BINGHAM McCUTCHEN LLP
DONN P. PICKETT (SBN 72257)
GEOFFREY M. HOWARD (SBN 157468)
HOLLY A. HOUSE (SBN 136045)
ZACHARY J. ALINDER (SBN 209009)
BREE HANN (SBN 215695)
Three Embarcadero Center
San Francisco, CA 94111-4067
Telephone: (415) 393-2000
Facsimile: (415) 393-2286
donn.pickett@bingham.com
geoff.howard@bingham.com
holly.house@bingham.com
zachary.alinder@bingham.com
bree.hann@bingham.com

BOIES, SCHILLER & FLEXNER LLP
DAVID BOIES (Admitted *Pro Hac Vice*)
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
dboies@bsfllp.com
STEVEN C. HOLTZMAN (SBN 144177)
1999 Harrison St., Suite 900
Oakland, CA 94612
Telephone: (510) 874-1000
sholtzman@bsfllp.com

DORIAN DALEY (SBN 129049)
JENNIFER GLOSS (SBN 154227)
500 Oracle Parkway, M/S 5op7
Redwood City, CA 94070
Telephone: 650.506.4846
Facsimile: 650.506.7114
dorian.daley@oracle.com
jennifer.gloss@oracle.com

Attorneys for Plaintiffs
Oracle USA, Inc., *et al.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE USA, INC., *et al.*, Plaintiffs, v. SAP AG, *et al.*, Defendants.	Case No. 07-CV-01658 PJH (EDL) **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE EXPERT TESTIMONY OF PAUL K. MEYER** **Date:** September 30, 2010 **Time:** 2:30 p.m. **Place:** Courtroom 3, 3rd Floor **Judge:** Hon. Phyllis J. Hamilton

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

In its motion against Paul Meyer, SAP tries again to prevent Oracle from seeking damages in the form of a fair market value ("FMV") hypothetical license fee. The Court has already held: "Oracle should be permitted to present evidence regarding the fair market value of the copyrights that SAP allegedly infringed, including expert testimony based on established valuation methodology . . . . So long as 'the amount is not based on "undue speculation,"' the jury can consider evidence regarding a hypothetical lost license fee." Dkt. 628 (1/28/2010 MSJ Order) at 5:5-11 (quoting *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004)). Oracle meets that test.

As explained below, Meyer applies four established valuation methodologies to determine the FMV of SAP's infringing use of Oracle's PeopleSoft and Siebel intellectual property ("IP"). Because all are intended to determine what SAP, as a willing buyer, would have paid Oracle, as a willing seller, for access to the copyrighted IP beginning in January 2005 (when SAP acquired SAP TN), Meyer relies on the parties' forecasts, goals and statements at that time. Meyer presents all of his detailed analyses and the extensive facts on which they are based, along with his expert conclusion that the FMV of the infringed IP, other than database, is at least $2.1 billion – a number well within the indicated values suggested by the four methodologies.

SAP concedes the appropriateness of Meyer's methodologies and instead argues that Meyer failed to consider the evidence SAP likes or Meyer gave too much weight to evidence SAP would discount. These complaints "go to the *weight*, not the admissibility" of Meyer's opinions. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230-31 (9th Cir. 1998). SAP can and should advance any criticisms through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 596 (1993). The motion should be denied.

II. MEYER'S PEOPLESOFT AND SIEBEL FMV LICENSE DAMAGES OPINIONS ARE ADMISSIBLE

A. Overview of Meyer And His FMV Damages Analyses

SAP does not attack Meyer's expertise, nor could it. Meyer has over 25 years of relevant experience, and has extensively employed the techniques he uses in this case to estimate reasonable IP values. His expert testimony has been accepted in approximately 70 trials and major arbitrations, including over 30 jury trials. Declaration of Nitin Jindal in Support of Plaintiffs' Opposition to Defendants' Motion to Exclude Testimony of Paul K. Meyer ("Jindal Decl."), Ex. A (Meyer Report) ¶¶ 4, 96; Ex. C (Attachments 1.SU and 2.SU to Meyer Report)

To determine the FMV of SAP's use of Oracle's copyrighted works, Meyer used four established valuation methodologies: the market, income and cost approaches, and a hypothetical negotiation approach applying the factors set forth in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1119-20 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir.), *cert denied*, 404 US 870 (1971).[1] Meyer's analyses yielded a range of indicated values depending on assumptions relevant to each approach. Jindal Decl., Ex. A (Meyer Report) ¶¶ 153 Table 8, 113-127, 289 Table 12, 265-274 (Market Methods), 128-141, 275-281 (Income Methods), 142-152, 282-288 (Cost Methods),[2] 154-241,290-350 (Hypothetical Negotiations).

Meyer concluded that while all were useful, the most relevant was the hypothetical license approach. Jindal Decl., Ex. B (Meyer Depo.) at 65:16-66:5, 152:4-153:19. Based on his analysis, Meyer's opinion is the FMV of SAP's use of Oracle's PeopleSoft, Siebel and Oracle database program copyrights is at least $2.156 billion: $2 billion for the PeopleSoft copyrights, $100 million for the Siebel copyrights and $56 million for the Oracle database program copyrights. Jindal Decl., Ex. A (Meyer Report) Table 1, Ex. B (Meyer Depo.) at 64:13-22.

B. Proper Expert Analysis Yields Multiple Indicators, Which Is Acceptable As A Matter of Practice And As A Matter of Law

Meyer's different methodologies resulted in a range of FMV indicators. This is the norm, as the intellectual property valuation treatise relied on by both damages experts confirms:

> Only rarely are indications of market value for an intangible asset

---

[1] SAP's damages expert "accept[s] that it is appropriate to value intellectual property using the market, income and cost approaches." Jindal Decl., Ex. G (Clarke Report) at 24. *Accord* Gordon V. Smith and Russell L. Parr, *Intellectual Property Valuation, Exploitation, and Infringement Damages* (2005) at 148-55, 155 ("Smith & Parr"), Ex. O to Jindal Decl. ("The cost, market, and income approaches are tools of valuation.").

[2] Meyer's cost method considers SAP's historical research and development ("R&D") costs, Oracle's historical R&D costs, and the costs to independently develop the infringed IP, as measured by Oracle's expert, Paul Pinto. Jindal Decl., Ex. A (Meyer Report) ¶¶ 142-152.

> nearly the same when they are arrived at by application of cost, market and income approaches . . . . Therefore, we are nearly always faced with reconciling indications of market value in order to reach a conclusion, and this is why the results of valuation calculations prior to this effort are called "indications' of value."

Id., Ex. O (Smith & Parr) at 253. In addition to the typical variation among approaches, Meyer's FMV indicators vary because he allows for different scenarios depending on the number of expected customer switches from Oracle to SAP. *See, e.g.*, *id.*, Ex. A (Meyer Report) ¶¶ 122, 130, 133.

Fact-finders are often presented with FMV ranges. *Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th. Cir. 2007) (upholding damages amount picked from six estimates of FMV of infringed materials because award fell "well within the range of the other five estimates"); *Micro Chem., Inc. v. Lextron, Inc.*, 161 F. Supp. 2d 1187, 1195, 1200 (D. Colo. 2001) (both parties presented royalty ranges at trial). As this Court has already found, in "seeking to recover actual damages [Oracle] is not required to establish a precise value for the rights infringed . . . ." Dkt. 628 (1/28/2010 MSJ Order) at 4:19-22. The Ninth Circuit elaborates: "Having taken the copyrighted material, [defendant] is in no better position to haggle over the license fee than an ordinary thief and must accept the jury's valuation unless it exceeds the range of the reasonable market value." *Polar Bear*, 384 F.3d at 709; *see also On Davis v. The Gap, Inc.*, 246 F.3d 152, 164-65 (2d Cir. 2001) (courts should "broadly construe[]" actual damages to "favor victims of infringement").

C. Meyer's Market Approach Opinions Are Admissible

1. *Meyer's Market Approach*. In the market approach, Meyer identified "relevant licensing and sales transactions involving the subject [IP]." Jindal Decl., Ex. A (Meyer Report) ¶ 113. As there were no license transactions relevant to the scope of use at issue, Meyer reviewed sales of the subject or comparable IP (*id.* ¶¶ 114-127, 171-193), and concluded that Oracle's acquisitions of PeopleSoft and Siebel were the best comparables to determine the value of use under the market approach, as both were contemporaneous, in the same software market and involved the copyrighted materials in suit. *Id.* ¶¶ 122 blt. 1, 265-66. Meyer did not rely on the full acquisition prices to determine the FMV of the copyrighted property. Rather, he used only components of the transactions that relate to the use of the copyrights in suit to earn support revenues, and a portion of the premium paid over specifically valued assets, which relates to the ability to earn future revenues by leveraging the existing support relationship with customers (goodwill). *Id.* ¶¶ 119-122, 270-273; Ex. B (Meyer Depo.) at 195:1-20; 196:21-198:14; 206:14-207:15, 210:23-211:13. Standard & Poor's ("S&P"), an independent third-party, contemporaneously valued acquired PeopleSoft maintenance agreements and customer relationships at $2.35 B, and Oracle recorded goodwill of $6.5 B. Therefore the total relevant value was $8.85 B. *Id.*, Ex. A (Meyer Report) ¶¶ 119-122.

Meyer considered the number of customers that would be at issue under a hypothetical license in this case and the related profits and value from support agreements, customer relationships and the premium paid that would have been valued differently if those customers had not been assumed to be retained by Oracle. *Id.* ¶ 122. For the PeopleSoft copyrights in suit, Meyer used the two most conservative of SAP's own contemporaneous analyses of expected new customers (2000 or 3000).[3] *Id.* ¶¶ 117-121, 122. Those SAP projections yielded indications of value using the market approach of $1.78 B and $2.67 B. *Id.* For the Siebel copyrights in suit, SAP's estimates of 200 customers converted, applied to the market approach, yielded indications of value of $170 M and $305 M. *Id.* ¶¶ 274, 289 Table 12.

2. *The Market Approach Is Recognized*. SAP's attack on Meyer's market approach fails for multiple reasons. To begin, the "focus" under *Daubert* is on whether Meyer used a valuation approach that is an established methodology. 509 U.S. at 594-95. The market approach (and the other valuation methodologies Meyer uses) are clearly established and accepted, including by SAP and its own expert. *See* II.A& B above.

3. *Meyer's Reliance On Contemporaneous Sales Of The Subject IP Is Reasonable.* The entirety of SAP's attack on Meyer's market approach is quibbling over his use of evidence –

---

[3] SAP management repeatedly predicted luring away 4000 or more PeopleSoft customers. Jindal Decl., Ex. K (Plfs.' Ex. 455) at SAP-OR00009817 ("Scenario 2: 4000 customers in 2009"), Ex. L (Plfs.' Ex. 2043) at SAP-OR00329587-88 ("I [Shai Agassi] think that [the 4,000 joint SAP PeopleSoft/JDE customers] will make the right choice . . . [and] consolidate to a strategic relationship with SAP across the board."), Ex. M (Plfs.' Ex. 236) at SAP-OR00092050 ("Our goal is to convert the majority of the [10,000] customer base to SAP . . . .").

much of it from SAP – based on a selective reading of his analysis. SAP first falsely asserts that Meyer never looked for comparable licenses. Mo. 3:16-24. In fact, Meyer looked for comparable licenses of the subject IP and concluded none existed "in comparable or instructive situations." Jindal Decl., Ex. A (Meyer Report) ¶¶ 170-193, 304-312. Neither SAP nor its expert suggests any comparable license exists.[4] SAP then mistakenly asserts that Meyer testified that he would not even consider comparable licenses. Mo. 4:21-5:1. In fact, at Meyer's deposition, defense counsel assumed the existence of a non-existent, imaginary license and asked whether that fiction would have been a better comparison than the PeopleSoft transaction; Meyer testified that the pretend license would not "necessarily be anything instructive" given the existence of "a very compelling metric" – Oracle's actual transaction at the same time of the hypothetical negotiation for the exact PeopleSoft subject IP which could be analyzed to determine comparable value. Jindal Decl., Ex. B (Meyer Depo.) at 201:8-203:12. Analysis of a sale of IP is an established methodology to value that IP. *Id.*, Ex. O (Smith & Parr) at 169, 175; *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 606 F. Supp. 2d 571, 585-86 (M.D.N.C. 2009) (rejecting claim that jury improperly calculated royalty damages "by considering the total amount . . . [paid] in exchange for the assignment of the [relevant trade-]mark and associated goodwill" because amount "provided additional evidence regarding the value of the trademark that was appropriated and the potential amount of compensation due to [] infringement . . . .").[5]

---

[4] SAP asserts Meyer failed to consider Plaintiffs' license agreements but does not explain why any are relevant; indeed, SAP's expert concedes they do not provide an established royalty rate. Mo. 4:21-24; Jindal Decl., Ex. G (Clarke Report) at 203-205 (Clarke's royalty not based on existing licenses); Ex. H (Clarke Depo.) at 381:4-11, 436:12-437: 4 (same). That is correct as none of these licenses allows a competitor to use the licensed IP to lure away customers. *Id.*, Ex. A (Meyer Report) ¶ 171-173. Even if Clarke had thought these licenses were comparable, that dispute is not a *Daubert* issue. *See, e.g., Sunstar, Inc. v. Alberto-Culver Co.*, 2004 WL 1899927 (N.D. Ill.) (whether license probative of reasonable royalty is for jury).

[5] SAP cites to *Boeing Co. v. United States*, 86 Fed. Cl. 303 (Fed. Cl. 2009) and *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064, 1078 (N.D. Cal. 2005), implying rejection of aspects of Meyer's damages opinions in those cases is relevant here. Mo. 5:1-7;8:8-13. It is not, including because there are no relevant benchmark licenses Meyer ignores. Oracle has neither the space nor obligation to explain the myriad differences between these cases or to correct SAP's misstatements about them; Meyer can do so and attest to how his opinions were in fact used by these courts if cross-examined at trial. For purposes of this motion, Meyer's analysis here must be evaluated on its own merit.

4. ***Meyer's Per Customer Value Alternative Was An Appropriate Check***. Meyer used the value of SAP's expected new customers as a reasonable secondary check on his market valuation. SAP mischaracterizes this check as Meyer's entire method and wrongly criticizes his calculation. Mo. 3:26-5:21.

As described above, Meyer analyzed Oracle's contemporaneous acquisition of the Subject IP and found indications of values at $1.78 B and $2.67 B. He then conducted a separate analysis – 3000 new customers (SAP's contemporaneous projection) at an average value of $1 M, or $3 B total – as a "reasonableness check" based on SAP's theoretical acquisition of a portion of the PeopleSoft customer base "and the associated support revenue stream." Jindal Decl., Ex. A (Meyer Report) ¶¶ 115, 122 blt. 6; Ex. B (Meyer Depo.) at 363:7-367:10. Meyer made clear in his deposition that the $1 M figure is "not a basis I would use to calculate the [valuation] number. It's more just a check." *Id.* at 363:21-23.

None of SAP's attacks on the secondary reasonableness check rises to the level of a *Daubert* issue. First, SAP notes that an acquisition of a customer base would include fixed assets and other IP, both of which go beyond the subject IP. Mo. 4:7-11. But SAP once again mistakenly presumes that the $1 M per customer metric is the *basis* for Meyer's valuation. It is not. Meyer valued the stream of maintenance revenues that Oracle would lose, not the value of the other assets, in reaching his $2 B valuation. Jindal Decl., Ex. B (Meyer Depo.) at 337:25-328:11. In his separate check, Meyer agreed other assets should not be part of the valuation (consistent with his work) but used the calculation, consistent with Oracle's practice simply "to make certain we're in the proper range of determining value." *Id.* at 365:23-368:19.

Second, SAP contends that Meyer's check does "not value[] a license to use the Subject IP at all, but rather a share of the PeopleSoft customer base," and contrasts acquisition of a customer to a right to compete for one. Mo. 5:13-21. SAP mistakenly equates the acquisition of 3000 customers with the right to compete for 3000 customers. Mo. 5:20. In fact, Meyer's check properly views the acquisition of 3000 customers as equivalent to converting 3000 customers when given the right to compete for all *9920* of them. Jindal Decl., Ex. A (Meyer Report) ¶ 122 blt. 4. SAP itself publicly crowed when it announced its acquisition of SAP TN that none of

Oracle's acquired customers were locked in and that they could switch maintenance providers as well as applications. Then SAP Board Member Shai Agassi stated:

> [I]f you want to look at it from sort of the financials perspective, the rationale is more around the value, if you want, that these customers represent as a potential future set of customers for SAP applications. And it's -- the value was estimated by Oracle, rightfully or wrongly, as $10 billion. What we believe is that this customer base is not necessarily captive by Oracle. I think this customer base has to make a choice right now.

Id., Ex. L (Plfs.' Ex. 2043) at SAP-OR00329578; Ex. B (Meyer Depo.) at 218:25-222:19.[6]

5. *Meyer Properly Relied on SAP's Estimates.* SAP next argues that the number of "expected lost customers" used by Meyer is supported only by statements of "Oracle's senior executives." Mo. 5:23-7:11. Yet SAP later admits Meyer's assumptions of expectations of 3000 converted PeopleSoft customers and 200 converted Siebel customers are based on analyses SAP itself used at the time to justify the acquisition of SAP TN and to launch Safe Passage programs to convert PeopleSoft and Siebel customers. Mo. 12:1-13:1. Meyer's use of SAP's own analyses is both justified and mandated by law. *See* p. 13 & n.14 below.

Though the 3000 and 200 customer estimates came from SAP, not Oracle, Meyer did ask Oracle executives how they would have valued providing their archrival the hypothesized licenses on the relevant negotiation dates, and found that they would "consider the volume of customers they would have expected to lose to SAP as a result of the license" – losses they believed could be as high as 30-50%. Jindal Decl., Ex. A (Meyer Report) ¶ 115; Ex. B (Meyer Depo) at 373:11-378:1. If 30% of the PeopleSoft customers were converted to SAP, Oracle would deem a loss in FMV to be $3.3 B or 30% of the acquisition price.[7] *Id.* Oracle's perspective is reasonable additional support for Meyer's $2 B valuation. *Polar Bear*, 384 F.3d at 709 ("Common sense dictates that an expert may confer with the copyright holder and that the background data may be factored into calculations of actual damages").

---

[6] Moreover, Meyer did consider the difference between an acquisition and a right to compete by using more conservative projections for customers converted and by using a $2 B valuation instead of the $2.67 B indicated. Jindal Decl., Ex. B (Meyer Depo.) at 225:23-229:8. Similarly, the $3 B reasonableness check fully supports the lower $2 B valuation. *Id.* at 366:21-368:19.

[7] If 10% of the Siebel customers were converted to SAP, Oracle would deem the FMV loss to be $600 M (10% of $6.1 B acquisition price). Jindal Decl., Ex. A (Meyer Report) ¶ 267.

6. ***A Factual Dispute On Oracle's View of SAP TN's Impact Is Irrelevant.*** SAP quibbles with what Oracle evidence it claims Meyer should have emphasized and about the SAP evidence he did consider. Mo. 5:22-7:16. Again, the weight given by Meyer to any evidence in dispute does not justify preclusion. *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1208-09 (N.D. Cal. 2009) (PJH) ("to the extent that defendants challenge the accuracy or propriety of [inputs in the expert's model], it is an issue that goes to the weight, rather than the admissibility"). Regardless, SAP's criticisms of Meyer are unfounded.

SAP contends that Oracle really did not view SAP TN as a significant threat, and that Meyer failed to consider evidence of that. Mo. 5:22-7:16. But SAP relies on Oracle's statements about SAP TN when Oracle did not know about SAP TN's massive infringement and its corresponding ability to offer competitive levels of maintenance for low prices or even free. Those uninformed statements provide no useful information about what Oracle would have reasonably expected if it were negotiating to license the subject IP to SAP AG, its primary competitor, the day after having paid billions to acquire the customer base. Mo. 6:6-7:8; *see also* Jindal Decl., Ex. A (Meyer Report) ¶ 183.[8]

SAP then objects that Meyer's market approach considers SAP's estimates of 2000 and 3000 customers converted. SAP claims that Meyer's reliance on these estimates is "arbitrary" and objects that Meyer did not explain which was "more appropriate." Mo. 7:11-16. But ranges based on varying inputs are the norms in valuation, *see* II.B above, and Meyer provided the explanation in his deposition. Jindal Decl., Ex. B (Meyer Depo.) at 307:13-308: 24. In any event, as is the case for nearly all of SAP's attacks, the propriety of these ranges, or the weight to be given to these ranges are not *Daubert* issues. *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392-93 (Fed. Cir. 2003) (whether damages expert based reasonable royalty opinion on

---

[8] In addition, SAP miscites the Oracle evidence. *See, e.g.*, Wallace Decl., Ex. 7 (3/25/2005 email) ("[Y]es we are seeing TomorrowNow/SAP in more and more renewals. Every customer is incented to at least get a quote from TomorrowNow . . . . I believe we will need to respond to SAP's aggressive tactics with some of our own."); Ex. 8 (9/19/2005 email) ("Oracle is well aware of the increased pressure and urgency to keep customers happy."). At trial Oracle will present more rebuttal than that contained in SAP's cherry-picked examples.

disputed or unreliable facts is question for jury where proper valuation method applied).

7. *Meyer Based His Analysis on Proper Scope of Defendants' Actual Use*. SAP next claims that Meyer values something other than Defendants' "actual use." Mo. 7:18-8:18. First, SAP argues that "actual use" is determined not by the scope of the infringement, but by the revenues ultimately earned through that infringement. *Id.* at 7:18-27. This argument repeats SAP's contention that FMV should be based on hindsight evidence of results rather than the parties' reasonable expectations at the time of the hypothetical negotiation. This Court has twice confirmed that Oracle may seek damages measured by "what a willing buyer would have been reasonably required to pay to a willing seller" measured by the parties' expectations at the time of infringement. Dkt. 628 (1/28/2010 MSJ Order) at 3:15-23; Dkt. 762 (8/17/2010 MSJ Order) at 20:18-21:2. SAP's argument that Meyer erred in following that approach is counter to the law. *Id.*; *see also* p. 13 & n.14 below; Dkt. 781 (Oracle's Mo. to Exclude Clarke) at 8:6-9, n.5.

While SAP asserts, without foundation, that Meyer did not "connect his value of use calculation to the alleged infringement" (Mo. 8:1-2), in reality Meyer relied on Oracle's "technical experts" to prove the scope of infringement and even provided a detailed scope of use description at his deposition. Jindal Decl., Ex. B (Meyer Depo.) at 159:3-22, 155:15-158:19, 171:1-176:16 ; Ex. F (Plfs.' Ex.3204). In any event, SAP TN has now stipulated to "all liability on all claims" and SAP stipulated to "vicarious liability on the copyright claims against TN in their entirety," rendering any arguments about scope of use moot. Dkt. 837 at 1:14-25.

8. *Meyer Properly Analyzed Contemporaneous Sales of the Subject IP, Including Amounts Attributed to Goodwill*. SAP's last challenge to Meyer's market approach analysis criticizes his primary valuation of $2 B and his treatment of goodwill in Oracle's $11.1 B acquisition of PeopleSoft. Mo. 8:20-11:6.[9] None of SAP's arguments supports preclusion of Meyer's FMV opinions.

As discussed above, in the absence of comparable licenses, Meyer relied on Oracle's purchase of PeopleSoft, including all of the subject IP. He used the relevant parts of S&P's

[9] The same issue arises in Meyer's analysis of Oracle's $6.1 B acquisition of Siebel. Mo. 8 n.6.

contemporaneous valuation of the intangible assets and Oracle's recorded goodwill of $6.5 B. Jindal Decl., Ex. A (Meyer Report) ¶¶ 117-122 and pp. 3-4 above. Goodwill is the premium Oracle paid for PeopleSoft over the value of the separately identified acquired assets. *Id.* ¶ 121 n.301. The premium represents value related to the subject IP because access to that IP presents an opportunity to sell future software products to PeopleSoft customers and to earn support revenues for those products. *Id*., Ex. B (Meyer Depo.) at 210:23-211:23, 238:9-18, 245:18-246:3. Meyer's valuation is not based on a claim for the accounting goodwill asset recorded on Oracle's financial statements; rather, Meyer used the amount of the premium paid in the acquisition as a metric to estimate the minimum value of future revenue opportunities Oracle expected from the acquisition. *Id.*, Ex. A (Meyer Report) ¶ 121, 235; Ex. B (Meyer Depo.) at 255:14-17. The expected future sales opportunities are at least this value because Oracle would (and did) expect to make a return on its investment by earning more revenues and profits from the acquisition than the amount paid. *Id.*, Ex. B (Meyer Depo.) at 283:14-284:2, 339:19-341:23.

SAP makes three arguments challenging Meyer's treatment of the $6.5 B premium Oracle paid: *First*, SAP asserts, without any authority, that goodwill should be ignored because SAP "never possessed or used" it. Mo. 9:2-6. SAP ignores that Meyer's use of the amount attributed to goodwill simply and appropriately represents a metric of the value of Oracle's opportunity to gain additional customer revenues as a result of its access to the PeopleSoft subject IP. By acquiring and using SAP TN, SAP sought to take those future sales opportunities away from Oracle. *Buzz Off Insect Shield*, 606 F. Supp. 2d at 585-86. If, as SAP planned, thousands of PeopleSoft customers were to convert to SAP due to SAP's access to the subject IP, then SAP, not Oracle, would get the additional revenues from future sales and support. Jindal Decl., Ex. A (Meyer Report) ¶¶ 121, 55-61, 65; Ex. B (Meyer Depo.) at 210:23-212:22, 245:11-246:3, 256:13-21.

Second, SAP says no one can know how much goodwill is related to the subject IP because it "is not associated with any particular asset." Mo. 9:7-8. But Meyer properly uses the amount of the premium paid to represent the value of future opportunities due to goodwill associated with the subject IP based on Oracle's expectations at the time of the acquisition.

Jindal Decl., Ex. A (Meyer Report) ¶¶ 121, 235; Ex. B (Meyer Depo.) at 250:8-12. As SAP recognized in making SAP TN the "cornerstone" of SAP's Safe Passage customer conversion program, the ability to convert is directly related to access to the subject IP. *Id.*, Ex. A (Meyer Report) ¶ 65. Contrary to SAP's claim, Meyer did not assume 100% of the goodwill relates to the subject IP, (Mo. 9:14-15), but rather, that "the premium was paid for the ability to cross-sell and upsell" these customers. *Id.*, Ex. B (Meyer Depo.) at 250:8-12, 238:15-18; Ex. A (Meyer Report) ¶¶ 121, 235. Accordingly, because SAP conservatively expected to convert 3,000 of the 9,920 customers (30.2%), Meyer appropriately assigned that percentage to his metric of upsell and cross-sell (the amount Oracle attributed to goodwill) to SAP's value of use. *Id.* ¶ 122.[10]

Third, SAP argues that even if goodwill should be assigned to converted existing customers, some goodwill should be allocated to potential new customers. Thus, SAP contends Meyer should not have used "a percentage derived from existing PeopleSoft customers only" but somehow should have used some unknown lower percentage to account for potential customers. Mo. 10:3-13. SAP's position is inconsistent with Oracle's stated objectives for the acquisition, which were related to the existing customer base acquired. Jindal Decl., Ex. A (Meyer Report) at ¶¶ 30, 235. The portion of the $11.1 B purchase price attributed to goodwill reflects the "ability to cross-sell and upsell" to the PeopleSoft customers that were being acquired. *Id*., Ex. B (Meyer Depo.) at 250:8-12. The value of potential sales to new customers in the future is a potential that is "over and above the 11 billion," which is consistent with the perspectives of Oracle's executives who understandably would not pay a premium to an acquired company for the effort Oracle would then have to make to gain new customers. *Id.* at 341:5-344:3, 250:8-12. Meyer's

---

[10] SAP's only case in support, *Transclean Corp. v. Bridgewood Servs., Inc.*, 2001 U.S. Dist. LEXIS 24383, at *35-36 (D. Minn.), is inapposite. The court excluded consideration of the *infringer's* goodwill because the proffered expert "did not attempt to further analyze that figure, so as to isolate what portion of the goodwill could properly be attributable to infringement." *Id.* The expert testified "he knew nothing about" the goodwill and "did not know the components" of it. *Id.* at *37. But Meyer is an expert in analyzing goodwill and determined the appropriate value to be allocated from goodwill by examining the PeopleSoft and Siebel transactions, third party tangible and intangible asset valuations and the principal decision-makers who determined the purchase prices. Jindal Decl., Ex. A (Meyer Report) ¶¶ 121, 272.

use of 30.2%, based on the existing customer base, is appropriate.[11]

D. Meyer's Income Approach Is Admissible

1. *Meyer's Income Approach.* Meyer determined what both parties' expectations would have been, at the time of the hypothetical negotiations, for the net present value of cash flows expected as a result of entering into the PeopleSoft and Siebel licenses. Jindal Decl., Ex. A (Meyer Report) ¶¶ 128, 275. Meyer performed the income approach from the perspective of (1) Oracle's expected losses, (2) SAP's expected gains, and (3) SAP's own projected impacts on Oracle's profits (because SAP TN was operated as a loss leader with goal to "inflict pain" on Oracle). *Id*. ¶¶ 56, 129-140, 276-281. For Oracle, Meyer relies on the contemporaneous discounted cash flow models used by Oracle and its third party valuation experts in connection with the acquisitions of PeopleSoft and Siebel. *Id*. ¶¶ 129-131, 276-278; Ex. B (Meyer Depo.) at 440:1-441:7. For SAP, Meyer relies on internally and externally communicated projections and statements about the expected benefits from acquiring SAP TN. *Id.*, Ex. A (Meyer Report) ¶¶ 132-140; 279-281; Ex. B (Meyer Depo.) at 473:12-24. The ranges of indicated value presented by Meyer result from varying the assumptions regarding SAP's expected ability to convert customers to SAP TN support and SAP applications. *Id.*, Ex. B (Meyer Depo.) at 467:10-468:7; 224:10-225:14; 286:11-288:6; 319:21- 323:7. For the PeopleSoft materials infringed, the lowest indicated value of $881 M assumes that SAP would convert 1,375 of Oracle's 9,900 PeopleSoft and J.D. Edwards customers (far lower than SAP's contemporaneous projections), while the highest indicated value of $3.8 B assumes that SAP would convert 3,000 customers.[12] In both models, Meyer assumes (from SAP's projections) that SAP TN supported 3,000 Oracle customers. Jindal Decl., Ex. A (Meyer Report) ¶¶ 130-134, 153 Table 8. For the Siebel materials infringed, the indicated values ranging from $97 M to $247 M reflect varying assumptions regarding the value of Oracle losing, or SAP gaining, 200 Siebel customers. *Id.*,

---

[11] SAP's fourth argument (Mo. 10:14-11:6) rehashes its motion in limine that Oracle's use of goodwill valuations in its FMV opinions is precluded by the Rule 37 Orders limiting lost profits damages. Dkt. 728 at 1-3. Oracle refutes this claim in its MIL opposition. Dkt. 790 at 1-4.

[12] Meyer uses these assumptions even though various documents evidence that SAP expected more than 3,000 customer gains. See n.3 above,

¶¶ 275-281, 289 Table 12.

2. *Meyer Follows Established Valuation Methodology and the Law.* The income approach is an established methodology and is "commonly used by experts to value intangible assets." Jindal Decl., Ex. G (Clarke Report) at 24, Ex. O (Smith & Parr) at 148-55.[13] SAP does not attack Meyer's income method, but rather attacks the inputs. SAP primarily attacks Meyer for focusing on the parties' expectations at the time of the valuation rather than hindsight results. Mo. 11:15-27; 13:12-17. SAP cites no support for its argument, which is contrary to law.

As Meyer explained, "[t]he income approach values intellectual property based upon the additional cash flows a business *is expected to generate in the future* from the exploitation of the property at issue." Jindal Decl., Ex. A (Meyer Report) ¶ 128 (emphasis added); *see also id.*, Ex. B (Meyer Depo.) at 453:16-454:5. The treatise on IP valuation cited by both parties' experts confirms this. *Id.*, Ex. O (Smith & Parr) at185 (income approach measures "present value *of future* economic benefits") (emphasis added) (quoted at Mo. 11:8-10). SAP agrees. Mo. 11:13-14 (income approach is "forward-looking approach used to *estimate unknown future profits*")(emphasis added). As SAP and its expert concede, Meyer's income approach properly focuses on the parties' expectations as of the dates of the hypothetical negotiations.

Meyer also followed the law. As Oracle explained in its motion to exclude Clarke, focusing on actual results is contrary to "the rule that recognizes sales expectations at the time when infringement begins as a basis for a royalty base as opposed to after-the-fact counting of actual sales." *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384-85 (Fed. Cir. 2001).[14] To substitute post-negotiation data for a focus on expectations would render

---

[13] Despite their expert's concession, SAP now implies the income approach is an anomaly. Mo. 13 n.14. The case they cite, *Leland Med. Ctrs., Inc. v. Weiss*, 2007 U.S. Dist. LEXIS 76095 (E.D.Tex.) is inapposite, addressing how to measure infringer's profits for unsold real property built from an infringing design, where Texas courts "long favored the comparable sales approach when determining the market value of real estate property." *Id*. at *14.

[14] *See* Dkt. 781 (Mo. to Exclude Clarke) at III.A.2, also citing, *e.g*., N.D. Cal. Model Patent Jury Instructions, Instr. B.5 ("[T]he focus is on what the expectations of the patent holder and infringer would have been had they entered into an agreement at that time and acted reasonably in their negotiations."); *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1081 (Fed. Cir.1983) (reasonableness "is to be determined not on the basis of a hindsight evaluation of what actually happened, but on the basis of what the parties to the hypothetical license negotiations

(Footnote Continued on Next Page.)

meaningless the law's requirement that the parties return to a hypothetical negotiation date. That requirement exists to ascertain the real FMV of infringement, rather than an after-the-fact evaluation of infringer's profits.

3. *Though Weight of Evidence Is Irrelevant Under <u>Daubert</u>, the SAP Evidence Meyer Considers Is Reliable.* Meyer's income approach for the PeopleSoft infringed materials relies on, among other evidence, a December 24, 2004 analysis prepared by Thomas Ziemen, a senior SAP executive, for several SAP board members then considering whether to acquire TN and projecting almost a billion in revenues for SAP TN in the first three years after acquisition. SAP asserts that Meyer's reliance on SAP's own document was "inappropriate" because "there is no evidence that Ziemen's assumptions were adopted by SAP or used as the basis for any formal projections." Mo. 12:1-1, 12:10-11. SAP further claims that "Ziemen testified that his assumptions were not based on TN." Mo. 12:15-16. Ziemen in fact testified to the opposite. Jindal Decl., Ex. I (Ziemen Depo.) at 68:9-11 ("Q. Did this attack plan assume that PeopleSoft – that SAP would acquire TomorrowNow? A. Yes."). SAP also faults Meyer's consideration of SAP's April 2006 valuations of expected value of $10 to SAP and $18 taken from Oracle for every $1 of SAP TN revenue – which valuations yielded billion dollar-plus projected revenue impacts against Oracle and in favor of SAP. Mo. 13:2-10; Jindal Decl., Ex. A (Meyer Report) ¶¶ 135-136, 225-226.[15]

SAP ignores the testimony of its own executives when it questions the reliability of these SAP documents.[16] Although SAP may try to impeach its own documents and executives at trial,

---

(Footnote Continued from Previous Page.)

would have considered at the time of the negotiations."); *Snellman v. Ricoh Co., Ltd.*, 862 F.2d 283, 289-90 (Fed. Cir. 1989) (error to set aside jury award based on infringer's expected sales even though it far surpassed the infringer's actual sales).

[15] Meyer uses SAP TN's projections of $10 or $18 in value for every $1 of SAP TN revenue only as reference checks on his income approach results. *Id.*, Ex. A (Meyer Report) ¶ 135; Ex. B (Meyer Depo.) at 489:16-23, 490:20-23.

[16] *See, e.g.*, Wallace Decl., Ex. 15 (Plfs.' Ex. 447) at SAP-OR00253278 (sent to SAP Board members Apotheker, Agassi, Kagermann and Oswald); Jindal Decl., Ex. I (Ziemen Depo.) at 66:11-17, 67:18-23, 68:2-11, 77:16-19, 85:12-22 (Ziemen attempted to be reasonable in making projections in Ex. 447, knew SAP was negotiating to acquire SAP TN, had acquisition of SAP TN in mind when created; sent Plfs.' Ex. 447 to several board members); Ex. J (Oswald Depo.) at 42:24-43:1; 43:23-44:6 (SAP Board member and head of support assigned Ziemen job of

(Footnote Continued on Next Page.)

it is inappropriate for SAP to mischaracterize them to try to exclude Meyer's expert testimony. *See*, *e.g.*, *Micro Chem.*, 317 F.3d at 1392 (whether expert based royalty on disputed or unreliable facts is question for jury). Excluding Meyer's income approach opinions based on SAP's own projections would be error. *See, e.g., Snellman*, 862 F.2d at 289-90 (error to disallow damages based on infringer's forecasted sales and limit damages to infringer's actual sales).

E. Meyer's *Georgia-Pacific* Analysis Is Admissible

1. ***Meyer's Analysis.*** Applying the 15 well-recognized *Georgia-Pacific* criteria, Meyer conducted extensive, detailed analyses of the factors that would bear on hypothetical negotiations between Oracle and SAP in January 2005 for the PeopleSoft IP and in September 2006 for the Siebel IP. He considered how the parties would weigh the financial, economic and other valuation issues raised by the negotiations and concluded a willing buyer and seller would have agreed to license fees of at least $2 B for the PeopleSoft and at least $100 M for the Siebel copyrights in suit. Jindal Decl., Ex. A (Meyer Report) ¶¶ 154-241, 290-350.

2. ***SAP's Disagreements on Evidence Are Irrelevant.*** SAP's six criticisms of Meyer's *Georgia-Pacific* analyses all question the weight he places on a handful of the voluminous evidentiary inputs to his analyses. Because SAP does not agree with a few of his inputs, it contends that Meyer's analysis is "superficial, one-sided and results-oriented." Mo.14:5-6.

First, SAP again says Meyer gave too much weight to Oracle executives' views that the value of the hypothetical PeopleSoft license would be over $3 B. Mo. 14:18-15:3. SAP also criticizes Meyer's citation to Oracle's belief that approximately 400 of 4000 Siebel customers might convert to SAP, which would result in a value of $600 M. Mo. 14:25-15:3. It is proper for Meyer to rely on Oracle's views, as Oracle would have been one of the two parties to the negotiation. *Polar Bear*, 384 F.3d at 709. In any event, Oracle's assessment is merely one of

---

(Footnote Continued from Previous Page.)

making projections and knew SAP was planning to acquire SAP TN when gave assignment; was sent Plfs.' Ex. 447 and recalls no disagreements with it); Jindal Decl., Ex. A (Meyer Report) ¶¶ 135-136. n.331, 225-226 (citing evidence that analysis related to SAP TN's $10 for $1 and $18 for $1 projections were approved by SAP for SAP TN to use to brief industry analysts); Ex. B (Meyer Depo.) at 311:5-10, 319:21-323:7, 125:23-127:2; Ex. D (Defs.' Ex. 2028: Meyer's Schedule summarizing key contemporaneous strategy and projections); *see also* n. 3, above.

many inputs (literally one paragraph out of 80 regarding PeopleSoft and one of 60 regarding Siebel) that Meyer considered. Jindal Decl., Ex. A (Meyer Report) ¶¶ 154-241, 290-350. In addition, SAP simply ignores that Meyer's valuation of the PeopleSoft and the Siebel infringement is far less than that suggested by Oracle executives, and that his much lower Siebel FMV assumes that the parties would have considered SAP TN's actual impact on Oracle's PeopleSoft customer base prior to September 2006. *Id.* ¶¶ 237, 241, 342 blt. 4, 350.

Second, SAP claims Meyer did not give sufficient weight to the $10 M price it paid for SAP TN and the differences between a paid up license and a running percentage royalty. Mo. 15:4-16:4.[17] Meyer properly considered both. Among other things, the price SAP paid for SAP TN expressly did not include any TN intellectual property rights (including for the subject IP), so it is hardly a benchmark for the hypothetical IP license. Jindal Decl., Ex. A (Meyer Report) ¶ 189. Moreover, the price SAP paid for a business model it knew was illegal understates the value of a legitimate license; stolen property always trades at a significant discount. *Cf. U.S. v. Werner*, 160 F.2d 438, 443 (2d Cir. 1947) ("In prosecutions for receiving stolen property for obvious reasons one of the most telling indices of guilt is a low price paid by the receiver."). As for the dispute between paid up and percentage royalties, Meyer properly considered and will explain to the jury why a lump sum royalty is more appropriate. While he recognized SAP's risks in agreeing to a paid up royalty (similar to acquiring a company), he also considered the enormous disadvantages of a running percentage royalty, including the following: Oracle had just paid $11 B for PeopleSoft and would require a lump sum, especially because the license would provide the dominant player in the market the IP it needed to credibly attack all of the PeopleSoft customer base that provided the bulk of that acquisition value; a lump sum would protect Oracle against the possibility its well-funded competitor could (as it did) charge loss leader prices or even zero support fees to drive down the royalties due. *Id.*, Ex. B (Meyer Depo.)

---

[17] SAP's argument that the $10 M it paid for SAP TN is probative of the license price is also belied by their thousand customer projections for SAP TN in January 2005 that result in almost a billion in gains in only 3 years, and their April 2006 projection of billion dollar gains and impacts on Oracle. *See* p. 14 & n.3 above.

at 460:13-461:24, 549:21-550:14, 554:18-555:5, 564:19-565:10. The weight Meyer gives to this evidence and his conclusions are admissible. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F. Supp. 2d 147, 151-52 (D. R.I. 2009) (denying motion in limine to preclude expert testimony that reasonable royalty award should be up-front lump sum payment because challenges went to weight, not admissibility). That Clarke disagrees (Mo. 15:19-21) is irrelevant. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1192 (9th Cir. 2000) ("Weighing the credibility of conflicting expert witness testimony is the province of the jury.").

Third, SAP asserts that "Meyer's analysis of the *Georgia-Pacific* factors is superficial." Mo. 16:5-20. This is facially untrue. *See* Jindal Decl., Ex. A (Meyer Report) ¶¶ 154-241 (PeopleSoft *Georgia-Pacific* analysis is 50 pages with 152 evidentiary footnotes), ¶¶ 290-340 (Siebel *Georgia-Pacific* analysis is 25 pages with 67 footnotes). What SAP protests is the relative weight Meyer places on various *Georgia-Pacific* factors, which is no basis for preclusion of expert testimony. *Wyler*, 235 F.3d at 1192. The point of *Georgia-Pacific* is that "there is no formula by which these factors can be rated precisely in the order of their relative importance"; rather, arriving at a defensible FMV opinion calls for "exercise [of] a discriminating judgment reflecting [the] ultimate appraisal of all pertinent factors in the context of the credible evidence." *Georgia-Pacific*. 318 F. Supp. at 1120-21; *see also* Dkt. 628 at 5:5-11. Meyer has done this.

Fourth, SAP again complains that Meyer should have used hindsight rather than the parties' contemporaneous expectations to inform the hypothetical negotiation. Once again SAP turns the law on its head. *See* p. 13 & n.14 above.[18]

[18] Though post-negotiation evidence may be admissible, SAP's cases confirm its limited relevance and inapplicability here. *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 799 (1933) allowed post-breach evidence "to bring out and expose to light the elements of value *that were there from the beginning*," (emphasis added), and did so because a hypothetical license as of the negotiation date would have undercompensated the victim as the patent was undeveloped and market indications as of that date would have been misleading. There are no such issues here. *Lucent Tech. Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1333-34 (Fed. Cir. 2009) opined that post-infringement evidence is "probative in *certain* circumstances" such as where facts "*could not have been known to or predicted by the hypothesized negotiators*" (emphasis added). Here SAP did know and predict how its use of SAP TN would benefit it. Moreover, the *Lucent* court considered actual usage as a proxy for *what the parties would have known at the time* of the negotiation about how little the infringed material mattered to the defendants' product. *Id*. There is no such blank to fill in here. Finally, the *Lucent* court

(Footnote Continued on Next Page.)

Fifth, SAP says Meyer "ignore[d]" the initial infringement by TN in 2002 and should have calculated a separate license fee for TN (and presumably PeopleSoft). Mo. 17:21-18:11. Meyer did not ignore that infringement. He concluded that a 2002 license would be irrelevant to the 2005 negotiation between Oracle and SAP because it would not have covered the same scope of use, would not be transferable to SAP and would not include all relevant lost revenues. Jindal Decl., Ex. A (Meyer Report) ¶157 n. 357, 358 (citing *Everex Sys., Inc. v. Cadtrak Corp.*, 89 F.3d 673 (9th Cir. 1996); *SQL Solutions, Inc. v. Oracle Corp.*, 1991 U.S. Dist. LEXIS 21097 (N.D. Cal. 1991)). SAP's own expert agrees that the license to be valued commenced when SAP acquired SAP TN and this is the only license for which Clarke performed a *Georgia-Pacific* analysis. Jindal Decl., Ex. G (Clarke Report) at 31, 117, 129-30, 134.

Sixth, SAP argues that Meyer calculates too many ranges of values and claims that makes his $2 B PeopleSoft value of use conclusion inadmissible. Mo. 18:12-19:7. As explained in II.A above, Meyer appropriately used each of his four methodologies, with a variety of inputs, to determine indicators of values. This approach allowed Meyer to compare the results and reach his ultimate conclusion well within the ranges resulting from his analyses. Meyer's ultimate opinion is that "the hypothetical negotiation is the most relevant" approach and that the market, income and cost approaches" are "supportive" and "consistent" with that approach. Jindal Decl., Ex. B (Meyer Depo.) at 64:18-66:2. That exercise of judgment is normal and appropriate. *See* II.B above; Jindal Decl., Ex. O (Smith & Parr) at 253; *Georgia-Pacific*. 318 F. Supp. at 1120-21.

III. MEYER'S DATABASE DAMAGES OPINION IS ADMISSIBLE

Meyer's Database Damages Analysis. Even before the recent stipulation, SAP admitted that before and after SAP acquired it, SAP TN downloaded and used multiple copies and

---

(Footnote Continued from Previous Page.)

endorsed reliance on a party's contemporaneous "rough estimates as to the expected frequency of use" when doing a hypothetical license analysis, which is what Oracle does and SAP wants to avoid. Notably, this jurisdiction recognizes actual sales cannot be used to cap damages as SAP seeks to do. See N.D. Cal. Model Patent Jury Instructions, Instr. B.5 ("In this trial, you have heard evidence of things that happened after the infringing sales first began. That evidence can be considered only to the extent that [*add appropriate limitations on consideration of later occurring events*]. You *may not limit or increase the royalty based on the actual* profits [alleged infringer] made.") (emphasis added).

versions of Oracle's copyrighted database software to support customers for which SAP and SAP TN knew they had no licenses. Jindal Decl., Ex. A (Meyer Report) ¶¶ 244, 247-248; Dkt. 670 at 5:1-5. SAP TN's 30(b)(6) database software witness also conceded that SAP TN's use of Oracle's database software to support numerous customers did not constitute internal SAP TN use that would be allowed under the terms of the standard end-user Oracle database license ("OLSA"). Dkt. 783 (House Decl. In Support of Mo. to Exclude Clarke), Ex. J (Thomas 30(b)(6) Depo.) at 7:6-16. As described below, this means that SAP TN's use was outside of the scope of Oracle's OLSA, that the OLSA pricing is not an established royalty for SAP TN's use, and that the purchase of a single OLSA would not have cured SAP TN's infringement.

Meyer used SAP's specific scope of use of Oracle's database software and discussed with Oracle's Richard Allison how a license for that scope of use could be priced using Oracle's existing OLSA database licensing structure, even though the OLSA license would not have allowed SAP TN's cross-use. He learned that the list price varied by hardware configuration and that under the OLSA, Oracle requires an Enterprise Edition database program for use with PeopleSoft and Siebel software products. Jindal Decl., Ex. A (Meyer Report) ¶ 252, Ex. B (Meyer Depo.) at 810:16-20. Meyer confirmed that the best fit was a separate Enterprise Edition OLSA "license . . . for each relevant customer for which TomorrowNow provided application maintenance services using an Oracle database." *Id.*, Ex. A (Meyer Report) ¶¶ 252. Depending on how many customers were supported, Meyer's calculations yield database damages calculations of $23.6 M (SAP TN customers supported with their own database environment), $38.1 M (SAP TN customers supported through their own or another customer's database environment) or $55.6 M (all relevant SAP TN customers). *Id.* ¶¶ 253-257.

Amount of License Fee Is No Defense. SAP asks the Court to throw out Meyer's calculations. Mo. at IV. There is no basis to do so. First SAP asserts that Meyer's largest database license fee exceeds SAP TN's total revenues. Mo. 19:10-12. But the law does not cap a FMV license based on SAP's success at exploiting what it infringed. *See, e.g., Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1374 (Fed. Cir. 2008) ("[A]lthough an infringer's anticipated profit from use of the patented invention is [a]mong the factors to be considered in determining a reasonable royalty, the law does not require that an infringer be permitted to make a profit.") (quotations and citations omitted); *Hanson*, 718 F.2d at 1081 (high cost of license and claim that defendant would never have agreed is irrelevant if license amount has reasonable basis). Nor can an infringer reduce its damages by giving away or under pricing the stolen software. *F.W. Woolworth Co. v. Contemporary Arts, Inc*., 344 U.S. 228, 233 (1952)(disapproving of "a rule of liability which merely takes away the profits from an infringement [because it] would offer little discouragement to infringers.").

Reliance on Allison Is Appropriate. SAP's principal claim is that Meyer's reliance on Allison makes his calculations unreliable. SAP implies that Meyer blindly adopted a model for database license fees that Allison simply made up to inflate damages. Mo. 19:20-20:1; 20:14-27. That is not true. Meyer's analysis used Oracle's Enterprise Edition standard database OLSA pricing structure (which is applicable to PeopleSoft and Siebel customers) and applied it against the most common server configurations SAP TN actually used (not the largest). Jindal Decl., Ex. B (Meyer Depo.) at 799:15-800:15; 803:22-804:18; Ex. A (Meyer Report) ¶ 253, n.529. Portions of Meyer's testimony that SAP omits show that Allison explained the OLSA database license structure and pricing and Meyer then applied that pricing as a proxy to each database use that would have had to be licensed by SAP TN. *Id.*, Ex B (Meyer Depo.) at 820:24-821:6. Meyer sought confirmation from Allison to ensure he applied that pricing structure accurately given the complexity of server configurations used by SAP TN. *Id.*, Ex. B (Meyer Depo.) at 807:16-808:15, 809:11-810:6; 820:17-821:6; Ex. A (Meyer Report) ¶ 250.[19]

The main point of contention between the parties is whether a *single* OLSA would have allowed for SAP TN's actual use of Oracle's software for multiple customers. Mo. 21:1-8. Here, Allison confirmed what he and SAP TN's own 30(b)(6) witness had already attested to: a single OLSA would not allow SAP TN to use the licensed database software to support multiple customers and OLSA pricing was based on single customer use. Jindal Decl., Ex. A (Meyer

[19] Indeed, SAP's damages expert also uses Oracle's standard database pricing structure (although he incorrectly construes it as an established royalty) and acknowledges the relevance of server configurations to database license pricing. Jindal Decl., Ex. G (Clarke Report) at 206.

Report) ¶ 250; Ex. B (Meyer Depo.) at 800:16-801:8; 802:6-22.[20] Given Allison's familiarity with these licenses, reliance on him is wholly reasonable. *Polar Bear*, 384 F.3d at 709.[21]

Clarke's Factual Do-Over Is Against the Law. SAP also faults Meyer for not assuming that instead of installing Oracle's database software as it actually did, SAP TN "*could* configure its servers less expensively" which would result "in a license fee nearly $54 million less than the configuration Meyer adopted." Mo. 21:19-22 (emphasis added); *id.* 20:9-13 ("TN *could* have used single processor computers and purchased a Standard Edition license . . . ." (emphasis added)); 21:10-12. SAP cannot revise how it actually used Oracle's databases to minimize the license fees. *See, e.g., Hanson*, 718 F.2d at 1081-82 (Defendant "could have avoided infringement, and paying royalties therefore, by purchasing non-infringing machines . . . ." Defendant "chose, however, to purchase and use [plaintiff's] infringing machines. Having followed that course, it cannot invalidate an otherwise reasonable royalty on the claim that by hindsight it would have been better off if it had purchased the non-infringing [] machines.").

IV. MEYER'S INFRINGERS' PROFITS OPINION IS ADMISSIBLE

Meyer also quantified under 17 U.S.C. § 504(b), profits SAP gained that are attributable to its infringement. SAP does not attack Meyer's method of calculating infringer's profits. Instead, it argues Oracle has not provided evidence sufficient to meet its burden of proof as to causation. Mo. at V. Defendants' arguments are not appropriate to a *Daubert* motion. *Pierson v. Ford Motor Co.*, 2008 WL 7084522, at *3 (N.D. Cal.) (PJH) (rejecting motion seeking to exclude expert testimony based on a claim that expert did not satisfy plaintiff's causation burden: "[t]he ultimate issue of causation is not appropriate for determination in a motion to exclude evidence"). In any event, Oracle's evidence is more than sufficient for it to submit infringer's

---

[20] That is why Oracle's end user database license is not an established benchmark for SAP's infringing cross-use with other customers. *See* Dkt. 781 (Mo. to Exclude Clarke) at 15:13-16:7.

[21] SAP cites only *Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346 (S.D.N.Y. 2003), rejecting an inexplicably inflated pricing structure when a more comparable structure covering the use at issue for much less existed. *Id.* at 355 n.4. Here there is no comparable established license allowing SAP TN's cross-use, and Meyer fully explains the support for quantifying licenses and fees for each customer SAP TN supported with Oracle's database software.

profits to the jury.

Meyer's Analysis and Support. SAP indisputably acquired SAP TN to help drive Oracle's acquired PeopleSoft customers to take the "Safe Passage" from SAP TN's cheap/free support to purchase SAP applications. Jindal Decl., Ex. A (Meyer Report) ¶¶ 55-61, 65, 439. SAP and SAP TN indisputably benefitted financially and strategically from being able to market and sell SAP TN's support services using a business model that relied upon infringement and misuse of Oracle's IP. *Id.* ¶¶ 440-443. Because, as a loss leader, SAP TN never made any profits, Oracle does not seek infringer's profits from SAP TN. However, SAP did make significant profits in connection with Safe Passage customers who purchased SAP goods and services and were enticed in some way by SAP TN. Meyer's analysis did not simply point to SAP's entire gross earnings. Based on the extensive evidence of SAP's stated goals and subsequent benefits from using SAP TN to assist in SAP sales and to otherwise harm Oracle, Meyer instead started with the 86 customers who had purchased both SAP TN support and SAP products or services as within the scope of potential infringers' profits damages. *Id.* ¶ 444. Meyer continued to make various downward adjustments to isolate the profits attributable to infringement, including: (1) taking out revenues received prior to a customer's association with SAP TN; (2) taking out support revenues related to products under license prior to a customer's association with SAP TN; (3) removing a customer's SAP purchases if SAP credibly demonstrated the customer switched to SAP regardless of the support it got from SAP TN; and (4) applying Clarke's 50% profit margin. Jindal Decl., Ex. A (Meyer Report) ¶¶ 444-445; Ex. B (Meyer Depo.) at 99:12-106:15; 660:7-664:2; 675:6-688:13; Ex. E (Defs.' Ex. 2020).

Oracle Meets Its Burden to Get to Trial. Infringer's profits are awarded "to prevent the infringer from unfairly benefiting from a wrongful act." Jindal, Ex. N (H.R. REP. NO. 94-1476, at 161 (1976)). Oracle's burden under § 504(b) is to segregate which of SAP's gross revenues are reasonably related to the infringement.[22] Oracle also must "present a modicum of proof

---

[22] The statute requires only proof of SAP's gross revenues, but case law now requires Oracle to "'formulate the initial evidence of gross revenue duly apportioned to relate to the infringement.'" *Polar Bear*, 384 F.3d at 711 (quoting 4 *Nimmer on Copyright* § 14.03[B], 14-39).

linking the infringement to the profits sought." *Polar Bear,* 384 F.3d at 715; *see also id* at 710 (Oracle "must establish the existence of a causal link before indirect profits damages can be recovered") (quoting *Mackie v. Reiser* , 296 F.3d 909, 914 (9th Cir. 2002)); *id.,* 296 F.3d at 915-16 ("copyright holder must proffer sufficient, non-speculative evidence to support a causal relationship between the infringement and the profits generated indirectly from such infringement"). The same "nexus requirement exists in both direct and indirect profits cases." *Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789, 796 (8th Cir. 2003). That indirect profits generally "are more difficult to quantify. . . does not change the burden of proof established by the statute." *Id.* (defendant still bears burden of apportionment even where profits indirect).

Meyer's analysis meets Oracle's infringer's profits burden. As explained above, Meyer relies on SAP internal and external documents and statements and testimony highlighting SAP TN as a "strategic weapon against Oracle" and the "cornerstone" to the Safe Passage program which yielded the overlapping SAP/SAP TN sales at issue. Jindal Decl., Ex. A (Meyer Report) ¶¶ 56-60, 65, 439-443. SAP TN's infringement was central to SAP's ability to lure Oracle's acquired customers away from Oracle with equal or better support at half the price or less, SAP TN's infringing business model provided SAP financial and strategic benefits, and affected SAP's customers were in fact induced to switch. *Id.* Accordingly, Oracle has evidence that exceeds what has been deemed sufficient. *Compare Andreas*:

> The infringement was the centerpiece of a commercial that essentially showed nothing but the TT coupe. The evidence established that Audi enthusiastically presented the commercial to its dealers as an important and integral part of its launch of the TT. . . . . We conclude the jury had enough circumstantial evidence to find that the commercial contributed to the profitable introduction of the TT couple, which shifted the burden to Audi of showing what effect other factors had on its profits.

336 F.3d at 796-97 (also "reject[ing] notion that [plaintiff] was required to put a TT buyer on the stand to testify that she bought the car because of the commercial in order to meet his burden of a causal connection" and admonishing court for "placing the detriment of any speculation on [plaintiff] rather than [infringer]"); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.* , 772 F.2d 505, 517-18 (9th Cir. 1985) (Statement in MGM's annual report that its gaming operations were

"materially enhanced by the popularity of the hotel's entertainment" provided sufficient evidence that use of six minutes of infringed music in casino's on-site revue contributed to MGM's gaming profits; "[g]iven the promotional nature of [the revue], we conclude indirect profits from the hotel and gaming operations, as well as direct profits from the show itself, are recoverable if ascertainable."); *William. A. Graham Co. v. Haughey*, 568 F.3d 425, 442 (3d Cir. 2009) (upholding jury award of defendants' commissions on sales where evidence included client proposals containing infringing language, defendant testimony that written proposals were important to sale process, proof that defendants made copies available to employees and encouraged use, and evidence of value to defendants of infringing language).

The only case SAP cites where an infringer's profits claim was deemed too speculative to go to trial was *Mackie*, where the expert attested "he could not 'understand' how it would be possible to establish a causal link between the [Seattle] Symphony's use of [infringed art] and any Pops series revenues generated through the inclusion of the collage in the direct-mail literature." 296 F.3d at 916. Meyer's strongly supported infringer's profits opinion is not remotely analogous. SAP does not justify escaping the consequences of "unfairly benefiting from [the] wrongful act" of SAP TN's infringement – the very purpose of infringer's profits damages under the Copyright Act. Jindal Decl., Ex. N (H.R. Rep. No. 94-1476, (1976)) at 161.

SAP - Not Oracle - Has Burden to Justify Any Award Less Than Oracle's Full Infringer's Profits Demand. SAP criticizes Meyer for purportedly (1) not doing "analysis to determine whether the fact that the customer received support services from TN had anything to do with the customer's subsequent decision to purchase SAP software"; (2) failing "to distinguish among a customer's various SAP purchases"; and (3) doing "no analysis to determine whether the customer would have made the same SAP purchases if it had never received any support services from TN." Mo. 22:24-25, 23:3, 23:9-10. The first criticism is inaccurate: as explained above, Meyer made several downward adjustments to account for any credible demonstration that a customer's SAP purchases were unrelated to SAP TN.

More importantly, as set forth above, none of SAP's proposed analyses is a prerequisite to Oracle's seeking SAP's infringer's profits. Instead, SAP has the burden to prove its appropriately deductible expenses and which, if any, of the profits for any of the sales to the 86 customers are "attributable to factors other than the copyrighted work." 17.U.S.C. § 504(b); *Frank Music Corp.*, 772 F.2d at 518.[23] SAP cannot shift that burden to Oracle. *Compare Andreas*, 336 F.3d at 797 (rejecting defendant's claim that because "numerous unknown elements other than [infringing words in commercial] . . . contributed to the sales of the TT coupe" that jury award was necessarily "speculative," and holding because plaintiff carried initial causal nexus burden, "Audi then bore the burden of establishing that its profit was attributable to factors other than the infringing words").

Moreover, now, and at trial, "[a]ny doubt as to the computation of costs or profits is to be resolved in favor of [Oracle]." *Frank Music Corp.*, 772 F.2d at 514 (citation omitted). And if, as here, "the infringing defendant does not meet its burden of providing costs, the gross figure stands as defendants' profits." *Id.*[24]

SAP's Evidence Does Not Merit Preclusion. Finally, **t**hat Oracle's and SAP's experts focus on different evidence for and against Oracle's infringer's profits claims is for the jury to sort out. *See, e.g,. Andreas*, 336 F.3d at 797-98 ("The question of allocating an infringer's profits between the infringement and other factors, for which the defendant infringer carries the burden, is highly fact specific, and should have been left for the jury." (citations omitted)). Trial is where arguments about the weight of evidence on specific customers such as those SAP cites (Mo. V.B) belongs. Oracle's infringers' profits claims should proceed to trial.

DATED: September 9, 2010

BINGHAM McCUTCHEN LLP

By: /s/Donn P. Pickett
Donn P. Pickett
Attorneys for Plaintiffs
Oracle USA, Inc., Oracle International Corp.,
and Siebel Systems, Inc.

---

[23] The Ninth Circuit has confirmed Oracle need not put on customer-by-customer proof. *Polar Bear*, 384 F.3d at 715.

[24] Oracle has moved to exclude Clarke's flawed regression analyses that yielded SAP's claimed 50% infringer's profit margin. Dkt. 781 at 22:8-24:12.