EXHIBIT 1

Oracle USA, Inc., et al

v.

SAP AG, et al

Stephen K. Clarke
Expert Report

May 7, 2010

3. Quantification of "Value of Use" – PeopleSoft and Siebel

The Meyer Report includes an analysis of the Value of Use the Defendants allegedly made of the Subject IP ("Value of Use") to support PeopleSoft and Siebel users. The two sections of the report that cover PeopleSoft and Siebel are largely redundant, although there are a number of items unique to each section. Because of the largely redundant content, I discuss both sections together and make references specifically to PeopleSoft or Siebel where appropriate.

I address Mr. Meyer's "quantification" of the Value of Use in detail below.

3.1. "Lost Profits" versus "Value of Use"

Mr. Meyer provides his understanding of the law[104] relating to damages claims in copyright cases and provides an overview to commence his calculation of damages which states,[105] "I understand that courts, including the Ninth Circuit, have held that the actual damages for the defendant's 'value of use' may be determined on the basis of a fair market value license fee paid *for use of the plaintiff's work*." [emphasis added]. I recognize that as of this time Mr. Meyer is allowed by a ruling[106] of the Court to present a Value of Use approach in an attempt to quantify Oracle's actual damages. He develops the Value of Use in part by assessing the outcome of a hypothetical negotiation ("Negotiation") at the time of SAP's acquisition of TomorrowNow in the form of a reasonable royalty, as well as considering market, income and cost approaches to intellectual property valuation.

However, Mr. Meyer's damages analysis makes no mention of the specific preclusion of certain elements of damages as outlined in the Court's Order: The preclusions are relevant to Mr. Meyer's analysis because they establish boundaries within which to calculate damages. Although the Court may determine that Mr. Meyer has introduced the precluded damages evidence through the "back door," that determination may not be known for some time. Accordingly, I must address Mr. Meyer's Value of Use as a complete body of work including[107] the elements of damages the Court precluded.

As will also become apparent in my analysis of his report, Mr. Meyer's application of a reasonable royalty fails to properly quantify the Value of Use. However, it should not even be necessary to compute a Value of Use. Oracle's lost profits may be determined with precision, so there is no need to do a Value of Use analysis. Because the profits Oracle may have lost as a result of the Alleged Actions can be determined with a high degree of precision, so there is no need to *estimate* a reasonable royalty.

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104 Meyer Report, page 64, paragraph 91.
105 Meyer Report, page 65, paragraph 92.
106 Order Denying Defendants' Motion For Partial Summary Judgment, Judge Phyllis Hamilton, dated January 28th, 2010.
107 Meyer Report, page 63, paragraph 89. Mr. Meyer also references "pricing pressure" but never develops his thought any further than merely mentioning it. It is unclear why Mr. Meyer includes reference to pricing pressure but because it refers to losses Oracle may have realized due to price reductions the reference should be excluded by the Court's Order.

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

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

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

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

8. Clarke Georgia-Pacific Analysis

Section 504(b) of the Copyright Act provides that:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.[358]

I understand that the Court in this case has thus far indicated that a reasonable royalty ("Reasonable Royalty") for the actual use Defendants made of the Subject IP may be an appropriate damage calculation methodology.[359]

As I have stated, the facts in this case suggest that in reality the parties would not have negotiated a license covering the activities involved in the Alleged Actions.[360] In light of the

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

[358] United States. U.S. Copyright Office - Copyright Law: Chapter 5. <http://www.copyright.gov/title17/92chap5.html>.

[359] Order Denying Defendants' Motion for Partial Summary Judgment dated January 28, 2010.

[360] "I think it would be so prohibitively – it would be so expensive that…I don't know if they [SAP] would do it, but – it would be a very expensive license." Larry Ellison deposition dated May 5, 2009, page 75. Ms.

current state of the Court's guidance on this issue, however, I will assume that some form of a reasonable royalty may be an appropriate means of measuring the Value of Use Defendants actually made of the Subject IP.

A *reasonable* royalty in this case would be expressed as a percentage rate tied to future[361] revenues or profits (for example, X% of gross sales revenues or Y% of profits) gained from relevant customers (i.e., customers the Defendants would not have gained anyway). A royalty expressed as a fixed fee payable in advance, such as that asserted by Mr. Meyer, would only be applied where it was the industry norm for licenses to be structured in that manner and it would produce a reasonable result for both parties. In addition, license deals at fixed fees in advance only make sense where the amounts paid are relatively small such that accounting for the future royalties (with attendant audit and periodic payment requirements, etc.) is not practical or desirable. There are other ways to structure large scale license transactions including: straight royalty percentage rate applied to gross revenues, gross margin or net profits; fixed payments set at a per unit rate (i.e., $Z per unit sold); annual minimum/maximum payments with per unit or percentage royalty rates payable on actual sales revenues or profits; or combinations of such arrangements. However, these alternative methods would be less appropriate to the facts of this case than a percentage rate applied to revenues or profit.

SAP would be at the negotiating table in its role as the owner and manager of its subsidiary, TomorrowNow. However, SAP would not be a party to the License because only TomorrowNow needed a license to cover its support activities. Accordingly, any references to SAP in my consideration of the Reasonable Royalty are to its role as negotiator rather than as Licensee (unless the sense dictates otherwise). As a practical matter, the License will include payments by TomorrowNow to cover payments due for SAP's use of the Subject IP. I assume SAP would fund its subsidiary to the extent necessary to cover the Reasonable Royalty arising from both Defendants' use of the Subject IP.

There was almost no chance SAP and Oracle would have negotiated a license of any kind for the Subject IP in the real world. As prudent negotiators, it would not be reasonable for the parties to the Negotiation to agree on a fixed royalty in advance. SAP would not have wanted to overpay for the License and a fixed fee up front would have made that more likely; and Oracle would not want to have been underpaid for the License, and a fixed fee in advance would have made that more likely. Accordingly, the parties would both have had an interest in negotiating a royalty rate set as a percentage of applicable revenues or profits. There is precedent for SAP and Oracle in a royalty negotiation. In 1994, they negotiated a license agreement for SAP's resale of the

Catz suggested the "gigantic" number SAP would have to offer for a license should exceed the 12.6 billion dollars Oracle paid for PeopleSoft, plus another hundred million in fees, plus expenses resulting from the lawsuit brought by the U.S. Government. Safra Catz deposition dated March 27, 2009, page 159. Later, in declarations, both Mr. Ellison and Ms. Catz faulted unclear questioning by the lawyers for their previous answers and allowed that a license could have been negotiated. Mr. Ellison went on to note, "I do not believe a license in excess of $1 billion dollars would have been prohibitively expensive for SAP." Declaration of Larry Ellison in Support of Oracle's Opposition to Defendant's Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009, pages 1-3. Declaration of Safra Catz in Support of Oracle's Opposition to Defendant's Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009, pages 1-2.

361 "Future" is used in the sense that the sales/profits take place *after* the Negotiation.

Oracle database and that royalty was set at a percentage of the product price with a variable that depended on the amount of product sold.[362]

A Reasonable Royalty in this case is for the License,[363] which would be concluded in the Negotiation[364] and it must be reasonable to the parties. Therefore, I am assuming a forced license that balances the potential benefits and risks to the parties. As I discussed earlier, it is unreasonable to assume that SAP would have entered into a fully paid-up license with Oracle at the time of the Negotiation. The only license that would have made any rational business sense to both parties is one based on a percentage of earned revenues or profits arising from relevant sales.

I begin my analysis with an overview of TomorrowNow's support model and then I consider each Georgia-Pacific factor in turn. I discuss my conclusion of a royalty-based license in Georgia-Pacific Factor 15.

During the hypothetical license period, TomorrowNow provided the following categories of support programs, "Extended Support," "Critical Support" and 24x7 Call Support. Extended support only applied to the PeopleSoft lines.

The major characteristics of Extended Support were:

1. Marketed from 2002 to mid-2004[365]

2. Provided some customers with tax and regulatory updates

3. Generally for retired PeopleSoft releases

4. Most customers maintained support with PeopleSoft

5. Generally treated as supplemental to PeopleSoft support

The Extended Support model provided tax and regulatory updates to customers on PeopleSoft Human Resources versions 7.0, 7.5 and 7.6,[366] and updates to Financial's to a lesser extent.

Based on testimony by Shelley Nelson, PeopleSoft referred customers to TomorrowNow.[367] At Mr. Ravin's deposition, one exhibit (Ex 1325) was produced that shows PeopleSoft referred customers to TomorrowNow.[368] Because TomorrowNow's Extended Support model provided

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362 "Oracle Reseller Agreement" with SAP. August 1, 1994; ORCL0070432-365, at -333.

363 I defined the License earlier in this report. It is a license designed to compensate Oracle for the actual use Defendants made of the Subject IP assuming non-exclusivity, limited duration, limited access to the IP, and limited territory.

364 Also defined previously.

365 There is no precise date upon which TomorrowNow stopped providing Extended Support and started to provide Critical Support. The evidence suggests the change was more like a process than an event. For purposes of this report, where required, I am going to assume Critical Support began in mid-2004.

366 Pursuant to the TomorrowNow customer contracts.

367 Shelley Nelson deposition dated December 6, 2007, pages 132-133.

368 Email dated April 21, 2004 from Terry Wagner at Lockheed Martin to Gregory Stevenson at PeopleSoft. "Lockheed Martin has contacted the supplier you recommended for continued tax update support of version

supplemental, non-threatening support, there would be significant downward pressure on the royalty rate.

The major characteristics of Critical Support included:

1. Mid-2004 roll-out

2. Support for J.D.Edwards announced in December 2004; first J.D.Edwards customer January 1, 2005[369]

3. Support for Siebel announced in May 2006, first Siebel customer September 29, 2006[370]

4. Service included tax/regulatory updates, patches, fixes

5. Tax/regulatory updates "developed from scratch" (not retrofitted)[371]

6. Replacement for PeopleSoft, J.D.Edwards and Siebel support generally[372]

7. Provide customers with the ability to support their current version for 10 years

8. Allow for extension of lifespan for existing products[373]

9. "30 minute response time, 24x7x365"[374]

TomorrowNow started providing Critical Support to its customers as a result of customer requests:

1. In late 2003, the Municipality of Anchorage approached TomorrowNow: "This customer came to us and said we can't pay maintenance anymore, our budget doesn't allow us, can you help us, can you do this for us."[375]

2. In early 2004, another customer approached TomorrowNow with a similar request.[376]

7.5. In order for Lockheed Martin to engage TomorrowNow for continued support of V7.5 tax updates we need to have PeopleSoft's authorization to provide the CD's that they are requesting." Ravin Exhibit 1325. TN-OR00800751-753, at -752.

369 Koontz-Wagner's support period began January 1, 2005 per Support Services Agreement dated January 20, 2005; TN-OR00007459-70.

370 MKS, Inc.'s support period began September 29, 2006 per Support Services Agreement dated September 29, 2006; TN-OR00000556-562.

371 Shelley Nelson deposition dated April 18, 2008, pages 279-280.

372 Most Critical Support customers cancelled PeopleSoft/J.D.Edwards/Siebel support.

373 TomorrowNow PowerPoint Presentation titled, "Maintenance and Support for Enterprise Software Applications." December 17, 2004; TN-OR00335417-443, at -429.

374 TomorrowNow PowerPoint Presentation titled, "Maintenance and Support for Enterprise Software Applications." December 17, 2004; TN-OR00335417-443, at -425.

375 Shelley Nelson deposition dated April 18, 2008, page 281.

3. In June 2004, "we began to, or the, the sales team began to identify it as a service offering versus just having clients come to us and say can you do this for us."[377]

4. By mid-2005, most of TomorrowNow's customers were Critical Support customers.[378]

8.1. Georgia-Pacific Factor No. 1: Royalties Received by Licensor

"The royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty."

"An established royalty exists where the patent owner has licensed the infringed property to others…"[379] Plaintiffs provided various software license agreements related to PeopleSoft: software alliance program agreements; service alliance program agreements; consulting partner alliance program agreements; platform alliance program master agreements; an outsourcer alliance agreement; a value added remarketer agreement; end user licenses; and other agreements.

Plaintiffs also provided various software license agreements related to J.D.Edwards, including: alliance program agreements; consulting alliance program agreements; reseller and value added reseller agreements; and end-user license agreements. The license agreements are summarized in Appendix H and analyzed below:

8.1.1. PeopleSoft: Software Alliance Program Agreements

As shown in Appendix H, Plaintiffs provided Software Alliance Program agreements with eight alliance partners or prospective partners.[380] The Software Alliance Program Agreements document the terms whereby the alliance partners can use PeopleSoft software to develop and maintain an interface between their software and PeopleSoft software. The eight Software Alliance Program Agreements and terms of interest within those agreements are listed below:[381]

8.1.1.1 Ariba Technologies, Inc.

Ariba Technologies, Inc. ("Ariba") entered into a Software Alliance Program Agreement with PeopleSoft with Partner Addendum on July 28, 1998,[382] a Software and Services Addendum dated August 5, 1998[383] and an Amendment dated October 12, 1998.[384] The agreement included the following terms:

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376 Shelley Nelson deposition dated April 18, 2008, page 282 (Note: Ms. Nelson did not name the second customer).

377 Shelley Nelson deposition dated April 18, 2008, page 282.

378 Shelley Nelson deposition dated April 18, 2008, pages 282-283.

379 *"Intellectual Property Infringement Damages"* by Russell L. Parr. 1993. PP. 11-12.

380 As defined in the agreements.

381 Capitalized terms are generally defined in the agreements.

382 "PeopleSoft Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Partner Addendum) July 28, 1998; ORCL19443-447.

383 "PeopleSoft Addendum to the Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Exhibits A-G). August 5, 1998; ORCL00019453-468.

384 "First Amendment to the Software Alliance Program Master Agreement between Ariba Technologies, Inc. and PeopleSoft, Inc." October 12, 1998; ORCL00019448-452.

1. "Nothing in this Agreement shall be construed as prohibiting or restricting either party from independently developing or acquiring and marketing materials, programs or software which are competitive with those of the other party or from entering into the same or similar agreements with others."[385]

   This term indicates that PeopleSoft was willing to enter into alliances with its competitors.

2. PeopleSoft shall…"[p]rovide Partner with access to the PeopleSoft Alliance Connection."[386]

3. Ariba shall… "pay PeopleSoft a non-refundable annual partner fee of ten thousand dollars ($10,000)."[387]

4. "'Software' means any or all portions of the then commercially available global version of the binary computer software programs, updates and enhancements thereto, (including corresponding source code, unless specifically excluded elsewhere in the Agreement)…"[388]

5. The August 1998 Software & Services Addendum provided that PeopleSoft agrees to provide software, technical support and related services to Partner under PeopleSoft's Software Alliance Software and Services Program,[389] and that the fees for these services are waived.[390]

   The software support services were described in more detail in Exhibit A to the Software and Services Addendum:

   > PeopleSoft will provide technical support for the PeopleSoft software licensed to Partner during the Term, including telephone support and software fixes to errors, pursuant to the Alliance Software Support Services Terms and Conditions attached hereto as Exhibit E. The PeopleSoft support hotline will handle general questions about using PeopleSoft software.[391]

   Exhibit E to the Software and Services Addendum provides:

   > PeopleSoft shall periodically issue to Partner technical and functional fixes to errors…

385 "PeopleSoft Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Partner Addendum). July 28, 1998; ORCL00019443-447, at -444.
386 "PeopleSoft Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Partner Addendum). July 28, 1998; ORCL00019443-447, at -446.
387 "PeopleSoft Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Partner Addendum) August 5, 1998; ORCL00019443-447, at -446-447.
388 "PeopleSoft Software and Services Addendum to the Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Exhibits A-G) August 5, 1998; ORCL00019453-468, at -456.
389 "PeopleSoft Software and Services Addendum to the Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Exhibits A-G) August 5, 1998; ORCL00019453-468, at -453.
390 "PeopleSoft Software and Services Addendum to the Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Exhibits A-G) August 5, 1998; ORCL00019453-468, at -455.
391 "PeopleSoft Software and Services Addendum to the Software Alliance Program Master Agreement with Ariba Technologies, Inc." (with Exhibits A-G) August 5, 1998; ORCL00019453-468, at -454.

operation. Staff competencies are maintained across all technical and functional disciplines and employees are physically located within the US, Canada, Europe, and India. This allows CMS to integrate best-in-class capabilities across the entire Oracle value chain to provide a growing base of over 100 customers with highly efficient, economical managed services solutions on a "24/7" basis.

CMS provides the industry's most dynamic set of services designed specifically for Higher Education, Commercial, and Public Sector clients of all sizes, in all industries, located nationwide. Each client is unique and receives one or many CMS services packaged to meet their needs. Offerings include the following:

> **CMS Host** provides world-class hosting across the entire suite of oracle E-Business Suite and PeopleSoft Enterprise applications. Hosting delivers enterprise-class solutions to our customers, incorporating robust data center facilities, high-performance and fully redundant computing platforms, security protocols, advanced systems management solutions, best-in-class application management, regular environment and technology upgrades, and a "24/7" Help Desk dedicated to ongoing system operational and support needs. Each area has been carefully architected into a highly scalable hosting solution that meets the needs of both large and small customers through a no-nonsense service-level agreement that is surpassed by none.
>
> **CMS Manage** offerings have been designed to comprehensively meet the outsourcing needs of non-hosted customers. This outsourcing service provides all the application support and maintenance benefits of the CMS Host service offering while permitting the customer to retain ownership, operation, and physical responsibility of the underlying computing assets. Depending on the client's specific requirements, CMS can also provide support solutions for the E-Business or PeopleSoft application infrastructure. Clients have a choice of on-site and/or remote support from a dedicated team of Oracle Certified personnel.
>
> **CMS Maintain** provides Tax and Regulatory updates, delivered on a CD, in conjunction with remedial "break/fix" and application help desk support. When bundled, these CMS Maintain services provide both supported and unsupported clients with options and flexibility otherwise not available. CMS Maintain delivers services to help bridge the support gap as a vendor who is committed to keeping clients in the Oracle ecosystem.
>
> **CMS Lab** augments and/or replaces in-house supported upgrades and implementations. The CMS Lab provides an offsite, third-party option for completing PeopleSoft application upgrades and hosting implementations. Customers leverage CMS' instant infrastructure and scalable services to strategically focus internal resources on core activities, leaving the contextual upgrade and implementation hosting responsibilities to CMS.

> **CMS Develop** occurs as a normal function of daily applications support, during implementations, projects and upgrades. CMS Develop is the ideal solution for clients requiring point-in-time development support over an extended period of time.[769]

The firm "offers 'Support in an Unsupported World' as a true service offering, not as an exception to appease clients on a 'one-off' basis."[770] CedarCrestone offers two types of support services for clients who need to remain legally compliant with current tax and regulatory updates: 1) RetroSupport is for clients with PeopleSoft support agreements but remaining on an older, unsupported version of the software; 2) Extended support is for clients on any version of PeopleSoft, but who do not maintain a PeopleSoft support agreement. In its service brochure, CedarCrestone provides a detailed description of its retro support and extended support methodologies.[771]

To the extent that a customer's ERP solution is relatively stable (requiring minimal break/fix support), and that tax and regulatory updates are based on publicly available information requiring well known algorithms for implementation,[772] the CedarCrestone approach to support may be a non-infringing alternative for customer support, and conceivably could be offered on any release of PeopleSoft software.

CedarCrestone won deals against TomorrowNow[773] and, after TomorrowNow wound down its operations, numerous companies went to CedarCrestone, including Baker Botts, BASF, Borders Group, Circuit City, George Weston Bakeries, Interpublic Group, Longaberger, Markel, National Surgical Hospitals, Parkview Health, Standard Register, Syngenta, Telapex, University of Massachusetts, and University of New Orleans.[774]

Oracle also lost support business directly to CedarCrestone. Oracle lost $121,794 in revenue from the City of Ontario, a PeopleSoft Enterprise customer, to CedarCrestone in approximately June 2006. A note from the customer states, "We are looking to lock in to our current versions. At this time, I have direction from our Administrative Services director to not upgrade any of our PeopleSoft applications. To that end, we will be looking to not be under maintenance with Oracle but instead contract with Cedar Crestone [sic] for ongoing support."[775]

CedarCrestone appears to have provided such similar support services to TomorrowNow that customers evaluated the competitors against each other. For example, A.O. Smith evaluated four third-party maintenance providers before selecting TomorrowNow. One of the vendors was CedarCrestone. A document provided by A.O. Smith states, "There are at least four different vendors who are willing to provide core support services for our PeopleSoft applications. Core support includes items like patches and fixes, regulatory, governmental and tax upgrades. They

[769] "CedarCrestone Managed Services." CedarCrestone.com.
[770] "PeopleSoft Application Maintenance Services." AOSMITH000491-511, at -494.
[771] "PeopleSoft Application Maintenance Services." AOSMITH000491-511, at -496-497.
[772] Industry research reports suggest that tax and regulatory updates can legitimately be provided by third-party firms. See for example, Sweeney, Judy and Marc-A. Meunier. "PeopleSoft HR- What Now?" AMR Research. March 2005.
[773] Andrew Nelson deposition, April 29, 2009, page 290-291.
[774] Statement of Rick Riordan, Executive Vice-President-Shared Services of CedarCrestone. October 30, 2009.
[775] "3rd party risk analysis, 1/25/08 [REDACTED];" ORCL00079745.

8.14. Georgia-Pacific Factor No. 14: Opinion Testimony

"The opinion testimony of qualified experts."

My discussion of Oracle's expert report by Mr. Meyer and my own analysis of the Georgia-Pacific factors 1 through 14 are contained earlier in this report.

8.15. Georgia-Pacific Factor No. 15: Hypothetical License Amount

"The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee-who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention-would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license."

Georgia-Pacific is a patent case. Accordingly, it is possible to use the 15 factors only if they provide a reasonable framework within which to value the *actual use* of the Subject IP. I am going to assume that the 15 factors do provide a framework that would be helpful in determining the Value of Use in this case. However, because the Georgia-Pacific analysis is not necessarily applicable to a copyright matter, the Court will have to determine whether to apply a "forced" license to the claims in this case.

The ultimate arrangement must represent a *business* proposition and it must be fair to both sides and allow TomorrowNow and SAP to make a "reasonable profit."

8.15.1. Licensing Rationale

An intellectual property owner would generally only grant a license to use its intellectual property if the license allowed the licensor to generate profits it could not otherwise have made. Conversely, a potential licensee would only be prepared to accept a license that allowed it to make a reasonable return on its investment.

8.15.2. Negotiation

A hypothetical negotiation means going back in time and considering factors such as: market size; sales potential; profit potential; industry competition; required investment; economic conditions of the relevant industry and alternative methods of achieving the same purpose.[984]

8.15.3. Probable Losses

The evidence in this case indicates that Oracle would have lost many of the customers it lost to TomorrowNow even if TomorrowNow had not existed. All of the customers Oracle identified as

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[984] Parr, Russell L. *Intellectual Property Infringement Damages: A Litigation Support Handbook*. New York, NY; John Wiley & Sons, Inc. 1993. Page 13. TomorrowNow PowerPoint Presentation titled, "Maintenance and Support for Enterprise Software Applications." December 17, 2004; TN-OR00335417-443, at -421.

"At-Risk" were probable losses for Oracle in the "but-for" world; they may have gone to another third-party vendor (this is especially true after 2004) or they may have self supported but their place on the At-Risk report shows they were all in danger of leaving Oracle.

As I showed previously, of the at-risk customers Oracle identified, fewer than half went to TomorrowNow and if TomorrowNow had not existed it is likely these customers would have left Oracle anyway.

8.15.4. Economic Causation

I understand the plaintiff must prove that but-for the Alleged Actions, it would have earned the profits it is claiming were lost. Leaving aside for the moment whether use of a reasonable royalty to calculate Value of Use or lost profits in a copyright case is appropriate methodology, Oracle relies on a prima facie argument without support that a group of customers that went to TomorrowNow for whatever reason would have stayed at Oracle in the but-for world. I address economic causation in detail later in this report.

8.15.5. TomorrowNow Royalty Rate

The royalty rates Oracle would want would be as close to the support fees their customers paid as possible (recognizing that Oracle would save the expense associated with providing the support and may be able to keep a customer on its software that they might otherwise lose to another ERP vendor). However, a royalty set at a rate approaching 50% of the Oracle support price would make it impossible for TomorrowNow to stay in business. (The 50% base rate TomorrowNow charged for support plus a royalty equal to 50% of Oracle's price would be 100% of Oracle's price and would not be a viable option.) On the other hand, Factor 15 requires that TomorrowNow be able to price support at a rate its potential customers would find tempting and still give it a *chance* to make a profit. Assuming TomorrowNow could have generated any business with a price higher than it actually charged, the royalty would still have to be significantly less than the Oracle support price.

To complicate matters, TomorrowNow never made a profit overall so in addition to requiring a low royalty rate, they needed to increase revenues (or reduce expenses) as well. The highest possible royalty structure that may have worked would be a royalty equal to 25% of Oracle's overall pricing, which would yield a TomorrowNow support price approximately equal to 75% of the Oracle pricing.[985] While it is unlikely this price could be successfully marketed by TomorrowNow (i.e., their customers and potential customers would have been prepared to pay this higher price) it represents the maximum royalty the market and TomorrowNow could possibly bear.[986] For the purposes of the Negotiation, I am going to assume that the TomorrowNow price could be increased to about 75% of Oracle's support price (i.e., a 50% increase in TomorrowNow's pricing) without affecting the volume of sales made by TomorrowNow. The 75% pricing policy is the absolute maximum price TomorrowNow could have charged and remained within the boundaries of feasibility. I also assume that in the real

[985] TomorrowNow's pricing structure was not a straight 50% of the PeopleSoft price across the board but for the purposes of this section it is a fair assumption.

[986] I am assuming TomorrowNow would have to maintain its former price structure plus the royalty to Oracle. Therefore, it could not implement a price increase to cover its losses.

world if the price policy were to increase to more than 75% of the Oracle price, the sales made by TomorrowNow would have been reduced to zero. My assumption that the demand curve for TomorrowNow pricing is flat between 50% and 75% of the Oracle price favors Oracle.

I do not assume for the purposes of my analysis that TomorrowNow must be given a royalty rate that *guaranteed* it making a profit; TomorrowNow was unable to make a profit applying the 50% price policy so it is most unlikely it could have made a profit with prices 50% higher. There is nothing in the law (that I am aware of) other than the wording of Georgia-Pacific Factor 15 that guarantees profits[987] for the defendant. However, it would be inappropriate to assume a royalty so high that it would drive the company out of business. Accordingly, the resulting royalty rate must have a balance between compensating Oracle and not putting TomorrowNow out of business. I am not aware of any enhancement TomorrowNow could have used to boost their ability to generate support sales at a price 50% higher than they actually charged.

8.15.6. TomorrowNow Royalty

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

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

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

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

987 In this case, because TomorrowNow could not make a profit using the 50% of Oracle price metric, it is probably impossible to set a royalty rate that would result in profits. Any royalty would have to be either added to the support price or absorbed in the existing price. In the first case, sales would likely decline and in the second case the losses would increase.

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

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

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

991 As discussed later in my report.

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

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

8.15.7. SAP "Royalty"

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

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

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

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

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

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

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

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

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

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

9. TomorrowNow's Use of Oracle's Database Software

Shelley Nelson explained the use TomorrowNow made of Oracle's database software:

> Q. How did TomorrowNow use the Oracle database software that it did use as part of supporting customers?
>
> A. It was kind of the database server, so to speak, for those customers who had Oracle to run their PeopleSoft application. So, the – the Oracle database would act as the server to house PeopleSoft demo environments for customers who ran PeopleSoft with Oracle.
>
> Q. Why was it necessary to have Oracle database software acting as the – as the server for those customers who had Oracle database underneath their environments?
>
> A. It – in certain instances, the PeopleSoft software might behave differently, depending on what database back-end is being used to house it. And, so, it's preferred that – that an install is done on that database version. So, you're – you're working in the same – or a similar environment with the client's demo environment.[997]

SAP and Oracle entered into a license agreement for SAP to act as a reseller of Oracle database software. Mr. Plattner stated that the fee SAP negotiated for the database from Oracle "…was decided by market price, and not by IP, or value or whatever. It was decided by market price."[998] Similarly, a Negotiation for TomorrowNow's use of Oracle's database would be based on market price.

Mr. Meyer provides an extensive assessment of the Value of Use TomorrowNow made of Oracle's database software.[999] However, it is unclear why Mr. Meyer's analysis is so lengthy because the calculation is simple. The Oracle database is readily available at a known price to

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

any customer that wishes to use it. Because the price is known and well established in the marketplace, all Mr. Meyer needs to do to quantify the amount TomorrowNow should have paid for the allegedly inappropriate use of the Oracle database is multiply the quantity used by the applicable price. However, Mr. Meyer did not make this calculation correctly.

Mr. Meyer is correct in his statement that the per processor[1000] price for the Oracle Database Enterprise Edition software was $40,000 for the license and $8,800 for support.[1001] Mr. Meyer then claims:

> The server with the majority of TomorrowNow local environments running on Oracle database was purchased in January 2005 and was a 4 processor Unix server with dual-cores, or effectively 8 processors, based upon which Oracle would price a license for 6 processors (Oracle applies a .75 processor factor to Unix processors, so 8 * .75 = 6 processors priced in the license)….Therefore, I have assumed that Oracle would require SAP to purchase no less than a license that covered each customer accessing Oracle database priced at 6 processers per license. A 6 processor Enterprise Edition Oracle database license would be priced at 6 processors times the license fee of $40,000 per customer, or $240,000 per customer, and an annual support fee of $8,800 times 6 processors, or $52,800 per year per customer.[1002]

Mr. Meyer applies the base license and support costs for the number of years each customer used the Oracle database, deducting 5% to account for any additional costs. He then claims that "counting only one environment per customer, at least 71 local environments were running Oracle database software on TomorrowNow's systems (both customer-specific and non-customer specific)."[1003] This calculation results in damages of $23.6 million.[1004]

Mr. Meyer's approach to computing these damages is incorrect. The Oracle database pricing does not work in the way that he suggests. Database licenses are purchased based on the server core processors on which they will be installed. The number of databases the licensed user (or environments) creates after the installation is irrelevant. I understand that TomorrowNow had the Oracle database software that was ultimately used to support its customers installed on servers with 27 processors as follows:[1005]

1000 The actual processor metric used to calculate the quantity is based on the number of cores multiplied by a processor factor to arrive at the licensing quantity. For example, a dual-core, quad-processor Intel server would consist of eight cores (4 * 2), which would be multiplied by a processor factor of 0.5. See Oracle E-Business Global Price List, September 1, 2006; "Oracle E-Business Global Price List." September 1, 2006; ORCL00704381-396, at -392 to arrive at a licensing quantity of four (8 * 0.5).

1001 Meyer Report, page 165, paragraph 252.

1002 Meyer Report, pages 166-167.

1003 Meyer Report, page 167, paragraph 254. Schedule 44.1.SU lists 69 customer-specific and two non-customer specific environments.

1004 Meyer Report, page 169, table 9.

1005 Based on an email from Josh Fuchs at Jones Day to Nitin Jindal at Bingham McCutchen dated February 19, 2010, TomorrowNow had Oracle Database software installed on 7 servers with 20 processors and a total of 46 cores. Taking into account the applicable licensing factors results in a licensing quantity of 27 processors; ORCL00704381-396, at -392.

Server Name	Processor Type	Processors	Core Count	Total Cores	Licensing Factor	Licensing Quantity
PSDEV01	PowerPC	4	2	8	0.75	6
PSDEV02	PowerPC	4	2	8	0.75	6
DCPSTEMP01	Intel	2	2	4	0.50	2
DCPSTEMP02	Intel	4	4	16	0.50	8
DCSBLPROD03	Intel	2	2	4	0.50	2
TN-FS01	Intel	2	2	4	0.50	2
TN-Dell2650	Intel	2	1	2	0.50	1
Totals		**20**		**46**		**27**

Accordingly, the correct license computation multiplies the actual number of licensed processors by the cost per processor, plus support on the licensed processors for four years:[1006]

[1006] This overstates the cost for support, because as Mr. Meyer points out on page 168 of the Meyer Report, TomorrowNow would only have paid for support during the period that the software was installed and being used to support the environments.

Oracle Database – Enterprise Edition	**Pricing**
Processor License[1007]	$40,000
x Licensing Quantity	27
Total License Cost	*$1,080,000*
Software Update & Support (per year)[1008]	$8,800
x Licensing Quantity	27
x Number of years	4
Total Support Cost	*$950,400*
Subtotal	$2,030,400
x Profit Margin[1009]	95%
Total Oracle Database Cost	**$1,928,880**

Alternatively, if forced to have a separate license for each customer supported, TomorrowNow could have installed the Oracle Database on a single processor server.[1010] At the single processor level, TomorrowNow would have been able to purchase Standard Edition software at a much lower price than Enterprise Edition. In addition, though Mr. Meyer claims that Oracle would not license the database to TomorrowNow at a discount,[1011] evidence indicates that TomorrowNow could have acquired the Oracle database license at a discount from a third party reseller.[1012] For purposes of this calculation, I have ignored discounts and rely on retail pricing as follows:

Oracle Database – Standard Edition	**Pricing**
Processor License[1013]	$15,000
x Number of customers (single-processor)[1014]	71
Total License Cost	*$1,065,000*
Software Update & Support (per year)[1015]	$3,300

1007 "Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.
1008 "Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.
1009 Meyer Report, page 169, table 9.
1010 I base this conclusion on Mr. Gray's Report.
1011 Meyer Report, page 163, paragraph 250.
1012 Email from Paul Bigos of SAP to George Lester of TomorrowNow dated March 31, 2006. TN-OR01029489-493, at -489-490 with attached pricing proposal from SHI. TN-OR01029494. The proposal indicates that TomorrowNow could have purchased the Oracle Standard Edition license at a 24% discount ((15,000-11,414)/15,000) and the support at a 30% discount ((3,300 – 2,310)/3,300).
1013 Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.
1014 Meyer Report, page 167, paragraph 254.
1015 Oracle E-Business Global Price List," September 1, 2006; ORCL00704381-396, at -382.

x Number of customers	71
x Number of years	4
Total Support Cost	*$937,200*
Subtotal	$2,002,200
x Profit Margin	95%
Total Oracle Database Cost	**$1,902,090**

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.[1016] I determined, at the outset, however, that I needed to do so. Accordingly, I analyzed millions of pages of produced documents[1017] using sophisticated search techniques[1018] 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.[1019] 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

1016 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.

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

1018 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.

1019 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[1020] 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[1021] basis using the same documentation Mr. Meyer had available. Using information from Mr. Sommer for background purposes,[1022] 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.

10.1.1. Oracle Failed to Meet its Burden

Although not explicitly stated, Mr. Meyer assumes that absent the Alleged Actions, SAP would not have made *any* sales of SAP products or services to the customers he included in his analysis. The reality is, of course, that to be properly included in the damage calculation, it is a necessary condition that the customer licensed SAP products or purchased services *as a result of the Alleged Actions*. In spite of that necessary condition, Mr. Meyer's starting point was to assume that all profits for all but 17 of the customers on the List of 86 represented disgorgeable profits.[1023] However, the agreed criteria that placed a customer in the List of 86 had at most a tangential link with economic (or legal) causation. The criteria were established as a result of an

[1020] 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).

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

[1022] 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.

[1023] 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.

agreement related to Targeted Search Request Number 1 and are not an admission by Defendants as to liability.

The agreed criteria were clarified in a letter from Mr. McDonell to Mr. Geoffrey Howard, Ms. Holly House and Mr. Zachary Alinder (attorneys for Oracle) dated November 3, 2009. The letter makes clear that the List of 86 provided to Oracle was nothing more than "…the agreed upon subset of so-called 'Safe Passage' SAP customers who had simultaneous TomorrowNow purchases or were existing TomorrowNow customers at the time they made a new SAP purchase during the relevant time period (January 1, 2005 through October 31, 2008)."

If a customer satisfied the inclusion criteria, it was added to the list of customers responsive to Targeted Search Request Number 1. The list ultimately had 86 customers on it and became known as the List of 86. Clearly, nothing in the criteria suggests Defendants were admitting that inclusion on the List of 86 established legal or economic causation for the listed customers. It was inappropriate, therefore, for Mr. Meyer to interpret the criteria as an SAP admission of liability for the List of 86 (as he appears to have done).

The List of 86 provided information to Plaintiffs that might be relevant to their discovery in the case.

I understand that for disgorgement in a copyright case the plaintiff's burden is to prove that there was a reasonable probability that the revenues and profits accused were generated as a result of the alleged infringement. Mr. Meyer wrongly assumed that simply being on the List of 86 was sufficient to prove causation and excluded only the few customers that came to his attention as having purchased SAP products or services for reasons other than the Alleged Actions. The fact that a customer is on the List of 86 indicates only that it made SAP purchases during the time it was at TomorrowNow. It says nothing about the reasons why the customer made the SAP purchases. The proper analysis for Mr. Meyer to have made would have been to identify the reasons a customer on the List of 86 bought or licensed SAP products and services during the relevant period and use the information to identify the customers that did so as a result of the Alleged Actions. He failed to do so. Mr. Meyer's fundamental assumption, therefore, is inappropriate and the entire premise underlying his disgorgement analysis is flawed.

10.1.2. Decision to Migrate to SAP Was Not Due to TomorrowNow

The decision to migrate to SAP is one of enormous consequence for the customer,[1024] typically involving millions of dollars worth of license fees, training costs, consulting fees, hardware and middleware costs, and includes all the attendant internal turmoil and disruption related to the transition from one vendor to another, a process that can span several years. Such decisions are entered into only after careful study of the costs and benefits to the company of making the switch and a proper evaluation of the alternatives. Such study usually involves specialist consultants to assist in specifying the system requirements, identifying responsive systems, and helping with the implementation process.

Mr. Sommer, who is an expert in this precise area, confirmed that such decisions are significant events that usually need approval from multiple executives within the company and often from

[1024] Sommer Report and also discussed earlier in my report.

the full board. Therefore, the idea that a customer would go through this arduous, lengthy, and costly process as a result of TomorrowNow's involvement is speculative. The assumption Mr. Meyer made (i.e. that being on the List of 86 is sufficient to prove the economic causation to support a damages claim) is contradicted by the facts as my analysis (described later) shows.

10.1.3. Decision to Move to SAP Was Made After Product Evaluation

Mr. Sommer's report indicates that the choice of an ERP provider is a decision a company takes after evaluating the available alternatives. The ERP evaluation process requires a large investment of time and once the purchase decision is made, the company is then faced with investing even more time and money to implement a new system. Such decisions are not made because TomorrowNow could provide support at a price lower than Oracle, which is a fundamental assumption of Mr. Meyer's analysis and the evidence shows TomorrowNow did not drive sales of products and services at SAP, which is another fundamental assumption underlying Mr. Meyer's analysis. The time and effort spent on due diligence when exploring future ERP systems makes the idea that a customer would evaluate the available ERP vendors' product offerings and select SAP as its application license vendor as a result of TomorrowNow involvement is speculative and neither Oracle nor Mr. Meyer have provided any proof that their assumptions are appropriate.

10.1.4. Customers Left Oracle for SAP Without Going to TomorrowNow

According to Mr. Meyer, TomorrowNow was the sole reason an Oracle customer decided to buy products or services from SAP. However, his assumption is contradicted by the facts. There were approximately 853 Safe Passage customers by the end of the first quarter of 2008 (the latest date for which I have reported data).[1025] Not all of the Safe Passage customers represented replacements of Oracle ERP systems. In addition, I understand that SAP's account executives inflated the Safe Passage numbers and that it was never completely clear what defined a Safe Passage 'deal'.

However, the report (which is the best available information) states that there were 853 Safe Passage Initiative deals including 625 SAP deals and 228 standalone TomorrowNow customers (i.e., no SAP product involved). Therefore, it was reported[1026] that at least 228 customers terminated Oracle support and went to TomorrowNow without going to SAP for products or services; and at most 78[1027] of the 625 SAP customers went to TomorrowNow for support.

The assumption Mr. Meyer is making in his analysis is that TomorrowNow drove customers to cancel Oracle support and because of TomorrowNow's involvement they became SAP licensed customers.

The facts, as I have described them here, prove his claim is unfounded. Of 625 SAP customers reported to be Safe Passage customers, 547[1028] (or 88%)[1029] went to SAP and were not supported

1025 "Oracle Factsheet – Q1 2008." SAP-OR00098932-933, at -933.

1026 Assuming the quoted data are accurate, which is doubtful.

1027 TomorrowNow only ever had 358 customers. If 228 of those were stand alone Safe Passage deals and TomorrowNow had 52 customers when SAP bought the company, at most 78 customers could be SAP Safe Passage customers (358 – 228 – 52 = 78).

1028 625 – 78 = 547.

by TomorrowNow. On the other hand, of 358 total TomorrowNow customers, at most 78 were Safe Passage customers from SAP while supported at TomorrowNow. The data show therefore, that TomorrowNow was not instrumental in driving sales for SAP and TomorrowNow support was not attractive to 88% of the SAP Safe Passage customers as they transitioned to SAP. These facts prove that customers left Oracle to go to SAP (for one or more purchases) for reasons unrelated to TomorrowNow, and by extension, unrelated to the Alleged Actions.

10.2. Customer-Specific Exclusion Criteria – SAP Disgorgement

I identified customer-specific exclusion criteria that show Mr. Meyer's fundamental causation assumption for SAP disgorgement-related claims to be inappropriate. I created an Exclusion Pool for each of the following:

1. Decided to join SAP prior to joining TomorrowNow
2. Parent company mandate
3. Competitor evaluation
4. Standardization
5. Specific functionality
6. Product extensions
7. Non-replacement products
8. Reseller/BPO
9. No accused conduct – disgorgement
10. Other – disgorgement

I placed the customers that matched the criteria into the relevant Exclusion Pool. A customer in one of these Exclusion Pools should be excluded from the damage analysis because the facts show that they purchased SAP products and services for reasons unrelated to the Alleged Actions. Although some customers fell into more than one Exclusion Pool, I classified a customer as an 'exclude' for causation purposes based on their placement in just one Exclusion Pool. The following discussion sets out the rationale behind each Exclusion Pool.

10.2.1. Decided to Join SAP Prior to Joining TomorrowNow

If a customer decided to move to SAP for an ERP system (or a component of an ERP system) before the customer moved to TomorrowNow for support services, then the customer could not have moved to SAP as a result of the Alleged Actions. Mr. Meyer excluded 17 customers,[1030]

[1029] 547/625 = 88%.
[1030] Schedule 42.SU to the Meyer Report.

"…for which evidence indicates that they may have decided to switch to SAP before engaging TomorrowNow."[1031] I concur with Mr. Meyer's rationale of his exclusion of the 17 customers.

I reviewed the evidence related to the remaining 69 customers[1032] Mr. Meyer did not exclude and applied the parameters he defined. Based on my review, Mr. Meyer should have excluded an additional 17 customers (in addition to the 17 he excluded) because they decided to contract with SAP before engaging TomorrowNow as shown in Appendix E-2.

10.2.2. Parent Company Mandate

The period of potential Disgorgement damages (i.e., 2005 through 2008) was one of great activity in corporate transactions. Acquisitions were across industries and across borders and included acquisitions of Oracle customers by SAP customers and (presumably) vice versa. When the parent company mandated that their newly acquired subsidiary run on the same software as the rest of the company, the subsidiary had no choice but to accede to the mandate. A perfect example of such a case is the BASF acquisition of Engelhard Corporation. BASF has been a committed user of SAP software in its operations around the world (BASF is one of the largest diversified conglomerates in the world) and upon acquisition required Engelhard to switch ERP systems to SAP. Although Engelhard had no choice but to make the switch to SAP, Mr. Meyer included it in his disgorgement claim. The facts show that the switch to SAP was not related to the Alleged Actions.

I added a customer to this Exclusion Pool if the products supported by TomorrowNow were the products that were mandated to standardize on SAP. Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.3. Competitor Evaluation

From time to time companies reassess their ERP systems. For example, the company may believe the existing system can no longer support the company's level of activity, or the company has accounting, operations or control needs that the existing system cannot provide. Whatever the reason, when the company decides to upgrade their systems or migrate to a new system, they frequently engage in a competitive evaluation of potential vendors for the required software. A customer was included in this Exclusion Pool if the product line or products supported by TomorrowNow were the products that the customer was evaluating and replacing. If the customer in question (i.e., from the List of 86) engaged in a competitive evaluation, the Alleged Actions were not the cause of the change in ERP vendor. Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.4. Standardization

From time to time, major corporations take steps to rationalize their operations, a process that is particularly important for customers with diverse operations (whether the diversity is the result of geographical differences, operational and/or functional differences, or the result of acquisitions that have never been fully integrated). One solution (among others) is to replace all

[1031] Meyer Report, page 255, paragraph 446.
[1032] Those customers which have a parent/subsidiary relationship are counted as one customer; 86 – 17 = 69.

diverse systems and standardize on one ERP system which occurs when the company selects an ERP vendor and implements the selected ERP solution across the entire company. As Mr. Sommer indicated, companies pursue this path only after extensive analysis of the available options.

Customers are added to this pool if they had multiple product lines (either Oracle only or Oracle and Non-Oracle) and they were standardizing on an SAP solution. The standardization decision would not have been made as a result of the Alleged Actions. Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.5. Specific Functionality

As the record shows, both Oracle and SAP release upgrades to existing software and sometimes create entirely new software in order to keep up with customer demand for particular functionalities. Customers also need their software to perform very specific functions based on the needs of their industry and the needs may change over time. If the required functionality is not found at their current vendor or within their current software, the customer will likely look elsewhere until they find a vendor to supply the needed functionality.

Often a customer could only achieve the desired functionality within their current product line by upgrading, and the upgrade process alone, because it can be such an extensive process, particularly for highly customized environments, causes customers to re-evaluate their software options. For example, Mr. Hurst testified:

> A customer that would be more likely to make the move to SAP would be a customer that is at a point in time where they're – they're forced to do some sort of an upgrade of their current applications. So it's not enough that their current applications are supported; they need more than what they can do. So if they're forced to upgrade, they would be at a point where they would [sic] looking to be making a decision.[1033]

I excluded customers if they had stated their need for specific functionality and researched ERP vendors to find it. Because the customer needed the specific functionality in order to conduct business, it is inappropriate for Mr. Meyer to assume that subsequent purchases were caused by the Alleged Actions.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.6. Product Extensions

Many of the customers on the List of 86 had made the decision to purchase products or services from SAP prior to receiving support services from TomorrowNow which, therefore, could not have been the causal link between the customer and its SAP purchases. These customers may have extended their existing SAP software's functionality (e.g., by adding payroll to an existing Human Resources component) *after* the customer was receiving support from TomorrowNow, which meant the customer was included in the List of 86.

[1033] Thomas Gene Hurst, II deposition dated April 30, 2008, page 136.

Although Mr. Meyer includes such purchases in his disgorgement damages figure, the facts show the customers only purchased extensions of their existing SAP software. Because the initial purchases preceded the TomorrowNow relationship, they could not possibly be tied to the Alleged Actions. Other examples of customer actions in this Exclusion Pool include: customers that purchased additional users for existing systems and customers that extended a previously purchased base product. Such purchases were not caused by the Alleged Actions.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.7. Non-Replacement Products

Customers may change their ERP strategy for a variety of reasons: a new IT structure for the company; a development or acquisition of a new product area; reduced or expanded functionality needs; and many more. Whatever the reason for the shift in IT demands, customers may need to buy new applications unrelated to the systems they had previously licensed from a non-party vendor. The scenario played out in a number of cases for customers on the List of 86. Those customers licensed new software from SAP that was not a replacement of the software they previously had supported at Oracle. For example, if a TomorrowNow customer had a Lawson accounting package but decided to buy SAP accounting software, such a replacement could not be caused by the Alleged Actions, but the customer would have been added to the List of 86 because it was supported at TomorrowNow when it made the SAP purchase.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.8. Reseller/BPO

SAP has sales agreements with a number of third-party resellers (“Resellers”) of SAP licenses. SAP has also licensed a number of BPOs to host and process transactions for customers that do not wish to operate their own IT department or process their own transactions. Customers that licensed SAP components via a Reseller or a BPO did so because of the relationship with the Reseller or BPO, not because of the Alleged Actions.

Based on the above criterion, I excluded the customers in Appendix E-2.

10.2.9. No Accused Conduct – Disgorgement

I understand that Oracle engaged Mr. Kevin Mandia to evaluate the “means and methods by which [TomorrowNow] accessed and downloaded from Oracle’s customer support websites, as well as the nature and extent of [TomorrowNow’s] copying, modification, distribution, and use of Oracle’s intellectual property to support [TomorrowNow’s] customers” and that he generally reached the following conclusions:

1. TomorrowNow engaged in mass downloading from, and improper access to, Oracle systems.

2. TomorrowNow made thousands of full or partial copies of Oracle enterprise application software and database software.

3. TomorrowNow's fix development and delivery process resulted in significant cross-use and contamination.

4. TomorrowNow continued to access, download, copy, modify and distribute Oracle enterprise application software and support materials after Oracle filed this action.

I understand Defendants' expert, Mr. Gray, analyzed Mr. Mandia's report and analysis regarding the conclusions referenced above and Mr. Gray determined that even assuming Mr. Mandia is correct the accused conduct does not apply to all of TomorrowNow's customers. Accordingly, I have excluded them from the disgorgement analysis and show them in Appendix E-2.

10.2.10. Other – Disgorgement

While the Exclusion Pools I have defined above thoroughly outline the majority of the scenarios that result in the exclusion of certain customers from the disgorgement analysis, there are, in addition, other more exceptional scenarios that mean a single customer should be excluded from disgorgement (i.e., in effect the customers are in a pool of their own). Accordingly, I placed such customers in the "Other Exclusion Pool" for the disgorgement analysis.

I listed the customers that I determined should be excluded but did not fit any of the criteria above in Appendix E-2.

10.2.11. Summary

Based on the criteria outlined in the various customer-specific Exclusion Pools, I excluded the listed customers in Appendix E-1 from the disgorgement analysis because their decision to buy licensed applications or services from SAP was made for reasons other than the Alleged Actions.

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*.[1034]

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[1035] using sophisticated search techniques[1036] 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

1034 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.

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

1036 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.[1037][1038] 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,[1039] 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.

11.1.1. Oracle Service

Although Mr. Meyer assumes that cost was the customer's primary (possibly even their sole) motivation for switching support from Oracle to TomorrowNow, his assumption is not supported by the evidence. The documents produced in this case show that the support services provided by Oracle and TomorrowNow differed in many ways and that price was only one of those differences.

For example, Oracle's own documents show that customers switched to TomorrowNow for support even though Oracle made a great effort to retain the customer. Such efforts often included discussion of the dire consequences of terminating Oracle support and the high cost of returning to Oracle at a later date.

Despite Mr. Meyer devoting nearly 50 pages of his report to an overview of Plaintiffs' and Defendants' businesses, he never addresses the nature of the support Oracle provided to its customers or what services third party vendors provided as an alternative. However, the quality of the support offering should have formed a significant component of his damage analysis. For example Oracle's customers had, as evidenced by emails and other correspondence between the

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1037 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.

1038 Removed Footnote.

1039 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.

customer and Oracle, complained that service calls would be answered by someone who did not know the customer's environment from a hardware or software perspective, so time would have to be spent educating them on those prerequisites for a solution.

11.1.2. Oracle Customer Relations

Oracle displayed a lack of concern about losing its customers to TomorrowNow. Internal documents contain evidence that Oracle accepted that there may be benefits to having TomorrowNow in the marketplace because it might take care of customers Oracle did not want to support.

Oracle's support staff tended to ignore customers that did not have a large support renewal spend. In fact, Oracle created the Romania Renewals department, which was responsible for the customers that had annual support renewals under $50,000.[1040] The purpose of the Romania Renewal's team was to manage the large number of customers that had renewals with small annual support fees. Assigning small customers to the Romania Renewals group would allow other resources to be devoted to the larger customers. Oracle executives stated that the loss of a number of the smaller customers was acceptable because the "risk to business [was] negligible" and it would allow the company to "focus on other activities" that presumably Oracle found more lucrative.[1041]

The evidence highlights the fact that Oracle had little contact or relationship with certain customers because Oracle produced no documentation that they attempted to keep them at Oracle when they were terminating (in contrast to several customers with large annual support spending).[1042] Oracle's lack of attention to the referenced customers is evidence that Oracle may have lost these customers anyway. As such, they should be excluded from the Lost Profits damage analysis.

Oracle internal communications also show that Oracle was not concerned about losing some customers to third parties, regardless of what they are claiming in this case. Laura Sweetman, a TomorrowNow employee, stated in an email that "Crosby" (who I presume is an Oracle employee) told her that "Oracle execs aren't too terribly threatened by [TomorrowNow] re: JDE, because they feel our clients are those that they would have lost anyway."[1043] Another Oracle executive, Juan C. Jones, Senior Vice President, Customer Services North America stated in an email that if, "TomorrowNow fills up with unprofitable laggards, then I'm not sure that's actually a bad thing in the medium/long run."[1044]

Oracle's support sales staff was concerned that Oracle's license sales staff seemed unwilling to help them retain customers. Robert Lachs, an Oracle support staff member stated:

[1040] Oracle Presentation. "FY07 North America Renewal Volume Review." February 2, 2006; ORCL00532043-076, at -044-050.

[1041] Oracle Presentation. "FY07 North America Renewal Volume Review." February 2, 2006; ORCL00532043-076, at -050.

[1042] Appendix R.

[1043] TomorrowNow email from Mandy Wheeler to Andrew Nelson, et al. June 23, 2005. Re: Quest Software Migration Evaluation: Management Call - Wednesday, June 22; TN-OR01133541-542, at -541.

[1044] Oracle email from OSSINFO - Kevin to Juergen Rottler. August 29, 2006. Re: TomorrowNow threat: Home Depot Executive Summary; ORCL00480669-674, at -672.

> I am seeing the start of what I hope is not an endorsed trend, in which License Sales is not overly concerned with losing customers to TomorrowNow. Some reps, and myself yesterday, have heard first hand from sales that their best prospects are customers that dropped support two to three years ago and are relicensing candidates. They are also of the mindset that money saved on maintenance frees up license dollars, so there almost appears to be some encouragement, or certainly no discourangement [sic]to dropping support.[1045]

Rick Cummins, Oracle's Senior Director for North America Support Services, stated in an email:

> We have also recently run across a couple of recent situations where license reps are coaching customers that there is limited life line with existing products and they need to move to Oracle products/Fusion. We have certainly been involved in multiples [sic] cases recently where license sales is less than willing to even look at a JE even if there is no license deal forecast.[1046]

These quotes are examples of Oracle's indifference to losing customers to TomorrowNow and Mr. Jones goes so far as to suggest that TomorrowNow had a positive impact on Oracle in the medium to long run. As the presumed Oracle employee admitted, Oracle was likely to lose the customers whether or not TomorrowNow existed. Therefore, Oracle's own statements suggest that some or all of the TomorrowNow customers should be excluded from the Lost Profits analysis.

The evidence suggests Oracle's license sales team was giving something less than their full cooperation to support sales staff on support renewals and may even have encouraged customers to leave Oracle support for an extended period of time because the relicensing fees would net them a large future commission; in other words, Oracle's license sales team had an incentive to dissuade customers from renewing their support contract. Mr. Meyer has ignored such evidence. Therefore, his analysis is incomplete and his conclusion is incorrect.

It is inappropriate of Oracle to claim that the Alleged Actions caused customers to terminate Oracle support when its employees were not trying to retain them (or even encouraged them to terminate) for reasons unrelated to the Alleged Actions. However, Mr. Meyer takes no account of the effects of Oracle's behavior on the customers' willingness to stay on Oracle support.

11.1.3. Localization

Localization is the process by which the customer's software is translated (or otherwise manipulated) to make it more appropriate to the geographic area in which the customer is located. The changes may be made to reflect local legislation or regulation, currency, tax

1045 Oracle email from Robert Lachs to Rick Cummins. August 11, 2006. Re: American Commercial Barge Lines (ACBL); ORCL00128780.

1046 Oracle email from Robert Lachs to Rick Cummins. August 11, 2006. Re: American Commercial Barge Lines (ACBL); ORCL00128780.

regimes, language and so on. There were certain territories in which Oracle did not provide complete (e.g., local language) service for the localized software (if it was localized at all). Customers that needed or wanted support for their localized software and could not obtain such support from Oracle would be likely to use a third party support vendor if they did offer such service. Therefore, if customers terminated Oracle support in order to obtain localized service from one or both of the Defendants, the termination was not the result of the Alleged Actions. However, Mr. Meyer takes no account of localization on the customers' willingness to stay on Oracle support.

11.1.4. Retiring Releases

Oracle applies a 'life policy' to the software it licenses. Under the policy, a customer eventually finds that support for the licensed software is reduced over time[1047] and the price of support increases. The evidence in this case shows that customers faced with declining service and increasing cost expressed their distaste for Oracle's support policy.

If a customer was content with the functionality of its software and did not wish to upgrade to a newer (and still supported) release of the software, the only way they could continue to use it and support it in a manner consistent with the Oracle standard support offering at the time was to either go to a third-party support vendor or self-support. As such, the resulting termination of Oracle support was not caused by the Alleged Actions. However, Mr. Meyer takes no account of the effects of Oracle's policy on the customers' willingness to stay on Oracle support.

11.2. Customer-Specific Exclusion Criteria – Lost Profits

The general criteria do not represent Exclusion Pools. They do, however, provide a framework to help understand some of the specific customer behaviors that result in a decision to terminate Oracle support in favor of a third party support vendor (which in this case is TomorrowNow).

In addition to the general criteria, the customer-specific exclusion criteria are as follows:

1. Reinstatement/relicense
2. Never left Oracle
3. Non-customer
4. Product mismatch
5. Non-association
6. Causation
7. Service evaluation
8. Parent mandate

[1047] I understand that Oracle offers Lifetime Support in which a customer can continue to receive technical and other support elements.

9. Service gap
10. No accused conduct – lost profits
11. Other – lost profits

I treated each criterion listed above as an Exclusion Pool for the affected customers. Although some customers were classified into more than one Exclusion Pool, I classified a customer as an exclude for causation purposes based on their placement in just one of the Exclusion Pools listed below.

11.2.1. Reinstatement/Relicense

Mr. Meyer excluded customers from his lost profits calculation if the customer reinstated support with Oracle or relicensed Oracle software. These customers generally paid back-support fees for the time that they were off support so Oracle suffered no loss of profits.

Mr. Meyer excluded 26 customers from his lost profits calculation and I agree with his assessment of these customers.[1048] These customers are listed in Appendix E-3.

11.2.2. Never Left Oracle

Mr. Meyer excluded 54 customers from his lost profits calculation because they never cancelled Oracle support.[1049] I agree with Mr. Meyer's exclusion of this pool of customers. These customers are listed in Appendix E-3.

11.2.3. Non-Customer

Mr. Meyer excluded 3 customers from his lost profits calculation because they did not sign a support contract with TomorrowNow or they were not an Oracle customer.[1050] I agree with Mr. Meyer's exclusion of this pool of customers. These customers are listed in Appendix E-3.

11.2.4. Product Mismatch

Mr. Meyer excluded 2 customers from his lost profits calculation because the products the customers supported at TomorrowNow were not the same as those cancelled at Oracle.[1051] I agree with Mr. Meyer's exclusion of this group of customers.[1052] These customers are listed in Appendix E-3.

1048 Meyer Schedule 33.SU.
1049 Meyer Schedule 33.SU.
1050 Meyer Schedule 33.SU.
1051 Meyer Schedule 33.SU.
1052 Mr. Meyer states on his schedule 33.SU that SCSG Management is excluded because there is no name association with an Oracle entity, Mr. Meyer's Schedule 33.3.SU states that the customer was excluded for Product Mismatch. For the purposes of my report, I am assuming the reason for exclusion is No Name Association with an Oracle entity.

11.2.5. Non-Association

One company on the TomorrowNow customer list has no association with Oracle, so Mr. Meyer excluded it from his lost profits calculation.[1053] I agree with Mr. Meyer's exclusion of this customer.[1054] These customers are listed in Appendix E-3.

11.2.6. Causation

Mr. Meyer used the 'Causation' pool to capture customers not eligible for lost profits damages that did not fall into one of the other pools.[1055] I agree with Mr. Meyer's exclusion of these customers. These customers are listed in Appendix E-3.

11.2.7. Service Evaluation

As I explain elsewhere in this report, TomorrowNow was not the only provider of third-party support. There were numerous alternatives available that customers could have used instead of TomorrowNow. After TomorrowNow ceased operations on October 31, 2008,[1056] most customers went to another third-party support vendor and did not return to Oracle. In addition, before cancelling support with Oracle, many customers did a thorough evaluation of their alternatives and were well aware of the advantages and limits of third-party support. The evaluation sometimes involved requests for proposals ("RFP's") to named third-party providers that were possible alternatives to continuing Oracle support.

If a customer conducted an evaluation of named third party vendors before choosing TomorrowNow that was strong evidence that their decision to terminate Oracle support was not driven by TomorrowNow but a desire to leave Oracle.

The time and effort put into the evaluation process is further evidence of the customer's intention to leave Oracle. Therefore, absent TomorrowNow, the customer would likely have chosen another third-party vendor or self-supported. Because the customer was going to leave Oracle regardless of the Alleged Actions, they should not be included in the Lost Profits damage analysis. Therefore, I excluded all customers in this Pool from my analysis of Lost Profits damages, see Appendix E-3.

11.2.8. Parent Mandate

Parent companies may mandate that their subsidiaries change their ERP systems to a new system. Such a change leads to the subsidiary canceling support on their current system at some point. Accordingly, if the parent company mandated that the subsidiary stop paying support, Oracle's loss was not the result of the Alleged Actions. Based on the above criterion, I excluded the customers in Appendix E-3.

1053 Meyer Schedule 33.SU.

1054 Mr. Meyer states on his schedule 33.SU that SCSG Management is excluded because there is no name association with an Oracle entity, Mr. Meyer's Schedule 33.3.SU states that the customer was excluded for Product Mismatch. For the purposes of my report, I am assuming the reason for exclusion is No Name Association with an Oracle entity.

1055 Meyer Schedule 33.SU.

1056 "TomorrowNow Operations Wind Down: Final Report." October 31, 2008; TN-OR03523871-924.

11.2.9. Service Gap

Mr. Meyer determined that a four year period between the cessation of Oracle support and the start of support at TomorrowNow was enough of a gap to exclude the customer from his Lost Profits damage analysis.[1057] I agree with his principle but the timeline is too long. Logically, after a customer has self supported or run without support for six months or more, their termination of Oracle support could not be the result of the Alleged Actions. Mr. Sommer indicated that a customer running without support for six months must have terminated Oracle support for reasons unrelated to the Alleged Actions. Therefore, I excluded the customers in Appendix E-3.

11.2.10. No Accused Conduct – Lost Profits

I understand that Oracle engaged Kevin Mandia to evaluate the "means and methods by which [TomorrowNow] accessed and downloaded from Oracle's customer support websites, as well the nature and extent of [TomorrowNow's] customers" and that he generally reached the following conclusions:

1. TomorrowNow engaged in mass downloading from and improper access to Oracle systems

2. TomorrowNow made thousands of full or partial copies of Oracle enterprise application software and database software

3. TomorrowNow's fix development and delivery process resulted in significant cross-use and contamination

4. TomorrowNow continued to access, download, copy, modify and distribute Oracle enterprise application software and support materials after Oracle filed this action.

I understand that Defendants engaged Mr. Gray to analyze Mr. Mandia's report and analysis regarding the conclusions above and Mr. Gray determined that, even assuming Mr. Mandia was correct, the accused conduct does not apply to all of TomorrowNow customers. Accordingly, I have excluded the customers for which there was no accused conduct from the Lost Profits damage analysis. I listed these customers in Appendix E-3.

11.2.11. Other – Lost Profits

While the pools defined above describe the majority of scenarios that, by themselves, were sufficient to exclude a customer from the damage analysis related to lost profits, there are other situations that would also lead to exclusion but do not fall within any of the above pools. I have placed those customers in the "Other – lost profits" pool. Customers that I determined should be excluded but did not fit in any of the lost profits pools described in paragraphs 11.2.1 to 11.2.10 are listed in Appendix E-3.

[1057] According to Mr. Meyer's Schedule 33.3.SU, Everdream and Powerway had a four year gap between the cessation of Oracle support and TomorrowNow support beginning. He excluded these customers solely on this basis.

Based on the criteria outlined in the various customer-specific Exclusion Pools, I excluded the listed customers in Appendix E-1 from the lost profits analysis because their decision to cancel support with Oracle was made for reasons other than the Alleged Actions.

11.3. Possible Exclusion Criteria

There are many other reasons a customer may have terminated Oracle support and contracted with TomorrowNow or SAP. Individually the reasons may be insufficient to exclude the customer from the Disgorgement or Lost Profits damage analysis. I refer to these criteria as Possible Exclusion Criteria. While I have not excluded any of the customers that exhibit any one Possible Exclusion criterion, as I explain later, I developed a methodology that resulted in exclusions for certain *combinations* of Possible Exclusion Criteria.

As a general proposition, the non-excluded customers are still in the lost profits damage calculation because there is insufficient data to exclude them, which is more a sign that they were non-communicative (if the customer did not inform Oracle or anyone else why they were terminating Oracle support there is little or no related evidence in the produced documents) rather than an indication that they terminated Oracle support as a result of the Alleged Actions. A reasonable analysis of the available data indicates that the relevant customers terminated Oracle support for reasons other than the Alleged Actions and this is entirely logical from the point of view of the customers. Furthermore, when the available information shows that so many of the relevant customers should be excluded from the lost profits analysis for causation reasons, it is likely there are other customers that should also be excluded but for which the documentary record is insufficient to support such exclusion.

The Possible Exclusion Criteria are discussed in detail below:

1. Budget constraint
2. Cost
3. Customized
4. Did not return to Oracle
5. Dislikes Fusion
6. Dislikes Oracle
7. Dissatisfied customer
8. ERP vendor change
9. Financial distress
10. Localization
11. No intent to upgrade

12. No value
13. Non-specific evaluation
14. Older or stable release
15. Other support vendor
16. Poor service
17. Poor TomorrowNow support (List of 86 Customers only)
18. Price increases
19. Product direction
20. Product limitations
21. Retired releases
22. SAP functionality
23. SAP relationship
24. Self-support
25. Service level
26. Uses little or no support

The Possible Exclusion Criteria have been identified as potential factors leading to a customer's decision to terminate vendor support and move to third-party support and/or change their ERP to SAP solution. The Possible Exclusion Criteria by themselves do not warrant a customer being excluded from lost profits damages, but individually they are indicators of the type of customer most at-risk of leaving Oracle for a third-party support vendor.

As I describe later, however, there are certain combinations of the Possible Exclusion Criteria that lead to exclusion of the customer from the lost profits damage analysis for causation reasons. These are dealt with in the Joint Exclusion Criteria Section of this report.

Oracle even outlined the type of customer that would find third-party support appealing in the "at-risk" customer profile: low call volume, highly customized, old release, limited sales opportunity/activity in account and an overall lack of relationship with Oracle.[1058] As Oracle

[1058] "PeopleSoft/JDE 'At Risk' Update." August 16, 2006; ORCL00087649-660, at -654. "Maintenance At Risk Analysis: PeopleSoft/J.D. Edwards Customer Base." June 10, 2005; ORCL00130679-690, at -688-690. "NAS Customer Escalation Report." May 27th, 2005; ORCL00138470-475, at -470. Oracle email from Rick Cummins to Michael J. Lochead. March 23, 2005. Re: Pepay Option; ORCL00172564-566, at -565.

admits, there are customers that would consider third-party support a possible and appealing alternative to Oracle support. In order to provide a well-rounded illustration of the customer's experience at Oracle, I have included some sources that reference product lines that customers did not have supported by TomorrowNow.

11.3.1. Budget Constraint

I included customers in the "Budget constraint" pool if they had recent budget restrictions or parent/management mandated decreases in IT spending. Because support fees are often a large part of the customer's IT budget, they tend to be scrutinized closely when a company has financial difficulties.

This pool is different from the "Cost" pool to the extent budget constraints may play a role in a support termination even though the customer would like to retain the services. When the termination is the result of a parent mandate to cut costs or financial difficulties at the company itself, the customer has no choice but to comply. If support costs are one avenue for achieving the required reductions, then from time to time the company will take that avenue and terminate support. Sometimes, budget constraints alone are enough to cause a customer to terminate support with a vendor. I listed the customers that met this criterion in Appendix E-4.

11.3.2. Cost

I included customers in the "Cost" pool if they cited cost as a factor that caused them to terminate Oracle support or they were displeased with the costs associated with Oracle support. A customer that had cost as a primary concern would find the reduced support prices of third-party vendors appealing.

Support for a customer's Oracle system is expensive. A customer that may have spent millions of dollars to license a new Oracle system and millions more to train its people on the system, are then faced with annual support fees that are about 22% of the license cost to support the system. As such, the customer effectively pays for the system twice over the course of just a few years. Inevitably, the customer's management questions the value of what they are getting for the annual support fees. The desire to cut costs (especially in difficult economic times) may be overwhelming and a prime focus of such cost cutting, as Mr. Sommer indicated, is the support budget. The desire to cut costs may become even greater when the customer is: on an old or stable release; has competent in-house staff who can deal with most problems without outside assistance; is experiencing financial difficulties, and so on.

Based on the evidence produced in this case, Oracle's answer to most customer requests for support price cuts has been to deny the cut. They try to instill fear of a systemic failure into the customer by telling them of all the catastrophes that may befall them if they terminate support and also point out that coming back to Oracle support will be even more expensive (more about reinstatement fees below). Accordingly, the customer is in a bind – it cannot terminate support without incurring risk but does not want to (or simply cannot afford to) write the check each year to pay for support. Sometimes, the customer will resort to alternative providers of support including third-party support or self support or a combination of those two. While price alone will not usually be enough to cause the customer to terminate support, taken in combination with other factors, it may result in a support termination. I listed the customers that met this criterion in Appendix E-4.

11.3.3. Customized

I included customers in this pool if any of their applications had been significantly customized. Mr. Sommer confirmed that customers with highly customized software sometimes develop problems that are less amenable to the standard solutions the ERP vendor provides. Based on the Oracle email traffic, highly customized customers were difficult to support and were at high risk for terminating support.[1059] The availability of a dedicated support individual which was one of the services TomorrowNow provided would appeal to these customers because it would allow them to receive the personalized support that Oracle struggled to provide. I am aware that TomorrowNow did not guarantee support for customized software, only that they would do their best to support it. I listed the customers that met this criterion in Appendix E-4.

11.3.4. Did Not Return to Oracle

Once TomorrowNow closed its doors on October 31, 2008,[1060] its customers may still have needed support for their Oracle software (usually the need was dependent on the product line that was being supported).

The fact that most customers did not go back to Oracle when they had the chance to do so suggests they would have left Oracle regardless of TomorrowNow. As Mr. Meyer stated that 74 customers reinstated, relicensed or never left Oracle,[1061] I concluded that the remaining 284 customers did not return to Oracle. I listed the customers that met this criterion in Appendix E-4.

11.3.5. Dislikes Fusion

I included customers in this pool if they did not see a future for Oracle's Fusion in their company. Many customers and industry analysts expressed their view that Fusion would not be released when anticipated or that it would ineffectively combine all of the product lines that Oracle had acquired.[1062] Such worries appear to have been justified because Fusion was behind schedule, and is not yet fully implemented.[1063] Because Oracle had stated that Fusion was the future of Oracle, customers that did not want to move to Fusion had, therefore, effectively decided not to have a future with Oracle. I listed the customers that met this criterion in Appendix E-4.

[1059] "NAS Customer Escalation Report." May 27th, 2005; ORCL00138470-475, at -470. Oracle email from Rick Cummins to Michael J. Lochead. March 23, 2005. Re: Pepay Option; ORCL00172564-566, at -565.

[1060] "TomorrowNow Operations Wind Down: Final Report." October 31, 2008; TN-OR03523871-924.

[1061] Meyer Schedule 33.SU.

[1062] "Marketplace Communications: Influence Uptake;" SAP-OR00060092-428, Various locations within the document. "FROM THE ANALYSTS: Saluting the Siebel supernova; Summing up the postmortems on Oracle's latest acquisition." SAP-OR00044052-081, at -072. Maynard, Billy and Yvonne Genovese. "PeopleSoft Users Face Tough Choices." Gartner Research. April 13, 2005, pages 2-3; TN-BEC00000017-023, at -019-021.

[1063] "Competitive Overview Siebel vs. Oracle Master Slide Deck." July 2005; TN-OR06360322-384, at -382.

11.3.6. Dislikes Oracle

I included customers in this pool if they expressed their dislike for Oracle. I included in this pool customers that were displeased with their Oracle support sales representative, customers that were unhappy with the support service provided by Oracle, customers that filed a lawsuit against Oracle, and other reasons. I listed the customers that met this criterion in Appendix E-4.

11.3.7. Dissatisfied Customer

I included a customer in this pool if I found evidence of overall dissatisfaction with Oracle or a previous vendor or their support. A dissatisfied customer would view any alternative means of support worthy of investigation. Many customers left a trail of writing as evidence of their thinking. I listed the customers that met this criterion in Appendix E-4.

11.3.8. ERP Vendor Change

I included customers in this pool if they decided to move off their current Oracle system and migrate to a vendor other than an SAP provider. If a customer was not planning on continuing to use its current applications, then it had effectively made the decision to end the Oracle relationship. It would also be difficult for the customer to justify the continued expense of a large annual support fee used to fund the development of future application improvements to software solutions it was no longer using or would stop using in the future. I listed the customers that met this criterion in Appendix E-4.

11.3.9. Financial Distress

I included customers in this pool if they evidenced financial distress by such events as: laying off a significant number of employees, declining profits, operating at a loss, or declaring (or about to declare) bankruptcy. As annual support is often a large part of the customer's IT budget, these are often the first items to be scrutinized when a company is suffering financial distress. I listed the customers that met this criterion in Appendix E-4.

11.3.10. Localization

I included customers in this pool if they reported dissatisfaction with: local tax updates being applied; support service not being provided in the region's native language; or other issues arising as a result of the company's localized requirements. My review of the documents show the issues were often reported by customers with operations in multiple countries with different support requirements depending on location.

A localized software system would require knowledgeable people on the specific system which Oracle appears not to have provided in some instances. I listed the customers that met this criterion in Appendix E-4.

11.3.11. No Intent to Upgrade

I included customers in this pool if they planned to stay on the current version of the application and not upgrade. If the customer was not planning on upgrading, then any enhancements or additional functionality incorporated into the future releases would have little or no value to the customer. Therefore, especially if the installation was stable and adequately managed by in-house staff, there was little incentive to retain Oracle support because the customer would not need any of the upcoming upgrades. I listed the customers that met this criterion in Appendix E-4.

11.3.12. No Value

I included customers in this pool if they stated support provided no value or benefit to the customer. For example: the customer decided it would not upgrade in the future (or if it did, it would maintain its own systems until the upgrade and use the saved support fees to pay for a new license); the customer did not find the support provided to be helpful; the customer's internal staff could handle support and a number of other instances in which the customer referenced no value in the support offering. I listed the customers that met this criterion in Appendix E-4.

11.3.13. Non-Specific Evaluation

Mr. Meyer argues that TomorrowNow was the reason customers left Oracle; however, TomorrowNow was only one of many available third-party support vendors. I included customers in this pool if they expressed interest in other support vendors and acted upon that interest by evaluating other vendors.

This pool is similar to the service evaluation pool, but is for customers whose evaluation is less defined (e.g., customers that expressed interest in or considered unnamed third-party support vendors other than TomorrowNow).

I listed the customers that met this criterion in Appendix E-4.

11.3.14. Older or Stable Release

I included customers in this pool if they had been on their current release for some time. I considered a release to be stable when it had been available for an extended period and was widely used without significant problems i.e., most, if not all, of the bugs in the software when originally issued had been fixed. Because such releases require little support, the value of vendor support is reduced, becoming less of a necessity and more of an expensive security blanket. I listed the customers that met this criterion in Appendix E-4.

11.3.15. Other Support Vendor

I included customers in this pool if they went to or considered the option of going to a different third-party support vendor after they terminated TomorrowNow or while they were at TomorrowNow. A customer moving to another third-party support vendor after leaving TomorrowNow suggests the customer would have left Oracle for a third-party support vendor even if TomorrowNow had not existed. I listed the customers that met this criterion in Appendix E-4.

11.3.16. Poor Service

I included customers in this pool if they expressed dissatisfaction with the level of service or if they complained that cases were not corrected promptly or properly. The documents show that one common frustration customers expressed was that a case they had raised had been closed because the fix would be included in the next release of the software.[1064] If a customer had no intention of upgrading in the future, the existence of a fix in the next release would be of no use and may even anger the customer because the support they paid for was not forthcoming.

Other commonly occurring issues customers noted were: support personnel who could not handle the customer's case(s); support personnel who did not speak the native language; cases being closed without the customer's consent or concurrence; and Oracle not being able to resolve a case. I listed the customers that met this criterion in Appendix E-4.

11.3.17. Poor TomorrowNow Support (List of 86 Customers Only)

The essence of Mr. Meyer's analysis is that TomorrowNow *caused* some TomorrowNow customers to purchase SAP applications (in other words, absent TomorrowNow these customers would not have chosen the SAP applications) they licensed. However, the evidence shows that certain customers had a negative experience with TomorrowNow, which could not reasonably be argued to have caused the SAP purchase (more likely, the bad experience would be a source of irritation and negativity for the customer).

Accordingly, I included customers in this pool if they were dissatisfied with their TomorrowNow support or ended their TomorrowNow support prematurely due to quality of support concerns. I listed the customers that met this criterion in Appendix E-4.

11.3.18. Price Increases

I included customers in this pool if they had frequently complained about price increases. In addition, the way the PeopleSoft contracts were written resulted in misunderstandings at the customer level because what was called a 'cap' on price increases in the contract was generally applied across the board and became the de facto price increase. Therefore, rather than representing a maximum price increase the annual cap also represented a minimum; a fact several customers angrily pointed out to PeopleSoft.[1065]

When Oracle acquired the PeopleSoft customers, it continued to apply annual uplifts to the support contracts in order to move the support price closer to 22% of then-current pricing that

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1064 Oracle email from Mary June Dorsey to Paul Brook. February 6, 2007. Heads up from JB Hunt call on February 2, 2007; ORCL00087417-418, at -417. Oracle email from customer Gwen West to Marty (Nagel) Dollinger. November 16, 2005. Subject: FW: errors with OSHA pagch – 3974548; ORCL00490344-346, at -344.

1065 Oracle email from Danna Davis to Rick Cummins. April 28, 2006. Subject: National Dairy P-04-04449-000- -3; ORCL00186027-028, at -027. "PeopleSoft Executive Summary." September 1, 2006; ORCL00273902-904, at -903.

was the Oracle support standard.[1066] As a result, customers might then consider seeking alternative solutions to their support needs.

The law of supply and demand, and the realities of the changes in the national economic situation from 2005 through 2008 suggest that significant support price increases would drive most customers to reconsider support costs and some of them to terminate support. Such an outcome would be most likely to occur when the cost was already under scrutiny by senior management or budget constraints had reared their head. I listed the customers that met this criterion in Appendix E-4.

11.3.19. Product Direction

I included customers in this pool if they were unhappy with the future 'direction' of the applications they had licensed. If a customer was concerned with the future of its application software, it would tend to remain on its current release, especially if it was a stable installation, or migrate to a non-Oracle product which would obviate or eliminate the need for Oracle support. Other examples of customers in this pool are customers that: expressed concern that promised functionality would not be incorporated into future versions; worried that no additional enhancements or upgrades were going to be provided for a particular application; or became worried that they had an orphan system that Oracle would not support in the future. I listed the customers that met this criterion in Appendix E-4.

11.3.20. Product Limitations

I included customers in this pool if they stated a degree of dissatisfaction regarding the applications they had licensed. Some examples of disgruntled customer complaints in relation to this pool involve: customers being unhappy with the current functionality of their software, the product being too robust for a particular company's needs or general dissatisfaction with the product's performance. Customers that were dissatisfied with their product would be likely to evaluate other product lines as replacements for their current product set. Once a customer decided to move off its current software, it would have had no incentive to fund further developments of that product with its support dollars and would likely pursue alternative support solutions. I listed the customers that met this criterion in Appendix E-4.

11.3.21. Retired Releases

One of the downsides of the Oracle support was their retiring release schedule. Each software release has a retirement date by which support changed. For example, as a general rule, three support variations were made over time: Premier Support, Extended Support and Sustaining Support.

When first issued, a release would be supported on Premier Support (a full support package). At a predetermined date, the release would retire and move to Extended Support—for an additional

[1066] "Executive Summary." October 20, 2005; ORCL00270586-590, at -588. Oracle email from David Carey to Angela Stout. November 14, 2006. Subject: FW: Question re: DRC PeopleSoft Support for Karen R.; ORCL00011305-309, at -308. "Oracle's OpenWorld Event – Day Three: About-Face." September 21, 2005; SAP-OR00078501-503, at -502. Oracle email from Rick Cummins to OSSINFO – Kirsten. May 30th, 2006.Re: RE: Urgent – Revised Exec Summary for Voith Fabrics; ORCL00186170-171, at -170.

fee—the customer had all of the components of the Premier Support offering with the exception of certification with third party products. However, often the cessation of updates, fixes, tax and regulatory updates occurred prior to the end of the Extended Support period. So if a customer needed these items, they would have to pay the additional fee for Extended Support. Many releases did not even have the Extended Support option. At a later date, the release would move to Sustaining Support, which did not include any new fixes, tax and regulatory updates or certification with other products.

As a release was retired and moved into a different phase of support, the extent of the support declined and the cost of support increased. Needless to say, many customers found Oracle's policy frustrating and unfair.

After the acquisition of PeopleSoft and Siebel by Oracle, many customers were disenchanted with Oracle because they would be forced to pay annual support fees while at the same time they were nervous about the future of the product lines into which they had invested so much time and money. Oracle's published retirement dates were perceived by customers as being short and were not well received. Oracle attempted to remedy their customers' dissatisfaction by launching Applications Unlimited and Lifetime Support which extended the PeopleSoft, J.D.Edwards and Siebel retirement dates. Even so, many customers felt that their products' lifespan had been reduced so they would be paying more support fees while receiving less support. TomorrowNow provided a solution to the customers' quandary because they specialized in supporting older releases. I listed the customers that met this criterion in Appendix E-4.

11.3.22. SAP Functionality

I included customers that purchased SAP for its functionality in this pool. This pool is slightly different than the disgorgement exclusion pool of specific functionality because this pool does not require a named functionality. Customers may have chosen SAP because it was the best overall fit for the customer's needs. Therefore, the functionality of SAP's product best met the customer's needs. Accordingly, the customer should be excluded from the damages claim. I listed the customers that met this criterion in Appendix E-4.

11.3.23. SAP Relationship

I included customers in this pool if they had a prior relationship with SAP outside of the interactions that occurred after the customer contracted with TomorrowNow. If a customer had a prior purchase history with SAP, then subsequent purchases of SAP software were likely the result of the prior relationship rather than the existence of, or interactions with, TomorrowNow. Customers were also included in this pool if they had senior management that had experience with, or a preference for, SAP due to prior SAP relationships. Customers with strong prior ties to SAP would be more inclined to pursue their relationship with SAP further and to purchase additional products from SAP. I listed the customers that met this criterion in Appendix E-4.

11.3.24. Self-Support

I included customers in this pool if the evidence indicated the customer was capable of and considered self-support as an alternative to Oracle support prior to contracting with TomorrowNow. If the customer could handle cases internally, the value of vendor support is reduced, and may be a double payment (paying once for a competent in-house staff and again for Oracle support). I listed the customers that met this criterion in Appendix E-4.

11.3.25. Service Level

I included customers in this pool if they expressed dissatisfaction that Oracle's support level was declining. Evidence of declines included comments from customers that service levels declined after an acquisition. For example, J.D.Edwards' customers stated that after PeopleSoft acquired J.D.Edwards, service was not as good as their previous experience.[1067] J.D.Edwards and PeopleSoft customers also complained that Oracle's service was worse than PeopleSoft support had been.[1068]

When Oracle retired a release or a release transitioned to a different level of support, customers often perceived a decline in service coupled with an increase in support fees for that application. Therefore, the customer's decision to terminate Oracle support was unlikely to be related to the Alleged Actions. I listed the customers that met this criterion in Appendix E-4.

11.3.26. Uses Little or No Support

I included customers in this pool if they placed few (or no) support calls or logged few (or no) cases. Customers that did not use support services for their system problems (perhaps because they were on an old stable release or their in-house staff was able to manage on the system internally) often also fit into several of the other categories mentioned in this section. Many of these customers felt there was little or no value in Oracle support (e.g., they were paying a large fee for a service they used little or not at all). Such customers would likely search for alternative support options that would provide acceptable service for a lower cost. I listed the customers that met this criterion in Appendix E-4.

11.4. Joint Exclusion Criteria

Although the list of exclusion criteria is not comprehensive, they are instructive as to damages. As I stated previously, I did not exclude any customer from the lost profits damage analysis because of any single Possible Exclusion Criterion. However, I determined there was sufficient evidence that a termination was not caused by the Alleged Actions if customers exhibited certain *combinations* of the Possible Exclusion Criteria. My methodology was to exclude a customer if the customer had reason to *consider* terminating Oracle support (as evidenced by certain Possible Exclusion Criteria), and *acted* upon such consideration by evaluating the alternatives to Oracle support. I refer to the combination of Possible Exclusion Criteria that *do* allow an exclusion determination as "Joint Exclusion Criteria" because together they are sufficient to exclude a customer from the Lost Profits damages analysis.

The combinations of Possible Exclusion Criteria that show a customer terminated Oracle support for reasons other than the Alleged Actions are:

1067 Oracle email from Barbry McGann to Teck Wee Lim. March 17, 2005. Re: FW: StarHub call brief and follow-up items - Jim Patrice, Rich holada [sic] and Kari Dimler - I need your help; ORCL00502032-034, at -032.

1068 ORCL00361000-003, at -000.

1. Non-specific evaluation OR Self-support AND
2. At least one of the following:
    a. Customized
    b. Dislikes Oracle
    c. Dissatisfied customer
    d. Financial distress
    e. No intent to upgrade
    f. Older or stable release
    g. Poor service
    h. Uses little or no support

When the Joint Exclusion Criteria are met, the evidence indicates that the Alleged Actions were not the cause of the termination of Oracle support. Considered from Oracle's point of view, at a minimum, when the Joint Exclusion Criteria are met, Oracle cannot prove that the Alleged Actions caused the customer to terminate Oracle support and Mr. Meyer should exclude them from his lost profits analysis.

I have accumulated, and added to my report, a vast amount of detail regarding the customers' reasons for leaving Oracle. Because the data show that certain customers contracted with TomorrowNow for support for numerous reasons other than the Alleged Actions, Oracle did not suffer any loss of profits as a result of the Alleged Actions for these customers and the customers exhibiting the Joint Exclusion Criteria should be excluded from the damage calculations. I listed the customers that met the Joint Exclusion criteria in Appendix E-5.

11.5. Summary

Appendix E-1 shows the customers I excluded because (a) the evidence shows they terminated Oracle support for reasons other than the Alleged Actions or (b) the evidence is not sufficient to prove that the customer terminated Oracle support and contracted with TomorrowNow for support as a result of the Alleged Actions.

12. Disgorgement of SAP Profits

The remedies for a successful plaintiff's copyright infringement claim include disgorgement of the profits defendants earned as a result of the Alleged Actions ("Disgorgement"), provided they

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

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

May 7th, 2010

Stephen K. Clarke

Date

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

[1270] Appendix N-1.

[1271] Appendix Q-1.