THEN THAT YOU CAN TAKE INTO ACCOUNT THIS ADDITIONAL
6 INFORMATION.

7 AND I DO, SINCE HE'S NOT HERE TO DEFEND HIMSELF, SAY
8 ONE THING ABOUT MR. MEYER. COUNSEL PUT UP A STATEMENT FROM
9 MR. MEYER IN ANOTHER CASE ABOUT REALITY TESTING. THERE ARE TWO
10 DIFFERENT KINDS OF REALITY TESTING. I TOLD YOU IN MY OPENING
11 STATEMENT THAT THERE'S ONE KIND OF REALITY TESTING THAT WE ALL
12 AGREE OUGHT TO TAKE PLACE, AND THAT IS THE REALITY TESTING OF
13 LOOKING AT THE REAL WORLD AS IT EXISTS AT THE TIME OF THE
14 LICENSE NEGOTIATION. THAT'S THE KIND OF REALITY TESTING THAT
15 MR. MEYER AND EVERYBODY ELSE WOULD AGREE OUGHT TO TAKE PLACE.

16 THE REALITY TESTING THAT THEY WANT TO DO "REALITY
17 TESTING" IN QUOTES IS THEY WANT TO TAKE WHAT HAPPENED AFTER THE
18 FACT AND GO BACK AND SAY THIS SHOULD HAVE BEEN IN THEIR MIND.

19 NOW, EVEN IF YOU DID THAT, IF YOU LOOK AT THE VALUE
20 THAT CAME FROM JUST THE 86 CUSTOMERS, YOU SEE THAT THE VALUE OF
21 THIS LICENSE AND THE VALUE OF THE DAMAGE THAT WAS DONE BY
22 ORACLE IS MUCH GREATER THAN ANYTHING THAT SAP WANTS TO ESTIMATE
23 IN THIS CASE.

24 BUT THE FUNDAMENTAL POINT IS THAT THE LAW SAYS WHEN
25 YOU TAKE SOMETHING AND USE IT, IT DOESN'T BELONG TO YOU, YOU

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 DON'T HAVE THE CHOICE OF SAYING I WANT TO PAY WHAT IT WAS WORTH
2 THEN OR IF I SCREW IT UP AND DON'T WORK OUT VERY WELL, I ONLY
3 WANT TO PAY WHAT I GOT.

4 THE LAW SAYS THAT THE VICTIM IS ENTITLED TO FAIR
5 MARKET VALUE OF WHAT WAS TAKEN, WHAT WAS TAKEN AND WHAT WAS
6 USED; NOT WHAT THE RESULTS OF THAT USE NECESSARILY WERE.

7 NOW, AS I SAY, I THINK THE RESULTS OF THAT USE WERE
8 VERY, VERY ENRICHING TO SAP AND DAMAGING TO ORACLE. AND YOU
9 SEE THAT IN THE ORACLE'S DOCUMENTS AND SAP'S DOCUMENTS. BUT
10 THE RIGHT TEST IS WHAT WERE THEY REASONABLY ENTITLED TO AT THE
11 TIME THAT THE INFRINGEMENT TOOK PLACE.

12 AND THAT'S VERY IMPORTANT. BECAUSE IF YOU DID

13 ANYTHING ELSE, YOU WOULD SIMPLY BE ENCOURAGING PEOPLE TO TAKE
14 AND USE THINGS THEY DON'T HAVE ANY RIGHT TO. BECAUSE THEY
15 WOULD KNOW THAT IF I GET CAUGHT, ALL I AM GOING TO HAVE TO DO
16 IS PAY FOR WHAT THE LOSS WAS AND GIVE UP MY PROFITS IF SOMEBODY
17 CAN PROVE IT. BUT I AM NOT GOING TO HAVE TO PAY FOR THE VALUE
18 OF WHAT I ACTUALLY TOOK.

19 AND IF YOU THINK ABOUT IT, IN COMMON SENSE TERMS, IF
20 SOMEBODY GOES IN AND STEALS A GAME FROM BEST BUY, AND LET'S SAY
21 BEST BUY HAS A LOT OF THOSE GAMES, SO THEY DON'T REALLY LOSE
22 ANY CUSTOMERS OVER IT BECAUSE THEY HAVE EXCESS INVENTORY, AND
23 LET'S SAY THE PERSON NEVER USES THE GAME, BESIDES PARENTS WON'T
24 LET THEM USE THE GAME, WHATEVER REASON, DOESN'T USE THE GAME,
25 DOES THAT MEAN HE DOESN'T OWE ANYTHING FOR THAT GAME THAT WAS

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 TAKEN?

2 YOU CAN'T HAVE THAT KIND OF RULE ABOUT THINGS THAT
3 PEOPLE ESSENTIALLY TAKE. YOU DON'T HAVE A RIGHT TO TAKE AND
4 THEN GO BACK IN AND SAY, WELL, WE DIDN'T MAKE AS MUCH AS WE
5 THOUGHT WE GAINED, YOU DIDN'T LOSE AS MUCH AS YOU THOUGHT YOU
6 WOULD LOSE, THEREFORE, WE DON'T HAVE TO PAY YOU WHAT IT WOULD
7 HAVE COST US TO LICENSE THAT SOFTWARE AT THE TIME.

8 NOT ONLY IS THAT NOT FAIR, BUT THAT SENDS UP EVERY
9 WRONG INCENTIVE FOR HOW WE WANT PEOPLE, AND PARTICULARLY LARGE
10 CORPORATIONS TO BEHAVE AND CONDUCT THEIR BUSINESSES. IT IS
11 ALSO SOMETHING THAT UNDERMINES THE VERY FOUNDATIONS OF THE
12 SOFTWARE BUSINESS.

13 NOW, WHAT SAP WOULD LIKE YOU TO BELIEVE IS THAT
14 THERE WAS NEVER ANY DANGER TO ORACLE. THEY SAY ORACLE THOUGHT
15 IT WAS A GNAT. THEY QUOTE ONE DOCUMENT FROM ONE PERSON, BUT
16 WHAT THEY DON'T DO IS QUOTE IT IN CONTEXT AND THEY DON'T SHOW
17 YOU THE OTHER DOCUMENTS GOING BACK AND FORTH AT THE SAME TIME.

18 I AM GOING TO SHOW YOU A COUPLE OF THOSE JUST FOR
19 CONTEXTUAL PURPOSES. BUT THE KEY POINT IS THAT WE ALL KNOW
20 WHAT THE INFRINGER, WE ALL KNOW WHAT SAP THOUGHT WAS GOING TO
21 HAPPEN BECAUSE WE GOT THEIR DOCUMENTS. WE KNOW THAT THEY

22 THOUGHT THIS WAS INCREDIBLY VALUABLE.
23 AND IT WAS INCREDIBLY VALUABLE FOR SEVERAL REASONS.
24 REVENUE, IT'S ONLY ONE, CUSTOMER, WAS EVEN MORE IMPORTANT. AND
25 WHETHER IT'S SAP'S RUNNING ROYALTY OR WHETHER IT IS LOST

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 PROFITS OR INFRINGER PROFITS, ALL OF THOSE DEPEND ON REVENUE.
2 THEY DON'T TAKE INTO ACCOUNT THE NUMBER OF CUSTOMERS.
3 WE ALSO KNOW THEY WANT TO DISRUPT ORACLE. AND
4 COUNSEL SAYS, WELL, THEY DIDN'T SUCCEED VERY WELL IN DISRUPTING
5 ORACLE. ACTUALLY IF YOU LOOK AT SOME OF THE DOCUMENTS THAT YOU
6 SAW IN EVIDENCE, THAT'S NOT ENTIRELY TRUE. BUT EVEN IF IT WERE
7 TRUE, HOW IT WORKS OUT IS NOT THE RIGHT LEGAL STANDARD.

8 LET ME GO TO 223.

9 (SLIDE DISPLAYED ON SCREEN.)

10 NOW, THIS IS DEFENDANTS' EXHIBIT A277. IT IS
11 JANUARY 23, 2005, SHORTLY AFTER THE ACQUISITION. AND IT IS AN
12 E-MAIL TO CHARLES PHILLIPS WHO TESTIFIED HERE.

13 "CHARLES, I AM STARTING TO SEE THEM PITCH
14 TOMORROWNOW EVERYWHERE. SAP IS PITCHING IT AT
15 EVERY SILO DEAL."

16 THAT'S WHAT WAS ACTUALLY HAPPENING. THAT IS NOT
17 SOMEBODY'S CHARACTERIZATION. THAT IS WHAT WAS ACTUALLY
18 HAPPENING. AND 224.

19 (SLIDE DISPLAYED ON SCREEN.)

20 THIS IS DEFENDANTS' A63, PAGE 12. AND IT IS TALKING
21 ABOUT AN ANALYSIS OF THIRD PARTY COMPETITORS.

22 "TOMORROWNOW/SAP THREAT LEVEL HIGH."

23 THAT'S NOT THE WAY YOU DESCRIBE A GNAT.

24 NOW, THESE DESCRIPTIONS, I WILL TELL YOU, I DO NOT
25 BELIEVE ARE THE CRITICAL DESCRIPTIONS. THIS IS NOT THE

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 EVIDENCE THAT I THINK IS MOST RELEVANT. WHAT IS MOST RELEVANT
2 IS WHAT SAP CONTESTED AND THOUGHT. BUT BECAUSE OF COUNSEL'S
3 EMPHASIS ON THIS EVIDENCE, I WANT YOU TO SEE THAT THE REAL
4 RECORD IS THAT THIS THREAT WAS EXACTLY WHAT ORACLE SAW FROM ITS
5 SIDE.

6 AND LET ME -- 278. LET ME SHOW YOU ONE TESTIMONY
7 FROM SAFRA CATZ WHO TESTIFIED ABOUT THIS A LOT.

8 (SLIDE DISPLAYED ON SCREEN.)

9 "QUESTION: WAS TOMORROWNOW SUCCEEDING IN TAKING
10 AWAY ORACLE'S CUSTOMERS OVER TIME?

11 "ANSWER: THEY ACTUALLY WERE. I MEAN, THEY WERE
12 REALLY GAINING TRACTION. I THINK THE ONLY THING
13 THAT, YOU KNOW, STOPPED THEM WAS THEM FINALLY
14 SHUTTING DOWN MONTHS AFTER WE CAUGHT THEM AND
15 AFTER WE SUED. I MEAN, THEY WERE REALLY GAINING
16 TRACTION WITH SOME OF THE BIGGEST CUSTOMERS WE
17 HAD."

18 THAT WAS THE THREAT THAT ORACLE FACED, AND IT WAS A
19 REAL THREAT.

20 NOW LET ME TURN TO THE DOCUMENTS THAT SAP'S COUNSEL
21 INCORRECTLY SAYS WAS THE MOST IMPORTANT DOCUMENT. AND THAT IS
22 THE SO-CALLED, WHAT HE LIKES TO REFER TO AS THE ZIEMEN
23 DOCUMENT. AND THIS DOCUMENT IN WHICH YOU RECALL -- PUT UP 279.

24 IS A DOCUMENT THAT -- PUT UP -- I AM SORRY, PUT UP
25 166.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 (SLIDE DISPLAYED ON SCREEN.)

2 THIS DOCUMENT, PLAINTIFFS' EXHIBIT 4814, IS THE
3 DOCUMENT THAT SHOWS AN \$897 MILLION REVENUE PROJECTION FOR THE
4 FIRST THREE YEARS '05, '06, '07. I REMIND YOU THAT'S ONLY
5 THREE YEARS. IT DOESN'T INCLUDE 2008.

6 COUNSEL SAYS THIS WAS JUST ASSUMPTIONS; NOBODY PAID
7 ANY ATTENTION TO IT. IT WAS JUST MR. ZIEMEN.

8 NOW, HE MAKES THAT ARGUMENT EVEN THOUGH THE VERY
9 FIRST PAGE OF PLAINTIFFS' EXHIBIT 4814, WHICH IS OUR CHART 165,

10 IS AN E-MAIL THAT ATTACHES THIS.

11 AND WHAT DOES IT SAY? LET'S BLOW UP THAT WHOLE

12 FIRST PARAGRAPH. THE WHOLE FIRST PARAGRAPH.

13 (SLIDE DISPLAYED ON SCREEN.)

14 IT DOES SAY THAT THOMAS ZIEMEN HAS PUT TOGETHER FOR

15 THE BOARD THE PEOPLESOFT ATTACK PROGRAM. THAT IS MR. ZIEMEN.

16 AND THEY SAY ATTACHED IS THE LAST VERSION.

17 BUT THEN IT GOES ON, AND I SHOWED YOU THIS BEFORE

18 AND YET SAP CONTINUES TO WANT TO PRETEND IT DOESN'T EXIST.

19 IT TALKS ABOUT HENNING, LEO, GERD AND SHAI, ALL FOUR

20 MEMBERS OF THE EXECUTIVE BOARD HAVE GIVEN INPUT AND EXTENSIVE

21 GUIDANCE ON THIS.

22 SO THIS DOCUMENT RIGHT HERE (INDICATING) IS NOT JUST

23 MR. ZIEMEN, THIS IS WHAT THE FOUR SENIOR MEMBERS OF THE BOARD

24 AGREED TO. IT IS NOT SIMPLY AN ASSUMPTION, IT IS WHAT THESE

25 EXECUTIVE BOARD MEMBERS HAVE AGREED TO.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 NOW, HE THEN SAYS, WELL, IF YOU LOOK AT THE BUSINESS

2 CASE FROM JANUARY 7, AND THAT'S PLAINTIFFS' EXHIBIT -- SOMEBODY

3 WILL TELL ME THE NUMBER, PLAINTIFFS' EXHIBIT 19, MAYBE PUT THAT

4 UP ON THE BOARD. IT IS 279.

5 (SLIDE DISPLAYED ON SCREEN.)

6 THIS IS THE BUSINESS CASE, THE JANUARY 7 BUSINESS

7 CASE. WHAT HE SAYS IS THAT THIS ANALYSIS IS MUCH LOWER AND HE

8 SAYS IT ONLY HAS 300 CUSTOMERS. OKAY?

9 NOW, I WANT YOU, WHEN YOU GO INTO THE JURY ROOM, TO

10 TAKE THIS DOCUMENT AND I WANT YOU TO DO THREE THINGS.

11 ONE, LOOK FOR WHERE IT SAYS 300 CUSTOMERS. IT'S NOT

12 THERE.

13 TWO, READ THE VERY FINE PRINT THAT'S DOWN HERE. AND

14 WHAT THAT SAYS IS THAT IT WAS PREPARED BY TOMORROWNOW

15 MANAGEMENT, NOT BY SAP.

16 THIRD -- 280.

17 (SLIDE DISPLAYED ON SCREEN.)

18 REMEMBER WHAT WERNER BRANDT TESTIFIED TO ABOUT THIS
19 DOCUMENT.
20 "QUESTION: AND JUST SO THERE IS NO CONFUSION,
21 THIS VALUATION OVERVIEW WAS BASED ON FINANCIAL
22 INFORMATION PROVIDED BY TOMORROWNOW MANAGEMENT,
23 NOT SAP. CORRECT, SIR?
24 "ANSWER: THAT'S CORRECT.
25 "QUESTION: AND THIS ASSUMED THAT TOMORROWNOW

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 CONTINUED TO BE INDEPENDENT, IT WAS NOT ACQUIRED
2 BY SAP?
3 "ANSWER: CORRECT."
4 SO REMEMBER THAT BECAUSE THE SUGGESTION THAT THIS
5 WAS SOMEHOW SAP'S ANALYSIS IS SIMPLY NOT TRUE.
6 AND AS YOU KNOW FROM ALL THE EVIDENCE THAT YOU'VE
7 SEEN, WHAT SAP DID WAS AGREE TO COMMIT A LOT OF ADDITIONAL
8 RESOURCES TO THAT. AND THE DOCUMENT JANUARY 7TH, THE SO-CALLED
9 BUSINESS CASE TOMORROWNOW, WAS THE BUSINESS CASE BEFORE THE
10 ACQUISITION.
11 LET ME SHOW YOU PLAINTIFFS' EXHIBIT 177 -- OUR CHART
12 283.
13 (SLIDE DISPLAYED ON SCREEN.)
14 OKAY? AND WHEN YOU LOOK AT THEIR DOCUMENT, LOOK AT
15 THIS DOCUMENT, TOO. PLAINTIFFS' EXHIBIT 177. THIS IS DATED
16 FEBRUARY 18TH. AND WHAT YOU WILL SEE IS THE ORIGINAL PLAN BY
17 TOMORROWNOW FOR MAINTENANCE REVENUE AND NUMBER OF CUSTOMERS.
18 AND THEN YOU WILL SEE THE SAP PLAN, WHICH IS IN YELLOW.
19 AND YOU SEE HOW MUCH MORE BOTH THE MAINTENANCE
20 REVENUE AND THE NUMBER OF CUSTOMERS GO UP. AND THOSE, I NOTE,
21 ARE JUST THROUGH 2006.
22 SO, WHEN YOU LOOK AT THE ACTUAL RECORD OF THE
23 EVIDENCE, WHAT YOU SEE IS THAT SAP WAS MAKING ITS OWN ANALYSIS
24 WITHIN LESS THAN A MONTH AFTER ACQUIRING TOMORROWNOW AND THEY
25 WERE MAKING THAT ANALYSIS BASED ON ALL OF THE INFORMATION THAT

REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 THEY KNEW ABOUT HOW THEY WERE ACTUALLY GOING TO USE IT.
2 THE STANDALONE ANALYSIS THAT PRECEDED IT AND ASSUMED
3 THAT THERE WAS NO ACQUISITION IS SIMPLY IRRELEVANT AS EVERY
4 WITNESS HAS TESTIFIED.

5 NOW, COUNSEL PUT UP A SMALL PORTION OF MR. AGASSI'S
6 TESTIMONY, AND I WOULD LIKE TO TRY TO PUT UP THAT LITTLE BIT
7 MORE IN CONTEXT, IF I CAN. THIS IS AT PAGES 311 AND 312.

8 (SLIDE DISPLAYED ON SCREEN.)

9 AND AT THE TOP:

10 "DID YOU HAVE ANY REASON TO QUESTION THESE
11 PROJECTIONS EITHER THE ONE PRESENTED IN THE
12 JANUARY 7 BUSINESS PLAN OR SUBSEQUENTLY?

13 "ANSWER: I THOUGHT WE COULD -- WE COULD DO BETTER.

14

15 "QUESTION: AND BETTER THAN THE ORIGINAL
16 PROJECTION JANUARY 7?

17 "ANSWER: AND BETTER THAN THE EXECUTION."

18 AND THEN HE EXPLAINS WHY.

19 AND THEN HE'S ASKED BECAUSE THE TESTIMONY THAT WAS
20 SHOWN YOU BY COUNSEL SUGGESTED THAT ALL HE WAS SAYING WAS THAT
21 THEY COULD SOMEHOW IMPROVE OVER 300 CUSTOMERS; THAT HE WASN'T
22 SAYING THEY COULD IMPROVE OVER ONE, TWO, 3,000 CUSTOMERS.

23 "QUESTION: DID YOU HAVE ANY ASSESSMENT OF HOW
24 MANY OF THE 12,000 PEOPLESOFT CUSTOMERS MIGHT BE
25 SUBJECT TO CONVERSION?

REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 "ANSWER: NO, NO EXACT NUMBER."

2 THEN WE GO ON.

3 "WHAT'S THAT RATIO?" TALKING ABOUT THE RATIO
4 BETWEEN ORACLE AND SAP.

5 "YOU'RE BIGGER THAN ORACLE?"

6 "ANSWER: YES.
7 "DO YOU KNOW WHAT ROUGHLY THAT IS, 60/40?
8 "ANSWER: YEAH, SOMETHING LIKE THAT.
9 "QUESTION: SOMETHING LIKE THAT?
10 "ANSWER: YEAH."
11 SO HE'S THINKING THEY MIGHT GET 60 PERCENT OF THE
12 CUSTOMERS. THEY DIDN'T, BUT THAT WAS WHAT WAS IN THEIR MIND IN
13 JANUARY OF 2005. AND THAT'S WHAT IS RELEVANT IN TERMS OF WHAT
14 THE VALUE OF IT, WHAT THE VALUE OF IT WAS.
15 AND IT WASN'T JUST MR. AGASSI THAT TESTIFIED TO
16 THAT. YOU NOTICE THAT COUNSEL TRIED TO DRAW A DISTINCTION
17 BETWEEN WHAT GOALS EXISTED AND WHAT ESTIMATES OR PROJECTIONS
18 WERE. HE SAID GOALS AREN'T ESTIMATES OR PROJECTIONS.
19 168.
20 (SLIDE DISPLAYED ON SCREEN.)
21 IN ADDITION TO MR. AGASSI, REMEMBER MR. BRANDT'S
22 TESTIMONY ON THIS.
23 AND IT SAYS: "THE VALUE TO SAP OF THE PROGRAM,
24 USING TOMORROWNOW, INCLUDED NOT ONLY JUST THE
25 MAINTENANCE AND SUPPORT REVENUES THAT WERE

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1 EXPECTED TO BE EARNED, BUT ALSO THE CAPACITY TO
2 MOVE CUSTOMERS FROM PEOPLESFT AND J.D. EDWARDS
3 TO SAP, CORRECT, SIR?
4 "ANSWER: THE GOAL OF SAFE PASSAGE WAS TO GAIN
5 AS MANY CUSTOMERS AS POSSIBLE. THAT'S WHAT YOU
6 JUST STATED IS CORRECT.
7 "QUESTION: AND IT WAS PROJECTED THAT YOU WOULD
8 GET ALMOST \$900 MILLION IN REVENUES OVER THE
9 INITIAL THREE YEARS OF THE PROGRAM, CORRECT,
10 SIR?
11 "ANSWER. YES, THIS IS CORRECT. THIS IS THE
12 RESULT OF SEVERAL MARKETING PLANS THAT WERE PUT
13 TOGETHER AT THE TIME."
14 THAT'S AT TRANSCRIPT PAGE 684 OF THIS TRIAL

15 TRANSCRIPT.

16 MR. BRANDT IS ASKED: "AND IT WAS PROJECTED THAT
17 YOU WOULD GET ALMOST \$900 MILLION IN REVENUES
18 OVER THE INITIAL THREE YEARS OF THE PROGRAM,
19 CORRECT, SIR?

20 "ANSWER: YES, THIS IS CORRECT. THIS IS THE
21 RESULT OF SEVERAL MARKETING PLANS THAT WERE PUT
22 TOGETHER AT THE TIME."

23 I AM NOT TALKING SIMPLY ABOUT UNREALISTIC
24 ASPIRATIONS UNREALISTIC GOALS.

25 LET'S GO TO MR. ZIEMEN. MR. ZIEMEN WAS THE AUTHOR

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 OF THE DOCUMENT.

2 167.

3 (SLIDE DISPLAYED ON SCREEN.)

4 "WHEN YOU SENT THIS E-MAIL TO THE SAP BOARD
5 MEMBERS, YOU ATTEMPTED TO MAKE REASONABLE
6 ASSUMPTIONS, CORRECT?

7 "ANSWER: CORRECT.

8 "SO THIS INITIATIVE AT THIS POINT IN TIME, THERE
9 WAS AT LEAST A POTENTIAL EXPECTATION OF ALMOST A
10 BILLION DOLLARS IN THE FIRST THREE YEARS?
11 ALMOST 900 MILLION -- 900 MILLION?

12 "RIGHT."

13 SO, WHEN YOU LOOK AT THE ACTUAL DOCUMENTS AND YOU
14 LOOK AT WHAT PEOPLE'S ACTUAL TESTIMONY IS, WHAT YOU SEE IS THEY
15 ARE NOT TALKING ABOUT UNREALISTIC ASPIRATIONS, THEY ARE NOT
16 TALKING ABOUT HOPES, THEY ARE TALKING ABOUT EXPECTATIONS, THEY
17 ARE TALKING ABOUT PROJECTIONS, THEY ARE TALKING ABOUT EXACTLY
18 WHAT LARGE CORPORATIONS USE TO MAKE DECISIONS.

19 YOU REMEMBER MS. CATZ TALKING ABOUT HOW ORACLE SPENT
20 \$11.1 BILLION TO ACQUIRE PEOPLESOFT BASED ON CERTAIN ESTIMATES
21 AND PROJECTIONS BECAUSE THAT'S THE WAY THEY WORK.

22 NOW, I WAS NOT, I WAS NOT GOING TO FILL OUT THAT

23 JURY FORM FOR YOU. I WAS GOING TO LET YOU DO THAT. BUT SINCE
24 MY COLLEAGUE HAS DONE IT, LET ME GIVE YOU MY THOUGHTS ABOUT
25 THAT.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 AND IN THAT CONNECTION, I WANT TO PUT UP THE CHART
2 THAT I HAD SHOWED YOU BEFORE THAT PUT IN CONTEXT THE VARIOUS
3 ESSENCE, AND THIS WAS -- IT WAS A SUMMARY CHART LISTED -- HERE
4 IT IS, 239.

5 (SLIDE DISPLAYED ON SCREEN.)

6 WHAT I WOULD LIKE TO DO IS SHOW YOU HOW I WOULD FILL
7 THIS OUT IF I HAD -- HOW I WOULD DO IT IS AS RELEVANT AS HE
8 WOULD DO IT BECAUSE IT IS ALL UP TO YOU. SINCE HE DID IT, LET
9 ME SHOW YOU WHAT I THINK.

10 NOW, IN THE FAIR MARKET VALUE OF THE LICENSE, AND
11 LET ME JUMP BACK TO 239 JUST FOR A MINUTE. I WILL PUT UP -- I
12 WILL TRY AND PUT IT UP HERE.

13 (SLIDE DISPLAYED ON ELMO.)

14 YOU REMEMBER THAT ON 239 THERE WERE A WHOLE SERIES
15 OF VALUATIONS. NOW, SOME OF THE VALUATIONS WERE VERY HIGH,
16 SOME WERE IN THE MIDDLE, SOME WERE VERY LOW. THERE ARE TWO
17 VALUATIONS THAT I THINK ARE USEFUL TO KEEP IN MIND.

18 ONE IS THE 3,000 CUSTOMERS VALUED AT A MILLION
19 DOLLARS AND THE OTHER IS FAIR MARKET VALUE LICENSE THAT
20 MR. MEYER CAME UP WITH. AND THE ANSWER IS PROBABLY SOMEWHERE
21 IN THERE.

22 I THINK WE KNOW IT'S HIGHER THAN MR. MEYER'S FAIR
23 MARKET VALUE LICENSE BECAUSE HE IDENTIFIED A WHOLE SERIES OF
24 THINGS THAT HE COULD NOT TAKE INTO ACCOUNT. ON THE OTHER HAND,
25 I AGREE WITH COUNSEL THAT THE VALUATIONS AT FOUR OR \$5 BILLION

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 ARE VALUATIONS THAT IT'S HARD TO HAVE ENOUGH SUPPORT FOR SO
2 THAT WE CAN ACTUALLY SAY THAT'S A DAMAGE NUMBER THAT YOU OUGHT

3 TO AWARD.

4 SO WHAT I WOULD SAY IS 3,000 CUSTOMERS, WHICH WAS ON
5 THE LOW END OF SOME OF THEIR ESTIMATES. REMEMBER YOU SAW SOME
6 OF THE ESTIMATES OF A MAJORITY, WHICH WOULD BE FIVE OR 6,000.
7 YOU SAW OTHER ESTIMATES AT 4,000, OTHER ESTIMATES AT 5,000. SO
8 3,000 IS A REASONABLY CONSERVATIVE NUMBER. AND \$1 MILLION
9 VALUE PER CUSTOMER IS A VERY CONSERVATIVE NUMBER BECAUSE YOU
10 WILL REMEMBER THAT FOR JUST THOSE FOUR CUSTOMERS THAT
11 MR. CLARKE HAD, THE AVERAGE REVENUE WAS \$1.9 MILLION. YOU TAKE
12 THOSE AND YOU COME UP WITH A \$3 BILLION NUMBER.

13 AND MR. MEYER COMES UP WITH \$1.65 BILLION NUMBER,
14 AND THOSE NUMBERS, HE SAYS, UNDERSTATE BECAUSE HE CAN'T
15 IDENTIFY ALL OF THE ASPECTS AND HE DOESN'T EVEN MAKE AN ATTEMPT
16 TO EVALUATE THE EXTENT OF DISRUPTION AND THE LIKE THAT WAS ONE
17 OF THE KEY REASONS THAT SAP ENGAGED IN THIS INFRINGEMENT. SO,
18 FAIR MARKET VALUE OF THE LICENSE IS SOMEWHERE BETWEEN 1.65 AND
19 3 BILLION.

20 NOW, THE LOST PROFITS NUMBER IS AN ALTERNATIVE TO
21 THE FAIR MARKET VALUE LICENSE. AND FOR ALL THE REASONS WE
22 TALKED ABOUT, JUST LOOKING AT LOST PROFITS ON A
23 CUSTOMER-BY-CUSTOMER BASIS DOES NOT PROVIDE YOU WITH EITHER A
24 FAIR REFLECTION OF HOW ORACLE WAS HARMED OR A FAIR REFLECTION
25 OF HOW SAP WAS BENEFITED.

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 BUT FOCUSING ON INFRINGER PROFITS, I THINK THERE ARE
2 TWO NUMBERS. ONE IS 288 MILLION AND THE OTHER IS 689 MILLION.
3 THAT'S THIS NUMBER OVER HERE. THAT'S A REVENUE NUMBER; THAT IS
4 NOT A PROFIT NUMBER.

5 AND THE ONLY WAY THAT YOU WOULD AWARD THAT IS IF YOU
6 CONCLUDED THAT THEY HAD NOT CARRIED THEIR BURDEN OF SHOWING
7 WHAT THE COSTS ASSOCIATED WITH THAT NUMBER ARE.

8 NOW, IF THEY -- IF YOU DO LOOK AT THE EVIDENCE IN
9 THE RECORD ABOUT COSTS, I THINK YOU WILL CONCLUDE THAT THE
10 ACTUAL COSTS ARE NOT NEARLY AS HIGH AS THEY WOULD ARGUE THEY

11 ARE. BUT YOU WOULD HAVE TO ADJUST THIS NUMBER FOR WHATEVER
12 COSTS YOU FIND THAT THEY HAVE PROVED.

13 SO FOR WHAT IT'S WORTH, I DON'T THINK IT IS WORTH
14 MUCH, BECAUSE IT IS REALLY UP TO YOU. THAT'S HOW I WOULD
15 APPROACH IT.

16 ONE OF THE PROBLEMS WITH THE ELMO, YOU CAN'T PUT THE
17 WHOLE PAGE ON. SO THAT'S THE WAY THAT I WOULD APPROACH FILLING
18 OUT THOSE TWO PARTS OF THE DAMAGE CALCULATION.

19 NOW, I WANT TO LEAVE YOU WITH SOME QUESTIONS. IN A
20 SENSE, THE ONLY REAL QUESTION YOU HAVE TO ANSWER IS WHAT'S THE
21 FAIR MARKET VALUE LICENSE? WHAT'S THE LOST PROFITS IF YOU
22 DON'T HAVE A FAIR MARKET VALUE LICENSE? WHAT'S THE INFRINGERS'
23 PROFITS? AS YOU GET TO THAT, AS YOU THINK ABOUT HOW YOU ARE
24 GOING TO GET TO THAT, I WOULD LIKE YOU TO THINK ABOUT TWO SETS
25 OF QUESTIONS:

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 (SLIDE DISPLAYED ON ELMO.)

2 WELL, THIS IS GOING TO BE REALLY BAD BECAUSE I CAN'T
3 EVEN PUT THIS ON THE SCREEN. MAYBE THIS CAN BE -- IS THERE A
4 FOCUS? THERE IS A WAY TO MAKE THAT --

5 (COUNSEL ASSISTED.)

6 AND THESE ARE SOME QUESTIONS I WOULD LIKE YOU TO
7 THINK ABOUT AS YOU ARE WORKING YOUR WAY TOWARDS THAT, THOSE
8 ULTIMATE QUESTIONS.

9 IF TOMORROW AND THE INFRINGEMENT DIDN'T REALLY
10 MATTER, WHICH IS WHAT SAP ARGUES, WHY DID SAP TAKE THE SERIOUS
11 RISK OF GETTING CAUGHT?

12 AND COUNSEL SAYS ASSUME IT'S NOT A -- ASSUME IT'S
13 NOT A BILLION DOLLAR RISK, ASSUME IT'S ONLY A \$40 MILLION RISK.
14 THAT'S THE WHOLE POINT. THE WHOLE POINT IS THEY WOULDN'T HAVE
15 TAKEN THIS RISK FOR \$40 MILLION. NO COMPANY WOULD. YOU ONLY
16 TAKE THIS KIND OF RISK IF IT IS REALLY IMPORTANT.

17 IF THEY THOUGHT THAT THEY FACED THIS SERIOUS RISK OF
18 GETTING CAUGHT AND ALL THEY WERE GOING TO GET OUT OF IT WAS
19 \$40 MILLION, THEY NEVER WOULD HAVE TAKEN THAT RISK.

20 THE POINT IS NOT CIRCULAR, AS COUNSEL SUGGESTS. THE
21 POINT IS THAT THE VERY FACT THAT THEY TOOK THE RISK EVIDENCES
22 THE IMPORTANCE THEY ATTACHED TO GETTING THIS SOFTWARE, THIS
23 INTELLECTUAL PROPERTY.

24 SECOND, WHY DID SAP ACTUALLY EXPAND THE
25 INFRINGEMENT?

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 YOU SAW THE UNDISPUTED EVIDENCE AND COUNSEL DIDN'T
2 EVEN ADDRESS THIS; THAT AFTER THEY GOT TOMORROWNOW, THEY
3 EXPANDED THE INFRINGEMENT. IF IT DIDN'T MATTER, WHY WOULD THEY
4 DO THAT?

5 THIRD, WHY DID SAP HAVE TOMORROWNOW REPORT DIRECTLY
6 TO THE SAP EXECUTIVE BOARD IN GERMANY? WHY DID THEY DO THAT?

7 THEY HAD TO CHANGE THEIR LEGAL STRUCTURE. USUALLY
8 THEY REPORTED TO SAP AMERICA. WHY DID THEY DO THIS IF
9 TOMORROWNOW DIDN'T MATTER? THEY DID IT BECAUSE TOMORROWNOW
10 MATTERED ENORMOUSLY TO THEM. YOU SEE THAT IN THEIR BOARD
11 MINUTES, YOU SEE THAT IN THE BOARD PRESENTATION.

12 THIS IS NOT A PROGRAM THAT WENT ON DOWN IN THE LOWER
13 LEVELS OF THE CORPORATION. THIS IS NOT EVEN SOMETHING THAT
14 WENT ON IN THE MIDDLE LEVELS OF THE CORPORATION. THIS IS
15 SOMETHING THAT WENT ON AT THE VERY TOP OF THAT CORPORATION.

16 AND THEY INSISTED, BECAUSE OF ITS IMPORTANCE, THAT
17 IT, UNLIKE ANY OF THE OTHER THINGS THAT THEY WERE DOING IN THIS
18 COUNTRY, REPORT DIRECTLY TO THE SAP EXECUTIVE BOARD IN GERMANY.

19 FOURTH, WHY DID SAP/TOMORROWNOW DOWNLOAD MILLIONS OF
20 COPIES OF ORACLE'S SOFTWARE?

21 IF IT WAS SIMPLY A QUESTION, AS COUNSEL SUGGESTED,
22 THAT MAYBE THEY WERE USING ONE CUSTOMER'S SOFTWARE FOR ANOTHER
23 CUSTOMER, WHY DIDN'T THEY SIMPLY DO THAT IF IT DIDN'T MATTER?
24 WHY WOULD THEY DOWNLOAD MILLIONS OF COPIES OF ORACLE SOFTWARE
25 IF IT DIDN'T MATTER?

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 FIFTH, WHY DIDN'T SAP TAKE THE SIMPLE STEP OF
2 REMOVING ORACLE'S SOFTWARE FROM TOMORROWNOW'S COMPUTERS?

3 YOU HEARD MR. BRANDT TESTIFY THAT HE KNEW IT WAS
4 IMPROPER TO HAVE ORACLE SOFTWARE ON -- TO HAVE ORACLE SOFTWARE
5 ON TOMORROWNOW'S COMPUTERS. AND YOU HEARD HIM SAY THAT EVEN
6 THOUGH HE COULDN'T CHECK IT, HE HAD A LOT OF PEOPLE WHO COULD
7 CHECK IT WITH A PHONE CALL.

8 WHY DIDN'T THEY DO THAT? IF IT DIDN'T MATTER, IF IT
9 DIDN'T MATTER, WHY DIDN'T THEY DO THAT?

10 SIXTH, WHY DID SAP'S TOP EXECUTIVE PLAN ON BILLIONS
11 OF DOLLARS OF VALUE AND THOUSANDS OF CUSTOMERS?

12 THIS WAS NOT SOMETHING BY SOME FORECASTER. THIS WAS
13 NOT JUAN JONES. THIS WAS THE VICE PRESIDENT OF SAP IN GERMANY
14 WORKING IN DIRECT CONJUNCTION WITH THE EXECUTIVE BOARD
15 THEMSELVES, WHERE THE EXECUTIVE BOARD THEMSELVES WERE
16 DETERMINING WHAT THE PROJECTIONS WERE THAT THEY WOULD ACCEPT.

17 WHY DID THESE TOP EXECUTIVES PLAN ON THESE BILLIONS
18 OF DOLLARS OF VALUE AND THOUSANDS OF CUSTOMERS IF IT REALLY
19 DIDN'T MATTER?

20 AND LAST, WHY DID SAP REPEATEDLY DESCRIBE
21 TOMORROWNOW AS A KEY COMPONENT, A KEY PART, THE CORNERSTONE,
22 THE MAJOR CORNERSTONE OF SAP'S MARKET?

23 AND THESE WERE NOT SIMPLY STATEMENTS OUT TO THE
24 FIELD. THEY WEREN'T TRYING TO PUMP UP THE TROOPS. THIS IS THE
25 WAY THEY TALKED WITHIN THE BOARD. THIS IS THE TOP EXECUTIVES

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 TALKING TO THE BOARD. THIS IS WHAT THE BOARD IS BEING TOLD.

2 THIS IS NOT SALESMANSHIP. THIS IS NOT PUFFERY.
3 THIS IS WHAT THE BOARD IS BEING TOLD AND IT IS THE BASIS OF THE
4 BOARD'S DECISIONS.

5 YOU WILL NOTICE THAT COUNSEL, IN ALL THE TIME HE
6 TALKED TO YOU, DID NOT SHOW YOU ANY DOCUMENTS FROM SAP THAT
7 DISAGREED WITH THESE CONCLUSIONS. HE QUOTED A COUPLE OF PEOPLE

8 TESTIFYING LATER IN DEPOSITION, HE QUOTED MS. CATZ OUT OF
9 CONTEXT, BUT HE DIDN'T SHOW YOU ANY EVIDENCE THAT DISPUTES
10 THESE POINTS.

11 AND THEN MY LAST SET OF QUESTIONS, LITTLE MORE
12 QUANTITATIVE. ASK YOURSELF, FIRST, THESE QUESTIONS ALL RELATE
13 TO HOW SAP'S DAMAGE CALCULATION CONSISTENT WITH A NUMBER OF
14 THINGS THAT YOU KNOW AND WILL SEE:

15 FIRST, HOW IS SAP'S DAMAGE CALCULATION CONSISTENT
16 WITH THE COURT'S INSTRUCTION TO CONSIDER FAIR MARKET VALUE AT
17 THE TIME INFRINGEMENT BEGAN?

18 LOOK AT WHAT THE COURT INSTRUCTS YOU ABOUT HOW TO
19 DETERMINE FAIR MARKET VALUE AND LOOK AT WHAT THE COURT
20 INSTRUCTS YOU ABOUT WHY WE HAVE A RIGHT TO SEEK FAIR MARKET
21 VALUE DAMAGES.

22 WE ARE SEEKING FAIR MARKET VALUE DAMAGES BECAUSE WE
23 BELIEVE THOSE DAMAGES MOST FAIRLY COMPENSATE US FOR WHAT WAS
24 ACTUALLY TAKEN AND USED BY SAP. NOT NECESSARILY ALL OF THE
25 RESULTS OF IT, BUT WHAT WAS ACTUALLY TAKEN AND USED. THAT'S

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 WHAT WE ARE ENTITLED TO UNDER THE LAW.

2 AND HOW IS SAP'S DAMAGE CALCULATION CONSISTENT WITH
3 THE BILLIONS OF DOLLARS OF VALUE AND THOUSANDS OF CUSTOMERS
4 SAP'S 2005 DOCUMENTS CONTEMPLATE?

5 I CAN UNDERSTAND HOW YOU CAN SAY I DON'T THINK IT'S
6 4 BILLION, I THINK IT'S 3 BILLION. I DON'T THINK IT'S 3
7 BILLION, I THINK IT'S 2.2 BILLION. I UNDERSTAND HOW REASONABLE
8 MINDS CAN DIFFER AS TO WHETHER IT'S 3,000 CUSTOMERS OR 1300
9 CUSTOMERS OR 2500 CUSTOMERS, BUT HOW CAN YOU SAY IT'S FOUR
10 CUSTOMERS? HOW CAN YOU LOOK AT THESE THOUSANDS OF CUSTOMERS
11 THAT ARE ESTIMATED AND SAY IT'S FOUR?

12 HOW CAN YOU LOOK AT THE BILLIONS OF DOLLARS THAT ARE
13 ESTIMATED AND SAY IT'S 40 MILLION? THEY ARE NOT IN THE
14 BALLPARK. THEY ARE NOT ONLY NOT IN THE BALLPARK WITH ALL THE
15 EVIDENCE IN THIS TRIAL, THEY ARE NOT IN THE BALLPARK WITH THEIR

16 OWN DOCUMENTS.
17 HOW IS SAP'S DAMAGE CALCULATION CONSISTENT WITH THE
18 UNDISPUTED ESTIMATES OF ORACLE'S TOP EXECUTIVES?
19 OBVIOUSLY THE ORACLE PEOPLE HAVE GOTTEN INCENTIVE IN
20 THIS CASE. THEY HAVE COME IN, THEY ARE REPRESENTING THEIR
21 COMPANY. BUT THEY COME IN UNDER OATH, SUBJECT TO
22 CROSS-EXAMINATION, AND THEY TESTIFY ABOUT THE FAIR MARKET
23 VALUE. YOU DON'T HEAR ANYTHING FROM THE OTHER SIDE. AND
24 THAT'S WHY I ASKED HOW IS SAP'S DAMAGE CALCULATION CONSISTENT
25 WITH THE FAILURE OF SAP TO OFFER A SINGLE ESTIMATE FROM A

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 SINGLE EXECUTIVE OF THE FAIR MARKET VALUE OF WHAT WAS TAKEN.
2 IF YOU WERE LOOKING AT SOMETHING, WOULDN'T YOU WANT
3 TO KNOW WHAT DO THE PEOPLE IN THE INDUSTRY, WHAT DO THE
4 BUSINESS PEOPLE GOING TO BE EFFECTED, WHAT ARE THE PEOPLE WHO
5 ARE ACTUALLY GOING TO BE IN A LICENSE NEGOTIATION, WHAT DO THEY
6 THINK?
7 YOU MAY NOT ACCEPT WHAT ANY ONE OF THEM SAYS, AND,
8 INDEED, I THINK PROBABLY MOST PEOPLE WOULD COMPROMISE. YOU
9 WOULD SAY, WELL, I'VE GOT THESE ESTIMATES FROM THE ORACLE
10 PEOPLE, I'VE GOT THESE ESTIMATES FROM THE SAP PEOPLE, I AM
11 GOING TO TRY TO SORT MY WAY THROUGH IT, LOOK AT THEIR
12 CREDIBILITY, I AM GOING TO DETERMINE WHAT THE BASIS IS THAT
13 THEY HAVE, AND I AM PROBABLY GOING TO ARRIVE AT A COMPROMISE.
14 BUT HOW DO YOU BEGIN TO ARRIVE AT COMPROMISE WHEN YOU DON'T
15 HAVE ANYTHING ON THE OTHER SIDE?
16 HOW DO YOU BEGIN TO ANSWER THIS QUESTION WHEN SAP
17 FAILS TO OFFER A SINGLE ESTIMATE FROM A SINGLE EXECUTIVE OF THE
18 FAIR MARKET VALUE OF WHAT WAS TAKEN?
19 NEXT, HOW IS SAP'S DAMAGE CALCULATION CONSISTENT
20 WITH THE ABSENCE OF A SINGLE CONTEMPORANEOUS ESTIMATE,
21 CONSISTENT WITH SAP'S DAMAGE ESTIMATE FOR TRIAL?
22 THIS IS NOT A SITUATION IN WHICH THEY HAVE SEVERAL
23 ESTIMATES AND WE ARE SAYING LOOK AT THESE ESTIMATES AND THEY
24 ARE SAYING, NO, LOOK AT THESE OTHER ESTIMATES, AND THEY ARE

25 DIFFERENT AND YOU HAVE TO CHOOSE BETWEEN THEM. THIS IS A

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 SITUATION IN WHICH WE HAVE GIVEN YOU ESTIMATE, PROJECTION, PLAN
2 AFTER ESTIMATE, PROJECTION, PLAN.

3 THEY HAVEN'T GIVEN YOU A SINGLE CONTEMPORANEOUS
4 ESTIMATE, PROJECTION OR PLAN FOR HOW SAP WAS GOING TO USE
5 TOMORROWNOW THAT COMES FROM 2005 OR 2006. NOT ONE.

6 THAT'S WHY IT IS SO IMPORTANT FOR THEM TO TRY TO
7 DISTORT THE DECEMBER 23 DOCUMENT, WHICH IN ONE PAGE HAS THE
8 TOMORROWNOW STANDALONE FIGURES, THE FIGURE THAT MR. BRANDT AND
9 EVERYBODY ELSE HAS SAID DON'T HAVE ANYTHING TO DO WITH HOW SAP
10 WAS GOING TO USE IT. IT SIMPLY SHOWED WHAT TOMORROWNOW'S
11 MANAGEMENT SAID TOMORROWNOW MIGHT BE ABLE TO DO ON ITS OWN.
12 THE REASON THEY TRIED TO USE THAT OUT OF ALL CONTEXT IS BECAUSE
13 THAT'S ALL THEY HAVE. THEY DO NOT HAVE A SINGLE
14 CONTEMPORANEOUS ESTIMATE CONSISTENT WITH SAP'S DAMAGE ESTIMATE
15 FOR TRIAL.

16 NEXT, HOW IS SAP'S DAMAGE CALCULATION CONSISTENT
17 WITH THE MANY VALUES SAP SOUGHT OTHER THAN IMMEDIATE REVENUES
18 AND PROFITS?

19 FOR EXAMPLE, THE DISRUPTION AND DISCREDITING OF
20 ORACLE, IMPROVED CUSTOMER RELATIONS. WE HAD A WHOLE LIST OF
21 THEM. YOU SAW THOSE IN THEIR PLANNING DOCUMENTS. YOU SAW
22 THOSE IN THEIR BOARD DOCUMENTS. BUT SAP'S DAMAGE CALCULATION,
23 IGNORE THOSE ENTIRELY. IT JUST LOOKS AT IMMEDIATE REVENUES AND
24 PROFITS.

25 AND, FINALLY, HOW IS SAP'S DAMAGE CALCULATION

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 CONSISTENT WITH THE UNCERTAINTY IN DISPUTES THAT ARE INHERENT
2 IN SAP'S DAMAGE CALCULATION AS SHOWN BY THE INABILITY OF SAP'S
3 OWN EXPERT TO FIGURE IT OUT?

4 HE'S THE GUY, PAID \$14 MILLION, SPENT THREE AND A
5 HALF YEARS, LOOKED AT 12 AND A HALF MILLION DOCUMENTS, AND HE
6 KEPT CHANGING. I DON'T -- I DON'T BLAME HIM FOR CHANGING
7 BECAUSE THIS IS HARD. IN FACT, IT'S IMPOSSIBLE. BUT THE FACT
8 THAT HE KEPT CHANGING MEANS THAT WHAT HE HAD DID NOT HAVE A
9 BASIS THAT COULD BE REASONABLY USED FOR A BUSINESS NEGOTIATION.

10 AND I NOTE THAT WHAT I SAID BEFORE, AND THIS WAS NOT
11 CHALLENGED, NOBODY, NOT ANY FACT WITNESS, NOT ANY EXPERT
12 WITNESS HAS EVER COME FORWARD WITH A LICENSE THAT DEPENDED ON
13 FIGURING OUT WHY CUSTOMERS DID THINGS.

14 YOU SOMETIMES HAVE LICENSES THAT SAY FOR EVERY UNIT
15 THAT YOU SELL, IT WILL COST YOU THIS MUCH. YOU SOMETIMES HAVE
16 LICENSES THAT SAY FOR EVERY DOLLAR THAT YOU RECEIVE, YOU WILL
17 PAY THIS MUCH. THOSE ARE OBJECTIVE DESCRIPTIONS.

18 NO ONE HAS SEEN A LICENSE LIKE THE LICENSE THAT SAP
19 SAYS YOU SHOULD IMPOSE IN THIS CASE. NO ONE HAS EVER SEEN A
20 LICENSE THAT SAYS BEFORE YOU CAN FIGURE OUT HOW MUCH YOU ARE
21 DUE, YOU'VE GOT TO FIGURE OUT WHY CUSTOMERS DID THINGS. WHY
22 DID THEY LEAVE? WHY DID THEY GO? WHY DID THEY BUY THE THINGS
23 THEY DID?

24 THAT'S THE ONLY WAY THEY GET FROM 86 CUSTOMERS TO
25 FOUR. INDEED, IT IS THE ONLY WAY THEY GET FROM OVER 200

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REBUTTAL CLOSING ARGUMENT - MR. BOIES

1 CUSTOMERS TO 86. BECAUSE WHAT THEY HAVE TO DO IS THEY HAVE TO
2 FIGURE OUT WHY PEOPLE DID THAT.

3 AND I SUGGEST TO YOU NO ONE HAS EVER DONE THAT,
4 LICENSE THAT WAY BEFORE, AND NOBODY EVER WOULD HAVE DONE A
5 LICENSE THAT WAY PARTICULARLY AMONG COMPETITORS. WHEN YOU'RE
6 DIRECT COMPETITORS AND YOU KNOW EACH OF YOU IS GOING TO HAVE
7 INCENTIVE TO SCREW THE OTHER. NO ONE IS GOING TO LOCK
8 THEMSELVES IN A SITUATION IN WHICH YOU ARE GOING TO HAVE TO
9 FIGHT FOR YEARS OVER WHY DID CUSTOMERS DO PARTICULAR THINGS.

10 AS YOU GO BACK AND YOU THINK ABOUT THESE ISSUES,
11 THESE ARE IMPORTANT ISSUES AND A LOT OF MONEY INVOLVED, I WANT
12 YOU TO FOCUS ON THESE QUESTIONS, FOCUS ON THE EVIDENCE, AND

13 PLEASE LOOK AT WHAT WAS ACTUALLY TESTIFIED TO. LOOK AT WHAT
14 THE ACTUAL DOCUMENTS SAY.

15 DON'T LISTEN TO ME EXCEPT TO THE EXTENT I HAVE
16 POINTED YOU TO EVIDENCE. DON'T LISTEN TO THE OTHER SIDE EXCEPT
17 TO THE EXTENT THEY'VE ACTUALLY POINTED YOU TO EVIDENCE.
18 BECAUSE THE EVIDENCE IS WHAT YOU'VE SWORN WILL DETERMINE THIS
19 CASE. AND THE JUDGE WILL GIVE YOU INSTRUCTIONS ON WHAT THE LAW
20 IS, BUT YOU ARE THE FINAL ARBITRATORS, THE FINAL JUDGES OF WHAT
21 THE FACTS IN THIS CASE ARE.

22 I WANT TO THANK YOU AGAIN FOR YOUR SERVICE AND YOUR
23 TIME AND ATTENTION.

24 THE COURT: ALL RIGHT. THANK YOU, MR. BOIES.

25 LADIES AND GENTLEMEN, I AM GOING TO START WITH THE

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1 INSTRUCTIONS. IT IS NOT GOING TO TAKE LONG, ABOUT MAYBE TEN OR
2 15 MINUTES, BUT I WOULD LIKE EVERYONE TO STAND AND HAVE A
3 SEVENTH INNING STRETCH. THIS IS THE LAST THING WE ARE GOING TO
4 ASK YOU ALL TO DO. EVERYBODY JUST STAND AND STRETCH.

5 (PAUSE IN THE PROCEEDINGS.)

6 THE COURT: ALL RIGHT.

7 LADIES AND GENTLEMEN, MEMBERS OF THE JURY, NOW THAT
8 YOU'VE HEARD ALL OF THE EVIDENCE AND ARGUMENTS OF THE
9 ATTORNEYS, IT IS MY DUTY TO INSTRUCT YOU AS TO THE LAW THAT
10 APPLIES IN THE CASE.

11 A COPY OF THESE INSTRUCTIONS WILL BE SENT WITH YOU
12 INTO THE JURY ROOM SO YOU DON'T NEED TO TAKE NOTES. ACTUALLY,
13 WE WILL SEND SEVERAL COPIES BACK WITH YOU.

14 NOW, YOU MUST NOT INFER FROM THESE INSTRUCTIONS OR
15 FROM ANYTHING THAT I MAY SAY OR DO AS INDICATING THAT I HAVE AN
16 OPINION REGARDING THE EVIDENCE OR WHAT YOUR VERDICT SHOULD BE.

17 IT IS YOUR DUTY TO FIND THE FACTS FROM ALL OF THE
18 EVIDENCE IN THE CASE. TO THOSE FACTS YOU WILL APPLY THE LAW AS
19 I GIVE IT TO YOU. AND YOU MUST FOLLOW THE LAW AS I GIVE IT TO
20 YOU WHETHER YOU AGREE WITH IT OR NOT. AND YOU MUST NOT BE

21 INFLUENCED BY ANY PERSONAL LIKES, OR DISLIKES, OPINIONS,
22 PREJUDICES OR SYMPATHY. THAT MEANS THAT YOU MUST DECIDE THE
23 CASE SOLELY ON THE EVIDENCE BEFORE YOU AND YOU WILL RECALL THAT
24 ON THE FIRST DAY YOU TOOK AN OATH TO DO EXACTLY THAT.

25 AND IN FOLLOWING MY INSTRUCTIONS, YOU MUST FOLLOW

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1 ALL OF THEM AND NOT SINGLE OUT SOME AND IGNORE OTHERS.

2 NOW, THE EVIDENCE YOU ARE TO CONSIDER IN DECIDING
3 WHAT THE FACTS ARE CONSISTS OF THREE THINGS. ONE, THE SWORN
4 TESTIMONY OF THE WITNESSES, TWO, THE EXHIBITS WHICH HAVE BEEN
5 RECEIVED INTO EVIDENCE AND, THREE, ANY FACTS TO WHICH THE
6 LAWYERS AND PARTIES HAVE AGREED TO OR STIPULATED TO. AND IN
7 REACHING YOUR VERDICT, YOU MAY ONLY CONSIDER THESE ITEMS OF
8 EVIDENCE.

9 THERE ARE CERTAIN THINGS THAT ARE NOT EVIDENCE AND
10 YOU MAY NOT CONSIDER THEM IN DECIDING WHAT THE FACTS ARE. I
11 WILL LIST THOSE FOR YOU AS WELL.

12 ONE, THE ARGUMENTS AND STATEMENTS BY THE LAWYERS ARE
13 NOT EVIDENCE. THE LAWYERS ARE NOT WITNESSES. WHAT THEY HAVE
14 SAID IN THEIR OPENING STATEMENTS AND IN THEIR CLOSING ARGUMENTS
15 AND AT OTHER TIMES DURING THE TRIAL IS SIMPLY DESIGNED TO HELP
16 YOU INTERPRET THE EVIDENCE, BUT IT IS NOT ITSELF EVIDENCE.

17 IF THE FACTS AS YOU REMEMBER THEM DIFFER FROM THE
18 WAY THE LAWYERS HAVE STATED THEM, YOUR MEMORY CONTROLS.

19 SECONDLY, THE QUESTIONS AND THE OBJECTIONS BY THE
20 LAWYERS ARE NOT EVIDENCE. ATTORNEYS HAVE A DUTY TO THEIR
21 CLIENTS TO OBJECT WHEN THEY BELIEVE A QUESTION IS IMPROPER
22 UNDER THE RULES OF EVIDENCE, AND YOU SHOULD NOT BE INFLUENCED
23 BY THE OBJECTION OR BY THE COURT'S RULING ON IT.

24 THREE, ANY TESTIMONY THAT HAS BEEN EXCLUDED OR
25 STRICKEN OR THAT I HAVE INSTRUCTED YOU TO DISREGARD IS NOT

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1 EVIDENCE AND MUST NOT BE CONSIDERED.

2 IN ADDITION, SOMETIMES TESTIMONY AND EXHIBITS ARE
3 RECEIVED ONLY FOR A LIMITED PURPOSE. AND WHEN I HAVE GIVEN YOU
4 A LIMITING INSTRUCTION, YOU ARE REQUIRED TO FOLLOW IT.

5 AND, LASTLY, ANYTHING THAT YOU HAVE SEEN OR HEARD
6 WHEN THE COURT WAS NOT IN SESSION IS NOT EVIDENCE. AND YOU ARE
7 TO DECIDE THE CASE SOLELY BASED UPON THE EVIDENCE YOU RECEIVED
8 HERE AT TRIAL.

9 EVIDENCE MAY BE DIRECT OR CIRCUMSTANTIAL. DIRECT
10 EVIDENCE IS PROOF -- IS DIRECT PROOF OF A FACT SUCH AS
11 TESTIMONY BY A WITNESS ABOUT WHAT THAT WITNESS PERSONALLY SAW
12 OR HEARD OR DID.

13 CIRCUMSTANTIAL EVIDENCE IS PROOF OF ONE OR MORE
14 FACTS FROM WHICH YOU CAN FIND ANOTHER FACT. AND YOU SHOULD
15 CONSIDER BOTH KINDS OF EVIDENCE. THE LAW MAKES NO DISTINCTION
16 BETWEEN THE WEIGHT TO BE GIVEN TO EITHER DIRECT OR
17 CIRCUMSTANTIAL EVIDENCE. IT IS UP TO YOU TO DECIDE HOW MUCH
18 WEIGHT TO GIVE, ANY AND ALL THE EVIDENCE.

19 IN DECIDING WHAT THE FACTS OF THE CASE ARE, YOU MAY
20 HAVE TO DECIDE WHICH TESTIMONY TO BELIEVE AND WHICH TESTIMONY
21 NOT TO BELIEVE. YOU MAY BELIEVE EVERYTHING A WITNESS SAYS, OR
22 PART OF IT, OR NONE OF IT. PROOF OF A FACT DOES NOT
23 NECESSARILY DEPEND UPON THE NUMBER OF WITNESSES WHO TESTIFY
24 ABOUT IT.

25 IN CONSIDERING THE TESTIMONY OF ANY WITNESS, YOU MAY

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1 TAKE INTO ACCOUNT THE FOLLOWING: ONE, THE OPPORTUNITY AND THE
2 ABILITY OF THE WITNESS TO SEE OR HEAR OR KNOW THE THINGS
3 TESTIFIED TO.

4 TWO, THE WITNESS' MEMORY.

5 THREE, THE WITNESS' MANNER WHILE TESTIFYING.

6 FOUR, THE WITNESS' INTEREST IN THE OUTCOME OF THE
7 CASE OR ANY BIAS OR PREJUDICE.

8 FIVE, WHETHER OTHER EVIDENCE CONTRADICTED THE

9 WITNESS' TESTIMONY.

10 SIX, THE REASONABLENESS OF THE WITNESS' TESTIMONY IN
11 LIGHT OF ALL THE EVIDENCE.

12 AND SEVEN, ANY OTHER FACTORS THAT BEAR ON
13 BELIEVABILITY.

14 THE WEIGHT OF THE EVIDENCE AS TO A FACT DOES NOT
15 NECESSARILY DEPEND UPON THE NUMBER OF WITNESSES WHO TESTIFY
16 ABOUT IT.

17 AND FROM TIME TO TIME DURING THE TRIAL, THE PARTIES
18 HAVE OFFERED INTO EVIDENCE DOCUMENTS THAT HAVE BEEN PARTIALLY
19 REDACTED, WHICH MEANS THAT CERTAIN CONTENTS OF THE DOCUMENT
20 HAVE BEEN BLACKED OUT OR WHITED OUT AND THE DOCUMENT HAS BEEN
21 STAMPED REDACTED.

22 REDACTIONS ARE NECESSARY FOR A WIDE VARIETY OF
23 REASONS, INCLUDING THAT THE REDACTED INFORMATION IS UNRELATED
24 TO THE EVIDENCE IN THE CASE, OR THE COURT HAS DETERMINED THAT
25 THE INFORMATION IS NOT ADMISSIBLE, OR TO PROTECT AS PRIVATE THE

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1 PERSONAL INFORMATION OF INDIVIDUALS OR OTHER COMPANIES THAT ARE
2 NOT PARTIES TO THIS LAWSUIT. THESE ARE JUST EXAMPLES. YOU MAY
3 GIVE THE UNREDACTED INFORMATION IN ANY DOCUMENT WHATEVER WEIGHT
4 YOU CHOOSE AND YOU ARE NOT TO CONSIDER ANY CHARACTERIZATIONS OF
5 THE FACT OR EXISTENCE OF A REDACTION IN ANY DOCUMENT INCLUDING
6 BY COUNSEL.

7 NOW, OVER THE COURSE OF THE TRIAL, YOU HAVE HEARD
8 EVIDENCE ON ORACLE'S DAMAGES CLAIMS AGAINST TOMORROWNOW, SAP AG
9 AND SAP AMERICA. AS REFLECTED IN THE STIPULATIONS BETWEEN THE
10 PARTIES CONTAINED IN YOUR JUROR NOTEBOOK, THE PARTIES AGREE
11 TOMORROWNOW IS LIABLE FOR THE COPYRIGHT INFRINGEMENT ASSERTED
12 BY ORACLE AND THAT SAP AG AND SAP AMERICA ARE ALSO VICARIOUSLY
13 AND CONTRIBUTORILY LIABLE FOR THAT COPYRIGHT INFRINGEMENT.

14 YOU MUST NOW DECIDE THE AMOUNT OF DAMAGES THAT
15 SHOULD BE AWARDED TO ORACLE FOR THE DEFENDANTS' STIPULATED
16 INFRINGEMENT OF ORACLE'S COPYRIGHTS, AND YOU MUST MAKE THIS
17 DETERMINATION BASED ON THE INSTRUCTIONS THAT I WILL GIVE YOU

18 NOW REGARDING THE LAW ON COPYRIGHT INFRINGEMENT AND THE DAMAGES
19 YOU MAY AWARD BASED ON THE AGREED COPYRIGHT INFRINGEMENT IN
20 THIS CASE.

21 NOW, A COPYRIGHT IS THE EXCLUSIVE RIGHT TO COPY.
22 THIS RIGHT TO COPY INCLUDES EXCLUSIVE RIGHTS TO DO THE
23 FOLLOWING THINGS:

24 ONE, TO REPRODUCE THE COPYRIGHTED WORK.

25 TWO, TO PREPARE DERIVATIVE WORKS BASED UPON THE

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1 COPYRIGHTED WORK BY ADAPTING OR TRANSFORMING IT.

2 THREE, TO DISTRIBUTE COPIES OF EITHER THE
3 COPYRIGHTED WORK OR ANY UNAUTHORIZED DERIVATIVE WORK.

4 AND, FOUR, TO DISPLAY PUBLICLY A COPY OF EITHER THE
5 COPYRIGHTED WORK OR ANY UNAUTHORIZED DERIVATIVE WORK.

6 IT IS THE OWNER OF THE COPYRIGHT WHO MAY EXERCISE
7 THESE EXCLUSIVE RIGHTS. THE OWNER REFERS TO THE AUTHOR OF THE
8 WORK OR ONE WHO HAS BEEN ASSIGNED THE OWNERSHIP OF THE
9 EXCLUSIVE RIGHTS IN THE WORK.

10 IN GENERAL, COPYRIGHT LAW PROTECTS AGAINST THE
11 PRODUCTION, ADAPTION -- ADAPTATION, DISTRIBUTION OR PUBLIC
12 DISPLAY OF THE OWNER'S COPYRIGHTED WORKS WITHOUT THE OWNER'S
13 PERMISSION.

14 AN OWNER MAY ENFORCE THESE RIGHTS TO EXCLUDE OTHERS
15 IN AN ACTION FOR COPYRIGHT INFRINGEMENT.

16 NOW, EVEN THOUGH ONE MAY ACQUIRE A COPY OF THE
17 COPYRIGHTED WORK, THE COPYRIGHT OWNER RETAINS CERTAIN RIGHTS
18 AND CONTROL OF THAT COPY, INCLUDING USES THAT MAY RESULT IN
19 ADDITIONAL COPIES OR ALTERATIONS OF THE WORK.

20 NOW, THE PARTIES HAVE ENTERED INTO SEVERAL
21 STIPULATIONS OF LIABILITY AND FACTS. THESE STIPULATIONS HAVE
22 NOW BECOME ORDERS OF THE COURT, AND THE STIPULATIONS HAVE BEEN
23 REFERRED TO BY THE PARTIES THROUGHOUT THE TRIAL AND ENTERED
24 INTO EVIDENCE LABELED JTX 1 THROUGH 5. THEY ALSO CAN BE FOUND
25 IN YOUR JUROR NOTEBOOKS AND ARE REFERENCED IN THE TABLE OF

1 CONTENTS AS NUMBERS 2 THROUGH 6 IN YOUR NOTEBOOK.

2 IN THESE STIPULATIONS, DEFENDANTS HAVE ADMITTED THAT
3 TOMORROWNOW IS DIRECTLY LIABLE TO ORACLE FOR ALL OF ORACLE'S
4 CLAIMS FOR DIRECT COPYRIGHT INFRINGEMENT OF ALL 120 ORACLE,
5 PEOPLESOFT, J.D. EDWARDS AND SIEBEL COPYRIGHTS THAT ARE LISTED
6 IN ATTACHMENT A TO TRIAL STIPULATION NUMBER 3.

7 TRIAL STIPULATION NUMBER 3 ALSO CONTAINS COUNTS OF
8 THE MINIMUM NUMBERS OF INFRINGING COPIES AND DOWNLOADS MADE BY
9 TOMORROWNOW. AND THE DEFENDANTS HAVE ALSO ADMITTED THAT SAP AG
10 AND SAP AMERICA ARE CONTRIBUTORILY AND VICARIOUSLY LIABLE FOR
11 ALL OF TOMORROWNOW'S COPYRIGHT INFRINGEMENT.

12 YOU ARE, THEREFORE, TO TREAT ALL OF ORACLE'S
13 COPYRIGHT INFRINGEMENT CLAIMS AS HAVING BEEN PROVED.

14 NOW, SAP AG AND SAP AMERICA AGREE THEY ARE LIABLE
15 FOR ALL OF TOMORROWNOW'S INFRINGEMENT BASED UPON PRINCIPLES OF
16 VICARIOUS LIABILITY. AND BY AGREEING TO VICARIOUS LIABILITY,
17 SAP AG AND SAP AMERICA AGREE THAT THEY BOTH RECEIVED A DIRECT
18 FINANCIAL BENEFIT FROM THE INFRINGING ACTIVITY OF TOMORROWNOW
19 AND THEY BOTH HAD THE RIGHT AND ABILITY TO SUPERVISE OR CONTROL
20 THE INFRINGING ACTIVITY OF TOMORROWNOW.

21 SAP AG AND SAP AMERICA ALSO AGREE THAT THEY ARE
22 LIABLE FOR ALL OF TOMORROWNOW'S INFRINGEMENT BASED UPON
23 PRINCIPLES OF CONTRIBUTORY INFRINGEMENT AND BY AGREEING TO
24 CONTRIBUTORY INFRINGEMENT, SAP AG AND SAP AMERICA AGREED THAT
25 THEY KNEW OR HAD REASON TO KNOW OF THE INFRINGING ACTIVITY OF

1 TOMORROWNOW AND THEY INTENTIONALLY AND MATERIALLY CONTRIBUTED
2 TO TOMORROWNOW'S INFRINGING ACTIVITY.

3 NOW YOU MUST DETERMINE, YOU MUST DETERMINE ORACLE'S
4 DAMAGES RESULTING FROM THE COPYRIGHT INFRINGEMENT AGREED TO BY
5 THE DEFENDANTS. ORACLE IS ENTITLED TO RECOVER THE ACTUAL

6 DAMAGES SUFFERED AS A RESULT OF THE INFRINGEMENT.

7 AS THE MEASURE OF ITS ACTUAL DAMAGES, ORACLE, AS THE
8 PLAINTIFF, HAS THE RIGHT TO SEEK TO RECOVER EITHER THE FAIR
9 MARKET VALUE OF A LICENSE FOR THE RIGHTS INFRINGED OR ITS LOST
10 PROFITS.

11 IF YOU AWARD ORACLE ACTUAL DAMAGES BASED ON ITS LOST
12 PROFITS, THEN ORACLE IS ALSO ENTITLED TO RECOVER ANY PROFITS
13 THAT EACH DEFENDANT MADE THAT ARE ATTRIBUTABLE TO THE
14 INFRINGEMENT.

15 IF YOU AWARD ORACLE ACTUAL DAMAGES BASED ON THE FAIR
16 MARKET VALUE OF A LICENSE FOR THE RIGHTS INFRINGED, THAT AWARD
17 TAKES INTO ACCOUNT THE DEFENDANTS' PROFITS ATTRIBUTABLE TO
18 THEIR INFRINGEMENT AND ORACLE IS NOT ENTITLED TO ANY ADDITIONAL
19 AWARD.

20 ORACLE MUST PROVE DAMAGES BY A PREPONDERANCE OF THE
21 EVIDENCE.

22 NOW, ORACLE IS ENTITLED TO RECOVER THE ACTUAL
23 DAMAGES SUFFERED AS A RESULT OF THE INFRINGEMENT. ACTUAL
24 DAMAGES MEANS THE AMOUNT OF MONEY ADEQUATE TO COMPENSATE ORACLE
25 FOR THE REDUCTION OF THE FAIR MARKET VALUE OF THE COPYRIGHTED

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1 WORK CAUSED BY THE INFRINGEMENT.

2 THE REDUCTION OF THE FAIR MARKET VALUE OF THE
3 COPYRIGHTED WORK IS THE AMOUNT A WILLING BUYER WOULD HAVE BEEN
4 REASONABLY REQUIRED TO PAY A WILLING SELLER AT THE TIME OF THE
5 INFRINGEMENT FOR THE ACTUAL USE MADE BY DEFENDANTS OF ORACLE'S
6 WORKS. THAT AMOUNT ALSO COULD BE REPRESENTED BY THE LOST
7 LICENSE FEES THAT ORACLE WOULD HAVE RECEIVED FOR DEFENDANTS'
8 UNAUTHORIZED USE OF ORACLE'S WORKS.

9 IN DETERMINING THE FAIR MARKET VALUE OF THE RIGHTS
10 INFRINGED, YOU MUST CONSIDER THE ENTIRE SCOPE OF INFRINGEMENT
11 WHICH IS REFLECTED IN THE FIVE STIPULATIONS IN YOUR JURY
12 NOTEBOOK.

13 NOW, WHILE THERE IS NO PRECISE FORMULA FOR

14 DETERMINING ACTUAL DAMAGES, YOUR AWARD MUST BE BASED ON
15 EVIDENCE, NOT ON SPECULATION, GUESSWORK OR CONJECTURE.
16 DETERMINING THE FAIR MARKET VALUE OF THE RIGHTS INFRINGED MAY
17 INVOLVE SOME UNCERTAINTY AND ORACLE IS NOT REQUIRED TO
18 ESTABLISH ITS ACTUAL DAMAGES WITH PRECISION.

19 NOW, IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S
20 ACTUAL DAMAGES IS A FAIR MARKET VALUE LICENSE, YOU SHOULD
21 CONSIDER ALL OF THE INFORMATION KNOWN TO AND ALL OF THE
22 EXPECTATIONS OF THE PARTIES ON THE DATES OF THE HYPOTHETICAL
23 NEGOTIATIONS, WHICH ARE THE DATES ON WHICH INFRINGEMENT BEGAN.

24 YOU MUST DETERMINE WHAT WOULD HAVE BEEN THE RESULT
25 OF THIS NEGOTIATION IN ORDER TO ESTABLISH THE FAIR MARKET

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1 VALUE.

2 THE FAIR VALUE MARKET VALUE IS AN OBJECTIVE MEASURE
3 OF ORACLE'S DAMAGES THAT IS MEANT TO APPROXIMATE THE FAIR
4 MARKET VALUE OF A LICENSE FOR ALL OF THE COPYRIGHTS DEFENDANTS'
5 INFRINGED CALCULATED AT THE TIME THE INFRINGEMENT COMMENCED,
6 WHICH THE PARTIES AGREE IS JANUARY 19TH, 2005 FOR THE
7 PEOPLESOFT, J.D. EDWARDS AND THE DATABASE COPYRIGHTS, AND
8 SEPTEMBER 29TH, 2006 FOR THE SIEBEL COPYRIGHTS.

9 THE VALUE OF A HYPOTHETICAL LICENSE IS NOT
10 NECESSARILY THE AMOUNT THE DEFENDANTS IN THIS CASE WOULD HAVE
11 AGREED TO PAY OR THAT ORACLE WOULD HAVE ACTUALLY AGREED TO
12 ACCEPT. YOU MAY CONSIDER EVIDENCE OF EVENTS AND FACTS THAT
13 HAPPENED AFTER THE DATE OF THE HYPOTHETICAL NEGOTIATION ONLY TO
14 THE EXTENT THAT IT PROVIDES INSIGHT INTO THE EXPECTATIONS OF
15 THE PARTIES AT THE TIME THE INFRINGEMENT FIRST BEGAN OR INSIGHT
16 INTO THE AMOUNT A WILLING BUYER WOULD HAVE BEEN REASONABLY
17 REQUIRED TO PAY A WILLING SELLER AT THE TIME OF INFRINGEMENT.
18 AND YOU MAY NOT LIMIT OR INCREASE THE FAIR MARKET VALUE OF THE
19 RIGHTS INFRINGED BASED ON THE ACTUAL PROFITS DEFENDANTS MADE.

20 IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S
21 DAMAGES IS LOST PROFITS, YOU MUST DETERMINE WHAT PROFITS ORACLE
22 PROVES IT WOULD HAVE MADE WITHOUT THE INFRINGEMENT.

23 LOST PROFITS ARE THE REVENUE ORACLE WOULD HAVE MADE
24 WITHOUT THE INFRINGEMENT LESS ANY ADDITIONAL EXPENSES IT WOULD
25 HAVE INCURRED IN MAKING THE SALES.

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1 NOW, IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S
2 ACTUAL DAMAGES IS LOST PROFITS, YOU MUST ALSO DETERMINE THE
3 AMOUNT OF PROFITS MADE BY ANY DEFENDANT THAT ARE ATTRIBUTABLE
4 TO THE STIPULATED INFRINGEMENT.

5 YOU MAY NOT INCLUDE IN AN AWARD OF DEFENDANTS'
6 PROFITS ANY AMOUNT THAT YOU ALREADY TOOK INTO ACCOUNT IN
7 DETERMINING ORACLE'S LOST PROFITS. YOU MAY MAKE AN AWARD OF
8 DEFENDANTS' PROFITS ONLY IF YOU FIND THAT ORACLE HAS SHOWED A
9 CAUSAL RELATIONSHIP BETWEEN THE INFRINGEMENT AND THE PROFITS
10 GENERATED INDIRECTLY FROM THE INFRINGEMENT.

11 THE DEFENDANTS PROFITS ARE DETERMINED BY SUBTRACTING
12 ALL EXPENSES FROM THE DEFENDANTS' GROSS REVENUE. DEFENDANTS'
13 GROSS REVENUE IS ALL OF DEFENDANTS' RECEIPTS ASSOCIATED WITH
14 THE STIPULATED INFRINGEMENT. EXPENSES -- I AM SORRY, I SKIPPED
15 A SENTENCE.

16 ORACLE HAS THE BURDEN OF PROVING DEFENDANTS' GROSS
17 REVENUE BY A PREPONDERANCE OF THE EVIDENCE.

18 AND EXPENSES ARE ALL OPERATING COSTS, OVERHEAD
19 COSTS, AND PRODUCTION COSTS INCURRED IN PRODUCING DEFENDANTS'
20 GROSS REVENUE.

21 DEFENDANTS HAVE THE BURDEN OF PROVING THEIR EXPENSES
22 BY A PREPONDERANCE OF THE EVIDENCE.

23 NOW, UNLESS YOU FIND THAT A PORTION OF THE PROFIT
24 FROM THE USE OF THE COPYRIGHTED WORKS IS ATTRIBUTABLE TO
25 FACTORS OTHER THAN USE OF THE COPYRIGHTED WORKS, ALL OF THE

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1 PROFIT IS TO BE ATTRIBUTED TO THE INFRINGEMENT. AND THE

2 DEFENDANTS HAVE THE BURDEN OF PROVING THE PORTION OF THE
3 PROFIT, IF ANY, ATTRIBUTABLE TO FACTORS OTHER THAN INFRINGING
4 THE COPYRIGHTED WORKS.

5 ALL RIGHT. NOW WHEN YOU BEGIN YOUR DELIBERATIONS,
6 YOU SHOULD ELECT ONE MEMBER OF THE JURY TO ACT AS YOUR
7 PRESIDING JUROR. THAT PERSON WILL PRESIDE OVER THE
8 DELIBERATIONS AND SPEAK FOR YOU HERE IN COURT.

9 YOU WILL THEN DISCUSS THE CASE WITH YOUR FELLOW
10 JURORS TO REACH AGREEMENT, IF YOU CAN DO SO. YOUR VERDICT MUST
11 BE UNANIMOUS. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF,
12 BUT YOU SHOULD DO SO ONLY AFTER YOU HAVE CONSIDERED ALL OF THE
13 EVIDENCE, DISCUSSED IT FULLY WITH THE OTHER JURORS AND LISTENED
14 TO THE VIEWS OF YOUR FELLOW JURORS. DO NOT HESITATE TO CHANGE
15 YOUR OPINION IF THE DISCUSSION PERSUADES YOU THAT YOU SHOULD.
16 DO NOT COME TO A DECISION SIMPLY BECAUSE OTHER JURORS THINK
17 THAT IT IS RIGHT. IT IS IMPORTANT THAT YOU ATTEMPT TO REACH A
18 UNANIMOUS VERDICT BUT, OF COURSE, ONLY IF EACH OF YOU CAN DO SO
19 AFTER HAVING MADE YOUR OWN CONSCIENTIOUS DECISION. DO NOT
20 CHANGE AN HONEST BELIEF ABOUT THE WEIGHT AND EFFECT OF THE
21 EVIDENCE SIMPLY TO REACH A VERDICT.

22 DURING YOUR DELIBERATIONS, YOU MUST NOT COMMUNICATE
23 WITH OR PROVIDE ANY INFORMATION TO ANYONE BY ANY MEANS ABOUT
24 THIS CASE. YOU MAY NOT USE ANY ELECTRONIC DEVICE OR MEDIA SUCH
25 AS A TELEPHONE, CELL PHONE, SMART PHONE, IPHONE, BLACKBERRY OR

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1 COMPUTER, THE INTERNET, ANY INTERNET SERVICE, OR ANY TEXT OR
2 INSTANT MESSAGING SERVICE, OR ANY INTERNET CHAT ROOM, BLOG, OR
3 WEBSITE SUCH AS FACEBOOK, MY SPACE, LINKED IN, U TUBE OR
4 TWITTER TO COMMUNICATE TO ANYONE ANY INFORMATION ABOUT THIS
5 CASE OR TO CONDUCT ANY RESEARCH ABOUT THIS CASE UNTIL I ACCEPT
6 YOUR VERDICT HERE IN OPEN COURT.

7 IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO
8 COMMUNICATE WITH ME, YOU MAY SEND A NOTE THROUGH THE COURT
9 SECURITY OFFICER, SIGNED BY YOUR PRESIDING JUROR, BY ONE OF THE
10 OTHER MEMBERS OF THE JURY.

11 NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO
12 COMMUNICATE WITH ME EXCEPT BY A SIGNED WRITING AND I WILL
13 COMMUNICATE WITH ANY OF YOU CONCERNING THE CASE ONLY IN WRITING
14 OR HERE IN OPEN COURT.

15 IF YOU SEND OUT A QUESTION, I WILL CONSULT WITH THE
16 PARTIES BEFORE ANSWERING IT. IT MAY TAKE SOME TIME AND YOU MAY
17 CONTINUE YOUR DELIBERATIONS WHILE WAITING FOR AN ANSWER TO ANY
18 QUESTION.

19 AND REMEMBER, YOU ARE NOT TO TELL ANYONE, INCLUDING
20 ME, HOW THE JURY STANDS NUMERICALLY OR OTHERWISE UNTIL YOU HAVE
21 REACHED A UNANIMOUS VERDICT OR HAVE BEEN DISCHARGED BY ME. AND
22 DO NOT DISCLOSE ANY VOTE COUNT IN ANY NOTE THAT YOU MIGHT SEND
23 OUT.

24 A VERDICT FORM HAS BEEN PREPARED FOR YOU. AND AFTER
25 YOU HAVE REACHED A UNANIMOUS AGREEMENT ON A VERDICT, YOUR

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1 PRESIDING JUROR WILL FILL IN THE FORM THAT HAS BEEN GIVEN TO
2 YOU, SIGN IT, DATE IT, AND ADVISE THE COURT SECURITY OFFICER
3 THAT YOU ARE READY TO RETURN TO THE COURTROOM.

4 WE WILL ALSO SEND BACK WITH YOU THE -- IN ADDITION
5 TO THE INSTRUCTIONS AND THE VERDICT FORM, THE EXHIBITS THAT
6 HAVE BEEN RECEIVED INTO EVIDENCE.

7 AT THIS TIME, LADIES AND GENTLEMEN, YOU ARE EXCUSED.
8 I WILL CALL YOU BACK OUT BEFORE 5:00 O'CLOCK AT THE END OF THE
9 DAY TO TALK ABOUT OUR SCHEDULE FOR TOMORROW AND THE REST OF THE
10 WEEK.

11 MADAME CLERK, WILL YOU TAKE THE JURY IN?

12 (JURORS BEGIN DELIBERATIONS.)

13 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

14 THE COURT: ALL RIGHT, COUNSEL. WHAT I WOULD LIKE
15 IS A BLIND SET OF THE INSTRUCTIONS THAT WERE E-FILED LAST
16 NIGHT. DO YOU HAVE A BLIND SET?

17 MR. ALINDER: I DO.

18 THE COURT: LEAVE THEM UP HERE.

19 MR. ALINDER: I HAVE FIVE COPIES.
20 THE COURT: OKAY. ALL RIGHT. AND YOU WILL NEED TO
21 MAKE SURE THAT NICHOLE HAS YOUR CELL PHONE NUMBER SO THAT WE
22 CAN REACH YOU DURING THE COURSE OF DELIBERATIONS.
23 AND I JUST HAVE A COUPLE OF COMMENTS. MAYBE BY THE
24 NEXT TIME I SEE YOU, ONE SIDE OR THE OTHER IS GOING TO BE VERY
25 DISAPPOINTED. SO, I WOULD LIKE TO JUST TAKE A FEW MOMENTS

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1 BEFORE YOU ALL DISPERSE FOR NOW TO COMMEND YOU ON YOUR
2 PRESENTATION OVER THE LAST COUPLE OF WEEKS. YOU ALL HAVE DONE
3 A VERY GOOD JOB. THAT GOES WITHOUT SAYING. I AM SURE GIVEN
4 YOU HAVE BEEN WORKING AROUND THE CLOCK, I KNOW YOU HAVE MADE A
5 VERY COHERENT PRESENTATION AND YOU JUST PUT IT TOGETHER IN TOP
6 NOTCH FASHION ALL ALONG.

7 BUT IN ADDITION TO THAT, I WANTED TO JUST THANK YOU
8 ALL FOR THE COURTESY THAT YOU HAVE EXTENDED TO EACH OTHER
9 THROUGHOUT THE COURSE OF THESE PROCEEDINGS AND, OF COURSE, TO
10 THE COURT.

11 I KNOW HOW DIFFICULT THIS CASE IS. I KNOW HOW HARD
12 FOUGHT IT HAS BEEN ALL ALONG, BUT YOU ALL, I THINK YOU PROBABLY
13 SURPRISED YOURSELVES. YOU WERE ABLE TO AGREE ON MORE THINGS
14 THAN I AM SURE YOU THOUGHT YOU WOULD TWO OR THREE MONTHS AGO.
15 I DO APPRECIATE THE WORK YOU PUT IN, GETTING THE INSTRUCTIONS.
16 YOU'VE PRESERVED ALL OF YOUR OBJECTIONS. YOU HAVE DONE A VERY
17 GOOD JOB OF GIVING ME A LOT OF MATERIAL JOINTLY, AND I KNOW
18 THAT THAT TOOK A LOT OF EXTRA WORK ON YOUR PART, AND IT HAS NOT
19 GONE UNNOTICED.

20 OKAY? MAKE SURE NICHOLE KNOWS HOW TO REACH YOU AND
21 WE WILL CONTACT YOU WITH ANY QUESTIONS OR WITH ANY VERDICT.

22 AND, MR. BOIES, I WILL JUST SAY TO YOU THAT I GUESS
23 I AM GLAD THAT I AM NOT THE ONLY PERSON WHO DOESN'T REMEMBER
24 ALL OF THE FACTS BECAUSE YOU CERTAINLY MISSTATED WITH REGARD TO
25 MR. JONES.

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1 HE WAS A WITNESS HERE LAST MONDAY. AND YOU SAID
2 ABOUT MR. MITTELSTAEDT THAT HE DIDN'T BRING HIM. HE HAD
3 REFERRED TO THE TESTIMONY AS SOMEBODY WHO WASN'T HERE.

4 MR. BOIES: I MUST HAVE MISSED THAT, YOUR HONOR.

5 THE COURT: OBVIOUSLY YOU DID. NEEDLESS TO SAY,
6 THERE WERE LOTS OF BITS AND PIECES HERE, AND YOU ALL DID A GOOD
7 JOB.

8 WE ARE ADJOURNED FOR NOW.

9 MR. BOIES: THANK YOU.

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11 ((CONTINUED ON NEXT PAGE; NOTHING OMITTED.))

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1 ((COURT IN RECESS WHILE JURY DELIBERATING.))

2 ((PROCEEDINGS RESUMED AT 4:57 P.M.))

3 ((THE FOLLOWING PROCEEDINGS WERE HEARD OUT OF THE
4 PRESENCE OF THE JURY:))

5 THE COURT: ALL RIGHT. "WE HAVE A QUESTION FROM THE
6 JURY, AND IT READS AS FOLLOWS: WE WANT TO HAVE A BREAKDOWN OR
7 CHART OF HOW MR. MEYER AND MR. CLARKE CALCULATED ALL OF THEIR

8 FAIR MARKET VALUE OR LOST PROFIT AMOUNTS."

9 I'M SURE THERE ARE SOME EXHIBITS, BUT THEY'RE HAVING
10 A HARD TIME FINDING THEM. SO WHAT I THOUGHT WE WOULD DO IS I
11 WOULD EXCUSE THEM FOR THE DAY AND -- AND THEN YOU ALL CAN PULL
12 OUT THE VARIOUS DIFFERENT EXHIBITS THAT HAVE BEEN USED SO THAT I
13 CAN PREVIEW THEM AND DETERMINE WHICH ONE -- IF WE CAN DO IT,
14 JUST ONE PER EXPERT -- SEND IT BACK TO THEM.

15 I MEAN, I'M SURE THEY'RE IN THERE. THEY'RE IN EITHER
16 SOME OF THE DEMONSTRATIVES THAT WERE -- THAT WE ALLOWED TO GO IN
17 OR IN SOME OF THE UNDERLYING EXHIBITS. THEY JUST CAN'T FIND
18 THEM. OKAY?

19 SO EVERYONE IN AGREEMENT THAT WE SHOULD EXCUSE THEM
20 FOR THE DAY AND WE'LL HAVE IT FOR THEM FIRST THING IN THE
21 MORNING?

22 MR. BOISE: YES, YOUR HONOR.

23 MR. LANIER: YES.

24 THE COURT: ALL RIGHT.

25 /////

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1 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
2 OF THE JURY:)

3 THE COURT: ALL RIGHT.

4 GOOD AFTERNOON AGAIN, LADIES AND GENTLEMEN.

5 AND WHO SPEAKS FOR YOU? WHO'S BEEN THE ELECTED
6 CHAIRPERSON?

7 MR. HALBERT?

8 THE FOREPERSON: YES.

9 THE COURT: I RECEIVED THE QUESTION THAT YOU SENT IN,
10 AND WE WILL GIVE YOU -- WE'LL PULL OUT THE EXHIBIT OR EXHIBITS
11 THAT YOU NEED THAT WILL GIVE YOU THE INFORMATION AS TO THE
12 BREAKDOWN OF BOTH MR. MEYER AND MR. CLARKE'S CALCULATIONS OF THE
13 TWO KINDS OF DAMAGES, THE FAIR MARKET VALUE OR THE LOST PROFIT
14 DAMAGES.

15 BUT BECAUSE I WOULD LIKE TO PREVIEW THE EXHIBITS --
16 THEY'RE PROBABLY IN THE STACK OF THINGS THAT YOU ALL HAVE BEEN
17 GIVEN, BUT I FIGURED YOU PROBABLY COULDN'T FIND IT -- WE'LL

18 FIGURE OUT THE BEST ONES AND PULL THEM OUT, BUT WE'LL GIVE IT TO
19 YOU FIRST THING IN THE MORNING.

20 SINCE WE'RE AT THE END OF THE TRIAL DAY AND WE NEED A
21 FEW MINUTES TO DO THAT, WE'LL PROVIDE IT FOR YOU FIRST THING IN
22 THE MORNING AT 8:30. SO YOU ALL ARE EXCUSED FOR THE EVENING.

23 AND KEEP IN MIND ALL THE INSTRUCTIONS THAT I'VE GIVEN
24 YOU SINCE THE COMMENCEMENT OF THE CASE WILL CONTINUE TO APPLY
25 UNTIL YOUR DISCHARGE BY THE COURT.

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2226

1 SO WE'LL SEE YOU TOMORROW MORNING, THEN, AT 8:30.

2 (OFF-THE-RECORD DISCUSSION.)

3 THE COURT: NO, WE'LL TALK TOMORROW ABOUT -- YOU CAN
4 LET US KNOW THROUGHOUT -- SOMETIME THROUGHOUT THE COURSE OF THE
5 DAY WHAT YOU ARE GOING TO WANT TO DO ABOUT WEDNESDAY IF -- IF
6 YOU SHOULD NEED TO HAVE AN ADDITIONAL DAY. SO WE'LL TALK
7 TOMORROW MORNING. OKAY?

8 AND WE'LL PROVIDE LUNCH FOR YOU, TOO, FOR EVERY DAY
9 THAT YOU'RE HERE. OKAY. SEE YOU TOMORROW.

10 (THE FOLLOWING PROCEEDINGS WERE HEARD OUT OF THE
11 PRESENCE OF THE JURY:)

12 THE COURT: OKAY. SO DO YOU ALL WANT TO LOOK OVER
13 YOUR MATERIALS TONIGHT AND JUST COME IN IN THE MORNING?

14 MR. LANIER: WE WILL.

15 THE COURT: NOW, I WOULD LIKE TO PREVIEW THEM, SO
16 I'LL SEE YOU HERE, LET'S SAY, 8:10. THAT WILL GIVE US 20
17 MINUTES. I CAN LOOK AT WHAT EACH SIDE -- WHAT I'D LIKE IS ONE
18 OR TWO SLIDES FOR EACH OF THE EXPERTS. I CAN KIND OF ENVISION
19 THE ONES THAT I WOULD PICK, BUT I'LL ALLOW YOU ALL TO PICK OUT
20 THE ONES THAT YOU WANT.

21 MR. MITTELSTAEDT: I THINK WHAT WE'RE TALKING ABOUT
22 REALLY ARE DEMONSTRATIVES.

23 THE COURT: YEAH.

24 MR. BOISE: I THINK THAT'S RIGHT.

25 THE COURT: THEY ARE -- THEY ARE DEMONSTRATIVES.

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1 OKAY? WE'LL SEE YOU IN THE MORNING, THEN.

2 THE CLERK: JUDGE, I THINK THERE'S A FEW ISSUES ABOUT
3 THE EXHIBITS THAT NEED TO BE DEALT WITH THAT.

4 THE COURT: STILL EXHIBITS?

5 THE CLERK: YES.

6 THE COURT: OKAY.

7 MR. LANIER: THERE'S SOMETHING -- APPARENTLY WE'RE
8 SUPPOSED TO READ IN SOME DEMONSTRATIVES AND HOW THEY WERE
9 REMAINED INTO THE RECORD. WE'D BE HAPPY TO SUBMIT IT IN
10 WRITING, BUT WE'VE BEEN ASKED TO READ IT INTO THE RECORD, WHICH
11 WE CAN DO.

12 THE COURT: OKAY.

13 MR. ALINDER: OUR ONLY ISSUE WAS THERE WAS ONE
14 EXHIBIT -- I BELIEVE IT WAS READ IN AND -- AS PTX432, AND IT WAS
15 ACTUALLY MOVED INTO EVIDENCE AND ADMITTED AS A432. AND THE A432
16 IS THE CORRECT EXHIBIT NUMBER. THE INITIAL REFERENCE TO IT AS
17 PTX432 WAS INACCURATE.

18 THE COURT: OKAY. ALL RIGHT. IS THAT -- DO YOU --
19 ARE YOU IN AGREEMENT?

20 MR. LANIER: WE HAVE NO PROBLEM WITH THAT.

21 THE COURT: ALL RIGHT. SO IT'S A432.

22 MS. PERRY: THAT'S RIGHT. AND THEN IN TERMS OF
23 DEMONSTRATIVES, WHAT WE'VE DONE IS JUST GONE THROUGH ALL THE
24 DEMONSTRATIVES THAT DEFENDANTS HAVE OFFERED INTO EVIDENCE AND
25 WE'VE RENAMED THEM WITH A NUMBERS WHICH ARE DEFENDANTS' TRIAL
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1 EXHIBIT NUMBERS.

2 AND IF THE COURT WOULD PERMIT, WE'LL JUST READ THOSE
3 INTO THE RECORD AT THIS TIME. SO THE FOLLOWING DEMONSTRATIVES
4 WERE USED IN DEFENDANT'S OPENING STATEMENT. DD-A-001 IS RENAMED
5 A-9500. DD-A-002 IS RENAMED A-9501. DD-A-003 IS RENAMED
6 A-9502. DD-A-004 IS RENAMED A-9503. DD-A-005 IS RENAMED
7 A-9504. DD-A-006 IS RENAMED A-9505. DD-A-019 IS RENAMED
8 A-9506.

9 THE FOLLOWING DEMONSTRATIVES WERE USED IN DEFENDANTS'
10 CROSS-EXAMINATION OF KEVIN MANDIA, DD-A-021 IS RENAMED A-9507.
11 DD-A-022 IS RENAMED A-9508. DD-A-023 IS RENAMED A-9509.

12 THE FOLLOWING DEMONSTRATIVES WERE USED IN DEFENDANTS'
13 CROSS-EXAMINATION OF PAUL MEYER: DD-A-024 IS RENAMED A-9510.
14 AND A-9332 WAS USED FOR DEMONSTRATIVES PURPOSES ONLY WITH
15 MR. MEYER.

16 THE FOLLOWING DEMONSTRATIVES WERE USED AS SLIDES WITH
17 DEFENDANTS' DIRECT EXAMINATION OF STEPHEN CLARKE. SLIDE 1 IS
18 A-9511. SLIDE 2 IS A-9512. SLIDE 3 IS A-9513. SLIDE 4 IS
19 A-9514. SLIDE 5 IS A-9515. SLIDE 6 IS A-9516. SLIDE 7 IS
20 A-9517. SLIDE 8 IS A-9518. SLIDE 9 IS A-9519. SLIDE 10 IS
21 A-9520. SLIDE 11 IS A-9521. SLIDE 12 IS A-9522. SLIDE 13 IS
22 A-9523. SLIDE 18 IS A-9524. SLIDE 20 IS A-9525. SLIDE 21 IS
23 A-9526. SLIDE 24 IS A-9527. SLIDE 25 IS A-9528. SLIDE 26 IS
24 A-9529. SLIDE 27 IS A-9530. SLIDE 28 IS A-9531. SLIDE 29 IS
25 A-9532. SLIDE 30 IS A-9533. SLIDE 31 IS A-9534. SLIDE 32 IS
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1 A-9535. SLIDE 33 IS A-9536. SLIDE 34 IS A-9537. SLIDE 35 IS
2 A-9538. SLIDE 36 IS A-9539. SLIDE 37 IS A-9540. SLIDE 39 IS
3 A-9541. SLIDE 40 IS A-9542. SLIDE 43 IS A-9543. SLIDE 44 IS
4 A-9544. SLIDE 46 IS A-9545. SLIDE 53 IS A-9546. SLIDE 54 IS
5 A-9547.

6 THE FOLLOWING EXHIBIT WAS USED FOR DEMONSTRATIVE
7 PURPOSES ONLY WITH THE VIDEO TESTIMONY OF TRACY HALLENBERGER.
8 THAT'S A-9 -- EXCUSE ME -- 1738.

9 THE FOLLOWING EXHIBIT WAS USED FOR DEMONSTRATIVE
10 PURPOSES ONLY WITH THE VIDEO TESTIMONY OF JOHN RITCHIE. THAT
11 WAS A-1815.

12 AND FINALLY, THE FOLLOWING EXHIBIT WAS USED FOR
13 DEMONSTRATIVE PURPOSES ONLY WITH THE VIDEO TESTIMONY OF JEFFREY
14 O'DONNELL. AND THAT WAS A-0646.

15 (DEFENDANTS' EXHIBITS A9500 THROUGH
16 A9510, A9332, A9511 THROUGH A9547,
17 A1738, A1815, A646 MARKED FOR

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IDENTIFICATION)

THE COURT: OKAY.

MS. PERRY: THANK YOU, YOUR HONOR.

THE COURT: ANYTHING ELSE FROM YOU ALL? NO? OKAY.

MR. HOWARD: NO.

THE COURT: ALL RIGHT. WE'LL SEE YOU TOMORROW

MORNING ABOUT 8:10.

(PROCEEDINGS WERE CONCLUDED AT 5:07 P.M.)

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2230

CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, MONDAY, NOVEMBER 22, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

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

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

DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 23, 2010