

# EXHIBIT 3

---

***Oracle USA, Inc., et al***

***v.***

***SAP AG, et al***

---

**Stephen K. Clarke**  
Expert Report

May 7, 2010

TEXT REMOVED - NOT RELEVANT TO MOTION

## 10. Causation - Disgorgement

I understand that Oracle may recover lost profits suffered as a result of the alleged infringement (“Lost Profits”) and any profits of Defendants attributable to the alleged infringement that are not taken into account in computing lost profits (“Disgorgement”). In this case, that means Oracle must prove that an Oracle customer terminated Oracle support services and *as a result of the Alleged Actions* (a) contracted for support with TomorrowNow, or (b) contracted for support with TomorrowNow and contracted with SAP for products or services.

Mr. Meyer did not properly analyze the reasons a customer terminated support at Oracle.<sup>1016</sup> I determined, at the outset, however, that I needed to do so. Accordingly, I analyzed millions of pages of produced documents<sup>1017</sup> using sophisticated search techniques<sup>1018</sup> to identify relevant documents. When I identified a document that explained why the customer made the decision to terminate Oracle support and contract for support or applications from one or both of the Defendants, I extracted from it the pertinent details and included those details in a database.<sup>1019</sup> For those customers on the List of 86, I reviewed contracts in conjunction with other available sources to substantiate the documentation reviewed during the course of my analysis. I then used

---

<sup>1016</sup> Mr. Meyer’s analysis of the reasons a customer terminated Oracle support is inadequate. He excluded 17 customers from his summation of accused revenues on Schedule 42.SU, and explained that “...those [were] customers for which evidence indicates that they may have decided to switch to SAP before engaging TomorrowNow...” (Meyer Report, page 274, paragraph 446). While Mr. Meyer properly excluded the 17 customers because they purchased software for reasons unrelated to the Alleged Actions, he failed to exclude numerous other customers for which there was adequate evidence that their termination and buying decisions were unrelated to the Alleged Actions.

<sup>1017</sup> Including email traffic, correspondence, contracts, spreadsheets and reports produced by the parties, as quantified in total in Appendix C-2.

<sup>1018</sup> Appendix I-1 contains a list of search terms applied to identify documents relating to the 358 TomorrowNow customers and the List of 86 SAP customers. Appendix I-2 contains a list of search terms applied to identify documents relating to: the customers’ relationship with Oracle; the customers’ relationship with TomorrowNow; and the reasons customers may have purchased products or services at SAP.

<sup>1019</sup> The database has been provided as Bates range SAP-SKG-118165 for the customers I excluded for disgorgement and/or lost profits. SAP-SKC-118166 contains the database entries for all customers I did not exclude from the damage analysis.

the information to identify why a customer acted as it did<sup>1020</sup> and grouped the reasons into “Exclusion Pools” which I explain below.

The evidence I gathered shows there were numerous reasons a customer chose to terminate Oracle support and contract with Defendant(s) and most of the reasons led me to conclude that the customer should be excluded from the damage analysis either for disgorgement damages, lost profits damages, or both (I deal with lost profits later in this report) because their decisions were not the result of the Alleged Actions. Some of the exclusion criteria are general and relate to the entire list of accused customers and some are customer-specific.

### 10.1. General Criteria – SAP Disgorgement

I analyzed the facts on a customer by customer<sup>1021</sup> basis using the same documentation Mr. Meyer had available. Using information from Mr. Sommer for background purposes,<sup>1022</sup> I analyzed millions of pages of documents produced by the parties to this action, and identified the reasons a customer terminated Oracle support and chose to buy products or services from the Defendants and noted their reason(s).

My analysis allowed me to determine which customers resulted in SAP making sales they would have made in any event (*i.e., sales not generated as a result of the Alleged Actions*) and which should, therefore, be excluded from the damages calculation.

I discuss in more detail below my rationale for the customer-by-customer analysis.

TEXT REMOVED - NOT RELEVANT TO MOTION

---

<sup>1020</sup> I also considered such factors as the products for which the customer cancelled support at Oracle (Appendix J), the time period the customer was supported at TomorrowNow (Appendix K-1), and the products supported at TomorrowNow (Appendix L).

<sup>1021</sup> Those customers which have a parent/subsidiary relationship are counted as one customer; 86 – 17 = 69.

<sup>1022</sup> I discussed the IT industry in general and the ERP industry in particular with Mr. Sommer and used the information I learned in those discussions to develop or confirm my understanding of customer behavior in the ERP business.

<sup>1023</sup> Although Mr. Meyer states that “It is my opinion, a portion of these revenues have been earned, and or enhanced, by the Defendants’ alleged conduct” (Meyer Report, page 274, paragraph 445), the only analysis Mr. Meyer performed was to exclude 17 customers “that may have decided to switch to SAP before engaging TomorrowNow” (Meyer Report, page 274, page 446). Note: Allianz Life Insurance Company of North America and Allianz SE are considered one customer due to the parent/subsidiary relationship. Therefore, his effective assumption was that the revenues and profits generated from the non-excluded customers had a sufficient connection (nexus) to the alleged infringement that he could accuse all such revenues/profits.

TEXT REMOVED - NOT RELEVANT TO MOTION

## 11. Causation – Lost Profits

As I stated previously, Oracle must prove it suffered losses because of the Alleged Actions. In this case, that burden involves proving that an Oracle customer terminated Oracle support services and contracted for support with TomorrowNow *as a result of the Alleged Actions*.<sup>1034</sup>

Mr. Meyer did not properly analyze the reasons a customer terminated support at Oracle. I determined, at the outset, however, that I needed to do so. Accordingly, I analyzed millions of pages of produced documents<sup>1035</sup> using sophisticated search techniques<sup>1036</sup> to identify relevant documents. When I identified a document that explained why the customer made the decision to terminate Oracle support and contract for support from TomorrowNow, I extracted from it the

---

<sup>1034</sup> The Court's Order precluded lost profits claims related to lost up-sell and lost cross-sell opportunities. Therefore Oracle's lost profits can only relate to lost support revenues; which means, in turn, that only TomorrowNow's revenues are at issue for disgorgement.

<sup>1035</sup> Including email traffic, correspondence, contracts, spreadsheets and reports produced by the parties, as quantified in total in Appendix C-2.

<sup>1036</sup> Appendix I-1 contains a list of search terms applied to identify documents relating to the 358 customers at issue. Appendix I-2 contains a list of search terms applied to identify documents relating to: the customers' relationship with Oracle; the customers' relationship with TomorrowNow; and the reasons customers may have purchased software at SAP.

pertinent details and included those details in a database.<sup>1037</sup><sup>1038</sup> I grouped the reasons in “Exclusion Pools” which I explain below.

There were numerous reasons a customer chose to terminate Oracle support and contract with TomorrowNow and many of the reasons led me to conclude that the customer should be excluded from the lost profits damages analysis because the termination was not caused by the Alleged Actions. Some of the reasons a customer terminated support at Oracle are general and relate to the entire list of accused customers and some are customer-specific.

### **11.1. General Criteria – Lost Profits**

I analyzed the facts on a customer by customer bases using the same documentation Mr. Meyer had available. Using information from Mr. Sommer for background purposes,<sup>1039</sup> I analyzed millions of pages of documents produced by the parties to this action, and identified the reasons a customer terminated Oracle support and contract with TomorrowNow and noted their reason(s).

My analysis allowed me to determine which customers would have left Oracle regardless of the Alleged Actions and which should, therefore, be excluded from the damages calculation.

I discuss in more detail below my rationale for the customer-by-customer analysis.

TEXT REMOVED - NOT RELEVANT TO MOTION

---

<sup>1037</sup> The database has been provided as SAP-SKC-118165 for the customers I excluded for disgorgement and/or lost profits. SAP-SKC-118166 contains the database entries for all customers I did not exclude from the damage analysis.

<sup>1038</sup> Removed Footnote.

<sup>1039</sup> I discussed the IT industry in general and the ERP industry in particular with Mr. Sommer and used the information I learned in those discussions to develop or confirm my understanding of customer behavior in the ERP business.