In The
Supreme Court of the United States

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ACCENTURE, L.L.P.,

Petitioner,

v.

WELLOGIX, INC.,

Respondent.

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**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

A district court has broad discretion to admit or exclude expert testimony at trial. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997). The district court's judgment is disturbed only if it is manifestly erroneous. *Id.*

The district court here held a *Daubert** hearing, carefully weighed each of the factors set forth in Federal Rule of Evidence 702, and found that the expert witness's testimony satisfied each Rule 702 factor. Petitioner challenges two *Daubert* rulings and faults one sentence of trial testimony that came in without objection, was cumulative of other testimony, and was well within the witness's expertise.

The questions presented are (a) whether the district court abused its discretion in admitting an expert witness's testimony where significant evidence supported the reliability of that testimony under the standard of Rule 702; and (b) whether the district court abused its discretion by not preventing the expert from answering a single specific question at trial – to which Petitioner did not object – where the answer was cumulative of testimony given by others without objection?

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* *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

CORPORATE DISCLOSURE STATEMENT

In accordance with S. Ct. R. 29.6, respondent Wellogix, Inc. states that it has no parent corporation. Capital Southwest Corporation, which is traded on the NASDAQ stock market under the ticker symbol "CSWC," owns 19.74% of Wellogix, Inc.

iii

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTRODUCTION

This case presents two fact-bound disputes concerning the admissibility of an expert's testimony at trial, which Petitioner attempts to combine into one issue worthy of certiorari. In fact, the courts below ably resolved both questions without dissent. The opinion below conflicts with no decision of this Court and with no decision of any other court of appeals, and the issue it presents is not of national importance. The petition for certiorari should be denied.

At issue is the testimony of Kendyl Roman, a prominent software engineer and forensic computer expert. Wellogix proved that its trade secrets were intentionally taken by Petitioner and provided to Petitioner's business partner, SAP. Roman opined at trial that trade secrets belonging to Wellogix to which Petitioner had access, were incorporated into SAP's software. As the district court held in two careful opinions – one resolving Petitioner's pre-trial *Daubert* objections and one deciding Petitioner's post-trial motions – Roman was eminently qualified to opine on those questions, and his testimony more than satisfied Federal Rule of Evidence 702.

During trial, Roman was also asked about the effect of the theft of trade secrets on a company like Wellogix. He explained that, based on his extensive experience in startup technology firms, a small company like Wellogix is damaged when its unique trade secret is stolen and incorporated into a competitor's base software. He told the jury – without specific objection from Petitioner – that Wellogix's value

"went to zero" after the theft because its value was based on the fact that the trade secret was not known to Wellogix's competitors. Roman's testimony elaborated on the earlier testimony of Wellogix's CEO, Ike Epley, who explained that after Wellogix's trade secret was stolen and used by Petitioner and SAP, Wellogix went out of business and only had residual assets.

Neither of the district court's rulings on Roman's testimony implicates any circuit split. The cases Petitioner cites to illustrate the "split" are far removed from this case. Some are cases where a district court either failed to apply Rule 702 or flatly ignored *Daubert*. The lower courts in this case assiduously applied those standards. Other cases involved difficult questions of how Rule 702 operates at the frontiers of scientific inquiry. As Petitioner's amicus briefs show, those issues usually arise in multi-plaintiff mass tort cases where only scientific evidence can prove causation. This is not such a case.

Moreover, there is no fundamental dispute among the circuits about Rule 702 or *Daubert*. The very courts Petitioner lauds as properly applying Rule 702 have issued recent opinions admitting expert testimony in much the same terms as the Fifth Circuit did here. The differing results and reasoning in these cases is explained not by a circuit split but by distinguishable facts and by the application of the abuse of discretion standard. Petitioner's failure to identify a true circuit split is laid bare by the fact that its own amici, in this case and other cases,

disagree with it about which courts fall on which side of the claimed split.

Further, this case is a deeply problematic vehicle for the resolution of any split with respect to Rule 702, for the simple reason that the judgment can readily be affirmed based on additional evidence adduced at trial. There is no serious challenge to the sufficiency of proof of causation in this Court. The evidence showed Petitioner intended to "harvest" Wellogix's intellectual property. Causation was thus amply proved out of Petitioner's own damning emails and does not hinge on Roman's unobjected-to testimony. Petitioner also cannot complain about the jury's finding that Wellogix failed. The only potential dispute left concerns the value of the retained assets after Wellogix failed. Petitioner's claim that Roman's testimony was the only foundation for the verdict is false. The district court and Fifth Circuit properly resolved this case.

The petition does not identify a circuit split; fails to situate this case within any dispute among the lower courts; fails to show that reversal on the Rule 702 claim would require remand; and does not even show that the Fifth Circuit erred in declining to find manifest error. The result below should not be disturbed.

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STATEMENT

Wellogix was an entrepreneurial software company that, beginning in 1998, offered unique and valuable software solutions to help oil and gas companies efficiently manage the complex acquisition of goods and services necessary to drill wells. This case involves Petitioner's misappropriation and theft of Wellogix's intellectual property, and the resulting financial destruction to Wellogix from the loss of its unique technology.

Wellogix developed software solutions relating to the electronic procurement of products and services in the oil and gas industry. Wellogix was a unique company because it developed the ability to write and implement software with the functionality required for the dynamic environment of complex services. Pet. App. 2a. Traditionally, complex services were purchased manually: oil and gas producers and suppliers discussed the amount and cost of services, field tickets were generated while drilling was performed and used to track these services, and the paper field tickets were later manually reconciled with the contract and purchase order by project engineers. Wellogix identified this gap and created software that automated the acquisition of complex services. Pet. App. 3a. Wellogix had the ability to write and implement this software because Wellogix possessed both the logic behind the software and the knowledge and skill to develop and customize the programs. Pet. App. 3a. From 2000 to 2005, Wellogix was the only company

offering electronic procurement for complex services in the oil and gas industry. Pet. App. 3a.

Wellogix hired Petitioner, a global consulting firm, to assist it with marketing and implementing its unique software solutions. Pet. App. 3a. Beginning in 2000, Wellogix and Petitioner entered into six different agreements that created a marketing alliance to target potential customers, submit joint proposals, share confidential information with each other, and allow Petitioner to license Wellogix's software. Pet. App. 3a. Despite the confidentiality promises in these agreements, Petitioner took advantage of the relationship to steal Wellogix's trade secrets and supply them to its confederates, including SAP, a large international software company. Pet. App. 4a. Once SAP had access to Wellogix's secrets, it was able to displace Wellogix in the market. Pet. App. 4a. Wellogix's burgeoning business was rapidly destroyed, its employees were laid off, and its doors closed. Wellogix sought compensation by suing Petitioner, among others, in district court in 2008. Pet. App. 4a.

A. District Court Proceedings

Wellogix filed suit against BP, Petitioner, and SAP in 2008. This case concerns only Wellogix's claims against Petitioner, which went to trial in the Southern District of Texas in May, 2011.

The Pre-Trial Daubert Motion. Prior to trial, Petitioner moved to exclude Wellogix's liability expert, Kendyl Roman. The district court conducted an

extensive *Daubert* hearing and subsequently issued a comprehensive opinion explaining its decision to admit Roman's testimony. Pet. App. 124a. The opinion carefully tracked the requirements of Rule 702. Pet. App. 125a. First, the court ruled that Roman was qualified to be an expert regarding two critical topics at trial: (1) whether Wellogix's software constituted a trade secret, and (2) a comparison between Wellogix's software and that of BP and SAP. Pet. App. 126a.

Second, the court rejected Petitioner's claim below that Roman had not used SAP's proprietary programming language, and therefore Roman was unqualified. Pet. App. 127a. As the court noted, Roman was a highly experienced computer programmer who had taught himself that language, and certainly possessed sufficient knowledge to compare Wellogix's software with SAP's code. Pet. App. 128a. Third, the court rejected Petitioner's argument that the method Roman used to compare Wellogix's and SAP's code was inadequate. Pet. App. 128a. As the court explained, Roman's technique included using a software tool to initially compare the code. He then manually analyzed those results to confirm whether the code was, in fact, copied. Pet. App. 130a. The simple fact that Roman's testimony contradicted Petitioner's expert testimony did not render it unreliable. Fourth, the court then carefully considered and rejected Petitioner's argument that Roman's testimony lacked an evidentiary basis and described the specific documents that supported the testimony and that rebutted Petitioner's claims. Pet. App. 131a. The court also

expressly rejected the complaint Petitioner focuses on in this Court – the argument that Roman looked to the wrong code for his analysis. The district court found that Roman's testimony about how he analyzed and found matches in the code making up SAP's core software was reliable. Pet. App. 132a. The court did not rely on Petitioner's right to cross-examine Roman to justify the admission of Roman's testimony. Pet. App. 132a. Rather, the court noted that notwithstanding its conclusion that Roman was qualified and his testimony admissible, Petitioner retained the right to cross-examine him based on whatever weaknesses it believed to be in his testimony. Pet. App. 132a.

Trial Testimony. At trial, Wellogix presented evidence of its trade secrets, generally consisting of its source and object code, and the "know how," the logic and technical knowledge behind the process workflow, flow diagrams, implementation, information for deployment, interface design specifications, and the development of complex services templates. Wellogix further presented evidence that Petitioner improperly used these trade secrets to develop products and services with SAP. Moreover, the jury heard evidence of Petitioner's fear of being marginalized and its malicious scheme to steal Wellogix's trade secrets to neutralize Wellogix. Ultimately, the jury found the evidence adduced by Wellogix to be compelling, and found liability for Wellogix under both its common law trade secret misappropriation and Texas Theft Liability Act theories.

The jury also heard evidence of Wellogix's lost business value through the testimony of its two experts, Michael Wagner and Roman, and through Ike Epley, Wellogix's Chief Executive Officer. Wagner, not Roman, testified that Wellogix's value prior to Petitioner's misappropriation was nearly $28 million. His testimony was based upon a late 2005 transaction in which a third party, First Capital, invested approximately $8.5 million to purchase 31 percent of Wellogix. App. 46-48, 51. Based on this transaction, Wagner concluded that a conservative estimate of Wellogix's value at that time was $27,779,725. App. 44, 48. Petitioner does not challenge that valuation or Wagner's testimony.

Epley and Roman provided evidence that after Petitioner's theft, Wellogix was essentially valueless. Epley testified that Wellogix lost its potential customers and never made a sale after the theft. App. 4-5. He further testified that his potential customers told him that there was "no need" for Wellogix because SAP had all the same functionality, App. 8, and that he was forced to lay off his staff. App. 8. Elaborating on Epley's testimony, Roman described how, based on his industry experience and the specific experience of Wellogix, a small software company is harmed when its trade secrets are stolen by a much larger company and made available in the marketplace. App. 24. Petitioner objected that Roman should not be permitted to testify as to damages, and the district court sustained that objection, ruling that he could not give a damages number. App. 22. Roman

then testified, without further objection, regarding how Wellogix was damaged by losing its trade secrets, that Wellogix's value "went to zero," and that once its trade secrets were taken, there was no way to get them back. App. 22-23. Roman further testified – again without objection – that when a small software company's foundational trade secret is stolen, the "loss is total." App. 24. Petitioner made no objection or motion to strike, nor did it request an instruction that the jury disregard this testimony.

Petitioner did not dispute whether Wellogix's business failed. As for the amount of the loss, Wellogix presented evidence that the jury should credit $1.6 million against its total loss based on Wellogix's licensing income from its patents. Petitioner urged the jury to credit Wellogix for more than $1.6 million. App. 50. The jury returned a verdict for Wellogix, awarding $26.2 million in compensatory damages and $68.2 million in punitive damages, finding that Petitioner maliciously stole Wellogix's trade secrets. Pet. App. 5a. In reaching that verdict, the jury accepted Wellogix's argument that the compensatory damages should reflect Wellogix's pre-tort value, less $1.6 million for Wellogix's licensing its patents.

Post-Trial Motions. Petitioner also challenged Roman's testimony in its post-trial motion for a new trial or remittitur and renewed motion for judgment as a matter of law. First, Petitioner again challenged Roman's admission as an expert witness on the same

grounds as in its pre-trial *Daubert* motion. The district court carefully examined the trial record and determined that Roman's testimony was reliable, largely for the reasons described above, but adding to the analysis the testimony of Petitioner's own expert who confirmed that the two SAP software products at issue worked together, meaning that the trade secrets found in one program could be used in the other. This evidence further supported the reliability analysis performed again, at Petitioner's request, after trial. Pet. App. 98a. The district court did not dismiss those challenges as questions for the jury or otherwise abdicate its role as gatekeeper. Rather, the district court observed that where Petitioner's expert and Roman disagreed on a factual issue, that disagreement was for the jury to weigh and decide as the finder of fact. Pet. App. 99a.

Petitioner did not challenge Roman's "went to zero" testimony either during trial or in its post-trial motions, despite its claim now that the district court's error on that point requires the intervention of this Court. Instead, Petitioner attacked Wagner's analysis of Wellogix's pre-tort value as insufficient. The district court examined those challenges and rejected them. Pet. App. 82a-84a. Petitioner's *only* challenges to Roman in its initial post-trial briefs were those previously raised before trial and discussed in detail above.[1]

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[1] Petitioner raised its objection to Roman's "went to zero" testimony in its reply brief on its motion for judgment as a

B. Fifth Circuit Proceedings

Petitioner appealed to the Fifth Circuit. In that appeal, it challenged Roman's admission as an expert witness. Moreover, for the first time it squarely challenged Roman's unobjected-to testimony regarding Wellogix's value after the theft of its property. The court of appeals reviewed the district court's decision permitting Roman to testify and held that the court had properly exercised its gatekeeping function. Pet. App. 50a. The Fifth Circuit credited "Roman's experience as a software developer and forensic analyst, and his fluency in different programming codes." Pet. App. 50a. The court of appeals agreed with Wellogix and the district court that Roman did not need specific oil and gas expertise to provide his opinions, and also agreed that Roman's ability to teach himself SAP's programming language made his methodology valid. Pet. App. 51a.

Contrary to how the decision has been portrayed by Petitioner and by some amici, the court of appeals apparently assumed without deciding that Petitioner was right to say that Roman had made two factual mistakes in his testimony by: (a) stating that a Wellogix design specification was a valuable trade secret when it was already public; and (b) comparing Wellogix's code to the wrong SAP code. Pet. App. 51a. In fact, as the district court found, Roman made no

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matter of law, in discussing the sufficiency of Wellogix's damages evidence.

such fact mistakes. As described in detail below, Roman explained that the critical information he relied on was not public and that he had properly compared Wellogix's code to SAP's core product.

With respect to Roman's testimony that the theft of Wellogix's trade secrets reduced its value, the court of appeals concluded that such testimony was within the range of Roman's expertise with respect to trade secrets. Pet. App. 52a.

Petitioner moved for panel rehearing and rehearing en banc, urging many of the same arguments that the court of appeals panel had rejected the first time. Both motions were denied. The revised opinion issued by the panel made only two insignificant revisions to the opinion. The revision Petitioner faults, Pet. 9, is irrelevant to this case, because it did nothing more than delete a stray reference to testimony regarding Wellogix's financial condition prior to the theft of its secrets by Petitioner.[2] That testimony makes no difference here because it concerned Wellogix's value prior to the transaction on which Wagner based his valuation of Wellogix's pre-tort value.

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REASONS FOR DENYING THE PETITION

Petitioner asserts that this case stands on one side of a purported split in authority among the

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[2] The court of appeals also deleted a second reference to similar testimony.

courts below regarding the application of the *Daubert* standard and of Rule 702. Fundamentally, however, this case has little to do with the cases involved in Petitioner's supposed "split," which involve reversal either for a wholesale abdication of the Rule 702 gatekeeping role, or were close cases involving cutting-edge arguments about scientific causation. The district court here conducted an extensive *Daubert* hearing and explained its reasons for finding Roman qualified to testify about Wellogix's trade secrets and their theft by Petitioner. It stringently applied *Daubert* in denying Petitioner's pre-trial and post-trial challenges to Roman. Stripped of Petitioner's *Daubert* rhetoric, the Petition actually turns on whether the district court properly allowed an expert to answer a single question during trial, without objection. That routine issue is not implicated in Petitioner's putative "split."

Moreover, Petitioner cannot show any true split in the application of *Daubert* or Rule 702. Indeed, a simple analysis of the cases shows that the circuits Petitioner places on one side of the "split" routinely reach results just like those on the other side. Petitioner and its amici themselves put different circuits on different sides of the supposed split. At most, what Petitioner has proved is that courts find the resolution of *Daubert* questions to be fact-bound, specific to each case, and sometimes difficult. That is no reason to review this case. The decision below does not decline to follow any other circuit, and Petitioner does not claim – much less demonstrate – that the case

below would have been decided differently in any other circuit.

In all events, this case is a poor vehicle for resolving the question presented, both because the Fifth Circuit properly resolved the case and because the jury could have reached precisely the same verdict based on equally persuasive trial evidence. Petitioner's claim that Roman's testimony was the sole basis of the verdict is inconsistent with the record. Nor does this case represent an issue of exceptional importance – to the contrary, this case presents an issue that is fact-bound and specific to the case at hand.

To be sure, Petitioner did not like the jury's verdict in this case. But it has had ample opportunity to challenge the alleged errors below. Not a single judge has agreed with its claims. This Court should deny the petition.

I. THE CLAIMED "SPLIT" IN AUTHORITY DOES NOT INVOLVE THIS CASE.

Although Petitioner tries to shoehorn this case into a supposed circuit split among courts that stringently apply Rule 702 and those that "defy" it, Pet. 11, 13, the decision below has nothing to do with that (illusory) conflict. This case gave the Fifth Circuit no cause to wade into any developing disagreement between the circuits on the application of Rule 702.

The issue in this case is a narrow one. Concealed beneath rhetoric about adherence to Rule 702 – which it is plain the district court carefully applied – the gravamen of the Petition is that the courts below erred in permitting Roman to testify about the effect on Wellogix's business. Pet. 16-17. Specifically, the question here is whether the district court abused its considerable discretion at trial in allowing Roman to testify about the effects on Wellogix when it lost its most valuable trade secrets – testimony that Roman ultimately gave without objection.

Petitioner also attacks the district court's decision under Rule 702 to permit Roman to testify.[3] The

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[3] Petitioner attempts to capitalize on the Fifth Circuit's citation to two comments made by the district judge about Roman to support their claim that the court allowed Roman to testify despite having misgivings about his expertise and testimony. That claim mischaracterizes the record. The context of the discussion was this: during the cross-examination of Petitioner's expert Smith, the court dismissed the jury and questioned Smith and Petitioner's counsel about their claim that Roman had looked at the wrong software. App. 55-57. When the district court questioned how Roman could be "that much off the point" and make "such a rudimentary mistake," he was expressing skepticism not about Roman but about the claim by Petitioner and its expert that such errors had occurred. App. 57. The district court had already determined pre-trial that Roman's opinion "was not based on a faulty analysis or an analysis of completely irrelevant data." Pet. App. 133a. And the district court returned to that issue in its post-trial opinion and found that based on the testimony of Roman and Smith. Roman's opinion that SAP had incorporated Wellogix's software into its own was not unreliable. Pet. App. 99a. As for the district court's "lament" that some testimony was "hard to follow," the

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cases Petitioner cites illustrate the gap between the supposed split and this case. In some of Petitioner's authorities, the district court made no attempt to comply with *Daubert* before trial and was therefore reversed. *See Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 407 (6th Cir. 2006) (reversing where trial court permitted expert testimony without making *any* findings "regarding the reliability" of the expert's testimony); *Estate of Barabin v. Astenjohnson, Inc.*, 740 F.3d 457, 461-62 (9th Cir. 2014) (en banc) (reversing trial court where court first excluded expert testimony because of "dubious credentials," then reversed itself without explanation and without a *Daubert* hearing); *Elcock v. Kmart Corp.*, 233 F.3d 734, 750 (3d Cir. 2000) (reversing where court failed to conduct a *Daubert* hearing on opinions or qualifications of vocational rehabilitation expert and admitted expert testimony where witness admitted he did not possess the usual qualifications to be an expert in that field). These cases are not applicable here,

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context of the paragraph Petitioner cites makes plain the district court's concern about the complexity of *all* the technical testimony at trial, not Roman's in particular:

> Mr. Voyles: You know, in his defense, he's a nice man. He's not just – he might not have known. He didn't go look at the functionality. He said that. He didn't look behind the code comparison to see what that actually did.

> The Court: Well, we've had a lot of smart people testify. I just hope the jury is up to it, I really do. It's hard for me to follow. I've already been through an arbitration on this. App. 57.

where the district court conducted a *Daubert* hearing and issued two appropriate orders extensively discussing Roman's qualifications and the reliability of his testimony.

Many of the other cases Petitioner cites – on both sides of the supposed split – involve cases where the lower courts allegedly left questions of serious methodological dispute to resolution by the jury, usually in cases where the science at issue was unsettled. Whatever their merits, those cases have no bearing on this one. *See Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 1002 (2012) (challenge to expert testimony regarding medical causation of leukemia); *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010) (challenge to testimony regarding whether exposure to manganese caused Parkinson's disease); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000) (after promising to exclude unlawful conduct from expert testimony on antitrust, expert failed to do so, rendering methodology suspect); *Lifewise Master Funding v. Telebank*, 374 F.3d 917 (10th Cir. 2004) (expert admitted he lacked qualifications to conduct economic analysis). The question of how to treat hypotheses that science has not yet confirmed is an important one, as Judge Sutton has observed, *Tamraz*, 620 F.3d at 677, but it is not a question the Petition raises.

The amicus briefs filed on Petitioner's behalf – supposedly showing how this case deserves review as part of a circuit split – instead demonstrate that any dispute among the circuits about *Daubert* does not

implicate this case. The brief of the American Chemistry Council for example, worries that *Daubert* might not be properly enforced in cases involving so-called "differential diagnosis" testimony to prove specific causation, general causation in personal injury litigation, the "emerging field of dose reconstruction testimony" and "fate and transport opinions in environmental litigation." The Chamber of Commerce instead focuses on "multi-plaintiff toxic tort and product liability cases" and blames inappropriate *Daubert* rulings for keeping useful products off the shelves by exposing manufacturers to crippling mass tort liability. And the Atlantic Legal Foundation's brief calls *Milward* – a case that has no application here because it concerns the unresolved scientific question of whether benzene causes leukemia – "[p]erhaps the most revealing recent example of . . . lower courts' resistance" to Rule 702. The clarity amici seek in the application of Rule 702 would not come from granting certiorari in this case.

The misfit between the supposed problem Petitioner claims exists and this case is even illustrated by a scholarly authority Petitioner cites. David E. Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 NOTRE DAME L. REV. 27, 55 (2013). Bernstein identifies seven errors common to cases that, in his view, misapply Rule 702: (A) ignoring the text of Rule 702 in favor of *Daubert*; (B) reliance on obsolete precedents dating from before the amendments to Rule 702 or even before *Daubert*; (C) ignoring this Court's decision in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) by refusing to

examine each study relied on by an expert individually; (D) reducing the burden faced by plaintiff when the issue is "on the frontier of medical knowledge or because strong contrary evidence has not been presented"; (E) allowing scientists to "speculate based on incomplete data"; and (F) allowing "weight of the evidence methodology," *i.e.*, allowing an expert to determine the most plausible explanation for a scientific phenomenon by weighing various sources of inconclusive evidence. *Id.* at 62. None of those supposed errors were even arguably made in this case. The courts below carefully relied on the current language of Rule 702 and applied post-amendment precedent. There was no speculation in the realm of uncertain science, no reliance on weight of the evidence claims (indeed, the *Milward* court itself pointed out that the Fifth Circuit rejected the "weight of the evidence" approach in at least one case, *id.* at 19) and no dispute about incomplete data. Those concerns are simply divorced from the routine evidentiary dispute at issue here. And one will rarely find a more thorough and careful analysis of a *Daubert* challenge than is evident in the opinions of the district judge. Pet. App. 96a-100a, 124a-133a.

In short, if there is a debate among the lower courts concerning Rule 702, it occurs at the frontiers of scientific and technical knowledge, where, as Justice Breyer has stated, "science itself may be highly uncertain and controversial." Stephen Breyer, *Introduction* to REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 1, 5 (Federal Judicial Center ed., 3d ed.

2011). Those questions have nothing to do with either the district court's rigorous application of *Daubert* or its admission of Roman's "went to zero" testimony. Certiorari should be denied.

II. THERE IS NO "SPLIT" AMONG THE CIRCUITS FOR THIS COURT TO RESOLVE.

Petitioner's argument for granting certiorari is based on the notion that the lower courts are "divided" in some fundamental way over the question of whether *Daubert*'s gatekeeping function belongs to the jury or properly to the judge. Thus, Petitioner implies, this Court must act to prevent a crisis in the application of *Daubert*. That "crisis" is entirely manufactured.[4]

The cases Petitioner cites as examples of the "split" are either explained by the interpretive lens of abuse of discretion review or are simply the results of Petitioner's decision to group some cases *excluding* an

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[4] This Court has repeatedly denied certiorari in cases raising more substantial Rule 702 issues – some even in this term. The issue Petitioner raises is not currently worthy of intervention. *See Broussard v. Maples*, 535 Fed. App'x 825 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1310 (Feb. 24, 2014) (raising supposed split with respect to the proper scope of a district court's gatekeeping function under *Daubert*); *Zellars v. Nextech Ne.*, 533 Fed. App'x 192 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 911 (Jan. 13, 2014); *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 1002 (Jan. 9, 2012).

expert's testimony on one side of an arbitrary dividing line and other cases *permitting* an expert to testify on the other. It is no surprise that such a division of cases would yield different results. But Petitioner's claim of a fundamental, philosophical split in the circuits is belied by the fact that the courts Petitioner places in its camp, the Ninth, Eighth, Sixth, Third, and Second Circuits, each have issued recent opinions discussing the critical importance of the jury's role and the adversary process in evaluating expert testimony, in much the same terms as the courts Petitioner excoriates as ignoring Rule 702. *See, e.g., Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) ("When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert may testify and the jury decides how much weight to give that testimony."); *Messick v. Novartis Pharm. Corp.*, ___ F.3d ___, 2014 WL 1328182, at *2 (9th Cir. Apr. 4, 2014) (reversing exclusion of expert testimony because Rule 702 must be applied with a "liberal thrust"); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 916 (8th Cir. 2005) ("To the extent PPG's complaints about Martin's studies are well-founded, they go to the weight to be accorded his opinions by the jury. It was PPG's responsibility at trial, through careful cross-examination of Martin . . . to alert the jury to the weaknesses in the factual basis of Martin's opinion . . . ."); *United States v. Stafford*, 721 F.3d 380, 394 (6th Cir. 2013) (approving district court's decision to permit testimony where district court stated that "[w]hether the jury will put any weight on either [expert], I don't know, but [the Defendant's] arguments

go to the weight [of the evidence], not the admissibility"); *United States v. Mitchell*, 365 F.3d 215, 244-45 (3d Cir. 2004) ("Yet Rule 702 and *Daubert* put their faith in an adversary system designed to expose flawed expertise. Mitchell misconceives this balance struck by the framers of Rule 702 and the *Daubert* Court."); *United States v. Farhane*, 634 F.3d 127, 160 (2d Cir. 2011) ("The prosecution's failure to adduce specific evidence of [defendant's] familiarity with the information went to the weight of [the expert's] testimony rather than to its admissibility.").

The very circuits Petitioner caricatures as "dismissive" of Rule 702's strictures, for their part, routinely exclude expert opinions on precisely the bases Petitioner touts. *See Smith v. Jenkins*, 732 F.3d 51, 69 (1st Cir. 2013) (reversing verdict under Rule 702 for expert's failure to satisfy *Daubert* requirements); *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291, 1294 (11th Cir. 2005) (affirming district court's decision to exclude unreliable expert testimony because Rule 702 requires a "rigorous inquiry"); *Microstrategy, Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1355 (Fed. Cir. 2005) (Rule 702's "pre-admission determination . . . is committed to the sound discretion of the district court, *not* the jury" and thus expert was properly excluded). Petitioner does not and cannot demonstrate any conflict among the lower courts where any similar cases would be differently decided if another court's decision were applied as precedent. And, certainly, there is no disagreement expressly articulated in lower court decisions as would typically

invoke this Court's need for resolution. Petitioner's "conflict" proposition is its misplaced notion that courts of appeals do not follow this Court's precedent. Accordingly, there is no justification for this Court to brand any of the cited courts of appeals as noncompliant with this Court's established *Daubert* and Rule 702 jurisprudence.

This is particularly true of the Fifth Circuit, which strictly polices expert testimony using precisely the standards Petitioner demands. *See, e.g., Brown v. Ill. Cent. R.R. Co.*, 705 F.3d 531, 535 (5th Cir. 2013) (district court must find "an adequate fit between the data and the opinion proffered"); *Arthur J. Gallagher & Co. v. Babcock*, 703 F.3d 284, 293 (5th Cir. 2012) ("Expert opinion testimony must be based on reliable principles and methods . . . ."); *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347, 352 (5th Cir. 2007) (affirming exclusion of expert testimony that appellant claimed was subjected to overly "rigorous" review by district court); *see also* Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 9, 35 (Federal Judicial Center ed., 2d ed. 2000) (citing Fifth Circuit cases as representative of restrictive approach to differential diagnosis methodology).

The only true split here is between Petitioner and its own amici, who cannot agree on which circuits properly apply Rule 702 and which do not. Petitioner lauds the Eighth Circuit as requiring a "thorough analysis" of expert opinions, but the Chamber of Commerce lists that circuit as improperly "confining

[its] gatekeeping analysis" to the second prong of Rule 702. The Atlantic Legal Foundation also sees the Eighth Circuit as having fallen prey to the First Circuit's lead in *Milward*. The Chamber and Petitioner place the Tenth Circuit on opposite sides of the supposed "divide," and the American Chemistry Council singles out the Eleventh Circuit as properly applying *Daubert* while Petitioner and DRI think otherwise. These internal divisions between Petitioner and the amici show that the issues presented here are not appropriate for review. There is no real conflict to resolve.[5]

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[5] It is worth noting that in urging this Court to grant certiorari in *Milward*, amicus DRI lauded the Fifth Circuit's willingness to exclude "speculative testimony." 2011 U.S. S. Ct. Briefs LEXIS 1887, at *11. Similarly, the Chamber of Commerce – consistent with the *Milward* petitioner – claimed that the *Milward* court's decision "stands in clear conflict with the Second, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits." 2011 U.S. S. Ct. Briefs LEXIS 1871, at *26. Its brief in this case excludes the Fifth, Eighth, and Tenth Circuits from that list (although the cases which the Chamber now claims the Eighth Circuit and Tenth Circuit got wrong were decided in 2006, 2007 and 2000, long before the *Milward* amicus was drafted). That the putative circuit split (if it exists) is apparently so fluid is further evidence that at most, it should be left to further percolate in the courts of appeals.

III. THIS CASE IS A POOR VEHICLE BE-CAUSE ALTERNATIVE GROUNDS RE-QUIRE THE SAME OUTCOME REACHED BY THE COURT OF APPEALS.

This case is a poor vehicle for this Court to address issues regarding the application of Rule 702 because an alternative ground would require affirmance. Namely, contrary to Petitioner's repeated assertions, the trial produced ample evidence other than Roman's testimony to support the jury's verdict.

Petitioner and some amici contend that the only possible basis of the jury's verdict was Roman's testimony. Pet. 6. The impression Petitioner seeks to leave is that if the courts below were wrong about Roman's testimony, then reversal must follow. But that is not so. An erroneous admission of evidence is only reversible error where the jury would not have reached the same verdict based on other trial evidence. *Liebsack v. United States*, 731 F.3d 850, 858 (9th Cir. 2013) ("[T]he erroneous admission of expert testimony is subject to harmless error analysis . . . ."); *United States v. Khanani*, 502 F.3d 1281, 1292 (11th Cir. 2007) ("Even if an evidentiary ruling is erroneous, that 'ruling will result in reversal only if the error was not harmless.'"); *Mike's Train House*, 472 F.3d at 407 ("Moreover, even if we determine that Dr. Stein's testimony was improperly admitted, we are not to disturb the jury's verdict if the improper admission of that testimony was harmless."). Trial evidence other than Roman's testimony supported the jury's trade secret damages findings.

Petitioner claims Roman's testimony was the sole basis for the jury's findings that Wellogix possessed trade secrets and that Petitioner stole them. With respect to the former point, the court of appeals pointed to evidence and testimony showing that Wellogix was "the only company offering complex services" from 2000-2005, and therefore, Wellogix had value based on that knowledge, as shown by third-party investors valuing Wellogix at more than $27 million. Pet. App. 7a. With respect to Petitioner's illicit use of the trade secrets, the court of appeals explained that "even without Roman's testimony, a jury could legitimately infer, based on the plain language of the documents – for example, Accenture's reference to 'us[ing] Wellogix for content'" – that Petitioner used Wellogix's trade secrets. Pet. App. 13a (internal citations omitted).

Moreover, the "before" valuation of Wellogix was provided by Wagner, as noted above, and that valuation is not challenged in the petition. The "after" valuation was amply supported by evidence entirely independent of Roman's testimony. Although Petitioner makes much of the importance of Roman's "went to zero" testimony, ultimately there is no dispute between the parties about whether Wellogix's business failed or not. Pet. 4. Petitioner does not claim that somehow Wellogix's business operations retained value after Epley laid off his employees and lost all of its customers. At trial, Petitioner did not dispute that Wellogix's business failed – instead it tried to shift the blame to Wellogix's management.

Pet. App. 80a-81a. In this Court, Petitioner focuses on whether Wellogix retained some value after Petitioner stole the trade secrets, based on Wellogix's ownership of patents. App. 50. But the jury heard and credited evidence of the patents' licensing value in making its damages finding. Thus, the jury did not take literally Roman's "went to zero" testimony because it assessed the post-tort value of Wellogix at $1.6 million, as shown by the damage model and award. If anything, Petitioner's complaint is that the jury disagreed with its evidence, not with anything Roman said.

Wellogix also presented other clear evidence that, in fact, its business failed because Petitioner stole its trade secrets. There was ample evidence to support the jury's findings on the damage done to Wellogix (damage the record shows Petitioner intended), as noted by the panel. After Petitioner acquired and used Wellogix's trade secrets, companies no longer needed to go to Wellogix to obtain functions that previously only its software provided. App. 4-5, 7-8, 22-24, 27. As a result of Petitioner's exploitation of Wellogix's technology, the genie was out of the bottle and Wellogix's loss was total. App. 4, 22-24.

Roman's testimony was also consistent with additional evidence that showed SAP implemented technology developed by Wellogix. App. 34, 51-55. Petitioner's own expert admitted that, before the misappropriation, Wellogix possessed solutions for complex services that no other company had developed. App. 62-65. The jury heard testimony and considered

documents and correspondence showing that, in 2005, SAP was still years away from developing complex services functionality – rendering Wellogix's technology crucial to SAP's processes – but that by 2007, SAP had incorporated complex services in its software. A complex services solution was a major gap in SAP's suite of products, and Wellogix was seen as the only company with the technology capable of filling this gap. Petitioner believed it could duplicate or "harvest" Wellogix's complex services functionality, to Petitioner's and SAP's benefit, and used Wellogix's technology to enhance SAP's software. App. 65-66. All of this evidence, considered and weighed by the jury, and noted by the court of appeals, supports the verdict independent of Roman's testimony.

Thus, even were this Court to rule that Roman's testimony was inadmissible, it would not change the result in this case.

IV. THE FIFTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT.

The Fifth Circuit correctly affirmed the district court's broad latitude to perform its gatekeeping function in complete compliance with the *Daubert* trilogy. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (reversing exclusion of expert testimony); *Joiner*, 522 U.S. at 147 (holding that district court did not abuse its discretion); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (holding that district court has "broad latitude" to carry out

gatekeeping function). The district court properly carried out its responsibilities under *Daubert* and at trial. The district court conducted an appropriate and rigorous analysis of Roman's testimony under Rule 702 in its initial opinion on the *Daubert* motion and in issuing its opinion on Petitioner's post-trial motions. Moreover, the district court did not hold, as Petitioner and amici claim, that the jury ought to decide the question of Roman's reliability. Rather, the district court made clear that even though it found Roman qualified and his testimony reliable, Petitioner was nonetheless free to attack Roman at trial on the same grounds it had urged in its *Daubert* motion. Petitioner availed itself of that opportunity. This case is therefore far afield from cases where district courts were found to have abused their discretion by failing to even acknowledge *Daubert* or Rule 702, or by abdicating their responsibility to carefully review an expert's qualifications and testimony. Thus, the court of appeals correctly found that the district court properly exercised its discretion.

The court of appeals also properly held that Roman's testimony satisfied Rule 702 and that Roman was qualified to testify based on his specialized knowledge and experience. Each of the attacks Petitioner made on Roman's testimony before trial and in their post-trial motions was wrong. Petitioner first argued that Roman should be disqualified because he did not have oil and gas experience. But Roman was not asked about the oil and gas field: he served as an expert on computer software. He was able to do so based on his review of Petitioner's documents that

assessed various software vendors' capabilities, and he described how Wellogix's solution was identified in the Accenture documents as a unique solution. App. 8-10.

Petitioner claimed below that Roman had not previously used SAP's proprietary programming language and was unqualified to compare the Wellogix code with SAP's. Pet. App. 127a. The trial evidence showed, however, that Roman was a highly experienced computer programmer who had taught himself the SAP language and that he certainly had sufficient knowledge to compare Wellogix's code with SAP's. App. 28-29, 30-33.

Petitioner also claimed that the method Roman used to compare Wellogix's and SAP's code was inadequate despite the fact that Roman used a software tool to compare the code and then manually compared the important pieces of code to each other to analyze potential matches. But Roman was highly experienced in using this technique. App. 14-16. Petitioner's expert, Deon Smith, by contrast, had only just learned how to use the relevant code comparison tools mere days before issuing his report. App. 58-60.

The trial evidence also demonstrated that contrary to Petitioner's claims, Roman did not "compar[e] the code in the wrong software." App. 42-44, 62-63. SAP's "SRM" product is used to pay supplier invoices. SAP also provides software called ECC, which the trial evidence showed operated as the "engine" of all SAP's business software. ECC feeds directly into

SRM. App. 20-21. Roman testified that, as a result, Wellogix's functionality was present in SAP's software. App. 20-21. Smith conceded that SAP's ECC software is a platform that provides "oil industry solutions," App. 61, and agreed with Roman that SAP's SRM and ECC platforms both work together as SAP's overall business suite. App. 63. Petitioner's claim that Roman compared Wellogix's software to software used only by German municipal governments is simply wrong, and the jury was well within its rights to reject it.

Roman also explained why Petitioner's argument that he mistakenly found "public information was a trade secret" was wrong. As Roman showed, the schema in question contained several pages of information that were trade secrets, including (i) "Detailed Data Transformation Rules," (ii) "XML Schema," (iii) "Intermediate Table Layout," and (iv) "Processing Requirements." App. 36-39. Roman explained that the important information in the schema was not available publicly and therefore remained trade secrets protected by Wellogix. App. 10-13, 36-39. In contrast, Petitioner presented no evidence disputing Roman's testimony. The jury was entitled to put Petitioner's arguments in context and credit Roman's testimony.

All of the circuits, including the circuits on which Petitioner relies, recognize that where, as here, there is conflicting evidence about the facts, such disputes are properly for the jury to decide, not for the court. *See, e.g., United States v. Oliver*, 278 F.3d 1035, 1043 (10th Cir. 2001) (noting that "it is 'solely within the province of the jury[ ]' to weigh . . . expert testimony");

Primiano, 598 F.3d at 565 ("Under *Daubert*, the district judge is 'a gatekeeper, not a fact finder.'") (internal quotations omitted); *Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2005) ("Indeed, competing expert opinions present the 'classic battle of the experts' and it is up to a jury to evaluate what weight and credibility each expert opinion deserves.").

Petitioner's independent attack on Roman's "went to zero" testimony is equally meritless. Pet. 15-19. The fact that Wellogix's value "went to zero" was supported by independent evidence, not to mention common sense. Its CEO Epley testified that the loss of its key trade secrets put Wellogix out of business, and that Petitioner's theft of the trade secrets caused Wellogix to lose its sales and to lay off all its employees. App. 2-4. Roman simply elaborated on Epley's testimony, without objection, that the loss to Wellogix was total based on the facts that its value was in its trade secrets, that smaller companies generally cannot compete with larger software companies who can more cheaply provide the same functionality as part of a base software package, and that there was no need for companies like SAP or others to acquire Wellogix after it lost its unique value in the marketplace. App. 22-24. Roman further elaborated, without objection and based on his experience in the software industry, about the importance of trade secrets to small software companies. App. 25-28.

Finally, the Fifth Circuit's opinion was correct because Petitioner never objected to the question at issue. FED. R. EVID. 103 (party must "timely object" and "state the specific ground" of the objections); *see also United States v. McGlothin*, 705 F.3d 1254, 1262 (10th Cir. 2013) (objection waived where defendant fails to "contemporaneously object" to the admission of testimony at the time it is adduced); *Muhammad v. Secretary, Fla. Dep't of Corr.*, 733 F.3d 1065, 1072 (11th Cir. 2013); *C.P. Interests, Inc. v. Cal. Pools, Inc.*, 238 F.3d 690, 693 (5th Cir. 2001) (objection preserved only where contemporaneous objection made to testimony). Petitioner objected only to any testimony from Roman placing a specific dollar figure on damages, and that objection was sustained. Thereafter, Roman testified without objection about the fatal effect the theft of Wellogix's trade secrets had on the company. Nor did Petitioner raise the supposedly central "went to zero" testimony in its initial post-trial briefs. As a result, this case is fundamentally inappropriate for review for basic procedural reasons.

In short, there is no reason to believe that the district court here abused its discretion. The court of appeals properly affirmed the district court.

V. THIS CASE PRESENTS NO ISSUE OF NATIONAL SIGNIFICANCE.

Petitioner says that certiorari must be granted because some judges "seem not to [have] realiz[ed]"

that Rule 702 was amended in 2000, and therefore this case presents an issue of great national importance that needs to be decided now. As explained above, the merits of that overheated claim are dubious. And any arguably important issues concerning Rule 702, such as those discussed in the amicus briefs, *see supra* at 17, will not be reached in review of this case, which concerns a straightforward judicial determination that expert testimony was based on reliable data and a reliable methodology. The district court considered and rejected as untrue Petitioner's fact-bound complaints about an expert's analysis of software. This issue has no national application or broader significance whatsoever.

————◆————

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WELLOGIX, INC.	*	3:08-CV-119
VS.	*	Houston, Texas
	*	
ACCENTURE, LLP	*	

JURY TRIAL

BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE[1]

APPEARANCES:

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[1] Michael Wagner testified out of order during trial, beginning his direct testimony before Roman's testimony was complete. For the Court's convenience, all of Roman's testimony has been presented together in this Appendix. Thus, the transcript page numbers in this Appendix are not sequential.

Also

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* * *

[2-288] Q [Laminack]   What steps did you take at Wellogix – did Wellogix take to protect its trade secrets?

A [Epley]   We had confidentiality agreements with people that – any time we would have an exposure to our trade secrets, we would have confidentiality agreements with the companies. To think that we showed our trade secrets to a lot of different companies without them is not true.

We did have demos and presentations that would show what our software did, not how it did it; and I would say what it did and then the sales presentations were – were not trade secrets.

Q   Okay. Would you get confidentiality agreements signed, for example, when you went out and actually piloted the software?

A   Yes. We would always have an agreement in place.

Q   When you delivered software, would you get confidentiality agreements?

A   Yes.

Q   We heard a little bit about partnering with different companies like Accenture and SAP. Were

those partnership arrangements covered by confidentiality agreements?

A   Yes, they were.

Q   When investors would come and – that were considering investing in Wellogix and they would kind of want to look under the hood, did you get confidentiality agreements?

A   Yes, we did.

[2-289] Q   Okay. I think this is obvious. But for a little startup company like Wellogix, what would happen if its trade secrets were revealed to people in this industry?

A   Well, more than likely, we would be out of business, be put out of business.

Q   And help me understand why that is.

A   Well, because if we gave up our trade secrets to – without any – without a confidentiality agreement or if we disclosed our trade secrets to companies that could go build it and were larger than we were and had financial stability much more so than us, then there would be no point for the customers to buy Wellogix' software.

Q   I'm going to look at some of these in a minute. But tell the jury how many confidentiality agreements you had with just Accenture.

A   At least six.

Q   I want to talk a minute about the state of a software company in the oil and gas business back in the 2000 to 2005 time frame. Are you with me?

A   Yes, sir.

Q   All right. First of all, did anyone else have Wellogix' complex services solution?

A   No.

Q   Or anything like it?

A   No, sir.

[2-290] Q   Okay. We're going to look at some documents in a minute that prove that. Are you telling the jury that you had no real rival as far as the product itself?

A   I would say that that's true.

<p style="text-align:center">*   *   *</p>

[3-476] Q   [Laminack]   Was there ever any discussions when you approached BP or SAP or Wellogix after you-all were cut out of the process where you were told "We're free to use it. Everybody's got it. You've shown it to everybody"?

A [Epley]   No.

Q   Did anybody say anything like that?

A   No.

Q   Did anybody ever say anything like "Don't get all worked up. It's just kind of cool, it's not that good"?

A   No.

Q   All right. Now, what happened with respect to these other projects where you were negotiating

money deals, Anadarko, you talked about Saudi Aramco, Pemex.

A   Right. Pemex informed us that SAP and Accenture told them they would have the functionality. Saudi Aramco said that SAP had the – was going to provide the functionality, they didn't need Wellogix. And so we didn't get either of those – of those deals.

Q   Or any sales since?

A   Correct.

Q   Did Accenture have access to Wellogix' trade secrets?

A   Yes, they did.

[3-477] Q   In 2000 when they were the implementer on the eServices project, did they have access to the secrets behind your DynaMaps or templates?

A   Yes.

Q   As part of the due diligence that they conducted and investment time, did they access some of your trade secrets?

A   Yes.

Q   As part of the teaming agreements you did, did they have access to your trade secrets?

A   Yes.

Q   As part of the implementation of your solution in places like Marathon, did they have access to some of your trade secrets?

A   Yes.

Q   We've already seen as part of their work on the P2P project they accessed information off of SharePoint, right?

A   Right.

Q   Is there any doubt in your mind that your trade secrets were lifted by Accenture, to use their words?

A   No doubt.

<p style="text-align:center">*   *   *</p>

[3-478] Q [Laminack]   Now, help me understand how Accenture would benefit if SAP has your complex services solution.

[3-479] A [Epley]   Well, Accenture would benefit because they could continue to implement SAP and have one solution. And Accenture's relationship with SAP was such that they would make more money if they did it through – through SAP.

Q   And in the typical software sale installation situation, where does most of the money change hands, in the sale of the software or the implementation work?

A   The implementation. Typically, it's three to four times the sale of the software is what the implementation is.

Q   So anytime SAP makes a sale, if Accenture gets the implementation work, most of the money goes to Accenture?

A   Right.

Q   Do you remember we looked at a lot of e-mails about how anxious Accenture was to somehow get control or get an exclusive to be the implementer of Wellogix?

A   Correct.

Q   In fact, we looked at Exhibit 972 – the jury has seen this – where they were talking about maybe working a deal with Microsoft. Remember that?

A   Right.

Q   Where Microsoft would buy Wellogix and Accenture would get the implementation business?

A   Yes, sir.

Q   There was a comment "Let's show how we structure alliance to ensure that Wellogix does their work through us," us being [3-480] Accenture, "not around us."

A   Right.

Q   And then do you recall how important it was in Exhibit 476 where Accenture says, when they're

talking about Wellogix, "I believe BP work alone could generate annual fees for us in excess of $20 million if Accenture controlled Wellogix"? Do you remember that whole string of e-mails?

A   Yes.

Q   Was it your impression that Accenture at the time thought what you had was a really big deal?

A   Yes.

Q   Okay. Now, you told us that by early '06, spring of '06, you don't get the P2P work. You've gone to these other places and have been told that SAP can do what you-all can do so there was no need for you?

A   Right.

Q   And you didn't get anymore business, did you?

A   No.

Q   What happened to your people?

A   They were let go.

<div align="center">*   *   *</div>

[4-797] Q   [Pirtle] From your review of the technology –

A   [Roman] Yes.

Q   – Wellogix' technology, have you formulated an opinion as to whether or not the technology was unique?

A   It was unique.

Q   And explain why?

A   Well, one of the things we looked at is were there any competitors? And in fact, I believe Accenture did a study to look and see, well, who are the competitors and what do they have?

Q   Well, the jury saw that just before you came in.

A   Oh, okay.

Q   It's Exhibit 888, and I won't pull it back out. But you can go ahead and talk about it.

A   Anyway, so the bottom line is nobody had all of the complete solution. And we talked about it being an end-to-end solution because it goes all the way from the planning and the supplier through all the accounting system all the way to the [4-798] supplier being paid.

But nobody had that complete end-to-end solution, and there are people out there doing electronic invoicing, but that's not the whole solution. There are people out there doing a few other things. You know, they understood it was valuable and they wanted to compete but nobody else had what Wellogix had.

Q   So we've got a unique – unique system. And now, the question is, based on everything you've seen, did that system have value? Was it a valuable piece of hardware?

A   Yes.

Q   In your world, the software world?

A   Oh, yes. It was extremely valuable.

Q   And can you tell the jury why you've reached some of those conclusions.

A   Well, again, before I form a technical opinion in this case, I consider multiple points of data. A lot of the information I had were these million pages of documents. There are a number of documents, BP documents, that show that it was valuable, that they would save, you know, hundreds of millions of dollars a year by being able to inclement [sic] this full end-to-end Purchase to Pay system.

*   *   *

[874] Q.   [Pirtle] All right. Let me get out 714 and let me display it. And this is a document of the type on share point?

A.   [Roman] Yes.

Q.   That someone like Victor would have had access to?

A.   Yes.

Q.   Does this document contain trade secrets?

A.   It does. It's a confidential document. And again, it's of the type that contains lots of information that would be trade secrets. If we look at the different

sections, there's database schema, there's interface documents.

Q. So if I'm understanding what you're telling me and I hope I am, from a technical point of view, what's written in that document would make Wellogix talk to another program?

A. Right.

[875] Q. Back and forth?

A. To the third party software. So part of what's in here, well, there's – there's lots of information, but one of the key things that are in here, is a description of the e-Field ticket in a programming language, which allows third party software to be able to receive and transmit the field ticket.

Q. So this would be the coating [sic] that would be used to make that happen?

A. Yes.

Q. And in particular, I won't claim any owner-ship to this because you showed it to me, but turn over to Page 34. It's titled interface design specs?

A. Yes, that's the name of the document. And this section about the interface actually starts on Page 17 and it ends on Page 34.

Q. Okay. So the whole interface starts on Page 17?

A. Yes. Well, this one file of computer code.

Q.   All right. And on Page 34, it looks like there's a listing of at least things I can read.

A.   Yes. And if we go through the whole document, you will see that there is some abbreviations used, and at the center of the page, you'll see it says Wellogix service types.

Q.   I see that.

[876] A.   Okay. And then after that is a listing of the code that's used inside the document, and then a more human readable version. So CHL, for example, is CH logging and WL are wire line services. And then COMP, fluid, the fourth one down is completion and work over fluids. And – so each of these have has [sic] a code, and then there's an explanation.

So we talked about mud earlier in the case, MLS is the mud logging services. And . . .

Q.   It looks like also the services are like this. Is this for an e-Field ticket or is it for a template or both?

A.   Well, these are the – these are the names of the different service types. And the service type would have both a complex services template and an e-field ticket. If you – if we go back and look through the entire file, we'll see that it specifically talks about the e-Field tickets.

Q.   I can see that on, like Page 26. Now, would this document be a document that would be authored

by Wellogix alone or would there be other people involved?

A. Well, this document is the structure of the data that's being transferred through this interface. This was only known to Wellogix and it was created by Wellogix, and this document then is used to communicate to the other [877] implementers such as SAIC. Cathy Musgrave at SAIC would have received this, so she would have known what the data looked like.

* * *

[894] Q. [Pirtle] Go ahead.

A. [Roman] So data schema, which we saw in P-14, actually has the schema.

Q. That's the glue?

A. That's the glue. Data schema is how the data is organized.

And from my experience in – as a technical expert related to trade secrets, the database schema is a trade secret in and of itself. Even if some of the individual data items might be known because they're visible on the screen, for example, that collection of data and how it's organized and the types of elements in the data which make up the database schema is a trade secret.

* * *

[904] THE COURT: All right. You may resume your inquiry.

MR. PIRTLE: Thank you, Your Honor.

BY MR. PIRTLE:

Q. Mr. Roman, when we left off, we were going through the pages of the screen shots of Wellogix's solution for complex services e-Field tickets and the like.

A. [Roman] Yes.

Q. I'm afraid if we go through any more screen shots, everybody's going to fall asleep. So let's do something else. All right?

A. Okay.

Q. You also have an – a particular expertise, do you not, in that you look at source code electronically?

A. Yes. Part of what I do in patent cases, trade secret cases, copyright cases is analyze the source code.

Q. How do you go about do [sic] that?

A. Computer scientist. Typically what happens in a case is both parties will request that the other party produce all of the relevant source code and object code as well.

[905] And so, a typical scenario is for me to get Party A'S source code and Party B'S source code and to do a comparison to see is there substantial similarity. In this case, is there trade secrets embodied in

one piece of source code? Who developed them? Did they have value? And to see if those same trade secrets show up in the other party's source code.

Q. Hold on. Let's back up.

How do you go about the process of evaluating source code?

A. Well, ideally I can get the source code files in an electronic format at –

Q. I meant your tools.

A. Oh, my tools, yeah. So ideally, I get them electronically. And then as I mentioned before, there are millions of source code files in this case. And for an individual to go through and look at each file like you normally would review a document would arguably take decades.

And so, I got into this litigation support starting out with some relatively small code bases; but as I got more involved, the cases got bigger and bigger, and I found that in order to analyze a million files, for example, in less than two years, I had to come up with more efficient means. So I actually developed my own [906] proprietary tools that allow me to take a code base of a million files over here and a million files over here, then compare those and to find similarity – well, do analysis of they [sic], figure out which ones are most likely to be compared, and to do the analysis.

One of the tools is – allows me to take source code file and produce a listing that's exhibit-ready for court, has line numbers and identifies confidentiality.

Another tool allows me to put those files side-by-side, and then we have some formats that allow us to highlight, to shed light on, the similarities of those documents. And we use that by using colors and fonts.

Q.   And you use these tools in other cases in other courts?

A.   Yes. In fact, on some other cases here in Texas, the judges have ordered that our tools be used in these code comparisons.

Q.   Now, are the tools on the Internet?

A.   We do have a Website called casematters.com where we make some of the tools I just described available. And then also for more complex things where – especially in this case, where there's confidential materials, then we make personal arrangements to provide the tools with the experts that want to use those same tools.

[907] Q. Now, you've – you've got all of Wellogix's source code?

A.   Yes.

Q.   And I use the term "all." I know I got like you, but you got –

A.   Yes. Early on Wellogix produced their source code in a typical fashion.

Q.   All right. And have you taken now the latest version of SAP's software and SAP's software versus Wellogix?

A.   Yes. So SAP's source code gets given out to everyone that gets a license, but it's very complex. As I said, there's millions of files. And it's not actually stored as a normal file; it's stored in the database. And there are database reports that will tell you what those files are, and there's actually an editor built in the SAP product.

But if you use the editor to look at file [sic], it takes you several minutes for every file. And so, I developed an ABAP program that would export the ABAP source code into files so that I could use my tools on them. And I produced over 2 million – well, I extracted almost 2 million files out of SAP and then started the process of comparing those to the Wellogix source code.

Q.   And what exhibits would depict that?

A.   So my Exhibit 36, which there are three parts, 36.1 [908] 36.2 and 36.3. And that's part of my report, which – well, associated with my report, I think, 831.

Q.   Okay. Which number do you want to take first to show the jury?

A.   Let's take them in order.

Q. Okay. So looking at 36.1, we'll put it up on the screen.

A. I'm afraid late in the afternoon this may have put people to sleep.

Q. No. This is better than the screen shots?

A. Okay. We'll keep it exciting.

Q. I'll move around a bit too.

A. Okay. So 36.1, good news. It's only 10 pages long.

Q. All right.

A. And this is a side-by-side exhibit that I produced, again, using the tools that are available on my Website. This is a side-by-side code listing. What I did is took a file from the Wellogix side, so the left-hand side is identified as Wellogix Release 6. And you'll see the last four letters of the name is .JAVA. This tells you that this is JAVA source code.

And then on the right-hand side, I show the full path to the SAP code. And you see the last four letters on the right-hand side is ABAP. That's ABAP, which is the SAP's language that they developed they [909] developed [sic] to do report writing, and SAP is implemented in it.

There are also JAVA files, but this is a comparison between JAVA file and then the core SAP source code file.

Q.   And what does your analysis using your tool show on this?

A.   Well, so the tool allows me to line things up. It shows the line numbers. And if you turn to Page 3, I've underlined and highlighted in blue things that are similar.

And, again, I do this so the jury and Judge can start to understand some of these complex technical things. They're totally different languages.

Q.   That's what I was fixing to ask.

This SAP stuff is written in something called ABAP?

A.   That's correct.

Q.   And that's like German?

A.   Yes.

Q.   And then the – our Wellogix is written in JAVA?

A.   Yes.

Q.   And that's like Southern California and English?

A.   Right.

Q.   So you're comparing that?

[910] A.   And this is where experts become important to be able to shed light on the similarities, because when you just look at it, one of ordinary skill

is not going to be able to determine similarity. But I can give you a few key interpretations.

So if I look at Line 76, you'll see this is called the EFT reconciliator table model. So this is right at the heart of what we're talking about: The ability to reconcile an electronic field ticket.

And on the right-hand side, the ABAP code's much more cryptic, you know, RMESSRKO is the file name. This is a particular report.

If you look at Line 3 it starts to list the tables. And EKPO determined is a table that's related to the purchase order, which is similar to the work order. And ESSR is similar to the e-Field ticket.

And so, this report basically is going to use these two tables, and it's going to do something with them. And as we work through, you'll see on Line 83, we get a list of field tickets, and it actually goes to the work order and gets the field tickets. And then that allows it to use that field ticket's data structure to go through each field ticket.

On the right-hand side, similar kind of thing is doing. There's a begin and an end. That creates [911] a block of things to be included. On the next page, Page 4, it's getting the status to see if it's one that wants to be included, whether it's on hold or canceled or a draft.

On the right-hand side, it's also selecting certain purchase orders, and it actually says "Read purchase orders on Line 26." That's a comment. And then it

says "Select from EPKO," which is the purchase order table, into a table EKPO with a certain set of status.

Anyway, so both of these are doing the same thing: One is getting – and this select statement is actually SQL. We talked about this before. So the SQL is embedded in ABAP. JAVA has a different way of doing that. Again, it's different languages, different technology; but it's doing the same thing. They're both getting a list of purchase orders and a list of – or work orders and a list of field tickets.

Q.   So what's the end result of it?

A.   Well, the end result – and you know, we can look – there's more that matches up on Page 7. And sometimes things don't match up. You know, especially when it's different language, different structure, things don't necessarily line up side-by-side. They're structured differently.

[912] But to give you a general idea of the number of lines in the file and how many of them are functionally similar, there is a statistic at the end. And for this particular file, on the last page, there were 111 lines of code in the ABAP code, and the functionally identical, there was 105, which is 94 percent.

Q.   So have you been seeing Wellogix's functionality creeping into SRM, or let me just put SAP?

A.   Yeah. So this is right in the core software of the ECC of SRM. And let me restate that. It's the core software of SAP, the ECC.

*   *   *

[924] Q.   Another point from Wellogix's perspective and we've seen this chart and used it to talk about how much money was used to make this stuff, but the creation of these templates and Wellogix being cut out, that's the point I'm making, was there damage suffered by Wellogix that you can identify?

[925] MS. BOYCE: Excuse me, Your Honor, this is clearly beyond the pale of this man's alleged expertise, was there damage?

MR. PIRTLE: She's –

MS. BOYCE: Damage expert.

THE COURT: I think it's a proper question if you're asking for what confidentiality was – what kind of confidentiality agreement was breached and what was communicated. It's clearly not appropriate for this witness to put a dollar figure on it.

MR. PIRTLE: I'm not going to have him put a dollar figure on it.

THE COURT: I know.

BY MR. PIRTLE:

Q.   Were they damaged?

A.   [Roman] They were damaged, a software company, essentially its product is its software. And so, the 40 million-dollar investment to build that software was the value of the company. And a trade secret has value because it's not known by your competitors. It's not available for use by the public.

As soon as that trade secret gets disclosed, especially to the largest software company in this industry, SAP, then they can build it and they can build it much more efficiently, they can build it faster. [926] You've already spent years developing it, figuring out what works, figuring out what doesn't work, testing it, doing pilots to make sure it works.

And so, now you've got a finished product, you know, maybe it started out at a rough diamond, but you polished it. Now you have this very valuable thing that works. It's been proven. It's been shown to save hundreds of millions of dollars to your clients. You can copy it much more quickly if you have access to the trade secrets, if you have access to the source code and the documents and all the information about how it works.

And as soon as the big company has it, you know, I'm already licensing SAP, if SAP makes it a part of their standard software package, then I don't have to pay any more money. If I have to license it from Wellogix and SAP, then I have to pay more money because I'm paying two people for the software.

So as soon as SAP came out and said, yeah, we're doing complex services and you don't need Wellogix, the total value of Wellogix went to zero.

Q. Because they were based on this one piece of confidential information?

A. Yes. And again –

Q. I say one piece, collection of –

A. It's all of the work they developed all of these [927] years.

Q. Microsoft wasn't looking to buy them anymore?

A. That's right.

Q. Or SAP?

A. No, because they already had it.

Q. Or Accenture?

A. Accenture was able to benefit if they could implement Complex Services without Wellogix.

Q. And in the real world, in the real software world when you're looking at SAP and Accenture, you know, I'll even throw Oracle in there. I know they're not in this mix, but companies of that size, is there any practical way that a company like Wellogix whose [sic] lost its trade secrets can compete in a market with those guys?

A. Yeah, there's no way to get it back. There's no way for them to go and say, take the risk with me and the small company when you can get it from the large company you already have your core package with.

Q. So once the Jeanie [sic] is out of the bottle it's not going back in?

A. It's not going back in.

Q. And the loss is total?

A. Yes.

Q.   I want to ask another bit of questions based on your knowledge. You've been in here when you've heard talk [928] about that my company, my CEO Ike Epley's sophisticated, knowledgeable?

A.   Yes.

Q.   These folks at Accenture, they're pretty sophisticated too, aren't they?

A.   Yes, they're a top consulting firm.

Q.   And they're pretty knowledgeable about the industry?

A.   Yes.

Q.   And pretty knowledgeable about the market out there?

A.   Yes.

Q.   And I would assume that it's pretty easy for them to figure out this is a very closed market?

A.   Yes.

Q.   Denominated [sic] by giant players?

A.   Yes.

Q.   Do you believe that they would have to know that if you take a small company's intellectual property it's going to destroy that company?

MS. BOYCE: Objection, Your Honor. Those issues well beyond the report.

MR. PIRTLE: Let me rephrase this question.

THE COURT: All right.

BY MR. PIRTLE:

Q.   Based on the knowledge that you know, what you have in your head about the software industry, would you know [929] that if you took this company's intellectual property would destroy this company?

A.   From my experience –

Q.   Yes, sir.

A.   – in silicon valley in 30 years, if you take a company's software, it's [sic] body of trade secrets, and it ends up in the hands of a major competitor, that small startup has no chance.

Q.   You've seen a few small startups in the silicon valley?

A.   I have.

Q.   What's some of them?

A.   Well, I've been involved with some small startups that have been successful, Sun is one.

Q.   Sun Micro Systems?

A.   I interviewed there when they had maybe 400 employees, and, you know, I could have been a multi-millionaire had I taken that job. I've also –

Q.   I bet everybody's got a story like that out there?

A. Oh, yes. I also – when NetScape came out with their first big competitive release with JAVA and JAVA Script, I was working in a little start-up company called At Home, which was developing cable modems. And we were the only ones using kind of the bleeding [sic] edge technology of NetScape and so NetScape actually gave me a pager so their [930] engineers could page me and find out of [sic] the details of the bugs we were finding.

But what happened with At Home, it was funded by William Randolph Hurst [sic], who is the newspaper guy, and he basically saw newspapers were going to suffer because of the Internet. But he was competing with the big cable companies, AT&T, TCI, Comcast, Roadrunner, they were all involved.

And ultimately what happened is Comcast, AT&T took over the cable modem business and At Home, which I invested in went to zero, even though it was well funded, had a big IPO, once they lose their core stuff to the big guys, the big guys are going to win and the start-ups [sic] going to go to zero.

THE COURT: Explain to the jury initially [sic] public offering.

THE WITNESS: Yes. So a start-up company typically today, to be successful, you need to get outside funding, venture capital. And it may came [sic] from friends or family and it may come from big professional investors. That's exactly what happened to Wellogix. Usually it starts out with the founders

and their friends and family and then it expands as they become more successful.

*   *   *

[993] [Roman] One of the things I did, most of my computer knowledge, you know, I was in university 30 years ago, most of what's important in computer science today didn't exist 30 years ago when I was in college. JAVA is a good example, JAVA did not exist. I learned CN in college, but 15 years later they came out with JAVA. So I went and got a book and I taught myself JAVA. And then I became recognized as a JAVA expert, and I developed my medical device software in JAVA.

So I did the same thing here. I got the book, consultant's guide to SAP SRM. I read the book. And in there I found out how SAP software today implements complex services and this supplier relationship management. And there's a particular chart which I put in [994] my Exhibit 30, which shows this back and forth process, the collaboration between the supplier and the operator. And then I went to SAP. And I said – well, before that I got an SAP license about a year ago and I purchased the multi-servers that are required to run a supplier SRM server and then a core ECC server. And I hired SAP consultants just like SAP did to implement my instance of SAP. And I learned how to extract the ABAP source code and I learned how to edit the code and run it, make modifications.

Q.   [Pirtle] You've had a number of SAP consultants hired for awhile; right?

A.   Yeah. And the – I think the typical SAP installation takes at least $17 million to implement. Anyway, mine, of course, I have very focus, I'm just trying to implement the parts that's related to the case, but I probably had 20 different SAP experts work on setting up my computers, making sure that they have all the right components, the right versions, the right license keys. I've had people in Silicon Valley, a couple of different companies, I've had people in India.

And you'll note, if you look at this book it's written by people from SAP's division in India. And I think we've heard testimony about that SAP, not only do they have development in Palo Alto, California where I [995] live, but they have development in Waldorf and they also have a huge development effort in India. And the people who wrote this book are actually the guys in India.

And what I found is I was – I was trying to find out things that most SAP people didn't know. I have various contacts at SAP who provide support. They couldn't give me answers, they would refer me to the third party implementers, and they would send me to India because the guys in India have the detailed knowledge.

So again, I probably had 20 different people working, who were SAP experts. Then I have my own team who they're co-inventors with me on some of my

patents. They've helped implement my Website, casematters.com. And they have been helping me for a number of years do these large co-compares.

So I have my core team of employees, I had consultants that I've worked with for many years and then I hired SAP specific people. And through all that I was able to gain the knowledge that I needed to be able to not only understand how the system worked, but also to extract over two million source code files from SAP.

*   *   *

[1000] Q.   [Pirtle] And as part of the selection process, was there an analysis done of the capabilities of the software that was out there?

A.   [Roman] Yes.

Q.   Would that be something that someone charged with selecting the software would do?

A.   Right. In fact, they would be required to do that. They need to go out and look and say what are the best options out there for BP. And ultimately the decision they make and the recommendation to BP should be, what's the best available solution for BP.

Q.   And does Document 888 reflect the results of the analysis of the software tools out there and what they could do?

A.   Yes. And there's an Excel spreadsheet attached. And it shows the different core features that

are required, and then it lists the companies. I'm looking at 1028.

Q.   All right. We'll put it on 1028. And when you say you're looking at core procurement.

A.   Right. So this section of core procurement is [1001] Columns B through J and again it goes through this whole process that I was talking about, but of particular interest is complex services, that's the last Column J. And then it [sic] Column A, it lists all the people that Accenture looked at.

Q.   And I want to spend a little time on that. Accenture right up to the head of the list is Maximo?

A.   That's right. Again, that's now owned by IBM.

Q.   And then there's various SAP products; right?

A.   Yes. So like FI is the financial package, SRM is the new supplier relationship management thing that SAP is trying to create. XIEP again, was scenario one and two, which were the well planning and the drilling management at –

Q.   Well, it doesn't have any?

A.   – complex services.

Q.   xIEP doesn't have any?

A.   Right, because at this point in time scenario three wasn't implemented and so, no complex services. In fact, it doesn't do anything. So it's been stated by one person that xIEP was an empty box.

Q.   All right. Fair enough. Then we've got Ariba, that's another competing software that's been mentioned?

A.   Yes.

Q.   There's Oracle's business suite in there?

[1002] A.   Yes. So again, as I mentioned Oracle competes with SAP. And not only do they make the database that SAP runs on, but they also have applications, and those applications compete with SAP, but they didn't have complex services either.

Q.   There's Quadrem [sic], that's the name that's been mentioned in here as being a competitor?

A.   Yeah. But as I said, Quadrem [sic] really didn't have.

Q.   Number 35?

A.   If we look at 35, you'll see there's just one X, there's no – Quadrem [sic] doesn't have any of the core procurement requirements. The only thing they have at this point in time – well, they don't even have – that's Trade Ranger that has the catalog management.

Q.   And that's another name that's been mentioned, Trade Ranger?

A.   Right.

Q.   And then the rest of them that have been mentioned didn't even make the traveling team?

A. I'm just trying to see what Quantrum [sic] did have, 35 if we go to the next page, the – they had nothing.

Q. At least according to this analysis?

A. According to Accenture's analysis.

Q. All right. Now, here's the important point, there is a spot here for complex services they analyzed; right?

[1003] A. Yes.

Q. Accenture and BP at this point. And the two software packages that can do that, as of the date of this document, November 18th, 2004, are Wellogix, we know that.

A. Right. And they did that independently. They offered it.

Q. ETrans because was enabled through Wellogix software?

A. That's right. That's the BP project we talked about here. ETrans could do it and again, because eTrans had Wellogix solutions built into it. So it was unique and Accenture knew it was unique. They're the only ones that could provide complex services.

Q. Were other companies looking to try to get into that market?

A. Well, I think this whole list of companies knew that this was a viable market and they knew

that to meet the needs of oil and gas companies like BP, and Shell and Saudi Aramco, they had to be able to do duplex services because 70 to 80 percent of the spend in ENP is complex services.

<div align="center">*   *   *</div>

[1009] Q.   [Pirtle] So the point is SAP is starting to implement technology that Wellogix had developed a long time ago?

A.   [Roman] Yes.

Q.   And you've looked at certain features of the SAP programs that are coming out now, and you're starting to see that kind of thing?

A.   Yes.

Q.   All right.

A.   And, specifically, we talked about different versions of SRM. SRM 4.0 did not have the ability to do e-Field tickets, did not have the ability to do the line item detail.

Q.   And that was the version that was implemented in P2P back at BP –

A.   Right.

Q.   – when Accenture would build our templates?

[1010] A.   That's right. And if we look at these contracts that happened in 2005, 2006, we'll see that part of this work, the 36 million-dollar contract, was

to go from SRM 4.0 to SRM 5.0. SRM 6.0 was planned by SAP to do complex services, but it was never released.

And then today, we have 7.0 or 2007, which is what this book is written about, and the Exhibit 30-31 describe.

Q.   Last subject: Any doubt Accenture was in a position of confidence to – and had access to our trade secrets?

A.   So ultimately, to form an opinion, a technical opinion of trade secret misappropriation, I need to first determine were there trade secrets. There were trade secrets.

Did they have value? No question about it. They had big value to the biggest software companies in the world.

Then the next question I look is: Was there access? And I think that's what we did here. We went through and showed Accenture had access to eServices; they had access to Trade Ranger; they had access to Marathon; and they had access through SharePoint to –

Q.   They had access to everything on Share-Point?

A.   Right. So they had the documents. They had the XML code that defines the different P2P.

*   *   *

[1159] Q. [Pirtle] Now, let's talk about number 714, with Cathy Musgrave, this BP eTrans pilot Wellogix and SAIC. Have you got it in front of you?

A. [Roman] 714?

Q. Yes.

A. Yeah, I have it.

Q. All right. First off, does this document contain Wellogix's trade secrets?

A. It definitely does.

Q. And I want to show you Page 405. If we can get it up. It's called the interface design specification detail data transformation rules.

A. Yes. It's one of the areas of trade secrets that I discussed in my report was the business rules. And this is an area where maybe something in the user interface is – can be observed from someone looking at it.

[1160] But the rules that happen underneath the software, those rules would not be disclosed, for example, by a screen shot that would be shown in the marketing publication, so these rules are an example.

Q. These rules tell you what we're doing with the data and the specifications; correct?

A. Yes.

Q. And then over here on Page 425, it's called intermediate table layout option.

A.   Okay. This is a more detailed version of the database SCHEMA that I talked about. In fact, this is just a subset of the overall SCHEMA. One of the documents I reviewed was a lengthy data based SCHEMA that showed all the different tables.

But this particular one has internal information about what the table structure is. The first column begins with a name. The second column is can it be null. And then again in Oracle database there's some enforcement of that, and then the type. And again, that type of information isn't seen from a screen shot.

Q.   And then the next page I want to stop at is Page 427, processing requirements. This is the work order for processing an e-Field ticket; correct?

A.   Yes.

Q.   And this is trade secrets; correct?

[1161] A.   Yes. And again, this talks about the logic the dependencies, the computations. These are the things that happen down at the lower level of the program, the computation that happened.

Q.   Now this XML code that was shown excerpt off of our Web site, that's on Page 406.

Can you go there, Trevor?

A.   Yeah. So we just talked about the – with the Accenture's counsel, we just talked about what started at the bottom of the page under SCHEMA. We didn't talk about the part up at the top, which is the file that was sent to SAIC.

Q. I understand.

MR. PIRTLE: Blow it up real big, Trevor, at the top.

BY MR. PIRTLE:

Q. In terms of trying to figure out how to find this out on Worldwide Web, it's pretty easy to do, because on the – one, two – third line down, the exact location on the Website of this particular SCHEMA interface is printed in this document, isn't it?

A. Yes.

Q. And that's because, by the industry standards, all these type of SCHEMAs are maintained on the Web; right?

A. Well, there are different type of data SCHEMAs: [1162] There's the more complex data SCHEMAs that I talked about that tells how the internal databases are laid out; but at some point, for third parties to be able to interface with Wellogix, they need to be able to publish at least this much information. And they do it – and, again, the purpose of XML is so that different software companies can exchange information.

And so, this particular one is posted where it can be accessible. And the line that's highlighted in yellow basically points off to this other file, which then defines the information that's being passed back and forth.

Q. It's an –

A. The other information here wouldn't be available.

Q. It's an XSD file; right?

A. Right.

Q. And all the companies publish those; right? Or at least in this business?

A. Yeah. Basically, if you want to be able to access something openly over the Internet, then you would publish this file. Other companies might use XML in a way that's not publicly available. You have to look at the facts in the particular situation.

Q. Now, 714, the type of document that was on eTrans?

A. Yes.

[1163] Q. Does it contain trade secrets of Wellogix?

A. It does.

Q. Thank you.

<p style="text-align:center">*   *   *</p>

[1138] Q. [Voyles] You do not implement SAP systems for a living; correct?

A. [Roman] Well, I've implemented one within my own company, but I hadn't done it prior to this case.

Q. Prior to this case, you had never implement-
ed an SAP system?

[1139] A. That's correct.

Q. You had never worked as an SAP implemen-
tation consultant?

A. No.

Q. You had no specific training in the use of
SAP software prior to being hired by Wellogix in this
case; correct?

A. Right. I was aware of SAP, but I hadn't had
specific training.

Q. You do not have any ABAP, A-B-A-P, certifi-
cations issued by SAP because, to use your words,
that's not what you're into; correct?

A. That's correct. I teach myself.

Q. You had no prior experience with SAP SRM
4.0 prior to being engaged as an expert in this case;
correct?

A. Yes. Again, you're referring to SAP's version
of SRM, because there's generic supplier relationship
management software out there from other suppliers.

Q. You had no prior experience with SAP's SRM
4.0 software prior to this case?

A. That's correct. As you state it, that's correct.

Q. Similarly, prior to being hired to testify in this case, you had no significant experience dealing with SAP SRM 5.0; correct?

A. Yes.

[1140] Q. Prior to being hired to work on this case, you also did not have a lot of specific experience with SRP R/3 software; correct?

A. Yes.

Q. And before you were hired to testify in this case back in August or September of 2009, you did not have any experience actually implementing or configuring SAP software, did you?

A. That's correct.

Q. You have also never implemented or configured any version of SAP R/3 or SAP ECC; correct?

A. Well, prior to this case. Again, I do – have set up both an [sic] P2P and SRM system within my company.

Q. Prior to this case, you had never implemented SAP – implemented or configured any version of SAP R/3 or SAP ECC?

A. That's correct.

Q. You had never integrated any software SAP R/3?

A. That's correct.

Q. Prior to when you were hired to work on this case, you had no substantial experience programming or reading ABAP; correct?

A. That's correct.

Q. Now you testified at length yesterday on direct about some code comparisons between Wellogix code and SAP code. [1141] Do you recall that testimony?

A. Yes.

Q. And those are seen in Defendant's Exhibit's 102, 103 and 104. And in those code comparisons, and I'll let you get those. That should be in Volume 3, Mr. Roman.

A. Are these the same as my Exhibit 36, 1, 2 and 3.

Q. They are.

A. And again, the numbers you are using?

Q. 102, 103 and 104.

A. Okay, yes.

Q. In these code comparisons that you prepared in January 2011, you compared Wellogix's code to SAP's ECC code; correct?

A. That's correct.

Q. ECC is the name of the later versions of SAP's R/3 software; correct?

A. Yes, that's the core ERP or enterprise re-source planning component.

Q. And as Mr. Epley has already testified and you agree, SAP's ECC software product is not the same as SAP's SRM software product; correct?

A. Yeah, they're separate components that work together and the R/3 or ECC has been around and SRM was added in the 2000.

Q. They're different software products?

[1142] A. Yeah, they're designed – they're part of the SAP business suite components.

Q. They're two separate software products?

A. Yes, sir.

Q. ECC R/3 on the one hand and SRM on the other hand; correct?

A. Correct.

Q. So I'd like to talk about the process that you used to create Exhibits 102 and 104.

A. 102 and 104?

Q. Yes, sir. Those are ones [sic] Defendant's Ex-hibits 102 and 104. In part you used a manual pro-cess; correct?

A. Well, as I described before on our Web site, we provide this code listing set of tools and we also have internal versions.

And one version of the tool allows you to do a single file listing, the other version allows you to do side-by-side listing. That's an automated process. And then once we've done that, then the marking of the blue lines which we went through, on at least one of these exhibits, is a way to show the similarities between the two codes and that requires someone who can do that translation between the Silicon Valleys and the German, JAVA and ABAP in order to shed light on the areas of the code that have some similarity.

*   *   *

[1077] A.   [Wagner] Well, this is my conclusion after the work that I did that in late 2005, the value of the company itself, was $27,779,725 and adding prejudgment interest at a 5 percent simple rate to today adds another $4,383,869 for a total loss value as of today of $32,163,594.

Q.   [Martines] Okay. Now, that number came as a result of quite a bit of investigation on your part; is that correct?

A.   It did.

Q.   Okay. And you looked at a lot of documents in this case?

A.   I think if you look at my report I have a list of the documents considered and I looked – I or my staff looked at 285 documents to reach my conclusion.

Q.   And you considered deposition testimony?

A.   Many of those documents were depositions of party witnesses.

Q.   And a number of those documents were financial [1078] documents provided by Wellogix, is that correct?

A.   Oh, yes, those are probably the most important documents to me as the financial information about the company.

Q.   And some of the documents you looked at were independent audits or independent evaluations of the company?

A.   They did have audited financial statements. I did look at those documents.

Q.   Okay. Let's look at the basis for where this number comes from. This case is interesting in my mind, and you tell me if it is in yours too, because we have a couple of really unique pieces of evidence here. And the jury has seen them, and I want to go over them with you. And they concern some independent evaluations that were done of Wellogix right about the time that the theft occurred. Is that a fair statement?

A.   I think that is fair.

Q.   And have you seen anything like that before in your career?

A.   It's rare that I have. Data points that are as close in time to the date I have to do my damage

calculation and that are prepared not in anticipation of the litigation.

Q. And is that – why I think you might have answered my question, but why are these particular documents important [1079] to you?

A. Well, they're important is that right at the time that I'm to value this company, there's actually an investment in this exact company by third parties who have no previous relationship with the company and who independently came in and assessed what this company was worth and paid eight and a half million dollars of their own money to invest in this company.

Q. And that's not something see every day?

A. It's rare in my experience.

<div align="center">*   *   *</div>

[1088] Q. Okay. And based on your review of all the documentation, how much were these folks willing to invest back in 2005?

A. Based on the actual transaction, it was about 8.6 million between First Capital, who was the lead – what I call the lead underwriter or venture capitalist; and the [sic] Capital Southwest put in most of the rest; and then some of the existing investors also put in additional money.

Q. So back in 2005, is it fair to say that a group of [1089] investors was willing to put upwards of $8 million into the company?

A.   They were.

Q.   Okay. After an independent investigation?

A.   That's correct.

Q.   Where they did evaluation of the company?

A.   They did – each of these entities did their own evaluation of what they thought the company was worth.

Q.   And that included looking at audited financials?

A.   They did look at those financials.

Q.   Making telephone calls to partners and customers?

A.   Those are steps they also performed.

Q.   Checked out the validation – checked out the software itself to make sure that, you know, it was what – and I don't mean – I don't want to imply to the jury that they were examining process charts and source code. You and I aren't going there. I mean, they checked out the software in the marketplace?

A.   Yes. They asked knowledgeable people, both partners and customers, what they thought of the software, and they also tried to find out is there any competition.

Q.   So the investment gets done in 2005 after all of this research is done on the company by these third parties.

What is the total value of the company after that investment?

[1090] A.   Well, based on that investment and the fact that these investors got 31 percent of the company, that means the company on a minority value basis was worth $27.8 million as of late 2005.

Q.   And is that a number you used in your damage calculation?

A.   That is a number that I used.

Q.   So that is the value that you placed on the company for purposes of this litigation and what you're [sic] damage model is?

A.   I did.

Q.   Okay. And do you think that's the best number to use?

A.   I think it's the most reasonable number to use, yes.

Q.   Is that a conservative estimate in your mind?

A.   I believe that it is, because, again, I just told you it's a minority value of the company. When you only own 31 percent of a company, you can't change the strategy of the company. You can't unilaterally decide what the company's going to do and what it's not going to do. That's considered a minority value.

*   *   *

[1102] Q.   [Voyles] There are no damages in this case if in your understanding there was no Wellogix software within the SRM code; isn't that right?

A.   [Wagner] Again, that's a liability question, but I would think that's correct.

Q.   And there is no damages in this case in your understanding if it's not shown, if it's not proven, that Accenture caused Wellogix's code to be incorporated into the SRM code?

A.   I think that's accurate.

Q.   Now, is it fair to say to say [sic] that the most significant basis for your opinion are the reports of First Capital and the due diligence Capital Southwest?

A.   I think those are very important pieces of information. The actual most important piece of information is the actual transaction.

Q.   Okay. But the actual transaction was done based on the analysis of the First Capital memorandum; right?

A.   I agree with that

*   *   *

[1118] Q. [Voyles]   You didn't do any independent analysis or review of his valuation calculations?

A. [Wagner]   That's fair.

Q. You did no comparisons between Wellogix and similar companies, when it comes to valuations?

A. No. There were some of those done in the innovation advisors, which I reviewed, but I didn't do any independently on my own.

Q. Now, you said that you, for purposes of your work, you were asked to assume a hundred percent of the value of Wellogix has been lost; right?

A. I was asked to assume that.

Q. But they are still in business, are they not?

A. I believe they are.

Q. And you had not given any consideration to the value of their patents, have you?

A. No.

Q. And you know that at least according to Mr. Chisolm at Wellogix, their patent portfolio has a value as [sic] of much as $160 million; right?

A. I don't know that number.

Q. You've not seen a letter from Mr. Chisolm to that effect during your deposition?

[1119] A. I'm not recalling seeing that in my deposition, no.

Q. Well, you did, but we won't bother with it. Have you considered in doing your analysis any

revenue that Wellogix has received from its patents since August of '05?

A. No. Those weren't values. None of these patents were issued as of that date. And I haven't looked at anything after that date as far as Wellogix.

* * *

[1134] Q. [Martines] Okay. Last question: Knowing everything that you know, everything that you've read, everything that you've evaluated, every question that you've been asked by Mr. Voyles and myself, is it still your expert opinion that Wellogix's value in late 2005 was $27.8 million?

A. [Wagner]   It is.

Q.   And can you explain to the jury why?

A.   Again, this is probably the third time I've told you this. This is a terrific data point for me.

Q.   I'm sorry.

[1135] A.   It is independent people who look at all the plusses and minuses, who, based on my review of their due diligence – and I've seen many due diligence analyses – did what they were supposed to do, had informed judgment. These are sophisticated investors, and they decided to put $8.5 million into this company because they thought it had a future.

* * *

[7-1732] Q [Laminack]   And if you take a look at 926.

A [Thomas]   926.

Q   And specifically what I'm interested in is the bottom of the second page of that chain where it talks about capability release 2, functional scope of en-hancements and it talks about the SRM 5.0 upgrade.

A   Okay. Let me look here. Okay.

Q   You see where I am?

A   I see it.

Q   So now, correct me if I'm wrong, but SAP is updating its SRM software?

A   They upgrade their – they update their software all the time. They have version releases for all their software.

Q   Sure. And you started at BP with Version 4.0?

A   That's correct.

Q   And by July of '06, we're up to Version 5.0?

A   That's correct.

Q   And today we're using Version 7.0?

A   That's correct.

Q   All right. And if you flip over to the back page, one of the things that it talks about, the very bottom entry, enhancements to complex services solution –

A   Uh-huh.

Q   – right?

[7-1733] "Enhanced ability to plan, order, capture receipt detail, and check pricing for services that cannot be fully defined up front."

A   Uh-huh.

Q   Did I read that right?

A   You did.

Q   Have you, by any chance, looked very closely at – and I think you said you hadn't, but I'm not sure – at what Wellogix's complex services software can do?

A   I haven't even seen their software.

Q   Would it surprise you that it's almost word for word what I just read?

A   I take you at your word. I've never seen it.

Q   Okay. I want to ask you about one last area.

A   Okay.

Q   And that's Exhibit 502. And I want to ask you about your e-mail that started this discussion.

A   Uh-huh.

Q   And the jury has seen this document a lot.

A   Okay.

Q   And you're the man that started this, right, this e-mail?

A   Well, I – I initiated this e-mail.

Q   Right.

A   I didn't start the process.

Q   I understand what you're saying.

[7-1734] A   Okay.

Q   Now, you write this and say, "Tracy has brought to my attention that there is a dispute that has some potential for litigation over intellectual capital rights between Wellogix and SAP that could pose risk to both BP and Accenture being potentially named as parties in a lawsuit" –

A   Uh-huh.

Q   – "pursuant to our design and development activities around complex services."

A   Uh-huh.

Q   "In light of this, we may wish to have a meeting to discuss our options relative to our template development efforts and determine whether or not it would be best to defer this activity until such time as the matter is settled or adjudicated."

A   Uh-huh.

Q   Now, do you remember how you described what you were doing in your deposition?

A   Uh-huh. Yes, I do.

Q   You said something to the effect that your attitude was kind of if somebody pulls a fire alarm, the best course of action is to get out of the house?

A   That's right.

Q   And that's what you were suggesting here?

A   That's correct.

Q   All right. Did the activity get deferred?

[7-1735] A   The activity got deferred.

Q   Okay.

A   So the purpose of the e-mail was precautionary. So when someone – if you're performing an activity and someone makes an accusation about you're doing something wrong, you're going to stop what you're doing and investigate further so that you can understand the specifics of that person's claims.

And so the intent here was for me to inform my superiors on the project that I was made aware that apparently there's some noise about what we're doing, let's stop what we're doing until we learn more, and then, you know, we'll – we'll proceed from there.

Q   All right. I understand.

                    *   *   *

[7-1826] THE COURT: Okay.

MR. VOYLES: And plus, your Honor, with all due respect to counsel, what they've alleged in this

case – where they alleged the misuse occurred was in SRM, not ECC.

MS. RODRIGUEZ: And specifically, in SRM 7.0, Judge.

MR. VOYLES: And they've said that in pleadings they're filed. In opposing our summary judgment motion, they've said it. They've said it over and over again, SRM, not ECC. That's their allegation in this case. That's what we've gone to trial on.

THE COURT: And it's your contention that Roman's testimony is then by that – by that much off the mark?

MR. VOYLES: Well, Mr. Roman actually did testify to a question just before our break. Mr. Pirtle asked him "Did you do a code comparison with SRM?" He said, "Yes." He just never offered any evidence after that as to what he found. The only evidence he offered was as to ECC.

And we saw – I mean, you heard he's going to be subject to cross examination what that comparison was. It was some German government portal or something of that nature.

THE COURT: I heard that. But how could – how can [7-1827] that be? How can somebody as experienced as Mr. Roman be that much – that much off the point?

MS. BOYCE: Because he saw red on one side and red on the other and green on one side and

green on the other. That's what drove it. It was the commonality of those words. That's all he saw. That's the only commonality. It just happened to be that the functionality had nothing to do. He simply glommed onto the fact that green was on the left and green was on the right.

THE COURT: That's such a rudimentary mistake, though.

MS. BOYCE: Well, it's – I think it's – because there's nothing there, Judge. I mean, I think the ultimate conclusion is that that's how he did his comparison because there is no similarity, there is no overlap, there is no similar functionality.

MR. VOYLES: You know, in his defense, he's a nice man. He's not just – he might not have known. He didn't go look at the functionality. He said that. He didn't look behind the code comparison to see what that actually did.

THE COURT: Well, we've had a lot of smart people testify. I just hope the jury is up to it, I really do. It's very hard for me to follow. I've already been through an arbitration on this.

*   *   *

[1902] Q. [Pirtle]   So as far as – and I'll abbreviate it – intellectual property, patents, not a TS, trade secrets, not an expert. In fact, you've told me in deposition, you don't even know what a trade secret is, hadn't you.

A. [Smith] I can't quite recall what I said at that time.

Q. Also to add to that, you're not an expert in contracts and confidentiality agreements?

A. I think I did say I'm not expert in – in agreements.

Q. So let's figure out what you are. One thing you profess to have expertise is something I talked to you about yesterday. Code comparison; right?

A. That's one of my expertise, yes.

Q. All right. And we talked leading up to yesterday about how you got your credentials for code comparison; right?

A. Correct.

Q. And that was off the Internet?

A. That's not totally true.

[1903] Q. Well, you got CodeSuite off the Internet; right?

A. No.

Q. You bought CodeSuite?

A. Bought CodeSuite.

Q. Went to the Safe, S-A-F-E site, and took a course off the Internet.

A. Not true.

Q.   What site did you go to?

A.   After I subscribed to the license, Safecore sent me training materials. They sent me link to video for online trainings, a training, they sent me exercise material.

Q.   Okay. You signed up for CodeSuite and Safe sent you material in the mail?

A.   No. They did send me a fairly large file with information contained in it electronically.

Q.   Okay. By e-mail?

A.   By e-mail.

Q.   Then you took the course online?

A.   I took the course online.

Q.   And you took it over a three-day period, three- to four-day period, broke it down to two to three hours a day?

A.   That's not quite what I said, but I took it over probably a week.

Q.   I won't argue with you on that point.

[1904] And then you got your certification seven days before your report was issued in this case? Am I right about that?

A.   That's – that's about right, yes.

Q.   You didn't write CodeSuite or code comparison software?

A. I did not write that code, no.

Q. And you don't know who did?

A. Well, I don't know who the actual author is, no.

Q. Do you know the name of the principal involved in it?

A. That would be Bob Zeidman or Zeidman.

Q. Zeidman?

A. Actually, correct German pronunciation is "Zeidman."

Q. And do you know Mr. Zeidman?

A. No, I do not.

Q. Never met him?

A. I have not met him.

Q. I'd asked you yesterday where he was. He's out in the Silicon Valley; right?

A. I think more accurate Cupertino, maybe, yeah.

<p style="text-align:center">*   *   *</p>

[1930] Q. [Pirtle]   So you admit it's part of the ECC SAP system?

A. [Smith]   Correct.

Q. And the ECC SAP system is enabled to service various needs; right?

A.   Absolutely.

Q.   And some of them would be governmental needs?

A.   Yes, it would be.

Q.   And so, all of this stuff, whether it's bundled or unbundled, is part of SAP ECC?

A.   I don't quite understand your question.

Q.   All of this stuff, the various applications that it can run, whether it's a auto parts store, a law office, or a plant, is all part of ECC?

A.   It is part of – and, again, if I understand your question correctly, it depends what industry you belong to and I think that is where you're heading.

Q.   That's where I'm headed.

A.   Right. So, yeah, SAP does allow for government specific banking, IS, oil industry solutions.

Q.   And are you aware that that ECC module is part of something called SAP Business Suite 7?

A.   That would be if you are just generically have the business suite, if you're not a specific industry [1931] solution.

Q.   Are you familiar with SAP Business Suite 7?

A.   I am.

Q.   I want to show you a document. 1029 is titled SAP Business Suite Invasion 2010; right?

A.   It does, say, so.

Q.   This particular one is off the African SAP user group. I figured you being from South Africa it might be –

A.   It just happens to be in the wrong language. Should have been in Africans [sic], but no, I'm just pulling your leg.

Q.   Well, the SAP Business Suite 7, 2010 Innovations, have you looked at what has come out for 2010 on the SAP Business Suite 7?

A.   I have, but not this specific document.

Q.   Well, there's one area that I want to look at on 1029, and would you turn the page?

A.   Again, this is in your exhibit; right?

Q.   That's a new exhibit.

A.   Okay.

Q.   Turn to Page 26.

A.   I am there.

Q.   This Page 26, on the left-hand side is talking about the Business Suite 7's 2010 innovation offering end to end process for complex services; right?

[1932] A.   I see that, yeah. You read that correct.

Q.   Were you aware of that innovation?

A.   Well, I was aware that that was actually coming and a lot of that innovation was actually through input from various customers.

I mean, if we continue – one of the major flaws SAP and SRM had in previous releases, were it could not process hierarchal data, which is particularly the details as Wellogix has. When you use SAP product, let's say I create a requisition in SRM, or reverse or an ECC is probably the better way to explain it, I will have typically a header item that says "fix compressor," and under that compressor, I will actually have line items saying "replace bearing this service."

One of the flaws with SRM was that document goes over from the ECC system to SRM, you would only see the line item called "fix compressor." And that is where Wellogix did have a solution, yes.

Q.   And looks like now SAP is bringing in their solution to that?

A.   An actual fact, no. We really have to look at how the Wellogix solution works. And if we look at Wellogix solution, the fact that SAP in itself could not process hierarchal items, one of the capabilities Wellogix had, they actually exposed the subline items as line items.

[1933] So there is nothing new, really, the way Wellogix makes it through SAP was not at a high hierarchal level. They brought everything at the top. That's why Wellogix's solution worked.

Q.   Well, here it says, "SAP Business Suite 7 Innovations 2010, support for end to end process for complex services. This support addresses the representation of service hierarchies in the procurement catalog in the handling of hierarchies in the source and process and creation of following documents." Did I read that reasonably correctly?

A.   You read that correctly.

Q.   And then it says on the solution enhancements down towards the bottom it says, "Enable a Web DynPro development environment version of purchase requisition to handle service hierarchies and create – in case of create and change." Are you using this?

A.   Using what?

Q.   This new enhanced end to end complex services solutions?

A.   No, I have not actually not implemented it.

Q.   All right. The –

A.   But, again, please note that this stresses hierarchies and again, do you know what DynPro is, Mr. Pirtle?

[1934] Q.   I don't. It sounds to me like it's some type of new innovation for an end to end process.

A.   No. Clearly, and again, before SRM – well, this suite, which includes this SRM 2 point – 7.0 was

released, we did give some input to SAP and hierarchies was the major issue.

If we are talking about – if we're talking DynaMaps or any type of templates with intelligence, that was not the case. Our major issue with the – the product was hierarchies. Now, if we look at where, Mr. Pirtle, highlighted the enablement of Web DynPro, that is a technical solution where again, SAP didn't give the capability where I could put the line item in a Web environment. If I put the header where I said "fix compressor," I didn't have the capabilities to put the subline items in. They have not done that enhancement to give you that capability.

Q. And, of course, Wellogix's solution had the ability to transfer line item detail, didn't it?

A. Absolutely. And, again, as I mentioned before, Wellogix did have [sic] solution, a clever solution in the sense that they took the subline items and then proposed them as actual line items to SAP, and that's how it worked.

Coming back to SAP previously could not handle subline items or hierarchal items. The way [1935] Wellogix proposed to SAP to make SAP work is to propose it at the higher level. That's why the solution worked.

<center>*   *   *</center>

[8-2040] Q   Okay. You spent quite a bit of time on Exhibit 473. Do you have that there in front of you? The list to Walldorf and harvest –

A   It's here somewhere.

Yep.

*   *   *

[8-2043] Q   Okay. So what was going on here is SAP was talking about taking the Wellogix solution and integrating it into the SAP/SRM solution?

A   That's what these document are about, correct.

Q   And, of course, this is dated February of '04?

A   U-huh.

*   *   *

[8-2092] Q   And 971 is an e-mail that talks about Surprenant, the former SAP man, leaving SAP and going to work for Quadrum [sic], right?

A   That is what this says, yes.

Q   Talks about his extensive experience at SAP, et cetera. Now he's going over to Quadrum [sic]. And you get an e-mail from one of your people saying, "I suppose this leaves Wellogix with one less sponsor." And you respond "One can only hope." That was your response, right?

A   I did. I –

*   *   *