EXHIBIT 22

ORACLE USA, INC., ET AL

V.

SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.
FEBRUARY 23, 2010

PAUL K. MEYER

V.   Quantification of SAP's "Value of Use" of Oracle's Copyrighted Property – Overview and Methodology

A.   Overview

91. I understand that in matters of copyright infringement, a plaintiff's available damages remedies include the plaintiff's actual damages, as well as the disgorgement of the infringer's profits, to the extent they are not taken into account in the computation of plaintiff's actual damages. In the alternative, the plaintiff may seek statutory damages.[258]   A plaintiff's actual damages resulting from copyright infringement can be measured in alternate ways: "Actual damages are usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer."[259] One articulation of the "value of use" measure of damages is explained as:

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[258] *Nimmer on Copyrights*, August 2009, Volume 4, Chapter 14 "Infringement Actions – Remedies", at §14.01[A] and 14.01[B] (pgs. 14-5, 14-6 and 14-9).

[259] *See Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004) (quoting *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir. 2003)). *See also* Nimmer on Copyrights, at §14.02 (pgs. 14-13 and 14-20.1 through 14-

"It amounts to a determination of what a willing buyer would have been reasonably required to pay to a willing seller for plaintiff's work. That is a different measure than the determination of defendant's actual profits from the infringement. An author might license the use of his copyright either for a lump sum based on the reasonable value of the work or for a royalty derived from the licensee's profits, or for a combination of both."[260]

92. 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.[261] I understand that the Ninth Circuit Model Civil Jury Instruction on actual damages in copyright infringement matters states, "The reduction of the fair market value of the copyrighted work is the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by the defendant of the plaintiff's work."[262] As noted in *Nimmer on Copyrights*, the similarities between the

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31). *See also Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, (9th Cir. 1985); and *Jarvis v. K2, Inc.*, 486 F.3d 526, 533 (9th Cir. 2007).

[260] The decision of the U.S. Court of Appeals for the Ninth Circuit acknowledges, "This same distinction is recognized in patent cases." *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, (9th Cir. 1977).

[261] *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004); *Jarvis v. K2, Inc.*, 486 F.3d 526, 533 (9th Cir. 2007); *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002); *Frank Music Corp. v. Metro-Goldwyn-Mayer*, 772 F.2d 505, (9th Cir. 1985); and *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, (9th Cir. 1977); January 28, 2010 Order of Judge Hamilton, Order Denying Defendants' Motion for Partial Summary Judgment, pg. 3. Relevant case law may refer to the standard of measurement as the "fair market value" or "market value," which can be terms of art in the context of valuation of particular assets, and with respect to financial reporting. For purposes of my analysis, references to "fair market value" throughout this declaration refer to the amount at which property would exchange between a willing buyer and willing seller, in an arm's length transaction, neither being under compulsion, and each having reasonable knowledge of the relevant facts. This definition is consistent with guidance of the American Institute of Certified Public Accountants (AICPA) and relevant treatises on the valuation of intellectual property. *See, e.g.,* the June 2007 AICPA Statement on Standards for Valuation Services No. 1, "Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset", pg. 44; *see also Intellectual Property, Valuation, Exploitation, and Infringement Damages*, by Gordon V. Smith and Russell L. Parr. 2005 Edition, pg. 143.

[262] Ninth Circuit Model Civil Jury Instruction 17.23 – Copyright – Damages – Actual Damages.

"value of use" theory of copyright damages and the reasonable royalty rule in patent law are apparent.[263]

B. Methodology

93. What a willing buyer would have paid a willing seller for use of the infringed PeopleSoft/J.D. Edwards, Siebel and Oracle Database copyrighted software and software support materials ("copyrighted materials in suit") can be determined based on analyses indicating the fair market value of the copyrighted materials in suit to the parties at the time of first infringement. I have determined what Oracle, as a willing seller, would have accepted from SAP, as a willing buyer. I understand from Judge Hamilton's January 28, 2010 ruling Denying Defendants' Motion for Partial Summary Judgment, "Oracle in the present instance is not required to prove that it would have successfully negotiated a license with SAP, nor is it precluded from seeking license damages simply because it has never before licensed what SAP infringed."[263A] The copyrighted materials in suit are set forth in Oracle's Fourth Amended Complaint and are also summarized in Oracle's technical expert reports.[264]

94. SAP's "value of use" is measured as it impacts Oracle's consolidated operations and family of entities, although the successor in interest to the relevant copyright owners or exclusive licensees at the time of the valuation is Oracle International Corporation. In entering into a license with SAP, Oracle International Corporation would act on behalf of its predecessors in interest,

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[263] *Nimmer on Copyrights,* at §14.02[B][1] (pgs. 14-22).

[263A] January 28, 2010 Order of Judge Hamilton, Order Denying Defendants' Motion for Partial Summary Judgment, pg. 4.

[264] *See* Oracle USA, Inc. et al v. SAP AG et al, Fourth Amended Complaint in Case No. 07-CV-01658 dated August 18, 2009, pgs. 6 and 51-55; November 16, 2009 Expert Report of Paul Pinto, pg. 2; February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 10 and 98-99.

affiliates, and ultimate parent and SEC Registrant, Oracle Corporation. I understand this approach is consistent with the *Union Carbide Chemicals and Plastics Technology Corporation, et al., v Shell Oil Company et al.*, matter.[265]

95. As addressed below, I have determined SAP's "value of use" of the copyrighted materials in suit based on commonly accepted valuation methodologies: the market approach, income approach and cost approach. I have also evaluated relevant financial, economic and other factors, consistent with determination of the fair market value under the framework of the well-known patent case, *Georgia-Pacific Corp. v. U.S. Plywood Corp. ("Georgia-Pacific")*, for determining the outcome of a hypothetical license negotiation for the copyrighted materials.

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[265] *Union Carbide Chemicals & Plastics Technology Corp., et al., v. Shell Oil Company, et al.*, 425 F. 3d 1366. *Union Carbide* is a patent case where the federal circuit upheld the district court's admission of evidence regarding the impact of infringer's sales on the parent of a holding company that holds the title to the intellectual property. The federal circuit found "Simply put, the holding company would not enter any negotiation without considering the competitive position of its corporate parent."

157.   I understand that Oracle alleges that TomorrowNow began downloading PeopleSoft enterprise software applications and support materials starting in early 2002, prior to SAP's acquisition of TomorrowNow.[356] Consequently, a hypothetical negotiation would also take place between PeopleSoft and TomorrowNow in the early 2002 timeframe, before the alleged infringement first occurred. The license fee resulting from this hypothetical negotiation would reflect the value that TomorrowNow and PeopleSoft would have willingly agreed upon for TomorrowNow's use of PeopleSoft's copyrighted property between 2002 and January 2005.[357] However, I also understand that, as a legal matter, SAP would have had to negotiate with Oracle concerning a hypothetical license allowing TomorrowNow to use the PeopleSoft intellectual property, because SAP purchased TomorrowNow and non-exclusive copyright licenses are personal and non-assignable without the consent of the licensor (in this case, Oracle - PeopleSoft's successor in interest).[358] Therefore, a separate hypothetical negotiation would have occurred between Oracle and SAP at or around the time SAP acquired TomorrowNow in January 2005.

[356] Oracle USA, Inc. et al v SAP AG et al, Fourth Amended Complaint in Case No. 07-CV-01658 dated August 18, 2009, pg. 7.

[357] For purposes of this report, I have not determined the amount that PeopleSoft and TomorrowNow would have negotiated for a license for TomorrowNow's use of PeopleSoft's intellectual property since the license would not have covered the same scope of use and would not be transferrable to an acquiring entity.

[358] See, e.g., Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC Inc.), 89 F. 3d 673 (9th Cir. 1996); SQL Solutions, Inc. v. Oracle Corp., 1991 U.S. Dist. LEXIS 21097 (N.D. Cal. 1991).

158.   I have considered the opinions and relevant information of Oracle Senior Executives as to what Oracle would be willing to consider for a license fee paid by SAP to license the copyrighted materials in suit and understand, as a matter of law, that this is appropriate.[359] I also understand that although these parties are direct competitors, and even though Oracle has not before licensed the infringed material to a competitor, a fair market value for a license is an available damage remedy.   This remedy is based on establishing the appropriate consideration given up and received by both sides under the relevant factors.[360]

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[359] *See Polar Bear Prods., Inc. v. Timex Corp.* 384F.3d 700 (9th Cir. 2004).   I understand that some of the relevant factors that would be considered by Oracle executives are stated in the declarations of Larry Ellison and Safra Catz in support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment [Declaration of Larry Ellison in Support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009; Declaration of Safra Catz in Support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009].

[360] That Oracle and SAP could have reached an agreement on the fair market value for the license to the PeopleSoft/J.D. Edwards copyrighted materials at issue is supported by the fact that, although Oracle is aware that SAP promotes other database vendors such as Microsoft and IBM, and sells its own database product, Oracle and SAP have had a long-standing license for SAP to resell Oracle's database products. *See* Reseller Sublicense Addendum between SAP and Oracle Corporation dated November 30, 1999, ORCL00669957-964; Reseller Agreement Between Oracle Deutschland GmbH and SAP AG dated August 1, 1994, ORCL00670076-87; Declaration of Larry Ellison in Support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009, pg. 3.

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166.   First, the timing of the license would be critical to both parties: Oracle had just agreed to pay multiple billions of dollars to acquire PeopleSoft; SAP wanted to take advantage of the fear, uncertainty and doubt of PeopleSoft customers at that time, and knew that it had to strike quickly, which the TomorrowNow acquisition allowed them to do.

167.   Second, Oracle would consider and extract a price for the financial impact on Oracle of licensing to a competitor that has abundant resources to directly compete with Oracle in providing a level of PeopleSoft and J.D. Edwards service that has little, to no other, competition.

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252.   SAP is Oracle's most significant competitor in enterprise applications and, under the contemplated database license, would be using Oracle's database software to compete for Oracle's application support business at critical junctures in the two companies' histories (at the time of Oracle's acquisition of PeopleSoft and Siebel, and at the time of SAP's acquisition of TomorrowNow and launch of support service for Oracle applications, as is described elsewhere in my report). However, the effects of Defendants' actions on Oracle's PeopleSoft, J.D. Edwards, and Siebel customer bases have already been taken into account in my quantification of the value of use of licenses for those applications. Thus, I have limited SAP's value of use of the copyrighted database materials in suit to the measure of the lost license fees that SAP would have had to pay Oracle had it purchased a license (similar to a separate OLSA) for each relevant customer for which TomorrowNow provided application maintenance services using an Oracle database. For

purposes of determining SAP's value of use of the copyrighted database materials in suit, I have applied Oracle's pricing for its standard OLSA licensing terms assuming a particular configuration of TomorrowNow hardware. I have not included any fees for options or upgrades that may have been needed by TomorrowNow for each customer in order to emulate its customers' environments. These additional fees could be considerable. For example, some options have additional license fees of 25% - 50% of the enterprise edition license fees. I understand that for an Oracle Standard (Full-Use) license, Oracle would price the database license using its Enterprise Edition, utilizing the count of processors (or cores on each processor, for multi-core processors) on the servers with Oracle database installed or running.[526] In pricing this license, I have considered the following specifications:

- Oracle's list price per processor for the basic Enterprise Edition license and support was consistent between 2004 and 2008 at $40,000/processor for the license and $8,800/processor per year for support.[527] Therefore, I have used $40,000 per customer per processor as the one-time perpetual license fee and $8,800 per processor per customer as the support fee per year.

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[526] Discussion with Richard Allison. Oracle Software Investment Guide, TN-OR 01765697-752, at 709 and 714. For purposes of this analysis, a "processor" refers to either the CPU itself for single-core chips or each core, for multi-core processors.

[527] Oracle December 2004 E-Business Global Price List, ORCL00704411-433, at 412; Oracle September 2006 E-Business Global Price List, ORCL00704381-410, at 382; US$ Pricing Oracle Database filename: ePL071708 JDE Localisable Price lists.xls, ORCL00213686. Oracle's price lists also show options including Enterprise Edition Options such as Real Application Clusters, Partitioning and OLAP. Enterprise Edition Options are priced in addition to the license fees and the listed options range from an additional $10,000 to $20,000 per processor per option. *See* Oracle December 2004 E-Business Global Price List, ORCL00704411-433, at 412.

- TomorrowNow installed and ran Oracle database software on numerous servers that had 2 to 4 processors which were single to quad-core, or effectively 2 to 16 processors per server when considering Oracle's pricing practices, which considers each core for a multi-core processor.[528] 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).[529]

- Per discussion with Richard Allison, I understand that Oracle would have priced the license based on the largest server configuration. Therefore, I have assumed that Oracle would

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[528] Defendant TomorrowNow, Inc.'s Eighth Amended And Supplemental Response to Plaintiff Oracle Corporation's First Set of Interrogatories (Set One), December 4, 2009, Interrogatory No. 11 pgs. 42-55. (Identifying TomorrowNow servers with Oracle database-related files). Defendant's First Supplemental Responses And Objections To Plaintiffs' Fifth Set of Interrogatories To Defendant TomorrowNow, inc. and Fourth Set of Interrogatories to Defendants SAP AG and SAP America, Inc., December 4, 2009, pgs. 7-32. (Identifying TomorrowNow servers with Oracle database-related files and confirming that customer local environments accessed Oracle database files). Email from Joshua Fuchs (Jones Day) to Nitin Jindal (Bingham McCutchen), February 19, 2010 identifying the number of processors, number of cores and the date of purchase for each server identified in interrogatories as having an Oracle database installation. *See also*, October 28, 2005 email from George Lester to Jennifer Mrak (SAP), TN-OR01020812-818 at 812 (G. Nelson Exhibit 1831), indicating that, "I have been trying to procure a license for Oracle Standard Edition on two of our internal servers, which each have 4 CPU's."; Email from Alex La Mar (TomorrowNow) to Greg Nelson (TomorrowNow) on March 20, 2006, TN-OR01040829-34 at 829 (G. Nelson Exhibit 1832), indicating "we need to obtain Oracle Standard Edition for a 4 CPU machine running AIX and a 4 CPU machine running Windows."

[529] Email from Joshua Fuchs (Jones Day) to Nitin Jindal (Bingham McCutchen, February 19, 2010 identifying the number of processors, number of cores and the date of purchase for each server identified in interrogatories as having an Oracle database installation. TomorrowNow PeopleSoft Growth Projections, TN-OR02171843-848, at 844, identifying Quad Processor Unix Database Server as the location for the majority of PeopleSoft environments running on Oracle Database software); Discussion with Richard Allison; Oracle Software Investment Guide, TN-OR 01765697-752, at 709 and 714 (identifying the Unix processor factor as .75).

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.[530]

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[530] Oracle Software Investment Guide, TN-OR 01765697-752, at 713-714. I am not aware of any technological reason related to Oracle's database or applications to explain why TomorrowNow built environments on servers with different processor configurations.

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