EXHIBIT A
[REDACTED VERSION]

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

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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.

ranging from $60 to $575 per hour. I may supplement my report should additional information become available.

In addition to bringing my own knowledge and expertise to bear on the subject matter of my report, I also discussed the case with an industry expert engaged by SAP, Brian Sommer ("Mr. Sommer"). I also read and referenced the reports of Mr. Sommer and of the software valuation and technical experts retained by Defendants, David Garmus ("Mr. Garmus"), Donald Reifer ("Mr. Reifer") and Stephen Gray ("Mr. Gray"), as required for my report.

2. Meyer Report – Overall Comments

The Meyer Report presents Mr. Meyer's opinion of damages in four categories as follows:

> …the fair market value of SAP's actual use of Oracle's intellectual property (copyrighted materials), Oracle's lost profits related to support contracts, SAP's infringer profits/unjust enrichment and Oracle's additional costs caused by SAP's alleged actions.[12]

2.1. Discretionary Claims

Mr. Meyer adds that if he is "…allowed by the Court, [he] may also be asked to compute or provide opinions related to pre-judgment interest, attorney's fees and costs and punitive damages."[13] Because such awards are generally at the discretion of the Court, I have no opinion on whether Mr. Meyer's analysis and presentation of such claims would be appropriate in the context of a trial in this matter. If Mr. Meyer is allowed by the Court to testify about these discretionary claims, I will be prepared to address them at that time.

2.1.1. Contaminated Damage Claim

The Court's Order states that Oracle is precluded from presenting evidence of claims which include damages related to "(1) alleged lost profits relating to customers that did not become customers of TomorrowNow; (2) alleged lost profits relating to licensing revenue, as opposed to support revenue; and (3) alleged lost profits relating to products that were not supported by TomorrowNow" and that the "…precluded evidence will NOT be admitted through the back door…" [emphasis in original]. I interpret the Court's Order to mean that Mr. Meyer will not be allowed to testify about the precluded damage claims even if he includes them in his "Value of Use" claim or in other portions of his overall damage analysis.

However, the Meyer Report does not differentiate between the damages he calculates for claims precluded by, and those not precluded by, the Court's Order. Therefore, Mr. Meyer's damage opinions include damages contaminated by precluded claims.

[12] Meyer Report, page 14, paragraph 20.
[13] Meyer Report, page 14, paragraph 20.

acquisition of PeopleSoft and was, therefore, one result of Oracle's actions.[23] Accordingly, it would be a reasonable business action for SAP to capitalize on the opportunity in the market to boost its chances of converting former PeopleSoft customers to SAP.[24]

Mr. Meyer is required by a code of standards to which he is bound to maintain objectivity, defined by the American Institute of Certified Public Accountants as:

> Objectivity is a state of mind, a quality that lends value to a member's services. It is a distinguishing feature of the profession. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest.[25]

In spite of the requirement that he maintain objectivity, Mr. Meyer tries to establish an aura of illegality around SAP's efforts to compete with Oracle based solely on SAP's efforts to attract customers from Oracle. However, the statements in the cited references do not indicate inappropriate activity on the part of SAP. Rather, the cited material references normal competitive efforts of a company in a competitive business.

Typically, damages experts for plaintiffs and defendants assume liability on the part of the defendant[26] which obviates the need for the expert to address a plaintiff's liability arguments or the merits of a defendant's actions. Many of Mr. Meyer's statements characterize SAP's behavior inappropriately. It is unclear what Mr. Meyer was trying to achieve by doing so. Because the material appears to be connected to Mr. Meyer's calculation of SAP's alleged Value of Use of the Subject IP, I address various additional elements of his treatment of these items below.

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[23] According to a statement by Oracle, in the pre-acquisition litigation with PeopleSoft "in a management presentation to Oracle's Board of Directors concerning possible acquisitions, made months before the tender offer, the uncertainty that a contested acquisition of PeopleSoft would necessarily create among the customers of *both* companies was cited as a major disadvantage of such an initiative." *PeopleSoft, Inc., and J.D.Edwards & Company v. Oracle Corporation,* Memorandum of Points and Authorities in Support of Oracle Corporation's Motion for Summary Adjudication on PeopleSoft's Claim for Interference with Prospective Economic Advantage, page 1of FOLGER005737-812 at 742. In the same litigation, PeopleSoft stated that, "Upon announcing the 'Tender Offer' Oracle represented that it would kill PeopleSoft products and that PeopleSoft would not be the surviving platform in the event of a merger." *PeopleSoft, Inc., and J.D.Edwards & Company v. Oracle Corporation,* PeopleSoft's Amended Memorandum of Points and Authorities in Opposition to Oracle Corporation's Motion for Summary Adjudication on Claim for Interference with Prospective Economic Advantage, December 16, 2004, page 8, FOLGER000039-106 at 51.

[24] Mr. Meyer appears to acknowledge that Oracle created the fear, uncertainty and doubt. He states at the end of paragraph 52 that, "the fear, uncertainty and doubt result[ed] from Oracle's long takeover battle with PeopleSoft" and references the Keith Block and Larry Ellison depositions. Meyer Report, page 37, paragraph 52, footnote 129.

[25] AICPA: Forensic and Valuation Services (fvs.aicpa.org). Statement on Standards for Consulting Services No. 1; Article IV. <http://fvs.aicpa.org/Resources/Laws+Rules+Standards+and+Other+Related+Guidance/AICPA+Professional+Standards/Statement+on+Standards+for+Consulting+Services+No.+1.htm?PrinterFriendly=true>.

[26] Experts for both plaintiffs and defendants assume liability on the part of the defendant.

TomorrowNow ever had, only 86[67] bought products or services from SAP while they were supported by TomorrowNow. The small fraction of TomorrowNow customers that bought products or services from SAP while supported by TomorrowNow is strong evidence that TomorrowNow had no, or almost no, effect on sales for SAP. And, as I describe in more detail later, only a small fraction of the SAP Safe Passage customers used TomorrowNow for support of their Oracle products. Therefore, SAP sales did not drive support sales for TomorrowNow. Consistent with this evidence, Oracle executive, Safra Catz ("Ms. Catz"), Co-President and Board Member of Oracle stated, "I don't believe we have lost any large customers because of this [SAP and TomorrowNow joint sales efforts]. If we lost, we lost to SAP for other reasons."[68]

Mr. Meyer fails to give a balanced view of Safe Passage. For example, Mr. Meyer fails to point out that the business rationale for Safe Passage was perfectly reasonable – namely, encourage Oracle's customers to terminate their existing relationship with Oracle and choose SAP for their future ERP needs. In fact, several other software vendors, including Oracle, announced programs similar to Safe Passage. In the midst of Oracle's hostile bid for PeopleSoft, leading ERP vendors sought to maintain or expand their slice of the licensing and support business through similar migration programs.[69] In some cases, ERP vendors partnered with a third-party support vendor to offer a suite of ERP licenses and support at a discounted price for customers wanting to switch their ERP solution.[70] In addition, SAP had an earlier program called Safe Harbor, which was similar to Safe Passage but without TomorrowNow's involvement;[71] further evidence that TomorrowNow was not an essential part of the overall program.

Safe Passage was the successor to Safe Harbor as described in an industry article quoted in an SAP memorandum:

> Safe Passage follows an earlier SAP initiative to lure JDE and PeopleSoft customers. The initial program, called Safe Harbor, was announced at the beginning of the Oracle/PeopleSoft takeover battle and involved a free SAP-provided assessment of a company's application environment and possible options. SAP spokesman Bill Wohl said he couldn't provide specific results of the Safe Harbor program, but he noted that SAP has increased its market share by 22 points in the last year, although not all of that gain can be attributed to the program.[72]

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67 Not all of the customers on the List of 86 were Safe Passage customers. The List of 86 merely matched certain agreed criteria developed by the parties' lawyers.

68 Oracle email from Jeff Henley to Safra Catz dated March 25, 2005. Re: At Risk from Juergen; ORCL0074446-448 at -446.

69 "Competitive Marketing Strategy – Support Services Customer Retention." January 28, 2005. v.5. ORCL00032579-586, at -579. See also, Morgan, Timothy Prickett. "ERP Vendors Target PeopleSoft, JDE Bases." *IT Jungle*. January 24, 2005. <http://www.itjungle.com/tfh/tfh012405-story02. html>.

70 Morgan, Timothy Prickett. "ERP Vendors Target PeopleSoft, JDE Bases." IT Jungle. January 24, 2005. <http://www.itjungle.com/tfh/tfh012405-story02.html>.

71 Thomas Gene Hurst, II deposition dated April 30, 2008, pages 189-190: "Q. And was Safe Harbor similar to Safe Passage, except there was no TomorrowNow element? A. That is correct."

72 Brousell, David R. "SAP Offers 'Safe Passage' for PeopleSoft, JDE Users." *Managing Automation*. January 20, 2005. <http://www.managingautomation.com/maonline/magazine/read.jspx?id=2457601&printable>. Contained in a SAP memorandum dated January 20, 2005; SAP-OR00416955-977, at -967.

companies selecting Oracle applications over SAP in the company's last fiscal year. Oracle also reported that "more than 2200 SAP R/3 customers have registered in the 'OFF SAP' program, or Oracle Fusion for SAP."[88]

The migration programs offered by Microsoft, SAP, and Lawson, geared towards capturing some of the business in play due to anxiety created by Oracle's acquisition of PeopleSoft, indicate the evolution of normal competitive practices in the industry. SAP's and TomorrowNow's joint program was consistent with programs sponsored by other ERP competitors (such as Microsoft and Lawson) and in the normal course of business. Oracle's own efforts with a third-party support component targeting SAP R/3 users, was proof (if any were needed) of the competition in the industry and that such programs were part of the normal competitive environment.[89] Therefore, Mr. Meyer's portrayal of the Safe Passage program as somehow inappropriate is contradicted by the facts.[90]

There were a number of ways in which SAP could have offered a program similar to its Safe Passage program without TomorrowNow. First, as mentioned above, SAP already had a Safe Harbor program in place prior to its acquisition of TomorrowNow that did not include a third-party support provision. SAP could have chosen to continue the program without the third-party support component. Such action would be consistent with its legitimate objective of capitalizing on the market's anxiety over the future of PeopleSoft products resulting from Oracle's acquisition. Second, SAP could have hired its own team of PeopleSoft engineers to provide support on a consulting basis in the same way other vendors support customers. Third, SAP could have partnered with another third-party vendor to offer Oracle support. Finally, SAP could have enhanced its Safe Passage program by paying some or all of the price of Oracle support during a specified migration period for customers choosing SAP and dispensed with third-party support altogether.

Migration programs continue as of the date of this report. For example, a March 1, 2010 article on cio.com reports:

> …other enterprise software vendors have forged migratory software-switching programs. Most recent, SaaS ERP vendor NetSuite has rolled out its 'Crossroads' campaign to move SAP customers to NetSuite's wares. ('Crossroads' appears to come from the fact that many SAP customers are right now deciding whether to do some serious upgrades with their R/3 apps.)

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88 Oracle.com. June 26, 2006. "585 Customers Selected Oracle Over SAP in Fiscal Year 2006: Wide-Spread Interest in 'OFF SAP' Drives Oracle Customer Adoption." <http://www.oracle.com/us/corporate/press/016757_EN?rssid=rss_ocom_pr>.

89 The nature of competition between Oracle and SAP may be characterized in a 2006 Oracle email from Keith Block to Jeff Henley regarding customer, JM Smucker: "my guys are fired up beyond belief and we are going to stick it to sap big time." In response, Jeff Henley replied: "I'm happy to do whatever I can to help kick SAP's butt!" Oracle email chain from Jeff Henley to Keith Block dated March 11, 2006. Re: JM Smucker Meeting; ORCL00744679-680 at -679.

90 Larry Ellison deposition dated May 5, 2009, page 133; "Q. Do you recall the OFFSAP program? A. Yes. Q. What was that? A. It was the name of one of our marketing programs to try to convince people to move off of SAP to Oracle. Q. Is there anything wrong with having a marketing program designed to convince your competitor's customers to move to you? A. It's the American way."

> Infor has also received some attention for its 'Down with Big ERP' campaign that targets large and expensive SAP and Oracle installs.[91]

The fact that migration programs continue suggests that they are normal practice in the ERP market. They have simply changed to target new customer anxieties.

Therefore, it was a legitimate business objective for SAP to try to attract customers from Oracle, and that is not what this case is about.

REDACTED - NOT RELEVANT TO MOTION

3. Quantification of "Value of Use" – PeopleSoft and Siebel

The Meyer Report includes an analysis of the Value of Use the Defendants allegedly made of the Subject IP ("Value of Use") to support PeopleSoft and Siebel users. The two sections of the report that cover PeopleSoft and Siebel are largely redundant, although there are a number of items unique to each section. Because of the largely redundant content, I discuss both sections together and make references specifically to PeopleSoft or Siebel where appropriate.

I address Mr. Meyer's "quantification" of the Value of Use in detail below.

3.1. "Lost Profits" versus "Value of Use"

Mr. Meyer provides his understanding of the law[104] relating to damages claims in copyright cases and provides an overview to commence his calculation of damages which states,[105] "I understand that courts, including the Ninth Circuit, have held that the actual damages for the defendant's 'value of use' may be determined on the basis of a fair market value license fee paid *for use of the plaintiff's work*." [emphasis added]. I recognize that as of this time Mr. Meyer is allowed by a ruling[106] of the Court to present a Value of Use approach in an attempt to quantify Oracle's actual damages. He develops the Value of Use in part by assessing the outcome of a hypothetical negotiation ("Negotiation") at the time of SAP's acquisition of TomorrowNow in the form of a reasonable royalty, as well as considering market, income and cost approaches to intellectual property valuation.

However, Mr. Meyer's damages analysis makes no mention of the specific preclusion of certain elements of damages as outlined in the Court's Order: The preclusions are relevant to Mr. Meyer's analysis because they establish boundaries within which to calculate damages. Although the Court may determine that Mr. Meyer has introduced the precluded damages evidence through the "back door," that determination may not be known for some time. Accordingly, I must address Mr. Meyer's Value of Use as a complete body of work including[107] the elements of damages the Court precluded.

As will also become apparent in my analysis of his report, Mr. Meyer's application of a reasonable royalty fails to properly quantify the Value of Use. However, it should not even be necessary to compute a Value of Use. Oracle's lost profits may be determined with precision, so there is no need to do a Value of Use analysis. Because the profits Oracle may have lost as a result of the Alleged Actions can be determined with a high degree of precision, so there is no need to *estimate* a reasonable royalty.

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104 Meyer Report, page 64, paragraph 91.

105 Meyer Report, page 65, paragraph 92.

106 Order Denying Defendants' Motion For Partial Summary Judgment, Judge Phyllis Hamilton, dated January 28th, 2010.

107 Meyer Report, page 63, paragraph 89. Mr. Meyer also references "pricing pressure" but never develops his thought any further than merely mentioning it. It is unclear why Mr. Meyer includes reference to pricing pressure but because it refers to losses Oracle may have realized due to price reductions the reference should be excluded by the Court's Order.

3.2. Use of Subject IP

Mr. Meyer fails to define the *actual use* Defendants allegedly made of the Subject IP and his failure leads to his lack of definition as to how Defendants allegedly used the Subject IP inappropriately. Although he does not define the use he was attempting to value, it is implicit in his approach that he was calculating the value of a fully paid, perpetual, world-wide license,[108] and explicit that the license related to the "PeopleSoft/J.D.Edwards, Siebel, and Oracle Database copyrighted software and software support materials."[109]

My analysis of the alleged use Defendants made of the Subject IP reveals a different "use" as follows:

1. Use of the Subject IP over a period of varying duration *depending on the particular product at issue* but not exceeding seven years (based on the period 2002, the start of the alleged infringement, through the end of alleged infringement in 2008).

2. Different use *depending on the particular product at issue* (PeopleSoft, J.D.Edwards and Siebel) because the manner in which TomorrowNow supported the customer was different for each product line.

3. Limited access to the underlying software source code such that the Defendants would not *own* the computer code that runs the ERP operations but would be entitled to modify it[110] in limited ways.

4. No access to the software object code.

5. Use in the limited territories necessary to service the actual supported customers.

6. Intense competition from Oracle for the same customers.

7. A built-in bias towards early termination of any TomorrowNow support agreement for those customers that migrated their applications to SAP or other vendors' licenses, which would affect the Value of Use.

8. No rights to sell licenses to the Subject IP.

9. Creation of fixes and patches for one customer and promulgation of fixes or patches to other customers (i.e. TomorrowNow would not have to re-write fixes and patches independently for each customer).

10. Copies of customer environments on TomorrowNow computers for at least some of the period at issue.

11. No rights to sell the Subject IP in a transaction.

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108 Later in this report, I address the exclusive/non-exclusive nature of the license.

109 Meyer Report, page 66, paragraph 93.

110 Based on testimony in this case, specifically Richard Allison deposition dated November 12, 2009, pages 65-73, and discussions with Mr. Sommer, customers have access to and may modify Oracle source code.

accordingly. The Meyer Report does not make clear how Mr. Meyer separates the reasonable royalty from other claims such that it is not duplicative.

3.7. Negotiation

If Mr. Meyer is going to adopt a reasonable royalty as a measure of the Defendants' Value of Use, he must develop his conclusion by "forcing" the parties in the Negotiation to agree on a royalty rate that is reasonable to both. Therefore, the resulting royalty rate will likely be *less than Plaintiffs claim* they would have required to enter into a license agreement and *more than Defendants claim* they would ever have been willing to pay.

Mr. Meyer describes a hypothetical negotiation methodology beginning in paragraph 93 of the Meyer Report and I address his methodology here:

3.7.1. Date of Negotiation

Mr. Meyer uses "January 2005"[136] as the date of the Negotiation for Oracle for PeopleSoft products. Actually the right date for the Negotiation is January 19th 2005, the date of SAP's acquisition of TomorrowNow.

Mr. Meyer uses September 2006[137] as the date of the Negotiation for Siebel. The right date for the Siebel Negotiation is September 29, 2006 when TomorrowNow first supported a Siebel customer.[138]

3.7.2. Subject IP

Mr. Meyer states that he is quantifying "…the amount that SAP – as a willing buyer – would pay Oracle, and that Oracle – as a willing seller – would accept from SAP in the form of a license fee to represent SAP's 'value of use' of Oracle's PeopleSoft-related copyrighted materials in suit."[139] He repeated the same sentence in relation to Siebel. He also includes a calculation of SAP's Value of Use for the "Oracle Database copyrighted materials in suit."

3.7.3. Actual Use

In paragraph 104 of the Meyer report, Mr. Meyer references the Alleged Actions and their relationship to the damages he is calculating and states, "I understand [the fair market value license measure of copyright actual damages] must relate to the fair market value of a license that allows for SAP's actions that constitute copyright infringement, and *cannot allow for more or different infringement than actually occurred*." [emphasis added]. This statement is fundamental to the quantification of damages that follows in the Meyer Report. As I point out below, Mr. Meyer loses sight of this statement and its meaning during his analysis and related calculations. However, the concept is so fundamental that it is worth repeating: Defendants are only liable for damages to the extent they infringed the Subject IP. Therefore, the Negotiation must focus only on Defendants' *actual use* of the Subject IP during the infringement period.

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136 Meyer Report, page 69, paragraph 102.
137 Meyer Report, page 176, paragraph 260.
138 Siebel_service.xls export. TN-OR07717977.
139 Meyer Report, page 70, paragraph 103.

Mr. Meyer's statement is consistent with those of Mr. Ellison and Ms. Catz. Mr. Ellison stated in a declaration,

> "I understand that for purposes of damages in this case, any retroactive 'hypothetical' license award can only cover the exact scope and duration of the infringement by Defendants." He further stated that a "hypothetical license value" would "focus on the actual use by SAP's subsidiary, TomorrowNow, for a finite time period, of certain specific Oracle intellectual property, with specific results in the marketplace."[140]

Ms. Catz echoed Mr. Ellison's sentiment in her declaration:

> "I understand that for purposes of damages in this case, any retroactive 'hypothetical' license award can only cover the exact scope and duration of the infringement by Defendants." She further stated that a "hypothetical license value" would "focus on the actual use by TomorrowNow, for a finite time period, of certain specific Oracle intellectual property, with specific results in the marketplace."[141]

As previously stated, the hypothetical license would be for a limited duration, in limited territories, with limited rights, for the Subject IP (i.e., the portion of the Oracle intellectual property necessary to deliver the service TomorrowNow is accused of providing inappropriately) and to a limited number of customers.

Mr. Meyer's list of a range of "benefits" that he claims SAP enjoyed as a result of the Alleged Actions is the first evidence that he is not quantifying a license for Defendants' actual use of the Subject IP. Mr. Meyer suggests that because SAP's ability to:[142]

1. "reproduce" the copyright materials in suit
2. "disseminate" the copyright materials in suit
3. "make derivative works of the copyright materials in suit"

It enjoyed the following benefits:[143]

1. "enhanced revenues"
2. "improved market position"
3. "enhanced customer retention"

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140 Declaration of Larry Ellison in Support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim [Redacted] dated September 22, 2009, pages 2-3.

141 Declaration of Safra Catz in Support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim dated September 22, 2009, pages 2-3.

142 Meyer Report, page 71, paragraph 105.

143 Meyer Report, page 71, paragraph 105.

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.

to have access to the entirety of Oracle's software in order to provide the actual support service to the TomorrowNow customers. Based on Mr. Garmus' report, Mr. Meyer's Value of Use should incorporate an adjustment to allow for the lack of access to those portions of Oracle's software that TomorrowNow did not actually support.

The only license Defendants would need in the Negotiation is one that allowed them to: maintain copies of the customer's environment on their computers; use solutions developed for one customer to be promulgated to other customers; and download the Subject IP from Oracle's website to support its customers.

According to testimony in this case, customers have access to modify necessary software source code. Matthew Bowden[148] at TomorrowNow, also explained how such modification occurs:

> …customers have many programs that have been provided to them by PeopleSoft. They don't all work as they need to work. They don't necessarily work as designed, so they may have to modify them to correct bugs. They also may want to extend the functionality and prove the functionality to be more suitable to their business needs. So they may modify the programs for that reason. They may actually add additional programs to it for that reason. So, to me, this is common practice open source behavior – in the IT world.[149]
>
> …PeopleCode is a language that's provided to the customers for their use in modifying and managing programs. They're – they're encouraged to write their own PeopleCode programs. It's common, done all the time. There is – many GSC [Oracle's Global Support Center] cases are resolved by telling the customer, 'Well, you can write a PeopleCode program to do that.'[150]
>
> …I have to use PeopleTools to change – PeopleTools to change PeopleCode.[151]

Mr. Bowden further explained that PeopleSoft provided its customers with a lot of the source code that employees and consultants needed for modification:

> Q. Is it your understanding that people who had never purchased PeopleSoft could change these files?
>
> A. No. I would not expect someone who had never purchased PeopleSoft to be able to do that, no. I mean, as an employee of a company who had purchased them, that, yes, they would. As a consultant, it's been done, you know, many times, but the – ultimately, there is someone that purchased

148 Mr. Bowden, a primary support engineer who did not have a formal title at TomorrowNow. Matthew Bowden deposition dated December 5, 2008, page 26.
149 Matthew Bowden deposition dated December 5, 2008, pages 104-105.
150 Matthew Bowden deposition dated December 5, 2008, page 105.
151 Matthew Bowden deposition dated December 5, 2008, page 107.

> There is an arm's length transaction for the subject intellectual property within a year of the valuation date. Data related to Oracle's acquisition of Siebel provides relevant, comparable, metrics of the fair market value for the copyright materials in suit.[154]

As with the PeopleSoft license, Mr. Meyer implicitly assumes that if Defendants negotiated a license to the Subject IP, they would receive a pro rata share of the assets Oracle acquired in the Siebel transaction. In paragraph 266, he states "SAP could have entered into a fair market value transaction and acquired a portion of the Siebel customer base and associated revenue stream." However, the value of a portion of the total market value of Siebel is not an appropriate basis for the Value of Use in this case which is limited to Defendants' actual use of the Subject IP.

The effect of Mr. Meyer's approach to quantifying damages is to charge Defendants for the same rights Oracle acquired when it bought PeopleSoft and Siebel including: the right to all revenues and profits flowing from the acquired customers; the right to all computer code and other intellectual property acquired in the transaction; the work force in place; the tangible assets acquired; the value of the licenses PeopleSoft and Siebel had received or granted to any other person or entity; the work in progress on new software applications; in every territory, for all time, for all products, software and services, in fact every item the Standard & Poor's and Duff & Phelps' valuation specialists included in their purchase price allocations, including goodwill.

What Mr. Meyer appears to ignore is the axiom he stated in an earlier paragraph, namely that the Defendants are only liable for, "the fair market value of a license that allows for SAP's actions that constitute copyright infringement, and cannot allow for more or different infringement than actually occurred."[155] His calculation does not value a limited license; it values the acquisition of a portion of PeopleSoft and Siebel.

4. Value of Use – Market Approach

4.1. Market Approach – Background

Based on the testimony[156] in this case, TomorrowNow could have provided certain services to its customers with no license to any of the Subject IP. For example, TomorrowNow could provide its 24/7 on-call technical support for issues that arose at a customer site by going to the customer's site and operating as an in-house technician. It could also have provided such services by logging in to the customer's environment remotely, although I understand that remote access is not a desirable method of providing all support. Providing they operated within the boundaries of Oracle's end-user licenses, TomorrowNow technicians could also create fixes to operating problems by amending the source code, creating work-arounds, or by available

[154] Meyer Report, page 179, paragraph 265.
[155] Meyer Report, pages 70-71, paragraph 104.
[156] For example, Richard Allison, Oracle's Senior Vice President of Global Practices stated that consultants can provide on-site support. Richard Allison deposition dated November 12, 2009, page 62.

4.5. Market Approach - PeopleSoft

4.5.1. Inappropriate Basis

Mr. Meyer's paragraph 114 highlights his failure to value Defendants' actual use, a task he identifies with particularity earlier in his report. Instead; he suggests SAP "…acquired a portion of the PeopleSoft/J.D.Edwards customer base and the associated revenue stream" which he then values as a pro rata share of the PeopleSoft acquisition prices. Mr. Meyer leaves unexplained how he equates the value of the acquired company with all its attendant assets (software, customers, employees, works in progress, goodwill, etc.) with the value of the actual use TomorrowNow and SAP made of the Subject IP. Whatever his rationale, his application of the acquisition price as a basis for his calculations is inappropriate in the context of this matter and I can find no treatise or other support for his approach, which I have described as fatally flawed.

4.5.2. Oracle Executives

Mr. Meyer also provides the opinion of certain Oracle senior executives (Mr. Ellison, Ms. Catz and Mr. Phillips) that the "fair market value" of Oracle's loss is equivalent to Oracle's purchase price of PeopleSoft times the percentage of support customers lost to SAP. [162] Not only is Mr. Meyer's injection of his client's assessment of damages into his expert report inappropriate, but the executives' view of the fair market value of the Subject IP is unsupported and contradicted by the facts as I explain in this report.

4.5.3. Standard & Poor

Mr. Meyer states, "Oracle retained Standard & Poor's ("S&P") to value certain PeopleSoft assets…and allocate the $11.1 billion acquisition price for financial reporting purposes."[163] Although a purchase price allocation is required when one company acquires another, the actual calculations of value are, to a greater or lesser extent, driven by tax and accounting considerations especially as they relate to goodwill.[164] In addition, recently adopted rules related to "impairment" of assets are also likely drive purchase price allocations (for example, companies may try to allocate value to assets that are less likely to become impaired, obviating or reducing the need for the future negative consequences of an impairment).[165] While I have no reason to doubt S&P's valuation and, for the purposes of this report have assumed the values were fairly reported, without a complete analysis and thorough study to confirm their applicability, such valuations are an inappropriate basis for a damage calculation.

However, my analysis of the asset allocation reveals a quite different result from that suggested by Mr. Meyer.

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162 Meyer Report, pages 77-78, paragraph 115.

163 Meyer Report, page 78, paragraph 116.

164 Huefner, Ronald J., and James A. Largay III. "The Effect of the New Goodwill Accounting Rules on Financial Statements." *The CPA Journal*. <http://www.nysscpa.org/cpajournal/2004/1004/essentials/p30.htm>.

165 United States. IRS.gov. Partnership - Audit Technique Guide - Chapter 3 - Contribution of Property with Built-in Gain or Loss - IRC section 704(c) (Revised 12-2007). <http://www.irs.gov/businesses/partnerships/article/0,,id=134692,00.html>.

Mr. Meyer states that the "total customer relationship value would have to be apportioned for an appropriate number of relevant customers."[177] It is not clear what this statement means in the context of his damage analysis.

4.5.5. Goodwill

In paragraph 121,[178] Mr. Meyer states that a portion of the goodwill quantified by S&P should be allocated to SAP's alleged infringement. However, the reader is left to guess what that allocation is in total.

Both Mr. Meyer and I assumed the S&P valuation conclusion was fair. However, S&P by definition could not allocate any of the 'goodwill' identified in their valuation to any *particular* asset (i.e., goodwill is the difference between the value of the acquired assets and the purchase price – in other words, what is left over after all the acquired assets have been separately valued). Therefore, SAP never possessed, controlled or used any of Oracle's goodwill, so goodwill should not play a role in the Value of Use analysis.

After all the identified assets and liabilities involved in a transaction are valued, goodwill is what is left over. Therefore, goodwill must consist of the unknown future benefits associated with the combined operations of the acquirer and the acquired entity. Because the Court's Order precluded future up-sell and cross-sell claims, and goodwill is even more remote than the potential for up-sell and cross-sell activities, it is logical for the Court's Order to preclude claims related to goodwill as well (although goodwill is not specifically mentioned in the Court's Order). However, it is clear there has been no impairment of Oracle's acquired goodwill for reasons discussed elsewhere in this report. Therefore, every element of Mr. Meyer's damages opinion that is tainted by a goodwill value should be excluded.

4.5.6. Pro Rata Value of Use

Mr. Meyer states, "SAP's business strategy at the time of the alleged access to the Oracle copyrighted materials indicated that it planned to convert 3,000 PeopleSoft customers to SAP/TomorrowNow support services."[179] Mr. Meyer then states that SAP's "planned" effort to convert 3,000 customers represents 30.2% of the 9,920 PeopleSoft customers Oracle acquired, so the fair market value of the allegedly infringed copyrighted materials was 30.2% of $8.85 billion or $2.67 billion; (he also states that if only 2,000 customers "converted to SAP" the fair market value would be $1.78 billion). For the reasons I have stated, a pro rata share of the PeopleSoft acquisition is an inappropriate basis for computing Value of Use.

4.5.7. Speculative Acquired-Customer Count

Mr. Meyer states SAP "targeted 3,000 PeopleSoft customers to convert them to support contracts using 2,000 potential customer relationships"[180] in performing his Value of Use analysis. However, there is no need for him to speculate on the customer counts SAP *targeted*; targeted

[177] Meyer Report, page 82, paragraph 120.
[178] Meyer Report, page 83, paragraph 121.
[179] Meyer Report, pages 84-85, paragraph 122, bullet point 4.
[180] Meyer Report, page 85, paragraph 122.

Mr. Meyer again provides the opinion of certain Oracle senior executives (Ellison, Catz and Phillips) that:

> …***they*** would value a license to SAP for the Siebel copyrighted materials in suit based on the ratio of Siebel customers that ***they believed might*** leave for TomorrowNow, applied against the total $6.1 million [sic] acquisition price. Using this ***methodology***, ***if*** up to ***10%*** of Siebel's customers **would be expected** to depart Oracle, the fair market value of SAP's value of use of Oracle's Siebel copyrighted materials in suit would be approximately $600 million[184] [emphasis added].

As I stated previously, not only is Mr. Meyer's inclusion of his client's opinions into his expert inappropriate, but the opinions of the executives are unsupported and contradicted by the facts as I explain in this report. However, in the Siebel portion of his report, Mr. Meyer has gone even further than he did in the PeopleSoft section of his report by describing the executives' damage calculation and presenting it in a manner that makes it appear that he endorses it. For Mr. Meyer to include a damage analysis based, as he says, on how many customers "they" (i.e., presumably Oracle senior management), "believed *might*" [emphasis added] leave Oracle for TomorrowNow is inappropriate, but to call such an approach a "methodology" is overstating its application to this case. Then to put actual numbers into the "methodology" and say "if" they assume that "10%" of the Siebel customers were to leave Oracle support and go to TomorrowNow for support, then that would represent 10% or $600 million of damages is inappropriate and speculative. The Defendants did not acquire a pro rata share of the Siebel net assets as Oracle did in the transaction and they did not acquire 10% of the Siebel customers.

In paragraph 268, Mr. Meyer states, "Oracle retained Duff & Phelps, LLC ('Duff & Phelps') to value certain assets and liabilities acquired from Siebel Systems, Inc. and allocate the $6.1 billion acquisition price…" for financial reporting purposes.

However, when I apply the asset allocation list as a basis for the following discussion, I identify a quite different result from that suggested by Mr. Meyer.

1. The support agreements and customer relationships represented only 19.8% of the total intangible asset allocation of $4.1 billion.

2. Defendants did not gain any of the patents or core technology, goodwill, trademarks or trade names. In addition, any value in goodwill, customer relationships or technology inevitably includes consideration of the value of selling future licenses to customers. Because neither of the Defendants could sell licenses to the Subject IP, such value should be excluded.

3. The total number of Siebel customers TomorrowNow ever supported was 16 or 0.4% of the 4,000 customers acquired by Oracle in the Siebel transaction.

4. Only 7 or 44% of the 0.4% customers purchased products or services from SAP while they were using TomorrowNow support.

[184] Meyer Report, page 181, paragraph 267.

4.6.4. Speculative Acquired-Customer Count

Mr. Meyer speculates that SAP would gain 200 Siebel customers with a fair market value of $231.9 million in performing his Value of Use analysis.[187] However, there is no need for him to speculate on the acquired customer count. The Value of Use should focus on the actual use which is best measured by looking at the actual number of Siebel customers that used TomorrowNow for support or which licensed applications from SAP as a result of the Alleged Actions.

4.6.5. Siebel Fair Market Value Opinion

Based on his limited discussion and (presumably) his client's view of Oracle's damages, Mr. Meyer states, "…the market approach indicates a fair market value of SAP's use of Oracle's Siebel copyrighted materials in suit of no less than $170 million, computed as 5% of $3.4 billion in intangible asset value related to support revenues, customer relationships and goodwill." He also states, "…using the $1.525 million average cost per customer resulting from the Siebel acquisition…extended to the 200 *potentially* lost customers, indicates a value of $305 million."[188] [emphasis added]

The financial analysis Mr. Meyer relied upon for his opinion is inadequate to support an opinion that damages are between $170 million and $305 million and his methodology is speculative and inappropriate for his purposes.

5. Value of Use – Income Approach

After presenting his market approach, Mr. Meyer continues his Value of Use analysis with an income approach opinion. The analysis begins with the statement that the value computed is "…based upon the additional cash flows a business is expected to generate in the future from the exploitation of the technology at issue."[189]

5.1. Oracle Losses - PeopleSoft

Paragraph 129 begins with a statement that Mr. Meyer fails to explain: "S&P's overall valuation of Oracle's PeopleSoft acquisition was measured using a discounted cash flow model for revenues and profits from PeopleSoft's support customers lost to TomorrowNow and SAP (post-October 2008), lost incremental license revenue (up-sell) and related support, and lost new license revenue (cross-sell) and related support." While it is not at all clear what he meant to say with this sentence, it appears that Mr. Meyer is basing his Value of Use (under the income approach) on a valuation model S&P created for the purposes of a purchase price allocation for financial accounting purposes.

As I pointed out previously, purchase price allocations are not an appropriate basis for a damage calculation or a Value of Use analysis. Mr. Meyer also includes damages that were precluded by the Court's Order. However, because Mr. Meyer has ignored the Court's Order and presented an

[187] Meyer Report, page 187, paragraph 278.
[188] Meyer Report, pages 185-186, paragraph 274.
[189] Meyer Report, page 89, paragraph 128.

income approach Value of Use analysis I must address each element of his income approach in this report.

Mr. Meyer's income approach includes "three scenarios." One scenario assumes SAP caused 1,375 Oracle customers to "…switch their applications to SAP." The other two models assume 2,000 and 3,000 customer switches respectively. These switches relate to the number of PeopleSoft users/customers that would migrate their applications from Oracle to SAP. Mr. Meyer assumed TomorrowNow would gain 3,000 customers in each scenario. He goes on to state that he included the "…terminal value of up-sell license and support revenue losses through December 31, 2014."[190]

Mr. Meyer assumes:[191]

1. Incremental costs of 20% for support revenues

2. Incremental costs of 30% for license revenues for existing customers and 50% for new licenses

3. A terminal value of lost license and support profits

4. Date of damage is January 2005 so all cash flows are discounted to that date

Based on this data set, Mr. Meyer opines that, "…the fair market value under various assumptions regarding the number of customers Oracle would lose to SAP as a result of licensing the copyrighted materials in suit, of between $2.0 billion and $3.8 billion, assuming terminal value."[192] It is not clear what portion, if any, of the $2 billion to $3.8 billion is derived from support sales at TomorrowNow.

Mr. Meyer's income approach to Value of Use is inappropriate as I describe below.

Mr. Meyer bases his analysis on customer losses to SAP in the amounts of (a) 1,375 (b) 2,000 and (c) 3,000. His numbers are based on a single slide titled "SAP Business Opportunity"[193] within a presentation titled "A Roadmap for PSFT Customers to SAP" by Thomas Ziemen[194] The slide has a table and chart showing "UpSwitch", "Cross-Sell" and "Maintenance" projections from 2005 to 2007 in terms of the number of customers and revenue dollars. The 1,375 customers are based on the number of UpSwitch customers, defined by Mr. Ziemen in deposition as "Replacing the existing environment with SAP software."[195]

The 2,000 customers in the second scenario are based on Mr. Meyer's assumption that SAP would generate an additional 625 "UpSwitch" customers in 2008, the same number SAP had

190 Meyer Report, pages 89-90, paragraph 130.
191 Meyer Report, page 90, paragraph 130.
192 Meyer Report, page 90, paragraph 131.
193 PowerPoint Presentation titled, "A Roadmap for PSFT Customers to SAP." December 23, 2004; SAP-OR00253279-301, at -288.
194 PowerPoint Presentation titled, "A Roadmap for PSFT Customers to SAP." December 23, 2004; SAP-OR00253279-301.
195 Thomas Ziemen deposition dated September 30, 2008, page 73. See also Meyer Report, Schedule 11.3.

projected for 2007,[196] but pro-rated for 10 months in 2008 to correspond to the TomorrowNow wind-down.

In the third scenario, Mr. Meyer deviated from SAP's presentation to estimate his own figures. The same slide in the SAP presentation shows 3,000 support customers (i.e. TomorrowNow customers) through 2007. Schedule 13.3 to the Meyer Report states, "I have assumed all support customers will also buy a license to SAP products ("up-switch")" and assumes 3,000 customers would switch from Oracle to SAP. However, as discussed, even SAP only estimated 1,375 "Up-Switch" customers.

Mr. Meyer also inappropriately assumed that all 3,000 customers were being supported by TomorrowNow[197] (although the presentation does not state that such is the case). He then went further and assumed that TomorrowNow had a 100% success rate in causing customers to migrate to SAP.[198] Both of Mr. Meyer's assumptions are unsupported and speculative. It is inappropriate for an economic damages expert to rely on a presentation with no verifiable support for the broad estimates he uses to compute damages amounting to billions of dollars. In addition, with actual data available, it is inappropriate for Mr. Meyer to rely on *any* of his three "scenarios."

The realities are that of all the TomorrowNow customers from 2005 to 2008, only 86 customers[199] bought products or services from SAP while they were also a TomorrowNow customer. As I demonstrate later in this report, over half of the 86 customers were SAP customers prior to engaging TomorrowNow and the vast majority of the remaining customers went to SAP for reasons unrelated to the Alleged Actions. More importantly, approximately 75% of the TomorrowNow customers did not have any simultaneous sales with SAP. These figures clearly demonstrate how unsuccessful TomorrowNow was at generating sales for SAP.

Mr. Meyer also applies a TomorrowNow estimate of "$18 to $20 impact on Oracle revenues" for every $1 of TomorrowNow revenue. In other words, $18 to $20 of total Oracle revenue is lost to Oracle for every dollar Mr. Meyer speculates TomorrowNow would have gained as a result of the Alleged Actions.[200]

By applying the 18 to 1 multiplier, Mr. Meyer then argues that the SAP business case analysis, which included an assumption of 3,000 TomorrowNow customers by 2007, results in $1.47 billion of lost profits for Oracle. Mr. Meyer's reliance on a business case prepared by people who may have had an interest in overstating the estimates, without appropriate verification and analysis to opine to $1.47 billion in Oracle losses is an inappropriate use of the source document and is inappropriate methodology for a damages expert, who should not rely on such information without thoroughly analyzing it. My consideration of the 18:1 ratio suggests it is likely self-serving, overstated and inappropriate.

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196 Meyer Report, Schedule 12.3.SU.
197 Meyer Report, Schedule 13.1.
198 Meyer Report, Schedule 13.3.
199 Not all of the 86 customers were Safe Passage customers.
200 Meyer Report, page 93, paragraph 136.

Mr. Meyer references the key performance indicators ("KPI") that SAP executives used to monitor and manage TomorrowNow. One KPI was revenue "taken away from Oracle" in the amount of $142.7 million for "the period of 2005 through September 2007."[201] Mr. Meyer proffers no analysis of this figure nor does he support it in any way. His reliance upon it (if that is what he does, it is not clear) is inappropriate. By way of example only,[202] if TomorrowNow gained a customer when a subsidiary responded to a parent company mandate to migrate to SAP, TomorrowNow would count that customer to be a gain from Oracle and one to include in its KPI (with all the attendant multipliers and inaccuracies inherent in marketing driven computations), even though Oracle's "loss" and Defendants' "gains" were the result of decisions made by the customer's parent company. As such, Mr. Meyer has included the Oracle loss and the Defendants' gain as a damage even though it is inappropriate to do so because the change did not occur as a result of the Alleged Actions. As I will describe later in this report, customers terminate Oracle support and re-license with SAP for reasons unrelated to the Alleged Actions. Therefore, the KPI's are inappropriate metrics for the purpose of a damages analysis.

5.2. SAP Expected Gains - PeopleSoft

Mr. Meyer addresses "SAP's Expected Gains"[203] under the Income Approach stating that he uses a projection prepared by SAP as the basis for his damages analysis. In a manner similar to his income approach to "Oracle's Expected Losses," Mr. Meyer applies the same 3,000 estimate of Oracle customers defecting to TomorrowNow as a result of the Alleged Actions with two scenarios of SAP gains (1) 1,375 Oracle customers migrate to a mySAP license or (2) 2,000 Oracle customers migrate to a mySAP license.

In no case does Mr. Meyer state that his calculations are based on actual customer migrations or terminations, nor does he state that his two scenarios assume the migrations had to occur as a result of the Alleged Actions, rather than unrelated factors. He claims to have "determined the terminal value of the support revenues from the new mySAP licenses."[204] After deducting costs of 30% and discounting the results to January 2005 at 14% "based on the discount rates used in the asset valuation performed for SAP's acquisition of Business Objects," Mr. Meyer claims SAP's anticipated gains ranged between "$881 million and $2.7 billion."[205]

For the reasons stated earlier in this report, Mr. Meyer's use of SAP's "Expected Gains" as a basis for his Value of Use is an inappropriate measure of the actual use Defendants allegedly made of the Subject IP.

In addition, Mr. Meyer's assessment of SAP's "Expected Gains" is speculative, not supported by objective data, and misleading for the following reasons:

1. SAP projected that support "cross-sell" and "up-switch" opportunities from PeopleSoft customers between the years of 2005 and 2007 would result in revenues of $897 million.[206]

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201 Meyer Report, pages 93-94, paragraph 137.
202 I describe several examples of this fact pattern for actual customers later in this report.
203 Meyer Report, pages 90-91, paragraph 132.
204 Meyer Report, page 91, paragraph 133.
205 Meyer Report, pages 91-92, paragraph 133-134.
206 Meyer Report, page 42, paragraph 60.

This calculation, however, is irrelevant in the context of this matter because it is not representative of SAP's actual use of the Subject IP. Accordingly, the entire premise underlying Mr. Meyer's "Expected Gains" calculation is fundamentally flawed.

2. SAP's aspirations of $897 million in revenues[207] from selling software and services to former Oracle customers over a three year period would only be even arguably relevant in the context of this matter if it were reasonable for SAP to enter into a multi-billion dollar paid-up license for the Subject IP. However, for the reasons I have stated, the Value of Use must be limited to the actual use Defendants allegedly made of the Subject IP which means the value must be related to the actual customers, not the customers SAP hoped for in an unsupported business case.

In another attempt to demonstrate the success of TomorrowNow at converting customers to SAP, Mr. Meyer states that during the years from 2005 through 2008, SAP earned revenues of $1.37 billion from the customers on the List of 86.[208] Mr. Meyer then divides the $1.37 billion by 86 to arrive at per-customer revenues of $15.9 million over the four-year period, or nearly $4.0 million per customer per year. While the arithmetic Mr. Meyer applied to generate these numbers is technically accurate, the result is misleading. Mr. Meyer's analysis leads the reader to the conclusion that TomorrowNow was the cause of SAP generating nearly $4.0 million per year in revenue for every customer on the List of 86. However, Mr. Meyer included recurring revenues that were the result of a relationship between the customer and SAP that existed prior to TomorrowNow's involvement. In addition, Mr. Meyer included revenues for customers that decided to purchase SAP software before any involvement by TomorrowNow or for other reasons that had nothing to do with TomorrowNow.[209] Because he included inappropriate revenues, Mr. Meyer's calculation is both wrong and overstated.[210][211]

[redacted] However, the referenced data is the SAP revenue data[212] produced for the List of 86 SAP customers. He uses the data to support his assertion that the "$1 million customer terminal value...would tend to underestimate the value to SAP of obtaining new SAP licenses and associated support contracts with former PeopleSoft customers." Mr. Meyer's use of the data is inappropriate. As already stated, the customers on the List of 86[213] are not all Safe Passage customers and the fact that they are on the List of 86 is not evidence that their SAP revenues arose as a result of the Alleged Actions.

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207 Meyer Report, page 91, paragraph 133.

208 Meyer Report, pages 94-95, paragraph 139.

209 Meyer Report, Schedule 42, footnote 3.

210 Removed Footnote.

211 Removed Footnote.

212 "SAP Customer Report July 2009 Update.xls;" SAP-OR00789887. "SAP Customer Report Updated 10-30-09.xls;" SAP-OR00841587. "SAP Customer Report.xls;" SAP-OR00603615 (collectively, "SAP Revenue Report").

213 List of 83.xls dated July 15, 2009 as updated per email from Jason McDonell to Geoff Howard dated October 17, 2009. Letter from Jason McDonell to Geoff Howard dated November 3, 2009; Defendants' Fifth Supplemental Responses to Plaintiffs' First Set of Targeted Search Requests to Defendants dated December 4, 2009. ("List of 86").

The List of 86 customers was identified during the course of discovery in this case[214] as a result of the targeted search process. In response to Targeted Search Request 1(c), SAP agreed to search central repositories of financial information and stated "Defendants do not admit or contend that customers identified in response to Targeted Search Request No. 1(c) have any legal or factual significance, but instead are simply a list of companies identified after a reasonable and good faith search for TomorrowNow customers who purchased TomorrowNow service and SAP products/support simultaneously or were existing TomorrowNow customers at the time they purchased new SAP software or service…"

Clearly, nothing in the criteria suggests Defendants were providing a list of customers with "Signed Safe Passage Deals." Therefore, the SAP revenue data produced for the List of 86 customers is not equal to Safe Passage license revenue.

5.3. TomorrowNow Expected Gains – PeopleSoft

Mr. Meyer's approach[215] to calculating the value of TomorrowNow's use is inappropriate. He states that he calculates the value of TomorrowNow's use of the Subject IP on the basis of 3,000 customers when the company had only 358 customers throughout its entire life. Accordingly, Mr. Meyer's methodology yields a sum that cannot possibly represent the value of TomorrowNow's actual use of the Subject IP. For the reasons I state elsewhere, the royalty would be a percentage of applicable revenues or profits so the Value of Use should be based on the actual use TomorrowNow made of the Subject IP which is best measured by the actual revenues generated from customers TomorrowNow gained as a result of the Alleged Actions.

Mr. Meyer states that TomorrowNow estimated every dollar of revenue represented $10 of "SAP strategic license revenue pipeline." He goes on to use that metric by suggesting TomorrowNow would gather 15% (or 1,500) of Oracle's PeopleSoft customers and that the resulting "pipeline" would be $1 billion of new license business for SAP based on an assumed license fee of $600,000 per customer plus support revenues of $1 million per customer over a 10-year period. He also adds that such license and support sales would result in support profits of $1.1 million per customer. Although Mr. Meyer does not appear to use the resulting figures to quantify a Value of Use, he does use the data to show that estimating Value of Use at $1 million per customer is "reasonable."[216]

The facts show that three quarters of TomorrowNow customers bought nothing from SAP during the relevant period and, assuming 853 Safe Passage[217] customers,[218] at most 86 (or 10%)[219] bought products or services from SAP while supported by TomorrowNow. Given such facts, it is inappropriate for Mr. Meyer to assume without further evidence that the cause of a customer migrating licenses to SAP was TomorrowNow or that Safe Passage was the cause of customers

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214 Defendants' Fifth Supplemental Objections and Responses to Plaintiffs' First Set of Targeted Search Requests to Defendants, December 4, 2009, at page 21.

215 Meyer Report, page 91, paragraph 133.

216 Meyer Report, page 92, paragraph 135.

217 The data on the Oracle fact sheet are the best available data but are not reliable for a number of reasons: there was no clear definition of Safe Passage; and SAP account executives earned a higher commission if they booked a Safe Passage deal so they had an incentive to overbook such deals.

218 Oracle Fact Sheet –Q1 2008. April 25, 2008; SAP-OR00098932-933.

219 Not all of the 86 customers were Safe Passage customers.

Mr. Meyer assumes:[223]

1. Estimates of incremental costs of 15% for support revenues

2. Estimate of incremental costs of 20% for license revenues for existing customers and 50% for new licenses

3. A terminal value of lost license and support revenue.

Mr. Meyer ignores all of the facts in this matter and bases his analysis of customer losses to SAP on an assumed 200 lost customers when the reality was far different. Mr. Meyer's estimate of 200 lost customers comes from a projection SAP made and he ignores the reality that SAP gained only 7 of Oracle's Siebel customers. Such a projection is irrelevant because the Value of Use should be based on actual use which is best measured based on actual sales that would not otherwise have been made to actual customers. It is inappropriate for Mr. Meyer to speculate on how many customers would migrate their systems from Oracle to SAP, and similarly inappropriate for him to base his speculation on the number of sales SAP *hoped* to make if TomorrowNow supported Siebel products.

The evidence shows that SAP and TomorrowNow gained 7 and 16 Siebel customers respectively. And of those, as I demonstrate later in this report, all went to SAP for reasons unrelated to the Alleged Actions.

Mr. Meyer's use of a capitalization model to compute the terminal value of Oracle's future profits related to lost support and license revenues is inappropriate because it values allegedly lost profits into perpetuity.

5.5. SAP Expected Gains – Siebel

In paragraph 279, Mr. Meyer addresses "SAP's Expected Gains" under the Income Approach stating that he uses a projection prepared by SAP as the basis for his damages analysis. He applies SAP's estimate of the number of Oracle customers it hoped might become SAP customers. Mr. Meyer does not state that his calculations are based on actual customer migrations or terminations, nor does he state that his model assumes the migrations occurred as a result of the Alleged Actions. He claims to have determined the "fair market value of the Siebel copyrighted materials in suit" to be $97 million after deducting costs of 30% and discounting the results to September 2006 at 14%. Mr. Meyer adds a second scenario in which he "…assumes the same base case calculations outlined above but computes a $1,000,000 residual value assuming that 200 Siebel customers are lost to SAP…"[224] for a fair market value of $246.7 million.[225]

Mr. Meyer's assessment of SAP's "Expected Gains" are not an appropriate measure of actual use damages. SAP's business aspiration of making a profit from selling software and services to

[223] Meyer Report, page 188, paragraph 278.
[224] Meyer Report, page 189, paragraph 280.
[225] Meyer Report, page 189, paragraph 280.

6. Value of Use - Cost Approach

6.1. PeopleSoft Acquisition Cost

[redacted]

6.2. R&D Expenditures

[redacted]

232
233
234
235
236

[redacted]

Value of Use Conclusions		
	PeopleSoft	**Siebel**
Low	$881 million	$97 million
High	$3,800 million	$573 million
Spread	$2,919 million	$476 million

Mr. Meyer actually concludes by stating that the fair market value of the PeopleSoft Subject IP is "No less than $2 billion," which may mean his Value of Use damage figure covers a range of $2 billion to $3.8 billion. Mr. Meyer concludes that the fair market value of the Siebel Subject IP is "No less than $100 million."[253]

It will be for the Court to determine whether Mr. Meyer's report and the opinions it contains are sufficient to meet his obligations under the rules of evidence.

7. Georgia-Pacific Approach

Mr. Meyer addresses[254] the Georgia-Pacific factors and ignores the Court's Order which precluded certain elements of damages. As a general proposition, Mr. Meyer fails to disclose any separation between the damages the Court's Order allowed and those it precluded. As such, Mr. Meyer's entire Georgia-Pacific factors analysis is inappropriate in the context of this case because it includes elements of the precluded claims without identifying what those elements consist of and how much they are. However, as a result of Mr. Meyer detailing the Georgia-Pacific factors analysis over 74 pages[255] of his report I must address it here.

7.1. Analysis

Mr. Meyer purports to develop a reasonable royalty using a Georgia-Pacific factors analysis. Because the Georgia-Pacific framework is a patent related structure, it is incumbent on Mr. Meyer to address the differences that arise in a copyright case such as this one. I will address these differences as I discuss each element of Mr. Meyer's factor analysis.

As a starting point, Mr. Meyer claims that his application of the Georgia-Pacific factors is designed to quantify the Value of Use Defendants made of Oracle's PeopleSoft and Siebel software and assumes negotiations in January 2005[256] and September 2006[257] between Oracle and SAP, both acting as "rational and willing"[258] parties.

253 Meyer Report, page 192, paragraph 289.
254 Meyer Report, page 101, paragraph 154 and Meyer Report, page 193, paragraph 290.
255 Meyer Report, pages 101-150 (PeopleSoft) and additional 25 pages discussing Siebel, pages 193-218.
256 Meyer Report, page 103, paragraph 156.

after the transaction. Apparently, the customers perceived Oracle to be a threat to the continued support and development of their PeopleSoft software, which is not surprising given the public statements made by Mr. Ellison (some of which I quoted previously).

7.3. Factors 1, 2 and 4 – Licensing Practices

Mr. Meyer states, "Oracle has never 'licensed out' to a third party its [PeopleSoft/J.D.Edwards] copyrighted materials in suit" and he may be right.[270] However, in spite of strong pressure from Defendants to produce licenses it had granted to its intellectual property, Oracle successfully resisted providing most of its licenses with third parties with the exception of a few partner licenses. I identify these partner licenses and summarize them later in my report.

Mr. Meyer chose to ignore these partner agreements and Oracle's past licensing practices. Oracle's software is frequently specified, bid, installed and run by consulting companies that specialize in providing such services to their clients. While not exactly the same as a license of the same scope and nature as the one at issue in this case, these consultants appear to handle their customer's implementations and support needs. Accordingly, I assume licenses to provide similar services are not necessary

Mr. Meyer repeats[271] his client's stated position that the amount Oracle paid in the PeopleSoft and Siebel transactions is evidence of the value of the alleged infringement. By doing so, Mr. Meyer again overlooks the difference between what Oracle acquired in the PeopleSoft and Siebel transactions and what SAP supposedly gained as a result of the Alleged Actions. As Mr. Meyer rightly pointed out, the License should only cover the *actual use* that Defendants made of the Subject IP not the acquisition of a pro rata share of PeopleSoft and Siebel.

Mr. Meyer states[272] that the licenses and support contracts Oracle uses charge to its customers for use of its copyrights "…are not instructive as to a license between SAP and Oracle…" I disagree. While what Oracle charges its customers for use of its copyrights would not be conclusive as to the eventual royalty rate payable by Defendants for use of the Subject IP, any information related to license fees of this type would be helpful because it will inform the discussion. Such charges must necessarily form the basis upon which to start quantifying the hypothetical royalty because it is from such a basis that TomorrowNow would begin to set its support pricing. To understand why Oracle pricing would be helpful in determining the hypothetical royalty rate, it is essential to understand Defendants' actual use of the Subject IP.

TomorrowNow would use the Subject IP to provide support for the customers' Oracle applications. From the TomorrowNow customer base SAP would hope to acquire customers for its ERP applications it would not otherwise have acquired. As such, the negotiated royalty rate plus the TomorrowNow cost of doing business could not exceed (or even equal) Oracle's support price to its customers. Few customers would give up Oracle support in order to go to TomorrowNow unless TomorrowNow's support pricing was lower than Oracle's. Therefore, something less than the Oracle support price is the upper limit on what TomorrowNow's pricing

[270] Meyer Report, page 112, paragraph 171 and Meyer Report, page 198, paragraph 306.
[271] Meyer Report, page 112, paragraph 171 and Meyer Report, page 198, paragraph 306.
[272] Meyer Report, pages 113-114, paragraph 173. I assume Mr. Meyer asserts the same for Siebel; Meyer Report, pages 198-199, paragraph 308.

A TechRepublic survey found that the costs of installation, implementation, and data migration generally run 3 to 4 times the original cost of the ERP software. "For example, if your software costs $2 million, you can expect to pay an additional $6 million to $8 million[323] for consulting services to get the system into production." Training end users is also a significant expense. The same article stated that "Gartner suggest that, at a minimum, enterprises should allocate 17 percent of the total cost of an ERP project to training." In addition, "On the average, IT managers can expect to lose up to 40 percent of their IT staff, primarily those programmers who are unwilling or unable to master the new software."[324]

It is clear from the foregoing list that a modest reduction in support costs is not what drives an Oracle customer to terminate support and migrate some or all of its applications to SAP.[325] In addition, as I have stated, SAP's *aspirations* regarding new customers are not a useful metric for calculating damages in this case.

Mr. Meyer states "that there were 'lots of uncertainties in PeopleSofts [sic] installed base (12,750 in total).'"[326] While I have no doubt that Mr. Meyer's statement is true, (I note that he was quoting Mr. Ziemen of SAP), the evidence points to such uncertainties being created by the actions of his client, Oracle, as it fought to acquire PeopleSoft. In paragraph 52 of his report, Mr. Meyer convincingly described the atmosphere of "fear, uncertainty and doubt" PeopleSoft customers felt post-acquisition, which made SAP's offer of an alternative to Oracle more attractive.[327] Mr. Meyer's reasonable royalty fails to address the extent to which Oracle's creation of the uncertainty (and fear and doubt) caused Oracle's customers to become customers of TomorrowNow or SAP.

In addition, Mr. Meyer states that TomorrowNow's ability to service Siebel customers was significantly affected by Siebel's decision to provide no source code to its customers.[328] In spite of acknowledging this difficulty, Mr. Meyer makes no allowance for it in his reasonable royalty calculation other than to say in summary (without explanation) that it would cause upward pressure on the license fee.

7.8. TomorrowNow Revenue Equation

Mr. Meyer quotes Mr. Andrew Nelson, co-founder of TomorrowNow, as saying, "$1 of TomorrowNow stand-alone revenue equals $18 of 'originally' expected Oracle revenue…" He states that Mr. Nelson explained how he derived the equation that gives rise to this 18 multiple

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323 With a $2 million license fee and additional costs of $6 million to $8 million, the total cost of $8 million to $10 million would be 4 to 5 timese the license cost.

324 Donald Burleson. Four factors that shape the cost of ERP, Aug 16, 2001. http://articles. techrepublic.com. com/5100-10878_11-1054263.html.

325 Mr. Hurst's deposition supports this point: "…when you are talking about a CRM implementation, it's a very – it's a very big, very complex solution. And typically customers aren't going to make a decision to, you know, rip out one and replace it with another just because there's a support offering to get you from point A to point B." Thomas Gene Hurst, II deposition dated September 10, 2009, page 576.

326 Meyer Report, page 140, paragraph 224.

327 Meyer Report, page 36, paragraph 52. Shai Agassi deposition dated January 5, 2009, pages 64-65. James Mackey deposition dated July 15, 2008, pages 56-58. Arlen R. Shenkman deposition dated June 4, 2008, page 33. "SAP AG Phone Conference;" SAP-OR00329565-591, at -567.

328 Meyer Report, page 207, paragraph 332.

3. In a transaction such as that contemplated by the Negotiation, especially when such vast sums of money are potentially involved, it would be foolhardy for either party to enter into a license on the terms Mr. Meyer postulates which might lead Defendants to overpay or underpay for the license depending on the commercial success of their efforts to attract Oracle customers to TomorrowNow support and SAP licenses.

4. He suggests[349] license fees in a range between a low of $881 million (lower estimate of SAP's future economic benefit according to Mr. Meyer) to a high of $3.8 billion (Oracle's lost "potential license and support" fees according to Mr. Meyer). At the high end of this range, Oracle's "potential" license fee of $3.8 billion, is more than three times the total SAP *revenue* from sales to former Oracle customers over the period 2005 to 2008. In addition, as Mr. Meyer states, the range includes various claims that were precluded by the Court's Order.

5. Mr. Meyer suggests a $4.2 billion royalty figure based on doubling the $2.1 billion value Standard & Poor placed on the support agreements and customer relationships acquired in the entire PeopleSoft transaction. He points out (in paragraph 235) that it is the opinion of unnamed "Oracle Senior Executives" that "the transaction goodwill premium reflects Oracle's ability to gain additional monetary value over time from acquired customers through *"cross-sell and up-sell* opportunities" [emphasis added].

   Mr. Meyer includes other statements from three (named) Oracle executives, Mr. Ellison, Ms. Catz, and Mr. Phillips, who informed him "that Oracle would expect a significant license fee from SAP…" and stating that these three people "indicated the impact of licensing [the Subject IP] would be greater than $3 billion on Oracle."[350]

   It is inappropriate for Mr. Meyer to include the damages opinions of his client's senior executives in his independent expert report. Such opinions are not the purview of an independent expert and, in this case, the opinions of these Oracle executives are not supportable from a factual or an economic perspective as I have described in this report.

Mr. Meyer opines that "a further perspective on losing *potentially* 3,000 customers…is illustrated by applying 30.2% to the value of the total support contracts, customer relationships and goodwill of $8.85 billion to result in $2.67 billion of potential loss"[351] [emphasis added]. It is unclear whether Mr. Meyer's "further perspective" is his damages opinion (or that of his client's senior management) but if it is, it is not supported by any recognized economic principle or technique.

In spite of providing 74 pages[352] of detailed narrative and some schedules of analysis, based on the facts and appropriate economic analysis, Mr. Meyer's report does not support the conclusion that the license would cost SAP *at least* $2 billion. Furthermore, his opinion includes precluded claims.

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349 Meyer Report, pages 146-147, paragraph 234.
350 Meyer Report, page 148, paragraph 237.
351 Meyer Report, page 148, paragraph 237.
352 Meyer Report, pages 101-150 (PeopleSoft) and an additional 25 pages discussing Siebel, pages 193 to 218.

1. Mr. Meyer fails to consider or even mention any type of license other than a fully paid, perpetual, worldwide *exclusive* license to the *affected customers*.[357] Although he refers to various license terms in his report, his approach as applied in the schedules is most nearly equated to a pro-rata share of the total Siebel acquisition price.

2. Mr. Meyer fails to consider or even mention alternative royalty schemes such as a percentage of revenues or profits.

In a transaction such as that contemplated by the Negotiation, especially when such vast sums of money are potentially involved, it would be foolhardy for either party to enter into a license on the terms Mr. Meyer postulates because a paid up license could overpay or underpay Oracle depending on the commercial success of Defendants' efforts to attract Oracle customers.

Whatever Mr. Meyer's rationale might be, it is certain that a $100 million license fee in advance would not be rational on any level for SAP. The only license fee that would make any rational sense would be a percentage of the actual revenues generated from customers that would not otherwise have chosen TomorrowNow or SAP.

8. Clarke Georgia-Pacific Analysis

Section 504(b) of the Copyright Act provides that:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.[358]

I understand that the Court in this case has thus far indicated that a reasonable royalty ("Reasonable Royalty") for the actual use Defendants made of the Subject IP may be an appropriate damage calculation methodology.[359]

As I have stated, the facts in this case suggest that in reality the parties would not have negotiated a license covering the activities involved in the Alleged Actions.[360] In light of the

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357 My use of the terms "exclusive" and "affected customers" refers to the fact that the hypothetical license Mr. Meyer postulates implicitly assumes the customers Defendants acquired (allegedly) inappropriately would become their exclusive domain. Accordingly, the license Mr. Meyer postulates reflects the permanent transition of the customers to Defendants. I do not agree that such a license is appropriate. SAP would gain no customers as a result of the Negotiation, only the right to use the Subject IP to service the TomorrowNow customers' support needs, and Mr. Meyer's license would preclude SAP from marketing any of its products and services as an Oracle authorized partner.

358 United States. U.S. Copyright Office - Copyright Law: Chapter 5. <http://www.copyright.gov/title17/92chap5.html>.

359 Order Denying Defendants' Motion for Partial Summary Judgment dated January 28, 2010.

360 "I think it would be so prohibitively – it would be so expensive that…I don't know if they [SAP] would do it, but – it would be a very expensive license." Larry Ellison deposition dated May 5, 2009, page 75. Ms.

current state of the Court's guidance on this issue, however, I will assume that some form of a reasonable royalty may be an appropriate means of measuring the Value of Use Defendants actually made of the Subject IP.

A *reasonable* royalty in this case would be expressed as a percentage rate tied to future[361] revenues or profits (for example, X% of gross sales revenues or Y% of profits) gained from relevant customers (i.e., customers the Defendants would not have gained anyway). A royalty expressed as a fixed fee payable in advance, such as that asserted by Mr. Meyer, would only be applied where it was the industry norm for licenses to be structured in that manner and it would produce a reasonable result for both parties. In addition, license deals at fixed fees in advance only make sense where the amounts paid are relatively small such that accounting for the future royalties (with attendant audit and periodic payment requirements, etc.) is not practical or desirable. There are other ways to structure large scale license transactions including: straight royalty percentage rate applied to gross revenues, gross margin or net profits; fixed payments set at a per unit rate (i.e., $Z per unit sold); annual minimum/maximum payments with per unit or percentage royalty rates payable on actual sales revenues or profits; or combinations of such arrangements. However, these alternative methods would be less appropriate to the facts of this case than a percentage rate applied to revenues or profit.

SAP would be at the negotiating table in its role as the owner and manager of its subsidiary, TomorrowNow. However, SAP would not be a party to the License because only TomorrowNow needed a license to cover its support activities. Accordingly, any references to SAP in my consideration of the Reasonable Royalty are to its role as negotiator rather than as Licensee (unless the sense dictates otherwise). As a practical matter, the License will include payments by TomorrowNow to cover payments due for SAP's use of the Subject IP. I assume SAP would fund its subsidiary to the extent necessary to cover the Reasonable Royalty arising from both Defendants' use of the Subject IP.

There was almost no chance SAP and Oracle would have negotiated a license of any kind for the Subject IP in the real world. As prudent negotiators, it would not be reasonable for the parties to the Negotiation to agree on a fixed royalty in advance. SAP would not have wanted to overpay for the License and a fixed fee up front would have made that more likely; and Oracle would not want to have been underpaid for the License, and a fixed fee in advance would have made that more likely. Accordingly, the parties would both have had an interest in negotiating a royalty rate set as a percentage of applicable revenues or profits. There is precedent for SAP and Oracle in a royalty negotiation. In 1994, they negotiated a license agreement for SAP's resale of the

Catz suggested the "gigantic" number SAP would have to offer for a license should exceed the 12.6 billion dollars Oracle paid for PeopleSoft, plus another hundred million in fees, plus expenses resulting from the lawsuit brought by the U.S. Government. Safra Catz deposition dated March 27, 2009, page 159. Later, in declarations, both Mr. Ellison and Ms. Catz faulted unclear questioning by the lawyers for their previous answers and allowed that a license could have been negotiated. Mr. Ellison went on to note, "I do not believe a license in excess of $1 billion dollars would have been prohibitively expensive for SAP." Declaration of Larry Ellison in Support of Oracle's Opposition to Defendant's Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009, pages 1-3. Declaration of Safra Catz in Support of Oracle's Opposition to Defendant's Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009, pages 1-2.

361 "Future" is used in the sense that the sales/profits take place *after* the Negotiation.

Oracle database and that royalty was set at a percentage of the product price with a variable that depended on the amount of product sold.[362]

A Reasonable Royalty in this case is for the License,[363] which would be concluded in the Negotiation[364] and it must be reasonable to the parties. Therefore, I am assuming a forced license that balances the potential benefits and risks to the parties. As I discussed earlier, it is unreasonable to assume that SAP would have entered into a fully paid-up license with Oracle at the time of the Negotiation. The only license that would have made any rational business sense to both parties is one based on a percentage of earned revenues or profits arising from relevant sales.

I begin my analysis with an overview of TomorrowNow's support model and then I consider each Georgia-Pacific factor in turn. I discuss my conclusion of a royalty-based license in Georgia-Pacific Factor 15.

During the hypothetical license period, TomorrowNow provided the following categories of support programs, "Extended Support," "Critical Support" and 24x7 Call Support. Extended support only applied to the PeopleSoft lines.

The major characteristics of Extended Support were:

1. Marketed from 2002 to mid-2004[365]

2. Provided some customers with tax and regulatory updates

3. Generally for retired PeopleSoft releases

4. Most customers maintained support with PeopleSoft

5. Generally treated as supplemental to PeopleSoft support

The Extended Support model provided tax and regulatory updates to customers on PeopleSoft Human Resources versions 7.0, 7.5 and 7.6,[366] and updates to Financial's to a lesser extent.

Based on testimony by Shelley Nelson, PeopleSoft referred customers to TomorrowNow.[367] At Mr. Ravin's deposition, one exhibit (Ex 1325) was produced that shows PeopleSoft referred customers to TomorrowNow.[368] Because TomorrowNow's Extended Support model provided

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362 "Oracle Reseller Agreement" with SAP. August 1, 1994; ORCL0070432-365, at -333.

363 I defined the License earlier in this report. It is a license designed to compensate Oracle for the actual use Defendants made of the Subject IP assuming non-exclusivity, limited duration, limited access to the IP, and limited territory.

364 Also defined previously.

365 There is no precise date upon which TomorrowNow stopped providing Extended Support and started to provide Critical Support. The evidence suggests the change was more like a process than an event. For purposes of this report, where required, I am going to assume Critical Support began in mid-2004.

366 Pursuant to the TomorrowNow customer contracts.

367 Shelley Nelson deposition dated December 6, 2007, pages 132-133.

368 Email dated April 21, 2004 from Terry Wagner at Lockheed Martin to Gregory Stevenson at PeopleSoft. "Lockheed Martin has contacted the supplier you recommended for continued tax update support of version

supplemental, non-threatening support, there would be significant downward pressure on the royalty rate.

The major characteristics of Critical Support included:

1. Mid-2004 roll-out
2. Support for J.D.Edwards announced in December 2004; first J.D.Edwards customer January 1, 2005[369]
3. Support for Siebel announced in May 2006, first Siebel customer September 29, 2006[370]
4. Service included tax/regulatory updates, patches, fixes
5. Tax/regulatory updates "developed from scratch" (not retrofitted)[371]
6. Replacement for PeopleSoft, J.D.Edwards and Siebel support generally[372]
7. Provide customers with the ability to support their current version for 10 years
8. Allow for extension of lifespan for existing products[373]
9. "30 minute response time, 24x7x365"[374]

TomorrowNow started providing Critical Support to its customers as a result of customer requests:

1. In late 2003, the Municipality of Anchorage approached TomorrowNow: "This customer came to us and said we can't pay maintenance anymore, our budget doesn't allow us, can you help us, can you do this for us."[375]
2. In early 2004, another customer approached TomorrowNow with a similar request.[376]

7.5. In order for Lockheed Martin to engage TomorrowNow for continued support of V7.5 tax updates we need to have PeopleSoft's authorization to provide the CD's that they are requesting." Ravin Exhibit 1325. TN-OR00800751-753, at -752.

369 Koontz-Wagner's support period began January 1, 2005 per Support Services Agreement dated January 20, 2005; TN-OR00007459-70.

370 MKS, Inc.'s support period began September 29, 2006 per Support Services Agreement dated September 29, 2006; TN-OR00000556-562.

371 Shelley Nelson deposition dated April 18, 2008, pages 279-280.

372 Most Critical Support customers cancelled PeopleSoft/J.D.Edwards/Siebel support.

373 TomorrowNow PowerPoint Presentation titled, "Maintenance and Support for Enterprise Software Applications." December 17, 2004; TN-OR00335417-443, at -429.

374 TomorrowNow PowerPoint Presentation titled, "Maintenance and Support for Enterprise Software Applications." December 17, 2004; TN-OR00335417-443, at -425.

375 Shelley Nelson deposition dated April 18, 2008, page 281.

3. In June 2004, "we began to, or the, the sales team began to identify it as a service offering versus just having clients come to us and say can you do this for us."[377]

4. By mid-2005, most of TomorrowNow's customers were Critical Support customers.[378]

8.1. Georgia-Pacific Factor No. 1: Royalties Received by Licensor

"The royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty."

"An established royalty exists where the patent owner has licensed the infringed property to others…"[379] Plaintiffs provided various software license agreements related to PeopleSoft: software alliance program agreements; service alliance program agreements; consulting partner alliance program agreements; platform alliance program master agreements; an outsourcer alliance agreement; a value added remarketer agreement; end user licenses; and other agreements.

Plaintiffs also provided various software license agreements related to J.D.Edwards, including: alliance program agreements; consulting alliance program agreements; reseller and value added reseller agreements; and end-user license agreements. The license agreements are summarized in Appendix H and analyzed below:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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 vendors[515] 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.

The License would be non-exclusive because Oracle provides the same Software and Support Materials to its customers. Non-exclusive licenses command a lower royalty rate than exclusive licenses.

The hypothetical license would cover the actual use TomorrowNow made of the Subject IP. TomorrowNow's operations were exclusively in the US from 2002 through 2004. In 2005, TomorrowNow began supporting customers with international tax and regulatory updates[516] and opened offices in the United Kingdom, the Netherlands, Singapore and Australia.[517] Therefore, the License would be geographically limited to the USA from 2002 through 2004 and would have been limited to the territories in which TomorrowNow's customers were supported from 2005 through 2008.

In addition, because license agreements are frequently re-negotiable upon a change in ownership, I have assumed the License would have been re-negotiated on January 19th, 2005 when SAP acquired TomorrowNow.

However, I do not postulate a separate royalty for the period before January 19, 2005 (the pre-acquisition period) and after that date. Mr. Meyer has not provided a damage claim for the pre-acquisition period so there is no need for me to address such a claim. For the purposes of my report however, I have assumed that the Reasonable Royalty developed in the Negotiation would apply retroactively to the pre-acquisition period. Because the use of the Subject IP was less in the pre-acquisition period than post-acquisition, the Reasonable Royalty is the maximum it could possibly be (and still be reasonable) in the pre-acquisition period.

8.4. Georgia-Pacific Factor No. 4: Licensor's Established Policy

"The licensor's established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly."

Plaintiffs were in the business of licensing their software and support materials to customers. Therefore, TomorrowNow's customers *had* access to the Subject IP to the same extent TomorrowNow would need access to support that customer, provided the customer kept up its Oracle support contract. As I stated previously, TomorrowNow could stand in the shoes of its customer (customers are licensed to access source code and amend it as needed to fix bugs, etc.), in the same way other third-party consultants and support vendors and in-house staff do. For the

516 TomorrowNow started supporting Foot Locker, Inc. on March 1, 2005 with tax and regulatory updates in US, Canada, Australia, New Zealand, Europe, and Asia Pacific. "PeopleSoft Support Services Agreement for PeopleSoft Releases." December 12, 2004; TN-OR00006885-898.

517 Blau, John. "Safe Passage Support Comes to Europe, Asia." *Computer World*. April 29, 2005. <http://web.archive.org/web/20050430104650/www.computerworld.com.sg/ShowPage.aspx?pagetype=2&articleid=936&pubid=3&issueid=45>. Koe, Benjamin. "It's Time For TomorrowNow." *CMPNet Asia*. July 1, 2005. <http://web.archive.org/web/20051202095327/www.cmpnetasia.com/ViewArt.cfm?Artid=27175&Catid=8&subcat=75>.

purposes of the Negotiation, I assume Plaintiffs' customer access to, and use of, the copyrighted material would have been restricted as described in the Complaint:[518]

> ...Oracle's customers purchase licenses that grant them limited rights to use specific Oracle software programs with Oracle retaining all copyright and other intellectual property rights in these works. In addition, licensed customers can, and typically do, purchase some set of technical support services that include the right to obtain upgraded products such as updates, bug fixes, or patches to those software programs the customers have expressly licensed from Oracle and have the right to use for purposes authorized by Oracle...
>
> ...all of the relevant license agreements for what is now Oracle software set comparable rules for access to, and use of, that software. Among other things, those rules prohibit access to, or use of, any portion of the software not expressly licensed to and paid for by the licensee, and any sublicense, disclosure, use, rent, or lease of the software to third parties...
>
> Licensees may designate third parties to help maintain Oracle's software, but only subject to the terms of the relevant license agreement between the licensee and Oracle...
>
> Through the terms of its use, Oracle restricts access to the customer support websites used by Oracle customers and/or their authorized agents to access and download Oracle software, including for its JDE, PeopleSoft and Siebel Software and Support Materials licensed to Oracle customers.

TomorrowNow simply needed the same access to Oracle software that its customers (and other third-party vendors) enjoyed plus the Delta.

[redacted]

518 Complaint, pages 16-17.

519 [redacted]

[redacted]

[redacted]

[redacted]

8.4.3. Klee Associates

A February 8, 2005 article titled "JDE Shops Have Plenty of Options for Third-Party Maintenance," published in IT Jungle, Volume 5, Number 6, states:

> J.D.Edwards shops cringing at the thought of writing 22 percent maintenance checks to Oracle can rest a little easier knowing there are other options, and the ranks of companies offering third-party maintenance programs for World and EnterpriseOne are growing quickly... The latest company to announce third-party maintenance service for J.D.Edwards shops is Conexus Partners... Conexus joins several other vendors that have promised to provide J.D.Edwards shops with ongoing maintenance and support for a fraction of what Oracle will charge them, including CIBER, Klee Associates, Versytec, and TomorrowNow.[533]
>
> Whatever the differences, these five vendors are after the same thing: to serve the growing number of World and EnterpriseOne users who *don't want to pay Oracle for support* but still want a minimum level of support.[534] [emphasis added].

530 [redacted]
531
532

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

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

Two of the five companies listed, Klee Associates and CIBER, are Oracle *partners*. Klee Associates is listed on Oracle's Partner Network website as a Systems Integrator at the Partner Level[535] and CIBER is listed as a Systems Integrator at the Certified Advantage Partner Level.[536]

Klee Associates claims to have entered the third-party support business in December 2004 as a natural extension of its J.D.Edwards consulting business, JDEtips, says Andy Klee, president of the Denver-based company. Mr. Klee was quoted in an article saying:

> "We'd been doing J.D.Edwards consulting and training for many years," Klee says. Some of his customers asked if they would provide third-party maintenance support, and Klee looked into what it would take to do it, and how many clients it would take to make it work. "I would call it a logical extension of our services," he says. Klee Associates provides maintenance support on J.D.Edwards World and OneWorld ERP products.[537]

In 2005, Klee Associates reportedly charged only 25 percent of customers' then-current support fees plus an hourly rate for additional services such as bug fixes or enhancements to a J.D.Edwards application. The company had 10-20 customers that had either bought or committed to third-party support with two staff members dedicated to the third-party support division and the balance of the work being outsourced to business partners.[538]

Oracle recognized that it lost customers to Klee Associates in its 3rd Party At-Risk Reports. Oracle lost $142,092 in revenue from [redacted] to Klee Associates in approximately May 2005. Oracle's notes for this customer state:

[redacted]

Oracle also lost $28,652 in revenue from [redacted] to Klee Associates in approximately January 2006. Oracle's notes for this customer state,

[redacted]

535 Oracle.com. "Oracle Partner Network: Klee Associates, Inc." <http://solutions.oracle.com/partners/jdetips>.

536 Oracle.com. "Oracle Partner Network: Ciber." <http://solutions.oracle.com/partners/ciber>.

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

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

539 [redacted]

540

An internal Oracle email admitted that Oracle was losing business to Klee Associates. Elizabeth Shippy wrote to James Patrice on June 3, 2005, stating, "We're facing more and more customers who are threatening to leave us for a 3rd party vendor (i.e. TomorrowNow, Conexus, Klee, etc.)."[541]

Another Oracle document titled "Oracle/PeopleSoft Third-Party Support SWAT Team states;

> In late 2004 we began to see the emergence of third-party support providers for PeopleSoft products. These grey market *competitors* are providing an alternative support option to PeopleSoft customers on *retired releases.* Third party support competitors such as TomorrowNow, Conexus Partners, Versytec, and Klee Associates are attracting PeopleSoft customers by offering significantly reduced support services fees. These reductions off customer's current support services fee range between 50%-75% depending on the third-party support vendor. In Q3 FY05 we lost $9.4 million dollars to third-party support providers. In addition, there are currently 21 PeopleSoft/J.D.Edwards customers equating to 9 million dollars in support revenue at-risk to third-party support providers.[542] [emphasis added].

Oracle's own business documents group Klee Associates in the *same category as TomorrowNow and other third-party maintenance providers.* Klee Associates directly competed with Oracle despite the fact that Klee Associates is an Oracle partner. There came a point at which Klee essentially gave its support business to TomorrowNow and received, in exchange, the referrals from TomorrowNow for systems integration and consulting services.[543]

8.4.4. CIBER

CIBER was listed as a Certified Advantage Partner on Oracle's website,[544] which defined Certified Advantage Partners ("CAPs") as "Oracle Partner Network's highest membership level. CAPs consistently demonstrate superior product knowledge, technical expertise, and commitment to Oracle, and receive advanced levels of service, training, benefits, and resources."[545]

CIBER, Oracle's own CAP, partnered with another vendor in 2005 to convert Oracle customers to a competing software platform.

A January 24, 2005 article titled "ERP Vendors Target PeopleSoft, JDE Bases," published in IT Jungle, Volume 14, Number 4, states:

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541 Oracle email from Elizabeth Shippy to Jim Patrice. June 3, 2005. Re: Monthly E1 Conference calls; ORCL00089538.

542 "ORACLE/PeopleSoft, Third Party Support SWAT Team." ORCL00088177-181, at -180.

543 TomorrowNow email from Bob Stephens to Tim Harper, August 8, 2008, TN-OR06097046-048 at 047; TomorrowNow email chain from Kirk Chan to Russell Parker, October 9, 2006, TN-OR07869025-028 at 028; TomorrowNow email chain from Andrew Nelson to Nigel Pullan, et al., April 3, 2006, TN-OR00582962-63.

544 Oracle.com. "Oracle Partner Network: Ciber." <http://solutions.oracle.com/partners/ciber>.

545 It appears that Oracle recently changed its highest level to Platinum. On its website, CIBER holds itself out to be a CAP. CIBER.com "Partners: Oracle "<http://www.ciber.com/ciber/alliances/oracle>.

> Lawson has partnered with CIBER, a 30-year-old IT services and integration company with expertise in JDE suites, to provide support services to JDE shops that want to migrate in the future to Lawson's ERP suite (either the 8.03 release or the future 8.1 release) but do *not want to give Oracle any support money.* CIBER, which is based in Denver, like the former JDE, is offering support on the EnterpriseOne and World suites at *up to half off the price that PeopleSoft (and now Oracle) were charging.* Lawson will then cut as much as 50 percent off the cost of its ERP suite, and will use CIBER's data migration tools to move DB2/400 databases from the OneWorld and World formats over to the Lawson formats.[546] [emphasis added]

A February 8, 2005 article titled "JDE Shops Have Plenty of Options for Third-Party Maintenance," published in IT Jungle, Volume 5, Number 6, also states:

> Several weeks ago, Lawson Software announced it had entered into a partnership with CIBER, an international IT services firm located in the Denver suburb of Greenwood Village. As part of the deal, CIBER will provide support services to J.D.Edwards shops that want to migrate in the future to Lawson's ERP suite, which runs on the iSeries. *CIBER is offering maintenance for about half the price charged by PeopleSoft,* and Lawson will then cut up to another 50 percent off the cost of its ERP suite. Finally, customers will be able to use CIBER's data migration tools to move the DB2/400 data from the J.D.Edwards to Lawson formats.[547] [emphasis added]

CIBER was also a TomorrowNow customer and is on the List of 86 that purchased SAP software or services while on TomorrowNow support. Mr. Geib explained CIBER's move to SAP:

> Q. Does the win note refresh your recollection as to whether TomorrowNow was important to CIBER's decision?
>
> A. If I remember CIBER's business drivers, CIBER was building a new SAP practice, because they felt that Oracle's business was failing. So they were choosing to establish and build an SAP-oriented business as their consulting, because they were a consultancy, and that was their primary business driver.
>
> Q. So through this deal, you didn't have any understanding if TomorrowNow was especially important to CIBER?

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546 Morgan, Timothy Prickett. "ERP Vendors Target PeopleSoft, JDE Bases." *IT Jungle*. January 24, 2005. <http://www.itjungle.com/tfh/tfh012405-story02.html>.

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

> A. Yeah. My recollection is that CIBER was choosing that Oracle was a failing product, and that they needed to divest from PeopleSoft business and move into SAP. That that was their primary motivation. That's my recollection.[548]

CIBER directly competed with Oracle and deliberately moved away from PeopleSoft ERP software despite the fact that CIBER is an Oracle CAP.

8.4.5. Access to Subject IP

Typically, the more accessible intellectual property is, the lower the royalty the intellectual property would command. I have no opinion on whether Oracle properly protected the Subject IP. However, Oracle produced documents in this matter indicating that it allowed customers to access Oracle's website, CustomerConnection, for months after their support end date had passed. Elizabeth Shippy indicates in an email that "800+ PSFT/JDE customers have been identified in C1 [the "PSFT/JDE support delivery system"] as having access to support (speaking with Support Analysts, using Customer Connection, etc.) without an active support contract in OKS…we are fairly confident (98%) this list represents customers whose support access was not terminated correctly during the normal course of business."[549] Additional documents, including emails from Ms. Shippy, indicate that specific customers' support was not turned off after their support end dates:[550]

1. Eight months past support end date: Greater Vancouver Regional District[551]

2. Seven months past support end date: Shands Healthcare[552]

3. Five months past support end date: Smithfield Foods;[553] Mortice Kern Systems Inc.;[554] and Wesfarmers Limited[555]

4. Four months past support end date: Engelhard Corporation;[556] Berri Limited;[557] and Ronis S.A.S.[558]

5. Two months past support end date: Metro Machine;[559] Herbert Waldmann Lichttechnick GmbH;[560] Texas Association of School Boards;[561] Basler Electric Company;[562] Oce-Technologies B.V.;[563] and Merck[564]

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548 Robert (Bob) Geib deposition dated January 9, 2009, pages 178-179.
549 Email from Elizabeth Shippy to various Oracle groups dated October 10, 2007 (ORCL00240796).
550 Number of months after support end date is based on emails cited for each customer.
551 Email from Elizabeth Shippy to Suzy Stohr dated March 9, 2007 (ORCL00088804-05).
552 OKS printout dated September 7, 2007 states, "Customer cancelled support 11-30-06 but in C1 customer still had support due to this false prepaid. An SR to queue 1851 has been logged #10050009 6-6-07 to cancel support on this renewal…" (ORCL00156214).
553 Email from Elizabeth Shippy to Shauna Baribeau dated March 10, 2007 (ORCL00089099).
554 Email from Elizabeth Shippy to Bradley Penwell dated March 10, 2007 (ORCL00089104).
555 Email from Elizabeth Shippy to Ann Armitage-Jackson dated March 12, 2007 (ORCL00088797).
556 Email from Elizabeth Shippy to James McLeod dated March 9, 2007 (ORCL00088813-14).
557 Email from Elizabeth Shippy to Suzanne Miriam Kemp dated March 10, 2007 (ORCL00089109).
558 Email from Elizabeth Shippy to Alisa Ionescu dated March 10, 2007 (ORCL00089102).

Oracle's practice of allowing access to the Subject IP without authorization, puts downward pressure on the Reasonable Royalty.

8.5. Georgia-Pacific Factor No. 5: Relationship between Licensor and Licensee

"The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter."

The commercial relationship between the licensor would differ depending on the license in question. I address each license in turn.

8.5.1. Extended Support

For its Extended Support, TomorrowNow would have required a license to provide its customers with support on PeopleSoft software, specifically versions 7.0, 7.5, and 7.6 with the limited scope necessary to cover the Delta.

It is worth noting that most customers chose to contract for Extended Support from TomorrowNow while they also paid PeopleSoft for extended support. For example, [redacted] paid TomorrowNow [redacted] for Extended Support for only six months, from April 2003 to October 2003, on version 7.5 of PeopleSoft Human Resources, Payroll, and Benefits Administration modules[565] and never canceled PeopleSoft support.[566] The fact that customers were prepared to pay PeopleSoft and TomorrowNow simply to keep their tax and regulatory information up-to-date indicates that PeopleSoft was generally not harmed by TomorrowNow's Extended Support business and that price was not the only motivating factor for customers using TomorrowNow for support, which is what Mr. Meyer suggests and appears to assume.

From early 2002 to mid 2004, Oracle likely did not view TomorrowNow as a significant competitor. In fact, prior to Oracle's takeover of PeopleSoft, PeopleSoft referred certain customers to TomorrowNow. Ms. Nelson stated that PeopleSoft "stopped supporting those customers; and we got – we got a lot of those customers, some of whom were referred by PeopleSoft to us."[567] When PeopleSoft and other ERP vendors stopped supporting their customers, the customers were either forced to upgrade to a newer version or go to a third-party support vendor for continued support.

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559 Email from Elizabeth Shippy to Angela Stout dated March 9, 2007 (ORCL00088738-39).
560 Email from Elizabeth Shippy to Maria Avram dated March 10, 2007 (ORCL00088740-41).
561 Email from Elizabeth Shippy to Honi Grasing dated March 8, 2007 (ORCL00088786-87).
562 Email from Elizabeth Shippy to Lori Sanabria dated March 9, 2007 (ORCL00088794).
563 Email from Elizabeth Shippy to Marjolein Nakhli dated March 10, 2007 (ORCL00089103).
564 Email from Elizabeth Shippy to Todd Orlando dated March 10, 2007 (ORCL00089106).
565 "Extended Support Services Agreement for Retiring & Retired PeopleSoft Releases between TomorrowNow and [redacted]" February 27, 2003. TN-OR00006068-079, at -069.
566 Meyer Report, Schedule 33.SU.
567 Shelley Nelson deposition dated December 6, 2007, page 133.

The threat to PeopleSoft's revenue stream was minimal because the majority of TomorrowNow's Extended Support customers went to TomorrowNow for a distinct period and never cancelled their PeopleSoft support.

One effect on PeopleSoft's business that the company would have considered in the Negotiation, was that its customers may have chosen to wait longer before upgrading to a higher version of PeopleSoft software.[568] For the most part, such delays would not affect the revenues PeopleSoft generated from customers because the upgrades were provided at no additional cost to customers that were current on their fee payments.[569] But customers that could not complete an upgrade in time to meet PeopleSoft's retiring release schedule, needed a short-term solution until they could upgrade.[570] Accordingly, PeopleSoft and TomorrowNow were not competing for the same support dollars as Ms. Nelson confirmed in deposition:

> Q. And did you also understand that at the time that TomorrowNow was a competitor to PeopleSoft?
>
> A. Not necessarily a competitor, no. My understanding at that time is that PeopleSoft had not offered any, any service for these particular customers who had nowhere to go and weren't supported on that release.[571]

Therefore, TomorrowNow was providing a short-term service to some PeopleSoft customers, PeopleSoft did not view TomorrowNow as a significant competitor, and few Extended Support customers cancelled PeopleSoft support. The commercial relationship between PeopleSoft and TomorrowNow for extended support would have resulted in a minimal royalty rate especially in view of the fact that PeopleSoft encouraged third-party vendors like TomorrowNow to help its customers.

In addition, at the time of the Negotiation, PeopleSoft's policy of terminating support on older software may have driven certain customers to other software vendors for ERP and payroll systems.[572] If the customer did not wish to upgrade to a later version and PeopleSoft ceased supporting the version they were on, the customer might feel they were being cheated out of their support fees once tax and regulatory updates ended. By allowing the customer to continue support of older versions through third-party vendors like TomorrowNow, PeopleSoft could keep the customer on their ERP software and may have believed it had a better chance of selling the customer additional software in the future. This factor would suggest a minimal royalty rate.

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568 Leo Apothecker deposition dated October 2, 2008, pages 85-86, "But if you would look at the nature of the software business, and that's something you realize over time, then you understand that or realize that application software, be it PeopleSoft or Oracle or SAP's, is pretty sticky in the customer. And the paradox might have been that because SAP did acquire TomorrowNow, it actually helped people to stay on PeopleSoft software instead of helping them migrate off PeopleSoft software. So from that perspective, I personally saw that the usefulness of TomorrowNow was the client [sic]."

569 PeopleSoft, Inc. Form 10-K for the fiscal year ended December 31, 2003, page 7.

570 Shelley Nelson deposition dated April 18, 2008, page 253.

571 Shelley Nelson deposition dated April 18, 2008, page 267.

572 Robert Wasson deposition dated July 23, 2009, pages 28, 38, 90.

8.5.2. Critical Support

Critical Support services were first provided in late 2003 to the Municipality of Anchorage. At the time, TomorrowNow was still a small business with few employees.[573]

By late 2004, the commercial relationship between PeopleSoft and TomorrowNow changed because, as a result of European Commission and US District Court Rulings, Oracle had been allowed to proceed with its hostile takeover bid of PeopleSoft. TomorrowNow recognized the market opportunity presented by the anxiety evident in the PeopleSoft customer base due to the expected takeover of PeopleSoft by Oracle. The company reassured customers that they could obtain stable support services from TomorrowNow with a variety of press releases:

> PeopleSoft Licensees Assured Continued Support Availability into Next Decade
>
> Pleasanton, Calif. – Sept. 10, 2004. In the wake of a federal court's ruling that Oracle Corp. can proceed with its hostile bid for PeopleSoft Inc., TomorrowNow, Inc. today reassured PeopleSoft software licensees of continued support availability for their PeopleSoft 8.x and 7.x releases well into the next decade.
>
> TomorrowNow Inc. offers an alternative support program that replaces PeopleSoft Annual Maintenance & Support services. Fortune 500, mid-market, and public sector organizations from nearly every industry sector have selected TomorrowNow, Inc. as their support services vendor of choice.[574]
>
> TomorrowNow Assures PeopleSoft Licensees of Support into Next Decade
>
> Pleasanton, Calif. – Oct 28, 2004. TomorrowNow, Inc. announced today – in the wake of the recent European Commission and U.S. District Court Rulings clearing Oracle Corp's takeover bid for PeopleSoft Inc. – that PeopleSoft licensees can be reassured of continued maintenance and support services from TomorrowNow for their PeopleSoft products well into the next decade.
>
> TomorrowNow offers the TomorrowNow Support Services program that replaces PeopleSoft Annual Maintenance & Support services…

TomorrowNow was capitalizing on the anxiety in the market place to grow its business:

> 'The ongoing uncertainty surrounding the fate of PeopleSoft and its products has PeopleSoft licensees genuinely concerned about the future

[573] "TomorrowNow Confidential Executive Summary: Series A Preferred Stock Private Placement." December 2004; TN-OR00627768-794, at -779. Gilbert, Alorie. "A 'Plan B' for PeopleSoft customers." September 21, 2004. <http://articles.techrepublic.com.com/5100-22_11-5375095.html>.

[574] "PeopleSoft Licensees Assured Continued Support Availability into Next Decade." September 10, 2004; TN-OR00004770-771, at -770.

> availability, quality, cost, and scope of support for the PeopleSoft products in use today,' said Seth Ravin, president of TomorrowNow. 'Today, TomorrowNow clients enjoy a safe harbor, with predictable and substantial cost savings, 10-year support periods, and highly responsive support services that assure them a strong return on their ERP and CRM investments for years to come. TomorrowNow is an independent support provider, our clients are free to move their businesses forward without any consideration of the current upheaval in the enterprise software market.'[575]

As previously discussed, in the period leading up to the license negotiation, PeopleSoft had begun to recognize TomorrowNow as a competitor. In the third quarter of 2004, PeopleSoft "…developed a new TomorrowNow response sheet for the Support Sales team to use, [which] provides a script they can use with their customers to justify the value of staying [with PeopleSoft support]."[576] Also, in a Business Overview memo dated November 17, 2004, PeopleSoft stated:

> Further threatening our business are emerging grey market support providers with an alternative option to PeopleSoft customers on retired releases. These grey market competitors are offering support services PeopleSoft no longer provides to the customer – bug fixes and tax and regulatory updates. TomorrowNow, a consulting company staffed with former PeopleSoft employees…is aggressively pursuing the Enterprise customer base offering support at a 50 – 70% reduction off of their current maintenance bill. They are also targeting customers on active supported releases with similar savings. Versytec, Conexus (former J.D.Edwards Support Services executives), and InOne are similar types of companies targeting former JDE customers on both World and XE releases. More and more customers are mentioning these competitive alternatives during their renewal negotiations.[577]

As a result of the perceived threat, the Business Overview recommended offering supplemental support for retired releases. PeopleSoft's recognition of the threat posed by a variety of third-party support vendors would have meant that it viewed TomorrowNow as one of a group of new competitors and would presumably have passed on its information to Oracle when the acquisition closed in December 2004.

8.5.3. Renegotiated License in January 2005

Following SAP's acquisition of TomorrowNow, the License would have been re-negotiated. Oracle and SAP are competitors in the same market and because of their commercial relationship, Oracle would have been unwilling to license its software to an SAP subsidiary that offered competitive support products.

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575 "TomorrowNow Assures PeopleSoft Licensees of Support into Next Decade." October 28, 2004. TN-OR 00004772-73.

576 "PeopleSoft Q3 2004 Global Operational Performance Package Support Services." October 27, 2004; ORCL00233793-812, at -807.

577 "PeopleSoft Support Services Strategy Supplemental Support Program Releases Retiring in 2005 (v.2)." November 17, 2004. ORCL00135397-403, at -397.

In its Complaint, Oracle calls SAP's acquisition of TomorrowNow in January 2005 a "calculated competitive move." However, Oracle executives may not have viewed TomorrowNow as a real threat even after SAP acquired TomorrowNow. For example, on November 19, 2005, ten months after SAP acquired TomorrowNow, RedHerring.com quoted an Oracle executive dismissing TomorrowNow, "'We rarely ever see them and *they have had no impact on Oracle*,' says Juergen Rottler, executive vice president of Oracle Support Services."[578] [emphasis added].

Mr. Rottler dramatically changed his story in deposition, stating:

> We saw significant impact from SAP/TomorrowNow, but -- you know, but at the same time, we've obviously taken a lot of countermeasures to that threat as well. So we've been able to -- you know, recover from what were at times very poor renewal rates when the threat was the greatest.[579]

Despite Mr. Rottler's contradictory statements as to whether TomorrowNow posed a threat to Oracle's business, the At-Risk Reports indicate Oracle recognized TomorrowNow and other third-party support providers as competing for Oracle's support revenue at least by late 2004.

Given the competitive relationship between Oracle and SAP, Oracle would drive a hard bargain with SAP in the Negotiation. However, during the Negotiation, if it were rational, Oracle would have viewed the receipt of royalties from third-party support vendors as a way to mitigate the profits lost to the new class of competitors; receiving a royalty from TomorrowNow for lost support customers would be better than receiving nothing from customers lost to other third party support vendors. This emerging new market from third-party support vendors suggests a low royalty rate.

In September 2006, TomorrowNow began supporting Siebel applications. SAP acquired TomorrowNow 21 months previously and by the time of the Siebel Negotiation both TomorrowNow and SAP would have known that TomorrowNow's role in the Safe Passage program was a failure, and SAP would have known that they were not generating the TomorrowNow led customers they hoped for. Nevertheless, I assume the royalty rate would not change to reflect the plan's failure. Therefore, I assume the same Reasonable Royalty would apply to all relevant revenues no matter which Oracle software suite was being supported by TomorrowNow; except for Oracle database which I deal with separately.

Interestingly, an odd tension existed between TomorrowNow and SAP in that at a fundamental level, they were essentially competing for the same customers. Evidence confirms the notion that it was not in TomorrowNow's self interest to encourage its customers to move to SAP as it would have preferred to keep the steady support revenue stream for itself.[580] A TomorrowNow executive planning document stated, "SAP desires to move TN customers off TN services and on

578 Bhuta, Falguni. "TomorrowNow Faces Oracle." *Red Herring*. November 19, 2005. <http://www.redherring.com/Home/14403>.

579 Jeurgen Rottler deposition dated May 13, 2009, pages 235-236.

580 Montgomery, Nigel. "TomorrowNow Now." *AMR Research*. November 3, 2005; TN-OR00317779-780, at -780.

to SAP, which would cause a loss of TN revenue, and incentive conflicts…Sales incentives do not align with SAP's long-term goals for TN…"[581]

Therefore, it is clear that TomorrowNow recognized the negative effect of allowing SAP to be involved in its own direct sales efforts. These effects included "Loss of TN revenue, Sales channel conflict," and "Reduction of Employee Satisfaction due to reduction of customer base."[582] Clearly, TomorrowNow was struggling to co-operate with SAP given the inherent conflicts of interest that existed between the two business models.

Other reports suggest the two firms may not have coordinated closely on potentially converging business fronts.[583] TomorrowNow documents show that SAP account executives involved in the Safe Passage program tended to keep TomorrowNow at a distance during the sales process. For example, one 2007 TomorrowNow document stated:

> …we need a REASON for SAP [account executives] AE's to leverage and introduce TN into more deals…Overall, America's sales goal is to get SAP AE to bring in TN AE to deals (currently, this is not happening with frequency)….Right now we are missing many (most?) Safe Passage deals on the year in which they happen.[584]

In addition, Mr. Hurst testified that:

> …the majority of the [Safe Passage] deals would – still would have been won, but there may have been a couple that TomorrowNow was influential in… The way that TomorrowNow was sold, it was sold separately, through their own sales force. And I know that we had some difficulty getting traction within the SAP sales force with TomorrowNow. A lot of the SAP sales reps were hesitant to bring TomorrowNow into their deals and position it, for fear of stalling sales cycles.[585]

The difficulties inherent in the business models manifested as friction between the SAP and TomorrowNow sales teams because if TomorrowNow encouraged customers to move to SAP products, TomorrowNow lost that customer[586] while the SAP sales team felt that having

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581 "TomorrowNow 2007 Executive Planning Meeting;" TN-OR00164225-290 at -226.

582 "TomorrowNow 2007 Executive Planning Meeting;" TN-OR00164225-290 at -253.

583 Montgomery, Nigel. "TomorrowNow, Later or Never." AMR Research. April 28, 2005; TN-OR00250169-170, at -169.

584 "TomorrowNow 2007 Executive Planning Meeting;" TN-OR00164225-290 at -236-237.

585 Thomas Gene Hurst II deposition dated April 30, 2008, pages 107-108.
Lesley Loftus deposition dated June 13, 2008, pages 189-195.

586 TomorrowNow was referred to as "A Parking Lot" for customers unready to leave Oracle for any other vendor. "Protect Your Investment -- Today and Tomorrow 'Safe Passage;'" TN-OR01027103-133, at -133. "Starting in 2006, TomorrowNow offered (as part of Safe Passage) a "Sunset" program for "zero dollar" pure Safe Passage transactions." "Safe Passage with TomorrowNow Support." January 28, 2006; TN-OR00003204-205, at -205.

TomorrowNow involved in the negotiations to sell a significant license only served to slow down (and possibly derail) the process.[587]

8.6. Georgia-Pacific Factor No. 6: Derivative or Convoyed Sales

"The effect of selling the patented specialty in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or convoyed sales."

8.6.1. Existing Value of the Invention to the Licensor as a Generator of Sales of Non-Patented Items

While Oracle's support revenue is not used to generate sales of other products, the opposite is true – software licenses generate other revenues. For example, consulting sales[588] generally lag software sales by several quarters because consulting services are performed after customers purchase software.[589] Oracle's Form 10-K supports the notion that software license sales generate support sales:

> The growth of software license updates and product support revenues is influenced by three factors: (1) the support contract base of companies acquired, (2) the renewal rate of the support contract base and (3) the amount of new support contracts sold in connection with the sale of new software licenses…[590]
>
> Substantially all customers purchase license updates and product support when they buy new software licenses, resulting in a further increase in our support contract base. Even if new license revenue growth was flat, software license updates and product support revenues would continue to grow assuming renewal and cancellation rates remained relatively constant since substantially all new software license transactions add to the support contract base.
>
> Substantially all of our customers, including customers from acquired companies, renew their support contracts when eligible for renewal.[591]

However, Mr. Meyer's failure to recognize or acknowledge these factors should not matter if my understanding of the Court's Order is correct. The Court's Order precludes Oracle from presenting evidence of cross-sell and up-sell opportunities (amongst other things). As a result,

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587 Andrew Nelson deposition dated February 26, 2009, page 164. "They [the SAP sales team] thought that if we [TomorrowNow] closed a three-year deal with a customer that that meant we have taken away an opportunity for them." "FKOM '07 Las Vegas; "SAP-OR00019846-868, at -857.

588 Consulting revenues are generated from assisting customers in deploying Oracle's applications and technology products (Oracle Form 10-K for the fiscal year ended May 31, 2007, page 7).

589 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007, page 26.

590 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007, page 25.

591 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007, page 26, which is evidence the effect of third party support vendors has been minimal.

Oracle cannot claim damages for any items other than lost support sales and related licenses and disgorgement of SAP and TomorrowNow profits, if any.

8.6.2. The Effect of Selling the Patented Specialty in Promoting Sales of Other Products of the Licensee

Oracle contends that SAP used TomorrowNow's support services as a means of establishing relationships that would cause the customer to cancel Oracle support and switch to SAP applications.

Oracle's theory of the case is not borne out by the facts. While I do not take issue with the fact that SAP management hoped TomorrowNow could generate numerous sales of SAP applications, the reality was far different from the aspiration. The facts show that SAP gained few, if any[592] additional customers as a result of its ownership of TomorrowNow. Whether SAP's ownership of TomorrowNow gave added credibility to the TomorrowNow operation is not at issue in this Georgia-Pacific factor. Based on the realities, TomorrowNow's use of the Subject IP did little or nothing to promote sales of SAP products or services.

I assumed all of the customers on the List of 86 were relevant to Oracle's claim unless I had evidence to the contrary. It is a fact that the documentary record for some customers was sparse, so I had no evidence to support an exclusion. However, based on the evidence I have seen, the reality is that no customer migrated their ERP systems to SAP as a result of the Alleged Actions.

8.7. Georgia-Pacific Factor No. 7: Duration and Term

"The duration of the patent and the term of the license."

Plaintiffs allege that TomorrowNow began infringing in 2002:

> Beginning as early as 2002, SAP TN co-founders Andrew Nelson and Seth Ravin decided that SAP [TomorrowNow] would expand its services and, in doing so, would create and keep on its computer systems illegal copies of Oracle's underlying software applications...[593]

Shelley Nelson, Vice President of Global Support Services, ("Ms. Nelson") was able to provide a time period in 2002 when TomorrowNow began offering support:

> Q. When, to your knowledge, was the first retrofit update created at TomorrowNow?

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592 I say "few, if any" additional customers because the evidence shows that of the List of 86 customers that might arguably have bought something from SAP as a result of the Alleged Actions, 83 purchased SAP software for reasons other than the Alleged Actions. Of the 3 customers that remain, it is highly likely they also purchased software for reasons unrelated to the Alleged Actions. However, because they did not document their reasons for doing so (or the documentation has been misplaced, lost, or just not produced), I cannot determine why they acted as they did. However, as previously reported, the enormous costs associated with switching applications means it is likely no customer purchased SAP software as a result of modest savings on their support while at TomorrowNow.

593 Complaint, page 7.

> A. Well, it was before I joined, so the dates are a bit vague to me. I believe it was in the summer or, the summer of 2002.[594]

Therefore, the License first covers a period beginning in 2002 with TomorrowNow's Extended Support model and ends January 19th when TomorrowNow was acquired by SAP. The License then would be renegotiated because of TomorrowNow's change of ownership and that license term ends on October 31, 2008 when TomorrowNow ceased operations.[595]

8.8. Georgia-Pacific Factor No. 8: Product Success

"The established profitability of the product made under the patent; its commercial success; and its current popularity."

In mid-2007, Computer Business Review estimated the enterprise application support market at between $8 billion and $20 billion annually[596] and Mr. Wang of Forrester Research stated that the market for support is growing by about 9 percent each year.[597]

Oracle reports a gross margin of about 90% on its Product License Updates and Product Support.

> Software license updates provide customers with rights to unspecified software product upgrades and maintenance releases and patches released during the term of the support period. Product support includes internet and telephone access to technical support personnel located in our global support centers, as well as internet access to technical content… Substantially all of our customers purchase software license updates and product support when they acquire new software licenses. In addition, substantially all of our customers renew their software license updates and product support contracts annually.[598]

Oracle's software license updates and product support represented $8.3 billion, or 46 percent of total revenues in 2007; $6.6 billion, or 46 percent of total revenues in 2006; and $5.3 billion, or 45 percent of total revenues in 2005.[599] Oracle's reported financial information indicates that the Software and Support Materials are profitable, commercially successful, and used extensively by its customers. The high profit margins on support provide ample room to cut the fees charged to customers and potentially earn a profit. Third-party support vendors generally advertise a range of cost savings (around 50 percent) over the support provided by the major ERP vendors.[600] The

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594 Shelley Nelson deposition dated April 18, 2008, pages 253-254.

595 "By October 31, 2008, SAP had completed the orderly wind down of operations at TN and TN had ceased providing third-party maintenance and support services or any other business activities." "TomorrowNow Operations Wind Down: Final Report" October 31, 2008; TN-OR0352387-924, at -876.

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

597 Gohring, Nancy and Elizabeth Montalbano. "Maintenance contracts at the heart of Oracle, SAP dispute," *Info World*, March 22, 2007. http://www.infoworld.com.

598 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007, page 6.

599 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007, pages 7 and 41.

600 I discuss later in my report that Versytec, Rimini Street, Conexus Partners, LegacyMode, ContinuServe and CIBER advertised approximately 50% cost savings. Citagus claimed it could offer a 30%-60% reduction

fact that numerous companies, ranging from small start-ups in the U.S., to billion dollar international companies have entered the third-party support business suggests that the marketplace's acceptance of third-party support vendors is positive and growing. In addition, these companies provide support services that are substantially similar to those provided by TomorrowNow to J.D.Edwards and PeopleSoft customers. The fact that they do so with varying degrees of acquiescence by Oracle creating a vibrant market for replacement support in the process. Therefore, over time, there will be significant downward pressure on Oracle to lower the cost of support which will put similar downward pressure on the Reasonable Royalty.

8.9. Georgia-Pacific Factor No. 9: Advantages over Old Devices

"The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results."

Of course, because this is a copyright case, there are no "old devices" and "old modes" at issue and such devices that would not be relevant in the context of this case anyway (because support must always include the latest methods of achieving the purpose of the applications; even if the application itself is an old, retired version, the updates for tax and accounting purposes must always be current).

However, I am going to address this factor by amending it slightly to comport with the copyright nature of the case as follows:

> The advantages of providing support services for existing applications using Oracle support versus the support provided by third-party vendors in general.

The Subject IP includes "the updates, patches and fixes incorporated in each relevant version, service packs of Oracle updates, patches and fixes, and individual exemplar Software and Support Materials, including certain Oracle knowledge management solutions and certain Oracle updates, patches and fixes…"[601] In addition, Oracle support allows the customer to contact a call center for assistance with a software problem (a problem is referred to as a "case").

It is apparent there are ways for TomorrowNow to have achieved a high level of support (at least a level of support the customers would have found acceptable) by utilizing alternatives to the alleged inappropriate use of the Subject IP, I discuss several examples in the following sections. I also discuss alternatives to TomorrowNow, including self-support and other support vendors.

8.9.1. Tax and Regulatory Updates and Bug Fixes and Patches

Keeping the software current with the latest tax and other regulatory authorities is a component of the support Oracle provides its customers. The company gathers the relevant data (from the various authorities) and creates the updates needed to insert the revised data into the customer's

in annual support costs. Klee Associates and netCustomer advertised up to 75% cost savings but the customer paid an hourly fee for people employed on their project on top of the support fee. CH2M HILL advertised a 30% cost savings.

601 Complaint, page 55.

systems that require such changes. Generally, the customer (or their consultant) imports the necessary software elements to effect the changes to their system.[602] Oracle does not have a monopoly on the data needed to create the changes. There are data-gathering services that gather the data and sell relevant data to companies that need them. Therefore, Oracle enjoys no special advantages in the area of tax updates (except, perhaps, that it is able to amortize its data gathering costs over more customers).

Instead of downloading Oracle's tax and regulatory updates, TomorrowNow began to write their own beginning in fall of 2003.[603] TomorrowNow did its "…own research on regulatory sites or subscription services to determine what the new changes are – are going to impact the software and we design and develop those changes from scratch for the different clients."[604] John Baugh further testified that:

> Well, one, we're no longer getting any updates from PeopleSoft. I'm not sure at what point that process has changed, but since I think sometime in 2003 or 2004 – I'm not sure of the exact date – we've been doing all the regulatory research and developing the updates ourself. So that would be the – the one primary difference is that there's no involvement or no code that's being delivered by PeopleSoft that is used. It is all our own code now.[605]

Katherine Walker Williams also testified that:

> Generally what we do is we have some people that are business analysts that it is their responsibility to research tax updates and – and find out all the changes in the tax updates from tax localities. When they find those things, they would write up a business document to explain the change, and the development team would take that business document and develop the code off of the code itself in the clients [sic] – in the local environments.[606]

Oracle enjoys an advantage in any area of fixes and patches that requires special understanding of how the software operates. However, for the most part[607] Oracle's advantages are relatively minor in nature because many third-party support vendors offer similar levels of service and many ERP customers are able to self support.[608] I assume that the customers themselves have

602 "Customers regularly had employees, contractors, consulting firms help them implement, install, maintain and update their software. In order to do so, they [Oracle] had to grant those customers a customer connection ID if they had to do a download on them or update or fix. Standard business Oracle condoned and promoted all the time as part of the customer's license." Bob Geib deposition dated January 9, 2009, pages 230-231.

603 Shelley Nelson deposition dated April 18, 2008, page 280.

604 Shelley Nelson deposition dated October 30, 2007, pages 141-142.

605 John Baugh deposition dated February 6, 2008, pages 65-66.

606 Katherine Walker Williams deposition dated April 1, 2008, page 15.

607 Although I understand from the evidence that such instances are relatively rare, there may be bugs that require significant in-depth knowledge to fix. The existence of intractable bugs is also evidenced in the discovery documents. However, their relative rarity means Oracle's support advantages are limited. Jesper Anderson deposition dated June 10, 2009, pages 57-59.

608 Buffy Ransom deposition dated April 30, 2009, pages 118-119. Richard Cummins deposition dated April 21, 2009, pages 60-61.

access to the source code needed to create, test and install bug fixes and patches, as do the wide variety of third-party vendors that support Oracle products.[609] Therefore, TomorrowNow would not need a license to access Oracle's source code, provided it operated within the boundaries of the customer's Oracle license.[610]

8.9.2. Alternatives to Copies of Customer Environments

Remote access appears to be an alternative to keeping copies of environments on TomorrowNow's systems for some, if not all, of the activities that TomorrowNow performed, and I understand that TomorrowNow supported some customers remotely.[611] In fact, most of the J.D.Edwards customers were remote,[612] "nearly all of the [PeopleSoft] financial customers were remote,"[613] and "Some [PeopleSoft] HR customers were remote."[614] The main advantages to TomorrowNow having the License are cost-savings and speed (mainly for time to access remotely) the Delta would provide. The existence of numerous third party vendors as alternatives to TomorrowNow indicates a low royalty for the Subject IP.

Maintenance of Oracle's customer environments on TomorrowNow computers would cause upward pressure on the Reasonable Royalty.

8.9.3. Alternatives to Cross-Use of Customer Environments

An alternative to cross-use of customer environments is to develop fixes for each client individually. The existence of numerous third party vendors as alternatives to TomorrowNow's use of the Subject IP puts downward pressure on the Reasonable Royalty.

8.9.4. Alternatives to Using Downloaded Material for Multiple Customers

I understand that Plaintiffs allege that it was inappropriate for TomorrowNow to use one customer's downloaded materials to support another customer.[615] I also understand that Oracle contends that it was inappropriate for TomorrowNow to have downloaded the Subject IP to its computers. An alternative to any downloads at TomorrowNow would have been for TomorrowNow to assist the customers to download the Subject IP and retain it at *their* premises. On the other hand, Oracle would not wish to allow storage of downloaded materials on TomorrowNow computers. On balance, therefore, storage of downloads on TomorrowNow computer creates upward pressure on the Reasonable Royalty

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609 Mark Kreutz deposition dated October 30, 2007, pages 143-144. Larry Ellison deposition dated May 5, 2009, page 20.

610 Richard Allison deposition dated November 11, 2009, page 67.

611 John Zepecki deposition dated September 9, 2008, pages 220-221. "A. Consulting providers would often access customer systems. Q. Remotely? A. Yes. Remotely."

612 Shelley Nelson deposition dated April 18, 2008, page 487.

613 George Lester deposition dated April 23, 2009, page 63.

614 George Lester deposition dated April 23, 2009, page 63. Mark White stated that TomorrowNow had some concern as to whether it would be possible to transition hosted PeopleSoft payroll customers to a remote environment. Mark White deposition dated March 5, 2009, pages 278-279.

615 Complaint, page 56. Based on Mr. Gray's analysis, many of TomorrowNow's customer downloads were stored in individual customer folders.

8.9.5. Alternatives to TomorrowNow

The fact that systems integrators, other consulting firms, and other third-party support vendors provide support to Oracle licensees is evidence of the availability of other methods of providing support.

When SAP closed down TomorrowNow, the terminated customers were able to find alternative ways of supporting their systems without going back to Oracle. My analysis shows that on July 21, 2008 TomorrowNow had 228 contracted customers – 3 Baan, 112 J.D.Edwards, 101 PeopleSoft and 12 Siebel. Of the 228 customers, 117 made their choice of support vendor known and of those only 5% chose Oracle as their support provider.

The existence of alternative methods affects the outcome of the Negotiation because both parties at the table would have known how to achieve the same ends (or almost the same ends) without a license. For this purpose, I accept that the support provided by the alternate means was different to some degree from the TomorrowNow support, but that does not mean they are not indicative of alternate means of providing support to an Oracle customer.

The affected customers overwhelmingly chose not to accept Oracle's support when forced to choose upon TomorrowNow ceasing operations. The ability of numerous third-party vendors to provide support for Oracle's software customers suggests a vibrant third party market exists and that Oracle's customers had choices for their support. For example, Oracle stated that it never had a license with any of its Partners to provide support, yet Oracle Partners have provided support in competition with TomorrowNow and Oracle.[616]

The existence of multiple third party support vendors and the existence of multiple methods of providing support for Oracle customers, put downward pressure on the Reasonable Royalty.

8.9.6. Self-Support

Numerous customers went to self-support, which is a direct indication that customers could access the source code they needed to support their operations. For example, 7% of TomorrowNow customers went "Unsupported" after the TomorrowNow Wind-Down in October 2008.[617]

Oracle's At-Risk Report indicates that Oracle lost customers to self-support. For example, [redacted] went to self-support and Oracle notes state that [redacted]

It appears that Oracle considered in-house support a threat to its support business around the time of the Negotiation. A document dated March 23, 2005 titled "Support Services Strategy Prepaid

616 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2009, page 12.
617 "TomorrowNow Operations Wind Down: Final Report" TN-OR03523871-924, at -903.
618 [redacted]

Support Program, Retention of World and Third-Party Market Customers" shows that Oracle budgeted to lose $2 million (of $9.4 million in expected cancellations) to "Maint. In House."[619]

The existence of numerous alternatives to TomorrowNow's use of the Subject IP puts downward pressure on the Reasonable Royalty.

8.9.7. Third-Party Support Market

The third-party support industry began receiving growing press coverage and attention from industry research firms beginning in 2004.[620] One early report stated: "Rising support costs and customer apprehension related to Oracle's acquisition of PeopleSoft has spurred interest in using third parties for applications maintenance in lieu of vendor support. Several service providers have materialized in this space, offering the prospect of lower support costs and personalized service."[621]

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

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619 "Oracle Support Services Strategy Prepaid Support Program, Retention of World and Third Party Market Customers." Business Overview March 23, 2005, version 2 ORCL00478378-383, at -381. Note that an additional $1.5 million was expected to cancel due to "Cannot Afford Support" and $0.6 million due to "Retired Releases." It is unclear whether these customer categories could have also pursued a self-support option.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.9.8. Third-Party Support Vendors

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

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

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

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

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

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

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

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

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

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

drew up a comparison sheet with both TomorrowNow's and Klee Associates' support attributes against Oracle support before selecting a support vendor in early 2005.[637] Yet another customer, the Texas Association of School Boards, sought quotes from two different companies for J.D.Edwards software support. Internal feedback from the quotes stated, "…both are at or about 50% of Oracle's cost and include high level of support and includes [sic] 1099 updates... They both represent very large companies and the references had high appreciation for their level of support."[638] Other evidence from customers corroborates that they generally appear to be aware of various third-party vendors and typically compared and contrasted different competitive offerings before choosing a vendor.[639]

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

8.9.8.1 Versytec

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

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

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

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

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

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

> The company that lays claim to first identifying the market opportunity for third-party maintenance, and moving to embrace it, was Versytec, which first publicized its support offering in June 2004. Versytec had the market all to itself until PeopleSoft relented to Oracle's hostile bid and agreed to be acquired for $10.3 billion in December [2004].
>
> 'Because of the Oracle situation, a lot of people have been trying to jump into the business,' says Steve Striebel, who cofounded the Nashua, New Hampshire, company with his brother, Al, and Ed Hassman, a former J.D.Edwards developer, after scoping out the third-party maintenance market and deciding to focus on J.D.Edwards over Oracle's ERP system. 'We've been in operation for 18 months. It takes a lot of initial groundwork before you're ready to deliver on annual maintenance contracts,' Streibel says. 'We actually staffed a support center [in Denver, run by Hassman]. We didn't just hire one ex J.D.Edwards executive, then use contractors or use affiliations [to do the work]. We have expertise in-house to handle all of World.'
>
> 'Versytec currently has 30 active customers using its support service, Striebel says, the vast majority of which are World customers, although there are some in coexistence [with OneWorld]. Versytec's focus is on providing customer support and maintenance, and the company does not offer generalized consulting services or help with migrations, Striebel says.'[641]

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

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

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

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

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

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

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

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

Versytec had been on Oracle's radar as a competitive threat as early as November 2004.[647] A December 2004 Oracle document stated that "TomorrowNow and Versytec are two [third-party vendors] who are being extremely aggressive in marketing their services as an alternative to the service [customers] can receive from Oracle."[648]

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

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

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

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

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

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

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

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

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

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

customers to Versytec, including Exide Technologies,[654] Oasis Corporation, Regal Ware Inc., Eriez Magnetics, Riverside Paper Corporation, Laticrete International[655], Kappler Inc.,[656] Clearon Holdings,[657] International Filing Company,[658] Stanley Electric Company,[659] and RC Cement.[660]

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

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

8.9.8.2 Conexus Partners

Conexus Partners was founded in 2004[667] by two former J.D.Edwards executives. "In late January [2005], Conexus Partners announced its 'safe harbor' offering to users of various releases of World, EnterpriseOne, and those who use both in coexistence mode." In 2005, "[t]he company [had] 12 employees and several customers, and an arrangement with CH2MHILL [sic] Microsource, a very large IT services organization in Denver, to use its facilities and IT infrastructure." It was reported that Conexus Partners had a "…J.D.Edwards pedigree unmatched by other third-party providers."[668]

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

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

business/relationship interface"; "Quick response times"; "Critical bug fixes"; "Software updates"; "W2/1099 tax and country specific regulatory changes"; and integration services. The firm claims it has pricing options that offer savings of over 50 percent.[669] The company also provides "modernization" and "migration" services"[670] and a full range of IT managed services such as "application hosting, network management, remote management/monitoring, utility computing, Help Desk, VOIP, and Disaster Recovery Services."[671] Conexus has an alliance with Microsoft for customers' future modernization and migration considerations. However, Conexus claims to be vendor-agnostic and will assist customers' migration efforts to the vendor of their choice.[672]

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

Following TomorrowNow's announced business shut down, Gartner Research had identified Conexus Partners as a possible replacement vendor as of July 2008.[676]

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

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669 "What Will Happen with Oracle? The Future Remains Uncertain." <http://www.conexuspartners.com/library/ConexusFAQSheet.pdf>. See also, ConexusPartners.com. "Enterprise Resource Planning Services." January 18, 2008. <http://www.conexuspartners.com/page.asp?pageid=0|5|6&id=0|enterprise_resource_planning_services>.

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

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

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

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

674 "Juergen Talking Points." ORCL00183918-919, at -919.

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

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

8.9.8.3 Rimini Street

Rimini Street was founded in September 2005 by Seth Ravin, one of the co-founding partners of TomorrowNow.[678] Rimini Street initially provided support for Siebel's CRM software[679] and has since expanded its services to PeopleSoft, J.D.Edwards, and SAP products.[680] Rimini Street began offering PeopleSoft support in mid 2006.[681] In September 2006, the firm announced that by the end of the year it would offer support on J.D.Edwards World and EnterpriseOne ERP suites.[682] In May 2008, Rimini expanded its support offering to include SAP products.[683]

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

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

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

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

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

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

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

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

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

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

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

Support," and "Interoperability support". In addition, the firm offers flexible coverage periods and payment terms.[686]

According to industry press reports, Rimini Street was widely-recognized as a competitive alternative in the third-party support market for Siebel, PeopleSoft, and J.D.Edwards software.[687] Oracle documents show that it viewed Rimini Street as an alternative support provider[688] and Oracle lost customers directly to Rimini Street, including Hastings Entertainment Incorporated[689] and City of Des Moines.[690]

Similarly, TomorrowNow considered Rimini Street a serious competitive threat[691] and bid against it on numerous occasions.[692]

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

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

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

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

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

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

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

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

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

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

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

696 TomorrowNow email to John Baugh. August 28, 2008. Re: Customer Project Tasks; TN-OR06428125-155, at -131.

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

Following TomorrowNow's announced business shut down, Gartner Research identified Rimini Street as a possible replacement vendor as of July 2008.[702]

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

8.9.8.4 Citagus

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

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

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

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

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

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

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

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

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

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

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

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

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

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

globally and customers are recognizing our niche expertise in implementing PeopleSoft solutions."[709]

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

Following TomorrowNow's announced business shut down, Gartner Research had identified Citagus as a possible replacement vendor as of July 2008.[711] Citagus continues to provide support for PeopleSoft software as of the date of this report.[712]

8.9.8.5 Klee Associates

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

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

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

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

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

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

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

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

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

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

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

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

As of the date of this report, Klee Associates was still in operation and listed on the Oracle Partner Network as a publisher of the JDEtips and ORAtips Journals both of which Oracle states, "are widely accepted in the user community as excellent sources of information on Oracle and J.D.Edwards applications and technologies."[718] Klee Associates also publishes SAPtips; provides consulting and training services[719]; and operated a help desk for end user support.[720]

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

In addition, TomorrowNow had identified Klee as a direct competitor[724] and the two have competed for support services for the same clients.[725] For example, TomorrowNow and Klee bid

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

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

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

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

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

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

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

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

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

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

head-to-head for a support contract with Carlisle Companies and Klee won the business.[726] There is evidence that Oracle lost support customers to Klee, including Burly Corp.,[727] Perry Judds Holdings,[728] Lincoln Property Services, Inc.,[729] Captain D's, and Decorative Concepts[730][731]

Around mid-2006, Klee Associates began phasing out of J.D.Edwards third-party support and turned over its remaining clientele to TomorrowNow.[732] I understand that VSM Group,[733] Decorative Concepts,[734] and Eriez Manufacturing[735] were some of the former Oracle customers that TomorrowNow obtained from Klee Associates. It is my understanding that Klee Associates, therefore, is no longer a third-party support vendor.

8.9.8.6 netCustomer

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

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

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

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

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

728 "Projected Third Party Risk." ORCL00189765-768, at -768.

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

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

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

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

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

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

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

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

PeopleSoft and J.D.Edwards customers[737]. The PeopleSoft relationship ended, however, shortly after the firm was acquired by Oracle.[738] netCustomer began independently offering support for Siebel products in August 2005[739] and PeopleSoft Enterprise and J.D.Edwards EnterpriseOne support service were added in March 2006.[740]

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

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

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

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

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

739 Cowley, Stacy. "App Support Upstarts Promise Lower Costs." Computerworld.com. February 13. 2006. <http://www.computerworld.com/softwaretopics/software/story/0,10801,108567,00.html>. See also, "netcustomer Launches Third Party Support." Business Wire. August 10, 2005. <http://findarticles.com/p/articles/mi_m0EIN/is_2005_August_ 10/ai_ n14876258/print?tag=artBody;col1>.

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

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

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

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

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

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

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

TomorrowNow and others.[747] Following TomorrowNow's announced shut down, Gartner Research had identified netCustomer as a possible replacement vendor as of July 2008.[748]

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

8.9.8.7 LegacyMode

LegacyMode, based in Laguna Beach, California, is a third-party vendor focused on offering "complete legacy support for PeopleSoft."[750] According to ITJungle.com, LegacyMode was one of the early innovators in the third-party PeopleSoft support space, offering support as early as 2003.[751] LegacyMode support services include "…an initial on-site assessment, statement of work (SOW) designed to meet the client's specific needs…24 x 7 support and agree to respond to critical issues within thirty (30) minutes or less… [and] a senior technical/functional consultant is assigned to each client…"[752] The firm also provides tax and regulatory updates.[753] LegacyMode claims to save customers 50 percent or more over their current software support costs with support offerings starting at $50,000.[754]

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

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

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

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

750 "Complete Legacy Support for PeopleSoft." LegacyMode.com. <http://www.legacymode.com/docs/CompleteLegacyServices datasheetLMv22.pdf>.

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

752 "Complete Legacy Support for PeopleSoft." LegacyMode.com. <http://www.legacymode.com/docs/CompleteLegacyServices datasheetLMv22.pdf>.

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

754 "Complete Legacy Support for PeopleSoft." <http://www.legacymode.com/docs/Complete LegacyServicesdatasheetLMv22.pdf>. See also, Woodie, Alex. "J.D.Edwards Shops Get New Maintenance Options." *ITJungle.* October 31, 2006. <http://www.itjungle.com/fhs/fhs103106-story03.html>.

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

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

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

8.9.8.8 Reliasys

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

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

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

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

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

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

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

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

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

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

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

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

8.9.8.9 CedarCrestone

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CedarCrestone won deals against TomorrowNow[773] and, after TomorrowNow wound down its operations, numerous companies went to CedarCrestone, including Baker Botts, BASF, Borders Group, Circuit City, George Weston Bakeries, Interpublic Group, Longaberger, Markel, National Surgical Hospitals, Parkview Health, Standard Register, Syngenta, Telapex, University of Massachusetts, and University of New Orleans.[774]

Oracle also lost support business directly to CedarCrestone. Oracle lost $121,794 in revenue from the [redacted], a PeopleSoft Enterprise customer, to CedarCrestone in approximately June 2006. [redacted]

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

769 "CedarCrestone Managed Services." CedarCrestone.com.
770 "PeopleSoft Application Maintenance Services." AOSMITH000491-511, at -494.
771 "PeopleSoft Application Maintenance Services." AOSMITH000491-511, at -496-497.
772 Industry research reports suggest that tax and regulatory updates can legitimately be provided by third-party firms. See for example, Sweeney, Judy and Marc-A. Meunier. "PeopleSoft HR- What Now?" AMR Research. March 2005.
773 Andrew Nelson deposition, April 29, 2009, page 290-291.
774 Statement of Rick Riordan, Executive Vice-President-Shared Services of CedarCrestone. October 30, 2009.
775 [redacted]

generally offer installation and upgrade support, operational support, configuration support, application fixes, customization fixes, performance support and interoperability support."[776] A.O. Smith's analysis specifically concluded that CedarCrestone's offering provided the majority of the services listed[777] despite Oracle's claims that CedarCrestone is not licensed to provide support.[778]

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

CedarCrestone was well-known as a third-party support vendor and was listed alongside netCustomer as an alternative to TomorrowNow by Gartner Research."[781] CedarCrestone continues to offer PeopleSoft maintenance services today.[782] However, the company may have discontinued its J.D.Edwards services by 2010.[783]

8.9.8.10 ContinuServe

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

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

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776 "PeopleSoft Support Alternatives." AOSMITH001224-1226.

777 "PeopleSoft Support Alternatives." AOSMITH001224-1226.

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

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

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

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

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

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

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

785 "ContinuServe Corporate Overview," AOSMITH001008-009, at -008.

786 "ContinuServe Corporate Overview," AOSMITH001008-009, at -008.

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

TomorrowNow recognized ContinuServe as a direct competitor[788] and some TomorrowNow customers (e.g., A.O. Smith, Pepsi Americas), also may have evaluated ContinuServe's product offering before choosing TomorrowNow's support services.[789] The company was still in business and offering PeopleSoft support services as of the date of this report.[790]

8.9.8.11 Beoley Mill Software Ltd. (BMS)

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

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

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

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

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

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

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

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

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

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

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

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

8.9.8.12 CIBER

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

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

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

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

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

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

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

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

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

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

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

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

TomorrowNow documents indicate that it recognized CIBER as a direct competitor for third-party support.[802] CIBER was also listed on Gartner's 2006 partial list of secondary maintenance vendors for PeopleSoft, J.D.Edwards and Siebel software[803] and was noted in the industry trade press as a third-party alternative.[804]

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

8.9.8.13 CH2M HILL

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

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

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

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

802 "Internal Talking Points." Loomis Group. January 30, 2007; TN-OR03765355-358, at -356. See also, TomorrowNow email from Lon Fiala to Stephan Rossius. February 2, 2005. TN-OR08329116-119, at -118.

803 Disbrow, Jane B. and Alexa Bona. "Reduce IT Spending on Software Maintenance and Support." Gartner Research. May 19, 2006; SAP-OR00825770-776, at -775.

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

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

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

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

808 "CH2M HILL Acquires MicroSource." *Business Wire*. November 18, 2004. <http://findarticles.com/p/articles/mi_m0EIN/is_2004_Nov_18/ai_n6365486/print?tag=artBody;col1>.

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

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

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

- Annual maintenance and support, which is managed by a team of former J.D.Edwards managers and includes "1099/W-2 tax and regulatory updates, bug fixes, customer-elected priority management, online trouble ticketing and progress monitoring at significant savings versus renewing a maintenance contract with Oracle."

- Fully managed ERP hosting, in which "CH2M HILL can operate and manage [a customer's] J.D.Edwards ERP software hosted in one of [CH2M HILL's] global data centers";

- Co-location, in which "[c]ustomers operate and manage their application as it resides in one of CH2M HILL's global data centers";

- "Remote ERP management";

- Implementation, configuration, upgrade, development, and customization services; and

- "24x7x365 Help Desk."

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

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

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

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

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

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

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

TomorrowNow viewed CH2M HILL as a direct competitor[819] and competed with CH2M HILL for third-party support customers on many occasions.[820] For example, one TomorrowNow representative stated: "Pretty Products, Inc. was the first customer I spoke to as a TomorrowNow AE. Although they liked what they heard from TomorrowNow, they signed a maintenance contract with CH2M HILL because they felt the services were equivalent and CH2M HILL was half our price."[821]

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

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

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

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

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

817 "Projected Third Party Risk." ORCL00189765-768, at -768.

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

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

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

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

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

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

8.9.8.14 Spinnaker

Spinnaker was founded in 2002, primarily as a supply chain consulting firm.[824] Spinnaker hired the TomorrowNow resources specializing in J.D.Edwards application support at the time TomorrowNow ceased operations in September 2008.[825] According to Spinnaker, approximately 70 companies chose to follow the support team to Spinnaker. Spinnaker claims to have over 85 clients worldwide[826] and offers support services on J.D.Edwards World, One World, and Enterprise One applications, including access to "dedicated support team," tax and regulatory updates, "24 x 7 x 365, global support with…guaranteed 30 minute response time," at a 50 percent savings from vendor support charges.[827]

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

8.9.8.15 Other Third-Party Participants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Forrester Research reported that in some cases:

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

Another Forrester report asserted that:

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

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

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

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

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

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

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

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

Oracle and SAP are responding to SaaS with new SaaS offerings, and a willingness to fight for the business of customers that may be drawn to on-demand applications offered in the market.[845] Prior to embracing the hosting model, Oracle business documents clearly hinted that the hosted application model[846] was becoming a serious threat to Oracle's revenue stream during strategic discussions involving the creation of its own application management offering. In discussions with Forrester Research analyst, Erin Kinikin, Oracle reported:

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

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

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

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

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

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

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

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

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

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

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

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

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

849 Siebel was acquired by Oracle in September 2006.

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

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

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

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

To the extent the outsourcer's services fully replace the need for an ERP solution (and the commensurate support), these offerings represent competitive substitutes for Oracle support. In the case of Oracle client, [redacted]

Oracle also lost at least three identified customers to ADP, another HR outsourcing firm. In 2006, Oracle lost the support contract for its customer, [redacted] Two other customers, La Quinta and CSK Auto Inc., also dropped Oracle support and moved to ADP for their HR solutions.[857]

In addition, Oracle lost a large support contract with the [redacted] to Hewitt Associates, another firm that provides human resources consulting, outsourcing, and integrated solutions. According to Oracle, [redacted]

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

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

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

855 [redacted]

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

Yet another significant Oracle customer, Finally, Oracle customer, Fairchild Semiconductor moved its customer relationship management solution to Remedy and Salesforce.com, two other SaaS outsourcing vendors.[860]

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

8.9.8.17 Other

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

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

8.9.8.18 Summary of Available Alternatives

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

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

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

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

8.9.9. Demand for Third-Party Support

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

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

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

8.9.10. Third-Party Support Viability

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

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

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

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

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

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

> Does cheaper mean better? Although third-party providers cannot offer enhancements, they can offer technical support, troubleshooting, fixes and compliance updates and increasingly are extending the service to cater to user customizations. Their programs also promise to eliminate forced upgrades, deliver services not available with standard vendor support, and guarantee a better service-level commitment. Another advantage is flexibility, taking only the fix a customer needs, for example, rather than the complete fix bundle, which could itself depend on the installation of a previous update.
>
> As a customer, one of the key questions is whether you can afford to go without enhancements and upgrades. If you are thinking of sunsetting an application, or fear being railroaded into an upgrade then third-party support could be a good option. It may also be valuable as an interim solution or during a time of application transition.[865]

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

> Are not interested in product enhancements. Lower maintenance costs can be a reasonable tradeoff against functional upgrades for mature applications like accounting and human resources, especially where the company itself is mature and stable.
>
> Have limited geographic coverage needs. While SAP has promised to make its worldwide support facilities available to TomorrowNow if market demand warrants, most third-party maintenance companies focus on the US market. Currently, options for global and non-US customers are very limited, but this market may materialize as a business opportunity for providers with offshore resources.
>
> Want personalized service – for a limited product set. Smaller providers are able to assign dedicated resources to each customer for case continuity and personalized service, but this model has scalability limitations. Customers on older releases such as PeopleSoft World and PeopleSoft Enterprise 7.5x may find this model attractive when vendor support is no longer available or customization makes upgrades impractical.[866]

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

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

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

8.9.11. Third-Party Support Rationale

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oracle has, in fact, lost customers (such as [redacted] that continued to need tax and regulatory updates which Oracle apparently no longer provided on certain releases, despite its [redacted] program.[880] [redacted] was initially informed by an Oracle representative that its release would no longer be supported by Oracle. Oracle's sales notes stated, [redacted] Ultimately, it appears this customer decided to drop Oracle support. Regarding Oracle customer [redacted] an internal Oracle email confirmed that in [redacted]

Oracle notes regarding yet another customer that took up third-party support, the [redacted] stated, [redacted]

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

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

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

880 [redacted]

881 [redacted]

882 [redacted]

883 [redacted]

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

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

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

Over time, Oracle implemented increases to their already high support fees. For example, J.D.Edwards reported in its SEC filings that it increased support fees in each of the three fiscal years before it was acquired by PeopleSoft in July 2003.[887] PeopleSoft also increased its support fees before it was acquired by Oracle in January 2005.[888] Forrester Research reported in 2005 that, "[a]s PeopleSoft shifted its revenue mix toward maintenance through price escalations, customers became irate. Oracle's efforts to preserve this valuable maintenance base, however, focus on enhancements and do little to address the cost issue."[889] In addition, according to Paul Hamerman of Forrester Research, "In consideration of ongoing industry consolidation, acquisition-oriented vendors such as Oracle are taking advantage of the opportunity to raise maintenance prices in order to standardize pricing across the various product lines…The value of the maintenance services, however, varies by customer, depending on the customer's needs and use of the services."[890]

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

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

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

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

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

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

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

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

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

> …paying for bug fixes smacks of 'double jeopardy.' The software industry delivers shoddy code and charges a license fee for it (with minimal warranty), then expects buyers to pay maintenance to get bug fixes…
>
> Many periodic enhancements, especially in core ERP modules, are driven by statutory changes. The algorithms are publicly available, not proprietary IP of any software vendor.
>
> …after year 5, the support demands of most customers drop off as they stabilize their production environment. Fair maintenance pricing would be in a bell curve - gradually ramp up years 1 and 2, gradually ramp down starting in year 5. But today the software industry expects full rates from day one through termination.

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

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

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

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

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

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

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

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

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

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

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

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

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

Oracle's sales database shows some customers experiencing substantial rate increases with no apparent increase in service value and deciding to leave Oracle support. For example, in 2005, [redacted] Another customer, [redacted] a J.D.Edwards World customer, similarly voiced dissatisfaction with Oracle price hikes. In 2006, Oracle sales staff recorded that [redacted] Another at-risk customer, [redacted] experienced a [redacted] Not surprisingly, [redacted] was unhappy and began investigating third-party support options available, including TomorrowNow, Klee Associates, and C2HM HILL.[902]

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

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

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

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

900 [redacted]

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

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

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

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

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

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

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

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

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

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

> "The proportion of users unhappy with Oracle's account teams rose 4% from 10% in 2006 to 14% in 2007."
>
> "IT managers also saw room for improvement in Oracle's licensing policy. Just 15% of respondents said they were happy or very happy with Oracle licensing, a 5% decrease since 2006. The proportion of user groups saying they were unhappy or very unhappy increased to 32%."
>
> "Dissatisfaction with Oracle's global support desks increased from 7% to 17%."[907]

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

Oracle's own documents cite customer complaints and reports of poor customer service as well as other negative experiences, ultimately leading to the client's departure. For example, Oracle sales staff reported that its customer, [redacted] Another customer, [redacted]

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

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

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

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

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

911 [redacted]

912 [redacted]

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

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

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

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

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

[redacted]

A PeopleSoft customer, [redacted] was experiencing similar financial hardship. According to Oracle support sales staff notes:

[redacted]

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

914 [redacted]

[redacted]

Another customer, [redacted]" according to Oracle records.[916]

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

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

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

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

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

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915 [redacted]

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

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

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

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

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

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

A presentation that appears to be produced by Oracle as part of the DOJ investigation describes "PeopleSoft8 Internet Architecture:"[923]

> 100% Pure Internet is a Lie
>
> Poor Architecture and Interface Forces Customers into Customization Hell.

Oracle provided notes that accompany the slide:

> With Release 8 of PeopleSoft, first introduced mid 2000, Peoplesoft [sic] started claiming that they were now **'100% Pure Internet'** and there is **'no code on the client'**.
>
> **This is simply NOT TRUE!**
>
> I will explain how PeopleSoft's claim is a total lie. We will talk about how their internet architecture is lacking in functionality and is forcing customers into **Customization Hell**. Their architecture has no flexibility at both the user and enterprise level.
>
> Oracle provides risk functionality for end users of all types and complete flexibility allowing our customers to implement with no customizations – the holy grail of software. [emphasis in original document]

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

> PeopleSoft offers no Flexibility [sic] for end users in their applications. Every change, no matter how small is a customization, these customizations are not migrated during patching or upgrades. I cannot emphasize this enough. Any rational customer when faced with
>
> a] configuration utopia with zero customizations or
>
> b] customization hell should go to Oracle, the clear choice.
>
> The increased cost and complexity of a PeopleSoft solution vs. an Oracle solution is unbelievable, see the Vision website for analyst reports to support the high cost of customizing erp applications.
>
> PeopleSoft's user interface is weak (and their screens are ugly).

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

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

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

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

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

> When the Farm Bureau got support directly from PeopleSoft, it was sometimes provided as a service bundle that required installation of previous bundles, which Spears says was time-consuming and annoying because the group just wanted a single fix for whatever problem it was experiencing. 'When you actually need a fix, (Rimini) supplies you with a fix. They don't supply you with a bundle that requires you to have prerequisites installed.'
>
> Another advantage is that Rimini supports customizations, changes the Farm Bureau made on its own to the PeopleSoft application. 'I would recommend (third-party maintenance and support) to anyone that's on a legacy version, if you will, who may not actually plan on upgrading and tends to use the applications they have for a while,' Spears says. 'I don't know if I would recommend it to someone who's actually looking to do an upgrade.'
>
> The Virginia Farm Bureau has been using Version 8.0 for several years and has no plans to upgrade, which made using a third-party a good option, he says.

Farm Bureau switched to Rimini Street in late 2006.

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

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

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

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

Many Oracle clients have dropped Oracle support for similar reasons as indicated by Oracle Support Sales notes. For example, Oracle customer [redacted] Another customer, [redacted] Yet another customer, [redacted] These firms are examples where multiple factors played a role in their decision to drop Oracle support.

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

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

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

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

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

928 [redacted]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oracle first announced plans for its next generation Fusion applications - Oracle's project to blend the best of its various product lines into a new set of applications - in early 2005, soon after the company acquired rival software maker PeopleSoft and its line of business applications.[943] In January 2005, Gartner reported, "Oracle stated that Fusion would result in a 'new application' product that would be based on a 'new architecture' delivered by 2008. The market perception of this statement was that Oracle was creating a product that would have a clean sheet design, but with all the goodness of the acquired and established product lines. Most of the market was skeptical about Oracle's proclamation that it would build a new application set on a new architecture in the aggressive time frame given (by 2008)."[944] Clearly this market skepticism was not unfounded as Oracle's timeline for Fusion availability slipped, and it is still not clear when the full set of Fusion products will be released. In 2006, Gartner reported that "Oracle has yet to define and release the specifics of Fusion functionality and processes, and until that time, it is not possible for users to accurately quantify the benefits vs. costs of a move to Fusion."[945] In the fall of 2009, Oracle began rolling out its Fusion Applications to small number of customers for hands-on testing with plans on general availability to customers in 2010.[946]

In 2007, Business Week reported:

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

943 "Defusing Oracle's Fusion?" Workforce.com. October 2008. <http://www.workforce.com/section/10/feature/25/90/34/index.html>.

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

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

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

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

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

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

As an example, sales support notes indicate that Oracle customer, [redacted] Nevertheless, it has [redacted] Another client, [redacted] which appears to have contributed to its departure from Oracle support.[951]

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

8.9.11.1 Conclusion

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

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

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

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

950 [redacted]

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

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

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

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

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

8.10. Georgia-Pacific Factor No. 10: Benefits to Users

"The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention."

As previously discussed, the Georgia-Pacific case is a patent case. In a sense, therefore, Factor 10 needs to be re-worked in the context of this case. I am going to re-write Factor 10 and combine it with Factor 11 as follows:

The actual use made of the Subject IP to support TomorrowNow customers, including the benefits TomorrowNow accrued because it had access to the Subject IP.

8.10.1. Benefits of the Use of the Subject IP

Oracle alleges (and I assume) that the Subject IP licensed by certain customers was used by TomorrowNow for the benefit of other customers. I cannot quantify the extent to which the process of using one customer's environment or download library on behalf of other customers provided a benefit to those customers. However, as I have described earlier in this report, there are many ways an Oracle customer could be supported. Therefore, from the *customer's point of*

view, on balance,[952] there was little difference between the service they received from TomorrowNow and the service they could have received from another vendor.

However, TomorrowNow may have been able to troubleshoot customer issues in a more convenient way on their own machines while disconnected from the customer's environment.[953] TomorrowNow, therefore, may have benefitted by having more convenient access to the customers' environments, which may have affected their ability to provide the service in a financially viable manner.

Although TomorrowNow realized some benefits of having access to the Subject IP, TomorrowNow also provided its customers with additional benefits for which a royalty would not be required, as I discuss in the following sections.

8.10.2. Elements of TomorrowNow's Support Unrelated to Subject IP

The Subject IP was only a portion of the overall support product TomorrowNow offered its customers. I accept that the Subject IP was an important piece of the overall framework that allowed TomorrowNow to operate as it did but it was something less than the whole. For example, TomorrowNow offered cost savings,[954] an experienced primary support engineer, 30-minute response time 24x7x365, longer support periods,[955] assistance with customized code,[956] and alliances with IBM and Microsoft.

I discuss these attributes in turn.

8.10.2.1 Primary Support Engineer

TomorrowNow's service was provided with the help of skilled engineers (most, if not all, former PeopleSoft, J.D.Edwards or Siebel employees) who were assigned to specific customers.[957] The engineers knew the customer, their systems, including hardware platforms, the employees and their history.[958] Mr. Andrew Nelson explained that a component of TomorrowNow's support model included:

> …a named support engineer for a client account, as opposed to giving them, you know, an annual service that did not include a named engineer, so that we could develop a sort of a support relationship with the customer, again being more personalized, so that they would call someone who more often

952 There were pluses and minuses to the support provided by Oracle and TomorrowNow.

953 Mark Kreutz deposition dated October 29, 2007, pages 83-84.

954 I recognize that a significant claim made by Oracle is that TomorrowNow could only provide its service at 50% savings as a result of the Alleged Actions. However, my analysis of the third-party support market shows this claim is unfounded to some degree.

955 "Cutting Costs and Improving Service for Enterprise Applications," Strategies for Success. February 13, 2007; TN-OR00004279-306, at -303.

956 TomorrowNow "Frequently Asked Questions About TomorrowNow Support Services;" TN-OR00004408-410, at -410.

957 Mark Kreutz deposition dated October 30, 2007, pages 132-133.

958 "Take Control: Choose TomorrowNow;" TN-OR00004896-897. "TomorrowNow Support Services Escalation Policy;" TN-OR00004406-407.

> than not would be their direct contact for resolving the issue, instead of just calling a generic 1-800 number.[959]

TomorrowNow indicated that they provided the customer with a primary support engineer who had an average of 9 years experience.[960] TomorrowNow advertised that "Each TomorrowNow client is assigned a named Primary Support Engineer who understands their unique operational matters, risks, and needs, and works as a virtual member of their system support team. The Primary Support Engineer has full responsibility for rapidly diagnosing and resolving serious issues reported by a client."[961] TomorrowNow's "Primary Support Engineer is backed by a team of senior-level support engineers and developers who don't stop working on an a [sic] case until it's resolved."[962]

If the primary support engineer required assistance, the technical support team would get involved. Mr. Baugh described the support process:

> Our clients would submit a case. That case would go to their primary support engineer, and if the primary support engineer felt the case was more technical than they could effectively handle, then they would pass it to our group. It would go to my manager, and then he would allocate the cases to the technical support team.[963]

TomorrowNow's experienced, personalized support appears to have been highly regarded by clients. Steven Lloyd, Senior Director at Intraware, stated, "…you guys provide great service, nothing you tell me about your telephony [sic] solution is going to change my opinion on that. You could have tin cans and string, but at least we always end up with a really smart person picking up the can!"

8.10.2.2 30 Minute Response Time

As previously noted, TomorrowNow offered 30 minute response time[964] as opposed to PeopleSoft's 24-hour response time. Mr. Andrew Nelson stated that "we wanted to be a lot more responsive, really drive service excellence, and that [30-minute response time] was a component of it."[965] A March 7, 2006 press release states:

> TomorrowNow Inc….today unveiled the newest version of its patent-pending TomorrowNow Support Technology™ that enables the company to deliver real-time, high-quality support response services globally. With its broad applicability, this technology can also be used by any service

959 Andrew Nelson deposition dated February 26, 2009, page 64.
960 "Cutting Costs and Improving Service for Enterprise Applications." Strategies for Success. February 13, 2007; TN-OR00004279-306, at -303.
961 "Take Control: Choose TomorrowNow;" TN-OR00004896-897.
962 "TomorrowNow Support Services Escalation Policy;" TN-OR00004406-407.
963 John Baugh deposition dated February 6, 2008, page 31.
964 "Cutting Costs and Improving Service for Enterprise Applications." Strategies for Success. February 13, 2007; TN-OR00004279-303, at 303.
965 Andrew Nelson deposition dated February 26, 2009, page 63.

> organization needing 'always-connected,' around the clock emergency support.
>
> TomorrowNow uses the company's proprietary technology not only to route and quickly solve problems with clients' mission-critical enterprise business applications, but also to monitor and track the routing and response system's health. The technology proactively monitors the availability of service engineers' handheld devices including pagers and mobile/smart phones such [sic] Blackberries to ensure that emergency response equipment is working and in continuous contact with TomorrowNow's support center…TomorrowNow's case response process has enabled the company to deliver an average of under 10-minute response, and contractually guarantee 30-minute standard response times as compared to existing vendor-supported maintenance programs, which typically offer standard response times of 24 hours or more.[966]

8.10.2.3 Longer Support Periods

A main component of TomorrowNow's support offering was providing longer support periods than the vendor. Mr. Andrew Nelson testified that when TomorrowNow initially launched its support offering:

> We wanted to fix issues on older releases. And at the time the software company -- from my discussions with Seth Ravin, a business plan had been presented to PeopleSoft detailing how this –the idea of doing this extended support, and they weren't interested in the business.
>
> And so when Seth came and presented it to me the idea was that there was still a business need, and that it would be valuable to customers who needed more time on their older releases.
>
> And so another big component of this was not just -- in the early days the big component was to extend the life of these old releases that were retired by the software vendor. So that was another big component of it.[967]

Later, in the wake of Oracle's hostile takeover of PeopleSoft, customers were anxious about the future product direction that Oracle would provide. TomorrowNow provided customers with up to a 10-year support period.[968] As previously described, PeopleSoft users were concerned about whether Oracle would continue to support them. TomorrowNow and other third-party support providers offered customers an alternative that allowed them to believe they could remain supported on their software for many years.

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966 "Support Services for PeopleSoft, JDEdwards, and Siebel Products." Press Release. March 7, 2006; TN-OR00004883-885.

967 Andrew Nelson deposition dated February 26, 2009, pages 63-34.

968 TomorrowNow Press Release: "TomorrowNow Assures PeopleSoft Licensees of Support into the Next Decade," December 13, 2004. TN-OR00004780-781.

8.10.2.4 Assistance with Customizations

TomorrowNow assisted with the customizations customers had made to their software. An entry from a TomorrowNow FAQ reads:[969]

> Q. How do TomorrowNow support services apply when the customer might have done some extra configuration (customization) work?
>
> A. Almost all of the larger PeopleSoft customers (as well as J.D.Edwards and Siebel) do significant customization and configuration of their systems. This is very common. If the customer is highly customized that is NO problem at all for TomorrowNow. Our general obligation to solve problems is similar to the SAP standard. In our agreement we have an obligation to fix issues with the standard product. We will accept any calls about serious issues that a client submits. We then help the customer diagnose the issue. In some cases the problem may turn out to be caused by a customization, and in that case we have already delivered significant value over Oracle because we have identified root cause of the problem. Technically, we don't have an official obligation to fix the customized code. However, on a practical basis, we've already helped the customer identify the problem, and can provide direction or advice on what's wrong with their customization. This is normally considered by our customers to be a higher level of service than is provided by Oracle because in their case they first make the customer prove the issues is not a customization. This is a subtle, but important distinction. If significant work needs to be done, and the customer can't fix the problem on its own with TomorrowNow's direction, TomorrowNow will offer to fix the customization problem if resources are available on a time and material based fee or refer the customer to a partner.

Frequently Asked Questions About TomorrowNow Support Services elaborate on TomorrowNow's stated response relating to support for customizations:[970]

> Q. Do you support customised [sic] code?
>
> A. Our support engineers are very experienced in providing support for standard applications, but we do not have specific knowledge of our clients' customizations [sic]. Therefore, we do not include support for these customizations [sic] in our standard support offering. However, we will always take your call and work with you to find the best solution for fixing any problems in customized code.

969 Lesley Loftus deposition dated June 13, 2008, page 123.

970 TomorrowNow "Frequently Asked Questions about TomorrowNow Support Services;" TN-OR00004408-410, at -410.

8.10.2.5 Support Quality

TomorrowNow and other third-party vendors gained customers because of problems with Oracle's customer support quality. For example, [redacted] cancelled Oracle support in FY08 to go to an "Unknown" third-party (not TomorrowNow) because:

[redacted]

[redacted] a TomorrowNow customer cancelled Oracle support in FY07 because:

[redacted]

An Oracle email documented "Challenges at JB Hunt":

> As we discussed on the phone, there are serious support issues at JB Hunt. Yes, they are threatening Tomorrow Now and want their annual support to drop by $200K however, the cores (sic) issues are more than price.
>
> 1. JB Hunt is very dissatisfied with eth (sic) level of service they have received over the past year and want us to prove that support is better. Mike Shanley is supposed to get the list of issues from the customer for us to dive into however we have yet to see this. On a conference call with the customer, they shared that they had the following support issues are (sic) were to provide more details.
>
> a) Express Deposit Response Time
>
> b) eDelivery Request
>
> c) Lost changes
>
> d) Production tax issue

971 [redacted]
972

> Many of these issues seem to center around DB2 and performance. Per Gina Moseley, GSC can do nothing more.[973]

These are only a few examples of dissatisfied Oracle customers. I discuss this issue in more detail in the Causation section of my report and corresponding appendices. Customers left Oracle due to dissatisfaction with the quality of service they were receiving. TomorrowNow claims to have provided high quality service that was beyond its use of the Subject IP.

8.10.2.6 Other Elements of TomorrowNow's Support Model

In addition, I understand that TomorrowNow claims to have attempted to ensure that customers did not receive any Oracle source code that any given customer had not paid Oracle for regardless of the source of that source code. For example, I understand that TomorrowNow's PeopleSoft team used source groups as part of their regulatory support.[974] And, I understand that TomorrowNow occasionally used metadata to ensure that the customer-required material was posted to the Oracle websites prior to the customer's maintenance end date with Oracle.[975]

8.11. Georgia-Pacific Factor No. 11: Extent of Infringer's Use

"The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use."

Oracle alleges that TomorrowNow accessed the Subject IP by downloading it from Oracle's CustomerConnection website, receiving code directly from customers, copying customer environments onto TomorrowNow's servers, and using information developed for one customer to support other customers with the same starting source. For purposes of this factor, I have assumed that these allegations are true.

8.12. Georgia-Pacific Factor No. 12: Customary Portion of Profit or Price

"The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous invention."

Oracle achieves high profit margins on its support revenues, and its financial reporting to the SEC indicates gross margins up to approximately 90%.[976] TomorrowNow and other third-party support providers offered discounts of 50% or more on Oracle's support rate.

Mr. Philips stated in 2006, "our subscriptions are the dominant part of our revenue. So recurring revenue is like 70% of our business now. And we haven't gotten people to focus on that we're a different company than we were ten years ago. So that's where the cash flow comes from, and

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973 Email from Betsy Steelman to George Allbritten dated March 11, 2005; ORCL00188963-964.

974 Catherine Hyde deposition dated February 12, 2009, page 93.

975 Peter Surette deposition dated June 19, 2009, pages 16-19. "The number one rule that we observed - - we never varied from it – we never downloaded after the maintenance end date. That was the golden rule as we saw it." Peter Surette deposition dated June 19, 2009, pages 19-20.

976 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007.

that's healthy."[977] TomorrowNow explained in its Frequently Asked Questions how it could offer support at 50 percent of the cost of Oracle's support:

> Enterprise software vendors use the revenue from their maintenance fees for two activities: firstly, developing new software applications and updates that they can market and sell and secondly, providing support for current applications. TomorrowNow does it differently. Under our program, we only focus on providing high-quality support for current applications, providing greater value for your current needs.[978]

Lesley Loftus expanded on that point in deposition testimony:

> Q. How can they take over the maintenance of my applications for 50 percent less than Oracle charges?
>
> A. [Quoting from TomorrowNow's "FAQ for SAP AE's]: "TomorrowNow focuses only on providing high-quality support, not on research and development. This allows TomorrowNow to provide higher quality service at lower cost. The maintenance payments customers make to Oracle do not all go to providing support for the applications, but are used for future product research and development. Currently Oracle's primarily[sic] focus for research and development is for their Project Fusion, the beta release of which may or may not immediately meet the needs of Siebel, JD Edwards, and PeopleSoft customers. Thus Oracle customers that pay maintenance are inherently investing dollars in pre-funding research and development for 'Project Fusion.'"[979]

TomorrowNow stated in various documents and presentations that the reason that it could offer such large discounts off Oracle support prices was because Oracle used the profits from support revenues to fund R&D expenses, which TomorrowNow did not incur. A TomorrowNow presentation dated December 17, 2004 indicates that 70% of support fees paid to application software vendors was used to fund R&D.[980] The R&D expenses of software vendors include the costs of creating tax and regulatory updates, patches, upgrades and new products.

Despite, or perhaps because of, TomorrowNow's "focus on providing high quality support" and "providing greater value," TomorrowNow made losses over the course of its operations.

Under the terms of the License, the profits generated from the Subject IP would be divided between Oracle and TomorrowNow. It would be unreasonable for TomorrowNow to license the

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977 "Oracle Corporation Television Interview with Charles Phillips – CNBC." Filed by Siebel Systems, Inc. Pursuant to Rule 425. Commission File No. 0-20725; Registration No. 333-129139. Posted January 5, 2006. <http://www.sec.gov/Archives/edgar/data/1006835/000119312506003567/d425.htm>.

978 TomorrowNow "Frequently Asked Questions About TomorrowNow Support Services;" TN-OR00004408-410, at -408.

979 Lesley Loftus deposition dated June 13, 2008, page 127 and Loftus Exhibit 267. "TomorrowNow FAQ for SAP AE's – INTERNAL USE ONLY!" TN-OR00133306-310, at -307.

980 TomorrowNow PowerPoint Presentation titled, "Maintenance and Support for Enterprise Software Applications." December 17, 2004; TN-OR00335417-443, at -421.

Subject IP unless it had reasonable probability of generating a profit from its use in providing support. Any royalty payment by TomorrowNow to Oracle would have caused TomorrowNow's profitability to deteriorate because its ability to increase support prices would be limited by competition.

8.13. Georgia-Pacific Factor No. 13: Patented vs. Non-Patented Elements

"The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer."

Because the Subject IP involves copyrights not patents, I am going to re-define Factor 13 as follows:

> The portion of the realizable profit that should be credited to the copyrighted works as distinguished from other service elements provided by the support provider as well as business risks and investments in equipment.

Under the terms of the Georgia-Pacific factors, a reasonable royalty would allow TomorrowNow to earn a return on elements of its support service that were improvements on the Oracle support model as well as TomorrowNow's investment in the systems necessary to provide the service. In addition, the license would fairly and reasonably allocate profits between Oracle and TomorrowNow. "A licensee would consider the investment needed in tangible equipment, working capital, and other intangibles when negotiating a reasonable royalty. A fair return on these assets must be part of the equation that derives reasonable royalties."[981]

For purposes of my analysis, I have assumed that the Subject IP is necessary for TomorrowNow to provide its support services. In addition, support services require an investment to develop a support center, and staff who specialize in the Oracle software, typically former employees of PeopleSoft and J.D.Edwards. For example, Mr. Streibel, co-founder of Versytec, stated that "It takes a lot of initial groundwork before you're ready to deliver on annual maintenance contracts. We actually staffed a support center [in Denver]. We didn't just hire one ex J.D.Edwards executive, then use contractors or use affiliates [to do the work]. We have expertise in-house to handle all of World."[982] Conexus Partners, which claimed to have a "J.D.Edwards pedigree unmatched by other third-party providers," and later partnered with Microsoft for customers' migration needs, started its business by having access to CH2M HILL Microsource's facilities and infrastructure.[983]

Any royalty that did not allow TomorrowNow to be compensated for the various elements of their service unrelated to the Alleged Actions would be unreasonable and fail to meet the requirements of Georgia-Pacific Factor 15.

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981 Parr, Russell L. *Intellectual Property Infringement Damages: A Litigation Support Handbook*. New York, NY; John Wiley & Sons, Inc. 1993. Pages 14-15.

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

983 Conexus.com. "CoNexus – enhancing decision-making through electronic voting." <http://ideasciences.com/products/conexus/index.php>.

8.14. Georgia-Pacific Factor No. 14: Opinion Testimony

"The opinion testimony of qualified experts."

My discussion of Oracle's expert report by Mr. Meyer and my own analysis of the Georgia-Pacific factors 1 through 14 are contained earlier in this report.

8.15. Georgia-Pacific Factor No. 15: Hypothetical License Amount

"The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee-who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention-would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license."

Georgia-Pacific is a patent case. Accordingly, it is possible to use the 15 factors only if they provide a reasonable framework within which to value the *actual use* of the Subject IP. I am going to assume that the 15 factors do provide a framework that would be helpful in determining the Value of Use in this case. However, because the Georgia-Pacific analysis is not necessarily applicable to a copyright matter, the Court will have to determine whether to apply a "forced" license to the claims in this case.

The ultimate arrangement must represent a *business* proposition and it must be fair to both sides and allow TomorrowNow and SAP to make a "reasonable profit."

8.15.1. Licensing Rationale

An intellectual property owner would generally only grant a license to use its intellectual property if the license allowed the licensor to generate profits it could not otherwise have made. Conversely, a potential licensee would only be prepared to accept a license that allowed it to make a reasonable return on its investment.

8.15.2. Negotiation

A hypothetical negotiation means going back in time and considering factors such as: market size; sales potential; profit potential; industry competition; required investment; economic conditions of the relevant industry and alternative methods of achieving the same purpose.[984]

8.15.3. Probable Losses

The evidence in this case indicates that Oracle would have lost many of the customers it lost to TomorrowNow even if TomorrowNow had not existed. All of the customers Oracle identified as

[984] Parr, Russell L. *Intellectual Property Infringement Damages: A Litigation Support Handbook*. New York, NY; John Wiley & Sons, Inc. 1993. Page 13. TomorrowNow PowerPoint Presentation titled, "Maintenance and Support for Enterprise Software Applications." December 17, 2004; TN-OR00335417-443, at -421.

"At-Risk" were probable losses for Oracle in the "but-for" world; they may have gone to another third-party vendor (this is especially true after 2004) or they may have self supported but their place on the At-Risk report shows they were all in danger of leaving Oracle.

As I showed previously, of the at-risk customers Oracle identified, fewer than half went to TomorrowNow and if TomorrowNow had not existed it is likely these customers would have left Oracle anyway.

8.15.4. Economic Causation

I understand the plaintiff must prove that but-for the Alleged Actions, it would have earned the profits it is claiming were lost. Leaving aside for the moment whether use of a reasonable royalty to calculate Value of Use or lost profits in a copyright case is appropriate methodology, Oracle relies on a prima facie argument without support that a group of customers that went to TomorrowNow for whatever reason would have stayed at Oracle in the but-for world. I address economic causation in detail later in this report.

8.15.5. TomorrowNow Royalty Rate

The royalty rates Oracle would want would be as close to the support fees their customers paid as possible (recognizing that Oracle would save the expense associated with providing the support and may be able to keep a customer on its software that they might otherwise lose to another ERP vendor). However, a royalty set at a rate approaching 50% of the Oracle support price would make it impossible for TomorrowNow to stay in business. (The 50% base rate TomorrowNow charged for support plus a royalty equal to 50% of Oracle's price would be 100% of Oracle's price and would not be a viable option.) On the other hand, Factor 15 requires that TomorrowNow be able to price support at a rate its potential customers would find tempting and still give it a *chance* to make a profit. Assuming TomorrowNow could have generated any business with a price higher than it actually charged, the royalty would still have to be significantly less than the Oracle support price.

To complicate matters, TomorrowNow never made a profit overall so in addition to requiring a low royalty rate, they needed to increase revenues (or reduce expenses) as well. The highest possible royalty structure that may have worked would be a royalty equal to 25% of Oracle's overall pricing, which would yield a TomorrowNow support price approximately equal to 75% of the Oracle pricing.[985] While it is unlikely this price could be successfully marketed by TomorrowNow (i.e., their customers and potential customers would have been prepared to pay this higher price) it represents the maximum royalty the market and TomorrowNow could possibly bear.[986] For the purposes of the Negotiation, I am going to assume that the TomorrowNow price could be increased to about 75% of Oracle's support price (i.e., a 50% increase in TomorrowNow's pricing) without affecting the volume of sales made by TomorrowNow. The 75% pricing policy is the absolute maximum price TomorrowNow could have charged and remained within the boundaries of feasibility. I also assume that in the real

[985] TomorrowNow's pricing structure was not a straight 50% of the PeopleSoft price across the board but for the purposes of this section it is a fair assumption.

[986] I am assuming TomorrowNow would have to maintain its former price structure plus the royalty to Oracle. Therefore, it could not implement a price increase to cover its losses.

world if the price policy were to increase to more than 75% of the Oracle price, the sales made by TomorrowNow would have been reduced to zero. My assumption that the demand curve for TomorrowNow pricing is flat between 50% and 75% of the Oracle price favors Oracle.

I do not assume for the purposes of my analysis that TomorrowNow must be given a royalty rate that *guaranteed* it making a profit; TomorrowNow was unable to make a profit applying the 50% price policy so it is most unlikely it could have made a profit with prices 50% higher. There is nothing in the law (that I am aware of) other than the wording of Georgia-Pacific Factor 15 that guarantees profits[987] for the defendant. However, it would be inappropriate to assume a royalty so high that it would drive the company out of business. Accordingly, the resulting royalty rate must have a balance between compensating Oracle and not putting TomorrowNow out of business. I am not aware of any enhancement TomorrowNow could have used to boost their ability to generate support sales at a price 50% higher than they actually charged.

8.15.6. TomorrowNow Royalty

An alternative way to look at the pricing issue is to assume that TomorrowNow could not have stayed in business with a price lower than its 50% pricing policy, while the upper boundary of the TomorrowNow market price would be at most a 50% mark-up on the old TomorrowNow price policy. Based on my entire report and analysis therefore, I assume a Reasonable Royalty equal to 50% of TomorrowNow's gross revenues.

The 50% royalty rate on TomorrowNow's revenues would have been fair to Oracle. One Oracle executive referred to the companies that terminate Oracle support as "unprofitable laggards."[988] Similarly, an Oracle sales representative[989] "advised Laura [Sweetman of TomorrowNow] that Oracle execs aren't too terribly threatened by us re: JDE, because they feel our clients are those that they would have lost anyway."[990] While the 50% royalty rate would be fair to Oracle, I recognize that Oracle will claim they would never have settled for such a rate. That is a common plaintiff complaint and is not determinative of whether a license fee is appropriate in the circumstances.

I calculated 50% of TomorrowNow's revenues[991] to be approximately $32 million as shown in Appendix G-1.

If SAP had been forced to accept a 50% price increase on TomorrowNow service such that prices were set at a rate approximately equal to 75% of the Oracle support rate,[992] there is a slim

987 In this case, because TomorrowNow could not make a profit using the 50% of Oracle price metric, it is probably impossible to set a royalty rate that would result in profits. Any royalty would have to be either added to the support price or absorbed in the existing price. In the first case, sales would likely decline and in the second case the losses would increase.

988 Oracle email from Juan Jones to Chris Madsen and Rick Cummins. August 29, 2006. Re: Fw: FW: Home Depot Executive Summary; ORCL00173509-511, at -509.

989 Likely Kort Crosby, an Oracle sales representative. "Organization Chart, Oracle Aria People Search;" ORCL0034208.

990 TomorrowNow email from Mandy Wheeler to Andrew Nelson, et al. June 23, 2005. Re: Quest Software Migration Evaluation: Management Call – Wednesday, June 22; TN-OR01133541, at -541.

991 As discussed later in my report.

992 This assumption is a continuation of the fiction that TomorrowNow priced its service at 50% of the Oracle rate. Such an assumption is not exactly correct but is close enough for the purpose of the Negotiation.

chance TomorrowNow could have stayed in business through October 2008, before SAP took action to shut down its operations.

8.15.7. SAP "Royalty"

Given the background of the financial condition of TomorrowNow and the introduction of SAP as its new owner, the parties in the Negotiation would have faced a difficult time agreeing on any royalty that made sense from their points of view. Oracle would not want to grant a license except at a high price to SAP and SAP would not want to overpay for a license. Even though it would have been unlikely that the parties would have agreed to a license in the real world, particularly a paid-up license, I understand that the Court has indicated that a forced agreement should be assumed if it can be done without undue speculation. In my opinion, it is impossible to create a scenario in which the parties at the Negotiation would have reached an agreement for the License. It requires an act of pure speculation to assume they could have done so based on the testimony and other evidence in this case. Furthermore, even if the parties had been willing to discuss a license for TomorrowNow's use of the Subject IP, it is inconceivable they would have agreed on a rate. As Mr. Ellison stated, SAP would (or should) have been willing to pay a billion dollars for a license which would have made no rational business sense to a prudent licensee like SAP. Therefore, it is only by undue speculation that a Reasonable Royalty can be formulated and even then the fiction of the royalty rate stretches the imagination to breaking point.

In the real world the parties would never have agreed on a license. However, if the parties are forced to come to an agreement, the result of their deliberations would be as follows:

Once TomorrowNow had paid a license fee to Oracle of 50% of its revenues, it would be inappropriate for SAP to pay any royalty on application software sales because it (i.e., SAP) would assume it would have made no *additional* application license sales as a result of the License. The rationale for this argument is simple. Any customer terminating its license agreements with Oracle and migrating its ERP systems to SAP would have made that choice only after a thorough evaluation process showing that SAP was the preferred ERP vendor.[993] Therefore, the customer would only have migrated its ERP systems to SAP because of what SAP offered, not as a result of TomorrowNow's involvement.

I considered the analytical approach to computing the Reasonable Royalty. The analytical approach was referenced in the *TWM Mfg. Co., Inc. v. Dura* case,[994] affirmed on appeal.

The approach sets the reasonable royalty at a rate that disgorges the *excess* profits made by an infringer. For example, if the normal margin for the infringer is 10% and use of the intellectual property allows the margin to increase to 40%, then the royalty rate is set at 30% (i.e., 40% - 10% = 30%).

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[993] An ERP system migration is an expensive, disruptive and time consuming task. Accordingly, based on the evidence I have seen in this case, since confirmed by Mr. Sommer, the decision to change ERP systems is only made after thorough analysis and comparative assessments of competing systems.

[994] *TWM Manufacturing Co., Inc. v. Dura Corp. and Kidde, Inc*. 789 F.2d 895; United States Court of Appeals, Federal Circuit. April 25, 1986.

The approach in this case yields a royalty of zero because SAP made no *additional* margin on any sales made as a result of the Alleged Actions. Therefore, the royalty rate would be zero using the analytical approach.

The Reasonable Royalty for SAP would be half of the profits on any sales it made that it would not have made absent the Alleged Actions.

The parties would have agreed that SAP would pay a royalty of 50% of the profits that it would have earned on sales to the three customers that it would not have otherwise made.[995] 50% of total profits after interest of $4,344,212[996] equals $2,172,106.

9. TomorrowNow's Use of Oracle's Database Software

Shelley Nelson explained the use TomorrowNow made of Oracle's database software:

> Q. How did TomorrowNow use the Oracle database software that it did use as part of supporting customers?
>
> A. It was kind of the database server, so to speak, for those customers who had Oracle to run their PeopleSoft application. So, the – the Oracle database would act as the server to house PeopleSoft demo environments for customers who ran PeopleSoft with Oracle.
>
> Q. Why was it necessary to have Oracle database software acting as the – as the server for those customers who had Oracle database underneath their environments?
>
> A. It – in certain instances, the PeopleSoft software might behave differently, depending on what database back-end is being used to house it. And, so, it's preferred that – that an install is done on that database version. So, you're – you're working in the same – or a similar environment with the client's demo environment.[997]

SAP and Oracle entered into a license agreement for SAP to act as a reseller of Oracle database software. Mr. Plattner stated that the fee SAP negotiated for the database from Oracle "…was decided by market price, and not by IP, or value or whatever. It was decided by market price."[998] Similarly, a Negotiation for TomorrowNow's use of Oracle's database would be based on market price.

Mr. Meyer provides an extensive assessment of the Value of Use TomorrowNow made of Oracle's database software.[999] However, it is unclear why Mr. Meyer's analysis is so lengthy because the calculation is simple. The Oracle database is readily available at a known price to

995 Appendix N-1.
996 Per Appendix N-1, SAP made profits of $3,862,031. Adding interest through the estimated trial end date of December 10, 2010 equals $4,344,212.
997 Shelley Nelson deposition dated September 3, 2009, pages 627-628.
998 Hasso Plattner deposition dated June 2, 2009, page 49.
999 Meyer Report, Section VII, pages 150-173.

any customer that wishes to use it. Because the price is known and well established in the marketplace, all Mr. Meyer needs to do to quantify the amount TomorrowNow should have paid for the allegedly inappropriate use of the Oracle database is multiply the quantity used by the applicable price. However, Mr. Meyer did not make this calculation correctly.

Mr. Meyer is correct in his statement that the per processor[1000] price for the Oracle Database Enterprise Edition software was $40,000 for the license and $8,800 for support.[1001] Mr. Meyer then claims:

> The server with the majority of TomorrowNow local environments running on Oracle database was purchased in January 2005 and was a 4 processor Unix server with dual-cores, or effectively 8 processors, based upon which Oracle would price a license for 6 processors (Oracle applies a .75 processor factor to Unix processors, so 8 * .75 = 6 processors priced in the license)….Therefore, I have assumed that Oracle would require SAP to purchase no less than a license that covered each customer accessing Oracle database priced at 6 processers per license. A 6 processor Enterprise Edition Oracle database license would be priced at 6 processors times the license fee of $40,000 per customer, or $240,000 per customer, and an annual support fee of $8,800 times 6 processors, or $52,800 per year per customer.[1002]

Mr. Meyer applies the base license and support costs for the number of years each customer used the Oracle database, deducting 5% to account for any additional costs. He then claims that "counting only one environment per customer, at least 71 local environments were running Oracle database software on TomorrowNow's systems (both customer-specific and non-customer specific)."[1003] This calculation results in damages of $23.6 million.[1004]

Mr. Meyer's approach to computing these damages is incorrect. The Oracle database pricing does not work in the way that he suggests. Database licenses are purchased based on the server core processors on which they will be installed. The number of databases the licensed user (or environments) creates after the installation is irrelevant. I understand that TomorrowNow had the Oracle database software that was ultimately used to support its customers installed on servers with 27 processors as follows:[1005]

1000 The actual processor metric used to calculate the quantity is based on the number of cores multiplied by a processor factor to arrive at the licensing quantity. For example, a dual-core, quad-processor Intel server would consist of eight cores (4 * 2), which would be multiplied by a processor factor of 0.5. See Oracle E-Business Global Price List, September 1, 2006; "Oracle E-Business Global Price List." September 1, 2006; ORCL00704381-396, at -392 to arrive at a licensing quantity of four (8 * 0.5).

1001 Meyer Report, page 165, paragraph 252.

1002 Meyer Report, pages 166-167.

1003 Meyer Report, page 167, paragraph 254. Schedule 44.1.SU lists 69 customer-specific and two non-customer specific environments.

1004 Meyer Report, page 169, table 9.

1005 Based on an email from Josh Fuchs at Jones Day to Nitin Jindal at Bingham McCutchen dated February 19, 2010, TomorrowNow had Oracle Database software installed on 7 servers with 20 processors and a total of 46 cores. Taking into account the applicable licensing factors results in a licensing quantity of 27 processors; ORCL00704381-396, at -392.

Server Name	Processor Type	Processors	Core Count	Total Cores	Licensing Factor	Licensing Quantity
PSDEV01	PowerPC	4	2	8	0.75	6
PSDEV02	PowerPC	4	2	8	0.75	6
DCPSTEMP01	Intel	2	2	4	0.50	2
DCPSTEMP02	Intel	4	4	16	0.50	8
DCSBLPROD03	Intel	2	2	4	0.50	2
TN-FS01	Intel	2	2	4	0.50	2
TN-Dell2650	Intel	2	1	2	0.50	1
Totals		**20**		**46**		**27**

Accordingly, the correct license computation multiplies the actual number of licensed processors by the cost per processor, plus support on the licensed processors for four years:[1006]

[1006] This overstates the cost for support, because as Mr. Meyer points out on page 168 of the Meyer Report, TomorrowNow would only have paid for support during the period that the software was installed and being used to support the environments.

Oracle Database – Enterprise Edition	**Pricing**
Processor License[1007]	$40,000
x Licensing Quantity	27
Total License Cost	*$1,080,000*
Software Update & Support (per year)[1008]	$8,800
x Licensing Quantity	27
x Number of years	4
Total Support Cost	*$950,400*
Subtotal	$2,030,400
x Profit Margin[1009]	95%
Total Oracle Database Cost	**$1,928,880**

Alternatively, if forced to have a separate license for each customer supported, TomorrowNow could have installed the Oracle Database on a single processor server.[1010] At the single processor level, TomorrowNow would have been able to purchase Standard Edition software at a much lower price than Enterprise Edition. In addition, though Mr. Meyer claims that Oracle would not license the database to TomorrowNow at a discount,[1011] evidence indicates that TomorrowNow could have acquired the Oracle database license at a discount from a third party reseller.[1012] For purposes of this calculation, I have ignored discounts and rely on retail pricing as follows:

Oracle Database – Standard Edition	**Pricing**
Processor License[1013]	$15,000
x Number of customers (single-processor)[1014]	71
Total License Cost	*$1,065,000*
Software Update & Support (per year)[1015]	$3,300

1007 "Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.
1008 "Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.
1009 Meyer Report, page 169, table 9.
1010 I base this conclusion on Mr. Gray's Report.
1011 Meyer Report, page 163, paragraph 250.
1012 Email from Paul Bigos of SAP to George Lester of TomorrowNow dated March 31, 2006. TN-OR01029489-493, at -489-490 with attached pricing proposal from SHI. TN-OR01029494. The proposal indicates that TomorrowNow could have purchased the Oracle Standard Edition license at a 24% discount ((15,000-11,414)/15,000) and the support at a 30% discount ((3,300 – 2,310)/3,300).
1013 Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.
1014 Meyer Report, page 167, paragraph 254.
1015 Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.

x Number of customers	71
x Number of years	4
Total Support Cost	*$937,200*
Subtotal	$2,002,200
x Profit Margin	95%
Total Oracle Database Cost	**$1,902,090**

10. Causation - Disgorgement

I understand that Oracle may recover lost profits suffered as a result of the alleged infringement ("Lost Profits") and any profits of Defendants attributable to the alleged infringement that are not taken into account in computing lost profits ("Disgorgement"). In this case, that means Oracle must prove that an Oracle customer terminated Oracle support services and *as a result of the Alleged Actions* (a) contracted for support with TomorrowNow, or (b) contracted for support with TomorrowNow and contracted with SAP for products or services.

Mr. Meyer did not properly analyze the reasons a customer terminated support at Oracle.[1016] I determined, at the outset, however, that I needed to do so. Accordingly, I analyzed millions of pages of produced documents[1017] using sophisticated search techniques[1018] to identify relevant documents. When I identified a document that explained why the customer made the decision to terminate Oracle support and contract for support or applications from one or both of the Defendants, I extracted from it the pertinent details and included those details in a database.[1019] For those customers on the List of 86, I reviewed contracts in conjunction with other available sources to substantiate the documentation reviewed during the course of my analysis. I then used

[1016] Mr. Meyer's analysis of the reasons a customer terminated Oracle support is inadequate. He excluded 17 customers from his summation of accused revenues on Schedule 42.SU, and explained that "…those [were] customers for which evidence indicates that they may have decided to switch to SAP before engaging TomorrowNow…" (Meyer Report, page 274, paragraph 446). While Mr. Meyer properly excluded the 17 customers because they purchased software for reasons unrelated to the Alleged Actions, he failed to exclude numerous other customers for which there was adequate evidence that their termination and buying decisions were unrelated to the Alleged Actions.

[1017] Including email traffic, correspondence, contracts, spreadsheets and reports produced by the parties, as quantified in total in Appendix C-2.

[1018] Appendix I-1 contains a list of search terms applied to identify documents relating to the 358 TomorrowNow customers and the List of 86 SAP customers. Appendix I-2 contains a list of search terms applied to identify documents relating to: the customers' relationship with Oracle; the customers' relationship with TomorrowNow; and the reasons customers may have purchased products or services at SAP.

[1019] The database has been provided as Bates range SAP-SKG-118165 for the customers I excluded for disgorgement and/or lost profits. SAP-SKC-118166 contains the database entries for all customers I did not exclude from the damage analysis.

the information to identify why a customer acted as it did[1020] and grouped the reasons into "Exclusion Pools" which I explain below.

The evidence I gathered shows there were numerous reasons a customer chose to terminate Oracle support and contract with Defendant(s) and most of the reasons led me to conclude that the customer should be excluded from the damage analysis either for disgorgement damages, lost profits damages, or both (I deal with lost profits later in this report) because their decisions were not the result of the Alleged Actions. Some of the exclusion criteria are general and relate to the entire list of accused customers and some are customer-specific.

10.1. General Criteria – SAP Disgorgement

I analyzed the facts on a customer by customer[1021] basis using the same documentation Mr. Meyer had available. Using information from Mr. Sommer for background purposes,[1022] I analyzed millions of pages of documents produced by the parties to this action, and identified the reasons a customer terminated Oracle support and chose to buy products or services from the Defendants and noted their reason(s).

My analysis allowed me to determine which customers resulted in SAP making sales they would have made in any event *(i.e., sales not generated as a result of the Alleged Actions)* and which should, therefore, be excluded from the damages calculation.

I discuss in more detail below my rationale for the customer-by-customer analysis.

10.1.1. Oracle Failed to Meet its Burden

Although not explicitly stated, Mr. Meyer assumes that absent the Alleged Actions, SAP would not have made *any* sales of SAP products or services to the customers he included in his analysis. The reality is, of course, that to be properly included in the damage calculation, it is a necessary condition that the customer licensed SAP products or purchased services *as a result of the Alleged Actions*. In spite of that necessary condition, Mr. Meyer's starting point was to assume that all profits for all but 17 of the customers on the List of 86 represented disgorgeable profits.[1023] However, the agreed criteria that placed a customer in the List of 86 had at most a tangential link with economic (or legal) causation. The criteria were established as a result of an

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1020 I also considered such factors as the products for which the customer cancelled support at Oracle (Appendix J), the time period the customer was supported at TomorrowNow (Appendix K-1), and the products supported at TomorrowNow (Appendix L).

1021 Those customers which have a parent/subsidiary relationship are counted as one customer; 86 – 17 = 69.

1022 I discussed the IT industry in general and the ERP industry in particular with Mr. Sommer and used the information I learned in those discussions to develop or confirm my understanding of customer behavior in the ERP business.

1023 Although Mr. Meyer states that "It is my opinion, a portion of these revenues have been earned, and or enhanced, by the Defendants' alleged conduct" (Meyer Report, page 274, paragraph 445), the only analysis Mr. Meyer performed was to exclude 17 customers "that may have decided to switch to SAP before engaging TomorrowNow" (Meyer Report, page 274, page 446). Note: Allianz Life Insurance Company of North America and Allianz SE are considered one customer due to the parent/subsidiary relationship. Therefore, his effective assumption was that the revenues and profits generated from the non-excluded customers had a sufficient connection (nexus) to the alleged infringement that he could accuse all such revenues/profits.

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

10.2. Customer-Specific Exclusion Criteria – SAP Disgorgement

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

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

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

10.2.1. Decided to Join SAP Prior to Joining TomorrowNow

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

[1029] 547/625 = 88%.
[1030] Schedule 42.SU to the Meyer Report.

"…for which evidence indicates that they may have decided to switch to SAP before engaging TomorrowNow."[1031] I concur with Mr. Meyer's rationale of his exclusion of the 17 customers.

I reviewed the evidence related to the remaining 69 customers[1032] Mr. Meyer did not exclude and applied the parameters he defined. Based on my review, Mr. Meyer should have excluded an additional 17 customers (in addition to the 17 he excluded) because they decided to contract with SAP before engaging TomorrowNow as shown in Appendix E-2.

10.2.2. Parent Company Mandate

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

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

10.2.3. Competitor Evaluation

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

10.2.4. Standardization

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

[1031] Meyer Report, page 255, paragraph 446.
[1032] Those customers which have a parent/subsidiary relationship are counted as one customer; 86 – 17 = 69.

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

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

10.2.5. Specific Functionality

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

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

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

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

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

10.2.6. Product Extensions

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

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

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

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

10.2.7. Non-Replacement Products

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

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

10.2.8. Reseller/BPO

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

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

10.2.9. No Accused Conduct – Disgorgement

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

1. TomorrowNow engaged in mass downloading from, and improper access to, Oracle systems.

2. TomorrowNow made thousands of full or partial copies of Oracle enterprise application software and database software.

3. TomorrowNow's fix development and delivery process resulted in significant cross-use and contamination.

4. TomorrowNow continued to access, download, copy, modify and distribute Oracle enterprise application software and support materials after Oracle filed this action.

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

10.2.10. Other – Disgorgement

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

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

10.2.11. Summary

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

11. Causation – Lost Profits

As I stated previously, Oracle must prove it suffered losses because of the Alleged Actions. In this case, that burden involves proving that an Oracle customer terminated Oracle support services and contracted for support with TomorrowNow *as a result of the Alleged Actions*.[1034]

Mr. Meyer did not properly analyze the reasons a customer terminated support at Oracle. I determined, at the outset, however, that I needed to do so. Accordingly, I analyzed millions of pages of produced documents[1035] using sophisticated search techniques[1036] to identify relevant documents. When I identified a document that explained why the customer made the decision to terminate Oracle support and contract for support from TomorrowNow, I extracted from it the

[1034] The Court's Order precluded lost profits claims related to lost up-sell and lost cross-sell opportunities. Therefore Oracle's lost profits can only relate to lost support revenues; which means, in turn, that only TomorrowNow's revenues are at issue for disgorgement.

[1035] Including email traffic, correspondence, contracts, spreadsheets and reports produced by the parties, as quantified in total in Appendix C-2.

[1036] Appendix I-1 contains a list of search terms applied to identify documents relating to the 358 customers at issue. Appendix I-2 contains a list of search terms applied to identify documents relating to: the customers' relationship with Oracle; the customers' relationship with TomorrowNow; and the reasons customers may have purchased software at SAP.

regimes, language and so on. There were certain territories in which Oracle did not provide complete (e.g., local language) service for the localized software (if it was localized at all). Customers that needed or wanted support for their localized software and could not obtain such support from Oracle would be likely to use a third party support vendor if they did offer such service. Therefore, if customers terminated Oracle support in order to obtain localized service from one or both of the Defendants, the termination was not the result of the Alleged Actions. However, Mr. Meyer takes no account of localization on the customers' willingness to stay on Oracle support.

11.1.4. Retiring Releases

Oracle applies a 'life policy' to the software it licenses. Under the policy, a customer eventually finds that support for the licensed software is reduced over time[1047] and the price of support increases. The evidence in this case shows that customers faced with declining service and increasing cost expressed their distaste for Oracle's support policy.

If a customer was content with the functionality of its software and did not wish to upgrade to a newer (and still supported) release of the software, the only way they could continue to use it and support it in a manner consistent with the Oracle standard support offering at the time was to either go to a third-party support vendor or self-support. As such, the resulting termination of Oracle support was not caused by the Alleged Actions. However, Mr. Meyer takes no account of the effects of Oracle's policy on the customers' willingness to stay on Oracle support.

11.2. Customer-Specific Exclusion Criteria – Lost Profits

The general criteria do not represent Exclusion Pools. They do, however, provide a framework to help understand some of the specific customer behaviors that result in a decision to terminate Oracle support in favor of a third party support vendor (which in this case is TomorrowNow).

In addition to the general criteria, the customer-specific exclusion criteria are as follows:

1. Reinstatement/relicense
2. Never left Oracle
3. Non-customer
4. Product mismatch
5. Non-association
6. Causation
7. Service evaluation
8. Parent mandate

[1047] I understand that Oracle offers Lifetime Support in which a customer can continue to receive technical and other support elements.

9. Service gap

10. No accused conduct – lost profits

11. Other – lost profits

I treated each criterion listed above as an Exclusion Pool for the affected customers. Although some customers were classified into more than one Exclusion Pool, I classified a customer as an exclude for causation purposes based on their placement in just one of the Exclusion Pools listed below.

11.2.1. Reinstatement/Relicense

Mr. Meyer excluded customers from his lost profits calculation if the customer reinstated support with Oracle or relicensed Oracle software. These customers generally paid back-support fees for the time that they were off support so Oracle suffered no loss of profits.

Mr. Meyer excluded 26 customers from his lost profits calculation and I agree with his assessment of these customers.[1048] These customers are listed in Appendix E-3.

11.2.2. Never Left Oracle

Mr. Meyer excluded 54 customers from his lost profits calculation because they never cancelled Oracle support.[1049] I agree with Mr. Meyer's exclusion of this pool of customers. These customers are listed in Appendix E-3.

11.2.3. Non-Customer

Mr. Meyer excluded 3 customers from his lost profits calculation because they did not sign a support contract with TomorrowNow or they were not an Oracle customer.[1050] I agree with Mr. Meyer's exclusion of this pool of customers. These customers are listed in Appendix E-3.

11.2.4. Product Mismatch

Mr. Meyer excluded 2 customers from his lost profits calculation because the products the customers supported at TomorrowNow were not the same as those cancelled at Oracle.[1051] I agree with Mr. Meyer's exclusion of this group of customers.[1052] These customers are listed in Appendix E-3.

1048 Meyer Schedule 33.SU.
1049 Meyer Schedule 33.SU.
1050 Meyer Schedule 33.SU.
1051 Meyer Schedule 33.SU.
1052 Mr. Meyer states on his schedule 33.SU that SCSG Management is excluded because there is no name association with an Oracle entity, Mr. Meyer's Schedule 33.3.SU states that the customer was excluded for Product Mismatch. For the purposes of my report, I am assuming the reason for exclusion is No Name Association with an Oracle entity.

11.2.5. Non-Association

One company on the TomorrowNow customer list has no association with Oracle, so Mr. Meyer excluded it from his lost profits calculation.[1053] I agree with Mr. Meyer's exclusion of this customer.[1054] These customers are listed in Appendix E-3.

11.2.6. Causation

Mr. Meyer used the 'Causation' pool to capture customers not eligible for lost profits damages that did not fall into one of the other pools.[1055] I agree with Mr. Meyer's exclusion of these customers. These customers are listed in Appendix E-3.

11.2.7. Service Evaluation

As I explain elsewhere in this report, TomorrowNow was not the only provider of third-party support. There were numerous alternatives available that customers could have used instead of TomorrowNow. After TomorrowNow ceased operations on October 31, 2008,[1056] most customers went to another third-party support vendor and did not return to Oracle. In addition, before cancelling support with Oracle, many customers did a thorough evaluation of their alternatives and were well aware of the advantages and limits of third-party support. The evaluation sometimes involved requests for proposals ("RFP's") to named third-party providers that were possible alternatives to continuing Oracle support.

If a customer conducted an evaluation of named third party vendors before choosing TomorrowNow that was strong evidence that their decision to terminate Oracle support was not driven by TomorrowNow but a desire to leave Oracle.

The time and effort put into the evaluation process is further evidence of the customer's intention to leave Oracle. Therefore, absent TomorrowNow, the customer would likely have chosen another third-party vendor or self-supported. Because the customer was going to leave Oracle regardless of the Alleged Actions, they should not be included in the Lost Profits damage analysis. Therefore, I excluded all customers in this Pool from my analysis of Lost Profits damages, see Appendix E-3.

11.2.8. Parent Mandate

Parent companies may mandate that their subsidiaries change their ERP systems to a new system. Such a change leads to the subsidiary canceling support on their current system at some point. Accordingly, if the parent company mandated that the subsidiary stop paying support, Oracle's loss was not the result of the Alleged Actions. Based on the above criterion, I excluded the customers in Appendix E-3.

1053 Meyer Schedule 33.SU.

1054 Mr. Meyer states on his schedule 33.SU that SCSG Management is excluded because there is no name association with an Oracle entity, Mr. Meyer's Schedule 33.3.SU states that the customer was excluded for Product Mismatch. For the purposes of my report, I am assuming the reason for exclusion is No Name Association with an Oracle entity.

1055 Meyer Schedule 33.SU.

1056 "TomorrowNow Operations Wind Down: Final Report." October 31, 2008; TN-OR03523871-924.

11.2.9. Service Gap

Mr. Meyer determined that a four year period between the cessation of Oracle support and the start of support at TomorrowNow was enough of a gap to exclude the customer from his Lost Profits damage analysis.[1057] I agree with his principle but the timeline is too long. Logically, after a customer has self supported or run without support for six months or more, their termination of Oracle support could not be the result of the Alleged Actions. Mr. Sommer indicated that a customer running without support for six months must have terminated Oracle support for reasons unrelated to the Alleged Actions. Therefore, I excluded the customers in Appendix E-3.

11.2.10. No Accused Conduct – Lost Profits

I understand that Oracle engaged Kevin Mandia to evaluate the "means and methods by which [TomorrowNow] accessed and downloaded from Oracle's customer support websites, as well the nature and extent of [TomorrowNow's] customers" and that he generally reached the following conclusions:

1. TomorrowNow engaged in mass downloading from and improper access to Oracle systems

2. TomorrowNow made thousands of full or partial copies of Oracle enterprise application software and database software

3. TomorrowNow's fix development and delivery process resulted in significant cross-use and contamination

4. TomorrowNow continued to access, download, copy, modify and distribute Oracle enterprise application software and support materials after Oracle filed this action.

I understand that Defendants engaged Mr. Gray to analyze Mr. Mandia's report and analysis regarding the conclusions above and Mr. Gray determined that, even assuming Mr. Mandia was correct, the accused conduct does not apply to all of TomorrowNow customers. Accordingly, I have excluded the customers for which there was no accused conduct from the Lost Profits damage analysis. I listed these customers in Appendix E-3.

11.2.11. Other – Lost Profits

While the pools defined above describe the majority of scenarios that, by themselves, were sufficient to exclude a customer from the damage analysis related to lost profits, there are other situations that would also lead to exclusion but do not fall within any of the above pools. I have placed those customers in the "Other – lost profits" pool. Customers that I determined should be excluded but did not fit in any of the lost profits pools described in paragraphs 11.2.1 to 11.2.10 are listed in Appendix E-3.

[1057] According to Mr. Meyer's Schedule 33.3.SU, Everdream and Powerway had a four year gap between the cessation of Oracle support and TomorrowNow support beginning. He excluded these customers solely on this basis.

Based on the criteria outlined in the various customer-specific Exclusion Pools, I excluded the listed customers in Appendix E-1 from the lost profits analysis because their decision to cancel support with Oracle was made for reasons other than the Alleged Actions.

11.3. Possible Exclusion Criteria

There are many other reasons a customer may have terminated Oracle support and contracted with TomorrowNow or SAP. Individually the reasons may be insufficient to exclude the customer from the Disgorgement or Lost Profits damage analysis. I refer to these criteria as Possible Exclusion Criteria. While I have not excluded any of the customers that exhibit any one Possible Exclusion criterion, as I explain later, I developed a methodology that resulted in exclusions for certain *combinations* of Possible Exclusion Criteria.

As a general proposition, the non-excluded customers are still in the lost profits damage calculation because there is insufficient data to exclude them, which is more a sign that they were non-communicative (if the customer did not inform Oracle or anyone else why they were terminating Oracle support there is little or no related evidence in the produced documents) rather than an indication that they terminated Oracle support as a result of the Alleged Actions. A reasonable analysis of the available data indicates that the relevant customers terminated Oracle support for reasons other than the Alleged Actions and this is entirely logical from the point of view of the customers. Furthermore, when the available information shows that so many of the relevant customers should be excluded from the lost profits analysis for causation reasons, it is likely there are other customers that should also be excluded but for which the documentary record is insufficient to support such exclusion.

The Possible Exclusion Criteria are discussed in detail below:

1. Budget constraint
2. Cost
3. Customized
4. Did not return to Oracle
5. Dislikes Fusion
6. Dislikes Oracle
7. Dissatisfied customer
8. ERP vendor change
9. Financial distress
10. Localization
11. No intent to upgrade

12. No value
13. Non-specific evaluation
14. Older or stable release
15. Other support vendor
16. Poor service
17. Poor TomorrowNow support (List of 86 Customers only)
18. Price increases
19. Product direction
20. Product limitations
21. Retired releases
22. SAP functionality
23. SAP relationship
24. Self-support
25. Service level
26. Uses little or no support

The Possible Exclusion Criteria have been identified as potential factors leading to a customer's decision to terminate vendor support and move to third-party support and/or change their ERP to SAP solution. The Possible Exclusion Criteria by themselves do not warrant a customer being excluded from lost profits damages, but individually they are indicators of the type of customer most at-risk of leaving Oracle for a third-party support vendor.

As I describe later, however, there are certain combinations of the Possible Exclusion Criteria that lead to exclusion of the customer from the lost profits damage analysis for causation reasons. These are dealt with in the Joint Exclusion Criteria Section of this report.

Oracle even outlined the type of customer that would find third-party support appealing in the "at-risk" customer profile: low call volume, highly customized, old release, limited sales opportunity/activity in account and an overall lack of relationship with Oracle.[1058] As Oracle

[1058] "PeopleSoft/JDE 'At Risk' Update." August 16, 2006; ORCL00087649-660, at -654. "Maintenance At Risk Analysis: PeopleSoft/J.D. Edwards Customer Base." June 10, 2005; ORCL00130679-690, at -688-690. "NAS Customer Escalation Report." May 27th, 2005; ORCL00138470-475, at -470. Oracle email from Rick Cummins to Michael J. Lochead. March 23, 2005. Re: Pepay Option; ORCL00172564-566, at -565.

admits, there are customers that would consider third-party support a possible and appealing alternative to Oracle support. In order to provide a well-rounded illustration of the customer's experience at Oracle, I have included some sources that reference product lines that customers did not have supported by TomorrowNow.

11.3.1. Budget Constraint

I included customers in the "Budget constraint" pool if they had recent budget restrictions or parent/management mandated decreases in IT spending. Because support fees are often a large part of the customer's IT budget, they tend to be scrutinized closely when a company has financial difficulties.

This pool is different from the "Cost" pool to the extent budget constraints may play a role in a support termination even though the customer would like to retain the services. When the termination is the result of a parent mandate to cut costs or financial difficulties at the company itself, the customer has no choice but to comply. If support costs are one avenue for achieving the required reductions, then from time to time the company will take that avenue and terminate support. Sometimes, budget constraints alone are enough to cause a customer to terminate support with a vendor. I listed the customers that met this criterion in Appendix E-4.

11.3.2. Cost

I included customers in the "Cost" pool if they cited cost as a factor that caused them to terminate Oracle support or they were displeased with the costs associated with Oracle support. A customer that had cost as a primary concern would find the reduced support prices of third-party vendors appealing.

Support for a customer's Oracle system is expensive. A customer that may have spent millions of dollars to license a new Oracle system and millions more to train its people on the system, are then faced with annual support fees that are about 22% of the license cost to support the system. As such, the customer effectively pays for the system twice over the course of just a few years. Inevitably, the customer's management questions the value of what they are getting for the annual support fees. The desire to cut costs (especially in difficult economic times) may be overwhelming and a prime focus of such cost cutting, as Mr. Sommer indicated, is the support budget. The desire to cut costs may become even greater when the customer is: on an old or stable release; has competent in-house staff who can deal with most problems without outside assistance; is experiencing financial difficulties, and so on.

Based on the evidence produced in this case, Oracle's answer to most customer requests for support price cuts has been to deny the cut. They try to instill fear of a systemic failure into the customer by telling them of all the catastrophes that may befall them if they terminate support and also point out that coming back to Oracle support will be even more expensive (more about reinstatement fees below). Accordingly, the customer is in a bind – it cannot terminate support without incurring risk but does not want to (or simply cannot afford to) write the check each year to pay for support. Sometimes, the customer will resort to alternative providers of support including third-party support or self support or a combination of those two. While price alone will not usually be enough to cause the customer to terminate support, taken in combination with

other factors, it may result in a support termination. I listed the customers that met this criterion in Appendix E-4.

11.3.3. Customized

I included customers in this pool if any of their applications had been significantly customized. Mr. Sommer confirmed that customers with highly customized software sometimes develop problems that are less amenable to the standard solutions the ERP vendor provides. Based on the Oracle email traffic, highly customized customers were difficult to support and were at high risk for terminating support.[1059] The availability of a dedicated support individual which was one of the services TomorrowNow provided would appeal to these customers because it would allow them to receive the personalized support that Oracle struggled to provide. I am aware that TomorrowNow did not guarantee support for customized software, only that they would do their best to support it. I listed the customers that met this criterion in Appendix E-4.

11.3.4. Did Not Return to Oracle

Once TomorrowNow closed its doors on October 31, 2008,[1060] its customers may still have needed support for their Oracle software (usually the need was dependent on the product line that was being supported).

The fact that most customers did not go back to Oracle when they had the chance to do so suggests they would have left Oracle regardless of TomorrowNow. As Mr. Meyer stated that 74 customers reinstated, relicensed or never left Oracle,[1061] I concluded that the remaining 284 customers did not return to Oracle. I listed the customers that met this criterion in Appendix E-4.

11.3.5. Dislikes Fusion

I included customers in this pool if they did not see a future for Oracle's Fusion in their company. Many customers and industry analysts expressed their view that Fusion would not be released when anticipated or that it would ineffectively combine all of the product lines that Oracle had acquired.[1062] Such worries appear to have been justified because Fusion was behind schedule, and is not yet fully implemented.[1063] Because Oracle had stated that Fusion was the future of Oracle, customers that did not want to move to Fusion had, therefore, effectively decided not to have a future with Oracle. I listed the customers that met this criterion in Appendix E-4.

1059 "NAS Customer Escalation Report." May 27th, 2005; ORCL00138470-475, at -470. Oracle email from Rick Cummins to Michael J. Lochead. March 23, 2005. Re: Pepay Option; ORCL00172564-566, at -565.

1060 "TomorrowNow Operations Wind Down: Final Report." October 31, 2008; TN-OR03523871-924.

1061 Meyer Schedule 33.SU.

1062 "Marketplace Communications: Influence Uptake;" SAP-OR00060092-428, Various locations within the document. "FROM THE ANALYSTS: Saluting the Siebel supernova; Summing up the postmortems on Oracle's latest acquisition." SAP-OR00044052-081, at -072. Maynard, Billy and Yvonne Genovese. "PeopleSoft Users Face Tough Choices." Gartner Research. April 13, 2005, pages 2-3; TN-BEC00000017-023, at -019-021.

1063 "Competitive Overview Siebel vs. Oracle Master Slide Deck." July 2005; TN-OR06360322-384, at -382.

11.3.6. Dislikes Oracle

I included customers in this pool if they expressed their dislike for Oracle. I included in this pool customers that were displeased with their Oracle support sales representative, customers that were unhappy with the support service provided by Oracle, customers that filed a lawsuit against Oracle, and other reasons. I listed the customers that met this criterion in Appendix E-4.

11.3.7. Dissatisfied Customer

I included a customer in this pool if I found evidence of overall dissatisfaction with Oracle or a previous vendor or their support. A dissatisfied customer would view any alternative means of support worthy of investigation. Many customers left a trail of writing as evidence of their thinking. I listed the customers that met this criterion in Appendix E-4.

11.3.8. ERP Vendor Change

I included customers in this pool if they decided to move off their current Oracle system and migrate to a vendor other than an SAP provider. If a customer was not planning on continuing to use its current applications, then it had effectively made the decision to end the Oracle relationship. It would also be difficult for the customer to justify the continued expense of a large annual support fee used to fund the development of future application improvements to software solutions it was no longer using or would stop using in the future. I listed the customers that met this criterion in Appendix E-4.

11.3.9. Financial Distress

I included customers in this pool if they evidenced financial distress by such events as: laying off a significant number of employees, declining profits, operating at a loss, or declaring (or about to declare) bankruptcy. As annual support is often a large part of the customer's IT budget, these are often the first items to be scrutinized when a company is suffering financial distress. I listed the customers that met this criterion in Appendix E-4.

11.3.10. Localization

I included customers in this pool if they reported dissatisfaction with: local tax updates being applied; support service not being provided in the region's native language; or other issues arising as a result of the company's localized requirements. My review of the documents show the issues were often reported by customers with operations in multiple countries with different support requirements depending on location.

A localized software system would require knowledgeable people on the specific system which Oracle appears not to have provided in some instances. I listed the customers that met this criterion in Appendix E-4.

11.3.11. No Intent to Upgrade

I included customers in this pool if they planned to stay on the current version of the application and not upgrade. If the customer was not planning on upgrading, then any enhancements or

additional functionality incorporated into the future releases would have little or no value to the customer. Therefore, especially if the installation was stable and adequately managed by in-house staff, there was little incentive to retain Oracle support because the customer would not need any of the upcoming upgrades. I listed the customers that met this criterion in Appendix E-4.

11.3.12. No Value

I included customers in this pool if they stated support provided no value or benefit to the customer. For example: the customer decided it would not upgrade in the future (or if it did, it would maintain its own systems until the upgrade and use the saved support fees to pay for a new license); the customer did not find the support provided to be helpful; the customer's internal staff could handle support and a number of other instances in which the customer referenced no value in the support offering. I listed the customers that met this criterion in Appendix E-4.

11.3.13. Non-Specific Evaluation

Mr. Meyer argues that TomorrowNow was the reason customers left Oracle; however, TomorrowNow was only one of many available third-party support vendors. I included customers in this pool if they expressed interest in other support vendors and acted upon that interest by evaluating other vendors.

This pool is similar to the service evaluation pool, but is for customers whose evaluation is less defined (e.g., customers that expressed interest in or considered unnamed third-party support vendors other than TomorrowNow).

I listed the customers that met this criterion in Appendix E-4.

11.3.14. Older or Stable Release

I included customers in this pool if they had been on their current release for some time. I considered a release to be stable when it had been available for an extended period and was widely used without significant problems i.e., most, if not all, of the bugs in the software when originally issued had been fixed. Because such releases require little support, the value of vendor support is reduced, becoming less of a necessity and more of an expensive security blanket. I listed the customers that met this criterion in Appendix E-4.

11.3.15. Other Support Vendor

I included customers in this pool if they went to or considered the option of going to a different third-party support vendor after they terminated TomorrowNow or while they were at TomorrowNow. A customer moving to another third-party support vendor after leaving TomorrowNow suggests the customer would have left Oracle for a third-party support vendor even if TomorrowNow had not existed. I listed the customers that met this criterion in Appendix E-4.

11.3.16. Poor Service

I included customers in this pool if they expressed dissatisfaction with the level of service or if they complained that cases were not corrected promptly or properly. The documents show that one common frustration customers expressed was that a case they had raised had been closed because the fix would be included in the next release of the software.[1064] If a customer had no intention of upgrading in the future, the existence of a fix in the next release would be of no use and may even anger the customer because the support they paid for was not forthcoming.

Other commonly occurring issues customers noted were: support personnel who could not handle the customer's case(s); support personnel who did not speak the native language; cases being closed without the customer's consent or concurrence; and Oracle not being able to resolve a case. I listed the customers that met this criterion in Appendix E-4.

11.3.17. Poor TomorrowNow Support (List of 86 Customers Only)

The essence of Mr. Meyer's analysis is that TomorrowNow *caused* some TomorrowNow customers to purchase SAP applications (in other words, absent TomorrowNow these customers would not have chosen the SAP applications) they licensed. However, the evidence shows that certain customers had a negative experience with TomorrowNow, which could not reasonably be argued to have caused the SAP purchase (more likely, the bad experience would be a source of irritation and negativity for the customer).

Accordingly, I included customers in this pool if they were dissatisfied with their TomorrowNow support or ended their TomorrowNow support prematurely due to quality of support concerns. I listed the customers that met this criterion in Appendix E-4.

11.3.18. Price Increases

I included customers in this pool if they had frequently complained about price increases. In addition, the way the PeopleSoft contracts were written resulted in misunderstandings at the customer level because what was called a 'cap' on price increases in the contract was generally applied across the board and became the de facto price increase. Therefore, rather than representing a maximum price increase the annual cap also represented a minimum; a fact several customers angrily pointed out to PeopleSoft.[1065]

When Oracle acquired the PeopleSoft customers, it continued to apply annual uplifts to the support contracts in order to move the support price closer to 22% of then-current pricing that

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[1064] Oracle email from Mary June Dorsey to Paul Brook. February 6, 2007. Heads up from JB Hunt call on February 2, 2007; ORCL00087417-418, at -417. Oracle email from customer Gwen West to Marty (Nagel) Dollinger. November 16, 2005. Subject: FW: errors with OSHA pagch – 3974548; ORCL00490344-346, at -344.

[1065] Oracle email from Danna Davis to Rick Cummins. April 28, 2006. Subject: National Dairy P-04-04449-000- -3; ORCL00186027-028, at -027. "PeopleSoft Executive Summary." September 1, 2006; ORCL00273902-904, at -903.

was the Oracle support standard.[1066] As a result, customers might then consider seeking alternative solutions to their support needs.

The law of supply and demand, and the realities of the changes in the national economic situation from 2005 through 2008 suggest that significant support price increases would drive most customers to reconsider support costs and some of them to terminate support. Such an outcome would be most likely to occur when the cost was already under scrutiny by senior management or budget constraints had reared their head. I listed the customers that met this criterion in Appendix E-4.

11.3.19. Product Direction

I included customers in this pool if they were unhappy with the future 'direction' of the applications they had licensed. If a customer was concerned with the future of its application software, it would tend to remain on its current release, especially if it was a stable installation, or migrate to a non-Oracle product which would obviate or eliminate the need for Oracle support. Other examples of customers in this pool are customers that: expressed concern that promised functionality would not be incorporated into future versions; worried that no additional enhancements or upgrades were going to be provided for a particular application; or became worried that they had an orphan system that Oracle would not support in the future. I listed the customers that met this criterion in Appendix E-4.

11.3.20. Product Limitations

I included customers in this pool if they stated a degree of dissatisfaction regarding the applications they had licensed. Some examples of disgruntled customer complaints in relation to this pool involve: customers being unhappy with the current functionality of their software, the product being too robust for a particular company's needs or general dissatisfaction with the product's performance. Customers that were dissatisfied with their product would be likely to evaluate other product lines as replacements for their current product set. Once a customer decided to move off its current software, it would have had no incentive to fund further developments of that product with its support dollars and would likely pursue alternative support solutions. I listed the customers that met this criterion in Appendix E-4.

11.3.21. Retired Releases

One of the downsides of the Oracle support was their retiring release schedule. Each software release has a retirement date by which support changed. For example, as a general rule, three support variations were made over time: Premier Support, Extended Support and Sustaining Support.

When first issued, a release would be supported on Premier Support (a full support package). At a predetermined date, the release would retire and move to Extended Support—for an additional

[1066] "Executive Summary." October 20, 2005; ORCL00270586-590, at -588. Oracle email from David Carey to Angela Stout. November 14, 2006. Subject: FW: Question re: DRC PeopleSoft Support for Karen R.; ORCL00011305-309, at -308. "Oracle's OpenWorld Event – Day Three: About-Face." September 21, 2005; SAP-OR00078501-503, at -502. Oracle email from Rick Cummins to OSSINFO – Kirsten. May 30th, 2006.Re: RE: Urgent – Revised Exec Summary for Voith Fabrics; ORCL00186170-171, at -170.

fee—the customer had all of the components of the Premier Support offering with the exception of certification with third party products. However, often the cessation of updates, fixes, tax and regulatory updates occurred prior to the end of the Extended Support period. So if a customer needed these items, they would have to pay the additional fee for Extended Support. Many releases did not even have the Extended Support option. At a later date, the release would move to Sustaining Support, which did not include any new fixes, tax and regulatory updates or certification with other products.

As a release was retired and moved into a different phase of support, the extent of the support declined and the cost of support increased. Needless to say, many customers found Oracle's policy frustrating and unfair.

After the acquisition of PeopleSoft and Siebel by Oracle, many customers were disenchanted with Oracle because they would be forced to pay annual support fees while at the same time they were nervous about the future of the product lines into which they had invested so much time and money. Oracle's published retirement dates were perceived by customers as being short and were not well received. Oracle attempted to remedy their customers' dissatisfaction by launching Applications Unlimited and Lifetime Support which extended the PeopleSoft, J.D.Edwards and Siebel retirement dates. Even so, many customers felt that their products' lifespan had been reduced so they would be paying more support fees while receiving less support. TomorrowNow provided a solution to the customers' quandary because they specialized in supporting older releases. I listed the customers that met this criterion in Appendix E-4.

11.3.22. SAP Functionality

I included customers that purchased SAP for its functionality in this pool. This pool is slightly different than the disgorgement exclusion pool of specific functionality because this pool does not require a named functionality. Customers may have chosen SAP because it was the best overall fit for the customer's needs. Therefore, the functionality of SAP's product best met the customer's needs. Accordingly, the customer should be excluded from the damages claim. I listed the customers that met this criterion in Appendix E-4.

11.3.23. SAP Relationship

I included customers in this pool if they had a prior relationship with SAP outside of the interactions that occurred after the customer contracted with TomorrowNow. If a customer had a prior purchase history with SAP, then subsequent purchases of SAP software were likely the result of the prior relationship rather than the existence of, or interactions with, TomorrowNow. Customers were also included in this pool if they had senior management that had experience with, or a preference for, SAP due to prior SAP relationships. Customers with strong prior ties to SAP would be more inclined to pursue their relationship with SAP further and to purchase additional products from SAP. I listed the customers that met this criterion in Appendix E-4.

11.3.24. Self-Support

I included customers in this pool if the evidence indicated the customer was capable of and considered self-support as an alternative to Oracle support prior to contracting with TomorrowNow. If the customer could handle cases internally, the value of vendor support is

reduced, and may be a double payment (paying once for a competent in-house staff and again for Oracle support). I listed the customers that met this criterion in Appendix E-4.

11.3.25. Service Level

I included customers in this pool if they expressed dissatisfaction that Oracle's support level was declining. Evidence of declines included comments from customers that service levels declined after an acquisition. For example, J.D.Edwards' customers stated that after PeopleSoft acquired J.D.Edwards, service was not as good as their previous experience.[1067] J.D.Edwards and PeopleSoft customers also complained that Oracle's service was worse than PeopleSoft support had been.[1068]

When Oracle retired a release or a release transitioned to a different level of support, customers often perceived a decline in service coupled with an increase in support fees for that application. Therefore, the customer's decision to terminate Oracle support was unlikely to be related to the Alleged Actions. I listed the customers that met this criterion in Appendix E-4.

11.3.26. Uses Little or No Support

I included customers in this pool if they placed few (or no) support calls or logged few (or no) cases. Customers that did not use support services for their system problems (perhaps because they were on an old stable release or their in-house staff was able to manage on the system internally) often also fit into several of the other categories mentioned in this section. Many of these customers felt there was little or no value in Oracle support (e.g., they were paying a large fee for a service they used little or not at all). Such customers would likely search for alternative support options that would provide acceptable service for a lower cost. I listed the customers that met this criterion in Appendix E-4.

11.4. Joint Exclusion Criteria

Although the list of exclusion criteria is not comprehensive, they are instructive as to damages. As I stated previously, I did not exclude any customer from the lost profits damage analysis because of any single Possible Exclusion Criterion. However, I determined there was sufficient evidence that a termination was not caused by the Alleged Actions if customers exhibited certain *combinations* of the Possible Exclusion Criteria. My methodology was to exclude a customer if the customer had reason to *consider* terminating Oracle support (as evidenced by certain Possible Exclusion Criteria), and *acted* upon such consideration by evaluating the alternatives to Oracle support. I refer to the combination of Possible Exclusion Criteria that *do* allow an exclusion determination as "Joint Exclusion Criteria" because together they are sufficient to exclude a customer from the Lost Profits damages analysis.

The combinations of Possible Exclusion Criteria that show a customer terminated Oracle support for reasons other than the Alleged Actions are:

1067 Oracle email from Barbry McGann to Teck Wee Lim. March 17, 2005. Re: FW: StarHub call brief and follow-up items - Jim Patrice, Rich holada [sic] and Kari Dimler - I need your help; ORCL00502032-034, at -032.

1068 ORCL00361000-003, at -000.

1. Non-specific evaluation OR Self-support AND
2. At least one of the following:
    a. Customized
    b. Dislikes Oracle
    c. Dissatisfied customer
    d. Financial distress
    e. No intent to upgrade
    f. Older or stable release
    g. Poor service
    h. Uses little or no support

When the Joint Exclusion Criteria are met, the evidence indicates that the Alleged Actions were not the cause of the termination of Oracle support. Considered from Oracle's point of view, at a minimum, when the Joint Exclusion Criteria are met, Oracle cannot prove that the Alleged Actions caused the customer to terminate Oracle support and Mr. Meyer should exclude them from his lost profits analysis.

I have accumulated, and added to my report, a vast amount of detail regarding the customers' reasons for leaving Oracle. Because the data show that certain customers contracted with TomorrowNow for support for numerous reasons other than the Alleged Actions, Oracle did not suffer any loss of profits as a result of the Alleged Actions for these customers and the customers exhibiting the Joint Exclusion Criteria should be excluded from the damage calculations. I listed the customers that met the Joint Exclusion criteria in Appendix E-5.

11.5. Summary

Appendix E-1 shows the customers I excluded because (a) the evidence shows they terminated Oracle support for reasons other than the Alleged Actions or (b) the evidence is not sufficient to prove that the customer terminated Oracle support and contracted with TomorrowNow for support as a result of the Alleged Actions.

12. Disgorgement of SAP Profits

The remedies for a successful plaintiff's copyright infringement claim include disgorgement of the profits defendants earned as a result of the Alleged Actions ("Disgorgement"), provided they

> of overhead costs and conforms more to the legal standard of using costs that would not have been incurred but for the infringement.[1093]

Accordingly, I analyzed SAP's produced financial information using regression techniques to determine the fixed versus variable expense components in order to determine the deductible expenses to apply to the relevant revenues.

12.2.1. Regression Analysis

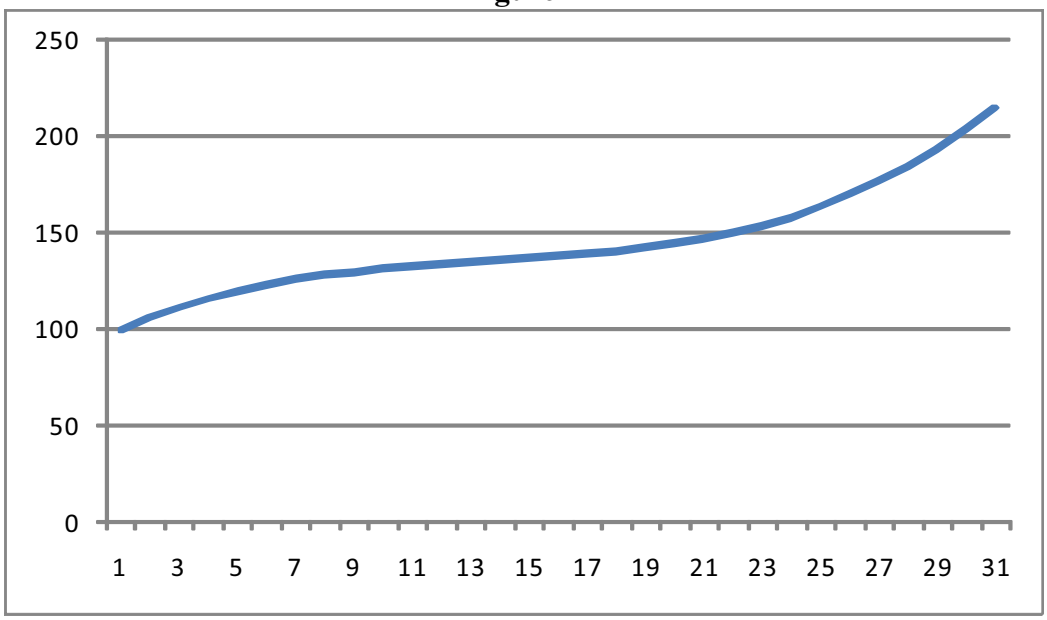
SAP's total costs include variable costs and fixed costs. The fixed costs are the costs the firm incurs regardless of the level of sales and variable costs change with the level of sales.

In the long run, all costs are variable.[1094] Theoretically, the total cost function is a multivariate non-linear equation[1095] in the form of:

$$TC = a + b_1Q + b_2Q^2 + b_3Q^3$$

Where: TC represents total cost; the intercept 'a' theoretically represents fixed costs; Q is the level of output; and the 'b' coefficients represent measured constants (see Figure 1 below).

Figure 1



[1093] Weil, Roman L., et al. *Litigation Services Handbook: The Role of the of Accountant as Expert*. 2nd ed. New York, NY: John Wiley & Sons, Inc., 1995, pages 33.9-33.10.

[1094] For example, in the case of a manufacturing operation, even the plant becomes a variable expense if production demands exceed capacity or if the level of demand no longer requires such a large facility.

[1095] Most basic microeconomic textbooks describe the total cost curve as a simple linear function in the form of TC = a + bQ which may be a reasonable fit in the short run. Note that the total cost curve is close to a linear function after the initial (fixed cost) start up period (see graph in the range of Q = 9 to Q = 20).

12.2.2. Regression Analysis to Apportion Fixed and Variable Costs

I assume that as revenues increase costs also increase. In practice it is not always possible to identify which of the cost categories tracked in the accounting records are fixed and which are variable. Therefore, I performed a regression analysis to allow discrimination between the two.

To estimate the fixed and variable components of total SAP costs I used single variable nonlinear regression analysis. The functional format I employed was a double log model using the natural logarithm (Ln). My specific equation was:

$$\text{Ln(Total Cost)} = \text{Ln}(a) + (b)\text{Ln}(x) \text{ (where } x = \text{ revenues)}$$

My equation above differs from a simple linear regression (i.e. TC = a + bx) in that it calculates the statistical relationship between costs and revenues using a double log format. Double log models to measure nonlinear relations and incremental changes (i.e., elasticities) are well suited to my current purpose. I considered other functional formats and determined my double log model provided the best fit for the SAP cost data. Given the functional format I used, fixed costs are approximated by the 'a' coefficient and the expected variable cost is estimated using the 'b' coefficient.

I analyzed quarterly costs and revenues for SAP subsidiaries with 2002 to 2008 data setting the dependent variable as total cost and the independent variable as total revenue.[1096] In all, this approach allows for 448 observations in my model and would typically be referred to as "pooled" cross-section/time series analysis (or panel data). I selected the 2002 to 2008 period to increase the number of observations and improve the accuracy of my model and to determine whether there is a fundamental change in the relationship between costs and revenues in the (alleged) "pre" and "post" period of disgorgeable revenues.[1097] My model is designed to apportion the fixed and variable costs on a percentage basis (i.e., I did not directly estimate the fixed and variable dollar amounts before and after the relevant period). Prior to estimating my regressions, I adjusted all dollars for inflation using the U.S. CPI (1982-1984 base year) as reported by the Bureau of Labor Statistics.[1098]

[redacted]

1096 This includes the U.S. (multiple subsidiaries), Germany (multiple subsidiaries), Japan, France, Switzerland, Canada, Netherlands, Italy, Australia, Singapore, Sweden, New Zealand, and Croatia.

1097 Appendix M-5. and Appendix M-9 (Figure 1).

1098 <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt>.

1099 [redacted]

I checked for the effect of autocorrelation in the regression using a Durbin-Watson test.[1100] The Durbin-Watson statistic of 2.07 showed my model was not affected by autocorrelation. The result of my regression is shown in Appendix M-9 (Figure 1).

[redacted]

1100 The Durbin-Watson statistic is explained in *Applied Statistics for Public Policy,* Macfie and Nufrio, p. 471.
1101 [redacted]
1102
1103

[redacted]

12.2.5. SAP Variable Expense Conclusion

Based on my analysis of the data, I determined that there is a substantial portion of variable expense embedded in the "below-the-line" accounts maintained by SAP (and Oracle). I have, therefore, included adjustments to the overall profitability of each company to reflect the variable component of total costs. The effect of my inclusion of the variable component of cost is shown in the analysis of each company's results for Lost Profits and Disgorgement.

12.3. SAP Disgorgement Damages

I calculated disgorgement damages as follows:

1. Used SAP Revenue Report for the List of 86[1105] to determine the total revenues earned by SAP from the 86 SAP customers from 2002 through 2008.

2. Excluded revenues earned prior to SAP's acquisition of TomorrowNow to arrive at total SAP revenues for the List of 86 from 2005 through 2008.[1106]

3. Excluded revenue related to BOBJ.[1107]

4. Excluded revenues earned prior to each of the customers' TomorrowNow support start date to arrive at total relevant revenues for the List of 86.[1108]

5. Excluded revenue related to Ongoing Revenue.

1104 [redacted]

1105 Including Nextiraone Europe B.V. and Nextiraone Management, S.A.S, which Mr. Meyer omitted from his calculation of disgorgement damages.

1106 [redacted]

1107 Appendix N-7.

1108 [redacted]

6. Excluded revenues related to the customers excluded by Mr. Meyer on Schedule 42.SU as well as those customers that should have been excluded for other reasons, as described elsewhere in this report.

7. Applied annual relevant margins for the remaining revenues according to the "functional area" and "company name" from the revenue report.

8. Added interest at an appropriate risk free rate to compensate Oracle for the delay in receiving profits.[1109]

The three customers[1110] from the List of 86 that I have not excluded spent [redacted] on purchases of applications, support and other services,[1111] which resulted in disgorgeable profits of $3.9 million and disgorgement damages of $4.3 million after interest, as shown in the table below:

Summary of Disgorgement of SAP Profits[1112]	
Total revenues from 2002 – 2008	[redacted]
Excluding revenues prior to the acquisition	[redacted]
Excluding BOBJ revenues	[redacted]
Excluding revenues prior to the TN start date	[redacted]
Excluding Ongoing Revenues	[redacted]
Excluding revenues for excluded customers	[redacted]
After applicable relevant margins	$3,862,031
After interest	**$4,344,212**

1109 I applied a risk-free interest rate from the mid-point of the year in which the revenues were earned through the estimated trial end date of December 10, 2010 (six weeks after the trial start date of November 1, 2010). I matched the number of years from the mid-point of each year through December 10, 2010 to the Federal Reserve treasury constant maturities as shown on Appendix N-8.

1110 Of the three remaining disgorgement customers [redacted] one of them [redacted] earned a Safe Passage credit (which at least suggests it was a Safe Passage customer - I have been unable to determine whether the other three customers were Safe Passage). Any significant concessions as part of a Safe Passage deal would have reduced the margins which would indicate lower, rather than higher, profits on Safe Passage deals.

1111 Appendix N-1.

1112 From Appendix N-3 and Appendix N-1.

2. For the Plaintiff entity specific approach, Mr. Meyer determines his profit margin by deducting certain expenses from Oracle's lost support revenue based on a combination of:

   a. Oracle's intercompany license agreements ("ILA") fees ("Sublicense Fees") and

   b. Applicable incremental costs ("Incremental Costs").

I address Mr. Meyer's profit margin calculations for each of his scenarios below. I made corrections to any errors I found in Mr. Meyer's calculations.

14.8.1. Relevant Margin for Oracle Organization as a Whole

As I stated earlier, Oracle Corporation is not a plaintiff in this matter. However, I have the following comments on the profit margins Mr. Meyer uses.

Mr. Meyer applies an 85% profit margin to lost support revenues prior to 2005 and 90% to lost support revenues thereafter. Mr. Meyer bases his 85% profit margin on "publicly filed financial statements."[1214] According to the Meyer Report, the "License Updates and Product Support" expenses represent costs directly incurred in providing support and making support sales, and include expenses associated with software support delivery, support renewal sales efforts (including salaries, benefits, commissions, etc.), and support operations (including the support organization's administrative office), as well as royalties paid on sales of third-party products.[1215] Mr. Meyer argues that these costs would tend to overstate actual expenses because they include costs that would not be expected to vary with the small volume of customers (2% of customer base and 0.5% of annual support revenue),[1216] as well as being higher as a result of the actions taken to combat the TomorrowNow support offering.[1217] Although I have done my own analysis of costs, which I present later in this report, I comment on Mr. Meyer's cost analysis here.

At times, Mr. Meyer paints a picture of the devastating impact that TomorrowNow had on Oracle's business and claims damages well into the billions of dollars by assuming up to 3,000 customers would have migrated their applications to SAP and TomorrowNow. However, in this section of the Meyer Report, he suggests the insignificance of the customers lost to TomorrowNow, both from a total customer base and support revenue point of view. It seems that depending on the purpose of his argument, Mr. Meyer plays up or plays down the effect Defendants had on Oracle's business. Either the effect of the Alleged Actions was devastating on Oracle or it was of little consequence but it cannot be both (my analysis shows the effect was not at all devastating as I describe later in this report).

Mr. Meyer ignores any allocation of overhead to support revenue. Mr. Meyer justifies his reasoning for excluding the overhead allocation as: [1218]

1214 Meyer Report, page 255, paragraph 414.
1215 Meyer Report, pages 253-254, paragraph 412.
1216 Meyer Report, page 254, footnote 766.
1217 Meyer Report, pages 254-255, paragraph 413.
1218 Meyer Report, page 255, footnote 769.

> As indicated in Oracle's Form 10-K disclosures, these gross margin amounts reflect the direct costs and expenses associated with providing software updates and support services; they do not include allocations for research and development, marketing, general and administrative, amortization of intangible assets, restructuring charges or stock-based compensation expense [See, e.g., Oracle Corporation Form 10-K for the Fiscal Year Ended May 31, 2007 (Guner Exhibit 31), pg. 103]. Those types of costs and expenses excluded from Oracle's reported gross margins are not relevant for purposes of this analysis, as they are not costs that would be incremental to Oracle making an additional support renewal sale. Additionally, they are not costs that Oracle considers when measuring its support business [Deposition of Corey West, April 9, 2009, pgs. 110-113].

Based on my review of Oracle's financial information Mr. Meyer's assertion is wrong. I performed a statistical analysis[1219] to show that many expenses that are below the gross margin line do in fact vary with the level of support revenue. In addition, as previously stated, Oracle's published financial statements include language specifically stating that the gross margin reported is not net of all expenses incurred to generate the gross margins.

My statistical analysis compares Oracle's quarterly total revenues (independent variable) to quarterly total operating expenses (dependant variable) for the quarter ended August 1996 through August 2009. In order to eliminate any factors of inflation in the data, I transform the data into real dollars by using the All Urban Consumer's Consumer Price Index as reported by the United States Bureau of Labor Statistics.

14.8.2. Plaintiff Entity-Specific Approach

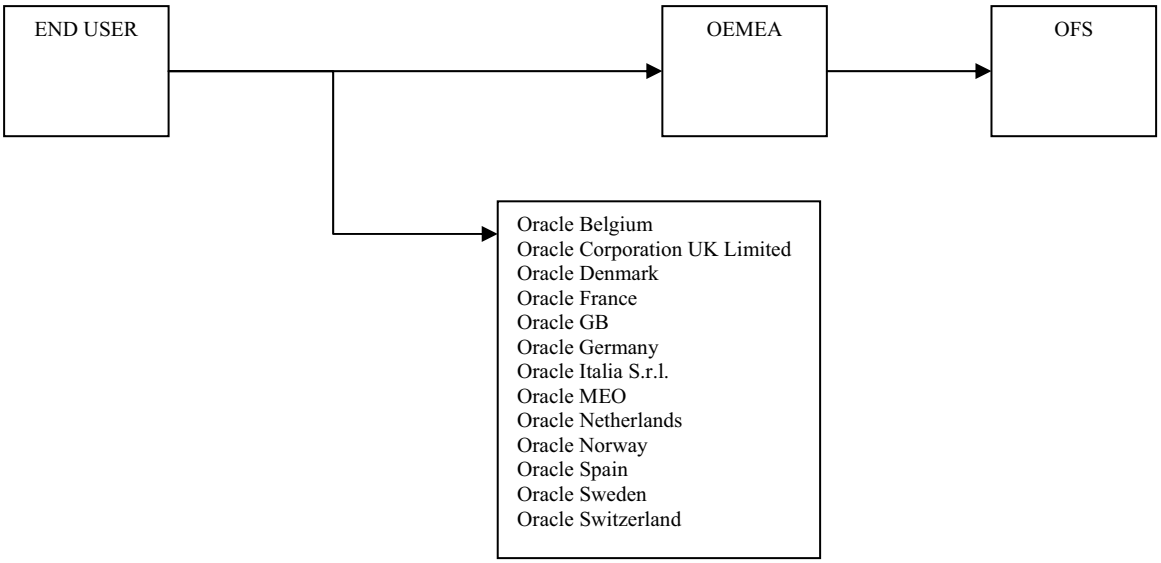
In addition to the profit margin Mr. Meyer applies to Oracle Corporation, Mr. Meyer also applies a profit margin to each of the Plaintiffs. Mr. Meyer separates the Sublicense Fees and Incremental Costs in his profit margin calculation.

14.8.2.1 ILA and Sublicense Fees

Oracle is divided into various entities delineated by factors such as reporting relationships, geographic regions and the right to receive a share of certain revenues. Oracle has Sublicense Fees between entities for the purpose of sharing revenue and costs. Mr. Meyer includes the Sublicense Fees paid from one entity to the other as a component of the cost margin for each of the Plaintiffs but claims that "an inter-company charge…is not relevant to the incremental cost to service a customer."[1220] However, inter-company charges, which are based on a percentage of revenues earned by each entity, are a direct incremental cost. If inter-company charges are

1219 I utilized the same regression analysis techniques that I explained in the disgorgement of SAP profits section of this report.

1220 Meyer Report, page 259, footnote 782.



Mr. Meyer deducts the Sublicense Fees of 39% paid to OFS by OEMEA through July 2008 and 56% thereafter from Lost Support Revenues.[1223] Based on my review of the ILAs, I apply Sublicense Fees in a similar manner to Mr. Meyer as shown in Appendix W-11.

14.8.2.5 Siebel

Based on my review of customers that had contracted with Siebel ("Siebel Customers"), all of the Siebel Customers had license agreements with an Oracle entity at the time of cancellation and cancelled in the Post Transaction Period.[1224] Any intercompany license agreements that may have existed between Siebel and any Oracle entities are irrelevant to calculating a relevant margin for Siebel Customers because the Siebel customers were making payments to OUSA at the time of cancellation.

14.8.3. Costs

Mr. Meyer stated that he deducted the incremental cost that would have been incurred by Oracle if it had generated the lost revenues he calculated. I concur that deduction of relevant costs is appropriate when computing lost profits on the basis of lost revenues. However, I do not agree that Mr. Meyer quantified the deductible expenses correctly.

Mr. Meyer bases his cost calculation for each of the named Plaintiffs[1225] on the Product Support & License Updates line of business detailed income statements for various Oracle entities ("Cost Source").[1226] The Cost Source is an Oracle profit and loss statement for the "Product Support &

1223 Meyer Report, page 262, paragraph 428.

1224 It appears CSBP Limited had an agreement with Siebel Systems Australia at the time of cancellation. However, I include it under Oracle Australia, for purposes of this report. Pomeroy IT Solutions had an agreement with Siebel Systems, Inc. However, I include it under OUSA for purposes of this report.

1225 Meyer Schedules 38.2, 39.2 and 40.2.

1226 DIS_SUPPORT-TOTAL_110909-ORCL00694040. The entities included in the Incremental Cost Source include: USA, US Eliminating, Israel (Old), China Fiscal Recharges, PeopleSoft US, Oracle International

License Updates" line of business for eleven Oracle entities. As such, the Cost Source should detail all of the revenues and expenses associated with support revenue. Mr. Meyer calculates his cost margin by dividing operating expenses and certain other charges by total revenues,[1227] but he does not perform a detailed analysis of all the costs incurred by Oracle and how they may vary with support revenue. Instead, he assumes the reported gross margin for Oracle's "Product Support & License Updates" line of business includes all the costs that are incurred to generate revenue in that category. However, Oracle does not charge the "Product Support & Licenses Updates" line of business certain *overhead* charges because they are generally treated as below the line expenses for reporting purposes. However, my analysis shows some of the expenses below the line vary with the level of support revenues. Consequently, Mr. Meyer's profit margins by entity are overstated.

The proper expenses to deduct are those that vary with the level of revenue because there is no way for Mr. Meyer (or anyone else) to determine the particular expenses Oracle would incur in the future to support the lost customers if they were still with Oracle. Therefore, consideration of the applicable deductible expenses should include analysis of which expenses vary with the level of revenue.

In order to determine the appropriate relevant margin to be applied to Lost Support Revenues for each of the Plaintiffs, I performed a regression analysis (similar to the analysis I used to determine SAP's relevant margin), comparing Plaintiff's cost and revenues.[1228] However, instead of using a double log regression, I utilized a zero intercept regression technique, which I explain below.

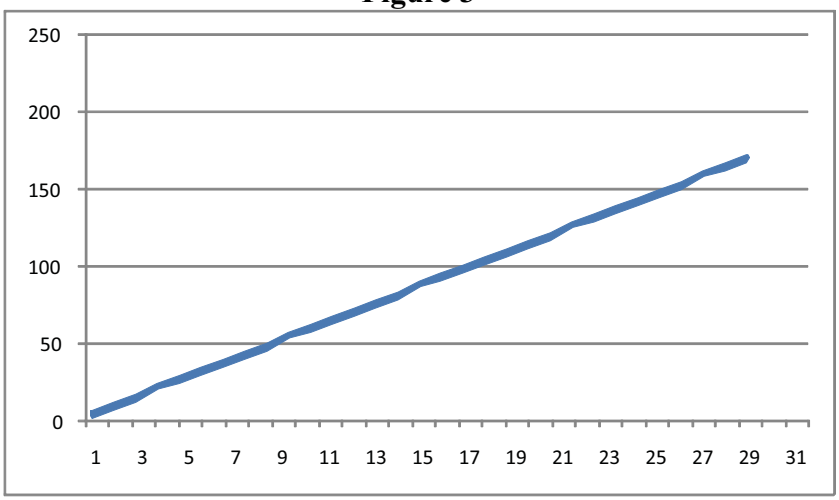
Because I was limited to fewer observations with OUSA and OEMEA, and the data exhibits a more linear pattern than the SAP data, intercept values resulting from a double log regression do not have any practical meaning. To address this issue I first estimate the slope (i.e. the 'b') of the variable cost function (VC = a + bQ) using a **zero intercept technique**.

Corporation, Latin America Fiscal Recharges, Siebel Systems Inc., Ireland - OEMEA Ltd, Oracle EMEA Ltd., OEMEA – US.

1227 See Meyer schedules 38.2, 39.2, 40.2.

1228 Various spreadsheets: ORCL00570176.

Figure 3



This function is illustrated in Figure 3 and approximates a linear function from the origin. I then use the 'b' coefficient to estimate total variable costs (*i.e.*, b * average revenue = variable cost). Fixed cost is what remains after subtracting variable cost from average total cost (see Excel regression output in Appendices U-2 and U-3).

Subtracting the calculated variable portion (*i.e.*, b * average revenue) from the average total cost yields average fixed costs.

I analyze quarterly revenues and costs produced by Oracle for the fiscal years 2006 through the first half of 2009 for OUSA and OEMEA.[1229] In my analysis, I analyze the total costs (the dependent variable) against total revenues (the independent variable). I utilize a zero intercept regression model to *apportion* the fixed and variable costs on a percentage basis (to determine a percentage margin) and not to directly estimate the fixed/variable dollars for each period.

I allocated the variable costs by line of business on a pro-rata basis based on revenue. According to Darron Knox, Oracle Director of Finance for Support Line of Business, revenue distribution was an acceptable estimate for allocating expenses to product lines.[1230]

A summary of my analysis, including the appropriate relevant margins to be applied to lost support revenue for the Plaintiffs is detailed in Appendices U-2 and U-3.

14.8.3.1 OUSA

Mr. Meyer applies a profit margin of 85% for the period prior to Oracle's purchase of PeopleSoft based on "PeopleSoft's historical profit margins on support."[1231] Mr. Meyer references an

[1229] Because OIC's revenue is generated from the intercompany license agreements, it does not incur many expenses, and the expenses it does incur are relatively small. Therefore, I have not analyzed the relationship between OIC's revenues and expenses using regression analysis.

[1230] Darron Knox deposition dated November 11, 2009, page 40.

[1231] Meyer Report, page 256, paragraph 414.

internal valuation of Oracle as the source for the 85% profit margin for PeopleSoft.[1232] However, Mr. Meyer did not verify the basis of his 85% profit margin. Additionally, it is likely that Mr. Meyer's 85% profit margin is a gross margin and does not include any allocation of overhead, which would result in an overstatement of Lost Profits.

For the purposes of my analysis, I apply the relevant margin I calculated for OUSA to the period prior to Oracle's purchase of PeopleSoft (it is reasonable to assume that the cost structure of PeopleSoft and OUSA are similar).

For the period after Oracle's purchase of PeopleSoft, Mr. Meyer bases his calculation on total operating expenses plus other income and expense items, line of business charges and uncontrollable costs, divided by the total revenues for the "5 company codes" by quarter beginning June 2005 and ending November 2008 as reported in OUSA's "Product Support & License Updates" profit and loss statement, to determine an average gross profit margin associated with OUSA of 92%.[1233] Again, Mr. Meyer fails to consider an appropriate allocation of overhead costs incurred by OUSA.

I perform a detailed analysis of *all* revenues and costs to determine which costs are variable, which I discuss below.

OUSA appears to consist of five separate company entities.[1234] Mr. Meyer cites discussions with Claire Sebti as the rationale for grouping the five separate company codes into OUSA, and I accept Ms. Sebti's explanation for purposes of my analysis.

Revenue Categories

In order to determine the relevant total revenues associated with OUSA, I analyzed the "Total Revenues" as reported in OUSA's profit and loss statement along with "Intercompany Charges" reported as income and/or revenue. I exclude Sublicense Fee revenues reported in OUSA's profit and loss statement, because I already account for Sublicense Fees through my application of the relevant ILAs. Additionally, I exclude any revenues associated with "Other Items", "Intercompany Charges – Acquired Companies" and "Intercompany Charges - Purchase Accounting", because they are not part of the ordinary course of business for OUSA.

Cost Categories

Mr. Meyer only considers certain cost accounts as reported in the OUSA Product Support & License Updates line of business. He fails to take into account overhead costs incurred by OUSA in the process of generating support revenues. Therefore, I analyze "Total Operating Expenses" as reported in the OUSA quarterly profit and loss statements along with all "Other Expense", "LOB Charges" and "Intercompany Charges" reported as an expense. I exclude Sublicense Fee expenses reported in OUSA's profit and loss statement, because I account for Sublicense Fee expenses through my application of the relevant ILAs. Additionally, I exclude

[1232] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004." ORCL00313160-253, at -189.

[1233] Meyer schedule 38.2.

[1234] 001-USA, 007-Israeil (Old), 01A-US Eliminating, 10Q-China fiscal recharges, and P01-PeoplsSoft US.

any expenses associated with "Other Items", "Intercompany Charges – Acquired Companies" and "Intercompany Charges - Purchase Accounting", because they are not part of the ordinary course of business for OUSA.

[redacted] I perform a qualitative review of OUSA's cost accounts to check the reasonableness of my regression analysis and I conclude that OUSA's expenses are indeed variable. For example, employee related expenses, which I would expect to fluctuate with the level of revenues earned, account for most of the total expenses.

14.8.3.2 OIC

Mr. Meyer bases OIC's profit margin on the expense items "'Intercompany License Sublicense Fee Expense,' 'Intercompany Technology Costs Expense' and the 'Line of Business (LOB) Charges'"[1235] as reported in the OIC's "Product Support & License Updates" profit and loss statement. Mr. Meyer concludes that a 95% profit margin is an accurate reflection of the costs incurred by OIC to generate inter-company revenues from lost support revenue. Based on my review of OIC's profit and loss statement for all lines of business, I conclude that minimal levels of expenses are incurred by OIC and I therefore accept Mr. Meyer's profit margin of 95%.

As I discuss earlier, Mr. Meyer claims OIC is entitled to Lost Profits associated with OTC and ORC.[1236] Although I do not agree with Mr. Meyer's inclusion of Lost Profits related to OTC and ORC, I apply OIC's relevant margin to OTC and ORC's Lost Revenues to arrive at Lost Profits for the purpose of this report, should they be deemed relevant.

14.8.3.3 OEMEA

Mr. Meyer claims "[t]he OEMEA legal entity is represented in Oracle's accounting system by three company codes."[1237] Mr. Meyer bases his calculation on total operating expenses plus various intercompany expenses, divided by the total support revenues plus various intercompany and contra revenues for the "three company codes" by quarter beginning June 2005 and ending November 2008, to determine an average cost margin associated with OEMEA of 20% or alternatively a profit margin of 80%.[1238] Again, Mr. Meyer failed to consider applicable overhead costs incurred by OEMEA in the process of generating Lost Revenues.

I perform a detailed analysis of *all* revenues and costs and determine which costs are variable, as discussed below.

OEMEA consists of three separate company entities.[1239] I again accept Ms. Sebti's explanation for the purpose of my analysis.

1235 Meyer Report, page 264, paragraph 431.
1236 Meyer Report, pages 251-252, paragraph 408.
1237 Meyer Report, page 260, paragraph 424.
1238 Meyer Schedule 39.2.
1239 06C - OEMEA – US, 031 - Ireland - OEMEA Ltd, and 038 - Oracle EMEA Ltd.

Revenue Categories

In order to determine the relevant total revenues associated with OEMEA, I analyze the "Total Revenues" as reported in OEMEA's profit and loss statement along with "Intercompany Charges" reported as income and/or revenue. I exclude Sublicense Fee revenues income reported in OEMEA's profit and loss statement, because I already account for Sublicense Fee income through my application of the relevant ILAs. Additionally, I exclude any revenues associated with "Other Items", "Intercompany Charges – Acquired Companies" and "Intercompany Charges - Purchase Accounting", because they are not part of the ordinary course of business for OEMEA.

Cost Categories

Although Mr. Meyer only considers certain cost accounts as reported in the OEMEA Product Support & License Updates line of business, he fails to take into account overhead costs incurred by OEMEA in the process of generating support revenues. Therefore, I analyze "Total Operating Expenses" as reported in the OUSA quarterly profit and loss statements along with all "Other Expense", "LOB Charges" and "Intercompany Charges" reported as an expense. I exclude Sublicense Fee expenses reported in OEMEA's profit and loss statement, because I already account for Sublicense Fee expenses through my application of the relevant ILAs. Additionally, I exclude any expenses associated with "Other Items", "Intercompany Charges – Acquired Companies" and "Intercompany Charges - Purchase Accounting", because they are not part of the ordinary course of business for OEMEA.

[redacted] I perform a qualitative review of OEMEA's cost accounts to check the reasonableness of my regression analysis and I concluded that OEMEA's expenses are indeed variable. For example, employee related expenses, which I would expect to fluctuate with the level of revenues earned, account for most of the total expenses.

14.8.3.4 Siebel

Based on my review of Siebel Customers, all of the Siebel Customers had license agreements with an Oracle entity at the time of cancellation.[1240] Therefore, any variable costs associated with Siebel Customers are included in one of the other Plaintiffs.

14.8.3.5 R&D Cost Sharing

Mr. Meyer did not deduct shared R&D costs. I analyzed numerous intercompany Oracle agreements detailing how R&D costs are allocated amongst the various Oracle entities. I accounted for R&D costs as a component of my variable cost analysis and as such, I include it in the margins detailed above.

[1240] It appears CSBP Limited had an agreement with Siebel Systems Australia at the time of cancellation. However, I include it under Oracle Australia, for purposes of this report. Pomeroy IT Solutions had an agreement with Siebel Systems, Inc. However, I include it under OUSA for purposes of this report.

Present Value of Lost Profits through the TomorrowNow Support End Date (in millions)		
	Meyer[1246]	**Clarke[1247]**
Scenario 1: Total Losses to Oracle		
Based on total lost support revenue	$99.6	$23.4
Excluding sales of EnterpriseOne and Siebel in Europe	$92.7	$21.9
Scenario 2: Losses by Plaintiff Entity		
Oracle USA		
Gross of fees paid to OIC	$83.4	$16.4
Net of fees paid to OIC	$47.2	$10.2
Oracle International Corporation		
Revenue ultimately received by OIC	$37.0	$17.3
Including OTC and ORC revenue	$42.2	$19.2
Oracle EMEA		
Gross of fees paid to OTC	$9.0	$2.8
Net of fees paid to OTC	$4.3	$1.7

15. Copyright Law and Analysis

Mr. Meyer quotes extensively from copyright law or copyright related cases in his report. However, his legal references are limited in their scope. Although I am not a lawyer and make no claims to interpreting the law (and precedent) from a *legal* perspective, I consider the *economic* effects of the law and precedent in order to properly compute *economic* damages in a wide variety of cases. In the economic context, I make the following observations as to the applicable law and precedent in regard to the computation of damages in this case.

Mr. Meyer states that the law of copyright requires the plaintiff to prove the defendants' revenues only and that the defendant then bears the burden of proving non-infringing elements. This approach to damages (often referred to as disgorgement) is embodied in 17 U.S.C.

[1246] Meyer Report, page 265, Table 16.
[1247] Appendix W-20.

§504(b)(1982) which states that in addition to any actual damages suffered as a result of an infringement, the copyright owner is entitled to recover "any profits of the infringer that are attributable to the infringement and are not taken into account in computing actual damages" and also states that, "…in establishing the infringer's profits, the copyright owner is required to present proof of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."

Mr. Meyer assumed that his only requirement is to point the finger at all of the profits he assumes SAP *hoped they might make*[1248] based on marketing projections and other statements made at the time of the TomorrowNow acquisition (i.e. around January 2005). He has further assumed that whatever profits they thought they might make from operating TomorrowNow over the course of many years, SAP would have been prepared to pay all of the profits over to Oracle in advance of making even one dollar of profit.[1249]

I believe I have demonstrated in this report that it would never be economically rational for SAP to have accepted a multi-billion dollar paid-up license to the Subject IP. In the context of this legal discussion, the inappropriate nature of Mr. Meyer's analysis becomes even more stark when his Value of Use computes value using the total profit SAP ever hoped to generate from its Safe Passage program and pays it to Oracle. As such, the approach could never be rational or fair from SAP's point-of-view.

15.1. Cream Records Incorporated v. Joe Schlitz Brewing Company et al.

In the Ninth Circuit Court of Appeals decision in the *Cream Records Incorporated ("Cream") v. Jos. Schlitz Brewing Company ("Schlitz") et al.* case (754 F.2d 826; 1985 U.S. App), the Court addressed an identical issue – namely how much revenue and, therefore, profit was generated from an infringer's use of copyright material. The defendant brewing company used a tune (the theme from 'Shaft') in a commercial without a license. Cream allowed that only some of the profits Schlitz generated during the relevant time frame should be allocated to the infringement (actually Cream claimed that the commercial was 13.7% of Schlitz' total advertising budget for the year and the music represented 10% of the commercial's advertising power so they should be awarded 1.37% of the total profits, an amount of $66,800). The district court disagreed and said that the value of the use "was minimal" and awarded just $5,000 being 1% of 10% of $5 million in profits. This decision, which was supported by the Court of Appeals, was made in spite of the fact that Cream argued it had properly established Schlitz' total profits from relevant beer sales, so the burden was on Schlitz to prove any portion of profits not attributable to the infringement. The Court of Appeals specifically rejected Cream's contention, stating, "Although the statute imposes on the infringer the burden of showing "the elements of profit attributable to factors other than the copyrighted work" [citation omitted] nonetheless where it is clear, as it is in this

[1248] Meyer Report, page 91, paragraph 133 describes how Mr. Meyer quantifies SAP's hoped for gains of 3,000 TomorrowNow customers and 1,375 or 2,000 new SAP customers to argue in favor of a high Value of Use under the income approach of the Fair Market Value of the Subject IP. The customer gains are based on projections SAP made at the time of the TomorrowNow acquisition. Ziemen Exhibit 447. SAP email from Thomas Ziemen to Leo Apotheker, et al. December 23, 2004. Re: PeopleSoft Attack Program; with attachment, PS_Attack_Program_12_2004_V6.ppt; SAP-OR00253278-301, at -288.

[1249] Meyer Report, pages 90-91, paragraph 132.

case, that not all of the profits are attributable to the infringing material, the copyright owner is not entitled to recover all of those profits merely because the infringer fails to establish with certainty the portion attributable to the non-infringing elements [and, presumably, deductible costs].

The published opinion goes on to reference an earlier case[1250] in which the Honorable Learned Hand was quoted as saying, "…we are resolved to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share. In cases where plaintiffs fail to prove their damages exactly, we often make the best estimate we can, even though it is really no more than a guess (*Pieczonka v. Pullman Co.*, 2 Cir 102 F.2d 432, 434) and under the guise of resolving all doubts against defendants we will not deny the one fact that stands undoubted."

It appears Mr. Meyer was not aware of his duty to include in his disgorgement damages award only those profits earned on revenues that arose *as a result of* the Alleged Actions.

15.2. Polar Bear Productions Inc. v. Timex Corporation, et al.

The Polar Bear case involves claims for copyright infringement and trademark infringement under the Lanham Act. It has direct relevance to the facts of the subject case. Mr. Meyer references the Polar Bear case in his report (paragraph 91). Polar Bear claimed that Timex had infringed its copyright by showing commercial footage licensed by Polar Bear outside the terms of the license. The jury in the district court case found Timex had indeed infringed the Polar Bear license. The issues before the Ninth Circuit Court of Appeals included the quantum of copyright (and Lanham Act) damages among others that are not pertinent here.

The Polar Bear case is interesting for many reasons. Mr. Meyer references the case for only one of those reasons, namely that a loss in fair market value[1251] is a reasonable way to compute damages in a copyright case. I do not take issue with Mr. Meyer over his reading of that section of the case, but the Ninth Circuit also looked at the following issues:

- Was there sufficient evidence to support the actual damages award (i.e. was the award "non-speculative")?
- Whether it was proper to base actual damages on a lost license fee or the value of use made by the infringer?
- Is an award of indirect profits appropriate?
- Is a claim for lost profits based on "an undifferentiated gross revenue number" appropriate?

I address the consequences of the Court's consideration of each of these terms in turn:

[1250] *Sheldon et al. v. Metro-Goldwyn Pictures Corporation et al*, 106 F.2d 45, 51 (2nd Cir. 1939).
[1251] As measured by lost profits or the value of use of the copyright works made by the infringer.

The Court in Polar Bear stated that there must be sufficient evidence to support the damages award so as to make it non-speculative. The Ninth Circuit also notes "Under §504(b) of the Copyright Act, actual damages must be suffered "as a result of the infringement," and recoverable profits must be "attributable to the infringement." Therefore, plaintiff must establish "a causal link between the infringement and the monetary remedy sought" if he or she is to be successful in proving "actual damages and profits."

Mr. Meyer failed to provide the entirety of the lost license fee or value of use quotation from the Polar Bear case. In section 3, "Actual Damages," the Court states, "…it is not improper for a jury to consider either a hypothetical lost license fee or the value of the infringing use to the infringer to determine actual damages, ***provided the amount is not based on 'undue speculation.'"*** [emphasis added].[1252]

Mr. Meyer's Value of Use analysis is speculative. Had Mr. Meyer been trying to assess the appropriate Value of Use to SAP of the Subject IP, he might have speculated that the hypothetical royalty rate upon which he bases his Value of Use would have been a high proportion of SAP's revenues generated from license and support sales of the Subject IP; he may have speculated that SAP would be prepared to guarantee a certain minimum royalty in any given year; he may even have speculated that SAP would have been prepared to pay a royalty (albeit at a low rate) based on the total ERP users in a particular market whether they were able to generate any sales or not. But Mr. Meyer opines that SAP would have found it reasonable and rational to pay a royalty of billions of dollars in advance, essentially "buying" Oracle's PeopleSoft customers at a price equal to a pro rata share of the PeopleSoft transaction price, even before SAP knew whether it would win *any* customers from Oracle or generate *any* additional revenues as a result. And he made this opinion knowing that the Value of Use he calculated of "no less than $2 billion" exceeded the gross revenues Defendants generated from customers only arguably related to the Alleged Actions. Mr. Meyer's Value of Use is, therefore, speculative.

Indirect profits are subject to the same standard of proof as direct profits but their greater 'separation' from the direct effects of the infringement often makes it more difficult for a plaintiff to achieve the applicable standard of proof. Therefore, my understanding is that indirect profits are only awardable "under certain conditions" because of their "more attenuated nexus to the infringement."[1253] The practical application of the Court's position on indirect profits is that "a copyright holder must establish the existence of a causal link before indirect profits damages can be recovered;" and, "when an infringer's profits are only remotely and speculatively attributable to infringement, courts will deny recovery to the copyright owner;"[1254] and "a court may deny recovery of a defendant's profits if they are only remotely or speculatively attributable to the infringement."[1255] Any profits generated by SAP as a result of the Alleged Actions would be subject to the higher standard of proof because they are indirect profits.

1252 *Polar Bear Productions, Inc. v. Timex Corporation*, 384 F.3d 700, 721 (U.S. App. 2004). (Citing a decision in the McRoberts Software, Inc. matter (329 F. 3d at 566)).

1253 *Mackie v. Rieser*, 296 F.3d 909, 911 (9th Cir. 2002), which I describe later. (Court is quoting Nimmer on Copyright).

1254 *Polar Bear Productions, Inc. v. Timex Corporation*, 384 F.3d 700, 726 (U.S. App. 2004), referencing "Nimmer On Copyright" §14.03, 14 – 34.

1255 *Frank Music Corporation v. MGM Grand Hotel, Inc.*, 772 F.2d 505, 526 (9th Cir. 1985).

One question in this case is whether SAP actually infringed Oracle's copyrights directly or did it do so only vicariously through its ownership of TomorrowNow. Although the question raised about the direct or indirect nature of SAP's alleged infringement is a legal question, it is a question that Mr. Meyer and his client need to address because it affects the degree of nexus they need to establish. Mr. Meyer makes an inadequate effort to address the question, assuming instead that all of SAP's sales to customers that were at the same time customers of TomorrowNow were a direct result of the Alleged Actions. Nothing could be further from reality. As my analysis of the causation issues related to the List of 86 clearly demonstrates, the vast majority of these customers bought products or services from SAP while at the same time using TomorrowNow support for reasons unrelated to the Alleged Actions. Additionally, the few customers with insufficient documentary evidence of their reasons for buying from SAP almost certainly did so for reasons other than the Alleged Actions. What is undeniable is that neither Mr. Meyer nor Oracle can prove that *any* of the List of 86 bought products or services from SAP as a result of the Alleged Actions and so they fail to establish the required degree of nexus between the Alleged Actions and accused revenues.

The Polar Bear case clearly establishes the Ninth Circuit's opinion on damage claims based on "an undifferentiated gross revenue number," which is that a "copyright owner is required to do more initially than toss up" such a number. Rather, "the revenue stream must bear a legally significant relationship to the infringement." The Court quoted Nimmer on Copyright stating that a, "…plaintiff seeking to recover indirect profits must 'formulate the initial evidence of gross revenue duly apportioned to relate to the infringement.'"

Based on his report, Mr. Meyer and Oracle fail to formulate their evidence of SAP's gross revenue in *any* way relying instead (and inappropriately) on the revenues generated from the List of 86. They also fail to apportion such revenue between that arising as a result of the Alleged Actions and other reasons. For example, one SAP customer on the List of 86 is a company called Engelhard.[1256] Engelhard was acquired by a German entity called BASF AG which has been a long-term worldwide user of SAP software to run its business.[1257] Upon its acquisition of Engelhard, BASF AG required Engelhard to migrate to the SAP ERP system so it was in conformity with BASF AG's worldwide business management system.[1258]

By no reasonable analysis could it be argued that Engelhard changed ERP vendors as a result of the Alleged Actions, yet because it is on the list of 86, it is among the stream of revenues Oracle claims were stolen as a result of the Alleged Actions. My further analysis of the remainder of Mr. Meyer's calculation of SAP's disgorgeable profits is expanded upon elsewhere in this report, but the underlying principle is the same. Mr. Meyer and Oracle have not established a "legally significant relationship" between the revenues and profits SAP generated from sales to the List of 86 and the Alleged Actions.

While Mr. Meyer made no attempt to establish a causal nexus between the sale of SAP licenses and support services for the revenues and related profits he assesses, he does select 17 customers

[1256] Final Report_(List_of_81).xls. SAP-OR00603612.

[1257] Oracle email from Robert Lachs to Rick Cummins. November 20, 2005. Re: Explanation of Reduced Revenue Potential; ORCL00201191.

[1258] TomorrowNow email from Nigel Pullan to All. December 9, 2006. Re: TomorrowNow WINS! BASF AG for J.D.Edwards and PeopleSoft; TN-OR01711887-891, at -890.

from the List of 86 and excludes them from his damage calculations.[1259] The customer exclusions, which appear to be an effort on Mr. Meyer's part to exclude revenues he recognizes as arising for reasons other than the Alleged Actions, only highlight his failure to consider causation for the remaining 69 customers that remain in his analysis. Mr. Meyer's approach to including or excluding SAP's customer revenues is flawed from an economic and legal perspective. Mr. Meyer fails to establish for each customer a rational causation argument. Instead, he offers only a blanket unsupported assumption which is that[1260] if the customer at issue is on the List of 86, then the causal nexus is established. He then applies a negative assumption: if he finds a rationale for excluding the customer he does so. Even though Mr. Meyer's rationale is backwards it would have been acceptable if he had conducted a thorough analysis of the available documents to determine all the reasons customers had for terminating Oracle support other than the Alleged Actions.

My understanding of the law, (which is supported by the judgment in Mackie and reiterated and restated in Polar Bear) is that the burden of establishing the causal nexus is on the plaintiff. Accordingly, Mr. Meyer's fundamental assumption that sales to customers on the List of 86 should be *included* in his damages analysis must be invalid if he presents no evidence in support of the assumption. Merely stating the basis with no analysis or proof is not sufficient under the law.

As my analysis of causation on a customer by customer basis shows, there were many reasons customers migrated their ERP systems from Oracle to SAP, or had SAP sales that were unrelated to their Oracle software. Not least of these reasons, although I am unable to quantify its effect, was the "fear, uncertainty and doubt" Mr. Meyer describes in his report. However, the fear, uncertainty and doubt was created by Oracle in the 19 month hostile takeover of PeopleSoft and by the statements made by Oracle CEO, Mr. Ellison before the acquisition closed.[1261] Mr. Meyer's failure to address the fear, uncertainty and doubt his own client created and, somehow, separate its effects from the effects of the Alleged Actions renders his entire damages premise fundamentally flawed.

The effect of Mr. Meyer's failure in this regard is expressly addressed in the Polar Bear case in which the Ninth Circuit judgment states: "…Polar Bear claimed a portion of Timex's profits from all [watch] sales, even though the evidence could, at best, only support a far narrower universe of profits. Thus, even if we suspect that Timex derived some quantum of profits from the infringement because its infringement was part of promotional efforts, it nevertheless remains the duty of the copyright plaintiff to establish a causal connection between the infringement and the gross revenue reasonably associated with the infringement." The process the Ninth Circuit describes was not attempted by Mr. Meyer.

1259 Meyer Report, Schedule 42.SU.

1260 Mr. Meyer may not have understood that his assumption is implicit in the damages methodology. Whether he understood it or not, the assumption underlies his entire lost profits and disgorgement analyses.

1261 Woodie, Alex. "Oracle Pledges Conditional support for JDE Apps, iSeries." ITJungle. March 8, 2004. <http.//ITJungle.com/tfh/tfh030804-story02.html>.

15.3. *Jack Mackie v. Bonnie Rieser*; Seattle Symphony Orchestra

The Mackie case is frequently quoted by the Ninth Circuit Court of Appeals in other cases.[1262] Mackie establishes and clarifies several key principles in copyright cases. One principle applied in Mackie (actually the principle was established in *Frank Music Corp. v. Metro-Goldwyn Mayer, Inc.* 772 F.2d 505 (9th Cir. 1985) was the holding that even to survive dismissal on summary judgment, "…a copyright infringement plaintiff seeking to recover indirect profits damages under 17 U.S.C. §504(b) must proffer some evidence to create a triable issue regarding whether the infringement at least partially caused the profits that the infringer generated as a result of the infringement." It is axiomatic that once the plaintiff's claim for indirect damages survives the summary motion to exclude it, the evidence that made the issue at least triable must also actually prove that the claimed disgorgement was caused by the actions complained of by the plaintiff.

The Frank case "…set forth general specification to guide the inquiry…" into the issue of indirect damages stating, "Notably, we held that a district court could preclude 'recovery of a defendant's profits if they are only remotely or speculatively attributable to the infringement.'"[1263]

For the reasons stated elsewhere in this report, Mr. Meyer and Oracle fail to establish any causal connection between the claimed disgorgement damages relying instead on a blanket assumption that such was the case. It will be for the Court to decide whether Mr. Meyer and Oracle have established the required causal connection between the Alleged Actions and revenues generated by SAP.

Interestingly, in Mackie, the Court laid out a series of possibilities for what drove a symphony patron to purchase a subscription (the Mackie infringer used Mackie's artwork in advertising symphony subscription tickets). The Court recognized the difficulty Mackie would have separating subscription revenues generated as a result of the infringement from subscriptions that arose because of: "the Symphony's reputation, or the conductor, or a specific musician, or the dates of the concerts, or the new symphony hall, or the program, or the featured composers, or community boosterism, or simply a love of music, or…" This litany of possible reasons a purchaser may have for buying a subscription is not dissimilar to the litany of reasons Defendants' customers had for terminating their Oracle services: corporate mandate; legacy software / shelved software; required functionality; highly customized software; internal politics and so on. Mr. Meyer has failed to establish any basis for tying any sale by Defendants to the Alleged Actions other than SAP generated a sale of a product or service while the customer received support from TomorrowNow. Furthermore, his own exclusion criteria highlight his failure to prove causation for the customers he failed to exclude, making his analysis demonstrably flawed. Mr. Meyer's disgorgement claim, which amounts to billions of dollars in claimed damages, falls exactly within the scope of the Ninth Circuit's decision in Mackie.

1262 *See Polar Bear Productions, Inc. v. Timex Corporation*, 384 F.3d 700 (U.S. App. 2004) and *Dawson v. Washington Mutual Bank*, 390 F.3d 1139 (9th Cir. 2004).

1263 *Frank Music Corporation v. MGM Grand Hotel, Inc.*, 772 F.2d 505, 526 (9th Cir. 1985).

15.4. ***Frank Music Corporation et al. v. Metro-Goldwyn-Mayer, Inc.*** **-** (772 F.2d 505 9th Cir. 1985)

The Frank case (generally referred to as Frank 1 to differentiate it from a later Frank Music case) is widely quoted and referenced in other cases. Indeed, the Ninth Circuit uses the term "a seminal case" to describe Frank 1.[1264] In Frank 1, the Ninth Circuit stated its use of the "*Krofft test"* [emphasis in original] to determine actual damages. The issue was application of the willing buyer, willing seller approach to determination of actual damages by use of the 'extent to which the market value of a copyrighted work has been injured or destroyed by an infringement." The court goes on to state that the proper construction of the test is "…what a buyer would have been willing to pay for a use of a plaintiff's work similar to the defendant's use." This clarification of the Krofft test supports Mr. Meyer's contention that it is the value of use Defendants actually made of the allegedly infringed software. It is also proof that Mr. Meyer's application of the test, which ignores Defendants' actual use and instead calculates damages based on three hypothetical scenarios of 1,375, 2,000, and 3,000 customers migrating to TomorrowNow and SAP was inappropriate.

Mr. Meyer's three scenarios are so far removed from the reality of how many customers SAP and TomorrowNow acquired *for whatever reason* that the damages analysis based on his scenarios are difficult to refute. It is especially difficult to pick apart the logic of a damage analysis that bears no relationship to the revenues and profits actually generated from the Alleged Actions and ignores the law to such a great extent. Mr. Meyer's application of the three scenarios bears no relationship to the actual use TomorrowNow and SAP ever made of the Subject IP and as such is disconnected from Mr. Meyer's stated basis for valuing such use. Needless to say, Mr. Meyer's damage analysis is flawed.

A further reality Mr. Meyer has not addressed is that Oracle regularly loses customers to SAP and SAP regularly loses customers to Oracle. The customer may never reveal the reason for their termination and migration. For Mr. Meyer to prove disgorgement damages he would have to identify how many of the customers that terminated Oracle support and went to the Defendants' for products or service did so as a result of the Alleged Actions, and not as a result of other factors. Expressed in a different way, Oracle's stated renewal rate is somewhere in the 90% to 97% range.[1265] Of both Oracle and SAP's non-renewing customers, a certain percentage migrate to the other ERP provider (i.e. some Oracle non-renewing customers go to SAP for their future ERP systems and some non-renewing SAP customers go to Oracle). Mr. Meyer failed to provide any analysis of the customers that left Oracle. In the context of this case, Oracle and SAP deposed numerous customers and discovered that for a number of the deposed customers, TomorrowNow services and pricing were not the reason for the customer's migration from Oracle to SAP.[1266] Mr. Meyer should have considered the customers' testimony and other

[1264] Mackie v. Rieser, 296 F.3d 909 (9th Cir. 2002).

[1265] Meyer Report, page 243, table 13.

[1266] Dan Restmeyer (Amgen) deposition dated October 21, 2009, pages 17–27; Robyn Harrel (Apria) deposition dated September 28, 2009, pages 60-62; Daniel Jerome (Electrolux) deposition dated October 7, 2009, pages 64-67; Jeffrey O'Donnell (Lexmark) deposition dated September 15, 2009, pages 35-41; Steven Brazile (Sara Lee) deposition dated October 14, 2009, pages 48-49; and Paul Cooley (Waste Management) deposition dated November 24, 2009, page 92.

evidence developed in this case and adjusted the remaining 69 customers [1267]to account for terminations and migrations that resulted from factors other than the Alleged Actions.

15.5. Georgia-Pacific Corp. v. United States Plywood Company (cite below)

Mr. Meyer adopts a reasonable royalty approach in his Value of Use analysis and the seminal case in reasonable royalty is known (almost universally) as the Georgia-Pacific case. *Georgia-Pacific Corp. v. United States Plywood Corp.*, 314 F.Supp 1116, 166 USPQ (BNA) 235 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295, 170 USPQ 369 (2d Cir. 1971), *cert. denied*, 404 U.S. 870 (1971). In the Georgia-Pacific case, the Court laid out fifteen factors it believed were relevant to quantifying a reasonable royalty. Both Mr. Meyer and I address the question of a reasonable royalty in our reports and we both use the Georgia-Pacific factors in our consideration. Because of its relevance, I include extracts from the judgment and my comments.

The parties agreed that there was no "established" royalty for the products at issue. Therefore, it was necessary to consider other facts probative of a "reasonable" royalty. The parties presented facts probative of a reasonable royalty and United States Plywood ("USP") referenced "the willing buyer and willing seller" rule. The rule was pronounced in "*Horvath v. McCord Radiator & Mfg. Co.*," 100 F.2d 326, 335 (6th Cir. 1938), cert. denied, *Carrier Engineering Corporation v. Horvath*, 308 U.S. 581, 60 S.Ct. 101, 84 L.Ed. 486, rehearing denied, 308 U.S. 636, 60 S. Ct. 171, 84 L. Ed. 529 (1939), in these terms:

> In fixing damages on a royalty basis against an infringer, the sum allowed should be reasonable and that which would be accepted by a prudent licensee who wished to obtain a license but was not so compelled and a prudent patentee, who wished to grant a license but was not so compelled.

A variant phrasing set forth in *Faulkner v. Gibbs*, 199 F.2d 635, 639 (9th Cir. 1952) reads:

> The primary inquiry, often complicated by secondary ones, is what the parties would have agreed upon, if both were reasonably trying to reach an agreement. (Footnote omitted.)

The Court stated that the rule "requires consideration not only of the amount that a willing licensee would have paid for the patent license but also of the amount that a willing licensor would have accepted" which would require consideration of specific factors. "Where a willing licensor and a willing licensee are negotiating for a royalty, the hypothetical negotiations would not occur in a vacuum of pure logic. They would involve a market place confrontation of the parties, the outcome of which would depend upon such factors as their relative bargaining strength; the anticipated amount of profits that the prospective licensor reasonably thinks he would lose as a result of licensing the patent as compared to the anticipated royalty income; the anticipated amount of net profits that the prospective licensee reasonably thinks he will make; the commercial past performance of the invention in terms of public acceptance and profits; the market to be tapped; and any other economic factor that normally prudent businessmen would, under similar circumstances, take into consideration in negotiating the hypothetical license."

[1267] 69 customers remain after Mr. Meyer excluded 17 of List of 86 as shown on Schedule 42.SU.

The Court also reiterated its opinion that by definition; a reasonable royalty assumes the infringer will make a profit. Therefore, an element to consider is that "GP would be willing hypothetically to pay a royalty which would produce "a reasonable profit" for GP. See *Faulkner v. Gibbs*, 199 F.2d 634, 639 (9th Cir. 1952)."

In a fact Mr. Meyer appears to have overlooked, "the willing seller and willing buyer rule represents an attempt to colligate diverse evidentiary facts of potential relevance. In applying the formulation, the Court must take into account the realities of the bargaining table and subject the proofs to a dissective scrutiny."[1268]

In Georgia-Pacific, the Court found that USP's presentation of the negotiation situation is, "in decisive respects, rooted in reality" and also found that that USP separated "the probative evidence from surmise, speculation, "guesswork opinion", and "campaign slogans." For the most part, where facts have been hypothesized by USP, they are premised on record evidence, direct and circumstantial. This is particularly true with respect to such elements as reasonably anticipated rates of profit, probable volume of sales, normal economic motivations, and the prevailing business outlook, all as of the time of the supposititious negotiations." Neither Oracle nor Mr. Meyer based their damage estimates on a similar sound footing.

16. Conclusion

16.1. Lost Profits

Because the majority of TomorrowNow customers left Oracle due to factors unrelated to the Alleged Actions, the only accurate way to calculate damages in this matter is one customer at a time.

I calculated Plaintiffs' Lost Profits damages for customers that were not excluded after applying a set of Exclusion Criteria to the facts discovered in my analysis. Based on my analysis, Lost Profits damages are $31,049,393. I reported Lost Profits for each Oracle entity, although I understand that the Court may later decide that certain entities are not eligible to receive damages in this matter.

Plaintiffs suffered no Lost Profits damages for customers who cancelled Oracle support due to factors unrelated to the Alleged Actions.

16.2. Disgorgement

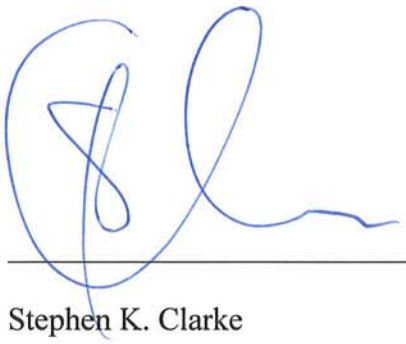
I calculated disgorgement of TomorrowNow profits in the amount of $1,054,474 for TomorrowNow customers that were not included in the Lost Profits calculation.

I calculated disgorgement of SAP profits in the amount of $4,344,212 for the three customers that were not excluded after applying a set of Exclusion Criteria to the facts discovered in my analysis.

[1268] *Georgia-Pacific Corp. v. United States Plywood Corp.*, 314 F.Supp 1116, 166 USPQ (BNA) 235 (S.D.N.Y. 1970)

Damages Summary[1269]	
Disgorgement – SAP[1270]	$4,344,212
Disgorgement – TomorrowNow [1271]	$1,054,474
Oracle Lost Profits	
OUSA	$10,162,957
OEMEA	
PeopleSoft	$241,616
J.D.Edwards EnterpriseOne	$476,574
J.D.Edwards World	$159,632
Siebel	$787,569
OIC	$17,312,276
OTC	$1,660,199
ORC	$248,569
Total	**$36,448,078**

Lost Profits and Disgorgement damages are additive. Therefore, total damages if Defendants are found liable for all of Oracle's claims are $36,448,078.



May 7th, 2010

Stephen K. Clarke

Date

1269 I did not calculate damages for the No Accused Conduct customers in any of my damages analyses. Earlier in my report, I calculated a reasonable royalty in response to Mr. Meyer's presentation. I do not consider reasonable royalty to be an appropriate measure of damages in this matter.

1270 Appendix N-1.

1271 Appendix Q-1.