

EXHIBIT G

ORACLE USA, INC., ET AL

V.

SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.

FEBRUARY 23, 2010


PAUL K. MEYER

55. Disrupting Oracle's business was a primary goal of SAP's acquisition of TomorrowNow. A few days after the emails discussing TomorrowNow as an acquisition candidate in mid-December 2004, John Zepecki, SAP Senior Vice President of Development, communicated SAP's "PeopleSoft 1-2-3" plan on December 21, 2004 to Shai Agassi.¹³⁴ Later, in January 2005, this plan is distributed more widely by Mr. Zepecki to Arlen Shenkman, James Mackey and other SAP employees.¹³⁵ This plan addressed the three steps SAP would take "to disrupt Oracle's software maintenance business and ultimately capture Peoplesoft customers as SAP customers:" 1) provide current SAP customers Peoplesoft support, 2) drive incremental revenue through composite applications and 3) upgrade Peoplesoft customers to mySAP ERP.¹³⁶ The plan also states that, "Even if SAP does not convert all Peoplesoft customers, SAP may force Oracle to change its behavior or plans around pricing or positioning."¹³⁷

56. Leo Apotheker, SAP Executive Board Member and Co-CEO, testified that he wanted the TomorrowNow deal to close as a way to "inflict some pain on

¹³⁴ SAP email from Arlen Shenkman to James Mackey Re: Peoplesoft 1-2-3, SAP-OR00091723-1728 (Shenkman Exhibit 210), at 725-727.

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Oracle.”¹³⁸ Henning Kagermann, SAP Executive Board Member and Co-CEO, testified that the TomorrowNow acquisition strategy was to “interrupt Oracle’s acquired maintenance income stream, making it difficult for them to invest in development of their fusion platform.”¹³⁹ SAP’s acquisition of TomorrowNow sought to: “Disrupt Oracle’s ability to pay for the [PeopleSoft] acquisition out of cash flow; Shrink [Oracle’s] share of the application market; Discredit [Oracle’s] efforts to create a next-generation application platform.”¹⁴⁰ Gerhard Oswald, SAP Executive Board Member, testified that a metric regularly used to assess TomorrowNow’s value after the acquisition was the amount of revenue taken from Oracle.¹⁴¹ Mr. Oswald also testified that up until the eve of Oracle’s lawsuit, TomorrowNow was integral to SAP’s efforts to attack Oracle.¹⁴²

57. While SAP would benefit if customers purchased support from TomorrowNow, converting the customer to an SAP application was the ultimate goal.¹⁴³ SAP forecasted that TomorrowNow would be providing

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¹⁴⁰ “Safe Passage: Winning Customers and Markets From Oracle-PeopleSoft-J.D. Edwards,” dated January 20, 2004, SAP-OR00299495-518 (Oswald Exhibit 595), at 500.

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support to 500 customers in 2005 and 1,000 customers in 2006.¹⁴⁴ However, Shai Agassi testified that SAP's Executive Board was more interested in converting customers to SAP software than continuing to collect support revenues.¹⁴⁵ SAP's "Peoplesoft 1-2-3" plan indicates that, "Freezing a Peoplesoft customer "forever" is not an end goal for SAP. SAP ultimately wants to sell more software and upgrade a customer to mySAP."¹⁴⁶

58. SAP planned to provide support of PeopleSoft software until 2009, by which point customers would be switched over to SAP software.¹⁴⁷ Nam Bui, TomorrowNow CFO, indicated that TomorrowNow would help "SAP take advantage of the new enterprise software market dynamics by increasing and accelerating defection rates from Oracle/PeopleSoft to SAP."¹⁴⁸ An SAP Executive Board presentation indicates that "TomorrowNow is a strategic investment and serves as a strategic weapon against Oracle."¹⁴⁹

59. Leo Apotheker testified that "[t]he acquisition of TomorrowNow was meant to facilitate the movement of customers who so desired to moved away from PeopleSoft -- from PeopleSoft software in that particular case to SAP."¹⁵⁰ SAP

¹⁴⁴ "TomorrowNow Integration Meeting," SAP-OR00009794-819 (Ziemen Exhibit 455), at 817; SAP email from Gerhard Oswald to Shai Agassi Re: Business Case TomorrowNow with attached document "Board_BC_TNow.ppt," SAP-OR00502277-292 (Agassi Exhibit 742), at 279 and 286; Deposition of Shai Agassi (Former SAP CTO and Executive Board Member), January 5, 2009, pgs. 344-345.

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¹⁴⁷ SAP email from Thomas Ziemen to Leo Apotheker Re: PeopleSoft Attack Program with attached document "PS_Attack_Program_12_2004_V6.ppt", SAP-OR00253278-301 (Ziemen Exhibit 447), at 283.

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set a goal to convert approximately 50% of PeopleSoft and J.D. Edwards customer installations to SAP.¹⁵¹ Shai Agassi testified that SAP could have done better than 50% and could have won approximately 60% of Oracle's PeopleSoft business.¹⁵²

60. SAP planned to charge 10% of Oracle's license fee for basic TomorrowNow support (less than half of what Oracle charges, 22% of the license fee) or allow customers to upgrade to SAP standard support, which included some advanced service options, for 17% of Oracle's license fee.¹⁵³ SAP projected this business opportunity of obtaining maintenance, "cross-sell" and "up-switch" revenue from PeopleSoft customers, for the 3 year period from 2005 through 2007, to be valued at \$897 million.¹⁵⁴ Within the first half of 2005, SAP reported €8.5 million¹⁵⁵ in TomorrowNow maintenance contract volume taken away from Oracle, and TomorrowNow's install base grew to a total of 98

¹⁵¹ "Safe Passage: Winning Customers and Markets From Oracle-PeopleSoft-J.D. Edwards," dated January 20, 2004, SAP-OR00299495-518 (Oswald Exhibit 595), at 500; Deposition of Shai Agassi (SAP Former Executive Board Member), January 5, 2009, pgs. 315-318.

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¹⁵⁴ SAP email from Thomas Ziemen to Leo Apotheker Re: PeopleSoft Attack Program with attached document "PS_Attack_Program_12_2004_V6.ppt", SAP-OR00253278-301 (Ziemen Exhibit 447), at 288. Thomas Ziemen defined "up-switch" as the moving of a customer off of Oracle to an SAP application, and explained "cross-sell" as the sale of other software components that are integrated with SAP's NetWeaver environment (Deposition of Thomas Ziemen (SAP Vice President of Service Solution Management), September 30, 2008, pgs. 72-74). SAP has admitted that the \$897 million value "does not 'project a customer's value over the lifecycle of a customer as, for example, it only includes assumptions for the years 2005-2007.'" [Defendants' Ninth Amended and Supplemental Response to Plaintiffs' Fourth Set of Interrogatories to Defendant TomorrowNow, Inc. and Third Set of Interrogatories to Defendants SAP AG and SAP America, Inc., Second Supplemental Response to Interrogatory 69, pgs. 21-22; Email from Bernd Welz to Bernd-Michael Rumpf Re: PeopleSoft Attack Program, with attached presentation, "A Roadmap for PSFT Customers to SAP", SAP-OR 00493900-923 (Scholten Exhibit 1782), at 910].

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customers taken away from Oracle.¹⁵⁶ SAP's primary goal with TomorrowNow was not to generate PeopleSoft software support revenues. In fact, SAP offered TomorrowNow support for free, as a loss leader in order to attract more customers to its Safe Passage program.¹⁵⁷

61. The below list summarizes some of SAP's stated reasons for acquiring TomorrowNow.

- "Disrupt Oracle's ability to pay for the acquisition out of cash flow; Shrink their share of the application market; discredit their efforts to create a next-generation application platform" and "affecting Oracle's ability to maintain this revenue stream could impact the ROI assumptions of the Oracle/PeopleSoft deal"¹⁵⁸
- "Inflict some pain on Oracle"¹⁵⁹
- "Interrupt Oracle's acquired maintenance income stream, making it difficult for them to invest in development of their Fusion platform."¹⁶⁰
- Take away Oracle's maintenance revenue stream¹⁶¹

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¹⁵⁸ SAP email from John Zepecki to Arlen Shenkman and other SAP personnel with attached document "Peoplesoft 1-2-3 01 05 05.doc", SAP-OR00004991-5007 (Shenkman Exhibit 225), at 993 and 998; "Safe Passage: Winning Customers and Markets From Oracle-PeopleSoft-J.D. Edwards," SAP-OR00299495-518 (Oswald Exhibit 595), at 500.

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358. In numerous presentations and internal communications, SAP executives espouse their goal of causing Oracle to incur financial losses in the form of lost support and license revenue. One of the drivers for SAP's acquisition of TomorrowNow was to take away Oracle's support revenue stream.⁶⁷¹ A January 2005 Safe Passage "Executive Overview" presentation explains that SAP's strategy for reaching its goal to "convert the majority of the PeopleSoft and J.D. Edwards customer base to SAP and contain Oracle's potential growth in the next generation application market," includes offering TomorrowNow support services in order to "siphon off the cash flow that Oracle needs to build or acquire its next generation applications."⁶⁷² Another SAP Safe Passage presentation stated goals to: "Convert approximately 50% of the PeopleSoft and J.D. Edwards customer installations to SAP (100% of shared customers). Disrupt Oracle's ability to pay for the acquisition out of cash flow. Shrink their share of the application market. Discredit their efforts to create a next-generation application platform."⁶⁷³ A presentation made at a 2005 SAP offsite strategy meeting indicates SAP's strategy was to "Interrupt Oracle's

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⁶⁷³ "Safe Passage: Winning Customers and Markets from Oracle-PeopleSoft-J.D. Edwards," January 20, 2005, SAP-OR00299495-518 (Oswald Exhibit 595), at 500. The date on the presentation erroneously indicates that it was presented in January 2004.

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434. Defendants' have benefited financially from being able to market and sell TomorrowNow support services using a business model that relied upon the alleged infringement and misuse of Oracle's intellectual property.⁸⁰³ As a result of the alleged bad acts, Defendants have been unjustly enriched as a result of being able to sell support service for PeopleSoft, J.D. Edwards and Siebel products, as well as obtain and enhance customer relationships that

⁸⁰³ In this section, unless specified otherwise, I use the terms "unjust enrichment" and "infringer's profits" synonymously.

facilitated sales of additional SAP software applications and associated support and other services. An alternative measure of Defendants' unjust enrichment is the cost that SAP would have incurred to develop the alleged misappropriated Software and Support Materials internally and license Oracle database software, as opposed to acquiring the technology improperly.⁸⁰⁴ Other experts for Oracle have quantified SAP's avoided development cost and I have summarized these amounts in an earlier section of this report.

435. I understand that disgorgement of Defendants' profits obtained as a result of its alleged infringement and misuse of Oracle's Software and Support Materials is a remedy of damages available to Oracle for certain of its causes of action in this litigation. I understand that under its copyright infringement claim, Oracle is entitled to claim infringer's profits to the extent they are not duplicative of its actual damages claim. If Oracle is awarded actual damages on the basis of its lost support profits (as opposed to based on the fair market value of SAP's use of the infringed copyrighted materials in suit), I understand Oracle would be entitled to an award of infringer's profits as it relates to any Relevant TomorrowNow Customers who also purchased applications or other services from SAP, or were otherwise excluded from the calculation of lost support profits.⁸⁰⁵ I have quantified Defendants' total revenues related to its alleged infringement and misuse of Oracle's Software and Support Materials.

⁸⁰⁴ SAP's unjust enrichment as measured by its avoided costs is an alternative to, rather than additive to the amount of SAP's unjust enrichment based on its ill-gotten support, license and other services revenue. I do not, however, use SAP's avoided costs as a measure of Defendants' infringers' profits for its copyright infringement, as I understand that Defendants' avoided cost is not an appropriate measure of copyright damages on the basis of disgorgement of infringer's profits.

⁸⁰⁵ For this reason, TomorrowNow's support revenue received from customers that are excluded from the calculation of Oracle's lost support profits is separately presented on SCHEDULE 41.U.

I understand in these circumstances it is the Defendants' burden to identify and address any appropriate apportionment issues and/or cost deductions.

B. Defendants' Unjust Enrichment – TomorrowNow Support Revenue

436. As explained above, absent its alleged infringement and misuse of Oracle's intellectual property, TomorrowNow would not have been able to market and represent to customers that it could provide the same or superior support service for Oracle's PeopleSoft, J.D. Edwards and Siebel products as Oracle at half the price. I also understand that Oracle's expert, Kevin Mandia, has concluded that TomorrowNow's entire business model relied upon the alleged infringement and misuse of Oracle's Software and Support Materials, and the unauthorized downloading and copying of Oracle's intellectual property.⁸⁰⁶ Therefore, Defendants have been unjustly enriched by every sale of TomorrowNow support services.

437. I have reviewed Defendants' reported TomorrowNow support revenue, by customer, for the Relevant TomorrowNow Customers since 2002. For the period of 2002 through the first part of 2005, TomorrowNow's customer-level revenue data is contained within TomorrowNow's QuickBooks file.⁸⁰⁷ For the periods after SAP's acquisition of TomorrowNow, Defendants have produced accounts receivable records, by region and by customer.⁸⁰⁸ The revenue information produced by Defendants includes reductions in revenue for

⁸⁰⁶ Discussion with Kevin Mandia (Mandiant); February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1 and 3. As testified to by several former TomorrowNow customers, the low cost of the TomorrowNow service was an important factor, and in some cases the most important factor, in their decision to switch to TomorrowNow for support services. For example, see Declaration of Richard Ball, Director of Procurement, The Standard Register Company, November 11, 2009, pg. 3; Deposition of Tracy Hallenberger (Baker Botts Chief Knowledge Officer), November 18, 2009, pgs. 26-27; Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pgs. 27-28.

⁸⁰⁷ TN-OR02986052, TomorrowNow, Inc._1.QBW.

⁸⁰⁸ TN-OR06125333, TN Customer Report-Revised.xls.

refunds and/or settlement payments paid to customers upon the shutdown of TomorrowNow in 2008.⁸⁰⁹

438. According to the customer-level revenue data produced by Defendants, excluding the reductions in revenue for settlement payments made to customers due to TomorrowNow's shutdown due to this litigation, TomorrowNow received \$54.1 million in revenue since 2002, \$48.5 million (90%) of which was received since TomorrowNow was acquired by SAP in January 2005.⁸¹⁰ Net of revenue reductions for settlement payments made, TomorrowNow received \$41 million in net revenue from the Relevant TomorrowNow Customers since 2002, \$35.4 million of which was received since it was acquired by SAP in January 2005.⁸¹¹

C. Defendants' Unjust Enrichment – Revenue from Sales of Other SAP Products and Services

439. As explained in section IV.B.3 above, TomorrowNow was an integral part of SAP's Safe Passage program, the goal of which was to capture Oracle's PeopleSoft and J.D. Edwards customers and convert them to SAP applications.⁸¹² The third step and ultimate goal of SAP's "PeopleSoft 1-2-3" plan was to convert PeopleSoft customers to SAP applications.⁸¹³ An SAP

⁸⁰⁹ See negative entries in the file: TN-OR06125333, TN Customer Report-Revised.xls. The amount of the refunds and settlements paid to TomorrowNow customers is also shown at "TomorrowNow Operations Wind Down: Final Report," TN-OR0352871-924 (Brandt Exhibit 535), at 891-899.

⁸¹⁰ SCHEDULE 41.U. \$15.7 million of the \$54.1 million in revenue relates to Relevant TN Customers that were excluded from the calculation of Oracle's lost profits.

⁸¹¹ SCHEDULE 41.U. \$13.9 million of the \$41 million in revenue relates to Relevant TN Customers that were excluded from the calculation of Oracle's lost profits.

⁸¹² SAP AG Annual Report, for the year ended December 31, 2005, pgs. 2 and 66; SAP email sent from Chuck Mulloy to Gerhard Oswald and other SAP personnel, dated January 17, 2005, with attached document "Safe Passage v6.ppt," SAP-OR00092046-070 (Shenkman Exhibit 236), at 048 and 050.

⁸¹³ SAP email from John Zepecki to Arlen Shenkman and other SAP personnel, dated January 5, 2005, with attached document "Peoplesoft 1-2-3 01 05 05.doc," SAP-OR00004991-5007 (Shenkman Exhibit 225), at 997 and 003.

document states, "Freezing a PeopleSoft customer 'forever' is not an end goal for SAP. SAP ultimately wants to sell more software and upgrade a customer to mySAP."⁸¹⁴ SAP's goal was to convert 50% of Oracle's PeopleSoft and J.D. Edwards customers to SAP.⁸¹⁵ SAP's primary goal of extending TomorrowNow support services to Oracle's Siebel product line was to get those Siebel customers to switch to SAP's CRM software.⁸¹⁶ In an effort to achieve these goals, SAP offered TomorrowNow service as a loss leader in order to gain more Safe Passage program customers.⁸¹⁷

440. SAP's TomorrowNow support offering served as an enabler for SAP to win more customers from Oracle. SAP did not have a comparable offering (to provide support service to Oracle's customer base) either before it acquired or after it shutdown TomorrowNow's operations.⁸¹⁸ Through its operation of TomorrowNow's alleged business model, Defendants have benefited financially from the sales of other SAP products and services to certain of the Relevant TomorrowNow Customers.

⁸¹⁴ SAP email from John Zepecki to Arlen Shenkman and other SAP personnel, dated January 5, 2005, with attached document "Peoplesoft 1-2-3 01 05 05.doc," SAP-OR00004991-5007 (Shenkman Exhibit 225), at 997.

⁸¹⁵ "Safe Passage: Winning Customers and Markets From Oracle-PeopleSoft-J.D. Edwards," SAP-OR00299495-518 (Oswald Exhibit 595), at 500; Deposition of Shai Agassi (Former SAP CTO and Executive Board Member), January 5, 2009, pgs. 315-318.

⁸¹⁶ Deposition of Terry Hurst (SAP Director of Competitive Programs), September 10, 2009, pgs. 503-504.

⁸¹⁷ Email from Thomas Zieman to Gerhard Oswald, dated July 31, 2006, Re: Q1 Oracle Disruption Plan, SAP-OR00156241-242 (Zieman Exhibit 454). See also, Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pgs. 34-39, who testified that the total cost of ownership was a deciding factor in Waste Management's decision to switch to TomorrowNow/SAP.

⁸¹⁸ Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 238-240.

1. SAP Positions and Claims Regarding Safe Passage Success and Revenues

441. In December 2004, Thomas Ziemer sent an email to several SAP Executive Board members attaching a presentation containing slides about a "PeopleSoft Attack Program." The slides indicate that the SAP Business Opportunity included revenues from "maintenance" of PeopleSoft products, "upswitch" of replacing PeopleSoft products with SAP products and "cross-sell" of selling customers other SAP products.⁸¹⁹ Reports on TomorrowNow's financial results indicated that support revenue won by TomorrowNow was not the full extent of value for SAP. For example, a June 20, 2006 SAP presentation titled "*CEO Council – Post Merger Integration (PMI)*" includes a slide titled "Financial Scorecard – TomorrowNow (Stand Alone)," which indicates that "When conducting a financial review for TomorrowNow the following two aspects have to be considered: 1) TomorrowNow on a Stand-Alone basis, as well as 2) Safe Passage implications."⁸²⁰ That same June 20, 2006 presentation contains a slide titled "TomorrowNow – Creation of Safe Passage," which reports:

- "Safe passage pipeline (752 opportunities) and Revenues justify the cost of the [TomorrowNow] acquisition and additional operating expenses;"

⁸¹⁹ Email and from Thomas Ziemer to Leo Apotheker and others dated December 23, 2004, Re: PeopleSoft Attack Program with (Ziemer Ex. 447) PS_Attack_Prog attachment, SAP-OR00253278-301, at 288-290; Deposition of Thomas Ziemer (SAP Vice President, Service Solution Management), September 30, 2008, pgs. 72-76. "Upswitch" relates to the conversion of a PeopleSoft or J.D. Edwards customer to SAP applications, while "cross-sell" relates to the sale of other software components that are integrated in the SAP NetWeaver environment [Deposition of Thomas Ziemer, September 30, 2008, pgs. 72-74].

⁸²⁰ CEO Council Post Merger Integration (PMI) dated June 20, 2006, SAP-OR00097329-364 (Oswald Exhibit 606), at 344.

- “In 2005, TNow was directly involved in 14 Safe Passage deals with net software value of approximately € 30M;” and,
- “Successful Deal strategically & financially (indirectly) . . . Global Benefits: In 2005, 35 Americas Customers and 33 EMEA Customers.”⁸²¹

442. A January 11, 2007 “*Safe Passage Update*” presentation made at a Global Leadership Meeting in Lake Tahoe defines a Safe Passage customer as “A current Oracle, PeopleSoft, JD Edwards, Retek, or Siebel customer that chooses to either replace their existing implementation in favor of SAP or defer migration to Oracle Fusion by purchasing a maintenance contract from TomorrowNow.”⁸²² That same January 11, 2007 presentation reports:

- 26 joint TomorrowNow/Safe Passage customers,⁸²³
- “30% of TomorrowNow customers think TomorrowNow is a first step on the road to SAP,”⁸²⁴
- “Safe Passage pipeline (403 opportunities currently in process); TomorrowNow pipeline (816 open opportunities), and revenues justify the cost of the [TomorrowNow] acquisition and additional operating expenses”;⁸²⁵ and,

⁸²¹ CEO Council Post Merger Integration (PMI) dated June 20, 2006, SAP-OR00097329-364 (Oswald Exhibit 606), at 344.

⁸²² TomorrowNow Global Leadership Meeting January 11, 2007, SAP-OR00007470-498 (Kagermann Exhibit 417), at 487.

⁸²³ TomorrowNow Global Leadership Meeting January 11, 2007, SAP-OR00007470-498 (Kagermann Exhibit 417) at 488.

⁸²⁴ TomorrowNow Global Leadership Meeting January 11, 2007, SAP-OR00007470-498 (Kagermann Exhibit 417), at 491.

⁸²⁵ TomorrowNow Global Leadership Meeting January 11, 2007, SAP-OR00007470-498 (Kagermann Exhibit 417), at 497.

- Predicted Break-even for TomorrowNow in 2008 “after completion of globalization and business scoping in 2007.”⁸²⁶

443. SAP regularly reported on the success of the Safe Passage program, of which TomorrowNow was an integral part.

Table 17: SAP Safe Passage Program Results				
	2005 ⁸²⁷	2006 ⁸²⁸	As of Sept 2007 ⁸²⁹	Total (Jan 2005 – Sept 2007)
Annual Safe Passage License Revenue (in Euros)	€170.0M	€206.8M	€119.0M	€495.8M
Annual Safe Passage License Revenue (in US Dollars) ⁸³⁰	\$211.7M	\$259.8M	\$160.0M	\$631.5M
Signed Safe Passage Deals	140	193	99	432

⁸²⁶ TomorrowNow Global Leadership Meeting January 11, 2007, SAP-OR00007470-498 (Kagermann Exhibit 417), at 497.

⁸²⁷ TomorrowNow Global Leadership Meeting January 11, 2007, SAP-OR00007470-498 (Kagermann Exhibit 417), at 493.

⁸²⁸ Service Initiatives Reporting Update October 2007 dated October 17, 2007, SAP-OR00565364-431 (Bamberger Exhibit 792), at 422.

⁸²⁹ Service Initiatives Reporting Update October 2007 dated October 17, 2007, SAP-OR00565364-431 (Bamberger Exhibit 792), at 422. This is the latest report that I have seen in the record of Safe Passage results.

⁸³⁰ Converted to U.S. Dollars using the average Euro to USD exchange rate for the respective years from oanda.com. Average exchange rates were 1.24539 for 2005, 1.25622 for 2006, and 1.34454 for January through September 2007.

2. Opinion: SAP Revenue Received from Relevant TomorrowNow Customers

444. SAP has identified a subset of its "Safe Passage" customers, comprised of 86 of the Relevant TomorrowNow Customers ("List of 86"), that purchased TomorrowNow support services and SAP products or services simultaneously, or that were existing TomorrowNow customers at the time that they purchased new SAP software or service.⁸³¹ SAP products and services sold to these customers include both the sale of SAP software to replace the customers' PeopleSoft, J.D. Edwards or Siebel applications, as well as sales of other non-replacement SAP products and services.

445. I have reviewed and analyzed the customer-specific revenue data produced by SAP for the List of 86 Customers, which includes revenue from sales of licenses, support, training and other services for the period of 2002 to 2008.⁸³² From 2005 (when SAP acquired TomorrowNow) through 2008, SAP received \$1.37 billion in revenue from sales of SAP software licenses, support, training and other services to the List of 86 customers, \$898 million of which was received after the customer started receiving support services from

⁸³¹ See, for example, Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pgs. 34-39, who testified that the total cost of ownership was a deciding factor in Waste Management's decision to switch to TomorrowNow/SAP.

I understand that Defendants' list of relevant SAP customers has changed over time. I have based my calculations on the latest version provided to me, which I understand was served by Defendants on July 15, 2009 (a list of 83 customers), and supplemented on October 17, 2009 to add 3 additional customers. See SAP file: List of 83.xls; Email from Jason McDonell (Jones Day) to Geoff Howard, et al. (Bingham McCutchen) Re: Customer list adds, dated October 17, 2009; Letter from Jason McDonell (Jones Day) to Geoff Howard (Bingham McCutchen) Re: List of 86, dated November 3, 2009. On November 3, 2009, Defendants identified seven more Relevant TN Customers that purchased SAP applications, though they have not produced relevant customer-level SAP revenue information [See November 10, 2009 Joint Discovery Statement, pgs. 19-20]. I understand Oracle has asked for this information and it was not forthcoming. I reserve the right to revise this section of the report and schedules accordingly if additional information becomes available.

⁸³²SAP-OR00603615 (SAP Customer Report.xls); SAP-OR00789887 (SAP Customer Report July 2009 Update.xls); SAP-OR00841587 (SAP Customer Report Updated 10-30-09.xls).

TomorrowNow.⁸³³ Of that \$898 million in revenue, \$298 million was from sales of new or additional licenses to SAP products.⁸³⁴ It is my opinion, a portion of these revenues have been earned, and or enhanced, by the Defendants' alleged conduct.

446. Excluding those customers for which evidence indicates that they may have decided to switch to SAP before engaging TomorrowNow, the SAP customers spent \$575 million.⁸³⁵

D. Opinion: Defendants' Unjust Enrichment – Avoided Costs

447. Through its alleged systematic misappropriation of Oracle's PeopleSoft, J.D. Edwards, Siebel and Oracle database Software and Support Materials, it is my opinion, SAP was able to provide support services to PeopleSoft, J.D. Edwards and Siebel customers without incurring the significant research and development costs, risks and time associated with creating those software applications and support materials themselves. I understand that Oracle's expert, Paul Pinto, was retained to estimate the costs that Defendants would have had to incur to independently develop certain of the Oracle copyrighted materials in suit that it allegedly accessed, copied and misused. Mr. Pinto submitted a report of his findings and analysis November 16, 2009, and for the purpose of quantifying Defendants' unjust enrichment on the basis of its avoided development costs, I defer to Mr. Pinto's conclusions. I have referenced Mr. Pinto's opinions on development costs in the cost approach of the valuation section.

⁸³³ SCHEDULE 42.SU.

⁸³⁴ SCHEDULE 42.1.

⁸³⁵ SCHEDULE 42.SU.

448. I understand that based on his analysis, Mr. Pinto has concluded that it would have cost Defendants significant amounts to develop 8 specific PeopleSoft, J.D. Edwards and Siebel software applications.

449. In addition, I understand that Mr. Pinto has concluded that it would take Defendants 2,828 well-trained resources to complete development of the 8 PeopleSoft, J.D. Edwards and Siebel applications that he analyzed within a 2 year period.⁸³⁶ As explained in Section IV.B.2 above, the timing of SAP's offering of TomorrowNow support services was critical to its overall strategy to disrupt Oracle's business and convert Oracle's PeopleSoft, J.D. Edwards and Siebel customer base over to SAP (i.e., it was critical for SAP to announce its offering of support on Oracle products immediately following Oracle's acquisitions of PeopleSoft and Siebel). If faced with a 2 year development timeframe, SAP may have determined that offering support services to Oracle products as an integral part of its Safe Passage program was not an attractive business decision, in which case Oracle's PeopleSoft, J.D. Edwards and Siebel customer base would not have been at such risk of leaving Oracle to go to TomorrowNow and SAP. I have referenced Mr. Pinto's results related to avoided development costs in Sections VI.A.3 and VIII.B.3 of this report.

E. Opinion: Defendants Unjust Enrichment – Avoided Costs of Licensing Oracle Database Copyrighted Materials

450. In Section VII. of this report, I calculated and summarize Defendants' gains related to not paying licensing and support fees to use Oracle's database in the servicing of its application support customers. The Defendants have

⁸³⁶ Discussion with Paul Pinto (Sylvan VI, Inc.); November 16, 2009 Expert Report of Paul Pinto, pgs. 2, 6-7 and 44. According to Mr. Pinto, "A development effort of this scope and complexity would be an extremely large project, very aggressive, and of high-risk to be pursued within this timeframe." [November 16, 2009 Expert Report of Paul Pinto, pg. 7].

avoided licensing and support fees of \$55.6 million related to the unlicensed use of Oracle's database software. More details of this analysis are included in Section VII (Tables 9, 10 and 10A) and **Schedule 44.SU**. This amount would represent unjust enrichment.

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