# EXHIBIT 1

# [FILED UNDER SEAL]

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

PAUL K. MEYER

TEXT REMOVED - NOT RELEVANT TO MOTION

95. As addressed below, I have determined SAP's "value of use" of the copyrighted materials in suit based on commonly accepted valuation methodologies: the market approach, income approach and cost approach. I have also evaluated relevant financial, economic and other factors, consistent with determination of the fair market value under the framework of the well-known patent case, *Georgia-Pacific Corp. v. U.S. Plywood Corp. ("Georgia-Pacific"),* for determining the outcome of a hypothetical license negotiation for the copyrighted materials.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

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

TEXT REMOVED - NOT RELEVANT TO MOTION

than actually occurred.[275] A business arrangement between the two companies that involved a license reflecting the full spectrum of use of the copyrighted and non-copyrighted materials by Defendants, beyond the actions that constitute copyright infringement in this matter, and which is indifferent to whether particular foreign Oracle subsidiaries are named plaintiffs on the cause of action, would likely have a higher value than the fair market value licenses determined herein. Some of that difference is captured by Oracle's interference claims.

TEXT REMOVED - NOT RELEVANT TO MOTION

[275] E.g., *Wall Data v. Los Angeles County Sheriff's Dep't*, 447 F.3d 769, 786-787 (9th Cir. 2006). In addition, I understand that, for standing reasons, the hypothetical license would not allow for the sale of software or support services in EMEA (Europe, the Middle East and Africa) for the J.D. Edwards EnterpriseOne versions 8.11 and earlier and Siebel versions 7.8 and earlier product lines. I understand that J.D. Edwards Europe Ltd. and Siebel Systems Ireland Holdings Ltd. own exclusive licenses to the relevant copyrights for these products in EMEA, and thus are the entities that would have legal standing to bring claims for copyright infringement related to those exclusive licenses. These are not named plaintiffs to Oracle's copyright infringement claim, so while damage occurred to Oracle entities, I understand it may not be recovered under the copyright infringement claim in this suit.

TEXT REMOVED - NOT RELEVANT TO MOTION

110. Just before SAP announced it was acquiring TomorrowNow to target the PeopleSoft support customer base, Oracle had agreed to pay $11.1 billion for PeopleSoft, including its significant annual support revenue stream.[283] The value that Oracle paid for PeopleSoft in an arm's length market transaction, virtually identical in time to SAP's acquisition of TomorrowNow, is particularly relevant to understanding the fair market value of SAP's value of

TEXT REMOVED - NOT RELEVANT TO MOTION

[283] Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 72-74; "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 171 and 204.

use of the infringed materials in the assessment of damages in this matter. Of particular relevance is the value to Oracle of the acquired PeopleSoft on-going support customer revenue and enhanced customer relationships, which were expected to lead to additional license sales of PeopleSoft and/or other Oracle software. Without the copyrighted materials in suit, no support competitor could offer the same breadth and depth of support services as Oracle could as the copyright owner. In the alternative, massive investments in research and development to attempt to independently create the copyrighted materials in suit would be required. I understand that the PeopleSoft/J.D. Edwards copyrighted materials in suit would have been very costly to independently develop.[284]

TEXT REMOVED - NOT RELEVANT TO MOTION

[284] Discussions with Paul Pinto; November 16, 2009 Expert Report of Paul Pinto, pg. 43 (Mr. Pinto calculated a total development cost for selected PeopleSoft and JDE applications he evaluated of $1.275 billion [$320 million for JDE Enterprise One + $707 million for PeopleSoft + $248 million for JDE World]).

TEXT REMOVED - NOT RELEVANT TO MOTION

### 1. Market Approach

113. The market approach provides a determination of fair market value based on a comparison of the subject intellectual property to relevant licensing and sales transactions involving the subject intellectual property and/or transactions involving the parties in suit or comparable transactions within the industry. In the market approach, I consider market transactions involving sales of all or part of the subject intellectual property, the consideration paid by Oracle to PeopleSoft to acquire the property and other market transactions involving software.

#### a. Oracle's Acquisition of PeopleSoft

114. Theoretically, in lieu of illegally accessing the copyrighted materials in suit, SAP could have entered into a fair market value transaction and acquired a portion of the PeopleSoft/J.D. Edwards customer base and the associated revenue stream. The value that Oracle paid on a per customer basis for PeopleSoft/J.D. Edwards reflects an arm's length transaction to acquire those customer relationships, revenue and future business opportunities. Oracle

[285] Discussions with Paul Pinto and Kevin Mandia; February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1-3, Section VI (pgs. 34-58), Section VII.A-G (pgs. 59-73) and Appendices D-H; Deposition of Edward Screven (Oracle Chief Corporate Architect), November 30, 2009, pgs. 31-32 (explaining that newer versions of PeopleSoft and J.D. Edwards applications incorporate almost all of the code of the older versions).

acquired the entire PeopleSoft, Inc. company for $11.1 billion in January 2005.[286] As part of Oracle's acquisition of PeopleSoft, Oracle acquired the intellectual property of PeopleSoft, including the PeopleSoft copyrighted materials in suit related to: PeopleSoft Enterprise, J.D. Edwards Enterprise One and J.D. Edwards World software applications and then existing software and support materials.[287] In addition, Oracle acquired access to approximately 9,920 PeopleSoft customers who were, at the time of acquisition, under support contracts with PeopleSoft.[288] PeopleSoft projected 2004 total revenues, including license and services, of $2.7 billion.[289] Oracle's acquisition price was approximately 4 times PeopleSoft's then-reported annual revenues.[290]

115. As discussed in section III.B above, Oracle Senior Executives viewed the PeopleSoft acquisition as providing important new or deepened access to PeopleSoft's customer base and technology. The $11.1 billion acquisition price equates to an investment of approximately $1 million per customer, on average. Oracle Senior Executives have indicated that one way they would consider the impact of a hypothesized PeopleSoft/J.D. Edwards license to SAP would be to consider the volume of customers they would have expected to lose to SAP as a result of the license. For example, if 30% of support customers would be lost to SAP, Oracle Senior Executives would consider the fair market

---

[286] Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 72-74.

[287] Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 72-74.

[288] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 188.

[289] **SCHEDULE 2.SU**

[290] **SCHEDULE 2.SU**

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 Valuation[294]<br>Oracle's Acquisition Price of PeopleSoft<br>($ 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)].

TEXT REMOVED - NOT RELEVANT TO MOTION

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

TEXT REMOVED - NOT RELEVANT TO MOTION

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 goodwill[301] 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.

TEXT REMOVED - NOT RELEVANT TO MOTION

[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

TEXT REMOVED - NOT RELEVANT TO MOTION

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 years) = $1,620,000 * 0.7 = $1.134 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.

136. TomorrowNow also estimated that $1 of TomorrowNow revenue equaled an $18 to $20 impact on Oracle revenues.[329] Using SAP's Business Opportunity as a Base Case, which assumes that 3,000 customers have left for TomorrowNow by 2007 with an annual support revenue stream of $102 million (adjusted for TomorrowNow 50% price discount), the value multiplier of $18 would equate to approximately $1.8 billion revenue loss for Oracle.[330] Using a 80% profit margin, based on a 15% cost of support services and a 5% cost of sales support per Oracle financial documents, would result in $1.47 billion loss of profits to Oracle.[331]

TEXT REMOVED - NOT RELEVANT TO MOTION

---

[329] April 25, 2006 email from Andrew Nelson to Lon Fiala, Re: Working financial impact notes , which indicates $1 of TomorrowNow revenue is equivalent to $20 of Oracle support revenues taken from a "10-year maintenance-based justification for the PeopleSoft/JDE takeover" [TN-OR00591548 (Nelson Exhibit 1019)]. A March 26, 2006 email from Andrew Nelson to Lon Fiala, et al, (with cc to SAP Co-Chief Executive Officer and Executive Board Member, Leo Apotheker) indicates that "$1 of TN Stand-alone revenue this year represents $18 of originally expected Oracle revenue" [TN-OR00609470-471 (Nelson Exhibit 1018)]. Mr. Apotheker did not disagree or contradict Mr. Nelson's analysis [Deposition of Andrew Nelson (Co-Founder of TomorrowNow), February 26, 2009, pgs. 163-166].

[330] **SCHEDULE 21.1.SU**. Email from Andrew Nelson to Lon Fiala, Re: TN Standalone deals to Safe Passage, dated 3/26/06, TN-OR00609470-471 (Nelson Exhibit 1018), at 470.

[331] **Schedule 21.1.SU**. Mr. Nelson and SAP employees created, discussed, and routed externally, including to the investment community, estimates that TomorrowNow would take $1.1 billion from Oracle in maintenance revenue alone. Those estimates are based on the assumption that, on average, customers are worth at least $100,000 annually or $1 million over a ten year period. See, for example: Email from Andrew Nelson to Lon Fiala Re: Revised PDF with attached document "Financial Impact on Maintenance Revenue over 10 years.pdf," TN-OR07165549-550, at 550. Email from Anke Mongannam (TomorrowNow Director of Marketing, Americas) to Michael Myers (SAP Analyst Relations Manager, Services, SAP Global Communications), TN-OR00141848-849; Email from Lon Fiala to Michael Prosceno (SAP Global Communications) Re: Impact on Vendor, TN-OR07160446; Email from Lon Fiala to J. Bonasia (Investors.com) with attached document "Financial Impact on Maintenance Revenue over 10 years.pdf," TN-OR07162308; Emails between Bob Geib (TomorrowNow Senior Vice President) and Daniel Jay (TomorrowNow Manager Services Marketing, Americas), TN-OR02774870-871; Email from Anka Mongannam (TomorrowNow Director of Marketing, Americas) to Mandy Wheller (Assistant to Andrew Nelson) with attached document "Brent_Thill_060504_VED_edits.doc," TN-OR07163894-899, at 896 and 899.

TEXT REMOVED - NOT RELEVANT TO MOTION

### c. Summary: Fair Market Value Using Income Approach

141. In my opinion, the income approach would indicate a fair market value of SAP's use of Oracle's copyrighted materials in suit of between $881 million and $3.8 billion, depending on different expectations of the impact on Oracle and the benefits inuring to SAP.

TEXT REMOVED - NOT RELEVANT TO MOTION

---

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

### 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.

---

TEXT REMOVED - NOT RELEVANT TO MOTION

| Table 8: Copyrighted Software and Support Materials<br>PeopleSoft/J.D. Edwards<br>Fair Market Values<br>With Projections of Up To 3,000 Oracle Lost Customers<br>($ 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** |

TEXT REMOVED - NOT RELEVANT TO MOTION

---

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

157. I understand that Oracle alleges that TomorrowNow began downloading PeopleSoft enterprise software applications and support materials starting in early 2002, prior to SAP's acquisition of TomorrowNow.[356] Consequently, a hypothetical negotiation would also take place between PeopleSoft and TomorrowNow in the early 2002 timeframe, before the alleged infringement first occurred. The license fee resulting from this hypothetical negotiation would reflect the value that TomorrowNow and PeopleSoft would have willingly agreed upon for TomorrowNow's use of PeopleSoft's copyrighted property between 2002 and January 2005.[357] However, I also understand that, as a legal matter, SAP would have had to negotiate with Oracle concerning a hypothetical license allowing TomorrowNow to use the PeopleSoft intellectual property, because SAP purchased TomorrowNow and non-exclusive copyright licenses are personal and non-assignable without the consent of the licensor (in this case, Oracle - PeopleSoft's successor in interest).[358] Therefore, a separate hypothetical negotiation would have occurred between Oracle and SAP at or around the time SAP acquired TomorrowNow in January 2005.

---

TEXT REMOVED - NOT RELEVANT TO MOTION

[356] Oracle USA, Inc. et al v SAP AG et al, Fourth Amended Complaint in Case No. 07-CV-01658 dated August 18, 2009, pg. 7.

[357] For purposes of this report, I have not determined the amount that PeopleSoft and TomorrowNow would have negotiated for a license for TomorrowNow's use of PeopleSoft's intellectual property since the license would not have covered the same scope of use and would not be transferrable to an acquiring entity.

[358] *See, e.g., Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC Inc.)*, 89 F. 3d 673 (9th Cir. 1996); *SQL Solutions, Inc. v. Oracle Corp.*, 1991 U.S. Dist. LEXIS 21097 (N.D. Cal. 1991).

TEXT REMOVED - NOT RELEVANT TO MOTION

161. The license agreement between SAP and Oracle for the copyrighted materials in suit would be a non-exclusive, non-transferable license allowing SAP to reproduce, distribute and create derivative works in all geographies where and when SAP actually used the PeopleSoft and J.D. Edwards copyrighted materials-in-suit.[365] The license would be non-exclusive, as the parties would understand that Oracle would continue to provide software and software support to its own customers using those materials. For example, at the time of Oracle's acquisition of PeopleSoft, Larry Ellison confirmed that it would continue to support PeopleSoft products for ten years from the 2005

TEXT REMOVED - NOT RELEVANT TO MOTION

[365] TN-OR06125333_TN Customer Report Revised.xls. The scope of the hypothetical license between Oracle and SAP would be worldwide, as I understand that SAP's sale and execution of TomorrowNow services outside of the United States was dependent upon its reproduction and distribution of the misappropriated copyrighted materials that took place in and from the United States [*See* section IV.B.7 of this Report, citing, among other things, Oracle's technical experts]. Reliance on the testimony of qualified experts is consistent with *Georgia-Pacific* factor 14.

date of acquisition.[366] Oracle has continued to support PeopleSoft and J.D. Edwards products throughout the term of the PeopleSoft/J.D. Edwards hypothetical license at issue. The license would include grant terms that would reflect SAP's alleged infringing behavior.

TEXT REMOVED - NOT RELEVANT TO MOTION

[366] January 18, 2005 Video Presentation "Oracle and PeopleSoft – Better Together," ORCL00223497-531 (Ellison Exhibit 400), at 501.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

163. Under the terms of the hypothetical license, SAP or TomorrowNow's use would be restricted as follows:

- SAP and TomorrowNow are not permitted to advertise or promote TomorrowNow or SAP as a licensed service provider or Partner with Oracle for providing service for PeopleSoft and J.D. Edwards products, or otherwise in a manner inconsistent with the rights otherwise accorded by a particular customers' license agreement with Oracle.
- SAP and Tomorrow Now cannot use Oracle's copyrighted information in any manner not expressly permitted under the hypothetical license.
- SAP and Tomorrow Now would not receive any intellectual property rights related to the infringed materials.

TEXT REMOVED - NOT RELEVANT TO MOTION

165. While the hypothetical license would end in October 2008, coinciding with the TomorrowNow dissolution,[368] Oracle would consider the long term financial implications of providing the above described license to the copyrighted materials to a larger direct competitor.[369] While the duration of the license is relatively short, which would generally put some downward pressure on a license fee, several key circumstances in this situation should be considered.

166. First, the timing of the license would be critical to both parties: Oracle had just agreed to pay multiple billions of dollars to acquire PeopleSoft; SAP wanted to take advantage of the fear, uncertainty and doubt of PeopleSoft customers at that time, and knew that it had to strike quickly, which the TomorrowNow acquisition allowed them to do.

167. Second, Oracle would consider and extract a price for the financial impact on Oracle of licensing to a competitor that has abundant resources to directly compete with Oracle in providing a level of PeopleSoft and J.D. Edwards service that has little, to no other, competition.

168. Third, SAP's own documents, as well as deposition testimony of SAP senior executives and board members, acknowledge that SAP's intention was not simply to receive revenue from the provision of TomorrowNow support services, but rather was to use its TomorrowNow offering to drive the conversion of Oracle's application customers to SAP's platform. In other

[368] SAP Annual Report for fiscal year ending December 31, 2008, pg. 173.

[369] Discussions with Oracle executives: Larry Ellison, Safra Catz and Charles Phillips.

words, SAP's objective was (and likewise Oracle's expectation would be) that some portion of TomorrowNow's customers obtained through October 2008 would switch to the SAP software platform, causing Oracle to lose license and maintenance revenue into the future.[370]

169. These factors significantly outweigh the relatively short duration of the license and result in net upward pressure on the amount of the license fee.

#### b. Past Licensing Practices of the Parties for Similar Intellectual Property, or Lack Thereof (*Georgia-Pacific* Factors 1, 2 and 4)

TEXT REMOVED - NOT RELEVANT TO MOTION

##### i. Oracle Licensing History

171. I am not aware of any specific agreements where license fees or royalties were received by Oracle for licensing the PeopleSoft/J.D. Edwards copyrighted materials in suit that would provide an established royalty. I understand that Oracle has never "licensed out" to a third party its copyrighted materials in suit or other intellectual property related to its PeopleSoft or J.D. Edwards software and support materials enabling other entities to provide support for PeopleSoft customers and compete directly with Oracle and/or PeopleSoft.[371] I understand from discussions with Oracle senior executives that to license the

[370] For example, "Step 3" of SAP's "PeopleSoft 1-2-3" plan was to "Upgrade PeopleSoft customers to mySAP ERP." Email from John Zepecki to Arlen Shenkman, Re: TomorrowNow/PSFT related background info, January 5, 2005, with attached document "PeopleSoft 1-2-3 01 05 05.doc," SAP-OR00004991-5007 (Shenkman Exhibit 225), at 003. *See also*, section IV.B.3 of this Report.

[371] Oracle's Opposition to Defendants' Motion to Compel Discovery Concerning Third Party Support Provided by Oracle's Partners, January 23, 2009, pgs. 8-9. I understand that Oracle does have partners who sell software licenses as resellers for Oracle. I understand that these partners, however, do not sell support renewal contracts, and do not provide customers with support [Deposition of Charles Philips (Oracle Co-Chief Executive Officer), April 17, 2009, pgs. 46-47.

copyrighted materials in suit to Oracle's strongest direct competitor would undermine Oracle's business model.[372] Oracle's reluctance, for business reasons, to license these materials illustrates the significant value to Oracle of what SAP allegedly stole. That being said, while Oracle has not licensed the PeopleSoft copyrighted materials in suit to third parties in comparable or instructive situations, Oracle did acquire the copyrighted materials in an arm's length transaction. The value to Oracle of the copyrighted materials and the use of those materials to provide service to its customers is evident in the amounts that it paid to acquire and develop that intellectual property.[373]

TEXT REMOVED - NOT RELEVANT TO MOTION

[372] Discussion with Oracle senior executives: Larry Ellison, Safra Catz and Charles Phillips.

[373] Oracle's acquisition cost per PeopleSoft customer of $1.0 million provides a fair market value license fee metric for the copyrighted materials, as those copyrighted materials enable and protect customer support revenues. The acquisition metric resulted from an arm's-length transaction in the same month as the hypothetical.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

189. The $10 million SAP paid to acquire TomorrowNow is not instructive as to the fair market value of a license to Oracle's PeopleSoft/J.D. Edwards copyrighted materials at issue, as SAP was aware that they were not acquiring any intellectual property in its acquisition of TomorrowNow.[406] Moreover, acquiring intellectual property from the owner (i.e., Oracle) is far more secure and expedient than acquiring or developing work-arounds (both technically and as a matter of litigation risk).[407] That technical advantage was touted by Oracle when it marketed against TomorrowNow.[408] As described in section IV.B.6 of this Report, SAP repeatedly acknowledged the litigation risk

TEXT REMOVED - NOT RELEVANT TO MOTION

[406] TomorrowNow Due Diligence Information Request, BR00123-28 at 125; SAP Corporate Finance: Purchase Price Allocation as of January 19, 2005 induced by the Acquisition of TomorrowNow, Inc. dated April 4, 2005, SAP-OR00005574-589 at 589. SAP's purchase price allocation for intangible assets includes no value for software applications and software and support materials.

[407] Discussion with Paul Pinto (Sylvan VI, Inc.); November 16, 2009 Expert Report of Paul Pinto, pg. 6.

[408] Deposition of Nancy Lyskawa (Oracle Vice President of Support Marketing), dated May 6, 2009, pgs. 91-94 and 144-145; Oracle email from Tawanna Saunders to Nancy Lyskawa, Re: Customer FAQ v2, ORCL00302457-467 (Lyskawa Exhibit 428), at 463-466; 30(b)(6) Deposition of Richard Cummins (Oracle Senior Director of Support Renewals for North America), September 16, 2008, pgs. 179-180.

associated with their purchase of a company with potential intellectual property infringement exposure.

TEXT REMOVED - NOT RELEVANT TO MOTION

---

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

196. Unauthorized access to, and use of, a company's intellectual property by a competitor significantly weakens the value of intangible assets, particularly when the competitor claims to offer the same product (in this case software support services) at significantly reduced prices.[416] By licensing its copyrighted property to a direct competitor such as SAP, Oracle would expect to experience lost software license revenue, reduced support revenue, reduced profit margins on retained customer accounts, reduced cross-selling and up-selling opportunities and lost strategic market positioning.

TEXT REMOVED - NOT RELEVANT TO MOTION

198. Oracle's financial benefits from its acquisition of PeopleSoft were impacted by TomorrowNow's actions, which cost Oracle lost customers, lost

[416] Deposition of Safra Catz (Oracle Co-President), March 27, 2009, pg. 79; Deposition of Charles Phillips (Oracle Co-President), dated April 17, 2009, pgs. 17-18; Service Deliveries for PSFT Customers dated January 16, 2005, SAP-OR 00000927-938 (Shenkman Exhibit 234) at 928; Deposition of Shai Agassi (SAP Executive Board Member), January 5, 2009, pgs. 26-28.

TEXT REMOVED - NOT RELEVANT TO MOTION

revenue, lost opportunities to sell more products to those customers, damaged customer relationships and reputational harm.[420]

TEXT REMOVED - NOT RELEVANT TO MOTION

[420] Oracle's November 2, 2009 Third Supplemental and Amended Initial Disclosures, Section III, Computation of Damages. *See also,* e.g., Deposition of Safra Catz (Oracle Co-President and Executive Board Member), March 27, 2009, pg. 79; Deposition of Larry Ellison (Oracle CEO and Executive Board Member), May 5, 2009, pgs. 10-12; Deposition of Charles Phillips (Oracle Co-President and Executive Board Member), April 17, 2009, pgs. 17-21. Deposition of Juergen Rottler (Oracle Executive Vice President, Customer Services), May 13, 2009, pgs. 50-54 and 67-68. Deposition of Judith Sim (Oracle Chief Marketing Officer), September 2, 2009, pgs. 232-233.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

### 3. Hypothetical Negotiation Approach Summary (*Georgia-Pacific* Factor 15)

229. My conclusions and opinion as to the outcome of a hypothetical negotiation based on consideration of the financial, economic and other relevant factors discussed above is set forth in the following section.

TEXT REMOVED - NOT RELEVANT TO MOTION

230. Oracle would realize in the hypothetical negotiation that "but for" the license to SAP, it would be able to realize the full value of its investment in PeopleSoft, which Oracle's history has indicated would include returns beyond the entire acquisition price. Licensing SAP will severely impact the transition of the PeopleSoft customers to Oracle. The acquired cost per customer valuation metrics allow Oracle to apply fair market value data to its calculation of what it is really giving up with the license. These customer metrics are relevant to the license fees that would result in consideration of Georgia-Pacific factor 1: fees charged for the use of the intellectual property in suit.

## D. Value of Use Under the Hypothetical Negotiation – Summary

231. The hypothetical negotiators would have considered the financial, economic and other valuation inputs that I have identified and analyzed, and then determined a reasonable royalty (i.e. license fee) by engaging in a "back and forth" negotiation.[490] Below, I summarize the hypothetical negotiation and refer to the various financial metrics in the market, income and cost approach section which would be relevant to determining the license fee in the hypothetical negotiation.

### 1. Summary of Factors Considered by Oracle and SAP

232. As discussed above, in determining the license fee that it would be willing to accept from SAP for SAP's use of the PeopleSoft/J.D. Edwards copyrighted materials in suit, Oracle would consider at least the following factors:

---

[490] I understand that the hypothetical negotiation would be conducted by a willing licensor (Oracle) and a willing licensee (SAP) acting in a rational manner in or around January, 2005.

- The broad scope of the license, which would enable SAP to compete against Oracle in providing support services to its PeopleSoft/J.D. Edwards customers, and provide SAP with enhanced ability to convert those customers to SAP applications;
- Expected lost support revenue to SAP on customers that would go to TomorrowNow for support services, as well as lost up-sell and cross-sell revenues from those customers;
- The anticipated permanent impact on Oracle due to the lost future license revenue and ongoing support renewals for customers that would switch to SAP applications;
- Immediately prior to the contemplated hypothetical negotiation, Oracle paid approximately $11.1 billion to acquire PeopleSoft, including rights to the PeopleSoft/J.D. Edwards customer support contracts and related relationships and associated goodwill;

REDACTED

[redacted]

- The nature of the relationship between Oracle and SAP, as direct competitors in the software applications business, particularly in light of Oracle's goals for the PeopleSoft acquisition to enhance its competitive position with SAP in the applications market;

- Anticipated changes to Oracle's business practices in order to compete with SAP to provide support services to Oracle customers; and,
- Anticipated negative impacts to the level of profitability and customer renewal rates of the Oracle support products that embody the copyrighted materials at issue, and the resulting impact on Oracle's ability to use that support revenue stream to fund ongoing research and development.

233. Similarly, in determining the amount of a license fee that SAP would be willing to pay to Oracle for its use of the PeopleSoft/J.D. Edwards copyrighted materials in suit, SAP would consider at least the following factors:

- The license would allow SAP to use its TomorrowNow service offering to drive the conversion of Oracle's applications customers to SAP's platform;
- SAP's willingness to pay significant amounts to acquire intellectual property and customer relationships, as evidenced in particular by its 2007 acquisition of Business Objects for $7.1 billion;
- SAP's knowledge that access to Oracle's copyrighted materials is necessary for the level of support that it sought to provide and advertised to Oracle's PeopleSoft/J.D. Edwards customers;
- TomorrowNow's entire business model relied upon its access and use of Oracle's PeopleSoft/J.D. Edwards copyrighted materials in suit;

- The nature of the competitive relationship between Oracle and SAP in the software applications business, and in particular the increased competitive threat that Oracle posed to SAP as a result of its acquisition of PeopleSoft;
- The significant development time, effort and risk that SAP would avoid by entering into the contemplated hypothetical license;
- The importance of timing and speed of SAP's offering of PeopleSoft/J.D. Edwards support services (to coincide with Oracle's acquisition of PeopleSoft and take advantage of customers' fear, uncertainty and doubt);
- The goals of SAP's Safe Passage program, of which the TomorrowNow service offering was an integral part, to convert the majority of the PeopleSoft/J.D. Edwards customer base to SAP; and,
- SAP's expected benefits from offering TomorrowNow support service, selling additional SAP products to those customers, and ultimately converting a portion of those customers to SAP.

234. In establishing their respective negotiating positions, Oracle and SAP would have considered the financial implications of entering into a license. Oracle would consider discounted cash flow scenarios with potential license and support losses between $2.0 billion and $3.8 billion (**SCHEDULES 11.SU-13.SU**); SAP would consider scenarios reflecting financial and economic benefits of between approximately $881 million to $2.7 billion (**SCHEDULES 15.SU-16**). These discounted cash flow scenarios are explained in the Market

Approach section related to SAPs "Value of Use", see Section VI.A.2 of this report. By granting SAP a license, Oracle and SAP would have also considered the financial metrics (multipliers) developed by TomorrowNow and SAP reflecting the impact on Oracle of SAP/TomorrowNow converting license and/or support revenue that would have otherwise been earned by Oracle. For example, one such TomorrowNow metric estimated the financial impact to Oracle at $20 support revenue lost for every $1 TomorrowNow gained. The parties would also consider the actual sales of TomorrowNow to PeopleSoft customers along with TomorrowNow's strategic planning and selling activities.

235. The parties would have considered the acquisition price paid by Oracle for PeopleSoft/J.D. Edwards and the components of the intangible assets. Significant value was embedded in the ongoing support revenue anticipated from the acquired PeopleSoft/J.D. Edwards customers. The copyrighted materials accessed by SAP are required resources to meet Oracle's/PeopleSoft related customer support contract commitments, or comparable materials must be independently developed. The valuation of the support revenue stream and customer relationships of $2.1 billion would be heavily considered. The parties would contemplate doubling the $2.1 billion value of support agreements and customer relationships[491] to $4.2 billion to reflect the goodwill premium paid overall by Oracle to acquire PeopleSoft. Oracle Senior Executives have indicated that the transaction goodwill premium reflects Oracle's ability to gain additional monetary value over time from acquired

[491] *See* Market Approach in Section VI.1 of this report. The goodwill premium is actually 1.4 times the acquired tangible and intangible assets (tangible assets of $1.2 billion + intangible assets of $3.4 billion = $4.6 billion x 1.4 = $6.5 billion of goodwill).

customers through cross-sell and up-sell opportunities, as well as other financial benefits. Oracle would understand that, with the hypothetical license, there would be an immediate impact on its support revenue and customer goodwill.

236. Market value metrics and valuations would bring significant upward financial pressure to the negotiation, particularly as the hypothetical license coincides with Oracle's $11.1 billion acquisition of PeopleSoft.

**2. Oracle Would Expect A Significant License Fee**

237. Larry Ellison, Safra Catz and Charles Phillips informed me that Oracle would expect a significant license fee from SAP for the PeopleSoft/J.D. Edwards copyrighted materials in suit, and indicated the impact of licensing would be greater than $3 billion on Oracle. A further perspective on losing potentially 3,000 customers (whose support is enabled by the copyrighted materials) is illustrated by applying 30.2%[492] 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.[493] I understand that Larry Ellison, Safra Catz and Charles Phillips would be personally involved in these negotiations.

**3. SAP Could Pay A Significant License Fee**

238. Theoretically, as SAP was strategically interested in expanding its customer support footprint and disrupting the transition of PeopleSoft customers to Oracle, SAP could have attempted to acquire PeopleSoft customer relationships and support revenue through a third party acquisition. In January 2005, in an arms-length transaction, Oracle paid approximately $1

[492] 3,000 customers / 9,920 customers = 30.2%.

[493] Discussion with Oracle Senior Executives: Larry Ellison, Safra Catz and Charles Phillips.

million per PeopleSoft customer.[494] PeopleSoft's customers have contracts for support services which were enabled by the PeopleSoft intellectual property, including the copyrighted materials in suit. SAP Senior Management would be aware of the value that Oracle paid, and that SAP would have had to pay, in a third party transaction to acquire similar customers, whose support services use the copyrighted materials.

239. SAP would be willing to pay a $2 billion license fee to compete head to head with Oracle for the acquired PeopleSoft support customers and to execute on its strategy to cross-sell and up-sell to PeopleSoft customers.

TEXT REMOVED - NOT RELEVANT TO MOTION

[494] The PeopleSoft cost per acquired customer of $1.0 million has a nature and components relevant to an established license fee under *Georgia-Pacific* factor 1, where consideration and analysis involves royalties paid for the subject intellectual property.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

**1. Oracle Agreements**

243. I understand that Oracle's database software can be downloaded from Oracle's website by end users hoping to develop database-related applications, by clicking through and accepting the terms of Oracle's Technology Network Development License Agreement ("Development License"), which restricts end users to use of Oracle's database software for limited development purposes.[507] Richard Allison, Oracle Senior Vice President, Global Practices and Risk Management, explained at his deposition that the Development License is limited to use of the database software for the purpose of developing and prototyping a beta or pre-production version of an application.[508] Oracle also licenses its database software to customers through

TEXT REMOVED - NOT RELEVANT TO MOTION

[507] Deposition of Richard Allison (Oracle Senior Vice President, Global Practices and Risk Management), November 12, 2009, pg. 207-211; Deposition of John Baugh (TomorrowNow PeopleSoft Environments Manager), December 3, 2009, pgs. 179-182, 212. *See* Oracle Technology Network Development License Agreement, ORCL00672292-294 (Allison Exhibit 835), and Oracle Technology Network Developer License Terms (Allison Exhibit 823 Tab 24).

[508] Deposition of Richard Allison (Oracle Senior Vice President, Global Practices and Risk Management), November 12, 2009, pgs. 209-210.

an Oracle License and Services Agreement ("OLSA").[509] Oracle conveys no ownership rights to Oracle's intellectual property under either a Development License or an OLSA.[510] The Development License prohibits the "use [of] the programs for…internal data processing or for any commercial or production purposes," and limits use of programs to "the development and prototyping" of an application.[511] The Development License allows the program to be installed on one computer and used by one person and, similar to the OLSA, disallows making "the programs available in any manner to any third party."[512] I understand it is Oracle's position that no license it issues would permit a licensee to use Oracle's database software in the manner in which TomorrowNow used the software.[513]

---

[509] *See*, *e.g.*, from Oracle License and Services Agreements at ORCL00670717-726 (December 2004) and ORCL00671364-375 (June 2006).

[510] *See*, *e.g.*, form Oracle License and Services Agreements ORCL00670717-726, at 717 Section D, and ORCL00671364-375, at 364 Section D. See, e.g., Oracle Technology Network Development License Agreement, ORCL00672292-294, at 292 and Oracle Technology Network Developer License Terms (Allison Exhibit 823 Tab 24).

[511] See, e.g., Oracle Technology Network Development License Agreement, ORCL00672292-94 (Allison Exhibit 835), and Oracle Technology Network Developer License Terms (Allison Exhibit 823 Tab 24). License rights granted under an OLSA include a "limited right to use the programs and receive any services ordered solely for your internal business operations and subject to the terms of this agreement."*See*, *e.g.*, form Oracle License and Services Agreement, ORCL00670717-726, at 717 Section C.

[512] *See, e.g.*, Oracle Technology Network Development License Agreement, ORCL00672292-294 (Allison Exhibit 835) and Oracle Technology Network Developer License Terms (Allison Exhibit 823 Tab 24). The OLSA also allows a licensed customer to make a "sufficient number of copies of each program for your licensed use" but the licensee may not "make the programs or materials resulting from the services available in any manner to any third party for use in the third party's business operations."*See*, *e.g.*, form Oracle License and Services Agreement, ORCL00670717-726, at 717 Section D.

[513] Plaintiffs' Fifth Amended and Supplemental Responses and Objections to Defendant TomorrowNow, Inc.'s First Set of Interrogatories (Database), December 4, 2009, pgs. 13-15; Deposition of Michael Poplack (Oracle Vice President and Associate General Counsel), November 24, 2009, pgs. 52-54; Deposition of Richard Allison (Oracle Senior Vice President, Global Practices and Risk Management), November 12, 2009, pgs. 228-231.

### D. Methodology

250. Although, as addressed above, I understand it is Oracle's position that no license it issues would permit a licensee to use Oracle's database software in the manner in which TomorrowNow used the software, for purposes of determining Oracle's damages as SAP's value of use, I have adopted certain aspects of Oracle's existing database licensing structure as benchmarks to determine the license fees that SAP should have paid Oracle for the contemplated license to Oracle's copyrighted database software materials. Richard Allison (Oracle Senior Vice President of Global Practices and Risk Management) has provided input into the calculation of the database license fee. The fact that Oracle would be licensing its database software to its biggest enterprise applications rival to enable it to compete with Oracle for Oracle application support revenue, would influence Oracle's license pricing and would justify Oracle offering SAP no discount off list price.[523] The billions of dollars Oracle had spent on research and development of its proprietary database software products also would be considered by Oracle, and would indicate that it would charge SAP a premium for the license.[524]

TEXT REMOVED - NOT RELEVANT TO MOTION

---

[523] Discussion with Richard Allison.

[524] Discussion with Richard Allison; *See* **SCHEDULE 9.**

TEXT REMOVED - NOT RELEVANT TO MOTION

252. SAP is Oracle's most significant competitor in enterprise applications and, under the contemplated database license, would be using Oracle's database software to compete for Oracle's application support business at critical junctures in the two companies' histories (at the time of Oracle's acquisition of PeopleSoft and Siebel, and at the time of SAP's acquisition of TomorrowNow and launch of support service for Oracle applications, as is described elsewhere in my report). However, the effects of Defendants' actions on Oracle's PeopleSoft, J.D. Edwards, and Siebel customer bases have already been taken into account in my quantification of the value of use of licenses for those applications. Thus, I have limited SAP's value of use of the copyrighted database materials in suit to the measure of the lost license fees that SAP would have had to pay Oracle had it purchased a license (similar to a separate OLSA) for each relevant customer for which TomorrowNow provided application maintenance services using an Oracle database. For

[525] Discussion with Richard Allison.

purposes of determining SAP's value of use of the copyrighted database materials in suit, I have applied Oracle's pricing for its standard OLSA licensing terms assuming a particular configuration of TomorrowNow hardware. I have not included any fees for options or upgrades that may have been needed by TomorrowNow for each customer in order to emulate its customers' environments. These additional fees could be considerable. For example, some options have additional license fees of 25% - 50% of the enterprise edition license fees. I understand that for an Oracle Standard (Full-Use) license, Oracle would price the database license using its Enterprise Edition, utilizing the count of processors (or cores on each processor, for multi-core processors) on the servers with Oracle database installed or running.[526] In pricing this license, I have considered the following specifications:

- Oracle's list price per processor for the basic Enterprise Edition license and support was consistent between 2004 and 2008 at $40,000/processor for the license and $8,800/processor per year for support.[527] Therefore, I have used $40,000 per customer per processor as the one-time perpetual license fee and $8,800 per processor per customer as the support fee per year.

---

[526] Discussion with Richard Allison. Oracle Software Investment Guide, TN-OR 01765697-752, at 709 and 714. For purposes of this analysis, a "processor" refers to either the CPU itself for single-core chips or each core, for multi-core processors.

[527] Oracle December 2004 E-Business Global Price List, ORCL00704411-433, at 412; Oracle September 2006 E-Business Global Price List, ORCL00704381-410, at 382; US$ Pricing Oracle Database filename: ePL071708 JDE Localisable Price lists.xls, ORCL00213686. Oracle's price lists also show options including Enterprise Edition Options such as Real Application Clusters, Partitioning and OLAP. Enterprise Edition Options are priced in addition to the license fees and the listed options range from an additional $10,000 to $20,000 per processor per option. *See* Oracle December 2004 E-Business Global Price List, ORCL00704411-433, at 412.

- TomorrowNow installed and ran Oracle database software on numerous servers that had 2 to 4 processors which were single to quad-core, or effectively 2 to 16 processors per server when considering Oracle's pricing practices, which considers each core for a multi-core processor.[528] 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).[529]
- Per discussion with Richard Allison, I understand that Oracle would have priced the license based on the largest server configuration. Therefore, I have assumed that Oracle would

[528] Defendant TomorrowNow, Inc.'s Eighth Amended And Supplemental Response to Plaintiff Oracle Corporation's First Set of Interrogatories (Set One), December 4, 2009, Interrogatory No. 11 pgs. 42-55. (Identifying TomorrowNow servers with Oracle database-related files). Defendant's First Supplemental Responses And Objections To Plaintiffs' Fifth Set of Interrogatories To Defendant TomorrowNow, inc. and Fourth Set of Interrogatories to Defendants SAP AG and SAP America, Inc., December 4, 2009, pgs. 7-32. (Identifying TomorrowNow servers with Oracle database-related files and confirming that customer local environments accessed Oracle database files). Email from Joshua Fuchs (Jones Day) to Nitin Jindal (Bingham McCutchen), February 19, 2010 identifying the number of processors, number of cores and the date of purchase for each server identified in interrogatories as having an Oracle database installation. *See also*, October 28, 2005 email from George Lester to Jennifer Mrak (SAP), TN-OR01020812-818 at 812 (G. Nelson Exhibit 1831), indicating that, "I have been trying to procure a license for Oracle Standard Edition on two of our internal servers, which each have 4 CPU's."; Email from Alex La Mar (TomorrowNow) to Greg Nelson (TomorrowNow) on March 20, 2006, TN-OR01040829-34 at 829 (G. Nelson Exhibit 1832), indicating "we need to obtain Oracle Standard Edition for a 4 CPU machine running AIX and a 4 CPU machine running Windows."

[529]Email from Joshua Fuchs (Jones Day) to Nitin Jindal (Bingham McCutchen, February 19, 2010 identifying the number of processors, number of cores and the date of purchase for each server identified in interrogatories as having an Oracle database installation. TomorrowNow PeopleSoft Growth Projections, TN-OR02171843-848, at 844, identifying Quad Processor Unix Database Server as the location for the majority of PeopleSoft environments running on Oracle Database software); Discussion with Richard Allison; Oracle Software Investment Guide, TN-OR 01765697-752, at 709 and 714 (identifying the Unix processor factor as .75).

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.[530]

TEXT REMOVED - NOT RELEVANT TO MOTION

[530] Oracle Software Investment Guide, TN-OR 01765697-752, at 713-714. I am not aware of any technological reason related to Oracle's database or applications to explain why TomorrowNow built environments on servers with different processor configurations.

TEXT REMOVED - NOT RELEVANT TO MOTION

257. According to records produced by the Defendants, in addition to the customers with local environments, and the customers for which it was determined that the customer received a fix from another customer's local environment, TomorrowNow appears to have had at least 58 additional PeopleSoft HRMS customers that may have benefited from fixes developed or tested on Oracle database environments. Due to TomorrowNow's business practices of cross-use of environments, including those running on top of Oracle database software for the development and testing of fixes that were delivered across the PeopleSoft HRMS customer base, I further understand through discussion with Oracle's expert, Kevin Mandia, that over the course of TomorrowNow's operational lifetime, it is more likely than not that every PeopleSoft HRMS customer received support delivered, at least in part, through TomorrowNow's use of the Oracle database software. As a result, I have offered a further opinion based on a measurement where TomorrowNow's use required a license covering 172 customers, comprised of 71 local environments based on Oracle database, 43 customers where another customer's local environment based on Oracle database was used to provide fixes, and 58 additional customers that received support for HRMS applications. Using an income approach to establish a fair market value of SAP's value of use, I have determined SAP's value of use to be approximately $55.6 million for 172 customers.

| Table 10A: SAP's Value of Use<br>Related to Use of Oracle's Database Copyrighted Materials<br>Measured as License Fees and Related Support for 172 Customers[537] | |
|---|---|
| | **SAP's Value of Use** |
| **License and Support Revenues** | 58,551,681 |
| **Margin** | 95% |
| **Total** | $55,624,097 |

In my opinion, Tables 9, 10 and 10A summarize my determination of SAP's value of use of Oracle's database copyright materials of $55.6 million based on the components described in this section.

TEXT REMOVED - NOT RELEVANT TO MOTION

[537] **Schedule 44.SU, 44.1.SU, 44.2.SU, 44.3.SU.** For purposes of this analysis, only customers with local environments accessing Oracle database, customers identified in the limited analysis of customers using other customer's local environments and only the remaining TomorrowNow PeopleSoft HRMS customers are summed, despite information regarding cross-use among PeopleSoft Financial customers, in order to align our analysis with Oracle's technical expert, Kevin Mandia. This analysis also may not capture the full measure of cross-use of environments based on Oracle's database that were used. For example, in the retrofit model the environments did not follow the later TomorrowNow convention of identifying the use of Oracle database by naming the environment to end in "O" and therefore, it was not possible to identify all of the retrofit environments based on Oracle database which may have been used. Deposition of John Baugh, February 6, 2008, pgs. 134, 138-139.

## B. Siebel Copyright Infringement – Determination Of SAP's Value Of Use Based On the Market Approach, Income Approach, and Cost Approach

TEXT REMOVED - NOT RELEVANT TO MOTION

### 1. Market Approach

265. In analyzing the fair market value of the Siebel copyrighted materials in suit using the market approach, I have considered the same types of evidence addressed in the market approach for the PeopleSoft/J.D. Edwards copyrighted materials in suit in Section VI.A.1 above. Specifically, I have considered the acquisitions addressed above between Oracle and PeopleSoft, PeopleSoft and J.D. Edwards, and SAP and Business Objects, which involve intellectual property relevant to understanding the value of the Siebel copyrighted materials in suit. Additionally, 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 copyrighted materials in suit. The following section sets forth my analysis of the market approach based on Oracle's acquisition of Siebel as well as considering the other acquisitions mentioned above.

#### a. Oracle's Acquisition of Siebel

---

TEXT REMOVED - NOT RELEVANT TO MOTION

266. Again, theoretically, in lieu of illegally accessing the copyrighted materials in suit, SAP could have entered into a fair market value transaction and acquired a portion of the Siebel customer base and the associated revenue stream. The amount Oracle paid to acquire Siebel reflects an arm's length transaction to acquire the same intellectual property, customer relationships and future revenues and profits that SAP sought to obtain. As part of Oracle's acquisition of Siebel in January 2006, Oracle acquired Siebel intellectual property, including the Siebel copyrighted materials in suit, which relate to Siebel's Customer Management Relationship ("CRM") software applications and then existing software and support materials.[552] In addition, Oracle obtained access to 4,000 Siebel customers who were, at the time of acquisition, under support contracts with Siebel. For the year-ended December 31, 2005, Siebel reported total revenue of $1.4 billion.[553] On January 31, 2006, Oracle acquired the entire Siebel company for $6.1 billion.[554] Therefore, Oracle's purchase price represented an approximate 4.3 price-to-revenue multiple.

267. As discussed in section III.C. above, Oracle Senior Executives believed the Siebel acquisition would provide Oracle new or deepened access to Siebel's customer base, a competitive benefit from Siebel's leading market position, and valuable software technology, including its "best in breed" CRM software. Oracle's $6.1 billion acquisition price equates to an investment of

[552] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pgs. 75-77; "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 756.

[553] News Release: Siebel Systems Confirms Financial Results for the Quarter Ended December 31, 2005, dated January 25, 2006, pgs. 2, 4; Email from Christian Klein to Thomas Ziemen 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.

[554] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pgs. 75-77.

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 Ziemen 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 Valuation[560]<br>Oracle's Acquisition Price of Siebel<br>($ 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 |

TEXT REMOVED - NOT RELEVANT TO MOTION

[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).

TEXT REMOVED - NOT RELEVANT TO MOTION

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

TEXT REMOVED - NOT RELEVANT TO MOTION

568 "Apollo Competitive Program Office Program Playbook," SAP-OR00790353-387 (Hurst Exhibit 1597), at 355; Email from Christian Klein to Thomas Ziemen 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.

$170 million, computed as 5% of the $3.4 billion in intangible asset value related to support revenues, customer relationships and goodwill.[569] Additionally, using the $1.525 million average cost per customer resulting from the Siebel acquisition described above, extended to the 200 potentially lost customers, indicates a value of $305 million.

TEXT REMOVED - NOT RELEVANT TO MOTION

[569] $3.4 billion intangible asset value times 5% (200/4,000 customers = 5%). $3.4 *5% = $170 million.

TEXT REMOVED - NOT RELEVANT TO MOTION

### 3. Hypothetical Negotiation Approach for Siebel Copyrighted Materials – Summary (*Georgia-Pacific* Factor 15)

TEXT REMOVED - NOT RELEVANT TO MOTION

340. Oracle would realize in the hypothetical negotiation that "but for" the license to SAP, it would be able to realize the full value of its investment in which Oracle's history has indicated would include returns beyond the entire acquisition price. Licensing SAP will severely impact the transition of Siebel customers to Oracle. The acquired cost per customer valuation metrics allow Oracle to apply fair market value data to its determination of what it is really giving up with the licensing of SAP.[642]

TEXT REMOVED - NOT RELEVANT TO MOTION

[642] These customer metrics are relevant to the license fees that would result in consideration of "*Georgia-Pacific* factor 1: fees charged for the use of the intellectual property in suit."

### E. Value of Use Under the Hypothetical Negotiation – Summary

341. I believe that the hypothetical negotiators would have considered the financial, economic and other inputs that I have identified and analyzed, and then determined the paid-up license fee by engaging in a "back and forth" negotiation.[643] Below, I summarize the hypothetical negotiation and refer to the various financial metrics in the market, income and cost approach section which would be relevant to the hypothetical negotiation for a license to Siebel copyrighted materials in suit.

#### 1. Summary of Factors Considered by Oracle and SAP

342. As discussed above, in determining the license fee that it would be willing to accept from SAP for SAP's use of the Siebel copyrighted materials in suit, Oracle would consider at least the following factors:

- The broad scope of the license, which would enable SAP to compete against Oracle in providing support services to its Siebel customers, and provide SAP with enhanced ability to convert those customers to SAP applications;
- Technological limitations on TomorrowNow's ability to fix source code-level product errors due to Siebel's historic policy to not distribute uncompiled source code outside of Oracle;
- Expected lost support revenue to SAP on customers that would go to TomorrowNow for Siebel support services, as well as lost up-sell and cross-sell revenues from those customers;

[643] I understand that the hypothetical negotiation would be conducted by a willing licensor (Oracle) and a willing licensee (SAP) acting in a rational manner in and around September 2006.

- Assuming there had already been a PeopleSoft/J.D. Edwards license in January 2005, Oracle would consider in September 2006 TomorrowNow's history of success at winning Oracle support customers in the period since SAP acquired TomorrowNow and SAP's success in leveraging TomorrowNow to win SAP applications customers, as well as the impact to date on support renewals, discounts and other impacts;
- The anticipated permanent impact on Oracle due to the lost future license revenue and ongoing support renewals for customers that would switch from Siebel applications to SAP applications;
- 10 months prior to the contemplated hypothetical negotiation, Oracle paid approximately $6.1 billion to acquire Siebel, including rights to the Siebel customer support contracts, related relationships and goodwill;

REDACTED

[redacted]

- The nature of the relationship between Oracle and SAP, as direct competitors in the software applications business, particularly in light of Oracle's ability with the Siebel acquisition to capture significantly more CRM market share than SAP;

- The Siebel acquisition had given Oracle acknowledged traction and market share against SAP which it would not want to endanger without significant upside;
- Anticipated changes to Oracle's business practices in order to compete with SAP to provide support services to Oracle customers; and,
- Anticipated negative impacts to the level of profitability and customer renewal rates of the Oracle support products that embody the copyrighted materials at issue, and the resulting impact on Oracle's ability to use that support revenue stream to fund ongoing research and development.

343. Similarly, in determining the amount of a license fee that SAP would be willing to pay to Oracle for its use of the Siebel copyrighted materials in suit, SAP would consider at least the following factors:

- The license would allow SAP to use its TomorrowNow service offering to drive the conversion of Oracle's Siebel applications customers to SAP's platform;
- Technological limitations on TomorrowNow's ability to fix source code-level product errors due to policy to not distribute uncompiled source code outside of Oracle;
- SAP's willingness to pay significant amounts to acquire intellectual property and customer relationships, as evidenced in particular by its 2007 acquisition of Business Objects for $7.1 billion;

- SAP's knowledge that access to Oracle's copyrighted materials is necessary for the level of support that it solicited and sought to provide to Oracle's Siebel customers to gain their loyalty and future business;
- SAP's knowledge and understanding related to the research and development time and effort necessary to develop software and support materials, and its understanding that licensing will avoid delay, costs and likelihood of unsuccessful development;
- TomorrowNow's business model relied upon its access and use of Oracle's copyrighted materials in suit in order to provide service to customers at the level TomorrowNow promoted;
- The nature of the competitive relationship between Oracle and SAP in the software applications business, and in particular, the increased competitive threat that Oracle posed to SAP as a result of its acquisition of Siebel;
- The importance of timing and speed of SAP's offering of Siebel support services (while less important than in the PeopleSoft acquisition, SAP still sought to take advantage of customer uncertainty with the Siebel acquisition);
- The goals of SAP's Safe Passage program, of which the TomorrowNow service offering was an integral part to convert the 300+ Siebel customers to SAP; and,
- SAP expected benefits from offering TomorrowNow support service, selling additional SAP products to those customers,

and ultimately converting a portion of those customers to SAP.

344. In establishing their respective negotiating positions, Oracle and SAP would have considered the financial implications of entering into a license. Oracle would consider discounted cash flow scenarios with potential losses of up to $231.9 million; SAP would consider scenarios reflecting benefits between $97 million and $247 million (*See* Table 12). Oracle and SAP would have also considered the financial metrics (multipliers) developed by TomorrowNow and SAP reflecting the impact on Oracle of SAP/TomorrowNow converting license and/or maintenance revenue that would have been earned by Oracle. For example, one such TomorrowNow metric estimated the financial impact to Oracle at $18 - $20 lost for every $1 TomorrowNow gained.[644] As addressed in the income approach, at $7 million or $14 million in annual support revenues, there is a $110 million to $220 million impact on Oracle's revenues, assuming 10 years of support is lost to Oracle. (*See* **Schedule 22.U**) The parties would also consider the actual sales of TomorrowNow to Siebel customers along with TomorrowNow's strategic planning and selling activities.

345. The parties would have also considered the acquisition price paid by Oracle for Siebel and the intangible asset valuations. Significant value was assigned to the ongoing maintenance revenue anticipated from the acquired Siebel customers in addition to goodwill. The copyrighted materials accessed

[644] April 25, 2006 email from Andrew Nelson to Lon Fiala, which indicates $1 of TomorrowNow revenue is equivalent to $20 of Oracle support revenues taken from a "10-year maintenance based justification for the PeopleSoft/JDE takeover" [TN-OR00591548 (Nelson Exhibit 1019)]. A March 26, 2006 email from Andrew Nelson to Lon Fiala, et al, (with cc to Leo Apotheker) indicates that "$1 of TN Stand-alone revenue this year represents $18 of originally expected Oracle revenue" [TN-OR00609470-71 (Nelson Exhibit 1018)]. Mr. Apotheker did not disagree or contradict Mr. Nelson's analysis [Deposition of Andrew Nelson (Co-Founder of TomorrowNow), February 26, 2009, pgs. 163-166].

by SAP are required resources to meet Oracle/Siebel-related customer support contract commitments, or comparable materials must be independently developed. The valuation of this revenue stream and customer relationships of $808 million would be considered. The parties would contemplate increasing the $808 million value of support agreements and customer relationships by a factor to reflect the related goodwill premium paid overall by Oracle to acquire Siebel. SAP targeted 200 customers of Siebel's, or 5% of the acquired Siebel support customers. $170 million represents 5% of Siebel intangible assets of $3.4 billion. Oracle Senior Executives have indicated 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, as well as other financial benefits.

**2. Oracle Would Expect A Significant License Fee**

346. In licensing its largest direct competitor to access just acquired Siebel customer accounts with their intended goal to "take Oracle out of incumbent vendor position," it is my opinion that Oracle Senior Executives would expect a royalty in the form of a license fee. An amount consistent with Oracle's expectations of the amount of lost customers due to licensing would be considered, along with the potential permanent impact that granting such a license would have on Oracle's future support business revenues and future product sales.[645] I understand that Larry Ellison and Safra Catz would be involved in these negotiations.[646]

---

[645] SAP WebEx Presentation "AE Hot Topics Briefing: Using TomorrowNow to help you replace Oracle," dated March 1, 2007, pg. 2, TN-OR00412503 (native file); Discussion with Oracle senior executives: Larry Ellison, Safra Catz and Charles Phillips.

[646] Declaration of Safra Catz in Support of Plaintiff's Opposition to Defendants' Motion For Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009, p. 1.

### 3. SAP Could Pay A Significant License Fee

347. Theoretically, as SAP was strategically interested in expanding its customer support footprint, SAP could have attempted to acquire Siebel customer relationships and support revenue through a third party acquisition. In September 2006, in an arms-length transaction, Oracle paid approximately $1.5 million per Siebel customer.[647] Siebel customers had contracts for support services which were enabled by Siebel's intellectual property, including the copyrighted materials in suit. SAP Senior Management would be aware of the value that Oracle paid, and that SAP would have had to pay, in a third party transaction to acquire similar customers whose support services use the copyrighted materials.

348. SAP would be willing to pay a $100 million license fee to compete head to head with Oracle for the acquired Siebel support customers, and to execute on its strategy to cross-sell and up-sell to its customers. The value of the copyrighted materials accessed by SAP related to Siebel is much lower on a comparative basis than the value of copyrighted materials related to PeopleSoft, for a variety of reasons, including:

- the SAP/Siebel downloading activities were later in time;
- the Siebel software had additional protections on source code;
- SAP's access to PeopleSoft copyrighted materials was strategically timed to coincide with Oracle's acquisition of PeopleSoft to disrupt Oracle assimilation of the PeopleSoft

---

[647] The Siebel cost per acquired customer of $1.5 million has a nature and basis relevant to an established license fee under *Georgia-Pacific* factor 1, where consideration and analysis involves royalties paid for the subject intellectual property.

customers (the SAP/Siebel downloading activities did not coincide directly with Oracle's purchase of Siebel);

- SAP's anticipated conversion of Siebel customers was much less aggressive than its estimated conversion of it PeopleSoft customers, resulting in lower risk of customer losses to Oracle; and
- The period during which SAP provided support for Siebel customers was shorter than the PeopleSoft customer support period.[648]

TEXT REMOVED - NOT RELEVANT TO MOTION

[648] Based on the documents produced by SAP, SAPs anticipated conversion of Siebel customers to support contracts and cross-sell/up-sell contracts was much lower than such estimates in documents produced related to PeopleSoft.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

438. According to the customer-level revenue data produced by Defendants, excluding the reductions in revenue for settlement payments made to customers due to TomorrowNow's shutdown due to this litigation, TomorrowNow received $54.1 million in revenue since 2002, $48.5 million (90%) of which was received since TomorrowNow was acquired by SAP in January 2005.[810] Net of revenue reductions for settlement payments made, TomorrowNow received $41 million in net revenue from the Relevant TomorrowNow Customers since 2002, $35.4 million of which was received since it was acquired by SAP in January 2005.[811]

TEXT REMOVED - NOT RELEVANT TO MOTION

---

TEXT REMOVED - NOT RELEVANT TO MOTION

[810] **SCHEDULE 41.U**. $15.7 million of the $54.1 million in revenue relates to Relevant TN Customers that were excluded from the calculation of Oracle's lost profits.

[811] **SCHEDULE 41.U**. $13.9 million of the $41 million in revenue relates to Relevant TN Customers that were excluded from the calculation of Oracle's lost profits.

TEXT REMOVED - NOT RELEVANT TO MOTION

### 2. Opinion: SAP Revenue Received from Relevant TomorrowNow Customers

TEXT REMOVED - NOT RELEVANT TO MOTION

445. I have reviewed and analyzed the customer-specific revenue data produced by SAP for the List of 86 Customers, which includes revenue from sales of licenses, support, training and other services for the period of 2002 to 2008.[832] From 2005 (when SAP acquired TomorrowNow) through 2008, SAP received $1.37 billion in revenue from sales of SAP software licenses, support, training and other services to the List of 86 customers, $898 million of which was received after the customer started receiving support services from

TEXT REMOVED - NOT RELEVANT TO MOTION

[832] SAP-OR00603615 (SAP Customer Report.xls); SAP-OR00789887 (SAP Customer Report July 2009 Update.xls); SAP-OR00841587 (SAP Customer Report Updated 10-30-09.xls).

TomorrowNow.[833] Of that $898 million in revenue, $298 million was from sales of new or additional licenses to SAP products.[834] It is my opinion, a portion of these revenues have been earned, and or enhanced, by the Defendants' alleged conduct.

TEXT REMOVED - NOT RELEVANT TO MOTION

833 **SCHEDULE 42.SU**.

834 **SCHEDULE 42.1**.

TEXT REMOVED - NOT RELEVANT TO MOTION