

# **EXHIBIT B**

ORACLE USA, INC., ET AL

V.

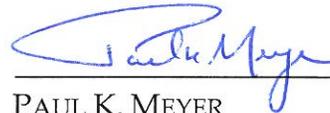
SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.

FEBRUARY 23, 2010



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PAUL K. MEYER

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### 3. Cost Approach

142. 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. The underlying assumption is that the cost to buy or develop alternative intellectual property is commensurate with

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the economic benefit, or value, of the intellectual property. In this circumstance, I have considered the acquisition cost to Oracle of purchasing the subject intellectual property as well as the investment in research and development by Oracle in the copyrighted materials in suit since the acquisition. I have also considered the amounts PeopleSoft and J.D. Edwards spent on research and development of their intellectual property (which Oracle subsequently acquired), and the estimates of Oracle's expert, Paul Pinto, on the costs SAP would have incurred had it independently developed certain of the copyrighted materials in suit.

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150. I understand that Oracle's expert Paul Pinto was retained to estimate the costs that Defendants would have had to incur to independently develop the Oracle copyrighted materials in suit that Defendants allegedly illegally accessed, copied and misused. I understand that 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.<sup>348</sup>

151. Additionally, I understand that Mr. Pinto has concluded that, if it were possible to be completed in two years, it would take Defendants 2,374 appropriately-trained personnel to complete the development of the 7 PeopleSoft/J.D. Edwards software applications he analyzed.<sup>349</sup> As explained in section IV.B.2 of this Report, the timing of SAP's offering of TomorrowNow support services was critical to its overall strategy to disrupt Oracle's business and convert Oracle's PeopleSoft, J.D. Edwards and Siebel customer base over

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<sup>348</sup> Discussion with Paul Pinto (Sylvan VI, Inc.); November 16, 2009 Expert Report of Paul Pinto, pg. 43 (\$320 million for JDE Enterprise One + \$707 million for PeopleSoft + \$248 million for JDE World = \$1.275 billion. \$221 million + \$543 million + 172 million = \$936 million. \$749 million + \$1,573 million + 581 million = \$2.903 billion).

<sup>349</sup> Discussion with Paul Pinto (Sylvan VI, Inc.); November 16, 2009 Expert Report of Paul Pinto, pgs. 42 and 44. 67,863 total person months effort, less 10,890 Siebel person months, divided by 24 months = 2,373.9. According to Mr. Pinto, "A development effort of this scope and complexity would be an extremely large project, very aggressive, and of high-risk to be pursued within this timeframe." [November 16, 2009 Expert Report of Paul Pinto, pg. 7].

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

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183. Although as explained above, a customer may hire a third party servicer as its own agent to step into its shoes under its agreements and provide consulting or support services in accordance with the customer's license,<sup>395</sup> if the provider wants to provide support for a customer who no longer has access rights to Oracle's updated support services and materials at a level "comparable" or "superior" to support provided by Oracle it would require the third party support provider to either have a license to Oracle's intellectual property or invest a significant amount of money to legally recreate it in a clean room environment.<sup>396</sup> While third party support competitors can offer some support services to PeopleSoft and J.D. Edwards customers without

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<sup>396</sup> Oracle USA, Inc. et al v. SAP AG et al, Fourth Amended Complaint in Case No. 07-CV-01658 dated August 18, 2009, pg. 17; Discussions with Kevin Mandia and Paul Pinto. According to Mr. Pinto, it would cost approximately \$1.275 billion, with a range of \$936 million to \$2.903 billion, for SAP to develop the PeopleSoft and JDE software applications that he analyzed [November 16, 2009 Expert Report of Paul Pinto, pg. 43].

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

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

<sup>407</sup> Discussion with Paul Pinto (Sylvan VI, Inc.); November 16, 2009 Expert Report of Paul Pinto, pg. 6.

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

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204. As discussed in section IV.B.2 of this Report, the timing and speed with which SAP could announce its TomorrowNow support offering was critical to SAP's competitive strategy against Oracle. I understand Oracle expert, Paul Pinto, has determined that without access to Oracle's software and support materials enabled by the copyright infringement, if it were possible to be completed in a 2 year period, it would have taken SAP 2,374 well-trained personnel to independently develop the PeopleSoft/J.D. Edwards copyrighted materials in suit.<sup>433</sup> Obtaining a license to Oracle's copyrighted materials would enable SAP to make a timely and strategic entry into this important market.

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<sup>433</sup> Discussion with Paul Pinto; November 16, 2009 Expert Report of Paul Pinto, pg. 42 and 44. 67,863 total person months effort, less 10,890 Siebel person months, divided by 24 months = 2,373.9.

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

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

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

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

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288. Oracle's expert, Paul Pinto, estimated the costs that Defendants would have incurred to independently develop certain of the Siebel copyrighted materials in suit. I understand that one of Mr. Pinto's conclusions addresses avoided development costs of \$198 million to \$573 million. I understand that if completed in a 1 to 2 year period, this effort would take approximately 450 to 900 well trained resources.<sup>586</sup>

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<sup>586</sup> 2.17 years \* \$104 million = \$225.7 million. November 16, 2009 Expert Report of Paul C. Pinto, pgs. 42-43. 10,890 person months ÷ 24 = 454 people; 10,890 person months ÷ 12 = 908.

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449. In addition, I understand that Mr. Pinto has concluded that it would take Defendants 2,828 well-trained resources to complete development of the 8 PeopleSoft, J.D. Edwards and Siebel applications that he analyzed within a 2 year period.<sup>836</sup> As explained in Section IV.B.2 above, the timing of SAP's offering of TomorrowNow support services was critical to its overall strategy to disrupt Oracle's business and convert Oracle's PeopleSoft, J.D. Edwards and Siebel customer base over to SAP (i.e., it was critical for SAP to announce its offering of support on Oracle products immediately following Oracle's acquisitions of PeopleSoft and Siebel). If faced with a 2 year development timeframe, SAP may have determined that offering support services to Oracle products as an integral part of its Safe Passage program was not an attractive business decision, in which case Oracle's PeopleSoft, J.D. Edwards and Siebel customer base would not have been at such risk of leaving Oracle to go to TomorrowNow and SAP. I have referenced Mr. Pinto's results related to avoided development costs in Sections VI.A.3 and VIII.B.3 of this report.

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<sup>836</sup> Discussion with Paul Pinto (Sylvan VI, Inc.); November 16, 2009 Expert Report of Paul Pinto, pgs. 2, 6-7 and 44. According to Mr. Pinto, "A development effort of this scope and complexity would be an extremely large project, very aggressive, and of high-risk to be pursued within this timeframe." [November 16, 2009 Expert Report of Paul Pinto, pg. 7].