



Federal Trade Commission

Lessons Learned from *United States v. Oracle Corp.*

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prepared for

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Mergers, Enforcement and Standardization

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Introduction

When we talk about the future of the merger enforcement in the technology sector, it is important to consider what we can learn from the past. I don't think anyone in the antitrust bar would disagree that the case of *United States v. Oracle Corporation*¹ provides a number of valuable lessons that we

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing these remarks.

¹ 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

all can use going forward. I am here today to share some of those lessons with you.

I was one of three lead trial counsel for Oracle Corporation (“Oracle”). The other two were Dan Wall and Greg Lindstrom. They were super trial lawyers, and it was a privilege to work with them. That said, I think they too would agree that we all learned a lot from that case.

Background

The case arose out of a June 6, 2003 hostile tender offer that Oracle had made for the shares of PeopleSoft, Inc. (“PeopleSoft”)—a rival in the market for the development, production, marketing and service of enterprise resource planning (ERP) software—literally on the heels of PeopleSoft’s own announcement, just days before, that it had reached an agreement to acquire another market rival, J.D. Edwards.² Admittedly, the timing was not coincidental. Among the Department of Justice’s (“DOJ”) trial exhibits was a June 2, 2003 internal email exchange between Safra Catz (then an Oracle Executive Vice-President) and Oracle CEO Larry Ellison with the subject line “Psft/JDEC,” in which Safra stated, “Now would be the time to launch on PSFT,” and to which Larry replied, “Just what I was thinking.”³

² Specifically, PeopleSoft made its announcement on June 2, 2003, and Oracle made its tender offer on June 6, 2003. For a useful Oracle–PeopleSoft timeline, see *Oracle’s Bid for PeopleSoft: Timeline of Key Developments*, GARTNER, INC., <http://www.gartner.com/pages/story.php.id.8834.s.8.jsp> (last visited Jan. 26, 2012).

³ Government Trial Exhibit P3327, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004), available at <http://www.justice.gov/atr/cases/f204400/204457.pdf>.

PeopleSoft's reaction was immediately negative. PeopleSoft CEO Craig Conway reportedly characterized Oracle's tender offer as "atrociously bad behavior from a company with a history of atrociously bad behavior" and compared Larry to Genghis Khan.⁴ That unvarnished animosity between the two companies and their respective CEOs would give color to the ensuing DOJ investigation and challenge of the transaction. As one journalist closely watching the case put it, *Oracle* was a "landmark case" not only because it stood out as a prominent merger challenge in the high technology sector, but also because it involved a clash of two unique, corporate cultures: Oracle's culture based on "the ruthless, take-no-prisoners attitude of the man at the top," CEO Larry Ellison, and PeopleSoft's culture based on "being a kinder, gentler place to work for employees and more caring of customers and partners."⁵

From Craig Conway's standpoint, it would have been an understatement to call Oracle a most unwelcome suitor. In particular, Conway dwelled on a burning suspicion that Ellison's real reason for making the tender offer was to eliminate PeopleSoft as a competitor—that after buying PeopleSoft, Oracle would discontinue PeopleSoft's products and migrate the customers over to Oracle's products. At one point, in a jab

⁴ Barbara Darrow, *Ellison Seeks Sit-Down with PeopleSoft*, CRN (June 9, 2003, 6:00 PM), http://www.crn.com/news/channel-programs/18830312/ellison-seeks-sit-down-with-peoplesoft.htm;jsessionid=-Vix6SQidI234Ou-XU3VyQ**.ecappj02.

⁵ Karen Southwick, *Perspective: Trying a "Landmark Case"*, CNET NEWS (June 10, 2004, 4:00 AM), http://news.cnet.com/Trying-a-landmark-case/2010-1014_3-5229895.html?tag=txt.

unambiguously directed at Ellison, Conway reportedly said that the tender offer was “like me asking if I could buy your dog so I can go out back and shoot it.”⁶ But Ellison himself did not suffer from a loss for words. At an Oracle analyst meeting during the summer of 2003, he reportedly retorted that if Conway and his dog “were standing next to each other and I had one bullet, trust me, it wouldn’t be for the dog.”⁷ This riposte in turn led Conway to appear at a September 2003 PeopleSoft customer conference with his black Labrador (named Abbey), both of them wearing bulletproof vests.⁸

In an attempt to kill the transaction, Conway, with the help of PeopleSoft’s lawyers, decided to cite antitrust concerns as a strong reason why the transaction should not be entertained by the PeopleSoft board. In an interview, Conway reportedly stated, “This wouldn’t pass an antitrust review. It’s like Ford saying it’s buying Chrysler and shutting it down. You’d only be left with two choices in the marketplace.”⁹ Sure enough, when the PeopleSoft board rejected Oracle’s tender offer on June 12, 2003, it cited antitrust concerns as well as the low offer price (originally \$16 a share) as principal reasons for its rejection.¹⁰

⁶ Chris O’Brien, *PeopleSoft’s Tough Defense*, SAN JOSE MERCURY NEWS, Mar. 7, 2004, at 1F.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Ellison and Oracle strongly suspected that Conway and PeopleSoft were “aggressively” lobbying DOJ, which had received clearance to review the transaction, to challenge the merger.¹¹ And indeed, the merger review process dragged on for months, into 2004. Although Conway flatly denied any lobbying, when DOJ finally decided on February 26, 2004 that it would challenge the transaction, Conway reportedly announced—triumphantly, “Now that the antitrust day of reckoning has arrived and the Justice Department has announced its decision to sue to block the transaction, it is time for Oracle to abandon its efforts to acquire the company.”¹²

What Conway and PeopleSoft did not count on—or perhaps they should have anticipated—was Ellison and Oracle’s willingness to take on a fight with DOJ.¹³ Oracle had doggedly pursued PeopleSoft, and when DOJ staff indicated in early February 2004 that they were recommending a challenge, the company pulled out the stops with its own lobbying efforts. Not only had Oracle already hired Jim Rill, formerly head of the Antitrust Division under the senior President Bush’s administration, and economist Jim Miller, a former Chairman of the Federal Trade Commission (“FTC”), to help make its case,¹⁴ but it also hired former Senator Tim Hutchinson, a

¹¹ Jaret Seiberg, *DOJ to Block Oracle–PeopleSoft*, THE DEAL, Feb. 27, 2004, §§ M and A.

¹² *Id.*

¹³ Chris O’Brien, *No Clear Winner As Testimony Concludes; Each Side’s Closing Slated for July 20*, SAN JOSE MERCURY NEWS, July 2, 2004, at 1F (describing Oracle’s decision to fight DOJ as an “unusual step”).

¹⁴ Chris O’Brien, *Oracle Dealt Key Setback on Hostile Bid; Justice Department Staff Opposes Offer for PeopleSoft*, SAN JOSE MERCURY NEWS, Feb. 11, 2004, at 1A; *In the News: Bring Out*

Republican from Arkansas, to meet with staff members of the Senate Judiciary Committee, in hopes of persuading them to lean on DOJ not to accept staff's recommendation.¹⁵ (At that time, Hew Pate was the Assistant Attorney General in charge of the Antitrust Division, and it was going to be his decision to make.)

Oracle's last-ditch political moves did not succeed, however, and DOJ filed suit in federal court in San Francisco. The case was assigned to Judge Vaughn Walker, a Republican appointee of the senior President Bush, and as we would later learn, a judge with a solid background in economics, having done a graduate fellowship in economics at Berkeley before going on to law school at Stanford.¹⁶ Although Oracle had hired Jim Rill and Howrey (as well as Morrison & Foerster) to make its case to DOJ not to bring a challenge, when that effort was unsuccessful and the antitrust fight moved from Washington, DC to San Francisco, the company turned to us (Dan Wall, Greg Lindstrom, myself, and Latham & Watkins), as the press reported, for our "West Coast litigation strength."¹⁷

the Big Guns, July 11, 2003, MARLIN & ASSOCIATES, LLC, http://www.marlinllc.com/press-intheNews/press_id=266 (reprint of article in *USAToday*) (last visited Jan. 27, 2012).

¹⁵ David A. Vise, *Oracle Turns to Politics on PeopleSoft Takeover*, WASH. POST, Feb. 25, 2004, at E01.

¹⁶ Bob Egelko, *The Judge Who Will Hear the Prop. 8 Case*, SAN FRANCISCO CHRON., Aug. 16, 2009, at A1.

¹⁷ Steve Hoare, *Latham Elbows Out Howrey and Morrison on Oracle Battle*, THE LAWYER, Mar. 8, 2004, <http://www.thelawyer.com/latham-elbows-out-howrey-and-morrison-on-oracle-battle/108961.article>.

Before I turn to the lessons, I should not neglect to mention that the European Commission (“EC”) was also reviewing the Oracle–PeopleSoft merger at the same time that DOJ was. But with respect to the EC, Oracle was able to persuade Competition Commissioner Mario Monti to stop the clock on the investigation in order to gather more information.¹⁸ This in turn allowed Oracle to focus its energies on the ensuing battle with DOJ, and ultimately to obtain a favorable decision from Judge Walker before the EC was ready to move forward again towards a decision.¹⁹ I will have a bit more to say about this strategy later.

Lessons

Lesson 1: Don’t expect to get hired to defend a merger case when you didn’t succeed in persuading the government not to bring it.

As I mentioned earlier, although Oracle had hired Howrey and Morrison & Foerster, both well respected and capable law firms, the company changed its counsel when DOJ filed suit in San Francisco. Although one could say that we were hired because of our “West Coast litigation strength,” I don’t think that would tell the whole story. Howrey and Morrison & Foerster both had offices in San Francisco, and significant litigation bench strength to boot. Rather, I think the lesson here is that when a client hires you to plead with the government not to bring a case and you don’t succeed, you shouldn’t

¹⁸ Renee Cordes, *EU to Clear Oracle’s PeopleSoft Bid*, THE DEAL, Sept. 27, 2004, §§ M & A [hereinafter Cordes, *Clear*]; Paul Meller, *Europe Said to Be Close to Allowing Bid by Oracle*, N.Y. TIMES, Sept. 25, 2004, § C, at 2; Renee Cordes, *EC’s PeopleSoft Probe Hits Hurdles*, THE DEAL, Apr. 19, 2004 [hereinafter Cordes, *Hurdles*].

¹⁹ *Id.*

expect to get hired to defend the case. Whether one is meeting with an antitrust enforcement agency or arguing in front of a federal judge, the same advocacy skills are at play. In this case, when its team of advocates failed to persuade the agency, Oracle felt that it needed a new team of advocates to tell its story to the judge.

Lesson 2: Do not challenge a merger in the A side's home court, however tempting that may be.

A lesson for DOJ—and the FTC as well—is not to challenge a merger in the A side's home turf. If it can't be Washington, DC, pick a neutral forum instead. Of course, perhaps DOJ can be forgiven for making this mistake in the *Oracle* case. PeopleSoft, which was a hostile B side, also called the San Francisco Bay Area home (Pleasanton, to be precise), and that is probably why the case was brought there instead of in Washington.

Lesson 3: Do not define the relevant product market based on the preferences of certain customers.

When DOJ announced that it was challenging the merger, it had already painted the transaction as a case of three firms (SAP, Oracle, and PeopleSoft) going down to two firms—based on the views of select customers.²⁰ Hew Pate, DOJ's antitrust chief, was quoted as saying, “We’ve heard from a large number of important customers who think this deal will deprive them of competition if this deal goes forward. The evidence is clear

²⁰ Seiberg, *supra* note 11 (quoting Assistant Attorney General Hew Pate as saying, “We took this action because it is the right thing to do to protect competition in an important market. Going [from] three to two companies in this market is a competitive problem that needed to be stopped.”).

that we have a product that only three firms are in a position to provide.”²¹ Oracle responded to this assertion by saying, “[DOJ’s] claim that there are only three vendors that meet the needs of large enterprises does not fit with the reality of the highly competitive, dynamic and rapidly changing market.”²² This debate over what vendors competed in the relevant product market would become a focal point of the bench trial, and DOJ’s excessive reliance on customer testimony would come back to haunt it.

Specifically, in his opinion, Judge Walker concluded, “In the main, and contrary to the characterization of plaintiffs’ counsel before trial, the court found the testimony of the customer witnesses largely unhelpful to plaintiffs’ effort to define a narrow market of high function FMS [financial management systems] and HRM [human relations management].”²³ While he found DOJ’s customer witnesses to be knowledgeable and sincere, their testimony could not carry the day for DOJ’s case because they were really testifying about their own preferences, and not “about what they would or could do or not do to avoid a price increase from a post-merger Oracle,” which was the gating issue for product market definition.²⁴ And insofar as the customer witnesses

²¹ Alex Pham, *U.S. Regulators Oppose Oracle’s PeopleSoft Bid*, L.A. TIMES, Feb. 27, 2004, at 2.

²² *Id.*

²³ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1130, 1131 (N.D. Cal. 2004).

²⁴ *Id.* at 1131 (“Customer preferences towards one product over another do not negate interchangeability.... The preferences of these customer witnesses for the functional features of PeopleSoft or Oracle products was evident. But the issue is not what solutions the customers would like or prefer for their data processing needs; the issue is what they could do in the event of an anticompetitive price increase by a post-merger Oracle.”).

had attempted to address the question of their likely response to a SSNIP by a post-merger Oracle, Judge Walker found such testimony to be speculative and unsupported by any hard evidence or analysis.²⁵

Ken Heyer, a DOJ economist, has termed this seeming inability of customers to testify knowledgeably and concretely about the likely effects of a merger—exemplified in *Oracle*—as “rational ignorance.”²⁶ As he puts it, “[f]or many of the goods and services that customers consume, it simply does not make economic sense for the customer to invest the time and effort required to become knowledgeable about all of the factors that determine whether a proposed merger will prove harmful.”²⁷ Heyer therefore resigns himself to the fact that “it is beyond question that in many merger investigations there is a great deal of highly relevant information about which customers simply cannot be expected to know very much, and about which government investigators may be able to learn a great deal from other (i.e., noncustomer) sources.”²⁸ I agree.

In addition to the shortcomings found by Judge Walker in *Oracle*, customer testimony poses other challenges for any antitrust plaintiff. Those

²⁵ *Id.* (“But unsubstantiated customer apprehensions do not substitute for hard evidence.”).

²⁶ Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 ANTITRUST L.J. 87, 103 (2007).

²⁷ *Id.*

²⁸ *Id.* at 104.

witnesses must be numerous enough to be “representative,”²⁹ and yet not too numerous as to bore the court to tears.³⁰ It is very hard, if not impossible, to thread that needle. Additionally, Judge Walker would later quip in an article he had written, “A special brand of judicial skepticism is reserved for a parade of witnesses beating the same drum.”³¹

Lesson 4: Do not define the relevant geographic market in a fashion that is at odds with what your economist has written.

In *Oracle*, DOJ called Professor Kenneth Elzinga as one of its economist experts.³² Anyone in the antitrust bar would have applauded this

²⁹ *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) (“No matter how many customers in each end-use industry the Government may have interviewed, those results cannot be predictive of the entire market if those customers are not representative of the market.”); *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414, 445 (M.D. Pa. 2009) (holding that “testimony presented by Defendants from a few customers who did not find price significant” should not be given “the same weight, particularly where as here, there is other evidence suggesting that price is quite important to other customers in the same industry”); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 192 (D.D.C. 2001) (“Without more information, the Court simply cannot determine whether these 50 declarations are representative of the shared hotspot client base.”). *See also* Vaughn R. Walker, *Search for a Competition Metric: the Role of Testimony from Customers, Competitors and Economists*, 2-1 COMPETITION L. INT’L 3, – (2006) (“Even when this testimony is given by live witnesses in the courtroom, the choice of customers is almost always a product of selection bias. Seldom does it appear that the customers’ views represent the general customer population.”).

³⁰ FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: ... undue delay, wasting time, or needlessly presenting cumulative evidence.”); FED. R. EVID. 611(a)(2) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: ... avoid wasting time”); *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1408 (7th Cir. 1991) (“Trial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence.”) (citing Rules 403 and 611).

³¹ Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, 5 COMPETITION POL’Y INT’L 35, 45 (Spring 2009).

³² Government Trial Exhibit P4014-A, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004), available at <http://www.justice.gov/atr/cases/f204200/204231.pdf> (curriculum vitae of Kenneth G. Elzinga). The other economist expert testifying for DOJ was Professor Preston McAfee.

choice, as Elzinga is accomplished and highly respected in antitrust circles. In this case, however, DOJ's choice proved to be a mistake given the case that it wanted to present.

As you probably know, Elzinga co-developed the Elzinga–Hogarty test for use in defining a geographic market.³³ Applying that test, the relevant geographic market in this case was undisputedly a worldwide market, as Judge Walker noted.³⁴ But DOJ was arguing for a United States market, and Elzinga was therefore put in the awkward position of having to tell Judge Walker that his “oft-used” test was not applicable here.³⁵ That position was at best confusing to the judge. At worst, it destroyed Elzinga's credibility.³⁶

Lesson 5: Do not believe it when your economist says that pricing is too opaque to support a coordinated effects theory.

There are lots of other ways that rivals can coordinate their behavior despite opaque pricing—for example, through market or customer

³³ The Elzinga–Hogarty test has been described by the courts as “measur[ing] the accuracy of a market delineation by determining the amount of either imports into or exports from a tentative market. The test is based on the assumption that if an area has significant exports or imports, then that area is not a relevant geographic market. Under the [test], exports or imports greater than 10% suggest that the market examined is not a relevant market.” United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 672 n.2 (D. Minn. 1990).

³⁴ United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1164 (N.D. Cal. 2004) (“Furthermore, the results of employing the E-H test are undisputed. See Tr at 2155:9–10 (Elzinga) (admitting that the E-H test would dictate the court to view the market as a global market).”).

³⁵ *Id.* at 1161 (“In reaching this [United States] market definition, Elzinga ironically enough did not rely upon the oft-used Elzinga-Hogarty (E-H) test, which he admitted has been used in ‘dozens and dozens of merger cases’ and which he himself co-developed. Tr at 2154:22–23 (Elzinga).”).

³⁶ *Id.* at 1164 (“Elzinga’s basis for rejecting the E-H test is unpersuasive.”) & 1165 (“Elzinga, creator of the test, admitted that applying the E-H test would mandate a global market. The court therefore finds that the geographic market in this case is global.”).

allocation.³⁷ A 2009 district court decision in a merger case brought by the FTC, *CCC–Mitchell*, illustrates this point.³⁸ Yet, in *Oracle* DOJ did not make a coordinated effects claim until the eleventh hour—after the trial record had closed.³⁹ By then it was too late.⁴⁰

Lesson 6: Designate a respected spokesperson for the company to deal with the press.

In *Oracle* Dan Wall was that person. Every night after court he would stroll into the mob of reporters and explain to them what they had just heard in words of one syllable—for example, I first heard the expression “whack a mole” from Dan. (For anyone who doesn’t yet know the meaning of this expression, I have included a citation to William Safire’s *On Language* column in the footnotes to my remarks.)⁴¹ Oracle went from a forlorn

³⁷ See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 7.2 (2010) (“Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation.”), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

³⁸ *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 64–66 (D.D.C. 2005) (noting that pricing is not the only type of “key information” that can be used to facilitate coordination, and that a mature market with “little room for growth” may supply conditions that “can lead to even greater stabilization of market share and greater segmentation of the market, thus increasing the incentives and lowering the impediments to tacit coordination.”).

³⁹ *Oracle*, 331 F. Supp. 2d at 1165, 1166 (“Plaintiffs presented no evidence at trial on coordinated effects. ... But in plaintiffs’ post-trial brief they unexpectedly included an entire section arguing that a post-merger Oracle and SAP could tacitly collude in allocating customers or markets.”). See also Dawn Kawamoto, *Judge’s Order May Be Good for Oracle*, CNET NEWS (July 12, 2004, 3:51 PM), http://news.cnet.com/Judges-order-may-be-good-for-Oracle/2100-1011_3-5266345.html?tag=txt (referring to Judge Walker’s request to the parties for post-trial submissions clarifying the nature of, and the support for, the unilateral effects theory of harm advocated by the government).

⁴⁰ *Id.* at 1166 (“With no evidence in the record regarding such a speculative coordinated effects argument, the court finds this new theory to be without merit.”).

⁴¹ William Safire, *On Language: Whack-a-Mole*, N.Y. TIMES, Oct. 29, 2006, http://www.nytimes.com/2006/10/29/magazine/29wwln_safire.html (“The origin is in the old

underdog in the press's view to the favorite ... and we won the defense verdict of the year.⁴²

When litigating merger cases, one has to remember that cases are not decided in a vacuum, especially if the case is high-profile and the trial is lengthy. Judges read the papers, watch television and surf the net the way the rest of us do. It is important that they not get the impression that the case they are deciding is either a slam dunk or a lost cause. The merging parties and their public relations people spend a lot of money making sure that a case of this kind is fairly reported.

Cognizant of the press's great interest in the case, both Dan and Oracle pushed for a more open trial, even though it would mean that the company would have to disclose some of its own closely held information.⁴³ Not only did this strategy allow the case to be tried in the court of public opinion as well as the court of law, but it also appealed to a trial judge's sensibilities about the courts needing to be open public forums where the public can see justice in

carnival or arcade game that has a mechanical mole suddenly appear for a player to knock down, which causes another object to appear.”).

⁴² June D. Bell, *Top Defense Win of 2004: Deft Defense Picks Apart the DOJ*, NAT'L L.J., Mar. 28, 2005.

⁴³ Michael Liedtke, *Oracle Antitrust Judge May Unseal Evidence*, CRN (June 11, 2004, 9:00 AM), http://www.crn.com/news/applications-os/21700311/oracle-antitrust-judge-may-unseal-evidence.htm;jsessionid=AmLStH7WhB-usE+P+pOPrw**.ecappj03 (quoting Dan Wall as saying, “Oracle very clearly wants this to be an open trial.”).

action.⁴⁴ Certainly that was the case with Judge Walker, as we all know from *Oracle* and the more recent *Proposition 8* trial.⁴⁵

Lesson 7: Designate someone to deal with your most important, but difficult, witness.

In *Oracle* that witness was Larry Ellison, and because I had the most grey hair, I was designated to deal with him in the board room. The first day he pontificated at length about how we were going to win the case. I spoke up and said there was only one person in the courtroom whose opinion mattered (referring to the judge), and it was not Larry. After the board exhaled, he said quietly that he'd remember that, and we never heard such bravado again.

Indeed, Larry became a star witness for the defense by all accounts. One reporter watching the *Oracle* trial observed: "Although Ellison has the reputation of speaking off the cuff in public appearances, often making

⁴⁴ Indeed, the United States District Court for the Northern District of California, where the *Oracle* case was tried, has very stringent requirements in its Local Rules for filing court papers and documents under seal. See N.D. CAL. L.R. 79-5 (with commentary that begins with the statement: "As a public forum, the Court has a policy of providing to the public full access to papers filed in the Office of the Clerk."). This policy is consistent with that expressed by the Ninth Circuit, most recently in *Pintos v. Pacific Creditors Association*, that a "compelling reasons" standard applies to most judicial records because of the common law right to inspect and copy public record and documents. 605 F.3d 665, 677–78 (9th Cir. 2010) (amended).

⁴⁵ Liedtke, *supra* note 43 ("Before listening to Thursday's testimony in the nonjury trial, U.S. District Judge Vaughn Walker expressed exasperation with the amount of evidence that has been submitted as 'highly confidential' material for competitive reasons."). See also Bob Egelko, *Vaughn Walker, Retired Judge, Reflects on Prop. 8*, SAN FRANCISCO CHRON., Apr. 7, 2011, at A-1, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/04/06/MN661IRCO5.DTL> ("But Walker said Wednesday that trials of great public interest—Prop. 8, or the current Barry Bonds perjury trial—are the ones that should be most visible outside the courtroom. 'We are supposed to have public trials in this country,' he said, and the only way that can happen now is 'to admit the public by their eyes and ears.'"). Notwithstanding Judge Walker's failed bid to get the *Prop. 8* trial televised, the Northern District of California has since gained participation in the Cameras in the Courtroom Pilot Program created by the Judicial Conference of the United States. *Cameras in the Courtroom*, U.S. DIST. CT. N.D. CAL., <http://www.cand.uscourts.gov/cameras> (last visited Jan. 26, 2012).

outrageous remarks, in court he was cool and unflappable. Pressed by Scott [the government’s lead trial lawyer] to agree that innovation would suffer as a result of PeopleSoft’s disappearance, Ellison suggested that his cross-examiner was on another planet.”⁴⁶

Lesson 8: On the other hand, don’t designate that same person to deal with the second most difficult, but important, witness.

In *Oracle* that witness was Safra Catz, who was Oracle’s co-president and the author of our efficiencies study. My wife, Kitzi, thought Safra was the smartest and best witness she had ever seen. But efficiencies was one of only two defenses that we lost at trial,⁴⁷ and that may have been my fault. Or it may be because the judge wanted to throw DOJ a bone.⁴⁸

Lesson 9: Have your most skilled trial lawyer interrogate witnesses that are not hostile witnesses.

The most skilled trial lawyer in the *Oracle* case was undoubtedly Greg Lindstrom. Why? Because witnesses that are not hostile cannot be led or otherwise cross-examined if the trial judge is worth his salt.⁴⁹ It takes intuition and guts to interrogate them “cold.” As all good trial lawyers know,

⁴⁶ Karen Southwick, *Perspective: Ellison’s Defining Moment*, CNET NEWS (July 2, 2004, 12:30 PM), http://news.cnet.com/Ellisons-defining-moment/2010-1001_3-5256253.html?tag=txt.

⁴⁷ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004) (“The court finds Oracle’s evidence on the claimed cost-savings efficiency to be flawed and unverifiable.”).

⁴⁸ *Id.* at 1108–09 (finding for Oracle on all issues except for its efficiency defense and its argument that the relevant product market included products in the integration layer of the “software stack”).

⁴⁹ FED. R. EVID. 611(b) & (c) (making clear that leading questions should not be allowed on direct examination “except as necessary to develop the witness’s testimony”).

to be effective, direct examination should not sound rehearsed or scripted.

Time and again, Greg demonstrated that he was up to that challenge.

Lesson 10: On the other hand, it is easy to cross-examine effectively hostile witnesses like customers.

All three of us took part in cross-examining DOJ's customer witnesses because all we had to do was to get them to admit (1) that their employer did not have the characteristics that DOJ's Complaint indicated they should have,⁵⁰ or (2) that they had bought or seriously considered buying their products (in this case, enterprise resource planning (ERP) software for financial management systems or human relations management) from a source other than the ones that DOJ's Complaint alleged were the only sources.⁵¹

Additionally, it was easy to present documentary evidence from a party. Dan did it for us. Dan didn't care whether the parties tried to impeach it or not. All he cared about was getting it in front of the judge (and the media).

⁵⁰ See Complaint ¶¶ 14, 17–20, 25 (describing the alleged characteristics of enterprise customers that need “high function HRM software solutions and high function FMS software solutions”), *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004), *available at* <http://www.justice.gov/atr/cases/f202500/202587.pdf>.

⁵¹ See *id.* ¶ 9 (“As described in more detail below, customers with the most demanding requirements typically find that the set of vendors that can meet their requirements is limited to Oracle, PeopleSoft and one other firm, Germany’s SAP AG.”) & ¶ 26 (“Oracle, PeopleSoft and SAP sell HRM and FMS software throughout the United States and the world.”).

Lesson 11: Be sure that the only sources of the relevant product are those described in the Complaint.

As it happened, DOJ itself had bought HRM and FMS software from a source that was not in its alleged, relevant product market—namely, a “mid-market” vendor named AMS.⁵² And during pretrial discovery, it came out that Microsoft was seriously considering entering the relevant product market—by buying SAP.⁵³ Both of these facts hurt DOJ grievously.⁵⁴ Dan would later describe the defense team’s discovery of Microsoft’s contemplated acquisition of SAP, among emails produced in discovery, as “one of the singular moments” in his career because it completely changed his view about the strength of the defense case, which he had originally described as an “eggshell case” that only “looked solid on the outside.”⁵⁵

⁵² *Oracle*, 331 F. Supp. 2d at 1160.

⁵³ Alorie Gilbert, *Oracle Hits Hard at Justice Dept.’s Case*, CNET NEWS (June 7, 2004, 4:11 PM) http://news.cnet.com/Oracle-hits-hard-at-Justice-Dept.s-case/2100-1012_3-5228060.html?tag=txt (“Oracle attorney Dan Wall dropped a bombshell on the opening day of the closely watched trial, claiming that its hostile bid for PeopleSoft triggered Microsoft to enter merger talks last year with German software maker SAP, an Oracle rival.”).

⁵⁴ *Oracle*, 331 F. Supp. 2d at 1160 (“Plaintiffs’ statistics, expert witness and behavior all treat mid-market vendors Lawson and AMS as part of the high function market. The court sees no reason why it should not follow suit.... Accordingly, the court finds that Microsoft will be a viable substitute for a significant number of consumers should a post-merger Oracle impose a SSNIP in its pricing of ERP software.”). As Judge Walker explained in an article he wrote after his *Oracle* decision, “Oracle’s witnesses testified about concrete and specific actions that they had taken in procuring information-processing software from vendors outside the government’s proposed market definition. This testimony was more persuasive than the testimony of customers presented by the government, whose proclamations could not be said to be based on anything more than preferences.” Walker, *supra* note 29, at –.

⁵⁵ Susan Beck, *Dashed Dreams: Why Antitrust Didn’t Save PeopleSoft*, AM. LAW., May 1, 2005, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1114765507123> (subscription required).

Lesson 12: Rely on the Merger Guidelines as much as possible.

In the *Oracle* case, DOJ's principal theory of antitrust harm was a unilateral effects theory described in the then Section 2.2 of the 1992 Horizontal Merger Guidelines.⁵⁶ Those Guidelines seemed to state that DOJ needed to prove that the parties were each other's best substitutes and they combined had at least 35% of the market.⁵⁷ We stressed that requirement in the Guidelines over and over again, and Judge Walker duly took note of it. His rulings dealt with the Guidelines requirement in two respects.

First, Judge Walker concluded that “[a] presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true.”⁵⁸ He held instead that “[t]o prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position.”⁵⁹ This significantly raised the bar on DOJ's burden to establish combined market shares for

⁵⁶ U.S. DEPT OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.2 (1992 & 1997 rev.) (superseded 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg.pdf>.

⁵⁷ *Id.* § 2.211 (“Where market concentration data fall outside the safeharbor regions of Section 1.5, the merging firms have a combined market share of at least thirty-five percent, and where data on product attributes and relative product appeal show that a significant share of purchasers of one merging firm's product regard the other as their second choice, then market share data may be relied upon to demonstrate that there is a significant share of sales in the market accounted for by consumers who would be adversely affected by the merger.”).

⁵⁸ *Oracle*, 331 F. Supp. 2d at 1123.

⁵⁹ *Id.* (citing *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995)).

Oracle and PeopleSoft high enough to be presumptively unlawful under the Guidelines.⁶⁰

Second, we gave Judge Walker our own estimates of combined market shares for Oracle and PeopleSoft for the worldwide FMS and HRM markets, and they were both below the 35% threshold under the Guidelines.⁶¹

Although Judge Walker did not find our estimates to be definitive and reliable, it didn't matter because as he noted, "it is plaintiffs, not defendant, who carry the burden of proving market shares and concentration in order to invoke the presumptions of the case law or to sustain a showing in accordance with the Guidelines. The court cannot furnish its own statistics."⁶² He therefore found that DOJ had "not proved that the post-merger level of concentration (HHI) in the product and geographic markets, properly defined, falls outside the safe harbor of the Horizontal Merger Guidelines[.]"⁶³

When trying a merger case, always remember who has the burden of proof. It is a point that I frequently remind the FTC staff whenever we are considering an enforcement action.

⁶⁰ *See id.* at 1148 (DOJ's economist expert calculating combined Oracle–PeopleSoft market shares of 48% and 68% of the United States high function FMS and HRM markets, respectively).

⁶¹ *See id.* at 1164 (Oracle offering combined Oracle–PeopleSoft market shares of 28.8% and 14.3% of the global high function FMS and HRM markets, respectively).

⁶² *Id.* at 1165.

⁶³ *Id.* at 1108.

Lesson 13: On the other hand, don't rely on what the judge says during argument or even when interrogating witnesses.

All three of us agreed that Judge Walker would try to keep the ball in the air throughout closing argument.⁶⁴ As a result, the press and even Tom Barnett, then the Deputy Assistant Attorney General for Antitrust, thought DOJ had won the case.⁶⁵ However, in questioning the witnesses, Judge Walker noted (and emphasized) that the parties sold other products besides the HRM and FMS software in question as “bundles” to customers. That seemed to us to be a brand new defense theory, and it was consistent with teaching in the case law that a relevant product market is not necessarily confined to similar, interchangeable products, but in some instances, may involve clusters of dissimilar products or services.⁶⁶ We were wrong.

Lesson 14: Be lucky enough to have a savvy judge.

We drew Judge Walker, who loved the case and was a skilled economist to boot.⁶⁷ Not only that, but he was smart enough to base his decision on the facts, as evidenced by his 164-page opinion thoroughly analyzing the record. That made it very hard for DOJ to appeal. As Tom Barnett reportedly acknowledged, “The court of appeals would give [Judge

⁶⁴ Alorie Gilbert, *Judge Grills Oracle, DOJ, at Trial's Close*, CNET NEWS (July 20, 2004, 4:34 PM), http://news.cnet.com/Judge-grills-Oracle%2C-DOJ-at-trials-close/2100-1012_3-5276907.html?tag=txt.

⁶⁵ O'Brien, *supra* note 13 (quoting Tom Barnett, Deputy Assistant Attorney General for Antitrust, as saying, “I don't believe they made their case, period. I think they raised a lot of distractions.”).

⁶⁶ *See, e.g., Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1221–22 (10th Cir. 1986); *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1016–17 (9th Cir. 1983).

⁶⁷ *See supra* note 16 and accompanying text.

Walker’s factual] findings a lot of deference. If you accept his factual findings, it’s hard to show the merger is anticompetitive.”⁶⁸

An article that Judge Walker wrote after the conclusion of the *Oracle* case highlights his insight into how judging marshals the factual record to reach a decision. Judge Walker explained that while it might be preferable for generalist trial judges to have some training in economics, the role of the judge in a merger case is not “to understand the economic analysis in the same way and with the same facility as those expert in the field.”⁶⁹ Rather, it is to take the economic analysis presented in a case together with the evidence and try to come to a perspective that ultimately guides his decision making, “in somewhat the same way a viewer discerns in an autostereogram two similar but distinct images so that from a two-dimensional surface there emerges a third image having depth, shape, and relief.”⁷⁰

Judge Walker’s metaphor—of two-dimensional images converging in stereo to form a three-dimensional projection—aptly captures his approach to reaching a decision in *Oracle*. In his words, “[n]o one analysis, no one item of evidence makes or breaks the case; it is the evidence and the economic analysis together from which an impression or image emerges—or does not emerge—and leads to an outcome.”⁷¹ When Judge Walker applied that

⁶⁸ Beck, *supra* note 53.

⁶⁹ Walker, *supra* note 31, at 38.

⁷⁰ *Id.*

⁷¹ *Id.* at 47.

approach in the *Oracle* case, he concluded that DOJ's evidence, as presented through its customer witnesses and its economist expert, did not match up with its story of harm: "There was a disconnect between the economic analysis the government sought to relate and the storytellers it brought to court."⁷²

Lesson 15: The EC can always stop the clock on an investigation.

The last lesson I will offer you is the observation that the EC can always stop the clock on a merger investigation it is conducting. In *Oracle*, the EC stopped the clock (for a second time) in April 2004, following a hearing during which Oracle argued that the agency needed to collect additional information regarding the alleged HRM and FMS software markets, and to consider the impact of the merger in the context of a broader product market.⁷³ German software giant SAP reportedly echoed Oracle's demand that the EC evaluate the merger in the context of a broader market definition, which probably helped to persuade the agency to stop the clock.⁷⁴

The EC's suspension of its investigation meant that Oracle could focus on its court battle with DOJ, which went to trial in June 2004. When Judge Walker issued his opinion on September 9, 2004, the EC still had not restarted the clock. But by that time, Commissioner Monti was nearing the end of his term, and he wanted to wrap up the investigation before he left

⁷² *Id.* at 46.

⁷³ Meller, *supra* note 18; Cordes, *Hurdles*, *supra* note 18.

⁷⁴ Meller, *supra* note 18.

office.⁷⁵ Moreover, the EC's legal services team following the investigation had reportedly been opposed to a prohibition decision for several months, and Commissioner Monti was known to accord them a lot of deference.⁷⁶ It was therefore only a matter of time before the EC cleared the merger as well, which it did on October 26, 2004.⁷⁷ No one was surprised by the news.

Aftermath

Notwithstanding its triumphs in the legal battles, Oracle did not successfully complete its hostile takeover of PeopleSoft until it offered to pay \$26.50 a share in December 2004.⁷⁸ By January 7, 2005, more than 97% of the shares of PeopleSoft stock had been tendered under the offered price, and Oracle was then able to expedite its takeover under Delaware law.⁷⁹

⁷⁵ Cordes, *Clear*, *supra* note 18.

⁷⁶ Meller, *supra* note 18.

⁷⁷ Benjamin Pimentel, *EU Clears Way for PeopleSoft Takeover*, SAN FRANCISCO CHRON., Oct. 27, 2004, at C-1, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/10/27/BUG949GR2I1.DTL>.

⁷⁸ Paul R. La Monica, *Finally, Oracle to Buy PeopleSoft*, CNN/MONEY (Dec. 13, 2004, 12:53 PM), http://money.cnn.com/2004/12/13/technology/oracle_peoplesoft/.

⁷⁹ Charles Babcock, *Oracle Completing PeopleSoft Takeover Today*, INFORMATIONWEEK (Jan. 7, 2004, 12:48 PM), <http://www.informationweek.com/news/57300414>.