

EXHIBIT H

Oracle USA, Inc., et al

v.

SAP AG, et al

Stephen K. Clarke
Expert Report

May 7, 2010

1.1. Allegations

Oracle USA, Inc. (“Oracle USA”), Oracle International Corporation (“OIC”), Oracle EMEA (“OEMEA”), and Siebel Systems, Inc. (“Siebel”) (together, “Plaintiffs”) filed their Fourth Amended Complaint (“Complaint”) against TomorrowNow, SAP AG, and SAP America, Inc. (together, “Defendants”) on August 18, 2009.⁹ The Complaint includes a range of claims including, inter alia:

1. Copyright infringement of Oracle’s “Software and Support Materials” (“Subject IP”)¹⁰
2. Breach of contract
3. Unjust enrichment
4. Interference with prospective economic advantage

However, the Court in this case (the Honorable Judge Hamilton) issued an order (“Court’s Order”)¹¹ that precluded certain claims made in the Complaint (as discussed more fully later in this report). Plaintiffs’ allegations are referred to as the “Alleged Actions” in this report.

Paul Meyer (“Mr. Meyer”) issued a report on November 16, 2009 (“Meyer Report”) in which he purported to quantify certain of the damages Plaintiffs allegedly suffered as a result of the Alleged Actions. The first Meyer Report contained many errors. Mr. Meyer issued a second report (with the same November 16, 2009 date) with numerous highlighted corrections to the errors in the first report. On February 23, 2010, Mr. Meyer issued a third report, expanding a section on Oracle’s database claims and correcting more errors made in his second report. I have addressed the third Meyer Report in my analysis and references to the Meyer Report are to his third iteration unless otherwise noted.

1.2. Scope of Engagement

Counsel for Defendants asked me to review and analyze the Meyer Report and to quantify what Oracle’s damages would be if Defendants are found liable for the Alleged Actions. Although for purposes of this analysis I have assumed Defendants are liable for the Alleged Actions, the assumption is not an admission of liability by Defendants. I offer no opinion on liability in this matter.

My resume and testimony experience are presented in Appendices A and B, respectively. In the course of my analysis I, or my staff acting at my direction, reviewed the documents listed in Appendix C. LECG has been compensated for the work done on this engagement at hourly rates

⁹ Complaint, pages 1-2.

¹⁰ I define Software and Support Materials consistently with Mr. Meyer: “application and database software, program updates, software updates, bug fixes, patches, customer solutions, and instructional documents for the PeopleSoft, J.D. Edwards, Oracle Database and Siebel families of software products.” Meyer Report, page 7, paragraph 7. I define Subject IP as the portion of the Software and Support Materials allegedly infringed and actually used by TomorrowNow.

¹¹ Judge LaPorte issued an original order dated September 17, 2009 and Judge Hamilton affirmed that order on November 2, 2009. I refer to the two orders as the Court’s Order.

4. “avoided costs”
5. “avoided risks”
6. “ease of market entry”
7. “negative” impact on Oracle

He then claims to have calculated the “...fair market value of these benefits to SAP.” However, he stated benefits are not relevant to his damages conclusion.

1. “Enhanced Revenues” are of no value if they do not lead to more profits and as I describe later in this report TomorrowNow would likely have made less profit if the License was in place (their selling price would have had to be higher than it was to accommodate the royalty and that would have reduced sales and profits) and SAP made little or no additional profit as a result of the Alleged Actions.
2. “Improved market position” is not a quantifiable benefit, at least within the boundaries of the Meyer Report.
3. There is no reason to believe the License would increase a customer’s propensity to stay on Defendants’ support, and Mr. Meyer presents no evidence to support the proposition.
4. “Avoided risks” and “Ease of market entry” are not quantifiable benefits, again within the boundaries of the Meyer Report.

There would be no “negative” impact on Oracle if the License was in place on the terms Mr. Meyer postulates. In fact, because Oracle would still own all of the assets it acquired in the acquisitions, it would be substantially better off under Mr. Meyer’s postulated license.

It is a significant contradiction in Mr. Meyer’s analysis that he states he is going to quantify the value of actual use then includes his list of SAP benefits. This contradiction (and others) runs throughout Mr. Meyer’s analysis and makes it impossible to segregate the damages he calculates related to the actual use and the damages related to the other benefits he ascribes to SAP. Stated another way, SAP’s unfulfilled and unrealized aspirations for the role of TomorrowNow driving sales of SAP application licenses do not constitute actual use and should play no role in assessing the Value of Use. Mr. Meyer’s adoption of SAP’s marketing hopes as his basis for a paid-up license is inappropriate and not the sort of objective data he should rely upon for his analysis. In addition, no prudent licensee would ever agree to the License as postulated by Mr. Meyer.

The contradiction is compounded when Mr. Meyer adds later in paragraph 105: “I understand that the copyrighted materials in suit are essential,¹⁴⁴ and without a license to the Oracle copyrighted materials in suit, SAP could not offer a level of support services to Oracle’s PeopleSoft, J.D.Edwards, Siebel and Oracle Database customers as quickly as SAP desired, or comparable to the level of service and at the price provided by TomorrowNow.” Based on Mr.

¹⁴⁴ Mr. Meyer does not clarify what the copyrighted materials in suit “are essential” for so this portion of his statement is unclear.

Meyer's statement, all SAP gains by infringing the Subject IP is the ability to provide "a level of support services" comparable to that provided by TomorrowNow, yet he refers the reader to "level of service" as provided by *Oracle* in footnote 276 to paragraph 105. Therefore, it is not clear what Mr. Meyer is assuming as regards actual use allegedly made of the Subject IP and the difference between the two makes a major difference on the analysis. In addition, the evidence in this case is overwhelming that Oracle believed the services provided by TomorrowNow were in many ways inferior to those provided by Oracle. Yet Mr. Meyer ignores his client's statements and claims to be basing his analysis on the assumption that the support services provided by TomorrowNow were equivalent to those provided by Oracle. He cannot have it both ways. Either the support services provided by the two companies were equivalent or they were not.

Mr. Meyer also ignores other evidence that indicates TomorrowNow did not provide the same level of service as Oracle. Industry media coverage, which has the potential to affect customer perceptions of the capabilities of third party support vendors, reported the differences between Oracle and TomorrowNow support. For example, a Forbes article reported that:

TomorrowNow readily acknowledges, that it's not offering the same level of services... "TomorrowNow offers no implementation services or training. They don't have a full-service services organization to duplicate Oracle's. They're doing [maintenance] for half the cost ... a much more minimal level of support, but an acceptable level of support for some customers."¹⁴⁵

Another industry article describes third party support:

Third-party support for enterprise software is entirely legal. It is, for the most part, very similar to buying a new BMW from an authorized BMW dealership, but taking it to an independent auto repair shop for servicing.¹⁴⁶ Oracle, however, has an obvious problem with the way in which TomorrowNow and Rimini Street have gone about offering their services and their individual "business models." ...the world of maintenance and support is unglamorous as it gets inside today's business. ...For the software vendors, however, the fees are a lucrative cash cow that keep on giving all year long.

As I discuss in more detail later in my report, third party support was reported by industry analysts to be a viable option for certain customers, especially those on old, stable, customized releases that are not interested in receiving upgrades.

Mr. Meyer implicitly assumes that to provide support services to the TomorrowNow customers, TomorrowNow would need a license to all of the "copyrighted materials in suit." However, based on information provided by Mr. David Garmus,¹⁴⁷ it was not necessary for TomorrowNow

¹⁴⁵ DiCarlo, Lisa. "Computer Hardware & Software: Hitting Oracle Where it Hurts," September 16, 2005. <http://www.forbes.com>.

¹⁴⁶ Wailgum, Thomas. "ERP Support: How Far will Oracle Go to Protect Golden Egg?" February 26, 2010.

¹⁴⁷ An expert retained by the Defendants in this case.

assumptions, Mr. Meyer then states that in his opinion SAP avoided development expenditures with a "...fair market value of no less than \$225.7 million."²⁴⁷

Mr. Meyer references²⁴⁸ SAP's expenditures of "...over \$█ billion on support development..." to buttress his argument that SAP would have been "aware of the significant cost associated with providing support to..." its customers. The argument does not appear to add anything to Mr. Meyer's argument as there is no doubt that both Oracle and SAP were aware that support development requires significant expenditures. The problem is that Mr. Meyer has failed to take the support related portion of such costs into account in his Oracle lost profits and Value of Use analyses.

In addition, my analysis of the testimony in this case indicates that TomorrowNow created some or most of its own fixes, updates and other materials. Accordingly, to the extent my understanding is correct, Mr. Meyer's damage analysis is inappropriate because it charges TomorrowNow for a portion of the Subject IP it did not use. Furthermore, as Mr. Garmus reports, (later) the Subject IP TomorrowNow used did not include the entire suite of software at issue. To the extent the Subject IP was only a subset of the software at issue, Mr. Meyer should have reduced his Value of Use for all approach measures (i.e., market, income and cost) accordingly.

6.3. Pinto Cost Estimate

Mr. Meyer next deals with the cost SAP would have had to incur to independently develop the Oracle copyrighted materials at issue. In doing so, he references a report prepared by Mr. Paul Pinto, an expert retained by Oracle in this case. Mr. Meyer states, "...Mr. Pinto has concluded that it would have cost Defendants approximately \$1.275 billion with a range of \$936 million to \$2.903 billion to develop 7 specific PeopleSoft and J.D.Edwards software applications."²⁴⁹ Mr. Meyer states, "...one of Mr. Pinto's conclusions addresses avoided development costs of [between] \$198 million and \$573 million"²⁵⁰ for Siebel.

The practical application of Mr. Meyer's opinion in this regard is unclear. I understand from Mr. Garmus, that to be suitable for Mr. Meyer's purposes (i.e., a replacement for Oracle software that would allow TomorrowNow to support its customers without using the Subject IP) the independently developed software would have to *exactly replicate* the Oracle software.²⁵¹ With millions of lines of software code at issue, statistically speaking, the probability of SAP exactly replicating the Oracle software without actually copying Oracle software code is essentially zero, an assessment Mr. Garmus confirmed. In addition, if SAP duplicated the four suites of software applications Mr. Meyer references the cost of replication would confer total ownership of the software on SAP which is not an appropriate measure of the Value of Use in this case

Therefore, what Mr. Meyer and Mr. Pinto are opining on makes no practical or economic sense in the context of this case. In addition, from an economic point of view, Mr. Pinto's cost

²⁴⁷ Meyer Report, page 191, paragraph 287.

²⁴⁸ Meyer Report, page 99, paragraph 149.

²⁴⁹ Meyer Report, page 99, paragraph 150.

²⁵⁰ Meyer Report, page 192, paragraph 288.

²⁵¹ Garmus Report.

analysis is too vague to be usable as the basis for damages analysis because for PeopleSoft alone it covers a range of \$2 billion which indicates it is little more than an unsubstantiated guess. Mr. Pinto's development cost estimate for Siebel ranges from \$198 million to \$573 million which is also little more than a guess as no reasonably accurate analysis could result in such a wide spread.

Mr. Reifer analyzed Mr. Pinto's approach to quantifying the effort and cost of replicating the Oracle software. Mr. Reifer (who I understand is an expert in the COCOMO model Mr. Pinto used in his analysis), states in his report that Mr. Pinto:

1. Made simple mathematical errors
2. Assumed inappropriately high labor rates
3. Double counted certain documentation costs
4. Counted the lines of code incorrectly
5. Employed a flawed estimation methodology

Mr. Reifer did his own analysis and reported a series of ranges that varied based on the degree and type of changes he incorporates into the assessment. His report shows that at the lower end of his range the cost to develop the four suites at issue in this case would be between \$211.8 million based on optimal factors and \$330.8 million assuming pessimistic factors. At the upper end of his range he estimates \$963.0 million based on optimal factors and \$1,504.6 million assuming pessimistic factors. There are other ranges in between these extremities.

Mr. Garmus states in his report that Mr. Pinto:

1. Applied Function Point Analysis inappropriately
2. Measured the code inappropriately by basing his estimate on the number of lines of code (a process Mr. Garmus refers to as "backfiring")
3. Assumed that all of the Oracle code for all four suites needed to be replicated when in fact many elements of the code were never used by TomorrowNow and should be excluded from the analysis

Mr. Reifer's and Mr. Garmus' reports show Mr. Pinto's approach and methodology to be inappropriate for the task Mr. Pinto was trying to accomplish and that his conclusion overstates the cost to replicate the appropriate code.

I have no opinion on the analyses these experts provided of the Pinto Report. However, if they are correct, then Mr. Meyer should not rely on Mr. Pinto's opinion. To the extent the Pinto opinion is found to be in error or otherwise inadequate, Mr. Meyer's reliance upon it for any portion of his damages analysis is inappropriate.

8.2. Georgia-Pacific Factor No. 2: Rates Paid by Licensee

“The rates paid by the licensee for the use of other patents comparable to the patent in suit.”

Defendants did not pay for the use of other intellectual property comparable to the Subject IP.

8.3. Georgia-Pacific Factor No. 3: Nature and Scope of the License

“The nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.”

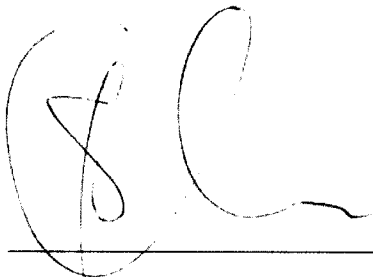
The license must cover the unauthorized use TomorrowNow allegedly made of the Subject IP but need not also include the use they could have made as authorized consultants to their customers. Based on the testimony in this matter, it is clear that Oracle’s customers, as well as their contractors, consultants and integrators, could legitimately access the Oracle code within the boundaries of the end-user license agreement. Therefore, the only activities TomorrowNow would need a license for would be the difference between the authorized and unauthorized uses of the Subject IP (“Delta”).

Based on my understanding of the claims made by Oracle, and on my understanding of the services provided by other consultants and third-party support providers, the Delta consists of the following:

1. TomorrowNow would be able to keep a copy of the customer’s environment on a TomorrowNow computer such that it would not need to remotely access the customer’s environment on the customer’s computer.
2. TomorrowNow could promulgate fixes developed in one customer’s software to fix another customer’s software (provided they had the same starting source code) without having to re-create the fix for each additional customer.
3. TomorrowNow could download from Oracle’s customer connection any fixes, patches, updates or upgrades it needed to ensure that a customer had what it was entitled to under the terms of the Oracle license agreement prior to leaving Oracle maintenance, (TomorrowNow would not be licensing the right to give that same customer material released by Oracle after its Oracle termination date.)

I understand that Oracle would view TomorrowNow as a competitor and, therefore, wish to charge a high royalty for TomorrowNow’s use of the Oracle software in order to limit its ability to compete. However, when viewed as a list and stripped down to the bare realities, it is clear that TomorrowNow’s actions were not very different from the actions many third-party support vendors⁵¹⁵ offer. The main differences between what TomorrowNow is alleged to have done and what the other third-party vendors appear to do without interference from Oracle are the three actions listed above, i.e., the Delta. I will address the nature and scope of the use SAP would make of the Subject IP in more detail later in this report.

⁵¹⁵ For this purpose, I include in third-party support vendors all consultants and system integrators that provide support or implementation services to their clients and customers.



Stephen K. Clarke

May 7th, 2010

Date