

EXHIBIT C

ORACLE USA, INC., ET AL

V.

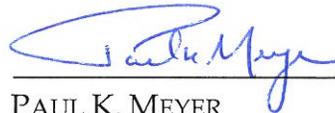
SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.

FEBRUARY 23, 2010



PAUL K. MEYER

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

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.

3. SAP's Ownership of TomorrowNow Was Also Critical to Making Inroads Into Oracle's Customer Base

363. An important reason why TomorrowNow became a viable option to customers and posed a great threat to Oracle was that the acquisition of TomorrowNow by SAP made TomorrowNow more legitimate, more financially viable and a much less risky option for customers to consider.⁶⁸⁶ Former TomorrowNow customers have testified that SAP's ownership of TomorrowNow's provided them with a greater level of comfort in going to TomorrowNow for support.⁶⁸⁷

4. Other Third Party Service Providers Would Not Have Otherwise Displaced Oracle Support Customers That Left for TomorrowNow

364. Depending on the point in time, there were (are) other third party providers of services related to Oracle's PeopleSoft, J.D. Edwards and/or Siebel products, including consulting services provided by Oracle partners. However, those companies are only able to provide a fraction of the support that a customer could obtain from Oracle, in that these other providers do not have access to Oracle's intellectual property and proprietary information (i.e.,

⁶⁸⁶ Deposition of Larry Ellison (Oracle CEO and Executive Board Member), May 5, 2009, pg. 40; Deposition of Nancy Lyskawa (Oracle Vice President of Support Marketing), May 6, 2009, pgs. 228-229; Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 73 and 197; Deposition of Richard Cummins (Oracle Senior Director, Support Renewals for North America), April 22, 2009, pg. 513; Deposition of Charles Phillips (Oracle Co-President and Executive Board Member), April 17, 2009, pgs. 148-149; Deposition of Shai Agassi (Former SAP Executive Board Member), January 5, 2009, pgs. 344-345 and SAP-OR00502277-292 (Agassi Exhibit 742), at 279 and 286.

⁶⁸⁷ Deposition of John Kreul (Pepsi Americas Vice President of Applications), June 2, 2009, pgs. 49-50; Deposition of Robyn Harrel (April Healthcare Program Manager for Finance and Supply Chain Applications), September 28, 2009, pg. 82; Deposition of Steven Brazile (Sara Lee Vice President of Application Development and Support), October 14, 2009, pg. 80; Declaration of Ed Valle of Everdream Corporation, November 17, 2009, pg. 2. TomorrowNow's agreement with Waste Management contained a "Parental Guarantee" clause, in which SAP guaranteed that TomorrowNow would perform under the contract [Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pg. 41].

without infringing Oracle's intellectual property rights) to provide those services.⁶⁸⁸

365. In 2005, Oracle identified other third party service providers in addition to TomorrowNow, such as Conexus Partners, CH2M Hill, Versytec and Klee Associates.⁶⁸⁹ However, Oracle experienced little effect from these other third party suppliers in relation to TomorrowNow, and Oracle did not perceive them to be then, or thereafter, legitimate competitors to Oracle support services; TomorrowNow was the most predominant competitive threat.⁶⁹⁰

366. Most of the other third party service providers identified by Oracle are no longer in business or only offer consulting services, not the same level of support that Oracle or TomorrowNow was providing to its customers.⁶⁹¹ Former TomorrowNow customers have acknowledged that there were no other viable alternatives at the time that they switched to TomorrowNow, and other third-party service providers, such as Klee Associates or Conexus Partners, did not meet necessary qualifications and were not considered to be real alternatives.⁶⁹²

⁶⁸⁸ Deposition of Juergen Rottler (Oracle Executive Vice President, Oracle Customer Services), May 13, 2009, pgs. 213-216.

⁶⁸⁹ "Oracle Third Party Support Competitive Update," dated May 12, 2005, ORCL00032592-621 (Cummins Exhibit 45), at 596; Deposition of Richard Cummins (Oracle Senior Director, Support Renewals for North America), September 16, 2008, pgs. 187 and 193-195.

⁶⁹⁰ Deposition of Richard Cummins (Oracle Senior Director, Support Renewals for North America), September 16, 2008, pgs. 90, 114-117 and 194-199; Deposition of Richard Cummins, April 21, 2009, pgs. 54-59; "Maintenance Strategy Session," ORCL00088216-30 (Cummins Exhibit 63), at 227; Deposition of Michael Van Boening (Oracle Support Renewal Sales Representative), September 10, 2009, pgs. 20-21 and 148-149.

⁶⁹¹ Deposition of Richard Cummins (Oracle Senior Director, Support Renewals for North America), September 16, 2008, pgs. 114-117 and 194-198; Deposition of Richard Cummins, April 21, 2009, pgs. 54-59.

⁶⁹² Deposition of Mark Anderson (Travel Centers Manager of IT for PeopleSoft, SAP, BW and Cognos Business Intelligence), June 8, 2009, pgs. 55-56; Deposition of John Kreul (Pepsi Americas Vice President of Applications), June 2, 2009, pgs. 48-49 and 136; Deposition of Jeffrey O'Donnell (Lexmark Commodity Manager), September 15, 2009, pgs. 87 and 99; Declaration of Steven Loyd, Former Director of Information Technology for Intraware, Inc.,

6. But for Defendants' Improper Actions, Oracle Would Have Retained the Customers That Left for TomorrowNow

372. Throughout the period in which customers cancelled their support contracts with Oracle to move to TomorrowNow, there were no viable non-infringing alternatives that could provide the level of PeopleSoft, J.D. Edwards and Siebel support that Oracle provided, and that customers were promised by, and able to obtain from, TomorrowNow due to its alleged infringement and misuse of Oracle's intellectual property. Moreover, as explained above, the lure of paying half of Oracle's support price (or less) for what was solicited to be the same or superior service, and particularly with the resource and brand backing of SAP and referrals of other TomorrowNow customers, was attractive to Oracle's PeopleSoft, J.D. Edwards and Siebel customers.⁷⁰⁸ For the reasons described, but for TomorrowNow's alleged bad acts, Oracle would not have lost the revenue and profits quantified in the following section of this report.⁷⁰⁹

C. Oracle's Lost Profits on Support Revenue Lost to TomorrowNow

(Travel Centers Manager of IT for PeopleSoft, SAP, BW and Cognos Business Intelligence), June 8, 2009, pg. 119; Declaration of Stefan Vilsmeier, President, On Behalf of BrainLab, Inc., July 9, 2009, pgs. 2-3; Declaration of John Goetz, Director of Information Technology of The Harris Products Group, November 16, 2009, pg. 3; Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pg. 69.

⁷⁰⁸ The importance of getting client references was regularly noted in TomorrowNow "Win" announcements [Deposition of Andrew Nelson (Co-Founder of TomorrowNow), February 26, 2009, pgs. 202-203. *See, e.g.*, TomorrowNow email from Bob Geib to all TomorrowNow employees, Re: TomorrowNow WINS! High Industries (PeopleSoft) Part TWO, TN-OR 00061877-878 (Hurst Exhibit 167), at 878; TomorrowNow email from Andrew Nelson to all TomorrowNow employees, Re: TomorrowNow WINS AGAIN! Telapex, Inc., TN-OR 03752526 (A. Nelson Exhibit 1022)]. Lesley Loftus, TomorrowNow Vice President of Global Marketing, testified that customer referrals were important because "it's a good foundation for a decision." [Deposition of Lesley Loftus, June 31, 2008, pg. 196]. As part of its marketing of the Safe Passage program, SAP sought to get TomorrowNow customer testimonials [Deposition of Terry Hurst (SAP Director of Competitive Programs), April 30, 2008, pg. 145-146; Home Depot reference quotes, SAP-OR 00066889-891 (Hurst Exhibit 163)].

⁷⁰⁹ I understand that discovery is on-going and that additional evidence related to causation and other issues may be presented at trial. I will consider any such relevant additional evidence and reserve the right to adjust my opinions in response.