ORACLE USA, INC., ET AL

V.

SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.
FEBRUARY 23, 2010

PAUL K. MEYER

3. SAP's TomorrowNow Acquisition Goals / Competition With Oracle

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

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

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

[135] SAP email from John Zepecki to Arlen Shenkman and other SAP personnel Re; TomorrowNow/PSFT related background info with attached document "Peoplesoft 1-2-3 01 05 05.doc", SAP-OR00004991-5007 (Shenkman Exhibit 225), at 991.

[136] SAP email from John Zepecki to Arlen Shenkman and other SAP personnel Re; TomorrowNow/PSFT related background info with attached document "Peoplesoft 1-2-3 01 05 05.doc", SAP-OR00004991-5007 (Shenkman Exhibit 225), at 998-003.

[137] SAP email from John Zepecki to Arlen Shenkman and other SAP personnel Re; TomorrowNow/PSFT related background info with attached document "Peoplesoft 1-2-3 01 05 05.doc", SAP-OR00004991-5007 (Shenkman Exhibit 225), at 998.

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

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

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[138] Deposition of Leo Apotheker (SAP Executive Board Member and Co-CEO), October 2, 2008, pgs. 191-192; SAP email from Leo Apotheker to Bill McDermott Re: TomorrowNow, SAP-OR00206525 (Apotheker Exhibit 487), at 525.

[139] Deposition of Henning Kagermann (SAP Executive Board Member and Co-CEO), September 25, 2008, pgs. 121-122; Email from Michael Wendell to Gregory McStravick Re: "CLEAR SAILING" SYLT 2005, SAP-OR00126416-417, SAP-OR00147894-919, SAP-OR00147924-934, SAP-OR00182303-306 (Kagermann Exhibit 413), at 928.

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

[141] Deposition of Gerhard Oswald (SAP Executive Board Member), December 11, 2008, pg. 259; "Business Case TomorrowNow 2006," dated November 16, 2005, SAP-OR00136760-68 (Oswald Exhibit 608) at 762; "Supervisory Board Meeting TomorrowNow Status Update," dated February 2007, SAP-OR00141570-581 (Kagermann Exhibit 436), at 571; "TomorrowNow Status Update, Status: November 9, 2006," SAP-OR00155970-994 (Oswald Exhibit 599), at 974 and 982.

[142] Deposition of Gerhard Oswald (SAP Executive Board Member), December 11, 2008, pgs. 293-294.

[143] SAP email from John Zepecki to Arlen Shenkman and other SAP personnel Re; TomorrowNow/PSFT related background info with attached document "Peoplesoft 1-2-3 01 05 05.doc," SAP-OR00004991-5007 (Shenkman Exhibit 225), at 997.

support to 500 customers in 2005 and 1,000 customers in 2006.[144] However, Shai Agassi testified that SAP's Executive Board was more interested in converting customers to SAP software than continuing to collect support revenues.[145] SAP's "Peoplesoft 1-2-3" plan indicates that, "Freezing a Peoplesoft customer "forever" is not an end goal for SAP. SAP ultimately wants to sell more software and upgrade a customer to mySAP."[146]

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

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

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

[145] Deposition of Shai Agassi (SAP Former Executive Board Member), January 5, 2009, pg. 310.

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

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

[148] SAP email from Gerhard Oswald to Thomas Ziemen Re: Potential acquisition of TomorrowNow, SAP-OR00002890-892 (Ziemen Exhibit 448), at 891; SAP email from Chuck Mulloy to Gerhard Oswald and other SAP personnel with attached document "Safe Passage v6.ppt," SAP-OR00092046- 070 (Shenkman Exhibit 236), at 050.

[149] "TomorrowNow Acquisition Monitoring Status Update," dated December 1, 2006, TN-OR00601257-271, at 258.

[150] Deposition of Leo Apotheker (SAP Executive Board Member and Co-CEO), October 2, 2008, pg. 83.

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

60. SAP planned to charge 10% of Oracle's license fee for basic TomorrowNow support (less than half of what Oracle charges, 22% of the license fee) or allow customers to upgrade to SAP standard support, which included some advanced service options, for 17% of Oracle's license fee.[153] SAP projected this business opportunity of obtaining maintenance, "cross-sell" and "up-switch" revenue from PeopleSoft customers, for the 3 year period from 2005 through 2007, to be valued at $897 million.[154] Within the first half of 2005, SAP reported €8.5 million[155] in TomorrowNow maintenance contract volume taken away from Oracle, and TomorrowNow's install base grew to a total of 98

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

[152] Deposition of Shai Agassi (SAP Former Executive Board Member), January 5, 2009, pgs. 311-312. Mr. Agassi testified that "I thought that if Oracle would do a bad job, we could see a similar distribution of the customers as the share of customers between SAP and Oracle."

[153] "Service Deliveries for PSFT Customers," dated January 16, 2005, SAP-OR 00000927-38 (Shenkman Exhibit 234), at 928.

[154] SAP email from Thomas Ziemen to Leo Apotheker Re: PeopleSoft Attack Program with attached document "PS_Attack_Program_12_2004_V6.ppt", SAP-OR00253278-301 (Ziemen Exhibit 447), at 288. Thomas Ziemen defined "up-switch" as the moving of a customer off of Oracle to an SAP application, and explained "cross-sell" as the sale of other software components that are integrated with SAP's NetWeaver environment (Deposition of Thomas Ziemen (SAP Vice President of Service Solution Management), September 30, 3008, pgs. 72-74). SAP has admitted that the $897 million value "does not 'project a customer's value over the lifecycle of a customer as, for example, it only includes assumptions for the years 2005-2007." [Defendants' Ninth Amended and Supplemental Response to Plaintiffs' Fourth Set of Interrogatories to Defendant TomorrowNow, Inc. and Third Set of Interrogatories to Defendants SAP AG and SAP America, Inc., Second Supplemental Response to Interrogatory 69, pgs. 21-22; Email from Bernd Welz to Bernd-Michael Rumpf Re: PeopleSoft Attack Program, with attached presentation, "A Roadmap for PSFT Customers to SAP", SAP-OR 00493900-923 (Scholten Exhibit 1782), at 910].

[155] $10,027,450 in year 2005, currency converted using exchange rate of $1.1797 to €1, per the SAP Annual Report for the fiscal year ending December 31, 2005, pg.98.

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

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

- "Disrupt Oracle's ability to pay for the acquisition out of cash flow; Shrink their share of the application market; discredit their efforts to create a next-generation application platform" and "affecting Oracle's ability to maintain this revenue stream could impact the ROI assumptions of the Oracle/PeopleSoft deal"[158]
- "Inflict some pain on Oracle"[159]
- "Interrupt Oracle's acquired maintenance income stream, making it difficult for them to invest in development of their Fusion platform."[160]
- Take away Oracle's maintenance revenue stream[161]

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[156] SAP email from Ina Daniela Weber to Christian Walter Re: Safe Passage Updates with attached documents "Apollo Program Update_Leo.ppt" and "Safe_Passage_Update_Board_Meeting_Paris_Gerd.ppt", SAP-OR00139918-969 (Kagermann, Exhibit 418), at 958.

[157] SAP email from Thomas Ziemen to Gerhard Oswald Re: Q1 Oracle Disruption Plan, SAP-OR 00156241-242 (Ziemen Exhibit 454).

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

[159] Deposition of Leo Apotheker (SAP Executive Board Member and Co-CEO), October 2, 2008, pgs. 191- 192; SAP email from Leo Apotheker to Bill McDermott Re: TomorrowNow, SAP-OR00206525 (Apotheker Exhibit 487), at 525.

[160] Deposition of Henning Kagermann (SAP Executive Board Member and Co-CEO), September 25, 2008, pgs. 121-122; SAP email from Michael Wendell to Gregory McStravick Re: "CLEAR SAILING" SYLT 2005, SAP-OR00126416-417, SAP-OR00147894-919, SAP-OR00147924-934, SAP-OR00182303-306 (Kagermann Exhibit 413), at 928.

- Earn maintenance revenue[162]
- "Act as a significant deal funnel for SAP's worldwide license salesforce"[163]
- "Announce a dramatic, market changing PeopleSoft and J.D. Edwards support and upgrade offering"[164]
- Sell software licenses[165]
- A "public relations win" to have "[t]he bragging rights for having more PSFT customers under service than Oracle"[166]
- Oracle's "share price will probably go down by 10%"[167]

4. SAP Claimed to Provide at Least Comparable Level of PeopleSoft/J.D. Edwards Service With TomorrowNow / Oracle's Software and Software and Support Materials Were Critical to Providing This Level of Service

62. To take advantage of the fear, uncertainty, and doubt of PeopleSoft customers resulting from Oracle's hostile takeover as well as the fear, uncertainty and doubt that SAP continued to generate in early 2005, SAP had to position TomorrowNow as comparable service to Oracle. Terry Hurst, SAP Director of Competitive Programs, testified at deposition that in marketing the Safe

[161] SAP email from James Mackey to Shai Agassi Re: TomorrowNow, SAP-OR00004915 (Shenkman Exhibit 208), at 915.

[162] Deposition of James Mackey (SAP Vice President of Corporate Finance), July 15, 2008, pgs. 80-81 and 319-320.

[163] Email from Nam Bui to Arlen Shenkman Re: Follow-Up Items, SAP-OR00005015-018 (Shenkman Exhibit 223), at 017.

[164] SAP email sent from Chuck Mulloy to Gerhard Oswald and other SAP personnel with attached document "Safe Passage v6.ppt," SAP-OR00092046-SAP-0R00092070 (Shenkman Exhibit 236), at 050.

[165] Email from Nam Bui to Arlen Shenkman Re: Follow-Up Items, SAP-OR00005015-018 (Shenkman Exhibit 223), at 017.

[166] Deposition of Shai Agassi (SAP Former Executive Board Member), January 5, 2009, pgs. 144-146, 248; SAP email from Shai Agassi to Arlen Shenkman re: TomorrowNow Financials (Confidential), SAP-OR00004970-972 (Shenkman Exhibit 213), at 970; "Business Case – TomorrowNow, Inc. January 7, 2005," SAP-OR00004763-771 (Shenkman Exhibit 220), at 764 (Plattner Exhibit 1400 in native form SAP-OR00136127 from native- at 132).

[167] SAP email from Shai Agassi to James Mackey re: TNow, SAP-OR00503908-909 (Agassi Exhibit 734), at 908.

program.[678] The $632 million in license volume that SAP claims to have taken from Oracle through September 2007 does not include the on-going support revenue associated with those licenses.

2. TomorrowNow's Low Price Was Critical to Making Inroads Into Oracle's Customer Base

361. Price and total cost of ownership ("TCO") are very important factors in a customer's selection of a software and support vendor.[679] Keith Block, Oracle's Executive Vice President of Sales and Consulting in North America, testified, ". . . by acquiring TomorrowNow, SAP created leverage, as well as – through legitimizing TomorrowNow, and presented customers with a do step, based on lowering that complete total TCO, and advertising that they had the same level of service and support that Oracle would provide."[680] Juergen Rottler, Oracle's Executive Vice President of Oracle Customer Services, also testified about the impact of price competition from TomorrowNow: "It was constantly on our mind, as with the acquisition of SAP, it was the one perceived, you know, credible alternative to our own support offering."[681] TomorrowNow documents touted the importance of its low cost support offering. For example, a TomorrowNow "Frequently Asked Questions" document on its Safe Passage program for J.D. Edwards mid-market

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678 **SCHEDULE 8.U**. 3Q 2007 was the latest period for which I have seen TomorrowNow and Safe Passage financial metrics reported. However, the customer-specific revenue data produced by Defendants confirms that TomorrowNow and SAP enjoyed additional revenue from sales of support, licenses and other services to TomorrowNow customers after September 2007 and through the October 2008 shutdown of TomorrowNow [*See* **SCHEDULES 41.U** and **42.SU**].

679 Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 38-39, 139 and 154-155; Deposition of Charles Phillips (Oracle Co-President and Executive Board Member), April 17, 2009, pgs. 148-149.

680 Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 238-239.

681 Deposition of Juergen Rottler (Oracle Executive Vice President, Oracle Customer Services), May 13, 2009, pg. 43.

customers stated, "These customers will eventually migrate – until then, SAP builds credibility and loyalty with the customer by providing immediate savings."[682] A TomorrowNow advertisement stating "What will you do with the money you save?" highlights the benefit of its offer of 50% support cost savings.[683] As testified to by several former TomorrowNow customers, the low cost of the TomorrowNow service was an important factor, and in some cases the most important factor, in their decision to switch to TomorrowNow for support services.[684]

362. I understand that absent its alleged misuse of Oracle's Software and Support Materials, TomorrowNow would not have been able to market the ability to provide comparable or better service at a significantly lower price than Oracle. As explained in section IV.B.4 above, SAP acknowledged that access and use of Oracle's proprietary Software and Support Materials was necessary to provide the level of support that TomorrowNow offered.[685]

[682] "Safe Passage Sales Brief," SAP-OR00042962-967 (Hurst Exhibit 175), at 963.

[683] Advertisement from www.Tomorrownow.com included in Plaintiff's Responses and Objections to Defendants' Fifth Set of Interrogatories, April 16, 2009, pg. 104.

[684] For example, see Deposition of Mark Anderson (Travel Centers Manager of IT for PeopleSoft, SAP, BW and Cognos Business Intelligence), June 8, 2009, pgs. 35 and 47-49; Deposition of John Kreul (Pepsi Americas Vice President of Applications), June 2, 2009, pgs. 47, 51, 54 and 56; Deposition of Jeffrey O'Donnell (Lexmark International Commodity Manager), September 15, 2009, pgs. 16-17 and 57-58; Deposition of Steven Brazile (Sara Lee Vice President of Application Development and Support) October 14, 2009, pgs. 85-87; Deposition of Thomas Bailey (Honeywell, Manager of IT and Global HR Technical Design Leader), November 12, 2009, pgs. 29-31; Declaration of Stefan Vilsmeier, President, On Behalf of BrainLab, Inc., July 9, 2009, pg. 3; Declaration of Richard Ball, Director of Procurement, The Standard Register Company, November 11, 2009, pg. 3; Deposition of Tracy Hallenberger (Baker Botts Chief Knowledge Officer), November 18, 2009, pgs. 26-27; Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pgs. 27-28.

[685] For example, see SAP email from John Zepecki to Arlen Shenkman and other SAP personnel with attached document "PeopleSoft 1-2-3 01 05 05.doc," SAP-OR00004991-5007 (Shenkman Exhibit 225), at 999.

accounting purposes) the customer maintenance relationships it acquired in its acquisitions of PeopleSoft.[727]

387. Prior to the Oracle acquisition, PeopleSoft support contracts typically provided for contractual increases whereby the annual cost of support would "walk-up" from a percentage of the net license price (net of discounts) to that same percentage of the then current list price of the software.[728] In June 2006, Oracle abandoned the PeopleSoft "walk-up" pricing approach and implemented a standard 3% annual inflationary support fee increase for its PeopleSoft, J.D. Edwards and Siebel support contracts, consistent with Oracle's standard pricing policy for its other products.[729] In calculating Oracle's lost support revenue by customer, I have applied a 3% annual fee increase.[730]

388. In order to account for the portion of the lost support revenue related to the Lost Customers that Oracle may have lost in the absence of TomorrowNow due to ordinary customer attrition, I have reduced the amount of Oracle's lost support revenue related to the Lost Customers by applying an estimated annual support revenue attrition rate. Historically, Oracle experienced the following annual support revenue attrition rates:

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[727] "Oracle Corporation – Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 188-190.

[728] Deposition of Juergen Rottler (Oracle Executive Vice President, Customer Services) May 13, 2009, pgs. 37-38 and 52; Discussion with Gary Miller (Oracle Head of Global Business Operations, Oracle Customer Services).

[729] Discussion with Gary Miller (Oracle Head of Global Business Operations, Oracle Customer Services); Deposition of Juan Jones (Oracle Senior Vice President, Customer Services, North America Support), April 24, 2009, pgs. 36-37; Deposition of Juergen Rottler (Oracle Executive Vice President, Customer Services) May 13, 2009, pgs. 29-30.

[730] To account for the fact that the lost customer contracts have service periods that start at different times of the year, I have kept the lost annualized support fee constant for the first partial and following first full year of the damage period (i.e., the next 3% annual increase is not applied until the second full year of the customer's damage period).

Table 13: Oracle Revenue Attrition Rates (Q3 2006 – Q3 2009)[731]				
Product Line	**Dec 2005 – May 2006**	**June 2006 – May 2007**	**June 2007 – May 2008**	**June 2008 – Feb 2009**
PeopleSoft	7%	5%	5%	3%
J.D. Edwards	10%	9%	5%	5%
Siebel	n/a	4%	n/a	n/a

389. Prior to Oracle's acquisition, PeopleSoft experienced an average annual revenue attrition rate of 6.3%, and had forecast annual revenue attrition for 2005 to be 2.5%.[732] Prior to its acquisition by Oracle, Siebel's customer annual renewal rates were approximately 90% (based on the number of customers). At the time of the acquisition, Oracle management forecast Siebel annual revenue attrition to be 7%.[733]

390. To account for support revenue attrition that Oracle would have experienced had it made the lost support sales to the Lost Customers, I have applied the following renewal (1-attrition rate) rates throughout the damages period:

[731] **SCHEDULE 34.2**.

[732] "Oracle Corporation – Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 188-189.

[733] "Oracle Corporation – Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," ORCL00312747-819, at 770-71.

customers stated, "These customers will eventually migrate – until then, SAP builds credibility and loyalty with the customer by providing immediate savings."[682] A TomorrowNow advertisement stating "What will you do with the money you save?" highlights the benefit of its offer of 50% support cost savings.[683] As testified to by several former TomorrowNow customers, the low cost of the TomorrowNow service was an important factor, and in some cases the most important factor, in their decision to switch to TomorrowNow for support services.[684]

362. I understand that absent its alleged misuse of Oracle's Software and Support Materials, TomorrowNow would not have been able to market the ability to provide comparable or better service at a significantly lower price than Oracle. As explained in section IV.B.4 above, SAP acknowledged that access and use of Oracle's proprietary Software and Support Materials was necessary to provide the level of support that TomorrowNow offered.[685]

[682] "Safe Passage Sales Brief," SAP-OR00042962-967 (Hurst Exhibit 175), at 963.

[683] Advertisement from www.Tomorrownow.com included in Plaintiff's Responses and Objections to Defendants' Fifth Set of Interrogatories, April 16, 2009, pg. 104.

[684] For example, see Deposition of Mark Anderson (Travel Centers Manager of IT for PeopleSoft, SAP, BW and Cognos Business Intelligence), June 8, 2009, pgs. 35 and 47-49; Deposition of John Kreul (Pepsi Americas Vice President of Applications), June 2, 2009, pgs. 47, 51, 54 and 56; Deposition of Jeffrey O'Donnell (Lexmark International Commodity Manager), September 15, 2009, pgs. 16-17 and 57-58; Deposition of Steven Brazile (Sara Lee Vice President of Application Development and Support) October 14, 2009, pgs. 85-87; Deposition of Thomas Bailey (Honeywell, Manager of IT and Global HR Technical Design Leader), November 12, 2009, pgs. 29-31; Declaration of Stefan Vilsmeier, President, On Behalf of BrainLab, Inc., July 9, 2009, pg. 3; Declaration of Richard Ball, Director of Procurement, The Standard Register Company, November 11, 2009, pg. 3; Deposition of Tracy Hallenberger (Baker Botts Chief Knowledge Officer), November 18, 2009, pgs. 26-27; Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pgs. 27-28.

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727 "Oracle Corporation – Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 188-190.

728 Deposition of Juergen Rottler (Oracle Executive Vice President, Customer Services) May 13, 2009, pgs. 37-38 and 52; Discussion with Gary Miller (Oracle Head of Global Business Operations, Oracle Customer Services).

729 Discussion with Gary Miller (Oracle Head of Global Business Operations, Oracle Customer Services); Deposition of Juan Jones (Oracle Senior Vice President, Customer Services, North America Support), April 24, 2009, pgs. 36-37; Deposition of Juergen Rottler (Oracle Executive Vice President, Customer Services) May 13, 2009, pgs. 29-30.

730 To account for the fact that the lost customer contracts have service periods that start at different times of the year, I have kept the lost annualized support fee constant for the first partial and following first full year of the damage period (i.e., the next 3% annual increase is not applied until the second full year of the customer's damage period).

Table 13: Oracle Revenue Attrition Rates (Q3 2006 – Q3 2009) [731]				
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Siebel	n/a	4%	n/a	n/a

389. Prior to Oracle's acquisition, PeopleSoft experienced an average annual revenue attrition rate of 6.3%, and had forecast annual revenue attrition for 2005 to be 2.5%.[732] Prior to its acquisition by Oracle, Siebel's customer annual renewal rates were approximately 90% (based on the number of customers). At the time of the acquisition, Oracle management forecast Siebel annual revenue attrition to be 7%.[733]

390. To account for support revenue attrition that Oracle would have experienced had it made the lost support sales to the Lost Customers, I have applied the following renewal (1-attrition rate) rates throughout the damages period:

[731] SCHEDULE 34.2.

[732] "Oracle Corporation – Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 188-189.

[733] "Oracle Corporation – Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," ORCL00312747-819, at 770-71.

429. As explained above, I have applied a 10% discount rate to OEMEAs lost profits extending beyond November 2010. Based on this plaintiff entity-specific approach, OEMEA has experienced lost profits of $41.0 million on lost support revenue through May 2015, and $9.0 million on support revenue lost during the period for which TomorrowNow provided support service to the Lost Customers.[796] Net of sublicense fees paid to OFS, OEMEA has experienced lost profits of $14.1 million on lost support revenue through May 2015, and $4.3 million on support revenue lost during the period for which TomorrowNow provided support service to the Lost Customers.[797]

iii. OIC's Lost Profits

430. OIC's business is to license its technology to other Oracle affiliates.[798] As described above, OIC's revenue is comprised of intercompany sublicense fees received from its license and distribution agreements with other Oracle entities. Given the nature of OIC's operations, it would be expected that it would have minimal incremental costs associated with earning additional sublicense fees on support sales to the Lost Customers.

431. I have obtained and reviewed the detailed income statements for the Product Support and License Updates line of business of OIC for the periods of Oracle's fiscal year 2006 through the second fiscal quarter of 2009.[799] In calculating OIC's incremental cost of support, I have included "Intercompany

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[796] **SCHEDULES 39.SU** and **39.1.SU**.

[797] **SCHEDULES 39.SU** and **39.1.SU**.

[798] Deposition of Ann Kishore (Oracle Director of Tax Department, Mergers and Acquisitions), April 14, 2009, pgs. 39-40. I understand that OIC also provides support services to the Latin American region through designees. Activity recorded in company code 35B – Latin America Fiscal Recharges relates to expense charges for those activities [Deposition of Ann Kishore (Oracle Director of Tax Department, Mergers and Acquisitions), September 25, 2009, pgs. 329-330; Discussion with Ann Kishore].

[799] ORCL00694040, DIS Support Total 110909.xls

License Sublicense Fee Expense," "Intercompany Technology Costs Expense" and the "Line of Business (LOB) Charges" recorded for the 35B Latin America Fiscal Recharge company code.[800] During this time period, OIC reported annual incremental profit margins on its support sublicense fee income of 94% to 96% (incremental cost of 4% to 6%).[801] In calculating OIC's lost profits damages, I have applied an incremental margin percentage of 95% (5% incremental costs) across all periods.

432. As explained above, I have applied a 10% discount rate to OIC's lost profits extending beyond November 2010. Based on this plaintiff entity-specific approach, OIC has experienced lost profits of $121.1 million on lost support revenue through May 2015, and $37.0 million on support revenue lost during the period for which TomorrowNow provided support service to the Lost Customers.[802]

D. Opinion: Summary of Oracle's Lost Profits

433. As a result of the Defendants' alleged bad acts, it is my opinion that Oracle has experienced lost profits on support revenue lost to TomorrowNow, as summarized in the following table.

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[800] I have included all expenses recorded for OIC's Product Support and License Updates line of business, except for the "Intercompany Fiscal Recharge Markup Expense" recorded in company code 35B. This expense is for a 10% markup on the Line of Business expenses that are charged to OIC by its designees that provide support services on OIC's behalf [Discussion with Claire Sebti (Oracle Senior Director of Corporate Accounting)]. This markup relates to an intercompany profit margin, rather than an actual cost to provide support services, and is therefore not relevant to the incremental cost to service a customer.

[801] **SCHEDULE 40.2**.

[802] **SCHEDULES 40.SU** and **40.1.SU**. Including sublicense fee profit received by ORC and OTC, OIC's lost profits related to the Lost Customers is $153.8 million through May 2015, and $42.2 million during the period in which the Lost Customers received support, services from TomorrowNow.

refunds and/or settlement payments paid to customers upon the shutdown of TomorrowNow in 2008.[809]

438. According to the customer-level revenue data produced by Defendants, excluding the reductions in revenue for settlement payments made to customers due to TomorrowNow's shutdown due to this litigation, TomorrowNow received $54.1 million in revenue since 2002, $48.5 million (90%) of which was received since TomorrowNow was acquired by SAP in January 2005.[810] Net of revenue reductions for settlement payments made, TomorrowNow received $41 million in net revenue from the Relevant TomorrowNow Customers since 2002, $35.4 million of which was received since it was acquired by SAP in January 2005.[811]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

License Sublicense Fee Expense," "Intercompany Technology Costs Expense" and the "Line of Business (LOB) Charges" recorded for the 35B Latin America Fiscal Recharge company code.[800] During this time period, OIC reported annual incremental profit margins on its support sublicense fee income of 94% to 96% (incremental cost of 4% to 6%).[801] In calculating OIC's lost profits damages, I have applied an incremental margin percentage of 95% (5% incremental costs) across all periods.

432. As explained above, I have applied a 10% discount rate to OIC's lost profits extending beyond November 2010. Based on this plaintiff entity-specific approach, OIC has experienced lost profits of $121.1 million on lost support revenue through May 2015, and $37.0 million on support revenue lost during the period for which TomorrowNow provided support service to the Lost Customers.[802]

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ORACLE CORPORATION
JDE, PEOPLESOFT & SIEBEL ATTRITION RATES
DECEMBER 2005 - FEBRUARY 2009

SCHEDULE 34.2

	JDE [1]	PeopleSoft [1]	Siebel [2]
FY 2006			
12/05- 2/06	7.80%	5.78%	n/a
3/06 - 5/06	12.75%	7.65%	1.71%
Average	10.28%	6.72%	n/a
FY 2007			
6/06 - 8/06	10.28%	5.41%	4.54%
9/06 - 11/06	9.90%	5.94%	3.85%
12/06 - 2/07	8.46%	3.68%	5.14%
3/07 - 5/07	6.93%	6.35%	3.70%
Average	8.89%	5.35%	4.31%
FY 2008			
6/07 - 8/07	5.34%	4.70%	n/a
9/07 - 11/07	4.01%	6.14%	n/a
12/07 - 2/08	3.25%	3.88%	n/a
3/08 - 5/08	7.12%	4.36%	n/a
Average	4.93%	4.77%	n/a
FY 2009			
6/08 - 8/08	3.97%	2.50%	n/a
9/08 - 11/08	4.66%	2.74%	n/a
12/08 - 2/09	5.65%	4.92%	n/a
Average	4.76%	3.39%	n/a

Sources:

[1] ORCL00689888_Psoft cancellation rates.xls.

[2] Oracle Presentation: "Customer Services, July Business Review," ORCL00568595 - 665, at 610.

ORACLE INTERNATIONAL CORPORATION
PRODUCT SUPPORT AND LICENSE UPDATES LINE OF BUSINESS
INCREMENTAL PROFIT MARGIN
JUNE 2005 - NOVEMBER 2009 [1]

SCHEDULE 40.2

	2006					2007					2008					Q1 - Q2 2009		
(in thousands)	6/05 - 8/05	9/05 - 11/05	12/05 - 2/06	3/06 - 5/06	TOTAL	6/06 - 8/06	9/06 - 11/06	12/06 - 2/07	3/07 - 5/07	TOTAL	6/07 - 8/07	9/07 - 11/07	12/07 - 2/08	3/08 - 5/08	TOTAL	6/08 - 8/08	9/08 - 11/08	TOTAL
Revenue																		
Intercompany License Sublicense Fee Income[2]																		
Oracle International Corporation	$ 60,877	$ 60,697	$ 69,303	$ 72,739	$ 263,616	$ 74,283	$ 76,828	$ 77,476	$ 82,980	$ 311,567	$ 84,346	$ 90,961	$ 95,188	$ 115,079	$ 385,574	$ 42,208	$ 50,326	$ 92,534
Latin America Fiscal Recharges	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Subtotal	**$ 60,877**	**$ 60,697**	**$ 69,303**	**$ 72,739**	**$ 263,616**	**$ 74,283**	**$ 76,828**	**$ 77,476**	**$ 82,980**	**$ 311,567**	**$ 84,346**	**$ 90,961**	**$ 95,188**	**$ 115,079**	**$ 385,574**	**$ 42,208**	**$ 50,326**	**$ 92,534**
Intercompany Technology Costs Income[2]																		
Oracle International Corporation	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ (7)	$ 1,888	$ 64,530	$ 66,411	$ 32,610	$ -	$ 32,610
Latin America Fiscal Recharges	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Subtotal	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ (7)**	**$ 1,888**	**$ 64,530**	**$ 66,411**	**$ 32,610**	**$ -**	**$ 32,610**
Total Revenue	**$ 60,877**	**$ 60,697**	**$ 69,303**	**$ 72,739**	**$ 263,616**	**$ 74,283**	**$ 76,828**	**$ 77,476**	**$ 82,980**	**$ 311,567**	**$ 84,346**	**$ 90,954**	**$ 97,076**	**$ 179,609**	**$ 451,985**	**$ 74,818**	**$ 50,326**	$ 125,144
Incremental Costs																		
Intercompany License Sublicense Fee Expense																		
Oracle International Corporation	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 3,673	$ 3,673	$ -	$ -	$ -
Latin America Fiscal Recharges	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Subtotal	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ 3,673**	**$ 3,673**	**$ -**	**$ -**	**$ -**
Intercompany Technology Costs Expense																		
Oracle International Corporation	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 948	$ -	$ 948
Latin America Fiscal Recharges	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Subtotal	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**	**$ 948**	**$ -**	**$ 948**
Other (Income)/Expense, LOB Charges and Uncontrollable Costs[3]																		
Oracle International Corporation	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Latin America Fiscal Recharges	2,945	2,943	3,129	1,586	10,603	3,563	6,675	3,692	3,790	17,720	3,927	4,256	1,245	3,005	12,433	2,971	3,242	6,213
Subtotal	**$ 2,945**	**$ 2,943**	**$ 3,129**	**$ 1,586**	**$ 10,603**	**$ 3,563**	**$ 6,675**	**$ 3,692**	**$ 3,790**	**$ 17,720**	**$ 3,927**	**$ 4,256**	**$ 1,245**	**$ 3,005**	**$ 12,433**	**$ 2,971**	**$ 3,242**	**$ 6,213**
Total Incremental Costs	**$ 2,945**	**$ 2,943**	**$ 3,129**	**$ 1,586**	**$ 10,603**	**$ 3,563**	**$ 6,675**	**$ 3,692**	**$ 3,790**	**$ 17,720**	**$ 3,927**	**$ 4,256**	**$ 1,245**	**$ 6,678**	**$ 16,106**	**$ 3,919**	**$ 3,242**	**$ 7,161**
Incremental Profit	**$ 57,932**	**$ 57,754**	**$ 66,174**	**$ 71,153**	**$ 253,013**	**$ 70,720**	**$ 70,153**	**$ 73,784**	**$ 79,190**	**$ 293,847**	**$ 80,419**	**$ 86,698**	**$ 95,831**	**$ 172,931**	**$ 435,879**	**$ 70,899**	**$ 47,084**	**$ 117,983**
Incremental Profit Margin	95%	95%	95%	98%	96%	95%	91%	95%	95%	94%	95%	95%	99%	96%	96%	95%	94%	94%

Sources:
[1] ORCL00694040_DIS SUPPORT TOTAL 110909.XLS.
[2] "Intercompany License Sublicense Fee Income" and "Intercompany Technology Costs" Income accounts are used to record sublicense fees paid to OIC by other Oracle entities [Discussion with Claire Sebti (Oracle Senior Director of Corporate Accounting)
[3] "Other (Income)/Expense, LOB Charges and Uncontrollable Costs" relates to charges to the Latin America company code for expenses incurred on its behalf by other Oracle entities [Discussion with Claire Sebti].