Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
Elaine Wallace (SBN 197882)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
ramittelstaedt@jonesday.com
jmcdonell@jonesday.com
ewallace@jonesday.com

Tharan Gregory Lanier (SBN 138784)
Jane L. Froyd (SBN 220776)
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 739-3939
Facsimile: (650) 739-3900
tglanier@jonesday.com
jfroyd@jonesday.com

Scott W. Cowan (Admitted *Pro Hac Vice*)
Joshua L. Fuchs (Admitted *Pro Hac Vice*)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600
swcowan@jonesday.com
jlfuchs@jonesday.com

Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., et al., Plaintiffs, v. SAP AG, et al., Defendants.	Case No. 07-CV-1658 PJH (EDL) **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE EXPERT TESTIMONY OF PAUL K. MEYER** Date: September 30, 2010 Time: 2:30 p.m. Courtroom: 3, 3rd Floor Judge: Hon. Phyllis J. Hamilton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULES

I. INTRODUCTION

Meyer's value of use and infringer's profits opinions do not meet the admissibility requirements of Rule 702. Plaintiffs fail to cite a single case that supports Meyer's use of the PeopleSoft and Siebel acquisitions as a benchmark for his market approach. His "cost per acquired customer" metric is so obviously flawed that Plaintiffs try to recast it as a "secondary reasonableness check" rather than admit to its central role in his analysis. His goodwill analysis is based on false assumptions that are contradicted by the S&P Report on which he relies. These and other critical errors mandate exclusion.

Meyer's income approach is not a measure of actual loss in fair market value at all, but speculation about losses we know for certain did not occur. It overcompensates Plaintiffs to the tune of billions of dollars. Plaintiffs fail to cite any authority that supports use of the approach in this way. And Meyer's *Georgia-Pacific* analysis is superficial and results-oriented, based on his flawed market and income approaches, and contaminated by the same errors. It should be excluded for the same reasons.

For value of use of the database software, Plaintiffs effectively concede that Meyer's "analysis" is just a recitation of the desired price stated by an Oracle employee. Meyer accepts that price wholesale and makes no effort to determine whether a reasonable licensor would have agreed to it. His complete reliance on the subjective opinion of an Oracle employee, and his failure to do any independent, objective analysis, is not a reliable methodology under Rule 702. In fact, it is not a methodology at all.

Finally, Meyer's infringer's profits analysis is too rudimentary to pass muster under Rule 702. If a customer is labeled as a Safe Passage participant, Meyer attributes the customer's SAP purchases to infringement without determining whether TN played any role in the customer's purchase decision. His method fails to establish any causal link to the infringement.

II. MEYER'S MARKET APPROACH SHOULD BE EXCLUDED

A. <u>Meyer Improperly Relied on the PeopleSoft and Siebel Acquisitions.</u>

Plaintiffs fail to cite a single case or other authority to support Meyer's reliance on the

PeopleSoft and Siebel acquisitions.[1] Plaintiffs claim there are no relevant licenses, but Clarke's 20-page analysis proves them wrong.[2] Opp.[3] at 3; Wallace Decl.[4] ¶ 6, Ex. 5 (Clarke Report) at 94-115. Moreover, Meyer's testimony that he would disregard even comparable licenses shows that he relied on acquisitions not for lack of relevant license agreements, but to further his goal of inflating the license fee. Plaintiffs' objection that Meyer was asked a hypothetical question is immaterial. Opp. at 5. His claim that an acquisition provides a "more compelling" metric than a directly comparable license proves his misapplication of the market approach. *Id*. The fact that the approach is an established methodology does not guarantee admissibility. *Id.* at 4. It must be applied "reliably to the facts of the case," which Meyer has not done. Fed. R. Evid. 702.

The rights and vast majority of the assets transferred in the PeopleSoft and Siebel acquisitions bear no relationship to the license Meyer purports to value. Mot.[5] at 3-5. This is not an issue of weight. Meyer's reliance on transactions that are not "commensurate with what the defendant has appropriated" is a fundamental error that mandates exclusion. *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 871-72 (Fed. Cir. 2010); *see also Boeing Co. v. United States*, 86 Fed. Cl. 303, 313-15 (2009) (excluding Meyer on the ground that he disregarded relevant agreements in favor of less comparable agreements with more favorable royalty rates).[6]

[1] *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 606 F. Supp. 2d 571, 585-86 (M.D.N.C. 2009) addressed the acquisition of a single trademark and its associated goodwill in determining a reasonable royalty for use of the same trademark. It addresses none of the issues with using the cost to acquire an entire corporation to value a license to some of the acquired intellectual property. Smith & Parr merely notes that when trademark rights are transferred, they are accompanied by their associated goodwill. Opp. at 5.

[2] The fact that the licenses do not provide an established royalty does not make them irrelevant. Opp. at 5 n.4. As Clarke states in the testimony Plaintiffs cite: "[t]hey are a data point that shouldn't be ignored" and "[i]f these companies are allowed by license with Oracle to provide support services for modest fees, and presumably doing everything legally, it would only be the delta that we referred to at length yesterday that would be at issue for the license in the TomorrowNow case." *Id.*

[3] All references to "Opp." are to ECF No. 846, Plaintiffs' Opposition to Defendants' Motion to Exclude Expert Testimony of Paul K. Meyer.

[4] All references to "Wallace Decl." are to ECF No. 800, Declaration of Elaine Wallace in Support of Motion to Exclude Expert Testimony of Paul K. Meyer.

[5] All references to "Mot." are to ECF No. 798, Defendants' Notice of and Motion to Exclude Expert Testimony of Paul K. Meyer.

[6] *Sunstar, Inc. v. Alberto-Culver, Inc.*, No. 01-C-0736, 01-C-5825, 2004 WL 1899927, at *30-31 (N.D. Ill. Aug. 23, 2004) is inapposite. It addresses the probative value of admittedly relevant agreements made under threat of litigation. It does not address the use of an entirely

B. Meyer's "Cost Per Acquired Customer" Metric Is Flawed.

Plaintiffs downplay Meyer's use of the cost per acquired customer metric, characterizing it as a "secondary reasonableness check." Opp. at 6. In fact, the metric is neither reasonable nor secondary to Meyer's analysis. Plaintiffs downplay it because it is deeply flawed.

1. The metric is central to Meyer's analysis.

Plaintiffs contend that Meyer "analyzed Oracle's contemporaneous acquisition of the Subject IP and found indications of values at $1.78 B and $2.67 B" and "then" conducted a cost per customer analysis as a "reasonableness check." Opp. at 6. His report belies this claim. Meyer's first step was to measure "the value that Oracle paid on a per customer basis." Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) at ¶¶ 114-15.[7] His analysis of intangible assets comes later, and does not even include the Subject IP. *Id.* at ¶ 122; Mot. at 15 n.15. At no point does Meyer refer to the cost per customer metric as "secondary" or as a "reasonableness check." On the contrary, Meyer characterizes it as "directly comparable" to the license he purports to value:

> 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 material.

Id. at ¶122 n.305. Meyer also uses the cost per customer metric as the primary basis for his *Georgia-Pacific* analysis, analogizing it to an established royalty:

> The PeopleSoft cost per acquired customer of $1.0 million has a nature and components relevant to an established license fee under *Georgia-Pacific* factor 1, where consideration and analysis involves royalties paid for the subject intellectual property.

(continued…)

different type of transaction (a corporate acquisition) as a basis for valuing a license.

[7] This is consistent with Meyer's flawed starting point that "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." *Id.* at ¶ 114. This does not value a license to use the Subject IP, but a share of the PeopleSoft customer base. Meyer charges Defendants the same price for the right to compete for customers that Oracle paid to actually acquire them, plus all the other acquired assets. Mot. at 5. Plaintiffs' argument that Meyer only charges Defendants for the acquisition of 3000 customers although they would have the right to compete for 9920 of them misses the point. Opp. at 6. Under the license, Defendants would "acquire" zero customers.

Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) at ¶ 238 n.494; *see also id.* at ¶ 230 ("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."). Plaintiffs' only support for the notion that Meyer uses the metric as a "secondary reasonableness check" is his deposition testimony, which conflicts with his report. Opp. at 6-7. By the time of his deposition, however, Meyer was aware of Clarke's criticisms of the metric and was attempting to backpedal.

2. <u>The metric is unreasonable</u>.

Plaintiffs downplay the central role of the cost per customer metric in Meyer's analysis because it is deeply flawed. It charges Defendants for assets that admittedly should not be part of the license and it produces an inflated value as a result. Mot. at 3-4. Plaintiffs fail to explain how this unreasonably inflated value can act as a "reasonableness check." In reality, it is prejudicial because it will mislead the jury into believing that $2 billion is "conservative." Opp. at 7 n.6 ("Similarly, the $3 B reasonableness check fully supports the lower $2 B valuation.").

Plaintiffs contend that Meyer does not rely on the full acquisition price or the cost per customer for his valuation. Opp. at 3, 6. In fact, these are the source of his $2 billion number:

> Although SAP targeted 3,000 PeopleSoft customers to convert to support contracts, using 2000 potential customer relationships (enabled by the alleged copyright infringement) at $1 million per customer indicates a $2 billion valuation of the copyrighted materials.

Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) at ¶122, 6th bullet. Plaintiffs confirm this in their response to the argument that Meyer erroneously equates the right to compete for customers with acquisition of customers: "Meyer did consider the difference between an acquisition and a right to compete by using more conservative projections for customers converted and by using a $2 B valuation instead of the $2.67 B indicated [by his intangible assets analysis]." Opp. at 7 n.6.

C. <u>Meyer's Goodwill Analysis Is Flawed.</u>

Plaintiffs fail to cite a single case to support their claim that recorded goodwill is an appropriate metric. *Buzz Off* is inapposite because it addresses the transfer of a single trademark and the goodwill associated with that specific trademark. 606 F. Supp. 2d at 585-86. It did not involve a corporate acquisition and addresses none of the issues that flow from using recorded goodwill from the acquisition of an entire corporation to value a limited license to use just some of the acquired intellectual property.

Plaintiffs fail to distinguish *Transclean Corp. v Bridgewood Servs., Inc.*, No. 97-2298, 2001 U.S. Dist. LEXIS 24383, at *35-36 (D. Minn. Jan. 8, 2001). The fact that it involved the defendant's goodwill is irrelevant to the court's conclusion that it "would be a resort to pure speculation and conjecture" for the jury to divine the percentage of goodwill attributable to infringement. *Id.* The same applies here, and Meyer's "say so" does not make his conclusion any less speculative. Opp. at 11 n.10 (relying on the claim that "Meyer is an expert in analyzing goodwill . . . ."); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (court may exclude opinion connected to the data only by *ipse dixit* of the expert).

Meyer cannot support his assumption that 100% of the goodwill is attributable to the Subject IP. Goodwill can be associated with any number of factors, and Meyer presents no basis for his unreasonable conclusion that none of it is associated with, for example, the acquired patents and trademarks. Mot. at 9-10; *see also* Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) at ¶¶ 116 (Table 6), 268 (Table 11) (assets acquired in PeopleSoft and Siebel transactions included patents and trademarks). Plaintiffs contend that Meyer did not assume 100% of the goodwill but "appropriately assigned" a percentage to Defendants based on "expected" numbers of converted customers. Opp. at 10-11. Plaintiffs miss the point. Meyer *first* assumed that 100% of goodwill was attributable to the Subject IP, *then* assigned a pro rata share of the total to Defendants. It is this first assumption that Meyer cannot support and Plaintiffs fail to address.

Finally, Meyer bases his goodwill analysis on a miscalculation. Mot. at 10. Meyer assumes that S&P's goodwill number included only existing customers at the time of the acquisition, and not new customers obtained after the acquisition. Based on this incorrect assumption, he applies a percentage based on existing customers to S&P's goodwill number. *Id.* Plaintiffs do not dispute that the S&P Report contradicts Meyer's assumption. Opp. at 11. Instead, they argue, it would have been inconsistent with "Oracle's stated objectives" for Meyer to assume that the goodwill number included new customers. *Id.* Regardless of "Oracle's stated objectives," however, it was error for Meyer to apply a percentage based only on existing customers to S&P's goodwill number, which expressly included both existing and new customers. Plaintiffs criticize Defendants for purportedly contending that Meyer "somehow should have used some unknown lower percentage to account for potential customers." *Id.* In other words, Plaintiffs criticize Defendants for insisting that Meyer do his math correctly.[8] Moreover, the fact that it is impossible to determine the portion of goodwill attributable to existing versus new customers proves Defendants' point that goodwill is an inappropriate metric in the first place.

D. Meyer Improperly Ignored the Actual Use Requirement.

Plaintiffs fail to rebut Meyer's admission that his $2 billion license fee would remain the same whether all of the Subject IP was infringed, only half, or (presumably) even less than half. Mot. at 8. Plaintiffs also fail to address the fact that Meyer did no apportionment of the PeopleSoft and Siebel acquisition prices to account for intellectual property admittedly not at issue in the case, such as patents, trademarks, and copyrighted works not supported by TN. *Id.* Plaintiffs also erroneously contend that the actual number of customers is irrelevant. Opp. at 9. Plaintiffs simply charge Defendants a pro rata share of the PeopleSoft and Siebel acquisition price based on "expected" lost customers without regard to the portion of the acquisition price attributable to the Subject IP, the portion of the Subject IP actually infringed, or the number of customers actually lost. Totally absent from this formulation is any concept of "actual use." *Wall Data Inc. v. L. A. Cnty. Sheriff's Dep't.*, 447 F.3d 769, 786 (9th Cir. 2006) (license fee must reflect actual use made of copyrighted work).

The liability stipulation does not moot this issue. Opp. at 9. First, because Meyer did not apportion the acquisition prices to account for intellectual property not at issue in the case, his valuation does not reflect actual use even assuming all of the Subject IP was infringed. Second, in relying on speculative assumptions regarding "expected" lost customers and ignoring the actual number of lost customers, Meyer impermissibly turns a blind eye to the scope of actual

[8] It is not just Meyer who has the math wrong. Plaintiffs do as as well. Even if goodwill were an appropriate metric (which it is not) or the portion attributable to new customers versus existing customers could be determined (which it cannot), the correct method would not be to apply a "lower percentage to account for potential customers." Opp. at 11. The correct method would be to determine the portion of goodwill attributable to existing customers and apply Meyer's percentage to that portion only.

use. This is true even assuming all of the Subject IP was infringed. Third, the disconnect between Meyer's $2 billion license fee and actual use proves the arbitrary and speculative nature of his methodology. *See, e.g.*, *Nilssen v. Motorola, Inc.*, No. 93 C 6333, 1998 U.S. Dist. LEXIS 12882, at *40-41 (N.D. Ill. Aug. 14, 1998) (fact that license fee did not change after expert identified specific trade secrets valued cast doubt on methodology).

E. Meyer Disregards All Evidence That Contradicts Oracle's Executives.

Meyer relies on "expected" lost customer numbers that are ten times the actual number of lost customers and disregards the evidence that Oracle's executives did not perceive TN or the Safe Passage program as a significant threat. Mot. at 5-7. Plaintiffs contend this goes to weight, not admissibility. Opp. at 8. However, factual disputes go to weight only if the expert opinion meets Rule 702's threshold requirement that it be based on "sufficient" facts. Fed. R. Evid. 702; *see also Cole v. Homier Distrib. Co., Inc.*, 599 F.3d 856, 865-66 (8th Cir. 2010) (expert's disregard of contradictory facts warranted exclusion); *Multimatic, Inc. v. Faurecia Interior Sys. USA, Inc.*, Nos. 08-1332, 08-1420, 2009 U.S. App. LEXIS 28156, at *655 (6th Cir. Dec. 22, 2009) ("Perceived flaws in an expert's opinion go to weight only if they fall within the accepted norms of the discipline and have a non-speculative basis in facts."); *United States v. Bailey*, 571 F.3d 791, 803 (8th Cir. 2009) ("Expert evidence is unreliable if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case.").[9] Meyer's opinion fails that test.[10]

Plaintiffs claim, without support, that the statements were made without knowledge of alleged infringement and thus "provide no useful information" about what Oracle would have expected in a hypothetical negotiation. Opp. at 8. Plaintiffs are wrong. The statements fall into two categories: (1) statements that customers do not purchase ERP products based on low cost support and that if Plaintiffs lost customers to SAP, it lost them for reasons other than TN; and

[9] *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391-92 (Fed. Cir. 2003), cited by Plaintiffs, states this proposition. In Plaintiffs' other case, *Sun Microsystems Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166, 1208-09 (N.D. Cal. 2009), there is no suggestion that the expert opinion did not meet the threshold Rule 702 "sufficient" facts requirement.

[10] Defendants do not "miscite" any evidence. Opp. at 8 n.8. The quotes Plaintiffs cite come from the same documents Defendants have submitted to the Court and do not contradict the portions Defendants cite. Nor do Defendants suggest that Meyer relied only on Oracle's executives. *Id.* at 7. Defendants devote an entire section of their motion to Meyer's reliance on the speculative assumptions in the SAP documents. Mot. at 11-12.

(2) statements based on empirical data that Plaintiffs' support sales were not significantly impacted by TN.[11] Knowledge of infringement is irrelevant to both. Since the Oracle executives correctly believed that customers would not purchase SAP products based on low cost support, TN's ability to provide support, whether infringing or not, would not be a significant threat. Similarly, since the Oracle executives correctly observed that TN and other third party providers had little impact on Plaintiffs' support sales, TN would not be a significant threat.

F. Meyer's Value Ranges in the Billions Are Unduly Speculative.

Neither of Plaintiffs' cases support the proposition that ranges of up to $3 billion are reliable and nonspeculative. Mot. at 7, 13, 18; Opp. at 3. *Jarvis v. K2, Inc.*, 486 F.3d 526, 534-35 (9th Cir. 2007) is inapposite. Only one of the six values came from an expert and the maximum range was a few thousand dollars. Similarly, the ranges in *Micro Chem., Inc. v. Lextron, Inc.*, 161 F. Supp. 2d 1187, 1200-01 (D. Colo. 2001) were minimal.[12] Defendants have found no case where an expert proposed a range of the magnitude Meyer proposes.

Plaintiffs attribute Meyer's ranges to differences in the numbers of "expected" customers. Opp. at 3, 8. However, it does not "assist the trier of fact" to have Meyer multiply 3000 or 2000 customers by $1 million per customer. Fed. R. Evid. 702; Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) at ¶122, 6th bullet. The jury can do that math for itself. Meyer's obligation is to explain why either of these numbers is reasonable and why his selection of 2000 was appropriate. Meyer does not do so in his report and could not do so in deposition. Mot. at 7, 18-19.

III. MEYER'S INCOME APPROACH SHOULD BE EXCLUDED.

A. There Is No Authority For Meyer's Approach.

Contrary to Plaintiffs' assertion, Defendants challenge not only Meyer's "inputs," but his methodology. Opp. at 13; Mot. at 11, 13. As discussed in Defendants' motion, and as Plaintiffs concede, the income approach is a method of estimating *unknown* future profits. *Id.* There is no authority (and Plaintiffs cite none) for use of the income approach in a copyright case to value damages for past infringement in the form of a license based on "expected" revenues when the

---

[11] Wallace Decl. ¶¶ 8-15, Exs. 7-14.

[12] $5.2 to $5.5 million for one expert and $650,000 to $870,000 for the other. *Id.*

relevant sales have already been made and actual revenues are already known.[13] Mot. at 13. *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384-85 (Fed. Cir. 2001) does not support Plaintiffs' position. It is not a copyright case, it does not involve the income approach, and as explained in Defendants' opposition to Plaintiffs' motion to exclude Clarke, Plaintiffs misconstrue it in any event. Clarke Opp.[14] at 7-8.

Plaintiffs claim (without support) that Defendants and Clarke "concede" that Meyer properly focuses on expectations at the time of the hypothetical negotiation. Opp. at 13. The opposite is true. The primary basis for Defendants' challenge to Meyer's methodology is his use of "expected" rather than actual customer numbers. Moreover, Clarke specifically states in the portion of his report cited by Plaintiffs that he does *not* agree that the income approach is appropriate to value the "limited actual use" here. Jindal Decl.[15] ¶ 9, Ex. G (Clarke Report) at 24.

Plaintiffs turn Rule 702 on its head. Opp. at 13. It is Plaintiffs who bear the burden of showing that Meyer's opinions are admissible. Fed. R. Evid. 702. The fact that no case supports Meyer's use of the income approach is an issue for Plaintiffs, not Defendants.

B. <u>Meyer's Approach Overcompensates Plaintiffs Based on Pure Conjecture.</u>

Meyer's income approach is not a measure of the actual loss in fair market value of the Subject IP, but conjecture about vast losses that we know for certain did *not* occur. Mot. at 13. It is inconsistent with the purpose of the reasonable royalty remedy, which is to ensure that a plaintiff who proves infringement but cannot prove lost profits is not left without a remedy. *See, e.g.*, *On Davis v. The Gap, Inc.*, 246 F.3d 152, 164-67 (2d Cir. 2001) (holding that reasonable royalty is a permissible remedy under the Copyright Act where plaintiff can prove no lost sales); *Mobil Oil Corp. v. Amoco Chems. Corp.*, 915 F. Supp. 1333, 1340 (D. Del. 1994) ("A reasonable

---

[13] Nothing in Smith & Parr supports Meyer's use of the income approach here either. Jindal Decl. ¶ 17, Ex. O (Smith & Parr) at 148-55, 185.

[14] All references to "Clarke Opp." are to ECF No. 851, Defendants' Opposition to Plaintiffs' Motion No. 1 to Exclude Expert Testimony of Stephen K. Clarke.

[15] All references to "Jindal Decl." are to ECF No. 847, Declaration of Nitin Jindal in Support of Plaintiffs' Opposition to Defendants' Motion to Exclude Expert Testimony of Paul K. Meyer.

royalty . . . is a measure of recovery 'intended to provide a just recovery to persons who for evidentiary or other reasons cannot prove lost profits or an established royalty.'"). Here, Plaintiffs' damages can be calculated with precision. Meyer's income approach subverts the reasonable royalty remedy by overcompensating Plaintiffs to the tune of billions of dollars.[16]

IV. MEYER'S *GEORGIA-PACIFIC* APPROACH SHOULD BE EXCLUDED

A. Meyer's Analysis Is Superficial and Results-Oriented.

Meyer's *Georgia-Pacific* analysis combines his other flawed approaches. Mot. at 3, 16. It is superficial because the only factors he gives true weight are the ones on which he relies for his flawed market and income approaches. *Id.* It is results-oriented because he uses the same flawed metrics and assumptions to reach the same pre-determined $2 billion license fee. *Id.*; *see also* Section II.B.1 above. Plaintiffs do not dispute Meyer's incorporation of his other approaches, but characterize the problem as one of "relative weight" of the *Georgia-Pacific* factors. Opp. at 17. In fact, these flawed metrics and assumptions go squarely to admissibility.

Plaintiffs also imply that the extent of Meyer's reliance on Oracle's executives can be determined by counting the number of paragraphs in which they are referenced. Opp. at 15-16. This misses the point. Meyer attributes to them his use of the PeopleSoft and Siebel acquisitions and the cost per customer metric as the starting point for his market approach analysis, as well as the highest numbers in the range of values he calculates. Mot. at 3-7; *see also* Wallace Decl. ¶ 4, Ex. 3 (5/13/10 Meyer Tr.) at 372:5-378:1. These improper metrics contaminate his *Georgia-Pacific* approach. Due regard to the opinions of the parties to the hypothetical negotiation is one thing, but wholesale acceptance of these improper metrics is quite another. *On Davis*, 246 F.3d at 166 (2d Cir. 2001) (the "question is not what the owner would have charged, but rather what is the fair market value"); *Jarvis*, 486 F.3d at 534 (objective analysis avoids what plaintiff thinks or wished he should have charged).

---

[16] Plaintiffs mischaracterize the documents and testimony on which Meyer relies. For example, Plaintiffs dispute that Ziemen testified his assumptions were based on TN. Opp. at 14. But Plaintiffs rely on a portion of Ziemen's testimony that he subsequently clarified, as evidenced by the testimony submitted by Defendants. Mot. at 12.

With regard to the $10 million TN acquisition price, Plaintiffs reiterate the implausible argument that Meyer ignores it because the acquisition did not include any intellectual property. But they fail to respond to Defendants' point that Meyer's intangible asset analysis, which they now claim is his "primary" valuation method, does not include any intellectual property either. Mot. at 15 n.15. Plaintiffs' "illegal business" theory fails to account for the massive discrepancy between Meyer's $2 billion valuation and SAP's purchase of TN for a mere $10 million.

B. <u>Plaintiffs Misstate the Book of Wisdom Doctrine.</u>

Plaintiffs erroneously imply that the Book of Wisdom applies only to undercompensation of a plaintiff. Opp. at 17 n.18. In *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1333-35 (Fed. Cir. 2009), however, the court relied on the doctrine to overturn a $350 million jury award based on evidence of minimal use of the infringing work after the date of the hypothetical negotiation. Nothing in *Lucent* implies that a court should look at post-negotiation evidence to assess the reasonableness of a royalty only under the limited circumstances Plaintiffs suggest. Opp. at 17 n.18. Plaintiffs concede that courts do not turn a blind eye to reality if the result is to undercompensate the plaintiff. There is no reason to think courts are willing to turn a blind eye to reality if the result is to vastly overcompensate a plaintiff either.

C. <u>Plaintiffs Fail To Rebut Defendants' Infringement Date Argument.</u>

Plaintiffs do nothing to rebut Defendants' argument that Meyer intentionally fails to value the pre-2005 license other than restate Meyer's implausible reasoning and mischaracterize Clarke. Clarke does not calculate a separate royalty rate for the pre-2005 period because there was no Meyer license fee for him to rebut. Jindal Decl. ¶ 9, Ex. G (Clarke Report) at 117. Nonetheless, Clarke applies his post-2005 royalty rate of 50% retroactively to the pre-2005 time period on the assumption it was the maximum it could be and still be reasonable. *Id.* This distinguishes his approach from Meyer's, which was to avoid any downward pressure on his $2 billion license fee from the pre-2005 period by simply ignoring it.

D. <u>Plaintiffs Fail To Rebut Defendants' Ipse Dixit Argument.</u>

Plaintiffs do nothing to rebut Defendants' argument that Meyer's $2 billion license fee is pure *ipse dixit* other than mischaracterize it. The problem with Meyer's opinion is not that he "calculates too many ranges of values." Opp. at 18. The problem is that his choice of $2 billion is arbitrary, as evidenced by his inability to articulate any reason for choosing it. Mot. at 18-19.

V. MEYER'S DATABASE VALUE OF USE APPROACH SHOULD BE EXCLUDED

Plaintiffs effectively concede that Meyer's "analysis" is simply a recitation of Allison's desired price of $55.6 million. Meyer admits that if Allison had suggested 50% of that price, Meyer would have accepted it, and if Allison had suggested twice that price, Meyer would have accepted that too. Mot. at. 19. Plaintiffs' opposition is silent on this point. Meyer's complete abdication to Allison shows that he has no expert opinion of his own, much less a reliable one.

Plaintiffs mischaracterize Defendants' argument as based on amount when, in fact, it is based on method. Meyer made no effort to determine whether a prudent licensor in TN's circumstances would have agreed to pay $55.6 million for a license to use the database software. Mot. at 21-26. TN had just been sold for $10 million at the time of the supposed hypothetical negotiation, and TN's total revenues for its entire existence were $41 million. *Id.* at 19. Meyer fails to offer any plausible analysis as to why a prudent licensor in those circumstances would agree to pay more than *five times the total value of the company* for some incidental software.

Plaintiffs' newly forged suggestion that it was Meyer, not Allison, who "confirmed" that the "best fit" was a separate Enterprise Edition license for each customer flatly contradicts Meyer's admission that it was Allison, not he, who invented the "structure" of this "unique" license. Opp. at 19; Mot. at 19-20. Allison made huge assumptions that worked in Plaintiffs' favor, and Meyer accepted them all. Mot. at 20-21. Plaintiffs offer no basis to conclude that Allison's pricing represents objective market evidence where it simply assumes: (1) the more-expensive Enterprise Edition pricing rather than the less expensive Standard Edition pricing;[17] (2) pricing based on the larger and more expensive servers that TN used rather than the smaller, less expensive servers that TN also used;[18] and (3) that TN would need a separate license for each

[17] Knowledge of what it would have cost TN to purchase the less expensive Standard Edition license for each customer would be a relevant consideration in determining what a reasonable licensor would have agreed to pay). Clarke Opp. at 22 (explaining Clarke's treatment of the Standard Edition license).

[18] Meyer asserts that TN installed the database software on "numerous servers" with two to sixteen processors per server. Wallace Decl. ¶ 2, Ex. 1 (Meyer Report) at ¶ 252. Yet Allison elected to price the license on the assumption that all servers had eight processors. *Id.*

database it created using the database software. Mot. at 21. Plaintiffs have not identified any comparable transaction as evidence that such a pricing structure is reasonable.

Meyer fails to consider, much less substantiate, why TN would not insist on pricing based on the less expensive Standard Edition and TN servers, or that the multiplier based on TN's customers be modified. Given Plaintiffs' "unique" license claim, it is reasonable to assume the licensee would negotiate for these less expensive metrics even if they would not apply to a conventional license. Finally, Meyer fails to consider that TN would have a license to use the ERP software, and that the database software would be incidental to this use. Under those circumstances, there is no reason to conclude that the parties would have negotiated a separate license fee of tens of millions of dollars. Ultimately, Meyer permits Allison to serve as the fox guarding the hen house and unilaterally select an exorbitantly high license fee under the guise of fair market value. Such complete reliance on the plaintiff, and lack of objective evidence of what a reasonable buyer would pay, has been rejected by the courts. *On Davis*, 246 F.3d at 166; *Jarvis*, 486 F.3d at 534.

Plaintiffs' argument regarding the scope of OLSA is beside the point. Defendants have demonstrated in their opposition to Plaintiffs' motion to exclude Clarke that TN did use the software for internal operations and could have licensed under OLSA.[19] Clarke Opp. at 20. Regardless, Plaintiffs' argument does not save Allison's unilateral choice of price.

VI. MEYER'S INFRINGERS' PROFITS METHODOLOGY IS UNRELIABLE

Contrary to Plaintiffs' assertion, Defendants do not attack the sufficiency of Meyer's evidence, but his methodology. Mot. at 22-23. Meyer makes no genuine attempt to establish a causal link. If a TN customer was labeled as a participant in SAP's Safe Passage marketing

[19] Plaintiffs mischaracterize as a "do over" Clarke's valuation of the cost of Standard Edition licenses. Opp. at 21. In the hypothetical world where Allison prices the unique license using the Enterprise Edition pricing applied to a different configuration of servers than TN actually deployed, it is reasonable to assume that a licensor would take into consideration the much lower market pricing available under the Standard Edition in negotiating price. Thus, Clarke's consideration of the Standard Edition market pricing is pertinent. Meyer ignores this perspective. *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1081-82 (Fed. Cir. 1983) is inapt, as it held that an infringer could not invalidate an "otherwise reasonable royalty" by arguing that it would have been better off purchasing a non-infringing machine. Here the issues are whether the royalty is reasonable and why Meyer ignores relevant market information.

program, he includes SAP revenues from that customer in his infringer's profits calculation.[20] *Id.* Plaintiffs claim that Meyer excludes customers if there is credible evidence that "the customer switched to SAP regardless of the support it got from TN." Opp. at 22. Meyer's report and testimony belie that claim. Of the 86 customers who purchased SAP software after their TN relationship began, Meyer includes *all* that were identified as Safe Passage in his infringer's profits analysis. Jindal Decl. ¶¶ 4, 7, Ex. B (5/12/10 Meyer Tr.) at 99:12-103:4 ("ultimately from my perspective if they're found to have become a Safe Passage customer, I would then leave them in the determination of the infringer's profits") and (5/14/10 Meyer Tr.) at 681:1-688:13 (explaining Schedule 42.2 DU); Ex. E (Schedule 42.2 DU to Meyer's Report).

Plaintiffs try to make a virtue of the fact that Meyer excludes SAP revenues received prior to the customer's relationship with TN, and ongoing support revenues for SAP products purchased prior to the TN relationship. Opp. at 22. Such revenues *obviously* were not caused by TN as they related to purchases made before the TN relationship began. These concessions do not validate Meyer's methodology.[21]

Meyer's methodology fails because TN was only one component of Safe Passage and the Safe Passage label reveals nothing about whether a customer's SAP purchases were *caused* by TN's support services. Mot. at 22-23. To assume otherwise produces erroneous results, *i.e.* customers are included in Meyer's calculation of infringers' profits that clearly did not become SAP customers as a result of TN's activities. *Id.* at 24-25 (describing four examples of erroneous results). Tellingly, Plaintiffs do not attempt to defend Meyer's inclusion of these four customers. Of the millions of documents produced in this case, Plaintiffs and Meyer do not identify a single one stating that a customer purchased SAP products because of TN, and no customer has testified to that in deposition. That this did not affect Meyer's methodology is inexcusable.

Plaintiffs argue that Meyer's analysis meets Oracle's burden because "Meyer relies on SAP internal and external documents" describing SAP goals. Opp. at 23. According to Meyer, if

[20] This is Meyer's second attempt at an infringer's profits methodology. He abandoned his first approach in response to Clarke's criticisms. Jindal Decl. ¶ 4, Ex. B (5/14/10 Meyer Tr.) at 675:6-676:9.

[21] Meyer also agreed with Clarke's SAP's profit margin calculation, which is a separate issue from the reliability of his causation analysis. Opp. at 22.

SAP aspired to get more customers with the offer of TN support, it follows that any customers it did get from Safe Passage were because of TN. *Id.* However, Meyer's analysis fails to isolate TN as the causal factor and, as a result, fails to show the requisite nexus between infringement and infringers' profits. *Estate of Vane v. Fair, Inc.*, 849 F.2d 186, 189-90 (5th Cir. 1988) (expert opinion too speculative because it failed to isolate profits attributable to infringing material from broader marketing material). The Ninth Circuit rejected a similar methodology in *Mackie v. Reiser,* 296 F.3d 909, 916 (9th Cir. 2002) (expert's "supposition that the [Defendants'] goal of generating 1.5% response rate to its direct mail brochure was somehow directly correlated with revenue generated by individuals who subscribed because of Rieser's art is a virtual non-sequitur"). Meyer's method fails for the same reason.[22]

VII. CONCLUSION

For the reasons above, Defendants' motion should be granted.

Dated: September 16, 2010

JONES DAY

By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

Counsel for Defendants

SAP AG, SAP AMERICA, INC., and TOMORROWNOW, INC.

[22] Plaintiffs' cases are inapposite. The language Plaintiffs quote from *Pierson v. Ford Motor Co.*, No. C-06-6503, 2008 U.S. Dist. LEXIS 111791, at *7-8 (N.D. Cal. Aug. 1, 2008) relates to the argument that the plaintiff could not meet his burden of proving causation, which the Court deemed inappropriate for a motion to exclude. On a separate argument on reliability of the expert's opinion, the Court denied the motion based on insufficient information. There was no expert opinion at issue in *William A. Graham Co. v. Haughey*, 568 F.3d 425, 442-43 (3d Cir. 2009) and, in any event, the court found that the plaintiff had shown the necessary causal nexus. In *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 517 (9th Cir. 1985), the court simply held that indirect profits attributable to infringement are recoverable "if ascertainable." Plaintiffs' remaining cases stand for this same uncontroversial proposition.