

EXHIBIT 1

ORACLE USA, INC., ET AL

V.

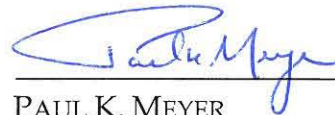
SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.

FEBRUARY 23, 2010



PAUL K. MEYER

5. TomorrowNow Was an Integral Part of SAP's Safe Passage / Conversion of PeopleSoft and J.D. Edwards Customers to SAP Platform

65. The TomorrowNow acquisition allowed SAP to offer application software support for non-SAP systems applications as part of SAP's "Safe Passage" program.¹⁷² A key goal of the Safe Passage program was to capture a percentage of the PeopleSoft and J.D. Edwards customer base and convert them to SAP products.¹⁷³ Approximately nine months after the TomorrowNow acquisition, Henning Kagermann, SAP Executive Board Member and Co-CEO, was quoted in a Business Week article as saying that TomorrowNow had been "'instrumental' in the success" of Safe Passage.¹⁷⁴ Colin Sampson, SAP Asia Pacific Senior Vice President and Chief Operating Officer, stated that the TomorrowNow acquisition was "an integral part of SAP's safe passage" program.¹⁷⁵ With the acquisition of TomorrowNow, SAP had an opportunity to sell PeopleSoft customers SAP software applications, increase SAP's market share and capture support revenue of existing PeopleSoft customers.¹⁷⁶ The Safe Passage program was an immediate revenue opportunity for SAP and an immediate opportunity to disrupt Oracle's business.¹⁷⁷ In February 2007, shortly before Oracle filed its complaint in this

¹⁷² SAP AG Annual Report for fiscal year ending December 31, 2005, pgs. 2 and 66.

¹⁷³ SAP email sent from Chuck Mulloy to Gerhard Oswald and other SAP personnel with attached document "Safe Passage v6.ppt," SAP-OR00092046-070 (Shenkman Exhibit 236), at 048 and 050.

¹⁷⁴ "SAP's End Run Around Oracle," dated October 24, 2005 (Kagermann Exhibit 435), pg. 1.

¹⁷⁵ "SAP Brings PeopleSoft Services Arm to Asia-Pacific," dated June 30, 2005, pg. 1.

¹⁷⁶ Deposition of James Mackey (SAP Vice President of Corporate Finance), July 15, 2008, pg 319; Deposition of Gerhard Oswald (SAP Executive Board Member), December 10, 2008, pgs. 93-94; Deposition of Henning Kagermann (SAP Executive Board Member and Co-CEO), September 25, 2008, pgs. 39-41.

¹⁷⁷ SAP email from John Zepecki to Arlen Shenkman and other SAP personnel with attached document "PeopleSoft 1-2-3 01 05 05.doc," SAP-OR00004991-5007 (Shenkman Exhibit 225), at 998 and 002; "Safe Passage: Winning Customers and markets From Oracle-PeopleSoft-J.D. Edwards," SAP-OR00299495-518 (Oswald Exhibit 595), at 500; Deposition of Henning Kagermann (SAP Executive Board Member and Co-CEO), September 25, 2008, pgs. 121-122;

matter, SAP's Supervisory Board was told in a presentation from Henning Kagermann, SAP's Co-CEO and Executive Board Member, that TomorrowNow was established as a cornerstone of the SAP Safe Passage Program.¹⁷⁸

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SAP email from Michael Wendell to Gregory McStravick Re: "CLEAR SAILING" SYLT 2005, SAP-OR00126416-417, SAP-OR00147894-919, SAP-OR00147924-934, SAP-OR00182303-306 (Kagermann Exhibit 413), at 928.

¹⁷⁸ Deposition of Thomas Ziemer (SAP Vice President Service Solution Management), October 1, 2008, pgs. 319-326; "Supervisory Board Meeting TomorrowNow Status Update," dated February 2007, SAP-OR00141570-581(Kagermann Exhibit 436), at 571.

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1. Summary of Factors Considered by Oracle and SAP

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

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- The broad scope of the license, which would enable SAP to compete against Oracle in providing support services to its PeopleSoft/J.D. Edwards customers, and provide SAP with enhanced ability to convert those customers to SAP applications;
- Expected lost support revenue to SAP on customers that would go to TomorrowNow for support services, as well as lost up-sell and cross-sell revenues from those customers;
- The anticipated permanent impact on Oracle due to the lost future license revenue and ongoing support renewals for customers that would switch to SAP applications;
- Immediately prior to the contemplated hypothetical negotiation, Oracle paid approximately \$11.1 billion to acquire PeopleSoft, including rights to the PeopleSoft/J.D. Edwards customer support contracts and related relationships and associated goodwill;
- Oracle's investment of over \$1 billion in further research and development for its PeopleSoft and J.D. Edwards products since the acquisition, which Oracle would reasonably understand that it would have to spend, and that SAP would avoid spending by virtue of the license;
- The nature of the relationship between Oracle and SAP, as direct competitors in the software applications business, particularly in light of Oracle's goals for the PeopleSoft acquisition to enhance its competitive position with SAP in the applications market;

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

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

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

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

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2. TomorrowNow's Low Price Was Critical to Making Inroads Into Oracle's Customer Base

361. Price and total cost of ownership ("TCO") are very important factors in a customer's selection of a software and support vendor.⁶⁷⁹ Keith Block, Oracle's Executive Vice President of Sales and Consulting in North America, testified, ". . . by acquiring TomorrowNow, SAP created leverage, as well as – through legitimizing TomorrowNow, and presented customers with a do step, based on lowering that complete total TCO, and advertising that they had the same level of service and support that Oracle would provide."⁶⁸⁰ Juergen Rottler, Oracle's Executive Vice President of Oracle Customer Services, also testified about the impact of price competition from TomorrowNow: "It was constantly on our mind, as with the acquisition of SAP, it was the one perceived, you know, credible alternative to our own support offering."⁶⁸¹ TomorrowNow documents touted the importance of its low cost support offering. For example, a TomorrowNow "Frequently Asked Questions" document on its Safe Passage program for J.D. Edwards mid-market

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⁶⁷⁹ Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 38-39, 139 and 154-155; Deposition of Charles Phillips (Oracle Co-President and Executive Board Member), April 17, 2009, pgs. 148-149.

⁶⁸⁰ Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 238-239.

⁶⁸¹ Deposition of Juergen Rottler (Oracle Executive Vice President, Oracle Customer Services), May 13, 2009, pg. 43.

customers stated, “These customers will eventually migrate – until then, SAP builds credibility and loyalty with the customer by providing immediate savings.”⁶⁸² A TomorrowNow advertisement stating “What will you do with the money you save?” highlights the benefit of its offer of 50% support cost savings.⁶⁸³ As testified to by several former TomorrowNow customers, the low cost of the TomorrowNow service was an important factor, and in some cases the most important factor, in their decision to switch to TomorrowNow for support services.⁶⁸⁴

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⁶⁸² “Safe Passage Sales Brief,” SAP-OR00042962-967 (Hurst Exhibit 175), at 963.

⁶⁸³ Advertisement from www.Tomorrownow.com included in Plaintiff’s Responses and Objections to Defendants’ Fifth Set of Interrogatories, April 16, 2009, pg. 104.

⁶⁸⁴ For example, see Deposition of Mark Anderson (Travel Centers Manager of IT for PeopleSoft, SAP, BW and Cognos Business Intelligence), June 8, 2009, pgs. 35 and 47-49; Deposition of John Kreul (Pepsi Americas Vice President of Applications), June 2, 2009, pgs. 47, 51, 54 and 56; Deposition of Jeffrey O’Donnell (Lexmark International Commodity Manager), September 15, 2009, pgs. 16-17 and 57-58; Deposition of Steven Brazile (Sara Lee Vice President of Application Development and Support) October 14, 2009, pgs. 85-87; Deposition of Thomas Bailey (Honeywell, Manager of IT and Global HR Technical Design Leader), November 12, 2009, pgs. 29-31; Declaration of Stefan Vilsmeier, President, On Behalf of BrainLab, Inc., July 9, 2009, pg. 3; Declaration of Richard Ball, Director of Procurement, The Standard Register Company, November 11, 2009, pg. 3; Deposition of Tracy Hallenberger (Baker Botts Chief Knowledge Officer), November 18, 2009, pgs. 26-27; Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pgs. 27-28.

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367. At the time of its acquisition of TomorrowNow, SAP acknowledged the lack of third party support alternatives for Oracle's acquired PeopleSoft and J.D. Edwards products. In its research leading up to the acquisition of TomorrowNow, SAP concluded that TomorrowNow had no "meaningful North American competitors," and found that according to a Gartner research study, less than 1% of ERP software customers obtain their software support from third party suppliers.⁶⁹³ Furthermore, SAP's practice of reporting the amount of support revenue taken from Oracle as a factor of 2 times each dollar in revenue reported by TomorrowNow indicates they understood the market for PeopleSoft, J.D. Edwards and Siebel support services to be a two-supplier market comprised of Oracle and TomorrowNow.⁶⁹⁴

368. In 2005, Seth Ravin, a co-founder of TomorrowNow, left SAP and founded Rimini Street, another third-party software service provider described as having the exact same business model as TomorrowNow.⁶⁹⁵ In

June 25, 2009, pg. 2; Declaration of Jeff Scheele for Harley-Davidson, Inc., September 28, 2009, pg. 2; Declaration of William A. Fiedler of Spokane County, Washington, September 29, 2009, pg. 3; Declaration of John Goetz, Director of Information Technology of The Harris Products Group, November 16, 2009, pg. 3; Deposition of Paul Cooley (Waste Management Director of Information Technologies), November 24, 2009, pg. 67.

⁶⁹³ Email from Arlen Shenkman to Shai Agassi, James Mackey and Werner Brandt Re: Confidential, SAP-OR00091570-572 (Shenkman Exhibit 209), at 570. TN email correspondence indicates that as of April 2006, Klee Associates only had three customers and was considering getting out of the maintenance and support business. Email from Nigel Pullman to Andrew Nelson, Bob Geib and Lon Fiala, dated April 3, 2006, TN-OR07165464-465 at 464.

⁶⁹⁴ For example, "Update on Safe Passage Program Board Offsite Meeting in Paris July 21-22, 2005," SAP-OR00139957-69 (Kagermann Exhibit 418), at 958; "Supervisory Board Meeting – TomorrowNow Status Update, February 2007," SAP-OR00141570-81 (Kagermann Exhibit 436), at 571 and 578.

⁶⁹⁵ "The Man Behind 'Half Off' Third-Party Software Maintenance," *CIO Business Technology Leadership*, April 11, 2008. I understand that Oracle is seeking additional discovery from Seth Ravin and Rimini Street related to its business model, including whether or not Rimini Street has relied on copies of customers' licensed Oracle software to provide software support, and certain related documents. To the extent that additional discovery becomes available, I will analyze that information and assess the impact, if any, on my opinions at that time [See Plaintiffs' Notice of Motion and Motion to Compel Non-Party Seth Ravin to Answer Deposition Questions, and to Compel Non-Party Rimini Street, Inc. to Produce Documents in Response to Oracle's Subpoena, August 19, 2009; Plaintiffs' Reply Memorandum in Support of Motion to Compel Non-Party Seth Ravin to Answer Deposition Questions, and

the first quarter of 2006, Rimini Street launched its support services for Oracle's Siebel software products.⁶⁹⁶ Later that year, and after non-compete provisions of Mr. Ravin's agreement with SAP expired, Rimini Street began offering support services for Oracle's PeopleSoft (third quarter 2006) and J.D. Edwards (fourth quarter 2006) products.⁶⁹⁷ However, Rimini Street did not have the level of credibility and resources that TomorrowNow benefited from as a subsidiary of a major software company such as SAP. I understand Oracle infrequently lost customers to Rimini Street, and it was not viewed by Oracle to be a threat to its installed base.⁶⁹⁸

369. SAP also did not consider Rimini Street to be a viable alternative for customers seeking the level of support offered by Oracle and TomorrowNow. When discussing competition from Rimini Street, TomorrowNow account executives acknowledged, "From an acceptable risk perspective there are only two options: TomorrowNow and Oracle."⁶⁹⁹ Andrew Nelson, then TomorrowNow CEO, was quoted in an *IT Jungle* article, in which he downplayed the significance of Rimini Street saying, "while we're pleased to

to Compel Non-Party Rimini Street, Inc. to Produce Documents in Response to Oracle's Subpoena, September 24, 2009; Magistrate Judge Foley's Order, October 13, 2009.

⁶⁹⁶ Rimini Street press release "Rimini Street Announces Strong First Quarter Results for Siebel Support Service, Infrastructure & Staff Expansion and Service Expansion to Cover PeopleSoft Products," dated April 24, 2006.

⁶⁹⁷ Rimini Street press release "Rimini Street Announces Strong First Quarter Results for Siebel Support Service, Infrastructure & Staff Expansion and Service Expansion to Cover PeopleSoft Products," dated April 24, 2006; Rimini Street press release "Rimini Street Expands Industry-Leading Support Services to Cover JD Edwards Products," dated September 14, 2006; Email from Seth Ravin to James Mackey (SAP) Re: Personal & Confidential, dated January 22, 2006, RS-SR000006-009 (Ravin Exhibit 1317), at 008.

⁶⁹⁸ Deposition of Richard Cummins (Oracle Senior Director, Support Renewals for North America), April 21, 2009, pg. 55; Deposition of Nancy Lyskawa (Oracle Vice President of Support Marketing), May 6, 2009, pg. 211; Deposition of Juergen Rottler (Oracle Executive Vice President, Oracle Customer Services), May 13, 2009, pgs. 125-126 and 188-189.

⁶⁹⁹ Email from Spencer Phillips to John Tunney Re: TomorrowNow follow-up information, dated April 17, 2007, TN-OR04489264-270, at 264.

see other's get into the [third-party support] market, we're seeing customer short-listing to Oracle and TomorrowNow. We think we're the only two."⁷⁰⁰

370. Some of the customers that cancelled their Oracle support in favor of TomorrowNow's services have since gone to other third party vendors, including Rimini Street, for support of their PeopleSoft, J.D. Edwards and/or Siebel products.⁷⁰¹ This does not necessarily indicate that these customers would have left Oracle regardless of Defendants' alleged misconduct. At the time of the acquisition of TomorrowNow by SAP, only 1% of support customers risked third party support.⁷⁰² The acquired PeopleSoft customers who stayed with Oracle reported increased satisfaction and there is no reason to believe that the lost customers, if they had stayed, would not have been likewise satisfied.⁷⁰³ Oracle Senior Executives, licensing sales and support renewal personnel have testified that once a customer is lost it is very difficult to get them to return.⁷⁰⁴ In addition, former TomorrowNow customers have explained that once their support expenses have been reduced (i.e., paying significantly less to TomorrowNow), it is difficult in a subsequent year to raise the budget back to previous levels (i.e., to return to Oracle and pay a higher

⁷⁰⁰ "TomorrowNow Expanding Third-party maintenance Business," *IT Jungle*, November 27, 2006.

⁷⁰¹ Seth Ravin identified 81 Rimini Street customers (31 of which were publicly disclosed as Rimini Street customers) that were previously customers of TomorrowNow [Deposition of Seth Ravin (Founder and CEO of Rimini Street and Co-Founder of TomorrowNow), May 21, 2009, pgs. 252-257 and Exhibit 1327]. See also, "TomorrowNow Operations Wind Down Final Report," TN-OR03523871-924 (Brandt Exhibit 535), at 903.

⁷⁰² SAP Email from Arlen Shenkman to Shai Agassi Re: Hexaware and TomorrowNow acquisition possibilities, SAP-OR 00091570-72 (Shenkman Exhibit 209), at 570.

⁷⁰³ Deposition of Juergen Rottler (Oracle Executive Vice President, Customer Services), May 13, 2009, pg. 56-57; Oracle Presentation: "Business Review – Oracle Support, On Demand, Education." ORCL 00266389-445 (Rottler Exhibit 442), at 416.

⁷⁰⁴ See, e.g., Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 224-225; Deposition of Richard Cummins (Oracle Senior Director, Support Renewals for North America), April 21, 2009, pg. 95; Deposition of Charles Phillips (Oracle Co-President and Executive Board Member), April 17, 2009, pgs. 146-147.

amount for support and back support for the years during which it was serviced by TomorrowNow).⁷⁰⁵ As Oracle has experienced, once a customer has been dislodged from Oracle by TomorrowNow, it can result in a permanent revenue loss to Oracle.

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⁷⁰⁵ Deposition of Jeffrey O'Donnell (Lexmark Commodity Manager), September 15, 2009, pg. 90; Deposition of Daniel Jerome (Electrolux Head of IT Operations for North America), October 7, 2009, pgs. 130-132; Deposition of Tracy Hallenberger (Baker Botts Chief Knowledge Officer), November 18, 2009, pg. 65.

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440. SAP's TomorrowNow support offering served as an enabler for SAP to win more customers from Oracle. SAP did not have a comparable offering (to provide support service to Oracle's customer base) either before it acquired or after it shutdown TomorrowNow's operations.⁸¹⁸ Through its operation of TomorrowNow's alleged business model, Defendants have benefited financially from the sales of other SAP products and services to certain of the Relevant TomorrowNow Customers.

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⁸¹⁸ Deposition of Keith Block (Oracle Executive Vice President of Sales and Consulting in North America), September 17, 2009, pgs. 238-240.