

EXHIBIT 9

Oracle USA, Inc., et al

v.

SAP AG, et al

Stephen K. Clarke
Expert Report

May 7, 2010

TEXT REMOVED - NOT RELEVANT TO MOTION

8.9.7. Third-Party Support Market

The third-party support industry began receiving growing press coverage and attention from industry research firms beginning in 2004.⁶²⁰ One early report stated: “Rising support costs and customer apprehension related to Oracle’s acquisition of PeopleSoft has spurred interest in using third parties for applications maintenance in lieu of vendor support. Several service providers have materialized in this space, offering the prospect of lower support costs and personalized service.”⁶²¹

By 2007, Gartner reported that “...hundreds of third-party support companies exist today worldwide to serve as proxies for the licensed owner...” and also, “Historically, software vendors have not challenged systems integrators providing support services on the customer’s behalf during implementation or while in production, as long as the customer also continued to have an active maintenance agreement with the original software vendor...”⁶²² and also, “The third-party may also “offer core code changes if the customer has access to the application’s source code.” Where this is not possible, the third party will offer work-arounds or extensions to the application to meet the requirements that the vendor would have delivered in a new release.”⁶²³

TEXT REMOVED - NOT RELEVANT TO MOTION

⁶²⁰ Swanton, Bill. “Third-Party ERP Support: It’s an Opportunity (and Threat).” AMR Research. October 28, 2004; ¶ Bank, David. “‘Rebel’ Customers May Cut into Profits at Big Software Firms.” *Wall Street Journal*. September 30, 2004; ¶ Woodie, Alex. “JDE Shops Have Plenty of Options for Third-Party Maintenance.” *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>. ¶ Hamerman, Paul, with Jessica Harrington. “Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle’s PeopleSoft Acquisition Boosts an Emerging Market.” Forrester Research. March 11, 2005. ORCL00427952-954.

⁶²¹ Hamerman, Paul, with Jessica Harrington. “Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle’s PeopleSoft Acquisition Boosts an Emerging Market.” Forrester Research. March 11, 2005. ORCL00427952-954, at -952.

⁶²² Phiefer, Gene, et al. “Oracle/SAP Suit Highlights Care Required in Using Third-Party Support.” Gartner Research. March 26, 2007; TN-OR00005065-068.

⁶²³ Phelan, Pat. “Switching to a Third-Party for Business Application Technical Support Services.” Gartner Research. December 11, 2006. ¶ Discussion about application source code in “Safe Passage with TomorrowNow Support.” January 28, 2006; TN-OR00003204-205, at -204. ¶ Discussion about access to source code for products being supported in “Safe Passage with TomorrowNow Support.” January 28, 2006; TN-OR00003204-205.

Mr. Wang of Forrester Research stated that these third-party support providers typically halve the cost of support fees simply because the ERP vendors' profit margins are incredibly large.⁶²⁴ In July 2007, Mr. Wang called the competitive third-party support industry one of the fastest growing areas of software, and very profitable.⁶²⁵ A Computer Business Review article echoed this sentiment in its discussion of the third-party support: "Large markets attract competition and with the enterprise application maintenance market estimated at between \$8bn and \$20bn annually, there is enough to merit intense competition."⁶²⁶

"A Datamonitor survey of SAP users found that around 4% of respondents had opted for third-party support."⁶²⁷ A 2008 Credit Suisse Analyst Report referenced the growth and increasing competition among third-party vendors: "Rimini Street and Versytec are among the major players in this [third-party support] field. They compete with the likes of netCustomer, Conexus Partners and CIBER, in the competitive third-party maintenance market."⁶²⁸

More recent industry press has highlighted some of the more prominent players in the third-party support market. For example, shortly after SAP publicly announced that it would close TomorrowNow by October 2008, industry research firm, Gartner, noted "[c]ustomers not planning a system replacement or upgrade should seek third-party support providers that have expertise in the versions of products deployed now, and can provide references in which the vendor's customer is supported for similar-scope environments and product versions. Potential vendors that could be investigated for third-party support include CedarCrestone, Citagus, Conexus Partners, netCustomer, Inc., Reliasys, Rimini Street and Versytec. Gartner is not endorsing these specific vendors; there may be additional vendors in the market."⁶²⁹

As discussed in more detail below, third-party support providers include small companies founded by former employees of ERP vendors and small and large companies that provide support services as an important part of a larger product offering. In addition, large IT consulting firms including EDS, Accenture, and Deloitte, as well as offshore vendors such as Wipro and Satyam, compete for customers. Alternative outsourcing products also exist, including business process outsourcing services and software-as-a-service options that can replace ERP applications for some customers. The existence of such a vibrant market for third party support puts significant downward pressure on the Reasonable Royalty because in a but-for world in which the License exists, TomorrowNow would be the only third party vendor paying a royalty – a fact almost guaranteed to put the company out of business.

⁶²⁴ Schwartz, Ephraim. "Stop overpaying for support." *Infoworld.com*. November 13, 2007. <http://www.info-world.com/realitycheck/archives/2007/11/stop_overpaying.html>.

⁶²⁵ Plourd, Kate. "SAP-Oracle Tussle Could Roil ERP Market." June 11, 2007. <http://www.cfo.com/printable/article.cfm/9466073/c_2984382?f=options>.

⁶²⁶ Eager, Angela. "Maintenance: better the devil you know?" *Computer Business Review*. July 31, 2007. <http://www.cbronline.com/article_cbr.asp?guid=4BB12A32-4703-44B7-AB56-FF926373A6D1>.

⁶²⁷ Eager, Angela. "Maintenance: better the devil you know?" *Computer Business Review*. July 31, 2007. <http://www.cbronline.com/article_cbr.asp?guid=4BB12A32-4703-44B7-AB56-FF926373A6D1>.

⁶²⁸ Credit Suisse Equity Research: SAP. September 16, 2008, page 24.

⁶²⁹ Igou, Bob, Pat Phelan, and Jane B. Disbrow. "SAP Shutdown of TomorrowNow Pushes Customers to Alternatives." Gartner Research. July 25, 2008, page 2.

8.9.8. Third-Party Support Vendors

While the vendors discussed below compete in the third-party support space, their product offerings vary across several dimensions, and may be viewed by customers as substitutes for the original licensor's support offering depending on the particular product features demanded. For example, the competitors vary in the particular product support that they offer (PeopleSoft, J.D.Edwards, etc.), the basket of services (tax updates, patches and fixes, 24x7 support, etc.), the geographic market coverage (U.S., North America, International, etc.), type of customer firm targeted (varying by firm size, sector, etc.), as well as other dimensions. Thus, while not every third-party vendor is an acceptable substitute for a given customer, many of these firms do have reasonably similar product offerings available to customers at any given point in time and several have been available concurrently in the marketplace along with TomorrowNow's product.⁶³⁰

It appears many customers have been evaluating their options related to support cost. According to online industry journal CIO.com, "[d]uring the last year, many CIOs have either looked into or completely turned over their ERP or CRM systems maintenance to a third-party provider such as TomorrowNow or Rimini Street."⁶³¹ Substantial evidence indicates that customers have been aware of multiple vendors in the marketplace and that they often investigated different options before choosing a support vendor. General customer awareness of the available third-party vendors comes from various sources including industry research reports,⁶³² vendor advertisements and promotions,⁶³³ general research by prospective customers, and sometimes word of mouth.⁶³⁴ In addition, competing ERP vendors, including SAP, Lawson, and Microsoft widely publicized their ERP migration programs, in some cases, creating awareness of discounted support on PeopleSoft/J.D.Edwards generally.⁶³⁵

One potential customer, A.O. Smith, was aware of or otherwise investigated several vendors before finally deciding on TomorrowNow. These other vendors included Rimini Street, CedarCrestone, ContinuServe, and LegacyMode.⁶³⁶ Another customer, Koontz-Wagner Electric,

⁶³⁰ See for example, "Oracle: Third-Party Support Competitive Update." May 12, 2005; ORCL00009981-983, at -981.

⁶³¹ Wailgum, Thomas. "Six Enterprise Application Trends to Watch in 2008." CIO. December 14, 2007. <<http://www.cio.com/article/print/165553>>.

⁶³² Hamerman, Paul, with Jessica Harrington. "Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle's PeopleSoft Acquisition Boosts an Emerging Market." Forrester Research. March 11, 2005. ORCL00427952-954, at -952. See also, Dorr, Erik. "Third Party Vendors Offer Alternatives for Business Application Support," Gartner Research. March 30, 2005; ORCL00200156-160 at -156.

⁶³³ For example, "LegacyMode Provides Aftermarket Software Support for Oracle Applications." PRWeb Press Release Newswire. October 23, 2006; AOSMITH000865-866. See also, "cut 75% off your ORACLE support costs." <<http://www.netcustomer.com/pdf/netCustomer-WSJ-Ad-Oct-25-2006.pdf>>. See also, Oracle email from Scott Trieloff to Shelley Moses-Reed. June 7, 2005. Re: Berry Plastics; ORCL00089576-578, at -577. "TomorrowNow and Klee & Associates and Versytec are all over them – they printed off and gave me copies of emails sent from the company presidents to Berry's CFO."

⁶³⁴ See for example, Praxair email from Drew McNichol to Christina Bleckinger. October 19, 2006. Re: FW: JD Edwards Support at 40% -50% Savings; PX00216-220, at -216.

⁶³⁵ "Lawson Announces Migration Program for PeopleSoft Customers Seeking Committed Solution for iSeries Servers." *Business Wire*. January 17, 2005. <http://findarticles.com/p/articles/mi_m0EIN/is_2005_Jan_17/ai_n8694937/>.

⁶³⁶ "LegacyMode Provides Aftermarket Software Support for Oracle Applications." PRWeb Press Release Newswire. October 23, 2006; AOSMITH000865-866. See also, Rimini Street correspondence from Seth Ravin to Dave Saalfeld of A.O. Smith. September 5, 2006; AOSMITH000446-447. See also, Rimini Street

drew up a comparison sheet with both TomorrowNow's and Klee Associates' support attributes against Oracle support before selecting a support vendor in early 2005.⁶³⁷ Yet another customer, the Texas Association of School Boards, sought quotes from two different companies for J.D.Edwards software support. Internal feedback from the quotes stated, "...both are at or about 50% of Oracle's cost and include high level of support and includes [sic] 1099 updates... They both represent very large companies and the references had high appreciation for their level of support."⁶³⁸ Other evidence from customers corroborates that they generally appear to be aware of various third-party vendors and typically compared and contrasted different competitive offerings before choosing a vendor.⁶³⁹

The existence of such a vibrant market for third party support would put significant downward pressure on the Reasonable Royalty.

8.9.8.1 Versytec

Versytec claims that it is the "...original independent provider of maintenance contracts for JDE World customers."⁶⁴⁰ One writer described Versytec's beginnings in a February 2005 IT Jungle article:

correspondence from Seth Ravin to Dave Saalfeld of A.O. Smith. May 1, 2006; AOSMITH000485-487. See also, "Rimini Street Announces Delivery of 2007-C Tax and Regulatory Updates." June 11, 2007; AOSMITH000755-757. See also, Google Alerts email to David Saalfeld of A.O. Smith. November 20, 2010. Re: Google Alert – peoplesoft; AOSMITH000761. See also, Rimini Street correspondence from Seth Ravin to Dave Saalfeld. December 1, 2006; AOSMITH000444-445, at -444. See also, CedarCrestone email from Sherie Monroe to David Saalfeld of A.O. Smith. May 23, 2006. Re: FW: CedarCrestone's Managed Services Offerings; AOSMITH000489-490. See also, ContinuServe email from Mark Fustine to David Saalfeld. June 16, 2006. Re: ContinuServe Corporate and Maintenance Overviews / Software Survey; AOSMITH000484. See also, Rimini Street email from Michael Davichick to David Saalfeld. November 21, 2007. Re: Additional information on Rimini Street Support Services; AOSMITH000744-748. See also, "PeopleSoft Support Alternatives." AOSMITH001224-226.

⁶³⁷ "Koontz-Wagner Electric, PeopleSoft Software Maintenance/Support Options." January 18, 2005; TN-KWE00000036.

⁶³⁸ State of Texas email from Bonnie Hudspeth to Kristi Powell. December 5, 2006. Re: Software Support Renewal Quotation for Texas Association of School Boards Service Renewal # P-JD-M00078-00--24; TN-TASB00000811-813, at -811.

⁶³⁹ See Blue Cross Blue Shield Kansas email string from Rick Woodbury to Mark Hung, et al. September 14, 2006, BCBSKS0942-947, at -943. See also, TomorrowNow email from Eric Osterloh. November 13, 2006. "TomorrowNow – LIVE Reference Round Table, Friday- November 17th." BCBSKS0422-427, at -422. See also, Blue Cross Blue Shield email from Rick Woodbury to Mark Hung. January 24, 2007. Re: TomorrowNow; BCBSKS0255-256, at -256. See also, Rimini Street email from Kelli Gowin to Rick Woodbury of Blue Cross Blue Shield. August 31, 2006. Re: Rimini Street, Inc. – 50% off PeopleSoft & Siebel Support and Maintenance Extend the Life of Your Existing Applications!; BCBSKS0935-941, at -935. See also, Yazaki email string from Joel Joyce to Kathi Kowaleski. February 8, 2007. Re: FW: World CDs; YAZAKI000942-943, at -942. See also, Acushnet email string from Joyce Higgins to Peg Nicholson. January 4, 2007, Re: RE: Annual PeopleSoft Renewal Costs; TN-ACU0001327-328, at -328. See also, Praxair email from Drew McNichol to Christina Bleckinger. October 19, 2006. Re: Re: FW: JD Edwards Support at 40% -50% Savings; PX00216-220, at -216. See also, Oracle email from Shelley Moses-Reed to Janice Bruno, et al. June 3, 2005. Re: Fwd: RE: E1, Enterprise, and World Calls; ORCL00160328-335, at -328 and -331.

⁶⁴⁰ Versytec.com. "Versytec." March 14, 2010. <<http://versytec.com>>.

The company that lays claim to first identifying the market opportunity for third-party maintenance, and moving to embrace it, was Versytec, which first publicized its support offering in June 2004. Versytec had the market all to itself until PeopleSoft relented to Oracle's hostile bid and agreed to be acquired for \$10.3 billion in December [2004].

'Because of the Oracle situation, a lot of people have been trying to jump into the business,' says Steve Striebel, who cofounded the Nashua, New Hampshire, company with his brother, Al, and Ed Hassman, a former J.D.Edwards developer, after scoping out the third-party maintenance market and deciding to focus on J.D.Edwards over Oracle's ERP system. 'We've been in operation for 18 months. It takes a lot of initial groundwork before you're ready to deliver on annual maintenance contracts,' Striebel says. 'We actually staffed a support center [in Denver, run by Hassman]. We didn't just hire one ex J.D.Edwards executive, then use contractors or use affiliations [to do the work]. We have expertise in-house to handle all of World.'

'Versytec currently has 30 active customers using its support service, Striebel says, the vast majority of which are World customers, although there are some in coexistence [with OneWorld]. Versytec's focus is on providing customer support and maintenance, and the company does not offer generalized consulting services or help with migrations, Striebel says.'⁶⁴¹

Versytec offers two levels of support service for annual maintenance of J.D.Edwards World customers: VersyPro Complete is an "...all-inclusive offering...designed to provide customers with service levels comparable to the industry's most comprehensive support programs."⁶⁴² VersyPro Complete includes "24x7 receipt of issues"; "1 hour response" for P1 issues; "Named Technical Account Manager" and "Named Executive Relationship Manager"; "Remote Diagnosis & Troubleshooting"; "Advisory support for customization issues"; "Tax updates and Regulatory Changes"; and indefinite "Technical...Application...[and] Configuration... Support".⁶⁴³

VersyPro Expert is a reduced support level that "...provides access to support for critical issues while allowing the customer to solve level-1 issues internally."⁶⁴⁴ Versytec claims to reduce annual support costs by up to 50 percent.⁶⁴⁵ Versytec serves the North American market and in

⁶⁴¹ Woodie, Alex. "JDE Shops Have Plenty of Options for Third-Party Maintenance." *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁶⁴² "Your Key to Cost Effective ERP Maintenance and Support," page 3. <http://www.versytec.com/corp/literature/bro_webv.pdf>.

⁶⁴³ "Your Key to Cost Effective ERP Maintenance and Support," page 3. <http://www.versytec.com/corp/literature/bro_webv.pdf>.

⁶⁴⁴ "Your Key to Cost Effective ERP Maintenance and Support," page 3. <http://www.versytec.com/corp/literature/bro_webv.pdf>.

⁶⁴⁵ "Your Key to Cost Effective ERP Maintenance and Support," page 4. <http://www.versytec.com/corp/literature/bro_webv.pdf>.

2008 claim to have supported over 100 organizations in the US and Canada with a 95 percent contract renewal rate.⁶⁴⁶

Versytec had been on Oracle's radar as a competitive threat as early as November 2004.⁶⁴⁷ A December 2004 Oracle document stated that "TomorrowNow and Versytec are two [third-party vendors] who are being extremely aggressive in marketing their services as an alternative to the service [customers] can receive from Oracle."⁶⁴⁸

Oracle business documents discussing the competitive threat of third-party support vendors list Versytec as a "leading" third-party competitor focusing on former J.D.Edwards products.⁶⁴⁹ Many Oracle documents prominently featured Versytec as an important third-party support vendor offering "very appealing" price reductions to some Oracle customers and winning their business.⁶⁵⁰ A March 2005 Oracle document discussing strategies for retaining J.D.Edwards World customers noted that Versytec was similar to TomorrowNow and other firms targeting former J.D.Edwards customers on both World and XE releases and that "[m]ore and more customers are mentioning these competitive alternatives during their renewal negotiations."⁶⁵¹ A July 2005 Oracle Director's Meeting Report recognized Versytec as one of four "[k]ey support services competitors" at the time.⁶⁵²

By February 2006, Oracle determined that at least 10 percent of 62 customers lost to third-party vendors to date had gone to Versytec for support services.⁶⁵³ According to Oracle's own documents tracking customer defections to third-party vendors, Oracle directly lost many named

⁶⁴⁶ Versytec.com. "Versytec." March 14, 2010. <<http://versytec.com>>.

⁶⁴⁷ Oracle email from Rick Cummins to Jamie Blackford, et al. November 23, 2004. Re: December 1st Sales Meeting; ORCL00382644.

⁶⁴⁸ "Recommendations for PeopleSoft World Business Moving Forward." December 20, 2004; ORCL00392375-406, at -377.

⁶⁴⁹ "Third Party Threat." ORCL00012497-514, at -499.

⁶⁵⁰ Oracle email from Elizabeth Shippy to Michal Ni. October 6, 2005. Re: Clarification FW: Support Sales – Customers At Risk listing 10/5/05; ORCL00089612-614, at -612. See also, "Competitive Marketing Strategy Support Services Customer Retention." January 28, 2005; ORCL00034024-031, at -029. See also, "Oracle & PeopleSoft Combined Launch: John Wookey." January 2005; ORCL00268369-406, at -402. See also, "FY06 Support, On Demand and Global IT Budget." April 12, 2005; ORCL00232272-342, at -310. See also, "Global Support Sales Team Business Update." March 23, 2005; ORCL00189116-136, at -123. See also, "PeopleSoft/JDE North America Support Sales Update." June 22, 2005; ORCL00264179-201, at -200. See also, Oracle email from Buffy Ransom to John Schiff. January 5, 2005. Re: GSC Concerns; ORCL00385891. See also, "FAQs for HEUG/Alliance Conference 2006." March 2006; ORCL00104368-400, at -372. While one Oracle business document listing Versytec as a key third-party competitor characterizes the firm as a low threat level, the reason appears related to the fact that Versytec's support offering was limited to J.D.Edwards World customers only. See also, "Maintenance Strategy Session." ORCL00199403-422, at -419.

⁶⁵¹ "Support Services Strategy Prepaid Support Program, Retention of World and Third Party Market Customers." March 25, 2005; ORCL00189146-152, at -147. See also, Oracle email from Rachel Romano to Rick Cummins. November 15, 2006. Re: FW: Exec Summary – Advantis Technologies, Inc. – 2-year flatline - GA; ORCL00201396-397, at -397. See also, Oracle email from Arnaud Lambert to Rachel Romano. November 14, 2006, Re: Exec Summary – Advantis Technologies, Inc. – 2-year flatline - GA; ORCL00201396-397, at -397. See also, Oracle email from Scott Trieloff to Shelley Moses-Reed. June 7, 2005. Re: RE: berry plastics; ORCL00089576-578, at -577.

⁶⁵² "Madsen Director's Meeting," July 12, 2005; ORCL00130364-402, at -371.

⁶⁵³ Oracle email from Elizabeth Shippy to Shelley Lynn Moses-Reed. February 15, 2005. Re: Apps strategy meeting follow up; ORCL00138840.

customers to Versytec, including Exide Technologies,⁶⁵⁴ Oasis Corporation, Regal Ware Inc., Eriez Magnetics, Riverside Paper Corporation, Laticrete International⁶⁵⁵, Kappler Inc.,⁶⁵⁶ Clearon Holdings,⁶⁵⁷ International Filing Company,⁶⁵⁸ Stanley Electric Company,⁶⁵⁹ and RC Cement.⁶⁶⁰

TomorrowNow also recognized Versytec as a direct competitor.⁶⁶¹ For example, TomorrowNow competed head-to-head against Versytec for certain Oracle customers including Just Born,⁶⁶² WWL Vehicle Services Americas,⁶⁶³ and Merck,⁶⁶⁴ among others.

Versytec was included in the list of “Known Client Choices” in TomorrowNow’s Wind-Down Report at October 31, 2008, indicating that some of TomorrowNow’s customer(s) opted to take their support to Versytec instead of returning to Oracle,⁶⁶⁵ and it was clearly still in business as of the date of this report according to its website.⁶⁶⁶

8.9.8.2 Conexus Partners

Conexus Partners was founded in 2004⁶⁶⁷ by two former J.D.Edwards executives. “In late January [2005], Conexus Partners announced its ‘safe harbor’ offering to users of various releases of World, EnterpriseOne, and those who use both in coexistence mode.” In 2005, “[t]he company [had] 12 employees and several customers, and an arrangement with CH2MHILL [sic] Microsource, a very large IT services organization in Denver, to use its facilities and IT infrastructure.” It was reported that Conexus Partners had a “...J.D.Edwards pedigree unmatched by other third-party providers.”⁶⁶⁸

In 2008, Conexus Partners represented that its ERP Support Services includes “24/7/365 coverage”; “Named contacts for both the application/technical interface and the

⁶⁵⁴ Oracle email from Steve Johnston to Chris Madsen. January 9, 2006. Re: Re: PSFT Analysis; ORCL00199792-795, at -794.
⁶⁵⁵ “Projected Third Party Risk.” ORCL00136500-503, at -502-503.
⁶⁵⁶ PeopleSoft email from Jamie Blackford to Rick Cummins. February 1, 2005. Re: Re: Arrears 01-31-05 Details; ORCL00383451-454, at -451.
⁶⁵⁷ “Applications Division Status Report.” ORCL00400329-334, at -329.
⁶⁵⁸ “Projected Third Party Risk, North America.” ORCL00264307-310, at -309.
⁶⁵⁹ Stanley Electric Company email from Cindy Morgan to Dan Rogers at Oracle. October 31, 2005. Re: Re: Cancellation Request: ORACLE Support for Stanley Electric Us Co Inc; ORCL00381344-347, at -344.
⁶⁶⁰ “Versytec Summary.” ORCL00088078-080, at -080.
⁶⁶¹ “Low Cost Competitors.” February 2006; TN-OR00391622-641, at -627-636.
⁶⁶² TomorrowNow email from Bob Stephens to Laura Sweetman. November 18, 2005. Re: Fw: Question on prospect – Just Born; TN-OR04224870-872, at -870.
⁶⁶³ TomorrowNow email from Bob Geib to TomorrowNow – All. December 20, 2006. Re: TomorrowNow WINS! WWL Vehicle Services Americas (J.D. Edwards); TN-OR08301535.
⁶⁶⁴ TomorrowNow email from Bob Geib to Bob Stephens. November 21, 2005. Re: Re: Merck Pricing; TN-OR08349018-020; at -018-119.
⁶⁶⁵ “TomorrowNow Operations Wind Down: Final Report.” October 31, 2008. TN-OR03523871-924, at -903. The number of customer(s) under Versytec rounded to 0% of TomorrowNow’s customers. 46% of customers are listed as “Unknown.”
⁶⁶⁶ Versytec.com. “Versytec.” March 14, 2010. <<http://versytec.com>>.
⁶⁶⁷ “Projected Third Party Risk.” ORCL00291021-030, at -026.
⁶⁶⁸ Woodie, Alex. “JDE Shops Have Plenty of Options for Third-Party Maintenance.” *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

business/relationship interface”; “Quick response times”; “Critical bug fixes”; “Software updates”; “W2/1099 tax and country specific regulatory changes”; and integration services. The firm claims it has pricing options that offer savings of over 50 percent.⁶⁶⁹ The company also provides “modernization” and “migration” services⁶⁷⁰ and a full range of IT managed services such as “application hosting, network management, remote management/monitoring, utility computing, Help Desk, VOIP, and Disaster Recovery Services.”⁶⁷¹ Conexus has an alliance with Microsoft for customers’ future modernization and migration considerations. However, Conexus claims to be vendor-agnostic and will assist customers’ migration efforts to the vendor of their choice.⁶⁷²

Oracle documents list Conexus Partners as a known competitor in the third-party vendor market.⁶⁷³ Evidence from Oracle documents indicates that some of its customers were approached by Conexus Partners for third-party support services, including Publicis Groupe.⁶⁷⁴ Other documents demonstrate that some Oracle customers obtained competing bids from both Conexus Partners and TomorrowNow for support services.⁶⁷⁵

Following TomorrowNow’s announced business shut down, Gartner Research had identified Conexus Partners as a possible replacement vendor as of July 2008.⁶⁷⁶

While Conexus Partners continues to be in business and claims to offer “software support,” there is no clearly detailed product offering described on the company website or further evidence that it continues to actively market third-party support on Oracle software today.⁶⁷⁷

⁶⁶⁹ “What Will Happen with Oracle? The Future Remains Uncertain.”
<<http://www.conexuspartners.com/library/ConexusFAQSheet.pdf>>. See also, ConexusPartners.com.

“Enterprise Resource Planning Services.” January 18, 2008.
<http://www.conexuspartners.com/page.asp?pageid=0|5|6&id=0|enterprise_resource_planning_services>.

⁶⁷⁰ “Enterprise Resource Planning Services.”
<http://www.conexuspartners.com/page.asp?pageid=0|5|6&id=0|enterprise_resource_planning_services>.

⁶⁷¹ “What Will Happen with Oracle? The Future Remains Uncertain.”
<<http://www.conexuspartners.com/library/ConexusFAQSheet.pdf>>.

⁶⁷² See also, Woodie, Alex. “JDE Shops Have Plenty of Options for Third-Party Maintenance.” *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁶⁷³ “Support FAQ for HEUG Conference 2006.” ORCL00473373-387, at -374. See also, “Projected Third Party Risk.” ORCL00291021-030, at -026. See also, “Third Party Support SWAT Team.” ORCL00676612-616, at -612 and -614. See also, Oracle email from Joyce Boland to Nancy Lyskawa. January 31, 2005. Re: RE: Competitive Write ups; ORCL00462941-957, at -941. See also, “Support Services Strategy Prepaid Support Program, Retention of World and Third Party Market Customers.” March 25, 2005; ORCL00189146-152, at -147. See also, “FAQs for HEUG/Alliance Conference 2006.” March 2006; ORCL00104368-400, at -372. See also, “Third Party Support Competitive update,” March 8, 2006, ORCL00406029-031, at -029. One Oracle business document listed Conexus Partners as a key third-party competitor, although characterized the firm as a “low to medium” threat, presumably because Conexus Partners’ offering was limited to J.D.Edwards World/EnterpriseOne customers only. See “Maintenance Strategy Session.” ORCL00484443-455, at -452.

⁶⁷⁴ “Juergen Talking Points.” ORCL00183918-919, at -919.

⁶⁷⁵ TomorrowNow email from Bob Stephens to Nigel Pullan, et al. June 23, 2005. Re: Lexmark; TN-OR01729322. See also, email from Bob Stephens to Nigel Pullan. June 27, 2005. Re: Lexmark: Request for Pricing Response; TN-OR08329895-896, at -895. See also, “Low Cost Competitors, Assessing the Threat from Third-Party Imitators.” February 2006; TN-OR07161151-169, at -166.

⁶⁷⁶ Igou, Bob, Pat Phelan, and Jane B. Disbrow. “SAP Shutdown of TomorrowNow Pushes Customers to Alternatives.” Gartner Research. July 25, 2008.

8.9.8.3 Rimini Street

Rimini Street was founded in September 2005 by Seth Ravin, one of the co-founding partners of TomorrowNow.⁶⁷⁸ Rimini Street initially provided support for Siebel's CRM software⁶⁷⁹ and has since expanded its services to PeopleSoft, J.D.Edwards, and SAP products.⁶⁸⁰ Rimini Street began offering PeopleSoft support in mid 2006.⁶⁸¹ In September 2006, the firm announced that by the end of the year it would offer support on J.D.Edwards World and EnterpriseOne ERP suites.⁶⁸² In May 2008, Rimini expanded its support offering to include SAP products.⁶⁸³

Rimini Street claims to enable "Siebel, PeopleSoft, JD Edwards, and SAP licensees to maximize the return on their existing software investments with [their] innovative support program that provides more than 50% savings in annual support fees, eliminates forced-upgrades, delivers services not available with standard vendor support, and guarantees the best service level commitment in the industry. Rimini Street's management team has helped hundreds of Fortune 500, mid-market, small, and public sector companies running Siebel, PeopleSoft, JD Edwards and SAP products successfully make the switch to alternative support programs."⁶⁸⁴

I understand Rimini Street offers broad product and support service coverage of Siebel, PeopleSoft, and J.D.Edwards ERP suites.⁶⁸⁵ Its support services include a "Named, Regional Primary Support Engineer," "24/7 Support with Guaranteed 30 Minutes or less Response," "Installation & Upgrade Process Support," "Configuration Support," "Operational Support," "Application & Repository Fixes," "Documentation [and] Customization Fixes," "Performance

⁶⁷⁷ ConexusPartners.com. "Software." March 14, 2010. <<http://www.conexuspartners.com/verticals-software.html>>, One undated TomorrowNow Competitor document states "Connexus [sic] defunct, but tech arm still active as CH2M Hill." See "Low Cost Competitors: James's notes." TN-OR00391605-606, at -605.

⁶⁷⁸ Mr. Ravin sold his 50 percent interest in TomorrowNow to SAP in January 2005. See RiminiStreet.com. "Management Team." December 1, 2008. <<http://www.riministreet.com/managementteam.htm>>. See also, Barlas, Demir. "Rimini Street won't buy TomorrowNow." IT Knowledge Exchange. April 9, 2008. <<http://itknowledgeexchange.techtarget.com/sap-watch/rimini-street-wont-buy-tomorrownow/>>.

⁶⁷⁹ Bhuta, Falguni. "Rimini Street Eyes Siebel Biz." redherring.com. October 16, 2005. <<http://www.redherring.com/Home/14025>>. See also, J. Bonasia. "Third-Party Companies Jolting Software Field." Investors Business Daily. June 21, 2006. <<http://www.riministreet.com/cms/uploads/NewsArticle/ibd.pdf>>.

⁶⁸⁰ "Rimini Street Expands Its Support Offering to Cover SAP Products." RiminiStreet.com. May 5, 2008. <http://www.riministreet.com/press_releases.php>.

⁶⁸¹ J. Bonasia. "Third-Party Companies Jolting Software Field." Investors Business Daily. June 21, 2006. <<http://www.riministreet.com/cms/uploads/NewsArticle/ibd.pdf>>. See also, Morgan, Timothy Prickett "Rimini Street Offers JDE Support Services." *IT Jungle*. September 25, 2006. <<http://www.itjungle.com/tfh/tfh092506-story09.html>>. See also, "Rimini Street Announces Strong First Quarter Results for Siebel Support Services, Infrastructure & Staff Expansion and Service Expansion to Cover PeopleSoft Products." RiminiStreet.com. April 24, 2006. <<http://www.riministreet.com/news.php?id=120>>.

⁶⁸² Morgan, Timothy Prickett "Rimini Street Offers JDE Support Services." *IT Jungle*. September 25, 2006. <<http://www.itjungle.com/tfh/tfh092506-story09.html>>.

⁶⁸³ "Rimini Street Expands Its Support Offering to Cover SAP Products." RiminiStreet.com. May 5, 2008. <<http://www.riministreet.com/news.php?id=208>>.

⁶⁸⁴ RiminiStreet.com. "Welcome to Rimini Street." March 14, 2010. <http://www.riministreet.com/services_overview.htm>.

⁶⁸⁵ Rimini Street advertises coverage of all Siebel ERP products beginning with release 5.X, PeopleSoft Enterprise HCM, FIN, CRM, EPM, SRM, SCM, Public Sector and Campus Solutions, releases 7.x, 8.x, 9.x, and J.D.Edwards World and OneWorld, HCM, Financials, Distribution and manufacturing, all releases and all SAP product lines. See RiminiStreet.com. "Rimini Street Products and Releases." March 15, 2010. <http://www.riministreet.com/products_and_releases.htm>.

Support,” and “Interoperability support”. In addition, the firm offers flexible coverage periods and payment terms.⁶⁸⁶

According to industry press reports, Rimini Street was widely-recognized as a competitive alternative in the third-party support market for Siebel, PeopleSoft, and J.D.Edwards software.⁶⁸⁷ Oracle documents show that it viewed Rimini Street as an alternative support provider⁶⁸⁸ and Oracle lost customers directly to Rimini Street, including Hastings Entertainment Incorporated⁶⁸⁹ and City of Des Moines.⁶⁹⁰

Similarly, TomorrowNow considered Rimini Street a serious competitive threat⁶⁹¹ and bid against it on numerous occasions.⁶⁹²

Rimini Street was included in the list of “Known Client Choices” in TomorrowNow’s Wind-Down Report at October 31, 2008, indicating that at least 21% of TomorrowNow’s customers opted to take their support to Rimini Street instead of returning to Oracle.⁶⁹³ These customers include Richardson Electronics,⁶⁹⁴ Robert Half International,⁶⁹⁵ JB Hunt,⁶⁹⁶ Acushnet Company, Clear Channel Communications, Philadelphia Corporation for Aging, CC Industries

⁶⁸⁶ See RiminiStreet.com. “Rimini Street Support Services.” March 15, 2010. <http://www.riministreet.com/support_services.htm>.

⁶⁸⁷ TomorrowNow email from Laura Sweetman to JDE – All. February 15, 2006. Re: Fw: ComputerWorld article; TN-OR07448112-114, at -113. See also, Bona, Alexa. “Five Trends to Watch for in Software Maintenance in 2006 and Beyond.” Gartner Research. December 28, 2005; ORCL00307140-146, at -143. See also, Phelan, Pat. “TomorrowNow: An Alternative for Business Application Technical Support Services.” Gartner Research. February 7, 2007; TN-OR00364884-889, at -886. See also, “International Media Coverage Highlights, TomorrowNow Management Changes Announcement.” November 20, 2007; SAP-OR00177758-790, at -762.

⁶⁸⁸ “Support FAQ for HEUG Conference 2006.” ORCL00473373-387, at -374.

⁶⁸⁹ Oracle email from Rachel Romano to Rick Cummins. April 4, 2007. Re: RE: Finance Report; ORCL00201594-595, at -594.

⁶⁹⁰ Oracle email from Elizabeth Shippy to Sudhir Chilakapati. January 31, 2007. Re: RE: Third Party Risk; ORCL00104344-347, at -344.

⁶⁹¹ “Management Issues Summary & Preparation.” TN-OR01369665-730, at -699-700. See also, TomorrowNow email from Anke Mogannam to Carrie Koch. March 9, 2007. Re: Performance Improvement Plan; TN-OR00365860-864, at -863. See also, “TomorrowNow Siebel Support.” TN-OR07538840-868, at -844. See also, TomorrowNow email from Eric Osterloh to Bob Ludlam. November 29, 2006. Re: FW: PLEASE READ; TN-OR06559280.

⁶⁹² TomorrowNow email from Spencer Phillips. November 6, 2006. Re: Phelps Dodge Bld – Strategy mtg; TN-OR04482786-787, at -786. See also, TomorrowNow email from Bob Ludlam to All TomorrowNow, May 23, 2008; Re: TomorrowNow WINS!!! Specialty Care Services Group (Net New JDE OneWorld Customer); TN-OR05238186-187, at -187. PepsiAmericas email from Dan E. Vitous to Reggie L. Wright. December 21, 2007. Re: RE: Rimini Call Summary; TN-PESPIAM0000181-183, at -183; Baxter email from David Berner to Donna Campagna. February 13, 2008. Re: Remini (sic) Street Findings; TN-BAXTER00000330-331, at -330.

⁶⁹³ “TomorrowNow Operations Wind Down: Final Report.” October 31, 2008; TN-OR03523871-924, at -903. 21% of TomorrowNow’s customers are listed under Rimini Street and 46% of customers are listed as “Unknown.”

⁶⁹⁴ Richardson Electronics email from Steve Wolf to Kathleen Dvorak at TomorrowNow. August 20, 2008. Re: FW: TomorrowNow Termination [sic] Agreement. TN-RE0000083-084, at -083.

⁶⁹⁵ TomorrowNow email to Shelley Nelson. August 15, 2008. Re: Service End Date Updates – 3162; TN-OR06080108-109, at -108.

⁶⁹⁶ TomorrowNow email to John Baugh. August 28, 2008. Re: Customer Project Tasks; TN-OR06428125-155, at -151.

Incorporated, City of Huntsville, Gregg Appliances, Inc., Visteon Corporation, Ace Parking Management, Blue Diamond Growers, Oklahoma Publishing Company,⁶⁹⁷ MillerCoors LLC,⁶⁹⁸ Municipality of Anchorage,⁶⁹⁹ Olin Corporation,⁷⁰⁰ and Heritage Valley.⁷⁰¹

Following TomorrowNow's announced business shut down, Gartner Research identified Rimini Street as a possible replacement vendor as of July 2008.⁷⁰²

Recently, Oracle filed suit against Rimini Street alleging infringement similar to that alleged in the Complaint.⁷⁰³ Rimini Street was still operating as of the date of this report according to its website.⁷⁰⁴

8.9.8.4 Citagus

Founded in December 2004 by former PeopleSoft employees, Citagus' primary technology focus is in the PeopleSoft services space.⁷⁰⁵ Citagus has offices in Duluth, Georgia and Bangalore, India.⁷⁰⁶ The company offers a comprehensive portfolio of services including PeopleSoft consulting and implementation services; customizations; application support, maintenance, and upgrade services; integration and migration services; application hosting; product training; and technology and infrastructure services.⁷⁰⁷ Citagus's PeopleSoft product expertise includes all releases of financials, human capital, customer relationship management, supply chain, and enterprise performance management.⁷⁰⁸

Citagus markets itself globally and, according to Raam Ramachandran, Director and Head of the ESA [Enterprise Service Automation] Practice at Citagus, "[w]e are seeing good traction

⁶⁹⁷ TomorrowNow email from Tim Harper to Bob Ludlam, et al. August 28, 2008. Re: Alternative support provider (ASP) updates needed; SAP-OR00803266-272.

⁶⁹⁸ TomorrowNow email to Shelley Nelson. September 5, 2008. Re: Service End Date Updates – 2441; TN-OR06035821-822, at -821.

⁶⁹⁹ TomorrowNow email to Shelley Nelson. September 2, 2008. Re: Service End Date Updates – 5276; TN-OR06077689-690, at -689.

⁷⁰⁰ TomorrowNow email from Stacy Carlyle to Benny Daigle, et al. September 9, 2008. Re: Key Points from yesterday's Offboarding Discussion; TN-OR06078285-286. See also, Orlin Corporation email from Benny Daigle to Stacy Carlyle, et al at TomorrowNow. September 9, 2008. Re: RE: Key Points from yesterday's Offboarding Discussion; TN-OR06078285-286, at -285.

⁷⁰¹ Heritage Valley email from Edward Fortwangler to Dale Petter at TomorrowNow. September 18, 2008. Re: Off Boarding Call; TN-OR06074069-070 at -069.

⁷⁰² Igou, Bob, Pat Phelan, and Jane B. Disbrow. "SAP Shutdown of TomorrowNow Pushes Customers to Alternatives." Gartner Research. July 25, 2008. See also, Disbrow, Jane B. and Alexa Bona. "Reduce IT Spending on Software Maintenance and Support." Gartner Research, May 19, 2006; SAP-OR00825770-776 at -775.

⁷⁰³ Complaint for Damages and Injunctive Relief, Oracle USA, Inc. and Oracle International Corporation v. Rimini Street, Inc. and Seth Ravin Filed January 25, 2010.

⁷⁰⁴ RiminiStreet.com. "Welcome to Rimini Street." February 12, 2010. <<http://riministreet.com/>>.

⁷⁰⁵ Citagus.com. "Overview." March 14, 2010. <<http://www.citagus.com/overview.htm>>. See also, Citagus.com. "News Room." March 14, 2010. <<http://www.citagus.com/newsroom.asp>>.

⁷⁰⁶ Citagus.com. "Contact Us." March 14, 2010. <<http://www.citagus.com/contact.htm>>.

⁷⁰⁷ Citagus.com. "Solutions." March 14, 2010. <<http://www.citagus.com/support.htm>>.

⁷⁰⁸ Citagus Corporate Profile. Citagus.com. <<http://www.citagus.com/images/Citagus%20Corporate%20Profile.pdf>>.

globally and customers are recognizing our niche expertise in implementing PeopleSoft solutions.”⁷⁰⁹

There is evidence that some Oracle customers obtained competing bids from both TomorrowNow and Citagus for support services.⁷¹⁰

Following TomorrowNow’s announced business shut down, Gartner Research had identified Citagus as a possible replacement vendor as of July 2008.⁷¹¹ Citagus continues to provide support for PeopleSoft software as of the date of this report.⁷¹²

8.9.8.5 Klee Associates

Klee Associates entered the third-party support business in December 2004 as a natural extension of its J.D.Edwards consulting business, JDEtips, says Andy Klee, president of the Denver-based company. “‘We’d been doing J.D. Edwards consulting and training for many years,’ Klee says. Some of his customers asked if they would provide third-party maintenance support, and Klee looked into what it would take to do it, and how many clients it would take to make it work. ‘I would call it a logical extension of our services,’ he says.” Klee Associates provides support on J.D.Edwards World and OneWorld ERP products.⁷¹³

In 2005, Klee Associates reportedly charged only “...25 percent of the current maintenance fees, then anything beyond that by the hour...The company had between 10-20 customers who have either bought or committed to it. Two full-time Klee staff members are dedicated to the third-party maintenance division, while the rest of the work is farmed out to about 30 trusted business partners.”⁷¹⁴

An independent article by John Zarb of ITinerantCIO, LLC in JDEtips Journal, noting some of the third-party support players in the market in mid-2005, stated, “...Klee Associates/JDEtips offers their vast array of expertise and contacts to companies who would prefer to have a cost-effective support safety net under themselves. Their model is adaptable to large or small users of JDEdwards World customers.”⁷¹⁵

In a later article that year, Mr. Zarb asks JDEtips readership, “[w]hen is the last time that you did an RFQ on ERP maintenance?... The software vendors themselves will often not even respond to

⁷⁰⁹ Citagus.com. “News Room.” March 14, 2010. <<http://www.citagus.com/newsroom.asp>>.

⁷¹⁰ TomorrowNow email from Eric Osterloh to Bob Geib, et al. July 28, 2005. Re: New Competitor; TN-OR07157939-940, at -939.

⁷¹¹ Igou, Bob, Pat Phelan, and Jane B. Disbrow. “SAP Shutdown of TomorrowNow Pushes Customers to Alternatives.” Gartner Research. July 25, 2008. See also, Disbrow, Jane B. and Alexa Bona. “Reduce IT Spending on Software Maintenance and Support.” Gartner Research, May 19, 2006; SAP-OR00825770-776 at -775.

⁷¹² Citagus.com. “Company.” March 14, 2010. <<http://www.citagus.com/>>. See also, Citagus.com. “Solutions.” March 14, 2010. <<http://www.citagus.com/support.htm>>.

⁷¹³ Woodie, Alex. “JDE Shops Have Plenty of Options for Third-Party Maintenance.” *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁷¹⁴ Woodie, Alex. “JDE Shops Have Plenty of Options for Third-Party Maintenance.” *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁷¹⁵ Zarb, John A. “ERP Software Support – is it all that it’s cracked up to be?” JDEtips Journal. July/August 2005.

a request such as this, but there are many who will – INCLUDING Klee Associates/JDEtips!...Specifically, consider Klee Associates/JDEtips as a company who may be able to tackle the long-term needs of your ERP support. When I seriously considered this, as a CIO of a multi-national, Russell 2000, company, they were the only company, of those I contacted, who did not have rigid rules of engagement...JDEtips was ready to adapt to the model that made sense for me.”⁷¹⁶ Presumably, these articles (and others) printed in the JDEtips journal, that publicize the third-party support vendor market, serve as useful advertisements to get the word out about the industry, as they are “read by thousands of IT staff... at over 600 SAP and J.D.Edwards Klee Associates’ clients.”⁷¹⁷

As of the date of this report, Klee Associates was still in operation and listed on the Oracle Partner Network as a publisher of the JDEtips and ORATips Journals both of which Oracle states, “are widely accepted in the user community as excellent sources of information on Oracle and J.D.Edwards applications and technologies.”⁷¹⁸ Klee Associates also publishes SAPtips; provides consulting and training services⁷¹⁹; and operated a help desk for end user support.⁷²⁰

Klee Associates was recognized by the trade press as a competitor in the third-party support market for some Oracle products.⁷²¹ In numerous business documents, Oracle acknowledged Klee as a third-party threat.⁷²² One Oracle document from September 2005 stated, “Klee Associates is one of the primary 3rd party providers to JDE and PeopleSoft support. We do have them on our radar screen.”⁷²³

In addition, TomorrowNow had identified Klee as a direct competitor⁷²⁴ and the two have competed for support services for the same clients.⁷²⁵ For example, TomorrowNow and Klee bid

⁷¹⁶ Zarb, John A. “Beyond ERP Vendor Maintenance Lie Savings Opportunities...” JDEtips Journal. November/December 2005.

⁷¹⁷ Klee, Andy. “The ERP Life Cycle: From Birth to Death and Birth Again,” IT Jungle. May 31, 2005. <<http://www.itjungle.com/tfh/tfh053105-story03.html>>.

⁷¹⁸ Oracle.com. “Klee Associates, Inc.” March 14, 2010. <<http://solutions.oracle.com/partners/jdetips/>>.

⁷¹⁹ ERPTips.com. “Welcome to ERPTips; SAP training, consulting, and content for SAP Clients.” March 23, 2010. <<http://www.erptips.com/>>.

⁷²⁰ JDEtips.com. “HelpDesk for JD Edwards Software.” January 18, 2008. <<http://www.jdetips.com/HelpDesk.asp>>.

⁷²¹ “AMR Research.” January 21, 2005; ORCL00461370—371 at -371. See also, Dorr, Erik. “Third Party Vendors Offer Alternatives for Business Application Support,” Gartner Research. March 30, 2005; ORCL00200156-160 at -159-160.

⁷²² “Projected Third Party Risk,” ORCL00291021-030 at -026. See also, “Third Party Support SWAT Team.” ORCL00676612-613, at -612. See also, “Competitive Marketing Strategy Support Services Customer Retention.” January 24, 2005; ORCL00510890-896, at -894. See also, “Third Party Support Competitive Update.” March 8, 2006; ORCL00406029-031, at -031. See also, Oracle email, from Elizabeth Shippy to James Patrice. June 3, 2005. Re: Monthly E1 Conference calls; ORCL00089538. See also, Oracle email from Elizabeth Shippy to Shelley Lynn Moses-Reed. February 15, 2006. Re: Apps Strategy meeting follow up; ORCL00138840.

⁷²³ Oracle email from Juergen Rottler to Tan HoonJuay, et al. September 6, 2005. Re: RE: Welcome to JDEtips: ERP Life Cycle Services for JD Edwards World and EnterpriseOne Clients; ORCL00271472.

⁷²⁴ “Marketing Overview,” August 8, 2006; TN-OR00121322-345, at -339. See also, “Low Cost Competitors, Assessing the Threat from Third-Party Imitators.” February 2006; TN-OR07161151-170, at -167.

⁷²⁵ TomorrowNow email from Bob Stephens to Nigel Pullan, et al. June 23, 2006. Re: Lexmark; TN-OR01729322. See also, TomorrowNow email from Lon Fiala to Stephan Rossius. February 2, 2005. Re: TomorrowNow conversation; TN-OR08324955. See also, Robyn Harrel deposition, September 28, 2009,

head-to-head for a support contract with Carlisle Companies and Klee won the business.⁷²⁶ There is evidence that Oracle lost support customers to Klee, including Burly Corp.,⁷²⁷ Perry Judds Holdings,⁷²⁸ Lincoln Property Services, Inc.,⁷²⁹ Captain D's, and Decorative Concepts⁷³⁰⁷³¹

Around mid-2006, Klee Associates began phasing out of J.D.Edwards third-party support and turned over its remaining clientele to TomorrowNow.⁷³² I understand that VSM Group,⁷³³ Decorative Concepts,⁷³⁴ and Eriez Manufacturing⁷³⁵ were some of the former Oracle customers that TomorrowNow obtained from Klee Associates. It is my understanding that Klee Associates, therefore, is no longer a third-party support vendor.

8.9.8.6 netCustomer

netCustomer was founded in 1998 by Punita Pandey as a provider of customer relationship management services that included “e-mail management, voice over Internet, live interactive help over the Web and integration with supply chain management and fulfillment services.” netCustomer’s first customers included Dell Computer Corp., Sony, Qualcomm, and Johnson & Johnson.⁷³⁶

In 2001, PeopleSoft Corporation outsourced some of its global support operations to netCustomer for a period of approximately four years, during which time netCustomer provided support across PeopleSoft product lines and extended to J.D.Edwards product lines after the acquisition by PeopleSoft. netCustomer claims to have resolved over 80,000 support requests for

pages 9 and 64-65. See also, Oracle email from Michael Gorski to Rick Cummins, et al. June 28, 2005. Re: FW: LEXMARK'S J.D. EDWARDS SOFTWARE MAINTENANCE CANCELLATION NOTIFICATION; ORCL00204036-037.

⁷²⁶ TomorrowNow email from Bob Stephens to Bob Geib, et al. August 18, 2005. Re: Carlisle Companies; TN-OR04231108.

⁷²⁷ “[Proje]cted Third Party Risk.” ORCL00199493-495, at -495.

⁷²⁸ “Projected Third Party Risk.” ORCL00189765-768, at -768.

⁷²⁹ TomorrowNow email from Gabriel Ramos to Laura Sweetman. February 28, 2006. Re: Where there’s smoke, there’s fire. Want s’more from your JD Edwards maintenance?; TN-OR08345367-069, at -068.

⁷³⁰ “Decorative Concepts Signs with Klee Associates for Maintenance Support on PeopleSoft World Software.” PR Web Press Release Newswire. December 27, 2004.

⁷³¹ Captain D’s and Decorative Concepts were Klee & Associates 1099 clients prior to moving to TomorrowNow. There is no record of Captain D’s support vendor prior to Klee Associates. See TomorrowNow email chain from Kirk Chan to Jim Wright. September 27, 2006. Re: Klee clients for 1099 updates: Capt D’s, Decorative Concepts; TN-OR07869025-028, at -028.

⁷³² TomorrowNow email from Bob Stephens to Tim Harper. August 8, 2008. Re: 3rd Party Provider List – JDE Update; TN-OR06097046-048, at -047. See also, TomorrowNow email chain from Kirk Chan to Jim Wright. October 9, 2006, Re: Klee clients for 1099 updates: Capt D’s, Decorative Concepts; TN-OR07869025-028, at -028. See also, TomorrowNow email from Nigel Pullan to Andrew Nelson, et al. April 3, 2006. Re: Fw: follow up; TN-OR00582962-963, at -062.

⁷³³ TomorrowNow email from Bob Geib. September 29, 2006. Re: TomorrowNow WINS! VSM Group for J.D. Edwards; TN-OR02027184.

⁷³⁴ TomorrowNow email from Brenda Clark to JDE Managers. February 7, 2007. Re: Q3 Reports; TN-OR03672351-362, at -359.

⁷³⁵ TomorrowNow email from Bob Geib to TomorrowNow - All. March 30, 2007. Re: TomorrowNow WINS! Eriez Manufacturing Renewal) for J.D. Edwards World customer; TN-OR08818662.

⁷³⁶ Dutt, Ela. “Corporate Dossier, Punita Pandey, founder and CEO, netCustomer.” *India Abroad*. December 29, 2000.

PeopleSoft and J.D.Edwards customers⁷³⁷. The PeopleSoft relationship ended, however, shortly after the firm was acquired by Oracle.⁷³⁸ netCustomer began independently offering support for Siebel products in August 2005⁷³⁹ and PeopleSoft Enterprise and J.D.Edwards EnterpriseOne support service were added in March 2006.⁷⁴⁰

netCustomer's team includes PeopleSoft and J.D.Edwards alumni based in Silicon Valley and provides a 24x7 support center located in India.⁷⁴¹ The company provides support for multiple applications, tools, and releases while delivering up to 75 percent savings in day-to-day technical operations. It offers customers a pay-for-use model and a cafeteria-style menu of services to enable its customers to pick and choose what is right for their business.⁷⁴² Support services include "Regulatory updates", "Critical bug fixes", "Emergency support", "Troubleshooting", "Development", "Customization", "24x7 help desk" and "Upgrade" services.⁷⁴³

Industry analysts warned Oracle of the expected threat from third-party vendors, especially netCustomer. According to notes from Oracle's conversations with Forrester analysts, one analyst asserted that "NetCustomer [sic] could be a bigger threat than TomorrowNow."⁷⁴⁴

Oracle documents recognize netCustomer as a known competitor in the third-party support marketplace.⁷⁴⁵ TomorrowNow also viewed netCustomer as active in its competitive space.⁷⁴⁶ Industry articles also make reference to netCustomer as a competitor in this market with

⁷³⁷ netCustomer.com. "About us." March 14, 2010. <<http://www.netcustomer.com/about-us.asp>>.

⁷³⁸ Woodie, Alex. "NetCustomer Tempts J.D.Edwards Shops with Third-Party Support." *IT Jungle*. March 14, 2006. <<http://www.itjungle.com/fhs/fhs031406-story01.html>>.

⁷³⁹ Cowley, Stacy. "App Support Upstarts Promise Lower Costs." *Computerworld.com*. February 13, 2006. <<http://www.computerworld.com/softwaretopics/software/story/0,10801,108567,00.html>>. See also, "netcustomer Launches Third Party Support." *Business Wire*. August 10, 2005. <http://findarticles.com/p/articles/mi_m0EIN/is_2005_August_10/ai_n14876258/print?tag=artBody;coll>.

⁷⁴⁰ Cowley, Stacy. "App Support Upstarts Promise Lower Costs." *Computerworld.com*. February 13, 2006. <<http://www.computerworld.com/softwaretopics/software/story/0,10801,108567,00.html>>. See also, "net Customer Announces Industry-Leading Third-Party Support Services for PeopleSoft Licensees..." *Business Wire*. March 7, 2006. <http://findarticles.com/p/articles/mi_m0EIN/is_2006_March_7/ai_n26784967/>.

⁷⁴¹ netCustomer.com. "Contact us." March 14, 2010. <<http://www.netcustomer.com/contact.asp>>. See also, netCustomer.com. "About us." March 14, 2010. <<http://www.netcustomer.com/about-us.asp>>.

⁷⁴² netCustomer.com. "Service not customized to your needs?" March 14, 2010. <<http://www.netcustomer.com/index.asp>>. See also, Woodie, Alex. "netCustomer Delivers Regularory Updates for J.D. Edwards, PeopleSoft." *IT Jungle*. 30 Oct. 2007. <<http://www.itjungle.com/fhs/fhs103007-story09.html>>.

⁷⁴³ "Optimizing Enterprise Applications Environment" Northern California PeopleSoft/JDE Regional User Group Conference. June 15, 2007. <http://www.netcustomer.com/pdf/netCustomer-NorCalRUG-Jun_15_2007.pdf>. Based on netCustomer's website, netCustomer maintenance services are offered for PeopleSoft Enterprise FSCM, HCM, CRM, EPM, releases 7.x, 8.1x, 8.3x, 8.4x, 8.8x, 8.9x; World and OneWorld, HCM, Financials, Distribution and Manf., Releases A7.2, A7.3, A8.1, B73.2, B73.3, Xe, ERP 8.0, 8.9, 8.10, 8.11, 8.11 SP1, and Siebel SFA, CRM, Call Center Apps., all releases. See netCustomer.com. "Supported Products." March 14, 2010.

⁷⁴⁴ "Analyst Conversations on Support." January 25; ORCL00033228-231, at -229.

⁷⁴⁵ Paul Brook deposition, August 21, 2009, pages 9 and 16-23.

⁷⁴⁶ "Siebel Remote Administration." TN-OR06048360-382, at -382.

TomorrowNow and others.⁷⁴⁷ Following TomorrowNow's announced shut down, Gartner Research had identified netCustomer as a possible replacement vendor as of July 2008.⁷⁴⁸

As of the date of this report, netCustomer continues to offer support services for PeopleSoft, J.D.Edwards, and Seibel products.⁷⁴⁹

8.9.8.7 LegacyMode

LegacyMode, based in Laguna Beach, California, is a third-party vendor focused on offering "complete legacy support for PeopleSoft."⁷⁵⁰ According to ITJungle.com, LegacyMode was one of the early innovators in the third-party PeopleSoft support space, offering support as early as 2003.⁷⁵¹ LegacyMode support services include "...an initial on-site assessment, statement of work (SOW) designed to meet the client's specific needs... 24 x 7 support and agree to respond to critical issues within thirty (30) minutes or less... [and] a senior technical/functional consultant is assigned to each client..."⁷⁵² The firm also provides tax and regulatory updates.⁷⁵³ LegacyMode claims to save customers 50 percent or more over their current software support costs with support offerings starting at \$50,000.⁷⁵⁴

LegacyMode purportedly differs from other third-party support firms such as TomorrowNow or Rimini Street by its "unique consultative methodology relying upon Application Encapsulation through Virtualization." According to LegacyMode, "[t]his patent-pending process ensures that your application is placed in a digital bubble (aka Digital Formaldehyde) so that it may be run in

⁷⁴⁷ Phelan, Pat. "TomorrowNow: An Alternative for Business Application Technical Support Services." Gartner Research. February 7, 2007; TN-OR00364884-889, at -886;

⁷⁴⁸ Igou, Bob, Pat Phelan, and Jane B. Disbrow. "SAP Shutdown of TomorrowNow Pushes Customers to Alternatives." Gartner Research. July 25, 2008.

⁷⁴⁹ netCustomer.com. "Services." March 14, 2010. <<http://www.netcustomer.com/support-services.asp>>. See also, netCustomer.com. "Supported Products." March 14, 2010. <<http://www.netcustomer.com/supportedproducts.asp>>.

⁷⁵⁰ "Complete Legacy Support for PeopleSoft." LegacyMode.com. <<http://www.legacymode.com/docs/CompleteLegacyServicesdatasheetLMv22.pdf>>.

⁷⁵¹ Woodie, Alex. "J.D.Edwards Shops Get New Maintenance Options." *ITJungle*. October 31, 2006. <<http://www.itjungle.com/fhs/fhs103106-story03.html>>. Woodie states that LegacyMode has been offering PeopleSoft support for three years as of 2006. See also, Daniels, Doug. "Going LegacyMode with PeopleSoft." *legacymode.com*. Sep./Oct. 2004. <http://www.legacymode.com/docs/going_legacymode_psft_vLM.pdf>. Based on PeopleSoft de-support dates provided on the LegacyMode website, it appears that LegacyMode supports the following PeopleSoft modules and releases: HCM (HRMS) 8, HCM 8.3, FM 8, Campus Solutions (SA), CRM 8.1, EPM 8.3 FSM 8.4, SCM 8.4 CRM 8.4, ESA 8.4. See LegacyMode.com. "De-Support Dates." March 14, 2010. <http://www.legacymode.com/de_dates.php>.

⁷⁵² "Complete Legacy Support for PeopleSoft." LegacyMode.com. <<http://www.legacymode.com/docs/CompleteLegacyServicesdatasheetLMv22.pdf>>.

⁷⁵³ LegacyMode has partnered exclusively with Independent Systems (www.taxrates.com) as its tax and regulatory data provider of choice. Independent Systems has been providing mission critical tax data for ERP systems since 1977. See LegacyMode.com. "Tax and Regulatory Update Service." <http://www.legacymode.com/docs/LM_Tax_reg_update_svc_v2.pdf>. For further discussion on the availability of tax and regulatory data, see Daniels, D.L. "Encapsulating n-tier PeopleSoft Applications for Legacy Deployments." LegacyMode.com. <http://www.legacymode.com/docs/encapsulating_psft_v521_final.pdf>.

⁷⁵⁴ "Complete Legacy Support for PeopleSoft." <<http://www.legacymode.com/docs/CompleteLegacyServicesdatasheetLMv22.pdf>>. See also, Woodie, Alex. "J.D.Edwards Shops Get New Maintenance Options." *ITJungle*. October 31, 2006. <<http://www.itjungle.com/fhs/fhs103106-story03.html>>.

perpetuity with decreasing costs over time. Other companies are merely transferring one maintenance stream from another while [LegacyMode is] offering a permanent way to lower costs over time.”⁷⁵⁵ LegacyMode “...uses modern virtualization technology to capture and emulate complete hardware-level snapshots of the multi-tier ERP system environment...The resulting encapsulation produces virtual hardware artifacts which allow our support team to understand the exact nature of the legacy system environment at various points in time & change history...In this way, virtualization, originally a mainframe-era technology, allows modern IT shops to GO LEGACY and achieve another mainframe-era benefit: decreasing costs over time on maintenance and support.”⁷⁵⁶ LegacyMode founder, Doug Daniels states, “[i]t’s simple enough on the surface – freeze your stable PeopleSoft application as it is today in order to extract maximum value while the software industry and market forces flesh out the future.”⁷⁵⁷

The firm defines “legacy mode” as a PeopleSoft system that no longer requires or consumes manufacturer-issued application updates and is deployed with the intent of maintaining the software for a decade or longer. As such, a move to legacy mode requires a greater degree of change control and comprehensive application monitoring. Furthermore, LegacyMode does not recommend going “legacy mode” on any version less than PeopleSoft release 8.x (also known as PeopleSoft Internet Architecture, or ‘PIA’) as 8.x provides a modern architecture with many integration and interoperability features that facilitate legacy operations over the long term.⁷⁵⁸ Based on the firm’s statements, the LegacyMode model, whereby a system is frozen in its current state, while allowing minimal changes such as the obligatory tax and regulatory updates, appears to represent an important, presumably non-infringing substitute, for PeopleSoft customers.

TomorrowNow recognized LegacyMode as a direct competitor.⁷⁵⁹ The company was still in business offering PeopleSoft support services as of the date of this report, according to its website.⁷⁶⁰

8.9.8.8 Reliasys

Founded in 1997, Reliasys is a software development, consulting and support services firm serving a wide spectrum of businesses worldwide.⁷⁶¹ Reliasys caters to customers that run

⁷⁵⁵ LegacyMode.com. “LegacyMode FAQ.” February 12, 2010. <<http://www.legacymode.com/faq.php>>. See also, LegacyMode.com. “Maintenance Costs/Time.” March 14, 2010. <http://www.legacymode.com/images/costs_v1.jpg>.

⁷⁵⁶ LegacyMode.com. “Encapsulation through Virtualization.” March 14, 2010. <<http://www.legacymode.com/virtual.php>>.

⁷⁵⁷ Daniels, D.L. “Encapsulating n-tier PeopleSoft Applications for Legacy Deployemnts.” legacymode.com. <http://www.legacymode.com/docs/encapsulating_psft_v521_final.pdf>.

⁷⁵⁸ Daniels, Doug. “Going LegacyMode with PeopleSoft.” legacymode.com/Sep./Oct. 2004. <http://www.legacymode.com/docs/going_legacymode_psft_vLM.pdf>. See also, LegacyMode.com. “LegacyMode FAQ.” February 12, 2010. <<http://www.legacymode.com/faq.php>>. See also, LegacyMode.com. “Maintenance Costs/Time.” March 14, 2010. <http://www.legacymode.com/images/costs_v1.jpg>.

⁷⁵⁹ “SAP Summer Sales Meeting, Denver, CO.” July 17, 2006; TN-OR01811482-494, at -486. See also, “Marketing Overview.” August 8, 2006; TN-OR00121322-345 at 339.

⁷⁶⁰ LegacyMode.com. “Welcome to IT Savings.” March 14, 2010. <<http://legacymode.com/index.php>>.

⁷⁶¹ Reliasys.com. “About Us.” March 14, 2010. <<http://reliasys.com/aboutus.htm>>. See also, Reliasys.com. “Offshore Development Services.” March 14, 2010. <<http://reliasys.com/offshore.htm>>.

J.D.Edwards software.⁷⁶² In addition, Reliasys offers database administration, visual basic-design & development, network security management, network administration, and integration services.⁷⁶³ It also operates offshore software development centers (ODC) that specially cater to a client's software development needs.⁷⁶⁴

Reliasys' "ReliaOps" program for J.D.Edwards provides monitoring and maintenance of enterprise applications on a regular basis. The plan "...covers daily monitoring of system resources and scheduled system maintenance... Scheduled system maintenance keeps the system updated with the latest services packs, ASUs [Automatic System Updates] and ESUs [Essential System Updates] avoiding harmful program errors and data disruptions."⁷⁶⁵ In addition, the firm offers a special package of pre-paid hours at a discounted rate for activities not covered under operations outsourcing. These activities include data fixes, program bug fixes, custom program fixes, etc. This package is available only to clients with a valid ReliaOps for J.D.Edwards plan.⁷⁶⁶

Reliasys was included in the list of "Known Client Choices" in TomorrowNow's Wind-Down Report at October 31, 2008, indicating that some of TomorrowNow's customer(s) may have opted to take their support to Reliasys instead of returning to Oracle.⁷⁶⁷

As of the date of this report, the company was still in operation and was providing outsourcing for J.D.Edwards users.

8.9.8.9 CedarCrestone

CedarCrestone, provides a wide variety of hosting and remotely managed services for Oracle's PeopleSoft Enterprise and J.D.Edwards EnterpriseOne applications.⁷⁶⁸ The firm states,

"CedarCrestone Managed Services (CMS) has been in the business of delivering expert Oracle E-Business Suite and PeopleSoft Enterprise Outsourcing services since 1999. CMS is headquartered in Alpharetta, GA and utilizes two geographically dispersed data centers within its

⁷⁶² Reliasys.com. "JDEdwards Operations Outsourcing." March 14, 2010. <http://reliasys.com/jde_opera.htm>.

⁷⁶³ Reliasys.com. "Our SiteMap..." March 15, 2010. <<http://reliasys.com/sitemap.htm>>.

⁷⁶⁴ Reliasys.com. "Offshore Development Services." March 14, 2010. <<http://reliasys.com/offshore.htm>>.

⁷⁶⁵ Reliasys.com. "JDEdwards Operations Outsourcing." March 14, 2010. <http://reliasys.com/jde_opera.htm>.

⁷⁶⁶ Reliasys.com. "JDEdwards Operations Outsourcing." March 14, 2010. <http://reliasys.com/jde_opera.htm>.

⁷⁶⁷ "TomorrowNow Operations Wind Down: Final Report." October 31, 2008; TN-OR03523871-924, at -903. 1% of TomorrowNow's customers are listed under Reliasys and 46% of customers are listed as "Unknown." Former TomorrowNow customer, Crothall Services Group, In. obtained bids from both Reliasys and Spinnaker. See TomorrowNow email to Shelley Nelson. August 26, 2008. Re: Service End Date Updates – 30761; TN-OR06036714-715, at -714. Former TomorrowNow customer, Dominion Homes Inc. obtained proposals from Reliasys and Spinnaker. See TomorrowNow email to Shelley Nelson. August 27, 2008. Re: Service End Date Updates – 925; TN-OR06036604-605, at -605.

⁷⁶⁸ CedarCrestone.com. "Services." December 8, 2008. <http://www.cedarcrestone.com/cms_maintain.php>. CedarCrestone is mentioned as a third-party maintenance competitor in many industry publications. See for example, Phelan Pat. "TomorrowNow: Business Application Technical Support Services for Oracle Applications." Gartner Research. April 2, 2007; TN-OR00005096-103 at -099.

operation. Staff competencies are maintained across all technical and functional disciplines and employees are physically located within the US, Canada, Europe, and India. This allows CMS to integrate best-in-class capabilities across the entire Oracle value chain to provide a growing base of over 100 customers with highly efficient, economical managed services solutions on a “24/7” basis.

CMS provides the industry’s most dynamic set of services designed specifically for Higher Education, Commercial, and Public Sector clients of all sizes, in all industries, located nationwide. Each client is unique and receives one or many CMS services packaged to meet their needs. Offerings include the following:

CMS Host provides world-class hosting across the entire suite of oracle E-Business Suite and PeopleSoft Enterprise applications. Hosting delivers enterprise-class solutions to our customers, incorporating robust data center facilities, high-performance and fully redundant computing platforms, security protocols, advanced systems management solutions, best-in-class application management, regular environment and technology upgrades, and a “24/7” Help Desk dedicated to ongoing system operational and support needs. Each area has been carefully architected into a highly scalable hosting solution that meets the needs of both large and small customers through a no-nonsense service-level agreement that is surpassed by none.

CMS Manage offerings have been designed to comprehensively meet the outsourcing needs of non-hosted customers. This outsourcing service provides all the application support and maintenance benefits of the CMS Host service offering while permitting the customer to retain ownership, operation, and physical responsibility of the underlying computing assets. Depending on the client’s specific requirements, CMS can also provide support solutions for the E-Business or PeopleSoft application infrastructure. Clients have a choice of on-site and/or remote support from a dedicated team of Oracle Certified personnel.

CMS Maintain provides Tax and Regulatory updates, delivered on a CD, in conjunction with remedial “break/fix” and application help desk support. When bundled, these CMS Maintain services provide both supported and unsupported clients with options and flexibility otherwise not available. CMS Maintain delivers services to help bridge the support gap as a vendor who is committed to keeping clients in the Oracle ecosystem.

CMS Lab augments and/or replaces in-house supported upgrades and implementations. The CMS Lab provides an offsite, third-party option for completing PeopleSoft application upgrades and hosting implementations. Customers leverage CMS’ instant infrastructure and scalable services to strategically focus internal resources on core activities, leaving the contextual upgrade and implementation hosting responsibilities to CMS.

CMS Develop occurs as a normal function of daily applications support, during implementations, projects and upgrades. CMS Develop is the ideal solution for clients requiring point-in-time development support over an extended period of time.⁷⁶⁹

The firm “offers ‘Support in an Unsupported World’ as a true service offering, not as an exception to appease clients on a ‘one-off’ basis.”⁷⁷⁰ CedarCrestone offers two types of support services for clients who need to remain legally compliant with current tax and regulatory updates: 1) RetroSupport is for clients with PeopleSoft support agreements but remaining on an older, unsupported version of the software; 2) Extended support is for clients on any version of PeopleSoft, but who do not maintain a PeopleSoft support agreement. In its service brochure, CedarCrestone provides a detailed description of its retro support and extended support methodologies.⁷⁷¹

To the extent that a customer’s ERP solution is relatively stable (requiring minimal break/fix support), and that tax and regulatory updates are based on publicly available information requiring well known algorithms for implementation,⁷⁷² the CedarCrestone approach to support may be a non-infringing alternative for customer support, and conceivably could be offered on any release of PeopleSoft software.

CedarCrestone won deals against TomorrowNow⁷⁷³ and, after TomorrowNow wound down its operations, numerous companies went to CedarCrestone, including Baker Botts, BASF, Borders Group, Circuit City, George Weston Bakeries, Interpublic Group, Longaberger, Markel, National Surgical Hospitals, Parkview Health, Standard Register, Syngenta, Telapex, University of Massachusetts, and University of New Orleans.⁷⁷⁴

Oracle also lost support business directly to CedarCrestone. Oracle lost \$121,794 in revenue from the City of Ontario, a PeopleSoft Enterprise customer, to CedarCrestone in approximately June 2006. A note from the customer states, “We are looking to lock in to our current versions. At this time, I have direction from our Administrative Services director to not upgrade any of our PeopleSoft applications. To that end, we will be looking to not be under maintenance with Oracle but instead contract with Cedar Crestone [sic] for ongoing support.”⁷⁷⁵

CedarCrestone appears to have provided such similar support services to TomorrowNow that customers evaluated the competitors against each other. For example, A.O. Smith evaluated four third-party maintenance providers before selecting TomorrowNow. One of the vendors was CedarCrestone. A document provided by A.O. Smith states, “There are at least four different vendors who are willing to provide core support services for our PeopleSoft applications. Core support includes items like patches and fixes, regulatory, governmental and tax upgrades. They

⁷⁶⁹ “CedarCrestone Managed Services.” CedarCrestone.com.

⁷⁷⁰ “PeopleSoft Application Maintenance Services.” AOSMITH000491-511, at -494.

⁷⁷¹ “PeopleSoft Application Maintenance Services.” AOSMITH000491-511, at -496-497.

⁷⁷² Industry research reports suggest that tax and regulatory updates can legitimately be provided by third-party firms. See for example, Sweeney, Judy and Marc-A. Meunier. “PeopleSoft HR- What Now?” AMR Research. March 2005.

⁷⁷³ Andrew Nelson deposition, April 29, 2009, page 290-291.

⁷⁷⁴ Statement of Rick Riordan, Executive Vice-President-Shared Services of CedarCrestone. October 30, 2009.

⁷⁷⁵ “3rd party risk analysis, 1/25/08 [REDACTED];” ORCL00079745.

generally offer installation and upgrade support, operational support, configuration support, application fixes, customization fixes, performance support and interoperability support.”⁷⁷⁶ A.O. Smith’s analysis specifically concluded that CedarCrestone’s offering provided the majority of the services listed⁷⁷⁷ despite Oracle’s claims that CedarCrestone is not licensed to provide support.⁷⁷⁸

Another customer, Phelps Dodge, compared CedarCrestone directly with TomorrowNow. An internal email provided by Phelps Dodge dated December 6, 2006 states, “If you are talking about the extended support bid the two finalists are TomorrowNow and CedarCrestone.”⁷⁷⁹ Phelps Dodge chose TomorrowNow. More recently, an extensive response to an RFP by the Tucson School District shows CedarCrestone bidding almost exactly the same service as TomorrowNow provided its customers.⁷⁸⁰

CedarCrestone was well-known as a third-party support vendor and was listed alongside netCustomer as an alternative to TomorrowNow by Gartner Research.”⁷⁸¹ CedarCrestone continues to offer PeopleSoft maintenance services today.⁷⁸² However, the company may have discontinued its J.D.Edwards services by 2010.⁷⁸³

8.9.8.10 ContinuServe

ContinuServe, based in Cambridge, Massachusetts, provides “outsourced back-office solutions to Fortune 2000 companies using an integrated approach to technology and business processes.” ContinuServe solutions span three key practice areas - Strategic Solutions, Technology Solutions, Business Process Outsourcing (“BPO”). Each of these practice areas is an extension of ContinuServe’s core competency – Back-Office Best Practices and Technology Solutions.⁷⁸⁴

ContinuServe offers outsourced “application management [including ongoing support and maintenance] as a recurring, fixed fee service for enterprise backoffice systems such as SAP, Oracle, and PeopleSoft [it does not maintain J.D.Edwards].”⁷⁸⁵ Application management services are “delivered with an integrated on-site/off-site approach to ensure efficiency and quality.”⁷⁸⁶

⁷⁷⁶ “PeopleSoft Support Alternatives.” AOSMITH001224-1226.

⁷⁷⁷ “PeopleSoft Support Alternatives.” AOSMITH001224-1226.

⁷⁷⁸ Oracle's Opposition to Defendants' Motion to Compel Discovery Concerning Third Party Support Provided by Oracle Partners, page 13.

⁷⁷⁹ Phelps Dodge email from John Plummer to Chuck Wargo. December 6, 2006. Re: People Soft Project; FMI001269.

⁷⁸⁰ CedarCrestone RFP for Tucson Unified School District No. 10-63-12. October 22, 2009.

⁷⁸¹ Phelan, Pat. “TomorrowNow: Business Application Technical Support Services for Oracle Applications.” Gartner Research. April 2, 2007; TN-OR00005096-103, at -096.

⁷⁸² CedarCrestone.com. “PeopleSoft – Managed Services – Host.” March 12, 2010. <<http://www.cedarcrestone.com/sol-ps-cms.php>>.

⁷⁸³ The company currently only lists services for PeopleSoft, E-Business Suite and Fusion Middleware. See CedarCrestone.com. “PeopleSoft – Managed Services – Host.” March 12, 2010. <<http://www.cedarcrestone.com/sol-ps-cms.php>>.

⁷⁸⁴ “ContinuServe Corporate Overview,” AOSMITH001008-009, at -008. See also, ContinuServe.com. “ContinuServe.” <<http://www.continuserve.com/>>.

⁷⁸⁵ “ContinuServe Corporate Overview,” AOSMITH001008-009, at -008.

⁷⁸⁶ “ContinuServe Corporate Overview,” AOSMITH001008-009, at -008.

ContinuServe's PeopleSoft support service claims to "provide all the necessary updates, fixes and patches to ensure tax and regulatory compliance as well as a stable production environment for 50% less than the standard support fee charged by PeopleSoft. These services are backed by a comprehensive service level agreement that guarantees quicker response and resolution times than the standard PeopleSoft maintenance agreement. ContinuServe guarantees that it will continue to support its customers' PeopleSoft environments for up to 10 years without requiring costly upgrades over that period."⁷⁸⁷

TomorrowNow recognized ContinuServe as a direct competitor⁷⁸⁸ and some TomorrowNow customers (e.g., A.O. Smith, Pepsi Americas), also may have evaluated ContinuServe's product offering before choosing TomorrowNow's support services.⁷⁸⁹ The company was still in business and offering PeopleSoft support services as of the date of this report.⁷⁹⁰

8.9.8.11 Beoley Mill Software Ltd. (BMS)

Beoley Mill Software Ltd ("BMS"), located in Warwickshire, England (UK), has been dedicated to the full line of J.D.Edwards products (World and OneWorld) and services for the past 16 years.⁷⁹¹ With over sixty consultants cross trained between modules, BMS claims to have the largest single source of experienced World and EnterpriseOne applications consultants available within the UK. Services include "health checks, CNC systems administration, training, performance monitoring and tuning, [and] development requests and applications". While BMS claims to offer 24/7/365 support across Europe, it is not clear that the company markets outside of the UK. BMS offers a customized, simple 'pay as you go' model where the customer only pays for what is used but also obtains full-time cover.⁷⁹²

When TomorrowNow announced its closing in 2008, BMS issued a news release targeting TomorrowNow clients:

Customers who switched their support to TomorrowNow are now facing the prospect of losing their support from 1st November. BMS can offer a lifeline to these customers by offering their support offerings to these customers. With a large, dedicated team of Certified World and EnterpriseOne specialists at hand to deal with all types of support calls through a first rate SLA [Service Level Agreement]. As a Certified Oracle

⁷⁸⁷ ContinuServe.com. "PeopleSoft Maintenance Solutions." March 14, 2010. <http://mysite.valuebound.com/continuserve/services_solutions/people_soft.htm>.

⁷⁸⁸ "SAP Summer Sales Meeting, Denver, CO." July 17, 2006; TN-OR01811482-494, at -486. See also, "Marketing Overview." August 8, 2006; TN-OR00121322-345, at -339.

⁷⁸⁹ John Kreul deposition, June 2, 2009, pages 11, 59-60 and 136. See also, "ContinuServe Corporate Overview." AOSMITH001008-009, at -009.

⁷⁹⁰ ContinuServe.com. "Technology Services." March 14, 2010. <http://continuserve.com/services_solutions/technology_services.htm>.

⁷⁹¹ BeoleyMill.co. "About Beoley Mill Software." March 15, 2010. <<http://www.beoleymill.co.uk/about.htm>>. See also, BeoleyMill.co. "Finding Beoley Mill Software." March 15, 2010. <<http://www.beoleymill.co.uk/location.html>>.

⁷⁹² BeoleyMill.co. "Flexible, Cost-effective Support for Your JD Edwards Systems." March 15, 2010. <<http://www.beoleymill.co.uk/support.htm>>.

Partner we work strictly within the Oracle stipulated guidelines. We can also help customers who wish to investigate the cost of going back to Oracle support and maintenance.⁷⁹³

BMS was included in the list of “Known Client Choices” in TomorrowNow’s Wind-Down Report at October 31, 2008, indicating that at least some of TomorrowNow’s customer(s) opted to take their support to BMS instead of returning to Oracle.⁷⁹⁴

The company was still in business as of the date of this report, offering J.D.Edwards support.⁷⁹⁵

8.9.8.12 CIBER

According to their website, CIBER, Inc. “is a pure-play international IT outsourcing and software implementation and integration consultancy with superior value-priced services and reliable delivery for both private and government sector clients. CIBER’s services are offered globally on a project- or strategic-staffing basis, in both custom and enterprise resource planning (ERP) package environments, and across all technology platforms operating systems and infrastructures. Founded in 1974 and headquartered in Greenwood Village, Colo., CIBER now serves client businesses from over 40 U.S. offices, 25 European offices and seven offices in Asia/Pacific. Operating in 18 countries, with more than 8,000 employees and annual revenue in excess of \$1 billion, CIBER and its IT specialists continuously build and upgrade clients’ systems to ‘competitive advantage status.’”⁷⁹⁶ The company claims that “90 percent of our client companies return to CIBER again and again. Global 2000’s, Middle Market, Emerging Companies, Governments.”⁷⁹⁷ Since 1990, CIBER has assisted more than 500 clients in more than 1,000 separate engagements.⁷⁹⁸

CIBER's Oracle practice specializes in helping clients implement, upgrade, and maintain Oracle application suites, especially J.D.Edwards products.⁷⁹⁹ CIBER advertises that as part of its “Enterprise Application Support” service, the company offers multiple tiers of support depending on the client’s needs. These services include application performance monitoring, production support 24x365, break-fix, and maintenance patch and update management.⁸⁰⁰

In approximately early 2005, Lawson Software announced it had entered into a partnership with CIBER. “As part of the deal, CIBER will provide support services to J.D.Edwards shops that

⁷⁹³ “TomorrowNow Support ends for JDE World of EnterpriseOne NEWSFLASH – BMS can step in and save the day!” March 15, 2010. <[http://www.howardpage.co.uk/SITES/BMS/JDEdwards Support htm](http://www.howardpage.co.uk/SITES/BMS/JDEdwards%20Support.htm)>.

⁷⁹⁴ “TomorrowNow Operations Wind Down: Final Report.” October 31, 2008; TN-OR03523871-924, at -903. The number of customer(s) under BMS rounded to 0% of TomorrowNow’s customers. 46% of customers are listed as “Unknown.”

⁷⁹⁵ BeoleyMill.co. “Welcome to Beoley Mill Software.” March 14, 2010. <<http://www.beoleymill.co.uk/>>.

⁷⁹⁶ CIBER.com. “Fact Sheet.” March 14, 2010. <http://www.ciber.com/ciber_overview/fast_facts.cfm>.

⁷⁹⁷ CIBER.com. “Clients.” March 14, 2010. <<http://www.ciber.com/ciber/clients/>>.

⁷⁹⁸ CIBER.com. “Oracle Solutions.” March 14, 2010. <<http://www.ciber.com/ces/oracle/start.cfm>>.

⁷⁹⁹ CIBER currently offers support on PeopleSoft products, but it is unclear when this support was made available. See CIBER.com. “Oracle Solutions.” March 14, 2010. <<http://www.ciber.com/ces/oracle/start.cfm>>. See also, Morgan, Timothy Prickett. “ERP Vendors Target PeopleSoft, JDE Bases.” *IT Jungle*. January 24, 2005. <<http://www.itjungle.com/tfh/tfh012405-story02.html>>.

⁸⁰⁰ CIBER.com. “Enterprise Application Support.” March 14, 2010. <http://www.ciber.com/services/pop_printable.cfm?id=cs-app-ease>.

want to migrate in the future to Lawson's ERP suite, which runs on the iSeries. CIBER is offering maintenance for about half the price charged by PeopleSoft, and Lawson will then cut up to another 50 percent off the cost of its ERP suite. Finally, customers will be able to use CIBER's data migration tools to move the DB2/400 data from the J.D.Edwards to Lawson formats.⁸⁰¹

TomorrowNow documents indicate that it recognized CIBER as a direct competitor for third-party support.⁸⁰² CIBER was also listed on Gartner's 2006 partial list of secondary maintenance vendors for PeopleSoft, J.D.Edwards and Siebel software⁸⁰³ and was noted in the industry trade press as a third-party alternative.⁸⁰⁴

The company was still in business as of the date of this report, offering support for the entire PeopleSoft and J.D.Edwards suites of products.⁸⁰⁵ The company refers to itself as an Oracle Certified Advantage Partner.⁸⁰⁶

8.9.8.13 CH2M HILL

CH2M HILL was founded in 1946, is headquartered in Englewood, Colorado, and has gross revenues of \$6.3 billion in 2008 with over 23,500 employees worldwide. The company is a leader in full-service engineering, consulting, construction, and operations.⁸⁰⁷

In November 2004, CH2M HILL purchased Microsource, Inc., which then became a unit of CH2M HILL's Communications and Information Solutions group which specializes in IT consulting, integration, implementation and operation, and maintenance. According to CH2M HILL's press release regarding its acquisition:

MicroSource, Inc. provides managed technology services that reduce client's annual technology expenses by up to 30 percent. Headquartered in Greenwood Village, Colorado, MicroSource helps companies of all sizes avoid the purchase and maintenance of today's costly IT capital investments by allowing them to leverage an existing Fortune 500 infrastructure. By offloading the internal IT department's burden of maintaining IT systems, MicroSource helps companies focus on their core business functions.⁸⁰⁸

⁸⁰¹ Woodie, Alex. "JDE Shops Have Plenty of Options for Third-Party Maintenance." *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁸⁰² "Internal Talking Points." Loomis Group. January 30, 2007; TN-OR03765355-358, at -356. See also, TomorrowNow email from Lon Fiala to Stephan Rossius. February 2, 2005. TN-OR08329116-119, at -118.
⁸⁰³ Disbrow, Jane B. and Alexa Bona. "Reduce IT Spending on Software Maintenance and Support." Gartner Research. May 19, 2006; SAP-OR00825770-776, at -775.

⁸⁰⁴ Karaian, Jason. "In a fix." *CFO Europe*. December 2006/January 2007; TN-OR07554949-951, at -951. See also, "IDC Market Analysis: Worldwide Software Maintenance 2005-2009 – Forecast and Analysis: Continued Growth." *IDC Research*. June 2005; ORCL00289888-906, at -899.

⁸⁰⁵ CIBER.com. "Fact Sheet." March 14, 2010. <http://www.ciber.com/ciber_overview/fast_facts.cfm>. See also, CIBER.com. "Oracle Solutions." March 14, 2010. <<http://www.ciber.com/ces/oracle/start.cfm>>.

⁸⁰⁶ CIBER.com. "Oracle Solutions." March 14, 2010. <<http://www.ciber.com/ces/oracle/start.cfm>>.

⁸⁰⁷ CH2M.com. "About Us." February 12, 2010. <http://www.ch2m.com/corporate/about_us/default.asp>.

⁸⁰⁸ "CH2M HILL Acquires MicroSource." *Business Wire*. November 18, 2004. <http://findarticles.com/p/articles/mi_m0EIN/is_2004_Nov_18/ai_n6365486/print?tag=artBody;coll1>.

This report suggests that Microsource, Inc. had its ERP support offering in the marketplace well before the acquisition.

In July 2005, JDEtips journal, an IT journal for users of J.D.Edwards products, acknowledged Microsource/CH2M HILL's support offering in the marketplace. "In the case of J.D.Edwards and PeopleSoft, new ventures have surfaced that give new options [for third-party support]. No surprise, given the years of planning time afforded entrepreneurs and/or competitors to position and create offerings. Microsource, a Denver-based startup, is an example of such a company. Backed by CH2MHILL (sic) and founded by ex-J.D.Edwards personnel, they offer experience and insight to prospective customers who are willing to forego the 'destination platform' for a less expensive maintenance formula."⁸⁰⁹ CH2M HILL also had a support servicing partnership with Conexus Partners.⁸¹⁰

Currently, as part of its Managed IT Services, the company offers J.D.Edwards World/OneWorld ERP Hosting, Management and Maintenance, in which CH2M HILL offers its clients the opportunity to choose and bundle services that may include:

- Annual maintenance and support, which is managed by a team of former J.D.Edwards managers and includes "1099/W-2 tax and regulatory updates, bug fixes, customer-elected priority management, online trouble ticketing and progress monitoring at significant savings versus renewing a maintenance contract with Oracle."
- Fully managed ERP hosting, in which "CH2M HILL can operate and manage [a customer's] J.D.Edwards ERP software hosted in one of [CH2M HILL's] global data centers";
- Co-location, in which "[c]ustomers operate and manage their application as it resides in one of CH2M HILL's global data centers";
- "Remote ERP management";
- Implementation, configuration, upgrade, development, and customization services; and
- "24x7x365 Help Desk."

CH2M HILL states that its "team of professionals helps clients reduce costs, while avoiding the costly investments related to purchasing, maintaining and upgrading IT capital investments."⁸¹¹

In 2005, Oracle documents identified CH2M HILL as one of several "key support services competitors" and a "3rd party threat" in the market.⁸¹² Several Oracle customers reported

⁸⁰⁹ Zarb, John A. "ERP Software Support – is it all that it's cracked up to be?" JDEtips Journal. July/August 2005.

⁸¹⁰ Conexus Partners email from Jon Mattei to Shannon Royster at Municipality of Anchorage. August 2, 2008. Re: RFP 28-P023 Provide PeopleSoft V7.5 FIS & HRMS Products; TN-MOA458.

⁸¹¹ Brochure titled "CH2M HILL Managed Services JD Edwards World/ OneWorld ERP Hosting, Management & Maintenance." <http://www.ch2m.net/Portals/chms/Slick%20Sheets/JD_EdwardsWorldOneWorld_ERP.pdf>.

⁸¹² "Madsen Director's Meeting." July 12, 2005; ORCL00130364-402, at -371.

receiving alternative bids from CH2M HILL for support services.⁸¹³ Oracle lost several customers directly to CH2M HILL,⁸¹⁴ including ABB Flexible Automation,⁸¹⁵ SHV North America,⁸¹⁶ Queenstake,⁸¹⁷ and Pretty Products.⁸¹⁸

TomorrowNow viewed CH2M HILL as a direct competitor⁸¹⁹ and competed with CH2M HILL for third-party support customers on many occasions.⁸²⁰ For example, one TomorrowNow representative stated: “Pretty Products, Inc. was the first customer I spoke to as a TomorrowNow AE. Although they liked what they heard from TomorrowNow, they signed a maintenance contract with CH2M HILL because they felt the services were equivalent and CH2M HILL was half our price.”⁸²¹

In 2009, CH2M HILL spun off the information technology arm of its business (a business now called Critigen) to focus on the core engineering and construction business.⁸²² Critigen does offer ERP support, application management and hosting, and Software-as-a-Service, however, it does not state specific software that it supports.⁸²³

⁸¹³ Oracle email from Sheila Ebbitt to Loretta Harrison. July 24, 2006. Re: RE: OLYMPUS – considered dropping; ORCL00128528-532, at -529. See also, “Executive Briefing Document.” ORCL00390447-449, at -447.

⁸¹⁴ Oracle email from Elizabeth Shippy to Shelley Moses-Reed. February 15, 2006. Re: Apps Strategy meeting follow up; ORCL00138840.

⁸¹⁵ ABB Flexible Automation may have been a joint Conexus Partners/CH2M HILL customer. See “[Proje]cted Third Party Risk.” ORCL00209108-110, at -110. See also, Oracle email from Rachel Romano to Robert Lachs. April 15, 2005. Re: ABB Flexible Automation Inc – At Risk Customer; ORCL00243109-110, at -109. One undated TomorrowNow Competitor document states “Connexus [sic] defunct, but tech arm still active as CH2M Hill.” See “Low Cost Competitors: James’s notes.” TN-OR00391605-606, at -605.

⁸¹⁶ “[Proje]cted Third Party Risk.” ORCL00199493-495, at -495.

⁸¹⁷ “Projected Third Party Risk.” ORCL00189765-768, at -768.

⁸¹⁸ “World Product Verification Form.” TN-OR05755621-623, at -621.

⁸¹⁹ TomorrowNow email from Russell Parker to Bob Geib, et al. December 7, 2006. Re: TomorrowNow and CH2MHill Key Differentiators; TN-OR01783622-23. See also, TomorrowNow email from Bob Geib to Bob Stephens. November 21, 2005. Re: Re: Merck Pricing; TN-OR08349018-020, at -019. See also, “Objectives/Goal Planning.” 2007; TN-OR00603872-875, at -874.

⁸²⁰ In late 2006, one TomorrowNow customer, Praxair, inquired into CH2M HILL’s support services offering. See CH2M HILL email from Steve Vogel to Howard Brodbeck at Praxair. October 18, 2006. Re: JD Edwards Support at 40%-50% Savings; PX00212-215, at -214. See also, Praxair email from Drew McNichol to Christina Bleckinger. October 19, 2006. Re: Fe: Fw: JD Edwards Support at 40%-50% Savings; PX00216-00220, at -216. Bonne Bell also solicited information from CH2M HILL and Rimini Street before choosing TomorrowNow. See “Contract Summary Form.” January 25, 2008. TN-OR02806850-852, at -851. See also, Oracle email from Shelley Moses-Reed to Janice Bruno, et al. June 3, 2005. Re: Fwd: RE: E1, Enterprise, and World Calls; ORCL00160328-335, at -328, regarding competition for Lexmark. See also, TomorrowNow email from Bob Geib to TomorrowNow- All. September 29, 2006. Re: TomorrowNow WINS! Laird Plastics for J.D. Edwards; TN-OR08818521, regarding competitor for Laird Plastics. See also, Vanguard Managed Solutions email from David Hartling to Nigel Pullan at TomorrowNow. April 11, 2005. Re: JDE Support TomorrowNow; TN-OR08341816, regarding competition for Vanguard Managed Solutions.

⁸²¹ “About the Customer.” TN-OR01730898. Pretty Products later appears to have departed CH2M HILL for TomorrowNow’s service offering.

⁸²² “Critigen, former CH2M HILL division, opens as separate business.” *Denver Business Journal*. October 19, 2009. <<http://denver.bizjournals.com/denver/stories/2009/10/19/daily12.html>>.

⁸²³ Critigen. “Manage.” March 15, 2010. <<http://www.critigen.com/services/manage>>.

8.9.8.14 Spinnaker

Spinnaker was founded in 2002, primarily as a supply chain consulting firm.⁸²⁴ Spinnaker hired the TomorrowNow resources specializing in J.D.Edwards application support at the time TomorrowNow ceased operations in September 2008.⁸²⁵ According to Spinnaker, approximately 70 companies chose to follow the support team to Spinnaker. Spinnaker claims to have over 85 clients worldwide⁸²⁶ and offers support services on J.D.Edwards World, One World, and Enterprise One applications, including access to “dedicated support team,” tax and regulatory updates, “24 x 7 x 365, global support with...guaranteed 30 minute response time,” at a 50 percent savings from vendor support charges.⁸²⁷

As noted above, prior to September 2008, Spinnaker was not an alternative third-party support option available to customers.

8.9.8.15 Other Third-Party Participants

There are numerous other systems integrators that provide complementary services such as support and smaller boutique firms that also provide third-party support in the market. Some, like S&I, (an Oracle partner for J.D.Edwards software), are localized in certain geographic areas (e.g., Asia).⁸²⁸ Some TomorrowNow customers previously supported by S&I in Singapore include Kentucky Fried Chicken Management Pte Ltd and Pizza Hut Singapore Pte Ltd, Ajinomoto, ZMC, and BM Nagano Pte Ltd.⁸²⁹ InOne is a global ERP implementation firm offering J.D.Edwards (managed) support service in the European market.⁸³⁰ Oracle recognized InOne as a competitor for third-party support, offering support at discounted rates.⁸³¹

⁸²⁴ Spinnaker.com. “Spinnaker’s History.” March 12, 2010. <<http://www.spinnakermgmt.com/inside.php?section=AB&page=340>>.

⁸²⁵ Kanaracus, Chris. “Oracle Subpoenas Firm That Hired Ex-TomorrowNow Workers.” IDG News Service. November 20, 2008. <http://www.pcworld.com/article/154293/oracle_subpoenas_firm_that_hired_extomorrownow_workers.html>.

⁸²⁶ Spinnaker.com. “Spinnaker’s History.” March 12, 2010. <<http://www.spinnakermgmt.com/inside.php?section=AB&page=340>>. See also, “JD Edwards Application Support Services.” Spinnaker.com <http://www.spinnakermgmt.com/web-PDFs/Support_overview_Jan2010.pdf>.

⁸²⁷ “JD Edwards Application Support Services.” Spinnaker.com <http://www.spinnakermgmt.com/web-PDFs/Support_overview_Jan2010.pdf>.

⁸²⁸ “Your Preferred Oracle JDE Partner.” <<http://www.si-asia.com/downloads/S%20%20%20profile-JDECC%20-10feb09.pdf>>.

⁸²⁹ TomorrowNow email from Nigel Pullan to TomorrowNow – All. November 12, 2006. Re: TomorrowNow WINS! Kentucky Fried Chicken Management Pte Ltd and Pizza Hut Singapore Pte Ltd for J.D. Edwards; TN-OR08298798. See also, “1st and 15th Status Report.” July 1, 2006; TN-OR07493816-818, at -816. See also, TomorrowNow email from Nigel Pullan to TomorrowNow – All. April 19, 2007. Re: TomorrowNow WINS! ZMC for J.D. Edwards in Singapore; TN-OR08818676. See also, TomorrowNow email from Nigel Pullan to TomorrowNow – All. February 4, 2007. Re: TomorrowNow WINS! – BM Nagano Singapore (J.D. Edwards World); TN-OR08818629.

⁸³⁰ InOne.com. “JD Edwards World.” March 12, 2010. <<http://www.inone-europe.com/solutions/jd-edwards-world/>>. See also, InOne.com. “Managed Services.” March 14, 2010 <<http://www.inone-europe.com/services/managed-services/>>. See also, InOne.com. “InOne Value Proposition.” March 14, 2010. <<http://www.inone-europe.com/services/value-proposition/>>.

⁸³¹ “Support Services Strategy Supplemental Support Program Releases Retiring in 2005.” November 17, 2004; ORCL00504250-256, at -250. See also, “PeopleSoft Competitive Marketing Strategy

8.9.8.16 Business Process Outsourcing Firms and Software-as-a-Service Outsourcing Options

In addition to third-party support vendors that offer remote delivery models, companies are also increasingly moving to alternative delivery models such as Business Process Outsourcing (“BPO”) options and Software-as-a-Service (“SaaS”) options. BPO is a form of outsourcing in which the operations and responsibilities of specific business functions (or processes) are transferred to a third-party service. BPO often includes internal business functions such as human resources, supply chain management, or finance and accounting, and customer-contact center services.⁸³² Examples of firms that offer BPO services include Accenture, EDS (now HP), and Genpact.⁸³³ BPOs can effectively replace an Oracle application and support in specific functional areas of the business.

SaaS, also known as on-demand, or subscription-based software, is an alternative hosted software delivery model whereby a proprietary application is hosted as a service provided to customers across the Internet.⁸³⁴ “With SaaS, enterprises pay a monthly per-user fee to rent an application from the vendor that hosts it... SaaS applications are usually built on an n-tier, multi-tenant architecture that allows multiple companies to use the same infrastructure, application, and database instance. SaaS vendors design their solutions with strong configuration capabilities, for the purposes of reducing, as much as possible, the need for customization.”⁸³⁵

By eliminating the need to install and run the application on the customer’s own computers, SaaS alleviates the customer’s burden of software and hardware support. Companies may also realize lower infrastructure and ownership costs, and added ease of software management.⁸³⁶ According to Amrit Williams, a former research director at Gartner, “You don’t have to have full-time people to administer and keep it up-to-date. You don’t have to worry about buying new hardware when new software is delivered that requires new RAM or hard disk space.’ Companies... can also benefit from the timeliness of software updates delivering new features and fixes on an irregular- or an as-developed- schedule instead of having them delivered in quarterly or annual updates.” Furthermore, “It’s very difficult for an organization to upgrade

TomorrowNow.” January 2005; ORCL00289097-100, at -097. See also, “Support FAQ for HEUG Conference 2006.” ORCL00473373-387, at -374.

⁸³² Singh, T.J. “Major Trends in BPO- What You Need to Know.” Gartner Research. <http://www.gartner.com/teleconferences/attributes/attr_152735_115.pdf>.

⁸³³ “Genpact: A Leader in Managing Business Processes.” Genpact.com. <http://www.genpact.com/Files/Genpact_Company_Overview.pdf>. See also, HP.com. “Business Process Outsourcing Services.” March 12, 2010. <<http://h10134.www1.hp.com/services/bpo/>>. See also, Accenture.com. “Business Processing Outsourcing (BPO).” March 14, 2010. <http://www.accenture.com/Global/Outsourcing/Business_Process_Outsourcing/default.htm>.

⁸³⁴ SaaS is an evolution of the Application Service Provider (ASP) model that emerged in the late 1990s. The technologies that support the model have changed but the fundamentals remain the same. See “SaaS: What it is and Why You Should Care.” InfoTech Research Group. September 19, 2006.

⁸³⁵ “SaaS: What it is and Why You Should Care.” InfoTech Research Group. September 19, 2006. See also, “Application Service Providers: Costs & Benefits.” Americanpayroll. March 2006.

⁸³⁶ Mirchandani, Vinnie. “The Shifting Sands of Business Applications.” JDEtips Journal. May/June 2006. See also, “SaaS: What it is and Why You Should Care.” InfoTech Research Group. September 19, 2006. See also, “Application Service Providers: Costs & Benefits.” Americanpayroll. March 2006. See also, Bolkovatz, Kevin. “Application Management Outsource or Retain in-House.” Quest Midwest Conference. September 14, 2006.

(major software applications) themselves,' said Williams, noting that they often have to go through the process of temporarily shutting down critical systems. 'If something goes bad, it is difficult to roll back. So, the timeliness of getting the latest updates handled by a software-as-a-service company is really strong, because they don't have to worry about it. The company that's delivering those services has to,' he said."⁸³⁷

Most vendors charge some kind of monthly "hosting" or "subscription" fee. Subscriptions make sense for businesses whose software needs, particularly with desktop and security applications, change from year to year.⁸³⁸ Some businesses may prefer subscription pricing to perpetual licenses. "Businesses are trading higher long-term costs for flexibility and lower startup costs,' says Amy Konary, director of software pricing and licensing at IDC [International Data Corporation]." Certain applications such as "...supply chain management, are particularly well-suited for subscription and/or hosted models because they can be deployed relatively quickly,' she says."⁸³⁹ There is evidence that large user populations or long time frames are factors that can make the traditional on-premises model more economical than the SaaS model.⁸⁴⁰ While different factors can impact the relative financial attractiveness of on-demand software relative to an on-premises deployment over a five or ten year period, experts appear to agree that there are nevertheless plenty of other advantages to the hosted model. Craig Sullivan, senior director of product management at hosted business applications provider Netsuite, said "...hosted software offered firms improved security and business continuity, greater ease of customization, the ability to better share data and functionality with partners and customers, and the opportunity to focus on their core business."⁸⁴¹

Forrester Research reported that in some cases:

...software-as-a-service (SaaS) applications can be an effective strategy to eliminate upgrades and maintenance costs [on current ERP solutions]. Opportunities also exist to outsource an entire business process, including the technology that supports it. Business processes with relatively few software integration points and mature applications, such as HR and CRM, represent the best opportunities for outsourcing, although cost reduction is often not the key objective."⁸⁴²

Another Forrester report asserted that:

⁸³⁷ Fitzhugh, Michael. "Interest in On-demand grows: Sybase, SAP, Oracle and others tout software as a service." *East Bay Business Times*. January 25, 2008. <<http://eastbay.bizjournals.com/eastbay/stories/2008/01/28/focus1.html>>.

⁸³⁸ Rendon, Jim. "Shifting Ground." *CIO Decisions Magazine*. <http://searchcio-midmarket.techtarget.com/magItem/0,291266,sid19_gci1073896_idx1,00.html>.

⁸³⁹ Rendon, Jim. "Shifting Ground." *CIO Decisions Magazine*. <http://searchcio-midmarket.techtarget.com/magItem/0,291266,sid19_gci1073896_idx1,00.html>.

⁸⁴⁰ "SaaS: What it is and Why You Should Care." InfoTech Research Group. September 19, 2006.

⁸⁴¹ Murray, James. "Cost of hosted software higher than expected." *IT Week*. September 7, 2006. <<http://www.computing.co.uk/itweek/news/2163776/cost-hosted-software-higher>>.

⁸⁴² Hamerman, Paul. "ERP Applications – Market Outlook Improves Ahead of the Architectural Battle." Forrester Research. June 29, 2006; ORCL00032857-871, at -862.

[s]ervices compete with applications. Business process outsourcers (BPOs) like Hewitt and Fidelity already compete as best-of-breed human resources solutions, taking on process execution and software management headaches for a single, predictable cost. As application innovation moves to architecture, impatient business users will look for quick-fix solutions –like application service providers (ASPs) and BPOs – that deliver something fast.⁸⁴³

Industry analyst, Ray Wang, believes corporate users are paying too much for traditional enterprise applications and support. He noted that “corporate users can best respond to vendors they feel are unfair by turning to alternative software-delivery methods, such as hosted systems or third-party maintenance companies.”⁸⁴⁴

Oracle and SAP are responding to SaaS with new SaaS offerings, and a willingness to fight for the business of customers that may be drawn to on-demand applications offered in the market.⁸⁴⁵ Prior to embracing the hosting model, Oracle business documents clearly hinted that the hosted application model⁸⁴⁶ was becoming a serious threat to Oracle’s revenue stream during strategic discussions involving the creation of its own application management offering. In discussions with Forrester Research analyst, Erin Kinikin, Oracle reported:

Erin also agreed that offering apps management for PSFT customers might also be attractive to some, but stressed that ‘hosting’ is not the right word. She suggested packaging it more like, ‘Oracle will manage (the apps) for you, do upgrades for fixed price, and maintain it – no worries for you.’ She thinks we could do a better job of educating customers on the benefits and value of hosting, perhaps via showing some actual customers [sic] case studies to convince wary customers. Help them understand how if the process changes, (going from in-house to hosting), how will it benefit them, so they can trust it as a possible solution.⁸⁴⁷

⁸⁴³ Hamerman, Paul, and Erin Kinikin. “Oracle-PeopleSoft Part I: Near-Term Focus on Organization and Product Delivery.” Forrester Research. March 15, 2005; ORCL00163661-671.

⁸⁴⁴ Fonseca, Brian. “Users fed up over software licensing, pricing tactics.” ComputerWorld.com. February 7, 2008. <<http://www.computerworld.com.au/index.php/id;1156767331>>.

⁸⁴⁵ Rendon, Jim. “Shifting Ground.” CIO Decisions Magazine. <http://searchcio-midmarket.techtarget.com/magItem/0,291266,sid19_gci1073896_idx1,00.html>. See also, Fitzhugh, Michael. “Interest in On-demand grows: Sybase, SAP, Oracle and others tout software as a service.” Business Times. January 25, 2008. <<http://eastbay.bizjournals.com/eastbay/stories/2008/01/28/focus1.html>>. See also, Oracle.com. “Oracle on Demand.” March 15, 2010. <http://www.oracle.com/us/products/ondemand/index.html> and <<http://www.sap.com/about/newsroom/press.epx?pressid=11453>>.

⁸⁴⁶ This hosted application model is distinct from the managed hosting model. In the latter scenario, the customer continues to hold applications licenses and pay support fees to either the vendor or a third-party. However, under the managed hosting model, the host (not the client) manages and supports the software and hardware at its own premises, thereby reducing or eliminating the client’s need for in-house IT staff to attend to the ERP software and hardware. The managed hosting model, therefore, does not replace the need to pay support fees to the vendor or a third-party.

⁸⁴⁷ It is not clear from the quote whether it is referring to managed hosting model or on-demand/ASP product. “Analyst Conversations on Support.” January 25; ORCL00033228-231, at -229.

Surveys conducted by AMR Research found that many of the companies that are currently licensing applications believed that in the future they would be paying for applications based on actual usage:

The fact that 23% of the executives surveyed indicated that their preferred method for purchasing enterprise applications is on demand should be a wake-up call for software executives who have mostly been taking a wait-and-see approach to on demand. The preference for on demand varies considerably by type of application, but in each segment, the percentage of companies that want to switch from user-based licensing to on demand has increased significantly.⁸⁴⁸

Both BPO and SaaS solutions, which specialize in the outsourcing of business services such as human resources or finance and accounting, can be effective substitute products for PeopleSoft, J.D.Edwards, or Siebel applications, and may, therefore, affect the value of the support revenue stream.

Forrester reported that certain types of ERP applications are gaining traction among firms buying SaaS solutions, including customer relationship management (CRM), marketing, procurement/sourcing, human resources (HR), and finance. Vendors leading the trend include Salesforce.com, Siebel CRM OnDemand,⁸⁴⁹ RightNow, and NetSuite for CRM applications; ADP, Ceridian, and Employease for HR applications; BrassRing and Recruitmax for recruiting; and Intacct and NetSuite for accounting.⁸⁵⁰

There is evidence that some Oracle customers turned to a number of these firms, including Ceridian, Hewitt, Salesforce.com, and others as replacements to an Oracle ERP license and support contract.⁸⁵¹ For example, Ceridian is one such firm that:

...has been offering traditional human resources outsourcing services for over 25 years. With this model, you partner with Ceridian to handle your human resources administration. HR practitioners at your company handle data entry, validation and management of employee and company-level information using our Web-based, hosted or non-hosted HR/payroll application. Ceridian processes information and provides reports and other information as needed. We also maintain back-up copies of your information and ensure protection of your employee and company data. In addition, we offer Web-based self-service solutions that empower your

⁸⁴⁸ Shepherd, Jim and Karen Carter. "Software Licensing and Maintenance: What a Difference a Year Makes." AMR Research. July 2005, page 6.

⁸⁴⁹ Siebel was acquired by Oracle in September 2006.

⁸⁵⁰ Herbert, Liz. "ForrTel: Using Software-As-A-Service to Gain Power Over IT." Forrester Research. March 31, 2005.

⁸⁵¹ It appears that many of these outsourcing firms specializing in a functional area of business offer several different product/service delivery models.

employees to manage and access their own human resources information, to ease the administrative burden on your HR staff.⁸⁵²

Ceridian's Human Resources (HR) outsourcing services cover the entire lifecycle of employment, including payroll, benefits administration, and recruitment and retention services, to name a few.⁸⁵³ Ceridian's HR outsourcing services are not unlike other prominent HR outsourcing firms such as Hewitt/Exult, ADP, Fidelity, EDS, and others. Business processes such as human resources and financials are prime candidates for outsourcing for many firms seeking proven expertise in a core functional business area and a desire to free up scarce firm resources to focus on its primary business. Ceridian was included in the list of "Known Client Choices" in TomorrowNow's Wind-Down Report at October 31, 2008, indicating that at least some of TomorrowNow's customers opted to take their support to Ceridian instead of returning to Oracle.⁸⁵⁴

To the extent the outsourcer's services fully replace the need for an ERP solution (and the commensurate support), these offerings represent competitive substitutes for Oracle support. In the case of Oracle client, Baltimore Aircoil Company, its parent company, Amstead, mandated that it go to Ceridian for its human resources management solution, resulting in Oracle losing the support contract.⁸⁵⁵

Oracle also lost at least three identified customers to ADP, another HR outsourcing firm. In 2006, Oracle lost the support contract for its customer, Alcon Labs, when it made a strategic decision to drop PeopleSoft's HR application and support and contract with ADP's HR outsourcing solution.⁸⁵⁶ Two other customers, La Quinta and CSK Auto Inc., also dropped Oracle support and moved to ADP for their HR solutions.⁸⁵⁷

In addition, Oracle lost a large support contract with the Bank of Montreal to Hewitt Associates, another firm that provides human resources consulting, outsourcing, and integrated solutions. According to Oracle, "Hewitt is now providing support to Bank of Montreal per an agreement signed b/w Exult Canada (who was purchased by Hewitt) and the Bank. They provide via patches and fixes they are licensing through another 3rd party support provider...Bank of

⁸⁵² Ceridian.com. "Ceridian Services." March 15, 2010. <http://www.ceridian.com/human_resources_nav/1,6267,15576,00.html>. Ceridian offers another option called HR Business Process Outsourcing (HR BPO), a model where Ceridian manages all of the processes *and all of the administrative tasks* of HR. This means that Ceridian is responsible for all the data entry, the validation and the processes. See Ceridian.com. "Ceridian Services." March 15, 2010. <http://www.ceridian.com/human_resources_nav/1,6267,15576,00.html>.

⁸⁵³ Ceridian.com. "Human Resources Outsourcing (HRO)." <http://www.ceridian.com/human_resources_nav/1,6267,15576,00.html>.

⁸⁵⁴ "TomorrowNow Operations Wind Down: Final Report." October 31, 2008; TN-OR03523871-924, at -903. The number of customer(s) under Ceridian were 1% of TomorrowNow's total customers. 46% of customers are listed as "Unknown."

⁸⁵⁵ "Third-Party Risk Analysis 2008, 1-25-08;" ORCL00079745.

⁸⁵⁶ "Third-Party Risk Analysis 2008, 1-25-08;" ORCL00079745.

⁸⁵⁷ "Third-Party Risk Analysis 2008, 1-25-08;" ORCL00079745. See also, Oracle email from Todd Chapel to Pat Penton at CSK Auto Inc. October 27, 2006. Re: RE: Purchase Order Required Oracle* Support Contract Renewal – CSK Auto Incorporated; ORCL00151320-321, at -320.

Montreal does still have \$573K CAD on support that will probably eventually go to the hosting partner....”⁸⁵⁸

Yet another significant Oracle customer, MBNA, “...declined to renew [support] as they outsourced their entire [human capital management] HCM process to Fidelity Employer Services...” Oracle staff noted it had “...placed the contract in ‘Moved to Competitor’ status...”⁸⁵⁹ Finally, Oracle customer, Fairchild Semiconductor moved its customer relationship management solution to Remedy and Salesforce.com, two other SaaS outsourcing vendors.⁸⁶⁰

Despite the differences between the on-site and on-demand business models, the evidence indicates full-service outsourcing firms and business process outsourcers are acceptable substitute products for many customers, effectively displacing both Oracle license and support contracts.

8.9.8.17 Other

In addition to engaging an active third-party support vendor to support a customer’s software, there are other alternatives. To list them all would be prohibitively time-consuming and unnecessary. However, an example will suffice:

A customer that, for whatever reason (financial distress, downsized operations, parent mandate) wanted to reduce its total IT department spend, could do so by outsourcing certain activities or reducing the complexity and capability of their software (while still retaining needed operational capacity). For example, one method of reducing costs might include buying an off-the-shelf accounting system or inventory control package. While less than ideal from the point-of-view of integration, use of such reduced functionality packages may allow a company to significantly reduce its overall IT spending and, in extremis, the customer may have no choice but to do so.

8.9.8.18 Summary of Available Alternatives

As described in detail above, numerous alternatives to Oracle support exist now and existed at the time of the Negotiation in January 2005. For example, LegacyMode, CedarCrestone, and Citagus for PeopleSoft products; and Versytec, Conexus Partners, and Klee Associates for J.D.Edwards products, plus a large group of consultants, systems integrators and outsourcing firms were available to customers at that time.

Appendices F-1 and F-2 summarize the available alternative support vendors over time for PeopleSoft and J.D.Edwards software products. These appendices represent a conservative summary of the available support vendors because they exclude vendors of outsourced business operations, support vendors based outside the U.S. and “On-Demand” or SaaS products that

⁸⁵⁸ “Third-Party Risk Analysis 05-10-06;” ORCL00032753. See also, “Third-Party Risk Analysis 2008 1-25-08;” ORCL00079745.

⁸⁵⁹ “Third-Party Risk Analysis 2008 1-25-08;” ORCL00079745.

⁸⁶⁰ Salesforce.com is a web-based CRM solution for sales and marketing streamlines customer relationship management. See Salesforce.com. “CRM.” March 14, 2010. <<http://www.salesforce.com/>>. See also, “Third-Party Risk Analysis 05-10-06;” ORCL00032753 and “Third-Party Risk Analysis 2008, 1-25-08;” ORCL00079745.

compete to fully replace Oracle ERP licenses and support. Appendix F-3 summarizes the range of cost savings advertised by third party support vendors.

8.9.9. Demand for Third-Party Support

The emergence of third-party support vendors is driven by customer demand and the corresponding opportunity to provide a niche service in the marketplace. Oracle business documents highlight the third-party vendors' positioning and value proposition relative to Oracle which I interpret to mean they are acceptable substitutes at significantly reduced prices.⁸⁶¹

In 2005, Forrester Research reported, "[t]his emerging alternative support market may encourage Oracle (and other app vendors with large installed bases) to improve the quality and value of its support... The most visible market for third-party applications support targets the [Oracle] acquired PeopleSoft and J.D. Edwards customers."⁸⁶² Indeed, most of the third-party support providers focused largely, if not entirely, on products that Oracle acquired with PeopleSoft, J.D. Edwards and Siebel.⁸⁶³ Gartner reports that "There is a small segment of vendors that offer third-party software support, and it is primarily applications maintenance for legacy products, such as PeopleSoft, JD Edwards, Siebel and older versions of SAP."⁸⁶⁴

As I discuss below, third-party support services are focused on Oracle acquired products and are a viable option for some ERP customers.

8.9.10. Third-Party Support Viability

There are advantages and disadvantages to obtaining support through one of the third-party vendors in the market, making third-party support a viable option for certain customers. Angela Eager with Computer Business Review reported:

Not surprisingly there are compromises. Third-party support is only appropriate for stable, legacy systems where there is little requirement for change, other than in predictable areas such as meeting tax and other regulatory requirements, because those opting out of vendor maintenance also opt out of the latest releases and vendor-built security updates and patches. As Rimini Street CEO Seth Ravin points out, this means the third-party option is not suitable for everyone. 'Would we expect a majority of the customers? No, but we believe we could get a 10% to 15% fringe.'

⁸⁶¹ "Oracle Third-Party Support SWAT Team." ORCL00088177-181, at -179.

⁸⁶² Hamerman, Paul, with Jessica Harrington. "Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle's PeopleSoft Acquisition Boosts an Emerging Market." Forrester Research. March 11, 2005; ORCL00427952-954, at -952.

⁸⁶³ *IT Jungle*, an online IT periodical reported that Conexus Partners, CIBER, Klee Associates, Versytec, and TomorrowNow "...are after the same thing: to serve the growing number of [J.D. Edwards] World and [PeopleSoft] EnterpriseOne users..." See Woodie, Alex. "JDE Shops Have Plenty of Options for Third-Party Maintenance." *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁸⁶⁴ Igou, Bob. "Dataquest Insight: Top 50 Software Maintenance and Support Service Providers, Business as Usual in a Highly Fragmented Market, Worldwide, 2008." Gartner Dataquest. November 20, 2008, page 22.

Does cheaper mean better? Although third-party providers cannot offer enhancements, they can offer technical support, troubleshooting, fixes and compliance updates and increasingly are extending the service to cater to user customizations. Their programs also promise to eliminate forced upgrades, deliver services not available with standard vendor support, and guarantee a better service-level commitment. Another advantage is flexibility, taking only the fix a customer needs, for example, rather than the complete fix bundle, which could itself depend on the installation of a previous update.

As a customer, one of the key questions is whether you can afford to go without enhancements and upgrades. If you are thinking of sunseting an application, or fear being railroaded into an upgrade then third-party support could be a good option. It may also be valuable as an interim solution or during a time of application transition.⁸⁶⁵

Paul Hamerman of Forrester Research reported that the best candidates to use third-party support are companies that:

Are not interested in product enhancements. Lower maintenance costs can be a reasonable tradeoff against functional upgrades for mature applications like accounting and human resources, especially where the company itself is mature and stable.

Have limited geographic coverage needs. While SAP has promised to make its worldwide support facilities available to TomorrowNow if market demand warrants, most third-party maintenance companies focus on the US market. Currently, options for global and non-US customers are very limited, but this market may materialize as a business opportunity for providers with offshore resources.

Want personalized service – for a limited product set. Smaller providers are able to assign dedicated resources to each customer for case continuity and personalized service, but this model has scalability limitations. Customers on older releases such as PeopleSoft World and PeopleSoft Enterprise 7.5x may find this model attractive when vendor support is no longer available or customization makes upgrades impractical.⁸⁶⁶

In the following sections, I discuss why Oracle support may not have been a viable alternative for a minority of the customers described above. For most of these customers, third-party support offers a practical business solution where the value proposition is more aligned with the customers' business needs and the price more reflective of actual services used.

⁸⁶⁵ Eager, Angela. "Maintenance: better the devil you know?" Computer Business Review. July 31, 2007. <http://www.cbronline.com/article_cbr.asp?guid=4BB12A32-4703-44B7-AB56-FF926373A6D1>.

⁸⁶⁶ Hamerman, Paul, with Jessica Harrington. "Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle's PeopleSoft Acquisition Boosts an Emerging Market." Forrester Research. March 11, 2005. ORCL00427952-954, at -953.

8.9.11. Third-Party Support Rationale

The evidence I have reviewed indicates that ERP customers have sought and still seek third-party support for a variety of reasons. Some of the key factors that drove and may still be driving customers towards alternative third-party support include:⁸⁶⁷

1. Total Cost of Ownership
2. Budget constraints and financial hardship
3. Ability to extend the functional and economic life of a stable ERP asset
4. Limited customer value from product upgrades/enhancements
5. A high level of software application customization that diminishes the value of vendor support
6. Planned sunseting of a software application
7. The ERP vendor practice of limited or discontinued support and upgrades for legacy applications
8. Dissatisfaction with current ERP vendor customer service relative to its costs
9. Anxiety related to Oracle's acquisition of PeopleSoft and the future product roadmap

In many cases, customers experienced more than one of these issues which likely only compounded the incentive to seek an alternative support solution.

Oracle's own strategy documents corroborate many of these "key customer issues" explaining why customers were leaving Oracle support, including "Cost/ROI of support," "Expiration of XE support in 2007," and "Limited upgrade plans."⁸⁶⁸ An Oracle presentation document stated, "we face many 3rd-party support offerings worldwide, not the least of which is TomorrowNow. We must differentiate our support offering for our customers to ensure a competitive (in cost, and quality) solution."⁸⁶⁹ Another internal Oracle email discussing "customers at-risk" noted that "[m]any of the customers won't be upgrading in the near future, don't see the value of support and can't afford it due to cutbacks at their companies. 3rd party vendors (TomorrowNow, Klee, Versytec, etc) offer 50-70% reductions from our pricing – very appealing to some of our customers. We simply cannot and will not match those prices...it comes down to cost for many of these customers."^{870 871}

⁸⁶⁷ For example, see general discussion in Phelan, Pat. "Switching to a Third-Party for Business Application Technical Support Services." Gartner Research. December 11, 2006.

⁸⁶⁸ "Maintenance Strategy Session." ORCL00089583-594, at -593.

⁸⁶⁹ Overview of our HCM Global Product Support Organization;" ORCL00087130-159, at -135.

⁸⁷⁰ Oracle Email from Elizabeth Shippy to Michael Ni. October 6, 2005. Re: Clarification RE: Support Sales – Customers At Risk listing 10/5/05; ORCL00089612-614, at -612.

For the reasons listed above, which I expand upon below, most of the customers Oracle has identified in the Complaint would have been in the market seeking the services of alternative third-party support vendors, purchasing products similar to what they bought from TomorrowNow absent the Alleged Actions.

According to the evidence in this case, some customers find the existing version of the Oracle software (i.e. the version they are running ‘now’) to be adequate for their needs. They pay their support fees recognizing that the argument in favor of high support prices (i.e., the vendor needs the money to fund future product upgrades) may not be of direct benefit to them. They wish to continue to use their existing software indefinitely (and certainly into the medium term) and they also wish to avoid the cost and disruption associated with an upgrade implementation. Some customers are able to support their own systems (i.e., they have in-house staff able to solve most problems with little or no help from the software vendor). Accordingly, some customers want (and plan) to avoid future upgrades to some extent. Oracle recognized such customers as being at high-risk for terminating their support. The record is replete with customers that analyze their support cost against their support usage and decide the value equation is heavily weighted against them.

These customers frequently asked Oracle for some cost relief only to find (for the most part) that Oracle would not reduce their support costs. Again, Oracle recognized that customers that seldom used support were at risk of terminating.

ERP software vendors charge high support fees for licensed products. The evidence I have reviewed shows that many customers report a low value relative to the costs of their Oracle support contracts. The same customers also indicate Oracle is generally unwilling to help close the value gap or work with struggling customers that are experiencing financial difficulties by reducing support costs. The evidence further shows that Oracle’s practices pushed customers to consider and sometimes switch to third-party support vendors.

In 2005, Forrester Research reported that “[c]ompanies continuing to run older versions should recognize that support levels will diminish as these releases reach the end of their support life cycle. Vendors may provide limited levels of extended maintenance on older releases (e.g., no compliance updates), but they will continue to charge the same (or higher) fees for such support.”⁸⁷²

Oracle’s lifetime support program is no exception. In approximately September 2005, Oracle announced that it would offer lifetime support for users of PeopleSoft, J.D.Edwards, and Siebel applications.⁸⁷³ Oracle’s lifetime support comes in three segments: *Premium* (years one through

⁸⁷¹ Other Oracle business documents echo the same basic characteristics of firms who are at-risk for seeking third-party support. See for example, “Oracle Support Services, The Best Protection Money Can Buy.” ORCL00012451-473, at -453.

⁸⁷² Hamerman, Paul and Elisse Gaynor. “Apps Customers Question Maintenance Fee Value.” Forrester Research. December 6, 2005, page 3.

⁸⁷³ Babcock, Charles. “Third Parties Eager to Offer Alternative to Oracle Lifetime Support.” Information Week. October 6, 2005. <<http://informationweek.com/shared/printableArticleSrc.jhtml?articleID=>

five), *Extended* (years six through eight), and *Sustaining* (year nine forward).⁸⁷⁴ Information Week explains:

Here are the economics laid out by Oracle's VP of licensing strategy, Jacqueline Woods: In the first five years after a purchase, a company pays what amounts to 22% of the software's purchase price. In year six, the annual price goes up 10%, and for years seven and eight, it's another 20% hike. In year nine, it reverts back to the price of the first five years, but support doesn't include updates that keep an application in line with regulatory changes. Seth Ravin, president of Rimini Street Inc., a startup selling Siebel support, says, 'What they're really doing is charging a premium price for a declining level of support.'⁸⁷⁵

Thus, despite Oracle's "lifetime support" offer, Oracle's *extended* and *sustaining* support levels come at additional expense and the level of service reduces in year nine. For example, while sustaining support provides major product and technology releases, technical support, and pre-existing fixes, it does not include updates, fixes, and security alerts, new tax, legal, and regulatory updates, certification with new third-party products/versions or other Oracle products. Customers may obtain user-specific fixes for an additional fee.⁸⁷⁶ Therefore, despite Oracle's "lifetime support" policy, the "lifetime" characterization appears to be misleading since full support actually tapers off over time and additional fees must be incurred in order to obtain critical elements of support, such as tax updates. Moreover, the price of Oracle's "lifetime support" is far higher than support by typical third-party support vendors.

One Oracle customer, Intraware, stated in a November 2005 RedHerring.com article that many customers backed away from considering TomorrowNow after Oracle announced lifetime support and an upgrade patch to its new Fusion product. However, in the same article, Albert Pang, an analyst at research firm IDC, discussed his doubts about Oracle's lifetime support program and called it "more of a marketing tactic than anything."⁸⁷⁷ Gartner Research also reported that "...Oracle's extended maintenance program includes a higher fee for the initial years of extended support, thus making it harder to justify the ongoing payments for support."⁸⁷⁸

Prior to Oracle's lifetime support program, announced in 2005, customers were left without support for their legacy software applications after only a few years. For example, PeopleSoft generally provided on-going development, bug fixes, and regulatory updates for four years after

171203423>. See also, Babcock, Charles. "Oracle's Offer of a Lifetime." Information Week. October 3, 2005. <<http://informationweek.com/shared/printableArticleSrc.jhtml?articleID=171202541>>.

⁸⁷⁴ Babcock, Charles. "Third Parties Eager to Offer Alternative to Oracle Lifetime Support." Information Week. October 6, 2005. <<http://informationweek.com/shared/printableArticleSrc.jhtml?articleID=171203423>>.

⁸⁷⁵ Babcock, Charles. "Oracle's Offer of a Lifetime." Information Week. October 3, 2005. <<http://informationweek.com/shared/printableArticleSrc.jhtml?articleID=171202541>>.

⁸⁷⁶ See "FAQs for HEUG/Alliance Conference 2006." March 2006; ORCL00104368-400, at -374.

⁸⁷⁷ Bhuta, Falguni. "TomorrowNow Faces Oracle." November 19, 2005. *Red Herring*. <www.redherring.com>.

⁸⁷⁸ Phelan, Pat. "TomorrowNow: Business Application Technical Support Services for Oracle Applications." Gartner Research. April 2, 2007; TN-OR00005096-103, at -098.

a product was first commercially available, making third-party support the only alternative to upgrading.⁸⁷⁹

Oracle has, in fact, lost customers (such as Baxter International) that continued to need tax and regulatory updates which Oracle apparently no longer provided on certain releases, despite its “lifetime support” program.⁸⁸⁰ Bay Area Air Quality Management District, was initially informed by an Oracle representative that its release would no longer be supported by Oracle. Oracle’s sales notes stated, “[t]hey don’t log many cases & the support we offer is so limited for v.8, he’s not sure it’s worth it. Cust[omer] was advised by AE that we no longer support version 8.0, so they have already been having consultants try to trouble shoot the software, but often w/out success... I sent cust[omer] documentation on Lifetime support brochure that their release is supported thru 2013. Cust[omer] needs some training, looking into it.”⁸⁸¹ Ultimately, it appears this customer decided to drop Oracle support. Regarding Oracle customer Praxair, an internal Oracle email confirmed that in “Jan 05, [customer] Praxair chose to NOT to [sic] renew their maintenance due to Xe support being dropped in Feb 05 and instead moved to a TomorrowNow maintenance package.”⁸⁸²

Oracle notes regarding yet another customer that took up third-party support, the Burlington Resources Oil & Gas Company, stated, “[c]ustomer is on a very old PSFT release 8.0sp1, and is mostly concerned with receiving tax updates. Since tax updates end on their release this March, they would need to purchase the Tax Updates package for an add’l fee. I am trying [to] convince the customer to stay on Oracle support for as long as possible, but support costs will play a big factor in this decision.”⁸⁸³

Thus, the evidence indicates a number of Oracle customers were dissatisfied with the level of support Oracle offered on its older releases, including the additional fees to obtain support for a legacy system. Third-party support typically provides extended support for a fraction of Oracle’s price. The high number of alternative sources of support indicates the even absent TomorrowNow’s existence in the market, many customers would still have sought support services from an alternate third-party vendor.

Demand for the services of third-party support is driven in part by the substantial support fees charged by Oracle, which have historically averaged approximately 22 percent of license fees per year.⁸⁸⁴ “If you buy software every 10 years, at [20%-25%], you are paying 2.5 times the original license cost simply to maintain the app, says Mr. Wang of Forrester Research.”⁸⁸⁵

⁸⁷⁹ In 2003, PeopleSoft added a fifth year of upgrade support for its latest internet releases of Enterprise and EnterpriseOne software products, as well as a sixth year of tax and regulatory support. PeopleSoft Form 10-K for the fiscal year ended December 31, 2003, page 7.

⁸⁸⁰ “3rd party risk analysis, 1/25/08 [REDACTED];” ORCL00079745.

⁸⁸¹ “3rd party risk analysis, 1/25/08 [REDACTED];” ORCL00079745.

⁸⁸² Oracle email from Susan Zaffarano to Paul Frascella. May 19, 2005. Re: Praxair; ORCL00205830-835, at -831.

⁸⁸³ “PSFT-JDE Third-Party Risk Analysis, 05-10-07;” ORCL00264271.

⁸⁸⁴ Wailgum, Thomas. “Six Enterprise Application Trends to Watch in 2008,” CIO. December 14, 2007. <<http://www.cio.com/article/print/165553>>. See also, Credit Suisse Equity Research: SAP, September 16, 2008, page 24.

⁸⁸⁵ Schwartz, Ephraim. “Stop overpaying for support.” November 13, 2007. <http://www.info-world.com/realitycheck/archives/2007/11/stop_overpaying.html>.

Forrester Research also reported that, “[d]espite efforts by the major vendors to improve customer satisfaction, response times, and upgrade benefits...most customers continue to believe that they are not receiving the value from the 2x to 2.5x they are paying in license fees over a 10-year period.’ In response to the traditionally high prices, third-party vendors are undeniably a preferred alternative.”⁸⁸⁶

Over time, Oracle implemented increases to their already high support fees. For example, J.D.Edwards reported in its SEC filings that it increased support fees in each of the three fiscal years before it was acquired by PeopleSoft in July 2003.⁸⁸⁷ PeopleSoft also increased its support fees before it was acquired by Oracle in January 2005.⁸⁸⁸ Forrester Research reported in 2005 that, “[a]s PeopleSoft shifted its revenue mix toward maintenance through price escalations, customers became irate. Oracle’s efforts to preserve this valuable maintenance base, however, focus on enhancements and do little to address the cost issue.”⁸⁸⁹ In addition, according to Paul Hamerman of Forrester Research, “In consideration of ongoing industry consolidation, acquisition-oriented vendors such as Oracle are taking advantage of the opportunity to raise maintenance prices in order to standardize pricing across the various product lines...The value of the maintenance services, however, varies by customer, depending on the customer’s needs and use of the services.”⁸⁹⁰

In 2005, Oracle’s Mr. Phillips announced that there would be a “pricing uplift” for acquired PeopleSoft and J.D.Edwards customers. In addition, he remarked that Oracle was implementing cost of living adjustments, or COLA, each year and “we’ve started doing those more recently. We went for four or five years without doing those so we’re kind of actually behind the curve on those. But we are starting to do those as well.”⁸⁹¹

⁸⁸⁶ Tsai, Jessica. “Will the Sun Come Out for TomorrowNow?” DestinationCRM.com. November 26, 2007. <<http://www.destinationcrm.com/print/default.asp?ArticleID=7389>>.

⁸⁸⁷ J.D.Edwards stated that it increased its maintenance revenues in part by increasing prices during its fiscal years ending October 31, 2001 and 2002 and again in January 2003. See J.D.Edwards’s Form 10-K for the period ending October 31, 2002, page 33 and J.D.Edwards Form 10-Q for the period ending April 30, 2003, page 17.

⁸⁸⁸ In December 2004, Bill Means, Vice President of Information Technology at Decorative Concepts, stated that PeopleSoft’s annual price increases averaged 15 percent per year for the past three years. See “Decorative Concepts Signs with Klee Associates for Maintenance Support on PeopleSoft World Software.” PR Web Press Release Newswire. December 27, 2004. In January 2005, Jack Hughes, IS Director for The Park Associates, which uses PeopleSoft applications, reported that PeopleSoft “bumps up” the price of maintenance 25% at the end of a three year agreement. “PeopleSoft says ‘their customers are paying more for maintenance, so they want you to pay fair market value. That’s ludicrous because we rely less and less on support the more familiar we get with our applications,’ he says.” See Babcock, Charles. “Third-Party Support an Option for PeopleSoft Customers.” *Information Week*. January 4, 2005. <<http://www.informationweek.com>>. Both customers switched to third-party support.

⁸⁸⁹ Hamerman, Paul, with Jessica Harrington. “Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle’s PeopleSoft Acquisition Boosts an Emerging Market.” Forrester Research. March 11, 2005; ORCL00427952-954, at -952.

⁸⁹⁰ Hamerman, Paul and Elisse Gaynor. “Apps Customers Question Maintenance Fee Value.” Forrester Research. December 5, 2005, page 1.

⁸⁹¹ Filed by Oracle with the SEC Pursuant to Rule 425 Under the Securities Act of 1933, Subject Company: Siebel. Commission File No. 0-20725. Registration No.: 333-129139. Page 15 of transcript of presentation that was posted to Oracle’s website. <http://www.sec.gov/Archives/edgar/data/777676/000119312505207897/d425.htm>. Messrs. Wang and Hamerman of Forrester Research report that “...the maintenance

Finally, in mid-2008, Oracle announced a new price list which indicated a 15%-20% increase in software (including support) fees for customers in the United States. The move was seen as a means of fattening earnings as competition faded in the industry.⁸⁹²

Industry commentator Vinnie Mirchandani, writing for Deal Architect, declared that ERP vendor support “reflects the most empty calories in IT spend from a buyer’s perspective.”⁸⁹³ He elaborates on his assertion, stating, for example:

...paying for bug fixes smacks of ‘double jeopardy.’ The software industry delivers shoddy code and charges a license fee for it (with minimal warranty), then expects buyers to pay maintenance to get bug fixes...

Many periodic enhancements, especially in core ERP modules, are driven by statutory changes. The algorithms are publicly available, not proprietary IP of any software vendor.

...after year 5, the support demands of most customers drop off as they stabilize their production environment. Fair maintenance pricing would be in a bell curve - gradually ramp up years 1 and 2, gradually ramp down starting in year 5. But today the software industry expects full rates from day one through termination.

Mr. Mirchandani states that his list “could go on” but the story is clear. “Maintenance, direct from most software vendors, is over priced by a long shot.”⁸⁹⁴

As a result of Oracle further increasing its acquired customers’ support fees, Oracle may have pushed its customers to their budgetary limit and ultimately forced many of them to take their business to third-party providers. An AMR Research survey published around the time of the PeopleSoft acquisition found that approximately 65 percent of J.D.Edwards customers on support would stop paying Oracle support fees if Oracle raised rates.⁸⁹⁵

In fact, Oracle’s own business documents acknowledged the firm has lost customers who are no longer willing to pay substantially higher fees. One strategy document stated:

[t]hird party support competitors such as TomorrowNow, Conexus Partners, Versytec, and Klee Associates are attracting PeopleSoft customers by offering significantly reduced support services fees. These reductions off

fees usually have built-in cost escalations tied to the rate of inflation or arbitrary rates set by vendors in maintenance contracts.” Wang, R “Ray” and Paul Hamerman. “Topic Overview: Enterprise Resource Planning,” Forrester Research. August 8, 2006.

⁸⁹² Worthen, Ben. “SAP, Oracle Boost Software Prices.” *Wall Street Journal*. July 17, 2008, page 1.

⁸⁹³ Mirchandani, Vinnie. “Third-Party Maintenance: Tomorrow is Now for Buyers!” <http://dealarchitect.typepad.com/deal_architect/2007/03/third_party_mai.html>.

⁸⁹⁴ Mirchandani, Vinnie. “Third-Party Maintenance: Tomorrow is Now for Buyers!” <http://dealarchitect.typepad.com/deal_architect/2007/03/third_party_mai.html>.

⁸⁹⁵ Woodie, Alex. “JDE Shops Have Plenty of Options for Third-Party Maintenance.” *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

customer's current support services fee range between 50%-75% depending on the third-party support vendor. In Q3 FY05 we lost \$9.4 million dollars to third-party support providers. In addition, there are currently 21 PeopleSoft/J.D.Edwards customers equating to 9 million dollars in support revenue at risk to third-party support providers.⁸⁹⁶

By June 2005 Oracle had identified approximately \$13 million of PeopleSoft/J.D.Edwards ERP support revenues that were under negotiation and possible risk of leaving Oracle support.⁸⁹⁷

These findings are consistent with other Oracle documents. For example, one internal Oracle email described statements by Oracle Support Sales, the group responsible for ensuring customers renew their annual support agreement: "We are encountering more and more customers who are challenging the fees we're charging... Specifically, World customers (Bronze, Self Service) are being approached by 3rd party vendors (TomorrowNow, Conexus, etc) who offer substantial discounts to the annual maint fees we charge (in some cases up to 50% or more!)."⁸⁹⁸

A February 2008 industry article in ComputerWorld.com confirmed that customers have lost patience over complicated licensing and pricing schemes that do not fit their business goals. As conveyed in a recent Forrester Research survey of 215 business process and applications professionals, respondents' annual support costs can average 26 percent of their licensing fees and users continue to be frustrated by escalating support costs.⁸⁹⁹

Oracle's sales database shows some customers experiencing substantial rate increases with no apparent increase in service value and deciding to leave Oracle support. For example, in 2005, Enterprise licensee LS Management Inc. experienced a "...52% increase in support fee over last 4 yrs....Customer signed with Tomorrow Now and rejected our last offer of last year's rate. Customer's maintenance has doubled in 6 years and they are angry with Oracle/PSFT. They will not communicate."⁹⁰⁰ Another customer, Perry Juds Holdings, a J.D.Edwards World customer, similarly voiced dissatisfaction with Oracle price hikes. In 2006, Oracle sales staff recorded that Perry Juds "...was displeased with the fee increase last year. We increased again in 2006. They feel it is inappropriate for a static product. We know it is not static but this customer has no plas [sic] to upgrade. They will have a sing-up [sic] fee and pay-as-you-go set up with Klee."⁹⁰¹ Another at-risk customer, Lexmark International, experienced a "16% increase after having a fixed rate of \$1M/year for past 3 years [sic]." Not surprisingly, Lexmark was unhappy and began investigating third-party support options available, including TomorrowNow, Klee Associates, and C2HM HILL.⁹⁰²

⁸⁹⁶ "Oracle/PeopleSoft, Third-Party Support SWAT Team." ORCL0008177-181, at -177.

⁸⁹⁷ "Maintenance Strategy Session." ORCL00089583-595, at -584.

⁸⁹⁸ Oracle email from Elizabeth Shippy to Carol R. Mackenzie, et al. May 10, 2005. Re: Proposal: Monthly World conference call; ORCL00089530.

⁸⁹⁹ Fonseca, Brian. "Users fed up over software licensing, pricing tactics." ComputerWorld.com. February 7, 2008. <<http://www.computerworld.com.au/index.php/id;1156767331>>.

⁹⁰⁰ "Third-Party Risk Analysis 05-10-06;" ORCL00032753.

⁹⁰¹ "Third-Party Risk Analysis 05-10-06;" ORCL00032753.

⁹⁰² "At-Risk Attack Strategy, Lexmark International." ORCL00089545.

As the evidence I have reviewed confirms, customers with mature, stable applications and minimal support requirements are reluctant to continue paying significant support fees. According to The Park Associates', Jack Hughes, ERP vendors presumably expect both old and new customers to pay full price, but "that's ludicrous, because we rely less and less on support the more familiar we get with the applications."⁹⁰³ Instead, The Park Associates was using its own skills and resources to engineer reports.⁹⁰⁴ The evidence indicates that many Oracle customers value its support services at less than the price Oracle charges which has resulted in a number of departures from Oracle support to third-party vendors.

Appendix F-3 presents the range of cost savings offered by third-party support vendors relative to Oracle support costs. Reported support cost savings range between 30 percent and 75 percent of Oracle's fees with the majority of vendors offering services of about 50 percent off Oracle's standard charges. While the variation in discounts in part reflects different pricing methodologies, such as tiered pricing, pay-as-you-go pricing, or a flat annual fee for a fixed set of services, the dollar saving offered by third-party vendors is substantial relative to the cost of Oracle support. The pricing levels and methodologies offered by third-party support firms appear more consistent with the value these firms provide and the demand characteristics of the customers that choose them.

Mr. Wang of Forrester Research stated, "[c]ustomers we talked to say they are getting the same or better performance from third-party suppliers." That's due in part to "...the fact that up until recently, maintenance and support from the major software vendors was poor...Wang concedes that Oracle and SAP have improved their support programs. However, 'for a lot of people, they left a bad taste in their mouth,' he adds...The bad taste Wang mentions comes from a failure to return phone calls and a support process that required the customer to step through escalating hoops before being connected with an engineer who could actually resolve the issue."⁹⁰⁵

Reports from Forrester Research have also stated that, "[d]espite efforts by the major vendors to improve customer satisfaction, response times and upgrade benefits...most customers still believe that they are not receiving value from the 2x to 2.5x they are paying in license fees over a 10-year period."⁹⁰⁶

Customer service seems to have been an issue for some customers. For example, a survey of 600 users by the UK Oracle User Group revealed lower levels of satisfaction in Oracle Support in 2007 compared with 2006. Survey findings published in ComputerWeekly.com include:

"One in five user group members surveyed said they were unhappy with an element of Oracle support."

⁹⁰³ Babcock, Charles. "Third-Party Support an Option for PeopleSoft Customers." *Information Week*, January 4, 2005. <<http://www.informationweek.com/shared/printableArticleSrc.jhtml?articleID=56900118>>.

⁹⁰⁴ Babcock, Charles. "Third-Party Support an Option for PeopleSoft Customers." *Information Week*, January 4, 2005. <<http://www.informationweek.com/shared/printableArticleSrc.jhtml?articleID=56900118>>.

⁹⁰⁵ Schwartz, Ephraim. "Stop overpaying for support." *Infoworld.com*. November 13, 2007. <http://www.infoworld.com/realitycheck/archives/2007/11/stop_overpaying.html>.

⁹⁰⁶ Tsai, Jessica. "Will the Sun Come Out for TomorrowNow?" *DestinationCRM.com*. November 26, 2007. <<http://www.destinationcrm.com/print/default.asp?ArticleID=7389>>.

“The proportion of users unhappy with Oracle’s account teams rose 4% from 10% in 2006 to 14% in 2007.”

“IT managers also saw room for improvement in Oracle’s licensing policy. Just 15% of respondents said they were happy or very happy with Oracle licensing, a 5% decrease since 2006. The proportion of user groups saying they were unhappy or very unhappy increased to 32%.”

“Dissatisfaction with Oracle’s global support desks increased from 7% to 17%.”⁹⁰⁷

Customer service issues have benefited third-party support vendors such as netCustomer and Klee Associates. NetCustomer grew its business by 400 percent in 2006 with practically no advertising by capitalizing on the dissatisfaction that many J.D.Edwards and PeopleSoft customers had with Oracle.⁹⁰⁸ Robert Crichet, IT Manager at Ludlow Composites Corporation, one of netCustomer’s customers, stated that “netCustomer always has very fast response times on requests for our support. On the periodic regulatory updates, netCustomer has provided more implementation service than any previous provider.”⁹⁰⁹ Similar sentiments have been expressed by other customers. In 2004, Bill Means, President of Information Technology at Decorative Concepts, publicly stated that Klee Associates’ customer service “...is better than we have received anywhere else, including JD Edwards, PeopleSoft, and Oracle.”⁹¹⁰

Oracle’s own documents cite customer complaints and reports of poor customer service as well as other negative experiences, ultimately leading to the client’s departure. For example, Oracle sales staff reported that its customer, Long & Foster, was “irate” and “...feels Oracle overcharges, provides mediocre customer service and [the customer] is not renewing the May/June contracts.”⁹¹¹ Another customer, Spokane County apparently believed “[Oracle] technical support is too slow to help and is never much help.” The customer reportedly “end[ed] up solving their problems before Oracle [could].”⁹¹²

Thus, Oracle was and is not acceptable to some customers. Poor customer service is just one of several negative experiences customers experienced before making the decision to drop Oracle support. The evidence proves that many, if not most, of these customers would likely have dropped Oracle support (even absent TomorrowNow in the third-party market) because they

⁹⁰⁷ Saran, Cliff. “Oracle user satisfaction dips.” December 5, 2007. <<http://www.computerweekly.com>>.

⁹⁰⁸ Woodie, Alex. “netCustomer Capitalizes on Dissatisfaction with Oracle.” *IT Jungle*. September 18, 2007. <<http://www.itjungle.com/fhs/fhs091807-story02.html>>.

⁹⁰⁹ netCustomer.com. “netCustomer Offers Stand Alone 1099 Updates for J.D.Edwards and PeopleSoft Applications.” October 24, 2007. <http://www.netcustomer.com/press_details.asp?id=79>.

⁹¹⁰ “Decorative Concepts Signs with Klee Associates for Maintenance Support on PeopleSoft World Software.” PR Web Press Release Newswire. December 27, 2004. See also, Karen Collins, Business Analyst for Decorative Concepts, concurred: “JDEtips support is better than the support we received from JDE/PeopleSoft/Oracle; not to mention the cost savings... We are extremely satisfied with the support we have received from them...” Decorative Concepts, Inc. turned to Klee Associates after being on PeopleSoft support and being faced with increases in maintenance costs. JDEtips.com. “HelpDesk Feedback.” January 18, 2008. <<http://www.jdetips.com/HelpDeskTestimonials.asp>>.

⁹¹¹ “3rd party risk analysis, 1/25/08 [REDACTED];” ORCL00079745.

⁹¹² “3rd party risk analysis, 1/25/08 [REDACTED];” ORCL00079745.

cannot justify Oracle's high support fees in light of the level and quality of service they were receiving.

Whether as a result of mis-management or changes in the economy, many firms, or public sector agencies, have resource constraints that call for reduced spending and budget cuts. As such, some firms simply must employ cost cutting measures. In other cases, budgets may be static from year to year, not allowing much flexibility when costs escalate.

Birdville Independent School District ("Birdville"), which serves more than 22,000 students in grades K-12 on 32 campuses in the Dallas/Fort Worth region of Texas, switched its support from PeopleSoft to Rimini Street in 2005 after Oracle acquired PeopleSoft. Birdville switched to Rimini Street because the company could support Birdville's custom modifications to its PeopleSoft implementations. Birdville saved more than 50 percent on support fees.

Mike DePaola, Birdville's manager of information management systems, stated that Birdville has a very small IT staff and limited IT resources and is also achieving savings by avoiding costly PeopleSoft upgrades and hefty consulting fees. "If we had stayed with Oracle and had continued to apply upgrades and patches and stuff like that, not having the staff, a lot of times we'd have to enlist outside help and that was another cost item," Mr. DePaola said". Birdville is planning to upgrade from PeopleSoft version 8.8 to 8.9 within the next few years.⁹¹³

Oracle sales records indicate that a significant number of customers terminated Oracle support due to financial hardships that made it difficult to justify Oracle's steep fees. Oracle support sales staff noted that one of its customers, EBSCO was clearly in financial straits. Oracle's renewal notes state:

...no plans to replace JDE World just have to cut corners in budget. They are a binder manufacturer and business is down with the advent of the internet and less paper. Struggling to stay alive. They like the product but jus[t] don't use support much. I looked up logged calls for last year[,] most were just administrative in nature. Offered quarterly payment, dropping products, etc. They have no plans to upgrade. We would have to go more than 50% discount for any consideration to keep support and that might not even do. I offered to do more research and get back to her. 8-19-05: confirmed to customer there was nothing I could do for them after reviewing situation with Rob.⁹¹⁴

A PeopleSoft customer, Epiphany Marketing Software was experiencing similar financial hardship. According to Oracle support sales staff notes:

Customer is price sensitive due to sluggish sales and poor financial results. Presented new ILF terms and support fees. Customer rejected offer. Neither prepay nor additional product drop options are acceptable.

⁹¹³ Brunelli, Mark. "Oracle News: School district picks Rimini St. over TomorrowNow." SearchOracle.com. September 13, 2007. <http://searchoracle.techtarget.com/news/article/0,289142,Sid41_gcil272055,00.html>.

⁹¹⁴ "Third-Party Risk Analysis 05-10-06;" ORCL00032753.

Customer advised they will seek out 3rd Pty support with TN solely based on price point. Have reviewed Oracle support exclusives and drop risks. 6/20 - CIO sent cancellation letter. Customer decided to drop support to save costs until decision about ERP solution is made.⁹¹⁵

Another customer, Oasis Corporation, "...has had financial issues for the last several years Per Rick Trout at Oasis [and] they have chosen to use Versytec..." according to Oracle records.⁹¹⁶

While there were many Oracle customers in financial difficulties, Oracle appears to have done little to help them cope with escalating support fees.⁹¹⁷ This is consistent with an internal Oracle email exchange discussing reaching out to certain financially strapped clients who were dropping support. The email from Elizabeth Shippy to sales support staff stated, "I don't think it's appropriate to call them [Metaldyne] – they don't have the money and we are not flexible in our maintenance fees."⁹¹⁸

Understandably, Oracle's rigid stance regarding support fees did little to encourage customer loyalty and a number of customers moved to third-party support vendors in order to cope with their particular financial circumstances.

Sometimes, the customer's own actions could cause support problems. Forrester Research reported that "[license v]endor support has less value if...[the customer's system] is too customized to apply upgrades. Third-party support options should be considered to avoid paying for enhancements that are not needed."⁹¹⁹ In a 2005 Wall Street Journal article, Bill Swanton, vice president of AMR Research, Inc., a technology consulting firm in Boston, stated that [Rimini Street's] Mr. Ravin's "biggest opportunity is among customers who have heavily customized their own systems and are thus reluctant to upgrade."⁹²⁰

In late 2007, Rimini Street announced that the company "just launched a higher education unit. [There are] 800 universities that have spent tons of money, which aren't looking to upgrade except maybe once a decade because the systems are so complex, with so much customization. We have two universities on board, and that [will be] another huge segment for us."⁹²¹

Similarly, as Andy Klee of Klee Associates describes it, when customers customize J.D.Edwards ERP systems, customers cannot "...use new functionality, delivered via updates, called CUMs,

⁹¹⁵ "Third-Party Risk Analysis 05-10-06;" ORCL00032753.

⁹¹⁶ "Third-Party Risk Analysis 05-10-06;" ORCL00032753.

⁹¹⁷ For additional examples, see customer notes for Cellstar, ConAgra Foods, George Weston Bakeries, Metaldyne, Worldtex, Inc.; "Third-Party Risk Analysis 05-10-06;" ORCL00032753.

⁹¹⁸ Oracle email from Elizabeth Shippy to Teri Maxwell, et al. March 2, 2006. Re: RE: IN Touch; ORCL00090058-059, at -058.

⁹¹⁹ Hamerman, Paul, with Jessica Harrington. "Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle's PeopleSoft Acquisition Boosts an Emerging Market." Forrester Research. March 11, 2005. ORCL00427952-954, at -953.

⁹²⁰ Bank, David. "Oracle Will Face New Competitor for Siebel Users." *Wall Street Journal*. September 19, 2005. <<http://webreprints.djreprints.com/1624340007253.html>>.

⁹²¹ Franke, Jon. "SAP News: Rimini Street CEO addresses SAP TomorrowNow rumors." SearchSAP.com. December 13, 2007. <http://searchsap.techtarget.com/originalContent/0,289142,sid21_gci1286065,00.html>.

anyway, unless they basically rewrite all of their modifications for each CUM they apply. ‘Basically, people want regulatory updates, W2s and 1099s. The Canadians want T4s,’ he says. ‘We’ll be doing all those forms on an annualized basis.’”⁹²²

A presentation that appears to be produced by Oracle as part of the DOJ investigation describes “PeopleSoft8 Internet Architecture.”⁹²³

100% Pure Internet is a Lie

Poor Architecture and Interface Forces Customers into Customization Hell.

Oracle provided notes that accompany the slide:

With Release 8 of PeopleSoft, first introduced mid 2000, Peoplesoft [sic] started claiming that they were now ‘**100% Pure Internet**’ and there is ‘**no code on the client**’.

This is simply NOT TRUE!

I will explain how PeopleSoft’s claim is a total lie. We will talk about how their internet architecture is lacking in functionality and is forcing customers into **Customization Hell**. Their architecture has no flexibility at both the user and enterprise level.

Oracle provides risk functionality for end users of all types and complete flexibility allowing our customers to implement with no customizations – the holy grail of software. [emphasis in original document]

Oracle expanded on its explanation in a subsequent slide, stating:⁹²⁴

PeopleSoft offers no Flexibility [sic] for end users in their applications. Every change, no matter how small is a customization, these customizations are not migrated during patching or upgrades. I cannot emphasize this enough. Any rational customer when faced with

a] configuration utopia with zero customizations or

b] customization hell should go to Oracle, the clear choice.

The increased cost and complexity of a PeopleSoft solution vs. an Oracle solution is unbelievable, see the Vision website for analyst reports to support the high cost of customizing erp applications.

PeopleSoft’s user interface is weak (and their screens are ugly).

⁹²² Woodie, Alex. “JDE Shops Have Plenty of Options for Third-Party Maintenance.” *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁹²³ Presentation titled “PeopleSoft.” Government Exhibit P0021. ORCL-EDOC-00902997-032, at -001.

⁹²⁴ Presentation titled “PeopleSoft.” Government Exhibit P0021. ORCL-EDOC-00902997-032, at -013.

The Oracle presentation goes on to explain how to position Oracle's products against PeopleSoft's, urging the Oracle sales staff to make sure users understand "the high dollar costs of [PeopleSoft] customizations" and "the cost in dollar and people terms that [PeopleSoft] customization will make on their enterprise and not just the initial costs but the ongoing costs of maintaining these changes."⁹²⁵ Oracle's criticisms of PeopleSoft's products clearly made the case that customizations are expensive, complicated, and undesirable for customers.

Another Forrester Research report stated that, although software enhancements can enable customers to extend the business value and technical visibility of their applications, many customers "...have difficulty in justifying the substantial cost of implementing major upgrades and will resist doing so...In situations where upgrades and enhancements have little value, such as when the application is highly customized, maintenance alternatives may be available from third-party providers. Alternatively, the customer may simply decline to renew the support contract."⁹²⁶ For example, Virginia Farm Bureau ("Farm Bureau") uses PeopleSoft Financials 8.0 for accounts payable, asset management and the organization's general ledger. Tony Spears, financial systems administrator at Virginia Farm Bureau, reported in a Computer World article:

When the Farm Bureau got support directly from PeopleSoft, it was sometimes provided as a service bundle that required installation of previous bundles, which Spears says was time-consuming and annoying because the group just wanted a single fix for whatever problem it was experiencing. 'When you actually need a fix, (Rimini) supplies you with a fix. They don't supply you with a bundle that requires you to have prerequisites installed.'

Another advantage is that Rimini supports customizations, changes the Farm Bureau made on its own to the PeopleSoft application. 'I would recommend (third-party maintenance and support) to anyone that's on a legacy version, if you will, who may not actually plan on upgrading and tends to use the applications they have for a while,' Spears says. 'I don't know if I would recommend it to someone who's actually looking to do an upgrade.'

The Virginia Farm Bureau has been using Version 8.0 for several years and has no plans to upgrade, which made using a third-party a good option, he says.

Farm Bureau switched to Rimini Street in late 2006.

Mr. Spears says that Rimini Street provides the company with a contact person who can be reached at home, work, via cell phone and e-mail. Mr. Ravin says, "We offer at half the price

⁹²⁵ Presentation titled "PeopleSoft." Government Exhibit P0021. ORCL-EDOC-00902997-032, at -014.

⁹²⁶ Hamerman, Paul with Ellise Gaynor. "Apps Customers Question Maintenance Fee Value." Forrester Research. December 6, 2005, page 3.

what we consider a better support model. We cover customizations the same as we do Oracle's vanilla code."⁹²⁷

Many Oracle clients have dropped Oracle support for similar reasons as indicated by Oracle Support Sales notes. For example, Oracle customer Cellstar indicated it "is heavily customized [on] World with no plans to upgrade." Another customer, Fairchild Semiconductor stated, among other complaints about Oracle products and services, that it had "no plans to go from HR 8.4 to 8.8...Too many customizations." Fairchild generally felt that "PeopleSoft was not a good fit for a Semiconductor Company. It took them 8 years to go from R7 to R8.4 and given the acquisition of PSFT by ORCL [it] felt the time was right for a full ERP assessment. End result was that they felt they would never upgrade to R8.8 and would ultimately be faced with a reimplementation regardless so decision was made to go with a lower cost service provider and choose another (more fitting) solution provider down the road." Yet another customer, Fuji Film, cited reasons why it was leaving Oracle support, including: "...customized system, little/no use of Support Services, no planned migration, and little value for money."⁹²⁸ These firms are examples where multiple factors played a role in their decision to drop Oracle support.

The previous discussion strongly suggests that many of these (and other) customers would have turned to alternative vendors for support even if TomorrowNow had not existed.

As discussed previously, some companies, particularly those with highly constrained IT budgets, state they are content to use an older, stable software release indefinitely.⁹²⁹ Customers that are not interested in upgrading to a new release of their software can extend their legacy ERP application's functional and economic life by retaining a third-party vendor for support.

Former Gartner analyst, Vinnie Mirchandani, who now writes a blog on trends in the IT market reported, "[m]aintenance from application vendors tends to be 'one size fits all.' Third-party support tends to be much more component-based; their talent lies in bug fixes and support calls. While they cannot provide next releases, this is not as much of an issue for many application customers who do not plan to upgrade for years to come and find the lower cost of third party support financially attractive."⁹³⁰

As Andy Klee, principal of Klee Associates, discussed his customers' needs in 2005: "For [JD Edwards] EnterpriseOne, we look for clients that are near the end of their ERP life cycle, and who are expecting to get three to five years more life out of their system on the way to a new ERP solution," He further states that "[JD Edwards] World clients can expect to be able to extend their ERP life cycle indefinitely with our maintenance program."⁹³¹

⁹²⁷ Brodtkin, Jon. "The pros and cons of third-party software support." *Network World (US)*. April 19, 2007. <<http://www.computerworld.com.my/PrinterFriendly.aspx?articleid=4689&pubid=3&issuid=50>>.

⁹²⁸ "Third-Party Risk Analysis 05-10-06;" ORCL00032753. See also, Oracle email from Scott Trieloff to Shelley Moses-Reed. June 7, 2005. Re: Berry Plastics; ORCL00089576-578, at -577.

⁹²⁹ Hamerman, Paul with Ellise Gaynor. "Apps Customers Question Maintenance Fee Value." Forrester Research. December 6, 2005, page 3.

⁹³⁰ Mirchandani, Vinnie. "The Shifting Sands of Business Applications." *JDEtips Journal*. May/June 2006.

⁹³¹ Woodie, Alex. "Service Packs Put a Crimp in Third-Party Maintenance Plans." Volume 5, Number 7 – February 15, 2005. <<http://www.itjungle.com/fhs/fhs/021505-story01.html>>.

A Klee Associates JDEtips article that focuses on maximizing the financial return of an ERP investment emphasizes that extending the life of a system is a much better business strategy than constantly upgrading and changing the system. Many firms do not obtain cost-effective vendor support. Instead, “[t]hey just [need] a good partnership with a consultant (or even employee) who [knows] the system well.”⁹³² Firms in a position to extend the useful life of their ERP software via use of a third-party support vendor or in-house consultant, will effectively increase the financial return on their software investment.

Companies “sunsetting” their Oracle applications include: those that have been spun-off from a larger corporation and are no longer strategically wedded to an Oracle product; those that have been acquired and are in the process of migrating to non-Oracle products preferred by their new owners; and those seeking new functionality outside of their standard enterprise software suite, often to support a more customized business model. These companies have little incentive to upgrade their existing Oracle applications and have an incentive to seek alternatives to their annual support fees until they are ready to switch to an alternative product.⁹³³

Forrester reported that its “research and interactions with clients indicate that a vast majority have multiple ERP systems. These fragmented environments often result from divisional autonomy or acquisitions.” “Based on a Forrester survey of finance decision-makers, 64% of large enterprises surveyed in 2004 indicated that they had plans to consolidate their finance systems.” And, in 2006, “...30% of IT decision-makers consider[ed] it a priority or high priority to reduce the number of major applications vendors that they do business with.”⁹³⁴

Forrester also reported that “[l]arger companies, with substantial applications investment plans to standardize on a single or primary vendor, will have reduced maintenance needs for applications that are scheduled for replacement,” in which case “...the value of maintenance may be an issue.”⁹³⁵ This is consistent with other industry reviews. For example, JDEtips reported:

Another key area where companies have started to look for IT savings is the combination of enterprise software maintenance and lifecycle management. A wide variety of third-party providers have emerged that can help companies better and more economically manage their software at a great savings over traditional vendor-support plans. These providers come at an opportune time, because many of the major suppliers are looking to move their customers to a new technology platform in the next few years...⁹³⁶

While some customers have decided to sunset their ERP products in favor of migration to an alternate ERP vendor such as SAP or Microsoft (or even Oracle’s next generation Fusion

⁹³² Rhoads, C.J. “Stretching Out Maintenance.” *JDEtips Journal*. March/April 2006.

⁹³³ Greenbaum, Joshua. “Funding the CIO’s Innovation Gap: The TomorrowNow Alternative.” *Enterprise Applications Consulting*. Spring 2007, page 8.

⁹³⁴ Wang, R “Ray” and Paul Hamerman. “Topic Overview: Enterprise Resource Planning.” Forrester Research. August 8, 2006, reference to “Data Overview, Software and Services in Large Enterprises: Business Technographics in North America.” March 8, 2006.

⁹³⁵ Hamerman, Paul with Ellise Gaynor. “Apps Customers Question Maintenance Fee Value.” Forrester Research. December 6, 2005, page 3.

⁹³⁶ Keller, Erik. “Using IT entitlement Payments to Fund Business Innovation.” *JDEtips Journal*. July/August 2006.

product),⁹³⁷ others have chosen to gradually sunset their enterprise product while deciding their future course of action. Many of these customers have chosen from one of the many third-party vendors available where their support requirements can be met at relatively attractive prices during a sunset period.

CFO Europe Magazine reported that “Oracle’s hostile bid for PeopleSoft was launched shortly after PeopleSoft’s takeover of JD Edwards in mid-2003 and it was dragged on and on. PeopleSoft grudgingly accepted Oracle’s \$10.3 billion (€7.9 billion) offer at the end of 2004. When the dust settled, three of the ERP market’s largest vendors became one.”⁹³⁸

Industry analysts such as Gartner, Forrester Research, and IDC advised Oracle that customers (and the analysts themselves) were confused by Oracle’s communications following the acquisition. In a conversation with Gartner analysts, Oracle noted that:

[the analysts] were confused by the announcements on Tuesday. They think that Oracle is changing its story. Oracle had said they would support 8.X for 10 years – now we are saying that we will follow the PeopleSoft published release retirement schedules. This means that customers will need to migrate 1 to 2 times before project fusion is available. They believe that customers will not be pleased when they receive this clarification and that they will feel that Oracle is changing its story.⁹³⁹

Industry analyst Erin Kinikin of Forrester Research noted that her “personal feeling [is] that Oracle is over committing – and needs to be more realistic with customers so that they can easily understand what’s the best release to get them to Fusion and where specifically Oracle [is] going to put the most of its resources. Erin mentioned that the over commitment she sees is in terms of the product roadmap, not the support messages.”⁹⁴⁰

Other analysts confirmed the confusion experienced by the new Oracle customer base.⁹⁴¹ In addition, the analysts noted that the “*big issue is the product roadmap. Great concern over this.*”⁹⁴² [Emphasis added].

In this section, I discuss the evidence that many PeopleSoft and J.D.Edwards customers have been concerned about the future of the PeopleSoft and J.D.Edwards applications on the one hand, and the next generation roadmap – including the timing of the Fusion applications product

⁹³⁷ See for example, customer notes for Pepsi Cola General Bottlers. “Third-Party Risk Analysis 05-10-06;” ORCL00032753.

⁹³⁸ Karaian, Jason. “In a Fix: Confused by the spate of takeovers in the enterprise software industry? A new crop of third-party providers is here to help.” *CFO Europe Magazine*. December 18, 2006. <http://www.cfo.com/article.cfm/8446578/c_9966699/?f=archives>. Forrester Research also noted that Oracle’s “drawn-out acquisition of PeopleSoft took its toll on its customers. Now Oracle has to rebuild customer trust and confidence...” Hamerman, Paul and Erin Kinikin. “Oracle-PeopleSoft Part I: Near-Term Focus on Organization and Product Delivery.” Forrester Research. March 15, 2005; ORCL00163661-671, at 666.

⁹³⁹ “Analyst Conversations on Support.” January 25; ORCL00033228-231, at -230.

⁹⁴⁰ “Analyst Conversations on Support.” January 25; ORCL00033228-231, at -228.

⁹⁴¹ “Analyst Conversations on Support.” January 25; ORCL00033228-231, at -230.

⁹⁴² “Analyst Conversations on Support.” January 25; ORCL00033228-231, at -230.

as well as its expected functionality and associated costs. Speculation in these areas appears to have hindered customers' ability to plan their future enterprise needs in the context of an Oracle-based solution. In addition, some customers are concerned about any forced upgrade or migration to a product they know nothing about.

Oracle first announced plans for its next generation Fusion applications - Oracle's project to blend the best of its various product lines into a new set of applications - in early 2005, soon after the company acquired rival software maker PeopleSoft and its line of business applications.⁹⁴³ In January 2005, Gartner reported, "Oracle stated that Fusion would result in a 'new application' product that would be based on a 'new architecture' delivered by 2008. The market perception of this statement was that Oracle was creating a product that would have a clean sheet design, but with all the goodness of the acquired and established product lines. Most of the market was skeptical about Oracle's proclamation that it would build a new application set on a new architecture in the aggressive time frame given (by 2008)."⁹⁴⁴ Clearly this market skepticism was not unfounded as Oracle's timeline for Fusion availability slipped, and it is still not clear when the full set of Fusion products will be released. In 2006, Gartner reported that "Oracle has yet to define and release the specifics of Fusion functionality and processes, and until that time, it is not possible for users to accurately quantify the benefits vs. costs of a move to Fusion."⁹⁴⁵ In the fall of 2009, Oracle began rolling out its Fusion Applications to small number of customers for hands-on testing with plans on general availability to customers in 2010.⁹⁴⁶

In 2007, Business Week reported:

Oracle customers and Wall Street analysts are skeptical that Fusion can deliver what the company has promised. Corporate IT departments have been left in the dark about what to expect since Oracle has eschewed the usual practice of testing a major product upgrade with select customers at least a year or two before it's released. 'No one knows because no one's seen anything,' says Charles Di Bona, a senior equity analyst at Sanford C. Bernstein & Co. And some chief information officers still have a hangover from a buggy version of Oracle applications released in 2000. For now, Oracle's customers are stuck with a passel of aging products for which they pay hefty annual technical-support fees, and which aren't particularly easy to combine with one another or the latest Web technologies."⁹⁴⁷

'Other than a lot of hype and hot air about Fusion, how is it really going to work?' asks [one Oracle customer], Allen Emerick, IT director at

⁹⁴³ "Defusing Oracle's Fusion?" Workforce.com. October 2008.

<<http://www.workforce.com/section/10/feature/25/90/34/index.html>>.

⁹⁴⁴ Genovese, Yvonne. "Oracle Fusion: Understand the Road Map and Estimate the Transition Costs." Gartner. March 27, 2006, page 3. <<http://www.oaug.org/fusioncouncil/GartnerResearchFusion.pdf>>.

⁹⁴⁵ Genovese, Yvonne. "Oracle Fusion: Understand the Road Map and Estimate the Transition Costs." Gartner. March 27, 2006, page 3. <<http://www.oaug.org/fusioncouncil/GartnerResearchFusion.pdf>>.

⁹⁴⁶ Pang, Albert and Michael Fauscette. "Oracle Starts Fusion Applications Countdown with Incremental and Decisive Customer-Centric Strategies." IDC Research. October 2009.
<http://www.oracle.com/corporate/analyst/reports/ent_apps/fusion/idc-fusion-applications.pdf>.

⁹⁴⁷ Ricadela, Aaron. "Oracle Fusion gets a New Boss." *Business Week*. November 5, 2007.
<http://www.businessweek.com/technology/content/nov2007/tc2007112_928470.htm>.

construction firm, Skanska USA Building (SKAB). ‘The timing has been all over the place.’ Skanska runs applications from J.D.Edwards. It remains unclear, Emerick said, how Oracle will get that software and its customized elements working with Fusion products.⁹⁴⁸

Other Oracle customers have been skeptical of the product roadmap and the need for a next generation suite. Many of these customers are generally content to remain on their legacy solution and view upgrades or a possible Fusion migration as a high cost proposition with unknown business benefit. Since transition costs to Fusion for PeopleSoft and J.D.Edwards customers are predicted to be close to the cost of a reimplementaion, these customers have been advised to “[a]ssess the move to Fusion as if it is a new business application solution with the costs of licensing waived.”⁹⁴⁹ Thus, the end result for some Oracle clients that have not “bought in” to the Fusion roadmap has been a weakened allegiance to Oracle and its support offering.

As an example, sales support notes indicate that Oracle customer, Fairchild Semiconductor, has “...had discussions about Fusion Roadmap with Oracle Folks.” Nevertheless, it has “[n]ot bought into Fusion.” Instead, the customer gave Oracle a “...drop notification on all product.”⁹⁵⁰ Another client, Host Communications was reportedly, “...dismissive to value prop of Fusion Applications...” which appears to have contributed to its departure from Oracle support.⁹⁵¹

In summary, it is clear that many PeopleSoft and J.D.Edwards customers and users were anxious regarding the future of their respective ERP systems and the future product roadmap at Oracle. Such concerns appear to have prompted many customers to reconsider their options in terms of support and future migration to other ERP systems.

8.9.11.1 Conclusion

A variety of third-party support options exist for PeopleSoft and J.D.Edwards customers, and many of these options have been in the marketplace for several years. While third-party support options were generally limited prior to 2004, there has been a steady growth in the number of options available since then. Many of the new support offerings represent substitutes for TomorrowNow’s product. Accordingly, to prove its losses against Defendants, Oracle must determine which customers it would have lost to other vendors if TomorrowNow had not been in the market.

Third-party support options largely replace Oracle support for a fraction of the cost of Oracle support. Third-party options include companies that specialize in ERP support (either remote support, managed hosting, or both); small and larger companies that offer support as a

⁹⁴⁸ Ricadela, Aaron. “Oracle Fusion gets a New Boss.” *Business Week*. November 5, 2007. <http://www.businessweek.com/technology/content/nov2007/tc2007112_928470.htm>.

⁹⁴⁹ Genovese, Yvonne. “Oracle Fusion: Understand the Road Map and Estimate Transition Costs.” Gartner Research. March 27, 2006. Following the PeopleSoft acquisition, Forrester Research also recommended that Oracle customers investigate competing application options and consider third-party support to protect themselves from an uncertain Oracle roadmap. See Hamerman, Paul and Erin Kinikin. “Oracle-PeopleSoft Part I: Near-Term Focus on Organization and Product Delivery.” Forrester Research. March 15, 2005. ORCL00163661

⁹⁵⁰ “Third-Party Risk Analysis 05-10-06;” ORCL00032753.

⁹⁵¹ “3rd party risk analysis, 1-25-08[REDACTED];” ORCL0079745.

component of a broader product and service offering; and larger global or offshore IT services firms that focus on large, complex accounts. Finally, outsourcing firms that offer full in-house replacement of ERP systems, or parts of ERP systems and business processes, can also act as substitutes for TomorrowNow's product for certain clients.

Third-party support offerings vary across a number of product and service attributes, including cost, product features, and geographic coverage, and therefore, may be viewed by customers as acceptable substitutes depending on the particular support demanded. While there is some differentiation, many of these firms have reasonably similar product offerings. Evidence indicates that customers were generally aware of alternative support vendors in the market, and often compared different offerings before contracting with a selected vendor.

Third-party support vendors are best suited for customers that tend to share certain characteristics, characteristics that Oracle highlighted in various communications and reports: customers that are satisfied with their current functionality and intend to remain on their current application release for an extended period; customers that have stable or highly customized systems with no business need to upgrade; customers that anticipate low support usage; customers that plan to migrate away from the current vendor at some point, customers with significant "issues" with their Oracle service (perhaps the quality of support a poor customer service relationship); customers under financial constraints or in financial distress (the customer may still like the product and support but can no longer afford it); customers that have negative feelings towards Oracle for whatever reason; and many others.

In a world absent TomorrowNow, the majority of its customers would likely have sought out support services from one of the other vendors that existed in the marketplace. It is not only likely that these alternative vendors would have filled the void if TomorrowNow had not existed, but equally likely they would have grown faster than they did because they would have picked up customers that actually went to TomorrowNow.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10.1.2. Decision to Migrate to SAP Was Not Due to TomorrowNow

The decision to migrate to SAP is one of enormous consequence for the customer,¹⁰²⁴ typically involving millions of dollars worth of license fees, training costs, consulting fees, hardware and middleware costs, and includes all the attendant internal turmoil and disruption related to the transition from one vendor to another, a process that can span several years. Such decisions are entered into only after careful study of the costs and benefits to the company of making the switch and a proper evaluation of the alternatives. Such study usually involves specialist consultants to assist in specifying the system requirements, identifying responsive systems, and helping with the implementation process.

Mr. Sommer, who is an expert in this precise area, confirmed that such decisions are significant events that usually need approval from multiple executives within the company and often from

¹⁰²⁴ Sommer Report and also discussed earlier in my report.

the full board. Therefore, the idea that a customer would go through this arduous, lengthy, and costly process as a result of TomorrowNow's involvement is speculative. The assumption Mr. Meyer made (i.e. that being on the List of 86 is sufficient to prove the economic causation to support a damages claim) is contradicted by the facts as my analysis (described later) shows.

10.1.3. Decision to Move to SAP Was Made After Product Evaluation

Mr. Sommer's report indicates that the choice of an ERP provider is a decision a company takes after evaluating the available alternatives. The ERP evaluation process requires a large investment of time and once the purchase decision is made, the company is then faced with investing even more time and money to implement a new system. Such decisions are not made because TomorrowNow could provide support at a price lower than Oracle, which is a fundamental assumption of Mr. Meyer's analysis and the evidence shows TomorrowNow did not drive sales of products and services at SAP, which is another fundamental assumption underlying Mr. Meyer's analysis. The time and effort spent on due diligence when exploring future ERP systems makes the idea that a customer would evaluate the available ERP vendors' product offerings and select SAP as its application license vendor as a result of TomorrowNow involvement is speculative and neither Oracle nor Mr. Meyer have provided any proof that their assumptions are appropriate.

10.1.4. Customers Left Oracle for SAP Without Going to TomorrowNow

According to Mr. Meyer, TomorrowNow was the sole reason an Oracle customer decided to buy products or services from SAP. However, his assumption is contradicted by the facts. There were approximately 853 Safe Passage customers by the end of the first quarter of 2008 (the latest date for which I have reported data).¹⁰²⁵ Not all of the Safe Passage customers represented replacements of Oracle ERP systems. In addition, I understand that SAP's account executives inflated the Safe Passage numbers and that it was never completely clear what defined a Safe Passage 'deal'.

However, the report (which is the best available information) states that there were 853 Safe Passage Initiative deals including 625 SAP deals and 228 standalone TomorrowNow customers (i.e., no SAP product involved). Therefore, it was reported¹⁰²⁶ that at least 228 customers terminated Oracle support and went to TomorrowNow without going to SAP for products or services; and at most 78¹⁰²⁷ of the 625 SAP customers went to TomorrowNow for support.

The assumption Mr. Meyer is making in his analysis is that TomorrowNow drove customers to cancel Oracle support and because of TomorrowNow's involvement they became SAP licensed customers.

The facts, as I have described them here, prove his claim is unfounded. Of 625 SAP customers reported to be Safe Passage customers, 547¹⁰²⁸ (or 88%)¹⁰²⁹ went to SAP and were not supported

¹⁰²⁵ "Oracle Factsheet – Q1 2008." SAP-OR00098932-933, at -933.

¹⁰²⁶ Assuming the quoted data are accurate, which is doubtful.

¹⁰²⁷ TomorrowNow only ever had 358 customers. If 228 of those were stand alone Safe Passage deals and TomorrowNow had 52 customers when SAP bought the company, at most 78 customers could be SAP Safe Passage customers (358 – 228 – 52 = 78).

¹⁰²⁸ 625 – 78 = 547.

by TomorrowNow. On the other hand, of 358 total TomorrowNow customers, at most 78 were Safe Passage customers from SAP while supported at TomorrowNow. The data show therefore, that TomorrowNow was not instrumental in driving sales for SAP and TomorrowNow support was not attractive to 88% of the SAP Safe Passage customers as they transitioned to SAP. These facts prove that customers left Oracle to go to SAP (for one or more purchases) for reasons unrelated to TomorrowNow, and by extension, unrelated to the Alleged Actions.

10.2. Customer-Specific Exclusion Criteria – SAP Disgorgement

I identified customer-specific exclusion criteria that show Mr. Meyer's fundamental causation assumption for SAP disgorgement-related claims to be inappropriate. I created an Exclusion Pool for each of the following:

1. Decided to join SAP prior to joining TomorrowNow
2. Parent company mandate
3. Competitor evaluation
4. Standardization
5. Specific functionality
6. Product extensions
7. Non-replacement products
8. Reseller/BPO
9. No accused conduct – disgorgement
10. Other – disgorgement

I placed the customers that matched the criteria into the relevant Exclusion Pool. A customer in one of these Exclusion Pools should be excluded from the damage analysis because the facts show that they purchased SAP products and services for reasons unrelated to the Alleged Actions. Although some customers fell into more than one Exclusion Pool, I classified a customer as an 'exclude' for causation purposes based on their placement in just one Exclusion Pool. The following discussion sets out the rationale behind each Exclusion Pool.

10.2.1. Decided to Join SAP Prior to Joining TomorrowNow

If a customer decided to move to SAP for an ERP system (or a component of an ERP system) before the customer moved to TomorrowNow for support services, then the customer could not have moved to SAP as a result of the Alleged Actions. Mr. Meyer excluded 17 customers,¹⁰³⁰

¹⁰²⁹ 547/625 = 88%.

¹⁰³⁰ Schedule 42.SU to the Meyer Report.

“...for which evidence indicates that they may have decided to switch to SAP before engaging TomorrowNow.”¹⁰³¹ I concur with Mr. Meyer’s rationale of his exclusion of the 17 customers.

I reviewed the evidence related to the remaining 69 customers¹⁰³² Mr. Meyer did not exclude and applied the parameters he defined. Based on my review, Mr. Meyer should have excluded an additional 17 customers (in addition to the 17 he excluded) because they decided to contract with SAP before engaging TomorrowNow as shown in Appendix E-2.

10.2.2. Parent Company Mandate

The period of potential Disgorgement damages (i.e., 2005 through 2008) was one of great activity in corporate transactions. Acquisitions were across industries and across borders and included acquisitions of Oracle customers by SAP customers and (presumably) vice versa. When the parent company mandated that their newly acquired subsidiary run on the same software as the rest of the company, the subsidiary had no choice but to accede to the mandate. A perfect example of such a case is the BASF acquisition of Engelhard Corporation. BASF has been a committed user of SAP software in its operations around the world (BASF is one of the largest diversified conglomerates in the world) and upon acquisition required Engelhard to switch ERP systems to SAP. Although Engelhard had no choice but to make the switch to SAP, Mr. Meyer included it in his disgorgement claim. The facts show that the switch to SAP was not related to the Alleged Actions.

I added a customer to this Exclusion Pool if the products supported by TomorrowNow were the products that were mandated to standardize on SAP. Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.3. Competitor Evaluation

From time to time companies reassess their ERP systems. For example, the company may believe the existing system can no longer support the company’s level of activity, or the company has accounting, operations or control needs that the existing system cannot provide. Whatever the reason, when the company decides to upgrade their systems or migrate to a new system, they frequently engage in a competitive evaluation of potential vendors for the required software. A customer was included in this Exclusion Pool if the product line or products supported by TomorrowNow were the products that the customer was evaluating and replacing. If the customer in question (i.e., from the List of 86) engaged in a competitive evaluation, the Alleged Actions were not the cause of the change in ERP vendor. Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.4. Standardization

From time to time, major corporations take steps to rationalize their operations, a process that is particularly important for customers with diverse operations (whether the diversity is the result of geographical differences, operational and/or functional differences, or the result of acquisitions that have never been fully integrated). One solution (among others) is to replace all

¹⁰³¹ Meyer Report, page 255, paragraph 446.

¹⁰³² Those customers which have a parent/subsidiary relationship are counted as one customer; 86 – 17 = 69.

diverse systems and standardize on one ERP system which occurs when the company selects an ERP vendor and implements the selected ERP solution across the entire company. As Mr. Sommer indicated, companies pursue this path only after extensive analysis of the available options.

Customers are added to this pool if they had multiple product lines (either Oracle only or Oracle and Non-Oracle) and they were standardizing on an SAP solution. The standardization decision would not have been made as a result of the Alleged Actions. Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.5. Specific Functionality

As the record shows, both Oracle and SAP release upgrades to existing software and sometimes create entirely new software in order to keep up with customer demand for particular functionalities. Customers also need their software to perform very specific functions based on the needs of their industry and the needs may change over time. If the required functionality is not found at their current vendor or within their current software, the customer will likely look elsewhere until they find a vendor to supply the needed functionality.

Often a customer could only achieve the desired functionality within their current product line by upgrading, and the upgrade process alone, because it can be such an extensive process, particularly for highly customized environments, causes customers to re-evaluate their software options. For example, Mr. Hurst testified:

A customer that would be more likely to make the move to SAP would be a customer that is at a point in time where they're – they're forced to do some sort of an upgrade of their current applications. So it's not enough that their current applications are supported; they need more than what they can do. So if they're forced to upgrade, they would be at a point where they would [sic] looking to be making a decision.¹⁰³³

I excluded customers if they had stated their need for specific functionality and researched ERP vendors to find it. Because the customer needed the specific functionality in order to conduct business, it is inappropriate for Mr. Meyer to assume that subsequent purchases were caused by the Alleged Actions.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.6. Product Extensions

Many of the customers on the List of 86 had made the decision to purchase products or services from SAP prior to receiving support services from TomorrowNow which, therefore, could not have been the causal link between the customer and its SAP purchases. These customers may have extended their existing SAP software's functionality (e.g., by adding payroll to an existing Human Resources component) *after* the customer was receiving support from TomorrowNow, which meant the customer was included in the List of 86.

¹⁰³³ Thomas Gene Hurst, II deposition dated April 30, 2008, page 136.

Although Mr. Meyer includes such purchases in his disgorgement damages figure, the facts show the customers only purchased extensions of their existing SAP software. Because the initial purchases preceded the TomorrowNow relationship, they could not possibly be tied to the Alleged Actions. Other examples of customer actions in this Exclusion Pool include: customers that purchased additional users for existing systems and customers that extended a previously purchased base product. Such purchases were not caused by the Alleged Actions.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.7. Non-Replacement Products

Customers may change their ERP strategy for a variety of reasons: a new IT structure for the company; a development or acquisition of a new product area; reduced or expanded functionality needs; and many more. Whatever the reason for the shift in IT demands, customers may need to buy new applications unrelated to the systems they had previously licensed from a non-party vendor. The scenario played out in a number of cases for customers on the List of 86. Those customers licensed new software from SAP that was not a replacement of the software they previously had supported at Oracle. For example, if a TomorrowNow customer had a Lawson accounting package but decided to buy SAP accounting software, such a replacement could not be caused by the Alleged Actions, but the customer would have been added to the List of 86 because it was supported at TomorrowNow when it made the SAP purchase.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.8. Reseller/BPO

SAP has sales agreements with a number of third-party resellers (“Resellers”) of SAP licenses. SAP has also licensed a number of BPOs to host and process transactions for customers that do not wish to operate their own IT department or process their own transactions. Customers that licensed SAP components via a Reseller or a BPO did so because of the relationship with the Reseller or BPO, not because of the Alleged Actions.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.9. No Accused Conduct – Disgorgement

I understand that Oracle engaged Mr. Kevin Mandia to evaluate the “means and methods by which [TomorrowNow] accessed and downloaded from Oracle’s customer support websites, as well as the nature and extent of [TomorrowNow’s] copying, modification, distribution, and use of Oracle’s intellectual property to support [TomorrowNow’s] customers” and that he generally reached the following conclusions:

1. TomorrowNow engaged in mass downloading from, and improper access to, Oracle systems.
2. TomorrowNow made thousands of full or partial copies of Oracle enterprise application software and database software.

3. TomorrowNow's fix development and delivery process resulted in significant cross-use and contamination.
4. TomorrowNow continued to access, download, copy, modify and distribute Oracle enterprise application software and support materials after Oracle filed this action.

I understand Defendants' expert, Mr. Gray, analyzed Mr. Mandia's report and analysis regarding the conclusions referenced above and Mr. Gray determined that even assuming Mr. Mandia is correct the accused conduct does not apply to all of TomorrowNow's customers. Accordingly, I have excluded them from the disgorgement analysis and show them in Appendix E-2.

10.2.10. Other – Disgorgement

While the Exclusion Pools I have defined above thoroughly outline the majority of the scenarios that result in the exclusion of certain customers from the disgorgement analysis, there are, in addition, other more exceptional scenarios that mean a single customer should be excluded from disgorgement (i.e., in effect the customers are in a pool of their own). Accordingly, I placed such customers in the "Other Exclusion Pool" for the disgorgement analysis.

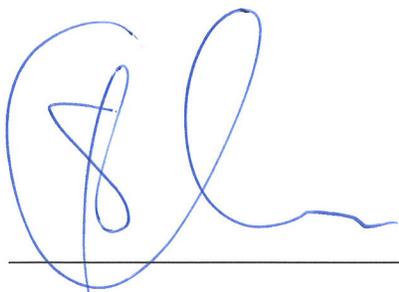
I listed the customers that I determined should be excluded but did not fit any of the criteria above in Appendix E-2.

10.2.11. Summary

Based on the criteria outlined in the various customer-specific Exclusion Pools, I excluded the listed customers in Appendix E-1 from the disgorgement analysis because their decision to buy licensed applications or services from SAP was made for reasons other than the Alleged Actions.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION



Stephen K. Clarke

May 7th, 2010

Date

TEXT REMOVED - NOT RELEVANT TO MOTION