EXHIBIT C

ORACLE USA, INC., ET AL

V.

SAP AG, ET AL

CASE NO. 07-CV-01658

SUPPLEMENTAL EXPERT REPORT OF PAUL K. MEYER

TM FINANCIAL FORENSICS, LLC.
FEBRUARY 23, 2010

PAUL K. MEYER

SAP desired, or comparable to the level of service and at the price provided by TomorrowNow.[276]

VI. Quantification of SAP's "Value of Use" of Oracle's Copyrighted Property - PeopleSoft/J.D. Edwards Copyright Infringement

106. Both Oracle and SAP value support contract revenue, profits and related customer relationships. These profits are the base on which research and development is funded, customer relationships are enhanced, and future software license sales occur.[277] Both companies seek to protect this valuable revenue and profit stream by maintaining exclusivity over advanced levels of

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[276] For purposes of this Report, "level of service" refers to the depth and breadth of support services offered. Oracle refers to support services generally by "levels" of service. Colleen Kelly, Oracle's Senior Director of Global Practices, defined support by level as, "First level support typically involves responding to telephone, email or web-based requests for support, incident tracking and resolving customer issues. Second level support may include the same services provided in first level of support, but could involve more complex issues, and might also involve the partner helping the customer create and manage an incident request that is sent to Oracle's support team seeking Oracle's assistance." Oracle then provides an additional level of support which pertains to using Oracle's application software and support materials in order to create fixes, patches or updates for customers. Declaration of Colleen A. Kelly in Support of Oracle's Opposition to Defendants' Motion to Compel Discovery concerning Third party Support Provided by Oracle's Partners, dated January 23, 2009, pgs. 1-2. *See* also, SAP Presentation, January 17, 2007 SAP-OR00141563-66 (Ziemen Exhibit 470), at 565 citing a Gartner industry analysts opinion that Systime, a third-party provider of support for SAP software, "can not be seen as a real alternative because without access to the SAP source code the whole offering is more or less useless." Oracle expert Kevin Mandia concluded that TomorrowNow's entire business model relied upon the alleged infringement and misuse of Oracle's Software and Support Materials, and the unauthorized downloading and copying of Oracle's intellectual property [February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1- 3].

[277] Email from Leo Apotheker to Erwin Guust, Re: Maintenance, dated March 20, 2007, SAP-OR00206971 (Ziemen Exhibit 467) [SAP and Oracle have similar business models where profits from support services are used to fund future R&D efforts]; Deposition of Charles Phillips (Oracle Co-President), April 17, 2009, pg. 63 [support dollars fund product development]; Deposition of Hasso Plattner (SAP Supervisory Board Chairman), June 2, 2009, pgs. 53-54 [acquiring companies are looking to get revenue streams from the maintenance that the customer base pays; acquirers are hoping to sell new licenses to acquired customer base];.EWeek.com article "SAP Touts Synergies in Business Objects Deal," October 8, 2007 ["We have many clients asking for highly, tightly integrated solutions, and we can expand our customer base and exploit up-selling opportunities," Kagermann said]; Deposition of Safra Catz (Oracle Co-President), March 27, 2009, pgs. 77-78 [goals of PeopleSoft acquisition included enlarging customer base to fund more R&D].

support, and maintaining controls over proprietary software and support materials through their respective intellectual property.[278]

107. In its acquisition of PeopleSoft, Oracle understood that it was acquiring an entity with customer relationships that had significant recurring/on-going revenue from support contracts, which was largely protected by PeopleSoft intellectual property. Oracle Senior Executives were well aware that PeopleSoft's products, services and customer support revenue stream were largely protected by copyright or other intellectual property.[279] Strategically, Oracle's senior executives understood the overall importance of the PeopleSoft acquisition to Oracle's future. Oracle has been highly successful in seamlessly integrating acquired software companies on a large and small scale, and Oracle has acquired at least 11 notable software companies since January 2005.[280]

108. The fair market value of SAP's access to Oracle's copyrighted materials in suit related to PeopleSoft, through its acquisition of TomorrowNow, was significant, as it paralleled in time Oracle's acquisition of PeopleSoft, and was based on expectations that similarly anticipated the value of PeopleSoft's intellectual property and on-going support contracts. The PeopleSoft/J.D.

[278] Deposition of Thomas Ziemen (SAP Vice President, Service Solution Management), October 1, 2008, pg. 438. [SAP does not have contracts with non-SAP entities that allows them to service SAP applications.]; Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007, pg. 26 [acquisition program "expands our customer base and provides greater scale to increase our investment in research and development to accelerate innovation, grow our earnings and increase stockholder value."]; Bernstein Research Call, November 4, 2004, pg. 3. ["By buying PSFT, ORCL is in effect purchasing a maintenance annuity stream and some incremental license, service, and maintenance revenue opportunities."]

[279] Discussions with Safra Catz (Oracle Co-President and Executive Board Member); eWeek.com article, "Oracle Warns SAP to Step Lightly," January 26, 2005 (Ellison Exhibit 404) [Quoting Larry Ellison as saying, "SAP has every right to provide support for PeopleSoft applications as long as they don't violate our intellectual and contractual property rights."]; Deposition of Larry Ellison (Oracle CEO and Executive Board Member), May 5, 2009, pgs. 117-119.

[280] *See* SCHEDULE 2.SU.

Edwards copyrighted materials in suit were necessary for TomorrowNow to offer its customers "comparable" or "superior" support at half Oracle's price, in the time and manner offered, as well as enable SAP to be ready to support future customers.[281]

109. In this matter, copyrights cover the creative works of software developers, including the programming code that ensures that software products, upgrades and bug fixes function as intended.[282] Unlike a patent license that only provides "use" rights and requires technology development by the licensee, in this instance, the copyright license provides for access to and use of existing software code. That software code has already been licensed by a large installed base of customers, and is already running at customer locations, thereby creating 'demand' for related support services. This built-in ready demand and support revenue stream, as well as the ability to deepen the customer relationship and sell more software, are key reasons SAP would desire to license the copyrighted materials in suit.

110. Just before SAP announced it was acquiring TomorrowNow to target the PeopleSoft support customer base, Oracle had agreed to pay $11.1 billion for PeopleSoft, including its significant annual support revenue stream.[283] 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

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[281] Discussions with Kevin Mandia; February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1, 3, 25 and 32.

[282] Discussion with Doug Lichtman; November 16, 2009 Expert Report of Doug Lichtman, pgs. 21-23. Oracle USA, Inc. et al v SAP AG et al, Fourth Amended Complaint in Case No. 07-CV-01658 dated August 18, 2009, pgs. 16-17.

[283] Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 72-74; "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 171 and 204.

use of the infringed materials in the assessment of damages in this matter. Of particular relevance is the value to Oracle of the acquired PeopleSoft on-going support customer revenue and enhanced customer relationships, which were expected to lead to additional license sales of PeopleSoft and/or other Oracle software. Without the copyrighted materials in suit, no support competitor could offer the same breadth and depth of support services as Oracle could as the copyright owner. In the alternative, massive investments in research and development to attempt to independently create the copyrighted materials in suit would be required. I understand that the PeopleSoft/J.D. Edwards copyrighted materials in suit would have been very costly to independently develop.[284]

111. As explained further below, I have taken these issues into consideration in my determination of the fair market value of the copyrighted materials in suit using the market, income and cost valuation approaches, as well as in my analysis of financial, economic and other factors relevant to the determination of the outcome of a hypothetical negotiation between Oracle and SAP for SAP's use of the copyrighted materials in suit.

A. PeopleSoft/J.D. Edwards Copyright Infringement - Determination of SAP's "Value of Use" Based on the Market Approach, Income Approach and Cost Approach

112. In the following sections, I analyze the fair market value of the copyrighted materials in suit in the context of these three valuation approaches. These fair market values reflect the amount that SAP – as a willing buyer – would pay Oracle, and that Oracle – as a willing seller – would

284 Discussions with Paul Pinto; November 16, 2009 Expert Report of Paul Pinto, pg. 43 (Mr. Pinto calculated a total development cost for selected PeopleSoft and JDE applications he evaluated of $1.275 billion [$320 million for JDE Enterprise One + $707 million for PeopleSoft + $248 million for JDE World]).

accept in January 2005 to secure access to, and use of, Oracle's PeopleSoft and J.D. Edwards-related copyrighted materials in suit. I understand that the scope of copyrighted materials in suit is extensive and involves access to virtually every PeopleSoft/J.D. Edwards software application, software and support materials.[285] I understand that SAP would have access to the copyrighted materials in suit it needed to provide service to PeopleSoft/J.D. Edwards customers until at least October 2008.

1. Market Approach

113. The market approach provides a determination of fair market value based on a comparison of the subject intellectual property to relevant licensing and sales transactions involving the subject intellectual property and/or transactions involving the parties in suit or comparable transactions within the industry. In the market approach, I consider market transactions involving sales of all or part of the subject intellectual property, the consideration paid by Oracle to PeopleSoft to acquire the property and other market transactions involving software.

a. Oracle's Acquisition of PeopleSoft

114. 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. The value that Oracle paid on a per customer basis for PeopleSoft/J.D. Edwards reflects an arm's length transaction to acquire those customer relationships, revenue and future business opportunities. Oracle

[285] Discussions with Paul Pinto and Kevin Mandia; February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1-3, Section VI (pgs. 34-58), Section VII.A-G (pgs. 59-73) and Appendices D-H; Deposition of Edward Screven (Oracle Chief Corporate Architect), November 30, 2009, pgs. 31-32 (explaining that newer versions of PeopleSoft and J.D. Edwards applications incorporate almost all of the code of the older versions).

acquired the entire PeopleSoft, Inc. company for $11.1 billion in January 2005.[286] As part of Oracle's acquisition of PeopleSoft, Oracle acquired the intellectual property of PeopleSoft, including the PeopleSoft copyrighted materials in suit related to: PeopleSoft Enterprise, J.D. Edwards Enterprise One and J.D. Edwards World software applications and then existing software and support materials.[287] In addition, Oracle acquired access to approximately 9,920 PeopleSoft customers who were, at the time of acquisition, under support contracts with PeopleSoft.[288] PeopleSoft projected 2004 total revenues, including license and services, of $2.7 billion.[289] Oracle's acquisition price was approximately 4 times PeopleSoft's then-reported annual revenues.[290]

115. As discussed in section III.B above, Oracle Senior Executives viewed the PeopleSoft acquisition as providing important new or deepened access to PeopleSoft's customer base and technology. The $11.1 billion acquisition price equates to an investment of approximately $1 million per customer, on average. 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

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[286] Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 72-74.

[287] Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 72-74.

[288] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 188.

[289] SCHEDULE 2.SU

[290] SCHEDULE 2.SU

value of that loss to be approximately $3.33 billion, or 30% of PeopleSoft's acquisition price.[291]

116. Oracle acquired significant intangible asset value with the PeopleSoft acquisition. Oracle retained Standard & Poor's ("S&P") to value certain PeopleSoft assets and liabilities acquired and allocate the $11.1 billion acquisition price for financial reporting purposes.[292] S&P determined that the intangible assets were worth approximately $9.9 billion, including the value of goodwill, patents/core technology, maintenance agreements and related customer relationships and tradenames/trademarks.[293] The purpose of S&P's valuation was to provide individual asset category values which could be recognized as separate assets in Oracle's financial reporting resulting from the acquisition. Table 6 summarizes the intangible asset valuation for Oracle's acquisition of PeopleSoft as reported on Oracle's financial statements.

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[291] Discussions with Larry Ellison (Oracle CEO and Executive Board Member), Safra Catz and Charles Phillips (Oracle Co-Presidents and Executive Board Members).

[292] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 161 and 205.

[293] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 249.

Table 6: Intangible Asset Valuation[294] Oracle's Acquisition Price of PeopleSoft ($ In Millions)		
Goodwill	$	6,487
Other Intangible Assets:		
Existing Technology		614
Patents/Core Technology		349
Maintenance Agreements and Customer Relationships		2,101
Customer Relationships		250
Tradenames/Trademarks		70
Subtotal Other Intangible Assets	$	3,384
Total	$	9,871

117. S&P's valuation of PeopleSoft's intangible assets provides a contemporaneously prepared indication of the fair market value of the PeopleSoft/J.D. Edwards-related copyrighted materials in suit. While S&P did not specifically value solely the copyrighted materials in suit, relevant portions of the S&P intangible asset valuation include the value of using the

[294] Amounts in Table 6 reflect Oracle's financial statement disclosures regarding the accounting for the acquisition. S&P's allocation of acquisition value to intangible assets varies slightly from the accounting in the financial statements [*See* Oracle Annual Report for the fiscal year ended May 31, 2005, pgs. 16 and 72-74; SCHEDULE 3]; "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc., as of December 28, 2004," ORCL00313160-253, at 204. S&P's valuation of PeopleSoft's other intangible assets, excluding goodwill, totaled $3.6 billion. Oracle's financial statement disclosures recorded certain support agreements, valued at $208 million, for which PeopleSoft had not been paid as of the acquisition, within prepaid expenses and other current assets, rather than in intangible assets. Additionally, In-Process Technology valued at $33 million was recorded as "In-process research and development" in the financial statement disclosures and not included in the total identified intangible assets. These two adjustments reduce the intangible asset value on the financial statements to $3.4 billion [$3,625 (S&P) less $208(prepaid expense) less $33 (R&D) = $3,384]. S&P's asset valuation includes $2.3 billion for maintenance agreements and customer relationships. I have used $2.1 billion for these intangible assets in this report based on S&P's valuation excluding consideration of $208 million of support contracts mentioned above.

copyrighted materials in suit to provide service and enhance customer relationships. S&P's separate valuations performed for the following intangible asset categories include value attributable to the copyrighted materials in suit: maintenance agreements and related customer relationships, the cost to replace customer relationships, and residual value attributable to goodwill.[295] As addressed earlier in this Report, SAP acknowledged that it required PeopleSoft's software and support materials in order to solicit comparable or better support services to PeopleSoft customers.[296] Without the PeopleSoft copyrighted materials that SAP obtained without a license from Oracle, SAP would not be able to represent to PeopleSoft customers that it could meet the support service contract requirements, nor garner the customer referrals that eased customer concerns about the quality of service.[297] The illegally obtained copyrighted materials in suit enabled SAP to provide customer support.

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[295] S&P's valuation of Existing and In-Process Technology is not relevant to the determination of the copyright value in this matter because it measures the capability of the technology to generate new license revenues for that technology. In these circumstances, since SAP would not be selling licenses for the copyrighted software applications, this measure of value is unrelated to the alleged improper actions of SAP and TomorrowNow. Although, I understand that in some cases, TomorrowNow may have or did distribute CD's, instruction manuals and/or other items containing PeopleSoft trade names or trademarks, for purposes of this valuation, I have excluded any value associated with those alleged actions. SAS-TN-OR04446719-OR-00220 – 238 (Baugh Exhibit 1537); WMIFIX-TN-OR-01823634-OR-00039 – 51 (Russell Exhibit 304); SAS-TN-OR00009569-OR-00221 – 226 (Hyde Exhibit 116); TN-OR00809640-760 (Hyde Exhibit 118).

[296] *See* section IV.B.4 of this Report.

[297] The importance of getting client references was regularly noted in TomorrowNow "Win" announcements. Deposition of Andrew Nelson (Co-Founder of TomorrowNow), February 26, 2009, pgs. 202-203. *See*, as examples, TomorrowNow email from Bob Geib to all TomorrowNow employees, Re: TomorrowNow WINS! High Industries (PeopleSoft) Part TWO, TN-OR00061877-78 (Hurst Exhibit 167), at 78; TomorrowNow email from Andrew Nelson to all TomorrowNow employees, Re: TomorrowNow WINS AGAIN! Telapex, Inc., TN-OR 03752526 (A. Nelson Exhibit 1022). Lesley Loftus, TomorrowNow Vice President of Global Marketing, testified that customer referrals were important because "it's a good foundation for a decision." [Deposition of Lesley Loftus, June 13, 2008, pg. 196]. As part of its marketing of the Safe Passage program, SAP sought to get TomorrowNow customer testimonials [Deposition of Terry Hurst (SAP Director of Competitive Programs), April 30, 2008, pg. 145-146; Home Depot reference quotes, SAP-OR00066889-91 (Hurst Exhibit 163)].

118. S&P's analysis provides separate values for each asset category. S&P valued PeopleSoft acquired maintenance agreements and related customer relationships at $2.1 billion. S&P used a discounted cash flow approach that considered projections through May 31, 2015 of future support revenues and costs resulting from Oracle's use of the copyrighted materials in suit to service the 9,920 customers of PeopleSoft software as of the date of Oracle's acquisition.[298] S&P's valuation deducts costs from projected support revenues related to providing service. The cash flow from operations is then discounted to January 2005 at 10%, resulting in a present value of cash flows of $1.86 billion.[299]

119. For the "market approach," I have considered the value assigned to the ongoing and future servicing of PeopleSoft customers, which have been valued at $2.1 billion. While the $2.1 billion valuation includes Oracle's rights to these annual agreements as well as the copyrighted materials, SAPs access and use of Oracle's copyrighted materials in suit enabled SAP to attempt to supplant Oracle as the support provider and, if successful, to receive the benefit of the support agreements which Oracle understood it was acquiring in the transaction (which were protected by PeopleSoft copyrights). Because the support contracts renew annually, SAP could dislodge Oracle at any time the contracts were up for renewal by offering comparable levels of service at discounted prices. Because the contemplated license terms presume that SAP would only be using the copyrighted materials in suit until October 2008, SAP would not dislodge all of Oracle's PeopleSoft support customers, and

[298] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 229.

[299] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 229.

therefore some downward adjustment from the entire intangible asset value related to customer support contracts is warranted. My analysis takes this into consideration by apportioning the total value down to Oracle's anticipated customer loss.

120. S&P separately valued the cost to replace its estimate of approximately 4,200 new customer relationships Oracle acquired from PeopleSoft at $250 million.[300] This valuation assumes that by acquiring the customer base, Oracle avoided the cost of a 6 month sales cycle required to place a customer in a PeopleSoft license. Although SAP's use of the copyrighted materials was such that it was still required to solicit and attempt to establish TomorrowNow support relationships (e.g., TomorrowNow would still need to solicit the customer to obtain a support contract), SAP avoided the time and effort to get the customer to license PeopleSoft, instead spending a much shorter time to convince the customer to switch support providers. However, SAP indicates that it had less customer overlap with the PeopleSoft customer base than Oracle. A SAP presentation indicates that SAP's customer base overlapped with only approximately 2,000 PeopleSoft customers. Therefore, approximately 7,900 PeopleSoft customers would be new to SAP. I have considered that the $250 million fair market value for customer relationships represents the value of fewer customers than SAP would gain access to (4,200 versus 7,900), but will involve less SAP effort and time to complete the sales cycle than what was assumed for Oracle. Since those two considerations would have inverse impacts on the $250 million valuation, I conclude that using the $250 million as the fair market value for SAP's access to new

[300] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004," ORCL00313160-253, at 193-194.

customer relationships would be relevant and additive to the fair market value of the support contracts discussed previously in valuing the fair market value of SAP's use of the copyrighted materials in suit. As with the fair market value of the support contracts, the total customer relationship value would have to be apportioned for an appropriate number of relevant customers.

121. The residual value of $6.5 billion for goodwill[301] includes value related to the copyrighted materials in suit as they provide for the generation of support revenues from customers that will purchase PeopleSoft products after Oracle's acquisition date, as well as revenues from sales of other Oracle software to PeopleSoft customers.[302] As addressed in section IV.B.3 of this Report, a primary benefit to SAP of supplanting Oracle in providing support for PeopleSoft and J.D. Edwards customers was SAP's ability to market and sell SAP software. As such, a portion of the goodwill Oracle recorded from the acquisition also reflects the value of SAP's use of Oracle's copyrighted materials in suit.

122. In order to determine the fair market value of Oracle's copyrighted materials for SAP's use in providing PeopleSoft support services, and new or enhanced customer relationships, the following indicators from Oracle's acquisition of PeopleSoft are relevant:

[301] Goodwill is the excess of the purchase price paid for PeopleSoft over the value of the separately identified acquired assets.

[302] I consider the value of the copyrighted materials in suit in terms of their ability to generate sales of other Oracle products not to quantify the lost profits associated with Oracle's lost cross-sell and up-sell opportunities to TomorrowNow support customers, but as considerations that would inform and be relevant to the fair market value of Defendants' use of the allegedly infringed materials. I understand from Oracle's counsel, Defendants specifically did not seek preclusion of this measure of Oracle's copyright damages in its Motion for Sanctions Pursuant to Fed. R. Civ. P. 37(c) and 16(f).

- The Oracle acquisition of PeopleSoft was contemporaneous, in the same software market, involved the copyrighted materials in suit, and is a directly relevant market metric to determining the economic value gained by SAP.
- The copyrighted materials are key and enabling to providing support services and maintaining customer relationships. Additionally, the copyrighted materials or comparable independently developed materials are required resources to meet Oracle/PeopleSoft-related customer support contract commitments.
- The copyrighted materials fair market value would include a portion of $8.85 billion, which includes the fair market value of all PeopleSoft support agreements and related customer relationships at the time of acquisition ($2.1 billion), the avoided cost of developing certain new customer relationships ($250 million) and Oracle's recorded goodwill ($6.5 billion).
- SAP's business strategy at the time of the alleged access to the Oracle copyrighted materials indicated that it planned to convert 3,000 PeopleSoft customers to SAP/TomorrowNow support services. Comparing the 3,000 customers to the total PeopleSoft customers of 9,920 indicates a targeted percentage of 30.2%. Applying this percentage to the value of the total support contracts, customer relationships and goodwill of $8.85 billion indicates a fair market value of the copyrighted

materials of $2.67 billion.[303] Applying the percentage that would result from 2,000 customers converting to SAP would result in a valuation of $1.78 billion.[304]

- Theoretically, in lieu of accessing the copyrighted Oracle materials, SAP could have entered into a fair market value transaction and acquired a portion of the PeopleSoft customer base and the associated support revenue stream. The value that Oracle paid on a per customer basis for PeopleSoft of approximately $1 million reflects an arm's-length transaction to acquire those customer relationships, existing support revenue and future revenue expansion opportunities.[305]
- Although SAP targeted 3,000 PeopleSoft customers to convert to support contracts, using 2,000 potential customer relationships (enabled by the alleged copyright infringement) at $1 million per customer indicates a $2 billion valuation of the copyrighted materials.

123. The above factors and consideration indicate that the fair market value of SAP's alleged use of Oracle's copyrighted material for use in providing PeopleSoft's customer support services would be no less than $2 billion.

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[303] $8.85 billion * 30.2% = $2.67 billion. The income approach in the following section of this Report provides another perspective to the valuation estimate for the support agreements and related customer relationships.

[304] $8.85 billion * 20.16% = $1.78 billion.

[305] Oracle acquired PeopleSoft and its 9,920 customers for $11.1 billion, or approximately $1.1 million per customer. Data related to Oracle's acquisition of PeopleSoft provides directly comparable metrics of the fair market value for the copyrighted materials in suit.

b. PeopleSoft Acquisition of J.D. Edwards

124. On July 18, 2003, PeopleSoft acquired J.D. Edwards, a leading provider of enterprise software as well as related consulting, education and support services, for $2 billion.[306] For 2003, PeopleSoft reported revenues of $309.4 million for license, maintenance and professional services attributed to J.D. Edwards acquired software products.[307] PeopleSoft's acquisition price was approximately 6 times annual revenues.[308] PeopleSoft's acquisition of J.D. Edwards provides relevant market comparable information as it was an arms-length transaction that included a portion of the copyrighted materials in suit. PeopleSoft allocated $532.6 million of the acquisition price to J.D. Edwards intangible assets, and separately $951.0 million to goodwill.[309] The intangible asset value included $411 million of value attributable to customer contracts, maintenance agreements and related relationships.[310] As an alternative to the illegal acquisition of the copyrights in suit, SAP could have paid for access to the intellectual property either through purchasing all, or part, of J.D. Edwards. This transaction provides relevant information towards determining the fair market value of SAP's use of the J.D. Edwards copyrights in suit of up to $1.36 billion.[311] I have considered that this value would not only relate to the J.D. Edwards-related copyrighted materials in suit, but would also include the value of all J.D. Edwards customer contracts, maintenance agreements and related relationships projected beyond October

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[306] PeopleSoft Form 10-K for the fiscal year ended December 31, 2003, pg. 30.

[307] PeopleSoft Form 10-K for the fiscal year ended December 31, 2003, pg. 21.

[308] $2,000 million ÷ $309.4 million = 6.46.

[309] PeopleSoft Form 10-K for the fiscal year ended December 31, 2003, pg. 31.

[310] PeopleSoft Form 10-K for the fiscal year ended December 31, 2003, pg. 32.

[311] $951.0 million + $411 million = $1.36 billion.

2. Income Approach

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. The income approach measures the net present value of these future cash flows as of the date of the valuation. I have employed the income approach by determining the incremental net cash flows Oracle would expect to lose to SAP as a result of licensing the copyrighted materials in suit. I have also considered in the income approach analyses performed contemporaneously by SAP or TomorrowNow indicating either the revenues they expected to receive or the amount of Oracle's business they expected to displace.

a. Income Approach Applied To Oracle's Expected Losses

129. S&P's overall valuation of Oracle's PeopleSoft acquisition was measured using a discounted cash flow model for revenues and profits from PeopleSoft's support customers lost to TomorrowNow and SAP (post-October 2008), lost incremental license revenue (up-sell) and related support, and lost new license revenue (cross-sell) and related support. In modeling the incremental value of customers Oracle would expect to lose under a license to SAP, I have used various assumptions from the S&P valuation, including the size of the PeopleSoft customer base acquired, annual attrition rates, average annual maintenance fees, duration of the model to at least 2014, cost of sales and certain other expenses, and present value factors. I have also considered the terminal value of losing support customers, and incremental licenses and support as a result of licensing the copyrighted materials in suit to SAP.

130. I have addressed three scenarios varying the number of customers that switch their applications to SAP; one model assumes 1,375 customer switches;

another model assumes 2,000 customer switches; and lastly, a model with 3,000 customer switches. In each case I have assumed that Oracle would lose 3,000 of its PeopleSoft support customers to SAP and TomorrowNow between January 2005 and October 2008, with terminal value of up-sell license and support revenue losses through December 31, 2014.[319] Based on estimates of incremental costs including cost of goods and sales related expenses, I have deducted costs from the revenues at 20% for cost of support revenues, 30% for cost of incremental license sales to existing customers, and 50% for cost of new license revenues.[320] I have used a terminal value based on lost license and support profits, capitalized at 8.3%, to estimate the ongoing loss to Oracle of customers that would switch to SAP as a result of licensing the copyrighted materials in suit.[321] All amounts have been discounted to January 2005.

131. The results of these calculations are summarized in **SCHEDULES 11.SU-13.SU**, and indicate the fair market value under various assumptions regarding the number of customers Oracle would lose to SAP as a result of licensing the copyrighted materials in suit, of between $2.0 billion and $3.8 billion, assuming terminal value.[322]

b. Income Approach Applied To SAP's Expected Gains

132. Separately, SAP valued the access and use of the PeopleSoft copyrighted materials in suit. In December 2004, SAP prepared a "Business Opportunity" projecting that as a result of its "PeopleSoft Attack Program," of which TomorrowNow was a key part, it would obtain 3,000 PeopleSoft maintenance

[319] *See* **SCHEDULES 11.SU-13.SU.**

[320] *See, e.g.* **SCHEDULES 11.1** and **11.2SU.**

[321] *See, e.g.* **SCHEDULE 11.1.** "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006, dated July 20, 2006, ORCL00312747 – 819 at 812.

[322] *See* **SCHEDULES 11.SU-13.SU.**

230. Oracle would realize in the hypothetical negotiation that "but for" the license to SAP, it would be able to realize the full value of its investment in PeopleSoft, which Oracle's history has indicated would include returns beyond the entire acquisition price. Licensing SAP will severely impact the transition of the PeopleSoft customers to Oracle. The acquired cost per customer valuation metrics allow Oracle to apply fair market value data to its calculation of what it is really giving up with the license. These customer metrics are relevant to the license fees that would result in consideration of Georgia-Pacific factor 1: fees charged for the use of the intellectual property in suit.

D. Value of Use Under the Hypothetical Negotiation – Summary

231. The hypothetical negotiators would have considered the financial, economic and other valuation inputs that I have identified and analyzed, and then determined a reasonable royalty (i.e. license fee) by engaging in a "back and forth" negotiation.[490] Below, I summarize the hypothetical negotiation and refer to the various financial metrics in the market, income and cost approach section which would be relevant to determining the license fee in the hypothetical negotiation.

1. Summary of Factors Considered by Oracle and SAP

232. As discussed above, in determining the license fee that it would be willing to accept from SAP for SAP's use of the PeopleSoft/J.D. Edwards copyrighted materials in suit, Oracle would consider at least the following factors:

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[490] I understand that the hypothetical negotiation would be conducted by a willing licensor (Oracle) and a willing licensee (SAP) acting in a rational manner in or around January, 2005.

- The broad scope of the license, which would enable SAP to compete against Oracle in providing support services to its PeopleSoft/J.D. Edwards customers, and provide SAP with enhanced ability to convert those customers to SAP applications;
- Expected lost support revenue to SAP on customers that would go to TomorrowNow for support services, as well as lost up-sell and cross-sell revenues from those customers;
- The anticipated permanent impact on Oracle due to the lost future license revenue and ongoing support renewals for customers that would switch to SAP applications;
- Immediately prior to the contemplated hypothetical negotiation, Oracle paid approximately $11.1 billion to acquire PeopleSoft, including rights to the PeopleSoft/J.D. Edwards customer support contracts and related relationships and associated goodwill;
- Oracle's investment of over $1 billion in further research and development for its PeopleSoft and J.D. Edwards products since the acquisition, which Oracle would reasonably understand that it would have to spend, and that SAP would avoid spending by virtue of the license;
- The nature of the relationship between Oracle and SAP, as direct competitors in the software applications business, particularly in light of Oracle's goals for the PeopleSoft acquisition to enhance its competitive position with SAP in the applications market;

- Anticipated changes to Oracle's business practices in order to compete with SAP to provide support services to Oracle customers; and,
- Anticipated negative impacts to the level of profitability and customer renewal rates of the Oracle support products that embody the copyrighted materials at issue, and the resulting impact on Oracle's ability to use that support revenue stream to fund ongoing research and development.

233. Similarly, in determining the amount of a license fee that SAP would be willing to pay to Oracle for its use of the PeopleSoft/J.D. Edwards copyrighted materials in suit, SAP would consider at least the following factors:

- The license would allow SAP to use its TomorrowNow service offering to drive the conversion of Oracle's applications customers to SAP's platform;
- SAP's willingness to pay significant amounts to acquire intellectual property and customer relationships, as evidenced in particular by its 2007 acquisition of Business Objects for $7.1 billion;
- SAP's knowledge that access to Oracle's copyrighted materials is necessary for the level of support that it sought to provide and advertised to Oracle's PeopleSoft/J.D. Edwards customers;
- TomorrowNow's entire business model relied upon its access and use of Oracle's PeopleSoft/J.D. Edwards copyrighted materials in suit;

- The nature of the competitive relationship between Oracle and SAP in the software applications business, and in particular the increased competitive threat that Oracle posed to SAP as a result of its acquisition of PeopleSoft;
- The significant development time, effort and risk that SAP would avoid by entering into the contemplated hypothetical license;
- The importance of timing and speed of SAP's offering of PeopleSoft/J.D. Edwards support services (to coincide with Oracle's acquisition of PeopleSoft and take advantage of customers' fear, uncertainty and doubt);
- The goals of SAP's Safe Passage program, of which the TomorrowNow service offering was an integral part, to convert the majority of the PeopleSoft/J.D. Edwards customer base to SAP; and,
- SAP's expected benefits from offering TomorrowNow support service, selling additional SAP products to those customers, and ultimately converting a portion of those customers to SAP.

234. In establishing their respective negotiating positions, Oracle and SAP would have considered the financial implications of entering into a license. Oracle would consider discounted cash flow scenarios with potential license and support losses between $2.0 billion and $3.8 billion (**SCHEDULES 11.SU-13.SU**); SAP would consider scenarios reflecting financial and economic benefits of between approximately $881 million to $2.7 billion (**SCHEDULES 15.SU-16**). These discounted cash flow scenarios are explained in the Market

Approach section related to SAPs "Value of Use", see Section VI.A.2 of this report. By granting SAP a license, Oracle and SAP would have also considered the financial metrics (multipliers) developed by TomorrowNow and SAP reflecting the impact on Oracle of SAP/TomorrowNow converting license and/or support revenue that would have otherwise been earned by Oracle. For example, one such TomorrowNow metric estimated the financial impact to Oracle at $20 support revenue lost for every $1 TomorrowNow gained. The parties would also consider the actual sales of TomorrowNow to PeopleSoft customers along with TomorrowNow's strategic planning and selling activities.

235. The parties would have considered the acquisition price paid by Oracle for PeopleSoft/J.D. Edwards and the components of the intangible assets. Significant value was embedded in the ongoing support revenue anticipated from the acquired PeopleSoft/J.D. Edwards customers. The copyrighted materials accessed by SAP are required resources to meet Oracle's/PeopleSoft related customer support contract commitments, or comparable materials must be independently developed. The valuation of the support revenue stream and customer relationships of $2.1 billion would be heavily considered. The parties would contemplate doubling the $2.1 billion value of support agreements and customer relationships[491] to $4.2 billion to reflect the goodwill premium paid overall by Oracle to acquire PeopleSoft. Oracle Senior Executives have indicated that the transaction goodwill premium reflects Oracle's ability to gain additional monetary value over time from acquired

[491] *See* Market Approach in Section VI.1 of this report. The goodwill premium is actually 1.4 times the acquired tangible and intangible assets (tangible assets of $1.2 billion + intangible assets of $3.4 billion = $4.6 billion x 1.4 = $6.5 billion of goodwill).

customers through cross-sell and up-sell opportunities, as well as other financial benefits. Oracle would understand that, with the hypothetical license, there would be an immediate impact on its support revenue and customer goodwill.

236. Market value metrics and valuations would bring significant upward financial pressure to the negotiation, particularly as the hypothetical license coincides with Oracle's $11.1 billion acquisition of PeopleSoft.

2. Oracle Would Expect A Significant License Fee

237. Larry Ellison, Safra Catz and Charles Phillips informed me that Oracle would expect a significant license fee from SAP for the PeopleSoft/J.D. Edwards copyrighted materials in suit, and indicated the impact of licensing would be greater than $3 billion on Oracle. A further perspective on losing potentially 3,000 customers (whose support is enabled by the copyrighted materials) is illustrated by applying 30.2%[492] to the value of the total support contracts, customer relationships and goodwill of $8.85 billion to result in $2.67 billion of potential loss.[493] I understand that Larry Ellison, Safra Catz and Charles Phillips would be personally involved in these negotiations.

3. SAP Could Pay A Significant License Fee

238. Theoretically, as SAP was strategically interested in expanding its customer support footprint and disrupting the transition of PeopleSoft customers to Oracle, SAP could have attempted to acquire PeopleSoft customer relationships and support revenue through a third party acquisition. In January 2005, in an arms-length transaction, Oracle paid approximately $1

[492] 3,000 customers / 9,920 customers = 30.2%.

[493] Discussion with Oracle Senior Executives: Larry Ellison, Safra Catz and Charles Phillips.

E. Opinion: Value of Use of PeopleSoft/J.D. Edwards Copyrighted Materials Based on Hypothetical Negotiation Approach to Establish Intellectual Property Value – Oracle and SAP Would Have Agreed Upon a License Fee of No Less Than $2 Billion

241. Based on my analysis of the fifteen *Georgia-Pacific* factors and relevant economic, financial and valuation issues and considerations, in January 2005, it is my opinion that the parties would have agreed to a license fee of no less than $2 billion.[501]

VII. Quantification of SAP's Value of Use of Oracle's Copyrighted Property – Oracle Database Copyright Infringement

A. Background

242. In this section, I have provided an analysis of the damages Oracle has suffered due to Defendants' alleged conduct with respect to Oracle's database software. Oracle's database products are core Oracle software product offerings. Gartner reported Oracle as the worldwide leader in relational database software in 2008 with 48.9% of the market.[502] Oracle database and middleware products generated between 68% to 82% of Oracle's new software license revenues for the period 2003 through 2008.[503] I understand Oracle's database software is protected by copyrights.[504] I understand customer application software, such as PeopleSoft, J.D. Edwards and Siebel applications,

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[501] Oracle and SAP may have entered into a hypothetical license, depending on the level of payment [Deposition of Safra Catz, (Oracle Co-President and Executive Board Member), dated March 27, 2009, pgs. 20-25; Deposition of Charles Phillips (Oracle Co-President and Executive Board Member), dated April 17, 2009, pgs. 118-120].

[502] www.oracle.com referencing "Market Share: Relational Database Management System Software by Operating System, Worldwide, 2008," Gartner, June 12, 2009.

[503] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2005, pg. 2; Oracle Corporation Form 10-K for the fiscal year ended May 31, 2008, pg. 2.

[504] Plaintiffs' Fifth Amended and Seventh Supplemental Responses and Objections to Defendant TomorrowNow, Inc.'s Interrogatory No. 13, December 4, 2009, pgs. 178-184 and 199.

B. Siebel Copyright Infringement – Determination Of SAP's Value Of Use Based On the Market Approach, Income Approach, and Cost Approach

264. In the following sections, I analyze the fair market value of the Siebel copyrighted materials in suit using the valuation methods described above in Section V: the Market Approach, Income Approach and Cost Approach.[551] These fair market values reflect the amount that SAP would pay Oracle in September 2006 to license Oracle's Siebel-related copyrighted materials in suit.

1. Market Approach

265. In analyzing the fair market value of the Siebel copyrighted materials in suit using the market approach, I have considered the same types of evidence addressed in the market approach for the PeopleSoft/J.D. Edwards copyrighted materials in suit in Section VI.A.1 above. Specifically, I have considered the acquisitions addressed above between Oracle and PeopleSoft, PeopleSoft and J.D. Edwards, and SAP and Business Objects, which involve intellectual property relevant to understanding the value of the Siebel copyrighted materials in suit. Additionally, there is an arm's length transaction for the subject intellectual property within a year of the valuation date. Data related to Oracle's acquisition of Siebel provides relevant, comparable metrics of the fair market value for the copyrighted materials in suit. The following section sets forth my analysis of the market approach based on Oracle's acquisition of Siebel as well as considering the other acquisitions mentioned above.

a. Oracle's Acquisition of Siebel

[551] *Intellectual Property, Valuation, Exploitation, and Infringing Damages,* by Gordon V. Smith and Russell L. Parr., 2005 Edition, p. 148-154.

266. Again, 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 Siebel customer base and the associated revenue stream. The amount Oracle paid to acquire Siebel reflects an arm's length transaction to acquire the same intellectual property, customer relationships and future revenues and profits that SAP sought to obtain. As part of Oracle's acquisition of Siebel in January 2006, Oracle acquired Siebel intellectual property, including the Siebel copyrighted materials in suit, which relate to Siebel's Customer Management Relationship ("CRM") software applications and then existing software and support materials.[552] In addition, Oracle obtained access to 4,000 Siebel customers who were, at the time of acquisition, under support contracts with Siebel. For the year-ended December 31, 2005, Siebel reported total revenue of $1.4 billion.[553] On January 31, 2006, Oracle acquired the entire Siebel company for $6.1 billion.[554] Therefore, Oracle's purchase price represented an approximate 4.3 price-to-revenue multiple.

267. As discussed in section III.C. above, Oracle Senior Executives believed the Siebel acquisition would provide Oracle new or deepened access to Siebel's customer base, a competitive benefit from Siebel's leading market position, and valuable software technology, including its "best in breed" CRM software. Oracle's $6.1 billion acquisition price equates to an investment of

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[552] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pgs. 75-77; "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 756.

[553] News Release: Siebel Systems Confirms Financial Results for the Quarter Ended December 31, 2005, dated January 25, 2006, pgs. 2, 4; Email from Christian Klein to Thomas Ziemen and Bernd Welz (Vice President System Service Solution Management), dated October 25, 2005 with attached Business Case files, SAP-OR00250204-225, (Hurst Exhibit 1601), at 223.

[554] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pgs. 75-77.

approximately $1.53 million on average per Siebel customer for the 4,000 Siebel customers.[555] Oracle Senior Executives have indicated that they would value a license to SAP for the Siebel copyrighted materials in suit based on the ratio of Siebel customers that they believed might leave for TomorrowNow, applied against the total $6.1 million acquisition price.[556] Using this methodology, if up to 10% of Siebel's customers would be expected to depart Oracle, the fair market value of SAP's value of use of Oracle's Siebel copyrighted materials in suit would be approximately $600 million.

268. Oracle retained Duff & Phelps, LLC ("Duff & Phelps") to value certain assets and liabilities acquired from Siebel Systems, Inc., and allocate the $6.1 billion acquisition price.[557] Duff & Phelps determined that Siebel's intangible assets were worth approximately $1.6 billion, including patents/core technology, software support agreements and related customer relationships and trademarks.[558] Including acquired goodwill, valued at $2.5 billion, the total fair market value of Siebel intangible assets was $4.1 billion.[559] Table 11 summarizes the intangible asset valuation for Oracle's acquisition of Siebel as reported in Oracle's financial statements.

[555] SAP believed Siebel had 4,000 customers [Business Case: TomorrowNow – Siebel, TN-OR00995250-259, (Zieman Exhibit 472)], at 254; Email from Christian Klein to Thomas Ziemen and Bernd Welz (Vice President System Service Solution Management), dated October 25, 2005 with attached Business Case files, SAP-OR00250204-225, (Hurst Exhibit 1601), at 223.

[556] Discussion with Larry Ellison, Safra Catz and Charles Phillips. Deposition of Larry Ellison (Oracle CEO), May 5, 2009, pgs. 77-84.

[557] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 748, 783, 812.

[558] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 782.

[559] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pg. 76.

Table 11: Intangible Asset Valuation[560] Oracle's Acquisition Price of Siebel ($ In Millions)		
Goodwill	$	2,514
Developed Technology		418
Patents/Core Technology		199
Software Support Agreements and Customer Relationships		808
Customer Relationships		108
Trademarks		31
Total	$	4,078

269. Duff & Phelps' valuation of Siebel's intangible assets provides a contemporaneously prepared indication of the fair market value of the Siebel copyrighted materials in suit. While Duff & Phelps did not specifically value solely the Siebel copyrighted materials in suit, relevant portions of the Duff & Phelps intangible asset valuation include the value of using those copyrighted materials to provide service and enhance customer relationships. Duff & Phelps' valuations of the following intangible assets include value attributable to the Siebel copyrighted materials in suit: software support agreements and related customer relationships, the cost to replace customer relationships, and

[560] Amounts in Table 11 reflect Oracle's financial statement disclosures regarding the accounting for the acquisition. Oracle Form 10-K for the fiscal year ended May 31, 2006, pgs. 75-77; "Oracle Corporation: Estimation of the Fair Market Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 782. *See* SCHEDULE 4. Duff & Phelps' valuation of Siebel's intangible assets totaled to $1.628 billion. Oracle's financial statement disclosures recorded In-Process Technology valued at $64 million as "In-process research and development" in the financial statement disclosures and was not included in the total identified intangible assets valuation. This adjustment reduces the intangible asset valuation to $1.6 billion ($1,628 – $64 = $1,564).

the goodwill premium resulting from the transaction.[561] Without the Siebel copyrighted materials in suit, TomorrowNow would not have been able to represent to Oracle's newly-acquired Siebel customers that it could meet the support service contract requirements and offer comparable service to Oracle at half the price, nor be able to make such an offering in the short time frame after Oracle's acquisition of Siebel.[562]

270. Duff & Phelps valued Siebel software support agreements and related customer relationships at $808 million based on a discounted cash flow approach, considering projections of future support revenues and costs related to the use of the copyrighted materials in suit to provide support for the 4,000 Siebel customers through 2016.[563] Duff & Phelps' valuation deducts all costs of offering support services and operating expenses.[564] While this valuation includes Oracle's rights to these annual support agreements in addition to the Siebel copyrighted materials in suit, SAP's access and use of Oracle's copyrighted materials in suit would allow SAP to potentially supplant Oracle as the support provider and receive the benefit of the agreements that Oracle believed it was acquiring in the transaction. Because the terms of the contemplated hypothetical license presume that SAP would only be using the

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561 Duff & Phelps' valuation of Existing and In-Process Technology and Patents/Core Technology is not relevant to the determination of the fair market value of the copyrighted materials in suit in this matter because it measures the capability of the technology to generate new license revenues for that technology. In these circumstances, SAP would not be selling licenses for the copyrighted software applications, this measure of value is unrelated to the alleged improper actions of SAP and TomorrowNow. For purposes of this valuation, I have excluded any value associated with those alleged actions.

562 Discussions with Kevin Mandia; February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1-3; Discussions with Paul Pinto; November 16, 2009 Expert Report of Paul C. Pinto, pgs. 2, 42-43.

563 "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 770-772; 798.

564 "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 798.

Siebel copyrighted materials in suit until October 2008, and only a portion of Siebel's customers would be impacted, a downward adjustment to the $808 million intangible asset value would be warranted.

271. Duff & Phelps separately valued the cost to replace the approximate 1,800 new customer relationships Oracle obtained from the Siebel acquisition.[565] Duff & Phelps valued those relationships at approximately $108 million.[566] This valuation assumes that Oracle avoided the cost of a 6 month sales cycle in order to place a customer in a Siebel license contract with residual ongoing support contract revenues. Although SAP's use of the copyrighted materials still required it to approach and attempt to establish customer support relationships (e.g., they would not be handed a software support contract without some sales efforts), SAP avoided the time and effort required to get the customer to license Siebel software. Instead, SAP was able to spend a much shorter amount of time to convince the customer to switch support providers. In addition, there is little overlap between SAP and Siebel customers. Only 300 customers are estimated by SAP to overlap. Therefore, SAP would be gaining access to twice the number of new customers (3,700 customers) than the number of new customers to Oracle (1,800 customers) that were used to determine the $108 million customer relationship value. As a result, a large portion of the $108 million value of the Siebel customer relationships would be relevant to the value of the copyrighted materials in suit.

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[565] Since 55% percent of Siebel customers overlapped with Oracle customers, 45% represent new customer relationships (4,000 x 45% = 1,800); "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 772-773.

[566] "Oracle Corporation: Estimation of the Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc. as of January 31, 2006," dated July 20, 2006, ORCL00312747 – 819 at 800.

272. The $2.5 billion attributed to Siebel goodwill includes value relevant to the Siebel copyrighted materials in suit, including support revenues from customers that purchased Siebel products after Oracle's acquisition date, as well as revenues from purchases of other Oracle software by Siebel customers.[567] Some of the benefit to SAP of supplanting Oracle in providing support for Siebel customers is included in the $2.5 billion of goodwill.

273. SAP's "value of use" would include a portion of the total $3.4 billion of relevant intangible assets. The $3.4 billion is the sum of the fair market value of all Siebel maintenance agreements and related customer relationships at the time of acquisition ($808 million), the avoided cost of developing certain new customer relationships ($108 million) and all of Oracle's recorded goodwill from the acquisition ($2.5 billion). Since access to the copyrighted materials are important to generating revenues and enhancing customer relationships, a portion of the $3.4 billion would be relevant to the fair market value of the copyrighted property in suit.

b. Summary: Fair Market Value Using The Market Approach

274. SAP was projecting obtaining 200 Siebel support customers, or approximately 5%, of Siebel's 4,000 customers.[568] After considering the transactions described above, and providing particular focus on the Siebel acquisition, in my opinion, the market approach indicates a fair market value of SAP's use of Oracle's Siebel copyrighted materials in suit of no less than

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[567] Oracle Corporation Form 10-K for the fiscal year ended May 31, 2006, pg. 93.

[568] "Apollo Competitive Program Office Program Playbook," SAP-OR00790353-387 (Hurst Exhibit 1597), at 355; Email from Christian Klein to Thomas Ziemen and Bernd Welz (Vice President System Service Solution Management), dated October 25, 2005 with attached Business Case files, SAP-OR00250204-225, (Hurst Exhibit 1601), at 223 and 225.

$170 million, computed as 5% of the $3.4 billion in intangible asset value related to support revenues, customer relationships and goodwill.[569] Additionally, using the $1.525 million average cost per customer resulting from the Siebel acquisition described above, extended to the 200 potentially lost customers, indicates a value of $305 million.

2. Income Approach

275. In determining SAP's "value of use" of the Siebel copyrighted material in suit, I have employed the income approach by determining the incremental net cash flows Oracle would expect to lose to SAP as a result of licensing the copyrighted materials. I have also considered analyses performed contemporaneously by SAP or TomorrowNow indicating the revenues they expected to receive and/or the amount of Oracle's business they expected to displace.

a. Income Approach Applied To Oracle's Expected Losses

276. Duff & Phelps' overall valuation of Oracle's Siebel acquisition was measured as the discounted cash flow from revenues and profits from sales of Siebel software licenses to existing Siebel customers (up-sell), sales of licenses to new Siebel customers after the acquisition, and revenue from new and existing support contracts. In modeling the value of the customers Oracle would expect to lose if it licensed the Siebel copyrighted materials in suit to SAP, I have used various assumptions from the Duff & Phelps' valuation, including the size of the Siebel customer base acquired, expected annual attrition rates, average annual maintenance fees, cost information, and discount rates. I have also considered the terminal value of Oracle losing a

[569] $3.4 billion intangible asset value times 5% (200/4,000 customers = 5%). $3.4 *5% = $170 million.

Siebel customer as a result of licensing the Siebel copyrighted materials in suit to SAP.

277. I understand that Siebel had more source code protections than Oracle or PeopleSoft applications, such that a defect in the product that involves a fix to the code could only be fixed in the code by a Siebel engineer, or Siebel development, given that they had the only complete access to the source code.[570] As a result, Oracle would have considered these technical limitations on the scope of third party support offerings when determining the fair market value.

278. I have calculated the fair market value of the Siebel copyrighted material in suit under the assumption that Oracle would lose 200 Siebel support customers as a result of licensing the copyrighted materials in suit to SAP. My analysis indicates a fair market value of $231.9 million.[571] I varied the assumptions of a discounted cash flow model to reflect varied expectations of the revenue and profits that Oracle would lose assuming 200 of its Siebel support customers switch to SAP and TomorrowNow between September 2006 and October 2008, with terminal loss of up-sell and cross-sell license and related support revenue through December 31, 2015. Customer loss estimates are based on SAP's projections for TomorrowNow support wins for Siebel support services and Siebel customer license migration goals to SAP.[572] Based on estimates of Oracle's incremental costs, including cost of goods and sales

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570 Deposition of Edward Abbo (Oracle Senior Vice President, Applications), June 29, 2009, pgs. 146-147 and 179-180.

571 *See* SCHEDULE 14.U.

572 "Apollo Competitive Program Office Program Playbook," SAP-OR00790353-387 (Hurst Exhibit 1597), at 354-355; Email from Christian Klein to Thomas Ziemen and Bernd Welz (Vice President System Service Solution Management), dated October 25, 2005 with attached Business Case files, SAP-OR00250204-225, (Hurst Exhibit 1601), at 223 and 225.

expenses, I have deducted 15% for cost of support revenues, 20% for cost of incremental license sales to existing customers, and 50% for cost of new license revenues.[573] I have determined a terminal value representing lost support customers to SAP after October 2008, lost incremental license revenue and associated support.

b. Income Approach Applied To SAP's Expected Gains

279. SAP estimated the benefit that would be realized from access and use of the Siebel copyrighted materials in suit. In October 2005, Siebel-related projections by SAP indicated that they believed they would achieve limited success in converting Siebel support customers. SAP believed that approximately 300 of the 4,000 total Siebel customers also had SAP software.[574] While SAP's focus was to convert all of these 300 customers, the TomorrowNow Business Case for 2006 projects only 40, 100 and 200 customers of TomorrowNow for Siebel support between 2006 and 2008.[575] Analyzing the expected TomorrowNow support revenues, SAP up-sell and cross-sell revenue, and determining the terminal value of the ongoing support revenue from customers converted to SAP results in a fair market value of the Siebel

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[573] SCHEDULES **14.1.U**, **14.2.U**. Oracle Corporation Estimation of Fair Value of Certain Assets and Liabilities of Siebel Systems, Inc., as of January 31, 2006, ORCL00312747-819 at 799 and 813; Oracle Form 10-K data for 2004-2008 shows a gross margin on "New Software Licenses" ranging from 43% to 51% (*See* SCHEDULE **1.1**).

[574] "The opportunity is to move the 300+ SAP customers that SAP and Siebel have in common and migrate them to mySAP CRM" The launch date for the Siebel Safe Passage Program is October 17, 2005. Program Objectives – "Convert 5 joint SAP/Siebel customers by the end of Q2 and 20 by the end of Q4."Siebel Safe Passage Program Playbook, SAP-OR00790353-387 at 354-355, (Hurst Exhibit 1597).

[575] Business Case: TomorrowNow 2006 "Biz Planning – TNow Offering for Siebel" shows Customer (Calculated) forecast: 40 in 2006, 100 in 2007, and 200 in 2008. SAP-OR00250204-225 at 225, (Hurst Exhibit 1601); Siebel Safe Passage Program Playbook, SAP-OR00790353-387 at 354 (Hurst Exhibit 1597).

306. While Oracle has not licensed the Siebel copyrighted materials in suit to third parties in comparable or instructive situations, Oracle did acquire the copyrighted materials in an arm's length transaction. The value to Oracle of the copyrighted materials and the use of those materials to provide service to its customers is evident in the amounts that it paid to acquire and develop that intellectual property.[598] As discussed above in the market approach, Oracle invested significant capital, over $6.1 billion, to acquire Siebel, including the Siebel copyrighted materials in suit. Oracle valued the intangible assets at approximately $3.4 billion, including the value of goodwill, technology, maintenance contracts and customer relationships (see section III.C. of this Report).

307. Additionally, as addressed above in the cost approach, since its acquisition of Siebel, Oracle has continued to invest in its intellectual property, spending $260 million from March 2006 through August 2008, in additional research and development to provide applications development, updates, patches, fixes and other support materials.

ii. Oracle Licensing Policies/Protection of Copyrighted Materials In Suit

308. As explained in section VI.C above, Oracle and the predecessor company at issue (Siebel) did not, and does not, license the copyrighted materials in suit to third parties; it licenses them only to its customers for their own use.[599] Customers purchase licenses that grant them limited rights to use specific

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[598] Oracle's acquisition cost per Siebel customer of $1.5 million provides a fair market value license fee metric for the copyrighted materials, as those copyrighted materials enable and protect customer support revenues. The acquisition metric resulted from an arm's-length negotiation.

[599] *See*, e.g., License Agreement between Siebel Systems and Genting Information Knowledge Enterprise, TN-OR03568025-035 (Allison Exhibit 839) at 025.

333. SAP planned to sell its Siebel software support customers additional SAP software.[636] Mr. Oswald, also confirms that a reason for offering Siebel service was that TomorrowNow's software support offering can be used as an enabler for future SAP license revenue.[637]

334. The annuity resulting from obtaining Siebel support revenue streams, the long-term retention value of the Siebel acquired customers, and the benefits of up-sell and cross-sell opportunities over time, all put upward pressure on the amount of the license fee.

335. I understand that documents indicate, and Kevin Mandia has confirmed, that TomorrowNow's Siebel business model was reliant on access, copying and further use of Oracle's Siebel-related copyrighted materials in suit.

336. TomorrowNow activities impacted the fair market value of the acquisition of Siebel in the same way as PeopleSoft. Oracle Senior Executives have testified that it is difficult to measure how many customers were actually impacted.[638]

337. Oracle's acquisition price for Siebel was $6.1 billion.[639] Of that, $1.6 billion was related to intangible assets that included Siebel software support agreements and related relationships and developed technology, and another $2.5 billion was allocated goodwill.[640] If Oracle provided SAP a license to use Siebel copyrighted materials in suit and put Oracle's Siebel support customer

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[636] Business Case: TomorrowNow – Siebel, TN-OR00995250-259 (Zieman Exhibit 472), at 254.

[637] Deposition of Gerhard Oswald (SAP Executive Board Member), Vol. 2, December 11, 2008, pgs. 288-90.

[638] Deposition of Safra Catz (Oracle Co-President), March 27, 2009, pgs. 14-16.

[639] Oracle Annual Report for the fiscal year ended May 31, 2006, pg. 75.

[640] Oracle Annual Report for the fiscal year ended May 31, 2006, pgs. 75-77.

base 'at-risk', the fair market value of the intangible assets would be less than what Oracle paid for in the acquisition.

iii. Profitability Credited to the Copyrighted Materials in Suit As Opposed to Elements Contributed by SAP/TomorrowNow

338. I understand that neither SAP nor TomorrowNow made significant improvements to the copyrighted materials in suit related to Siebel, relying instead on Oracle's copyrighted software and support materials.[641]

3. Hypothetical Negotiation Approach for Siebel Copyrighted Materials – Summary (*Georgia-Pacific* Factor 15)

339. My conclusions and opinion as to the outcome of a hypothetical negotiation between Oracle – as a willing seller – and SAP – as a willing buyer – is based on consideration of the financial, economic and other relevant factors discussed above and summarized in the following section.

340. Oracle would realize in the hypothetical negotiation that "but for" the license to SAP, it would be able to realize the full value of its investment in which Oracle's history has indicated would include returns beyond the entire acquisition price. Licensing SAP will severely impact the transition of Siebel customers to Oracle. The acquired cost per customer valuation metrics allow Oracle to apply fair market value data to its determination of what it is really giving up with the licensing of SAP.[642]

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[641] Oracle USA, Inc., et al v. SAP AG, et al, Fourth Amended Complaint in Case No. 07-CV-01658 dated August 18, 2009, pgs. 5-9. Discussions with Kevin Mandia (Mandiant); February 12, 2010 Supplemental Expert Report of Kevin Mandia, pgs. 1-3.

[642] These customer metrics are relevant to the license fees that would result in consideration of "*Georgia-Pacific* factor 1: fees charged for the use of the intellectual property in suit."

E. Value of Use Under the Hypothetical Negotiation – Summary

341. I believe that the hypothetical negotiators would have considered the financial, economic and other inputs that I have identified and analyzed, and then determined the paid-up license fee by engaging in a "back and forth" negotiation.[643] Below, I summarize the hypothetical negotiation and refer to the various financial metrics in the market, income and cost approach section which would be relevant to the hypothetical negotiation for a license to Siebel copyrighted materials in suit.

1. Summary of Factors Considered by Oracle and SAP

342. As discussed above, in determining the license fee that it would be willing to accept from SAP for SAP's use of the Siebel copyrighted materials in suit, Oracle would consider at least the following factors:

- The broad scope of the license, which would enable SAP to compete against Oracle in providing support services to its Siebel customers, and provide SAP with enhanced ability to convert those customers to SAP applications;
- Technological limitations on TomorrowNow's ability to fix source code-level product errors due to Siebel's historic policy to not distribute uncompiled source code outside of Oracle;
- Expected lost support revenue to SAP on customers that would go to TomorrowNow for Siebel support services, as well as lost up-sell and cross-sell revenues from those customers;

[643] I understand that the hypothetical negotiation would be conducted by a willing licensor (Oracle) and a willing licensee (SAP) acting in a rational manner in and around September 2006.

- Assuming there had already been a PeopleSoft/J.D. Edwards license in January 2005, Oracle would consider in September 2006 TomorrowNow's history of success at winning Oracle support customers in the period since SAP acquired TomorrowNow and SAP's success in leveraging TomorrowNow to win SAP applications customers, as well as the impact to date on support renewals, discounts and other impacts;
- The anticipated permanent impact on Oracle due to the lost future license revenue and ongoing support renewals for customers that would switch from Siebel applications to SAP applications;
- 10 months prior to the contemplated hypothetical negotiation, Oracle paid approximately $6.1 billion to acquire Siebel, including rights to the Siebel customer support contracts, related relationships and goodwill;
- Oracle's investment of over $250 million in further research and development for its Siebel products since the acquisition as well as Oracle's understanding that about 60% of their research and development investment goes to software and support materials and that by licensing, SAP avoids these costs;
- The nature of the relationship between Oracle and SAP, as direct competitors in the software applications business, particularly in light of Oracle's ability with the Siebel

acquisition to capture significantly more CRM market share than SAP;

- The Siebel acquisition had given Oracle acknowledged traction and market share against SAP which it would not want to endanger without significant upside;
- Anticipated changes to Oracle's business practices in order to compete with SAP to provide support services to Oracle customers; and,
- Anticipated negative impacts to the level of profitability and customer renewal rates of the Oracle support products that embody the copyrighted materials at issue, and the resulting impact on Oracle's ability to use that support revenue stream to fund ongoing research and development.

343. Similarly, in determining the amount of a license fee that SAP would be willing to pay to Oracle for its use of the Siebel copyrighted materials in suit, SAP would consider at least the following factors:

- The license would allow SAP to use its TomorrowNow service offering to drive the conversion of Oracle's Siebel applications customers to SAP's platform;
- Technological limitations on TomorrowNow's ability to fix source code-level product errors due to policy to not distribute uncompiled source code outside of Oracle;
- SAP's willingness to pay significant amounts to acquire intellectual property and customer relationships, as evidenced in particular by its 2007 acquisition of Business Objects for $7.1 billion;

and ultimately converting a portion of those customers to SAP.

344. In establishing their respective negotiating positions, Oracle and SAP would have considered the financial implications of entering into a license. Oracle would consider discounted cash flow scenarios with potential losses of up to $231.9 million; SAP would consider scenarios reflecting benefits between $97 million and $247 million (*See* Table 12). Oracle and SAP would have also considered the financial metrics (multipliers) developed by TomorrowNow and SAP reflecting the impact on Oracle of SAP/TomorrowNow converting license and/or maintenance revenue that would have been earned by Oracle. For example, one such TomorrowNow metric estimated the financial impact to Oracle at $18 - $20 lost for every $1 TomorrowNow gained.[644] As addressed in the income approach, at $7 million or $14 million in annual support revenues, there is a $110 million to $220 million impact on Oracle's revenues, assuming 10 years of support is lost to Oracle. (*See* **Schedule 22.U**) The parties would also consider the actual sales of TomorrowNow to Siebel customers along with TomorrowNow's strategic planning and selling activities.

345. The parties would have also considered the acquisition price paid by Oracle for Siebel and the intangible asset valuations. Significant value was assigned to the ongoing maintenance revenue anticipated from the acquired Siebel customers in addition to goodwill. The copyrighted materials accessed

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[644] April 25, 2006 email from Andrew Nelson to Lon Fiala, which indicates $1 of TomorrowNow revenue is equivalent to $20 of Oracle support revenues taken from a "10-year maintenance based justification for the PeopleSoft/JDE takeover" [TN-OR00591548 (Nelson Exhibit 1019)]. A March 26, 2006 email from Andrew Nelson to Lon Fiala, et al, (with cc to Leo Apotheker) indicates that "$1 of TN Stand-alone revenue this year represents $18 of originally expected Oracle revenue" [TN-OR00609470-71 (Nelson Exhibit 1018)]. Mr. Apotheker did not disagree or contradict Mr. Nelson's analysis [Deposition of Andrew Nelson (Co-Founder of TomorrowNow), February 26, 2009, pgs. 163-166].

by SAP are required resources to meet Oracle/Siebel-related customer support contract commitments, or comparable materials must be independently developed. The valuation of this revenue stream and customer relationships of $808 million would be considered. The parties would contemplate increasing the $808 million value of support agreements and customer relationships by a factor to reflect the related goodwill premium paid overall by Oracle to acquire Siebel. SAP targeted 200 customers of Siebel's, or 5% of the acquired Siebel support customers. $170 million represents 5% of Siebel intangible assets of $3.4 billion. Oracle Senior Executives have indicated that the transaction goodwill premium reflects Oracle's ability to gain additional monetary value over time from acquired customers through cross-sell and up-sell opportunities, as well as other financial benefits.

2. Oracle Would Expect A Significant License Fee

346. In licensing its largest direct competitor to access just acquired Siebel customer accounts with their intended goal to "take Oracle out of incumbent vendor position," it is my opinion that Oracle Senior Executives would expect a royalty in the form of a license fee. An amount consistent with Oracle's expectations of the amount of lost customers due to licensing would be considered, along with the potential permanent impact that granting such a license would have on Oracle's future support business revenues and future product sales.[645] I understand that Larry Ellison and Safra Catz would be involved in these negotiations.[646]

[645] SAP WebEx Presentation "AE Hot Topics Briefing: Using TomorrowNow to help you replace Oracle," dated March 1, 2007, pg. 2, TN-OR00412503 (native file); Discussion with Oracle senior executives: Larry Ellison, Safra Catz and Charles Phillips.

[646] Declaration of Safra Catz in Support of Plaintiff's Opposition to Defendants' Motion For Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim, September 22, 2009, p. 1.

F. Opinion: Value of Use for Siebel Copyrighted Materials Based on Hypothetical Negotiation Approach to Establish Intellectual Property Value – Oracle and SAP Would Have Agreed Upon a License Fee of No Less Than $ 100 million

350. Based on my analysis of the fifteen *Georgia-Pacific* factors and relevant economic, financial and valuation issues and considerations, in September 2006, in my opinion the parties, as willing participants in a hypothetical negotiation for the above described license, would have agreed on a license fee of no less than $100 million.

IX. Quantification of SAP's Value of Use of Oracle's Copyrighted Property – Lost Profits

A. Overview

351. Oracle's[655] lost profits resulting from SAP's alleged infringement and use of Oracle's intellectual property include lost profits on lost support revenue related to Oracle's PeopleSoft, J.D. Edwards and Siebel products that would have been sold to customers that left to go to TomorrowNow.[656]

352. I understand that a quantification of actual damages as represented by Oracle's losses resulting from SAP's wrongful acts (i.e., Oracle's lost profits) is a remedy of damages available for certain of Oracle's causes of action in this

[655] In this section of the Report, "Oracle" refers to both the Plaintiff entities collectively, and their predecessors in interest.

[656] Pursuant to the September 17, 2009 Order of Magistrate Judge Laporte granting Defendants' Motion for Preclusion of Certain Damages Evidence, I understand that Oracle is precluded from seeking damages to which it believes it is entitled, including lost profits on lost up-sell or cross-sell opportunities related to the customers that cancelled their Oracle support contracts to go to TomorrowNow; lost profits related to discounts that Oracle provided to customers in order to compete with TomorrowNow; and lost profits associated with Oracle's adoption of its Lifetime Support and Applications Unlimited programs. Accordingly, I have not quantified those damages in this report. I understand that should Defendants take the position at trial that Oracle's claimed damages are excessive, the jury may be informed that Oracle is not seeking all of the damages to which it believes it is entitled [Magistrate Laporte's Order Granting Defendants' Motion for Preclusion of Certain Damages Evidence Pursuant to Federal Rules of Civil Procedure 37(c)(1) and 16(f), September 17, 2009; Judge Hamilton's November 2, 2009 Order].