

EXHIBIT B

ORACLE USA, INC., ET AL

V.

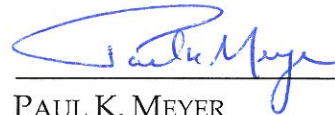
SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.

FEBRUARY 23, 2010



PAUL K. MEYER

100. The cost approach measures the market value of intellectual property based on the cost to replace the future service capability of the copyrighted asset. The Cost Approach does not directly consider the future economic benefits of the assets.²⁷⁰

101. In the valuation of intellectual property, it is common to consider analysis of the fair market value under multiple valuation approaches.²⁷¹ In litigation matters, it is common for practitioners to value intellectual property using a hypothetical negotiation considering financial, economic and other factors addressed in *Georgia-Pacific*. As explained in Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical [Fair Market Value] License Damages, I understand that the *Georgia-Pacific* hypothetical license methodology and factors mirror those used in copyright infringement cases, including in the Ninth Circuit.²⁷²

102. For PeopleSoft/J.D. Edwards and Oracle Database, when used in conjunction with providing support for PeopleSoft/J.D Edwards customers, the hypothetical negotiation for a license to Oracle's copyrighted materials in suit would occur at or around the date of SAP's first infringement, January 2005, when SAP first acquired TomorrowNow. For Siebel and Oracle Database, when used in conjunction with providing support for Siebel customers, the hypothetical negotiation would occur at or around the date of SAP's first infringement, September 2006, when TomorrowNow first

²⁷⁰ *Intellectual Property, Valuation, Exploitation, and Infringement Damages*, by Gordon V. Smith and Russell L. Parr, 2005 Edition, pg. 156.

²⁷¹ *Intellectual Property, Valuation, Exploitation, and Infringement Damages*, by Gordon V. Smith and Russell L. Parr, 2005 Edition, pg. 155.

²⁷² Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical [Fair Market Value] License Damages, September 23, 2009, pgs. 15-16.

contracted to provide Siebel service to a customer.²⁷³ For all licenses the term end date is October 31, 2008.²⁷⁴

103. Based on my analysis of the relevant factors, including consideration of the circumstances confronting SAP prior to acquiring TomorrowNow in 2005, I have determined 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. TomorrowNow needed access to Oracle Database in order to provide support to a portion of its PeopleSoft/J.D. Edwards customer base, which was running applications on Oracle Database. I have also considered the value of use of Oracle Database copyrighted materials in suit. Separately, based on my analysis of the relevant factors, including consideration of the circumstances confronting SAP prior to expanding TomorrowNow’s support offerings to include Siebel products, I have determined 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” for Oracle’s Siebel-related copyrighted materials in suit.

104. I understand there are limitations on the fair market value license measure of copyright actual damages. I understand it 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

²⁷³ TN-OR07717977, Siebel_Services.xls. On September 29, 2006, TomorrowNow entered into a Support Services Agreement with its first Siebel customer, MKS, Inc.

²⁷⁴ I understand that Oracle alleges Defendants’ infringing activity continued until the closing of TomorrowNow’s operations in October 2008 (See section IV.E of this Report).

value of that loss to be approximately \$3.33 billion, or 30% of PeopleSoft's acquisition price.²⁹¹

116. Oracle acquired significant intangible asset value with the PeopleSoft acquisition. Oracle retained Standard & Poor's ("S&P") to value certain PeopleSoft assets and liabilities acquired and allocate the \$11.1 billion acquisition price for financial reporting purposes.²⁹² S&P determined that the intangible assets were worth approximately \$9.9 billion, including the value of goodwill, patents/core technology, maintenance agreements and related customer relationships and tradenames/trademarks.²⁹³ The purpose of S&P's valuation was to provide individual asset category values which could be recognized as separate assets in Oracle's financial reporting resulting from the acquisition. Table 6 summarizes the intangible asset valuation for Oracle's acquisition of PeopleSoft as reported on Oracle's financial statements.

²⁹¹ Discussions with Larry Ellison (Oracle CEO and Executive Board Member), Safra Catz and Charles Phillips (Oracle Co-Presidents and Executive Board Members).

²⁹² "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 161 and 205.

²⁹³ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 249.

Table 6: Intangible Asset Valuation²⁹⁴
Oracle's Acquisition Price of PeopleSoft
(\$ In Millions)

Goodwill	\$	6,487
Other Intangible Assets:		
Existing Technology		614
Patents/Core Technology		349
Maintenance Agreements and Customer Relationships		2,101
Customer Relationships		250
Tradenames/Trademarks		70
Subtotal Other Intangible Assets	\$	3,384
Total	\$	9,871

117. S&P's valuation of PeopleSoft's intangible assets provides a contemporaneously prepared indication of the fair market value of the PeopleSoft/J.D. Edwards-related copyrighted materials in suit. While S&P did not specifically value solely the copyrighted materials in suit, relevant portions of the S&P intangible asset valuation include the value of using the

²⁹⁴ Amounts in Table 6 reflect Oracle's financial statement disclosures regarding the accounting for the acquisition. S&P's allocation of acquisition value to intangible assets varies slightly from the accounting in the financial statements [See Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 16 and 72-74; SCHEDULE 3]; "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc., as of December 28, 2004," ORCL00313160-253, at 204. S&P's valuation of PeopleSoft's other intangible assets, excluding goodwill, totaled \$3.6 billion. Oracle's financial statement disclosures recorded certain support agreements, valued at \$208 million, for which PeopleSoft had not been paid as of the acquisition, within prepaid expenses and other current assets, rather than in intangible assets. Additionally, In-Process Technology valued at \$33 million was recorded as "In-process research and development" in the financial statement disclosures and not included in the total identified intangible assets. These two adjustments reduce the intangible asset value on the financial statements to \$3.4 billion [\$3,625 (S&P) less \$208(prepaid expense) less \$33 (R&D) = \$3,384]. S&P's asset valuation includes \$2.3 billion for maintenance agreements and customer relationships. I have used \$2.1 billion for these intangible assets in this report based on S&P's valuation excluding consideration of \$208 million of support contracts mentioned above.

copyrighted materials in suit to provide service and enhance customer relationships. S&P's separate valuations performed for the following intangible asset categories include value attributable to the copyrighted materials in suit: maintenance agreements and related customer relationships, the cost to replace customer relationships, and residual value attributable to goodwill.²⁹⁵ As addressed earlier in this Report, SAP acknowledged that it required PeopleSoft's software and support materials in order to solicit comparable or better support services to PeopleSoft customers.²⁹⁶ Without the PeopleSoft copyrighted materials that SAP obtained without a license from Oracle, SAP would not be able to represent to PeopleSoft customers that it could meet the support service contract requirements, nor garner the customer referrals that eased customer concerns about the quality of service.²⁹⁷ The illegally obtained copyrighted materials in suit enabled SAP to provide customer support.

²⁹⁵ S&P's valuation of Existing and In-Process Technology is not relevant to the determination of the copyright value in this matter because it measures the capability of the technology to generate new license revenues for that technology. In these circumstances, since SAP would not be selling licenses for the copyrighted software applications, this measure of value is unrelated to the alleged improper actions of SAP and TomorrowNow. Although, I understand that in some cases, TomorrowNow may have or did distribute CD's, instruction manuals and/or other items containing PeopleSoft trade names or trademarks, for purposes of this valuation, I have excluded any value associated with those alleged actions. SAS-TN-OR04446719-OR-00220 – 238 (Baugh Exhibit 1537); WMIFIX-TN-OR-01823634-OR-00039 – 51 (Russell Exhibit 304); SAS-TN-OR00009569-OR-00221 – 226 (Hyde Exhibit 116); TN-OR00809640-760 (Hyde Exhibit 118).

²⁹⁶ See section IV.B.4 of this Report.

²⁹⁷ The importance of getting client references was regularly noted in TomorrowNow "Win" announcements. Deposition of Andrew Nelson (Co-Founder of TomorrowNow), February 26, 2009, pgs. 202-203. See, as examples, TomorrowNow email from Bob Geib to all TomorrowNow employees, Re: TomorrowNow WINS! High Industries (PeopleSoft) Part TWO, TN-OR00061877-78 (Hurst Exhibit 167), at 78; TomorrowNow email from Andrew Nelson to all TomorrowNow employees, Re: TomorrowNow WINS AGAIN! Telapex, Inc., TN-OR 03752526 (A. Nelson Exhibit 1022). Lesley Loftus, TomorrowNow Vice President of Global Marketing, testified that customer referrals were important because "it's a good foundation for a decision." [Deposition of Lesley Loftus, June 13, 2008, pg. 196]. As part of its marketing of the Safe Passage program, SAP sought to get TomorrowNow customer testimonials [Deposition of Terry Hurst (SAP Director of Competitive Programs), April 30, 2008, pg. 145-146; Home Depot reference quotes, SAP-OR00066889-91 (Hurst Exhibit 163)].

118. S&P's analysis provides separate values for each asset category. S&P valued PeopleSoft acquired maintenance agreements and related customer relationships at \$2.1 billion. S&P used a discounted cash flow approach that considered projections through May 31, 2015 of future support revenues and costs resulting from Oracle's use of the copyrighted materials in suit to service the 9,920 customers of PeopleSoft software as of the date of Oracle's acquisition.²⁹⁸ S&P's valuation deducts costs from projected support revenues related to providing service. The cash flow from operations is then discounted to January 2005 at 10%, resulting in a present value of cash flows of \$1.86 billion.²⁹⁹

119. For the "market approach," I have considered the value assigned to the ongoing and future servicing of PeopleSoft customers, which have been valued at \$2.1 billion. While the \$2.1 billion valuation includes Oracle's rights to these annual agreements as well as the copyrighted materials, SAPs access and use of Oracle's copyrighted materials in suit enabled SAP to attempt to supplant Oracle as the support provider and, if successful, to receive the benefit of the support agreements which Oracle understood it was acquiring in the transaction (which were protected by PeopleSoft copyrights). Because the support contracts renew annually, SAP could dislodge Oracle at any time the contracts were up for renewal by offering comparable levels of service at discounted prices. Because the contemplated license terms presume that SAP would only be using the copyrighted materials in suit until October 2008, SAP would not dislodge all of Oracle's PeopleSoft support customers, and

²⁹⁸ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 229.

²⁹⁹ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 229.

therefore some downward adjustment from the entire intangible asset value related to customer support contracts is warranted. My analysis takes this into consideration by apportioning the total value down to Oracle's anticipated customer loss.

120. S&P separately valued the cost to replace its estimate of approximately 4,200 new customer relationships Oracle acquired from PeopleSoft at \$250 million.³⁰⁰ This valuation assumes that by acquiring the customer base, Oracle avoided the cost of a 6 month sales cycle required to place a customer in a PeopleSoft license. Although SAP's use of the copyrighted materials was such that it was still required to solicit and attempt to establish TomorrowNow support relationships (e.g., TomorrowNow would still need to solicit the customer to obtain a support contract), SAP avoided the time and effort to get the customer to license PeopleSoft, instead spending a much shorter time to convince the customer to switch support providers. However, SAP indicates that it had less customer overlap with the PeopleSoft customer base than Oracle. A SAP presentation indicates that SAP's customer base overlapped with only approximately 2,000 PeopleSoft customers. Therefore, approximately 7,900 PeopleSoft customers would be new to SAP. I have considered that the \$250 million fair market value for customer relationships represents the value of fewer customers than SAP would gain access to (4,200 versus 7,900), but will involve less SAP effort and time to complete the sales cycle than what was assumed for Oracle. Since those two considerations would have inverse impacts on the \$250 million valuation, I conclude that using the \$250 million as the fair market value for SAP's access to new

³⁰⁰ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 193-194.

customer relationships would be relevant and additive to the fair market value of the support contracts discussed previously in valuing the fair market value of SAP's use of the copyrighted materials in suit. As with the fair market value of the support contracts, the total customer relationship value would have to be apportioned for an appropriate number of relevant customers.

121. The residual value of \$6.5 billion for goodwill³⁰¹ includes value related to the copyrighted materials in suit as they provide for the generation of support revenues from customers that will purchase PeopleSoft products after Oracle's acquisition date, as well as revenues from sales of other Oracle software to PeopleSoft customers.³⁰² As addressed in section IV.B.3 of this Report, a primary benefit to SAP of supplanting Oracle in providing support for PeopleSoft and J.D. Edwards customers was SAP's ability to market and sell SAP software. As such, a portion of the goodwill Oracle recorded from the acquisition also reflects the value of SAP's use of Oracle's copyrighted materials in suit.

122. In order to determine the fair market value of Oracle's copyrighted materials for SAP's use in providing PeopleSoft support services, and new or enhanced customer relationships, the following indicators from Oracle's acquisition of PeopleSoft are relevant:

³⁰¹ Goodwill is the excess of the purchase price paid for PeopleSoft over the value of the separately identified acquired assets.

³⁰² I consider the value of the copyrighted materials in suit in terms of their ability to generate sales of other Oracle products not to quantify the lost profits associated with Oracle's lost cross-sell and up-sell opportunities to TomorrowNow support customers, but as considerations that would inform and be relevant to the fair market value of Defendants' use of the allegedly infringed materials. I understand from Oracle's counsel, Defendants specifically did not seek preclusion of this measure of Oracle's copyright damages in its Motion for Sanctions Pursuant to Fed. R. Civ. P. 37(c) and 16(f).

- The Oracle acquisition of PeopleSoft was contemporaneous, in the same software market, involved the copyrighted materials in suit, and is a directly relevant market metric to determining the economic value gained by SAP.
- The copyrighted materials are key and enabling to providing support services and maintaining customer relationships. Additionally, the copyrighted materials or comparable independently developed materials are required resources to meet Oracle/PeopleSoft-related customer support contract commitments.
- The copyrighted materials fair market value would include a portion of \$8.85 billion, which includes the fair market value of all PeopleSoft support agreements and related customer relationships at the time of acquisition (\$2.1 billion), the avoided cost of developing certain new customer relationships (\$250 million) and Oracle's recorded goodwill (\$6.5 billion).
- 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. Comparing the 3,000 customers to the total PeopleSoft customers of 9,920 indicates a targeted percentage of 30.2%. Applying this percentage to the value of the total support contracts, customer relationships and goodwill of \$8.85 billion indicates a fair market value of the copyrighted

materials of \$2.67 billion.³⁰³ Applying the percentage that would result from 2,000 customers converting to SAP would result in a valuation of \$1.78 billion.³⁰⁴

- Theoretically, in lieu of accessing the copyrighted Oracle materials, SAP could have entered into a fair market value transaction and acquired a portion of the PeopleSoft customer base and the associated support revenue stream. The value that Oracle paid on a per customer basis for PeopleSoft of approximately \$1 million reflects an arm's-length transaction to acquire those customer relationships, existing support revenue and future revenue expansion opportunities.³⁰⁵
- Although SAP targeted 3,000 PeopleSoft customers to convert to support contracts, using 2,000 potential customer relationships (enabled by the alleged copyright infringement) at \$1 million per customer indicates a \$2 billion valuation of the copyrighted materials.

123. The above factors and consideration indicate that the fair market value of SAP's alleged use of Oracle's copyrighted material for use in providing PeopleSoft's customer support services would be no less than \$2 billion.

³⁰³ \$8.85 billion * 30.2% = \$2.67 billion. The income approach in the following section of this Report provides another perspective to the valuation estimate for the support agreements and related customer relationships.

³⁰⁴ \$8.85 billion * 20.16% = \$1.78 billion.

³⁰⁵ Oracle acquired PeopleSoft and its 9,920 customers for \$11.1 billion, or approximately \$1.1 million per customer. Data related to Oracle's acquisition of PeopleSoft provides directly comparable metrics of the fair market value for the copyrighted materials in suit.

2. Income Approach

128. The income approach values intellectual property based upon the additional cash flows a business is expected to generate in the future from the exploitation of the technology at issue. The income approach measures the net present value of these future cash flows as of the date of the valuation. I have employed the income approach by determining the incremental net cash flows Oracle would expect to lose to SAP as a result of licensing the copyrighted materials in suit. I have also considered in the income approach analyses performed contemporaneously by SAP or TomorrowNow indicating either the revenues they expected to receive or the amount of Oracle's business they expected to displace.

a. Income Approach Applied To Oracle's Expected Losses

129. 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. In modeling the incremental value of customers Oracle would expect to lose under a license to SAP, I have used various assumptions from the S&P valuation, including the size of the PeopleSoft customer base acquired, annual attrition rates, average annual maintenance fees, duration of the model to at least 2014, cost of sales and certain other expenses, and present value factors. I have also considered the terminal value of losing support customers, and incremental licenses and support as a result of licensing the copyrighted materials in suit to SAP.
130. I have addressed three scenarios varying the number of customers that switch their applications to SAP; one model assumes 1,375 customer switches;

another model assumes 2,000 customer switches; and lastly, a model with 3,000 customer switches. In each case I have assumed that Oracle would lose 3,000 of its PeopleSoft support customers to SAP and TomorrowNow between January 2005 and October 2008, with terminal value of up-sell license and support revenue losses through December 31, 2014.³¹⁹ Based on estimates of incremental costs including cost of goods and sales related expenses, I have deducted costs from the revenues at 20% for cost of support revenues, 30% for cost of incremental license sales to existing customers, and 50% for cost of new license revenues.³²⁰ I have used a terminal value based on lost license and support profits, capitalized at 8.3%, to estimate the ongoing loss to Oracle of customers that would switch to SAP as a result of licensing the copyrighted materials in suit.³²¹ All amounts have been discounted to January 2005.

131. The results of these calculations are summarized in **SCHEDULES 11.SU-13.SU**, and indicate 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.³²²

b. Income Approach Applied To SAP's Expected Gains

132. Separately, SAP valued the access and use of the PeopleSoft copyrighted materials in suit. In December 2004, SAP prepared a "Business Opportunity" projecting that as a result of its "PeopleSoft Attack Program," of which TomorrowNow was a key part, it would obtain 3,000 PeopleSoft maintenance

³¹⁹ See **SCHEDULES 11.SU-13.SU**.

³²⁰ See, e.g. **SCHEDULES 11.1** and **11.2SU**.

³²¹ See, e.g. **SCHEDULE 11.1**. "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006, dated July 20, 2006, ORCL00312747 – 819 at 812.

³²² See **SCHEDULES 11.SU-13.SU**.

customers by 2007, 2,250 of which would have purchased other SAP applications software (“cross-sell”) by 2007 (at an average deal size of \$70K), and 1,375 of which would purchase an SAP application to replace, at some point, their PeopleSoft application with a SAP application (“up-switch”).³²³ SAP’s revenue projection for 2005 through 2007 using these metrics was \$897 million.³²⁴

133. I have used SAP’s projections estimating \$897 million in revenue over 3 years to construct three scenarios. All three calculations assume TomorrowNow gains 3,000 PeopleSoft support customers. One calculation assumes SAP gains 1,375 new customers that purchase a mySAP license. The other two calculations assume SAP gains 2,000 new customers that purchase mySAP licenses. I have also determined the terminal value of the support revenues from the new mySAP licenses. In all calculations, I have deducted costs from revenues at 30%, based on 20% of incremental cost to provide licenses and support services, and 10% of incremental sales and marketing expense as supported by SAP’s financial statements.³²⁵ In addition, I have discounted SAP’s profits back to January 2005 using a 14% discount rate based

³²³ SAP email, December 23, 2004, Subject: PeopleSoft Attack Program with attached document, “PS_Attack_Program_12_2004_v6.ppt”, SAP-OR00253278-301 (Ziemen Exhibit 447), at 288; Deposition of Thomas Ziemen (SAP Vice President, Service Solution Management), September 30, 2008, pgs. 85-86.

³²⁴ SAP email, December 23, 2004, Subject: PeopleSoft Attack Program with attached document, “PS_Attack_Program_12_2004_v6.ppt”, SAP-OR00253278-301 (Ziemen Exhibit 447), at 288. Other financial projections include a April 25, 2006 email from Andrew Nelson to Lon Fiala, which projects TomorrowNow eventually taking \$1.1 billion in maintenance revenues from Oracle between 2005 and 2014, with an assumption that TomorrowNow will capture 15% of PeopleSoft support customers. TN-OR00591548 (Nelson Exhibit 1019). SAP has admitted that the \$897 million value “does not ‘project a customer’s value over the lifecycle of a customer as, for example, it only includes assumptions for the years 2005-2007.” [Defendants’ Ninth Amended and Supplemental Response to Plaintiffs’ Fourth Set of Interrogatories to Defendant TomorrowNow, Inc. and Third Set of Interrogatories to Defendants SAP AG and SAP America, Inc., Second Supplemental Response to Interrogatory 69, pgs. 21-22; Email from Bernd Welz to Bernd-Michael Rumpf Re: PeopleSoft Attack Program, with attached presentation, “A Roadmap for PSFT Customers to SAP”, SAP-OR 00493900-923 (Scholten Exhibit 1782), at 910].

³²⁵ SCHEDULES 15.SU, 15.1.SU, 16 and 19.

on the discount rates used in the asset valuation performed for SAP's acquisition of Business Objects.³²⁶

134. The results of my three scenarios are included as **SCHEDULES 15.SU, 15.1.SU** and **16**, and indicate anticipated gains of SAP ranging between \$881 million and \$2.7 billion.

135. TomorrowNow estimated that \$1 of TomorrowNow revenue equaled \$10 of SAP strategic license revenue pipeline.³²⁷ TomorrowNow estimated that at 15% of PeopleSoft customer base, approximately 1,500 customers, SAP's strategic license revenue pipeline would increase by \$1 billion. This computation assumes an approximate \$600,000 license opportunity per customer. With support revenues priced at 17% of license fees, over a 10 year period this would result in a \$600,000 license plus \$1.0 million in support revenues, or a \$1.6 million per customer, revenue projection. At a 30% margin that is a \$1.1 million per customer profit projection.³²⁸ These calculations provide additional indication that estimating SAP's value of use at \$1 million per customer residual value is reasonable.

³²⁶ A 14% discount rate is consistent with the rate used in SAP's valuation of its acquisition of Business Objects "SAP AG Fair Value of Certain Assets, Liabilities and Legal Entities of Business Objects S.A. As of January 21, 2008," SAP-OR00832546-721, at 605.

³²⁷ TN-OR00609470-471 (Nelson Exhibit 1018) ["It allows us to build \$10 of strategic future SAP license pipeline for every \$1 of TN Stand-alone business we get through this independence. By winning these customers, TN rips away Oracle's 'home-field advantage' jacking up the likelihood of SAP eventually replacing these Oracle-owned systems."].

³²⁸ Email from Andrew Nelson to Lon Fiala Re: Working financial Impact notes, TN-OR 00591548 (A. Nelson Exhibit 1019). $\$600,000 + (\$600,000 * 17\% * 10 \text{ years}) = \$1,620,000 * 0.7 = \$1.134 \text{ million}$. Various documents indicate that an ongoing customer relationship has a present value of one million dollars or greater. "Update TomorrowNow Status: January 30, 2006," TN-OR00608668-691, at 671; Email from Juergen Viehl to Bernd Welz, et al. Re: Service Initiatives Reports – October 2007 – UPDATE, and attached 071017_Services_Initiatives_Reporting_update.zip, SAP-OR000565364-431, at 422; January 11, 2005 Bernstein Research Call "ORCL: A Look at the Combined ORCL-PSFT – Concerns and Uncertainties Abound Pending Details from Management," pgs. 3-4.

to SAP (i.e., it was critical for SAP to announce its offering of support on Oracle products immediately following Oracle's acquisitions of PeopleSoft and Siebel). If faced with a multi-year development timeframe in lieu of using Oracle's copyrighted property, SAP may have determined that offering TomorrowNow support services as an integral part of its Safe Passage program was not an attractive business decision. Therefore, SAP would likely be willing to pay more than the cost to independently develop the intellectual property in order to receive a time to market advantage and to avoid the risk of unsuccessful development.

d. Summary: Fair Market Value Using Cost Approach

152. In my opinion, the cost approach would indicate a fair market value of SAP's use of Oracle's copyrighted materials in suit of no less than \$936 million, with other considerations indicating that development costs, and the risks of development failure, would be much higher. I am relying on Mr. Pinto, who has estimated the costs to independently develop certain software applications that were accessed by TomorrowNow and SAP.³⁵⁰

B. Summary: "Value of Use" of PeopleSoft/J.D. Edwards Copyrighted Materials Based on Market, Income and Cost Approaches

153. Table 8 summarizes the fair market values of the PeopleSoft/J.D. Edwards copyrighted materials in suit based on the market, income and cost approaches. In my opinion, these metrics and the valuation analysis previously described indicate that no less than \$2 billion is the fair market value for the PeopleSoft/J.D. Edwards copyrighted materials in suit.

³⁵⁰ Discussions with Paul Pinto; November 16, 2009 Expert Report of Paul Pinto (see Mr. Pinto's explanation of his assignment and summary of opinions at pgs. 1-2).

**Table 8: Copyrighted Software and Support Materials
PeopleSoft/J.D. Edwards
Fair Market Values
With Projections of Up To 3,000 Oracle Lost Customers
(\$ In Millions)**

<u>Market Approach</u>	
Based on PeopleSoft Acquisition	\$1,780 - \$2,670
<u>Income Approach</u>	
Oracle Potential Losses	\$1,979 - \$3,762
SAP Potential Gains	\$881 - \$2,690
SAP Projected Impact On Oracle Profits	\$1,468
<u>Cost Approach</u>	
Avoided Development Costs (Mr. Pinto)	\$ 936 - \$2,903
Fair Market Value	No less than \$2,000

C. PeopleSoft / J.D. Edwards Copyright Infringement – Determination of SAP’s “Value of Use” Based on Hypothetical Negotiation Approach to Establishing Intellectual Property Value

1. Methodology

154. As set forth above, I understand the hypothetical negotiation concept for copyright infringement is recognized by the Ninth Circuit and other courts. The relevant financial, economic and other factors considered are reflected in case law and the Ninth Circuit’s relevant jury instruction. They are likewise articulated in the *Georgia-Pacific Corp v. US Plywood Corp.*³⁵¹ opinion, which identifies fifteen factors for consideration in determining a reasonable royalty for a patent license. The *Georgia-Pacific* factor format is an appropriate

³⁵¹ *Georgia Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, (S.D.N.Y. 1970), modified, 446 F.2d 295, 170 USPQ 369 (2d Cir. 1971), cert. denied (1971).

approximately \$1.53 million on average per Siebel customer for the 4,000 Siebel customers.⁵⁵⁵ Oracle Senior Executives have indicated 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 acquisition price.⁵⁵⁶ 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.

268. 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.⁵⁵⁷ Duff & Phelps determined that Siebel's intangible assets were worth approximately \$1.6 billion, including patents/core technology, software support agreements and related customer relationships and trademarks.⁵⁵⁸ Including acquired goodwill, valued at \$2.5 billion, the total fair market value of Siebel intangible assets was \$4.1 billion.⁵⁵⁹ Table 11 summarizes the intangible asset valuation for Oracle's acquisition of Siebel as reported in Oracle's financial statements.

⁵⁵⁵ SAP believed Siebel had 4,000 customers [Business Case: TomorrowNow – Siebel, TN-OR00995250-259, (Zieman Exhibit 472)], at 254; Email from Christian Klein to Thomas Zieman and Bernd Welz (Vice President System Service Solution Management), dated October 25, 2005 with attached Business Case files, SAP-OR00250204-225, (Hurst Exhibit 1601), at 223.

⁵⁵⁶ Discussion with Larry Ellison, Safra Catz and Charles Phillips. Deposition of Larry Ellison (Oracle CEO), May 5, 2009, pgs. 77-84.

⁵⁵⁷ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 748, 783, 812.

⁵⁵⁸ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 782.

⁵⁵⁹ Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pg. 76.

Table 11: Intangible Asset Valuation⁵⁶⁰
Oracle's Acquisition Price of Siebel
(\$ In Millions)

Goodwill	\$ 2,514
Developed Technology	418
Patents/Core Technology	199
Software Support Agreements and Customer Relationships	808
Customer Relationships	108
Trademarks	31
Total	\$ 4,078

269. Duff & Phelps' valuation of Siebel's intangible assets provides a contemporaneously prepared indication of the fair market value of the Siebel copyrighted materials in suit. While Duff & Phelps did not specifically value solely the Siebel copyrighted materials in suit, relevant portions of the Duff & Phelps intangible asset valuation include the value of using those copyrighted materials to provide service and enhance customer relationships. Duff & Phelps' valuations of the following intangible assets include value attributable to the Siebel copyrighted materials in suit: software support agreements and related customer relationships, the cost to replace customer relationships, and

⁵⁶⁰ Amounts in Table 11 reflect Oracle's financial statement disclosures regarding the accounting for the acquisition. Oracle Form 10-K for the fiscal year ended May 31, 2006, pgs. 75-77; "Oracle Corporation: Estimation of the Fair Market Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 782. See SCHEDULE 4. Duff & Phelps' valuation of Siebel's intangible assets totaled to \$1.628 billion. Oracle's financial statement disclosures recorded In-Process Technology valued at \$64 million as "In-process research and development" in the financial statement disclosures and was not included in the total identified intangible assets valuation. This adjustment reduces the intangible asset valuation to \$1.6 billion (\$1,628 – \$64 = \$1,564).

the goodwill premium resulting from the transaction.⁵⁶¹ Without the Siebel copyrighted materials in suit, TomorrowNow would not have been able to represent to Oracle's newly-acquired Siebel customers that it could meet the support service contract requirements and offer comparable service to Oracle at half the price, nor be able to make such an offering in the short time frame after Oracle's acquisition of Siebel.⁵⁶²

270. Duff & Phelps valued Siebel software support agreements and related customer relationships at \$808 million based on a discounted cash flow approach, considering projections of future support revenues and costs related to the use of the copyrighted materials in suit to provide support for the 4,000 Siebel customers through 2016.⁵⁶³ Duff & Phelps' valuation deducts all costs of offering support services and operating expenses.⁵⁶⁴ While this valuation includes Oracle's rights to these annual support agreements in addition to the Siebel copyrighted materials in suit, SAP's access and use of Oracle's copyrighted materials in suit would allow SAP to potentially supplant Oracle as the support provider and receive the benefit of the agreements that Oracle believed it was acquiring in the transaction. Because the terms of the contemplated hypothetical license presume that SAP would only be using the

⁵⁶¹ Duff & Phelps' valuation of Existing and In-Process Technology and Patents/Core Technology is not relevant to the determination of the fair market value of the copyrighted materials in suit in this matter because it measures the capability of the technology to generate new license revenues for that technology. In these circumstances, SAP would not be selling licenses for the copyrighted software applications, this measure of value is unrelated to the alleged improper actions of SAP and TomorrowNow. For purposes of this valuation, I have excluded any value associated with those alleged actions.

⁵⁶² Discussions with Kevin Mandia; February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1-3; Discussions with Paul Pinto; November 16, 2009 Expert Report of Paul C. Pinto, pgs. 2, 42-43.

⁵⁶³ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 770-772; 798.

⁵⁶⁴ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 798.

Siebel copyrighted materials in suit until October 2008, and only a portion of Siebel's customers would be impacted, a downward adjustment to the \$808 million intangible asset value would be warranted.

271. Duff & Phelps separately valued the cost to replace the approximate 1,800 new customer relationships Oracle obtained from the Siebel acquisition.⁵⁶⁵ Duff & Phelps valued those relationships at approximately \$108 million.⁵⁶⁶ This valuation assumes that Oracle avoided the cost of a 6 month sales cycle in order to place a customer in a Siebel license contract with residual ongoing support contract revenues. Although SAP's use of the copyrighted materials still required it to approach and attempt to establish customer support relationships (e.g., they would not be handed a software support contract without some sales efforts), SAP avoided the time and effort required to get the customer to license Siebel software. Instead, SAP was able to spend a much shorter amount of time to convince the customer to switch support providers. In addition, there is little overlap between SAP and Siebel customers. Only 300 customers are estimated by SAP to overlap. Therefore, SAP would be gaining access to twice the number of new customers (3,700 customers) than the number of new customers to Oracle (1,800 customers) that were used to determine the \$108 million customer relationship value. As a result, a large portion of the \$108 million value of the Siebel customer relationships would be relevant to the value of the copyrighted materials in suit.

⁵⁶⁵ Since 55% percent of Siebel customers overlapped with Oracle customers, 45% represent new customer relationships (4,000 x 45% = 1,800); "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 772-773.

⁵⁶⁶ "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 800.

272. The \$2.5 billion attributed to Siebel goodwill includes value relevant to the Siebel copyrighted materials in suit, including support revenues from customers that purchased Siebel products after Oracle's acquisition date, as well as revenues from purchases of other Oracle software by Siebel customers.⁵⁶⁷ Some of the benefit to SAP of supplanting Oracle in providing support for Siebel customers is included in the \$2.5 billion of goodwill.

273. SAP's "value of use" would include a portion of the total \$3.4 billion of relevant intangible assets. The \$3.4 billion is the sum of the fair market value of all Siebel maintenance agreements and related customer relationships at the time of acquisition (\$808 million), the avoided cost of developing certain new customer relationships (\$108 million) and all of Oracle's recorded goodwill from the acquisition (\$2.5 billion). Since access to the copyrighted materials are important to generating revenues and enhancing customer relationships, a portion of the \$3.4 billion would be relevant to the fair market value of the copyrighted property in suit.

b. Summary: Fair Market Value Using The Market Approach

274. SAP was projecting obtaining 200 Siebel support customers, or approximately 5%, of Siebel's 4,000 customers.⁵⁶⁸ After considering the transactions described above, and providing particular focus on the Siebel acquisition, in my opinion, the market approach indicates a fair market value of SAP's use of Oracle's Siebel copyrighted materials in suit of no less than

⁵⁶⁷ Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pg. 93.

⁵⁶⁸ "Apollo Competitive Program Office Program Playbook," SAP-OR00790353-387 (Hurst Exhibit 1597), at 355; Email from Christian Klein to Thomas Ziemer and Bernd Welz (Vice President System Service Solution Management), dated October 25, 2005 with attached Business Case files, SAP-OR00250204-225, (Hurst Exhibit 1601), at 223 and 225.

expenses, I have deducted 15% for cost of support revenues, 20% for cost of incremental license sales to existing customers, and 50% for cost of new license revenues.⁵⁷³ I have determined a terminal value representing lost support customers to SAP after October 2008, lost incremental license revenue and associated support.

b. Income Approach Applied To SAP's Expected Gains

279. SAP estimated the benefit that would be realized from access and use of the Siebel copyrighted materials in suit. In October 2005, Siebel-related projections by SAP indicated that they believed they would achieve limited success in converting Siebel support customers. SAP believed that approximately 300 of the 4,000 total Siebel customers also had SAP software.⁵⁷⁴ While SAP's focus was to convert all of these 300 customers, the TomorrowNow Business Case for 2006 projects only 40, 100 and 200 customers of TomorrowNow for Siebel support between 2006 and 2008.⁵⁷⁵ Analyzing the expected TomorrowNow support revenues, SAP up-sell and cross-sell revenue, and determining the terminal value of the ongoing support revenue from customers converted to SAP results in a fair market value of the Siebel

⁵⁷³ SCHEDULES 14.1.U, 14.2.U. Oracle Corporation Estimation of Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc., as of January 31, 2006, ORCL00312747-819 at 799 and 813; Oracle Form 10-K data for 2004-2008 shows a gross margin on "New Software Licenses" ranging from 43% to 51% (See SCHEDULE 1.1).

⁵⁷⁴ "The opportunity is to move the 300+ SAP customers that SAP and Siebel have in common and migrate them to mySAP CRM" The launch date for the Siebel Safe Passage Program is October 17, 2005. Program Objectives – "Convert 5 joint SAP/Siebel customers by the end of Q2 and 20 by the end of Q4." Siebel Safe Passage Program Playbook, SAP-OR00790353-387 at 354-355, (Hurst Exhibit 1597).

⁵⁷⁵ Business Case: TomorrowNow 2006 "Biz Planning – TNow Offering for Siebel" shows Customer (Calculated) forecast: 40 in 2006, 100 in 2007, and 200 in 2008. SAP-OR00250204-225 at 225, (Hurst Exhibit 1601); Siebel Safe Passage Program Playbook, SAP-OR00790353-387 at 354 (Hurst Exhibit 1597).

copyrighted materials in suit of \$97 million after deducting 30% of revenues for incremental costs and discounting to September 2006 at 14%.⁵⁷⁶

280. A second scenario assumes the same base calculations outlined above, but computes a \$1,000,000 residual value assuming that 200 Siebel customers are lost to SAP, and results in a fair market value of the copyrighted materials in suit of \$246.7 million.⁵⁷⁷

281. Lastly, a third calculation is based on SAP's projection that in 2007 TomorrowNow earns \$14.38 million of Siebel service revenue. It is unclear whether the \$14.38 million assumes TomorrowNow's 50% discount of Oracle's license price (or support priced at 10% of license revenues) or if the revenue projection assumes a 17% fee on license revenues. Therefore, I have performed the below described calculation under two versions, one assuming \$14.38 million for TomorrowNow Siebel support revenues in 2007, and the other version assuming half of \$14.38 million, or \$7.19 million for TomorrowNow Siebel support revenues for 2007. Applying Andrew Nelson's ratio of \$1 of TomorrowNow revenue is equal to \$18 of Oracle lost revenue (as addressed in section VI.C. above), the \$7.19 million or \$14.38 million of TomorrowNow revenues is equivalent to \$129 million to \$259 million. Adjusting for 15% incremental cost (based on Oracle's financial data regarding costs and margins), results in a fair market value of the Siebel copyrighted materials in suit of \$110 million to \$220 million.⁵⁷⁸

⁵⁷⁶ See **Schedule 17.SU**.

⁵⁷⁷ See **Schedule 18.SU**.

⁵⁷⁸ **Schedule 22.U**. Various documents indicate that an ongoing customer relationship has a present value of one million dollars or greater. **Schedule 23.SU**; TN-OR00608667-691, at 676; SAP-OR000565364-431; ORCL00087645-661; 1/11/05 Bernstein Research Call.

F. Opinion: Value of Use for Siebel Copyrighted Materials Based on Hypothetical Negotiation Approach to Establish Intellectual Property Value – Oracle and SAP Would Have Agreed Upon a License Fee of No Less Than \$ 100 million

350. Based on my analysis of the fifteen *Georgia-Pacific* factors and relevant economic, financial and valuation issues and considerations, in September 2006, in my opinion the parties, as willing participants in a hypothetical negotiation for the above described license, would have agreed on a license fee of no less than \$100 million.

IX. Quantification of SAP's Value of Use of Oracle's Copyrighted Property – Lost Profits

A. Overview

351. Oracle's⁶⁵⁵ lost profits resulting from SAP's alleged infringement and use of Oracle's intellectual property include lost profits on lost support revenue related to Oracle's PeopleSoft, J.D. Edwards and Siebel products that would have been sold to customers that left to go to TomorrowNow.⁶⁵⁶

352. I understand that a quantification of actual damages as represented by Oracle's losses resulting from SAP's wrongful acts (i.e., Oracle's lost profits) is a remedy of damages available for certain of Oracle's causes of action in this

⁶⁵⁵ In this section of the Report, "Oracle" refers to both the Plaintiff entities collectively, and their predecessors in interest.

⁶⁵⁶ Pursuant to the September 17, 2009 Order of Magistrate Judge Laporte granting Defendants' Motion for Preclusion of Certain Damages Evidence, I understand that Oracle is precluded from seeking damages to which it believes it is entitled, including lost profits on lost up-sell or cross-sell opportunities related to the customers that cancelled their Oracle support contracts to go to TomorrowNow; lost profits related to discounts that Oracle provided to customers in order to compete with TomorrowNow; and lost profits associated with Oracle's adoption of its Lifetime Support and Applications Unlimited programs. Accordingly, I have not quantified those damages in this report. I understand that should Defendants take the position at trial that Oracle's claimed damages are excessive, the jury may be informed that Oracle is not seeking all of the damages to which it believes it is entitled [Magistrate Laporte's Order Granting Defendants' Motion for Preclusion of Certain Damages Evidence Pursuant to Federal Rules of Civil Procedure 37(c)(1) and 16(f), September 17, 2009; Judge Hamilton's November 2, 2009 Order].

suit.⁶⁵⁷ The relevant Oracle plaintiff entities vary by cause of action. As explained below, I have calculated and offer opinions on Oracle's lost profits both in total, and by plaintiff entity.

353. As it relates to Oracle's copyright infringement claim, a measurement of Oracle's lost profits may be one alternative measure of Oracle's "actual damages." However, based on the facts of this case, a more appropriate measure of damages is SAP's "Value of Use" of the copyrighted materials in this suit, as determined in a hypothetical negotiation between Oracle and SAP at that time and under the circumstances of the actual infringement. At the time of my initial report, a motion was pending before Judge Hamilton in which Defendants had challenged Oracle's right to seek damages based on the Fair Market Value of Use. Therefore, I included the following lost profits analysis as an affirmative opinion. As referenced above in my discussion of the alternative Fair Market Value of Use analysis, Judge Hamilton has now recognized Oracle's right to seek such damages on its copyright infringement claim. In light of that ruling, I understand that it is Oracle's position that Oracle reserves the right to withdraw lost profits as an affirmative opinion of its copyright damages, thereby making Defendants' rebuttal of such an analysis with an alternative measure of lost profits unnecessary, inappropriate and time-consuming at trial.

354. I understand that Oracle International Corporation (OIC), the claimant in Oracle's copyright infringement cause of action, is the owner or exclusive

⁶⁵⁷ I understand that lost profits is an available damages remedy under Oracle's claims of copyright infringement (as an alternative measure of Oracle's actual damages to SAP's "Value of Use" discussed in section V above), breach of contract, interference, and Computer Fraud and Abuse Act, and Computer Data Access and Fraud Act claims. Oracle's quantified lost profits damages that result from these various claims are overlapping, as they relate to lost support sales, and appear to be for the same set of customers.