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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE INTERNATIONAL CORPORATION, Plaintiff, v. SAP AG, *et al.*, Defendants.	CASE NO. 07-CV-01658 PJH (EDL) **OFFER OF PROOF REGARDING ORACLE'S HYPOTHETICAL LICENSE DAMAGES**

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I. INTRODUCTION

In its September 1, 2011, ruling granting judgment as a matter of law and a conditional new trial, the Court held Oracle's hypothetical-license evidence insufficient. The order stated that if Oracle rejected the remittitur (as Oracle subsequently did), it would "order a new trial as to actual damages in the form of lost profits/infringer's profits only." Dkt. 1081 at 20:5-7. Oracle subsequently moved to clarify that hypothetical-license evidence was admissible in the new trial, and alternatively sought reconsideration. On May 15, 2012, the Court denied Oracle's motion. Dkt. 1162. As a result, Oracle's hypothetical-license theory, and all evidence admissible only to support that theory, are excluded from the new trial.

The Court is familiar with the substance and purpose of Oracle's hypothetical-license evidence from the first trial and Oracle's prior offer of proof as to cross-sell/upsell evidence. Dkt. 989. Oracle submits this offer of proof to identify the evidence that Oracle would present, if permitted, at the new trial to prove the fair market value of a hypothetical license. This includes new evidence not admitted at the first trial.

II. PURPOSE AND RELEVANCE OF PROFFERED EVIDENCE

The purpose and relevance of this evidence is to establish one measure of Oracle's damages for Defendants' copyright infringement. Under the Copyright Act, Oracle is entitled to recover its actual damages. 17 U.S.C. § 504(b). One measure of these damages is the fair market value of a license to use the Oracle software that Defendants infringed. *E.g.*, *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708-09 (9th Cir. 2004); *Jarvis v. K2 Inc.*, 486 F.3d 526, 533-35 (9th Cir. 2007); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 513 n.6 (9th Cir. 1985); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1174 & n.20 (9th Cir. 1977). The value of such a license may be determined by, among other things, the license fee that Oracle and SAP would have agreed to in a hypothetical negotiation. *Jarvis,* 486 F.3d at 533-34 (damages include "what a willing buyer would have been reasonably required to pay to a willing seller for plaintiffs' work"); *Polar Bear,* 384 F.3d at 709 (jury may consider "hypothetical lost license fee" to determine actual damages); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 164-67 (2d Cir. 2001).

The proffered evidence is relevant to determine the license fee upon which Oracle and SAP would have hypothetically agreed. As detailed in Oracle's briefing on post-trial motions and Oracle's motions to certify the JMOL/new trial order for immediate appeal, courts have upheld hypothetical-license damages based on evidence similar to that proffered by Oracle here. *E.g., Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1130-31 (S.D.N.Y. 1970) (setting out factors to consider, including profits that plaintiff could expect to make on sales of its product if it did not license), *modified and aff'd*, 446 F.2d 295 (2d Cir. 1971); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538 (Fed. Cir. 1995) (affirming hypothetical-license damages award based on profits plaintiff would have expected to make if it did not grant license); *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371 (Fed. Cir. 2001) (affirming hypothetical-license damages based on profits defendant expected to make from infringing, based on defendant's contemporaneous business plan); *Snellman v. Ricoh Co.*, 862 F.2d 283, 289 (Fed. Cir. 1988) (affirming jury's consideration of internal "document projecting [defendant's] anticipated sale" of infringing products in support of hypothetical-license damages) (similar); *TWM Mfg. Co., Inc. v. Dura Corp.*, 789 F.2d 895, 900 (Fed. Cir. 1986) (affirming hypothetical-license damages based on "pre-infringement internal memorandum" on defendant's anticipated profits); *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197 (Fed. Cir. 2010).

III. SUBSTANCE OF PROFFERED EVIDENCE

If permitted, Oracle would introduce at the new trial all of the hypothetical-license evidence it introduced in the first trial, plus additional evidence. In part, the additional evidence would address profits that Oracle expected from upsell and cross-sell licensing and the development costs that SAP would have expected to save by using Oracle's software instead of developing its own software. This evidence is summarized below.

A. Hypothetical License Evidence

1. Oracle And SAP's Competitive Relationship In The Enterprise Resource Planning Software Market And Their Investments In Their Copyrighted Software Are Objective Evidence Of A Multi-Billion Dollar Valuation Of The Copyrighted Material In Suit.

1. In January 2005, as today, Oracle and SAP competed fiercely in the enterprise software industry:

- SAP was "a much larger company [than Oracle] in the applications segment." Declaration Of Lisa Chin In Support Of Oracle's Opposition To SAP's Motion For JMOL Or New Trial, Dkt. 1058 ("Chin Decl."), Ex. A (Phillips 517:8-14, 521:16-522:4, *cf.* Brandt 686:7-687:8).[1]
- In January 2005, SAP had a 57% market share in enterprise application software, as against Oracle's 12% and PeopleSoft's 11%. Chin Decl., Ex. Z (PTX 157) at p. 4.
- Before Oracle acquired Siebel in 2006, Siebel was the market leader for CRM software and SAP and Oracle were roughly equal in the CRM market. Oracle had 6.8% of that market, SAP 6.7% and, prior to Oracle's acquisition, Siebel had 10.7% of the CRM market. Declaration Of Kevin Papay In Support Of Oracle's Offer Of Proof ("Papay Decl."), Ex. B (PTX 680) at p. 4.

2. Enterprise software is very difficult, laborious, and expensive to develop. Oracle devotes "massive" resources to that "long and arduous process." Chin Decl., Ex. A (Screven 452:6-453:11, Ellison 760:13-22). Oracle depends on high-margin maintenance, support and service revenue to fund this multi-billion dollar process:

- Oracle generates revenues and profits through licensing the copyrighted

[1] Testimony from the first trial that is attached to the Chin or Papay Decls. is cited as "[Speaker] Page:Line," and other trial proceedings are cited "Tr. Page:Line." Deposition testimony attached to the Chin or Papay Decls. is cited as "[Witness] Depo Page:Line." Trial exhibits attached to the Chin or Papay Decls. are cited as PTX and JTX.

software it develops to end users as well as contracting with those end users to provide ongoing maintenance, support and service on its products. As is common in the industry and necessary for innovation to flourish, Oracle funds its R&D through its profits on license revenues as well as software maintenance fees, which customers pay to obtain annual support that includes technical assistance, fixes, and updates, which are provided to Oracle's customers while they remain on support contracts with Oracle. Chin Decl., Ex. A (Screven 453:12-23, Ransom 421:1-7).

- Oracle earned $4.8 billion in maintenance and support revenue (and another $276 million in advanced product services) in the past four quarters before SAP's infringement began. *Id.*, Ex. QQ (PTX 4809) at p. 4.
- Oracle's maintenance and support revenue enable Oracle's thousands of developers and support employees to enhance and advance its software, providing an important source of funding for Oracle's $1.3 billion annual R&D investment. *Id.*, Exs. A (Ransom 428:6-13, Ellison 761:9-25), QQ (PTX 4809) at p. 4.
- The loss or gain of a small percentage of customers has a large effect on the supplier's profits and the supplier's ability to invest in research and development. Larry Ellison, Oracle's CEO, testified that "[t]he cost of developing software and continuously improving software is vastly more expensive than the cost of delivering it." *Id.*, Ex. A (Ellison 762:17-19, 762:22-24). Because the total cost of servicing additional customers is low, software support is "a very, very high-margin business, in excess of 90 percent." *Id.*, Ex. A (Ellison 762:1-10).
- Charles Phillips, Oracle's former Co-President, testified that if customers are lost, the supplier loses the profit from those customers "if you don't have the customers, you can't fund the R&D. . . ." *Id.*, Ex. A (Phillips

532:9-11).

- Charles Rozwat, Oracle's former Executive Vice President of Product Development and current Executive Vice President of Oracle Customer Support Services, would testify that Oracle spends billions of dollars each year to employ over ten thousand employees who develop the copyrighted software at issue. He would further testify that a large portion of these expenses is spent on the development of ongoing support materials for customers, including through Oracle's Lifetime Support and Applications Unlimited programs.

3. Both Oracle and SAP rely on intellectual property protections to invest the enormous sums required to develop and improve enterprise software. Intellectual property protection allows a company to recoup its development investments and eliminate free-riding on its efforts. Without that protection, Oracle and SAP risk their ability to earn profits, invest in ongoing development, and ultimately survive:

- Larry Ellison, Oracle's CEO, testified that, "we'd be pretty close to going out of business" without IP protection. Chin Decl., Ex. A (Ellison 760:24-761:8).
- Edward Screven, Oracle's Chief Architect, testified that "[i]f Oracle did not have intellectual property rights, then there is no way that Oracle could have paid for the engineering to make the Oracle database what it is today" and build additional products. *Id.* (Screven 457:25-458:1, 458:17-20); *see also id.* (Phillips 516:5-12).
- Leo Apotheker, SAP's former CEO, testified that "[t]he entire software industry was founded on IP rights." Chin Decl., Ex. TT (PTX 4822 (Apotheker Depo 104:7-8; 104:15-25)). Werner Brandt, SAP's CFO, stated "SAP's business and Oracle's business depends on [their] intellectual property." *Id.*, Ex. A (Brandt 680:1-3).
- Shai Agassi, a former SAP Executive Board member, testified that "[a]t

SAP, we believe that without the ability to protect IP, most companies will no longer invest so much of their current revenues in future product innovation." *Id.*, Ex. B (Agassi Depo 27:4-15), admitted Tr. 594:18.

- Tim Crean, SAP's Chief IP Officer, would testify that intellectual property "can be valuable" to a company, and that the purpose of protecting intellectual property "is to provide an incentive to give exclusive rights to the owner, and by doing so, that provides an incentive for people to invest in innovation." Papay Decl., Ex. C (Crean Depo 35:3-8, 36:19-37:6). He further would testify that copyrights "provide economic motivation for companies to innovate." *Id*. (Crean Depo 47:17-20). He also would testify that SAP's software licenses tend to have restrictions on how a licensee can use the software. *Id*. (Crean Depo 47:17-20).

2. Oracle's $11B PeopleSoft Acquisition Is Objective Evidence Of A Multi-Billion Dollar Valuation Of The Copyrighted Materials In Suit

4. Oracle paid $11 billion for PeopleSoft because the copyrighted PeopleSoft and J.D. Edwards software would allow Oracle to earn billions in recurring revenue from thousands of customers:

- Oracle completed the $11 billion acquisition of PeopleSoft in January 2005. Chin Decl., Ex. A (Meyer 910:12-14).
- PeopleSoft took in $1.2 billion in revenue during the four quarters preceding the acquisition, and had 8% annual revenue growth. *Id.*, Ex. QQ (PTX 4809) at 4.
- Oracle's conservative financial modeling called for it to obtain $5.4 billion in PeopleSoft customer support revenue alone in the first four years after the deal's announcement. Papay Decl., Ex. D (PTX 4809) at p. 59; Chin Decl., Ex. A (Catz 842:7-843:22).
- Oracle's President Safra Catz explained that its pre-acquisition projections, based on the PeopleSoft customers Oracle expected to retain,

"were the basis for asking permission from the board of directors to spend . . . $11 billion and to take on all the liabilities that come with PeopleSoft and the assets. So those models are literally the key justification to spend $11.1 billion." Chin Decl., Exs. A (Catz 846:12-21, 842:12-843:1, 864:20-865:6), QQ (PTX 4809).

- Based on Oracle's pre-acquisition projections, Oracle paid roughly $1 billion per percentage point of ERP application market share. *See* Chin Decl., Exs. A (Meyer 932:16-21), Z (PTX 157).
- Douglas Kehring, the principal person assisting Safra Catz with the financial and valuation analyses in conjunction with Oracle's acquisition of PeopleSoft, would testify that Oracle based its projections on publicly available financial information from PeopleSoft itself, and information from the financial analyst community, as it related to the historical performance of the business. Ms. Catz and Mr. Kehring would testify that Oracle created its projections in consultation with investment bankers, who also studied PeopleSoft's historical performance and PeopleSoft's historical ability to generate revenues using the copyrighted works. Ms. Catz and Mr. Kehring would describe the extensive due diligence and investigations they conducted into PeopleSoft's financial performance. They would also testify that Oracle used PeopleSoft's historical ability to generate revenues as a benchmark for projecting Oracle's ability to generate revenues using the same copyrighted software.
- Oracle's acquisition model relied on the informed and conservative assumption that Oracle would retain in each subsequent year more than 90% of the nearly 10,000 PeopleSoft customers and receive the accompanying revenue stream for at least ten years. Chin Decl., Exs. A (Phillips 527:17-528:1, 528:17-25, Catz 854:18-21), QQ (PTX 4809), JJ (PTX 615).

- Safra Catz, Oracle's President, testified that "[h]aving a customer base that renews support and that stays with you over time is a huge value," because those customers provide the "high-margin recurring revenue" Oracle needs to re-invest in R&D and "accelerate[ ] innovation." Chin Decl., Exs. A (Catz 854:1-12), RR (PTX 4811) at 27.
- Charles Phillips, Oracle's former Co-President, testified about that competitive cycle: "[T]he more customers you have, the bigger R&D budget you can have, the more developers you can have. The more developers, the more innovation." Chin Decl., Ex. A (Phillips 528:2-16).

5. Oracle paid $11 billion for PeopleSoft because the copyrighted software gave Oracle access to a larger customer base, which improved Oracle's competitive position relative to SAP, and which threatened SAP's leadership in the market:

- Oracle's acquisition of PeopleSoft's 9,920 customers nearly doubled Oracle's ERP application market share, and made it a stronger competitor in that market. Chin Decl., Exs. A (Phillips 518:1-11, Meyer 932:3-935:7), Z (PTX 157) at p. 2.
- Charles Phillips, Oracle's former Co-President, testified that "[I]f someone else has three or four times as many customers as you can, and you have the same costs, eventually they can spend more, and you will never catch up." Chin Decl., Ex. A (Phillips 517:20-25); *see also id.* (Phillips 525:25-527:8).

6. SAP recognized that Oracle's acquisitions threatened SAP's dominance in the market:

- An SAP Executive Board presentation described the Board's concern: "Oracle has positioned itself to aggressively challenge SAP for leadership in business software solutions."[2] Chin Decl., Ex. BB (PTX 171) at p. 3; *see also id.*, Ex. A (Phillips 517:8-518:11, Meyer 934:10-935:7).

- SAP had suffered a recent "share price drop," "media interest" in the PeopleSoft acquisition was "high," and so was "internal pressure at SAP . . . to 'take on Oracle.'" Chin Decl., Ex. BB (PTX 171) at 3.
- A March 2006 SAP Midterm Strategy document explained, "[t]hrough its acquisitions, Oracle has emerged as the number one competitor for SAP." Papay Decl., Ex. E (PTX 294) at p. 6.
- SAP believed that as a result of Oracle's acquisition of Siebel, SAP's "competitive edge" in CRM products was "diminished by 40%," resulting in 1.52 billion euros of SAP software revenue being "at risk over 3 years." Chin Decl., Ex. DD (PTX 245) at p. 4. Without use of the copyrighted software, SAP recognized that its "ability to win" would be significantly diminished. *Id*.

3. SAP's Strategy And Expectations For TN Are Objective Evidence Of A Multi-Billion Valuation Of The Copyrighted Material In Suit

a. TN's Maintenance Offering, Based Integrally On Infringement Of The Copyrighted Material In Suit, Was The "Major Cornerstone" Of SAP's Plan To Obtain Billions Of Dollars In Business By Taking Oracle Customers

7. In response to Oracle's purchase of PeopleSoft, SAP devised a "dramatic, market-changing" program to mount an "immediate and serious challenge to Oracle." Chin Decl., Exs. Y (PTX 141) at p. 5, A (Brandt 694:11-15). That program, called Safe Passage, was designed to convert thousands of customers from Oracle/PeopleSoft/JDE applications to SAP software, which would allow SAP to earn billions of dollars. Safe Passage relied on SAP's immediate purchase of TomorrowNow ("TN", which provided half-price, or cheaper,

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[2] SAP's Executive Board comprised its most senior executives. Chin Decl., Ex. A (Trial Tr. 1448:6-11).

maintenance to PeopleSoft and JDE customers in competition with PeopleSoft. *Id.*, Ex. B (Agassi Depo 84:3-8, 88:6-12):

- SAP knew it had to move quickly to capitalize on market "uncertainties" "in this very short time frame, from January to February of 2005, to gain this competitive advantage." *Id.*, Ex. A (Brandt 684:20-685:5).
- In December 2004, the SAP Executive Board had decided to look into offering PeopleSoft support in order to "take away the maintenance revenue stream" from Oracle, and identifying a company in the short term was preferred. Papay Decl., Ex. F (PTX 2). SAP's goal was to "serve the customers that had doubt" immediately after the PeopleSoft acquisition closed. Chin Decl., Exs. B (Agassi Depo 100:18-102:18), Y (PTX 141) at p. 4. SAP planned to use the TN announcement "to create a 'good level' of market disruption" and turn momentum in its favor. Chin Decl., Exs. A (Zepecki 610:12-611:2), Ex. N (PTX 7) at 3.
- SAP's "Executive Board agree[d] to make a special offer to PeopleSoft/SAP customers to take over responsibility for the maintenance of their PeopleSoft HR installations and for potentially upgrading to mySAP." Papay Decl., Ex. G (PTX 3) at p. 2. That Safe Passage program was premised on SAP offering "full product maintenance and support for all PeopleSoft and J.D. Edwards products . . . through TomorrowNow." Papay Decl., Ex. H (PTX 24) at pp. 8, 20.
- SAP planned to "provide that important maintenance and support for PeopleSoft and J.D. Edwards customers through TomorrowNow." Chin Decl., Exs. A (Brandt 683:17-20), T (PTX 23) at p. 3 (TN would be "the vehicle through which [customers] would get the maintenance services.").
- SAP's Safe Passage "applie[d] to all PSFT/JDE customers" with a "focus" on "joint SAP customers." Papay Decl., Ex. I (PTX 193) at p. 11. SAP would "not turn down new PSFT/JDE customers, even if they intend to

initially convert on a partial basis." *Id*.

- A January 2005 SAP "Business Case" presentation indicated the short time to market was a strength of the TN business plan, and touted a "public relations win" to have "[t]he bragging rights for having more PSFT customers under service than Oracle." Papay Decl., Exs. J (PTX 129) at pp. 6, 9, K (PTX 10) at 1.
- The very "purpose of acquiring TomorrowNow was to acquire a company that could help SAP provide maintenance and support to PeopleSoft customers," as "part of an overall plan of SAP to try to convert PeopleSoft customers and J.D. Edwards customers to SAP customers." Chin Decl., Ex. A (Brandt 680:18-25). *See also* Papay Decl., Ex. L (PTX 23) at p. 12 ("The TomorrowNow acquisition really helps us hold over the PeopleSoft JDE customers.").
- SAP's January 19, 2005 press release announcing its acquisition of TN and launch of the Safe Passage program stated it would provide a "comprehensive offering for SAP customers running solutions from PeopleSoft and JD Edwards (JDE) with a flexible road map that includes SAP applications, technology and maintenance services." Papay Decl., Ex. M (PTX 148) at p. 1.
- SAP's "rationale" for building Safe Passage around TN "is more around the value . . . that these customers represent as a potential future set of customers for SAP applications. And . . . the value was estimated by Oracle, rightfully or wrongly, as $10 billion." *Id.*, Ex. L (PTX 23) at p. 14.
- SAP saw TN as the "key" to its ultimate goal because customers could defer the expensive decision to switch software, but could keep their old software supported with TN at half the cost, then switch to SAP software later. *Id.*, Ex. N (Oswald Depo 271:22-274:12) and Chin Decl., M

(PTX 6).

- SAP's top executives considered TN "instrumental" and the "cornerstone of [the] Safe Passage program," designed to recruit PeopleSoft customers uncertain about their future because of the Oracle acquisition. Chin Decl., Exs. H (Ziemen Depo 71:12-71:19, 302:9-302:17), GG (PTX 380), HH (PTX 404); Papay Decl., Ex. O (PTX 948) at p. 1.
- TN was, in fact, the "major cornerstone of our go-to-market strategy as our key Service-delivery unit." Chin Decl., Ex. AA (PTX 161) at 3; *see also* Chin Decl. Exs. H (Ziemen Depo 485:3-14), admitted Tr. 514:13 (TN was "key part" of Safe Passage), C (Hurst Depo 77:20-78:1, 78:8-20), admitted Tr. 758:21.

8. SAP could achieve its goal only through TN, including TN's massive infringement:

- SAP's Brandt testified that "TomorrowNow was the only company in North America that had the capacity to do what SAP wanted done." Chin Decl., Ex. A (Brandt 683:21-684:1).
- SAP's board was informed that research "has not provided us with any meaningful competitors for TomorrowNow in this space," and "the only vendor recommended by [industry analyst] Gartner for this third party maintenance is TomorrowNow." Papay Decl., Ex P (PTX 5) at p. 1; *see also* Chin Decl., Ex. S (PTX 19) at p. 3 ("Our market research shows that TomorrowNow is the only meaningful North American provider of third party PeopleSoft maintenance services.").
- Arlen Shenkman, SAP's Director of Corporate Finance, would testify that he looked into alternatives to SAP's purchase of TN, but at the time, there was no "alternative possibility to TomorrowNow in terms of the desire to provide support services for PeopleSoft customers." Papay Decl., Ex. Q (Shenkman Depo 29:8-11, 30:6-19). Shenkman would further testify that

at the time, Shenkman's research showed that "there was no meaningful North American competitor to TomorrowNow." *Id.*, Ex. Q (Shenkman Depo 36:16-37:2). According to Shenkman, TN was the "single target in mind for acquisition." *Id.* (Shenkman Depo at 37:8-10).

- Jeffrey Word, assistant to SAP board member Shai Agassi, would testify that in December 2004, SAP did not evaluate any other third-party support provider besides TN. Papay Decl., Ex. R (Word Depo at 43:5-14).
- Christopher Faye, SAP's Director of IP Transactions, would testify that SAP would not be able to "scale" TN if customer environments did not reside on TN's servers. Papay Decl., Ex. S (Faye Depo at 52:9-23).

b. The Confidence SAP Placed In TN's Ability To Hurt Oracle And Convert Thousands Of Customers To SAP Is Objective Evidence Of A Multi-Billion Dollar Valuation Of The Copyrighted Materials In Suit

9. SAP's "number one single-minded ambition" for Safe Passage was to convert thousands of Oracle customers to SAP software. Chin Decl., Ex. A (McDermott 1458:19-1459:7):

- The top SAP executives developed and executed on the TN acquisition plan to convert Oracle's customers to SAP. *Id.* (Brandt 682:9-685:5).
- SAP projected TN would be the "bridge for future SAP license business" to "capture PeopleSoft customers as SAP customers." *Id.*, Exs. W (PTX 43), A (Zepecki 602:9-19).
- Using TN to as the cornerstone of its Safe Passage program, SAP planned to "enable[] future license revenue, to grow maintenance contract volume taken away from Oracle and to generate additional maintenance revenue for SAP." *Id.*, Exs. C (Hurst Depo 40:14-42:16, 77:20-79:10, 548:22-549:22), LL (PTX 958) at p. 4.
- SAP's Business Case to the Executive Board for the TN acquisition projected that the Safe Passage program would both generate maintenance

revenue and, most important, enable future SAP license revenue. Chin Decl., Exs. CC (PTX 177), H (Ziemen Depo 269:13-25).

- Agassi testified that "[i]t was more important to get the customers converted rather than the maintenance revenues." *Id.*, Ex. B (Agassi Depo 310:17-24), admitted Tr. 594:18; *see also* Papay Decl., Exs. T (PTX 154) at p. 3 (minutes of 1/20/2005 Executive Board meeting approving Safe Passage and TomorrowNow offering) ("Guideline" for the PeopleSoft program "should not be measured in revenues, rather numbers of converted customers."), H (PTX 24) at p. 8.
- As SAP's own document – dated 1/20/05, within two days of the hypothetical negotiation – explained, "at stake" were literally billions of dollars: "There is a lot at stake: 9,200 PeopleSoft and JD Edwards customers, $1.3B in annual maintenance revenue, and Oracle's $10.3B acquisition cost." Papay Decl., Ex. U (PTX 4850) at p. 1.
- SAP's Shenkman would testify that the goal of Safe Passage was to "obtain customers through maintenance who could ultimately evolve into direct SAP software customers." *Id.*, Ex. Q (Shenkman Depo 33:12-19).

10. Oracle would ask SAP AG Board members (as well as Mr. Hurst, Mr. Crean, Mr. Faye, Mr. Trainor, Mr. Shenkman, Mr. Mackey, and Mr. Word), or if necessary play additional deposition testimony, about their expectation for the Safe Passage program and TN. Based on their deposition testimony, Oracle expects that they would testify that they expected TN to grow rapidly, that they expected Safe Passage and TN to generate significant new SAP license revenue, and that they expected TN to help SAP create, enhance, or solidify relationships with new and existing customers that would lead to increased and repeated sales of software, consulting, and support services over a long period of time. Near the time of the hypothetical January 18 or 19 license negotiation, SAP's executive board members made repeated, specific projections of how many customers Safe Passage would convert:

- SAP's December 23, 2004 "Roadmap for Customers to SAP," presented to the Executive Board and based on the board's "extensive guidance," projected that 3,000 customers would convert to SAP maintenance and 1,375 customers would convert to SAP software. Chin Decl., Exs. P (PTX 12), SS (PTX 4814) (Agassi, Apotheker, Kagermann, Oswald). The same projection predicted that SAP would earn $897 million in revenue from the TN acquisition in just three years. *Id.*, Exs. SS (PTX 4814), P (PTX 12), H (Ziemen Depo 66:11-14, 67:24-68:1, 68:9-11, 87:2-17). The Board unanimously adopted the projection. *Id.*, Exs. G (Oswald Depo 44:3-6), P (PTX 12). Board member Agassi expected that SAP could do even better. *Id.*, Ex. B (Agassi Depo 310:17-311:23).

- SAP's January 16, 2005, Safe Passage Executive Overview stated a goal of converting the "majority" of PeopleSoft and J.D. Edwards customers (5,000) to SAP software. *Id.*, Ex. Y (PTX 141) (Agassi, Apotheker, Oswald).
- SAP's January 20, 2005 "Safe Passage: Winning Customers and Markets from Oracle-PeopleSoft-JD Edwards" presentation indicated to the entire executive board a goal of converting "50%" (4,960) of PeopleSoft and J.D. Edwards customers to SAP software. *Id.*, Ex. U (PTX 24) at 6; Papay Decl., Ex. V (PTX 151) (entire executive board). SAP planned to convert all shared customers. Chin Decl., Ex. Y (PTX 141) at p. 6.
- Brandt testified that SAP's "goal was to convert approximately 50 percent of the PeopleSoft and J.D. Edwards customer installations to SAP." *Id.*, Ex. A (Brandt 682:17-20).
- SAP's January 25-26, 2005 TomorrowNow Integration presentation indicated that 2,000 to 4,000 customers would convert to TN maintenance. *Id.*, Ex. AA (PTX 161) at p. 4.
- Conversion of those customers would be incredibly valuable to SAP, for both the approximately 5,000 customers in their own right and the added

benefit of disrupting Oracle's $11 billion acquisition and shrinking Oracle's application market share, for which Oracle had just paid about $1 billion per percentage point. *Id.*, Exs. A (Brandt 693:3-694:10), U (PTX 24); Papay Decl., Ex. W (Agassi Depo 314:5-318:3).

- SAP stood to gain several times over, by shoring up its endangered dominance while seizing an unprecedented opportunity to attack Oracle when it was most vulnerable because of PeopleSoft customer uncertainty, take Oracle's software customers, undercut its acquisition strategy, weaken it competitively, and earn billions in the process. Chin Decl., Exs. A (McDermott 1466:2-1467:3), B (Agassi Depo 69:20-70:17, 71:18-22, 74:18-21).

11. TN's infringement of Oracle's copyrighted software was also extremely valuable to SAP as "a strategic weapon against Oracle." Contemporaneous SAP documents show SAP deliberately sought to harm Oracle, disrupt Oracle's revenue and plans, and that SAP considered this interference as one of the key benefits of the Safe Passage program and TN:

- SAP's Executive Board approved a Safe Passage presentation in January 2005 explaining that the"Goal" of the program was to convert 50% of PeopleSoft and J.D. Edwards customers to SAP, and thereby "Disrupt Oracle's ability to pay for the [PeopleSoft] acquisition out of cash flow," "Shrink their share of the application market" and "Discredit their efforts to create a next generation application platform." Chin Decl., Ex. U (PTX 24) at p. 6.
- SAP's "Strategy" for Safe Passage was that by offering full maintenance and support of PeopleSoft and J.D. Edwards systems, and migration tools and favorable upgrade licensing terms to SAP products, TN would help take Oracle's revenue and market share, lessen Oracle's ability to pay for the PeopleSoft acquisition from cash, and "SAP [would] siphon off the cash flow that Oracle needs to build or acquire it's [sic] next generation

applications" as well as "establish or re-invigorate relationships with potentially thousands of new and existing customers." *Id.*, Exs. Y (PTX 141) at p. 5, G (Oswald Depo 89:1-23); Papay Decl., Ex. W (Agassi Depo 316:24-318:3).

- Oswald testified that the goal was to "Discredit Oracle's efforts to create a next-generation application platform" and TN was "part of the means to achieve" it. Papay Decl., Ex. N (Oswald Depo 101:3-13).
- SAP recognized among "opportunities" of providing current SAP customers PeopleSoft support that it would be "Disruptive to Oracle." *Id.*, Ex. X (PTX 15) at p. 9. SAP further recognized that the JD Edwards World software maintenance business is extremely profitable for PeopleSoft/Oracle – affecting Oracle's ability to maintain this revenue stream could impact the ROI [return on investment] assumptions of the Oracle/PeopleSoft deal." *Id*. (PTX 15) at p. 3.
- Brandt, SAP's CFO and executive board member, testified that in addition to the revenue SAP expected, "SAP also expected to benefit from the disruption that the program would cause Oracle." Chin Decl., Ex. A (Brandt 684:20-685:5).
- SAP's "Business Case" for TN stated "An acquisition by SAP would create a good level of market disruption and force a reaction by Oracle." Papay Decl., Ex. Y (PTX 19) at p. 10. It also stated that TN provided "Opportunities" included Oracle "losing support revenue stream forces actions or reactions and is a distraction." *Id.*, Ex. (PTX 19) at p. 7.
- SAP's Shenkman would testify that the driver of SAP's acquisition of TN was to take away the maintenance revenue stream away from Oracle and to sell customers SAP software. Papay Decl., Ex. Q, (Shenkman Depo 28:16-23, 135:5-9). Oracle would play the testimony of James Mackey, SAP's head of Corporate Development, who also agreed that the "driver

of the deal was the opportunity to sell software applications of SAP to the PeopleSoft customers." *Id.*, Ex. Z (Mackey Depo 319:4-17).

- SAP's Word would testify that Safe Passage having success vis-a-vis Oracle was similar to SAP "pushing the knife in a little deeper." Papay Decl., Ex. R (Word Depo 207:8-21). He also would liken the effect of announcing Safe Passage to kicking Larry Ellison "in the nuts." *Id.* (Word Depo 208:14-18).
- SAP communications noted SAP's goal to "Disrupt Oracle's planned maintenance income stream from PSFT customers, making it more difficult for them to deliver their promises to the Street and the customer base." *Id.*, Ex. AA (PTX 171) at p. 20.
- SAP expected TN's standalone support business to have "negative margins," *i.e.*, lose money, the first few years, but had "other reasons besides revenue" for buying it, particularly as a "strategic weapon against Oracle." *Id.*, Ex. N (Oswald Depo 255:19-256:4); Chin Decl., Ex. H (Ziemen Depo 305:10-16, 18), admitted Tr. 514:13.
- SAP's Brandt testified that "anything that discredits [SAP's] major competitor helps [SAP]." *Id.*, Ex. A (Brandt 693:25-694:10).
- SAP's Agassi thought that the "bragging rights for having more PeopleSoft customers under service than Oracle may be all we need for a momentum swing." Papay Decl., Exs. W (Agassi Depo 145:25-146:7), K (PTX 10) at p. 1.
- Less than two weeks before SAP announced its acquisition of TN, SAP board member Agassi predicted to SAP America executives that when the TomorrowNow deal was announced, "ORCL's share price will probably go down by 10% that same minute." *Id.*, Ex. BB (PTX 18) at p. 1.
- Oracle would submit evidence that Oracle's market capitalization on January 6, 2005 was approximately $65 billion, so a 10% drop would have

been a $6.5 billion loss in value for Oracle. Papay Decl., LLL (Historical Market Cap Screenshot).

- SAP's Shenkman would testify that SAP attempted to announce the acquisition of TN "as close as we could to . . . Oracle closing the PeopleSoft transaction" for the "public relations" benefit. *Id.*, Ex. Q (Shenkman Depo 33:2-8). "The PR was an important factor." *Id.* (Shenkman Depo 175:2-18).
- SAP CEO Apotheker stated that "we need to inflict some pain on oracle. Is there a chance to close a few TN deals in the next coming days …?" *Id.*, Ex. CC (PTX 28) at p. 1.
- SAP's damages expert, Stephen Clarke, testified that it is "likely" and "reasonable to assume" that reducing Oracle's ability to invest in research and development and interrupting Oracle's maintenance revenue stream would help SAP. Chin Decl., Ex. A (Clarke 1776:2-17, 1778:13-21).
- SAP's damages expert, Clarke, also testified that interrupting Oracle's maintenance revenue stream and discrediting its efforts to create a next-generation application platform would "be a much more direct benefit" to SAP that is not measured in short-term revenues. Chin Decl., Ex. A (Clarke 1778:13-21, 1776:19-1777:4).

c. The Value Of The Required License Is Evidenced By Its Scope and Duration.

12. The scope of TN's infringement was breathtaking, and the value of the required license correspondingly high:

- TN copied millions of updates and support materials for J.D. Edwards World, J.D. Edwards EnterpriseOne, PeopleSoft and Siebel by downloading them from Oracle websites onto TN's computers. Chin Decl., Ex. A (Tr. 1447:16-21). It then further copied portions of those materials between TN's servers. *Id.* Many of the downloaded and copied files were infringing. *Id.*, Ex. K (JTX 2) at p. 6; Papay Decl., Ex. DD (JTX 3) at pp. 2, 4-5.

- When Oracle investigated and obtained discovery of TN's servers, Oracle found that at least over 10 million Oracle files had been downloaded by TN, over five terabytes in size. Chin Decl., Ex. A (Mandia 1381:21-25).
- TN itself counted approximately five million Oracle support files on its systems in 2008. *Id.* (Tr. 1447:22-23).
- TN copied five terabytes of Oracle downloads on its systems, and over ten terabytes of Oracle's application software and database software on its systems. *Id.* (Mandia 1383:6-24).
- TN's senior service automation developer testified: "Titan [TN's 'scraper'software] was hammering their [Oracle's] server so hard, downloading thousands and thousands of documents, I could see how many times the servers would crash by how many times my program had to break the connection and then reestablish it, re-navigate back to where it was and pick up where it left off." Papay Decl., Ex. EE (Ritchie Depo 33:23-34:12, 13:5-19), admitted Tr. 474:22.
- TN's infringement was also deliberate. One instant message exchange produced by TN readily admitted the infringement scheme was "true" and expressed surprise only that "they caught us":

> kimberley2229 . . . getting sued!
> kristin32532 . . . i know
> . . .
> kimberley2229 . . . : what are they saying in a nutshell
> kristin32532 . . . : that we illegally downloaded their stuff
> kristin32532 . . . used false information and customer id/pw to get it
> kimberley2229 . . . . : well, that's true
> kimberley2229 . . . . : wonder who on the inside told
> kristin32532 . . . . : i think they caught us

Papay Decl., Ex. FF (PTX 53) at p. 1.

13. The scope of the license needed to authorize TN's massive, deliberate activity would have been extraordinarily broad:

- As SAP's own damages expert, Clarke, conceded, the license SAP needed would have included the following rights among many others:
  - Volume: To make virtually unlimited copies of Oracle's software whenever needed – thousands of copies for some products
  - Internal Use: To keep its own copies of environments, fixes, patches and updates. . . .
  - Source Code: To make code line the same by copying one customer's software, labeling it for another customer, and applying the same TN-created fixes. . . .
  - Downloads Beyond Scope of License: To download more than what its customers were entitled to, for convenience and speed and to have a library. . . .
  - Downloads After Contract End-Dates: To download after Oracle termination dates.

Chin Decl., Exs. UU (PTX 7028) at pp. 1-2, A (Clarke 1862:25-17).

14. SAP's own witnesses acknowledged the unique value of a license to use a competitor's core software:

- SAP's CFO and executive board member Brandt testified he was "not aware of anyone at SAP" who had ever tried to license a competitor's basic software to compete with the competitor for maintenance and support of installations of the competitor's software. Papay Decl., Ex. A (Brandt 742:2-6). He had no idea how much SAP would charge Oracle for a license for all of SAP's software to compete with it. *Id.* (Brandt 742:7-13).
- SAP's damages expert, Clarke, never investigated or asked SAP what SAP would have demanded to give Oracle the same license that SAP needed from Oracle. *Id.* (Clarke 1745:1-8).
- Based on his deposition testimony, Oracle expects that Hasso Plattner, the

Chairman of SAP's Supervisory Board, would testify that in licensing intellectual property, the licensor might hope to earn a return on its investment in the licensed intellectual property. Papay Decl., Ex. GG (Plattner Depo 46:14-47:4). In other situations, the license fee could be determined by looking at the "market price" of the intellectual property. *Id.* (Plattner Depo at 47:11-48:2). Oracle expects he would further testify that a licensor would determine the license fee based on "market situation," and that the licensor can "charge what [it] want[s]" and can "calculate [it]self out of the market instantly." *Id.* (Plattner Depo at 53:1-10).

d. SAP's Deliberate Acceptance Of The Serious Liability And Reputational Risks Shows The Value Of TN To SAP

15. SAP's acceptance of the legal risk of infringement corroborates the value of SAP's infringement because, as Brandt acknowledged, "SAP would not lightly undertake a program that had serious liability risks because of its risk to SAP's reputation." Chin Decl., Ex. A (Brandt 695:2-8):

- In devising this strategy, every SAP Executive Board member fully understood "there could be substantial legal issues with TomorrowNow's service delivery processes." *Id.* (Brandt 718:8-21).
- The Board brought in John Zepecki, a recent PeopleSoft Vice President, to evaluate the deal, *id.* (Zepecki 596:1-9), because of his familiarity with PeopleSoft software and licenses. Zepecki told the Board it was "very likely that TomorrowNow is using the software outside the contractual use rights granted to them." Chin Decl., Exs. O (PTX 11) at 2, A (Zepecki 619:4-22).
- SAP knew in 2005 that "[i]t was inappropriate for TomorrowNow to provide support for customers on computers of TomorrowNow as opposed to on the computers of customers." *Id.*, Ex. A (Brandt 703:25-704:4).

- SAP knew that "in order to come up legally with bug fixes, legal fixes, compliance requirements, that would take R&D personnel at TomorrowNow." Chin Decl., Ex. A (McDermott 1483:20-1484:5). SAP also knew that TomorrowNow had no R&D employees, Papay Decl., Ex. HH (PTX 266) at p. 4, necessarily meaning that TN could not itself have developed the fixes, patches, and updates necessary to its operations.
- SAP also knew that it acquired "no intellectual property" in acquiring TN, *id.*, Exs. II (PTX 20) at p. 1, JJ (PTX 133) at p. 1, which necessarily meant that TN had to be using someone else's intellectual property.
- SAP's real-time risk assessments thus pointed out "serious liability issues with respect to the operation of TomorrowNow." Chin Decl., Ex. A (Brandt 694:16-23, 702:11-17). The TN Business Case that the SAP Executive Board evaluated before acquiring TN adopted Zepecki's warning essentially verbatim: "the access rights to the PeopleSoft software is very likely to be challenged by Oracle and past operating issues may be a serious liability if Oracle challenges." *Id.*, Exs. S (PTX 19) at p. 4, A (Brandt 717:1-18).
- SAP's own document said that "SAP will leave Texas corporation [*i.e.*, TN] in existence *as a liability shield* . . . ." *Id.*, Ex. S (PTX 19) at p. 5 (emphasis added).
- Board member Kagermann admitted that "[t]he risk of legal action by Oracle to TomorrowNow's access rights to PeopleSoft software was nevertheless a risk that SAP knowingly undertook when it decided to buy TomorrowNow." Chin Decl., Ex. E (Kagermann Depo 304:21-25, 305:2), admitted Tr. 1443:1-2.
- The Board specifically considered the billions in upside to SAP and harm to Oracle, "looked at those risks[,] and decided to acquire" TN "with the knowledge that there was a risk that Oracle would sue." *Id.*, Exs. E

(Kagermann Depo 304:21-25, 305:2), admitted Tr. 1443:1-2, G (Oswald Depo 84:7-11), B (Agassi Depo 53:14-17).

4. SAP Expanded The Scope Of The Infringement In 2006 By Directing TN To Offer Support For Siebel Customers.

16. Oracle's $6 Billion Siebel acquisition is objective evidence of a multi-billion dollar valuation of the copyrighted materials in suit:

- Oracle acquired Siebel in fall 2006 for $6.1 billion. Chin Decl., Ex. A (Phillips 541:17-23, 542:6-10, Catz 860:12-15); Dkt. 989 Ex. C (Meyer Report) at ¶266.
- Oracle's Siebel acquisition model projected it would receive $500 million in annual maintenance revenue from 4,000 acquired Siebel customers. Chin Decl., Exs. II (PTX 614), A (Meyer 1034:18-1036:1). Oracle's model was, again, conservative, particularly with its revenue inputs, which were less than analysts' expectations. *Id.*, Ex. A (Catz 860:16-861:14).
- "Once the decision was made by Oracle to consolidate [PeopleSoft, JDE, and Siebel] into Oracle, then it really became a much more heated battle between Oracle and SAP." *Id.*, Ex. A (McDermott 1454:24-1455:1).
- With its acquisition of Siebel's 4,000 customers, Oracle surpassed SAP in the customer relationship management (CRM) space. *Id.*, Ex. A (Catz 857:15-858:14).
- SAP foresaw an adverse €1.52 billion (about $2.2 billion) impact, and projected that its competitive positioning had dropped 40% overnight. Chin Decl. Exs. A (Meyer 1025:19-1026:24), DD (PTX 245) at p. 12.

17. In response to Oracle's acquisition of Siebel, SAP expanded TN's infringing service offering in 2006 to service and convert Oracle's Siebel customers. SAP's plans to use TN to mitigate Oracle's Siebel advantage, harm Oracle, and convert hundreds of Oracle Siebel customers to SAP, are objective evidence of a multi-billion dollar valuation of the copyrighted materials in suit:

- SAP decided “to expand the Safe Passage program to Siebel customers,” a decision that Brandt admitted was influenced by “Oracle’s acquisition of Siebel.” Papay Decl., Ex. KK (PTX 4824) (Brandt Depo 448:10-13, 4496-9).
- SAP’s Siebel service offering through TN, like that for PeopleSoft, was designed as “an enabler for future license revenue, to grow contract volume taken away from Oracle and to generate additional maintenance revenue for SAP.” Chin Decl., Exs. H (Ziemen Depo 484:14-485:14), admitted Tr. 514:13, G (Oswald Depo 289:17-290:1), admitted Tr. 652:17-18, EE (PTX 267) at p. 2.
- SAP believed TN’s opportunity to provide service to Siebel customers was “huge.” *Id.*, Ex. H (Ziemen Depo 484:24-485:2).
- An October 2005 “Siebel Safe Passage Program Playbook” indicated “the opportunity is to move the 300+ SAP customers SAP and Siebel have in common and migrate them to mySAP CRM.” Chin Decl., Ex. MM (PTX 960) at p. 2. SAP knowingly “authorized [TN] to service Siebel applications” even though “at that time [TN] didn’t have any people at all who had any experience with Siebel software.” Chin Decl., Ex. A (Brandt 721:1-8). As with PeopleSoft, the legal implications of that deficiency were outweighed by the financial and competitive gains SAP planned to achieve.

18. SAP also expanded TN’s infringing service to the Siebel product line due to TN’s strong success with PeopleSoft and J.D. Edwards. *See.* Section III. A. 5, below.

5. SAP’s Contemporaneous Documents Continued To Show That TN’s Use Of Oracle’s Intellectual Property Was Worth Billions of Dollars

19. Evidence throughout the period SAP used TN’s infringing service to harm Oracle while converting customers to SAP applications shows that TN’s use of Oracle’s copyrighted software was worth billions of dollars:

- In April 2006, SAP calculated TN's financial harm to Oracle and benefit to SAP: "Every $1 of 2005 closed [TN] business typically represents 1) $2 taken from Oracle's annual maintenance; 2) $20 taken away from any 10-year maintenance-based justification for the PeopleSoft/JDE takeover; 3) $10 increase to SAP's strategic license revenue pipeline." Chin Decl., Exs. NN (PTX 970), F (Nelson Depo 167:22-177:19 (over ten years, TN could take a billion dollars from Oracle and increase SAP revenue opportunities by a billion dollars)).
- In April 2006, SAP projected, "Over the long term, every $1 of TN stand-alone revenue this year represents $18 of originally expected Oracle revenue from their misguided acquisition strategy." *Id.*, Exs. V (PTX 37), A (Meyer 1028:2-1029:3, 1031:7-1032:2); *see also* Papay Decl., Exs. LL (PTX 373) at p. 14 ("$1 TN standalone revenue = $10 SAP license revenue pipeline" so "$11M FY06 YTD TN revenue = $110M SAP license revenue pipeline"), MM (PTX 295).

20. SAP's TN "weapon" remained "integral to SAP's efforts to attack Oracle" for years, right "up until the eve of Oracle's lawsuit." Chin Decl., Ex. G (Oswald Depo 294:5-10). The evidence shows SAP was successfully implementing its plan to use TN to hurt Oracle and take customers:

- In a June 2005 ZDNet article, Colin Sampson, SAP Asia Pacific Senior Vice President and Chief Operating Officer, is quoted saying that the Tomorrow acquisition was "an integral part of SAP's safe passage" program. Papay Decl., Ex. NN (Hurst Depo Ex. 155).
- A July 2005 SAP "Update on Safe Passage Program" presentation reported "customers taken away from Oracle" and "maintenance contract volume taken away from Oracle" within the first half of 2005. Papay Decl., Ex. OO (PTX 222).
- In July 2006, SAP's CEO, Apotheker, responds "Excellent Plan!" to email

about “Q1 Oracle Disruption Plan” to offer “Total TomorrowNow Lifetime Support with Free Maintenance.” *Id.*, Ex. PP (PTX 333) at p. 2.

- A November 2006 “TomorrowNow Status Update” presentation reports the “Key Achievements” of TomorrowNow in terms of maintenance revenue taken from Oracle. *Id.*, Ex. QQ (PTX 371).
- A December 1, 2006 SAP Executive Board presentation indicated that “TomorrowNow is a strategic investment and serves as a strategic weapon against Oracle.” *Id.*, Ex. RR (PTX 381) at p. 2.
- In a January 11, 2007 “Safe Passage Update” presentation made at an SAP Global Leadership Meeting, reporting TomorrowNow and Safe Passage results, SAP explains the “revenues justify the cost of the [TN] acquisition and additional operating expenses.” *Id.*, Ex. SS (PTX 953) at p. 28.
- In February 2007, an SAP Supervisory Board Meeting presentation confirmed that a key performance indicator (“KPI”) for TN was “Cumulated Maintenance Volume Taken Away From Oracle.” The presentation for SAP management continued to state that: “Value Proposition” of TN included “Hurt Oracle by taking away maintenance revenue,” “Serve[] as a bridge for future SAP license business” and “Provide [PeopleSoft, JD Edwards and Siebel] customers with a choice to migrate to SAP (at their own pace)”; trumpeting 41.4 million euros “reduction of Oracle maintenance revenue since acquisition of TomorrowNow”; TN “serves as strategic weapon against Oracle” by “Tak[ing] away maintenance revenue from Oracle” and “Creat[ing] pre-pipeline of future SAP customers.” Chin Decl., Ex. W (PTX 43) at pp. 2, 5; *see also* Ex. A (Brandt 684:20-685:10, 687:9-19).
- In March 2007, SAP noted in an email entitled “Safe Passage Overall Summary” that “TomorrowNow features prominently in everything we’re doing . . . .” Papay Decl., Ex. TT (PTX 8001).

- As late as October 2007 SAP reported a TN KPI of "Maintenance volume taken away from Oracle by TNow." Papay Decl., Ex. UU (PTX 8010) at p. 57.

6. Oracle And SAP Perspectives As Being Parties To A License

21. Oracle would submit evidence that Oracle would have licensed the infringed copyrighted software for an appropriate price:

- Oracle would submit evidence relating to the Oracle/SAP database reseller agreement. The agreement is between the same parties and relates to Oracle's crown-jewel software – here, Oracle's Database software. The agreement is evidence that the parties have in the past and would be in fact willing to license the software at issue, albeit only at the right price.
- Current and former Oracle executives, including Mr. Ellison, Ms. Catz, and Mr. Phillips, would testify, consistent with their prior testimony (and with Mr. Ellison and Ms. Catz's declarations submitted in support of Oracle's opposition to SAP's motion for summary judgment, Dkts. 539 and 485), that while they may have been disinclined to license the software at issue to their main competitor, they would certainly have done so (as with any business transaction) for an appropriate price. Though their inclination for Oracle to remain the exclusive user of Oracle's copyrighted software may have been a factor that might increase a relevant license fee, that inclination would not be a bar from Oracle and SAP, as reasonable parties, reaching an agreement on a license fee.

22. Oracle would submit evidence regarding how a license for the copyrighted works would affect its support business:

- Charles Rozwat, Oracle's current Executive Vice President of Oracle Customer Support Services, would testify that the vast majority of Oracle's customers renew support with Oracle every year. He would further testify that Oracle goes to great efforts to support and retain its customers. He would describe those efforts, including Oracle's support-specific research and development, Oracle's process for providing support, and Oracle's customer-outreach activities. He would further testify that if Oracle granted SAP a license for the copyrighted works, Oracle would have expected to need to greatly increase these efforts to retain customers.

23. Oracle would submit evidence regarding the amount SAP might charge for or pay for a license:

- Oracle would ask SAP AG Board members (as well as Mr. Hurst, Mr. Crean, Mr. Faye, Mr. Trainor, Mr. Shenkman, Mr. Mackey, and Mr. Word), or play additional deposition testimony, about the value SAP places on its own copyrighted software and the associated revenue streams. Based on their deposition testimony, Oracle expects they would testify that SAP's own copyrighted software generates significant recurring revenue for SAP, and that having exclusive rights over its copyrighted software is the reason SAP's maintenance contracts are renewed at an almost 100% renewal rate. Oracle expects they would also testify that SAP has in the past projected over 15 years of recurring revenue from these customers. Oracle expects they would also testify that the present value of that revenue stream would be in the billions of dollars. Oracle further expects that they would testify that providing Oracle with a license to SAP's own copyrighted software would significantly alter SAP's expectations as to how many of SAP's customers would renew support with SAP over time.
- Oracle would ask SAP AG Board members what they, as a willing licensee, would have been willing to pay to license the infringed Oracle Database. Oracle expects them to testify that various quotes generated by SAP personnel for purchase of an Oracle Database license were for a

license that would not allow for the use of Oracle Database made by TN. Oracle further expects them to testify that TN's use of Oracle Database exceeded the use authorized by the licenses contemplated by the SAP personnel who generated price quotes for a license. Oracle further expects them to testify that as a result, SAP would have expected a license to cost more than the price quotes generated by SAP personnel.

7. Valuation Of A Hypothetical License

24. The massive infringement, the value of the infringed IP and the customers put into play because of the infringement, and the top-level strategic business decisions behind the infringement set the scope of the hypothetical license. A prudent copyright owner and a prudent licensee, in the positions of Oracle and SAP, would have considered the extensive contemporaneous evidence of those factors to negotiate in January 2005 and, for Siebel, September 2006 for the licensee's right to use the licensed IP to make a reasonable profit while compensating the copyright owner in an acceptable amount. At the first trial, Oracle's damages expert, Paul Meyer, testified to the value of a hypothetical license based on these and other economic and legally accepted factors such as the *Georgia-Pacific* factors. That testimony is attached to the Chin Declaration as Exhibit A (Meyer 890:2-944:13, 970:20-1037:15, 1041:19-1048:25). If permitted, Oracle would offer substantially the same testimony at the second trial, and further support it with the additional evidence identified here. For the Court's convenience, we summarize it here.

Overview

25. The fair market value of a license is what a "willing" and "prudent" seller and a "willing" and "prudent" buyer would have agreed upon at the time the infringement began. Chin Decl., Ex. A (Meyer 898:7-899:17).

26. Meyer and Clarke agree that in this inquiry, the focus is on what was known at the time of the negotiation. "When I focus on this fair market value of the license issue, I really focus on information that was known at the time of the negotiation." *Id.* (Meyer 908:3-8). *See also* Papay Decl., Ex. A (Meyer 1332:8-1333:2). Clarke testified that the

valuation date for the license would have been January 18 or January 19, 2005, and "what [he] would be looking at is what would have been in the minds of SAP and Oracle on January 18th or January 19th." *Id.*, Ex. A (Clarke 1679:3-13, 1679:24-1680:4).

27. Meyer arrives at his opinions through careful consideration of all of this evidence. Chin Decl., Ex. A (Meyer 890:2-944:13, 970:20-1037:15, 1041:19-1048:25). As detailed below, using factors consistent with his analysis of the *Georgia-Pacific* factors, Meyer weighs each negotiating party's contemporaneous perspective and the evidence of their projected financial and other strategic motivations. *Id.* (Meyer 897:15-906:1). He applies an established valuation methodology to that evidence to determine the fair market value of SAP's infringing use of Oracle's copyrighted software. *See, e.g., id.* (Meyer 993:9-994:22, 995:2-1000:11, 1011:22-1014:8, 1032:25-1034:17, 1036:2-21, 1043:23-1046:25). Considering all the evidence, Meyer opines that the fair market value of SAP's use of Oracle's copyrighted software was at least $1.656 billion: $1.5 billion for PeopleSoft, $100 million for Siebel, and $55.6 million for the Oracle Database. Chin Decl., Ex. A (Meyer 1016:13-1017:8, 1036:22-1037:15, 1045:16-1047:11). (These figures do not include evidence of Oracle's upsell and cross-sell opportunities or SAP's saved development costs, which Oracle submits should be considered by the jury and the experts, but which the Court excluded from evidence in the first trial. Oracle describes that evidence in Section III. B, below).

<u>Form of License</u>

28. Meyer would testify, as he did at the November 2010 trial, that the payment would be a lump sum, not a royalty based on a percentage of revenue or profits:

- With a percentage royalty, "all the risk is on Oracle" because "they had to pay those amounts up front and they can't go back and redo those deals. So they are going to have $17 billion sitting out there where they have to execute, and the biggest competitor in the world is going to have a license to their very important software." *Id.* (Meyer 910:5-912:12,913:9-15). He testified that "would not be appropriate." *Id.* (Meyer 913:9-15, *see also* 1328:21-1329:21).

- Oracle executives confirmed that only a lump sum payment would have made sense in this business context, and that lump-sum licenses are common. Having put at risk billions of dollars up front to obtain PeopleSoft and Siebel, it would only make sense for Oracle to obtain "a good chunk of that up front" before granting access to its biggest competitor. Chin Decl., Ex. A (Phillips 522:23-523:5, 541:19-23, Ellison 769:1-19). Lump-sum royalty licenses are common in high-tech markets, including SAP's own licenses to use Java and Sybase and SAP's "outside in" license. Papay Decl., Ex. A (Catz 1891:16-21, 1892:4-7, 1894:22-1895:12). Qualcomm and Samsung agreed to a lump-sum license for over $1 billion. *Id.* (Catz 1913:19-1914:3).

PeopleSoft Software

29. Meyer determines the value of a hypothetical license to use Oracle's PeopleSoft software. As one consideration, he determines the profit SAP would have expected to make from using the software:

- Meyer uses SAP's expected number of customers it would take away from Oracle, SAP's average per-customer revenues obtained from SAP's documents, SAP's costs (30% of revenue), an expected attrition rate of 3.5% of customers per year, and the future value of converted customers. Meyer also reduced the profits to present value using SAP's discount factor of 14%. Chin Decl., Exs. A (Meyer 993:25-998:25), Ex. P (PTX 12), Ex. Q (PTX 13), Ex. T (PTX 23), Ex. U (PTX 24), Ex. Y (PTX 141), Ex. AA (PTX 161); Papay Decl., Exs. VV (PTX 533), WW (PTX 1760), XX (PTX 1761), YY (PTX 1762).
- Using this methodology and these figures, Meyer calculated the profits that SAP stood to gain from using the PeopleSoft software through October 2008, when it shut down TomorrowNow, depending on the number of customers that switched to SAP for maintenance and converted

to SAP software. Chin Decl., Ex. A (Meyer 995:14-996:14, 999:1-1001:19).

- If 3,000 customers switched to SAP for maintenance, of whom 1,375 converted to SAP software, SAP would gain $880 million. *Id.* (Meyer 1000:12-23).
- If 3,000 customers switched to SAP for maintenance, 2,000 of whom converted to SAP software, and using a standard industry revenue multiplier of four times the previous year's revenue, SAP would gain $1.22 billion. *Id.* (Meyer 999:1-1001:4).
- If 3,000 customers switched to SAP for maintenance, 2,000 of whom converted, with $250,000 of revenue per year, SAP would gain $2.7 billion. *Id.* (Meyer 1001:5-17).[3]
- Meyer's measurements are supported by contemporaneous SAP documents projecting that 3,000 customers would switch to SAP maintenance, and 2,000 or more customers would convert to SAP software, as well as related testimony from members of SAP's own board of directors.[4]

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[3] In ***December 2004*** – close to the time of the hypothetical negotiation – SAP internally projected three scenarios for the number of customers it would convert to SAP customers: 1375, 2000 or 3000 customers. Chin Decl., Ex. P (PTX 12) at p. 11; *see also* Exs. AA (PTX 161), SS (4814). According to SAP's expert Clarke, SAP's average revenues per customer were $1.9 million apiece. Papay Decl., Ex. ZZ (Clarke Trial Demonstrative 53). Thus, the three scenarios translated to $2.6 billion, $3.8 billion or $5.7 billion in gain from converted customers. Even using *lower* per-customer revenue assumptions than SAP's expert employed, Oracle's expert Meyer calculated SAP's expected gain in the three scenarios at $1.375 billion, $2.0 billion or $3.0 billion. Chin Decl., Ex. A (Meyer 998:17-21).

[4] Under SAP's contemporaneous projections, the assumption that 2,000 customers would convert was ***conservative***. *E.g.*, Chin Decl., Ex. A (Brandt 682:12-20) (SAP's goal through the Safe Passage program was "to convert approximately 50 percent of the PeopleSoft and J.D. Edwards customer installations to SAP."), Ex. B (Agassi Depo 310:17-311:23, 314:5-318:3) (convert 50% or better). Brandt explicitly connected SAP's 50% conversion goal to its position in any hypothetical-license negotiation: one of the reasons that a license would be valuable to SAP was that it would "enable SAP to try to convert the approximately 50 percent of the PeopleSoft and J.D. Edwards installations that it was seeking to convert." *Id.*, Ex. A (Brandt 693:9-14). Oracle had roughly 10,000 PeopleSoft customers at the time. *Id.* (Phillips 518:1-11). Hence, a 50%

(Footnote Continued on Next Page.)

30. Brandt and Agassi considered SAP's contemporaneous customer conversion numbers as SAP's internal business "projections," contrary to SAP's position at trial that they were mere hopes and desires:

- Agassi testified that the revenue and customer numbers were "projections" from a "business proposal," or "case," presented to SAP's board. Chin Decl. Ex. B (Agassi Depo 310:25-311:5).
- Brandt, referring to the board presentation projecting 3,000 customers switching, similarly admitted that "[i]t was ***projected*** that you would get almost $900 million in revenues over the initial three years of the program." *Id.*, Ex. A (Brandt 684:15-19) (emphasis supplied).
- The projection's author, Ziemen, testified that in creating it he "attempted to make reasonable assumptions." Papay Decl., Ex. AAA (Ziemen Dep. 77:16-23, admitted Tr. 514:13).
- Not only did Agassi ***not*** think these conversion numbers were pie-in-the-sky, he thought "we could do better." Chin Decl., Ex. B (Agassi Depo 311:15).
- The numbers were developed with "input and extensive guidance" from SAP's executive board members responsible for the business units affected: Henning Kagermann (CEO), Leo Apotheker (head of sales), Gerd Oswald (head of service), and Agassi (head of products). *Id.*, Ex. SS (PTX 4814) at p. 2.
- PTX 161, recording a January 2005 integration meeting between SAP and TomorrowNow, identifies two "scenarios" only: 2,000 customers switching or 4,000 customers switching. *Id.*, Ex. AA (PTX 161).
- Even beyond the revenue it would obtain by causing customers to convert,

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(Footnote Continued from Previous Page.)

conversion figure meant 5,000 customers converted from Oracle to SAP.

SAP's own evidence was that it would receive further value from disrupting its major competitor. *Id.*, Exs. A (Brandt 693:3-694:10; Zepecki 610:12-611:2), B (Agassi Depo 314:5-318:3), N (PTX 7), U (PTX 24), Y (PTX 141); *see* SectionIII.A.3.d above (describing how SAP used TN to disrupt Oracle).

31. As another consideration in measuring the value of a license to the infringed PeopleSoft software, Meyer determines the profit Oracle would have expected to lose from SAP's use of the software. Meyer's methods are similar to his SAP measurement, and equally grounded in objective contemporaneous evidence. To determine the amount that Oracle stood to lose, he determines the total potential revenue lost based on number of expected lost customers, adjusts for Oracle's expected attrition, multiplies by Oracle's average per customer revenues and profit margins, and discounts to present value. Chin Decl., Ex. A (Meyer 1011:22-1013:19):

- He bases his opinion on documents showing how Oracle ***actually valued*** its business when a license would have been negotiated, *i.e.*, when SAP's infringement began. *Id.*, Exs. A (Meyer 1011:13-1013:19), Q (PTX 13), JJ (PTX 615).
- He uses Oracle's documented average revenue per customer at the time, \$130,000. *Id.*, Exs. A (Meyer 1012:17-22), JJ (PTX 615). This figure comes from objective, contemporaneous evidence that existed at the time of the hypothetical negotiation: the very valuation model that Oracle relied on in deciding to buy PeopleSoft. *Id.*, Ex. A (Meyer 1011:13-21) (Meyer uses information from the "model that Ms. Catz talked about yesterday" to provide "financial information about average revenue and attrition rates and other information that would be known about Oracle's potential revenues and profits from the PeopleSoft customers"), (Meyer 1012:17-22) (\$130,000 figure came "from Oracle's valuation documents"), (Catz 845:12-846:21) (this model was basis for deciding price at which to buy

PeopleSoft).

- Meyer uses Oracle's historical 80% profit margin taken from Oracle's own financial records. *Id.*, Ex. A (Meyer 1012:23-1013:1); Papay Decl., Ex. BBB (PTX 13) at p. 71.
- Meyer uses Oracle's 3.5% attrition rate taken from its contemporaneous and objective PeopleSoft valuation model. Chin Decl., Ex. A (Meyer 1011:16-21, 1012:13-16); Papay Decl., Ex. BBB (PTX 13) at p. 29.
- Meyer's calculation covers ten years because customers typically use the same software for many years. Chin Decl., Exs. A (Meyer 1013:5-8), JJ (PTX 615); Papay Decl., Ex. BBB (PTX 13) at p. 35.
- Meyer discounts the projected revenues to present value as of the hypothetical negotiation date using the same 10% discount rate Oracle used when purchasing PeopleSoft and J.D. Edwards in 2005. Chin Decl., Ex. A (Meyer 1012:23-1013:4); Papay Decl., Ex. BBB (PTX 13) at p. 18.
- Using these contemporaneous and objective inputs, Meyer calculates that, if Oracle licensed the software and support materials to SAP, and SAP succeeded in winning 3,000 maintenance customers, 1,375 of which then converted to SAP software, Oracle would forego $1.386 billion in profits. Chin Decl., Ex. A (Meyer 1013:20-1014:22).
- If SAP won, and Oracle lost 3,000 maintenance customers, 2,000 of which then converted to SAP, Oracle would forego $1.82 billion in profits. *Id.* (Meyer 1014:17-24).
- If 3,000 converted, Oracle would forego $2.46 billion in profits. *Id.* (Meyer 1014:25-1015:1).
- Meyer's measurements are also supported by simple math based on PeopleSoft's actual revenues. As stated above, PeopleSoft received $1.2 billion in revenue for the four quarters preceding the acquisition, increasing at 8% per year, indicating a four-year total of $5.4 billion.

Papay Decl., Ex. D (PTX 4809) at p. 59. If permitting SAP to compete for those revenues using Oracle's own software put half those revenues at risk, the license would have to be $2.7 billion for this component alone. If only 30% of the revenues were put at risk, the license would have to be $1.62 billion for this component alone.

32. Meyer then compares SAP's anticipated gain and Oracle's anticipated foregone profits together to yield a reasonable range for a license:

- If 1,375 customers converted, SAP would gain $900 million and Oracle would forego $1.4 billion. Chin Decl., Ex. A (Meyer 1016:4-8).
- If 2,000 customers converted, SAP would gain $1.2 billion and Oracle would forego $1.8 billion. *Id.* (Meyer 1016:8-10).
- If 3,000 customers converted, SAP would gain $2.7 billion and Oracle would forego $2.5 billion. *Id.* (Meyer 1016:11-12).
- If the parties used the middle-of-the-range assumption that 2,000 customers converted, he opined, the fair market value of the right to use Oracle's software was at least $1.5 billion. *Id.* (Meyer 1016:13-1017:8).

<u>*Siebel Software*</u>

33. Using the same approach as described above, Meyer also values a hypothetical license to use Oracle's Siebel software as of September 2006, when TN first contracted to service a Siebel product. *Id.* (Meyer 1023:3-1024:12):

- He bases his opinion on documents showing how Oracle ***actually valued*** its business when a license would have been negotiated, *i.e.* when SAP's infringement began. Papay Decl., Ex., CCC (PTX 658).
- At that time, SAP expected to convert 200 Siebel customers by 2008, and SAP would have expected a Siebel license to yield gains of $96.7 million to $247 million. Chin Decl., Ex. A (Meyer 1027:21-1028:4, 1030:16-1031:2, 1033:3-1034:17), LL (PTX 958).
- Oracle would have expected to forego at least $93 million in profits and

- $71 million in future impact, for a total of $164 million, if it licensed Siebel software. Chin Decl., Ex. A (Meyer 1034:18-1036:21).
- Given SAP's expected gain and Oracle's expected loss from licensing software, Meyer opines that the parties would have negotiated a license fee of at least $100 million for the Siebel software. Chin Decl., Ex. A (Meyer 1036:22-1037:15).

<u>Database software</u>

34. Last, Meyer values the license fee that prudent parties in Oracle and SAP's positions would have agreed on for use of Oracle's database software. Chin Decl., Ex. A (Meyer 1041:19-1048:1). Meyer explains that he valued a license for SAP's use of Oracle's database software in servicing its TN customers. *Id.* (Meyer 1043:3-14). This is the only damages model available for the database software because TN's use of it was not consistent with, and was much broader in many respects than Oracle's historical licenses of the software. As a result, there is no separate lost profits model for TN's infringement of that software.

- Oracle's historical price lists stated that Oracle charged $40,000 per processor for a standard end-user license for Oracle's Database Software. Chin Decl., Exs. X (PTX 97), FF (PTX 269), KK (PTX 653), OO (PTX 984); Papay Decl., Ex. DDD (PTX 996).
- Meyer opines that, based on input from Oracle witness Richard Allison, concerning Oracle's historical database license practices and price lists, Oracle would have charged a license fee of $40,000 per processor for the database software, yielding a $240,000 yearly license fee per customer. Chin Decl., Exs. A (Meyer 1044:2-1045:19), X (PTX 97).
- Added to this license fee was a $52,800 yearly maintenance fee per customer. Chin Decl., Ex. A (Meyer 1045:19-1046:1, 1047:8).
- Meyer concludes that TN would need this database license and maintenance fee for 172 customers, from the time each customer became a TN customer until October 2008 (when TN was shut down). Chin Decl.,

- Ex. A (Meyer 1046:2-25); Papay Decl., Exs. EEE (PTX 583), FFF (PTX 602), GGG (PTX 2822), HHH (PTX 2827).
- Meyer determines the appropriate amount of the total hypothetical license fee for the database software was $55.6 million. Chin Decl., Ex. A (Meyer 1047:6-1048:1).

B. Upsell and Cross-Sell Evidence Excluded From First Trial.

35. In addition to the hypothetical-license evidence introduced at the first trial, Oracle would also introduce, if permitted, additional hypothetical-license evidence that was excluded from the first trial.

36. As detailed below, in January 2005, Oracle expected profits from upsell and cross-sell licensing. Oracle would have expected to forego these profits if it licensed the software to SAP. In any hypothetical negotiation, it would have been entitled to compensation for these foregone profits.

1. Safra Catz's Testimony

37. Ms. Catz was Oracle's President at the time Oracle acquired both PeopleSoft and Siebel. Chin Decl., Ex. A (Catz 838:5-8). She has personal knowledge of the Valuation Exhibits, the projections reflected in them, and how the projections were used by Oracle's executives and Board of Directors to value the PeopleSoft and Siebel acquisitions:

- If permitted, Ms. Catz would explain to the jury Oracle's contemporaneous upsell and cross-sell revenue projections for PeopleSoft found in the Valuation Exhibits and other contemporaneous Oracle and third party documents, including the bases for those projections; that those projections factored into Oracle's valuation of the PeopleSoft acquisition in December 2004; and that Oracle's projections, accounting valuations and related financial information would have been important factors in assessing the fair market value of a license for Oracle's acquired PeopleSoft intellectual property in January 2005, the time of the hypothetical license with SAP.

- Ms. Catz would testify that in 2004 Oracle projected well over $1 billion in profit from upsell and cross-sell of PeopleSoft software in its fiscal years 2005 through 2008, as demonstrated by Plaintiff's Trial Exhibit 615. Chin Decl., Ex. JJ (PTX 615).
- Ms. Catz would also testify that the going-forward assumptions in these projections were predicated on her and Mr. Ellison's expectations based upon their considerable experience in the industry.
- Ms. Catz would testify that, because of the expected impact on Oracle's future upsell and cross-sell revenue, Oracle would have expected to be compensated for losing additional hundreds of millions of dollars in profits from SAP's use of the PeopleSoft intellectual property, for which Oracle had just paid for exclusive use in its $11.1 billion acquisition.

38. Ms. Catz would similarly explain to the jury Oracle's contemporaneous upsell and cross-sell revenue projections for Siebel found in the Valuation Exhibits and other contemporaneous Oracle and third party documents, including the bases for those projections; that those projections factored into Oracle's valuation of the Siebel acquisition in January 2006; and that Oracle's projections, accounting valuations and related financial information would have been important factors in assessing the fair market value of a license for Oracle's acquired Siebel intellectual property in September 2006, the time of the hypothetical license with SAP:

- Ms. Catz would also testify that the going-forward assumptions in these projections were predicated on her and Mr. Ellison's expectations based upon their considerable experience in the industry.
- Ms. Catz also would testify that Oracle's contemporaneous cross-sell and upsell expectations would have required payment by SAP of considerably more than the one hundred million dollars that Oracle's damages expert has opined is the minimum fair value for the right to use Siebel intellectual property.

2. **Paul Meyer's Testimony**

39. Mr. Meyer analyzed Oracle's and Defendants' financial information and company records, discovery responses and testimony to calculate the damages Oracle suffered due to Defendants' infringement of Oracle's software. Consistent with the Court's prior ruling that "Oracle should be permitted to present evidence regarding the fair market value of the copyrights that SAP allegedly infringed, including expert testimony based on established valuation methodology," Dkt. 628 (Partial SJ Order) at 5:5-7, Mr. Meyer used several established valuation methods to estimate the amount of Oracle's damages as described at length in his February 23, 2010 damages report. Dkt. 989, Ex. C (Excerpts of Meyer Report). These methods include the hypothetical license negotiation, the income approach, and the market approach. The results of each of these valuation methods are affected significantly by the evidence of Oracle's contemporaneous upsell and cross-sell projections for PeopleSoft and Siebel.

Hypothetical License Negotiations

40. If permitted, Mr. Meyer would testify, as he stated in his expert report at ¶¶ 232, 234-237, 241, Dkt. 989, Ex. C, that Oracle's contemporaneous upsell and cross-sell projections for PeopleSoft, from December 2004, represent at least $500 million in additional value that Oracle and SAP, or reasonable parties in their positions, would have reasonably agreed to in fair market value PeopleSoft and Siebel license negotiations:

- Mr. Meyer would state that these projections are key evidence of the state of mind and reasonable goals and expectations of a reasonable licensor at the time, and that a reasonable licensor would have required compensation from SAP due to lowered upsell and cross-sell expectations that would have resulted if Oracle gave a license to SAP to use PeopleSoft (or Siebel) intellectual property to compete for this same projected revenue.
- In addition to demonstratives he has already used at trial, Mr. Meyer would testify, if permitted, to the analyses summarized in nine demonstratives, Dkt. 989, Exs. A, B (Meyer Demonstratives), that

illustrate this additional value and how it would factor into a hypothetical negotiation between the parties, or reasonable parties in their positions, for Oracle's acquired intellectual property. These demonstratives rely directly on the Valuation Exhibits and flow directly from his long-disclosed valuation approaches and evidence, about which Defendants took extensive discovery.

- Mr. Meyer would have presented and testified about a summary demonstrative regarding the financial impact a reasonable licensor would have expected from licensing the infringed PeopleSoft software to SAP. Dkt. 989, Ex. C. This slide shows that one input in calculating this impact is an assumption that 13% to 14% of the newly-acquired PeopleSoft customer base would have purchased new licenses from Oracle after the acquisition. *Id.* This assumption by Mr. Meyer is drawn directly from Valuation Exhibits, specifically the "Existing Customer Purchases % BOP Customer Base" projections for "License Revenue Buildup" in Trial Exhibit 615. Chin Decl., Ex. JJ (PTX 615). The same summary demonstrative relies on Oracle's contemporaneous projected revenue from license sales following the acquisition of PeopleSoft, specifically $130,000 per year for existing customers new license sales and $300,000 per year for incremental new customer license sales. Dkt. 989, Ex. A at p. 1.[5]
- Mr. Meyer would similarly rely on other information contained in the Valuation Exhibits to testify based on the other demonstratives in Dkt.

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[5] The color-coded circles on Dkt. 989, Exhibits A and B show how Oracle's projections in the Valuation Exhibits correspond to Mr. Meyer's assumptions in his opinions and trial presentation. Similar evidence relates to the Siebel acquisition and related hypothetical negotiation. *See e.g.*, Dkt. 989, Ex. B at p. 6-8.

989, Ex. B, both for the PeopleSoft and Siebel[6] fair market value license negotiations.

- As illustrated by Mr. Meyer's final slide in Dkt. 989, Ex. B, accounting for the value a reasonable licensor would have associated with its contemporaneous upsell and cross-sell projections results in a fair market value license for the PeopleSoft and Siebel software of at least $2.1 billion, a difference of approximately $500 million from the partial analysis Mr. Meyer was permitted to present.

Income Approach

41. During his trial testimony, Mr. Meyer also measured the damages Oracle suffered from Defendants' infringement using the income approach, which is based on SAP's expected gains and Oracle's expected losses under the hypothetical licenses. Because Mr. Meyer was precluded from relying on Oracle evidence of contemporaneous expected upsell and cross-sell opportunities, he was able to measure only Oracle's expected maintenance losses due to the infringement of PeopleSoft software ($1.36 billion to $2.46 billion), which resulted in his opinion that the fair market value license would be at least $1.5 billion:

- If allowed to also testify based on Oracle's contemporaneous upsell and cross-sell projections, Mr. Meyer would testify, similar to his testimony at his deposition at 437:7-448:19 and 462:23-475:10, Papay Decl., Ex. III, and as he stated in his expert report at ¶¶ 128-131 (Dkt. 989, Ex. C), that the income approach yields an estimate of Oracle's expected losses of $2 billion to $3.8 billion, which would result in a fair market value license for the PeopleSoft software of at least $2 billion.
- For the Siebel software at issue in this case, Mr. Meyer was able to testify

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[6] For a detailed discussion of Mr. Meyer's opinions regarding the fair market value of the Siebel products, including Oracle's contemporaneous upsell and cross-sell projections, *see* Dkt. 989 Ex. C (Meyer Report) at ¶¶ 306, 337, 341-342, 344-345, 350.

only that Oracle's expected losses of maintenance revenues were $164 million. If permitted, Meyer would testify, consistent with deposition testimony at 503:11-504:10 (Papay Decl., Ex. III), and as he stated in his report at ¶¶ 275-278 (Dkt. 989, Ex. C), that if Oracle's contemporaneous upsell and cross-sell projections for Siebel were considered, this number would increase to $232 million.

- Had Mr. Meyer been permitted to testify regarding his detailed income approach, that testimony would have served to support the conclusions of his fair market value license analysis.

Market Approach

42. Mr. Meyer also measured Oracle's damages using a third method, the Market Approach, that measures the value of the hypothetical license by measuring the value of the related intangible assets Oracle acquired in the PeopleSoft and Siebel acquisitions:[7]

- As he stated in his expert report at ¶¶ 113-127 (Dkt. 989, Ex. C), and in his deposition at 204:15-213:9 (Papay Decl., Ex. III), if permitted, Mr. Meyer would testify at trial that the related intangible assets (including, primarily, PeopleSoft's customer relationships and associated future sales to them) obtained as part of the PeopleSoft acquisition were contemporaneously valued by a third party, Standard & Poor's. However, excluding the anticipated upsell and cross-sell revenues reduces the value of the relevant intangible assets significantly.
- If Mr. Meyer were permitted to testify about the value of the intangible assets, he would state that when coupled with the expectation that Oracle

[7] Because the expected upsell and cross-sell opportunities constitute a significant portion of the related intangible assets obtained in the PeopleSoft and Siebel acquisitions, it made little sense to offer this valuation methodology at trial given the Court's exclusion of these topics. Had Mr. Meyer been permitted to testify regarding his detailed market approach, that testimony would have served to support the conclusions of his fair market value license and income approach analyses.

would have lost 20% to 30% of its PeopleSoft customers under the hypothetical license, the market approach would support the conclusion that any license for the PeopleSoft software would have been valued at no less than $2 billion. *See* Papay Decl., Exs. JJJ (PTX 1008), BBB (PTX 13).

- For the Siebel acquisition, if permitted, Mr. Meyer would testify consistent with his deposition testimony at 414:8-418:10 (Papay Decl., Ex. III), and as he stated in his report at ¶¶ 265-274 (Dkt. 989, Ex. C), that the related intangible assets (including, primarily, Siebel's customer relationships and associated future sales to them) were contemporaneously valued by a third party, Duff & Phelps, and that excluding the anticipated upsell and cross-sell revenues would significantly reduce the value of the relevant intangible assets.
- If permitted to testify about the value of the intangible assets, Mr. Meyer would state that when coupled with the expectation that Oracle would have lost 5% of its Siebel customers under the hypothetical license, the market approach would further support and cement his conclusion that any license for the Siebel software would have been valued at no less than $100 million. *See* Papay Decl., Exs. KKK (PTX 1003), CCC (PTX 658).

C. Saved Development Cost Evidence Excluded From First Trial

43. In addition to the hypothetical-license evidence introduced at the first trial and the upsell/cross-sell evidence set forth above, Oracle would also introduce, if permitted, evidence of the development costs that SAP saved by infringing Oracle's copyrights instead of developing its own similar software. On September 30, 2010, the Court precluded Oracle from introducing this evidence in support of the hypothetical license value at the first trial. Dkt. 914 at 3. On May 15, 2012, the Court denied leave to file a motion for reconsideration of that order. Dkt. 1162.

44. The development costs that SAP saved by infringing are an established component of the hypothetical-license price. In deciding how much it would be willing to pay for a license, the buying party in a hypothetical license negotiation would consider the cost of alternatives to buy or develop the licensed product. *See, e.g.*, *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1372-73 (Fed. Cir. 2008), *modified on other grounds by* 557 F.3d 1377 (Fed. Cir. 2009); *Deltak, Inc. v. Advanced Sys., Inc.*, 767 F.2d 357, 360-62 & n.3 (7th Cir. 1985). If permitted, Oracle would introduce the following evidence of SAP's saved development costs.

1. Paul Pinto's Testimony

45. Oracle would offer the expert testimony of Paul Pinto, an expert in software development who advises clients on, among other things, whether to develop their own software or license existing software. Mr. Pinto would testify as detailed in his expert report, (Dkt. 775, Ex. 2 (Pinto Report)). Because his full report is attached, we merely summarize his proffered testimony here:

- Mr. Pinto would testify that he analyzed what it would have cost SAP independently to develop the software that SAP infringed in maintenance services provided by TomorrowNow. Mr. Pinto has been involved in hundreds of software license negotiations on the sides of both buyer and seller. In negotiating the license price, he regularly considered the costs avoided by licensing the software instead of developing new software.
- Mr. Pinto would testify that he used two different industry-accepted, reliable methods (Function Point Analysis and Constructive Cost Model) to estimate the costs that SAP would have incurred to develop the JD Edwards EnterpriseOne and PeopleSoft CRM, HRMS, FSCM, Student Admin, and EPM modules software on its own. These methods yielded an estimate of $764 million to $2.3 billion that SAP saved by not having to develop this software.
- Based on a Constructive Cost Model analysis, Pinto estimates that SAP saved a further $1.1 to $3.5 billion by not having to develop JD Edwards

EnterpriseOne, JD Edwards World, PeopleSoft, and Siebel applications.

2. Paul Meyer's Testimony

46. If permitted, Oracle's damages expert, Paul Meyer, would incorporate Mr. Pinto's opinion into the hypothetical-license value given to the jury in two ways:

- First, Meyer would use Mr. Pinto's analysis to calculate a separate disgorgement, or unjust enrichment, damages figure.
- Second, Mr. Meyer would rely on Mr. Pinto's opinion of SAP's saved development costs as part of his "cost approach" – one of the valuation methods Mr. Meyer used to determine SAP's value of use of the infringed materials. Dkt. 925, Ex. A (Meyer Report) at ¶ 142-52, 282-88. As Mr. Meyer explained in his report, this "cost approach" provided a "reasonableness check on the valuations derived from [Meyer's] other approaches" that he used to value a hypothetical license. *Id.* He would not use it as a separate damages measure. *Id.*

D. Summary Of Hypothetical License Evidence Not Admitted At The First Trial

Evidence described above, but not admitted at the first trial, includes the following:

- Live or deposition testimony from SAP board members regarding their expectations of the value of the infringed copyrights as of the time of infringement. *See* Section III.A.1, III.A.3, above.
- Live or deposition testimony from SAP board members regarding their expectations for Safe Passage and TomorrowNow, as well as what they, as a willing licensee, would have been willing to pay to license Oracle Database. *See* Section III.A.3, III.A.6, above
- Testimony from SAP board members regarding the value SAP places on its own copyrighted enterprise software and the associated revenue streams. *See* Section III.A, above.

- Evidence of its projections related to its expected sales of additional software licenses to the PeopleSoft and Siebel customer bases, a key and objective set of evidence related to the value of the copyrighted works that other courts permit to evaluate fair market. *See* Section III.B, above.
- Oracle will submit expert and non-expert evidence of SAP's saved development costs. The cost that SAP would have incurred to develop the infringed materials is objective evidence that is logically and legally relevant to the parties' contemporaneous bargaining positions in a hypothetical negotiation. *See* III.C, above.
- Testimony from Oracle executives regarding the objectivity and underlying basis for Oracle's contemporaneous projections, Oracle's support line of business, and Oracle's research and development efforts. *See* III.A.2, above.
- Additional details surrounding the extensive due diligence and investigations that both parties invested in creating their projections of the value of the software at issue. *See* III.A.2, above.

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