EXHIBIT C

Oracle USA, Inc., et al

v.

SAP AG, et al

Stephen K. Clarke
Expert Report

May 7, 2010

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REDACTED - NOT RELEVANT TO OPPOSITION

4. Value of Use – Market Approach

4.1. Market Approach – Background

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

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156 For example, Richard Allison, Oracle's Senior Vice President of Global Practices stated that consultants can provide on-site support. Richard Allison deposition dated November 12, 2009, page 62.

downloads of fixes and patches through Customer Connection,[157] which is what in-house technical people and independent consultants do.[158]

Therefore, the license Defendants would need was one that allowed TomorrowNow to work on the customer's environment at its own data center, to maintain a customer's environment on its own computers, to have sufficient access to source code to create fixes, and the right to promulgate a fix written for one customer to other customers with the same starting source code. There is testimony to that effect from various deponents in the case. Accordingly, any license would be affected by the requirement for TomorrowNow to retain copies of customer environments on its own computers. However, as previously stated Defendants would not need: a license to sell or sub-license the Subject IP; the right to develop upgrades and new products that worked with the existing software; or any of the other rights or assets Oracle owned. Additionally, as Mr. Meyer points out, TomorrowNow's need for a license would terminate on October 31, 2008 when the company ceased doing business.

4.2. Standing

Mr. Meyer states,

> 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.

He expands on this thought by stating that "…for standing reasons, the hypothetical license would not allow for the sale of software or support services in EMEA"[159] for certain J.D.Edwards and Siebel products. However, Mr. Meyer's hypothetical license fee is based on the total acquisition price Oracle paid for PeopleSoft and Siebel, so it includes all of the assets and rights Oracle acquired in the transactions including worldwide exclusive perpetual ownership of the Subject IP. Therefore, Mr. Meyer's market approach analysis is fatally flawed.

4.3. Exclusivity

In his consideration of Oracle support revenues, Mr. Meyer states,

157 Provided the customer still had legitimate access at the time the fix was downloaded.

158 For example, John Zepecki, Vice President of Development at PeopleSoft stated, "Firms like Accenture and EDS, Wipro, Cognizant, CSC, helped customers maintain their PeopleSoft system on a regular basis" and "…on a regular basis, Consulting Partners, Accenture, EDS, et cetera, would provide consulting advice which would include fixes to problems which would be referred to as bugs." He further stated that these third-party vendors would need access to PeopleSoft systems and "…in order to change how a software functions, typically you have to have some access to the software. It's a general principle that probably holds true here." John Zepecki deposition dated September 9, 2008, pages 93 and 95.

159 Meyer Report, page 71, paragraph 104.

> Both companies [SAP and Oracle] seek to protect this valuable revenue and profit stream by maintaining exclusivity over advanced levels of support, and maintaining controls over proprietary software and support materials through their respective intellectual property.[160]

While Mr. Meyer may be correct that the companies protect their ongoing support revenues, that does not mean that other companies cannot provide some, or all, of the support the customer requires. In fact, there are many firms offering some level of support to Oracle and SAP customers. Accordingly, the issue is not the provision of support services, which are clearly in demand by a wide variety of customers and provided by a wide variety of third-party support vendors, as described above. As I have stated, if Oracle can successfully argue that a third-party support vendor must provide support by being on-site at the customer's facility (as opposed to accessing the customer's system by remote means), then the License would also include the right to remotely access the customer's system. Mr. Meyer states that absent unfettered access to the Oracle source code, "…no support competitor could offer the same breadth and depth of support services as Oracle…"[161] so TomorrowNow would need a license to cover whatever access they had that was in excess of that allowed under the terms of an Oracle customer license.

4.4. Market Approach Misapplication

A market approach to any valuation, by definition, looks to transactions that are (a) similar in nature to the subject asset (the asset may be, for example, a company, an item of intellectual property, or a piece of real estate), (b) whose selling prices are known, (c) in transactions that occurred at about the same time as the date of valuation.

In this case, Mr. Meyer adopts the market approach but misapplies it because:

1. The nature of the assets he chooses as comparables to the Subject IP are so different from the Subject IP as to render the comparison meaningless and even misleading. The Subject IP does not include any tangible assets, customer relationships or ownership of the underlying intellectual property acquired by Oracle in the PeopleSoft and Siebel transactions.

2. The price of the portion of the PeopleSoft and Siebel transactions applicable to the Subject IP is not known, and S&P did not value the Subject IP.

3. There have been no sales of the Subject IP. Oracle licensed it to its customers and Mr. Meyer specifically disclaims the utility of the Oracle license fees as a means of valuing the Subject IP.

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160 Meyer Report, pages 72-73, paragraph 106.
161 Meyer Report, page 75, paragraph 110.

4.5. Market Approach - PeopleSoft

4.5.1. Inappropriate Basis

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

4.5.2. Oracle Executives

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

4.5.3. Standard & Poor

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

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

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

163 Meyer Report, page 78, paragraph 116.

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

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

1. The maintenance agreements and customer relationships represented only 21% of the total purchase price allocation for intangible assets of $9.9 billion.[166]

2. Defendants did not gain any of the Oracle patents or other core technology,[167] did not receive ownership of the trademarks or trade names associated with the PeopleSoft acquisition, gained none of the goodwill or tangible and other assets acquired in the transaction.

3. The total number of customers TomorrowNow ever supported was 3.5%[168] of the 9,920 customers acquired by Oracle in the PeopleSoft transaction.

4. On the date of the Negotiation, TomorrowNow had only 52 customers,[169] or 0.5% of the 9,920 customers Oracle acquired.

5. Only 83, or 24% of the 3.5% bought products or services from SAP while they were on TomorrowNow support. Over half of the 83 customers had prior relationships with SAP before going to TomorrowNow.[170]

6. Of the 83[171] customers that bought products or services from SAP while they were on support at TomorrowNow, at *most* 3 customers (or 3.6%) became SAP customers for reasons even arguably related to the Alleged Actions, as discussed later in this report.

Given the above allocation and applying the number of arguably relevant lost customer ratio rather than Mr. Meyer's 30% ratio reveals damages of $629,000 even before allowing for the limitations inherent in the use Defendants actually made of the Subject IP.[172] In addition, any pro rata share of customer relationships should be excluded from the value analysis because in the Negotiation, the Defendants would not acquire the accused customers, just access to the Subject IP. It would be for Defendants to market the Oracle customer base in an attempt to persuade them to leave Oracle. Therefore, even the $629,000 figure overstates the Value of Use.

Mr. Meyer proffers his verdict on SAP's culpability as follows, "Without the PeopleSoft copyrighted material 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." And again: "The illegally obtained copyrighted materials in suit enabled SAP to provide customer support."[173] Such statements do not belong in an independent expert report and are

166 Meyer Report, page 79, table 6.

167 Technology not included in the copyright materials at issue in this case.

168 The 3.5% figure is derived by dividing 348 TomorrowNow customers (358 – 10 Siebel only TomorrowNow customers, these customers would not have been included in the PeopleSoft acquisition) by the 9,920 customers Mr. Meyer references. Such a computation overstates the relevant percentage. At the date of the Negotiation, TomorrowNow had only 52 customers, which is just 0.5% of the 9,920 PeopleSoft customer base.

169 Appendix K-4.

170 Appendix K-5.

171 Three customers on the List of 86 were Siebel only TomorrowNow customers, these customers would not have been included in the PeopleSoft acquisition.

172 The allocation based on TomorrowNow's relevant customer count of 348 would be 3.6% x 24% x 3.5% x 21% x $9.9 billion = $629,000; the allocation based on the TomorrowNow customer count at the time of the Negotiation would be even less.

173 Meyer Report, page 80, paragraph 117.

irrelevant because the Subject IP Mr. Meyer is valuing would include all the access needed to support a customer.

4.5.4. Value of Customer Relationships

As I have stated, there would be no value for customer relationships to Defendants because none were transferred from Oracle to Defendants (only actual use of the Subject IP should be valued). However, Mr. Meyer references S&P's value of maintenance agreements and customer relationships in the amount of $2.1 billion.[174] He goes on to state that S&P "considered projections through May 31, 2015" and discounted the cash flow at 10% to compute their value. There is a significant disconnect in Mr. Meyer's work. He accepts the S&P value even though it is based on a projection through 2015 in contrast to his stated end date for the Value of Use of October 31, 2008 (over 7 years earlier). S&P applied the 10% rate to PeopleSoft's entire customer base and an average renewal rate of more than 95%. However, the 95% renewal rate and the 10%-discount rate were for the entire PeopleSoft customer base, not the customers that cancelled support with Oracle because they were "at-risk" customers. For that sub-group, either the renewal rate should have been much lower or the discount rate should have been much higher to account for the greater risk inherent in that sub-group of customers.

Mr. Meyer states that the value to Oracle of the 4,200 *new* customer relationships it acquired when it bought PeopleSoft was $250 million based on an "avoided" sales cycle of about 6 months. He then claims SAP would benefit more than $250 million because it would gain 7,900 PeopleSoft new customer relationships if it could access the entire PeopleSoft customer base. He cites downward pressure on the value of the new customers because SAP would still have to incur essentially all of the customer acquisition costs as a result of having to "solicit and attempt to establish TomorrowNow support relationships" so it would incur time (and implicitly, cost) to cause the newly available customers to "switch support providers."[175]

Because he provides no explanation, the reader is left to determine how Mr. Meyer comes to his conclusion that the positive effects of the additional customer relationships are exactly offset by the negative effects of having to convince an Oracle customer to switch to TomorrowNow for support and to SAP for its licensed applications. Of course, such a conclusion is not only speculative, it is also contradicted by the facts. When Mr. Meyer says SAP would gain 7,900 new customers as a result of the alleged infringement he is speculating that every PeopleSoft customer acquired by Oracle in the PeopleSoft transaction that was not already an SAP customer became an added customer relationship for SAP, thereby resulting in an indeterminate amount of avoided marketing cost. The reality is that at most 86 of these 7,900 customers actually bought an SAP product or service during the time they were supported at TomorrowNow, and of the 358 total customers TomorrowNow *ever had*, at most 277[176] were new customers after the SAP acquisition. Mr. Meyer's analysis is, therefore, contradicted by the facts.

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174 Meyer Report, page 81, paragraph 118.
175 Meyer Report, page 82, paragraph 120.
176 Appendix K-4. 277 does not include customers with a TomorrowNow start date marked "N/A".

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

4.5.5. Goodwill

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

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

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

4.5.6. Pro Rata Value of Use

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

4.5.7. Speculative Acquired-Customer Count

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

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

customers are not actual customers. The analysis should focus on the value of the actual use as measured by actual customer counts which are known.

4.5.8. J.D.Edwards

Mr. Meyer discusses the PeopleSoft acquisition of J.D.Edwards.[181] He does a similar manipulation of the transaction acquisition metrics to determine that the J.D.Edwards intellectual property was worth $1.36 billion. It is not clear what Mr. Meyer does with the $1.36 billion. It is also unclear how he uses the information to separate the value attributable to PeopleSoft versus that attributable to J.D.Edwards for purposes of his damage analysis. What is clear is that whatever value is embodied in the J.D.Edwards intellectual property, it is value that is already included in the PeopleSoft intellectual property Mr. Meyer has dealt with elsewhere in his analysis. Mr. Meyer would, therefore, be double counting if he included any damages attributable to J.D.Edwards intellectual property.

4.5.9. BOBJ Reference

In paragraph 125, Mr. Meyer makes reference to SAP's acquisition of Business Objects ("BOBJ") for $7.1 billion. He suggests that the acquisition provides "…some relevant market information…" presumably for purposes of his damage calculation. He goes on to state that the acquisition "…demonstrates that SAP was willing to pay significant amounts to secure software license and support service revenue streams…"[182]

Mr. Meyer does not state how the SAP acquisition of BOBJ affected his damage analysis. Paragraph 125 adds nothing to the damages Oracle may have suffered as a result of the Alleged Actions. For the reasons I have indicated above, acquisitions of entire companies provide no guidance as to the quantum of a Value of Use.

4.5.10. PeopleSoft Fair Market Value Opinion

Based on his analysis, Mr. Meyer states, "…in my opinion, the Market Approach indicates a fair market value of SAP's use of Oracle's copyrighted materials in suit of no less than $2 billion."[183] His opinion appears to be based primarily on the PeopleSoft acquisition financial information which is inappropriate. In addition, because the final opinion ignores facts, and is contradicted by the facts I discussed above, the opinion is not properly supported and inappropriate for the claim. The opinion also ignores the Court's Order regarding preclusion of evidence.

4.6. Siebel

Mr. Meyer adopts the same approach in valuing the Subject IP arising from Siebel activities as he did for PeopleSoft and leaves unexplained how he equates the value of a portion of the Siebel acquisition price with all the acquired assets (tangibles, software, customers, employees, works in progress) with the value of the actual use Defendants made of the Subject IP. Whatever his rationale, it is inappropriate for the task he describes as his objective in this matter.

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181 Meyer Report, pages 86-87, paragraph 124.
182 Meyer Report, page 87, paragraph 125.
183 Meyer Report, page 88, paragraph 127.

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

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

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

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

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

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

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

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

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

184 Meyer Report, page 181, paragraph 267.

5. Of the 7 customers that purchased products or services from SAP while they were with TomorrowNow, none (0.0%) became SAP customers for reasons related to TomorrowNow.

Applying the same methodology I apply in the PeopleSoft example, given the above allocation and applying the actual percentage of lost customer ratios rather than Mr. Meyer's 10% ratio reveals a Value of Use of $0.[185]

4.6.1. Customer Relationships

In paragraph 270, Mr. Meyer again addresses the value of customer relationships and references Duff & Phelps' value of support agreements and customer relationships in the amount of $808 million. He goes on to state that Duff & Phelps used a discounted cash flow approach through 2016. He accepts the Duff & Phelps value even though it is based on a projection through 2016 in contrast to his stated end date for the alleged infringement of October 31, 2008 (about 8 years earlier).

Mr. Meyer's analysis of the value of new customer relationships to SAP is inappropriate. First of all, Mr. Meyer states that the value to Oracle of the 1,800 new customer relationships it acquired with Siebel was $108 million. He then claims SAP benefited by a "large portion" of the $108 million because it gained "…access to twice the number of new customers (3,700 customers)" as Oracle.[186] Mr. Meyer's conclusion is speculative and contradicted by the facts.

When Mr. Meyer says SAP gained access to 3,700 new customers as a result of the alleged infringement he is speculating that all but 300 of the Siebel customers acquired by Oracle in the Siebel transaction that were not already an SAP customer, became an instant customer of SAP, thereby resulting in an indeterminate reduction of marketing cost to make them an SAP customer. The reality is that only seven of these 3,700 customers purchased products or services at SAP while still a TomorrowNow customer, and of those seven, four were SAP customers before the Siebel acquisition. Mr. Meyer's analysis is, therefore, contradicted by the facts.

4.6.2. Goodwill

In paragraph 273, Mr. Meyer states that a portion of the goodwill quantified by Duff & Phelps should be allocated to SAP's alleged infringement. Again, however, the reader is left to guess what that allocation is in total. As discussed previously, Mr. Meyer should not include any goodwill in his analysis. The goodwill by definition excludes all the identifiable intangible and tangible assets. Therefore, SAP's use of goodwill was, by definition, zero.

4.6.3. Pro Rata Value of Use

In paragraph 265, Mr. Meyer states, "Data related to Oracle's acquisition of Siebel provides relevant, comparable metrics of the fair market value for the copyrighted materials in suit." He never justifies his rationale for this statement, which is inappropriate for the reasons I have previously stated.

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185 The allocation based on TomorrowNow's Siebel customer count of 16 would be 0.4% x 19.8% x 44% x 0.0% x $4.1 billion = $0.

186 Meyer Report, page 184, paragraph 271.

4.6.4. Speculative Acquired-Customer Count

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

4.6.5. Siebel Fair Market Value Opinion

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

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

5. Value of Use – Income Approach

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

5.1. Oracle Losses - PeopleSoft

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

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

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

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

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

Mr. Meyer assumes:[191]

1. Incremental costs of 20% for support revenues

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

3. A terminal value of lost license and support profits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.2. SAP Expected Gains - PeopleSoft

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

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

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

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

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

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

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

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

In another attempt to demonstrate the success of TomorrowNow at converting customers to SAP, Mr. Meyer states that during the years from 2005 through 2008, SAP earned revenues of REDACTED - NOT RELEVANT REDACTED - NOT RELEVANT from the customers on the List of 86.[208] Mr. Meyer then divides the REDACTED - NOT RELEVANT by 86 to arrive at per-customer revenues of REDACTED - NOT RELEVANT over the four-year period, or nearly REDACTED - NOT RELEVANT per customer per year. While the arithmetic Mr. Meyer applied to generate these numbers is technically accurate, the result is misleading. Mr. Meyer's analysis leads the reader to the conclusion that TomorrowNow was the cause of SAP generating nearly $4.0 million per year in revenue for every customer on the List of 86. However, Mr. Meyer included recurring revenues that were the result of a relationship between the customer and SAP that existed prior to TomorrowNow's involvement. In addition, Mr. Meyer included revenues for customers that decided to purchase SAP software before any involvement by TomorrowNow or for other reasons that had nothing to do with TomorrowNow.[209] Because he included inappropriate revenues, Mr. Meyer's calculation is both wrong and overstated.[210][211]

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

207 Meyer Report, page 91, paragraph 133.
208 Meyer Report, pages 94-95, paragraph 139.
209 Meyer Report, Schedule 42, footnote 3.
210 Removed Footnote.
211 Removed Footnote.
212 "SAP Customer Report July 2009 Update.xls;" SAP-OR00789887. "SAP Customer Report Updated 10-30-09.xls;" SAP-OR00841587. "SAP Customer Report.xls;" SAP-OR00603615 (collectively, "SAP Revenue Report").
213 List of 83.xls dated July 15, 2009 as updated per email from Jason McDonell to Geoff Howard dated October 17, 2009. Letter from Jason McDonell to Geoff Howard dated November 3, 2009; Defendants' Fifth Supplemental Responses to Plaintiffs' First Set of Targeted Search Requests to Defendants dated December 4, 2009. ("List of 86").

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

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

5.3. TomorrowNow Expected Gains – PeopleSoft

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

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

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

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

215 Meyer Report, page 91, paragraph 133.

216 Meyer Report, page 92, paragraph 135.

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

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

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

terminating Oracle support in favor of TomorrowNow. Mr. Meyer's assumptions are not only speculative, they are contradicted by the facts as I describe elsewhere in this report.

From 2002 to 2008, TomorrowNow had 358 customers and of those, 52 were customers when SAP bought TomorrowNow. As I will explain later in this report, many of the TomorrowNow customers were gained for reasons unrelated to the Alleged Actions. It is speculative to assume that any customer decided to incur the high cost of an ERP migration from Oracle to SAP as a result of the ability to save comparatively modest amounts on their support costs during the transition period. Mr. Sommer stated in his report that there is a high cost in terms of money, time, effort, disruption and uncertainty in migrating to a different ERP system. It is unlikely in the extreme that the cause of a customer's migration of an Oracle ERP system was the modest support savings they might achieve by using TomorrowNow during the transition phase of the migration; to do so would be economically irrational. As I explain in more detail later in this report, customers left Oracle and migrated to SAP for a variety of reasons unrelated to the Alleged Actions.

5.4. Oracle Losses - Siebel

Mr. Meyer's income approach analysis begins in paragraph 275 with the statement that the value computed is "…the incremental net cash flows Oracle would expect to lose to SAP as a result of licensing the copyrighted materials." He also includes the "…terminal value of Oracle losing a Siebel customer as a result of licensing the Siebel copyrighted materials in suit to SAP."[220]

He adds a statement in paragraph 276: "Duff & Phelps' overall valuation of Oracle's Siebel acquisition was measured as the discounted cash flow from revenues and profits from sales of Siebel software licenses to existing Siebel customers (up-sell), sales of licenses to new Siebel customers after the acquisition, and revenue from new and existing support contracts." It appears that Mr. Meyer is basing his damage calculation (under the income approach) on a valuation model Duff & Phelps created for the purchase price allocation for financial accounting purposes. As I pointed out previously, financial accounting entries do not make good damage calculations. For example, purchase price allocations may be driven by tax and other considerations. In addition, companies look to insulate themselves to the extent possible from future potential write-downs as a result of the impairment of acquired assets. Finally, Oracle is subject to the Court's Order that evidence of up-sell and cross-sell opportunities are excluded from the damage calculations. However, because Mr. Meyer has ignored the Court's Order, I must address each element of his income approach in this report.

Mr. Meyer references a model in which he assumes Oracle would lose 200 Siebel customers to SAP and states that the resulting Value of Use was \$231.9 million.[221] Although he does not spell them out in his report, Mr. Meyer states that he applied "varied" assumptions regarding revenues and profits Oracle would lose in his schedule of losses related to the 200 "lost" customers and he includes lost up-sell and cross-sell license and related support revenues through December 31, 2015.[222]

220 Meyer Report, pages 186-187, paragraph 276.
221 Meyer Report, page 187, paragraph 278.
222 Meyer Report, page 187, paragraph 278.

Mr. Meyer assumes:[223]

1. Estimates of incremental costs of 15% for support revenues
2. Estimate of incremental costs of 20% for license revenues for existing customers and 50% for new licenses
3. A terminal value of lost license and support revenue.

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

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

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

5.5. SAP Expected Gains – Siebel

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

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

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

former Siebel customers over a multi-year period is not a reasonable basis upon which to calculate the Value of Use in the context of this matter.

5.6. TomorrowNow Expected Gains – Siebel

Mr. Meyer also applied his SAP Expected Gains "methodology" to calculating the gains he believes TomorrowNow made (or expected to make). Mr. Meyer makes an unsupported and unrealistic assumption that TomorrowNow gained $14.38 million in support revenue from Siebel customers, or $7.19 million under a different scenario which assumes TomorrowNow's 50% discount of Oracle's support prices.[226] He goes on to apply Mr. Nelson's estimate that for every dollar of TomorrowNow revenue Oracle lost $18 in revenue,[227] and calculates Oracle's lost revenues to be $129 or $259 million (depending on which scenario he assumes). Then, "[a]djusting for a 15% incremental cost (based on Oracle's financial data regarding costs and margins)," his calculations result "in a fair market value of the Siebel copyrighted materials in suit of $110 million to $220 million."[228]

As Mr. Meyer must be aware, TomorrowNow never made any profits from its operations. In fact, over the 7 years TomorrowNow operated (including the pre and post SAP acquisition dates), TomorrowNow lost approximately $90 million.[229] TomorrowNow's revenues must be adjusted by deducting relevant expenses incurred to generate the accused revenues. Once the appropriate expenses are deducted, TomorrowNow has a low Value of Use, if any.

Mr. Meyer's methodology is flawed. As I stated above, Mr. Meyer should base his Value of Use only on the actual use Defendants allegedly made of the Subject IP, which for Siebel is de minimus, not on the estimates SAP made in the business case.[230] For reasons I have stated elsewhere in this report, a business case is not objective information. At best, a business case involves estimates made by a range of people who may not be diligent or objective in the analysis upon which the business case estimates are based. Business cases usually are developed through an iterative process in which various people add their thoughts and assumptions to the model. At the end of the development process it is not always possible to determine where estimates come from, who made the estimates, or what the support for the estimates might be. In addition, business case models frequently are created with a specific purpose in mind (support a transaction or defeat a transaction) and it is not always clear in hindsight what that purpose was. Furthermore, the influence of more senior management[231] on how the business case should look when complete is often the most important element in its creation. A business case is only one estimate of what might happen in the event a transaction is completed and may not be at all objective. Business cases involve so much subjectivity that once they have served their purpose, of supporting or defeating a transaction, they are often discarded. Mr. Meyer's reliance on a business case to support his analysis and opine to between $97 million and $247 million in Potential Gains is inappropriate.

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226 Meyer Report, page 189, paragraph 281.
227 Andrew Nelson deposition dated February 26, 2009, page 169.
228 Meyer Report, page 189, paragraph 281.
229 Except for a modest profit of approximately $20,000 in 2004. Appendix O.
230 In my experience, business case analyses are notoriously difficult to make and are often wrong. Inevitably, at the time a business case is made out, the results are all in the future and the case is usually made out by someone who will not ultimately be responsible for running the acquired business.
231 i.e. people more senior than the people tasked with preparing the business case.

6. Value of Use - Cost Approach

6.1. PeopleSoft Acquisition Cost

Mr. Meyer next opines[232] on the Value of Use under a cost approach. He states that the "…cost approach attempts to measure the future benefit of the intellectual property by quantifying the cost to develop alternative technology or replace the technology being valued." He claims[233] to have considered Oracle's cost of acquiring the intellectual property in the PeopleSoft transaction and "the investment in research and development by Oracle in the copyrighted materials in suit since the acquisition." Although Mr. Meyer claims to have considered Oracle's research and development ("R&D") spending on the acquired intellectual property since acquisition, several Oracle witnesses (Ms. Catz, Mr. Corey West ("Mr. West") Oracle Senior Vice President, Controller and Chief Accounting Officer, Mr. Ivgen Guner, and Mr. Charles Rozwat[234]) claimed that it was not possible to do so because the company did not track expenditures in that way.

Mr. Meyer cites a book titled "Intellectual Property Valuation, Exploitation, and Infringement Damages, by Gordon V. Smith and Russell L. Parr, 2005 Edition.[235] I have that book and studied it carefully to verify the citation. However, the citation is inapposite for Mr. Meyer's purpose. The reference states that the cost approach to valuing intellectual property is only applicable to valuing the absolute fee simple interest in the intellectual property which is an inappropriate basis of value in the context of this case.

Although the entire premise of Mr. Meyer's approach is undermined by his citation, I address his cost approach in detail below:

6.2. R&D Expenditures

Despite Oracle's senior management stating that it was not possible to determine how much Oracle spent on R&D by product line, Mr. Meyer states that from December 2004 through August 2008, Oracle spent a total of "…$1.1 billion on PeopleSoft product applications development" and that on average this was $290 million a year in "PeopleSoft software application and software and support materials."[236] Mr. Meyer states that Oracle personnel prepared reports that purport to track the R&D expenditures by product line and that from March 2006 through August 2008, Oracle spent a total of "…$260 million on Siebel product

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232 Meyer Report, page 95, paragraph 142.
233 Meyer Report, page 96, paragraph 142.
234 The lack of "granularity" in the reporting of Oracle R&D spending was noted on pages 89, 189, and 193 of Safra Catz's deposition dated March 27, 2009. When asked about R&D development costs with respect to new releases, Ivgen Guner replied, "I do not have that information. We do not collect that sort of detail. We do not separate our divisions of duties by release versus by product versus by version." Ivgen Guner deposition dated September 4, 2008, page 83. Corey West said that R&D expenditures were tracked in the general ledger (page 33), but when pressed admitted "in terms of activity-based tracking, that doesn't happen." Corey West deposition dated April 9, 2009, page 78. Similarly, Charles Rozwat was unable to account for time spent by his R&D teams on particular projects. Charles A. Rozwat deposition dated October 12, 2009, pages 77, 88 and 201.
235 Smith, Gordon V., and Russell L. Parr. *Intellectual Property Valuation, Exploitation, and Infringement Damages.* New York, NY: John Wiley & Sons, Inc. 2005.
236 Meyer Report, page 97, paragraph 147.

applications development" and that on average this was $104 million a year.[237] Mr. Meyer further opines that various analyses by *Oracle employees* informed him that Oracle "estimated that 60 - 65% of its research and development expense for its applications products related to support-related development efforts."[238] Mr. Meyer cites a November 2007 presentation with a chart that purports to show support and new development spend by product line. The chart is difficult to read, but it appears that approximately 75% of PeopleSoft research and development expense is related to support.[239] Mr. Meyer also cites a "Discussion with Houman Behazadi", for which he provided notes from a November 13, 2009 conversation that state, "November 2007 R+D cost analysis" and "60-65% of R+D spent on maintenance, ratio consistent today." The notes further state, "Data not tracked in Oracle's systems in normal course…separate analysis (manual process) performed to estimate time by task)." This "analysis" was provided by Oracle without explanation or support and it directly conflicts with 30(b)(6) deposition testimony stating that this information was never tracked by Oracle.[240]

"Therefore, for the period December 2004 through September 2008," Oracle spent "approximately $660 million to $715 million" on PeopleSoft support related to R&D. Mr. Meyer then states that an apportionment of Oracle's R&D is not required because "TomorrowNow copied Oracle's PeopleSoft and J.D.Edwards support materials as well as underlying applications…"[241] It is not clear what this sentence means. The relevance is also unclear because it would be a requirement of properly estimating the "profits" generated from support revenues to recognize all of the costs associated with generating such revenues. Using Mr. Meyer's data, Oracle spent an average of $181 million[242] a year developing support products for PeopleSoft applications and $65 million[243] a year on Siebel support. Because Oracle accounts for its R&D cost below the gross margin line of its reported financials, approximately $246 million[244] a year of support related R&D is not included in Mr. Meyer's lost profits, Value of Use and reasonable royalty analyses or Ms. Catz's estimate of profit on support. SAP, on the other hand, tracks R&D expenses related to support and charges it above the line, reducing gross margin (hence SAP's lower reported gross margin versus Oracle). Because many of the R&D costs are incurred to develop fixes, updates, patches and the like, Mr. Meyer's failure to properly apportion the R&D costs results in the support lost profits and Value of Use calculations being overstated.

Mr. Meyer states that during the January 2006 through September 2008 period, Oracle spent "$156 million to $169 million" on Siebel support related to R&D.[245] He added that Siebel spent a total of $211.9 million on R&D in the nine months ended September 2005.[246] Based on his

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237 Meyer Report, page 190, paragraph 284.
238 Meyer Report, page 191, paragraph 285.
239 Presentation titled "Applications Strategy – November 2007" ORCL00560527-566, at -533.
240 Safra Catz's deposition dated March 27, 2009, pages 89, 189 and 193. Ivgen Guner deposition dated September 4, 2008, page 83. Corey West deposition dated April 9, 2009, page 78. Charles A. Rozwat deposition dated October 12, 2009, pages 77, 88 and 201.
241 Meyer Report, page 98, paragraph 148.
242 $290 million a year (per Meyer Report, page 97, paragraph 147) times 62.5% (the average of "60-65%") = $181 million a year.
243 $104 million a year (per Meyer Report, page 190, paragraph 284) times 62.5% = $65 million a year.
244 $181 million + $65 million = $246 million.
245 Meyer Report, page 191, paragraph 285.
246 Meyer Report, page 191, paragraph 286.

assumptions, Mr. Meyer then states that in his opinion SAP avoided development expenditures with a "…fair market value of no less than $225.7 million."[247]

Mr. Meyer references[248] SAP's expenditures of "…over REDACTED - NOT RELEVANT on support development…" to buttress his argument that SAP would have been "aware of the significant cost associated with providing support to…" its customers. The argument does not appear to add anything to Mr. Meyer's argument as there is no doubt that both Oracle and SAP were aware that support development requires significant expenditures. The problem is that Mr. Meyer has failed to take the support related portion of such costs into account in his Oracle lost profits and Value of Use analyses.

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.

analysis is too vague to be usable as the basis for damages analysis because for PeopleSoft alone it covers a range of $2 billion which indicates it is little more than an unsubstantiated guess. Mr. Pinto's development cost estimate for Siebel ranges from $198 million to $573 million which is also little more than a guess as no reasonably accurate analysis could result in such a wide spread.

Mr. Reifer analyzed Mr. Pinto's approach to quantifying the effort and cost of replicating the Oracle software. Mr. Reifer (who I understand is an expert in the COCOMO model Mr. Pinto used in his analysis), states in his report that Mr. Pinto:

1. Made simple mathematical errors

2. Assumed inappropriately high labor rates

3. Double counted certain documentation costs

4. Counted the lines of code incorrectly

5. Employed a flawed estimation methodology

Mr. Reifer did his own analysis and reported a series of ranges that varied based on the degree and type of changes he incorporates into the assessment. His report shows that at the lower end of his range the cost to develop the four suites at issue in this case would be between $211.8 million based on optimal factors and $330.8 million assuming pessimistic factors. At the upper end of his range he estimates $963.0 million based on optimal factors and $1,504.6 million assuming pessimistic factors. There are other ranges in between these extremities.

Mr. Garmus states in his report that Mr. Pinto:

1. Applied Function Point Analysis inappropriately

2. Measured the code inappropriately by basing his estimate on the number of lines of code (a process Mr. Garmus refers to as "backfiring")

3. Assumed that all of the Oracle code for all four suites needed to be replicated when in fact many elements of the code were never used by TomorrowNow and should be excluded from the analysis

Mr. Reifer's and Mr. Garmus' reports show Mr. Pinto's approach and methodology to be inappropriate for the task Mr. Pinto was trying to accomplish and that his conclusion overstates the cost to replicate the appropriate code.

I have no opinion on the analyses these experts provided of the Pinto Report. However, if they are correct, then Mr. Meyer should not rely on Mr. Pinto's opinion. To the extent the Pinto opinion is found to be in error or otherwise inadequate, Mr. Meyer's reliance upon it for any portion of his damages analysis is inappropriate.

In addition to all the practical and economic arguments against Mr. Meyer's use of Mr. Pinto's replication analysis figures, I understand that counsel for Defendants have made a legal argument about it that has yet to be decided by the Court.

6.4. Avoided Costs – Other Claims

I understand that for certain of the non-copyright claims, Plaintiffs may be entitled to disgorgement of Defendants' profits if they arise as a result of the Alleged Actions. However, use of avoided costs as a measure of disgorgeable profits is inappropriate from an economic point of view because avoided costs do not represent accrued benefits to the Defendants. In other words, Defendants gained nothing by not paying for software they never developed. Accordingly, avoided costs are not an appropriate measure of damages.

6.5. Market, Income and Cost Approach Summary

In the summary, Mr. Meyer presents[252] a wide spread of potential Value of Use damages. Because Mr. Meyer does not state which of the figures presented are additive or alternative, the reader is left to guess as to his opinion of damages.

My best guess as to which of Mr. Meyer's damage claims are additive and which are alternative suggests the spread from the low side to the high side of his claims is as follows:

[252] Meyer Report, page 101, paragraph 153 and Meyer Report, page 192, paragraph 289.

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

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

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

7. Georgia-Pacific Approach

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

7.1. Analysis

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

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

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

Mr. Meyer states[259] that the Negotiation will result in a royalty designed to charge Defendants for the use of Oracle's software applications and support materials "…*exactly* as SAP and TomorrowNow actually did." [emphasis added] As I have previously stated, Mr. Meyer's professed limitation of charging Defendants only for the actual use of the Subject IP is not what he does in practice. Rather, his analysis charges Defendants as if they acquired a pro rata share of PeopleSoft and Siebel. I will develop this argument further, but it is so fundamental to a proper analysis of a reasonable royalty and Value of Use in this case that I preface my detailed remarks below with a reiteration of the fundamental point that it is only the Defendants' *actual* use that Mr. Meyer should consider in his analysis.

In spite of his own admonition to restrict himself to quantifying Defendants' actual use of the Subject IP, in the same paragraph[260] Mr. Meyer describes several items he believes are considerations at the time of the Negotiation which do not represent actual use of the Subject IP. For the reasons I cited earlier, such an approach is fundamentally flawed and out of character with an "actual use" license.

Mr. Meyer also references "the likely cost and time delays"[261] which are inappropriate elements of an actual use license. As discussed previously, the cost to replicate the Oracle software would never have been incurred by SAP, so cost savings would have played no role in the Negotiation. Similarly, because the License is granted instantaneously as of the date of alleged infringement, time delays are not an issue in the Negotiation. In the Negotiation, Oracle would consider what intellectual property rights it would have to concede to the Licensee and what it would gain from the License; while SAP would consider what rights it would need for TomorrowNow's support business and what the cost of the License would be. SAP would also be conscious of any benefits that might flow to SAP as a result of TomorrowNow's support offering.

Oracle would not have wanted to give away the Subject IP for less than it was worth[262] and SAP would not have wanted to overpay[263] for the Subject IP by paying royalties on revenues it never earned. Therefore, for this and all the reasons I have stated previously, the parties would have negotiated a royalty rate based on a percentage of revenues (or profits) to conclude the License.

Such is the background of the Negotiation. Now, I deal with the individual factors Mr. Meyer considered.

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[257] Meyer Report, page 193, paragraph 291.
[258] Meyer Report, page 103, paragraph 156.
[259] Meyer Report, page 103, paragraph 156.
[260] Meyer Report, pages 103-104, paragraph 156.
[261] Meyer Report, page 103, paragraph 156 and Meyer Report, pages 193-194, paragraph 291.
[262] Which it might do if the royalty was a fixed fee and SAP converted more PeopleSoft and Siebel customers than expected.
[263] Which it might do if the royalty was a fixed fee and SAP converted fewer PeopleSoft and Siebel customers than expected.

7.2. Factors 3 and 7. Nature, Scope and Duration of the License

7.2.1. Nature and Scope

Mr. Meyer begins by restating that the license at issue is non-exclusive and non-transferable, and that it allows SAP to "reproduce, distribute, and create derivative works in all geographies when and where SAP actually used…"[264] the Subject IP.

As Mr. Meyer rightly points out, Oracle would still be able to provide software and support to its own customers. What he fails to add to his statement is that the License would only be to the Subject IP and that no customers would be transferred between the parties as a result of a license being granted. The License is a license to use the Subject IP in a manner that would result in revenue for Defendants' only if they could persuade customers to leave Oracle's support, contract for TomorrowNow support and buy related licensed applications from SAP.

Similarly, and for the same reasons, the License would not cover the right to sell Oracle software applications. Oracle has not alleged that Defendants ever sold an Oracle application license. Therefore, Defendants would not be negotiating for a license to sell an Oracle license application. The License is to grant access to the Subject IP so as to provide support for Oracle software. To the limited extent TomorrowNow helped customers with upgrades, the hypothetical license would include the right to download, install and implement upgrades. As Mr. Sommer indicated, operations of this type are routinely performed by consultants, system integrators and third-party support vendors. Any effect of the right to upgrades on the ultimate license fee payable would be modest because many TomorrowNow customers went to TomorrowNow to avoid upgrades they were content with the version of Oracle's software that they had as I discuss elsewhere in this report.

I assume TomorrowNow and SAP made their best efforts to sell their products and services. If they were to sell more products and services than they actually did as Mr. Meyer assumes (he assumes sales to up to 3,000 customers for both TomorrowNow and SAP), then something they were doing in the real world would have to be different in the hypothetical world or sales would have been the same in both worlds. However, Mr. Meyer does not say what changes he assumes would be made to increase Defendants' sales. If the marketing restrictions Mr. Meyer postulates were in place, it is difficult to know what they could have done differently to attract the customers he claims Defendants would have acquired.

Mr. Meyer then states, "The broad scope of the contemplated hypothetical licenses [sic] puts upward pressure on the license fee amount." However, the license for which Mr. Meyer was attempting to estimate a reasonable royalty (i.e., the license required to cover the actual use Defendants made of the Subject IP) was severely limited in period (as discussed below), scope, marketing and advertising capability, territories, and customers, so the terms of the License contradict Mr. Meyer's conclusion.

264 Meyer Report, page 195, paragraph 295 and Meyer Report, page 106, paragraph 161.

7.2.2. Duration

It is not clear what date Mr. Meyer is using for the date of the Negotiation for PeopleSoft he simply states it was January 2005. However, the proper date to use is January 19th 2005 which is the date of SAP's acquisition of TomorrowNow. For Siebel, he simply states it was September 2006; the proper date to use is September 29, 2006.

Mr. Meyer states, "…the hypothetical license would end in October 2008…"[265] Such a short license period would render the license almost worthless. Recall that at the outset, neither party would know how many customers the licensees could generate in the 3.75 year license period (January 2005 to October 2008).[266] Furthermore, the potential customers would have to be informed that their support services would be terminated in October 2008. Such action would result in them knowing the risk that (a) they would have to go back to Oracle (or find another third-party vendor) for support, paying retroactively for support they never received in addition to paying whatever penalties Oracle imposed on returning customers and (b) they would have all the disruption of establishing a new customer relationship upon joining TomorrowNow and then again upon returning to Oracle or going to another support vendor. In such circumstances it is inconceivable TomorrowNow would have sold *any* support services of the type it offered.[267]

Mr. Meyer's paragraph 168 demonstrates the confused nature of his analysis. In it, he states that SAP's objective was to convince "…some portion of TomorrowNow's customers obtained through October 2008…" to "…switch to the SAP platform…" and become SAP license customers. Of course, this contention is diametrically opposed to his earlier contention that TomorrowNow would have gained 3,000 customers, *each of which* he assumes would have become an SAP customer. In fact, SAP was successful in winning at most just a few license customers from the pool of TomorrowNow customers, certainly many fewer than Mr. Meyer realizes, (as I describe later in this report).

Mr. Meyer states, "These factors significantly outweigh the relatively short duration of the license and result in net upward pressure on the amount of the license fee."[268] I disagree. Mr. Meyer's discussion of the duration of the License indicates severe *downward* pressure on the royalty rate and may even render the License worthless.

7.2.3. Fear, Uncertainty and Doubt

In paragraph 166[269] Mr. Meyer states, "SAP wanted to take advantage of the fear, uncertainty and doubt of PeopleSoft customers at that time…" Mr. Meyer should not use this statement as he does because, as I previously stated, the evidence shows that any anxiety in the market place was created by Oracle's 19 month battle with the DOJ and PeopleSoft's management to effect the hostile takeover. Many PeopleSoft customers professed their anxiety about becoming an Oracle customer in the news media, trade press and in correspondence with Oracle before and

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265 Meyer Report, page 111, paragraph 165.
266 The duration for Siebel is even shorter, 2 years (September 2006 to October 2008).
267 Of course, TomorrowNow could have reverted to onsite operations similar to those operated at TomorrowNow in the past and by other firms that provide support to Oracle (and SAP) customers.
268 Meyer Report, page 112, paragraph 169 and Meyer Report, page 197, paragraph 301.
269 See also Meyer Report, page 196, paragraph 299 in relation to Siebel.

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

7.3. Factors 1, 2 and 4 – Licensing Practices

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

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

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

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

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

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

can be and still be viable. TomorrowNow would have to change its pricing policies to accommodate the hypothetical royalty to Oracle but for the reasons stated its selling price could never approach Oracle's support price.

The fact of the support price ceiling alone indicates a significant downward pressure on the royalty rate. I understand Mr. Meyer's (and Oracle's) argument that SAP could afford to pay a higher rate than Oracle charged its customers for support because it hoped to sell licenses and support services to TomorrowNow customers it managed to migrate to SAP. I will address the royalty rate pressure caused by such aspirations later in my report. For the purposes of this section of the Meyer Report, such effects are not relevant. If TomorrowNow failed to make sales in the first instance (because its price was too high), SAP could not generate any downstream license sales.

Mr. Meyer opines[273] that other license fee information should be ignored for purposes of his reasonable royalty analysis. Oracle holds its intellectual property in a number of entities which then license it to the end user via certain intercompany license arrangements. For the most part, the intellectual property at issue in this matter is owned by Oracle International Corporation ("OIC"). Some of the intellectual property is owned by other entities such that OIC cannot recover for copyright claims arising from J.D.Edwards Enterprise One versions 8.11 and earlier and Siebel versions 7.8 and earlier in the OEMEA area. Mr. Meyer fails to fully incorporate the effects of the different ownership of the Subject IP which means his analysis is incomplete. Because his analysis includes damages for intellectual property owned by non-plaintiff entities, it is an inappropriate basis upon which to compute the damages in this case.

Oracle would almost certainly never negotiate a license for the Subject IP with SAP because:

1. The two companies are the two most dominant players in the ERP market and are locked in a fight for market share within that market.

2. As a general proposition, licenses only make sense from a *licensor's* point of view if they lead to increased profits. For example, if a licensor grants a license to a competitor so the competitor can service a market the licensor is not currently serving and has no intention of serving during the license period, profits increase for the licensor.

3. If the licensee's gained customers are equal to the licensor's lost customers, the only license fee that makes sense for the licensor is a rate equal to or greater than the lost profit associated with the lost customer, and that rate would mean little or no profits for the licensee. Therefore, a license is generally rejected.

4. Licenses only make sense from a *licensee's* point of view if the license will allow the licensee to make a profit. If the license fee is so high that a profit is not likely, then the licensee rejects the license.

The scenarios described above are by no means all the reasons two parties may be unable to negotiate a license that is reasonable to both. However, each of these scenarios applies to the facts of this case. Based on the royalty he proffered it is clear that it would not be economically

273 Meyer Report, page 114, paragraph 174.

rational for SAP to enter into a license agreement on such terms. Accordingly, even if Oracle had been willing to grant SAP a limited license for the actual use Defendants made of the Subject IP, it is unlikely Oracle would have concluded a license on any terms that SAP would have found economically rational.

Interestingly, Mr. Meyer references a series of companies that are licensed to provide support services of some kind to Oracle's customers. He states that the services allowed include first and second level support which allows the partner to help the customer up to the point at which the problem is referred to Oracle for resolution. Again, Mr. Meyer states that such partnership arrangements "are not instructive as to a license between SAP and Oracle as the scope, nature and purpose of these contracts and business relationships are significantly different then that [sic] contemplated by the hypothetical negotiation."[274] I disagree.

The nature of the support TomorrowNow was providing may have been greater than that provided by some of the partners (Mr. Meyer relies on a declaration by Colleen A. Kelly dated January 23, 2009 for his information). But the partnership agreements *inform* the reasonable royalty discussion, by creating a floor for the hypothetical license and demonstrating that Oracle does not have a vested interest in providing *every aspect* of support to its customers, possibly because it is not profitable to do so. For example, Oracle's Form 10-K states, "In the sale of consulting and systems integration services, we both partner with and compete against Accenture Ltd., HP, IBM Global Services, Bearing Point, Inc., Capgemini Group, and many others (both large and small)."[275] It is inappropriate for Mr. Meyer to decline use of these agreements for his analysis and inappropriate of Oracle to withhold them.

Mr. Meyer includes "goodwill" in his list of items Defendants actually used (in paragraphs 176 and 306). Therefore, I must address it here.

SAP did not acquire, use or interfere with the goodwill that arose in the Oracle acquisitions of PeopleSoft and Siebel. Inclusion of goodwill in the damages award would be compensating Oracle for SAP's use of something it never used, controlled or possessed. Accordingly, it would be inappropriate to include any portion of the value of goodwill in any damage calculation.

In addition, the best evidence available is Oracle's own public statements that it still retains whatever goodwill was acquired in the PeopleSoft and Siebel acquisitions the goodwill is actually reported by Oracle to the public via the 10-K report to the SEC every year.[276] Oracle has never taken an impairment charge on its books for any reduction in the value of the goodwill it acquired in the PeopleSoft and Siebel transactions and it would be required to do so if such impairment existed.

7.3.1. Licensed Services

As Mr. Meyer points out in paragraphs 178 and 308, "Oracle customers may engage third parties to help them install or *maintain* Oracle software [emphasis added]" but the paragraph (and the rest of his report) is silent on the reduction he made in the Value of Use to account for the

274 Meyer Report, page 115, paragraph 175.
275 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2009, page 12.
276 The 10-K is signed by Mr. Ellison, Mr. Phillips and Mr. Catz among others.

allowed uses of the software by a customer or a customer's consultants and support vendors. Mr. Meyer's statement proves that some (and possibly many) of the services TomorrowNow provided could have been provided within the same boundaries as the Oracle partner and customer licenses, which means Defendants only need a license to cover the portion of the actual use that was infringing.

Mr. Meyer goes much further in paragraphs 179 and 308 when he states, that "Oracle's licensed customers can purchase software support services which gives those customers the right to obtain product updates such as software upgrades, bug fixes and patches during the term of the support contract." I agree with Mr. Meyer that an Oracle support license confers on the customer all of these rights (as well as others not mentioned by Mr. Meyer). The list of services available to the customer plus all of the other support related rights are precisely what Oracle alleges TomorrowNow actually provided to the customers it gained from Oracle. However, because Oracle's customers are (a) entitled to these rights under the terms of the end user license and the same customers are allowed by license to buy support services from third parties, the only license Defendants would need was one that covered the allegedly infringing use Defendants made of the Subject IP. Oracle actually partners with and/or authorizes certain third-party support vendors to provide some of the services TomorrowNow was providing. Mr. Meyer should not have ignored this critical information and his failure to properly account for it means his analysis is incomplete and misleading.

7.3.2. SAP's Benefits

I understand that Oracle claims SAP benefited from TomorrowNow's alleged inappropriate use of the Subject IP and that as a result SAP would have been prepared to pay more to acquire the Subject IP than Oracle charged its customers. However, such a claim is misplaced. Oracle "sells" access to the Subject IP along with many other items and services (fixes, patches, updates, upgrades, etc.) to its thousands of customers at a price that is clearly a market price for such services.[277] Oracle alleges TomorrowNow used the Subject IP to provide many of the services Oracle provides. The use TomorrowNow made of the Subject IP is nearest in substance to the use made by self-support customers because such customers use their own staff or outside consultants to keep their systems running properly a service TomorrowNow effectively replicated by standing in place of in-house staff.

It is worth repeating that SAP would not be an Oracle licensee as a result of the Negotiation.

If SAP were to achieve a downstream sale, it would be unwilling to pay any portion of its related revenue stream because:

277 While it is clear that many of the uses TomorrowNow made of the Subject IP were within the boundaries of the Oracle customer licenses and may have been provided on a customer-by-customer basis by TomorrowNow, I understand that Oracle alleges TomorrowNow also used the Subject IP outside of the boundaries of the customer license. It is the use outside of the customer license that (a) I assume occurred as alleged by Oracle and (b) required the license that is the subject of the Negotiation. For the purposes of my analysis, I assumed that some of the services provided by TomorrowNow were not authorized by the end user license. I understand Defendants may dispute some or all of the claims Oracle makes.

1. Customers would not migrate their ERP applications from Oracle to SAP for modest savings on their support services during the transition because of the cost and disruption associated with the migration. Therefore, no more customers would migrate their ERP applications to SAP than would do so absent the Alleged Actions.

2. Bob Geib of TomorrowNow stated,

> I always felt that the fundamental value of the Safe Passage program was a license discount that SAP offered to its customers, TomorrowNow being a support element of that. But if you follow the money, the discount that SAP offered was much, much more significant than the TomorrowNow savings.
>
> Q: So you didn't feel that TomorrowNow offered as much as SAP did to the Safe Passage program?
>
> A: That's true.[278]

3. As the market leader, SAP would assume that it was the strength of its products and services that led a customer to migrate from Oracle to SAP, not the fact that under a license similar to the one Mr. Meyer suggests TomorrowNow would be able to provide support for an Oracle customer during the transition to SAP.

4. For the customers that did migrate to SAP for whatever reason, SAP would be interested only in a license to cover the interim support period during a customer migration to SAP because as soon as the customer was converted they would receive support from SAP. The interim period is covered under the TomorrowNow service.

5. SAP could have achieved the same result without incurring any risk if it had simply paid its prospective customers (i.e., those planning on switching some or all of its applications to SAP) half (or some other significant portion) of their Oracle support fees.

Mr. Meyer's analysis addresses none of these real limitations on the scope of the License.

7.3.3. TomorrowNow's Business Model

In spite of the enormous amount of information available to Mr. Meyer (from deposition testimony, customer contracts, and other sources), he seems to have ignored the realities of TomorrowNow's business model as it evolved over time. Beginning in 2002, the company provided additional support services, but its customers generally maintained their support contracts with PeopleSoft. The services offered by TomorrowNow under this support model were called the Extended Support Model because the majority of the support provided was to take the latest fixes and patches and re-write them to fit into the customer's older version of the PeopleSoft software. In mid-2003,[279] the Extended Support Model [280] was modified and later, by about mid-2004, the TomorrowNow sales people started actively marketing the Critical Support

278 Bob Geib deposition dated January 9, 2009, page 183.

279 "TomorrowNow Confidential Executive Summary: Series A Preferred Stock Private Placement." December 2004; TN-OR 00627768-794, at -786.

280 Often, also referred to as the Retrofit Model in practice.

model in which customers were not contractually required to maintain PeopleSoft support. TomorrowNow later supported J.D.Edwards and Siebel customers.

The testimony and documentary evidence shows that Oracle allowed third-party vendors to support its applications. The reasons for Oracle allowing third-party vendor support have not been fully developed in the testimony but *reasonably* possible explanations include:

1. Providing support to customers on old releases of software allowed the customer to continue to operate the old version even though Oracle had discontinued active support for that version. By allowing the customer to maintain its old version of software, the customer remained an Oracle user which Oracle may have believed gave them an advantage in selling future licenses or services to the customer.

2. By allowing customers to access third-party support vendors, Oracle saved themselves at least some of their customer's criticism of being abandoned[281] or threatened.[282]

3. Oracle may not have been able to support some customers even though they may have wished to do so. For example, customers in foreign countries not supported by Oracle and customers in small territories where there was no critical mass such that customers could be profitably supported.

Mr. Meyer extends his analysis of reasonable royalty by admitting that an Oracle customer could engage a third-party vendor to support their PeopleSoft and J.D.Edwards software.

The statements Mr. Meyer makes himself and those he attributes to others offer no insight into just how much it would cost Defendants to acquire the additional access to Oracle software they would have needed to support their customers. In other words, by admitting that Oracle's customers had legitimate access to Oracle's software, it became incumbent upon Mr. Meyer to state how much more access TomorrowNow would need to deliver its support services. Absent a detailed analysis of the difference between the contractually allowed customer access to Oracle's software and the access applicable to the License, Mr. Meyer leaves an unexplained gap in the required understanding of exactly what additional access and actual use are being valued.

7.3.4. Precluded Damages

In spite of the fact that Mr. Meyer was precluded by the Court from testifying about "cross-sell" and "up-sell" damages, he introduces such damages in his reasonable royalty analysis. In paragraph 182 he states that Oracle would require "significant consideration" to license SAP "because SAP …would be expected to have a major impact on Oracle's future sales levels and profit margins." For the reasons already stated, it is inappropriate for Mr. Meyer to ignore the Court's Order.

281 The customer might feel abandoned by PeopleSoft if their software was no longer supported.

282 The customer might feel threatened and coerced into spending time and money to upgrade to a later supported version of software in order to retain support.

7.3.5. SAP Licensing History/Acquisitions/IP Policies

Mr. Meyer contends that SAP and Oracle could reach an agreement in the Negotiation "…if an arrangement made business sense."[283] But he does not address the question of what happens if *no* arrangement makes business sense for both parties. Assuming for the purposes of this report that the law requires a "forced" reasonable royalty in the hypothetical negotiation, it may not be possible to force any agreement that is reasonable to both parties to the Negotiation.

Mr. Meyer focuses only on his clients' interests. The fact that his purportedly "reasonable" royalty is demonstrably unreasonable from the point of view of SAP means his analysis is inappropriate for his purposes in this case.

7.3.6. Comparisons with SAP Acquisition

Mr. Meyer uses SAP's acquisition of a number of companies (BOBJ being the most significant) to support his assertion that SAP would have been willing to pay substantial sums to "…expand its software portfolio when strategically warranted."[284] As I have described in the context of Oracle's acquisitions of PeopleSoft and Siebel, there is no valid comparison between the acquisition of a company with all its attendant assets and the negotiation of a limited license for support of a vendor's software. Therefore, Mr. Meyer's reference to SAP's acquisition of BOBJ is irrelevant in the context of the reasonable royalty.

7.4. Factor 5 - Nature of the Commercial Relationship Between Oracle and SAP

While there is no argument that Oracle and SAP are major competitors in the ERP field, it is inappropriate for Mr. Meyer to introduce lost cross-sell and up-sell opportunities into his analysis as he does in paragraphs 196 and 314. Such opportunities, if they existed, were precluded from Mr. Meyer's consideration by the Court's Order. Accordingly, because he makes no attempt to separate his damages claim between allowed and precluded claims, Mr. Meyer's reasonable royalty is not useful in the context of this matter. Mr. Meyer also includes reference to lost up-sell and cross-sell opportunities in paragraph 198 which merely adds weight to the inappropriate nature of his reasonable royalty analysis.

7.4.1. SAP Targeted Displacing Oracle

Mr. Meyer comments on SAP's competition with Oracle:

> SAP's goals were to, 'maintain market share growth at the expense of Oracle' and to 'interrupt Oracle's acquired maintenance income stream, making it difficult for them to invest in development of their Fusion platform.' SAP was looking to 'take on Oracle' in response to public provocation from Oracle,' and to 'Disrupt Oracles' [sic] planned maintenance income stream from PeopleSoft customers, making it more difficult for them to deliver their promises to the Street and the customer

283 Meyer Report, page 123, paragraph 186.
284 Meyer Report, page 124, paragraph 188 and Meyer Report, page 200, paragraph 309.

> base.'[285] Mr. Meyer went on to cite Mr. Geib in a Webex presentation saying, "We are here to help you, we are also here to make sure we put a world of hurt on Oracle."[286]
>
> The extension of TomorrowNow's service offerings to include Siebel software was intended to allow SAP to directly compete with Oracle for Oracle's Siebel support business, and compete for and win CRM applications customers from Oracle.[287]

Mr. Meyer sets out these statements to show that SAP's competitive posture was inappropriate. However, he never actually states that such is the case so the reader is left to ponder whether this section of Mr. Meyer's report forms a substantive portion of his analysis. What is certain is that Oracle and SAP were locked in competitive struggle and were both trying to win market share.[288] What Mr. Meyer fails to point out is that competition is the bedrock of a capitalistic business environment and there is nothing wrong with *appropriate* competition no matter how aggressive it may appear.[289]

7.4.2. Zero Dollar Deals

Mr. Meyer comments that SAP offered a zero dollar marketing campaign to new customers as they migrated some or all of their ERP systems to SAP products.[290] Again, Mr. Meyer fails to mention that "loss leader" pricing is a common element of a competitive marketing campaign and, of itself, is not even noteworthy. In addition, Mr. Meyer fails to address the overall pricing of a customer's migration from Oracle to SAP which was often accompanied by significant discounts off the full price of the newly licensed software. Mr. Meyer fails to recognize that for a rational customer the total package price is important, not how the individual elements of the package are priced. In any event, any savings the customers may have made on support services would have been a tiny fraction of the cost of an ERP migration.

REDACTED - NOT RELEVANT TO MOTION

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285 Meyer Report, page 129, paragraph 201.

286 Meyer Report, page 129, paragraph 202.

287 Meyer Report, page 202, paragraph 317.

288 Ricciuti, Mike. "SAP-Microsoft--harsh market reality." *ZDNet.com*. July 6, 2004. <http://news.zdnet.com/2100-3513 22-137003.html>. Jakovljevic, P.J. "The ERP Market 2001 And Beyond – Aging Gracefully With The 'New Kids On The Block.'" *TEC*. October 3, 2001. <http://www.technologyevaluation.com/research/articles/the-erp-market-and-beyond-aging-gracefully-with-the-new-kids-on-the-block--16484/>.

289 Larry Ellison deposition dated May 5, 2009, page 28. Elizabeth Ann Shippy deposition dated March 5, 2009, pages 119-120.

290 Meyer Report, page 203, paragraph 318.

291 Meyer Report, page 223, paragraph 357. See also Meyer Report, page 131, footnote 434.

292 Meyer Report, page 223, footnote 668. See also Meyer Report, page 131, footnote 434.

7.4.4. Lifetime Support

In spite of the Court's Order, Mr. Meyer implies in paragraph 210 of his report that Oracle's introduction of Lifetime Support was somehow caused by Defendants' actions and that it caused Oracle to "…incur additional costs." He reaches his conclusion in spite of quoting (in the same paragraph) testimony by Oracle's CEO, Mr. Ellison, that Oracle had "…always planned to continue to support those [PS] products into the indefinite future." It is inappropriate for Mr. Meyer to include consideration of "additional costs" for the Lifetime Support policy in spite of the Court's Order.

7.4.5. Applications Unlimited

Continued Releases and Lifetime Support:

> Applications Unlimited is Oracle's plan to continue providing enhancements to current J.D.Edwards EnterpriseOne, J.D.Edwards World, Oracle E-Business Suite, PeopleSoft, and Siebel product lines beyond the delivery of Oracle Fusion Applications. Applications Unlimited is driven by Oracle's commitment to protect our customers' investments.
>
> This commitment is demonstrated by new major releases across all of Oracle's applications product lines. In addition to enhancing our applications, we will also keep supporting them. Oracle's Lifetime Support Policy further extends Oracle's support for its applications.[301]

Mr. Meyer's inappropriate assumptions continue in his discussion of Applications Unlimited. He states that the Applications Unlimited policy was "…expanded as a result of the competitive pressure of SAP…"[302] when in fact such was demonstrably not the case according to Mr. Ellison. It is inappropriate for Mr. Meyer to characterize Oracle's changed business policies to be the result of the Alleged Actions when his client's own CEO testified that the change was "always planned."[303] In addition, Applications Unlimited is precluded by the Court's Order.

Mr. Meyer does not quantify the effects of any of the changes allegedly forced onto Oracle as a result of the Alleged Actions. However, he does state in paragraph 213 that the changes would cause "upward pressure on license fee amounts."

7.4.6. Price Pressure

Mr. Meyer's approach to quantifying the amount of the hypothetical license fee is to state that certain factors cause pricing pressure (upward or downward) on the hypothetical license fee, but he fails to state any base from which to start adding or subtracting the upward and downward pressures he alludes to.

301 Oracle.com "Applications Unlimited." <http://oracle.com/applications/applications-unlimited.html>.
302 Meyer Report, page 134, paragraph 211.
303 Meyer Report, page 134, paragraph 211.

Mr. Meyer determined that most of the Georgia-Pacific factors caused neutral or upward pressure on the reasonable royalty.[304] However, based on my analysis described in part above, it is clear that several of the factors discussed by Mr. Meyer would have caused significant downward pressure on the hypothetical license fee.

7.4.7. Relationship Between Oracle and SAP Summary

Mr. Meyer makes a convincing argument in his report that there were no circumstances in which Oracle would strike a bargain for the contemplated License that would make any business sense to Oracle absent such an unreasonably large payment from SAP that it would make no business sense to SAP.[305] The implication of Mr. Meyer's argument is that, indeed, there really was no license fee that could possibly make business sense to both parties in the real world and the License would be rejected. However, his conclusion would not be consistent with the purpose of the Negotiation which requires a royalty conclusion.

7.5. Factors 6, 8, 9, 10, 11, 12 and 13 – Market and Financial Considerations

Mr. Meyer considers the profitability and success of the products and services at issue as follows:

7.5.1. Gross Margins

For some reason, Mr. Meyer chooses to rely in part on testimony from Ms. "Safra Catz, Oracle Co-President and Executive Board Member" to determine Oracle's profit margins. His reliance is misplaced. Mr. Meyer should have used his client's books and records, so he could determine the company's relevant profit margins. Ms. Catz is essentially quoting from the published financial statements which overstate the profit margins on Oracle's support revenue stream.[306]

The fact is that Oracle's SEC filings (10-K) state clearly that the reported support gross margin in the financial statements does not include all of the expenses the company incurs to generate the support revenue.[307] Accordingly, Ms. Catz' stated gross margin is too high and Mr. Meyer's reliance on it is inappropriate.

A plaintiff's gross margin should never be accepted as the relevant profit margin for the purposes of a damage claim without a thorough analysis. Mr. Meyer does not appear to have determined the actual margin on support revenues. Therefore, his analysis is incomplete and his margin conclusion is contradicted by the evidence. In addition, there is no support for Ms. Catz'

[304] Except the short duration of the license, which "would generally put some downward pressure on a license fee." Meyer Report, page 196, paragraph 297 and for Siebel: "The limited duration and the limited nature of copyright protected acts put downward pressure on the license fee."

[305] Meyer Report, page 132, paragraph 208 and Meyer Report, pages 203-204, paragraph 320.

[306] Safra Catz deposition dated March 27, 2009. See also Meyer Report, page 136, paragraph 217 and Schedule 1.1 and Meyer Report, page 205, paragraph 326.

[307] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2009, page 113, footnote 2, states, "The margins reported reflect only the direct controllable costs of each line of business and do not include allocations of product development, information technology, marketing and partner programs, and corporate and general and administrative expenses incurred in support of the lines of business. Additionally, the margins do not reflect the amortization of intangible assets, restructuring costs, acquisition related and other expenses or stock-based compensation."

statement that after the first year on support contract, the actual margin "…reaches close to 100%"[308] which Mr. Meyer quotes for no apparent purpose.

I have done a detailed analysis of SAP's cost of providing support services which I describe elsewhere in this report. I have also calculated the support margin Oracle generated on support revenues using statistical analysis. In addition, as I described earlier, Oracle incurs $239 million a year in support related to R&D which is not included as an expense by Oracle for gross margin purposes. Accordingly, the gross margin Mr. Meyer applies is overstated.

My analysis shows that Oracle's support margin is much less than the 90% Ms. Catz suggested. Accordingly, Mr. Meyer's 90% gross margin figure overstates the amount of damages by a substantial amount.

7.5.2. Renewal Rates

Mr. Meyer states that Oracle's "overall renewal rates" are "90% and greater"[309] since the PeopleSoft and Siebel acquisitions. However, the post-acquisition renewal rate is skewed by the fact that according to Mr. Ellison the customers most likely to terminate PeopleSoft support had done so prior to the acquisition. While Mr. Ellison may be correct that the customers most likely to terminate had done so, there is ample evidence that customers were still anxious after the January 2005 negotiation date (e.g. Oracle's Lifetime Support policy wasn't finalized and communicated to customers until September 2005 and, as noted earlier, there was continuing customer anxiety with the merger in 2007). My analysis shows that numerous Oracle customers terminated support after the acquisition was finalized for reasons unrelated to the Alleged Actions and that most or all of the terminating customers chose SAP as their license vendor for reasons other than the Alleged Actions.

The conclusion Mr. Meyer draws from his consideration of renewal rates is unclear except to state that "Oracle would also anticipate a significant drop in its overall maintenance revenues, as well as reduced license revenue,[310] due to downward price pressure"[311] which, of course, means his statement is made in contravention of the Court's Order.

7.6. Extent of SAP's Use

When Mr. Meyer states "…TomorrowNow obtained copies of virtually all Oracle's PeopleSoft/J.D.Edwards applications and related customer support materials" and "TomorrowNow illegally obtained…Siebel application Software and Support Materials,"[312] he is relying on another expert, Mr. Kevin Mandia, for his understanding. However, I am not aware of any evidence that SAP used the Subject IP and Mr. Meyer presents no evidence of such use either.

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308 Meyer Report, page 136, paragraph 217 and Meyer Report, page 205, paragraph 326.
309 Meyer Report, page 136, paragraph 218 and Meyer Report, page 205, paragraph 327.
310 Mr. Meyer's continued inclusion of revenues excluded by the Court's Order.
311 Meyer Report, page 206, paragraph 327 and Meyer Report, page 137, paragraph 218.
312 Meyer Report, page 137, paragraph 220 and Meyer Report, page 206, paragraph 329.

7.7. SAP Admissions

In paragraph 222, Mr. Meyer states, "SAP has acknowledged that *it* was successful with obtaining contracts to provide support services, at least for some period of time, to approximately 350 PeopleSoft/J.D.Edwards customers" [emphasis added]. In addition, according to Mr. Meyer, SAP produced a document that stated an opportunity to migrate 300 joint SAP/Siebel customers of the 4,000 total Siebel customers Oracle acquired in the Siebel transaction to mySAP.[313]

TomorrowNow serviced 358 different customers[314] throughout its entire existence, only part of which was while it was owned by SAP. To the extent Mr. Meyer relies on the alleged "SAP acknowledgement," it brings into question one of the fundamental assumptions upon which his reasonable royalty is based.

Mr. Meyer uses the alleged acknowledgments to assert that "SAP planned to benefit from TomorrowNow's support customers by selling them SAP software that would replace PeopleSoft/J.D.Edwards software as well as cross-selling to those customers licenses to other SAP software"[315] and "SAP planned to sell its Siebel software support customers additional SAP software."[316] While SAP may have aspired to the opportunity Mr. Meyer stated, it is a long way from a marketing-driven *aspiration* to a license sale or support contract. Therefore, the aspiration is an inappropriate measure of the actual use of the Subject IP relevant to a damage calculation in this case. As I stated previously, a decision to migrate a company's software systems from Oracle to SAP would not be related to the customer making a modest saving on support services during a transition period. Based on Mr. Sommer's report, the decision to migrate software systems is one that:

1. Requires a long lead time with lagging benefits
2. Requires detailed analysis of system needs (system specification)
3. Involves competitive proposals in many cases
4. Is affected by internal interactions at the customer level
5. Involves significant expenditures and related cost analyses
6. Requires months or years to complete (averaging 21 months)
7. The pervasiveness of ERP systems create a high degree of disruption throughout the workplace
8. May require staff training, new hardware and other software
9. Necessitates a painstaking conversion of files and clean-up of master data

313 Meyer Report, pages 206-207, paragraphs 330-331.
314 Not including the Baan customers.
315 Meyer Report, page 139, paragraph 223.
316 Meyer Report, page 208, paragraph 333.

10. Involves interface design and software tailoring

11. Requires thorough testing of new implementations

12. May require on-site consulting specialists

13. Costs between 5 times and 25 times the license fee to complete (depending on the geographic spread of the affected operations)

14. Is a risky venture which can lead a company to financial peril, even ruin

Furthermore, in the DOJ investigation, the United States District Court stated in its Findings of Fact, Conclusions of Law and Order Thereon, that:

> An ERP installation, because of its complexity, usually requires substantial and expensive personnel training, consulting and other services to integrate the program into the customer's pre-existing or "legacy" software… ERP software vendors often provide some of those services, but they are typically also performed and augmented by the customer's own staff, obtained from providers other than ERP vendors or both.[317]

PeopleSoft also explained the high cost and complexity of its product implementations:

> The cost of licensing software has been variously estimated as only 5%,[318] 10%[319] and *'unfortunately just a small part'*[320] of the total cost of implementing the ERP package. The average implementation time for an ERP project is 18-24 months,[321] and the customer incurs significant costs for installation, training, and consulting beyond the licensing fees associated with the software products themselves. Once the software system begins operation, the customer also incurs costs for maintenance, support, and upgrades, not to mention the cost of disruption associated with the implementation of new technology.[322]

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317 US District Court for the Northern District of California, et al. v. Oracle Corporation. SA, Findings of Fact, Conclusions of Law and Order, Thereon, No C04-0807 VRW (document is not signed).

318 Referenced in the original document to: "Andrew Sorkin & Laurie Flynn, Rival says Oracle-PeopleSoft Deal Raises Antitrust Concerns, N.Y. TIMES, June 11, 2003, at C2 (quoting Robert Dutowski [sic] [Note: Dutkowski], then-CEO of J.D. Edwards) (PS-C418958)."

319 Referenced in the original document to: "Lisa Baertlein, PeopleSoft Users Brace for Possible Oracle Takeover, REUTERS, June 19, 2003 (PS-C03980-203982)."

320 Referenced in the original document to: "Marc Albert, Takeover May Sap Sales; German Firm SAP Campaigns to Lure PeopleSoft Customers, ALAMEDA TIMES-STAR, June 12, 2003 (page reference not available)."

321 Referenced in the original document to: "META Meta Spectrum Market Summary: Tier 1 Enterprise Resource Planning 2 (2003), page 36."

322 "PeopleSoft Inc. SEC File 5-42583, Amendment to Tender-Offer Solicitation/Recommendation Statement, Schedule 14D9, Ex-99.(E)(15): Exhibit (E)(15). Gary Reback, Carl & Ferrell, et al., A Hostage Taking: White Paper of PeopleSoft, Inc. Regarding the Unsolicited Tender Offer of Oracle Corporation. February 1, 2004, page 37." <http://www.secinfo.com/dsvrp.18M5.d.htm>.

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

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

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

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

7.8. TomorrowNow Revenue Equation

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

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

324 Donald Burleson. Four factors that shape the cost of ERP, Aug 16, 2001. http://articles. techrepublic.com. com/5100-10878 11-1054263.html.

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

326 Meyer Report, page 140, paragraph 224.

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

328 Meyer Report, page 207, paragraph 332.

but does not include that explanation in his report (addressing only a 10 multiple).[329] I have read Mr. Nelson's deposition, and find that his explanations of both the 10 multiple and the 18 multiple are not the sort of objective financial data an economics expert should rely upon.

7.9. Negotiation - PeopleSoft

Mr. Meyer's summary of the negotiation includes new statements, information and conclusions not previously presented so I address them here for the first time along with the already referenced material:

1. Mr. Meyer places himself in the position of Oracle and states that "Oracle would realize…that 'but-for' the license to SAP, it would be able to realize the full value of its investment in PeopleSoft…"[330] What Mr. Meyer does not address is that many of the customers that cancelled support with Oracle did so for reasons unrelated to the Alleged Actions (which I address in detail later in this report). Such customers should be excluded from the damage analysis because they did not terminate Oracle and contract with TomorrowNow or SAP as a result of the Alleged Actions.

   Mr. Meyer assumes SAP would be negotiating a "broad scope" of license.[331] I disagree. The required license is *limited* in terms of scope, nature, time and geography.

   Mr. Meyer equates the License and, therefore, the Value of Use with the full value of certain assets acquired by Oracle in the PeopleSoft acquisition and as such his analysis is inappropriate.

2. Mr. Meyer states that "Oracle's history has indicated [that its investment in PeopleSoft] would include returns beyond the entire acquisition price."[332] He provides no support for this assertion in his narrative. Acquirers may *hope* to make extraordinary gains from a transaction (by generating greater returns than they could have made by investing their money in an alternative transaction) but history shows that many acquisitions fail to provide the excess returns Mr. Meyer identifies.

   Some studies have indicated that "as many as 50%-80% underperform their industry peers or fail to earn their cost of capital."[333] The top three reasons for merger and acquisition failure include "overestimation of synergy or overpaying, the slow pace of post merger integration, and a flawed strategy.[334]

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329 Meyer Report, page 140, paragraph 225.
330 Meyer Report, page 143, paragraph 230.
331 Meyer Report, page 144, paragraph 232, bullet point 1.
332 Meyer Report, page 143, paragraph 230.
333 McKinsey & Company (1990); Mangenheim and Mueller (1988); Franks, Harris, and Titman (1991); Agrawal, Jaffe, and Mandelker (1992); Sirower (1997); Gregory (1997); Loughran and Vijh (1997); Rau and Vermaelen (1998); Agrawal and Jaffe (1990); Black, Carnes, and Jandik (2000); Deogun and Lipin (2000); and Sanford Bernstein & Company (2000). DePamphilis, Donald M. *Mergers, Acquisitions, and other Restructuring Activities*. San Diego, CA: Academic Press, 2003.
334 DePamphilis, Donald M. *Mergers, Acquisitions, and other Restructuring Activities*. San Diego, CA: Academic Press, 2003.

Mr. Meyer's unsupported assertion that Oracle's returns would include returns beyond the transaction price is speculative. Furthermore, as I stated earlier in this report, the license at issue in the Negotiation is significantly more limited than all of the rights Oracle acquired in the PeopleSoft transaction, which included all the other assets Oracle received in the transaction as well as the Subject IP.

3. Mr. Meyer states "Licensing SAP will severely impact the transition of the PeopleSoft customers to Oracle."[335] While Mr. Meyer does not explain why he believes this statement to be true or relevant it is certainly speculative. The License is only to cover the portion of Defendants' actual use of the Subject IP and, therefore, does not include "rights to" or "transfers of" customers from Oracle to Defendants. Any customers they would gain after the Negotiation and as a result of the License would have to be won from Oracle by sales and marketing efforts not as a result of the License. The evidence (which I describe later) shows that few, if any, customers switched from Oracle to SAP for reasons related to the Alleged Actions.

4. Mr. Meyer states, "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."[336] If more confirmation were needed that the premise upon which Mr. Meyer's reasonable royalty analysis is flawed, he provides it succinctly with this statement. The value of a customer derived by pro rating the PeopleSoft deal price over the customer base overstates the value of a customer because it embodies a pro rata share of *all of the acquired assets* not just the actual use of the Subject IP which is what is at issue in this matter. The absurdity of Mr. Meyer's approach is demonstrated by a simple example: if an acquisition were priced at $100 and included cash, accounts receivable, customer lists, deferred tax assets, pre-paid expenses, fixed assets and other assets valued at $99, and intellectual property valued at $1, and only one customer, using Mr. Meyer's customer valuation metrics would show that the one customer would be worth 100% of the value or $100 in spite of the fact that total assets excluding intellectual property are individually valued at 99% of the transaction price.

Mr. Meyer also includes a second summary in his report beginning in paragraph 232. In the second summary, he addresses the various factors "Oracle would consider" in the Negotiation. Mr. Meyer includes new ideas in his summary and others that ignore the Court's Order.

Mr. Meyer states[337] that the Negotiation "would be conducted by a willing licensor (Oracle) and a willing licensee (SAP) acting in a rational manner in or around January, 2005." Although he never defines what he means by "rational," the natural definition is that a rational actor weighs all the evidence and determines a course of action based on what they believe will maximize their utility.[338] Utility might include wealth, health, happiness, and other items, so utility is an all encompassing concept that refers to the total net benefits involved in a decision. In lay terms, the maximum utility is achieved when there is the greatest output for the least input. I am going to adopt this definition of rational for the purposes of my analysis of the reasonable royalty.

335 Meyer Report, page 143, paragraph 230.
336 Meyer Report, page 143, paragraph 230.
337 Meyer Report, page 143, footnote 490.
338 Utility is defined as "A measure of pleasure or satisfaction." Landsburg, Steven E. *Price Theory and Applications*. 4th ed. Cincinnati, OH: South-Western College Publishing, 1999, page 83.

In bullet point number 2 of paragraph 232, Mr. Meyer again ignores the Court's Order by introducing lost cross-sell and lost up-sell revenues into the discussion, and in bullet point number 3, lost future license revenues.

Bullet point number 4 references the $11.1 billion Oracle paid to acquire PeopleSoft. Although Mr. Meyer makes this statement in bullet point number 4 without appearing to use it in any way, it is consistent with his previous discussions regarding customer valuation metrics related to a pro rata share of the PeopleSoft transaction price. It is interesting to note that S&P applied only $2.1 billion of the $11.1 billion transaction price to support agreements and customer relationships.

In bullet point 5, Mr. Meyer references Oracle's on-going spending for "further research and development for its PeopleSoft and J.D.Edwards products since the acquisition." Again, Mr. Meyer fails to state the entirety of the issues related to on-going product R&D. First, Oracle stated that it could not quantify the R&D incurred on the PeopleSoft and J.D.Edwards products because that was not how their R&D staff tracked their time.[339] It is interesting that Mr. Meyer is now able to do so. Second, Oracle would have to spend money on R&D because it would be fixing bugs in the software it acquired and writing enhancements to the products (it is not clear whether the $1 billion[340] includes Fusion related R&D). Third, in order to cover the pro rata share of R&D costs per customer, all Oracle would need to be 'whole' would be a revenue stream in an amount sufficient to replace the lost *profit* stream associated with any customers lost as a result of the Alleged Actions.[341] Mr. Meyer's failure to consider or even mention any of these factors is inappropriate.

In paragraph 233, Mr. Meyer gives his views on SAP's negotiating posture in the Negotiation. In this paragraph he sets out all the benefits he claims SAP would receive with a license while citing none of the difficulties it might encounter in support of Oracle's customers. For example:

1. In bullet point 1, he states that the license would allow SAP to "drive the conversion of Oracle's applications customers to SAP's platform." It is inappropriate for Mr. Meyer to reference SAP applications licenses here because the License is to provide support services only, which is all TomorrowNow did with the Subject IP.[342]

   Mr. Meyer appears to be claiming that once an Oracle customer is being supported by TomorrowNow it will result in a convoyed sale of one or more licenses by SAP. The evidence in this case shows that the provision of support does not drive customers in any particular direction in regard to future license sales. If that were the case then far more of the TomorrowNow customers would have migrated their applications to SAP and more

339 Safra Catz deposition dated March 27, 2009, pages 89, 189 and 193. Ivgen Guner deposition dated September 4, 2008, page 83. Corey West deposition dated April 9, 2009, pages 33 and 78. Charles A. Rozwat deposition dated October 12, 2009, pages 77, 88 and 201.

340 Meyer Report, page 144, paragraph 232, bullet point 5.

341 The lost profit stream would equal lost revenue less saved support costs, less saved other costs, adjusted for normal attrition. Lost license fees have been precluded from this case as a result of the Court's Order.

342 I address SAP's potential benefits elsewhere in this report.

of the Safe Passage customers would have availed themselves of the TomorrowNow support.

Furthermore, it is unlikely a customer for TomorrowNow support would abandon its Oracle applications and migrate to SAP, incurring millions of dollars of license fees, training and disruption costs (as previously described) without other compelling reasons for doing so. My observation on this score is borne out by the reality that there were a total of 358 TomorrowNow customers, and of those only 86 bought products or services from SAP while they were on TomorrowNow support and almost all of those did so for reasons unrelated to the Alleged Actions as I describe later in this report.

2. In bullet point 2, Mr. Meyer points out that SAP acquired various entities for substantial sums. He fails to mention that the transactions involved numerous assets in addition to customers.

3. Some TomorrowNow customers retained their Oracle support contract while supported by TomorrowNow which is evidence that price alone was not the driving factor behind a customer's switch to TomorrowNow support.

4. In bullet point 4, Mr. Meyer states, "TomorrowNow's entire business model relied upon its access and use [sic] of Oracle's PeopleSoft/JDE copyrighted materials in suit." Although Mr. Meyer is not qualified to address the technical aspects of this case, he makes this unsupported statement without attribution. However, the facts show that TomorrowNow's business model did not change appreciably after the SAP acquisition and that it had customers before the acquisition.

5. The other bullet points reiterate numerous points made elsewhere.

7.10. Reconciliation and Conclusion

In paragraph 241, Mr. Meyer concludes without any numerical reconciliation of the "pressures" on the royalty rate he wrote about in his report.

Mr. Meyer begins his synthesis[343] of the various aspects of the two sides' negotiating posture. He does this based on a series of "Schedules" that he claims demonstrate what the financial implications would be for each of the parties as follows:

1. Oracle would consider "…support losses between $2 billion and $3.8 billion"

2. SAP "…would consider scenarios reflecting financial and economic benefits of between $881 million and $2.7 billion"

Additionally, he claims the following:

1. The value of the "…support revenue stream and customer relationships of $2.1 billion would be heavily considered"

[343] Meyer Report, pages 146-147, paragraph 234.

2. The parties "…would contemplate doubling the $2.1 billion value of support agreements and customer relationships to $4.2 billion to reflect the goodwill premium paid overall by Oracle to acquire PeopleSoft."

3. "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.[344]

4. Oracle executives stated that Oracle would expect a significant license fee and "indicated the impact of the licensing would be greater than $3 billion on Oracle."[345]

5. Applying the 30% share of customers lost to SAP to the value of the acquired PeopleSoft "…total support contracts, customer relationships and goodwill of $8.85 billion…" would "…result in $2.67 billion of potential loss."[346]

6. "SAP would be willing to pay a $2 billion license fee…" and could afford to do so because it had liquid assets of $4.4 billion.[347]

In his final "Opinion" Mr. Meyer states, "Based on my analysis of the fifteen *Georgia-Pacific* factors and relevant economic, financial and valuation issues and considerations, in January 2005, it is my opinion that the parties would have agreed to a license fee of no less than $2 billion" [emphasis in original].

Because the hypothetical negotiation is required to be reasonable for *both* parties,[348] if it results in a royalty that is unfair or unreasonable for either party, it must be rejected. In my opinion, Mr. Meyer's royalty conclusion is so unreasonable for SAP that it should be rejected because:

1. Mr. Meyer only mentions a fully paid, perpetual, worldwide license. However, the nature of the license he describes is one that is essentially exclusive to a group of customers because it implicitly assumes the customers Defendants acquired allegedly inappropriately, plus thousands of customers they never had, would become their exclusive domain. Accordingly, the license Mr. Meyer postulates effectively transfers an exclusive right to the claimed customers from Oracle to Defendants. I do not agree that such a license is appropriate. The only appropriate license (i.e., the License) would be non-exclusive because Oracle would be competing for the same customers at the same time using the Subject IP. Although Mr. Meyer refers to various license terms in his report, his approach as applied in the schedules is most nearly equated to a pro-rata share of the total PeopleSoft acquisition price.

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

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344 Meyer Report, page 148, paragraph 236.
345 Meyer Report, page 148, paragraph 237.
346 Meyer Report, page 148, paragraph 237.
347 Meyer Report, page 149, paragraph 239.
348 Factor 15 of the Georgia-Pacific factors goes so far as to state that the infringer should be allowed to make a reasonable profit after paying the reasonable royalty. Georgia-Pacific Corporation – United States Plywood Corporation, Civ. A.No. 99-195 (U.S. Dist. Court 1970).

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

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

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

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

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

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

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

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

Whatever Mr. Meyer's rationale might be, it is certain that a $2 billion license would not be rational on any level for SAP. Rather, with such uncertainty about possible future sales and such large sums of money at stake, the only license fee that would make any rational sense to Oracle and SAP would be a percentage of the actual revenues or profits generated from the customers that would not otherwise have chosen TomorrowNow or SAP.

7.11. Negotiation Summary - Siebel

Earlier in his report (paragraph 230), Mr. Meyer states, "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." Although he does not repeat that statement in the Siebel section of his report, he nevertheless applies the same logic by basing the reasonable royalty on a pro rata share of the price Oracle paid to acquire Siebel. As I stated previously, Mr. Meyer's Value of Use analysis is flawed, and he provides the evidence of his flawed approach with the statement quoted above. Mr. Meyer's approach overstates the value of a customer because it assigns a pro rata share of all of the acquired assets to each acquired customer.

In paragraph 342, Bullet Point number 3, Mr. Meyer again ignores the Court's Order by introducing lost cross-sell and lost up-sell revenues into the discussion.

Bullet point number 4 references the prior existing license relationship that would have existed at the time of the Siebel license (because Oracle and SAP would already be more than 18 months into the PeopleSoft license period and both would know that SAP's business strategy for TomorrowNow was a failure). Not only were customers not terminating their license agreements with Oracle in the numbers SAP had hoped (and Mr. Meyer used to project the PeopleSoft license fee), but SAP would also know that TomorrowNow was a failure as a marketing device for its applications. That fact was supported in an email from Chris Hummel to Holger Mueller dated September 14, 2006, right around the time of the hypothetical Siebel negotiation:

> I think we need to put this in perspective…very few customers have chosen to go to TomorrowNow (TN) and, in fact, we are already seeing customers like Manitowac start to come back. The danger here is more marketing than support revenue.
>
> If we present a strong case for why customers should continue to choose Oracle software and to upgrade to newer versions, TN is irrelevant.[353]

Given the realities of the first 18 months of the PeopleSoft portion of the strategy, it would have been irrational for SAP to have been interested in any negotiation with Oracle to acquire rights to support Siebel customers.

353 Oracle email from Chris Hummel to Holger Mueller, et al. September 14, 2006. Re: Re: Recap of Buzz Mtg re: SAP Passage II Campaign; ORCL00311546-549, at -547.

Bullet Point number 5 includes Mr. Meyer's attempt[354] to again bring in revenues for Oracle's "lost future license revenue" from "…customers that would switch from Siebel applications to SAP applications," which is a precluded claim.

In bullet point 7, Mr. Meyer references Oracle's on-going spending for "further research and development for its Siebel products since the acquisition." Again, Mr. Meyer fails to state the entirety of the issues related to on-going product R&D. Oracle stated that it could not quantify the R&D incurred and it would have to spend money on R&D because it would be fixing bugs in the software it acquired anyway (it is not clear whether the $250 million Mr. Meyer references includes R&D on Fusion). And, as previously stated, all Oracle would need to be 'whole' would be revenue to replace the lost profit stream associated with any customer revenues lost as a result of the Alleged Actions.[355] Accordingly, the statement that SAP avoids these costs is meaningless in the context of the Value of Use.

In paragraph 343, Mr. Meyer gives his views on SAP's negotiating posture in the Negotiation. In this paragraph he lists the benefits he claims SAP would receive with a license while citing none of the difficulties it might encounter in support of Oracle's customers. For example:

In bullet point 1, he states that the license would allow SAP to "drive the conversion of Oracle's Siebel applications customers to SAP's platform." Mr. Meyer ignores the fact that the License is to provide support services because that is all TomorrowNow did with the Subject IP; there is no evidence that I have seen that SAP used the Subject IP in its operations and my causation analysis shows that SAP made few, if any, license sales as a result of the Alleged Actions.

Mr. Meyer appears to be claiming that once an Oracle customer is being supported by TomorrowNow it will result in a convoyed sale of one or more licenses by SAP. However, evidence in this case does not support such a conclusion. As previously stated, the evidence in this case shows that provision of support does not drive customers in any particular direction in regard to future license sales. If that were the case then far more of the TomorrowNow customers would have migrated their applications to SAP and more of the Safe Passage customers would have availed themselves of the TomorrowNow support.

In bullet point 2, Mr. Meyer makes the point that SAP would suffer technical difficulties in supporting Siebel customers because of the lack of available source code but fails to mention how that would affect his conclusion. Mr. Meyer does not state how Siebel's different approach to the provision of support affected his conclusion.

In bullet point 4, Mr. Meyer states that SAP would know it needed access to Oracle's copyrighted materials in order to support the Siebel customers but fails to mention how the grant of access or the lack of such access would affect his conclusion.

In bullet points 5 and 8, Mr. Meyer makes statements related to SAP's desire to "avoid delay" and SAP's need for "speed" of entering the market for Siebel support services. However,

354 In contravention of the Court's Order.
355 The lost profit stream would equal lost revenue less saved support costs, less saved other costs, adjusted for attrition.

because a license would be granted instantly in the Negotiation, SAP's desire for speed would not affect the reasonable royalty and associated royalty rate.

In paragraph 344, Mr. Meyer references Oracle's "potential losses of up to $231.9 million" and SAP's potential benefits of "…between $97 million and $247 million. All of Mr. Meyer's loss and benefit figures are based on scenarios that are an inappropriate base upon which to compute a reasonable royalty for the actual use.

Mr. Meyer states that Oracle would have considered the "…financial metrics (multipliers) developed by TomorrowNow and SAP"[356] he had previously mentioned. However, in the Negotiation, Oracle would not have any knowledge of any metrics TomorrowNow or SAP developed. Therefore, the metrics if they meant anything at all are irrelevant to the Negotiation (although, if it were behaving rationally Oracle would consider its own metrics).

In paragraph 345, Mr. Meyer again addresses the acquisition price Oracle paid for Siebel. He refers to the possibility of the parties in the Negotiation "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." His inclusion of a factor to reflect an allocation of the goodwill paid to acquire Siebel is inappropriate as I explained earlier.

Mr. Meyer's paragraph 346 states his opinion that Oracle would expect a license fee from SAP for the copyrights in suit. While it is unclear exactly what Mr. Meyer means by this sentence, I am going to assume he means that the fee would be a lump sum paid in advance. For all the reasons I stated earlier in this report, I disagree with Mr. Meyer on this point. No rational business person would enter into such an agreement and neither would the parties to the Negotiation.

In paragraph 347, Mr. Meyer states that the amount Oracle paid to acquire Siebel was $1.5 million per Siebel customer, and alluding to but not actually stating that the amount is one of the bases for his reasonable royalty. Footnote 647 expands the commentary by stating that the acquisition price "…has a nature and basis relevant to an established license fee under *Georgia-Pacific* factor 1…" [emphasis in original].

Finally, in paragraph 348, Mr. Meyer states his conclusion that "SAP would be willing to pay a $100 million license fee to compete head to head with Oracle for the acquired Siebel support customers…" He goes on to provide a short list of reasons the Siebel license fee would be comparatively "much lower" than the similar PeopleSoft license fee he asserted. He then opines (paragraph 350) that the hypothetical license fee would be "no less than $100 million."

I state below the major reasons why the royalty Mr. Meyer asserts is unreasonable, but other sections of this report provide more detail of these items:

[356] Meyer Report, page 214, paragraph 344.

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

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

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

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

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

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

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

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

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

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

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

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

8.9.1. Tax and Regulatory Updates and Bug Fixes and Patches

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

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

601 Complaint, page 55.

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

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

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

Katherine Walker Williams also testified that:

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

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

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

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

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

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

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

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

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

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

8.9.2. Alternatives to Copies of Customer Environments

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

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

8.9.3. Alternatives to Cross-Use of Customer Environments

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

8.9.4. Alternatives to Using Downloaded Material for Multiple Customers

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

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

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

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

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

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

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

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

8.9.5. Alternatives to TomorrowNow

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

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

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

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

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

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616 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2009, page 12.
617 "TomorrowNow Operations Wind Down: Final Report" TN-OR03523871-924, at -903.
618 "3rd party risk analysis, 1/25/08 [REDACTED];" ORCL00079745.

REDACTED - NOT RELEVANT TO MOTION

8.9.8.17 Other

In addition to engaging an active third-party support vendor to support a customer's software, there are other alternatives. To list them all would be prohibitively time-consuming and unnecessary. However, an example will suffice:

A customer that, for whatever reason (financial distress, downsized operations, parent mandate) wanted to reduce its total IT department spend, could do so by outsourcing certain activities or reducing the complexity and capability of their software (while still retaining needed operational capacity). For example, one method of reducing costs might include buying an off-the-shelf accounting system or inventory control package. While less than ideal from the point-of-view of integration, use of such reduced functionality packages may allow a company to significantly reduce its overall IT spending and, in extremis, the customer may have no choice but to do so.

8.9.8.18 Summary of Available Alternatives

As described in detail above, numerous alternatives to Oracle support exist now and existed at the time of the Negotiation in January 2005. For example, LegacyMode, CedarCrestone, and Citagus for PeopleSoft products; and Versytec, Conexus Partners, and Klee Associates for J.D.Edwards products, plus a large group of consultants, systems integrators and outsourcing firms were available to customers at that time.

Appendices F-1 and F-2 summarize the available alternative support vendors over time for PeopleSoft and J.D.Edwards software products. These appendices represent a conservative summary of the available support vendors because they exclude vendors of outsourced business operations, support vendors based outside the U.S. and "On-Demand" or SaaS products that

[858] "Third-Party Risk Analysis 05-10-06;" ORCL00032753. See also, "Third-Party Risk Analysis 2008 1-25-08;" ORCL00079745.

[859] "Third-Party Risk Analysis 2008 1-25-08;" ORCL00079745.

[860] SalesForce.com is a web-based CRM solution for sales and marketing streamlines customer relationship management. See Salesforce.com. "CRM." March 14, 2010. <http://www.salesforce.com/>. See also, "Third-Party Risk Analysis 05-10-06;" ORCL00032753 and "Third-Party Risk Analysis 2008, 1-25-08;" ORCL00079745.

compete to fully replace Oracle ERP licenses and support. Appendix F-3 summarizes the range of cost savings advertised by third party support vendors.

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8.15.6. TomorrowNow Royalty

An alternative way to look at the pricing issue is to assume that TomorrowNow could not have stayed in business with a price lower than its 50% pricing policy, while the upper boundary of the TomorrowNow market price would be at most a 50% mark-up on the old TomorrowNow price policy. Based on my entire report and analysis therefore, I assume a Reasonable Royalty equal to 50% of TomorrowNow's gross revenues.

The 50% royalty rate on TomorrowNow's revenues would have been fair to Oracle. One Oracle executive referred to the companies that terminate Oracle support as "unprofitable laggards."[988] Similarly, an Oracle sales representative[989] "advised Laura [Sweetman of TomorrowNow] that Oracle execs aren't too terribly threatened by us re: JDE, because they feel our clients are those that they would have lost anyway."[990] While the 50% royalty rate would be fair to Oracle, I recognize that Oracle will claim they would never have settled for such a rate. That is a common plaintiff complaint and is not determinative of whether a license fee is appropriate in the circumstances.

I calculated 50% of TomorrowNow's revenues[991] to be approximately $32 million as shown in Appendix G-1.

If SAP had been forced to accept a 50% price increase on TomorrowNow service such that prices were set at a rate approximately equal to 75% of the Oracle support rate,[992] there is a slim

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988 Oracle email from Juan Jones to Chris Madsen and Rick Cummins. August 29, 2006. Re: Fw: FW: Home Depot Executive Summary; ORCL00173509-511, at -509.

989 Likely Kort Crosby, an Oracle sales representative. "Organization Chart, Oracle Aria People Search;" ORCL0034208.

990 TomorrowNow email from Mandy Wheeler to Andrew Nelson, et al. June 23, 2005. Re: Quest Software Migration Evaluation: Management Call – Wednesday, June 22; TN-OR01133541, at -541.

991 As discussed later in my report.

992 This assumption is a continuation of the fiction that TomorrowNow priced its service at 50% of the Oracle rate. Such an assumption is not exactly correct but is close enough for the purpose of the Negotiation.

chance TomorrowNow could have stayed in business through October 2008, before SAP took action to shut down its operations.

8.15.7. SAP "Royalty"

Given the background of the financial condition of TomorrowNow and the introduction of SAP as its new owner, the parties in the Negotiation would have faced a difficult time agreeing on any royalty that made sense from their points of view. Oracle would not want to grant a license except at a high price to SAP and SAP would not want to overpay for a license. Even though it would have been unlikely that the parties would have agreed to a license in the real world, particularly a paid-up license, I understand that the Court has indicated that a forced agreement should be assumed if it can be done without undue speculation. In my opinion, it is impossible to create a scenario in which the parties at the Negotiation would have reached an agreement for the License. It requires an act of pure speculation to assume they could have done so based on the testimony and other evidence in this case. Furthermore, even if the parties had been willing to discuss a license for TomorrowNow's use of the Subject IP, it is inconceivable they would have agreed on a rate. As Mr. Ellison stated, SAP would (or should) have been willing to pay a billion dollars for a license which would have made no rational business sense to a prudent licensee like SAP. Therefore, it is only by undue speculation that a Reasonable Royalty can be formulated and even then the fiction of the royalty rate stretches the imagination to breaking point.

In the real world the parties would never have agreed on a license. However, if the parties are forced to come to an agreement, the result of their deliberations would be as follows:

Once TomorrowNow had paid a license fee to Oracle of 50% of its revenues, it would be inappropriate for SAP to pay any royalty on application software sales because it (i.e., SAP) would assume it would have made no *additional* application license sales as a result of the License. The rationale for this argument is simple. Any customer terminating its license agreements with Oracle and migrating its ERP systems to SAP would have made that choice only after a thorough evaluation process showing that SAP was the preferred ERP vendor.[993] Therefore, the customer would only have migrated its ERP systems to SAP because of what SAP offered, not as a result of TomorrowNow's involvement.

I considered the analytical approach to computing the Reasonable Royalty. The analytical approach was referenced in the *TWM Mfg. Co., Inc. v. Dura* case,[994] affirmed on appeal.

The approach sets the reasonable royalty at a rate that disgorges the *excess* profits made by an infringer. For example, if the normal margin for the infringer is 10% and use of the intellectual property allows the margin to increase to 40%, then the royalty rate is set at 30% (i.e., 40% - 10% 30%).

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993 An ERP system migration is an expensive, disruptive and time consuming task. Accordingly, based on the evidence I have seen in this case, since confirmed by Mr. Sommer, the decision to change ERP systems is only made after thorough analysis and comparative assessments of competing systems.

994 *TWM Manufacturing Co., Inc. v. Dura Corp. and Kidde, Inc.* 789 F.2d 895; United States Court of Appeals, Federal Circuit. April 25, 1986.

The approach in this case yields a royalty of zero because SAP made no *additional* margin on any sales made as a result of the Alleged Actions. Therefore, the royalty rate would be zero using the analytical approach.

The Reasonable Royalty for SAP would be half of the profits on any sales it made that it would not have made absent the Alleged Actions.

The parties would have agreed that SAP would pay a royalty of 50% of the profits that it would have earned on sales to the three customers that it would not have otherwise made.[995] 50% of total profits after interest of $4,344,212[996] equals $2,172,106.

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995 Appendix N-1.
996 Per Appendix N-1, SAP made profits of $3,862,031. Adding interest through the estimated trial end date of December 10, 2010 equals $4,344,212.
997 Shelley Nelson deposition dated September 3, 2009, pages 627-628.
998 Hasso Plattner deposition dated June 2, 2009, page 49.
999 Meyer Report, Section VII, pages 150-173.

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16. Conclusion

16.1. Lost Profits

Because the majority of TomorrowNow customers left Oracle due to factors unrelated to the Alleged Actions, the only accurate way to calculate damages in this matter is one customer at a time.

I calculated Plaintiffs' Lost Profits damages for customers that were not excluded after applying a set of Exclusion Criteria to the facts discovered in my analysis. Based on my analysis, Lost Profits damages are $31,049,393. I reported Lost Profits for each Oracle entity, although I understand that the Court may later decide that certain entities are not eligible to receive damages in this matter.

Plaintiffs suffered no Lost Profits damages for customers who cancelled Oracle support due to factors unrelated to the Alleged Actions.

16.2. Disgorgement

I calculated disgorgement of TomorrowNow profits in the amount of $1,054,474 for TomorrowNow customers that were not included in the Lost Profits calculation.

I calculated disgorgement of SAP profits in the amount of $4,344,212 for the three customers that were not excluded after applying a set of Exclusion Criteria to the facts discovered in my analysis.

[1268] *Georgia-Pacific Corp. v. United States Plywood Corp.*, 314 F.Supp 1116, 166 USPQ (BNA) 235 (S.D.N.Y. 1970)

Damages Summary[1269]	
Disgorgement – SAP[1270]	$4,344,212
Disgorgement – TomorrowNow [1271]	$1,054,474
Oracle Lost Profits	
OUSA	$10,162,957
OEMEA	
PeopleSoft	$241,616
J.D.Edwards EnterpriseOne	$476,574
J.D.Edwards World	$159,632
Siebel	$787,569
OIC	$17,312,276
OTC	$1,660,199
ORC	$248,569
Total	**$36,448,078**

Lost Profits and Disgorgement damages are additive. Therefore, total damages if Defendants are found liable for all of Oracle's claims are $36,448,078.

Stephen K. Clarke

May 7th, 2010

Date

1269 I did not calculate damages for the No Accused Conduct customers in any of my damages analyses. Earlier in my report, I calculated a reasonable royalty in response to Mr. Meyer's presentation. I do not consider reasonable royalty to be an appropriate measure of damages in this matter.

1270 Appendix N-1.

1271 Appendix Q-1.