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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

Case No. 07-CV-1658 PJH (EDL)

DEFENDANTS' NOTICE OF MOTION AND MOTION TO EXCLUDE EXPERT TESTIMONY OF PAUL K. MEYER

Date: September 30, 2010
Time: 2:30 p.m.
Courtroom: 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

FILED PURSUANT TO D.I. 915

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on September 30, 2010 at 2:30 p.m., or as soon thereafter as this matter may be heard by the Honorable Phyllis J. Hamilton, 1301 Clay Street, Oakland, California, Courtroom 3, Defendants SAP AG, SAP America, Inc. (together, "SAP") and TomorrowNow, Inc. ("TN," and with SAP, "Defendants") will bring this motion to exclude the expert testimony of Paul K. Meyer, pursuant to Civil Local Rules 7-2–7-5 and Rule 702 of the Federal Rules of Evidence ("Rule 702"), against Plaintiffs Oracle USA, Inc. ("OUSA"), Oracle International Corp. ("OIC") and Siebel Systems, Inc. (together, "Plaintiffs").[1] This motion is based on the Memorandum of Points and Authorities herein, the Declaration of Elaine Wallace ("Wallace Decl."), and all exhibits attached to that declaration.

RELIEF REQUESTED

An Order pursuant to Rule 702 of the Federal Rules of Evidence excluding the testimony of Plaintiffs' damages expert, Paul K. Meyer, on value of use and alleged infringers' profits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The damages issue in this case is the extent to which alleged copyright infringement by TN caused actual harm to Plaintiffs. SAP acquired TN for $10 million. TN served only a tiny fraction of Plaintiffs' customers and never made a profit. SAP's hope that including a TN maintenance support offering in its Safe Passage marketing and sales program would help convince customers to switch to SAP software failed to come true—no customers chose to purchase SAP software because of TN.

Nonetheless, Plaintiffs' damages expert, Paul K. Meyer, purports to calculate the value of TN's alleged infringement at over $2 billion and SAP's alleged infringer's profits at $288 million. Meyer achieves these astronomical numbers by relying on speculative assumptions, applying arbitrary, subjective, and inconsistent approaches, and ignoring relevant facts and legal standards. In its role as gatekeeper, the Court should scrutinize Meyer's approach and reveal it for what it is: an unreliable, inadmissible, and vastly exaggerated damages claim.

[1] Oracle EMEA Ltd. is no longer a plaintiff in this case. D.I. 762 (8/17/10 Order) at 25.

II. LEGAL STANDARD

Rule 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . . " Fed. R. Evid. 702. "The expert's testimony must be based on 'sufficient facts or data,' it must be 'the product of reliable principles and methods,' and the expert must have 'applied the principles and methods reliably to the facts of the case.'" *Redfoot v. B.F. Ascher & Co.*, No. C 05-2045 PJH, 2007 U.S. Dist. LEXIS 40002, at *11 (N.D. Cal. Jun. 1, 2007) (quoting Rule 702). Thus, as gatekeeper, the trial court must determine whether the testimony is "reliable and trustworthy" and "relevant to the task at hand." *Id.* at *12 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

III. MEYER'S VALUE OF USE OPINIONS SHOULD BE EXCLUDED

A. Value of Use Damages under the Copyright Act.

Actual damages for copyright infringement are calculated "by the loss in the fair market value of the copyright," which is determined by "the profits lost due to the infringement" or "the value of the use of the copyrighted work to the infringer."[2] *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004). The Ninth Circuit has held that "in situations where the infringer could have bargained with the copyright owner to purchase the right to use the work," value of use may be determined using a hypothetical license. *Jarvis v. K2 Inc.*, 486 F.3d 526, 533 (9th Cir. 2007). The value of use approach requires "an objective, not a subjective analysis," and "[e]xcessively speculative" damage claims are to be rejected. *Id.* at 534; *see also Polar Bear*, 384 F.3d at 709 (hypothetical lost license fee may be awarded "provided the amount is not based on undue speculation") (citation omitted); D.I. 628 (MSJ Order) at 4-5. The value of use amount must be based on the actual use of the copyrighted work made by the defendant. *Wall Data, Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d 769, 786 (9th Cir. 2006).

B. Meyer's Value of Use Approaches.

Meyer purports to use four approaches to measure value of use for the PeopleSoft, J.D.

[2] Meyer's lost profits calculation is not at issue in this motion.

Edwards ("JDE"), and Siebel works at issue ("Subject IP"): the market, income, hypothetical license, and cost approaches. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 95. The first three are closely related in that his hypothetical license approach incorporates both his market and income approaches. Wallace Decl. ¶¶ 3-4, Ex. 2 (5/12/10 Meyer Tr.) at 151:12-153:19; Ex. 3 (5/13/10 Meyer Tr.) at 590:15-591:5. Errors in the first two approaches are repeated in the third, tainting all three. The Court has ruled that the fourth approach—the cost approach—is not a permissible damage theory. D.I. 762 (8/17/10 Order) at 18-23. Meyer's opinion on the cost approach is now moot, inadmissible on that ground, and thus not addressed in this motion.

C. <u>Meyer Misapplies the Market Approach.</u>

Meyer purports to use the market approach to determine the amount that Defendants would have had to pay for a license to use the Subject IP. Wallace Decl. ¶ 3, Ex. 2 (5/12/10 Meyer Tr.) at 184:16-185:18. The license would limit the use of the Subject IP to the sole purpose of supporting TN customers and would be non-exclusive, non-transferable, limited in duration and confer no ownership rights. *See also* Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 161, 163, 165.

Meyer concedes that, under the market approach, value of use is determined by looking at similar transactions involving similar assets. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 113. However, rather than looking at similar licenses or licenses involving the Subject IP, Meyer disclaims the relevance of *any* license—even a comparable one—to his analysis. Instead, Meyer contends that the only comparable transactions are Oracle's acquisitions of PeopleSoft and Siebel. *Id.* ¶¶ 114, 266. Using highly speculative assumptions regarding the number of customers Oracle would have expected to lose, Meyer calculates the license fee as a *pro rata* share of Plaintiffs' cost to acquire PeopleSoft and Siebel. This inappropriate metric and Meyer's speculative assumptions are fundamental flaws.

1. <u>Corporate acquisitions are not comparable to the limited license at issue.</u>

Meyer's first step is to measure "the value that Oracle paid on a per customer basis" for PeopleSoft and Siebel. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 114-15, 266-67. Thus, for PeopleSoft, Meyer divides the $11.1 billion acquisition price by the approximately 9,920

PeopleSoft customers Oracle acquired and concludes that the value was "approximately $1 million per customer." *Id.* ¶ 115. To calculate his proposed license, Meyer multiplies $1 million dollar per customer by the number of customers Oracle senior executives claim they would have expected to lose to Defendants as a result of a license (3,000) and concludes that the value of Defendants' use is "approximately $3.3 billion."[3] *Id.* There are two fundamental problems with this approach, aside from Meyer's speculative lost customer assumptions.

First, when Oracle acquired PeopleSoft, it acquired all of PeopleSoft's tangible and intangible assets, including fixed assets such as real estate and office equipment, liquid assets such as bank accounts and cash, customer relationships; and all of the intellectual property owned by the company, including patents, trademarks, and other intellectual property not at issue in this case. Meyer's $1 million per customer metric includes the value of all of these assets. Virtually none of these assets, however, are relevant to the license Meyer purports to value, which, as noted above, is just a *limited license to use some* of the intellectual property Oracle acquired in the transaction. As Meyer conceded in deposition, no real estate, office equipment, cash, patents, trademarks, or the like would be transferred to Defendants under the license. Wallace Decl. ¶ 4, Ex. 3 (5/13/10 Meyer Tr.) at 365:13-367:10. Even with regard to the Subject IP, the rights Oracle acquired when it purchased PeopleSoft (*i.e.*, full ownership rights) are not comparable to the rights Defendants would obtain under a non-exclusive, non-transferable, limited duration license to use the Subject IP for a limited, specified purpose. Meyer's $1 million per customer metric thus is an inappropriate measure of the value of the license.

Second, Meyer failed to consider Plaintiffs' license agreements relating to the Subject IP. Wallace Decl. ¶ 6, Ex. 5 (Clarke Report) at 94-115. In the hypothetical negotiation portion of his report, Meyer summarily dismisses those agreements as not comparable and refers again to $1 million per customer as the appropriate metric.[4] Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 171 n.373. Moreover, in deposition, Meyer testified that he would not consider such licenses even if

[3] Meyer performs a similar calculation for Siebel, using $1.53 million per customer and the speculative assumption that Defendants would acquire 10% of Siebel's customer base, to conclude that the value of use "would be approximately $600 million." Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 267.

[4] This illustrates how errors in one approach taint Meyer's other approaches.

they were comparable. Wallace Decl. ¶ 3, Ex. 2 (5/12/10 Meyer Tr.) at 201:19-203:12. This is strikingly similar to Meyer's approach in another case, *The Boeing Co. v. United States*, 86 Fed. Cl. 303, 313-15 (Fed. Cl. 2009), in which the court found that he had ignored the relevant license agreements in favor of other agreements that were far less comparable but contained more favorable royalty rates. The court excluded Meyer, finding that he had engaged in "an extraordinary degree of speculation," and that his approach was "capricious" and "little more than conjecture." *Id.*

Meyer's use of the PeopleSoft and Siebel acquisitions as the foundation for his market approach mandates exclusion. *See, e.g.*, *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 871-72 (Fed. Cir. 2010) (rejecting use of transactions that are not "commensurate with what the defendant has appropriated"). Far from being "directly comparable," the rights and vast majority of the assets transferred in the PeopleSoft and Siebel acquisitions bear no relationship to Meyer's purported license. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 122 n.305, 265. In fact, Meyer has not valued a license to use the Subject IP at all, but rather a share of the PeopleSoft customer base:

> Theoretically, in lieu of illegally accessing the copyrighted materials in suit, SAP could have entered into a fair market value transaction and *acquired a portion of the PeopleSoft/J.D. Edwards customer base and the associated revenue stream*.

Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 114 (emphasis added). For this imaginary share of the customer base, Meyer charges Defendants the same price per customer that Oracle paid, even though Oracle actually acquired the customers (not just the right to compete for them, which is all Defendants would get from a license) and much more beyond.

2. <u>Meyer's assumptions are speculative and contradicted by the facts</u>.

Meyer's calculations are based on "expected" lost customer numbers that are *ten times* the actual number of lost customers (*i.e.*, 3,000 "expected" lost PeopleSoft customers compared to 342 actually lost, and 200 "expected" lost Siebel customers compared to 16 actually lost). Meyer attributes these expectations to Oracle's senior executives:

> [They] felt the losses could be as high as 50 percent. And I sort of reigned them back to their lower end, which is 30 to 50, and worked from there. But they felt this would be a devastating impact to their company, which was consistent with their prior thoughts as to why this value could be, you know, tens of billions. So

> we focused on this 30 to 50 percent range, and that's how the conversation progressed. And then we moved to what was important to them, which was the value of what they had just paid for PeopleSoft, the 11 billion.

Wallace Decl. ¶ 4, Ex. 3 (5/13/10 Meyer Tr.) at 372:5-378:1 (quoting excerpt at 375:10-23). Meyer did no independent analysis to determine whether these alleged expectations were reasonable or supported by the facts.

Far from expecting a "devastating impact," the evidence shows that Oracle anticipated very little impact from TN. For example, one of the Oracle executives on whom Meyer relies, Oracle President and CFO, Safra Catz, informed Oracle Chairman Jeff Henley in March 2005: "I don't believe we have lost any large customers to SAP because of this. If we lost, we lost to SAP for other reasons." Wallace Decl. ¶ 8, Ex. 7 (3/25/05 email). Henley agreed, responding: "I think there may be *some* losses *eventually* where SAP convinces some SAP customers to switch from PeopleSoft to SAP rather than upgrading but our model always assumed there would be some attrition. . . . I think they'll give us time to show them we will do as we say before deciding whether to switch to SAP or upgrade to Oracle . . . ." *Id.* (emphasis added). These statements, made within weeks of SAP's January 2005 acquisition of TN, are directly at odds with Meyer's assumption that Oracle executives anticipated huge losses to SAP because of TN.

Plaintiffs continued to believe that TN was not a threat. In September 2005, Oracle's VP of Support Services, Juan Jones, referred to TN and other third party support providers as "gnats," and to the notion that customers would pay millions to migrate to SAP because of low TN support costs during the migration period as "the silliest argument I have ever heard!" Wallace Decl. ¶ 9, Ex. 8 (Defs.' Ex. 374). In October 2005, Oracle's Senior VP of Applications Strategy, Jesper Andersen, told *BusinessWeek* that TN was not a serious threat to Oracle. Wallace Decl. ¶ 10, Ex. 9 (Defs.' Ex. 632) at ORCL00556331. In December 2005, Juergen Rottler, EVP of Oracle Support Services, wrote that Oracle was "experiencing great renewal rates on Support" and "SAP's Safe Passage program has not impacted Oracle's business . . . ." Wallace Decl. ¶ 11, Ex. 10 (12/12/05 email). In May 2006, Charles Phillips, Oracle co-President and the second executive on whom Meyer relies, suggested announcing Oracle's record support renewal rate to combat a TN story. Wallace Decl. ¶ 12, Ex. 11 (Defs.' Ex. 635). In August 2006, Jones wrote:

> If TN (SAP) is going to win a bunch of maintenance-only customers with no plans to upgrade for 5 years, such as Abitibi, then I don't think TN will be too long for this world as SAP won't make any profitable money on these customers if they can't get them to implement SAP. (LJE took note of this long ago . . . .)

Wallace Decl. ¶ 13, Ex. 12 (Defs.' Ex. 637).[5] In September 2006, Chris Hummel, Oracle VP of Marketing, wrote that "very few customers have chosen to go to TN . . . ." Wallace Decl. ¶ 14, Ex. 13 (9/15/06 email). And in October 2006, Jones wrote that "[i]f TN gets a bunch of laggard customers who don't want to move to anything (including SAP), then that's not necessarily a bad thing strategically . . . ." Wallace Decl. ¶ 15, Ex. 14 (Defs.' Ex. 372).

Meyer's failure to consider this evidence and his reliance on the self-serving statements of Oracle's executives regarding the threat that TN posed make his opinion subjective, speculative, and unreliable. This is underscored by Meyer's arbitrary use, at other points in his market approach analysis, of 2,000 lost customers instead of the 3,000 allegedly expected by Oracle's executives. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 122. Meyer fails to explain which of the two numbers he considers more appropriate, and why, or how the jury is expected to decide between 2,000 and 3,000 (or his $1.78 and $3.3 billion value of use for the People Soft Subject IP—a range of almost *$2 billion*) without undue speculation. *Id.* ¶¶ 115, 122.

3. <u>Meyer ignores the "actual use" requirement.</u>

Meyer concedes that a value of use calculation must reflect Defendants' actual use and "cannot allow for any more or different infringement than actually occurred." Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 104 (citing *Wall Data*). But Meyer ignores that principle. *First*, he ignores the actual number of TN customers in favor of speculative assumptions. He cites no authority for this decision, which appears to have been driven by the Oracle executives:

> Oracle Senior Executives have indicated that one way they would consider the impact of a hypothesized PeopleSoft/J.D. Edwards license to SAP would be to consider the volume of customers they would have expected to lose to SAP as a result of the license. For example, if 30% of support customers would be lost to SAP, Oracle Senior Executives would consider the fair market value of that loss to be approximately $3.33 billion, or 30% of PeopleSoft's acquisition price.

Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 115.

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[5] "LJE" refers to Oracle CEO Larry J. Ellison, the third executive on whom Meyer relies.

Second, Meyer makes no attempt to connect his value of use calculation to the alleged infringement. For example, he concedes that PeopleSoft and Siebel both had intellectual property other than the Subject IP (patents, for example), but does no apportionment of the acquisition price to account for that. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 116 (Table 6), 268 (Table 11). Moreover, he confirmed in deposition that his value of use opinions are not related *at all* to how many, or which, of the works identified in the Complaint were actually infringed, and that his numbers would not change even if it were shown at trial that *half* of those works were *not* infringed. Wallace Decl. ¶ 3, Ex. 2 (5/12/10 Meyer Tr.) at 159:25-168:8. Again, this is strikingly similar to Meyer's approach in another case, *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064, 1076-77 (N.D. Cal. 2005), in which the court found his opinion regarding damages for misappropriation of all the trade secrets at issue "useless to the jury" after the jury found misappropriation as to only some of them. *Id.* ("The jury was then left without sufficient evidence, or a reasonable basis, to determine [] damages.")

This fundamental disconnect between the scope of the alleged actual use and Meyer's value of use calculation mandates exclusion. *See, e.g.*, *Nilssen v. Motorola, Inc.*, No. 93 C 6333, 1998 U.S. Dist. LEXIS 12882, at *40-41 (N.D. Ill. Aug. 14, 1998) (the fact that the expert's hypothetical license fee did not change even after court forced him to identify which specific trade secrets he had valued raised a credibility issue and cast doubt on his methodology).

4. <u>Meyer's analysis of acquired goodwill is inappropriate and unreliable.</u>

In addition to his $1 million per customer metric, Meyer relies on a second, equally inappropriate, calculation, this time based on a *pro rata* share of certain intangible assets acquired by Oracle in the PeopleSoft and Siebel transactions. For PeopleSoft, for example, he adds together $6.5 billion for goodwill, $2.1 billion for the value of support agreements and customer relationships, and $250 million in avoided sales costs. He then divides the total of $8.85 billion by 30.2 % (the same speculative acquired customer assumption discussed above) and concludes that the value of Defendants' use is $2.67 billion. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 119-22.[6] There are many problems with this approach, but the most significant relate to use of

[6] Meyer performs a similar calculation for Siebel, dividing $3.4 billion in intangible assets by 5%, to conclude that the value of Defendants' use is "no less that $170 million." Wallace Decl.

acquired goodwill, which, at $6.5 billion, accounts for most of the calculation.

First, goodwill is an inappropriate metric for the same reasons the total acquisition price is inappropriate. Defendants never possessed or used any of Plaintiffs' goodwill and would not acquire any of Plaintiffs' goodwill under the license. Rather than valuing the limited license at issue, Meyer is valuing a *pro rata* share of certain PeopleSoft and Siebel intangible assets—although he excludes the only *relevant* asset, the Subject IP.[7]

Second, Meyer cannot know what portion of the goodwill, if any, is related to the Subject IP because goodwill, by definition, is not associated with any particular asset. Goodwill is simply the amount a purchaser paid for a company over and above the company's book value. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 121, n.301; *see also Transclean Corp. v. Bridgewood Servs., Inc.*, No. 97-2298, 2001 U.S. Dist. LEXIS 24383, at *35-36 (D. Minn. Jan. 8, 2001) (goodwill valuation is "uncomplicated – the book value of Bridgewood's assets only needed to be deducted from the price paid by Century for the business, and the remainder would constitute Bridgewood's goodwill."). Goodwill can be attributable to any number of factors.[8] For Meyer to assume that 100% of the goodwill is related to the Subject IP is pure conjecture:

> [Plaintiff's] financial expert … did not attempt to further analyze [the goodwill] figure, so as to isolate what portion of goodwill could properly be attributable to infringement, as opposed to the Defendant's aggressive marketing, the quality of Bridgewood's product, Bridgewood's customer support and pricing promotion and the like . . . To allow the Jury to divine the percentage of goodwill, that would be properly attributable to infringement, if any, would be a resort to pure

(continued…)

¶ 2, Ex. 1 (Meyer Report) ¶¶ 273-74. He fails to explain why, for the Siebel calculation, he uses the number of customers he claims SAP expected to gain (5%) rather than the number of customers he claims Oracle expected to lose (10%), but did the opposite for the PeopleSoft calculation. *Id.* ¶¶ 267, 274. This is one of many examples of Meyer's selective use of data.

[7] Meyer contends that the value of Existing and In-Process Technology, which includes the Subject IP, is "not relevant" because it measures the ability to generate sales by Oracle of new software licenses. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 117 n.295. But this is inconsistent with his position that the "copyrighted materials are key," *id.* ¶ 122, and that the impact of TN on Oracle's ability to cross-sell and up-sell software licenses is the primary cause of upward pressure on the license fee. *See, e.g., id.* ¶¶ 110, 198, 232, 235.

[8] As discussed in Defendants' pending motion in limine, Plaintiffs recognized this at the sanctions motion hearing. Plaintiffs represented that they would not quantify or seek damages relating to goodwill because it "is a very difficult thing to quantify." D.I. 728 (Defs.' Mots. in Limine) at 1-3.

speculation and conjecture.

Id., at *35-37.[9]

Third, Meyer assumes, incorrectly, that goodwill does not include any value attributable to new customers acquired after the acquisition (as opposed to existing PeopleSoft customers at the time of the acquisition). Based on this erroneous assumption, he applies a percentage derived from existing PeopleSoft customers only. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 122 ("Comparing the 3000 customers to the total PeopleSoft customers of 9,920 indicates a target percentage of 30.2%. Applying this percentage to the value of . . . goodwill . . ."). However, the S&P report on which Meyer relies plainly states that the $6.5 billion goodwill number includes maintenance revenue from new customers acquired after the acquisition. Wallace Decl. ¶ 7, Ex. 6 (S&P Report) at 26 (maintenance revenue from new customers acquired after the acquisition "is considered a component of goodwill."). Since Meyer does not account for the portion of goodwill attributable to new customers, his calculation is fundamentally flawed.

Fourth, Meyer improperly bases his opinions on evidence covered by Magistrate Judge Laporte's order precluding certain damages evidence. D.I. 482 (Sanctions Order). The Sanctions Order precludes evidence relating to alleged lost license sales, referred to as "cross-sell" and "up-sell" opportunities. *Id.* at 26. The Sanctions Order expressly precludes such evidence in connection with Plaintiffs' lost profits claim. This Court's order affirming the Sanctions Order made clear that Plaintiffs may not offer the precluded evidence "through the back door" for any purpose. D.I. 532 (Affirming Order). Meyer's analysis of alleged lost cross-sell and up-sell opportunities in his market, income, and hypothetical license approaches is the kind of back door approach prohibited by the Affirming Order.[10] *See, e.g.*, Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 130 (income approach analysis includes calculation of terminal value of up-sell license revenue losses), 196 (considering reduced cross-selling and up-selling opportunities in hypothetical license analysis), 232 (same), 235 (goodwill reflects potential cross-sell and up-sell).

Because the Court has precluded evidence relating to alleged lost cross-sell and up-sell

[9] Meyer's only "apportionment" is to calculate a *pro rata* share of goodwill based on 30.2% of the customer base. He makes no attempt to apportion based on components of goodwill.

[10] This issue is also addressed in Defendants' pending Motion in Limine No. 2. D.I. 728.

opportunities, any portion of Meyer's opinions that is based on precluded evidence is not relevant to any fact in issue, not helpful to the trier of fact, and should be excluded under Rule 702. It should also be excluded under Rule 403 because the prejudice to Defendants of admitting the precluded evidence for purposes of Meyer's value of use opinions is the same as if it were admitted for purposes of his lost profits opinions. Fed. R. Evid. 403. That was the purpose of the Court's ruling that the evidence not be admitted through the back door.

D. <u>Meyer's Income Approach Is Inappropriate and Speculative.</u>

The income approach is a way of measuring "the present value of the future economic benefits of ownership" of an asset. Wallace Decl. ¶ 19, Ex. 18 (Gordon V. Smith and Russell L. Parr, *Intellectual Property Valuation, Exploitation, and Infringement Damages* (2005)) at 185;[11] *see also* Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 128 ("The income approach values intellectual property based upon the additional cash flows a business is expected to generate in the future from the exploitation of the technology at issue.") It is a forward-looking approach used to estimate unknown future profits.

Here, the data *is* known. We know exactly how many customers TN had during its existence (358) and how many of them purchased software or services from SAP (86) during the relevant time period. We know exactly how much revenue Defendants received from those customers and can calculate with the required degree of precision how much profit, if any, was attributable to the alleged infringement. We can also calculate with the same degree of precision how much profit Plaintiffs lost from those same customers as a result of the alleged infringement. Indeed, that is what Meyer purports to have done in his lost profits and disgorgement analysis.

Nonetheless, Meyer purports to use the income approach to calculate Plaintiffs' "expected" losses and Defendants' "expected" gains from January 2005 through October 2008 based on up to 3,000 "expected" customers. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 130-36. Meyer concludes that, under the income approach, the value of use of the Subject IP is between $881 million and $3.8 billion—a range of *$3 billion*—depending on "different expectations" of the impact on Plaintiffs and benefits to Defendants. *Id.* ¶ 141.

[11] Meyer relies on this treatise and cites to it extensively in his report.

For his income approach, Meyer relies on a single page in a document prepared by Thomas Ziemen, an employee in SAP's support services organization. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 132 n.324 (referring to Pls' Ex. 447). The document concerns SAP's proposed Safe Passage program, and the page at issue contains Ziemen's assumptions regarding the number of customers that would receive a proposed maintenance offering and the number of customers that would switch from PeopleSoft to SAP. Wallace Decl. ¶ 16, Ex. 15 (Pls.' Ex. 447) at SAP-OR00253288. Ziemen assumes that a maximum of 1,375 would switch by the end of 2007. *Id.* He testified that he made no assumptions regarding which third party provider would provide the maintenance service. Wallace Decl. ¶ 17, Ex. 16 (Ziemen Tr.) at 86:3-18.[12]

Meyer's reliance on this document is inappropriate. *First*, there is no evidence that Ziemen's assumptions were adopted by SAP or used as the basis for any formal projections. In fact, Werner Brandt, SAP AG's CFO and the person responsible for reviewing forecasts prepared in connection with SAP acquisitions, testified that there were no formal projections prepared for the TN acquisition. Wallace Decl. ¶ 18, Ex. 17 (Brandt Tr.) at 19:23-20:15, 113:15-21. *Second*, Ziemen testified that his assumptions were not based on TN (or any specific third party provider), but Meyer attributes them to TN nonetheless. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 132. *Third*, Meyer purports to base his three different income approach scenarios (1,375, 2,000, and 3,000 switched customers) on the Ziemen document. *Id.* ¶ 130. However, Ziemen assumed a maximum of 1,375. Moreover, the Ziemen document contains no information at all regarding the reasons for the assumed switch, for example the third party maintenance offering versus other aspects of the Safe Passage program, such as the 75% discount on licenses. *See, e.g.*, Wallace Decl. ¶ 16, Ex. 15 (Pls.' Ex. 447) at SAP-OR00253291 (referring to proposed 75% license discount). Thus, the document offers no support for Meyer's assumption that 1,375, 2,000, or 3,000 customers would switch *because of* TN. *Finally*, Meyer failed to consider whether Ziemen's assumptions were reasonable, since only 86 TN customers actually purchased anything

[12] This testimony is supported by the document, which is a preliminary "roadmap" for the Safe Passage program and states, at SAP-OR00253280, "Check TomorrowNow and other vendors" and, at SAP-OR00253281, that "Many more [third party support providers] are being founded." Wallace Decl. ¶ 16, Ex. 15 (Pls.' Ex. 447).

from SAP and even Plaintiffs did not believe customers would switch to SAP because of TN.[13]

Meyer refers to alleged estimates that $1 of TN revenue would equal $10 of SAP revenue and an $18 to $20 impact on Oracle's revenues. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 135-36. He testified that he used these numbers as a "reasonableness check." Wallace Decl. ¶ 4, Ex. 3 (5/13/10 Meyer Tr.) at 481:11-485:8, 488:24-490:3. However, Meyer assumed that $1 of TN income would *necessarily* translate to $10 in SAP income, which is hardly a reasonable assumption. *Id.* In addition, he disregarded the testimony of Andrew Nelson, TN's CEO and the author of the document on which Meyer relies, that these numbers were not intended to project actual revenue, but to illustrate how *potential* revenue could be calculated. *Id.*; *see also* Wallace Decl. ¶ 20, Ex. 19 (Defs.' Ex. 2032) at 167:22-168:24. If Meyer were truly interested in doing a reasonableness check, he could have (and should have) looked at actual TN and SAP revenues.

Meyer's income approach is not a measure of the actual "loss in the fair market value" of the Subject IP, but mere conjecture about losses we know for certain did not occur. *Polar Bear*, 384 F.2d at 708. Meyer cites no authority for his use of the income approach to *estimate* actual damages, for a time period that has already passed and for which the data is known, by ignoring the actual number of TN customers and, instead, basing his income approach on "expected" numbers of customers of ten times that.[14] In addition, Meyer's opinion that the income approach results in a value of use of anywhere between $881 million and $3.8 billion depending on "different expectations" would force the jury to engage in undue speculation. D.I. 628 (MSJ Order) at 4 (plaintiff must "present evidence sufficient to allow the jury to assess fair market value without 'undue speculation'") (citing *Polar Bear*). In short, Meyer's income approach runs afoul of the reliability requirement of Rule 702 and the principle that value of use damages may not be "[e]xcessively speculative." *Jarvis*, 486 F.3d at 534.

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[13] For Siebel, Meyer relied on a similar document that assumed 200 switched Siebel customers. Meyer admitted that he has no knowledge of the basis for that assumption and did nothing to confirm its reasonableness. Wallace Decl. ¶ 4, Ex. 3 (5/13/10 Meyer Tr.) at 432:7-435:5.

[14] Defendants are aware of only one copyright case in which the income approach was proposed as a measure of actual damages. *Leland Med. Ctrs., Inc. v. Weiss*, No. 4:07cv67, 2007 U.S. Dist. LEXIS 76095, at *17 (E.D. Tex. Sept. 28, 2007). The court excluded the opinion as "speculative, conjectural, and [the expert's] methodology [was] flawed throughout." *Id.*

E. Meyer Misapplies the Hypothetical License Approach.

Meyer purports to determine a hypothetical license fee based on the 15 factors set forth in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). However, his analysis lacks the "intellectual rigor" required under Rule 702. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Rather, Meyer engages in a superficial, one-sided, and result oriented process that has more to do with satisfying Oracle's desire for a damage award in the billions than about applying the appropriate objective willing buyer/willing seller test. In addition, Meyer incorporates and relies on the same speculative assumptions and inappropriate metrics that characterize his market and income approaches, mandating exclusion of his hypothetical license approach as well.

1. Meyer's analysis is superficial, one-sided, and result-oriented.

Value of use in copyright cases is an "an objective, not a subjective, analysis." *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002); *see also* D.I. No. 628 (MSJ Order) at 3. Plaintiffs' subjective view "has no place in this calculus." *Mackie*, 296 F.3d at 917. This objective standard is incorporated into the *Georgia-Pacific* analysis in the requirement that the willing buyer and willing seller be considered "prudent" and acting "reasonably." *Georgia-Pacific*, 318 F. Supp. at 1120. Meyer ignores this key principle.

First, Meyer places undue emphasis on his client's subjective opinion as to what Plaintiffs would have demanded for a license. *See, e.g.*, Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 237 ("Larry Ellison, Safra Catz and Charles Phillips informed me that Oracle would expect a significant license fee from SAP . . . and indicated the impact of licensing would be greater than $3 billion on Oracle . . . Larry Ellison, Safra Catz and Charles Phillips would be personally involved in these negotiations."). As discussed in Section III.C.2, rather than subjecting these opinions to independent analysis, Meyer takes them at face value and fails to consider evidence that Oracle anticipated (and experienced) virtually no impact from TN. This is particularly striking with regard to Meyer's Siebel analysis. The Siebel hypothetical negotiation would have taken place in September 2006, after the creation of the documents described in Section III.C.2, and long after SAP's January 2005 acquisition of TN. By September 2006, TN's minimal impact on Oracle was readily apparent. Nonetheless, Meyer accepts his client's alleged belief that "up to 10%" of Siebel customers (400) might leave for TN, which Meyer concludes would have resulted in a license fee of $600 million. *Id.* ¶¶ 267, 340. In fact, only 16 Siebel customers left for TN.

Second, consistent with his one-sided approach, Meyer excludes from his analysis key factors that SAP would have considered. For example, while Meyer opines that Oracle's cost to acquire PeopleSoft ($11.1 billion) would have been the benchmark for determining the license fee, he argues that SAP's cost to acquire TN ($10 million) would be totally irrelevant. Wallace Decl. ¶¶ 2, 4, Ex. 1 (Meyer Report) ¶ 189; Ex. 3 (5/13/10 Meyer Tr.) at 603:1-18. In other words, Meyer contends that in deciding to pay a $2 billion license fee—based on the huge benefit SAP allegedly expected to receive as a result of the TN acquisition—the fact that SAP had valued TN at a mere $10 million would not even have been considered by SAP. This does not pass the straight face test.[15]

Similarly, Meyer fails to consider the enormous risk to SAP of a $2 billion paid-up license and other, less risky alternatives SAP would have considered. At the time of the SAP acquisition, TN had managed to win only 50 customers in its three year history. Moreover, the notion of using a third party support provider to drive PeopleSoft customers to SAP was an untested concept. Yet Meyer assumes, unreasonably, that SAP would have been paid $2 billion up front based on the *hope* that TN would win an additional 2,950 customers over the next three years.

A more prudent approach (and the one proposed by Defendants' expert) is a running royalty for each customer that leaves Plaintiffs' support for TN, and an additional running royalty for each customer that switches to SAP because of TN. Moreover, faced with a $2 billion demand from Oracle, SAP could have abandoned the notion of third party support altogether and simply offered customers that were willing to migrate to SAP a rebate equivalent to 50% of their PeopleSoft support costs during the migration period. If, as Meyer contends, the support savings offered by TN was sufficient to cause customers to migrate to SAP, the rebate would achieve the

[15] Meyer's argument that the TN acquisition price is irrelevant because SAP acquired no intellectual property is unpersuasive, particularly in light of his claim in his market approach that the value of the Subject IP is *irrelevant* to the license fee. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 117 n.295. The TN acquisition price reflects SAP's assessment of TN's ability to win new PeopleSoft customers, which is the key factor throughout Meyer's value of use analysis.

same result as a $2 billion license (customers switching to SAP) but with far less risk. Meyer fails to consider these alternatives and instead proposes a license that no prudent licensee would accept. *Georgia-Pacific*, 318 F. Supp. at. 1120 ("the amount which a prudent licensee . . . would have been willing to pay as a royalty").

Third, Meyer's analysis of the *Georgia-Pacific* factors is superficial. For example, as discussed above, he disregards all of Plaintiffs' licenses involving the Subject IP and testified in deposition that he would disregard any license, even a comparable one. Section III.C.1, *supra*. He concludes that *every* factor exerts upward pressure, even the limited duration of the license, which he concedes would exert "some" downward pressure but concludes (unreasonably) would be outweighed by other factors.[16] Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 165-69. A review of Meyer's summary of the factors each party would consider in the hypothetical negotiation (*Georgia-Pacific* factor 15) shows that the only ones Meyer truly gives any weight are the ones he relies on for his market and income approaches, *i.e.*, the price of PeopleSoft and Siebel acquisitions and his speculative assumptions regarding the number of lost customers, which he expressly includes in his hypothetical license approach. *Id.* ¶¶ 229-39 (PeopleSoft), 341-48 (Siebel). Meyer's hypothetical license approach is thus flawed for the same reasons as his market and income approaches. It should be excluded for this reason and because his superficial application makes it unreliable. *See, e.g., Bowling v. Hasbro, Inc.*, No. 05-229S, 2008 U.S. Dist. LEXIS 30043, at *12-13 (D.R.I. Mar. 17, 2008) (holding superficial analysis of *Georgia-Pacific* factors renders expert opinion inherently unreliable).

2. <u>Meyer ignores the Book of Wisdom doctrine.</u>

Meyer testified that it would have been inappropriate for him to consider data from after the time of the hypothetical negotiation, including the actual number of TN customers. Wallace

[16] The limited duration exerts downward pressure because it would be difficult for TN to persuade customers to leave Oracle support if TN could only support them for a limited period of time. Meyer's conclusion that this downward pressure is outweighed by other factors is unreasonable because the other factors *assume* TN will win large numbers of customers. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶¶ 166 (license would permit SAP to "strike quickly" to attract PeopleSoft customers), 167 (Oracle would "extract a price" for licensing to a competitor) and 168 (SAP's purpose was to use TN to drive customers to SAP). None of these factors would exert upward pressure if TN could not win customers in the first place because of the limited duration of the license. Duration is thus a key factor that cannot be dismissed, as Meyer suggests.

Decl. ¶ 4, Ex. 3 (5/13/10 Meyer Tr.) at 452:4-24. Meyer is incorrect. In *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933), the Supreme Court recognized that factual developments occurring after the date of the hypothetical negotiation can inform the damages calculation. *Id.* at 698 ("[A] different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect.").

The Federal Circuit recently affirmed this principle in *Lucent Tech., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1333-34 (Fed. Cir. 2009) ("[O]ur case law affirms the availability of post-infringement evidence as probative in certain circumstances . . . the hypothetical negotiation analysis 'permits and often requires a court to look to events and facts that occurred thereafter and that could not have been known to or predicted by the hypothesized negotiators.'").

Meyer was not required to turn a blind eye to the reality that TN had only 358 customers (of which only 86 purchased anything from SAP), or to the fact that TN had little to no impact on the value of Oracle's investment in PeopleSoft or Siebel, as evidenced by Oracle's failure to record any impairment to its goodwill. Wallace Decl. ¶ 3, Ex. 2 (5/12/10 Meyer Tr.) at 265:2-7, 423:2-6. Indeed, consistent with his one-sided approach, Meyer did consider post-negotiation events when it suited his goal of maximizing the proposed license fee. *See, e.g.*, Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 233 (considering SAP's payment of $7.1 billion to acquire Business Objects in 2007 as a factor in his 2005 hypothetical negotiation analysis). That Meyer chose to ignore the facts and rely on conjecture renders his opinion unreliable and inadmissible.

3. <u>Meyer ignores the date on which the alleged infringement began.</u>

Plaintiffs allege infringement beginning in 2002. D.I. 418 (Fourth Amended Complaint) ¶ 19. Meyer concedes this, and that a hypothetical negotiation would have occurred between TN and PeopleSoft in 2002, in addition to the negotiation between Oracle and SAP in 2005. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 157. But Meyer failed to calculate a fee for the 2002 license, purportedly because it "would not have covered the same scope of use and would not be transferable" to Oracle and/or SAP. *Id.* ¶ 157 n.357. This is not persuasive. There is no evidence (and Meyer cites none) that TN's use of the Subject IP changed between the two time periods.

Moreover, the fact that the earlier license would not have been transferable did not prevent Meyer from calculating the fee—all he had to do was calculate two separate fees, one for the earlier time period and one for the later one.

Had Meyer calculated a fee for the earlier license, it undoubtedly would have been very modest, and Meyer would have had to consider that fact in his calculation of the later license.[17] Since there is no legitimate reason for not calculating a fee for the earlier license—indeed, the law *requires* that it be calculated—one can only assume that Meyer's failure to do so was motivated by his desire to avoid that unfavorable fact. *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1158 (6th Cir. 1978) ("The key element in setting a reasonable royalty . . . is the necessity for return to the date when the infringement began."). Again, Meyer's failure to consider unfavorable evidence warrants exclusion.

4. Meyer's $2 billion license fee is classic *ipse dixit*.

In his market and income approaches, Meyer calculates values for the PeopleSoft/JDE Subject IP ranging from $881 million to $3.762 million. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 153, Table 8. He concludes from this range that the value of use is "no less than" $2 billion. *Id.* However, Meyer does not explain in his report, and could not explain in deposition, why he chose $2 billion rather than, for example, $1.5 billion, or $2.5 billion, or any other number within the enormous range he proposes. Wallace Decl. ¶ 5, Ex. 4 (5/14/10 Meyer Tr.) at 839:23-847:18.

In his hypothetical license approach, Meyer again concludes that the parties would have agreed to a license fee "of no less than $2 billion." But, again, he does not explain in his report, and could not explain in deposition, why he chose $2 billion out of the almost two dozen values he purports to have considered in his hypothetical license analysis. Wallace Decl. ¶¶ 5, 21, Ex. 4 (5/14/10 Meyer Tr.) at 839:23-847:18; Ex. 20 (Defs.' Ex. 2044). In addition, although Meyer opines that the *Georgia-Pacific* factors each create upward pressure on the license fee, Meyer never discloses any baseline, so the effect of that upward pressure cannot be determined.

As discussed above, the ranges Meyer proposes in his market and income approaches are simply too vast to permit the jury to reach a conclusion on value of use without engaging in

[17] By the time of the SAP acquisition, TN still had only approximately 50 customers.

undue speculation. And Meyer's inability to explain the reasoning underlying his choice of $2 billion as the license fee leads to the conclusion that the choice was arbitrary. Meyer's opinions on value of use should be excluded for these reasons. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (a court may exclude opinion that is connected to the data only by *ipse dixit* of the expert because "a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered"). As the *Boeing* court stated with regard to Meyer's opinion in that case: "[P]lus or minus a guess, is, after all, still a guess." 86 Fed. Cl. at 314-15.

IV. MEYER'S DATABASE VALUE OF USE OPINION SHOULD BE EXCLUDED

Meyer calculates the value of TN's use of Oracle's database software as $55.6 million. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 257. The first inkling that something is wrong with this number is that it exceeds TN's *total revenues* for its entire seven-year existence ($41 million). *Id.* ¶ 438. Meyer's opinion is unreliable because it is based entirely on Oracle's subjective view of the price it would have charged for the license and because Meyer failed to analyze, much less substantiate, what TN, as a willing buyer, would have agreed to pay. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001) (the "question is not what the owner would have charged, but rather what is the fair market value"). Meyer cannot simply price the license at the amount Oracle would have liked to charge. The inquiry is an objective one—the result of a negotiation between a willing buyer and a willing seller. *Id.* The purpose of this objective test is to prevent copyright holders from claiming "unreasonable amounts as the license fee." *Id.*

Meyer—at best—attempted only half of the analysis. Oracle executive, Richard Allison, told Meyer that no standard Oracle license would cover TN's use and thus a "unique" license would have to be structured and priced. Wallace Decl. ¶ 5, Ex. 4 (5/19/10 Meyer Tr.) at 800:16-801:8. Meyer accepted that assertion wholesale, as well as Allison's opinion of how he would have structured and priced the license. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 250. Illustrating his lack of objective analysis, Meyer testified that had Allison suggested 50% of that price, Meyer would have accepted it. Wallace Decl. ¶ 5, Ex. 4 (5/14/10 Meyer Tr.) at 819:9-24. And had Allison suggested twice that price, Meyer would have accepted that too. *Id.* at 819:25-820:9. Meyer's "analysis" is simply a recitation of Oracle's desired price. It is devoid of objectively verifiable market evidence that a *reasonable buyer would have agreed* to pay it.

Oracle sells an Enterprise Edition and a Standard Edition license for database software. Wallace Decl. ¶ 22, Ex. 21 (ORCL00704411-421). The price for these licenses is well-established in the market. Indeed, the licenses are available online at published list prices, and they are priced according to the number of processors on the computer used to run the software. *Id.* The price for the Enterprise Edition license was $40,000 per processor for the license and $8,800 per processor per year for support. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 252. TN would have needed licenses to cover 27 processors; thus, the market price would have been $1,928,880. Wallace Decl. ¶ 6, Ex. 5 (Clarke Report) at 206-09. Alternatively, if required to purchase a separate license for each customer supported (which Defendants dispute), TN could have used single processor computers and purchased a Standard Edition license for each of the 172 relevant customers at the list price of $15,000, plus $3,300 per year for support, for a total of $1,902,090. *Id.* at 209.

Rather than consider this market information, Meyer accepted "Oracle's position that no license it issues would permit a licensee to use Oracle's database software in the manner in which TN used the software." Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 243; *see also* Wallace Decl. ¶ 5, Ex. 4 (5/14/10 Meyer Tr.) at 802:11-20. Meyer made no effort to corroborate this assertion. *Id.* at 819:1-8 ("I didn't do that analysis, because I knew at this point I was being asked to come up with the value of something that does not occur at Oracle, in its everyday customers.").

Meyer also accepted the structure and pricing of the license Allison devised. Wallace Decl. ¶ 5, Ex. 4 (5/14/10 Meyer Tr.) at 805:4-16 ("So what I'm using is what Mr. Allison told me would be the proper metric for this circumstance, which is unique."). Meyer testified:

> **Q.** So Mr. Allison told you what the license should be. Right?
> **A.** He told me the – basically the structure of the license. That's really an input from him.
> **Q.** And you accepted what he told you to do. Correct?
> **A.** Yes. In these circumstances, when I came to understand that this is not just what you mentioned a while back, sort of an off-the-shelf use of Oracle's database property.

Id. at 818:16-25.

Based on Allison's statements, Meyer assumed a license that deviates from Oracle's standard pricing in two ways, both of which dramatically inflate the price. *First,* Meyer assumed that the license would require TN to buy a separate license for each database TN created using the software. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 252. This is analogous to demanding that a customer buy a separate copy of Microsoft's Excel database software for every Excel spreadsheet the customer wants to create. *Second*, Meyer assumes that TN would have to configure its installation of the software in an artificially expensive manner. *Id.* ("Per discussion with Richard Allison, I understand that Oracle would have priced the license on the largest server configuration."). Meyer assumed that each database license would be installed on one of the largest server configurations (*i.e.*, the most processors) TN had at the time, ignoring the fact that a smaller (and correspondingly less expensive) configuration was viable. *Id.* This is the equivalent of demanding that a customer buy the most expensive version of the software, regardless of the fact that the cheapest version would meet its needs.

In deposition, Meyer could not justify either deviation and simply deferred to Allison. When asked why TN would need a separate license for each customer support database it created, Meyer stated that he followed the input Oracle had given him. Wallace Decl. ¶ 5, Ex. 4 (5/14/10 Meyer Tr.) at 817:22-818:15 ("[F]rom my perspective, I'm taking the input from Oracle, who has said, this is how we would structure this license"). When asked why TN could not use a less expensive configuration if it was forced to have a separate database license for each customer-support database, Meyer again deferred to Allison. *Id.* at 810:12-20. Defendants' expert, Dr. Stephen Gray, has opined that TN could configure its servers less expensively and buy a license for each customer, resulting in a license fee nearly $54 million less than the configuration Meyer adopted. Wallace Decl. ¶ 23, Ex. 22 (Gray Report) at 62-64. When confronted with this, Meyer deferred to Allison again. Wallace Decl. ¶ 5, Ex. 4 (5/14/10 Meyer Tr.) at 810:12-20. When asked if he had read Gray's opinion, Meyer admitted that he had not. *Id.* at 814:10-14.

Meyer's opinion is not based on non-speculative objective evidence of what a willing buyer would agree to pay a willing seller. His opinion is subjective and one-sided and should be excluded on that ground. His inability to explain his deviations from the accepted market price confirms its inadmissibility. *Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 354-55 n.4

(S.D.N.Y. 2003) (excluding expert opinion of a hypothetical license amount when expert had "no reasoned explanation" for the price of the license).

V. MEYER'S INFRINGERS' PROFITS OPINION SHOULD BE EXCLUDED

Meyer calculates alleged infringer's profits at $288 million. Wallace Decl. ¶ 24, Ex. 23 (Defs.' Ex. 2017). This claim is for the *indirect* profits of SAP from selling its own software and services; there is no claim for the *direct* profits of TN from selling the allegedly infringing services because TN made no profits. Wallace Decl. ¶ 3, Ex. 2 (5/12/10 Meyer Tr.) at 71:12-72-16. Indirect profits are recoverable only "under certain conditions" because of their "more attenuated nexus to the infringement." *Mackie*, 296 F.3d at 914. Courts scrutinize such claims, requiring that "a copyright holder must establish the existence of a causal link before indirect profits damages can be recovered." *Polar Bear*, 384 F.3d at 710. When an infringer's profits "are only remotely and speculatively attributable to the infringement," the claim should be denied. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc*., 772 F.2d 505, 517 (9th Cir. 1985).

A. Meyer's Opinion Is Not "Based upon Sufficient Facts or Data" or the "Product of Reliable Principles and Methods."

Meyer's infringer's profits analysis is too rudimentary to pass muster under Rule 702. Meyer makes no genuine effort to establish a causal link between TN's allegedly infringing support services and SAP's sales of its own software and services. Instead, Meyer's "analysis" consists of determining whether a customer was identified by SAP, in any document, as one that participated in the Safe Passage marketing program. If so, Meyer attributes *all* of the customer's subsequent purchases of SAP software to TN's alleged infringement. Wallace Decl. ¶¶ 3, 5, Ex. 2 (5/12/10 Meyer Tr.) at 100:6-101:2; Ex. 4 (5/14/10 Meyer Tr.) at 701:15-702:12, 707:15-708:15, 709:23-711:3. There are three fundamental problems with this approach.

First, Meyer does no analysis to determine whether the fact that the customer received support services from TN had anything to do with the customer's subsequent decision to purchase SAP software. The mere fact that SAP labeled the customer a Safe Passage customer indicates nothing about the customer's reasons for purchasing SAP software. For example, the customer could have made the purchase because of the 75% license discount offered under the Safe

Passage program, or any of the other benefits of the program unrelated to the TN support offering. Wallace Decl. ¶ 25, Ex. 24 (Defs.' Ex. 181) (Safe Passage Terms).

Second, Meyer does not distinguish among a customer's various SAP purchases. Once he decides that a customer was a Safe Passage customer, he attributes all of the customer's subsequent purchases to TN, even if the purchases are of non-replacement software (*i.e.*, software not intended to replace the PeopleSoft, JDE, or Siebel software supported by TN) or clearly unrelated to the Safe Passage program (*e.g.*, follow-up purchases related to purchases made before the customer even participated in the Safe Passage program).

Third, Meyer does no analysis to determine whether the customer would have made the same SAP purchases if it had never received any support services from TN. Plaintiffs have the burden to show that, but for the alleged infringement, SAP would not have made the accused profits. *Polar Bear*, 384 F.3d at 710-11. Since Meyer has made no effort to determine that, his opinion on infringer's profits is not helpful to the jury. Fed. R. Evid. 702 (expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue").

Because Meyer fails to analyze the reasons why customers made SAP purchases, his opinion is not based on "sufficient facts or data," as required by Rule 702. Similarly, because Meyer simply *assumes* that any TN customer identified as a Safe Passage customer purchased SAP software or services *because of* the alleged infringement, his opinion is not "the product of reliable principles and methods," as required by Rule 702. His opinion is unduly speculative and should be excluded. Fed. R. Evid. 702; *see also Mackie*, 296 F.3d at 916 (plaintiff failed to offer sufficient nonspeculative evidence to create a triable issue of fact because plaintiff's expert did not articulate a nonspeculative correlation between the alleged infringement and alleged infringer's profits: "In the absence of concrete evidence, [plaintiff's theory] is no less speculative than [the court's] effort [here] to enumerate even a relatively short list of the myriad factors that could influence an individual's purchasing decisions.").

B. Meyer's Opinion Is Unreliable Because It Lacks Objectivity.

The kind of information Meyer *should* have considered was available to him in hundreds of thousands of pages of relevant evidence from Plaintiffs' and Defendants' productions, the productions of over 100 customers subpoenaed by Plaintiffs, and customer deposition testimony. Wallace Decl. ¶ 1. Consistent with the one-sided approach Meyer adopted in his other damage opinions at issue in this motion, Meyer chose to ignore that information.[18] His systematic failure to consider evidence that contradicts his opinions indicates sufficient lack of objectivity to warrant exclusion. Fed. R. Evid. 702, Advisory Committee Notes (the more subjective the expert's inquiry, the more likely it is unreliable). The following examples are illustrative:

Amgen: Amgen decided to purchase SAP software *before* deciding to use TN for support. Wallace Decl. ¶ 26, Ex. 25 (Defs.' Ex. 2038) ("SAP's Safe Passage contract with Amgen was signed in mid-June, but with Amgen's Oracle support contract not expiring until December 31st, Amgen had little interest in pursuing [TN] services at that time."). Nonetheless, Meyer categorizes Amgen as a "Safe Passage" customer and assumes TN caused the SAP sale.

New Page Corporation: This customer submitted a declaration stating that its replacement of its JDE applications with SAP applications was not influenced in any way by the fact that it had used TN support for its JDE applications. Wallace Decl. ¶ 27, Ex. 26 (Defs.' Ex. 2042). Meyer did not consider this sufficient to change his opinion that the SAP sale was attributable to TN. Wallace Decl. ¶ 5, Ex. 4 (5/14/10 Meyer Tr.) at 781:21-790:2.

Lexmark: This customer testified that in deciding whether to purchase software from SAP or Oracle, it developed a list of 300 relevant data points. Wallace Decl. ¶ 28, Ex. 27 (O'Donnell Tr.) at 6:23-7:10, 37:14-38:16. TN was "not a data point"—not even one of 300. *Id.* at 41:22-42:2. But because this customer is identified as a Safe Passage customer, Meyer assumes that it made these SAP purchases because of TN. Wallace Decl. ¶ 29, Ex. 28 (Defs.' Ex. 2020) at 2.

BASF/Engelhard: BASF was an SAP customer for many years before the acquisition of TN, as evidenced in a document Meyer cites in his report. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) ¶ 445 n.832. In 2007, BASF acquired Engelhard, and in accordance with BASF's policy of keeping subsidiaries on a common operating platform, converted the newly acquired subsidiary

[18] The fact that Plaintiffs subpoenaed records from so many customers, only to have their damages expert disregard them, is telling in itself. If the records had supported Meyer's opinion that customers purchased SAP software and services because of TN, his infringer's profits methodology likely would have been very different. He would have done the same customer-by-customer analysis Defendants' expert has done.

to SAP software. Contemporaneous documents show that BASF's standardization policy, not TN, drove the SAP sale. These include TN documents ("BASF has a program in place for all of its acquired organizations to move to its standard enterprise software applications, which is SAP") and Oracle documents ("the decision had been made by the [parent/subsidiary] Integration team to standardize all applications on [parent's] SAP solutions"). Wallace Decl. ¶¶ 30-31, Ex. 29 (TN-OR00152649), Ex. 30 (ORCL00182769). Nonetheless, Meyer assumes that because this customer is identified as a Safe Passage customer, the sale was caused by TN.

These are just a few examples of the kind of evidence that Meyer should have considered, but did not. His opinion that any customer identified as a Safe Passage customer purchased SAP software and services *because of TN* is pure conjecture and should be excluded.

VI. CONCLUSION

For the reasons stated above, the Court should grant Defendants' motion.

Dated: August 19, 2010

JONES DAY

By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

Counsel for Defendants

SAP AG, SAP AMERICA, INC., and TN, INC.