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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, et

No C 04-0807 VRW

al,

Plaintiffs,

FINDINGS OF FACT,

v

CONCLUSIONS OF LAW

ORACLE CORPORATION,

AND ORDER THEREON

Defendant.

_____ /

The government, acting through the Department of Justice, Antitrust Division, and the states of Connecticut, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, New York, North Dakota, Ohio and Texas, First Amended Complaint (FAC) (Doc #125) ¶3 at 5-6, seek to enjoin Oracle Corporation from acquiring, directly or indirectly, the whole or any part of the stock of PeopleSoft, Inc. Plaintiffs allege that the acquisition would violate section 7 of the Clayton Act, 15 USC § 18. Both companies are publicly traded and headquartered in this district.

1 Jt Stip Fact (Doc #218) at 1-2. The court has subject matter
2 jurisdiction under 15 USC § 25 and 28 USC §§ 1331, 1337(a) and
3 1345. There is no dispute about the court's personal
4 jurisdiction over the defendant.

5 Oracle initiated its tender offer for the shares of
6 PeopleSoft on June 6, 2003. Jt Stip of Fact (Doc #128) at 2; Ex
7 P2040. Plaintiffs brought suit on February 26, 2004. Compl (Doc
8 #1). The case was tried to the court on June 7-10, 14-18, 21-25,
9 28-30 and July 1, 2004, with closing arguments on July 20, 2004,
10 and further evidentiary proceedings on August 13, 2004. Based on
11 the evidence presented and the applicable law, the court
12 concludes that plaintiffs have failed to carry the burden of
13 proof entitling them to relief and, therefore, orders that
14 judgment be entered for defendant and against plaintiffs.

15
16 *INTRODUCTORY FINDINGS: INDUSTRY OVERVIEW*

17 *Products at Issue*

18 Of the many types of computer software, such as
19 operating system software, database software, integration
20 software (sometimes called "middleware" in software parlance) and
21 utilities software, this case involves only one -- application
22 software. And within this type, the present case deals with only
23 applications that automate the overall business data processing
24 of business and similar entities; these applications are called
25 "enterprise application software" (EAS). Jt Definitions (Doc
26 #332) at 6. There are three main kinds of EAS. Plaintiffs
27 single out one.

28 Some EAS programs are mass market PC-based applications

1 of fairly limited "functionality" (meaning capability). Id (Doc
2 #332) at 5. See Daniel E O'Leary, Enterprise Resource Planning
3 Systems at 19 (Cambridge, 2000). Other EAS programs are
4 developed by or for a specific enterprise and its particular
5 needs; most large organizations had such specially designed EAS
6 (called "legacy software") prior to the advent of the products in
7 suit. Plaintiffs focus their claims on the third, intermediate
8 category of EAS -- enterprise resource planning (ERP) system
9 software. Jt Sub Definitions (Doc #332) at 6. ERP is packaged
10 software that integrates most of an entity's data across all or
11 most of the entity's activities. See O'Leary, Enterprise
12 Resource Planning Systems at 27-38. Oracle and PeopleSoft
13 develop, produce, market and service ERP software.

14 These copyrighted software programs are licensed
15 ("sold" is the term applied to these license transactions) to end
16 users along with a continued right to use license which usually
17 includes maintenance or upgrades of the software. To the
18 customer, the fees to license and maintain ERP software are
19 generally a small part, 10 to 15 percent, of the total cost of
20 the installation and maintenance of an ERP system. Tr at 133:12-
21 15 (Hatfield); 655:2-4 (Maxwell); 1385:6-11 (Gorriz). An ERP
22 installation, because of its complexity, usually requires
23 substantial and expensive personnel training, consulting and
24 other services to integrate the program into the customer's pre-
25 existing or "legacy" software. Jt Sub Definitions (Doc #332) at
26 6. See also O'Leary, Enterprise Resource Planning Systems at 19.
27 ERP software vendors often provide some of those services, but
28 they are typically also performed and augmented by the customer's

1 own staff, obtained from providers other than ERP vendors or
2 both.

3 Many ERP programs were developed to address the needs
4 of particular industries, such as banking and finance, insurance,
5 engineering, construction, healthcare, government, legal and so
6 forth (in industry lingo, these are called "verticals"). See
7 Martin Campbell-Kelly, From Airline Reservations to Sonic the
8 Hedgehog, at 169-73 (MIT, 2003). Vertical-specific ERP programs,
9 although well suited to the needs of firms engaged in a
10 particular industry, often are not well suited to the needs of
11 firms in other verticals. An enterprise that relies on vertical-
12 specific ERP software products, but whose operations embrace more
13 than one vertical faces the task of integrating the programs.
14 The largest and most complex organizations face particular
15 difficulty. "[O]nly custom-written software or carefully
16 tailored and integrated cross-industry packages [can] handle
17 larger firms' historically idiosyncratic accounting systems and
18 diverse overseas operations." Id at 172.

19 ERP programs have been developed to handle the full
20 range of an enterprise's activities; these include human
21 relations management (HRM), financial management systems (FMS),
22 customer relations management (CRM), supply chain management
23 (SCM), Product Life Cycle Management, Business Intelligence (BI),
24 among many others. These are called "pillars." Although ERP
25 encompasses many pillars, see Ex D5572, plaintiffs assert claims
26 with respect to only two pillars, HRM and FMS. FAC (Doc #125)
27 ¶23 at 12-13.

28 Within these two pillars, plaintiffs further limit

1 their claims to only those HRM and FMS products able to meet the
2 needs of large and complex enterprises with "high functional
3 needs." Id at ¶14 at 9. Plaintiffs label HRM and FMS products
4 capable of meeting these high function needs "high function HRM
5 software" and "high function FMS software," respectively. Id
6 ¶23(a)-(b) at 12-13. ERP pillars incapable of meeting these high
7 function needs are called "mid-market" software by plaintiffs.
8 Id ¶13 at 9.

9 "High function software" is a term adopted by
10 plaintiffs to describe what they contend is the separate and
11 distinct line of commerce in which they contend competition would
12 be lessened by the proposed acquisition. Id at ¶23 at 13-14.
13 Plaintiffs apply the term "high function" to both HRM and FMS.
14 "High function software," as defined by plaintiffs, has no
15 recognized meaning in the industry. See Tr at 349:7-10
16 (Bergquist); 2298:6-20 (Elzinga).

17 Rather, industry participants and software vendors use
18 the terms "enterprise" software, "up-market" software and "Tier
19 One" software to denote ERP that is capable of executing a wide
20 array of business processes at a superior level of performance.
21 See Tr at 274:24-275:7 (Bergquist); Tr at 1771:5-1772:1
22 (Wilmington); Tr at 1554:25-1555:7 (Wolfe); Tr at 2180:22-2181:5
23 (Iansiti). Software vendors use these terms to focus sales and
24 marketing initiatives. Tr 2816:6-2818:8 (Knowles) (testifying
25 that SAP divided mid-market and large enterprise at \$1.5 billion
26 based on SAP's sales resources and estimated amount of IT "spend"
27 available from those customers).

28 Each ERP pillar consists of "modules" that automate

1 particular processes or functions. HRM and FMS software each
2 consists of numerous modules. Exs P3010, P3011. Tr at 268:8-
3 269:11, 270:5-271:12 (Bergquist). HRM modules include such
4 functions as payroll, benefits, sales incentives, time management
5 and many others. Ex P3010. FMS modules include such functions
6 as general ledger, accounts receivable, accounts payable, asset
7 management and many others. Ex P3011.

8 "Core" HRM modules are those specific ERP modules that
9 individually or collectively automate payroll, employee tracking
10 and benefits administration. Core FMS modules are those ERP
11 modules that individually or collectively track general ledger,
12 accounts receivable, accounts payable and cash and asset
13 management business processes. Core FMS and HRM modules are
14 offered by all the ERP vendors that have HRM and FMS offerings.
15 Ex P3179 (Ciandrini 1/16/04 Dep) at Tr 256:2-257:10. Large
16 enterprise customers rarely, if ever, buy core HRM or FMS modules
17 in isolation. Tr at 3461:14-23 (Catz). Customarily, FMS and HRM
18 software are purchased in bundles with other products. Tr at
19 3807:21-3808:1 (Hausman). See also Tr at 3813:12-13 (Hausman).
20 Customers purchase a cluster of products such as Oracle's E-
21 Business Suite that provide the customer with a "stack" of
22 software and technology, which may include core HRM or FMS
23 applications, add-on modules, "customer-facing" business
24 applications such as CRM software, and the infrastructure
25 components (application servers and database) on which the
26 applications run. Tr at 3461:14-3462:5 (Catz); Tr at 3807:21-
27 3808:1 (Hausman). See, e g, Exs P1000-P1322 (Oracle discount
28 request forms).

1 ERP vendors, including Oracle and PeopleSoft, sell
2 modules individually as well as integrated suite products. Some
3 ERP vendors sell only one or a few modules. Individual modules
4 are referred to as "point solutions" as they address a particular
5 need of the enterprise. ERP vendors that sell products for only
6 one or a limited number pillars are referred to as point solution
7 or "best of breed" providers. A customer licensing a particular
8 module because it fits the specific needs of the enterprise is
9 sometimes said to be seeking a best of breed or point solution.
10 An ERP customer that acquires best of breed or point solutions
11 faces the task of integrating these solutions with one another
12 and with the customer's existing ERP or legacy footprint.

13 Although the production cost of ERP applications is
14 negligible, vendors bear significant development and marketing
15 expenses and substantial costs of pre- and post- sales support
16 and ongoing maintenance and enhancement. ERP vendors employ and
17 bear substantial costs of account managers, technical sales
18 forces and personnel for user training, product documentation and
19 post-sale support.

20
21 *Customers at Issue*

22 "Large Complex Enterprises" (LCE) is a term adopted by
23 plaintiffs to describe the ERP customers that have "high function
24 software" needs. Based on the testimony described hereafter, the
25 court finds that industry participants and software vendors do
26 not typically use this term and it has no widely accepted meaning
27 in the industry.

28 While many in the software industry differentiate

1 between large customers and mid-market customers, there is no
2 "bright line" test for what is a "large" or "up-market" customer.
3 Tr 348:23-349:3 (Bergquist) (acknowledging "different parties
4 tend to define it differently"); Tr 2033:1-12 (Iansiti); Ex P3032
5 (Henley 5/4/04 Dep) at Tr 98:20-25. Likewise, there is no
6 "bright line" test for what is a "mid-market" customer. Tr at
7 2820:9-19 (Knowles) (SAP executive noting that the separation
8 between mid-market and large enterprise customers is "not an
9 exact science"); Ex D7174 (Pollie 5/26/04 Dep) at Tr 54:14-55:3
10 (testifying that the meaning of the term mid-market "varies from,
11 from everyone you talk to"); Ex P3191 (Block 12/16/03 Dep) at Tr
12 88:12-21, 94:19-95:3 (noting the term mid-market is used in many
13 different ways by many different people). ERP vendors, analysts,
14 systems integrators and others in the industry define the mid-
15 market variously. Compare Tr at 864:19-865:2 (Keating) (noting
16 variability of definitions and that Bearing Point generally
17 refers to mid-market as customers in its General Business Group,
18 which is synonymous with companies having less than \$2 billion in
19 revenue) with Tr at 1846:17-1847:15 (Wilmington) (PeopleSoft
20 formerly defined mid-market as less than \$500 million revenue,
21 but after acquiring J D Edwards, it raised mid-market to include
22 companies with less than \$1 billion revenue).

23 Prior to Oracle's tender offer, PeopleSoft used a proxy
24 of \$500 million in revenue to distinguish mid-market customers
25 from large customers. Tr at 348:5-18 (Bergquist). SAP defines
26 its "large enterprise" market as companies with more than \$1.5
27 billion in revenues. Tr at 2819:12-20 (Knowles). Oracle
28 segments the market based on the customers' revenue level or

1 number of employees. Ex P3070 (Prestipino 5/18/04 Dep) at Tr at
2 21:5-23:11.

3 Plaintiffs failed to show ERP vendors distinguish mid-
4 market customers from large customers on the amount of money
5 spent in an ERP purchase. Yet, as discussed below, this was the
6 basis on which plaintiffs attempted to quantify the ERP market.

7

8 *Vendors at Issue*

9 Many firms develop, produce, market and maintain ERP
10 software. Ex 5543 at 8-17. Some ERP software vendors, notably
11 Oracle, PeopleSoft and a German company, SAP AG, developed cross-
12 industry applications or "suites" of "generalized integrated
13 software that could be customized for virtually any large
14 business," Campbell-Kelly, From Airline Reservations to Sonic the
15 Hedgehog at 172. It is to the products of these three vendors
16 that plaintiffs direct their allegations. Although not alone in
17 the ERP business, these three firms have the most comprehensive
18 ERP software offerings.

19 *Oracle.* Oracle is headquartered in Redwood Shores,
20 California. Oracle has over 41,000 employees and offices in 80
21 countries and sells product in over 120 countries. Tr at
22 3485:10-12, 3486:16-18 (Catz). Oracle's E-Business suite is a
23 fully integrated suite of more than 70 modules for FMS, internet
24 procurement, BI, SCM, manufacturing, project systems, HRM and
25 sales and service management. Ex P2209 at xiv. As of December
26 2002, Oracle had over 5000 customers of its E-Business Suite,
27 Release 11i. Ex P2208 at ORLIT-EDOC-00244117; Ex P3038.
28 Oracle's ERP products have enjoyed success with

1 telecommunications and financial services customers. Oracle is
2 a major producer of relational database software which accounts
3 for a much larger share of its revenue than its ERP business.

4 *PeopleSoft*. PeopleSoft is headquartered in Pleasanton,
5 California and has 8300 employees. PeopleSoft sells software "in
6 most major markets." Ex 7149 at 7. It has offices in Europe,
7 Japan, Asia-Pacific, Latin America and other parts of the world.
8 Id. PeopleSoft was formed in 1987 to develop an HRM product, and
9 it continues to enjoy widespread customer acceptance of its HRM
10 offerings. PeopleSoft now sells, in addition to HRM products,
11 FMS, SCM and CRM products and related consulting services. Jt
12 Stip Fact (Doc #218) at 2. In 2003, Peoplesoft generated about
13 \$1.7 billion in revenue, derived almost entirely from ERP-related
14 business. PeopleSoft v8 is PeopleSoft's current integrated suite
15 offering. It competes with Oracle's E-Business suite, Release
16 11i.

17 *SAP*. SAP AG is headquartered in Waldorf, Germany. SAP
18 AG has global operations, including major business operations in
19 more than a dozen countries and customers in more than 120
20 countries around the globe. Tr at 2805:20-2806:2 (Knowles). SAP
21 AG has over 30,000 employees and sells a product called MySAP ERP
22 Suite, which includes HRM, FMS, corporate controlling and
23 corporate services. Tr at 2811:7-13 (Knowles). SAP AG offers a
24 product called All-in-One, which is "essentially a scaled-down
25 version of MySAP ERP with a lot of functionality turned off." Tr
26 at 2813:20-2814:2 (Knowles). All-in-One is marketed both through
27 an indirect channel of resellers to the \$200 million-and-below
28 customer revenue segment and by SAP's direct sales force. Tr at

1 2813:20-2814:2 (Knowles). SAP AG also offers a product called
2 Business One, which is a "packaged software offering" targeting
3 the \$200 million-and-below customer revenue segment and sold
4 through an indirect channel of resellers. Tr at 2813:10-17
5 (Knowles). SAP has six sales regions worldwide. SAP America,
6 Inc is responsible for sales in the United States and Canada. Tr
7 at 2808:16-19 (Knowles). SAP America sells software solutions
8 created by SAP AG. Tr at 2808:8-15, 2806:16-17 (Knowles). In
9 addition to selling software solutions created by SAP AG, the
10 largest price discounts offered by SAP America must be approved
11 by SAP AG. Tr 2836:22-24 (Knowles). SAP products have won wide
12 acceptance in the aerospace and petroleum industries. Tr at
13 899:9-900:19, 947:10-21 (Keating).

14 *Lawson.* Lawson is headquartered in Saint Paul,
15 Minnesota and has 1700 employees. Lawson was founded in the mid-
16 1970s and has 2000 customers, mostly in North America and Europe.
17 Lawson offers FMS, HRM, procurement products, merchandising
18 products, enterprise performance management (EPM), service
19 automation and a unique function called surgery instrument
20 management. Tr at 3591:5-10 (Coughlan). In 2003, Lawson
21 generated more than \$360 million in annual revenue. Tr at
22 3589:19 (Coughlan). Lawson has tended to do extremely well in
23 the healthcare and retail verticals. Tr at 3591:1-2 (Coughlan).
24 As Professor Jerry Hausman testified, and the court will
25 hereafter find, although Lawson does not now compete in all the
26 industry verticals in which Oracle, PeopleSoft and SAP compete,
27 Lawson has sufficient resources and capabilities to reposition to
28 any industry vertical it so chooses. Tr at 3841:3-13 (Hausman).

1 AMS. AMS is an ERP vendor that was recently acquired
2 by CGI, headquartered in Montreal, Quebec, with offices in North
3 America, Europe and Asia-Pacific. As an ERP vendor, AMS offers
4 FMS, HRM, procurement, tax and revenue software, CRM, CMS,
5 environmental compliance software, performance management and
6 budgeting and contracting software to government entities. See
7 P3034 (Morea 5/7/04 Dep) at Tr 14:19-23. AMS has been successful
8 in its sales to state and federal governmental agencies, often
9 competing head to head with commercial ERP vendors. Tr at 972:6-
10 15 (Keating) (agreeing that AMS is a "viable competitor for large
11 and complex federal procurements"). In fact, only a short time
12 after this action was initiated, the United States Department of
13 Justice chose AMS FMS over the FMS offerings of Oracle,
14 PeopleSoft and SAP. See D7166 (Morea 5/7/04 Dep) at Tr 21:22-
15 22:7.

16 Microsoft. Microsoft is headquartered in Redmond,
17 Washington, and sells a wide range of software products. In 2001
18 Microsoft acquired Great Plains Software and renamed it Microsoft
19 Great Plains. Microsoft now has a division called Microsoft
20 Business Solutions (MBS), which was created in 2002 when
21 Microsoft Great Plains acquired the Danish software company
22 Navison. Tr at 2972:19-2973:9, 2973:8-9 (Burgum). MBS has four
23 existing ERP product lines: Navison, Great Plains, Axapta and
24 Solomon. Tr at 2996:16 (Burgum). Great Plains offers FMS, HRM,
25 E-commerce, retail management, CRM, analytics and reporting. See
26 <http://www.microsoft.com/BusinessSolutions/GreatPlains/default.asp>
27 x. Solomon provides FMS only. Tr at 2998:4 (Burgum). Navison
28 offers FMS, SCM, CRM and E-commerce. See

1 <http://www.microsoft.com/BusinessSolutions/Navison/default.aspx>.

2 Finally Axapta offers FMS, HRM, SCM, E-commerce, CRM and

3 analytics. See <http://www.microsoft.com/BusinessSolutions/>

4 [Axapta/default.aspx](http://www.microsoft.com/BusinessSolutions/Axapta/default.aspx).

5 *Best of breed vendors.* Ninety percent of ERP sales are
6 purchases of software "bundles" containing several pillars;
7 rarely does a consumer purchase a single pillar. Tr at 3815:10-
8 13 (Hausman). FMS and HRM pillars typically are sold in a bundle
9 along with additional kinds of ERP, such as CRM or SCM. Further,
10 the discounts that are offered to potential consumers are based
11 on the value of the entire bundle, not simply based upon the
12 presence of an HRM or FMS pillar. Tr at 3813:23-3814:1
13 (Hausman). Accordingly, when Oracle or PeopleSoft offers a
14 discount on a bundle, it is doing so in order to ensure that the
15 customer purchases all the pillars from Oracle or PeopleSoft,
16 rather than turn to a best of breed vendor that specializes in
17 selling a single kind of pillar. One best of breed vendor,
18 Siebel, sells individual pillars of CRM. Testimony suggests
19 Siebel is recognized industry-wide as selling high-quality CRM,
20 equal to or better than the CRM pillars in Tier One software. Tr
21 at 3814:15-17 (Hasuman).

22 *Outsourcing.* Because of the extensive amount of
23 training and maintenance involved in implementing ERP packages
24 purchased from ERP vendors, some companies have chosen an
25 alternative solution -- outsourcing. Outsourcing occurs when a
26 company hires another firm to perform business functions, often
27 HRM functions. Tr at 2198:15-2198:3 (Elzinga). A company may
28 outsource a single HRM function, such as benefits, pensions or

1 payroll, or it may choose to outsource its entire continuum of
2 HRM needs. Tr at 1648:14-22 (Bass). Many firms have outsourcing
3 capabilities. Some of the outsourcers discussed at trial
4 include: Accenture, Fidelity, ADP, Mellon, Exult, Hewitt, Aon and
5 Convergys. Outsourcing firms may process a company's HR data
6 using HRM software manufactured by an ERP vendor, such as Oracle,
7 but some outsourcing firms use internally created HRM software
8 (such as Fidelity using HR Access). Tr at 3152:18-3153:23
9 (Sternklar).

10 In addition to individual vertical success, ERP vendors
11 have tended to enjoy varying degrees of success in different
12 geographic regions. SAP, for example, has been more successful
13 at selling ERP to financial institutions in Europe than in North
14 America. Tr at 996:20-997:15 (Keating).

15 The FMS and HRM software sold to large customers is the
16 same as that sold to mid-market customers. Tr at 819:8-11
17 (Allen); Tr at 1787:25-1788:2 (Wilmington); Tr at 3436:24-3437:11
18 (Catz); Ex D7166 (Morea 5/17/04 Dep) at Tr 18:15-19:2 (AMS); Ex
19 P3179 (Ciandrini 1/16/04 Dep) at Tr 235:15-22. All the vendors -
20 - including Oracle, SAP, and PeopleSoft -- have a single product
21 "and that one product is sold up and down the line" to customers
22 of all sizes. Ex P3171 (Ellison 1/20/04 Dep) at Tr 148:10-
23 151:15. While some ERP vendors have introduced special licensing
24 packages of FMS and HRM that are marketed to smaller customers,
25 the actual software code in the FMS and HRM products sold to both
26 large and mid-market customers is not different. Ex P3070
27 (Prestipino 5/18/04 Dep) at Tr 35:19-36:10 (Oracle); Tr at
28 3437:5-9 (Catz). Oracle has recently launched its E-Business

1 Suite Special Edition to appeal to its smallest customers --
2 those who can use only 50 seats or less. It contains the same
3 code as the software sold to the largest and middle-sized
4 customers, but it arrives pre-configured by the consulting
5 organization. Tr at 3436:24-3438:5 (Catz). It contains a subset
6 of the modules found in Oracle's E-Business Suite, including FMS
7 but excluding HRM. Tr at 3437:5-11 (Catz); Ex P3070 (Prestipino
8 5/18/04 Dep) at Tr 25:5-22, 32:19-33:19.

9 Despite the identity of code in each company's ERP
10 packaged product, ERP product offerings are not homogeneous.
11 While the ERP products offered by Oracle and PeopleSoft and other
12 vendors perform the same or similar functions, these products are
13 not uniform in their architecture, scalability, functionality or
14 performance characteristics. Tr at 897:23-899:3, 899:9-900:19,
15 901:6-902:15, 903:6-15, 946:18-20, 947:4-9, 992:23-993:7, 993:16-
16 994:2, 996:20-997:15 (Keating). The product of each vendor
17 possesses certain features or qualities so that none is a perfect
18 substitute for any other. As the testimony indicated, and the
19 court finds, no vendor is capable of meeting all of the high
20 function needs, as defined by plaintiffs, of all customers. Tr
21 at 2085:3-5 (Iansiti).

22 Furthermore, because each packaged ERP product must be
23 customized and configured to fit the software footprint of the
24 customer, a packaged ERP product may, as fitted to one customer's
25 information technology footprint, differ significantly from the
26 same packaged ERP product fitted to another customer's footprint.
27 Because of these facts, the court finds the ERP products in suit
28 to be differentiated products.

1 The court also finds that ERP software is highly
2 durable and, therefore, regarded by customers as a capital good.
3 Campbell demo #5,6,19; see also Tr at 189:12-18 (Hatfield); Tr at
4 1107:16-19 (Cichnowicz); Tr at 1572:14-18 (Wolfe).

5 Customers almost always purchase a cluster of products
6 such as Oracle's E-Business Suite that provide the customer with
7 a stack of software and technology, which may include core HRM or
8 FMS applications, add-on modules, customer-facing business
9 applications such as CRM software and the infrastructure
10 components (application servers and database) on which the
11 applications run. Tr at 3461:14-3462:5 (Catz); Tr at 3807:21-
12 3808:1 (Hausman). See, e g, Exs P1000-P1322 (Oracle discount
13 request forms).

14
15 *Plaintiffs' Claim of Threatened Injury to Competition*

16 Plaintiffs allege that the HRM and FMS sold by Oracle,
17 PeopleSoft and SAP are the only HRM and FMS products that can
18 appropriately be deemed "high function HRM and FMS." FAC (Doc
19 #125) ¶9 at 8.

20 Plaintiffs allege that these "high function" HRM and
21 FMS products have the "scale and flexibility to support thousands
22 of simultaneous users and many tens of thousands of simultaneous
23 transactions and the ability to integrate seamlessly into bundles
24 or 'suites' of associated HRM and FMS functions." Id ¶14 at 9.
25 Plaintiffs allege that "high function" HRM and FMS products
26 compete in a market that is separate and distinct from that of
27 all other ERP products, such as SCM, CRM or mid-market HRM and
28 FMS, the latter being HRM or FMS products designed for

1 organizations having less demanding needs. These mid-market
2 products include Oracle's E-Business Suite Special Edition, SAP's
3 MySAP and All-in-One, PeopleSoft's PeopleSoft EnterpriseOne and
4 the products of ERP vendors such as Lawson and AMS.

5 Moreover, plaintiffs allege that this competition is
6 geographically confined to the United States. Id at ¶¶24, 26 at
7 13. Within this narrowly defined product and geographic market,
8 plaintiffs allege that with limited and specially explained
9 exceptions, only Oracle, PeopleSoft and, to a lesser degree,
10 SAP's United States arm, SAP America, are in effective
11 competition. The proposed merger would therefore, in plaintiffs'
12 view, constrict this highly concentrated oligopoly to a duopoly
13 of SAP America and a merged Oracle/PeopleSoft.

14 Oracle, predictably enough, contends that plaintiffs'
15 market definition is legally and practicably too narrow. Oracle
16 contends that (1) "high function" HRM and FMS software does not
17 exist; "high function" is simply a label created by plaintiffs;
18 (2) there is just one market for all HRM and FMS ERP products;
19 (3) many firms other than the three identified by plaintiffs
20 compete in the business of developing, producing, marketing and
21 maintaining HRM and FMS ERP software; (4) this competition plays
22 out in many more products than those in the HRM and FMS pillars;
23 (5) price competition comes from sources in addition to ERP
24 software vendors and includes competition from firms that provide
25 outsourcing of data processing, the integration layer of the
26 "software stack" and from the durability and adaptability of
27 enterprises' installed base or legacy systems; (6) the geographic
28 area of competition is worldwide or, at the very least, the

1 United States and Europe; (7) the knowledgeable and sophisticated
2 customers of ERP software would impede the exercise of any market
3 power by a merged Oracle/PeopleSoft; and (8) potential entrants
4 are poised to enter into competition, so that the proposed merger
5 will not have an anticompetitive effect.

6 Taking up this dispute, the court first discusses the
7 applicable law and economic principles that underlie its decision
8 and then describes the parties' contentions and evidence along
9 with the court's resolution of the disputed factual issues not
10 previously discussed. This begins with the parties' sharply
11 differing definitions of the product and geographic markets and
12 whether there is a level of concentration sufficient to trigger
13 the presumption under United States v Philadelphia Nat Bank, 374
14 US 321 (1963), that the proposed transaction will lead to a
15 substantial lessening of competition under the principles set
16 forth in the Department of Justice and Federal Trade Commission
17 Horizontal Merger Guidelines (Apr 2, 1992, as revised Apr 8,
18 1997) ("Guidelines"). The court then turns to an efficiency
19 defense offered by Oracle before setting forth its conclusions of
20 law.

21 In brief summary, for the reasons explained at length
22 herein, the court's findings and conclusions are as follows:

23 ! plaintiffs have not proved that the product market they
24 allege, high function HRM and FMS, exists as a separate
25 and distinct line of commerce;

26 ! plaintiffs have not proved the geographic market for
27 the products of the merging parties is, as they allege,
28 confined to the United States alone;

1 ! plaintiffs have not proved that a post-merger Oracle
2 would have sufficient market shares in the product and
3 geographic markets, properly defined, to apply the
4 burden shifting presumptions of Philadelphia Nat Bank;
5 ! plaintiffs have not proved that the post-merger level
6 of concentration (HHI) in the product and geographic
7 markets, properly defined, falls outside the safe
8 harbor of the Horizontal Merger Guidelines
9 (Guidelines);
10 ! plaintiffs have not proved that the ERP products of
11 numerous other vendors, including Lawson, AMS and
12 Microsoft, do not compete with the ERP products of
13 Oracle, PeopleSoft and SAP and that these other
14 vendors would not constrain a small but significant
15 non-transitory increase in price by a post-merger
16 Oracle;
17 ! plaintiffs have not proved that outsourcing firms, such
18 as Fidelity and ADP, would not constrain a small but
19 significant non-transitory increase in price by a post-
20 merger Oracle;
21 ! plaintiffs have not proved that the ability of systems
22 integrators to adapt, configure and customize competing
23 ERP vendors' products to the needs of the group of
24 customers that plaintiffs contend constitute a separate
25 and distinct product market would not constrain a small
26 but significant non-transitory increase in price by a
27 post-merger Oracle;
28 ! plaintiffs have not proved that a post-merger Oracle

1 and SAP would likely engage in coordinated interaction
2 as the products of Oracle and SAP are not homogeneous,
3 but are differentiated products, and that the pricing
4 of these products is not standardized or transparent;
5 ! plaintiffs have not proved localized product or
6 geographic competition between Oracle and PeopleSoft
7 that will be lessened as a result of the proposed
8 merger as the merger would not create a dominant firm
9 occupying a product or geographic space in which there
10 is no serious competition;
11 ! assuming that localized product or geographic
12 competition exists between Oracle and PeopleSoft,
13 plaintiffs have not proved that SAP, Microsoft and
14 Lawson would not be able to reposition themselves in
15 the market so as to constrain an anticompetitive price
16 increase or reduction in output by a post-merger
17 Oracle;
18 ! plaintiffs have proved that products in the integration
19 layer of the computer software industry and the
20 presence of incumbent ERP systems would not constrain
21 anticompetitive conduct on the part of a post-merger
22 Oracle;
23 ! Oracle has not proved efficiencies from the proposed
24 merger sufficient to rebut any presumption of
25 anticompetitive effects; should the court's principal
26 findings and its conclusion that plaintiffs have not
27 proved the proposed merger will likely lead to a
28 substantial lessening of competition not be upheld on

1 appeal, Oracle's efficiency defense should not require
2 further trial court proceedings.

3
4 *HORIZONTAL MERGER ANALYSIS*

5 Section 7 of the Clayton Act prohibits a person
6 "engaged in commerce or in any activity affecting commerce" from
7 acquiring "the whole or any part" of a business' stock or assets
8 if the effect of the acquisition "may be substantially to lessen
9 competition, or to tend to create a monopoly." 15 USC § 18. The
10 United States is authorized to seek an injunction to block the
11 acquisition, 15 USC § 25, as are private parties and the several
12 states, California v American Stores Co, 495 US 271 (1990);
13 Hawaii v Standard Oil Co of Cal, 405 US 251, 258-59 (1972), and
14 district courts have jurisdiction over such actions. 15 USC §
15 25; 28 USC § 1337(a). Plaintiffs have the burden of proving a
16 violation of section 7 by a preponderance of the evidence.

17 To establish a section 7 violation, plaintiffs must
18 show that a pending acquisition is reasonably likely to cause
19 anticompetitive effects. See United States v Penn-Olin Chem Co,
20 378 US 158, 171 (1964) (noting that a section 7 violation is
21 established when "the 'reasonable likelihood' of a substantial
22 lessening of competition in the relevant market is shown");
23 United States v Marine Bancorp, Inc, 418 US 602, 622-23 (1974);
24 FTC v H J Heinz Co, 246 F3d 708, 713, 719 (DC Cir 2001).
25 "'Congress used the words "may be substantially to lessen
26 competition" (emphasis supplied) to indicate that its concern was
27 with probabilities, not certainties.'" Id at 713 (quoting Brown
28 Shoe Co v United States, 370 US 294, 323 (1962)). "Section 7

1 does not require proof that a merger or other acquisition [will]
2 cause higher prices in the affected market. All that is
3 necessary is that the merger create an appreciable danger of such
4 consequences in the future." Hospital Corp of Am v FTC, 807 F2d
5 1381, 1389 (7th Cir 1986). Substantial competitive harm is
6 likely to result if a merger creates or enhances "market power,"
7 a term that has specific meaning in antitrust law. See Eastman
8 Kodak Co v Image Tech Servs, Inc, 504 US at 451, 464 (1992);
9 Rebel Oil Co v Atlantic Richfield Co, 51 F3d 1421, 1434 (9th Cir
10 1995).

11 *Market Definition*

12
13 In determining whether a transaction will create or
14 enhance market power, courts historically have first defined the
15 relevant product and geographic markets within which the
16 competitive effects of the transaction are to be assessed. This
17 is a "necessary predicate" to finding anticompetitive effects.
18 United States v du Pont & Co, 353 US 586, 593 (1957). Market
19 definition under the case law proceeds by determining the market
20 shares of the firms involved in the proposed transaction,
21 Philadelphia Nat Bank, 374 US 321, the overall concentration
22 level in the industry and the trends in the level of
23 concentration. United States v Aluminum Co of Am, 377 US 271,
24 277-79 (1964); United States v Von's Grocery Co, 384 US 270, 272-
25 74 (1966). A significant trend toward concentration creates a
26 presumption that the transaction violates section 7. United
27 States v Baker Hughes Inc, 908 F2d 981, 982-83 (DC Cir 1990)
28 (Thomas, J). See also United States v Citizens & S Nat Bank, 422

1 US 86, 120-22 (1975). In other words, plaintiffs establish a
2 prima facie case of a section 7 violation by "show[ing] that the
3 merger would produce 'a firm controlling an undue percentage
4 share of the relevant market, and [would] result [] in a
5 significant increase in the concentration of firms in that
6 market.'" Heinz, 246 F3d at 715 (quoting Philadelphia Nat Bank,
7 374 US at 363) (alterations in original). Under Philadelphia Nat
8 Bank, a post-merger market share of 30 percent or higher
9 unquestionably gives rise to the presumption of illegality. 374
10 US at 364 ("Without attempting to specify the smallest market
11 share which would still be considered to threaten undue
12 concentration, we are clear that 30% presents that threat.").

13 To rebut this presumption, defendant may "show that the
14 market-share statistics give an inaccurate account of the
15 merger's probable effects on competition in the relevant market."
16 Heinz, 246 F3d at 715 (internal quotation marks and alterations
17 omitted). See also Baker Hughes, 908 F2d at 987; California v Am
18 Stores Co, 872 F2d 837, 842-42 (9th Cir 1989), rev'd on other
19 grounds, 495 US 271 (1990); FTC v Warner Communs, 742 F2d 1156,
20 1164 (9th Cir 1984); Olin Corp v FTC, 986 F2d 1295, 1305-06 (9th
21 Cir 1993). Arguments related to efficiencies resulting from the
22 merger may also be relevant in opposing plaintiffs' case. See
23 FTC v Tenet Health Care Corp, 186 F3d 1045, 1054-55 (8th Cir
24 1999); FTC v Staples, Inc, 970 F Supp 1066, 1088 (D DC 1997).
25 "If the defendant successfully rebuts the presumption [of
26 illegality], the burden of producing additional evidence of
27 anticompetitive effects shifts to [plaintiffs], and merges with
28 the ultimate burden of persuasion, which remains with the

1 government at all times.'" Heinz, 246 F3d at 715 (quoting Baker
2 Hughes, 908 F2d at 983) (first alteration in original).

3 An application of the burden-shifting approach requires
4 the court to determine (1) the "line of commerce" or product
5 market in which to assess the transaction; (2) the "section of
6 the country" or geographic market in which to assess the
7 transaction; and (3) the transaction's probable effect on
8 competition in the product and geographic markets. See Marine
9 Bancorporation, 418 US at 618-23; FTC v Harbour Group Investments
10 LP, 1990 WL 198819 at *2 n3 (D DC). See also FTC v Swedish
11 Match, 131 F Supp 2d 151, 156 (D DC 2000); FTC v Cardinal Health,
12 Inc, 12 F Supp 2d 34, 45 (D DC 1998); Staples, 970 F Supp at
13 1072.

14 Both the Supreme Court and appellate courts acknowledge
15 the need to adopt a flexible approach in determining whether
16 anticompetitive effects are likely to result from a merger.
17 Reflecting their "generality and adaptability," Appalachian
18 Coals, Inc v United States, 288 US 344, 360 (1933), application
19 of the antitrust laws to mergers during the past half-century has
20 been anything but static. Accordingly, determining the existence
21 or threat of anticompetitive effects has not stopped at
22 calculation of market shares. In Hospital Corp of Am the court
23 upheld the FTC's challenge to the acquisition of two hospital
24 chains, but noted that "the economic concept of competition,
25 rather than any desire to preserve rivals as such, is the
26 lodestar that shall guide the contemporary application of the
27 antitrust laws, not excluding the Clayton Act." 807 F2d at 1386.
28 Hence, the court held that it was appropriate for the FTC to

1 eschew reliance solely on market percentages and the "very strict
2 merger decisions of the 1960s." *Id* at 1386. In addition to
3 market concentration, probability of consumer harm in that case
4 was established by factors such as legal barriers to new entry,
5 low elasticity of consumer demand, inability of consumers to move
6 to distant hospitals in emergencies, a history of collusion and
7 cost pressures creating an incentive to collude. 807 F2d at
8 1388-89.

9 In United States v Waste Management, 743 F2d 976 (2d
10 Cir 1984), the court of appeals reversed a finding of a section 7
11 violation based on market shares and prima facie illegality under
12 Philadelphia Nat Bank, one made even though there were few
13 barriers to new entry into the market. The trial court had
14 erroneously ignored the Supreme Court's holding in United States
15 v General Dynamics, 415 US 486 (1974), that a prima facie case
16 may still be rebutted by proof that the merger will not have
17 anticompetitive effects. A finding of market shares and
18 consideration of the Philadelphia Nat Bank presumptions should
19 not end the court's inquiry.

20 The trend in these cases away from the "very strict
21 merger decisions of the 1960s," Hospital Corp of Am, 807 F2d at
22 1386, is also reflected in the Guidelines. The Guidelines view
23 statistical and non-statistical factors as an integrated whole,
24 avoiding the burden shifting presumptions of the case law. The
25 Guidelines define market power as "the ability profitably to
26 maintain prices above competitive levels for a significant period
27 of time." Guidelines § 0.1. Five factors are relevant to the
28 finding of market power: (1) whether the merger would

1 significantly increase concentration and would result in a
2 concentrated market, properly defined; (2) whether the merger
3 raises concerns about potential adverse competitive effects; (3)
4 whether timely and likely entry would deter or counteract
5 anticompetitive effects; (4) whether the merger would realize
6 efficiency gains that cannot otherwise be achieved; and (5)
7 whether either party would likely fail in the absence of the
8 merger. Guidelines, § 0.2.

9 In defining the market, the Guidelines rely on consumer
10 responses. Starting with the smallest possible group of
11 competing products, the Guidelines then ask "whether 'a
12 hypothetical monopolist over that group of products would
13 profitably impose at least a "small but significant and
14 nontransitory" [price] increase ["(SSNIP)"]," generally deemed
15 to be about five percent lasting for the foreseeable future.
16 United States v Sungard Data Sys, Inc, 172 F Supp 2d 172, 182 (D
17 DC 2001) (quoting Guidelines § 1.11). If a significant number of
18 customers respond to a SSNIP by purchasing substitute products
19 having "a very considerable degree of functional
20 interchangeability" for the monopolist's products, then the SSNIP
21 would not be profitable. du Pont, 351 US at 399. See Guidelines
22 § 1.11. Accordingly, the product market must be expanded to
23 encompass those substitute products that constrain the
24 monopolist's pricing. The product market is expanded until the
25 hypothetical monopolist could profitably impose a SSNIP. *Id* §
26 1.11. Similarly, in defining the geographical market, the
27 Guidelines hypothesize a monopolist's ability profitably to
28 impose a SSNIP, again deemed to be about five percent, in the

1 smallest possible geographic area of competition. Id § 1.21. If
2 consumers respond by buying the product from suppliers outside
3 the smallest area, the geographic market boundary must be
4 expanded. Id.

5 Once the market has been properly defined, the
6 Guidelines set about to identify the firms competing in the
7 market and those likely to enter the market within one year.
8 Guidelines § 1.32. Following these steps, the Guidelines
9 calculate the market share of each participant, followed by the
10 Herfindahl-Hirschman Index (HHI) concentration measurement for
11 the market as a whole. Guidelines § 1.5. The HHI is calculated
12 by squaring the market share of each participant, and summing the
13 resulting figures. Id. The concentration standards in the
14 Guidelines concern the (1) pre-merger HHI (HHI_1), (2) the post-
15 merger HHI (HHI_2) and (3) the increase in the HHI resulting from
16 the merger, termed delta HHI (ΔHHI). See Andrew I Gavil, William
17 E Kovacic and Jonathan B Baker, Antitrust Law in Perspective:
18 Cases, Concepts and Problems in Competition Policy, 480-84
19 (Thomson West, 2002). The Guidelines specify safe harbors for
20 mergers in already concentrated markets that do not increase
21 concentration very much. For example if the post-merger HHI is
22 between 1000 and 1800 (a moderately concentrated market) and the
23 ΔHHI is no more than 100 points, the merger is unlikely to be
24 presumed illegal. Guidelines § 1.51. Likewise, if the post-
25 merger HHI is above 1800 (a highly concentrated market) and the
26 ΔHHI is no more than 50 points, the merger will not be presumed
27 illegal. Id.

28 Notwithstanding these statistical data, the Guidelines

1 next focus on the likely competitive effects of the merger.
2 Guidelines § 2.0; Baker Hughes, 908 F2d at 984 (“Evidence of
3 market concentration simply provides a convenient starting point
4 for a broader inquiry into future competitiveness * * *”). The
5 Guidelines recognize that anticompetitive effects may arise in
6 two contexts. First, the Guidelines address the lessening of
7 competition through coordinated interaction between the merged
8 firm and remaining rivals. Guidelines § 2.1. Second, the
9 Guidelines address the anticompetitive effects based on
10 unilateral action. Id § 2.2.

11
12 *Anticompetitive Effects*

13 *Coordinated Effects*

14 In analyzing potential coordinated effects, a court is
15 concerned that the merger may diminish competition by “enabling
16 the firms * * * more likely, more successfully, or more
17 completely to engage in coordination interaction.” Guidelines §
18 2.1. This behavior can be express or tacit (implied by silence),
19 and the behavior may or may not be lawful in and of itself. Id.
20 The Guidelines explicitly recognize that successful coordinated
21 interaction “entails reaching [1] terms of coordination that are
22 profitable to the firms involved and [2] an ability to detect and
23 punish [cheating].” Id § 2.1. See also FTC v Elders Grain, Inc,
24 868 F2d 901, 905 (7th Cir 1989); Hospital Corp of Am, 807 F2d at
25 1386-87. Examples of “terms that are profitable” include common
26 pricing, fixed price differentials, stable market shares and
27 customer or territorial restrictions. Guidelines § 2.11

28 Factors that increase the likelihood of coordination

1 include product homogeneity, pricing standardization and pricing
2 transparency. Brooke Group Ltd v Brown & Williamson Tobacco
3 Corp, 509 US 209, 238 (1993); Elders Grain, 868 F2d at 905.
4 Plaintiffs do not contend that any of those conditions are
5 presented in the proposed merger which must, therefore, be
6 analyzed for unilateral anticompetitive effects.

7 8 *Unilateral Effects*

9 There is little case law on unilateral effects merger
10 analysis. Few published decisions have even discussed the issue,
11 at least using the term "unilateral effects." See, e g, Swedish
12 Match, 131 F Supp 2d at 168; New York v Kraft Gen Foods, Inc, 926
13 F Supp 321, 333-35 (SDNY 1995); Guidelines § 2.2. But, as the
14 court demonstrates below, "unilateral effects" is primarily a new
15 term to address antitrust issues that courts have in other
16 contexts considered for quite some time.

17 Unilateral effects result from "the tendency of a
18 horizontal merger to lead to higher prices simply by virtue of
19 the fact that the merger will eliminate direct competition
20 between the two merging firms, even if all other firms in the
21 market continue to compete independently." Carl Shapiro, Mergers
22 with Differentiated Products, 10 Antitrust 23, 23 (Spring 1996).
23 Unilateral effects are thought to arise in primarily two
24 situations, only the second of which is alleged in this case.
25 See Roscoe B Starek III & Stephen Stockum, What Makes Mergers
26 Anticompetitive?: "Unilateral Effects" Analysis Under the 1992
27 Merger Guidelines, 63 Antitrust LJ 801, 803 (1995); Guidelines §§
28 2.21, 2.22; Phillip E Areeda, Herbert Hovenkamp & John L Solow, 4

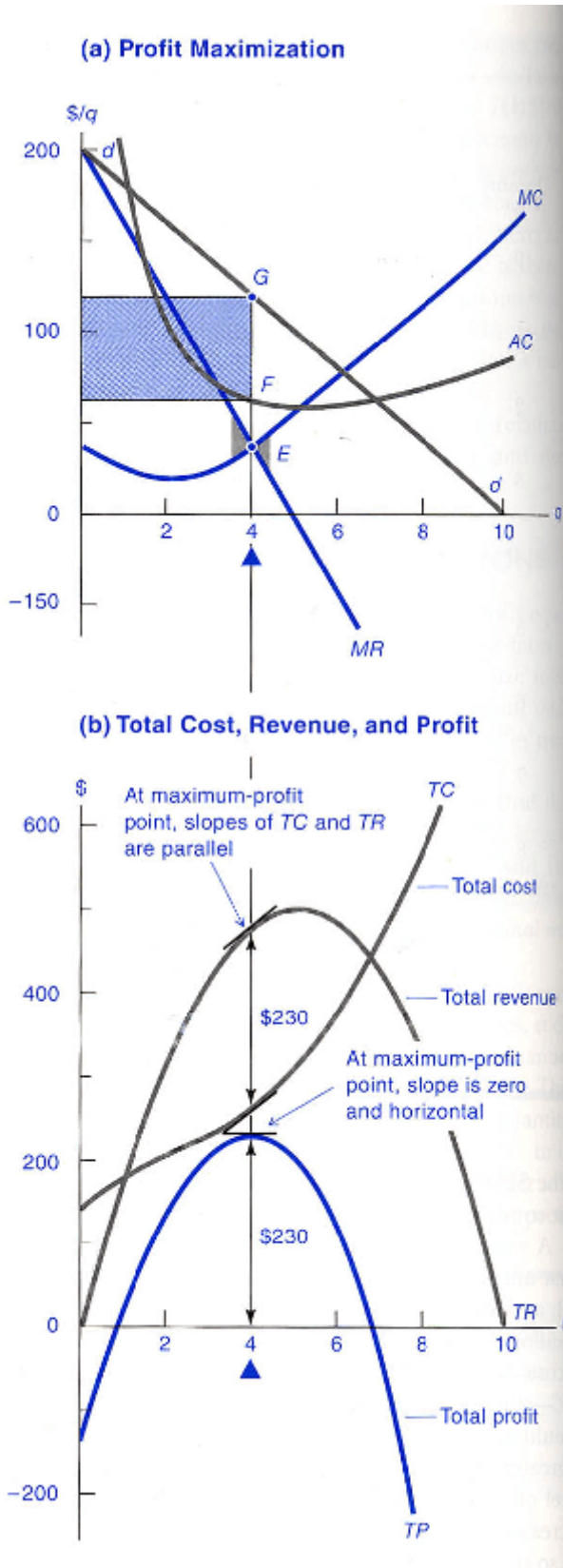
1 Antitrust Law ¶1910 (Aspen, rev ed 1998) (subdividing unilateral
2 effects theories into four categories).

3 The first situation involves a "dominant firm and a
4 'fringe' of competitors producing a homogeneous product." Starek
5 & Stockum, 63 Antitrust LJ at 803. In this situation, the
6 dominant firm has a substantial cost advantage over the fringe
7 competitors and, therefore, can restrict output to obtain an
8 above-marginal cost price.

9 The second situation, and the one here applicable,
10 concerns differentiated products. Starek & Stockum, 63 Antitrust
11 LJ at 803; Guidelines § 2.21. Competition in differentiated
12 product markets, such as ERP products, is often described as
13 "monopolistic competition." There is a notable and interesting
14 literature on this subject commencing with the path-breaking and
15 independent insights of two notable economists. See Edward
16 Chamberlin, The Theory of Monopolistic Competition (Harvard,
17 1933, 1938); Joan Robinson, The Theory of Imperfect Competition
18 (St Martin's, 1933, 2d ed 1969). The admirably clear exposition
19 found in Paul A Samuelson & William D Nordhaus, Economics 187-89
20 (McGraw-Hill, 17th ed 2001) makes apparent this nomenclature.

21 The market demand curve shows the quantity of a good
22 that would be purchased in the market at each price, other things
23 being equal. Id at 760. A seller's "own," or "residual," demand
24 curve shows the quantity of the good offered by the seller that
25 would be purchased from the seller at each price, other things
26 being equal. Under perfect competition, the individual seller
27 faces a horizontal (each additional unit brings the same
28 revenue), or perfectly elastic, demand curve because nothing the

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seller can do alters demand for the seller's product. Id at 148. The seller is a price taker. Because the seller's demand curve is horizontal, the seller's marginal revenue curve is also horizontal and the seller continues to produce until its marginal cost is equal to the market price or average revenue and profits, as economists define them, are zero. See id fig 8-2 and text at 148-50.

The adjacent figure, borrowed from Samuelson & Nordhaus, Economics fig 9-4 at 178, illustrates the different picture facing the monopolist. Its demand curve is not horizontal but reflects the inverse relationship between price and the quantity demanded. Because it is the only seller of the product, the pure or natural monopolist faces not the horizontal demand curve of the perfectly competitive firm, but

1 the sloping demand curve of the entire market. In the graph, the
 2 monopolist is able to maximize profit at the intersection of
 3 marginal cost and revenue by reducing output to 4 and raising the
 4 price to \$120, which exceeds marginal cost. The monopolist thus
 5 derives a "monopoly rent" equal to the number of units sold times
 6 the difference between the market price (G) and the monopolist's
 7 average cost (F), algebraically, $(G - F) \times 4$. It is this
 8 reduction in output and elevation of price that has been the
 9 historic concern of antitrust.

10 Firms in perfect competition "produce homogeneous
 11 product" so that "price is the only variable of interest to
 12 consumers, and no firm can raise its price above marginal cost
 13 without losing its entire market share." Jean Tirole, The Theory
 14 of Industrial Organization at 277 (MIT, 1988). Differentiated
 15 products are imperfect substitutes representing as they do
 16 different features or characteristics that appeal variously to
 17 different customers. Because no product is a perfect substitute
 18 of another in a differentiated products market, each seller

continues to face a downward sloping
 demand curve. Like a pure
 monopolist, the seller of a
 differentiated product, facing a
 downward sloping, or less than
 perfectly elastic, demand curve,
 maximizes its profit by pricing
 above marginal cost. See Samuelson
 & Nordhaus, Economics fig 10-3 and
 text at 188-89.

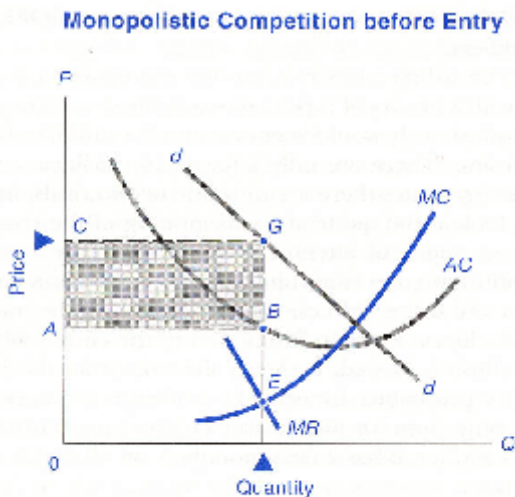
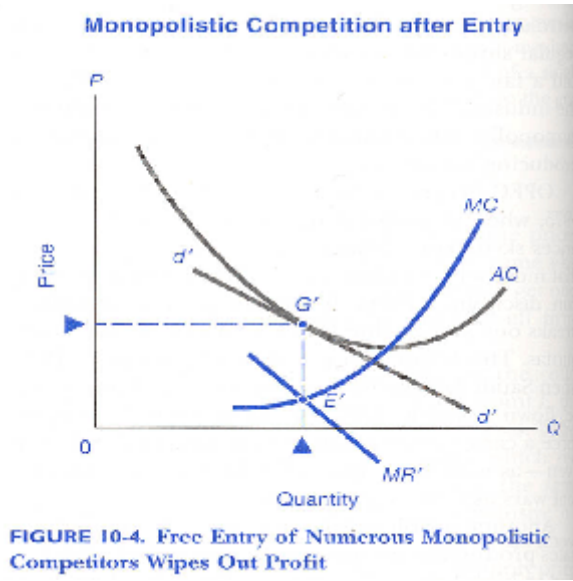


FIGURE 10-3. Monopolistic Competitors Produce Many Similar Goods

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Like a seller in a perfectly competitive market, however, sellers in a "competitive" differentiated products market do not obtain monopoly rents. In differentiated product markets with few barriers to entry, firms will introduce products that are increasingly close, although not perfect substitutes, for the other

products in the market. The introduction of additional products causes the demand curve faced by each seller to shift downward and leftward until, at long run equilibrium, the demand curve intersects the average cost curve of the seller (defined as economists define costs to include a reasonable profit) eliminating the monopolistic rent (ACGB). See id fig 10-4 and text at 188-89.

Differentiated product markets hence share some characteristics of both a pure monopoly and perfect competition, in that "prices are above marginal costs but economic profits have been driven down to zero." Id at 189 (describing "economic profits" as supra-normal profits or monopoly rents). Firms selling differentiated products have some "market power" in that they are able to exert some control over the prices they obtain although this does not rise to the level of "monopoly power." See Shapiro, 63 Antitrust LJ 24 n4 (citing the economic literature).

The Guidelines provide some instruction on the

1 necessary elements of a unilateral effects claim involving
2 differentiated products under section 7.

3 Substantial unilateral price elevation in a market for
4 differentiated products requires [1] that there be a
5 significant share of sales in the market accounted for
6 by consumers who regard the products of the merging
7 firms as their first and second choices, and [2] that
8 repositioning of the non-parties' product lines to
9 replace the localized competition lost through the
10 merger be unlikely.

11 Guidelines § 2.21.

12 Although the Guidelines' discussion quoted above may be
13 a helpful start, the factors described therein are not sufficient
14 to describe a unilateral effects claim. First, the Guidelines'
15 discussion, at least in section 2.21, emphasizes only the
16 relative closeness of a buyer's first and second choices. But
17 the relative closeness of the buyer's other choices must also be
18 considered in analyzing the potential for price increases. The
19 Guidelines later acknowledge as much in section 2.212, which
20 recognizes that if a buyer's other options include "an equally
21 competitive seller not formerly considered, then the merger is
22 not likely to lead to a unilateral elevation of prices."

23 Accordingly, a plaintiff must prove not only that the merging
24 firms produce close substitutes but also that other options
25 available to the buyer are so different that the merging firms
26 likely will not be constrained from acting anticompetitively.

27 Second, the Guidelines require only a demonstration of
28 some "significant share of sales in the market accounted for by

1 customers" that rank the merging firms first and second. Id §
2 2.21. "Measures of the 'closest substitutes' or 'second choices'
3 of inframarginal purchasers of Product A are only relevant to the
4 degree that inframarginal and marginal consumers have similar
5 preferences. However, essentially by definition, marginal and
6 inframarginal consumers do not share similar preferences."
7 Christopher A Vellturo, Creating an Effective Diversion:
8 Evaluating Mergers with Differentiated Products, 11 Antitrust 16,
9 18 (Spring 1997); Gregory J Werden & George A Rozanski, The
10 Application of Section 7 to Differentiated Products Industries:
11 The Market Definition Dilemma, 8 Antitrust 40, 41 (Summer 1994)
12 ("[T]here is no reason why the shares in any delineated market in
13 a differentiated products industry are indicative of the relative
14 importance of each merging firm as a direct competitor of the
15 other.").

16 In sum, it appears that four factors make up a
17 differentiated products unilateral effects claim. First, the
18 products controlled by the merging firms must be differentiated.
19 Products are differentiated if no "perfect" substitutes exist for
20 the products controlled by the merging firms. See Samuelson &
21 Nordhaus, Economics at 187-89; Areeda, Hovenkamp & Solow, 4
22 Antitrust Law ¶914d ("By 'significant' we mean product
23 differentiation that goes to fairly fundamental differences in
24 product design, manufacturing costs, technology, or use of
25 inputs."). Second, the products controlled by the merging firms
26 must be close substitutes. Products are close substitutes if a
27 substantial number of the customers of one firm would turn to the
28 other in response to a price increase. Third, other products

1 must be sufficiently different from the products controlled by
2 the merging firms that a merger would make a small but
3 significant and non-transitory price increase profitable for the
4 merging firms. Finally, repositioning by the non-merging firms
5 must be unlikely. In other words, a plaintiff must demonstrate
6 that the non-merging firms are unlikely to introduce products
7 sufficiently similar to the products controlled by the merging
8 firms to eliminate any significant market power created by the
9 merger. These four factors substantially track the analysis in
10 *Areeda, Hovenkamp and Solow*. *Areeda, Hovenkamp & Solow*, 4
11 Antitrust Law ¶914f at 68-69.

12 The essential elements of such a differentiated
13 products unilateral effects claim are quite similar to those in
14 "standard" antitrust analysis. In standard antitrust analysis,
15 the court considers both "demand elasticity" and "supply
16 elasticity" in determining whether anticompetitive effects are
17 likely. *Rebel Oil*, 51 F3d at 1436. In other words, courts
18 determine the degree to which price increases will cause marginal
19 buyers to turn to other products or marginal suppliers to
20 increase output of the product. Considerations of demand and
21 supply elasticity also motivate the factors outlined by the court
22 for a differentiated products unilateral effects analysis. The
23 factors considering the relative substitutability of the products
24 of the merging and non-merging firms, factors 1 to 3, essentially
25 address demand-side substitutability and the repositioning
26 factor, factor 4, essentially addresses supply-side
27 substitutability.

28 Antitrust analysis of differentiated product markets is

1 hardly new. See, e g, du Pont, 351 US at 392-93 (describing the
2 concepts of monopolistic competition and differentiated product
3 markets); Areeda, Hovenkamp & Solow, 4 Antitrust Law ¶914c
4 (suggesting that early railroad merger cases could be viewed as
5 unilateral effects cases). Indeed, as noted above, defining a
6 geographic market involves exactly same concept of localized
7 competition that motivates differentiated products unilateral
8 effects analysis.

9 Areeda, Hovenkamp and Solow persuasively contend that
10 "the appropriate conclusion [under a unilateral effects analysis]
11 is that the merger has facilitated the emergence of a new
12 grouping of sales capable of being classified as a relevant
13 market." Id ¶913b. This "new grouping of sales" is one "in
14 which the merging firms have either a monopoly or else a dominant
15 share." Id ¶914f at 69. In an example of two merging firms, B
16 and C, Areeda, Hovenkamp and Solow state that "the merger does
17 not create such a market because a cartel of firms B and C would
18 also have been able to increase price profitably, indicating that
19 B and C were already a relevant market." Id ¶914a at 60. But of
20 course, "before their union, B and C felt one another's
21 competition, as well as that of other firms, more significantly
22 than after the merger." Id. Areeda, Hovenkamp and Solow also
23 later note that "the sufficiently similar output of other firms
24 must be included" in the relevant market. Id ¶914f at 70.

25 In a unilateral effects case, a plaintiff is attempting
26 to prove that the merging parties could unilaterally increase
27 prices. Accordingly, a plaintiff must demonstrate that the
28 merging parties would enjoy a post-merger monopoly or dominant

1 position, at least in a "localized competition" space.

2 Unilateral effects analysis shares many similarities
3 with standard coordinated effects antitrust analysis. But there
4 are also notable differences.

5 Relevant markets defined in terms of "localized
6 competition" may be much narrower than relevant markets defined
7 in typical cases in which a dominant position is required.
8 Judicial experience cautions against the use of qualitative
9 factors to define narrow markets. This judicial experience
10 arises, in part, from the rise (and fall) of the "submarkets"
11 doctrine.

12 In Brown Shoe, the Supreme Court stated that submarkets
13 may constitute relevant product markets. "The outer boundaries
14 of a product market are determined by the reasonable
15 interchangeability of use or the cross-elasticity of demand
16 between the product itself and substitutes for it. However,
17 within this broad market, well-defined submarkets may exist
18 which, in themselves, constitute product markets for antitrust
19 purposes." Brown Shoe, 370 US at 325 (citing du Pont, 353 US at
20 593-95) (footnote omitted).

21 Properly construed, Brown Shoe suggests merely that the
22 technical definition of a relevant market in an antitrust case
23 may be smaller than a layperson would normally consider to be a
24 market. The use of the term "submarket" may be useful in
25 "overcom[ing] the first blush or initial gut reaction" to a
26 relatively narrowly defined market. See Staples, 970 F Supp at
27 1074 (defining the relevant market as "the sale of consumable
28 office supplies through office supply superstores").

1 Focusing on "submarkets" may be misleading, however,
2 because "the same proof which establishes the existence of a
3 relevant product market also shows (or * * * fails to show) the
4 existence of a product submarket." H J, Inc v International Tel
5 & Tel Corp, 867 F2d 1531, 1540 (8th Cir 1989). See also Olin,
6 986 F2d at 1301. Defining a narrow "submarket" tends to require
7 a relatively long laundry list of factors, which creates the
8 danger of narrowing the market by factors that have little
9 economic basis. Courts and commentators suggest that the use of
10 the submarkets doctrine has, in fact, misled courts into
11 "identify[ing] artificially narrow groupings of sales on the
12 basis of noneconomic criteria having little to do with the
13 ability to raise price above cost." Areeda, Hovenkamp & Solow, 4
14 Antitrust Law ¶914a at 60. See also Allen-Myland, Inc v IBM, 33
15 F3d 194, 208 n16 (3d Cir 1994); Satellite Television & Associated
16 Resources v Continental Cablevision of Va, Inc, 714 F2d 351, 355
17 n5 (4th Cir 1983).

18 The similarities between the submarkets doctrine
19 generally and localized competition in unilateral effects cases
20 are difficult to miss. Indeed, commentators have been quick to
21 note the potential for "localized competition" analysis to
22 devolve into an unstructured submarket-type analysis. See
23 Areeda, Hovenkamp & Solow, 4 Antitrust Law ¶914a at 60; Starek &
24 Stockum, 63 Antitrust LJ at 814-15 (arguing that the Guidelines'
25 focus on localized competition should not "be used as a tool for
26 rehabilitating discredited 'submarket' analysis").

27 Furthermore, judicial rejection of markets narrowly
28 defined to a single manufacturer's product has been even more

1 pronounced than judicial skepticism about narrowly defined
2 submarkets. See, e g, du Pont, 351 US at 392-93 (refusing to
3 define a market limited to cellophane); TV Communs Network, Incv
4 Turner Network Television, Inc, 964 F2d 1022, 1025 (10th Cir
5 1992) (refusing to define a market limited to TNT cable provision
6 in the greater Denver area); Town Sound & Custom Tops, Inc v
7 Chrysler Motors Corp, 959 F2d 468, 479-80 (3d Cir 1992) (en banc)
8 (refusing to define a market limited to Chrysler products); Gall
9 v Home Box Office, Inc, 1992 WL 230245 at *4 (SDNY) ("[T]he
10 natural monopoly every manufacturer has in its own product simply
11 cannot serve as the basis for antitrust liability."). Cf Eastman
12 Kodak, 504 US at 481-82 (upholding denial of summary judgment in
13 an installed base context).

14 As emphasized in du Pont:

15 [O]ne can theorize that we have monopolistic
16 competition in every nonstandardized commodity with
17 each manufacturer having power over the price and
18 production of his own product. However, this power
19 that, let us say, automobile or soft-drink
20 manufacturers have over their trademarked products is
21 not the power that makes an illegal monopoly. Illegal
22 power must be appraised in terms of the competitive
23 market for the product.

24 351 US at 393 (footnotes omitted).

25 Merely demonstrating that the merging parties' products
26 are differentiated is not sufficient. Instead, a plaintiff must
27 demonstrate product differentiation sufficient to sustain a small
28 but significant and non-transitory price increase.

1 Additionally, defining markets in terms of "localized
2 competition" may result in markets defined so narrowly that one
3 begins to question whether the market constitutes a "line of
4 commerce" as required by section 7. One concern is that the
5 market is defined so narrowly that it encompasses an
6 insubstantial amount of commerce. In Philadelphia Nat Bank, the
7 Supreme Court found a "workable compromise" between a geographic
8 market narrowly defined in terms of bank offices in the immediate
9 neighborhood or more expansively defined to include the banks
10 available only to large borrowers. 374 US at 360-61. Another
11 concern is that the market is defined so narrowly it fails to
12 capture the potential effects of the merger. For example, it
13 might be inappropriate to focus on a single city in analyzing the
14 effects of a merger between sellers who compete on a much larger
15 scale. Cf Staples, 970 F Supp at 1073 & nn5-6 (analyzing the
16 likelihood of anticompetitive effects in forty-two metropolitan
17 areas).

18 Even if a narrow market definition would be
19 appropriate, it may be more difficult to identify "clear breaks
20 in the chain of substitutes" sufficient to justify bright-line
21 market boundaries in differentiated products unilateral effects
22 cases. The conventional ideal market boundary divides products
23 within the market, which are freely substitutable with one
24 another, from products outside the market, which are poor
25 substitutes for the products within the market. See United
26 States v Rockford Memorial Corp, 717 F Supp 1251, 1260 (ND Ill
27 1989) (emphasis added), aff'd, 898 F2d 1278 (7th Cir 1990). In
28 differentiated products unilateral effects cases, a "spectrum" of

1 product differences, inside and outside the market boundary, is
2 more likely. In re Super Premium Ice Cream Distribution
3 Antitrust Litig, 691 F Supp 1262 (ND Cal 1988), aff'd sub nom,
4 Haagen-Dazs Co v Double Rainbow Gourmet Ice Creams, Inc, 895 F2d
5 1417 (9th Cir 1990) (table). In discussing unilateral effects,
6 Shapiro has written:

7 [A]ny attempt to make a sharp distinction between
8 products "in" and "out" of the market can be misleading
9 if there is no clear break in the chain of substitutes:
10 if products "in" the market are but distant substitutes
11 for the merging products, their significance may be
12 overstated by inclusion to the full extent that their
13 market share would suggest; and if products "out" of
14 the market have significant cross-elasticity with the
15 merging products, their competitive significance may
16 well be understated by their exclusion.

17 Shapiro, 10 Antitrust at 28. See also Edward Chamberlin, Product
18 Heterogeneity and Public Policy, 40 Am Econ Rev (Papers & Procs)
19 85, 86-87 (1950).

20 Additionally, to the extent that clear breaks are
21 difficult to identify, attempts to create defensible market
22 boundaries are likely to be based on relatively vague product
23 characteristics. Product characteristics that are too vague do
24 not meet section 7's requirement that the relevant market be
25 "well-defined." See Tenet Healthcare, 186 F3d at 1052.

26 A closer look at product differentiation demonstrates
27 further difficulties in defining the relevant market in
28 differentiated product unilateral effects cases. Price is one,

1 but only one, of many ways in which to differentiate a product.
2 A market of homogeneous goods can be seen as a market in which
3 sellers have only one dimension in which to differentiate their
4 product. One expects sellers in such a market to "differentiate"
5 their products by lowering the price until price equals marginal
6 cost. On the other hand, a differentiated product "market" is a
7 market in which sellers compete along more dimensions than price.
8 As a result, products competing against one another in a
9 differentiated product market may have widely different prices.
10 That products with widely different prices may, in fact, be in
11 the same market complicates market definition considerably.

12 The "Cellophane fallacy" may complicate matters even
13 further. This phenomenon takes its name from an error in the
14 Supreme Court's logic du Pont. In du Pont, the plaintiff was the
15 primary manufacturer of cellophane. The Supreme Court held that
16 the relevant market included "all flexible wrappings" because
17 cross-price elasticities of demand indicated that an increase in
18 the price currently charged for cellophane would cause a
19 significant number of purchasers to turn to other flexible
20 wrapping products.

21 The error in the logic of du Pont is that "[t]he
22 existence of significant substitution in the event of further
23 price increases or even at the current price does not tell us
24 whether the defendant already exercises significant market
25 power.'" Eastman Kodak, 504 US at 471 (quoting Phillip Areeda &
26 Louis Kaplow, Antitrust Analysis ¶1340(b) (Aspen, 4th ed 1988)).
27 Stated slightly differently, because a monopolist exercises
28 market power by increasing price until the cross-price elasticity

1 of demand is so high that a further price increase would be
2 unprofitable, a high cross-price elasticity of demand at current
3 prices, by itself, does not demonstrate that the seller lacks
4 market power.

5 The implications of the Cellophane fallacy on market
6 definition in differentiated product market cases would seem to
7 suggest caution. Courts should be wary of defining markets so
8 broadly that a seller's existing market power is missed. On the
9 other hand, in differentiated product markets, some measure of
10 market power is inherent and an unduly narrow product market
11 definition proves too much. In merger analysis, the court is
12 concerned primarily with determining whether the merger would
13 enhance market power, not whether market power currently exists.

14 In sum, defining the relevant market in differentiated
15 product markets is likely to be a difficult task due to the many
16 non-price dimensions in which sellers in such markets compete.
17 Further, it may be difficult to determine currently existing
18 market power and separate this from enhanced market power due to
19 the merger.

20 The inability clearly to define a market suggests that
21 strong presumptions based on mere market concentration may be
22 ill-advised in differentiated products unilateral effects cases.
23 As noted by Starek and Stockum, "it is generally misleading to
24 suggest that a firm "controls" a certain market share in the
25 absence of an analysis beyond market concentration." Starek &
26 Stockum, 63 Antitrust LJ at 804. See also Jerry A Hausman &
27 Gregory K Leonard, Economic Analysis of Differentiated Products
28 Mergers Using Real World Data, 5 Geo Mason L Rev 321, 337-39

1 (1997). Such a concern applies with equal force to
2 differentiated products unilateral effects claims. Furthermore,
3 in differentiated products unilateral effects cases, the merging
4 parties' combined market shares relative to competitors may be
5 less relevant than the size of their market shares in determining
6 whether anticompetitive effects are likely. See Gregory J Werden
7 & Luke M Froeb, The Effects of Mergers in Differentiated Products
8 Industries: Logit Demand and Merger Policy, 10 J L Econ & Org
9 407, 413 (1994).

10 Accordingly, a strong presumption of anticompetitive
11 effects based on market concentration is especially problematic
12 in a differentiated products unilateral effects context.

13 Despite the problems with qualitative analyses, modern
14 econometric methods hold promise in analyzing differentiated
15 products unilateral effects cases. Merger simulation models may
16 allow more precise estimations of likely competitive effects and
17 eliminate the need to, or lessen the impact of, the arbitrariness
18 inherent in defining the relevant market. For example, some
19 merger simulation methods compensate for potential errors in
20 market definition. A model advanced by Werden and Froeb uses a
21 set of "inside goods" and a set of "outside goods." Id at 410.
22 The model contains a parameter, beta, that controls for the
23 substitutability among the inside goods and another parameter,
24 epsilon, that controls for the substitutability between the
25 inside and outside goods. Id. To the extent the set of goods
26 considered as "inside goods" is defined narrowly, epsilon
27 increases. Id at 424-25. The increase in epsilon increases the
28 predicted amount of substitution to outside goods. Accordingly,

1 error in defining the product market too narrowly will be offset,
2 at least to some extent, by the increase in epsilon.

3 In sum, differentiated products unilateral effects
4 analysis shares many similarities to "standard" antitrust
5 analysis. The primary differences are that the relevant market
6 is likely to be smaller and more difficult to define and that
7 quantitative analyses may be robust.

8 In analyzing antitrust claims, courts have considered
9 both "circumstantial" and "direct" evidence of anticompetitive
10 effects. See Rebel Oil, 51 F3d at 1434. Even though "direct"
11 evidence of the potential for anticompetitive harm from a merger
12 is not literally available, merger analyses range from highly
13 qualitative ("circumstantial") to highly quantitative ("direct"),
14 depending on the data available for a particular market.
15 Qualitative analyses of antitrust claims are most often
16 structural. In a structural analysis, anticompetitive effects
17 are presumed if a plaintiff demonstrates undue concentration in a
18 well-defined market. See Philadelphia Nat Bank, 374 US at 363;
19 Baker Hughes, 908 F2d at 982. A relevant market may be defined
20 by reference to Brown Shoe's "practical indicia." 370 US at 325.
21 Once the relevant market is defined, market shares are calculated
22 and inferences are drawn from the degree of concentration.

23 The Guidelines adopt a structural approach for
24 addressing unilateral effects claims that closely mirrors
25 traditional structural analysis. See Guidelines § 2.211. The
26 biggest weakness in the Guidelines' approach appears to be its
27 strong reliance on particular market share concentrations. Under
28 the Guidelines, anticompetitive effects are presumed "[w]here

1 market concentration data fall outside the safeharbor regions of
2 Section 1.5, the merging firms have a combined market share of at
3 least thirty-five percent, and where data on product attributes
4 and relative product appeal show that a significant share of
5 purchasers of one merging firm's product regard the other as
6 their second choice," unless "rival sellers likely would replace
7 any localized competition lost through the merger by
8 repositioning their product lines." Id at §§ 2.211, 2.212.

9 A presumption of anticompetitive effects from a
10 combined share of 35% in a differentiated products market is
11 unwarranted. Indeed, the opposite is likely true. To prevail on
12 a differentiated products unilateral effects claim, a plaintiff
13 must prove a relevant market in which the merging parties would
14 have essentially a monopoly or dominant position. In Rebel Oil,
15 the Ninth Circuit noted that a market share of 30% is
16 "presumptively insufficient to establish the power to control
17 price." 51 F3d at 1438.

18 Market definitions, statistical presumptions and
19 likelihood of unilateral anticompetitive effects are all issues
20 on which the parties contended vigorously and presented much
21 evidence. To these, the court now turns.

22 23 *CONTENTIONS, EVIDENCE AND FINDINGS*

24 "Defining the relevant market is critical in an
25 antitrust case because the legality of the proposed merger[] in
26 question almost always depends upon the market power of the
27 parties involved." Cardinal Health, 12 F Supp 2d at 45. Yet the
28 precise characteristics that plaintiffs have used to describe the

1 line of commerce allegedly affected by the proposed transaction
2 changed throughout the course of this litigation. And the
3 evidence of market shares presented to enable the court to apply
4 the Philadelphia Nat Bank presumptions or make the HHI
5 calculations of the Guidelines is, given the mountain of evidence
6 plaintiffs presented, startling sparse.

7
8 *Plaintiffs' Proposed Product Market Definition*

9 Plaintiffs offer a product market of high function HRM
10 and FMS and a geographic market of the United States.

11 Four elements constitute plaintiffs' definition of high
12 function HRM software as alleged in the FAC: "[1] Human Resource
13 Management (HRM) [2] software and accompanying services [3] that
14 can be integrated into suites of associated functions from a
15 single vendor [4] with performance characteristics that meet the
16 demands of multifaceted organizations with high-level functional
17 needs." FAC (Doc #125) ¶23(a) at 12.

18 Likewise, four elements constitute plaintiffs'
19 definition of high function FMS software as alleged in the FAC:
20 "[1] Financial Management Services (FMS) [2] software and
21 accompanying services [3] that can be integrated into suites of
22 associated functions from a single vendor [4] with performance
23 characteristics that meet the demands of multifaceted
24 organizations with high-level functional needs." *Id* ¶23(b) at
25 12-13.

26 The FAC also notes certain performance characteristics
27 of high function software:

28 Customers with high-level functional needs ("enterprise

1 customers") require products that can support their
2 ongoing business processes and reporting requirements
3 that may stretch across multiple jurisdictions (often
4 requiring support for foreign languages and reporting
5 requirements), multiple legal entities or divisions
6 within the organization and multiple lines of business.
7 These products must have the scale and flexibility to
8 support thousands of simultaneous users and many tens
9 of thousands of simultaneous transactions, and the
10 ability to integrate seamlessly into bundles or
11 "suites" of associated HRM and FMS functions. Most
12 importantly, these products must have the flexibility
13 through configuration options or other means to be
14 matched to the administrative and reporting processes
15 of each unique customer.

16 Id ¶14 at 9.

17 Plaintiffs clarified their allegations at the request
18 of the court during the trial by submitting a statement of
19 definitions, some of which were joined by defendant. Jt Sub
20 Definitions (Doc #332). In these definitions, plaintiffs omitted
21 "and accompanying services" from the second element alleged in
22 the FAC. Plaintiffs also relegated the FAC's third element
23 regarding integration to a mere sub-element of the performance
24 characteristics described in the FAC's fourth element. Finally,
25 plaintiffs describe four "performance capabilities." Products in
26 the market are (1) "highly" configurable, (2) "seamlessly"
27 integrated software products that support (3) "multiple"
28 languages, currencies and legal regimes with (4) "virtually

1 unlimited" scalability. See *id* at 2-4 & n2.

2 This definition shifted somewhat in plaintiffs'
3 proposed findings of fact and conclusions of law. Plaintiffs
4 clarified the definition to include "licensing and maintenance"
5 rather than "licensing and accompanying services," as alleged in
6 the FAC's second element. See Pls Prop FF (Doc #356) at ¶¶3.1.1
7 - 3.1.2. Plaintiffs also added an element to the formal
8 definition, claiming that high function software "provid[es]
9 robust functionality that allows organizations to go beyond the
10 basics." *Id* at ¶3.1.3.4.

11 Even though not stated as part of the formal definition
12 of high function software, plaintiffs scatter throughout their
13 proposed findings of fact other characteristics of ERP software
14 in an apparent attempt further to narrow the relevant market.

15 First, plaintiffs point to the claimed strength of high
16 function software in "core" applications. See, e g, *id* at
17 ¶3.6.2.1.

18 Second, plaintiffs emphasize that high function
19 customers purchase high function software. *Id* (Doc #356).

20 Third, plaintiffs emphasize the brand value of the
21 software vendor. Factors that promote vendor brand value include
22 previous experience in a particular industry, research and
23 development spending and local sales forces. See, e g, *id* (Doc
24 #356) at ¶¶3.2.4.3 - 3.2.4.5.

25 Fourth, plaintiffs note the incumbent advantage
26 software vendors have in competing for further sales with a
27 customer who has that vendor's product as part of its existing
28 footprint. See, e g, *id* at ¶7.3.2.1.18 (pointing to testimony

1 that "Bearing Point has identified more than 1,200 companies that
2 now have an Oracle Financials and PeopleSoft HR footprint").

3 Fifth, plaintiffs emphasize the alleged strength of
4 Oracle and PeopleSoft in certain industry verticals, such as
5 insurance. See, e.g., *id* at ¶¶7.2.3.10 - 7.2.3.13.

6 Sixth, plaintiffs describe high-function software as
7 being "Able to Accommodate Rapid Growth, Acquisitions and
8 Reorganizations." *Id* at ¶2.2.5.

9 Seventh, plaintiffs define high function software as
10 allowing users to consolidate data across multiple organizations
11 while still allowing the user to drill down to the original data.
12 *Id* at ¶2.2.6.

13 In their post-trial brief too, plaintiffs adjusted
14 their proposed product market definition. They eliminated the
15 "robust functionality" factor and incorporated two of the factors
16 scattered throughout their proposed findings of fact into the
17 more formal definition of high function software. The newly
18 incorporated factors are that high function software must
19 accommodate rapid growth and complicated business structures.

20 At closing argument, plaintiffs disclaimed reliance on
21 high function software's claimed strength in "core" functionality
22 in defining the relevant market and accused Oracle of creating
23 confusion "by limiting the relevant market to basic 'core'
24 functionality." Pl Post Brief (Doc #366) at 10 n17.

25 Added together, plaintiffs propose a very restricted
26 product market definition: HRM and FMS integrated suites sold to
27 large complex enterprises ("high function FMS and HRM market").
28 See *id* (Doc #366) at 8. Plaintiffs have defined the asserted

1 relevant product market using a large number of factors. In sum,
2 the competition between Oracle and PeopleSoft that plaintiffs
3 claim will be impaired bears the following characteristics:

4 Product characteristics:

- 5 • Software licensing and maintenance;
- 6 • HRM and FMS (as separate markets);

7 Customer characteristics:

- 8 • High function needs;
- 9 • Oracle or PeopleSoft are major vendors in their
10 software footprint;

11 Performance characteristics:

- 12 • Scalable;
- 13 • Highly configurable;
- 14 • Seamlessly integratable;
- 15 • Able to accommodate rapid growth, acquisitions and
16 reorganizations;
- 17 • Able to reflect actual units of business; and
- 18 • Able to adapt to industry specific requirements.

19 Plaintiffs contend that this product market does not include mid-
20 market vendors, best-of-breed solutions, incumbent solutions or
21 outsourcing. Id (Doc #366) at 14-19.

22
23 *Plaintiffs' Evidence of a High Function HRM & FMS Market*

24 In support of their proposed product market definition
25 and theory of anticompetitive effects, plaintiffs presented at
26 trial or through deposition ten customer witnesses, five industry
27 witnesses, two systems integration witnesses, three expert
28 witnesses, a few others who appear mostly to have been presented

1 to fill a gap or two in the evidence or, because every trial
2 seems to need some, for spice (e g, the Ellison and Phillips
3 videotape deposition testimony) and a plethora of exhibits, some
4 of these also for spice (e g, Ex P2290). The court will not
5 attempt to recount or even summarize the entire evidentiary
6 record. Given the quantity of evidence, that would be unduly
7 time-consuming and is unnecessary. It suffices to note that the
8 laboring oar of the plaintiffs' case was pulled by the customer
9 witnesses (whom plaintiffs' counsel described as their strongest
10 witnesses), by some of the systems integrator and industry
11 witnesses and by the experts.

12
13 *Customer Witnesses*

14 Michael Gorriz, Vice President of Information
15 Technology Business at DaimlerChrysler (Daimler), testified about
16 his company's large and complex needs regarding HRM software. Tr
17 at 1368 (Gorriz). Daimler has about 365,000 employees worldwide
18 in about 100 manufacturing facilities. Tr at 1368:6-13 (Gorriz).
19 Since 1996, Daimler has used SAP as its financial management
20 software. Tr at 1370:4-10 (Gorriz). Daimler requires highly
21 functional HRM to accommodate its large number of employees and
22 to comply with the differing labor laws and union agreements in
23 different countries. Tr at 1371:9-12 (Gorriz). For its HRM
24 needs, Daimler currently uses PeopleSoft. Daimler chose
25 PeopleSoft based upon its reputation and the fact that companies
26 of comparable size to Daimler have had success with PeopleSoft
27 HRM. Tr at 1375:13-21 (Gorriz). But when Daimler was first
28 searching for an HRM vendor in 1996, Gorriz stated that "only

1 SAP, PeopleSoft or Oracle could serve [Daimler's] needs for the
2 HR management." Tr at 1376:9-11 (Gorriz). Gorriz stated that
3 Daimler considered no other vendors. Tr at 3716:18-19 (Gorriz).
4 Daimler's legacy system was "too old" for the company seriously
5 to consider upgrading. Tr at 1376:24 (Gorriz). Daimler did not
6 consider outsourcing to be an option because Daimler's HRM
7 requirements were, Gorriz testified, "too complex." Tr at
8 1377:24-25 (Gorriz). Further, if Oracle, SAP or PeopleSoft were
9 to increase their price for HRM by 10 percent, Gorriz stated that
10 Daimler "would not consider any offer" from any other vendors.
11 Tr at 1381:16 (Gorriz).

12 Bob Bullock, Senior Vice President and Chief
13 Information Officer of CH2M Hill, testified about the ERP needs
14 of that civil and environmental engineering firm. CH2M Hill has
15 14,000 employees, 200 worldwide offices and over \$2 billion in
16 annual revenue. CH2M Hill has used Oracle FMS since 1993, but in
17 2002 the company decided to replace its legacy HRM software.
18 Bullock stated that through consultation with the Gartner Group,
19 CH2M Hill was given a list of HRM vendors. CH2M Hill did not
20 seriously consider SAP, as it "was a very complex product" and
21 had a "reputation for being a costly product." Tr at 207:19-20
22 (Bullock). In Bullock's opinion, there were only two candidates,
23 Oracle and PeopleSoft. Id at 208:7-8 (Bullock). CH2M Hill never
24 considered outsourcing, Lawson or remaining on its legacy system.
25 Tr at 210:8, 211:12, 216:8-9 (Bullock). Oracle and PeopleSoft
26 both offered initial bids between \$1.5 and 41.6 million. Bullock
27 stated that if this price had been 10 percent higher, CH2M Hill
28 would not walked away from the deal with Oracle or PeopleSoft.

1 Tr at 218-19 (Bullock).

2 Curtis Wolfe, CIO for the State of North Dakota,
3 testified about the state's process of picking an ERP vendor. Tr
4 at 1532 (Wolfe). North Dakota has approximately 10,000 full and
5 part-time employees, 58 state agencies and a budget of \$5
6 billion. Tr at 1533 (Wolfe). In 2002, the state decided to buy
7 a full ERP program that included FMS and HRM. Tr at 1534:10-16
8 (Wolfe). North Dakota had a unique need in that it required that
9 its ERP serve the state's higher education facilities as well.
10 Id. North Dakota had six vendors submit proposals: Oracle,
11 PeopleSoft, SAP, SCT, Jenzabar (a partner of Lawson) and
12 Microsoft's Great Plains. Tr at 1543:21-22 (Wolfe). The state
13 eliminated SAP, Great Plains and Jenzabar almost immediately.
14 SAP was too expensive, while Jenzabar and Great Plains did not
15 have the required functionality. Tr at 1545-46 (Wolfe). SCT
16 did not make the final round; while SCT met the functionality for
17 the higher education area, it could not do so with state agency
18 needs. Tr at 1551:1-4 (Wolfe). Oracle and PeopleSoft were in
19 head to head competition and Wolfe testified that he believes
20 that this caused the state to get a \$6 to \$8 million lower final
21 bid from each vendor. Tr at 1561:10-11 (Wolfe). If these final
22 offers had been 10 percent higher, Wolfe stated that North Dakota
23 would not have turned to Lawson, Microsoft, SCT, outsourcing or
24 writing its own software. Tr at 1569-1570 (Wolfe).

25 Kenneth Johnsen, Chief of Technology for Pepsi
26 Americas, testified as to his concerns about the
27 Oracle/PeopleSoft merger. Pepsi Americas is the second largest
28 bottler of Pepsi-brand soft drinks within the Pepsi system and

1 the third largest bottler worldwide. Tr at 1723:25-1724:1
2 (Johnsen). Pepsi Americas has over 15,000 employees and annual
3 revenues of about \$3.2 billion. Tr at 1724:5-10 (Johnsen).
4 Pepsi Americas uses PeopleSoft ERP in its North America
5 operations and SAP ERP in its European operations. Tr at
6 1727:13-14 (Johnsen). Johnsen testified that he has "a concern"
7 about the impact of this merger on the long-term effectiveness of
8 the PeopleSoft ERP. Tr at 1734:23 (Johnsen). Johnsen is
9 concerned that a post-merger Oracle, while agreeing to maintain
10 the PeopleSoft ERP, will not provide enhancements to the
11 functionality of the software (i e, upgrades). Tr at 1737: 1-9
12 (Johnsen). To Johnsen this leaves Pepsi Americas with two
13 options: constantly upgrade with point solutions (not his desired
14 choice) or buy ERP from a new vendor. When asked what vendors he
15 could turn to meet his ERP needs, Johnsen claims there are no
16 options outside of Oracle, PeopleSoft and SAP. Tr at 1739:14
17 (Johnsen).

18 Scott Wesson, Senior Vice President and Chief
19 Information Officer of AIMCO, discussed the company's choices for
20 FMS and HRM software. Tr at 1126 (Wesson). AIMCO is the largest
21 owner and operator of apartment buildings in the United States.
22 Tr at 1127:7-8 (Wesson). The company owns approximately 2000
23 complexes in 47 states and the District of Columbia. AIMCO has
24 over 6,500 employees and an annual revenue of about \$1.5 billion.
25 Tr at 1127:9-24 (Wesson). For its FMS, AIMCO uses PeopleSoft's
26 financial suite. For its HR payroll systems, AIMCO currently
27 uses Lawson. Tr at 1129:8,21 (Wesson). In 2002, AIMCO began to
28 reevaluate its HRM options and it hired Towers Perrin consult in

1 this process. Towers Perrin told AIMCO that only three vendors
2 could meet AIMCO's HRM needs: PeopleSoft, Oracle and SAP. Tr at
3 1132:7-8 (Wolfe). (There was no objection to the question that
4 elicited this response). Wesson stated that AIMCO decided not to
5 upgrade to the latest version of Lawson because it would have
6 cost AIMCO "about the same * * * as it would to go with a new
7 system" and also, Lawson "[was] lacking some key features" that
8 AIMCO was looking for. Tr at 1133:5-11 (Wolfe). AIMCO was
9 deciding between Oracle and PeopleSoft when Oracle first made its
10 tender offer to PeopleSoft. Tr at 1143: 9-10 (Wolfe). Wesson
11 stated that because of this proposed merger, he believes
12 PeopleSoft gave him a "very good deal" on the HRM. Tr at 1144:17
13 (Wolfe). Wesson testified that Oracle agreed to match any price
14 offered by PeopleSoft. Tr at 1145:5 (Wolfe). Wesson said AIMCO
15 ultimately chose PeopleSoft because PeopleSoft had guaranteed to
16 pay AIMCO three times the contract price should there be a
17 "change of ownership" at PeopleSoft. Tr at 1146:14, 1147:6-16
18 (Wolfe). AIMCO is expecting to implement the PeopleSoft system
19 in late 2004 or early 2005. Tr at 1148:10 (Wolfe). Moreover,
20 Wesson stated, AIMCO does not consider outsourcing to be a viable
21 option because it is not quick to respond to "last minute
22 changes," such as new benefits programs. Tr at 1150:10 (Wolfe).
23 Best of breed solutions are too expensive for AIMCO to consider.
24 Tr at 1150:22-24 (Wolfe).

25 Richard Cichanowicz, Vice President of Systems
26 Integration of Nextel, testified about the wireless services
27 company's ERP needs. Nextel has 13 million subscribers, over \$8
28 billion in annual revenue 17,000 [transcript incorrect]

1 employees. See Tr at 1052:25-1053:3 (Cichanowicz). Before 2002,
2 Nextel had been using PeopleSoft HRM, Oracle FMS and Ariba SCM.
3 Tr at 1058:9-11 (Cichanowicz). In 2002, however, Nextel
4 determined that using one integrated solution would provide more
5 operational efficiency. Tr at 1061:7-9 (Cichanowicz). Nextel
6 received advice from six consulting firms, which informed Nextel
7 that Oracle, SAP and PeopleSoft could meet those software needs.
8 Tr at 1066:13-19 (Cichanowicz). Nextel then sent RFPs to Oracle
9 and Peoplesoft. Tr at 1067:25-1068:3 (Cichanowicz). Nextel did
10 not seriously consider SAP because it was already using Oracle
11 for FMS and PeopleSoft for HRM and believed that conversion costs
12 and risks for those two vendors would be lower. Tr at 1068:4-17
13 (Cichanowicz). Nextel ultimately chose Peoplesoft, based on its
14 scoring of vendor criteria such as functionality, ease of
15 integration, scalability, audits, costs and relationship
16 confidence. See Tr at 1071:20-1072-22 (Cichanowicz). Even after
17 it had chosen PeopleSoft, however, Nextel continued to negotiate
18 with Oracle for leverage purposes until the signing of the
19 December 2002 contract with PeopleSoft. Tr at 1073:11-20
20 (Cichanowicz). Cichanowicz stated that if the price of the
21 Oracle or PeopleSoft licenses had been 10 percent higher, Nextel
22 would not have considered a best of breed approach, writing or
23 building its own ERP software, outsourcing, staying with its
24 previous system or using SAP or any other United States vendor.
25 Tr at 1077:16-1080:25 (Cichanowicz).

26 Mary Elizabeth Glover, Vice President of Information
27 Technology at Greyhound Lines, testified about her company's
28 foray into the market for HRM software. Greyhound is in the bus

1 transportation business in both the United States and Canada.
2 The company employees some 16,000 people and has annual revenues
3 of around \$1.2 billion. Tr at 1459-1460 (Glover). For its FMS,
4 Greyhound uses Oracle in the United States and J D Edwards in
5 Canada. Tr at 1464:11-21 (Glover). For its HRM, Greyhound uses
6 a product called HR1 in the United States and HR2000 in Canada.
7 The company outsources its payroll to ADP. Tr at 1465:11
8 (Glover). Glover stated that the HR incumbent systems are "very
9 old" and no longer meet the needs of the company. Tr at 1466:21-
10 25 (Glover). Further, she testified that outsourcing is too
11 expensive for Greyhound. Tr at 1467:12-15 (Glover). For these
12 reasons, in 2001, Greyhound began a potential procurement process
13 for new HRM software. Tr at 1468:17-18 (Glover). The company
14 hired CDG & Associates to match Greyhound with potential vendors
15 who met their HRM needs. The firm narrowed the selection down to
16 only four vendors: Oracle, PeopleSoft, Lawson and Ultimate
17 Software. Tr at 1470:11 (Glover). Greyhound never considered
18 SAP because the consulting firm believed they were too costly.
19 Tr at 1470:16 (Glover). Ultimate Software was eliminated soon
20 thereafter because of lack of functionality. Tr at 1470:24-25
21 (Glover). Greyhound eliminated PeopleSoft as being too costly.
22 Between Oracle and Lawson, Greyhound found that Oracle had more
23 functionality; therefore, Lawson was eliminated. But before
24 Greyhound made a final choice, Glover stated that the company
25 decided to give PeopleSoft a second look. Upon reexamination,
26 Greyhound determined that both Oracle and PeopleSoft could meet
27 the company's needs, with the company preferring PeopleSoft over
28 Oracle. Tr at 1483:6-9 (Glover). Unfortunately, the events of

1 September 11, 2001, a new CEO and a decrease in profits caused
2 Greyhound to lose the funds necessary to purchase the software.
3 Tr at 1490:6-11 (Glover). But Glover stated that should
4 Greyhound ever decide to purchase HRM software, this proposed
5 merger would make the purchase more costly, as Greyhound's only
6 choices were Oracle and PeopleSoft. Tr at 1495:13-21. Without
7 the competition between the two, Glover foresees prices
8 increasing. Tr at 1495:13-21 (Glover).

9 Phillip Maxwell, Senior Vice President and Chief
10 Information Officer of the Neiman Marcus Group (NMG), testified
11 about the ERP needs of the specialty retailer. NMG has
12 properties located throughout the country, approximately 15,000
13 employees and \$3 billion in annual sales. Tr at 652:3-13
14 (Maxwell). NMG formerly had used FMS software that was
15 originally from MSA, a vendor purchased by Dun & Bradstreet and
16 then GEAC subsequent to NMG's installation of the software. Tr
17 at 655:15-22 (Maxwell). In 2002, NMG decided to replace its FMS
18 software and began conferring with individuals in its business
19 and technology units, three consulting firms and the Gartner
20 Group. See Tr at 662:1-663:11 (Maxwell). After examining
21 vendors' functionality, experience in retail, price and
22 size/stability, NMG narrowed its choices to Oracle and
23 PeopleSoft. Tr at 665:6-20 (Maxwell). NMG did not consider SAP
24 because of SAP's lack of strong presence in the retail vertical
25 and Maxwell's opinion that SAP is "very expensive to implement."
26 Tr at 669:11-16 (Maxwell). Had the cost of Oracle or PeopleSoft
27 FMS software been 10 to 20 percent higher, NMG would not have
28 considered SAP, any other FMS vendor, legacy software or

1 internally developed software. Tr at 669:17-670:15 (Maxwell).
2 Based on price, a high level comparison and detailed GAP
3 analysis, NMG eventually selected Oracle to provide it with FMS
4 software. See Tr at 671:8-673:2 (Maxwell).

5 NMG also began licensing HRM software from Oracle in
6 2003, though it has not yet begun to implement that software.
7 See Tr at 674:9-11, 676:14-18 (Maxwell). NMG went through a
8 similar process in evaluating HRM software as it did in
9 evaluating FMS software. Tr at 684:25-685:20 (Maxwell). As with
10 the FMS software, NMG concluded that Oracle and PeopleSoft were
11 its only viable alternatives. See Tr at 686:13-16 (Maxwell).
12 NMG did not believe that SAP suited its needs as a retailer. See
13 Tr at 686:11-18 (Maxwell). Had the cost of the Oracle or
14 PeopleSoft HRM software been 10 to 20 percent higher, NMG would
15 not have considered other HRM vendors, legacy software,
16 internally developed software or outsourcing. Tr at 686:19-
17 687:13 (Maxwell). NMG eventually selected the Oracle HRM
18 software, but based on a 70 to 80 percent higher target price
19 than previously predicted, NMG has delayed implementation of the
20 Oracle HRM software to look for cost-reducing options. Tr at
21 676:19-677:13 (Maxwell). But Maxwell testified that, even with
22 the 80 percent price increase, NMG has not abandoned the Oracle
23 HRM. Tr at 677:20-25 (Maxwell).

24 Laurette Bradley, Senior Vice President of Information
25 Technology at Verizon, testified about Verizon's current
26 procurement of new HRM software. Tr at 577 (Bradley). Verizon
27 is a telecommunications company with a "majority holding in four
28 of five different countries." Tr at 580:22-25 (Bradley).

1 Verizon has minor investments in over 30 countries worldwide with
2 an annual revenue of approximately \$66 billion. Id. Bradley
3 testified that 49 percent of Verizon's labor is unionized
4 worldwide, which places "significant demands upon [the] ERP
5 systems, particularly [the] HR and payroll systems" because each
6 union contract, from each jurisdiction, must be reflected and
7 managed regarding payroll, vacation, absences, and personal days.
8 Tr at 583:6-15 (Bradley). Prior to October 2003, Verizon had
9 used two different HRM programs, one from PeopleSoft and one from
10 SAP. Tr at 583:23 (Bradley). The PeopleSoft HRM was used to
11 manage the former BellAtlantic part of the company and SAP HRM
12 was used to manage the former GTE part of the company. Tr at
13 584:1-4 (Bradley). The same is true of Verizon's FMS. But in
14 October 2003, Verizon decided to consolidate the two systems as
15 far as HRM software. Tr at 584:11-12 (Bradley). Verizon chose
16 PeopleSoft HRM for the entire company and as of the date of the
17 trial, the new software was being implemented. Id. Bradley
18 testified that a merger between Oracle and PeopleSoft makes her
19 very concerned that Oracle will not be interested in upgrading or
20 further "developing" current PeopleSoft software. Tr at 592:5,
21 593:3-10 (Bradley). Bradley does not want to lose the constant
22 "care, feeding, repair, and evolution" that PeopleSoft now offers
23 to its customers. Tr at 592:17-18 (Bradley). When asked what
24 other vendors Verizon could turn to in obtaining FMS and HRM that
25 meet Verizon's complex and international needs, Bradley listed
26 only Oracle, PeopleSoft and SAP. Tr at 598:7-8 (Bradley). But
27 Bradley did testify that Verizon is "constantly" considering
28 outsourcing its entire HR management, but so far has determined

1 that the risks are just too high. Tr at 604:20-21 (Bradley).

2 Bradley admitted that Verizon already outsources its
3 401(k) stock plans and medical and dental benefits. Tr at
4 604:12-14 (Bradley). Finally, Bradley stated that if Oracle,
5 PeopleSoft or SAP increased prices by 10 percent, Verizon would
6 not turn to any other vendors for their FMS and HRM. Tr at
7 606:23-25, 607:1-3 (Bradley). Further, Verizon would not use its
8 off-shore information technology staff to develop an in-house FMS
9 or HRM system in response to a 10 percent increase. Tr at
10 607:12-15 (Bradley).

11 Finally, Scott Hatfield, Chief Information Officer of
12 Cox Communications discussed his company's ERP software needs.
13 Tr at 87:8-11 (Hatfield). Cox is the third largest cable
14 television operator in the United States, delivering video
15 service to about six and half million households. Tr at 89:11-14
16 (Hatfield). Cox has a presence in 30 states and about 21,000
17 employees. Cox has annual revenues of over \$6 billion. Tr at
18 89:22-25 (Hatfield). Hatfield testified that Cox uses PeopleSoft
19 HRM to handle payroll, recruitment, benefits programs and
20 training. Tr at 94:14-19 (Hatfield). In 1995, during the HRM
21 vendor procurement process, Cox only considered Oracle and SAP as
22 other potential vendors of HRM. Tr at 96:12 (Hatfield).
23 Hatfield testified that while Cox had considered outsourcing its
24 HRM altogether, it had decided against doing so because the
25 company needed to have a "tight integration" between its HRM and
26 CMS, which could not be outsourced. Tr at 97:17-19 (Hatfield).

27 Regarding FMS, in 2003, Cox decided to change from J D
28 Edwards to a new vendor. Cox hired Accenture to consult in this

1 process. Tr at 114:22-25 (Hatfield). Accenture gave Cox a list
2 of three vendors of FMS that could meet Cox's needs: Oracle,
3 PeopleSoft and SAP. Tr at 115:9-10 (Hatfield). Hatfield stated
4 that no other firms were "brought to his attention." Tr at
5 121:18 (Hatfield). Cox eliminated SAP because no one in the
6 company had any real experience with SAP and Hatfield did not
7 want to "be starting from scratch." Tr at 118:3 (Hatfield).
8 Hatfield stated that Cox wanted Oracle and PeopleSoft to know
9 they were the final two competing for Cox's FMS business and that
10 Cox asked the two vendors to give their best prices. Tr at
11 126:1-3 (Hatfield). Cox ultimately chose Oracle as its FMS
12 vendor based upon highest level of functionality ratings. Tr at
13 129:1-5 (Hatfield). Finally, Hatfield stated that if Oracle or
14 PeopleSoft's prices had been 10 percent higher, Cox would not
15 have turned to Lawson, Great Plains, best of breed solutions,
16 outsourcing or writing its own FMS software. Tr at 136:14-
17 138:23.

18 In the main, and contrary to the characterization of
19 plaintiffs' counsel before trial, the court found the testimony
20 of the customer witnesses largely unhelpful to plaintiffs' effort
21 to define a narrow market of high function FMS and HRM. Each of
22 these witnesses had an impressive background in the field of
23 information technology. They appeared knowledgeable and well
24 informed about their employers' ERP needs and resources. And the
25 court does not doubt the sincerity of these witnesses' beliefs in
26 the testimony that they gave. What the court questions is the
27 grounds upon which these witnesses offered their opinions on the
28 definition of the product market and competition within that

1 market.

2 The test of market definition turns on reasonable
3 substitutability. du Pont, 351 US 377. This requires the court
4 to determine whether or not products have "reasonable
5 interchangeability" based upon "price, use and qualities * * *."
6 Id at 404. What, instead, these witnesses testified to was,
7 largely, their preferences.

8 Customer preferences towards one product over another
9 do not negate interchangeability. See R R Donnelley & Sons Co,
10 120 FTC 36, 54n65 (1995) (citing Robert Pitofsky, New Definitions
11 of the Relevant Market and the Assault on Antitrust, 90 Colum L
12 Rev 1805, 1816 (1990) ("There will almost always be classes of
13 customers with strong preferences * * * but to reason from the
14 existence of such classes to a conclusion that each is entitled
15 to * * * a separate narrow market definition grossly overstates
16 the market power of the sellers.")). The preferences of these
17 customer witnesses for the functional features of PeopleSoft or
18 Oracle products was evident. But the issue is not what solutions
19 the customers would like or prefer for their data processing
20 needs; the issue is what they could do in the event of an
21 anticompetitive price increase by a post-merger Oracle. Although
22 these witnesses speculated on that subject, their speculation was
23 not backed up by serious analysis that they had themselves
24 performed or evidence they presented. There was little, if any,
25 testimony by these witnesses about what they would or could do or
26 not do to avoid a price increase from a post-merger Oracle. To
27 be sure, each testified, with a kind of rote, that they would
28 have no choice but to accept a ten percent price increase by a

1 merged Oracle/PeopleSoft. But none gave testimony about the cost
2 of alternatives to the hypothetical price increase a post-merger
3 Oracle would charge: e g, how much outsourcing would actually
4 cost, or how much it would cost to adapt other vendors' products
5 to the same functionality that the Oracle and PeopleSoft products
6 afford.

7 If backed by credible and convincing testimony of this
8 kind or testimony presented by economic experts, customer
9 testimony of the kind plaintiffs offered can put a human
10 perspective or face on the injury to competition that plaintiffs
11 allege. But unsubstantiated customer apprehensions do not
12 substitute for hard evidence.

13 While listening to the testimony of these customer
14 witnesses, it became clear to the court that these witnesses
15 represent a group of extremely sophisticated buyers and users of
16 information technology; they have decades of experience in
17 negotiating in this field. This made more evident the failure of
18 these witnesses to present cost/benefit analyses of the type that
19 surely they employ and would employ in assessing an ERP purchase.
20 The evidence at trial established that ERP customers have choices
21 outside the integrated suites of Oracle, PeopleSoft and SAP.
22 Indeed, Glover's testimony showed that -- as Oracle contends --
23 customers have some leverage by virtue of their existing
24 installed base "to do nothing" and thereby resist anticompetitive
25 price increases by ERP vendors. Although the court is not
26 convinced that this is a long-term option due to the ever
27 changing business and legal environment in which enterprises
28 operate, this option does afford ERP customers some limited

1 protection and leverage. At any rate, plaintiffs' customer
2 witnesses did not, in their testimony, provide the court with
3 data from actual or probable ERP purchases and installations to
4 demonstrate that the witnesses' employers would have had no
5 choice but to submit to a SSNIP imposed by a post-merger Oracle.

6 The court, therefore, finds that these witnesses did
7 not establish by a preponderance of the evidence that the
8 products offered by Oracle, PeopleSoft and SAP are in a distinct
9 line of commerce or product market from those offered by other
10 ERP vendors. The court finds that these witnesses did not
11 establish that it was more likely than not that customers of a
12 post-merger Oracle would have no choice but to submit to a small
13 but significant non-transitory price increase by the merged
14 entity. These findings do not rest alone on the court's
15 skepticism about the testimony of plaintiffs' customer witnesses.

16 Oracle, too, presented customer witnesses, although a
17 much smaller number of such witnesses. Brian Mearns, Director of
18 Personnel Service Delivery for Bank Of America (BA), testified
19 about BA and Fleet Boston's (Fleet) needs and decisions regarding
20 HRM and FMS software. Tr at 3276:2-21 (Mearns). In April 2004,
21 BA acquired Fleet. Tr at 3276:10 (Mearns). Mearns had held the
22 title of Director of HR Service Delivery at Fleet prior to the
23 acquisition. Mearns stated that Fleet had personnel of over
24 50,000 worldwide, with investment and mortgage offices in 32
25 states and throughout South America, Europe and Asia. Tr at
26 3280:14-3281:11 (Mearns). Mearns testified that Fleet had used
27 PeopleSoft HRM software since 1996. Tr at 3286:18-20 (Mearns).
28 In 2002, Fleet sought to upgrade its PeopleSoft HRM software to

1 encompass increased functionality. But the \$12 million price tag
2 was too much for Fleet's appropriation committee and Mearns was
3 told that upgrading PeopleSoft was not an option. Tr at 3289-
4 3290:11. Based upon this turn of events, Mearns stated that
5 Fleet instead turned to outsourcing to meet its HRM needs. Tr at
6 3290:24-25 (Mearns). The search to find an outsourcing firm that
7 could meet all of Fleet's needs led to five candidates: Mellon,
8 Hewitt, Exult, Accenture and Fidelity. Tr at 3293:1-2 (Mearns).
9 Fidelity "best met [the] business objectives and selection
10 criteria" that Fleet required. Tr at 3295:11-12 (Mearns). After
11 implementation of the new outsourcing solution, Mearns stated
12 that Fidelity's systems were "very configurable to meet [Fleet's]
13 requirements." Tr at 3297:12-14 (Mearns). After BA acquired
14 Fleet, Mearns gave a presentation to BA executives about Fleet's
15 experience with outsourcing and the capability of Fidelity. Tr
16 at 3300:14-17 (Mearns). Based upon this presentation, BA decided
17 to outsource all of its HRM functions to Fidelity. Tr at
18 3300:20-22 (Mearns).

19 Charles Peters, Senior Executive Vice President for
20 Emerson Electric Company (Emerson), was also called by Oracle to
21 testify about other viable substitutes to high function ERP.
22 Emerson is a global manufacturing company operating in six
23 industries including climate technologies (air conditioning and
24 heating components), motor and appliance components and
25 components for large industrial equipment. Tr at 1190-1191:15
26 (Peters). Emerson's annual revenue exceeds \$15 billion and its
27 workforce includes about 110,000 employees in over 50 countries.
28 Tr at 1191:18-25 (Peters). Within these six industries, Emerson

1 has over 40 divisions. Tr at 1193:11 (Peters). Some of these
2 divisions, standing alone, have global operations and revenues in
3 the billions of dollars. Tr at 1193:19-20 (Peters). Many of
4 these divisions operate their own HRM and FMS software. Tr at
5 1198:7-8 (Peters).

6 One aspect of Peters' job is to provide "options" to
7 each division regarding their choices for handling FMS and HRM
8 needs. Tr at 1197:6-18 (Peters). Peters stated these "options"
9 include ERP vendors, outsourcing, best of breed solutions, in-
10 house solutions and extending incumbent systems. Tr at 1198:7-19
11 (Peters). Peters testified that one of his divisions will not
12 implement Oracle ERP because their in-house software fully meets
13 its needs. Tr at 1211:1-18 (Peters). Further, Peters discussed
14 the increasing role that outsourcing to Asia or the Philippines
15 plays in the HR area of many divisions. Tr at 1214:7-16
16 (Peters). Finally, Peters stated that he did not believe that
17 Emerson divisions would have to pay more for Oracle ERP if the
18 proposed merger is consummated. Tr at 1235:11-14 (Peters).

19 In so testifying, Peters cited to a recent negotiation
20 he conducted with Oracle concerning ERP for one division. During
21 the negotiations, Peters stated, PeopleSoft was never a
22 contender. Tr at 1235:16 (Peters). The possibility of using
23 PeopleSoft was not leverage that Peters could use to advantage in
24 seeking to obtain a lower price from Oracle. Emerson still
25 received a competitive price from Oracle. Tr at 1235:18-24
26 (Peters). Accordingly, Peters stated that he does not believe
27 that the presence or absence of PeopleSoft is a factor that
28 constrains Oracle pricing. Id.

1 To be sure, the testimony of the Oracle witnesses, like
2 that of the plaintiffs' customer witnesses, entailed some
3 speculation about the presence or absence of PeopleSoft in the
4 market. But the Oracle witnesses testified about concrete and
5 specific actions that they had taken and been able to complete in
6 order to meet their firms' information processing needs, apart
7 from relying on the three ERP vendors that plaintiffs contend are
8 a market unto themselves. Hence, the court finds on this basis,
9 as well as an assessment of the witnesses' credibility, that the
10 testimony of the Oracle customer witnesses was more believable
11 than that of the plaintiffs' witnesses, despite the greater
12 number of the latter.

13
14 *Plaintiffs' Expert: Iansiti*

15 In addition to the customer witnesses, plaintiffs
16 presented the expert opinion testimony of Marco Iansiti, a
17 professor of business administration at the Harvard Business
18 School. Iansiti's expertise lies in operations management and
19 information technology. Iansiti also has experience as a
20 consultant for companies in the "software space." Tr at 2020:24
21 (Iansiti). Iansiti thus brought an academic perspective that
22 basically echoed the testimony of the customer witnesses. The
23 court is satisfied that Iansiti is well qualified to opine on
24 features of ERP products.

25 Iansiti was asked to identify the vendors whose ERP
26 products would meet the needs of a "large and complex
27 enterprise." Tr at 2024:4 (Iansiti). Iansiti examined the
28 product documents and analysts reports of 148 ERP vendors. Tr at

1 2025:10 (Iansiti). Iansiti testified that only the products of
2 Oracle, PeopleSoft and SAP possess the functionality adequate to
3 meet the needs of such an enterprise. With regard to Lawson,
4 Iansiti testified that its HRM product can handle only three
5 levels of an organization and its FMS product five levels and
6 thus is wholly inadequate for a large and complex enterprise. Tr
7 at 2047:3-5 (Iansiti). By contrast the PeopleSoft and Oracle
8 products can capture "unlimited levels of organization." Tr at
9 2047:17 (Iansiti).

10 Iansiti testified that Microsoft Business Solutions
11 (MBS) provides four ERP products: Navison, Axapta, Great Plains
12 and Solomon. Tr at 2054:7-8 (Iansiti). But MBS sells
13 exclusively through resellers and thus lacks the kind of direct
14 relationship necessary to furnish the level and specific services
15 required by large and complex enterprises. Tr at 2054:17-2055:11
16 (Iansiti). Microsoft will not, in Iansiti's view, have a single
17 product to "rationalize" its present four ERP products until
18 2009. Tr at 2058:25-2061:10 (Iansiti). Iansiti expressed doubts
19 that Microsoft will be able to develop products competitive with
20 those of PeopleSoft, Oracle and SAP because Microsoft's business
21 model is radically different from that of these three companies.
22 Tr at 2061:11-2063:15 (Iansiti). Iansiti also saw no
23 developments in internet technology or the integration layer that
24 would likely replace the functionalities of the ERP offerings of
25 PeopleSoft, Oracle and SAP. Tr at 2077:12-2080:11 (Iansiti).

26 The court finds that Iansiti's testimony fails to
27 establish a product market. Iansiti did not claim to have
28 performed an economic study of the ERP industry. Tr at 2082:5-20

1 (Iansiti). He conceded that there is not a "clear line or
2 demarcation" to distinguish enterprises that have high functional
3 needs from "lower function or mid-market needs." Tr at 2088:7-
4 2090:21 (Iansiti). Furthermore, Iansiti conceded that a number
5 of companies that would appear to meet the criteria of large and
6 complex enterprises have satisfied their ERP requirements with
7 the products of vendors other than PeopleSoft, Oracle and SAP and
8 have satisfied their needs from outsourcing or from their legacy
9 systems. See Tr at 2091:5-2095:3, 2100:1-2113:15 (Iansiti).
10 Because of his lack of economic analysis and his inability to
11 identify articulable product market boundaries (a key issue in a
12 horizontal merger case), the court finds that Iansiti failed to
13 establish a clearly defined product market along the lines
14 alleged by plaintiffs.

15 16 *Systems Integrators*

17 Plaintiffs presented the testimony of two systems
18 integrator witnesses in an effort to prove the existence of a
19 separate high function ERP market. One of these witnesses, Perry
20 Keating of BearingPoint, however, rebutted as much as supported
21 plaintiffs' positions regarding market participants and
22 likelihood of entry into the market.

23 Keating is the Senior Vice President of BearingPoint,
24 one of the largest consulting companies in the world. Tr at
25 857:12-15 (Keating). BearingPoint is involved in "management
26 consulting" which includes the "implementation of financial [and]
27 human resource * * * solutions." Tr at 858:4-7 (Keating). At
28 the outset of his testimony, Keating made clear that BearingPoint

1 has taken no position either for or against the proposed merger.
2 Tr at 858:11-18 (Keating). Keating stated that BearingPoint
3 "wishes both [Oracle and PeopleSoft] well." Id.

4 Keating started off by supporting plaintiffs' product
5 market definition, stating that BearingPoint's "large clients,
6 whether it be commercial or public service * * * predominant[ly]
7 * * * choose Oracle, PeopleSoft and SAP" software. Tr at 867:10-
8 14 (Keating). Keating called these large customers "Tier 1"
9 customers, describing their needs with regard to multiple
10 currencies, languages and legal systems. Keating stated that
11 "Oracle, PeopleSoft and SAP are the three clear, you know,
12 players in the marketplace." Tr at 870:9-10 (Keating).

13 Further, Keating testified that no other vendor could
14 deliver the degree of functionality that these three vendors
15 deliver. Tr at 871:17-20 (Keating). In support of these
16 contentions, plaintiffs introduced a questionnaire that
17 BearingPoint had completed for the European Commission's
18 investigation of the merger at bar. Ex P203 at 1. Keating was
19 personally involved in preparing the responses to this
20 questionnaire. In one question, the EC asked BearingPoint:
21 "[Is] there a specific market for supplying EAS * * * to large
22 companies, * * * in which only a few vendors are active?" Id at
23 11. BearingPoint responded: "Yes, there is such a market. The
24 vendors are SAP, Oracle and PeopleSoft * * *." Moreover,
25 BearingPoint's responses also stated that it believed innovation
26 would be slowed in this market as a result of the proposed merger
27 between Oracle and PeopleSoft. Id at 16.

28 Once the topic turned to the likelihood of entry into

1 this marketplace by vendors other than SAP, Oracle or PeopleSoft,
2 Keating's testimony began to undermine BearingPoint's response to
3 the EC. Plaintiffs directed the court's attention to a portion
4 of the EC questionnaire pertaining to ease of entry. When
5 BearingPoint was asked to "indicate at least three companies that
6 are potentially able to enter this [EAS for large companies]
7 market," BearingPoint had listed Microsoft, Siebel and IBM. Id
8 at 14. Moreover, the response stated that the only barrier to
9 entry by these three vendors is "self choice." Id. But when
10 asked at trial by plaintiffs if Keating was surprised by
11 Microsoft's approach to acquire SAP, Keating responded: "No, * *
12 * Microsoft's not a company that plays for second." Tr at
13 926:22-24 (Keating).

14 On cross-examination, Oracle delved deeper. When asked
15 if "there was any question in [his] mind that Microsoft has the
16 ability to develop a scalable product," Keating replied "no." Tr
17 at 940:13-15 (Keating). The following testimony presents a good
18 summary of Keating's contribution regarding the potential entry
19 of Microsoft into the high function market:

20 Question (by Oracle Counsel): They're
21 [Microsoft] coming aren't they, to the large
market space?

22 Answer (Keating): Monday they were almost
23 there [referring to the SAP acquisition
revelation].

24 Question: Indeed they were.

25 Answer: I had a conference call with my SAP
26 practice [saying], "you guys might want to get
27 new letterheads." I don't mean to be flip,
but it was pretty clear they're coming.

28 Tr at 942:14-19 (Keating).

1 Furthermore, Keating's testimony makes it appear that
2 BearingPoint is rolling out the red carpet for Microsoft's
3 arrival. At trial, an "alliance" between Microsoft and
4 BearingPoint came to light under which BearingPoint has agreed to
5 become Microsoft's "go to partner" in the high function ERP
6 software market for customers that have less than \$2 billion in
7 annual revenues. Ex D5051 at 2.

8 In the main, the court found Keating's testimony to be
9 credible. Most particularly, Keating's testimony of the alliance
10 between his company and Microsoft substantiates Oracle's
11 contention that Microsoft is a competitor for much ERP business
12 and able to extend its reach into an arena in which plaintiffs
13 contend that only Oracle, PeopleSoft and SAP now compete.
14 Keating's testimony gives evidence that Microsoft's entry into
15 competition may be achieved by a business model different from
16 that followed by Oracle, PeopleSoft or SAP. Microsoft's ERP
17 products through this collaboration with BearingPoint can be
18 customized, configured and adapted to be competitive with the
19 offerings of the three companies that plaintiffs contend make up
20 the market, at least up to a level that is well within the large,
21 complex level of customer demand that plaintiffs contend requires
22 high function ERP.

23 Nancy Ellen Thomas, the Global and Americas Financial
24 Management Solutions Leader for IBM, also called by plaintiffs,
25 testified about IBM's role as a consultant to "large, global
26 complex clients" procuring FMS software. Unlike BearingPoint,
27 IBM has publicly stated its opposition to the hostile takeover of
28 PeopleSoft by Oracle. Ex D5240R at 13 (stating that a

1 "successful Oracle bid" would be a "negative for IBM * * * [with]
2 possible impact on strong PeopleSoft [and IBM] alliance revenue"
3 and also considering taking a "proactive stance against the
4 [Oracle/PeopleSoft] deal"). Thomas began by echoing many of the
5 same views that Keating expressed in regard to the ERP needs of
6 large complex customers, including multiple geographies,
7 currencies, languages and regulatory requirements. Tr at 474:9-
8 12 (Thomas). When asked, based upon her experience, which ERP
9 vendors could offer a product that could satisfy the requirements
10 of these customers across multiple countries, Thomas listed only
11 Oracle, PeopleSoft and SAP. Tr at 475:2 (Thomas). When asked
12 what vendors could support reporting requirements for multiple
13 ranges of legal entities, Thomas listed only Oracle, PeopleSoft
14 and SAP. Tr at 476:3 (Thomas). The same three vendors were
15 listed when Thomas was asked about supporting multiple lines of
16 business. Tr at 476:15 (Thomas). Thomas downplayed the role
17 that Lawson plays within this "up market" sector, stating that
18 "the clients * * * we work with are typically not" focusing on
19 Lawson to the extent that they are focusing on Oracle, PeopleSoft
20 and SAP. Tr at 495:10-15 (Thomas).

21 Plaintiffs also appeared to use Thomas to bolster their
22 contention on "localization" between Oracle and PeopleSoft by
23 asking Thomas about the banking industry and which firms compete
24 for that business. When asked which vendors she would expect to
25 see in the final scoring and recommendation phase of a banking
26 customer's selection process, Thomas stated: "primarily Oracle
27 and PeopleSoft." Tr at 498:21-25 (Thomas).

28 When Oracle's counsel questioned Thomas about the

1 possible bias of IBM, Tr at 499-503 (Thomas), Thomas admitted
2 that IBM has the "largest PeopleSoft practice of any consulting
3 firm in the world" and that PeopleSoft has "publicly described
4 IBM as PeopleSoft's strongest partner." Tr at 499 (Thomas).
5 Further, IBM has over 150 employees dedicated to consulting and
6 implementing PeopleSoft products, all of whom could lose their
7 jobs if PeopleSoft was merged with Oracle, a company for which
8 IBM has only 75 dedicated consultants. Tr at 500:20-502:10
9 (Thomas).

10 Turning to Lawson, when asked about IBM's large and
11 complex implementation of Lawson HRM for the State of Arizona,
12 which has over 60,000 employees, Thomas stated that she didn't
13 have the "Lawson expertise" to talk about that transaction. Tr
14 at 519:12-13. Further, Thomas "was not aware" of IBM's
15 implementation of Lawson software at Montgomery County Schools in
16 Maryland, an entity with over 140,000 students. Nor was she
17 "aware" of IBM's implementation of Lawson for the State of
18 Michigan or IBM's implementation of Lawson for a large school
19 district in Tampa. Tr at 520:7-19 (Thomas).

20 The court first notes a possible IBM bias due to IBM's
21 potential loss of PeopleSoft implementation business, a
22 significant source of IBM revenue. Furthermore, the court cannot
23 overlook Thomas' lack of knowledge about any potential high
24 function implementation of Lawson software. This makes the court
25 reluctant to afford much, if any, weight to her testimony.
26 Thomas seemed not to be able to identify factors that would keep
27 Lawson from competing in the high function sector. Her testimony
28 failed to substantiate plaintiffs' claim of separate FMS and HRM

1 high function markets.

2

3 *Industry Witnesses: PeopleSoft and Microsoft*

4 Next, plaintiffs presented the testimony of several
5 industry witnesses in an effort to support the proposed high
6 function ERP market.

7 Richard Bergquist, Chief Technology Officer, Senior
8 Vice President and PeopleSoft "Fellow," explained to the court
9 how PeopleSoft defines a high function customer versus a mid-
10 market customer. Tr at 255:18-19, 275-276:21 (Bergquist). Not
11 surprisingly, Bergquist's definition of high function customers
12 and high function software echoed plaintiffs' definitions (or, at
13 least, some of them). First, Bergquist stated that a customer
14 cannot be labeled as high function simply based upon its size or
15 revenue. Rather, one "ha[s] to look all the different
16 dimensions" in order properly to distinguish between these two
17 types of customers. Tr at 276:3 (Bergquist). The "different
18 dimensions" that Bergquist referred to in guiding an explorer
19 through the task of deciding what label to apply to a customer
20 are: functionality, flexibility, scalability, reliability and
21 technology. Tr at 280-282, 283:18, 289:4-25 (Bergquist). Only
22 after knowing the customer's needs regarding all of these
23 dimensions, which one must learn "through a series of
24 conversations with the customer," can one then place a customer
25 in the correct talismanic column of high function or mid-market.
26 Tr at 276:11-13 (Bergquist).

27 A high function customer requires software that is
28 highly functional, highly flexible, contains large scalability

1 and is reliable 24 hours per day, seven days a week. Tr at 283-
2 289 (Bergquist). Customers who do not need software with such
3 deep functionality, large scalability or high flexibility are
4 mid-market customers who buy mid-market software. Tr at 300:10-
5 13 (Bergquist). Bergquist succinctly stated that "customers that
6 don't have the needs of large and complex enterprises, we
7 [PeopleSoft] group into the mid-market." Tr at 275:1-2
8 (Bergquist). Bergquist clearly stated that a market exists for
9 the sale of high function software to high function customers,
10 and in this market PeopleSoft competes with only SAP and Oracle.
11 Tr at 279:17 (Bergquist). Berquist went on to explain that a
12 customer can be high function regardless of its international
13 locations or international currency needs. Tr at 292:20
14 (Bergquist). "Internationality" was not a dimension for
15 delineating high function from mid-market, rather international
16 needs simply create the need for more function and scalability.
17 Nonetheless, multiple currency, language and nationality
18 capabilities are not requirements for a high function customer,
19 as a customer can be located in the United States only and use
20 only English and still be a high function customer according to
21 Bergquist. Tr at 292:1-15 (Bergquist).

22 Questions soon turned to Lawson and its role in this
23 high function software market. Berquist stated that PeopleSoft
24 "does not believe" that Lawson sells any HRM or FMS software that
25 has similar functionality to the same software sold by
26 PeopleSoft. Tr at 299:21-25 (Bergquist). Rather, Lawson has FMS
27 and HRM that is "adequate for the basics of what an organization
28 would need." Tr at 300:4-5 (Bergquist). If the organization has

1 simple and repetitive tasks, then "the Lawson product does that
2 very well." Tr at 300:9-10, 304:1-4 (Bergquist). But if a
3 customer starts going beyond those basic tasks, then the customer
4 needs features and functions that Lawson cannot supply. Tr at
5 300:10-13 (Bergquist). Moreover, Lawson does not have to ability
6 to support Unicode, a common character set for all languages of
7 the world. Since Lawson cannot do that, it is "limite[d] to the
8 US, Canada and UK." Tr at 301:19-25 (Bergquist).

9 The next topic was AMS and its role in the high
10 function market. Bergquist stated that AMS only has a "financial
11 product that is meant for sale in the public sector." Tr at
12 309:14-15 (Bergquist). Further, the software was developed only
13 for a minimum level of functionality and requires extensive
14 customization before it can be implemented. Tr at 309:12-17
15 (Bergquist). Further, AMS does not have an HRM product. Because
16 AMS does not rise to the level of functionality required to be
17 considered high function, AMS is not a high function vendor
18 selling a product that competes in the proposed market. Tr at
19 310:4-7 (Bergquist).

20 Next, Bergquist took aim at the best of breed
21 solutions, stating that a customer "can't assemble point
22 solutions to get the full picture." Tr at 311:12-14 (Bergquist).
23 These point solutions do not provide core functionality,
24 requiring a customer to purchase core functionality from a
25 different vendor, and then having "multiple solutions from point
26 solutions," creating extensive integration costs. Tr at 311:12-
27 25 (Bergquist). Accordingly, best of breed solutions are not
28 viable option for high function customers and therefore are not

1 substitutes for high function software.

2 Next, Bergquist set out to prove that outsourcing is
3 also not a viable option for high function customers stating that
4 "we see it [outsourcing] as less capable software than that
5 provided by PeopleSoft, SAP and Oracle." Tr at 314:11-12
6 (Bergquist).

7 Finally, Bergquist was questioned about potential
8 localized competition between Oracle and PeopleSoft, thus
9 establishing the likelihood of unilateral anticompetitive
10 effects. Bergquist testified that there are some instances where
11 Oracle is PeopleSoft's closest competitor over SAP. Tr at 319:6-
12 8 (Bergquist). This type of situation arises in the service
13 industries according to Bergquist because Oracle and PeopleSoft
14 both "grew up in the same neighborhood," the services industry
15 neighborhood, thus making Oracle and PeopleSoft strong
16 competitors in this vertical, especially among those who have a
17 "buy-American tendency." Tr at 319:11-16 (Bergquist). Moreover,
18 Bergquist testified that SAP has suffered from the "stereotype of
19 German engineering" that leads many to view SAP software as less
20 flexible and requiring more customization. Tr at 320:11-15
21 (Bergquist). But Oracle and PeopleSoft are both seen as very
22 flexible, again making them more likely competitors over SAP. Tr
23 at 320:16-18 (Bergquist).

24 On cross, Bergquist was first asked about the
25 distinction between mid-market and high function customers and
26 software. When asked if there were any PeopleSoft documents
27 which describe this distinction between high function and mid-
28 market customers or software, Bergquist said that he was not

1 aware of any such documents. Tr at 347:22-25 (Bergquist).
2 Further, Bergquist admitted that there are no "clear-cut answers"
3 or "firm dividing lines" that distinguish a mid-market customer
4 from a high function customer. Tr at 353:15-22 (Bergquist).

5 Next Bergquist was asked about his dismissal of Lawson
6 from the high function market. When asked if PeopleSoft had lost
7 any business from large and complex customers to Lawson,
8 Bergquist replied: "I can't think of any that we have * * *
9 lost." Tr at 364:5 (Bergquist). Oracle then showed Bergquist a
10 document, created by PeopleSoft, tabulating enterprise deals
11 which PeopleSoft had competed for, and the name of the competitor
12 on the deal. Ex D6236A. The data read that Lawson was an
13 enterprise competitor 27 times, with SAP competing 33 times and
14 Oracle 38 times. Id at PS-C077332. But Bergquist stated: "I
15 don't know anything about this document * * * where it came from
16 or how it was." Tr at 375:3-9 (Bergquist).

17 Bergquist was then asked about specific instances of
18 competition with Lawson. When asked if he knew anything about
19 PeopleSoft's loss to Lawson on the Dean Foods account, Bergquist
20 stated "no." Tr at 377:16-18 (Bergquist). When asked about
21 PeopleSoft's loss to Lawson on the Qwest [transcript misspelling]
22 Communications account, again Bergquist stated that he knew
23 nothing about that lost business. Tr at 377:19-21 (Bergquist).
24 Moreover, it appears Bergquist was not even aware of instances in
25 which PeopleSoft won business when in competition with Lawson.
26 When asked if he knew anything about PeopleSoft's wins over
27 Lawson on the Maricopa County account, Bergquist replied "no."
28 Tr at 377:22-24 (Bergquist). Bergquist provided the same answer

1 when asked about PeopleSoft's win against Lawson on the San Diego
2 Unified School District account. Tr at 378:2 (Bergquist).
3 Bergquist, like Ms Thomas before him, seemed to have been struck
4 with a singular memory lapse. It appears both witness, while
5 able to testify thoroughly about other vendors, drew a complete
6 blank when asked about potential high function implementations of
7 Lawson. The court began to wonder if this phenomenon, perhaps
8 called "Lawson Amnesia," would strike any more of plaintiffs'
9 witnesses.

10 The final part of Bergquist's cross came when defense
11 counsel began inquiring about the alleged localization of
12 competition between PeopleSoft and Oracle in the services
13 industry vertical:

14 Question (Oracle counsel): Can you identify
15 for me any particular verticals in which you
16 believe that SAP is not competitive with
Oracle and PeopleSoft?

17 Answer (Bergquist): SAP may compete in almost
18 all the verticals that are there. * * *
There is relative strength for PeopleSoft and
Oracle in the services industries.

19 Question: I understand that you've said that
20 sir, but my question is different. In any of
21 those services industries, is it your
testimony that SAP is not competitive with
Oracle and PeopleSoft?

22 Answer: No.

23 Tr at 388:1-11 (Bergquist) (emphasis added).

24 Notwithstanding any bias, Bergquist's testimony served
25 to hurt plaintiffs' claims rather than bolster them. First,
26 Bergquist conceded that no "clear-cut" dividing line exists in
27 labeling a customer as "high function" rather than "mid-market."
28 Finding an articulable division between so-called high function

1 and mid-market ERP is necessary to plaintiffs' burden of
2 establishing a product market. Second, Bergquist conceded that
3 there is not one single services industry vertical in which SAP
4 is not "competitive" with Oracle and PeopleSoft. The court must
5 demarcate such a "node" or area of localized competition between
6 Oracle and PeopleSoft as a prerequisite to finding any likelihood
7 of unilateral anticompetitive effects. Bergquist's testimony was
8 also full of self-serving statements regarding the low
9 functionality of AMS and Lawson, testimony that was shown to be
10 wholly unreliable on cross-examination when Bergquist was
11 rendered unable to remember key information regarding Lawson.

12 Philip Wilmington, Executive Vice President of
13 PeopleSoft Americas, further testified in support of the
14 plaintiffs' proposed product market. Tr at 1760:4 (Wilmington).
15 Wilmington began by expounding how PeopleSoft characterizes the
16 mid-market versus the "up-market" or high function market. Tr at
17 1765-1766 (Wilmington). Wilmington stated that the "up-market"
18 is defined as customers that have revenues of \$1 billion or above
19 and have "complex requirements." Tr at 1765:16-22 (Wilmington).
20 Prior to the PeopleSoft acquisition of J D Edwards, the
21 demarcation line between mid-market and up-market had been \$500
22 million. Tr at 1847:7-17 (Wilmington). Predictably, Wilmington
23 stated that PeopleSoft only competes in the up-market with Oracle
24 and SAP. Tr at 1773:14 (Wilmington). Oracle and SAP are the
25 "ones [PeopleSoft] runs into all the time." Tr at 1773:19-20
26 (Wilmington). Only these vendors have "the functionality" and
27 the "references or customer successes" which allow them to be a
28 competitive presence in the up-market. Tr at 1773:21-1774:2

1 (Wilmington). Wilmington further testified that when these three
2 competitors compete, it gets "very aggressive." Tr at 1797:20
3 (Wilmington). Moreover, Wilmington stated that oftentimes
4 PeopleSoft knew the identity of its competitors on any given
5 account, with that information driving higher discounts.
6 Wilmington cited the example of the Oracle and PeopleSoft
7 competition for Target, in which Target would communicate the
8 other competitor's discount offerings to PeopleSoft. Tr at
9 1797:20-25 (Wilmington).

10 Wilmington testified that he did not believe that the
11 "do nothing" option was a threat to PeopleSoft or other up-market
12 vendors. Wilmington stated: "Almost never do I see a company
13 that is invested in a [procurement] evaluation * * * just do
14 nothing." Tr at 1792:2-3 (Wilmington). Wilmington stated that
15 incumbent systems may simply "delay the decision" to buy ERP, but
16 it is not a long-term solution for any customer. Tr at 1792:21-
17 22 (Wilmington).

18 Testimony turned to Lawson and its classification as a
19 mid-market or up-market vendor. "Very, very infrequently do I
20 see Lawson," stated Wilmington in describing the competition for
21 high function customers. Tr at 1803:9 (Wilmington). "They are
22 not a viable competitor for the up-market." 1803:10-12
23 (Wilmington). Wilmington stated that Lawson competes, and
24 competes well, in the mid-market sector, and perhaps it can be
25 seen sporadically in the up-market healthcare and retail
26 industry. Tr at 1805:13-23 (Wilmington). When Wilmington was
27 asked about the competition between PeopleSoft and Lawson on the
28 Amerigroup account, Wilmington stated that Amerigroup "was very

1 much a mid-market opportunity." Tr at 1810:5-6 (Wilmington).
2 Regarding Microsoft, Wilmington stated that PeopleSoft does not
3 compete with Microsoft in the up-market and only sees it from
4 "time to time" in the mid-market. Tr at 1811:14 (Wilmington).

5 Next, Wilmington was asked about outsourcing and its
6 role in the up-market. Tr at 1812:13-14 (Wilmington).
7 Wilmington stated that he does not see outsourcing as a threat to
8 PeopleSoft; rather, he sees outsourcing as an opportunity. Tr at
9 1812-17-18 (Wilmington). Wilmington stated that outsourcers have
10 to buy software to manage the client's HR needs, and PeopleSoft
11 tries to be the vendor to supply such software. Tr at 1812:17-18
12 (Wilmington). Accordingly, outsourcing is a business
13 opportunity, not a threat. When asked about outsourcers who use
14 their own software to manage HR, Wilmington stated that he
15 doesn't feel threatened because that software lacks the "robust
16 functionality that is going to be necessary to successfully meet
17 the needs of [the] up-market." Tr at 1813:12-14 (Wilmington).

18 Finally, Wilmington testified regarding localized
19 competition between Oracle and PeopleSoft. Wilmington stated
20 that SAP software was "developed for a more rigid business model"
21 and therefore lacks flexibility. Tr at 1815:5-6 (Wilmington).
22 Oracle and PeopleSoft possess such flexibility and therefore are
23 better solutions for up-market customers. Tr at 1815:11-15
24 (Wilmington). Moreover, Wilmington testified that he believes
25 SAP is more expensive, ranging anywhere from "20 to 50 percent,
26 in terms of higher cost of ownership across the board." Tr at
27 1817:5-7 (Wilmington). In fact, Wilmington cited one example,
28 the PNC Bank account, in which Oracle, SAP and PeopleSoft were

1 all three competing. But SAP was eliminated because its software
2 did not possess the flexibility that PNC required. Accordingly,
3 PNC narrowed the competition to only Oracle and PeopleSoft.
4 Finally, Wilmington stated that the PNC scenario was exemplary of
5 the situation in the entire United States banking industry. Tr
6 at 1817-1818 (Wilmington).

7 On cross, Wilmington was questioned about PeopleSoft's
8 up-market versus mid-market demarcation. It was during this
9 questioning that the court learned that the day prior to Oracle's
10 tender offer for PeopleSoft, the demarcation line was \$500
11 million in revenues and/or 2,000 employees but, soon thereafter,
12 the of demarcation line increased to \$1 billion in revenue only.
13 Tr at 1848:10-16 (Wilmington). Wilmington stated that it was the
14 J D Edwards acquisition, and not the tender offer, which caused
15 the increase. But Oracle's counsel then asked: "If you drew the
16 line at 500 million and/or 2,000 employees for [the] mid-market
17 [roof amount], then the up-market would include players other
18 than Oracle, PeopleSoft and SAP, isn't that right?" Tr at
19 1849:5-7 (Wilmington). Wilmington had trouble giving a direct
20 answer to this question, choosing instead to argue that other
21 factors were necessary, other than revenue, before being able to
22 classify a customer in the mid-market or up-market. Tr at
23 1849:8-15 (Wilmington). But Oracle's counsel quickly brought
24 Wilmington's attention to a 2003 PeopleSoft Pricing Policy
25 Document which stated that "[a] mid-market customer is defined as
26 a customer with revenues of up to \$500 million and/or 2,000
27 employees." Ex P4965 at 6-7. There is no mention of other
28 factors such as scalability or functionality needs. Further, the

1 document stated that "[t]he revenue-based metric is meant to be
2 the single determinant of the Mid-Market Line * * *." Ex P4965
3 at 6-7 (emphasis added).

4 Regarding Lawson, Wilmington stood by his deposition
5 statement that not once in 25 years had Wilmington seen
6 PeopleSoft compete with Lawson for a "enterprise customer." Tr
7 at 1856:21-25 (Wilmington). Wilmington stated that he based this
8 statement upon the new \$1 billion demarcation line between mid-
9 market and up-market (enterprise) customers. Tr at 1857:5
10 (Wilmington). But Wilmington conceded that if the \$500
11 million/2,000 employee line were used, then PeopleSoft had
12 competed with Lawson for enterprise customers. Tr at 1858:7-8
13 (Wilmington). Oracle then introduced a document created by
14 PeopleSoft in July 2003, after the Oracle offer and the J D
15 Edwards acquisition, which showed the number of times PeopleSoft
16 had competed with certain vendors on enterprise deals. Tr at
17 1858:10-17 (Wilmington); Ex D6236. Since the document was
18 created after the J D Edwards acquisition, it would appear that
19 the mid-market demarcation line used would be (or should have
20 been) the \$1 billion line. The document lists PeopleSoft as
21 having competed with Lawson 27 times for an enterprise customer.
22 Tr at 1859:7-8 (Wilmington). When asked if Wilmington still
23 stood by his testimony, Wilmington stated that he still believed
24 that PeopleSoft "doesn't see Lawson in enterprise deals." Tr at
25 1859:13-14, 1861:5-7 (Wilmington). Wilmington elected to "stand
26 by his testimony." Tr at 1861:8 (Wilmington). Lawson Amnesia
27 appeared to have claimed yet a third victim.

28 When asked about PeopleSoft's competition with Lawson

1 for HCA Columbia, Wilmington could not speak to that issue
2 because "he had not been involved in the competition." Tr at
3 1868:4 (Wilmington). When shown a PeopleSoft document that
4 listed Lawson as "the number one competitor in new market deals"
5 in the western geographic region of the United States, Wilmington
6 stated that he "did not know" if Lawson was really number one.
7 Tr at 1866:13-21 (Wilmington). When competing with Lawson for
8 the Stanford University Medical Center, PeopleSoft documents
9 written by Lynn Duffy, the sales team leader on the deal, stated
10 that "Lawson is the competition," but Wilmington stated that he
11 "was not sure" if Duffy was right about that point. Tr at
12 1870:5-6 (Wilmington). When asked about PeopleSoft's loss to
13 Lawson for the State of Michigan account, Wilmington stated that
14 he was "not certain" if PeopleSoft had even competed against
15 Lawson for that account. Tr at 1878:15-16 (Wilmington). When
16 asked about PeopleSoft's loss to Lawson for ManuLife's business,
17 Wilmington stated that he "did not remember losing to them" on
18 that account. Tr at 1896:14 (Wilmington). When asked about the
19 loss to Lawson for the Mayo Clinic account, Wilmington stated
20 that he "was not familiar with the details of that competition."
21 Tr at 1896:22-23 (Wilmington). Since Wilmington apparently was
22 not aware of what PeopleSoft's own documents reveal about Lawson
23 as a competitor and is "not certain" whether PeopleSoft competed
24 against Lawson for several large accounts, the court finds
25 Wilmington's testimony concerning Lawson's absence from the up-
26 market largely incredible.

27 Regarding outsourcing, Wilmington was shown the same
28 document created by PeopleSoft soon after the Oracle tender

1 offer, which showed that PeopleSoft competed against ADP, an
2 outsourcer, 15 times. Ex D6236. Wilmington stated that he "did
3 not know how this [sic] data was compiled and edited;" therefore,
4 he could not state whether these data meant that PeopleSoft faced
5 competition from ADP for up-market customers. Tr at 1860:5-15
6 (Wilmington).

7 Finally, Oracle cross-examined Wilmington about any
8 alleged localization between Oracle and PeopleSoft. Wilmington
9 was shown his video deposition in which he was asked:

10 Question (Oracle counsel): Is there any
11 vertical segment of the market in the United
12 States, the ERP market, where you do not
13 consider SAP to be a formidable competitor for
14 large enterprise customers?

13 Answer (Wilmington): For large enterprise
14 customers, no. I believe them to be a
15 formidable competitor across the industry.

15 Tr at 1957:10-21 (Wilmington) (emphasis added). When asked if he
16 had given those answers, Wilmington replied "yes." Tr at 1957:20
17 (Wilmington).

18 For the same reasons the court mentioned above in
19 discounting Berquist's testimony, the court cannot accord much
20 weight to Wilmington's testimony. First, Wilmington admitted that
21 there is not a single vertical industry in which Wilmington does
22 not believe SAP to be a "formidable competitor" undercutting
23 plaintiffs' unilateral effects claim. Further, in describing the
24 way in which PeopleSoft characterizes mid-market customers,
25 Wilmington was impeached by a document created by his own
26 company. Likewise, the same document impeached his testimony
27 about the absence of outsourcers from the up-market. This
28 impeachment, combined with Lawson Amnesia, leads the court to

1 find that Wilmington did not offer reliable evidence establishing
2 an articulable product market containing only Oracle, PeopleSoft
3 and SAP.

4 Douglas Burgum, Senior Vice President of Microsoft
5 Business Solutions (MBS), was another industry witness called by
6 plaintiffs in order to support their theory of the high function
7 product market and its three participants. Burgum began by
8 describing how he literally "bet the farm" on a small software
9 company called Great Plains in 1983. In 2001 Microsoft acquired
10 Great Plains. Tr at 2974:3-8 (Burgum). In 2002, Microsoft
11 acquired Navison Software, a Danish company. The entire group
12 was rebranded as "Microsoft Business Solutions" (MBS). Tr at
13 2973:8-9 (Burgum). MBS sells four business application products:
14 Navison, Great Plains, Solomon and Axapta. Tr at 2996:15-16
15 (Burgum). Burgum is responsible for the overall performance and
16 market strategies of MBS, as well as ongoing developments of new
17 products and enhancements to existing products. Tr at 2974:18-20
18 (Burgum). Burgum began by stating that MBS is focused on selling
19 its product to mid-market customers. Tr at 2978:5-8 (Burgum).

20 To Microsoft, mid-market customers are customers who
21 have employees ranging from 50 to 1000 employees and an average
22 IT spend between \$10,000 and \$2 million. Ex P2533R at 6.
23 Further showing that Microsoft is only focused on mid-market
24 customers, Burgum testified that MBS does not have a sales force.
25 Rather, MBS is sold indirectly through reselling partners,
26 companies whose sole purpose is to resell MBS products. Tr at
27 2986-2988 (Burgum). Moreover, neither partners nor MBS itself
28 offers implementation or consulting services for the products and

1 do not intend to do so in the future. Tr at 2995:3-18 (Burgum).
2 When asked if MBS intended to expand its products' ability to
3 serve the large enterprise sector, Burgum responded "no, * * *
4 that is not a segment we are targeting." Tr at 3001:20-3302:1
5 (Burgum). Moreover, MBS products do not have the functionality
6 to meet large customers' needs. Tr at 3005:22-25 (Burgum). MBS
7 products, Burgum stated, cannot handle the "multi-multi-multi
8 issues," such as multiple languages and currencies that large
9 organizations tend to need. Tr at 3011:23-25 (Burgum). When
10 asked what firms' software could meet those needs, Burgum
11 responded: Oracle, PeopleSoft and SAP. Tr at 3006:8-9 (Burgum).
12 Burgum stated that while Microsoft competes with these three from
13 time to time, that competition only occurs for mid-market
14 customers. Tr at 3008:3-6 (Burgum).

15 Burgum cited the lost North Dakota account as an
16 example of the limited functionality of the Great Plains product,
17 both pre- and post-acquisition with Microsoft, and its inability
18 to meet large functional needs. Tr at 3022:3-7 (Burgum). Burgum
19 was asked why Microsoft didn't "just spend a bunch of money" to
20 redevelop the code and the salesforce in order to compete for
21 larger accounts. Tr at 3024:3-10 (Burgum). Burgum stated that
22 undertaking would "be a formidable task" and would "take more
23 money than I would be willing to recommend that Microsoft spend."
24 Tr at 3024:12-18 (Burgum). Plaintiffs asked Burgum about the
25 Microsoft/SAP acquisition proposal. Burgum stated the "leading"
26 reason that Microsoft wanted to acquire SAP was not to enter the
27 high function market for ERP and thereby start competing with
28 Oracle or PeopleSoft. Rather the acquisition was to create "a

1 better value for the customers who would use Microsoft Office to
2 work with and make decisions around the data that would come out
3 of the SAP system." Tr at 3040:9-15 (Burgum). Microsoft simply
4 wanted to purchase SAP in order to help "front-end users" be
5 "better able to communicate with back-end data." Tr at 3039:25-
6 3040:2 (Burgum). See Ex P841R at 1. Apparently, the acquisition
7 was not motivated by any ill-will towards Oracle or any desire to
8 enter the market and begin undercutting Oracle. The discussions
9 between Microsoft and SAP were concluded in early spring 2004,
10 about the time this suit went to trial, with a decision not to
11 move forward with the acquisition. Tr at 3028:9-10 (Burgum).

12 When asked about Microsoft's alliance with
13 BearingPoint, Burgum testified that Microsoft had only the
14 humblest of intentions in entering into this alliance. Under
15 this agreement, Microsoft was to "provide funding for hiring,
16 recruiting and training of people who would get skilled up on
17 Axapta." Tr at 3055:15-17 (Burgum). In return, BearingPoint
18 agreed to recommend, install and maintain MBS software,
19 specifically Axapta, to BearingPoint consulting clients. Tr at
20 3055:15-17 (Burgum); Ex 3249R at 4, 15. MBS had no plan or
21 expectation for BearingPoint to recommend Axapta software to high
22 function customers. Tr at 3053:1-6 (Burgum). To the contrary,
23 this agreement was only entered into for BearingPoint to sell MBS
24 to mid-market customers. Tr at 3054:10-18 (Burgum).

25 Subsequent to trial, BearingPoint announced that the
26 new Microsoft Business Solutions Axapta was "a compelling ERP
27 solution" which "provides functionality across all key areas of
28 the business * * * including financial management, CRM [and] HR

1 management * * *." See BearingPoint homepage at
2 [http://www.bearingpoint.com/solutions/enterprise_solutions/
3 microsoft_bus_sol.html](http://www.bearingpoint.com/solutions/enterprise_solutions/microsoft_bus_sol.html). The BearingPoint webpage claims the
4 "key" functionalities of Microsoft Axapta include "multiple
5 companies, multiple languages, and multiple currencies." Id.
6 Although these statements do not appear in the trial record, they
7 are consistent with the substantial evidence in the record and
8 afford additional reason to discount Burgum's testimony that MBS
9 is not at least a potential entrant in what plaintiffs
10 characterize as the high function market.

11 The court accords little weight to Burgum's testimony
12 attempting to prove Microsoft's absence from the so-called high
13 function ERP product market. Burgum's Uriah Heep like humility
14 about Microsoft's intentions regarding the failed SAP alliance
15 and the successful BearingPoint alliance was unconvincing. It
16 strains credulity to believe that Microsoft would offer billions
17 of dollars to acquire SAP merely to make data processing easier
18 for customers who use both Microsoft Office and SAP ERP.
19 Further, this proposition is impeached by Microsoft's actions
20 with BearingPoint concurrently, or soon after, the SAP alliance
21 was discontinued. Finally, the court wholly discounts Burgum's
22 testimony that MBS software, especially Axapta, lacks the
23 functionality to be considered high function ERP. Burgum stated
24 that MBS products cannot provide the "multi, multi, multi"
25 functionality, but BearingPoint is selling Axapta on the basis
26 that it can handle "multiple languages, currencies and
27 businesses." Accordingly, the court discounts Burgum's testimony
28 portraying MBS solely as a mere humble mid-market vendor.

1 Finally, in attempting to show the high barriers to
2 entry into the high function market, plaintiffs called Richard
3 Allen, former Executive Vice President of Finance Administration
4 and CFO of J D Edwards. Tr at 747:20-25 (Allen). Allen
5 testified that J D Edwards, prior to being acquired by
6 PeopleSoft, had been a company "focused on mid-market customers"
7 that did not need "high levels of configurability," "deep
8 functionality" or high scalability. Tr at 746:20-21, 757:25-
9 758:20 (Allen). But Allen testified that in the early 1990s J D
10 Edwards attempted to reposition itself in order to sell to "up-
11 market customers." Tr at 770:22-771:10 (Allen). J D Edwards had
12 to "create a software architecture to allow [its] products to run
13 on multiple hardware platforms, with multiple databases and
14 multiple operating systems." Tr at 771:16-21 (Allen). But J D
15 Edwards ultimately abandoned this attempted repositioning in
16 2001. Tr at 777:6 (Allen). Allen stated that "[J D Edwards]
17 came to the conclusion that after about a decade involved in the
18 effort, hundred of millions of dollars of investment, we didn't
19 have the products, services, and ultimately the reputation
20 necessary to satisfy the requirements that up-market customers
21 have." Tr at 777:8-13 (Allen). Accordingly, plaintiffs argue
22 that no firm could enter the high function FMS and HRM markets
23 within the required two year threshold set by the Guidelines.
24 Pls Post Brief (Doc #366) at 44 (citing Guidelines § 3.3).

25
26 *Plaintiffs' Expert: Elzinga*

27 By far the most important of plaintiffs' witnesses was
28 Professor Kenneth Elzinga of the University of Virginia. Elzinga

1 is a well known and highly regarded economist. Tr 2142-2145
2 (Elzinga); Ex 4014A. The court finds Elzinga to be highly
3 qualified to offer testimony on market definition. Elzinga was
4 the only one of plaintiffs' witnesses who offered testimony from
5 which the court could attempt to calculate market shares and
6 apply the Philadelphia Nat Bank presumptions or perform the HHI
7 calculations of the Guidelines.

8 In reaching his proposed market definition, Elzinga
9 purported to follow the Guidelines approach. Tr. at 2163:18-19
10 (Elzinga). Elzinga concluded that the relevant market was
11 limited to high function FMS and HRM software. Elzinga testified
12 that a hypothetical monopolist could profitably impose a SSNIP in
13 high function FMS and HRM. Tr at 2149:16-22 (Elzinga). Elzinga
14 posited that if a merged Oracle/PeopleSoft decided to increase
15 the price of its high function FMS and HRM products, consumers
16 would not substitute (1) mid-market solutions (such as those
17 produced by ERP vendor Lawson), (2) best-of-breed solutions (such
18 as those produced by vendor Kronos), (3) incumbent or legacy
19 solutions or (4) the services of outsourcing firms (such as
20 Fidelity and ADP). Tr at 2178:10, 2179:8-14 (Elzinga).

21 Elzinga reached his conclusions by analyzing several
22 "strains" of evidence: (1) Oracle discount approval forms; (2)
23 reports from independent research firms; (3) information from
24 high function FMS and HRM customers and consulting firms; and (4)
25 internal documents from firms in the enterprise software sector.
26 Tr at 2168:9-11, 2180:4, 2184:10-12, 2188:23-25 (Elzinga). This
27 being established, Elzinga then presented his conclusions on
28 market shares. Tr at 2209-2220 (Elzinga).

1 *Discount approval forms.* Elzinga's first strain of
2 evidence, and the one on which he appeared to place the greatest
3 emphasis, was the analysis and tabulation of Oracle discount
4 approval forms (DAF). See Exs P1000-P1944.

5 Oracle salespersons have the discretion to offer a 20
6 to 25 percent discount off the list price of HRM or FMS. Tr at
7 2168:25-2169:2 (Elzinga). If a situation arises in which Oracle
8 is competing with another ERP vendor and this requires the Oracle
9 salesperson to offer a larger discount on the Oracle ERP
10 software, a DAF must be executed and approved by an Oracle
11 official. Tr at 2169:3-9 (Elzinga). In executing a DAF, the
12 salesperson lists the "justification" for pursuing an increased
13 discount. In the justification column of the DAF, "sometimes the
14 particular competitor or alternative [solution] that is
15 justifying * * * or provoking the discount that is being
16 requested" can be found. Tr at 2169:17-19 (Elzinga).

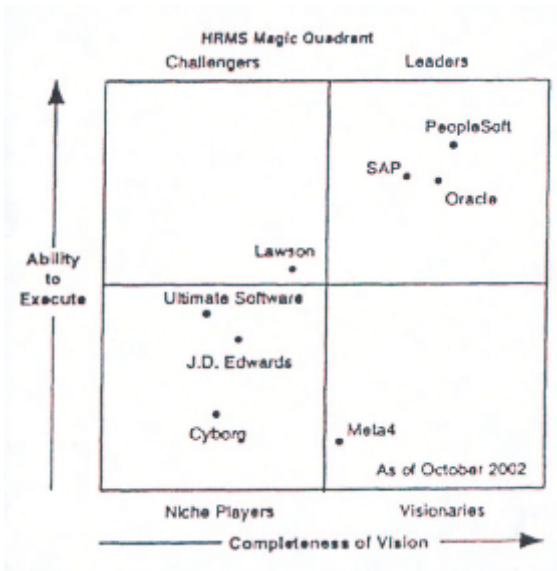
17 Elzinga analyzed 222 DAFs that Oracle provided to the
18 DOJ. Elzinga only analyzed the "forms that [1] had US customers,
19 [2] pertained to HRM or FMS software, * * * [3] [had a] net
20 transaction price [of] over \$500,000 and [4] where the
21 justification section listed the competitor [or alternative
22 solution] that was driving the request for the discount." Tr at
23 2174:14-18 (Elzinga). These criteria decreased the number of
24 DAFs available for analysis to just over 200. Tr at 2175:25
25 (Elzinga). After analyzing all the justifications that were
26 proffered by Oracle salespersons, Elzinga created a graph that
27 showed the number of times each competitor or alternative
28 solution forced an Oracle salesperson to request a discount (i e,

1 the number of times each competitor or alternative constrained
2 Oracle's pricing of FMS or HRM). See Ex P3175.

3 Based upon the graph, Oracle salespersons cited as
4 primary justification, competition from: Peoplesoft, 122 times;
5 SAP, 81 times; Lawson, 16 times; and Microsoft and AMS, each less
6 than 10 times. Pls Post Brief (Doc #366) at 12; Tr at 2177:10-11
7 (Elzinga). Elzinga concluded that this discount tabulation is
8 "very powerful, robust evidence" that the relevant product market
9 is high function FMS and HRM. Tr at 2179:7-8 (Elzinga). "I
10 think that [high function FMS and HRM] is [the relevant market]
11 because I don't see alternatives outside * * * of that market,
12 such as mid-market, or [incumbent] or outsourcing, disciplining
13 the Oracle pricing the way the [other] two manufacturers of high
14 function FMS software and HRM software do, and that's SAP and
15 PeopleSoft." Tr at 2179:9-14 (Elzinga).

16 *Market research studies.* Independent market research
17 organizations study certain product markets and summarize
18 findings about any number of relevant aspects of that market.
19 Most of these research organizations conduct research and issue
20 reports for "people who buy [the product] and want to implement
21 it, * * * but [these firms are] not writing to an antitrust
22 economist or antitrust lawyer audience." Tr at 2182:12-15
23 (Elzinga). Elzinga found one such market research report,
24 conducted by the Gartner Research firm, which analyzed the HRM
25 pillar of the software industry. Tr at 2181: 17-18 (Elzinga).
26 In the Gartner report, Gartner had enumerated two characteristics
27 upon which it chose to analyze HRM vendors: (1) "completeness of
28 vision" and (2) "ability to execute." Completeness of vision

1 apparently refers to a vendor's level of desire to have software
 2 capable of either broad and complex transactions (deemed
 3 "visionaries") or limited and ordinary transactions (deemed
 4 "niche players"). Tr at 2182: 17-19 (Elzinga). Ability to
 5 execute apparently refers to whether Gartner believed each vendor
 6 had the ability to execute its HRM capability "vision" (e g, high



7 levels of functionality and
 8 scalability). Tr at 2182:24-25
 9 (Elzinga).

10 According to Elzinga, the
 11 Gartner research only identified
 12 three firms as "visionaries" with a
 13 high ability to execute -- Oracle,
 14 PeopleSoft and SAP. Tr at 2183:1-4
 15 (Elzinga). Elzinga concluded that
 16 the Gartner report is again

17 "consistent with the notion that there is something different
 18 about high function enterprise software from other alternatives *
 19 * * and when it comes to high function software, there is
 20 something different about Oracle, PeopleSoft and SAP." Tr at
 21 2183: 16-20 (Elzinga) (emphasis added).

22 *Customers and consulting firms.* The next strain of
 23 evidence Elzinga relied upon were declarations of ERP customers
 24 and the "Big Five consulting firms" that plaintiffs furnished
 25 him. Tr at 2184:8-15 (Elzinga). In particular, Elzinga pointed
 26 to declarations of Perry Keating of Bearing Point (who also
 27 testified) and Deloitte's [David] Dortenzo. See Elzinga demo #6.
 28 Tr at 2185:1-2188:9 (Elzinga). In seeking cost-effective

1 solutions and recommendations in choosing ERP vendors, many
2 consumers employ consulting firms to advise them in their
3 negotiations with the vendors. Accenture, IBM Global Services,
4 BearingPoint, Deloitte and CGEY are the consulting firms
5 collectively known as the "Big Five." At trial, plaintiffs
6 offered the statement of BearingPoint's Senior Vice President,
7 Perry Keating. Tr at 912:15-916:7 (Keating). Keating stated
8 that Oracle, SAP and PeopleSoft "are the only [vendors] that
9 provide a product that will be acceptable to a large company in
10 terms of product capabilities * * *." Id.

11 Elzinga described the similar testimony of Keating and
12 Dortenzo in declarations as indicating that these Big Five
13 systems integrators most frequently recommend PeopleSoft, Oracle
14 and SAP for ERP implementations. Tr at 2186: 7-2188:9 (Elzinga).

15 The customers' declarations, Elzinga concluded, "were
16 consistent with the hypothesis that there's a distinction between
17 high function enterprise software and the mid-market * * *.
18 [Mid-market solutions] are not substitutes that a hypothetical
19 monopol[ist] * * * would be constrained [by] in its pricing
20 discretion [of high function FMS and HRM]." Tr at 2184:17-22
21 (Elzinga).

22 *Internal documents from ERP vendors.* Elzinga was also
23 privy to internal company documents, some of which he claimed
24 were informative. Tr at 2189:23-25, 2190:15 (Elzinga). First,
25 Elzinga was privy to customer surveys that had been completed by
26 Oracle ERP customers. These surveys had been given to Oracle
27 customers who were classified by Oracle as having over \$2 billion
28 in sales. Tr at 2189:5-7 (Elzinga). These 28 surveys asked the

1 Oracle customer to identify any other "vendors [other than
2 Oracle] that were considered." Id at 3-4 (Elzinga). Elzinga
3 summarized the surveys and concluded that PeopleSoft was
4 considered 50 percent of the time by Oracle customers. Ex P3176.
5 SAP was considered 28 percent of the time and Lawson was
6 considered 18 percent of the time. Id. Microsoft was considered
7 only 4 percent of the time. Id.

8 Also of interest to Elzinga was an internal document
9 produced by Microsoft in response to the government's civil
10 investigative demand (CID), MS-OPCID 1610. The document was
11 labeled "Microsoft Business Solutions: Scorecard Review." See
12 Elzinga demo #8. In the document, Microsoft is characterized as
13 worried about "Oracle, Peoplesoft, [and] SAP aggressively moving
14 down-market, increasing pricing pressure (discounting levels) and
15 creating new channel programs." Tr at 2192:8-11 (Elzinga).
16 Elzinga concluded that this document showed that Microsoft (1)
17 recognizes a difference between mid-market and high function
18 software and (2) does not consider itself to be in the market for
19 high function ERP. Tr at 2192:13-20 (Elzinga).

20 From the foregoing, Elzinga crafted a metric to measure
21 the product market.

22 Elzinga's data were calculated exclusively for use in
23 this trial. In estimating the product market from the non-public
24 sales data of Oracle and PeopleSoft and third party vendors
25 obtained through the government's compulsory process, Pls Fact
26 (Doc #356) 6.2, Elzinga applied a minimum threshold purchase "of
27 \$500,000 per customer" to identify high function FMS and HRM. Tr
28 at 2210:2-4 (Elzinga). Elzinga used this threshold amount to

1 filter out mid-market and point solution sales. Tr at 2210:4-6
2 (Elzinga). Accordingly, any sale of FMS or HRM that resulted in
3 at least \$500,000 in net license revenues to the vendor, Elzinga
4 considered to be a sale of high function FMS or HRM and thus was
5 in the relevant market. Because plaintiffs' product market
6 definition has no widely accepted meaning in the industry, there
7 were no generally available data explicating the proposed
8 market's participants and their relevant shares to backup
9 Elzinga's estimates.

10 From his numbers, Elzinga calculated the following
11 United States high function FMS market shares: SAP, 39 percent;
12 PeopleSoft, 31 percent; and Oracle, 17 percent. Tr at 2212:22-24
13 (Elzinga). A merged Oracle/PeopleSoft would, in Elzinga's view,
14 possess a 48 percent market share. Tr at 2212:24-25 (Elzinga).
15 Using the same data, Elzinga calculated the HHI_1 in the high
16 function FMS market to be 2800. Tr at 2214:17-18 (Elzinga).
17 Based upon Elzinga's calculations, a merger between Oracle and
18 PeopleSoft would increase the high function FMS HHI_2 to 3800. Tr
19 at 2214:20-21 (Elzinga).

20 For high function HRM, Elzinga calculated PeopleSoft's
21 market share at 50 percent, SAP at 30 percent and Oracle at 18
22 percent; hence, in Elzinga's view, a merged Oracle/PeopleSoft
23 would have a market share approaching 70 percent. Tr at 2218:18-
24 23 (Elzinga). Elzinga calculated an HHI_1 of 2800 in the high
25 function HRM market. Tr at 2219:7-9 (Elzinga). Post-merger, the
26 HHI_2 would increase to 5700. Tr at 2219:10-11 (Elzinga).

27 Plainly, the levels of concentration reflected in
28 Elzinga's testimony exceed the thresholds for "significant

1 competitive concerns" under the Guidelines. Guidelines §
2 1.51(c). Both HHI₂ amounts exceed 1800, and both ΔHHI amounts
3 exceed 50 points. Likewise, of course, post-merger market shares
4 of this magnitude would satisfy the conditions to raise the
5 anticompetitive presumption described by the Supreme Court in
6 Philadelphia Nat Bank.

7 But for reasons explained more fully following the
8 discussion of Oracle's expert witnesses, the court finds that
9 Elzinga failed to carry the plaintiffs' burden of (1)
10 establishing an articulable product market and (2) providing
11 post-merger market share and HHI measurements, in a properly
12 defined market, invoking an anticompetitive presumption under
13 Philadelphia Nat Bank or the Guidelines.

14
15 *Oracle's Critique of Plaintiffs' Product Market Definition*

16 Oracle painted a quite different picture. Oracle
17 assailed plaintiffs' high function software "label," arguing that
18 there is "not a sufficient break in the chain of FMS and HRM
19 substitutes to warrant calling 'high-function' software --
20 meaning SAP, Oracle and PeopleSoft [FMS and HRM] products -- a
21 market unto themselves." Def Post Brief (Doc #365) at 17.
22 Oracle argued that the relevant product market is, at least, the
23 entire continuum of FMS and HRM software, including those sold by
24 so-called mid-market vendors. Id. In support of this position,
25 Oracle presented several witnesses.

26
27 *Systems Integrator Witness*

28 Oracle called Christy Bass, Global Managing Partner of

1 Global Business Solutions for Accenture, to rebut plaintiffs'
2 product market definition as well as rebut the notion of
3 localized competition between Oracle and PeopleSoft. Accenture
4 is the largest systems integrator in the world, with annual
5 revenue exceeding \$11.4 billion. Tr at 1610:15 (Bass). Bass
6 testified that "all" of Accenture's clients have high function
7 needs. Tr at 1613:6-7 (Bass). Bass testified that several high
8 function clients, such as Best Buy and BellSouth, had chosen to
9 outsource their entire HR function. Tr at 1648:14-19 (Bass).
10 While some of these outsourcing clients were on a "one-to-one"
11 outsourcing model, in which it took a license directly from an
12 ERP vendor, such as Oracle, Bass stated that Accenture is
13 planning to launch the "one-to-many" model. Tr at 1649:14-
14 1650:13 (Bass). Under this model, the license will be between
15 Accenture and the ERP vendor, with no contractual arrangement
16 between the customer and the vendor. Tr at 1650:3-13 (Bass).
17 Moreover, Bass testified Accenture plans to begin outsourcing FMS
18 on a "one-to-many" model within the next two years. Tr at 1655:6
19 (Bass).

20 Bass also testified about best of breed solutions and
21 their potential to constrain high function ERP prices. Bass
22 stated that it was "extremely common" for high function clients
23 to pursue a best of breed approach. Tr at 1668:17 (Bass). Bass
24 stated that these best of breed solutions could possibly offer
25 greater functionality than Oracle, SAP or PeopleSoft. Tr at
26 1668:24-1669:3 (Bass). She also stated that best of breed
27 solutions put competitive pressure on these ERP vendors. Tr at
28 1669:19-22 (Bass).

1 Bass rebutted plaintiffs' assertions that SAP was a
2 "struggling" firm and also plaintiffs' evidence regarding
3 localized competition between Oracle and PeopleSoft. Bass
4 characterized SAP's position in the United States ERP marketplace
5 as "strong." Further, she testified that she considered SAP to
6 have a "stronger" position than either Oracle or PeopleSoft in
7 regards to Global 2000 clients. Tr at 1621:18-23 (Bass). When
8 asked about SAP's complete exclusion from the United States
9 banking industry, Bass conceded that such a situation existed,
10 but opined that change was on the horizon. Bass disclosed that
11 SAP and Accenture have entered into a "strategic alliance" to co-
12 develop a banking solution for European and United States banking
13 firms. Tr at 1633:4-7 (Bass); Ex D5001. Bass stated that
14 Accenture has relationships with all twenty of the largest United
15 States banks, and Accenture "leverag[ed] the experience that
16 [Accenture] has had in the banking industry" in order to get some
17 of these banks to discuss implementing the co-developed software.
18 Tr at 1634:15-16, 1635:3-10, 1636:1-6 (Bass).

19 The court finds Bass' testimony to be reliable and
20 informative on the issues of outsourcing and localized
21 competition. Regarding high function clients that have chosen
22 outsourcing as an ERP alternative, Bass gave specific examples of
23 companies, both of which would seem to meet plaintiffs' high
24 function definition, that had chosen to outsource their entire
25 HRM needs. Bass' testimony of a lack of localized competition
26 between Oracle and PeopleSoft was likewise supported by her
27 explanation of the SAP/Accenture co-development alliance, under
28 which Bass explicitly stated that Accenture will use its leverage

1 and experience with United States banking firms in order to help
2 SAP gain a larger competitive share in that vertical.

3

4 *Industry Witnesses: Lawson and SAP*

5 Jay Coughlan, CEO and President of Lawson Software
6 testified regarding his view of the plaintiffs' proposed product
7 market and its relation to Lawson. Tr at 3586:1-13 (Coughlan).
8 Oracle wasted no time in questioning Coughlan about plaintiffs'
9 characterization of Lawson as only a mid-market vendor. Tr at
10 3596:5-9 (Coughlan). Coughlan stated that he disagreed with this
11 view, testifying that Lawson has customers that exceed \$1 billion
12 in revenues, employ more than 10,000 people and are listed among
13 the Fortune 1000. Tr at 3596:6-19 (Coughlan). Coughlan stated
14 that the plaintiffs' perception of Lawson may have been
15 appropriate before 1996, when Lawson made a conscious decision to
16 focus on specific verticals and winning larger shares in those
17 verticals. Tr at 3597:1-8 (Coughlan). The first vertical that
18 Lawson focused on was healthcare and today it is providing
19 procurement and HRM for HCA, the largest health care provider in
20 the world with annual revenues exceeding \$20 billion. Tr at
21 3600:1-4 (Coughlan). Coughlan also stated that Lawson provides
22 FMS and procurement to the Mayo Clinic, an account for which
23 Lawson beat both Oracle and PeopleSoft. Tr at 3601:2-6
24 (Coughlan).

25 Coughlan stated that Lawson next focused upon the
26 retail vertical and has met with much success. Today, Lawson
27 provides FMS to Safeway, the third largest grocery chain in the
28 United States with approximate revenues of \$30 billion. Tr at

1 3604:1-8 (Coughlan). Lawson provides FMS to Walgreens, a
2 convenience store chain with more than \$30 billion in revenues.
3 Tr at 3604:12-21 (Coughlan). Lawson provides FMS for Target, a
4 department store chain with more than 300,000 employees and \$50
5 billion in revenues. Tr at 3605:2-13 (Coughlan). The same is
6 true for Williams-Sonoma. Tr at 3606:16-19 (Coughlan). In the
7 apparel area, Lawson provides HRM and FMS to Ralph Lauren and
8 Gucci. Tr at 3605:19-25 (Coughlan). Lawson provides HRM to
9 McDonald's, a food retailer with over 100,000 employees. Tr at
10 3607:4-19 (Coughlan).

11 In the public sector vertical, Lawson has won major
12 accounts with school districts in Florida, Virginia and Maryland,
13 all of which Lawson competed for, and won, against Oracle and
14 PeopleSoft. Lawson provides HRM to the States of Michigan and
15 Arizona. Tr at 3615:4-15 (Coughlan). Lawson provides HRM for
16 the City of Dallas and the University of Wisconsin. Tr at
17 3613:4-12 (Coughlan). Coughlan's testimony continued to describe
18 Lawson accounts in insurance and financial services verticals as
19 well as individual customers including Johnson & Johnson (HRM)
20 and Sara Lee and McGraw-Hill (HRM and FMS). Tr at 3636-3640
21 (Coughlan). See also Ex D7140.

22 Moreover, Coughlan testified that Lawson software
23 systems run in English, French and Spanish. Tr at 3645:13-17
24 (Coughlan). Coughlan testified that Lawson software is able to
25 handle multiple currencies as well, citing one Lawson customer,
26 Schlumberger, a major supplier to the oil industry with \$10
27 billion in revenues, 10,000 employees and international
28 operations. Tr at 3641:23-3642:11 (Coughlan). Schlumberger is

1 utilizing Lawson FMS in close to 100 countries, but not the
2 United States, thus showing that the Lawson software can handle
3 currencies beyond the United States dollar. Tr at 3642:16-3643:9
4 (Coughlan).

5 Finally, Oracle asked Coughlan about Professor
6 Elzinga's data expounding the market shares for high function HRM
7 and FMS. Tr at 3648:16-3655:19 (Coughlan). Oracle offered into
8 evidence the DOJ subpoena to which Lawson had responded by
9 telling the DOJ of a large number of HRM and FMS shipments that
10 had been made in late 2002 and throughout 2003. Ex D7079R. This
11 list included FMS sales to Dollar Tree Store, Louisiana Pacific
12 Corporation and ManuLife, with each sale totaling more than
13 \$500,000. Ex D7079R; Tr at 3650:3-8 (Coughlan). Moreover, FMS
14 suites were sent to Schlumberger, Sara Lee and Johnson & Johnson,
15 with each spending more than \$1 million on the suites. Id.
16 Accordingly, Coughlan stated that he was perplexed when told that
17 according to Professor Elzinga's statistics, Lawson had no market
18 share of the high function FMS market because Lawson had made no
19 sales of FMS over \$500,000. Tr at 3653:10-13 (Coughlan).
20 Further, Coughlan was told that Elzinga's HRM data listed Lawson
21 as having made only one sale above \$500,000, a sale for \$995,000,
22 leading Elzinga to call Lawson a "fringe player" in the HRM high
23 function market. Tr at 2219:16 (Elzinga). In response, Coughlan
24 stated that he disagreed with Elzinga's calculations, citing that
25 Lawson "had one deal alone in HRMS in [2003] that was more than
26 one million dollars." Tr at 3654:1-2 (Coughlan). Coughlan
27 stated that he disagreed with plaintiffs' attempts to
28 characterize Lawson as "not a serious player [in the high

1 function market].” Tr at 3655:15-19 (Coughlan).

2 On cross-examination, the plaintiffs were able to delve
3 more deeply into the customer relationships that Lawson has with
4 several of the customers discussed on direct. The City of Dallas
5 had extensive problems with Lawson’s HRM software, Coughlan
6 admitted, and its ability to handle overtime payroll
7 functionality, leading Dallas to withhold payments to Lawson. Tr
8 at 3699:15-19 (Coughlan). Coughlan claimed the problem had been
9 corrected. Tr at 3700:11 (Coughlan). Next, an internal Lawson
10 memo showed that McGraw-Hill was exploring the option of
11 replacing Lawson, as was another client, Cendant. Ex P3297.
12 Moreover, the document stated that Johnson & Johnson was “not
13 purchasing much in the way of additional applications.” Id. In
14 summation, the document seemed to call into question Lawson’s
15 ability to meet the HR needs of global organizations. Id.
16 Coughlan conceded that the Mayo Clinic has had problems with its
17 Lawson FMS software. Tr at 3715:10-23 (Coughlan). Plaintiffs
18 went through a series of Lawson customers that have had some
19 implementation or service problem with Lawson software. Tr at
20 3699-3711 (Coughlan).

21 This evidence was elicited in an attempt to show that
22 Lawson is not a player in the high function ERP market. The
23 evidence did show the existence of implementation or service
24 problems. But the customers all appeared to fit plaintiffs’
25 definition of high function customers. Hence, this line of
26 inquiry did not appear to demonstrate Lawson’s absence from this
27 or any such market, only that some Lawson customers have had
28 problems with its software. The court, therefore, discounts

1 Coughlan's cross-examination testimony for the purpose for which
2 it was apparently offered. Plaintiffs did not show that
3 implementation or service problems were absent or less frequent
4 in Oracle, PeopleSoft or SAP products. Accordingly, the court
5 credits Coughlan's testimony regarding large and complex
6 customers that have chosen Lawson ERP to meet their FMS and HRM
7 needs. Not only was this evidence uncontradicted, but the
8 testimony was amply supported by many exhibits.

9 Richard Knowles, Vice President of Operations for SAP
10 America, was called by Oracle to refute the plaintiffs' product
11 market definition as well as to poke holes in plaintiffs' theory
12 of unilateral anticompetitive effects. Tr at 2805:4-9 (Knowles).
13 At the outset, Knowles clarified some of the terms used in this
14 case, or at least as those terms are understood by SAP. "High
15 function" has no meaning apparently. SAP looks to customer
16 characteristics in determining whether a vendor is mid-market or
17 high function. SAP considers a customer to be mid-market if it
18 has revenues less than \$1.5 billion, but more than \$200 million.
19 Tr at 2818:9-19 (Knowles). A customer above \$1.5 billion is
20 considered a "large enterprise." Tr at 2819:14-15 (Knowles).
21 But Knowles stated that characterizing a customer as one or the
22 other was far from "an exact science." Tr at 2820:18-19
23 (Knowles).

24 Oracle then proceeded to "name drop" a large number of
25 SAP clients: Deloitte & Touche, Accenture, Halliburton, MCI,
26 SBC, T-Mobile, AOL, Starbucks, Nike, Home Depot and Barnes &
27 Noble, all clearly up-market customers. Tr at 2829:6-2831:19
28 (Knowles). This evidence tended to rebut the suggestion that SAP

1 was a struggling firm with substantial disadvantages in the
2 United States. Next, Oracle questioned Knowles regarding two
3 specific examples in which SAP had competed head to head against
4 Oracle and other ERP vendors. First, Oracle presented an SAP DAF
5 regarding a proposed ERP license transaction with ExpressJet, a
6 company with approximately \$1.5 billion in revenues, thus making
7 it a large enterprise. D5641R at 1; Tr at 2839:23 (Knowles). As
8 with the DAFs used by Oracle, the SAP DAFs had a column for
9 denoting the competitor that was requiring or motivating the
10 increased discount request. D5641R at 1. In the case with
11 ExpressJet, SAP was originally competing against PeopleSoft,
12 Lawson, Exact, Microsoft, Oracle and Ultimate. Ex D5641R at 2.
13 Knowles stated that he recognized the name Lawson and that SAP
14 "of course" competes with Lawson. Tr at 2841:8-12 (Knowles).
15 Moreover, once ExpressJet had narrowed the six vendors down to
16 three, it was a contest with Lawson, Oracle and SAP. Tr at
17 2842:23-2843:5 (Knowles).

18 Knowles stated that SAP was "agnostic" about which
19 competitor makes it to the final round, because SAP is going to
20 give the same level of discount regardless of the competitor. Tr
21 at 2848:7-10 (Knowles). Oracle then introduced another SAP DAF,
22 this time for Kellogg, Brown & Root, a subsidiary of Halliburton.
23 Ex D5649R at 1. This form listed the justification for the
24 discount as the "extreme competition" between Oracle and SAP.
25 Id. Knowles stated that this type of scenario was to be
26 expected, as SAP views Oracle to be "highly aggressive" on
27 pricing. Tr at 2856:10-11 (Knowles).

28 Next, Oracle introduced an email from Bill McDonald,

1 the CEO of SAP America. Ex D5636. The email contained
2 Microsoft's second quarter earnings for 2004. Id at 1. The
3 document began by reading: "These guys are here!". Id. Knowles
4 stated that McDermott was referring to Microsoft's 32 percent
5 year-over-year increase in the EAS market. Tr at 2892:4-23
6 (Knowles).

7 Finally, Oracle questioned Knowles about any
8 apprehensions SAP felt regarding increased prices should the
9 proposed merger of Oracle and PeopleSoft be consummated. Tr at
10 2858:9-11 (Knowles). Knowles responded that SAP has a neutral
11 opinion on the merger. Knowles stated his belief that the merger
12 will actually make the ERP market more competitive. Tr at
13 2858:20-21 (Knowles).

14 On cross, Knowles conceded that the reason SAP America
15 exists is because customers in the United States "want to have
16 somebody here present to deal with in buying the type of software
17 that [SAP] sells." Tr at 2902:12-15 (Knowles). Next, Knowles
18 stated that SAP views Lawson as a "mid-market company." Tr at
19 2924:24 (Knowles). This characterization appears to rest on
20 SAP's labeling as mid-market of customers with less than \$1.5
21 billion in revenues, a substantially different demarcation from
22 plaintiffs' labeling of a mid-market customer as one that does
23 not buy software packages exceeding \$500,000. See Tr at 2924:5-7
24 (Knowles). Accordingly, the court accords no weight to Knowles'
25 statement inasmuch as it was offered to show that Lawson does not
26 compete in the high function market. Otherwise, the court finds
27 Knowles' testimony to be reliable and uncontradicted.

28

Outsourcing Witnesses

1
2 Michael Sternklar, Executive Vice President of Fidelity
3 Human Resources Services Company, testified regarding Fidelity's
4 outsourcing solutions for HR needs. Tr at 3124-3126 (Sternklar).
5 Sternklar stated that Fidelity currently has a license with
6 Oracle for HRM software. Tr at 3130:2-7, 3135:3-8 (Sternklar).
7 Sternklar listed several of Fidelity's "large" customers: Bank
8 of America, IBM, American Corporation and Asea Brown Boveri
9 (ABB). Tr at 3136:13-3137:8 (Sternklar). Sternklar described
10 the procurement process by which Fidelity won the ABB account.
11 ABB made its choice between buying an in-house system from
12 PeopleSoft or SAP, or instead, outsourcing ABB's HRM needs
13 through Fidelity. Tr at 3138:14-25, 3139:10-13 (Sternklar). ABB
14 chose Fidelity over PeopleSoft and SAP. Tr at 3140:17-18
15 (Sternklar). Sternklar stated several reasons why a customer
16 would choose outsourcing over an in-house ERP system. One
17 important reason, Sternklar stated, was the "continued
18 investment" involved in buying an in-house ERP system based upon
19 the need continuously to upgrade such a system. Tr at 3139:23-25
20 (Sternklar).

21 Jay Rising, President of National Accounts at ADP also
22 testified about what he called "upgrade treadmill" and "hidden
23 costs" that are involved in package software. Tr at 4094:15-22
24 (Rising). Both Sternklar and Rising testified that there are no
25 such costs associated with outsourcing because the outsourcer
26 itself, not the customer, handles all upgrades and maintenance.
27 Tr at 3140:2-5 (Sternklar); 4093: 12-16 (Rising). The client
28 need not bother with such hassles.

1 Both witnesses also testified that outsourcing
2 companies are able to handle the HR needs of companies with large
3 numbers of employees. ADP has 1000 customers that have over 1000
4 employees. Tr at 4097:21-25 (Rising). ADP's client list
5 includes Comcast, Sysco, Xerox and Tyco. Tr at 4100:13-24
6 (Rising). Fidelity outsources for Bank of America which
7 currently has between 170,000 and 180,000 employees. Tr at
8 3145:18-25 (Sternklar).

9 Finally, Sternklar stated that Fidelity was currently
10 in the process of creating its own software called HR Access. Tr
11 at 3152:3-3153:13 (Sternklar). Fidelity's goal is to move all
12 customers onto HR Access within the next two years and cease
13 using Oracle software completely. Tr at 3154:9-15 (Sternklar).

14 The evidence of both of these outsourcing witnesses was
15 reliable and amply supported by specific examples of high
16 function customers that had chosen to outsource with Fidelity or
17 ADP as an ERP alternative. Accordingly, the court credits this
18 testimony in determining whether outsourcing solutions have a
19 price-constraining effect on ERP vendors.

20
21 *Expert Witnesses: Hausman and Campbell*

22 Oracle did not propose a product market definition.
23 Instead, Oracle picked apart plaintiffs' market definition piece
24 by piece. Two expert witnesses, Professor Jerry Hausman, an
25 industrial organization economist at MIT, and Tom Campbell, dean
26 of the Haas Graduate School of Business at the University of
27 California (Berkeley) testified for Oracle. Among other
28 important positions in government, Campbell served as director,

1 Bureau of Competition, at the FTC. Both Hausman and Campbell
2 assailed plaintiffs' product market definition, describing it as
3 vague, unrealistic and underinclusive. As with Elzinga, the
4 court finds both Hausman and Campbell to be well qualified to
5 offer their opinion testimony.

6 Vague. Hausman characterized the "high function" label
7 as vague and too "hard to get your arms around." Tr at 3807:14-
8 15 (Hausman). He cited plaintiffs' changing description of "high
9 function" ERP as illustrating the unreality of plaintiffs'
10 proposed product market definition. Tr at 3809:20-3810:9
11 (Hausman). At first, plaintiffs argued for a customer-based
12 product definition. Campbell characterized this initial
13 customer-based market definition as "unprecedented" and
14 "unusual." Tr at 2704:6 (Campbell). Hausman asserted that
15 plaintiffs, in reaching this strange product market, clearly
16 worked backwards from their desired result: finding a group of
17 customers all of which had purchased SAP, Oracle or PeopleSoft
18 ERP, then claiming that those customers were "similarly situated"
19 and defined the market. But, at trial, Hausman noted, plaintiffs
20 shifted ground and argued that the high function market was based
21 upon "product characteristics" of the software, such as
22 functionality and scalability, not the customers who buy it. Tr
23 at 3809:20-3810:3 (Hausman). See also Pls Post Brief (Doc #366)
24 at 3-4.

25 Even accepting the plaintiffs' second version of high
26 function software, both experts asserted that the term is too
27 imprecise to define a market. Hausman contended that Elzinga
28 himself admitted that the high function definition contained no

1 "quantitative metrics" that could be used to distinguish a vendor
2 of high function ERP from a vendor of mid-market software. Tr at
3 3807:16-17 (Hausman). See Tr 2151:18-2152:3 (Elzinga). Hausman
4 illustrated his point by reference to ManuLife Insurance Company,
5 the fifth largest insurance company in the United States with
6 offices throughout North America. ManuLife has complex needs and
7 transactions and thus by any objective measure would fit in
8 plaintiffs' high function market. But plaintiffs, for a reason
9 Hausman said plaintiffs left unexplained, considered ManuLife to
10 be a mid-market purchaser and therefore excluded from the
11 plaintiffs' market definition. Tr at 3840:17-3841:13 (Hausman).
12 The same applies to Johnson & Johnson and Safeway, both
13 considered by plaintiffs as mid-market customers because they
14 bought ERP solutions from vendors that Elzinga and plaintiffs put
15 in the mid-market. But plainly these firms fit plaintiffs'
16 description of enterprises having high functional needs. So,
17 concluded Hausman, plaintiffs have provided no objective way to
18 distinguish ERP licenses in the high function market from those
19 in the mid-market.

20 Both Hausman and Campbell made the obvious point that
21 if the market is not precisely defined, then the market
22 participants and their relative shares will be "economically
23 inaccurate." Tr at 2702:16-19 (Campbell); 3793:9-11 (Hausman).
24 Referring to plaintiffs' customer witnesses, Hausman asserted
25 that surveys that ask customers what their preferences are or
26 what their hypothetical actions "would be" are known to be
27 unreliable and subjective. Id.

28 Oracle summarized Hausman's vagueness argument by

1 claiming "there must be a clear break in the chain of substitutes
2 in order for separate markets to be found." Def Post Brief (Doc
3 #365) at 17. According to Oracle, "[T]here is clearly not a
4 sufficient break in the chain of FMS and HRM substitutes to
5 warrant calling * * * software [sold by] Oracle, PeopleSoft and
6 SAP, a market unto themselves." Id. If such a clear break
7 exists, plaintiffs have not proven it by a preponderance of the
8 evidence, Oracle argued in closing. Id.

9 *Disconnected.* Oracle also argued that plaintiffs'
10 product market definition "does not address the market reality"
11 of the way software is sold, a point to which Hausman testified.
12 Def Post Brief (Doc #365) at 1. Hausman posited that FMS and HRM
13 are not products in and of themselves. Rather, "90 percent" of
14 companies "are buying more than just FMS, more than just HRM. * *
15 * [they are] buying bundles of software." Tr at 3815:10-12,
16 3813:12-22 (Hausman).

17 Hausman gave as an example a consumer purchasing a
18 single package of software from PeopleSoft that included FMS,
19 HRM, EPM and CRM pillars. In such a bundle, PeopleSoft would not
20 offer discounts based on the individual pillars. Rather,
21 PeopleSoft would give a "blended discount" across all products in
22 the bundle in order to ensure that the consumer buys all the
23 pillars from PeopleSoft. Tr at 3814:3-22 (Hausman). If the
24 vendor does not offer an acceptable discount, then the consumer
25 can threaten to buy one of the pillars, such as CRM, from a best
26 of breed vendor such as Siebel. Tr at 3815:1-6 (Hausman). Based
27 upon this analysis, Hausman opined that the presence of best of
28 breed vendors constrains the prices that the ERP vendors can

1 charge for a bundle of software. Tr at 3814:18-22 (Hausman).

2 *Underinclusive.* Finally, Oracle's witnesses stated
3 that even if one assumes that a "high function HRM and FMS"
4 market does exist and the market can be demarcated from other
5 solutions, there are viable substitutes for high function ERP
6 that must be included in the product market. Specifically,
7 Oracle argued that (1) mid-market vendors, (2) outsourcing, (3)
8 incumbent systems, and (4) best of breed solutions, discussed
9 above, must all be included in the product market, as all are
10 potential substitutes constraining a post-merger SSNIP.

11 Incumbent systems, also called legacy systems, refer to
12 the FMS and HRM software systems that the DOJ's "enterprise
13 customers" already have in operation. These are the systems that
14 the new software from Oracle or PeopleSoft or SAP will replace,
15 should a consumer choose to purchase an integrated suite from one
16 of the high function vendors. Oracle argued that if a post-
17 merger Oracle/PeopleSoft imposed a SSNIP, consumers could
18 constrain that SSNIP by simply refusing to buy high function FMS
19 and HRM and choosing to use already existing products. Tr at
20 3821:1-9 (Hausman). Hausman stated that the cost of maintaining
21 and upgrading incumbent systems has been decreasing recently so
22 that these systems have become a "credible threat" to ERP
23 vendors. Tr at 3821:13 (Hausman). Accordingly, if a customer
24 finds a post-merger price offer too high, it can almost always
25 credibly claim it will not buy the product and instead continue
26 to operate its incumbent system. Tr at 3821:13-14 (Hausman).

27 Campbell stated that "20 to 30 percent of the time,
28 even after negotiations have started, the purchaser will opt to

1 drop out" and remain with the system it already has. Tr at
2 2708:23-25 (Campbell). Campbell claimed that this factor must be
3 taken into account when calculating market shares, otherwise
4 "you've made a very serious mistake in calculating your market
5 shares," because 20 to 30 percent of the relevant customers'
6 actual behavior is being ignored. Tr at 2709:1-6 (Campbell).

7 Regarding outsourcing, Hausman presented evidence of
8 over twenty large enterprises, such as Bank of America and A T &
9 T, who currently outsource all or some of their HRM needs. Tr at
10 3825:19-25 (Hausman). And this phenomenon was occurring long
11 before Oracle made its take-over offer to PeopleSoft. These
12 large enterprise customers would not be outsourcing if they did
13 not find this option to be equal to or better than the purchase
14 of high function software from a vendor. Tr at 3828:19-23
15 (Hausman). If this many corporations can currently have their
16 HRM needs effectively met by outsourcing, it only follows that
17 many more customers could follow suit should a post-merger SSNIP
18 occur in the high function market. Tr at 3829:1-3 (Hausman).

19 Hausman gave the example of MIT, his employer,
20 outsourcing its HRM to Fidelity, who he claims do "a heck of a
21 lot better" than MIT personnel. Tr at 3825:4 (Hausman). Hausman
22 presented evidence that many companies have chosen outsourcing;
23 these include: Bank of America, Motorola, International Paper,
24 McKesson, American Express and Sony. Tr at 3829:21-23 (Hausman).
25 These are "sophisticated" companies, with a lot of complex
26 transactions, and they have clearly found outsourcing a
27 satisfactory alternative. Id. Hausman's demonstratives alone
28 listed seven outsourcing firms capable of handling the HR for

1 large companies; these include Fidelity, Accenture, ACS, Exult
2 and Mellon, among others. Hausman demo #10.

3 Accordingly, both Campbell and Hausman asserted that
4 any product market must include outsourcing solutions as a viable
5 substitute to which consumers can turn in the event that a merged
6 Oracle/PeopleSoft imposes a SSNIP.

7 Finally, Oracle attempted to show that the products of
8 so-called mid-market vendors, such as Lawson and AMS are
9 reasonably interchangeable for those of the alleged high function
10 vendors, Oracle, PeopleSoft and SAP. Accordingly, Hausman stated
11 that any market definition that is devoid of these vendors is too
12 narrow. Tr at 3939-3940 (Hausman). Hausman presented evidence
13 of over thirty consumers, all of which have large and complex
14 needs, and all of which had chosen to use Lawson or AMS for their
15 FMS and HRM needs. Lawson's customers include: Johnson &
16 Johnson, Walgreens, Target, Williams-Sonoma, Jack in the Box, the
17 Federal Reserve Bank and Safeway. Hausman demo #11. AMS'
18 customers include: United States Environmental Protection Agency,
19 United States Postal Service, Library of Congress, Internal
20 Revenue Service and the DOJ. Id. Very telling to Hausman was
21 the fact that the DOJ, two weeks after bringing this case, chose
22 to buy AMS FMS for \$24 million, ranking AMS better than Oracle or
23 PeopleSoft in the DOJ's view for the DOJ's needs. Tr at 3842:7-
24 13 (Hausman).

25 Hausman admitted that these vendors are "not
26 PeopleSoft," nor do they "aspire to be." Tr at 3839:4-6
27 (Hausman). He also admitted that these three "cannot currently
28 satisfy the entire market as defined by the DOJ." But "you do

1 not have to beat PeopleSoft to constrain it" argued Hausman. Tr
2 at 3839:20-21 (Hausman). The question is not whether the entire
3 market would switch to these other vendors in the event of a
4 SSNIP, the question is whether enough consumers could potentially
5 turn to a product to meet their needs, thereby making a SSNIP
6 unprofitable. Clearly, if the high function needs of Johnson &
7 Johnson and the DOJ are met by these mid-market vendors, then
8 many other companies could also do so in the wake of a SSNIP.
9 Accordingly, these two mid-market vendors should be included in
10 the product market.

11 *Infrastructure layer.* Two of defendant's expert
12 witnesses discussed the infrastructure layer and its impact on
13 the product markets. Tr at 4138-4145 (Kutnik); Tr at 4364-4369,
14 4397-4398 (Teece). Traditionally, ERP software contained both
15 business logic and applications services. Business logic is the
16 logical structure of the business process being automated.
17 Applications services are tools that support business logic
18 across different business applications. Applications services
19 include directory services, security features and content
20 management tools. Web services are a type of applications
21 service.

22 Recent innovations in software technology have led to a
23 "decoupling" of business logic from applications services. These
24 innovations have resulted in the creation of an "infrastructure
25 layer" that standardizes many of the applications services that
26 were once incorporated with the business logic in an EAS program.
27 The infrastructure layer has also been referred to as the
28 "integration layer," the "applications services" layer and the

1 "composite applications" layer. Tr at 325-31 (Bergquist).

2 Infrastructure layer products and ERP software share
3 some degree of substitutability in that both address integration.
4 Developments in infrastructure layer technology allow greater
5 interoperability and easier horizontal integration. Ex D7143
6 (Mills 5/27/04 Dep) at Tr 59-61; Tr 2886-89 (Knowles); Tr
7 4150:9-19 (Kutnick). Similarly, pre-integration in ERP software
8 suites allows greater interoperability and easier horizontal
9 integration. Because one can choose more robust infrastructure
10 layer products instead of pre-integration, the infrastructure
11 layer is a partial substitute for the pre-integration in ERP
12 software suites.

13 Oracle's experts Kutnick and Teece testified that the
14 emergence of the infrastructure layer constitutes a paradigm
15 shift in ERP software products and affects the proper product
16 market definition.

17 The following facts suggest that infrastructure layer
18 products should not be included in the same relevant market as
19 ERP software. First, the overlap in substitutability between
20 infrastructure layer products and ERP software is limited. ERP
21 software products perform a large number of functions that are
22 not performed by infrastructure layer products, and vice versa.
23 Accordingly, sellers of infrastructure layer products likely
24 could not constrain market power of a hypothetical monopoly over
25 ERP software.

26 Second, the integration offered by infrastructure layer
27 products is a poor substitute for pre-integration in ERP software
28 suites. Pre-integration allows tighter integration than the

1 integration offered by infrastructure layer products. Certain
2 functions previously performed within the ERP software layer are
3 now performed in the infrastructure layer. Infrastructure layer
4 products, however, do not contain business logic. Tr at
5 4144:8-11, 4187 (Kutnik); Tr at 1813-1814 (Wilmington); Tr at
6 331-332 (Bergquist). Because infrastructure layer products do
7 not contain business logic, a purchaser could not choose a more
8 robust infrastructure layer product instead of ERP software.
9 Accordingly, the decoupling of the infrastructure layer from the
10 ERP software layer does not suggest that the infrastructure layer
11 products are partially substitutable for ERP software.

12 Oracle's experts Kutnick and Teece contend that the
13 emergence of the infrastructure layer constitutes a paradigm
14 shift in ERP software products. The age of infrastructure layer
15 products calls into question this contention. See D7143 (Mills
16 5/27/04 Dep) Tr at 30-31 (stating that IBM's middleware products
17 have been in the market for nearly twenty years); Tr at 420
18 (Kutnik) (testifying that applications servers have been
19 available for seven to eight years); Tr at 3414:2-18 (Wohl)
20 (noting that Oracle's applications server has been through
21 several versions); Tr at 328 (Bergquist) (testifying about the
22 evolution of web services protocols).

23 Even if the emergence of the infrastructure layer will
24 have a substantial impact on the EAS software industry, more
25 robust infrastructure layer products both enhance and diminish
26 the likelihood of stack competition. On the one hand, decoupling
27 applications services from the business logic provides the
28 interoperability standard necessary to create multi-seller

1 clustering. See Tr at 4378-4379 (Teece). On the other hand,
2 enhanced infrastructure layer products increase interoperability
3 with other stacks. See Tr at 2885-2889 (Knowles); Tr at 1637:7-
4 22 (Bass); P3337; D7143 (Mills 5/27/04 Dep) Tr 59-61; Tr at
5 4150:9-19 (Kutnik).

6
7 *Findings of Fact: Product Market Definition*

8 In order to sustain plaintiffs' product market
9 definition the court must find, by a preponderance of the
10 evidence, that plaintiffs' have shown an articulable and distinct
11 product market for HRM and FMS sold by Oracle, PeopleSoft and SAP
12 only that does not include mid-market software, outsourcing
13 solutions, best of breed solutions, legacy systems or the
14 infrastructure layer.

15 Based upon a review of the law and the evidence, the
16 court concludes that the plaintiffs have not met their burden of
17 establishing that the relevant product market is limited to so-
18 called high function FMS and HRM sold by Oracle, PeopleSoft and
19 SAP. The equivocal and vague evidence presented by plaintiffs at
20 trial does not permit the court to exclude mid-market vendors,
21 outsourcing or best of breed solutions from any product market
22 that includes ERP software sold by Oracle, PeopleSoft and SAP.

23 For reasons discussed above, the court cannot rely upon
24 the testimony of the customer witnesses offered by plaintiffs in
25 determining if plaintiffs have met their burden. Likewise, the
26 testimony of all three industry witnesses offered by plaintiffs
27 affords no reliable or articulable basis to distinguish a high
28 function product market. Ironically, much of plaintiffs'

1 testimony supports a finding of no clear or articulable
2 distinction.

3 Accordingly, the full weight of the plaintiffs' product
4 market burden fell at trial upon Elzinga. In resolving the
5 battle of the expert witnesses on product definition, the court
6 must conclude that Oracle's witnesses presented the better and
7 more convincing case. Elzinga for all his indubitable
8 credentials as an economist seemed mostly to apply the techniques
9 of his avocational interest in mystery writing. See Ex P4014A.
10 The evidence Elzinga marshalled was circumstantial and highly
11 qualitative.

12 Elzinga's tabulations of concentration statistics from
13 responses to the DOJ CIDs, Elzinga demo ##10-11, suffer from
14 several shortcomings. Elzinga defined high function ERP as any
15 sale in excess of \$500,000. As the DAFs establish, ERP vendors
16 sell a cluster of products. Sales exceeding a half-million
17 dollars, therefore, are likely in many instances, if not most, to
18 include pillars other than FMS and HRM. Elzinga's chosen
19 demonstrative, Ex 4015A, will make the point. The sale in
20 question, to Teradyne Corporation, met the \$500,000 threshold.
21 Ex 4015A at ORLITE0086650. Yet the discount Oracle offered on
22 the HRM pillar license fee was 100 percent, and the bundle
23 included modules in the SCM pillar along with modules in the HRM
24 pillar. Despite this, Elzinga tabulated this entire transaction
25 as an Oracle HRM sale, even though Oracle appeared to give away
26 for free an HRM license in order to sell modules in the SCM
27 pillar. Id at ORLITE0086654. The court has not attempted to
28 retabulate market shares to correct for these problems.

1 Elzinga's other statistical tabulations are sketchy at
2 best. The tabulation of Oracle customer surveys was a tiny
3 sample of only twenty-eight sales opportunities. Elzinga demo
4 #7. The roster of Oracle DAFs was also short. Elzinga demo #3.
5 But even more troubling, as pointed out in connection with the
6 Teradyne sale, is that these tabulations did not break out FMS
7 and HRM sales from the bundles in which they were sold. Again,
8 the DAFs register prices and discounts on a mixture of different
9 pillars and modules. Metaphorically, Elzinga did not separate
10 the wheat from the chaff.

11 Not only does the court find Elzinga's data to be
12 unreliable in establishing a distinct and articulable product
13 market, but Elzinga himself admitted that plaintiffs' product
14 market has no "quantitative metric" that could be used to
15 determine the distinction between a high function product and a
16 mid-market product. Tr at 2311:3-17 (Elzinga). Rather, Elzinga
17 kept telling the court that there is "something different" about
18 the products sold by Oracle, SAP and PeopleSoft. But the court
19 cannot delineate product boundaries in multi-billion dollar
20 merger suits based upon the mere notion that there is "something
21 different" about the merging products and all others, especially
22 when that "something different" cannot be expressed in terms to
23 make a judgment of the court have meaning. More is required.

24 Accordingly, based upon the evidence presented at
25 trial, the court concludes that the following products cannot be
26 excluded from the relevant product market for purposes of
27 analyzing the effects of this merger.

28 *Outsourcing.* Professor Hausman presented evidence of

1 over twenty large enterprises that currently outsource all or
2 some of their HRM needs. Furthermore, the testimony of Peters,
3 Bass, Sternklar and Rising all support Hausman's contention that
4 large companies can, and do, have their HRM needs effectively met
5 by outsourcing. Accordingly, outsourcing solutions cannot be
6 excluded.

7 Plaintiffs argue that because several of the
8 outsourcing firms themselves use Oracle, SAP or PeopleSoft, these
9 outsourcing firms do not count as independent competitors. But
10 the court finds the testimony of Bass and Sternklar regarding
11 "blanket licenses" or "one-to-many" licenses to be the most
12 reliable on how outsourcing works. Most outsourcers that handle
13 HRM needs for large enterprises either have, or soon will have, a
14 type of blanket contract with an ERP vendor. Under these
15 contracts, the software vendors agree to provide software to the
16 outsourcer at a set price up to a certain number of employees, or
17 "seats," usually numbering well into the millions of employees.
18 Fidelity's contract with Oracle provides for a "seat" capacity of
19 2 million employees, with Fidelity having the option to increase
20 the number of employees at a pre-set fee. Ex D7158. So if
21 Company X chooses to outsource through Fidelity, which may be
22 operating on Oracle software, there is no direct connection
23 between Oracle and Company X. There is no license between Oracle
24 and Company X and no chance for Oracle to take advantage of
25 Company X which has no "post-merger" choice in ERP software.
26 Company X is merely more "seats" in Fidelity's millions of empty
27 seats under its blanket contract.

28 Moreover, several outsourcing firms currently use their

1 own proprietary software, such as Hewitt and ADP. Fidelity has
2 also begun the process of migrating clients from Oracle software
3 to Fidelity's own software. Tr at 3154:3-15 (Sternklar).

4 *Mid-market vendors.* The court is perplexed about
5 plaintiffs' position that "mid-market solutions" are not part of
6 the product market for high function ERP. Plaintiffs claim that
7 mid-market vendors, such as Lawson and AMS could not constrain a
8 post-merger SSNIP. Pls Post Brief (Doc #366) at 14. Such a
9 statement clearly implies that plaintiffs do not view Lawson and
10 AMS as high function vendors. But Elzinga's high function market
11 share calculations showed Lawson and AMS each had market shares.
12 See Elzinga demo ##10-11. Further, Elzinga stated that his
13 calculations probably understated Lawson's market share in the
14 high function market. Lawson and AMS plainly cannot have market
15 shares in the high function market if they are not a part of it.
16 Accordingly, plaintiffs' own evidence shows that either (1)
17 Lawson and AMS are a substitute for high function vendors or (2)
18 no substantive demarcation between these two types of vendors
19 exists. This evidence glaringly shows that plaintiffs have
20 failed to prove a distinct relevant product market for this court
21 to analyze.

22 As surprising as plaintiffs' evidence and statistics on
23 the mid-market is one of the plaintiff's actual behavior.
24 Plaintiffs characterize vendors that serve the mid-market as
25 "hav[ing] limited capacity to support customers with diverse
26 operations such as multiple geographic locations, distinct legal
27 entities * * * or numerous lines of business." FAC (Doc #125)
28 ¶12 at 8. But, soon after filing its complaint, the United

1 States Department of Justice itself -- which surely meets at
2 least two of these criteria -- chose AMS, a so-called mid-market
3 vendor, to meet its HRM and FMS needs. The DOJ chose AMS over
4 Oracle and PeopleSoft.

5 Plaintiffs' statistics, expert witness and behavior all
6 treat mid-market vendors Lawson and AMS as part of the high
7 function market. The court sees no reason why it should not
8 follow suit.

9 *Microsoft.* As discussed above the court finds Burgum's
10 testimony regarding Microsoft's entry into the up-market to be
11 incredible. The testimony of Keating, as well as BearingPoint's
12 homepage, make it clear that Microsoft has every intention of
13 using Axapta and BearingPoint to compete for so-called up-market
14 business. Furthermore, Allen's testimony about the struggle of J
15 D Edwards in trying to enter the up-market does not apply to
16 Microsoft. Microsoft has the money, the reputation and now, due
17 to the BearingPoint alliance, it has the sales force necessary to
18 become a major competitor for up-market business. Accordingly,
19 the court finds that Microsoft will be a viable substitute for a
20 significant number of consumers should a post-merger Oracle
21 impose a SSNIP in its pricing of ERP software.

22 *Best of breed solutions.* The court does not dismiss
23 defendant's bundle argument as an "elaborate distraction" or
24 "economical nonsense" as plaintiffs urge. Pls Post Brief (Doc
25 #366) at 21-22. The reality of this industry is that 90 percent
26 of consumers purchase software "bundles" containing several
27 pillars; rarely does a consumer purchase a single pillar. Tr at
28 3815:10-13 (Hausman). FMS and HRM pillars typically are sold in

1 a bundle along with additional kinds of EAS, such as CRM or SCM.
2 Further, the discounts that are offered to potential consumers
3 are based on the value of the entire bundle, not simply based
4 upon the presence of an HRM or FMS pillar. Tr at 3813:23-3814:1
5 (Hausman). Accordingly, when Oracle or PeopleSoft offer a
6 discount on a bundle, they are doing so in order to ensure that
7 the customer purchases all the pillars from Oracle or PeopleSoft,
8 rather than turn to a best of breed vendor.

9 *Incumbent solutions.* The court, however, is not
10 persuaded that incumbent solutions would be able to constrain a
11 post-merger Oracle from imposing a SSNIP. Companies can, and
12 apparently do, threaten to "do nothing," in hopes of getting a
13 better price on ERP software. See Campbell demo ##20-21. But it
14 is highly unlikely that any monopolist would see this threat as
15 "credible," thereby preventing a SSNIP. Given the ever-changing
16 conditions of both the regulatory and technological aspects of
17 human resources and financial management, it is hard to sustain
18 the idea that large corporations would rather employ an
19 antiquated software system than pay 10 percent more for modern
20 and continuously maintained products. Such a choice in today's
21 business world would be extremely risky and unlikely.

22 Accordingly, without a relevant market having been
23 established, the court cannot conduct a burden-shifting
24 statistical analysis under Philadelphia Nat Bank, much less hold
25 that plaintiffs are entitled to such a presumption. Nor, of
26 course, can the court apply the concentration methodology of the
27 Guidelines. See Guidelines § 1.51.

28

1 *Plaintiffs' Proposed Geographic Market*

2 Assuming that high function FMS and HRM is the relevant
3 product market, plaintiffs claimed that the relevant geographic
4 market is the United States. Pls Post Brief (Doc #366) at 22.
5 Again, plaintiffs relied heavily on Elzinga's testimony. In
6 reaching this market definition, Elzinga ironically enough did
7 not rely upon the oft-used Elzinga-Hogarty (E-H) test, which he
8 admitted has been used in "dozens and dozens of merger cases" and
9 which he himself co-developed. Tr at 2154:22-23 (Elzinga).

10 In informal terms, the E-H test "measures the accuracy
11 of a market delineation by determining the amount of either
12 imports into or exports from a tentative market. The test is
13 based on the assumption that if an area has significant exports
14 or imports, then that area is not a relevant geographic market.
15 Under the [test], exports or imports greater than 10% suggest
16 that the market examined is not a relevant market." United
17 States v Country Lake Foods, Inc, 754 F Supp 669, 672 n2 (D Minn
18 1990).

19 Elzinga stated that he did not believe the E-H test
20 "fit this particular antitrust case." Tr at 2154:25-25
21 (Elzinga). Instead, Elzinga relied solely upon the Guidelines
22 "hypothetical monopolist" test in determining the geographic
23 market. Tr at 2204:1-11. (Elzinga). See Guidelines § 1.21. "I
24 am persuaded that the United States [is the geographic market
25 because] if [someone] were the sole supplier of high function FMS
26 and HRM * * * in the US, and [he imposed a SNNIP], he would not
27 be thwarted or undercut by economic * * * agents outside the
28 United States." Id.

1 Elzinga cited several relevant factors that led him to
2 believe the Guidelines required a United States-only geographic
3 market. Tr at 2203:24-25 (Elzinga).

4 *Where software code is written is not relevant to*
5 *geographic market.* "The [product] market here is high function
6 FMS and HRM, and that is not just code. What you buy when you
7 buy this product * * * is a relationship." Tr at 2154:10-14
8 (Elzinga) (emphasis added). Plaintiffs urged the court to
9 exclude from the geographic market the site of manufacture.
10 Hence, Elzinga urged the court to look beyond the location of
11 manufacture for FMS and HRM. Since all of SAP's software is
12 manufactured in Germany and SAP indisputably produces high
13 function ERP, inclusion of SAP's site of manufacture would wholly
14 undermine plaintiffs' proposed geographic market.

15 Rather, Elzinga stated that the relevant factor in
16 determining the geographic market is how the products are
17 "marketed and supported" (i e, the relationship) between the ERP
18 vendor and the consumer. Tr at 2202 (Elzinga). Elzinga argued
19 that purchasing high function FMS and HRM entails installation,
20 implementation, maintenance and upgrades -- a relationship that
21 has an inherently "local" aspect. Tr at 2154:21-25 (Elzinga).
22 Accordingly, since the relevant factor is the marketing and
23 support of the software (which occurs in the United States) and
24 not the "shipment" of the software from the manufacturing site
25 (which could occur outside the United States), the E-H
26 "shipments" test is not appropriate for this merger analysis. Tr
27 at 2205:11-14 (Elzinga).

28 Under the Guidelines, because the relevant factor of

1 "relationship" occurs only within the United States for United
2 States customers, these customers could not seek substitutes
3 abroad in the event of a SSNIP, thus making the United States the
4 geographic market, according to Elzinga.

5 *No arbitrage exists in this market.* Arbitrage occurs
6 when a consumer of a product buys the product from a vendor in
7 one geographic location at a low price, but then sells the
8 product to another consumer in a different geographic location
9 for a higher price. Tr at 2157:15-19 (Elzinga). Arbitrage is a
10 factor that Elzinga stated can "stitch" together two geographic
11 locations into "one geographic market" for merger analysis. Tr
12 at 2157:20-22 (Elzinga). Elzinga illustrated the phenomenon of
13 arbitrage for the court via a precious stone hypothetical. "If
14 the price of diamonds got relatively high in the United States,
15 compared to * * * Europe, * * * arbitragers could buy diamonds
16 where the price is low [Europe] and ship them to where the price
17 is high * * * thereby eliminating the price difference [between]
18 the two parts of the world." Tr at 2157:16-19 (Elzinga).

19 But, according to Elzinga, arbitrage is not a factor
20 that can "stitch" the United States high function FMS and HRM
21 markets to the same markets in other parts of the world. Tr at
22 2205:21 (Elzinga). Arbitrage does not exist in the high function
23 FMS and HRM markets for two reasons, he testified. First, the
24 products that consumers buy from Oracle, PeopleSoft or SAP are
25 licensed products; accordingly, the consumers "do not have the
26 legal authority" to resell the software to other consumers. Tr
27 at 2158:6 (Elzinga). Second, high function FMS and HRM is tooled
28 to "work * * * and meet the specific configurations and

1 capabilities [of only one consumer], it won't work [on another
2 consumer's computers]." Tr at 2158:18-21 (Elzinga). Therefore,
3 lack of the "arbitrage factor" reinforced Elzinga's proposition
4 that consumers cannot find substitute products outside of the
5 United States, he testified.

6 *Prices in the United States are not affected by prices*
7 *in other parts of the world.* Elzinga posited that United States
8 consumers of high function FMS and HRM cannot expect to be
9 charged the same price that a European consumer is paying. Tr at
10 2206:7-11 (Elzinga). "The United States is not affected by
11 prices or output of [high function FMS and HRM] outside the
12 United States. And the flip side is also true. [P]rices charged
13 outside of the United States aren't affected by prices charged
14 inside." Tr at 2206:10-12 (Elzinga).

15
16 *Oracle's Proposed Geographic Market*

17 Oracle asks the court to reject the plaintiffs'
18 proposed geographic market. Oracle argues that the geographic
19 market in this case is "so clear[ly] [a global market] that
20 reasonable people ought not be debating it." Def Post Brief (Doc
21 #365) at 22. Further, Oracle noted that this is not the first
22 time the DOJ has tried (unsuccessfully) to claim a United States-
23 only market in the face of overwhelming evidence of a worldwide
24 market. Def Post Brief (Doc #365) at 23 n19 (citing United
25 States v Eastman Kodak, 63 F3d 95 (2d Cir 1995)).

26 Oracle assailed plaintiffs' severance of SAP into two
27 distinct companies. "The proposed United States-only market is a
28 way of * * * making SAP appear 'smaller' than it really is and

1 simultaneously making Oracle and PeopleSoft appear 'bigger' than
2 they really are." Def Post Brief (Doc #365) at 23. While SAP
3 America is responsible for all sales of SAP software in the
4 United States and Canada, it sells software that was manufactured
5 in Germany. SAP America has no North American manufacturing
6 sites. Def Fact (Doc #357) ¶100 at 50. Further, all large
7 discount rates offered to United States customers by SAP America
8 must be approved by SAP AG. Tr at 2836:22-24 (Knowles).
9 Accordingly, without SAP AG, SAP America would (1) have nothing
10 to sell and (2) not be able to offer competitive discounts.

11 Moreover, simply because SAP has a larger market share
12 in Europe does not mean that the geographic market should be
13 limited to the United States. "Shares are not determinative of
14 how you define the [geographic] market" Hausman testified. SAP
15 -- all of SAP -- must be included he stated.

16 Once SAP is seen as a single entity, defendant claims
17 that there are four different ways of analyzing the geographic
18 market in this case, all of which point to a worldwide market.
19 Tr at 3793:18-19 (Hausman).

20 First, Hausman analyzed the geographic market under the
21 "hypothetical monopolist" test from the Guidelines. Tr at
22 3794:9-10 (Hausman). See Guidelines § 1.21. Even assuming SAP
23 America is distinct from SAP AG, Hausman stated that if a
24 hypothetical monopolist in the United States imposed a SSNIP, SAP
25 AG could "of course hire plenty of salespeople * * * and come in
26 and compete." Tr at 3795:2-6 (Hausman). "[SAP AG's] product
27 would do just fine in the United States." Id. Accordingly, "if
28 [the court] looks at this market from a Merger Guidelines

1 approach, you need to look at this on a worldwide basis." Tr at
2 3795:1-12 (Hausman).

3 Second, Hausman analyzed the geographic market under
4 the plaintiffs' description of the "high function needs" of the
5 customers who buy high function software. Tr at 3795:24-25
6 (Hausman). Hausman described the DOJ's product definition as
7 "multi, multi, multi," referring to the functionality that the
8 DOJ claims high function software possesses. Tr at 3796:1-2
9 (Hausman). The software must be able to handle multiple
10 currencies, from multiple jurisdictions, while understanding
11 multiple languages. Different currencies and different languages
12 are clearly "international or worldwide features," and therefore
13 "bring a worldwide aspect" to the analysis. Tr at 3798:7-8, 18-
14 20 (Hausman).

15 Third, Hausman employed the E-H test that was rejected
16 by its own creator. Tr at 3800-3804 (Hausman). Hausman stated
17 that this is a point that both he and Elzinga agree upon: the E-H
18 test would only be satisfied if the geographic market were
19 defined worldwide. Tr at 3801:7-11 (Hausman). Hausman stated
20 that Elzinga's rejection of the E-H test was "inappropriate" for
21 two reasons. First, there are several markets, other than the
22 high function ERP market, where the client buys a "relationship"
23 with the vendor (e g, the purchase of a mainframe computer or
24 server). But, it has never been argued that the computer market
25 is not a worldwide market. Tr at 3802:1-15 (Hausman). "We see
26 [this kind of relationship] in all sorts of high-technology
27 markets. Yet, people agree that those are all world markets."
28 Tr at 3802:13-15 (Hausman). Second, the E-H test has "often"

1 been applied to several cases involving services based upon a
2 relationship with customers, such as hospital merger cases. Tr
3 at 3803:12-20 (Hausman). Accordingly, the E-H test is
4 appropriate for this type of relationship-oriented scenario as
5 well, and all agree that the E-H test mandates a worldwide
6 market.

7 Finally, Hausman opined that there is empirical
8 evidence showing that prices in Europe constrain prices in the
9 United States, and vice versa. Tr at 3805 (Hausman). Hausman
10 studied the PeopleSoft DAFs submitted to the DOJ. He found that
11 the average discount rates for PeopleSoft in the United States
12 was 45.2 percent. Tr at 3805:19 (Hausman). In Europe, the
13 average discount was 45.1 percent. Tr at 3805:20 (Hausman).
14 Hausman stated that these discount rates are "virtually
15 identical." Tr at 3805:22. If the competitive conditions in
16 Europe and the United States were wholly independent of each
17 other, one would expect to see completely different discounts in
18 both regions. But these facts demonstrate, in Hausman's view,
19 that the market needs to be analyzed on a global scale. Tr at
20 3806 (Hausman).

21 Accordingly, Oracle urged the court to look at
22 concentration figures based upon a global market of all FMS and
23 HRM software. Def Fact (Doc #357) at 56. Using these product
24 and geographic market definitions, Oracle offered the following
25 global FMS market shares: SAP, 19.2 percent; Oracle, 16.8
26 percent; and PeopleSoft, 12 percent. Ex P0825 at 21. A merged
27 Oracle/PeopleSoft would, in Oracle's view, possess a 28.8 percent
28 market share in the FMS market.

1 For global HRM, Oracle offers the following market
2 shares: SAP, 11.9 percent; PeopleSoft, 11.3 percent; and Oracle,
3 3.04 percent. Ex D5815 at 9. A merged Oracle/PeopleSoft would
4 possess only a 14.3 percent market share in the HRM market.

5
6 *Findings of Fact: Geographic Market*

7 The court finds that the relevant geographic market
8 ("the area of effective competition") in this case is a worldwide
9 market. Tampa Electric Co v Nashville Coal Co, 365 US 320, 327-
10 28 (1961).

11 At the outset, the court must address the plaintiffs'
12 attempt to sever SAP into two companies -- SAP America and SAP
13 AG. The court finds this argument wholly unpersuasive. SAP
14 America, while critical to SAP's success in North America, is not
15 an independent company. This fact was clearly shown by the
16 testimony of Knowles who stated that any large discount (usually
17 above 70 percent) that SAP America offers, clearly in the face of
18 competition, must get that discount approved by SAP AG in
19 Germany. Further, while the source of the code is not
20 determinative of this severance inquiry, it is important to note
21 that all of SAP America's software is manufactured and shipped
22 from SAP AG. So without SAP AG, SAP America would have nothing
23 to sell, and even if it did have its own manufacturing, SAP
24 America would still have to get competitive discount rates
25 approved by SAP AG. To view these two dependent branches of SAP
26 as separate entities would be asking the court to ignore the
27 reality of how the industry presently operates. Accordingly, the
28 court finds that SAP must be viewed as one single entity.

1 Next the court must decide the geographic boundaries
2 within which the market participants effectively compete. This
3 court (per Judge Chesney) has used the E-H test in defining the
4 relevant geographic market for merger analysis. See California v
5 Sutter Health Systems, 84 F Supp 2d 1057, 1069 (ND Cal 2000)
6 ("The analytical process [of defining the geographic market]
7 generally begins with an application of the Elzinga-Hogarty test
8 * * *."). Furthermore, the results of employing the E-H test are
9 undisputed. See Tr at 2155:9-10 (Elzinga) (admitting that the E-
10 H test would dictate the court to view the market as a global
11 market). Elzinga's basis for rejecting the E-H test is
12 unpersuasive. The court, while agreeing that "relationships" are
13 important in ERP sales, does not find that such relationships
14 render the E-H test inapplicable. First, the court can think of
15 a number of sales transactions that involve marketing and
16 negotiation as well as installation and maintenance
17 "relationships" between seller and vendor: computer sales, copier
18 sales, motor vehicles to name a few. But to argue that these
19 markets, all involving major foreign vendors, are limited to the
20 United States would be untenable.

21 Second, the E-H test has been used when important
22 vendor-customer relationships are involved. A clear example is
23 Sutter Health, where Judge Chesney used the E-H test in a
24 hospital merger case to determine whether patients seeking
25 medical treatment outside of the Bay area required a geographic
26 market expansion. No one can argue that medical treatment is not
27 a "relationship" between the patient and the doctor. But the E-H
28 test controlled the analysis, not the location of the

1 "relationship" between the doctor and the patient. Further,
2 Judge Chesney is not alone in applying the E-H test to hospital
3 merger cases. See United States v Mercy Health Services, 902 F
4 Supp 968, 980 (ND Iowa 1995).

5 Finally, the court cannot allow this "relationship"
6 factor to solely dictate the geographic boundaries for this case,
7 as the court has already found that "non-relationship" solutions
8 (i e, outsourcing) cannot be excluded from the product market.

9 Accordingly, the court holds that the E-H test is an
10 appropriate method of determining the "area of effective
11 competition" between vendors in this relevant market. Tampa
12 Electric, 365 US at 327. Elzinga, creator of the test, admitted
13 that applying the E-H test would mandate a global market. The
14 court therefore finds that the geographic market in this case is
15 global.

16
17 *Findings of Fact: Market Shares and Concentration*

18 In addition to failing to meet their burden of proving
19 a distinct product market, plaintiffs have failed to prove that
20 the relevant product market in this case is geographically bound
21 to the United States. Accordingly, the market share and
22 concentration statistics presented by Elzinga are wholly
23 inapplicable to the court's analysis. The court is left with a
24 new product market definition which includes, at least: (1) ERP
25 sold by Oracle, SAP, PeopleSoft, Lawson, AMS and Microsoft; (2)
26 outsourcing solutions; and (3) best of breed solutions. Further,
27 this product market must be analyzed as a global one.

28 Not surprisingly, plaintiffs did not offer any market

1 share data other than those of Elzinga. Oracle, while
2 successfully picking apart plaintiffs' market definition did not
3 provide a definitive alternative of its own. The only
4 statistical data Oracle offered showed the 2002 global HRM shares
5 of Oracle, PeopleSoft and SAP, but did not include HRM data on
6 AMS or Microsoft's share since the BearingPoint alliance.
7 Moreover, Oracle offered even less in the way of FMS shares or
8 concentration.

9 But it is plaintiffs, not defendant, who carry the
10 burden of proving market shares and concentration in order to
11 invoke the presumptions of the case law or to sustain a showing
12 in accordance with the Guidelines. The court cannot furnish its
13 own statistics.

14 Without the benefit of presumptions, the burden remains
15 upon plaintiffs to come forward with evidence of actual
16 anticompetitive effects.

17
18 *Anticompetitive Effects*

19 *Plaintiffs' Evidence of Coordinated Effects*

20 Plaintiffs presented no evidence at trial on
21 coordinated effects. This was a wise decision, as proving the
22 probability of such collusion would definitely be an uphill
23 battle for two reasons. First, the products in the relevant
24 market are not homogeneous. Plaintiffs themselves even argue
25 against homogeneity. Pls Post Brief (Doc #366) at 30 (stating
26 that the products in the high function HRM and FMS market are
27 "highly differentiated"). Second, there is no price transparency
28 in this market. Prices and discount rates for software are known

1 only to the vendor and the customer, both of whom take great
2 pains to keep such information confidential. Without homogeneity
3 or transparency, the market conditions are not conducive to
4 coordinated effects, either tacit or express. Plaintiffs
5 recognized this unlikelihood. *Id* at 38 ("The fact that high
6 function software is a differentiated product and that pricing is
7 not transparent make price coordination between Oracle and SAP
8 unlikely.").

9 But in plaintiffs' post-trial brief they unexpectedly
10 included an entire section arguing that a post-merger Oracle and
11 SAP could tacitly collude in allocating customers or markets. *Id*
12 at 38-40. Plaintiffs argue that "Oracle is strong in the high
13 technology and telecommunications" area while "SAP dominates the
14 oil and gas industry." *Id* at 39. Accordingly, Oracle and SAP
15 could reach a tacit understanding based upon "mutual trust and
16 forbearance" and stop competing against each other in those
17 relevant areas. *Pls Post Brief* at 38 (quoting Hospital Corp of
18 Am, 807 F2d at 1391). But the court has searched in vain for any
19 testimony or exhibits regarding tacit territorial or market
20 divisions by Oracle and SAP. With no evidence in the record
21 regarding such a speculative coordinated effects argument, the
22 court finds this new theory to be without merit.

23

24 *Plaintiffs' Evidence of Unilateral Effects*

25 Plaintiffs rest their theory of anticompetitive effects
26 on an attempt to prove that Oracle and PeopleSoft are in a
27 "localized" competition sphere (a "node") within the high
28 function FMS and HRM market. This sphere does not include SAP or

1 any other vendors, and a merger of Oracle and PeopleSoft would,
2 therefore, adversely affect competition in this localized market.
3 Pls Post Brief (Doc #366) at 31-36; Tr at 2448-2450 (McAfee).
4 Plaintiffs also offered evidence to show that SAP could not
5 reposition itself to replace the localized competition that would
6 allegedly be lost if Oracle and PeopleSoft merge. Pls Post Brief
7 (Doc #366) at 32-33.

8 In attempting to prove localized competition between
9 Oracle and PeopleSoft, plaintiffs relied on virtually the same
10 kind of evidence used to prove the product market, including
11 internal corporate documents, SAP executive testimony, customer
12 and consultant firm testimony and expert testimony.

13 *Internal documents.* Plaintiffs rely upon several
14 quarterly "win/loss analysis" documents that were compiled by
15 Oracle during 2003 to show that Oracle and PeopleSoft are each
16 other's "closest competitors." Pls Post Brief (Doc #366) at 31.
17 In Quarter 1 of 2003, plaintiffs offered evidence that Oracle
18 lost to PeopleSoft 37 percent of the time when the two were in
19 competition, while Oracle lost to SAP only 15 percent of the time
20 the two competed. Ex P2090. Plaintiffs then offered evidence
21 from Quarter 3 in which Oracle "explicitly states" that
22 "PeopleSoft is our Number #1 competitor" and "SAP is our Number
23 #2 competitor." Ex P2093.

24 But what plaintiffs failed to mention regarding the
25 Quarter 3 findings is that Oracle lost to PeopleSoft 54 percent
26 of the time, while they lost to SAP 53 percent of the time.
27 Accordingly, what separates the "#1 competitor" and "#2
28 competitor" of Oracle is merely one percent. Ex P2093.

1 Moreover, these roughly equal loss ratios continued into Quarter
2 4 when Oracle lost to PeopleSoft 59 percent of the time, while
3 losing to SAP 50 percent of the time. Ex P2095. Accordingly,
4 the court can draw no conclusions from the conflicting data
5 within the win/loss reports upon which plaintiffs focus. In
6 fact, these documents arguably negate a showing of localization
7 between Oracle and PeopleSoft more than they support such a
8 finding.

9 *SAP executive testimony.* Plaintiffs attempt to
10 localize PeopleSoft and Oracle by showing that many customers
11 have a negative "perception" of SAP and that SAP is at a
12 "substantial disadvantage" when it comes to competing for
13 customers in the United States (the geographic market that the
14 court has already rejected). Pls Post Brief (Doc #366) at 31-32.
15 In proving these negative perceptions, plaintiffs pointed to the
16 testimony of SAP America's Knowles. At trial, Knowles agreed
17 that SAP has had to deal with "perceptions" that SAP is "too
18 costly and difficult to implement." Tr at 2950:8-12 (Knowles).
19 Further, plaintiffs cited evidence from consulting firms and
20 Knowles stating that SAP has had "trouble" breaking into certain
21 verticals in the United States. See Ex P3037 (Knowles dep
22 5/3/04) at Tr 67:21-68:7 (difficulty breaking into services
23 sector); Tr at 1698:1-8 (Bass) (difficulty in entering banking
24 industry).

25 In deciding the merits of this argument, the court is
26 again perplexed by the inconsistency within plaintiffs' own
27 evidence. In trying to prove Oracle and PeopleSoft are in
28 localized competition, plaintiffs tried to downplay SAP's

1 presence in the United States and characterize SAP has being
2 "disadvantaged" and unable to enter several markets. But
3 plaintiffs' own evidence on market shares negates such a finding.
4 Even assuming the relevant geographic market in this case was the
5 United States, Elzinga's calculations of market shares in so-
6 called high function FMS has SAP ranked highest (above Oracle and
7 PeopleSoft) with a 39 percent market share. Elzinga demo #10.
8 Moreover, in the HRM high function market, plaintiffs' expert
9 ranked SAP second with a 29 percent market share (beating
10 Oracle). Elzinga demo #11. SAP is not a "disadvantaged" and
11 "troubled" competitor in the United States. If it were, SAP
12 should not be beating Oracle in both markets and beating
13 PeopleSoft in the FMS market. Accordingly, the court cannot
14 credit plaintiffs' argument that SAP is suffering from negative
15 customer perceptions or is disadvantaged in competing against
16 Oracle and PeopleSoft.

17 *Customer and consulting firm testimony.* In furtherance
18 of this localization theory, plaintiffs argued that customer
19 testimony shows that "Oracle and PeopleSoft present better
20 alternatives in the United States than SAP." Pls Post Brief (Doc
21 #366) at 32. Plaintiffs support this assertion by citing the
22 testimony of five customers who eliminated SAP from the final
23 round of negotiations and instead chose to deal with Oracle and
24 PeopleSoft. *Id* (citing testimony of North Dakota, Neiman Marcus,
25 Greyhound, AIMCO and Cox).

26 The court finds this evidence unpersuasive for two
27 reasons. First, the court cannot take the self-interested
28 testimony of five companies which chose to eliminate SAP from

1 consideration, and from that sample draw the general conclusion
2 that SAP does not present a competitive alternative to Oracle and
3 PeopleSoft. Drawing generalized conclusions about an extremely
4 heterogeneous customer market based upon testimony from a small
5 sample is not only unreliable, it is nearly impossible. See
6 Sungard Data Sys, 172 F Supp 2d at 182-83. Second, the most
7 persuasive testimony from customers is not what they say in
8 court, but what they do in the market. And as Elzinga's
9 statistics showed, customers are buying SAP FMS more than Oracle
10 and PeopleSoft FMS. Elzinga demo #10. Customers are buying SAP
11 HRM more than that of Oracle. Elzinga demo #11.

12 Plaintiffs rely upon two of the Big Five consulting
13 firms' testimony stating "they believe SAP is often the third
14 choice of many US customers." Pls Post Brief (Doc #366) at 32.
15 According to BearingPoint's Keating, SAP has long been the least
16 flexible of the three vendors in the way it has sold its HRM and
17 FMS software. Tr at 901:6-20, 946:18-20 (Keating). Also,
18 Accenture's Bass testified that SAP was "less likely to discount
19 than Oracle and PeopleSoft." Pls Post Brief (Doc #366) at 32;
20 P3198 (Bass Dep) at Tr 132:08-133:07. But the plaintiffs' own
21 evidence discounts this argument. While it may be true that SAP
22 has been the least flexible and least likely to discount, the
23 evidence introduced by Elzinga shows that customers apparently
24 are not deterred by SAP's inflexibility or higher pricing.
25 Customers still buy SAP software over Oracle and PeopleSoft. See
26 Elzinga demo ##10-11.

27 Taken as a whole, the customer and consulting firm
28 testimony falls short of proving that Oracle and PeopleSoft

1 engage in competition to which SAP is simply not a party.
2 Moreover, both PeopleSoft industry witnesses conceded there is no
3 vertical in which SAP is not competitive with Oracle and
4 PeopleSoft. Tr at 388:1-11 (Bergquist); 1957:10-21 (Wilmington).

5 *Expert testimony.* Finally, plaintiffs offered the
6 testimony of Professor McAfee to show that PeopleSoft and Oracle
7 are engaged in localized competition to which SAP is not a party.
8 McAfee conducted three independent analyses to reach his
9 conclusions. Pls Post Brief (Doc #366) at 34.

10 First, McAfee examined, in detail, twenty-five of
11 Oracle's DAFs in which Oracle salespersons had listed PeopleSoft
12 as their justification for seeking a higher discount. Second,
13 McAfee, using charts of discount trends provided by Oracle, ran a
14 regression analysis to assess the effect of PeopleSoft's presence
15 on Oracle's discount levels. Third, using the market statistics
16 calculated by Elzinga, McAfee conducted a "merger simulation" to
17 assess the theoretical effects of an Oracle/PeopleSoft merger.
18 Tr at 2447-2449 (McAfee). Based upon these three independent
19 studies, McAfee concluded that in many instances PeopleSoft and
20 Oracle are each other's closest competitor and a merger between
21 the two would cause significant anticompetitive effects. Tr at
22 2466:8-13, 2449:22-24 (McAfee).

23 *Twenty-five case studies.* At trial, McAfee showed the
24 court several DAFs in which the presence of PeopleSoft had
25 justified an Oracle salesperson seeking a steep discount. McAfee
26 then picked out explicit language from the justification column
27 to prove that when Oracle and PeopleSoft compete, they do so
28 vigorously. For example, when seeking a discount on the Hallmark

1 account, a salesperson's justification for a discount was an
2 "EXTREMELY competitive situation against" PeopleSoft. Because of
3 this competition, a "higher discount was warranted." Tr at
4 2464:15-21 (McAfee). Likewise, in trying to win the Greyhound
5 account Oracle wanted to cause a "third straight loss" for
6 PeopleSoft and "only aggressive proposals" would win Greyhound
7 over. Tr at 2466:14-20 (McAfee).

8 These two examples are representative of the many that
9 McAfee showed the court -- clear examples of how vigorously
10 PeopleSoft and Oracle compete when they go "head to head" against
11 each other, he asserted. McAfee concluded that such head to head
12 competition between Oracle and PeopleSoft would be lost if this
13 merger were consummated. Tr at 2488:13-25 (McAfee).

14 *Regressions.* Next, in trying to show localized
15 competition, McAfee used a regression technique to calculate what
16 effect, if any, the presence of PeopleSoft or another competitor
17 has on the discounts offered by Oracle. Tr at 2495:22-25
18 (McAfee). McAfee ran two regression analyses. In the first,
19 McAfee was privy to sales representative surveys identifying the
20 discount percentages given to Oracle customers that had purchased
21 the E-Business Suite. The surveys also identified the competitor
22 that Oracle had beaten to get the account. Tr at 2497:10-14
23 (McAfee). McAfee narrowed the sample to all sales that were over
24 \$500,000, in order to equate the sample with Elzinga's market
25 definition. McAfee used these variables (competitor, net
26 revenue, discount percentage) and ran the regressions. Tr at
27 2498:3-20 (McAfee). The data led McAfee to conclude that
28 "PeopleSoft has a .097 (9.7 percent) effect" on the discount

1 Oracle offers. Tr at 2499:22-25 (McAfee). In other words, when
2 Oracle competes against PeopleSoft for the sale of Oracle's E-
3 Business Suite, the consumer obtains a 9.7 percent greater
4 discount than when Oracle competes against no one in selling the
5 suite.

6 Wanting to look at more than just the sale of the E-
7 Business suite, McAfee then analyzed all of the DAFs that Elzinga
8 had used in defining the product market and matched those with
9 the data from the sales representative forms to create a larger
10 sample with more variables. Tr at 2504:22-25 (McAfee). The DAFs
11 listed the percentage requested along with the competitor
12 justifying such a discount. Once McAfee ran this second
13 regression, he concluded that PeopleSoft had a .136 effect on
14 Oracle's discount rates (i e, 13.6 percent greater discount). Tr
15 at 2507:6-11 (McAfee). Accordingly, McAfee concluded that when
16 PeopleSoft is competing against Oracle, Oracle's discounts are 9
17 to 14 percentage points greater. Tr at 2508 (McAfee).

18 Based upon these DAF studies and regression analyses,
19 it is safe for the court to conclude that Oracle and PeopleSoft
20 do compete frequently for ERP customers and when they do compete,
21 that competition can be vigorous. But these two contentions are
22 not disputed by anyone in the case. Oracle concedes that
23 PeopleSoft is a frequent rival. Def Post Brief (Doc #365) at 34.
24 The court fails to understand what this undisputed fact is
25 supposed to show about whether Oracle and PeopleSoft are
26 competing head to head in a product space in which SAP is not a
27 party. McAfee himself stated that from these twenty-five DAFs,
28 he drew the "broad conclusion that in many instances PeopleSoft

1 and Oracle are each others' closest competitors." Tr at 2466:10-
2 12 (McAfee). But these DAFs tell the court nothing about how
3 often SAP competes against PeopleSoft or Oracle (a key factual
4 issue if trying to exclude SAP) or whether that competition is
5 equally fierce. What would have been more helpful to the court
6 would have been the DAFs of PeopleSoft and SAP as well.
7 Defendants introduced several SAP DAFs during trial, one showing
8 a very aggressive competition against Oracle, so it is clear that
9 such forms exist. Ex D5649R A more complete DAF record would
10 perhaps have evidenced localized competition between Oracle and
11 PeopleSoft. But plaintiffs did not provide such DAFs to McAfee,
12 nor is it clear whether they even sought to obtain such documents
13 during discovery.

14 Simply because Oracle and PeopleSoft often meet on the
15 battlefield and fight aggressively does not lead to the
16 conclusion that they do so in the absence of SAP.

17 *Merger simulation.* Finally, McAfee conducted a merger
18 simulation analysis. There are several merger simulation models
19 that can be used depending on the characteristics of the
20 industry. Tr at 2511:12-19 (McAfee). McAfee chose the "English
21 auction" model (also called the oral ascending auction) because
22 one of the features of this model is its allowance of multiple
23 bidders and multiple rounds of bidding. Tr at 2511:19-22
24 (McAfee). The simulation works by putting in necessary variables
25 and assumptions, such as market shares and percentage of wins in
26 head to head competition. Once these variables were accounted
27 for, McAfee still had to set a variable for "how competitive the
28 market [was] pre-merger." Tr at 2526:17-22 (McAfee). One way of

1 creating such a measurement is by estimating the "total value of
2 the product that accrues to the buyer" (i e, how "much of the
3 value of the software to the buyer actually accrues to the buyer
4 and how much accrues to the vendors in the form of price"). Tr
5 at 2517:1-4 (McAfee). McAfee ran the simulation based upon five
6 different "buyer accrual" estimates: .5 (only 50 percent
7 accrual) to .9 (90 percent accrual). McAfee used the market
8 shares calculated by Elzinga as his market shares variable. Once
9 all the data are compiled and the variables accounted for, the
10 merger is simulated by merging the shares of the two merging
11 firms. Once this is done, data can be calculated showing how
12 much the price of the relevant product is expected to increase.
13 McAfee asserted that in the high function FMS market, after the
14 Oracle/PeopleSoft merger, he expects price to increase anywhere
15 from 5 percent (.50 accrual variable) to 11 percent (.90 accrual
16 variable). In the high function HRM market, McAfee concluded
17 that the price would increase by 13 percent (.50 accrual
18 variable) to 30 percent (.90 accrual variable). Ex P4024.

19 McAfee asserted that this merger simulation, using
20 Elzinga's market share statistics, shows that a merger between
21 Oracle and PeopleSoft will lead to a unilateral price increase in
22 both markets.

23 But the court has already found that Elzinga's market
24 share statistics are not a reliable indicator of Oracle, SAP and
25 PeopleSoft's positions in the ERP market. Accordingly, because
26 this merger simulation is based upon these unreliable data, the
27 court concludes that the simulation results are likewise
28 unreliable.

1 *Oracle's Competitive Effects Rebuttal*

2 Oracle takes issue with all of the plaintiffs' evidence
3 regarding the likelihood of anticompetitive unilateral effects.

4 First, Oracle claims that the present case is not the
5 type of case for which the doctrine of unilateral effects was
6 created. Oracle offered Campbell's expert testimony that a
7 fundamental assumption of the unilateral effects theory is not
8 present in this case. Tr at 2721:3-5 (Campbell). Campbell
9 testified that the "unilateral effects doctrine is posited on the
10 notion of a localized market powered by a seller and a group of
11 purchasers located in product space or geographic space around
12 that particular seller." Tr at 2721:5-9 (Campbell). This
13 "product space" is defined by characteristics of the product or
14 products within the space. Campbell offered a homey example of
15 product space using breakfast cereal. Tr at 2721:15-18
16 (Campbell). A number of customers have characteristic
17 preferences for their breakfast cereal that could create a
18 product space within the entire breakfast cereal market. For
19 example, some customers prefer cereal to be crunchy, sugar-free
20 and high in fiber. These characteristics of the product will
21 narrow the entire market down to a "space" in which only crunchy,
22 sugarless, high fiber cereals occupy the space and only those
23 companies that produce such cereal are competitors. Campbell
24 called this space a "node," with the buyers being centered around
25 this node. The unilateral effects theory is concerned about
26 there being only one vendor operating inside the node, thereby
27 being able to increase the price unilaterally. Tr at 2721:19-23
28 (Campbell). Plaintiffs attempted to carve out a "node" for high

1 function FMS and HRM software in the United States in which only
2 Oracle and PeopleSoft compete. Accordingly, if a merger takes
3 place, there will be only one vendor in this node with the
4 ability unilaterally to reduce output and raise price within the
5 node.

6 Campbell asserted that the unilateral effects theory is
7 predicated on the fundamental assumption that the consumers in
8 the node have no "buyer power." He testified that the theory
9 assumes that customers are unsophisticated buyers who will not be
10 able to rebuff a price increase. Tr at 2721:23 (Campbell). This
11 fundamental assumption does not hold in the case of the products
12 in suit. Campbell asserted that the buyers of high function FMS
13 and HRM are extremely sophisticated and knowledgeable and engage
14 in extensive and intensive one-on-one negotiations with vendors.
15 These customers clearly have a lot of power during these
16 negotiations, Campbell claimed, and they are aware of this power.
17 Tr at 2722:1-4 (Campbell). Campbell gave examples of high
18 function consumers such as Emerson Electric and Daimler whose
19 representatives testified that their companies have "leverage"
20 and "power over people they deal with," and use their "size" and
21 "the size of the deal" to gain better deals on software.
22 Campbell demo #25 (citing Tr at 1287:22-1288:2 (Peters); Tr at
23 1407:20-1408:1 (Gorriz)). Campbell concluded that the unilateral
24 effects theory is "dogma developed for a totally different
25 context" from the present case. Tr at 2728:6-7 (Campbell).

26 Even assuming arguendo that a unilateral effects theory
27 is appropriate for this case, Oracle attacks each piece of
28 evidence that plaintiffs put forward attempting to prove

1 localization between Oracle and PeopleSoft.

2 Oracle objected to plaintiffs' characterization of SAP
3 as a struggling firm with a substantial disadvantage which
4 prevents it from being in a localized space with Oracle and
5 PeopleSoft. Def Post Brief (Doc #365) at 33. Oracle claims that
6 these SAP "struggling" assertions are "not remotely true" and are
7 belied by the fact that SAP has over 22,000 professional service
8 customers. Id. While Oracle admits that SAP does not "dominate"
9 the United States in the manner that it may "dominate elsewhere,"
10 non-domination does not equate with "struggling." Id.

11 Finally, Oracle takes aim at McAfee's expert testimony
12 on anticompetitive effects. First, Oracle claims that McAfee's
13 "case studies" based upon the Oracle DAFs do nothing more than
14 "show Oracle and PeopleSoft are frequent rivals." Id at 34.
15 This evidence reveals nothing about localization between Oracle
16 and PeopleSoft in a product space in which SAP is not
17 encompassed. McAfee offered no insights regarding the
18 characteristics of high function FMS and HRM that create the
19 alleged product space between Oracle and PeopleSoft. Further,
20 these case studies are devoid of any information about whether
21 head to head competition between Oracle and SAP, or PeopleSoft
22 and SAP, is equally vigorous.

23 With regards to McAfee's regression analysis, Oracle
24 argued the analysis was flawed from the outset. The data upon
25 which McAfee based his regression were "not based on any set of
26 data identifying * * * high function HRM and FMS software, but
27 only on data involving broader suites of EAS." Id at 36.
28 Accordingly, it is impossible to know if these alleged increased

1 discount rates were the product of high function FMS and HRM,
2 other ERP pillars or the bundling of all. Without this crucial
3 information, the regression analysis shows nothing in regards to
4 localization between Oracle and PeopleSoft in a high function FMS
5 and HRM product space. Id at 37.

6 Furthermore, Oracle assails McAfee's merger simulation
7 as "simplistic" and "spurious." Id. Oracle cites two major
8 flaws in the merger simulation. First, the "auction" model is
9 wholly inappropriate for the present market because (1) the
10 customers in this market are extremely powerful at bargaining and
11 (2) vendors of ERP do not simply "bid" for business; rather these
12 negotiations are extensive and prolonged, with the purchaser
13 having complete control over information disclosure. Id.
14 Second, the "market shares -- the only input having any
15 connection to real-world data -- were those produced by Elzinga
16 using the plaintiffs' market definition." Id at 38. Because
17 Oracle wholly rejects plaintiffs' "gerrymandered" market
18 definition, market statistics based upon this definition are
19 equally flawed. Accordingly, the merger simulation's prediction
20 of price increases after the merger are inaccurate and
21 unreliable, based as it is on an inappropriate model using
22 inaccurate data.

23 Finally, and perhaps most importantly, Oracle contends
24 that plaintiffs have offered no "econometric calculations in
25 trying to prove localization." Id at 31. Oracle argues that
26 proving localization requires "extensive econometric analysis,"
27 such as diversion ratios, price-cost margins and the like, of
28 which plaintiffs have offered none. When Oracle cross-examined

1 plaintiffs' expert witnesses, both admitted that they "did not
2 even attempt to calculate diversion ratios, or cross-
3 elasticities, or any other economically meaningful measurement of
4 whether the products of Oracle and PeopleSoft are uniquely close
5 substitutes for each other." *Id.* See Tr at 2293:23-25
6 (Elzinga); Tr at 2599:3-8 (McAfee).

7
8 *Findings of Fact: Unilateral Effects*

9 The court finds that the plaintiffs have wholly failed
10 to prove the fundamental aspect of a unilateral effects case --
11 they have failed to show a "node" or an area of localized
12 competition between Oracle and PeopleSoft. In other words,
13 plaintiffs have failed to prove that there are a significant
14 number of customers (the "node") who regard Oracle and PeopleSoft
15 as their first and second choices. If plaintiffs had made such a
16 showing, then the court could analyze the potential for exercise
17 of monopoly power over this "node" by a post-merger Oracle or the
18 ability of SAP or Lawson to reposition itself within the node in
19 order to constrain such an exercise of monopoly power.

20 Plaintiffs' attempt to show localized competition based
21 upon customer and expert testimony was flawed and unreliable.
22 Moreover, plaintiffs' evidence was devoid of any thorough
23 econometric analysis such as diversion ratios showing recapture
24 effects. Both the Kraft Gen Foods and Swedish Match courts, the
25 only other courts explicitly to address unilateral effects, based
26 their rulings in part upon econometric evidence submitted by the
27 parties. Kraft Gen Foods, 926 F Supp at 356 (relying on
28 econometric evidence of the cross-price elasticity of demand

1 between Post cereal brands and Nabisco brands); Swedish Match,
2 131 F Supp 2d at 169 (relying upon the diversion ratio between
3 two brands of loose leaf tobacco).

4 Plaintiffs claim they were unable to present the court
5 with such econometric data because "this [the high function HRM
6 and FMS market] is a market that's shot through with price
7 discrimination," and therefore such data would be unreliable. Tr
8 at 2291:15-16 (Elzinga). But the court finds plaintiffs' price
9 discrimination argument unpersuasive. First, "this" market which
10 Elzinga claims is plagued by price discrimination, is the so-
11 called high function FMS and HRM market that the court has
12 already rejected as being the relevant product market in which to
13 examine the effects of the proposed merger. Second, assuming
14 that the high function FMS and HRM market were the relevant
15 market, which it clearly is not, plaintiffs only evidence
16 regarding price discrimination came from Elzinga's analysis of
17 the Oracle DAFs. Elzinga stated that there was a wide range of
18 discounts offered by Oracle to these 222 customers. Tr at
19 2222:13-19 (Elzinga). Elzinga stated that because Oracle charged
20 different discounts to these customers, Oracle must be able to
21 determine what price it can charge a customer before the customer
22 eliminates Oracle as a potential vendor (i e, Oracle price
23 discriminates). And since Oracle price discriminates, then SAP
24 and PeopleSoft must price discriminate as well.

25 But Elzinga admitted he conducted no formal studies of
26 price discrimination in "this" market. Tr at 2343:14-20
27 (Elzinga). Nor did he examine the discounts given by PeopleSoft
28 or SAP to their respective customers. Tr at 2351:10-14

1 (Elzinga). Elzinga's assertion that this market is "shot
2 through" with price discrimination because "somehow" Oracle was
3 able to determine what level of discount it could offer to
4 different customers uncannily resembles his argument that there
5 is "something different" about Oracle, PeopleSoft and SAP.
6 Again, the court refuses to sustain plaintiffs' inarticulable
7 contentions.

8 In sum, the court finds that plaintiffs have failed to
9 show an area of localized competition between Oracle and
10 PeopleSoft.

11 *Oracle's Efficiency Defense*

12 Oracle offers an efficiency defense to rebut
13 plaintiffs' claim of anticompetitive effects. Def Post Brief
14 (Doc #365) at 39-40. Oracle claims that the merger will result
15 in two overall efficiencies: (1) significant cost-savings for
16 Oracle in many areas of business, and (2) an increase in Oracle's
17 scale (i e, customer base), thereby fueling more competition with
18 SAP, Siebel and Microsoft resulting in higher innovation and
19 lower costs. Def Fact (Doc #357) ¶¶234-237 at 113, ¶¶247-251 at
20 118-21.

21 Oracle's cost-savings evidence came from a spreadsheet
22 originally compiled in May 2003 when Oracle wanted to acquire J D
23 Edwards. The spreadsheet was revamped in June 2003 when Oracle
24 sought to acquire PeopleSoft. It was finalized in July 2003 when
25 Oracle looked at acquiring both. Tr at 3469:5-12, 3470:19-20
26 (Catz); Ex D7132. (Acquisition Efficiencies Analysis) (AEA).
27 The AEA lists, as of July 2003, PeopleSoft's total costs for the
28

1 areas of sales and marketing (S & M), research and development (R
2 & D) and general and administrative (G & A). Id. For 2003,
3 PeopleSoft's total cost of S & M was \$769.3 million, R & D was
4 \$466.9 million and G & A costs were \$214 million. Id. The AEA
5 projects that one year after Oracle has acquired PeopleSoft, the
6 cost of S & M will decrease to \$34 million (\$735.3 million in
7 savings), R & D will decrease to \$201.3 million (\$265.6 million
8 in savings) and G & A will decrease to \$37.4 million (\$176.6
9 million in savings). Id. Accordingly, Oracle argues that post
10 merger, it will achieve cost-savings of over \$1 billion. Def
11 Fact (Doc #357) ¶234 at 113. Moreover, the cost savings are
12 annual. So Oracle would save \$1 billion in 2005, \$1 billion in
13 2006, and so forth. Tr at 3493:2-5 (Catz).

14 Catz further testified to the efficiencies that would
15 result if Oracle's scale were expanded to include PeopleSoft's
16 customers. Tr at 3438-3439 (Catz). Catz stated that one of the
17 main reasons, aside from cost savings, that led Oracle to make a
18 tender offer for PeopleSoft was the potential acquisition of
19 PeopleSoft's "customer base." Tr at 3438:20 (Catz). The scale
20 of a company is a source of annuity revenue, revenue which allows
21 a company to invest more in research and development of its
22 products. Id. By acquiring PeopleSoft, Oracle would capture the
23 extra revenue of PeopleSoft's customer base as well as the
24 potential for revenue from sales of add-on products. Tr at
25 3439:6-12 (Catz). This additional revenue and customer base
26 would allow Oracle to expand its R & D, thereby fueling more
27 innovation of Oracle software. Specifically, Catz testified
28 about a new "superset product line" that would have the "best

1 features from Oracle" and the "best features and modules from
2 PeopleSoft." Tr at 3451:2-7 (Catz).

3 Further, the larger customer base and increased
4 innovation would allow Oracle to compete with larger competitors,
5 such as Microsoft, and compete better in other ERP markets, such
6 as SCM and CMS. Tr at 3440:3-7 (Catz); Def Fact (Doc #357) ¶251.
7 Reduced costs, increased innovation and more competition are
8 efficiencies Oracle claims outweigh, and thus rebut, any showing
9 of anticompetitive effects plaintiffs have put forward.

10
11 *Plaintiffs' Efficiency Rebuttal*

12 Plaintiffs rebutted the efficiency defense by calling
13 Professor Zmijewski, a professor of business from the University
14 of Chicago. Zmijewski was asked to verify the arithmetic in the
15 AEA spreadsheet that Oracle claims explicate its large cost-
16 saving efficiencies. To verify the spreadsheet, Zmijewski was
17 required to "tease out" all of the inputs (i e, the pre-merger
18 costs and the post-merger costs of all departments) that had been
19 plugged in by Oracle, verify that those inputs were true (based
20 in fact) and then recalculate the numbers to verify that the
21 final efficiency amounts were the same as the amounts represented
22 on the AEA. Tr at 4509:16, 4517-4518 (Zmijewski).

23 Zmijewski teased out the inputs successfully then began
24 looking at information provided by Oracle and the SEC for some
25 "factual foundation" for these inputs and post-merger assumptions
26 Oracle had used in calculating the AEA. Tr at 4520:5
27 (Zmijewski). But Zmijewski hit a "dead end" every time he tried
28 to find some factual basis for any of the inputs in the

1 spreadsheet. Id. A four month search through the documents left
2 Zmijewski with "essentially none" of the information he needed to
3 verify the AEA inputs. Tr at 4520:11 (Zmijewski). Zmijewski's
4 uneasiness about his fruitless search was relieved when he found
5 that there was no factual basis for the inputs. Catz had "used
6 her personal judgment" based upon consultation with Larry Ellison
7 and others in determining the inputs that went into the AEA. Tr
8 at 4520:14-23 (Zmijewski); 3558:1-8 (Catz). Further, there were
9 no documents that could explain how Catz and others had reached
10 these personal judgments on the inputs. Tr at 3558:21 (Catz).
11 This led Zmijewski to conclude that the AEA is "not verifiable"
12 and therefore not reliable under the verification standards used
13 by many professionals, including the SEC. Tr at 4519:24, 4516:5-
14 12 (Zmijewski). Plaintiffs claim that cost-saving efficiencies
15 require defendant to "'explain the methods used to calculate'"
16 the cost-saving numbers. Pls Post Brief (Doc #366) at 47
17 (quoting Staples, 970 F Supp at 1089). According to plaintiffs,
18 Oracle has provided no explanation of the methods used to
19 calculate the AEA other than the judgment of Catz and her
20 colleagues.

21 Finally, plaintiffs urge the court to put no stock in
22 Oracle's innovation claims, as they are unverified and not
23 merger- specific. Pls Post Brief (Doc #366) at 49-50. When Catz
24 was cross-examined about the superset product line, the
25 innovative hybrid of Oracle and PeopleSoft, she did not have any
26 documents discussing this proposed innovation, nor did she know
27 any details about when the product would be available. Pls Post
28 Brief (Doc #366) at 50; Tr at 3533:8-16 (Catz). Plaintiffs claim

1 this "vague" assertion of a superset product line is not a
2 cognizable innovation claim under case law or the Guidelines.
3 Pls Post Brief (Doc #365) at 49 (citing Heinz, 246 F3d at 723
4 (requiring "reliable and significant evidence that the merger
5 will permit innovation that otherwise could not be accomplished *
6 * *."))).

8 *Findings of Fact: Efficiencies*

9 In order for a claimed efficiency to be "cognizable,"
10 it must be "substantiate[d]" and "verfi[able]." Guidelines §
11 4.0. The court finds Oracle's evidence on the claimed cost-
12 savings efficiency to be flawed and unverifiable. Catz and
13 Ellison's personal estimations regarding the potential cost-
14 savings to Oracle are much too speculative to be afforded
15 credibility. Oracle's efficiency defense based upon future
16 innovations (e g, the superset product) was not verified by
17 internal documents. Oracle presented no evidence regarding the
18 functionality or characteristics the innovative product will
19 contain, nor any evidence regarding its date of availability.

20 Accordingly, both claimed efficiencies are much too
21 vague and unreliable to rebut a showing of anticompetitive
22 effects.

24 *Conclusions Of Law*

25 This court has jurisdiction over this action pursuant
26 to 28 USC §§ 1331, 1337(a) and 1345 and Section 15 of the Clayton
27 Act, 15 USC § 25. Venue is proper in this district pursuant to
28 15 USC § 22 and 28 USC § 1391(c).

1 In order to succeed on their claim, plaintiffs must
2 prove by a preponderance of the evidence (1) the relevant product
3 and geographic market, and within this market (2) the effect of
4 Oracle's acquisition of PeopleSoft may be substantially to
5 diminish competition. See Penn-Olin, 378 US at 171.

6 Plaintiffs alleged a product market limited to HRM and
7 FMS software licensed by Oracle, PeopleSoft and SAP. Plaintiffs
8 also alleged a geographic market limited to the United States.

9 Plaintiffs have proven that the relevant product market
10 does not include incumbent systems or the integration layer. But
11 plaintiffs failed to prove that outsourcing solutions, best of
12 breed solutions and so-called mid-market vendors should be
13 excluded from the relevant product market. Furthermore,
14 plaintiffs have failed to establish that the area of effective
15 competition is limited to the United States. Accordingly,
16 plaintiffs have failed to meet their burden of proving the
17 relevant market for section 7 analysis.

18 Because plaintiffs have failed to meet this predicative
19 burden, plaintiffs are not entitled to a presumption of
20 illegality under Philadelphia Nat Bank or the Guidelines.

21 Plaintiffs have failed to prove the likelihood that a
22 post-merger Oracle and SAP would tacitly coordinate by allocating
23 customers or markets. Accordingly, the plaintiffs have not met
24 their burden of establishing anticompetitive coordinated effects.

25 Plaintiffs have failed to prove an area of localized
26 competition between Oracle and PeopleSoft in which a post-merger
27 Oracle could profitably impose a SSNIP. Accordingly, plaintiffs
28 have not met their burden of establishing the likelihood of

1 anticompetitive unilateral effects.

2 Notwithstanding that plaintiffs have failed to carry
3 their burden to be entitled to relief, Oracle has not proved by a
4 preponderance of the evidence cognizable efficiencies sufficient
5 to rebut any anticompetitive effects of Oracle's acquisition of
6 PeopleSoft.

7 Because plaintiffs have not shown by a preponderance of
8 the evidence that the merger of Oracle and PeopleSoft is likely
9 substantially to lessen competition in a relevant product and
10 geographic market in violation of 15 USC § 7, the court directs
11 the entry of judgment against plaintiffs and in favor of
12 defendant Oracle Corporation.

13 This order is stayed 10 days to permit plaintiffs to
14 apply for appellate remedies.

15

16 IT IS SO ORDERED.

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_____/S/_____
VAUGHN R WALKER
United States District Chief Judge

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