

EXHIBIT 16

Oracle USA, Inc., et al

v.

SAP AG, et al

Stephen K. Clarke
Expert Report

May 7, 2010

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

6.3. Pinto Cost Estimate

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

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

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

²⁴⁷ Meyer Report, page 191, paragraph 287.

²⁴⁸ Meyer Report, page 99, paragraph 149.

²⁴⁹ Meyer Report, page 99, paragraph 150.

²⁵⁰ Meyer Report, page 192, paragraph 288.

²⁵¹ Garmus Report.

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10.2.9. No Accused Conduct – Disgorgement

I understand that Oracle engaged Mr. Kevin Mandia to evaluate the “means and methods by which [TomorrowNow] accessed and downloaded from Oracle’s customer support websites, as well as the nature and extent of [TomorrowNow’s] copying, modification, distribution, and use of Oracle’s intellectual property to support [TomorrowNow’s] customers” and that he generally reached the following conclusions:

1. TomorrowNow engaged in mass downloading from, and improper access to, Oracle systems.
2. TomorrowNow made thousands of full or partial copies of Oracle enterprise application software and database software.

3. TomorrowNow's fix development and delivery process resulted in significant cross-use and contamination.
4. TomorrowNow continued to access, download, copy, modify and distribute Oracle enterprise application software and support materials after Oracle filed this action.

I understand Defendants' expert, Mr. Gray, analyzed Mr. Mandia's report and analysis regarding the conclusions referenced above and Mr. Gray determined that even assuming Mr. Mandia is correct the accused conduct does not apply to all of TomorrowNow's customers. Accordingly, I have excluded them from the disgorgement analysis and show them in Appendix E-2.

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11.2.10. No Accused Conduct – Lost Profits

I understand that Oracle engaged Kevin Mandia to evaluate the “means and methods by which [TomorrowNow] accessed and downloaded from Oracle’s customer support websites, as well the nature and extent of [TomorrowNow’s] customers” and that he generally reached the following conclusions:

1. TomorrowNow engaged in mass downloading from and improper access to Oracle systems
2. TomorrowNow made thousands of full or partial copies of Oracle enterprise application software and database software
3. TomorrowNow's fix development and delivery process resulted in significant cross-use and contamination
4. TomorrowNow continued to access, download, copy, modify and distribute Oracle enterprise application software and support materials after Oracle filed this action.

I understand that Defendants engaged Mr. Gray to analyze Mr. Mandia’s report and analysis regarding the conclusions above and Mr. Gray determined that, even assuming Mr. Mandia was correct, the accused conduct does not apply to all of TomorrowNow customers. Accordingly, I have excluded the customers for which there was no accused conduct from the Lost Profits damage analysis. I listed these customers in Appendix E-3.

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13. Disgorgement of TomorrowNow Profits

13.1. TomorrowNow Revenue

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Although Mr. Meyer and Mr. Mandia both conclude that all of TomorrowNow's activities are infringing (which would mean all of TomorrowNow's costs would be properly deductible), I disagree. Analysis¹¹¹⁷ shows there were numerous customers that were not the recipient or beneficiary of any of the accused activity identified by Mr. Mandia. Therefore, there is TomorrowNow revenue that is not subject to disgorgement.

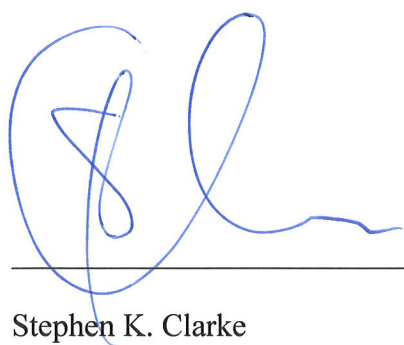
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¹¹¹⁷ I base my analysis and conclusion on Mr. Gray's report.

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Stephen K. Clarke

May 7th, 2010

Date

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