

EXHIBIT J

Oracle USA, Inc., et al

v.

SAP AG, et al

Stephen K. Clarke
Expert Report

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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 2006¹³⁷ 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.

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.

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.

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 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

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.

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

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

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

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

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

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

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

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

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

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