

1 BINGHAM McCUTCHEM LLP  
 2 DONN P. PICKETT (SBN 72257)  
 3 GEOFFREY M. HOWARD (SBN 157468)  
 4 HOLLY A. HOUSE (SBN 136045)  
 5 ZACHARY J. ALINDER (SBN 209009)  
 6 BREE HANN (SBN 215695)  
 7 Three Embarcadero Center  
 8 San Francisco, CA 94111-4067  
 9 Telephone: (415) 393-2000  
 10 Facsimile: (415) 393-2286  
 11 donn.pickett@bingham.com  
 12 geoff.howard@bingham.com  
 13 holly.house@bingham.com  
 14 zachary.alinder@bingham.com  
 15 bree.hann@bingham.com

16 BOIES, SCHILLER & FLEXNER LLP  
 17 DAVID BOIES (Admitted *Pro Hac Vice*)  
 18 333 Main Street  
 19 Armonk, NY 10504  
 20 Telephone: (914) 749-8200  
 21 Facsimile: (914) 749-8300  
 22 dboies@bsflp.com  
 23 STEVEN C. HOLTZMAN (SBN 144177)  
 24 FRED NORTON (SBN 224725)  
 25 1999 Harrison St., Suite 900  
 26 Oakland, CA 94612  
 27 Telephone: (510) 874-1000  
 28 Facsimile: (510) 874-1460  
 sholtzman@bsflp.com  
 fnorton@bsflp.com

DORIAN DALEY (SBN 129049)  
 JENNIFER GLOSS (SBN 154227)  
 500 Oracle Parkway, M/S 5op7  
 Redwood City, CA 94070  
 Telephone: (650) 506-4846  
 Facsimile: (650) 506-7114  
 dorian.daley@oracle.com  
 jennifer.gloss@oracle.com

Attorneys for Plaintiffs Oracle USA, Inc., *et al.*

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-01658 PJH (EDL)

**OFFER OF PROOF REGARDING  
 ORACLE'S UP-SELL AND CROSS-  
 SELL EXPECTATIONS AND IMPACT  
 ON DAMAGES ANALYSIS**

1 Plaintiffs submit this Offer of Proof to identify the testimony and documentary  
2 evidence concerning Oracle’s contemporaneous projections of up-sell and cross-sell revenue  
3 opportunities that Oracle would present, if permitted, to prove Oracle’s expectations as a willing  
4 seller in the fair market value of use damages analysis. If Oracle were permitted to present this  
5 evidence, its damages expert, Paul Meyer, would opine that Oracle’s copyright damages are at  
6 least \$2.156 billion; without that evidence, his opinion is that damages are at least \$1.656 billion  
7 – a difference of \$500 million. In addition, if Oracle were permitted to present this evidence,  
8 Mr. Meyer would be able to present additional analyses that support and corroborate his expert  
9 opinion on damages.

10 If permitted, Oracle’s President, Safra Catz, and Mr. Meyer would testify about  
11 the information contained in Plaintiffs’ Trial Exhibit 0615, admitted into evidence for Oracle’s  
12 maintenance revenue projections in connection with the PeopleSoft acquisition (relevant excerpts  
13 of which are attached as Exhibit A), other exhibits related to Oracle’s contemporaneous going-  
14 forward expectations for its PeopleSoft and Siebel acquisitions admitted into evidence on  
15 November 8, 2010 (collectively, the “Valuation Exhibits”),<sup>1</sup> and other documents produced in  
16 the case and referenced in Mr. Meyer’s expert report (relevant excerpts of which are attached as  
17 Exhibit C). Without dispute, Oracle produced the Valuation Exhibits in February 2009, prior to  
18 Defendants’ depositions of Oracle’s key executives knowledgeable about the projections  
19 reflected in the Valuation Exhibits, before Defendants filed their lost profits evidence sanctions  
20 motion, and long before the close of fact discovery on December 4, 2009.<sup>2</sup> There also is no  
21 dispute that Defendants never sought any relief from Judge Laporte for any failure by Oracle to  
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23 <sup>1</sup> See, e.g., Plaintiffs’ Exhibit 658 (referencing Oracle’s contemporaneous up-sell and cross-sell  
24 projections at the time of the Siebel acquisition). “PeopleSoft” in this Offer of Proof refers to  
25 both PeopleSoft and J.D. Edwards. As the Court knows, PeopleSoft acquired J.D. Edwards prior  
to Oracle’s acquisition of PeopleSoft.

26 <sup>2</sup> Ms. Catz was deposed on March 27, 2009. Oracle President Charles Phillips was deposed on  
27 April 17, 2009. Oracle CEO Larry Ellison was deposed on May 5, 2009. Several of these  
28 documents were discussed and marked at these depositions including Plaintiffs’ Trial Exhibits  
0013 and 0658. Defendants filed their sanctions motion on July 14, 2009.

1 produce these Valuation Exhibits, nor could there be any claim that there was any such failure.

2 On November 8, 2010, the Court ruled that evidence of Oracle's projected up-sell  
3 and cross-sell opportunities is "close enough" to the evidence of actual, after-the-fact lost up-sell  
4 and cross-sell profits that had been "denied all along." 11/8/10 Trial Transcript at 826:14-21.

5 Oracle respectfully submits that the Court's November 8 ruling is erroneous as a matter of law,  
6 for the reasons stated in Oracle's written submission (Dkt. 977) and the facts noted by the Court  
7 on November 8:

8 Judge Laporte's order doesn't address it. No order that I've issued  
9 addresses this. As far as I'm concerned, this is [an] entirely new  
10 issue. It is not barred by the prior discovery order. It couldn't  
11 conceivably be barred when I didn't even know it was an issue at  
12 the time that I adopted the sanctions order. So the question is  
13 whether or not irrespective of the sanction order, whether or not  
14 the evidence should come in. And the only question here is  
15 whether or not it was produced in discovery, the difficulty for SAP  
16 at this point is that you didn't raise the motion. You all raised  
17 motions on all manner of evidentiary issues. I cannot imagine that  
18 this is not something that you were aware of.

19 11/8/10 Trial Transcript at 817:15-818:3.

## 20 I. SAFRA CATZ'S TESTIMONY

21 Ms. Catz has testified she was Oracle's President at the time Oracle acquired both  
22 PeopleSoft and Siebel. 11/8/10 Trial Transcript at 838:5-8. She has personal knowledge of the  
23 Valuation Exhibits, the projections reflected in them, and how the projections were used by  
24 Oracle's executives and Board of Directors to value the PeopleSoft and Siebel acquisitions.

25 If permitted, Ms. Catz would explain to the jury Oracle's contemporaneous up-  
26 sell and cross-sell revenue projections for PeopleSoft found in the Valuation Exhibits and other  
27 contemporaneous Oracle and third party documents, including the bases for those projections;  
28 that those projections factored into Oracle's valuation of the PeopleSoft acquisition in December  
2004; and that Oracle's projections, accounting valuations and related financial information  
would have been important factors in assessing the fair market value of a license for Oracle's  
acquired PeopleSoft intellectual property in January 2005, the time of the hypothetical license  
with SAP. Ms. Catz would also testify that the going-forward assumptions in these projections

1 were predicated on her and Mr. Ellison’s expectations based upon their considerable experience  
2 in the industry. In addition, if permitted, Ms. Catz would testify that, because of the expected  
3 impact on Oracle’s future up-sell and cross-sell revenue, Oracle would have demanded  
4 additional billions of dollars in compensation from SAP for the right to use PeopleSoft  
5 intellectual property, for which Oracle had just paid for exclusive use in its \$11.1 billion  
6 acquisition.

7 Ms. Catz would similarly explain to the jury Oracle’s contemporaneous up-sell  
8 and cross-sell revenue projections for Siebel found in the Valuation Exhibits and other  
9 contemporaneous Oracle and third party documents, including the bases for those projections;  
10 that those projections factored into Oracle’s valuation of the Siebel acquisition in January 2006;  
11 and that Oracle’s projections, accounting valuations and related financial information would  
12 have been important factors in assessing the fair market value of a license for Oracle’s acquired  
13 Siebel intellectual property in September 2006, the time of the hypothetical license with SAP.  
14 Ms. Catz would also testify that the going-forward assumptions in these projections were  
15 predicated on her and Mr. Ellison’s expectations based upon their considerable experience in the  
16 industry. Ms. Catz also would testify that Oracle’s contemporaneous cross-sell and up-sell  
17 expectations would have required payment by SAP of far more than the one hundred million  
18 dollars that Oracle’s damages expert has opined is the minimum fair value for the right to use  
19 Siebel intellectual property.

## 20 **II. PAUL MEYER’S TESTIMONY**

21 Mr. Meyer is Oracle’s damages expert, and spent years analyzing Oracle’s and  
22 Defendants’ financial information and company records, discovery responses and testimony to  
23 calculate the damages Oracle suffered due to Defendants’ infringement of Oracle’s software.  
24 Consistent with the Court’s prior ruling that “Oracle should be permitted to present evidence  
25 regarding the fair market value of the copyrights that SAP allegedly infringed, including expert  
26 testimony based on established valuation methodology,” Dkt. 628 (Partial SJ Order) at 5:5-7, Mr.  
27 Meyer used three established valuation methods to estimate the amount of Oracle’s damages as  
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1 described at length in his February 23, 2010 damages report (relevant excerpts of which are  
2 attached as Exhibit C). These methods are the hypothetical license negotiation, the income  
3 approach, and the market approach. The results of each of these valuation methods are affected  
4 significantly by the evidence of Oracle's contemporaneous up-sell and cross-sell projections for  
5 PeopleSoft and Siebel. Mr. Meyer was deposed by Defendants, for three full days in May 2010,  
6 about these three methods and the evidentiary bases for his opinions. Furthermore, on  
7 September 23, 2009 and in connection with Oracle's Opposition to Defendants' first Motion for  
8 Partial Summary Judgment trying to bar Oracle's right to seek fair market license fees as  
9 damages, Mr. Meyer disclosed a detailed list of all of the documents he intended to rely on,  
10 including the Valuation Exhibits. *See* Dkt. 540 (Meyer Dec. in Support of Oracle's Opposition  
11 To Defendants' Motion for Partial Summary Judgment) (attached as Exhibit E).

12 ***Hypothetical License Negotiations***

13 In light of the Court's ruling on November 8, 2010, Mr. Meyer was obliged to  
14 exclude Oracle's up-sell and cross-sell projections from his trial testimony and presentation. At  
15 trial, with Oracle's up-sell and cross-sell projections excluded from his testimony, he used the  
16 hypothetical license negotiation method to calculate values associated with Oracle's future  
17 maintenance revenue stream only (not expected up-sell and cross-sell opportunities) of at least  
18 \$1.5 billion and \$100 million for fair market value licenses to the infringed PeopleSoft and  
19 Siebel software, respectively.

20 If permitted, Mr. Meyer would testify, as he stated in his expert report at ¶¶ 232,  
21 234-237, 241 (relevant excerpts of which are attached as Exhibit C) that Oracle's  
22 contemporaneous up-sell and cross-sell projections for PeopleSoft, from December 2004,  
23 represent at least \$500 million in additional value that Oracle and SAP would have reasonably  
24 agreed to in fair market value PeopleSoft and Siebel license negotiations. He would state that  
25 these projections are key evidence of the state of mind and reasonable goals and expectations of  
26 Oracle at the time, and that Oracle would have required compensation from SAP for Oracle's  
27 lower up-sell and cross-sell expectations that would have resulted if Oracle gave a license to  
28 SAP to use PeopleSoft (or Siebel) intellectual property to compete for this same projected

1 revenue.

2 In addition to demonstratives he has already used at trial, Mr. Meyer would  
3 testify, if permitted, to the analyses summarized in nine demonstratives, attached at Exhibit B,  
4 that illustrate this additional value and how it would factor into a hypothetical negotiation  
5 between the parties for Oracle’s acquired intellectual property. These demonstratives rely  
6 directly on the Valuation Exhibits and flow directly from his long-disclosed valuation  
7 approaches and evidence, about which Defendants took extensive discovery. For instance, Mr.  
8 Meyer would have presented and testified about a summary demonstrative regarding the  
9 financial impact Oracle would have expected from licensing the infringed PeopleSoft software to  
10 SAP. Exhibit B at 1. This slide shows that one input in calculating this impact is an assumption  
11 that 13 to 14% of the newly-acquired PeopleSoft customer base would have purchased new  
12 licenses from Oracle after the acquisition. *Id.* This assumption by Mr. Meyer is drawn directly  
13 from Valuation Exhibits, specifically the “Existing Customer Purchases % BOP Customer Base”  
14 projections for “License Revenue Buildup” in Trial Exhibit 0615. Exhibit A. The same  
15 summary demonstrative relies on Oracle’s contemporaneous projected revenue from license  
16 sales following the acquisition of PeopleSoft, specifically \$130,000 per year for existing  
17 customers new license sales and \$300,000 per year for incremental new customer license sales.  
18 Exhibit B at 1 & Exhibit A.<sup>3</sup>

19 If permitted, Mr. Meyer would similarly rely on other information contained in  
20 the Valuation Exhibits to testify based on the other demonstratives in Exhibit B , both for the  
21 PeopleSoft and Siebel<sup>4</sup> fair market value license negotiations. As illustrated by Mr. Meyer’s  
22 final slide in Exhibit B, accounting for the value Oracle would have associated with its

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24 <sup>3</sup> The color-coded circles on Exhibit A and Exhibit B show how Oracle’s projections in the  
25 Valuation Exhibits correspond to Mr. Meyer’s assumptions in his opinions and trial presentation.  
26 Similar evidence relates to the Siebel acquisition and related hypothetical negotiation. *See e.g.*,  
27 Exhibit B at 6-8.

28 <sup>4</sup> For a detailed discussion of Mr. Meyer’s opinions regarding the fair market value of the Siebel  
products, including Oracle’s contemporaneous up-sell and cross-sell projections, *see* Meyer  
Report at ¶¶ 306, 337, 341-342, 344-345, 350, attached as Exhibit C.

1 contemporaneous up-sell and cross-sell projections results in a fair market value license for the  
2 PeopleSoft and Siebel software of at least \$2.1 billion, a difference of approximately \$500  
3 million from the partial analysis Mr. Meyer was permitted to present.

4 Income Approach

5 During his testimony, Mr. Meyer also measured the damages Oracle suffered  
6 from Defendants' infringement using the income approach, which is based on SAP's expected  
7 gains and Oracle's expected losses under the hypothetical licenses.

8 Because Mr. Meyer was precluded from relying on Oracle evidence of  
9 contemporaneous expected up-sell and cross-sell opportunities, he was able to measure only  
10 Oracle's expected maintenance losses due to the infringement of PeopleSoft software (\$1.36  
11 billion to \$2.46 billion), which resulted in his opinion that the fair market value license would be  
12 at least \$1.5 billion. If allowed to also testify based on Oracle's contemporaneous, and long-ago  
13 produced up-sell and cross-sell projections, Mr. Meyer would testify, similar to his testimony at  
14 his deposition at 437:7-448:19 and 462:23-475:23 (relevant excerpts of which are attached as  
15 Exhibit D), and as he stated in his expert report at ¶¶ 128-131 (Exhibit C), that the income  
16 approach yields an estimate of Oracle's expected losses of \$2.0 billion to \$3.8 billion, which  
17 would result in a fair market value license for the PeopleSoft software of at least \$2 billion.

18 For the Siebel software at issue in this case, Mr. Meyer was able to testify only  
19 that Oracle's expected losses of maintenance revenues were \$164 million. If permitted, Meyer  
20 would testify, consistent with deposition testimony at 503:11-504:10 (Exhibit D), and as he  
21 stated in his report at ¶¶ 275-278 (Exhibit C), that if Oracle's contemporaneous up-sell and  
22 cross-sell projections for Siebel were considered, this number would increase to \$232 million.  
23 Had Mr. Meyer been permitted to testify regarding his detailed income approach, that testimony  
24 would have served to support the conclusions of his fair market value license analysis.

25 Market Approach

26 Mr. Meyer also measured Oracle's damages using a third method, the Market  
27 Approach, that measures the value of the hypothetical license by measuring the value of the  
28 related intangible assets Oracle acquired in the PeopleSoft and Siebel acquisitions.

1 As he stated in his expert report at ¶¶ 113-123 (Exhibit C), and in his deposition at  
2 151:15-153:9, 204:15-213:9, and 225:15-229:8 (Exhibit D), if permitted, Mr. Meyer would  
3 testify at trial that the related intangible assets (including, primarily, PeopleSoft’s customer  
4 relationships and associated future sales to them) obtained as part of the PeopleSoft acquisition  
5 were contemporaneously valued by a third party, Standard & Poor’s. However, excluding the  
6 anticipated up-sell and cross-sell revenues reduces the value of the relevant intangible assets  
7 significantly. If Mr. Meyer were permitted to testify about the value of the intangible assets, he  
8 would state that when coupled with the expectation that Oracle would have lost 20% to 30% of  
9 its PeopleSoft customers under the hypothetical license, the market approach would support the  
10 conclusion that any license for the PeopleSoft software would have been valued at no less than  
11 \$2 billion. *See* Plaintiffs’ Trial Exhibits 1008 and 13.

12 For the Siebel acquisition, if permitted, Mr. Meyer would testify consistent with  
13 his deposition testimony at 414:6-418:21 (Exhibit D), and as he stated in his report at ¶¶ 265-274  
14 (Exhibit C), that the related intangible assets (including, primarily, Siebel’s customer  
15 relationships and associated future sales to them) were contemporaneously valued by a third  
16 party, Duff & Phelps, and that excluding the anticipated up-sell and cross-sell revenues would  
17 significantly reduce the value of the relevant intangible assets. If permitted to testify about the  
18 value of the intangible assets, Mr. Meyer would state that when coupled with the expectation that  
19 Oracle would have lost 5% of its Siebel customers under the hypothetical license, the market  
20 approach would further support and cement his conclusion that any license for the Siebel  
21 software would have been valued at no less than \$100 million. *See* Plaintiffs’ Trial Exhibits  
22 1003 and 658.

23 Because the expected up-sell and cross-sell opportunities constitute a significant  
24 portion of the related intangible assets obtained in the PeopleSoft and Siebel acquisitions, it  
25 made little sense to offer this valuation methodology at trial given the Court’s exclusion of these  
26 topics. Had Mr. Meyer been permitted to testify regarding his detailed market approach, that  
27 testimony would have served to support the conclusions of his fair market value license and  
28 income approach analyses.



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BINGHAM McCUTCHEN LLP

By:           /s/ Geoffrey M. Howard            
Geoffrey M. Howard  
Attorneys for Plaintiffs  
Oracle USA, Inc., Oracle International  
Corp., and Siebel Systems, Inc.