

EXHIBIT B

Oracle USA, Inc., et al

v.

SAP AG, et al

Stephen K. Clarke
Expert Report

May 7, 2010

accordingly. The Meyer Report does not make clear how Mr. Meyer separates the reasonable royalty from other claims such that it is not duplicative.

3.7. Negotiation

If Mr. Meyer is going to adopt a reasonable royalty as a measure of the Defendants' Value of Use, he must develop his conclusion by "forcing" the parties in the Negotiation to agree on a royalty rate that is reasonable to both. Therefore, the resulting royalty rate will likely be *less than Plaintiffs claim* they would have required to enter into a license agreement and *more than Defendants claim* they would ever have been willing to pay.

Mr. Meyer describes a hypothetical negotiation methodology beginning in paragraph 93 of the Meyer Report and I address his methodology here:

3.7.1. Date of Negotiation

Mr. Meyer uses "January 2005"¹³⁶ as the date of the Negotiation for Oracle for PeopleSoft products. Actually the right date for the Negotiation is January 19th 2005, the date of SAP's acquisition of TomorrowNow.

Mr. Meyer uses September 2006¹³⁷ as the date of the Negotiation for Siebel. The right date for the Siebel Negotiation is September 29, 2006 when TomorrowNow first supported a Siebel customer.¹³⁸

3.7.2. Subject IP

Mr. Meyer states that he is quantifying "...the amount that SAP – as a willing buyer – would pay Oracle, and that Oracle – as a willing seller – would accept from SAP in the form of a license fee to represent SAP's 'value of use' of Oracle's PeopleSoft-related copyrighted materials in suit."¹³⁹ He repeated the same sentence in relation to Siebel. He also includes a calculation of SAP's Value of Use for the "Oracle Database copyrighted materials in suit."

3.7.3. Actual Use

In paragraph 104 of the Meyer report, Mr. Meyer references the Alleged Actions and their relationship to the damages he is calculating and states, "I understand [the fair market value license measure of copyright actual damages] must relate to the fair market value of a license that allows for SAP's actions that constitute copyright infringement, and *cannot allow for more or different infringement than actually occurred.*" [emphasis added]. This statement is fundamental to the quantification of damages that follows in the Meyer Report. As I point out below, Mr. Meyer loses sight of this statement and its meaning during his analysis and related calculations. However, the concept is so fundamental that it is worth repeating: Defendants are only liable for damages to the extent they infringed the Subject IP. Therefore, the Negotiation must focus only on Defendants' *actual use* of the Subject IP during the infringement period.

¹³⁶ Meyer Report, page 69, paragraph 102.

¹³⁷ Meyer Report, page 176, paragraph 260.

¹³⁸ Siebel_service.xls export. TN-OR07717977.

¹³⁹ Meyer Report, page 70, paragraph 103.

Mr. Meyer's statement is consistent with those of Mr. Ellison and Ms. Catz. Mr. Ellison stated in a declaration,

"I understand that for purposes of damages in this case, any retroactive 'hypothetical' license award can only cover the exact scope and duration of the infringement by Defendants." He further stated that a "hypothetical license value" would "focus on the actual use by SAP's subsidiary, TomorrowNow, for a finite time period, of certain specific Oracle intellectual property, with specific results in the marketplace."¹⁴⁰

Ms. Catz echoed Mr. Ellison's sentiment in her declaration:

"I understand that for purposes of damages in this case, any retroactive 'hypothetical' license award can only cover the exact scope and duration of the infringement by Defendants." She further stated that a "hypothetical license value" would "focus on the actual use by TomorrowNow, for a finite time period, of certain specific Oracle intellectual property, with specific results in the marketplace."¹⁴¹

As previously stated, the hypothetical license would be for a limited duration, in limited territories, with limited rights, for the Subject IP (i.e., the portion of the Oracle intellectual property necessary to deliver the service TomorrowNow is accused of providing inappropriately) and to a limited number of customers.

Mr. Meyer's list of a range of "benefits" that he claims SAP enjoyed as a result of the Alleged Actions is the first evidence that he is not quantifying a license for Defendants' actual use of the Subject IP. Mr. Meyer suggests that because SAP's ability to:¹⁴²

1. "reproduce" the copyright materials in suit
2. "disseminate" the copyright materials in suit
3. "make derivative works of the copyright materials in suit"

It enjoyed the following benefits:¹⁴³

1. "enhanced revenues"
2. "improved market position"
3. "enhanced customer retention"

¹⁴⁰ Declaration of Larry Ellison in Support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim [Redacted] dated September 22, 2009, pages 2-3.

¹⁴¹ Declaration of Safra Catz in Support of Oracle's Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim dated September 22, 2009, pages 2-3.

¹⁴² Meyer Report, page 71, paragraph 105.

¹⁴³ Meyer Report, page 71, paragraph 105.

4. "avoided costs"
5. "avoided risks"
6. "ease of market entry"
7. "negative" impact on Oracle

He then claims to have calculated the "...fair market value of these benefits to SAP." However, he stated benefits are not relevant to his damages conclusion.

1. "Enhanced Revenues" are of no value if they do not lead to more profits and as I describe later in this report TomorrowNow would likely have made less profit if the License was in place (their selling price would have had to be higher than it was to accommodate the royalty and that would have reduced sales and profits) and SAP made little or no additional profit as a result of the Alleged Actions.
2. "Improved market position" is not a quantifiable benefit, at least within the boundaries of the Meyer Report.
3. There is no reason to believe the License would increase a customer's propensity to stay on Defendants' support, and Mr. Meyer presents no evidence to support the proposition.
4. "Avoided risks" and "Ease of market entry" are not quantifiable benefits, again within the boundaries of the Meyer Report.

There would be no "negative" impact on Oracle if the License was in place on the terms Mr. Meyer postulates. In fact, because Oracle would still own all of the assets it acquired in the acquisitions, it would be substantially better off under Mr. Meyer's postulated license.

It is a significant contradiction in Mr. Meyer's analysis that he states he is going to quantify the value of actual use then includes his list of SAP benefits. This contradiction (and others) runs throughout Mr. Meyer's analysis and makes it impossible to segregate the damages he calculates related to the actual use and the damages related to the other benefits he ascribes to SAP. Stated another way, SAP's unfulfilled and unrealized aspirations for the role of TomorrowNow driving sales of SAP application licenses do not constitute actual use and should play no role in assessing the Value of Use. Mr. Meyer's adoption of SAP's marketing hopes as his basis for a paid-up license is inappropriate and not the sort of objective data he should rely upon for his analysis. In addition, no prudent licensee would ever agree to the License as postulated by Mr. Meyer.

The contradiction is compounded when Mr. Meyer adds later in paragraph 105: "I understand that the copyrighted materials in suit are essential,¹⁴⁴ and without a license to the Oracle copyrighted materials in suit, SAP could not offer a level of support services to Oracle's PeopleSoft, J.D.Edwards, Siebel and Oracle Database customers as quickly as SAP desired, or comparable to the level of service and at the price provided by TomorrowNow." Based on Mr.

¹⁴⁴ Mr. Meyer does not clarify what the copyrighted materials in suit "are essential" for so this portion of his statement is unclear.

Meyer's statement, all SAP gains by infringing the Subject IP is the ability to provide "a level of support services" comparable to that provided by TomorrowNow, yet he refers the reader to "level of service" as provided by Oracle in footnote 276 to paragraph 105. Therefore, it is not clear what Mr. Meyer is assuming as regards actual use allegedly made of the Subject IP and the difference between the two makes a major difference on the analysis. In addition, the evidence in this case is overwhelming that Oracle believed the services provided by TomorrowNow were in many ways inferior to those provided by Oracle. Yet Mr. Meyer ignores his client's statements and claims to be basing his analysis on the assumption that the support services provided by TomorrowNow were equivalent to those provided by Oracle. He cannot have it both ways. Either the support services provided by the two companies were equivalent or they were not.

Mr. Meyer also ignores other evidence that indicates TomorrowNow did not provide the same level of service as Oracle. Industry media coverage, which has the potential to affect customer perceptions of the capabilities of third party support vendors, reported the differences between Oracle and TomorrowNow support. For example, a Forbes article reported that:

TomorrowNow readily acknowledges, that it's not offering the same level of services... "TomorrowNow offers no implementation services or training. They don't have a full-service services organization to duplicate Oracle's. They're doing [maintenance] for half the cost ... a much more minimal level of support, but an acceptable level of support for some customers."¹⁴⁵

Another industry article describes third party support:

Third-party support for enterprise software is entirely legal. It is, for the most part, very similar to buying a new BMW from an authorized BMW dealership, but taking it to an independent auto repair shop for servicing.¹⁴⁶ Oracle, however, has an obvious problem with the way in which TomorrowNow and Rimini Street have gone about offering their services and their individual "business models." ...the world of maintenance and support is unglamorous as it gets inside today's business. ...For the software vendors, however, the fees are a lucrative cash cow that keep on giving all year long.

As I discuss in more detail later in my report, third party support was reported by industry analysts to be a viable option for certain customers, especially those on old, stable, customized releases that are not interested in receiving upgrades.

Mr. Meyer implicitly assumes that to provide support services to the TomorrowNow customers, TomorrowNow would need a license to all of the "copyrighted materials in suit." However, based on information provided by Mr. David Garmus,¹⁴⁷ it was not necessary for TomorrowNow

¹⁴⁵ DiCarlo, Lisa. "Computer Hardware & Software: Hitting Oracle Where it Hurts," September 16, 2005. <http://www.forbes.com>.

¹⁴⁶ Wailgum, Thomas. "ERP Support: How Far will Oracle Go to Protect Golden Egg?" February 26, 2010.

¹⁴⁷ An expert retained by the Defendants in this case.

to have access to the entirety of Oracle's software in order to provide the actual support service to the TomorrowNow customers. Based on Mr. Garmus' report, Mr. Meyer's Value of Use should incorporate an adjustment to allow for the lack of access to those portions of Oracle's software that TomorrowNow did not actually support.

The only license Defendants would need in the Negotiation is one that allowed them to: maintain copies of the customer's environment on their computers; use solutions developed for one customer to be promulgated to other customers; and download the Subject IP from Oracle's website to support its customers.

According to testimony in this case, customers have access to modify necessary software source code. Matthew Bowden¹⁴⁸ at TomorrowNow, also explained how such modification occurs:

...customers have many programs that have been provided to them by PeopleSoft. They don't all work as they need to work. They don't necessarily work as designed, so they may have to modify them to correct bugs. They also may want to extend the functionality and prove the functionality to be more suitable to their business needs. So they may modify the programs for that reason. They may actually add additional programs to it for that reason. So, to me, this is common practice open source behavior – in the IT world.¹⁴⁹

...PeopleCode is a language that's provided to the customers for their use in modifying and managing programs. They're – they're encouraged to write their own PeopleCode programs. It's common, done all the time. There is – many GSC [Oracle's Global Support Center] cases are resolved by telling the customer, 'Well, you can write a PeopleCode program to do that.'¹⁵⁰

...I have to use PeopleTools to change – PeopleTools to change PeopleCode.¹⁵¹

Mr. Bowden further explained that PeopleSoft provided its customers with a lot of the source code that employees and consultants needed for modification:

Q. Is it your understanding that people who had never purchased PeopleSoft could change these files?

A. No. I would not expect someone who had never purchased PeopleSoft to be able to do that, no. I mean, as an employee of a company who had purchased them, that, yes, they would. As a consultant, it's been done, you know, many times, but the – ultimately, there is someone that purchased

¹⁴⁸ Mr. Bowden, a primary support engineer who did not have a formal title at TomorrowNow. Matthew Bowden deposition dated December 5, 2008, page 26.

¹⁴⁹ Matthew Bowden deposition dated December 5, 2008, pages 104-105.

¹⁵⁰ Matthew Bowden deposition dated December 5, 2008, page 105.

¹⁵¹ Matthew Bowden deposition dated December 5, 2008, page 107.

PeopleSoft that says, 'I need this done,' and someone acting as an employee/consultant would – would make those changes.

Q. Is that still your opinion now, Mr. Bowden?

A. It's still being done all over the world right now.

Q. Is it still your opinion now, that PeopleSoft is –

A. Is open source?

Q. Is open source?

A. Yes.

Q. Is it still your opinion now that customization of PeopleSoft code is common practice? And by 'code', I mean at this point COBOL, SQR and PeopleCode?

A. Yes.¹⁵²

Because they never sold licenses to Oracle software, Defendants would not need a license to *sell* any of the Subject IP. All they needed was a license that allowed TomorrowNow to support its customers (by fixing bugs as they arose, issuing tax and regulatory updates, and so on).

Based on the foregoing, Mr. Meyer's treatment of a reasonable royalty in his Value of Use analysis, is inappropriate. I will expand in detail on all of these issues later in this report.

3.7.4. Customer Acquisition Assumption

Mr. Meyer implicitly assumes that if Defendants obtained the License they would also receive thousands of customers from Oracle. In paragraph 110, he states,

The value that Oracle paid for PeopleSoft in an arm's length market transaction virtually identical in time to SAP's acquisition of TomorrowNow is particularly relevant to understanding the fair market value of SAP's Value of Use of the infringed materials in the assessment of damages in this matter.

It is not at all clear what Mr. Meyer meant to say with this sentence but his application of it is clear. He bases his Value of Use analysis on the assumption that the license fee paid by Defendants in the Negotiation should compensate Oracle based on a pro rata¹⁵³ share of the PeopleSoft acquisition price.

He applies the same rationale to a Siebel license when he states,

¹⁵² Matthew Bowden deposition dated December 5, 2008, pages 105-106.

¹⁵³ Pro rata based on customer count or, in other words, the PeopleSoft transaction price computed as a number of dollars per acquired customer.

6. Value of Use - Cost Approach

6.1. PeopleSoft Acquisition Cost

Mr. Meyer next opines²³² on the Value of Use under a cost approach. He states that the "...cost approach attempts to measure the future benefit of the intellectual property by quantifying the cost to develop alternative technology or replace the technology being valued." He claims²³³ to have considered Oracle's cost of acquiring the intellectual property in the PeopleSoft transaction and "the investment in research and development by Oracle in the copyrighted materials in suit since the acquisition." Although Mr. Meyer claims to have considered Oracle's research and development ("R&D") spending on the acquired intellectual property since acquisition, several Oracle witnesses (Ms. Catz, Mr. Corey West ("Mr. West") Oracle Senior Vice President, Controller and Chief Accounting Officer, Mr. Ivgen Guner, and Mr. Charles Rozwat²³⁴) claimed that it was not possible to do so because the company did not track expenditures in that way.

Mr. Meyer cites a book titled "Intellectual Property Valuation, Exploitation, and Infringement Damages, by Gordon V. Smith and Russell L. Parr, 2005 Edition."²³⁵ I have that book and studied it carefully to verify the citation. However, the citation is inapposite for Mr. Meyer's purpose. The reference states that the cost approach to valuing intellectual property is only applicable to valuing the absolute fee simple interest in the intellectual property which is an inappropriate basis of value in the context of this case.

Although the entire premise of Mr. Meyer's approach is undermined by his citation, I address his cost approach in detail below:

6.2. R&D Expenditures

Despite Oracle's senior management stating that it was not possible to determine how much Oracle spent on R&D by product line, Mr. Meyer states that from December 2004 through August 2008, Oracle spent a total of "...\$1.1 billion on PeopleSoft product applications development" and that on average this was \$290 million a year in "PeopleSoft software application and software and support materials."²³⁶ Mr. Meyer states that Oracle personnel prepared reports that purport to track the R&D expenditures by product line and that from March 2006 through August 2008, Oracle spent a total of "...\$260 million on Siebel product

²³² Meyer Report, page 95, paragraph 142.

²³³ Meyer Report, page 96, paragraph 142.

²³⁴ The lack of "granularity" in the reporting of Oracle R&D spending was noted on pages 89, 189, and 193 of Safra Catz's deposition dated March 27, 2009. When asked about R&D development costs with respect to new releases, Ivgen Guner replied, "I do not have that information. We do not collect that sort of detail. We do not separate our divisions of duties by release versus by product versus by version." Ivgen Guner deposition dated September 4, 2008, page 83. Corey West said that R&D expenditures were tracked in the general ledger (page 33), but when pressed admitted "in terms of activity-based tracking, that doesn't happen." Corey West deposition dated April 9, 2009, page 78. Similarly, Charles Rozwat was unable to account for time spent by his R&D teams on particular projects. Charles A. Rozwat deposition dated October 12, 2009, pages 77, 88 and 201.

²³⁵ Smith, Gordon V., and Russell L. Parr. *Intellectual Property Valuation, Exploitation, and Infringement Damages*. New York, NY: John Wiley & Sons, Inc. 2005.

²³⁶ Meyer Report, page 97, paragraph 147.

applications development” and that on average this was \$104 million a year.²³⁷ Mr. Meyer further opines that various analyses by *Oracle employees* informed him that Oracle “estimated that 60 - 65% of its research and development expense for its applications products related to support-related development efforts.”²³⁸ Mr. Meyer cites a November 2007 presentation with a chart that purports to show support and new development spend by product line. The chart is difficult to read, but it appears that approximately 75% of PeopleSoft research and development expense is related to support.²³⁹ Mr. Meyer also cites a “Discussion with Houman Behazadi”, for which he provided notes from a November 13, 2009 conversation that state, “November 2007 R+D cost analysis” and “60-65% of R+D spent on maintenance, ratio consistent today.” The notes further state, “Data not tracked in Oracle’s systems in normal course...separate analysis (manual process) performed to estimate time by task.” This “analysis” was provided by Oracle without explanation or support and it directly conflicts with 30(b)(6) deposition testimony stating that this information was never tracked by Oracle.²⁴⁰

“Therefore, for the period December 2004 through September 2008,” Oracle spent “approximately \$660 million to \$715 million” on PeopleSoft support related to R&D. Mr. Meyer then states that an apportionment of Oracle’s R&D is not required because “TomorrowNow copied Oracle’s PeopleSoft and J.D.Edwards support materials as well as underlying applications...”²⁴¹ It is not clear what this sentence means. The relevance is also unclear because it would be a requirement of properly estimating the “profits” generated from support revenues to recognize all of the costs associated with generating such revenues. Using Mr. Meyer’s data, Oracle spent an average of \$181 million²⁴² a year developing support products for PeopleSoft applications and \$65 million²⁴³ a year on Siebel support. Because Oracle accounts for its R&D cost below the gross margin line of its reported financials, approximately \$246 million²⁴⁴ a year of support related R&D is not included in Mr. Meyer’s lost profits, Value of Use and reasonable royalty analyses or Ms. Catz’s estimate of profit on support. SAP, on the other hand, tracks R&D expenses related to support and charges it above the line, reducing gross margin (hence SAP’s lower reported gross margin versus Oracle). Because many of the R&D costs are incurred to develop fixes, updates, patches and the like, Mr. Meyer’s failure to properly apportion the R&D costs results in the support lost profits and Value of Use calculations being overstated.

Mr. Meyer states that during the January 2006 through September 2008 period, Oracle spent “\$156 million to \$169 million” on Siebel support related to R&D.²⁴⁵ He added that Siebel spent a total of \$211.9 million on R&D in the nine months ended September 2005.²⁴⁶ Based on his

²³⁷ Meyer Report, page 190, paragraph 284.

²³⁸ Meyer Report, page 191, paragraph 285.

²³⁹ Presentation titled “Applications Strategy – November 2007” ORCL00560527-566, at -533.

²⁴⁰ Safra Catz’s deposition dated March 27, 2009, pages 89, 189 and 193. Ivgen Guner deposition dated September 4, 2008, page 83. Corey West deposition dated April 9, 2009, page 78. Charles A. Rozwat deposition dated October 12, 2009, pages 77, 88 and 201.

²⁴¹ Meyer Report, page 98, paragraph 148.

²⁴² \$290 million a year (per Meyer Report, page 97, paragraph 147) times 62.5% (the average of “60-65%”) = \$181 million a year.

²⁴³ \$104 million a year (per Meyer Report, page 190, paragraph 284) times 62.5% = \$65 million a year.

²⁴⁴ \$181 million + \$65 million = \$246 million.

²⁴⁵ Meyer Report, page 191, paragraph 285.

²⁴⁶ Meyer Report, page 191, paragraph 286.

assumptions, Mr. Meyer then states that in his opinion SAP avoided development expenditures with a "...fair market value of no less than \$225.7 million."²⁴⁷

Mr. Meyer references²⁴⁸ SAP's expenditures of "...over REDACTED-NOT RELEVANT on support development..." to buttress his argument that SAP would have been "aware of the significant cost associated with providing support to..." its customers. The argument does not appear to add anything to Mr. Meyer's argument as there is no doubt that both Oracle and SAP were aware that support development requires significant expenditures. The problem is that Mr. Meyer has failed to take the support related portion of such costs into account in his Oracle lost profits and Value of Use analyses.

In addition, my analysis of the testimony in this case indicates that TomorrowNow created some or most of its own fixes, updates and other materials. Accordingly, to the extent my understanding is correct, Mr. Meyer's damage analysis is inappropriate because it charges TomorrowNow for a portion of the Subject IP it did not use. **Furthermore, as Mr. Garmus reports, (later) the Subject IP TomorrowNow used did not include the entire suite of software at issue. To the extent the Subject IP was only a subset of the software at issue, Mr. Meyer should have reduced his Value of Use for all approach measures (i.e., market, income and cost) accordingly.**

6.3. Pinto Cost Estimate

Mr. Meyer next deals with the cost SAP would have had to incur to independently develop the Oracle copyrighted materials at issue. In doing so, he references a report prepared by Mr. Paul Pinto, an expert retained by Oracle in this case. Mr. Meyer states, "...Mr. Pinto has concluded that it would have cost Defendants approximately \$1.275 billion with a range of \$936 million to \$2.903 billion to develop 7 specific PeopleSoft and J.D.Edwards software applications."²⁴⁹ Mr. Meyer states, "...one of Mr. Pinto's conclusions addresses avoided development costs of [between] \$198 million and \$573 million"²⁵⁰ for Siebel.

The practical application of Mr. Meyer's opinion in this regard is unclear. I understand from Mr. Garmus, that to be suitable for Mr. Meyer's purposes (i.e., a replacement for Oracle software that would allow TomorrowNow to support its customers without using the Subject IP) the independently developed software would have to *exactly replicate* the Oracle software.²⁵¹ With millions of lines of software code at issue, statistically speaking, the probability of SAP exactly replicating the Oracle software without actually copying Oracle software code is essentially zero, an assessment Mr. Garmus confirmed. In addition, if SAP duplicated the four suites of software applications Mr. Meyer references the cost of replication would confer total ownership of the software on SAP which is not an appropriate measure of the Value of Use in this case

Therefore, what Mr. Meyer and Mr. Pinto are opining on makes no practical or economic sense in the context of this case. In addition, from an economic point of view, Mr. Pinto's cost

²⁴⁷ Meyer Report, page 191, paragraph 287.

²⁴⁸ Meyer Report, page 99, paragraph 149.

²⁴⁹ Meyer Report, page 99, paragraph 150.

²⁵⁰ Meyer Report, page 192, paragraph 288.

²⁵¹ Garmus Report.

fact that numerous companies, ranging from small start-ups in the U.S., to billion dollar international companies have entered the third-party support business suggests that the marketplace's acceptance of third-party support vendors is positive and growing. In addition, these companies provide support services that are substantially similar to those provided by TomorrowNow to J.D.Edwards and PeopleSoft customers. The fact that they do so with varying degrees of acquiescence by Oracle creating a vibrant market for replacement support in the process. Therefore, over time, there will be significant downward pressure on Oracle to lower the cost of support which will put similar downward pressure on the Reasonable Royalty.

8.9. Georgia-Pacific Factor No. 9: Advantages over Old Devices

"The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results."

Of course, because this is a copyright case, there are no "old devices" and "old modes" at issue and such devices that would not be relevant in the context of this case anyway (because support must always include the latest methods of achieving the purpose of the applications; even if the application itself is an old, retired version, the updates for tax and accounting purposes must always be current).

However, I am going to address this factor by amending it slightly to comport with the copyright nature of the case as follows:

The advantages of providing support services for existing applications using Oracle support versus the support provided by third-party vendors in general.

The Subject IP includes "the updates, patches and fixes incorporated in each relevant version, service packs of Oracle updates, patches and fixes, and individual exemplar Software and Support Materials, including certain Oracle knowledge management solutions and certain Oracle updates, patches and fixes..."⁶⁰¹ In addition, Oracle support allows the customer to contact a call center for assistance with a software problem (a problem is referred to as a "case").

It is apparent there are ways for TomorrowNow to have achieved a high level of support (at least a level of support the customers would have found acceptable) by utilizing alternatives to the alleged inappropriate use of the Subject IP, I discuss several examples in the following sections. I also discuss alternatives to TomorrowNow, including self-support and other support vendors.

8.9.1. Tax and Regulatory Updates and Bug Fixes and Patches

Keeping the software current with the latest tax and other regulatory authorities is a component of the support Oracle provides its customers. The company gathers the relevant data (from the various authorities) and creates the updates needed to insert the revised data into the customer's

in annual support costs. Klee Associates and netCustomer advertised up to 75% cost savings but the customer paid an hourly fee for people employed on their project on top of the support fee. CH2M HILL advertised a 30% cost savings.

⁶⁰¹ Complaint, page 55.

systems that require such changes. Generally, the customer (or their consultant) imports the necessary software elements to effect the changes to their system.⁶⁰² Oracle does not have a monopoly on the data needed to create the changes. There are data-gathering services that gather the data and sell relevant data to companies that need them. Therefore, Oracle enjoys no special advantages in the area of tax updates (except, perhaps, that it is able to amortize its data gathering costs over more customers).

Instead of downloading Oracle's tax and regulatory updates, TomorrowNow began to write their own beginning in fall of 2003.⁶⁰³ TomorrowNow did its "...own research on regulatory sites or subscription services to determine what the new changes are – are going to impact the software and we design and develop those changes from scratch for the different clients."⁶⁰⁴ John Baugh further testified that:

Well, one, we're no longer getting any updates from PeopleSoft. I'm not sure at what point that process has changed, but since I think sometime in 2003 or 2004 – I'm not sure of the exact date – we've been doing all the regulatory research and developing the updates ourself. So that would be the – the one primary difference is that there's no involvement or no code that's being delivered by PeopleSoft that is used. It is all our own code now.⁶⁰⁵

Katherine Walker Williams also testified that:

Generally what we do is we have some people that are business analysts that it is their responsibility to research tax updates and – and find out all the changes in the tax updates from tax localities. When they find those things, they would write up a business document to explain the change, and the development team would take that business document and develop the code off of the code itself in the clients [sic] – in the local environments.⁶⁰⁶

Oracle enjoys an advantage in any area of fixes and patches that requires special understanding of how the software operates. However, for the most part⁶⁰⁷ Oracle's advantages are relatively minor in nature because many third-party support vendors offer similar levels of service and many ERP customers are able to self support.⁶⁰⁸ I assume that the customers themselves have

⁶⁰² "Customers regularly had employees, contractors, consulting firms help them implement, install, maintain and update their software. In order to do so, they [Oracle] had to grant those customers a customer connection ID if they had to do a download on them or update or fix. Standard business Oracle condoned and promoted all the time as part of the customer's license." Bob Geib deposition dated January 9, 2009, pages 230-231.

⁶⁰³ Shelley Nelson deposition dated April 18, 2008, page 280.

⁶⁰⁴ Shelley Nelson deposition dated October 30, 2007, pages 141-142.

⁶⁰⁵ John Baugh deposition dated February 6, 2008, pages 65-66.

⁶⁰⁶ Katherine Walker Williams deposition dated April 1, 2008, page 15.

⁶⁰⁷ Although I understand from the evidence that such instances are relatively rare, there may be bugs that require significant in-depth knowledge to fix. The existence of intractable bugs is also evidenced in the discovery documents. However, their relative rarity means Oracle's support advantages are limited. Jesper Anderson deposition dated June 10, 2009, pages 57-59.

⁶⁰⁸ Buffy Ransom deposition dated April 30, 2009, pages 118-119. Richard Cummins deposition dated April 21, 2009, pages 60-61.

access to the source code needed to create, test and install bug fixes and patches, as do the wide variety of third-party vendors that support Oracle products.⁶⁰⁹ Therefore, TomorrowNow would not need a license to access Oracle's source code, provided it operated within the boundaries of the customer's Oracle license.⁶¹⁰

8.9.2. Alternatives to Copies of Customer Environments

Remote access appears to be an alternative to keeping copies of environments on TomorrowNow's systems for some, if not all, of the activities that TomorrowNow performed, and I understand that TomorrowNow supported some customers remotely.⁶¹¹ In fact, most of the J.D.Edwards customers were remote,⁶¹² "nearly all of the [PeopleSoft] financial customers were remote,"⁶¹³ and "Some [PeopleSoft] HR customers were remote."⁶¹⁴ The main advantages to TomorrowNow having the License are cost-savings and speed (mainly for time to access remotely) the Delta would provide. The existence of numerous third party vendors as alternatives to TomorrowNow indicates a low royalty for the Subject IP.

Maintenance of Oracle's customer environments on TomorrowNow computers would cause upward pressure on the Reasonable Royalty.

8.9.3. Alternatives to Cross-Use of Customer Environments

An alternative to cross-use of customer environments is to develop fixes for each client individually. The existence of numerous third party vendors as alternatives to TomorrowNow's use of the Subject IP puts downward pressure on the Reasonable Royalty.

8.9.4. Alternatives to Using Downloaded Material for Multiple Customers

I understand that Plaintiffs allege that it was inappropriate for TomorrowNow to use one customer's downloaded materials to support another customer.⁶¹⁵ I also understand that Oracle contends that it was inappropriate for TomorrowNow to have downloaded the Subject IP to its computers. An alternative to any downloads at TomorrowNow would have been for TomorrowNow to assist the customers to download the Subject IP and retain it at *their* premises. On the other hand, Oracle would not wish to allow storage of downloaded materials on TomorrowNow computers. On balance, therefore, storage of downloads on TomorrowNow computer creates upward pressure on the Reasonable Royalty

⁶⁰⁹ Mark Kreutz deposition dated October 30, 2007, pages 143-144. Larry Ellison deposition dated May 5, 2009, page 20.

⁶¹⁰ Richard Allison deposition dated November 11, 2009, page 67.

⁶¹¹ John Zepecki deposition dated September 9, 2008, pages 220-221. "A. Consulting providers would often access customer systems. Q. Remotely? A. Yes. Remotely."

⁶¹² Shelley Nelson deposition dated April 18, 2008, page 487.

⁶¹³ George Lester deposition dated April 23, 2009, page 63.

⁶¹⁴ George Lester deposition dated April 23, 2009, page 63. Mark White stated that TomorrowNow had some concern as to whether it would be possible to transition hosted PeopleSoft payroll customers to a remote environment. Mark White deposition dated March 5, 2009, pages 278-279.

⁶¹⁵ Complaint, page 56. Based on Mr. Gray's analysis, many of TomorrowNow's customer downloads were stored in individual customer folders.

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8.9.8.17 Other

In addition to engaging an active third-party support vendor to support a customer's software, there are other alternatives. To list them all would be prohibitively time-consuming and unnecessary. However, an example will suffice:

A customer that, for whatever reason (financial distress, downsized operations, parent mandate) wanted to reduce its total IT department spend, could do so by outsourcing certain activities or reducing the complexity and capability of their software (while still retaining needed operational capacity). For example, one method of reducing costs might include buying an off-the-shelf accounting system or inventory control package. While less than ideal from the point-of-view of integration, use of such reduced functionality packages may allow a company to significantly reduce its overall IT spending and, in extremis, the customer may have no choice but to do so.

8.9.8.18 Summary of Available Alternatives

As described in detail above, numerous alternatives to Oracle support exist now and existed at the time of the Negotiation in January 2005. For example, LegacyMode, CedarCrestone, and Citagus for PeopleSoft products; and Versytec, Conexus Partners, and Klee Associates for J.D.Edwards products, plus a large group of consultants, systems integrators and outsourcing firms were available to customers at that time.

Appendices F-1 and F-2 summarize the available alternative support vendors over time for PeopleSoft and J.D.Edwards software products. These appendices represent a conservative summary of the available support vendors because they exclude vendors of outsourced business operations, support vendors based outside the U.S. and "On-Demand" or SaaS products that

⁸⁵⁸ "Third-Party Risk Analysis 05-10-06;" ORCL00032753. See also, "Third-Party Risk Analysis 2008 1-25-08;" ORCL00079745.

⁸⁵⁹ "Third-Party Risk Analysis 2008 1-25-08;" ORCL00079745.

⁸⁶⁰ Salesforce.com is a web-based CRM solution for sales and marketing streamlines customer relationship management. See Salesforce.com. "CRM." March 14, 2010. <<http://www.salesforce.com/>>. See also, "Third-Party Risk Analysis 05-10-06;" ORCL00032753 and "Third-Party Risk Analysis 2008, 1-25-08;" ORCL00079745.

compete to fully replace Oracle ERP licenses and support. Appendix F-3 summarizes the range of cost savings advertised by third party support vendors.

8.9.9. Demand for Third-Party Support

The emergence of third-party support vendors is driven by customer demand and the corresponding opportunity to provide a niche service in the marketplace. Oracle business documents highlight the third-party vendors' positioning and value proposition relative to Oracle which I interpret to mean they are acceptable substitutes at significantly reduced prices.⁸⁶¹

In 2005, Forrester Research reported, "[t]his emerging alternative support market may encourage Oracle (and other app vendors with large installed bases) to improve the quality and value of its support... The most visible market for third-party applications support targets the [Oracle] acquired PeopleSoft and J.D. Edwards customers."⁸⁶² Indeed, most of the third-party support providers focused largely, if not entirely, on products that Oracle acquired with PeopleSoft, J.D. Edwards and Siebel.⁸⁶³ Gartner reports that "There is a small segment of vendors that offer third-party software support, and it is primarily applications maintenance for legacy products, such as PeopleSoft, JD Edwards, Siebel and older versions of SAP."⁸⁶⁴

As I discuss below, third-party support services are focused on Oracle acquired products and are a viable option for some ERP customers.

8.9.10. Third-Party Support Viability

There are advantages and disadvantages to obtaining support through one of the third-party vendors in the market, making third-party support a viable option for certain customers. Angela Eager with Computer Business Review reported:

Not surprisingly there are compromises. Third-party support is only appropriate for stable, legacy systems where there is little requirement for change, other than in predictable areas such as meeting tax and other regulatory requirements, because those opting out of vendor maintenance also opt out of the latest releases and vendor-built security updates and patches. As Rimini Street CEO Seth Ravin points out, this means the third-party option is not suitable for everyone. 'Would we expect a majority of the customers? No, but we believe we could get a 10% to 15% fringe.'

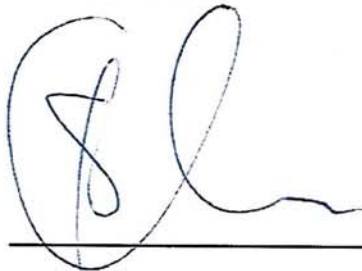
⁸⁶¹ "Oracle Third-Party Support SWAT Team." ORCL00088177-181, at -179.

⁸⁶² Hamerman, Paul, with Jessica Harrington. "Third-Party Application Support Promises Lower Costs, with Tradeoffs: Oracle's PeopleSoft Acquisition Boosts an Emerging Market." Forrester Research. March 11, 2005; ORCL00427952-954, at -952.

⁸⁶³ *IT Jungle*, an online IT periodical reported that Conexus Partners, CIBER, Klee Associates, Versytec, and TomorrowNow "...are after the same thing: to serve the growing number of [J.D. Edwards] World and [PeopleSoft] EnterpriseOne users..." See Woodie, Alex. "JDE Shops Have Plenty of Options for Third-Party Maintenance." *IT Jungle*. February 8, 2005. <<http://www.itjungle.com/fhs/fhs020805-story01.html>>.

⁸⁶⁴ Igou, Bob. "Dataquest Insight: Top 50 Software Maintenance and Support Service Providers, Business as Usual in a Highly Fragmented Market, Worldwide, 2008." Gartner Dataquest. November 20, 2008, page 22.

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Stephen K. Clarke

May 7th, 2010

Date

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