REPORT ON

ASSESSMENT OF DAMAGES REGARDING

COMPUTER ASSOCIATES INTERNATIONAL, INC., PLAINTIFF

V.

ALTAI, INC., DEFENDANT

CASE NO. CIV 89-0811

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SUMMARY

This report projects potential damages if the Court finds that Altai's programs have infringed Computer Associates' programs. No statements in this report should be construed as taking any position regarding the claimed infringements but are only to set up a framework for determining potential damages if the Court finds that infringement has occurred.

In this context, two hypothetical cases have been set up to show the logic and calculation process followed and to give an indication of the potential range of damages.

- Case 1 Definition: Limited infringement found by Court; infringement cured as of January 31, 1989.

- Case 1 Findings: Based on reasonable alternative actions by Altai, the potential damages would range from $92,895 to $152,790.

- Case 2 Definition: More substantial infringement found by Court; infringement not yet cured; would be cured as of January 31, 1991.

- Case 2 Findings: Based on reasonable alternative actions by Altai, the potential damages would range from $191,070 to $239,415.

If the Court finds that Altai's OSCAR program has infringed, factors in determining potential damages would be:

1. Should Altai's foreign sales and costs be included in damages calculations?

2. Degree to which infringing material was utilized in the development and use of OSCAR (e.g., approach, cost, time).

3. Degree to which infringing material was utilized in the development and marketing of each program.

4. Assuming infringement, has the infringement been cured? If so, when?

5. If the infringement has not been cured, what is the significance, if any, of the remaining infringing material as to OSCAR, ZEKE, ZACK and ZEBB?

6. If the infringement has not been cured, within what time frame can it be cured without harming Altai's customers?

SECTION I. SCOPE AND OBJECTIVES

In relation to a suit by Computer Associates International, Inc. (CA) against Altai, Inc. (Altai), Burton Grad has been retained by Wilner & Scheiner, attorneys for Altai, Inc., to be an expert witness on potential damages if Altai is found to have improperly used ADAPTER from CA in developing OSCAR, an Altai program used with various other Altai programs.

Burton Grad's professional qualifications and background are included as Appendix A.

SECTION II. WORK PLAN

Under the direction of counsel for Altai, Inc., I undertook the following preparation for this assignment:

1. Reviewed the report and deposition of plaintiff's technical expert as well as other written materials involved in this case. A list of those materials reviewed is shown in Appendix B.

2. At my request, consulted along with counsel in person or by phone with Gary Leslie, Chairman of the Board and Vice-President of Finance; Jim Williams, President; Claude Arney, Product Development Manager; and Charles Ealy, ZEKE Product Manager at Altai. Consulted along with counsel by phone with Altai's technical expert.

3. Constructed a revenue, cost and profit model for ZEKE, ZACK, and ZEBB for Altai's fiscal years, 1986 to 1989, based on materials and exhibits supplied and/or prepared by Gary Leslie. Determined the cost assignment factors that I would use to assign the costs among the following categories: U.S. and foreign; ZEKE, ZACK, and ZEBB; VSE and MVS.

4. Projected Altai's revenue, cost and profit for fiscal years 1990 and 1991, based on my experience and knowledge of the software industry gained by evaluating software companies, including the value of their programs. In this projection, I used the same cost assignment factors described above to allocate costs among the different categories.

5. Constructed a framework and two sets of assumptions (Case 1 and Case 2) for analyzing the potential range of benefits that Altai may have derived from the claimed infringement.

6. Computed assessment of damages for the two cases defined in item 5 above under two sets of possible alternative actions by Altai.

7. Prepared report describing process and findings.

SECTION III. FRAMEWORK AND ASSUMPTIONS

The approach followed in determining potential damages was to compute the benefits that may have been obtained by Altai from the claimed infringing programs versus the benefits which might have been obtained if Altai had used alternative programs which were not infringing.

The framework used for the analysis of potential damages was to set up a Base Case by determining the revenues, costs and profits related to the programs at issue during the period from the first revenues received from these claimed infringing programs through the end of fiscal year 1989 (which for Altai ended on July 31, 1989). Potential additional damages, if the claimed infringement has not already been cured, are dealt with separately using my projections of revenues, costs and profits.

Based on Altai's first general delivery of ZEKE/VSE 3.0 on April 29, 1985 and ZEKE/MVS 3.1 on August 1, 1985, which were the first offerings of these programs which used the OSCAR program, I began my analysis with Altai's 1986 fiscal year, beginning August 1, 1985. This means that four fiscal years of actual data (1986-1989) were included in my Base Case analysis. I then projected the revenues and costs for fiscal years 1990 and 1991.

The spreadsheet models for the four actual years are shown in Appendix C. Revenues were obtained directly from the Altai Income Statements for 1986-1989 which are Gary Leslie's Deposition Exhibits 21, 22, 27, 28, 32, 33, 37 and 38. Costs actually incurred were taken from the same exhibits and grouped for Development, Marketing and Sales, General and Administrative. Revenue projections for 1990 and 1991 were based on my general industry knowledge and experience; cost projections used previous Altai data modified slightly by industry experience.

Using cost assignment formulas which I developed (shown in Appendix D), the costs incurred were assigned by U.S. and foreign, by program and by operating system.

Certain costs and financial adjustments were eliminated in the calculations, including fiscal year 1989 legal fees. Software capitalization and amortization of development costs were eliminated for all years affected. Revenues included coverage for ZEKE, ZACK and ZEBB.

The Base Case profits were determined by subtracting the assigned costs from the relevant revenue figures so that a pre-tax profit was determined.

Please note the following assumptions on the Base Case:

1. I did not test for accuracy or verify the underlying financial records used for Mr. Leslie's deposition exhibits. I understand, however, that these exhibits were based on the records audited by Ernst & Young as part of Altai's compliance with its public reporting requirements.

2. All revenues, whether for new licenses, leases, rentals or maintenance, were included on an as-recognized basis.

3. Costs were primarily assigned on a revenue ratio basis with provision for those costs incurred in the U.S. to support foreign operations.

4. Canadian sales and costs are included in the U.S. figures; these are assumed to be under 5% of U.S. total.

To carry out my assessment of possible damages, I constructed hypothetical cases at two different places on a continuum of possible Court findings in this case. This should not be construed as a statement of my opinion as to the technical issues before the Court. These hypothetical cases were constructed solely to provide

for a wide range of potential damage assessments prior to having the actual Court findings. My analysis may also be further refined based upon review of Altai's technical expert's report and on CA's damages report.

Case 1 - Assumptions If Limited Infringement Found By Court

- Some portions of OSCAR infringed some portions of ADAPTER; OSCAR includes some structure, source code, and parameter lists which, in some respects, is similar to parts of ADAPTER and all those portions of ADAPTER are adjudged to be copyrighted or trade secrets.

- ZEKE does not infringe except to the extent that delivery of ZEKE uses the OSCAR program; similarly, neither ZACK nor ZEBB infringes any CA programs except to the extent that they use the OSCAR program in their delivery.

- The changes made to OSCAR in late calendar year 1988 cured the infringement and, therefore, programs currently in use are not infringing.

Case 2 - Assumptions If Substantial Infringement Found By the Court

- More substantial portions of OSCAR infringed than in Case 1.

- ZEKE/VSE, ZEKE/MVS, ZACK/VSE, ZACK/MVS and ZEBB/MVS indirectly infringed by using interface and parameter lists based on OSCAR interface and parameter lists which are similar to portions of the interface and parameter lists found in ADAPTER and which are adjudged to be copyrighted or trade secrets; no other aspect of ZEKE/VSE, ZEKE/MVS, ZACK/VSE, ZACK/MVS or ZEBB/MVS is found to be infringing in any other way.

- Changes made to OSCAR in late calendar year 1988 did not totally cure the claimed infringement and, therefore, copies of ZEKE, ZACK and ZEBB currently in customer hands are still infringing.

- Altai will have the opportunity to cure any remaining infringement and to replace all installed programs in a timely manner, but potential damages will continue to accrue until the cured programs are delivered to existing customers.

In both cases, potential damages have been viewed in terms of the incremental profit gain (past and future) to Altai if the Court finds that there has been infringement. However, to assess this incremental gain, one must consider what alternative actions Altai might have followed and what effect these alternative development paths would have had on Altai's revenue, cost and profit.

Two of these alternatives are defined below:

Alternative 1: A different OSCAR could have been developed. There would have been extra cost and a possible time delay in delivery of ZEKE using this different OSCAR.

Alternative 2: Separate integrated programs could have been developed for ZEKE, ZACK and ZEBB, each incorporating its own calls for VSE and MVS access. For example, Altai could have used its previous design approach and produced ZEKE/MVS as a modification to and extension of ZEKE/VSE without producing OSCAR at all. There would have been changes in the cost for development, possible time differences on delivery and greater maintenance costs.

The assessment of damages approach taken is to examine for each of the two cases what the results would have been from using each of the two alternative action paths and compare these results with what actually occurred and what is projected to occur in the future, if the infringement has not yet been fully cured.

The Base Case is reviewed in Section IV, Case 1 is analyzed in Section V and Case 2 is analyzed in Section VI.

SECTION IV. BASE CASE

The Base Case is a model of what happened in Altai from August 1, 1985 through July 31, 1989 and my projections as to what could be expected to happen in fiscal years 1990 and 1991.

There are three connected models all shown in Appendix C.

The first model (pages 1 and 2) shows revenue figures: for each marketable program; for U.S. and foreign; for new sales (including leases and rentals) and maintenance; for each operating system (VSE and MVS). The figures on Appendix C, page 1, were taken from Gary Leslie's Deposition Exhibits 22, 28, 33 and 38 for

fiscal years 1986, 1987, 1988 and 1989, respectively. Revenues other than from the identified programs were omitted. For fiscal years 1990 and 1991, I constructed revenue forecasts based on the historic data and my projections of U.S. and foreign growth of VSE and MVS systems and the relative penetration for each category of program.

Incurred costs (shown in Appendix C, pages 3 through 5) were grouped as follows:

- Development and Maintenance - included Development and Computer Center charges.

- U.S. Marketing and Sales - included Marketing, Domestic Sales, Sales Support, Customer Service and Product Management.

- Foreign Marketing and Sales covered foreign costs.

- General and Administrative is self defined.

These incurred costs were taken from the total column of Gary Leslie's Deposition, Exhibits 21, 27, 32 and 37. These costs were then assigned to various categories using the assignment formulas shown in Appendix D which I developed from examining Gary Leslie's Deposition, Exhibits 22, 28, 33 and 38. Since essentially the total revenues were included in the revenue model, correspondingly all operational costs of the business were included in the cost model, omitting fiscal year 1989 legal fees and software capitalization and amortization for all years affected.

The profit model is shown in Appendix C, page 6. It computes the operational pretax profits for ZEKE, ZACK and ZEBB by U.S. and foreign and by operating system. The appropriate statutory federal tax rates are applied and the overall profit after taxes computed.

Incurred costs were projected for fiscal years 1990 and 1991 on a revenue ratio basis, using Altai's history modified slightly by industry experience.

These costs were then assigned using the same formulas in Appendix D. The Base Case thus represents the full operation of the ZEKE, ZACK and ZEBB business for fiscal years 1986-1989 and projection for fiscal years 1990 and 1991.

SECTION V. CASE 1

In this limited infringement case, the following assumptions were made (repeated from Section III):

- Some portions of OSCAR infringed some portions of ADAPTER; OSCAR includes some structure, source code, and parameter lists which, in some respects, is similar to parts of ADAPTER and all those portions of ADAPTER are adjudged to be copyrighted or trade secrets.

- ZEKE does not infringe except to the extent that delivery of ZEKE uses the OSCAR program; similarly, neither ZACK nor ZEBB infringes any CA programs except to the extent that they use the OSCAR program in their delivery.

- The changes made to OSCAR in late calendar year 1988 cured the infringement and, therefore, programs currently in use are not infringing.

A. Implications from these assumptions:

- ZEKE/MVS deliveries included the claimed infringing materials up to the cure date.

- ZEKE/VSE deliveries, beginning in mid-1985, included the claimed infringing materials as did replacement of installed ZEKE/VSE systems, up to the cure date.

- ZACK/VSE and ZACK/MVS deliveries included the claimed infringing materials up to the cure date.

- ZEBB/MVS initial deliveries were not made until after the cure date.

- Damages are considered relevant for both U.S. and foreign installations.

- Damages are relevant only for revenues and profits until claimed infringing installations are delivered, assumed to be January 31, 1989.

B. <u>Financial Analysis From Base Case Information</u>:

<u>Relevant Revenues</u>

- New sales revenues received for identified infringing programs (permanent licenses, leases, rentals) -- U.S. and foreign -- for fiscal years 1986-1988 plus the first half of fiscal year 1989 (8/1/88 through 1/31/89).

- Maintenance revenues received for identified infringing programs (permanent licenses) -- U.S. and foreign -- for fiscal years 1986-1988 plus the first half of fiscal year 1989.

<u>Relevant Costs</u>

- All normal business operations costs incurred in obtaining and supporting the revenues identified above.

- Development and maintenance costs incurred for the relevant programs (not reduced by capitalization or increased by amortization).

<u>Relevant Profits</u>

- Pre-tax profits for relevant revenues and costs computed for each year.

- Statutory tax rates for each year.

- After-tax profits.

C. <u>Analysis of Alternative 1 for Case 1</u>

- If Altai had chosen this alternative, I have estimated an additional six work-months for design, coding and testing and a delay of three calendar months in bringing ZEKE/VSE and ZEKE/MVS, which included a clean OSCAR, to market. There would have been no allegations of infringement related to ZACK or ZEBB since this clean OSCAR would have also been used with them. There would have been no increase in maintenance costs.

- The delay in ZEKE/VSE would have had no sales or revenue impact because the ZEKE/VSE program was already in the market place and OSCAR is not a sales factor; the delay in ZEKE/MVS would have set back Altai's sales by three months, even though OSCAR is not a sales factor, since there was no prior ZEKE/MVS program.

- The profit impact would, therefore, be the additional development costs for OSCAR and the lost profit from the deferred ZEKE/MVS sales. The effect of this delivery delay would have continued until a cured OSCAR was delivered.

D. Analysis of Alternative 2 for Case 1

- The cost of producing an integrated version of ZEKE/VSE and ZEKE/MVS with embedded VSE/MVS/CMS calls, would have been less than the cost of building OSCAR and modifying ZEKE/VSE to incorporate OSCAR and building ZEKE/MVS to use OSCAR. It would also have taken less calendar time for design, coding and testing. Ongoing maintenance costs would be equivalent to the combined costs of maintaining ZEKE and OSCAR.

- When ZACK and ZEBB were produced, there would have been extra development costs incurred (above the use of an available OSCAR); the ongoing maintenance of the interface code would have been extra.

- There would have been no impact on the marketability or sales of ZEKE or ZACK because of using this design approach as long as the user interfaces and available user functions were as the same as they are now. OSCAR is not a sales factor.

- The profit impact would be the additional development cost for ZACK and ZEBB less the development saving on ZEKE plus the additional maintenance cost for ZACK plus the profit impact of different delivery dates of the programs.

E. Calculation of Potential Damages

In Appendix E and Appendix F, the calculations are made for Case 1 for Alternative 1 and Alternative 2, respectively.

First, we will examine Case 1, Alternative 1, which is shown in Appendix E. The additional development cost for a clean OSCAR is estimated at 6 work-months; the cost for 1 work-year would be $75,000; this would yield an extra cost of $37,500.

The revenue and cost impact of a 3-month deferral in delivery of ZEKE/MVS is shown in Appendix E, page 2. This shows a revenue loss of $485,000 which would have been mitigated by a reduction in costs. In order to be conservative, I have only included that portion of the costs which would change with short-term estimated revenue changes rather than the full costs which could probably be justified since this would have had a long-term impact.

The profit changes from lost sales (a loss of $194,000) is added to the extra development cost ($37,500) to get the total pretax profit loss of $231,500. After applying the current 34% federal tax rate, the after tax loss would have been $152,790.

Next, we will examine Case 1, Alternative 2, which is shown in Appendix F.

In this case we believe there would have been a development saving of at least 3 work-months in constructing ZEKE/MVS over the actual cost of building OSCAR and modifying ZEKE/VSE and building ZEKE/MVS to interface with OSCAR. However, there would have been 4 work-months extra to build ZACK/VSE and ZACK/MVS and 2 work-months extra to build ZEBB/MVS without an available OSCAR. This would cost a net of 3 work-months or $18,750 at $75,000 per work-year.

The delivery differences are shown on page 1 of Appendix F. As a conservative assumption, I have not included any benefit from earlier availability of ZEKE/MVS, but I have assumed a negative impact from the delay in ZACK/VSE and ZACK/MVS of 2 months. The revenue impact of this delay in ZACK is shown on page 2 of Appendix F. The $141,000 revenue loss is partially mitigated by the cost saving of $85,000 for a profit loss of $56,000.

Finally, the extra maintenance effort and cost are calculated on page 4 of Appendix F. Assuming that one would have to add the equivalent of all the OSCAR code to ZEKE and ZACK and of the common, MVS and CMS code to ZEBB, then one can calculate the extra lines of code which need to be maintained each year.

I used the total development costs incurred by Altai adjusted for my estimate of that portion of development devoted to maintenance rather than the enhancement of the existing products. This yields a potential increase in maintenance costs. For Case 1,

we used all increased costs for fiscal years 1986-1988 plus one-half of fiscal year 1989. This yields a $66,000 additional maintenance cost for Case 1.

Putting these three factors together (additional development cost of $18,750; loss of profit from market impact of late delivery of $56,000; added maintenance cost of $66,000) yields a reduction in pretax profits of $140,750. After applying the current 34% federal tax rate, the after tax loss would have been $92,895.

SECTION VI. CASE 2

In this case, the following assumptions were made (as in Section III):

- More substantial portions of OSCAR infringed than in Case 1.
- ZEKE/VSE, ZEKE/MVS, ZACK/VSE, ZACK/MVS and ZEBB/MVS indirectly infringed by using interface and parameter lists based on OSCAR interface and parameter lists which are similar to portions of the interface and parameter lists found in ADAPTER and which are adjudged to be copyrighted or trade secrets; no other aspect of ZEKE/VSE, ZEKE/MVS, ZACK/VSE, ZACK/MVS or ZEBB/MVS is found to be infringing in any other way.
- Changes made to OSCAR in late calendar year 1988 did not totally cure the claimed infringement and, therefore, copies of ZEKE, ZACK and ZEBB currently in customer hands are still infringing.
- Altai will have the opportunity to cure any remaining infringement and to replace all installed programs in a timely manner, but potential damages will continue to accrue until the cured programs are delivered to existing customers.

A. Implications from these assumptions:

- ZEKE/MVS deliveries include the claimed infringing materials up to the current date.

- ZEKE/VSE deliveries, beginning in mid-1985, include the claimed infringing materials as did replacement of installed ZEKE/VSE systems, up to the current date.

- ZACK/VSE and ZACK/MVS deliveries include the claimed infringing materials up to the current date.

- ZEBB/MVS deliveries include the infringing materials up to the current date.

- Damages are considered relevant for both U.S. and foreign installations.

- Damages are relevant for profits until cured code is delivered to infringing installations, assumed to be January 31, 1991.

B. Financial Analysis From Base Case Information:

Relevant Revenues

- New sales revenues received for identified infringing programs (permanent licenses, leases, rentals) -- U.S. and foreign -- for fiscal years 1986-1989 plus the projection of fiscal year 1990 and the first half of fiscal year 1991.

- Maintenance revenues received for identified infringing programs (permanent licenses) -- U.S. and foreign -- for fiscal years 1986-1989 plus the projection of fiscal year 1990 and the first half of fiscal year 1991.

Relevant Costs

- All normal business operations costs incurred in obtaining and supporting the revenues identified above.

- Development and maintenance costs incurred for the relevant programs (not reduced by capitalization or increased by amortization).

Relevant Profits

- Pre-tax profits for relevant revenues and costs computed for each year.

- Statutory tax rates for each year.

- After-tax profits.

C. <u>Analysis of Alternative 1 for Case 2</u>

- If Altai had chosen this alternative, I have estimated an additional six work-months for design, coding and testing and a delay of three calendar months in bringing ZEKE/VSE and ZEKE/MVS, which included a clean OSCAR, to market. There would have been no allegations of infringement related to ZACK or ZEBB since this clean OSCAR would have also been used with them. There would have been no increase in maintenance costs.

- The delay in ZEKE/VSE would have had no sales or revenue impact because the ZEKE/VSE program was already in the market place and OSCAR is not a sales factor; the delay in ZEKE/MVS would have set back Altai's sales by three months even though OSCAR is not a sales factor since there was no prior ZEKE/MVS program.

- The profit impact would, therefore, be the additional development costs for OSCAR and the lost profit from the deferred ZEKE/MVS sales. The effect of this delivery delay would continue until a cured OSCAR is delivered.

D. <u>Analysis of Alternative 2 for Case 2</u>

- The cost of producing an integrated version of ZEKE/VSE and ZEKE/MVS with embedded VSE/MVS/CMS calls, would have been less than the cost of building OSCAR and modifying ZEKE/VSE to incorporate OSCAR and building ZEKE/MVS to use OSCAR. It would also have taken less calendar time for design, coding and testing. Ongoing maintenance costs would be equivalent to the combined costs of maintaining ZEKE and OSCAR.

- When ZACK and ZEBB were produced, there would have been extra development costs incurred (above the use of an available OSCAR); the ongoing maintenance of the interface code would have been extra.

- There would have been no impact on the marketability or sales of ZEKE or ZACK because of using this design

approach as long as the user interfaces and available user functions were as the same as they are now. OSCAR is not a sales factor.

- The profit impact would be the additional development cost for ZACK and ZEBB less the development saving on ZEKE plus the additional maintenance cost for ZACK and ZEBB plus the profit impact of different delivery dates of the programs.

E. Calculation of Potential Damages

In Appendix E and Appendix F, the calculations are made for Case 2 for Alternative 1 and Alternative 2, respectively.

First, we will examine Case 2, Alternative 1, which is shown in Appendix E. The additional development cost for a clean OSCAR is estimated at 6 work-months. Because the cost for 1 work-year would be $75,000, this would yield an extra cost of $37,500.

The revenue and cost impact of a 3-month deferral in delivery of ZEKE/MVS is shown in Appendix E, page 2 for Case 2. This shows a revenue loss of $631,000 which would have been mitigated by a reduction in costs. In order to be conservative, I have only included that portion of the costs which would change with the short term estimated revenue changes shown, rather than the full cost which could probably be justified since this would have had a long-term impact.

The profit change from lost sales (a loss of $252,000) is added to the extra development cost ($37,500) to get the total pretax loss of profit $289,500. After applying the current 34% federal tax rate, the after tax loss would have been $191,070.

Next, we will examine Case 2, Alternative 2, which is shown in Appendix F.

In this case we believe there would have been a development saving of at least 3 work-months in constructing ZEKE/MVS over the actual cost of building OSCAR and modifying ZEKE/VSE and building ZEKE/MVS to interface with OSCAR. However, there would have been 4 work-months extra to build ZACK/VSE and ZACK/MVS and 2 work-months extra to build ZEBB/MVS instead of using an available OSCAR. This would cost a net of 3 work-months or $18,750 at $75,000 per work-year.

The delivery differences under Case 2 are shown on page 1 of Appendix F. As a conservative assumption, I have not included any

benefit from earlier availability of ZEKE/MVS, but I have assumed a negative impact from the delay in ZACK/VSE, ZACK/MVS and ZEBB/MVS of 2 months. The revenues impact of this delay in ZACK and ZEBB is shown on page 3 of Appendix F. The $310,000 revenue loss is partially mitigated by a cost saving of $186,000 for a pretax profit loss of $124,000.

Finally, the extra maintenance effort and cost are calculated on page 4 of Appendix F. Assuming that one would have to add the equivalent of all the OSCAR code to ZEKE and ZACK and of the common, MVS and CMS code to ZEBB, then one can calculate the extra lines of code which need to be maintained each year.

I used the total development costs incurred by Altai adjusted for my estimate of that portion of development devoted to maintenance rather than to enhancement of the existing products. This yields a potential increase in maintenance costs. For Case 2, we used the increased costs for fiscal years 1986-1989 plus projections of fiscal year 1990 and one-half of fiscal year 1991. This yields a $220,000 additional maintenance cost for Case 2.

Putting these three factors together (additional development cost of $18,750; loss of profit from market impact of late delivery of $124,000; added maintenance cost of $220,000) yields a reduction in pretax profits of $362,750. After applying the current 34% federal tax rate, the after tax loss would have been $239,415.

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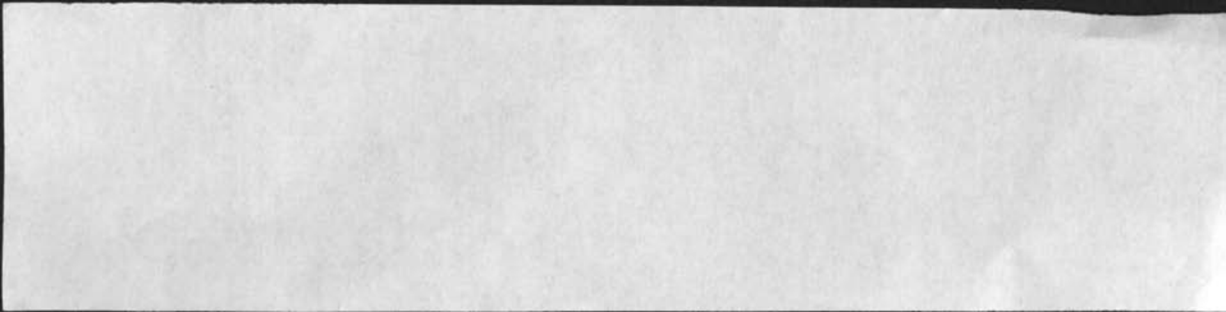

Report on Compensatory Damages
to be Paid to INSLAW
from Department of Justice

Case Reference: INSLAW et al. v. United States of America
Congressional Reference No. 95-338X

Date Submitted: November 27, 1996

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Attorney Work Product

Compensatory Damages Report

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Product and Delivery Assumptions

1. There were three different sets of programs:
   a. Enhanced Promis Programs -- Prime
   b. Enhanced Promis Programs -- VAX
   c. Batch Update Programs

2. These deliverables were intended for use at various Department of Justice locations:
   a. U.S. Attorneys' Offices
   b. Satellite offices

3. These programs were delivered to DOJ on various dates at various locations; additional copies were made by DOJ and installed in various additional locations. Exhibit 3 contains these dates per DOJ reports.

Assumptions on Facts

The assumptions on facts which were used in the damages assessment are attached as Exhibit 3.

Industry Principles and Practices

If a customer accepts delivery of and keeps possession of a product, then the customer should pay the fair market price for this product as long as it is in the customer's possession.

During the history of the software products business (since the late 1960's), mainframe and midrange application software products have usually been licensed by independent software companies to customers for an initial fee per machine or site for perpetual use, with an annual maintenance fee to provide corrections, currency, enhancements and technical support. Licenses provided the customer with the right to use, but the prices were not dependent on the amount of usage or even if the products were used at all. The licensed products were copyrighted and the licenses provided for trade secret protection, with restrictions on copying or even transferring license ownership.

In some cases, independent software companies and computer manufacturers offering application software products would license their products to customers on a period lease basis (e.g., one-year, three-year or five-year lease). These leases would provide for the customer to have the programs available to run on certain machines or sites for annual or monthly fees which included a maintenance and support fee. These licenses were treated like installment payment contracts and were renewable at the then current lease charges when the period expired.

Exhibit 4 provides more background on Industry Pricing and Packaging Practices during the 1980's.

Direct Damages Calculation Assumptions

1. All calculations are in terms of prices as of 1983 and 1985 and do not reflect any changes in the value of the dollar since those dates.

2. The calculations do not reflect any changes in INSLAW prices for similar products/offerings since 1985.

3. Maintenance & Enhancement charges have been excluded from all prices since DOJ did not wish to have any such services.

4. The prices for copies beyond the first reflect INSLAW's listed multiple copy discount.

5. To compute INSLAW's losses beyond the payments due, the then current one-year Treasury Bill rate was used for each year.

Direct Damages Calculation Process

Based on the facts, principles, practices and calculation assumptions, the direct damages valuation process was followed:

1. Identified the number of copies of each proprietary INSLAW product which DOJ has admitted having in its possession. Established the date at which DOJ received delivery of (or installed) each copy of each product. Established the date, if any, at which DOJ terminated possession of each copy of each product (returned it to INSLAW or provided evidence that the copy had been destroyed).

2. Established INSLAW's pricing practices and prices for each of its relevant products while DOJ retained possession of and/or used the INSLAW products. This included recognition of discounts for multiple copies.

3. Since perpetual licenses were the only available method of pricing and delivery after early 1985, these prices were used as of the delivery dates with no further charges for continued possession; this assumes that the customer was prepared to commit to a perpetual license. If we assume that the customer was not ready to commit to a perpetual license, then the appropriate term license prices were used (as computed, based on perpetual license prices).

4. The term prices were adjusted to eliminate the maintenance fee component even though this is contrary to industry practice on term leases.

5. The amount of money due from DOJ for each year was then computed for various assumptions on pricing.

6. The net present value of those payments was calculated using the one-year Treasury Bill rate each year as the effective return which could have been obtained on the delinquent payments by INSLAW. This was compounded annually. This is considered a very conservative rate of return.

Direct Damages Calculation Factors

Certain factors needed consideration during the direct damages calculations. Each of these damages calculation factors is addressed individually:

1. **Term or Perpetual License** -- While perpetual licenses were by far the most common approach during the 1980's, term licenses were also available. However, because of the effort required to resell at the end of each term, prices per year on term licenses were designed to make perpetual licenses more attractive. DOJ, in the previous trial, insisted that it didn't want a perpetual license, but only wanted an annual license or even a monthly license. They wanted the freedom to install another program if they wished. So, according to the assumptions on facts (Exhibit 3), DOJ should not receive the benefit of the more favorable perpetual license price for long-term retention, but should pay for its continued possession (and implied use) at the annual or, possibly at, the five-year license rate. Nevertheless, we will make the calculations using both term and perpetual license prices to show the difference in compensatory damages.

2. **Equivalent Term and Perpetual License Prices** -- Based on typical industry practices, the following formulas were used for equivalency calculations:

   - For a five-year term license without maintenance, currency or further enhancements:
     (Perpetual license fee less first year maintenance fee) times .4 for each year of the five-year term. This same formula would be repeated for each five-year term using the then current perpetual license fee.

     This formula is the same as that used by INSLAW's damages expert in the bankruptcy trial (he described it as dividing by 2.5). Note that the total fee over five years is twice the perpetual fee (less the first-year maintenance portion of the perpetual fee).

   - For a one-year term license without maintenance, currency or further enhancements:
     (Perpetual license fee less first-year maintenance fee) times .67. This same formula would be used each year (as long as the customer retained possession of the product) using the then current perpetual license fee.

     This formula is the same as that used by INSLAW's damages expert in the bankruptcy trial (he described it as dividing by 1.5) Note that the total fee over five years is more than three times the perpetual fee (less the first-year maintenance portion of the perpetual fee).

3. **Enhanced Promis-VAX** -- The first delivery of Enhanced Promis to DOJ was the VAX version sent in 1983. Later that same year the Prime version was delivered. Although DOJ has stated that it didn't actually use the VAX version, they have kept the copy and never returned it to INSLAW. Therefore, since possession, not usage, is the basis for payments due for software programs, DOJ should pay the license fees due on the VAX version from 1983 to the present. The price should be based on the Docketrac Perpetual License fee as is the Enhanced Promis-Prime price. There would be no discount since there was only a single copy delivered.

4. **Satellite Usage** -- In a number of U.S. Attorneys' Offices, there are satellite locations which access and use the computer facilities at the USAO office with which they are associated. This constitutes time-sharing use at an additional site. The information in Exhibit 3 identifies 31 satellite sites with their installed dates. INSLAW's basic license did not permit additional site time-sharing usage unless specifically authorized and paid for. Therefore, these satellite locations should be charged for at a Perpetual License fee of $40,000 (one-third of the discounted license fee for primary usage sites). This Perpetual License price was appropriately adjusted to determine term license fees.

5. **Batch Update Programs** -- These are separately licensed programs which are used to automatically convert existing information files rather than having to re-enter them manually. Every DOJ location would need to use these programs to convert the files which they had previously accumulated. These would be used at the same time that the Enhanced Promis programs were installed. Therefore, we have used the same installation dates as were used for Enhanced Promis-Prime installations (see Exhibit 3).

Direct Damages Calculations

This report examines three different cases, each representing a different basic assumption on the basis for the prices to be charged. Exhibit 5 provides further background on INSLAW's pricing practices during the 1983-1986 time period.

Case 1: This case assumes that the Court finds that DOJ should only have to pay the Perpetual License fees for Enhanced Promis, even though DOJ had stated that they did not want to be on a perpetual license or even a multi-year license. In this scenario, the pricing assumptions for Case 1 are:

1. INSLAW is entitled to payment for all USAOs, including EOUSA, possessing/using Enhanced Promis -- Prime Software based on the Docketrac list Perpetual License fee (less the M&E component) for the first copy and at a discount of 20% for each additional copy. Prices are $150K and $120K respectively for each USAO. Forty-five sites were installed or provided for from 1983-1987.

2. INSLAW is entitled to payment for all Satellite Sites based on the fact that there was no contract with DOJ which permitted off-site operation of Enhanced Promis. Price used is $40K per Satellite Site. Thirty-one Satellite Sites were in use by 9/87.

3. INSLAW is entitled to payment for each location which possessed/used Batch Update. Price is $10K per user. All forty-five locations possessed/used Batch Update by 12/87.

4. INSLAW is entitled to payment for the one copy of Enhanced Promis -- VAX software delivered to DOJ in 4/83. The price is based on the Docketrac perpetual license fee (list price). DOJ is not entitled to a multiple copy discount on VAX since this is a separate program from the Prime program although functionally similar. Price is $150K for the one copy.

Timing is only significant in this case to compute lost income to INSLAW on unpaid license fees. To be conservative, the one-year Treasury Bill rate was used each year, compounded annually, to establish the total net present value of the amount due to INSLAW as of 12/31/96. These rates are shown in Exhibits 6, 7 and 8. For delivery/installation payments due during a year, one-half the annual T-Bill rate was charged.

The results of the calculations for Case 1 (Perpetual License Fee) shows the total original amounts due were $7,270,000. These payments were due over the period of 1983-1987. The total payment due (including Treasury Bill interest) as of 12/31/96 is ~~$14,249,000.~~ 14,273,000 Exhibit 6 shows the details of this calculation.

Case 2: This case assumes that DOJ should have to pay the annual license fees due on Enhanced Promis for every year since the programs were delivered to or copied by DOJ. This is in accordance with DOJ's statement that they did not want to have a perpetual or multi-year license, since they planned to replace the program. In this scenario, the pricing assumptions for Case 2 are:

1. Enhanced Promis - Prime
   USAOs -- 45 sites (1983-1987)

   INSLAW is entitled to payment for Enhanced Promis -- Prime Software based on a one-year annual license fee, being renewed each year. The annual usage fee would be computed as (($150K-$18K)*.67) = $88K for first copy; (($120K-$14K)*.67) = $71K for additional copies. These are based on the Docketrac perpetual license fee.

2. Satellite Sites --31 locations (1983-1987)

   INSLAW is entitled to payment based on an annual license fee using the perpetual license fee of $40K. $40K *.67 = $26.8K

3. Batch Update -- 45 sites (1983-1987)

   INSLAW is entitled to payment based on an annual license fee using the perpetual license fee of $10K. $10K * .67 = $6.8K

4. Enhanced Promis - VAX -- 1 copy (1983)

   INSLAW is entitled to payment using an annual license fee based on the Docketrac perpetual license agreement. ($150K-$18K)*.67 = $88K. DOJ is not entitled to a multiple copy discount for this separate VAX product.

Timing is significant in this case since payments start with delivery or installation of the programs. Since DOJ has not returned any of the copies or sent a statement that they have discontinued usage and destroyed any copies, they should continue to pay for these programs since they are still in their possession. In addition, the one-year Treasury Bill interest rate should be charged against the unpaid balance due, compounded annually, and added to the overdue balance. New payments due were charged interest at one-half of the T-Bill rate.

The results of the calculations for Case 2 (Annual License Fee) shows that the one-year amounts add up to $54,357,000. The total payment due (including Treasury Bill interest compounded annually) as of December 31, 1996 is ~~$77,043,000~~ 77,221,000. Exhibit 7 shows the details of this calculation

Case 3: This case assumes that DOJ should be given the benefit of the five-year license price paid at one-fifth of the five-year price annually. This is done in spite of DOJ's statement that they did not wish to sign up for a multiple year or a perpetual license. Since DOJ did not take advantage of the five-year term license price available in 1983 and 1984, the five-year price should use the formulations based on the perpetual license fee.

1. Enhanced Promis - Prime
   USAOs -- 45 sites ('83-'87)

   INSLAW is entitled to payment each year at the annualized five-year usage price. Payment based on Docketrac Perpetual License fee. (($150K-$18K)*.4) = $53K/year for first copy; (($120K-$14K)*.4) = $42K/year for others.

2. Satellite Sites --31 locations ('83-'87)

   INSLAW is entitled to payment based on the five-year license fee, paid annually. $40K *.4 = $16K/year.

3. Batch Update -- 45 sites ('83-'87)

   INSLAW is entitled to payments based on the five-year license fee paid annually. $10K * .4 = $4K/year.

4. Enhanced Promis - VAX -- 1 copy ('83)

   INSLAW is entitled to payment based on the five-year license fee paid annually. ($150K-$18K)*.4 = $53K/year. This is a separate program from Enhanced Promis-Prime, so it is not entitled to a multiple copy discount.

Timing is significant in this case since payments start with delivery or installation of the programs. Since DOJ has not returned any of the copies or sent a statement that they have discontinued usage and destroyed any copies, they should continue to pay for these programs since they are still in their possession. In addition, the one-year Treasury Bill interest rate should be charged against the unpaid balance due, compounded annually, and added to the overdue balance. New payments due were charged interest at one-half of the T-Bill rate.

The results of the calculation for Case 3 (five-year license fees) shows that the amounts due add up to $31,612,000. The total payment due (including Treasury Bill interest compounded annually) as of December 31, 1996 is ~~$44,619,000~~ 44,722,000. Exhibit 8 shows the details of this calculation. BS

Summary and Recommendations

The results of the three cases are summarized below:

	Amounts Due	Interest Due	Total Amount Due
Case 1	$7,270,000	~~$6,979,000~~ 7,003,000	~~$14,249,000~~ 14,273,000
Case 2	$54,357,000	~~$22,686,000~~ 22,864,000	~~$77,043,000~~ 77,221,000
Case 3	$31,612,000	~~$13,007,000~~ 13,110,000	~~$44,619,000~~ 44,722,000

This is certainly a wide range of potential damages. But, in my opinion, it is a very unusual situation where a customer (like DOJ) would allow an unresolved situation to continue for so many years, particularly since the customer insisted that it did not want to continue to use the programs, but still continued to possess and/or use them.

The customer would normally cap their cost by agreeing to a perpetual license or a five-year license or discontinue possession and usage of the programs. DOJ did none of these things, permitting the damages to increase to very high levels.

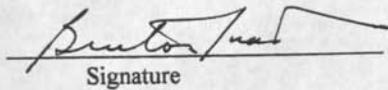
In my opinion, Case 1 gives DOJ the full benefit of hindsight and minimizes the DOJ costs so that it was worthwhile for them to have made the decision not to pay INSLAW for the software, but rather hope that they would not have to pay anything or would pay much less than commercial prices.

Between Case 2 and Case 3, there can be some debate about which best reflects the fair damages. Case 3 still gives DOJ the benefit of the doubt by assuming a five-year license, while Case 2 deals exactly with DOJ's strongly expressed position that they did not want any multiple-year agreement, so that they could be free to switch to another program, which would be produced by one of INSLAW's competitors.

Therefore, as large as the numbers may appear, it is my belief that Case 2 accurately recognizes the DOJ position, not just in 1983 or 1985 or 1988, but even today. DOJ wants to possess and/or use the programs, but they don't want to pay anything for them. Therefore, there is no basis, from a damages standpoint, to give DOJ any benefit of hindsight which would mitigate the compensatory damages due to INSLAW.

If DOJ is found to have possessed and/or used the INSLAW Enhanced Promis programs as stated in the Assumptions on Facts, then DOJ should pay to INSLAW ~~$77,043,000~~ 77,221,000 as of December 31, 1996.

This report has been prepared and submitted by Burton Grad.



Signature

November 29, 1996

Date

Burton Grad -- Qualifications as an Expert

I have been active in the computer software and services field since 1954, first in the General Electric Co., then in IBM and most recently as a consultant to software companies.

During my 18 years at IBM, I was responsible for developing major systems and applications programs. As a result, I have a comprehensive understanding of the process of determining market opportunities and requirements, managing development projects and estimating costs for development and marketing of mainframe and midrange software products.

During the last 18 years, I have served as a private consultant to over 150 computer software and services companies. In particular, since 1982, a substantial part of my consulting work has been valuing companies, products and services involved in acquisitions, mergers and business settlements. Many of these valuation processes are directly applicable to damages assessment.

From my work and long standing relationship with ITAA, the leading broad-based computer software and services trade association, I have had broad exposure to all segments of the industry and have been involved in a wide range of financial, technical and information studies for the industry.

Professional Summary

Burton Grad, President of Burton Grad Associates, Inc. (BGAI), has a long record of significant contributions to the computer software and services industry. He has experience as a user and developer of application and systems products and as consultant, innovator, businessman and industry leader in the computer software and services community:

Since 1978 he has been a consultant for software products, software professional services, value added remarketers, processing services and other computer software and services businesses:

- strategic planning, management and organizational consulting and product analysis, evaluation and review
- company and product acquisition studies including due diligence and valuation for financial, tax and capitalization purposes
- planning, assessment and analysis of business operations including quality and productivity measurements

Work is performed personally or with the assistance of well-known specialists in market research, customer service, industry applications and mainframe, midrange, workstation, client/server and personal computer systems.

EXHIBIT "3"

ASSUMPTIONS

1. Pursuant to Modification #12, DOJ agreed to negotiate in good faith and in a timely fashion for the possession and use of INSLAW's Enhanced PROMIS in the 20 largest U.S. Attorneys' Offices in exchange for INSLAW providing certain information to INSLAW including the VAX version of Enhanced PROMIS and later the VAX version of Enhanced PROMIS as modified for operation on PRIME computers.

2. INSLAW delivered the VAX version of Enhanced PROMIS to DOJ in April 1983 and, beginning in August 1983, INSLAW delivered to DOJ the VAX version of Enhanced PROMIS as modified for operation on PRIME computers.

3. The Enhanced PROMIS delivered to DOJ in April 1983, and modified and delivered for the United States Attorneys' Offices identified in #7 and Exhibit "3" below, was comprised of discrete enhancements sewn into the main body of the PROMIS application code. In addition, three major stand-alone sets of PROMIS code, identified as (1) Data Base Adjustment, (2) Batch Update and (3) Vendor Port to VAX, were provided to DOJ. BS

4. "Data Base Adjustment" refers to a module of nine Data Base Adjustment programs developed in the 1982-1983 time frame to replace two programs released in October, 1981. These nine programs enable the user to reformat the data base records from the original design to a retailored design. Each data record is of a field format that is determined by the data base designed. As users gain experience with their systems, they recognize the need to add data fields or records or to modify the current design in some fashion. The data base adjustment module transfers data from one data base design to the other, realigning data fields and adjusting data values as redefined by the user. Since most data base design changes are of a generic nature, this module relieves the user of the tedious and time consuming task of coding data conversion programs.

5. "Batch Update" is a separately licensed stand-alone enhancement and the term refers to a subsystem consisting of two programs that enable the user to add data directly to the system rather than through data entry at a terminal. The user defines the format of any input file and the correlation of the data to the data base fields. This definition is processed by the first program to generate program code to be compiled into the second. This second program is then executed as a one-time data conversion effort or on an on-going basis to load data into the data base. Because the user may define various input files, several versions of the program may be maintained unique to each input. BS

These programs were used to load data from the USAO Docketing and Reporting system into the PROMIS systems installed in individual USAOs. These programs obviated the need for each office to recreate and/or re-enter basic case data from the case files. They further enabled the USAOs to set initial values for files required in the PROMIS data base records.

6. "Vendor Port to VAX" concerns the port by INSLAW in 1981 of PROMIS from the 16-bit architecture PDP 11/70 mid-range computer manufactured by Digital Equipment Corporation to the much more powerful 32-bit architecture VAX 11/780 mid-range computer made by the same manufacturer. The differences between the operating systems of these two mid-range computers, inter-program communications, queuing methods, and compilers required significant and substantial adjustments to the source code. INSLAW performed the VAX port of PROMIS during the summer of 1981.

7. INSLAW modified and delivered specifically tailored PRIME versions of Enhanced PROMIS, with the separately licensed stand-along enhancement known as "Batch Update," for and to the United States Attorneys' Offices identified in Attachment "1" to this Exhibit on the dates shown thereon.

8. "Satellite Usage Payments" refers to fees payable to INSLAW for the timesharing use of INSLAW's Enhanced PROMIS at satellite locations beyond the specific installation site, which locations to the extent known are shown on Attachment "2" to this Exhibit.

9. No agreement was reached regarding DOJ's payment for Enhanced PROMIS or the United States Attorneys' Offices' use thereof, and no permission ever was granted for the copying of INSLAW's Enhanced PROMIS or for the use of same beyond the offices identified in #7 above.

10. DOJ installed unauthorized copies of INSLAW's Enhanced PROMIS, with the separately licensed stand-alone enhancement known as "Batch Update," at the United States Attorneys' Offices shown on Attachment "3" to this Exhibit, and in some instances provided unauthorized timesharing use to satellite offices.

11. The United States has maintained possession of the VAX version of INSLAW's Enhanced PROMIS since April, 1983, and has maintained possession of the PRIME version of INSLAW's Enhanced PROMIS at the locations identified in #s7 and 10, and the Attachments identified there, since the dates set forth there. DOJ also has maintained possession of two other copies of INSLAW's Enhanced PROMIS as set forth in #11 above.

12. INSLAW's Enhanced PROMIS and any integrated and stand-alone products have

been copyrighted by INSLAW and marketed by INSLAW with contracts specifying that these products were protected as trade secrets.

13. DOJ has stated that it never wanted a perpetual license but rather that it preferred to pay for INSLAW's Enhanced PROMIS on an annual license basis.

14. Contrary to industry practice, DOJ did not require nor did it utilize any maintenance services from INSLAW after the installation of Enhanced PROMIS in the last of the United States Attorneys' Offices identified in #7 above.

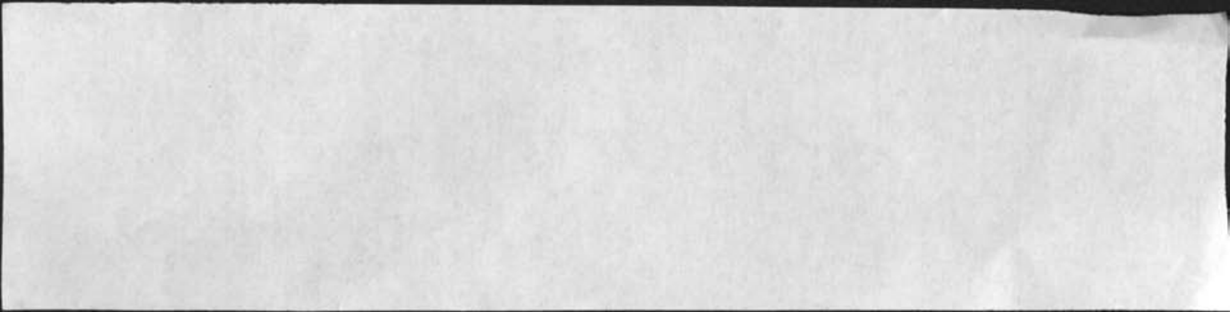
15. DOJ maintains possession of INSLAW's Enhanced PROMIS to the present.

16. DOJ's liability dates from its possession of INSLAW's Enhanced PROMIS.

17. Docketrac is an INSLAW proprietary product. This product is comparable to the version of INSLAW's Enhanced PROMIS, as provided to the EOUSA, such that reference to the license fees charged and paid for Docketrac provides a fair and reasonable basis for determining the fair market value of any license fees for Enhanced PROMIS.

18. Because DOJ failed to enter into good faith negotiations, and because as a consequence no agreement was reached regarding prices and fees to be paid for INSLAW's Enhanced PROMIS, and because DOJ made and installed unauthorized copies of INSLAW's ENHANCED PROMIS, DOJ is not entitled to the considerations to which a good faith customer might be entitled with respect to additional discounts for the lease of multiple copies of that product.

19. DOJ should pay INSLAW for: (1) VAX version of Enhanced PROMIS provided to DOJ in April, 1983; (2) Prime version of Enhanced PROMIS modified for the United States Attorneys' Offices set forth in #7 above, as well as for the separately licensed "Batch Update" software and for the satellite sites tied to those offices; (3) unauthorized copies of the PRIME version of Enhanced PROMIS as set forth in #s 10 and 11 above; and (4) any other unauthorized copies of INSLAWs Enhanced PROMIS which DOJ has made, and United States Attorneys' Offices and/or any other satellite sites in which Enhanced PROMIS has been used.



Report on Software Industry Practices Regarding

Software Maintenance and Updates

Case Reference: DBS v. Grace Consulting
Civil Action No. 94-1090 (NHP)

Prepared by:
Burton Grad, President
Burton Grad Associates, Inc.
235 Martling Avenue
Tarrytown, NY 10591

Date Prepared: April 4, 1997

Attorney Work Product

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1. Burton Grad Qualifications

2. Resource Materials Available

A. Assignment

My assignment was to:

- describe common software industry principles and practices regarding maintenance of mainframe application software products
- apply these industry principles and practices to this particular situation between DBS and Grace
- Specifically address the issue of the relation of maintenance costs and prices for software updates vs. other maintenance and support functions

Certain specific questions were addressed to me to be answered on a general basis and then applied to this specific case.

1. What is a customer normally permitted to do with mainframe application software source code and materials as delivered by a software vendor?
2. What is a customer generally prohibited from doing with mainframe application software? What does a customer have to do to get permission to perform any of these prohibited actions?
3. Since customers are not required to stay on maintenance in order to continue to use perpetually licensed programs and materials, are there any additional restrictions on customer use if the customer continues to use a program without a maintenance agreement?
4. Are customers entitled to use third parties (non-employees) to carry out all of their permitted activities in order to use the programs and materials that have been licensed?
5. Are there any additional restrictions on third parties who have access to copyrighted and trade secret programs and materials from the customer and have signed appropriate non-disclosure agreements?
6. Do the third-party responsibilities change if the software is no longer under a maintenance agreement with the software vendor?

B. Qualifications

I have been active in the computer software and services field since 1954, first in the General Electric Co., then in IBM and now as a consultant to software companies. During my 18 years at IBM, I was responsible for developing major systems and applications programs. As a result, I have a comprehensive understanding of the process of determining market opportunities and requirements, managing development projects and estimating costs for development and marketing of mainframe and midrange software products.

During the last 18 years, I have served as a private consultant to over 150 computer software and services companies. In particular, since 1980, a substantial part of my consulting work has been in valuing companies, products and services involved in acquisitions, mergers and business settlements. This has given me a broad knowledge of how business is done and how products and services are packaged and priced in this industry.

From my work and long standing relationship with ITAA, the leading broad-based computer software and services trade association, I have had extensive exposure to all segments of the industry and have been involved in a wide range of financial, technical and information studies for the industry. From this, I have been able to develop a comprehensive understanding of software industry business and operational practices.

From 1992 to 1996 I was actively managing CustomerCare, Inc., a publisher of a quarterly software customer service newsletter and an annual industry practices survey. From this experience, I was able to become fully current on software maintenance and support practices and prices for all segments of the industry.

As an assignment, I was retained in 1989 as a damages expert by the defendant, Altai, Inc., in a suit filed by Computer Associates, Inc. claiming infringement of software copyrights and trade secrets. This case went to trial and I was responsible for preparing a report and testifying for Altai regarding the amount of damages which should be assessed against Altai if it were found guilty of infringement.

As another assignment, I was retained in 1996 as a damages expert by the plaintiff, INSLAW, Inc., in a suit against the United States Department of Justice, claiming non-payment by the Department of Justice while using multiple copies of proprietary programs developed by INSLAW. The case went to trial in March 1997, and I was responsible for preparing a report and testifying for INSLAW regarding the amount of damages which should be assessed against the Department of Justice if the court found the Department of Justice guilty of using INSLAW's proprietary programs without paying for them.

My professional profile is attached as Exhibit 1.

C. Resource Materials

Various resource materials were provided to me from Grace and its attorneys . All of these documents are listed in Exhibit 2. Only a subset of these documents was used in formulating this report.

No other documents were specifically referenced in preparing this report.

D. Industry Principles and Practices on Maintenance

Maintenance and Support have been integral elements of the mainframe software business at least since 1969. Because the bulk of mainframe application software was written by software vendors to run on IBM mainframes, a consistency of principles developed during the 1970s and was then carried forward through the 1980s and to the present.

- The concept of licensing, not selling software products
- The use of a perpetual license, not a term license
- The use of a separate, annual maintenance agreement to cover error correction, support and enhancements
- The nature and even the wording of the licenses

These common principles came from following IBM contract terms, from having to meet competitive offerings, from examining contracts from other vendors and from what was found to be profitable business practices which were acceptable to large user accounts.

Listed below are some of the common practices:

1. Software companies typically provide a "perpetual" license to customers for continued use of delivered application programs and materials for an up-front fee.

2. The perpetual license for application programs usually states that the customer may only use the programs and materials for its own business operations and only at its designated site(s).

3. The perpetual license for mainframe application programs usually provides for the delivery of source code (typically written in COBOL) so that the customer can make necessary code modifications, add functions and program extensions and then recompile for its own use rather than requiring the software vendor to make these changes and recompile on an individual customer basis.

4. The perpetual license usually provides for one year of "free" maintenance (e.g., correction of errors), support (hot-line access) and delivery of enhancements incorporated in later releases and versions of the programs and materials.

5. After the end of the first year, software companies require the customer to sign a maintenance agreement if they wish to continue to have error correction, support and enhancements provided to them. Typical fees for these annual maintenance agreements have recently been 15%-18% of the current list price for a new perpetual license.

6. If a customer does not pay for an annual maintenance contract, it may continue to use the programs and materials, but it will not receive any error corrections, usage support or enhancements.

7. If a customer wishes to modify or extend the programs as delivered initially or later, the customer must perform this work itself or pay the software vendor or other professional services (e.g., consulting) firms to perform the work. Many customers use third parties (not the software vendor) for modifications and add-ons with an appropriate non-disclosure agreement between the customer and the third party. Note, however, that if the customer has such changes made, the software vendor warns that it may not be able to maintain the changed code and that future releases or versions may make these changes unusable as written, requiring further custom activities by the customer or the third parties which it retains.

8. In a number of cases, other software vendors have produced programs which work in conjunction with the original software company's programs. These programs utilize defined interfaces which the original software company specifies as being supported and will be protected as future corrections, improvements and enhancements are made by the original software company.

9. Most customers continue to pay for maintenance services from the software vendor; but typically, there is a 3%-8% annual attrition rate. There has always been some percentage of these discontinued customers who do not stop using the programs, but rather decide that they wish to "freeze" at a certain version/release level and accept responsibility for their own maintenance and improvements as needed. Many of these firms use experienced third parties to perform the functions needed to keep the programs usable, requiring the third parties to commit to the same responsibilities as the customer itself.

10. If a customer discontinues maintenance from the software vendor, then it will usually have to pay a premium if it wishes to get back on vendor maintenance at a later point in time.

11. Customers believe that this right to continued usage and self-maintenance is vital to protect them against unreasonable maintenance price increases, against a software vendor discontinuing product maintenance on legacy programs, or against a software vendor going out of business.

12. IBM used a "belt and suspenders" software license agreement starting in 1969, using both copyright and trade secret provisions

13. The copyright provisions have been viewed as the most significant protection against theft of the program code and design to prevent an infringing competitive product Software vendors want to avoid having another software company market software which incorporates their copyrighted materials.

14. Industry practices have encouraged customers to get full value from their licensed application software by allowing them to modify and extend the software. In many cases, the customer has contracted with a third party to perform these functions. While software vendors would like to receive the recurring revenue from the maintenance renewal fees, they are not going to lose a long-term business relationship by hindering the customer's continued usage, even if the customer does not renew the maintenance agreement.

15. In offering annual maintenance agreements, virtually all mainframe application software companies provide the following services:

    - correction of errors in programs and documentation
    - telephone support on how to effectively set up and utilize the programs
    - improvements and enhancements to the programs and documentation
    - program or table changes to maintain currency on changing factors (cut-off points, tax rates, etc.)
    - new releases and new versions of changed programs or modules

16. Annual Maintenance agreements do not normally commit the vendor to provide for any custom code modifications, added unique functions, or customer-specific extensions. These are the responsibility of the customer or its selected third parties.

17. In charging for maintenance services, all of these maintenance and support activities are usually packaged together for a single maintenance price. However, more recently some of the service elements have been separated and priced individually. For example, some companies will charge one price for annual program updates (payroll tax changes, business tax changes) and a separate price for on-going telephone support, error corrections and program enhancements.

18. In the Payroll, Personnel and Benefits application area, the annual software information updates might be priced at 30%-40% of the overall maintenance price; therefore, the support and other services would be priced at 60%-70% of the total maintenance price, if they are offered separately.

The typical software industry practices on customer rights are summarized below:

1. A customer has the right under an application software license to use the programs and materials provided to perform its business functions. It has this right for the term of the license.

2. A customer has the right to modify, add to or extend the programs and to make any program corrections or changes it wishes.

3. A customer can make copies of the source programs for backup, security and modification programming purposes.

4. A customer has the right to use third parties to perform these program modification and correction activities as long as the third party has agreed to observe the same rules on confidentiality and non-disclosure as the customer does.

5. Acustomer does not have to continue to have the software vendor provide maintenance (error correction, support, enhancements or updates) in order to continue to use the program under a perpetual license.

The typical software industry practices on customer restrictions or limitations are summarized below:

1. A customer cannot use the programs to perform processing services for other companies.

2. A customer cannot use the programs on a production basis at any but the authorized site(s) or on authorized computer(s).

3. These customer restrictions may be waived by action of the software vendor

E. Comments and Conclusions on DBS Practices and Grace Practices

Based on my reading of certain depositions and other documents supplied to the Court as well as an examination of the relevant M&D license agreements, I have related the specifics of this case to industry practices as stated in Section D. Please note that these opinions and conclusions are based on my industry expertise and do not presume any legal knowledge:

1. DBS Practices

The DBS license agreement follows industry practices which is not surprising considering that M&D was one of the industry pioneers in the 1970s.

- Source code is made available so that customers can modify, extend and do their own compilations
- Responsibility for modification and extension belongs to customer
- Permits use of third parties with an acceptable confidentiality agreement
- Separates license to use (99 years) from maintenance agreement, except for first year, which provides "free" maintenance within product acquisition license fee

2. Grace Practices

Grace was one of many companies providing custom modification and maintenance services to individual DBS customers with a contract from each customer including an appropriate confidentiality agreement with each customer. Then, Grace offered to perform a packaged maintenance service for DBS customers who did not wish to continue to receive maintenance and enhancements from DBS. This was a novel offering for mainframe application software products. Nevertheless, Grace acted within the framework of industry practices in making this offering:

- Grace offered a package price for a particular set of functions (error correction, operating system currency, support); this package did not include enhancements or modifications; these were performed on a custom basis.

- Grace required a separate agreement with each customer for the maintenance service package.

- Grace insisted on a standard form confidentiality agreement with each customer.

- For DBS payroll programs, Grace offered to deliver a program which annually provided updated information on tax cutoff points and tax rates. This program was supplied by a third party. Grace offers this program on a standalone basis or as part of its maintenance service. As a standalone, the program was priced at 35%-40% of the price for the total maintenance service.

F. Analysis and Conclusions

Possibly triggered by the novelty of this Grace offering, DBS has claimed that it has the right to prevent any other company from providing maintenance to its licensees, even though there is no such provision in the customer license.

The industry principles are quite clear:

- Each customer has the right to continue to use any program it has obtained for the term of the license agreement. Therefore, the customer is entitled to take all steps not specifically prohibited in the license to make the program usable if it chooses not to buy maintenance services from the original vendor.
- The customer may choose to use a third party to perform the needed services to keep a program usable as long as the third party agrees to observe the same rules on confidentiality and non-disclosure as the customer does.

While one can understand DBS' desire to be the only company providing maintenance on its software, it cannot do so, from an industry practices standpoint, unless it has explicit statements in its initial license agreement that prevent a customer from self-maintenance or from using third party maintenance. In my opinion, most large customers would not sign an agreement with these limitations for application programs, but would choose to use a competitive product.

It is my opinion that Grace has acted with imagination to create a new business opportunity for small computer software and professional services firms and that this will lead to greater value for customers and greater industry growth.

In summary, based on the case information I have reviewed and my knowledge of industry practices, Grace has not violated industry practices or the DBS customer license agreement in offering to perform maintenance services to DBS customers for DBS software products.

Publications by Burton Grad

1. *Management Systems*, by Burton Grad, *et. al.,* Holt Rinehart and Winston, New York, First Edition, 1968; The Dryden Press, Hinsdale, IL, Second Edition, 1979

2. "Managing Remote Application Development Work," by Burton Grad, EDP Analyzer, July 1982

3. "In Search of the Value Added," by Burton Grad and Esther Dyson, Datamation Magazine, June 1982

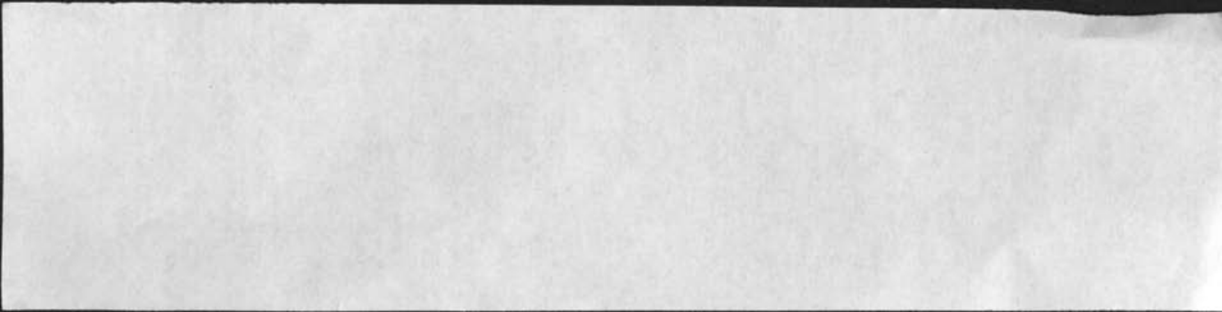
4. "Staying at Home: A New Work Ethic?", by Burton Grad, ICP INTERFACE Administrative and Accounting, Autumn 1981

5. CustomerCare Newsletter, July 1992-June 1996, 16 issues -- editorials and articles covering Customer Service: Support, Training and Documentation

6. CustomerCare Surveys, "Service and Support Practices in the Software Industry," 1993-1996, 4 editions

7. FASB86 Report, ITAA, 1986

8. Various articles on Customer Service 1992-1996 in newsletters and magazines



Crawford et al v SAP

Specific damages claims

I. Misrepresentation pg 33-34
- value of Data Dynamics + Maint +
- time spent devel Titan + Growth mkt
- reduced value of Titan

II Fraud pg 36-37

III. Interference with Contract (Modis) pg 39

IV Interference with Advantage pg 41

V NJ Franchise Practices pg 43

VI Breach of Contract pg 45-46

VII Breach - Implied pg 49-50

VIII Promissory Estoppel pg 52

IX Equitable Estoppel pg 53

X Unjust Enrichment pg 55

XI. Breach of Fiduciary Duty pg 57

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL CRAWFORD
46 Conover Lane
Red Bank, NJ 07701
and
STEVEN BELLI
56 Fallsington Place
Freehold, NJ 07728
and
DIRK FLOTE
1205 Bel Air Drive
Santa Barbara, CA 93105
and
RAECO INVESTMENT PARTNERSHIP
575 Madison Avenue
New York, New York 10021

Plaintiffs

v.

SAP AMERICA, INC.
3999 West Chester Pike
Newtown Square, PA 19073
and
SAP AG
Neurostrasse 16
69190 Walldorf
Germany
and
HASSO PLATTNER
6918 Schriesheim, Röschbachstr.2
Germany

Defendants

CIVIL ACTION NO. 00-CV-2779

JURY TRIAL DEMANDED

THIRD AMENDED
COMPLAINT IN CIVIL ACTION

The Plaintiffs, by and through their attorneys, hereby file this Civil Action against the Defendants and in support thereof allege as follows:

I. PARTIES

1. Plaintiff, Michael Crawford ("Crawford") is an individual citizen of the State of New Jersey, residing at 46 Conover Lane, Red Bank, NJ 07701.

2. Plaintiff, Steven Belli ("Belli") is an individual citizen of the State of New Jersey, residing at 56 Fallsington Place, Freehold, NJ 07728.

3. Plaintiff, Dirk Flote ("Flote") is an individual citizen of the Republic of Germany, residing at 1205 Bel Air Drive, Santa Barbara, CA 93105.

4. Plaintiff Raeco Investment Partnership ("Raeco") is a New York general partnership, located at 575 Madison Avenue, New York, New York 10021.

5. The general partners of Raeco are Theodore Levine, residing at 160 Walnut Drive, Roslyn, NY 11576; Thomas R. Bruno, residing at 2265 Carley Court, North Merrick, NY 11566-2229; Richard Shanley, residing at 799 Carroll Street, Brooklyn, NY 11215; Trust f/b/o Jane E. Baum u/w/o H. Rednor, 970 Park Avenue, New York, NY 10028; Carole S. Eisner, residing at 1107 5th Avenue, New York, NY 10128; Richard A. Eisner, residing at 1107 5th Avenue, New York, NY 10128; Trust f/b/o Richard A. Eisner u/w/o H. Rednor, 575 Madison Avenue, New York, NY 10022; Rockaway Associates, LP, c/o Measure Me, Inc., 100 Campus Drive, P.O. Box 944, Florham Park, NJ 07932, a limited partnership of the family of Ralph J. Anderson, Jr. and whose general and limited partners are citizens of the State of New Jersey; Eric P. Fisher, residing at 2400 Hudson Terrace, #2U, Fort Lee, NJ 07024; John Symon, 7 Drake Close, Somerville, NJ 08876; John T. Delalio, residing at 816 Chicken Valley Road, Locust Valley, NY 11560; Stephen Epstein, residing at 6 Harnes Road West, Stamford, CT 06902; Rhonda Levey, residing at 250 East 73 Street, Apt. 8-H, New York, NY 10021; Timothy Moeggenberg, 543 Washington Avenue, West Hempstead, NY 11552; Robert Sosink Clee, residing at 19 Ashton Place, Glen Rock, NJ 07452; Elaine Bashner, residing at 522 Shore Road, Apt. 4-F, Long Beach, JY 11561; Lori S. Weinstein, residing at 32 High Ridge Road, Plainview, NY 11803; Richard Dorrien, residing at 45 John Street, New City, NY 10956; Stanley Goldberg,

5 Pickering Place, Dix Hills, NY 11746; Rebecca James, residing at 600 West 115 Street, #53, New York, NY 10025; Dennis Lake, residing at 1 Federal Lane, Whitehouse Station, NY 08889; and Michael Pella, residing at 1820 East Howe, Seattle, WA 98112.

6. At all times relevant hereto, Crawford, Belli and Flote were members of Titan Technologies Group, LLC (hereinafter "Titan"), a New Jersey limited liability company and the assignee and successor in interest to the rights of Data Dynamics, Inc., a New Jersey corporation, in a Certified Business Solutions Provider Agreement entered into with Co-Defendants, SAP America, Inc. and SAP AG.

7. In June, 1997, Raeco acquired a 7.5% membership interest in Titan.

8. Defendant, SAP AG is a corporation organized and existing under the laws of the Republic of Germany, with a principal place of business at Neurostrasse 16, 69190 Walldorf, Germany. SAP AG is the world's leading provider of inter-enterprise software solutions, with a market share of approximately 36%. Overall, it is the fourth largest computer software company in the world.

9. Defendant, SAP America, Inc. is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 3999 West Chester Pike, Newtown Square, PA 19073. SAP America, Inc. is a wholly-owned subsidiary of SAP AG.

10. SAP AG and SAP America, Inc. will be collectively referred to hereafter as "SAP." All of the acts and/or omissions alleged hereafter to have occurred, or not to have occurred, were performed, or not performed, by SAP America, Inc., through its agents, on its behalf and on behalf of SAP AG.

11. Defendant, Hasso Plattner ("Plattner") is a co-founder of SAP AG and currently serves as Co-Chairman and Chief Executive Officer of the Executive Board of SAP

AG, and as Chairman of the Board of SAP America, Inc. Plattner is a citizen of the Republic of Germany and resides, upon information and belief, at 6918 Schriesheim, Röschbachstr.2, Germany. At all times relevant hereto, Plattner exercised dominion and control over the actions of SAP AG and SAP America, Inc., and directed, controlled and participated in SAP's business dealings with SAP's Certified Business Solutions Providers. Any references to "SAP" hereafter refer also to Plattner when he is not otherwise referred to individually.

12. All acts or omissions, representations or misrepresentations alleged hereafter to have occurred, or not to have occurred, were performed or not performed, by agents, servants, workmen or employees of the corporate Defendants and of Plattner within their apparent and/or express or implied authority or with express authority, consent and/or ratification.

II. JURISDICTION AND VENUE

13. Crawford and Belli are citizens of the State of New Jersey. Flote is an alien admitted to the United States for permanent residence in the State of California. Raeco is a New York general partnership and its general partners are citizens of the States of Connecticut, New Jersey, New York and Washington. SAP AG and Plattner are citizens of the Republic of Germany. SAP America, Inc. is a citizen of the State of Delaware and the Commonwealth of Pennsylvania. There is, therefore, diversity of citizenship so as to confer jurisdiction upon this Court pursuant to Section 1332(a) of the U.S. Judicial Code, 28 U.S.C. §1332(a).

14. The matter in controversy exceeds $75,000.00, exclusive of costs.

15. Venue in the Eastern District of Pennsylvania is proper pursuant to Section 1391 of the Judicial Code, 28 U.S.C. §1391, inasmuch as Defendant, SAP America, Inc. resides in this district.

III. FACTUAL BACKGROUND

16. In the mid-1990's, Plattner conceived of the idea of selling SAP's "R/3" enterprise software to small and medium-sized companies through a network of independent companies which would be licensed to resell SAP's software.

17. "R/3" is a comprehensive software system consisting of modules which can tie together and automate e-commerce applications and other basic business processes such as: taking orders; checking credit; verifying payments; balancing the books; and tracking inventory. It is a complex set of programs that require a great deal of time to implement. Integration with existing systems is complicated and time-consuming. Installation involves hiring consultants whose fees usually amount to double the cost of the software.

18. A support industry has developed around SAP comprised of consultants, trainers, specialists and software manufacturers who sell complementary "add-on" products and provide value-added consulting services. Included within that support industry are companies which have satisfied SAP that they have the training, certification and sophistication necessary to implement SAP software and integrate it into existing systems of users. SAP has designated these companies as SAP "Partners". SAP Partners work under a standard partnership agreement which allocates revenues between SAP and the Partner, among other provisions, and permits the Partner to use a logo including the SAP name. There are three categories of Partners: National Implementation Partners, National Logo Partners and Global Logo Partners. The designation of each depends on the size and capability of the Partner. Logo Partners are typically large firms with world-wide service capabilities that can provide assistance in all phases of an "R/3" implementation project. National Implementation Partners focus on mid-market customers.

19. Plattner's idea for selling "R/3" to the small-to-medium sized market was first tested in Germany in 1994. The success was mixed due to the use of non-exclusive distributors who did not have the incentive to invest sufficient capital to promote success of the program.

20. When the decision was made to introduce the "R/3" reseller program into the United States, SAP assembled a team to develop a model which would be conducive to attracting a commitment from entrepreneurs willing to develop a new market for the "R/3" modules. These companies would be responsible for attracting the necessary investment to fund rapid growth and to reward the owners/entrepreneurs.

21. The team was asked to study the development of the McDonald's franchise system in the United States. The team decided that a franchise system in which the owner/entrepreneur owned an exclusive territory would be most conducive to attracting the kind of entrepreneurs sought by SAP.

22. The team ultimately developed a plan which carved out fourteen exclusive geographical regions in North America in which a franchise would market, license and distribute software and software support services. The program was called "Certified Business Solutions" ("CBS"), and the franchisees were called "CBS Providers".

23. Flote was employed by SAP from 1990 to 1997. He worked as an Account Executive and Global Support Manager for specific accounts, including Hewlett Packard and Lucent Technologies. He was part of the team which designed the "R/3" CBS reseller program for the United States.

24. During the development of the CBS Program, there was internal discussion at SAP concerning the potential return on the investment of any CBS Provider. The assumption was that a franchise would be able to attract investment and thereby reward the owners and

employees with stock or stock options, which SAP understood was an important compensation feature needed to attract, and retain, key personnel.

25. On September 9, 1996, Crawford read an article in the *Computer Reseller News* describing SAP's CBS Program. At the time, SAP's "R/3" enterprise software had a reputation for being very expensive and difficult to implement, and had, theretofore, been sold directly to large national and international accounts through SAP's own sales force of account executives.

26. At the time he first learned of SAP's CBS Program, Crawford was the President and Chief Executive Officer of Data Dynamics, Inc. ("Data Dynamics"). Data Dynamics was started by Crawford in 1977 to serve as an exclusive distributor of computer hardware and software. The company also provided software implementation services. Its geographical sales region included New Jersey, Metropolitan New York and Long Island, Southern Connecticut and Eastern Pennsylvania. Belli joined Data Dynamics in 1992 as a co-owner and worked as its Chief Operating Officer. Data Dynamics' business model called for it to be the sole resource for its customers' software, hardware, implementation and related consulting services. This was the same model conceived by SAP for its CBS Program.

27. Crawford called John Vincze ("Vincze"), at the time SAP's Business Development Manager for the CBS Program. Vincze told Crawford to send him a letter expressing interest in becoming a CBS Provider and told Crawford that if he wished to be considered, he would have to phase out his involvement in Data Dynamics and devote 100% of his time and energy to SAP.

28. From November, 1996 through February, 1997, Vincze actively assisted Crawford and Belli with the development of Data Dynamics' Business Plan, to the extent of even providing data and other information to be incorporated into the Data Dynamics' Business Plan.

29. During the same time period as that alleged in the previous paragraph, Vincze spoke frequently with Crawford and Belli about the risk they would be incurring and how valuable the franchise would be to them, if they executed the plan properly. Vincze discussed with them their plan ultimately to sell the franchise, or their interest in the franchise. On December 2, 1996, at a meeting at the offices of Data Dynamics in Shrewsbury, New Jersey, in response to a direct question from Belli and Crawford, Vincze told them that the only restriction that SAP would place on their right to sell their franchise was that they could not sell more than a 25% interest to a "Big 5" accounting firm. Representations to like effect were made several times by Vincze to both Belli or Crawford, together or individually, during December, 1996 and January, 1997.

30. These representations were made by SAP with the knowledge, understanding and expectation that they would be repeated to potential investors in Data Dynamics, Inc. or any entity which Crawford, Belli and Flote formed to perform the responsibilities of a CBS Provider.

31. During this time period, Flote remained employed by SAP. Recognizing the potential of CBS, he expressed interest in owning a CBS franchise. He had successfully sold "R/3" to Chevron Oil Company in 1992 and had been in charge of test marketing "R/3" to the mid-sized market in California. SAP told Flote that he would be considered for a franchise. Flote was put in touch with Crawford and Belli by John Vincze, as part of Vincze's effort to package Crawford and Belli's Business Plan in a way that would be accepted by Paul Wahl, Chief Executive Officer of SAP America, Inc.

32. Crawford and Belli were attractive to Vincze because, through Data Dynamics, they had actual software sales experience in New Jersey and Metropolitan New York territory and had been promoting a single-source method of doing business. This method allowed a customer, otherwise known as an "End User", to rely on Data Dynamics for all of its hardware, software, implementation and consulting services without the need to deal with several vendors. This was the same model as that envisioned by SAP for CBS. Flote's knowledge of "R/3", and SAP generally, in combination with Crawford's and Belli's personal experience, presented a unique opportunity for SAP in the greater New York, Northern New Jersey territory, considered by SAP to be the most important sales region in its CBS initiative.

33. On February 17, 1997, Vincze e-mailed Crawford to tell him that Data Dynamics had been awarded the contract. A meeting was then arranged in New York City with Paul Wahl for Crawford, Belli and Flote to present their business plan. Present at the meeting were John Vincze, Brian Plug, President of SAP Canada, who was also responsible for the development and implementation of the CBS Program, Kevin Iler, Crawford, Flote and Belli. At the end of the presentation, Crawford was asked by Wahl whether the CBS business opportunity was profitable enough for him and his partners, Belli and Flote. Crawford answered in the affirmative, the contract was handed to him, and he signed it on behalf of Data Dynamics. There was no negotiation. During the preparation of their business plan, Crawford and Belli had been told by Vincze that no negotiation of the contract would be permitted, and that the contract had to be signed "as is." A true and correct copy of the Certified Business Solutions Provider Agreement between Data Dynamics and SAP America, Inc. and SAP AG (hereinafter "the Provider Agreement") is attached as Exhibit "A", and is incorporated by reference.

34. The Provider Agreement was entered into by Defendant SAP America, Inc. on its own behalf and on behalf of Defendant SAP AG.

35. At the time of the discussions leading up to the presentation and signing of the Provider Agreement and thereafter, SAP and SAP AG had such a dominant and controlling position in the industry that Plaintiffs could not deal with them on equal terms.

36. At all times during discussions prior to the presentation and signing of the Provider Agreement, Vincze informed Crawford and Belli that they would have to devote 100% of their time energy and expertise to SAP, and that they would have to relieve themselves of any responsibilities to Data Dynamics and any other business interest. It was not the expertise of Data Dynamics, Inc. that SAP evaluated when considering it as a potential CBS Provider. Rather, SAP was interested in persons with substantial and successful experience in areas comparable to those encompassed by the CBS Program to participate in the CBS Program. Crawford and Belli had a proven track record of becoming a leading seller of software products in a defined geographic area using a single-source business model. In addition, ninety percent of Crawford's and Belli's customer contacts were within the Growth Market defined in the Provider Agreement. This was the value that Crawford and Belli brought to SAP, in combination with Flote's close association with "R/3" and the CBS Program.

A. THE PROVIDER AGREEMENT

37. The Provider Agreement defines the CBS market to be corporations with up to $200,000,000 in gross revenue, including subsidiaries, but not other affiliates of such corporations [Provider Agreement ¶1.8]. It allocated an exclusive geographical market to Data Dynamics that included part of New York State, New York City and northern New Jersey. Qualified prospective companies within the exclusive geographic region are defined in the Provider Agreement, and shall be referred to hereafter as the "Growth Market".

38. Although the Provider Agreement states that it shall not be construed as creating a partnership, joint venture, agency relationship, or granting a franchise under any applicable laws [Provider Agreement ¶18.9], the relationship between Data Dynamics and SAP was such that, under the New Jersey Franchise Practices Act, 56 N.J.S.A. §10-1 et seq. (hereinafter "the Act"), a franchise was in fact created. The Provider Agreement is a written arrangement for a period of time in which SAP granted to Crawford, Belli and Flote, through Data Dynamics, a license to market and sublicense the "R/3" software and to provide support services within an exclusive territory, as part of SAP's Certified Business Solutions Provider program [Provider Agreement, "Recital"]. The Provider Agreement creates a community of interest between SAP and the CBS Provider in the marketing of the software and related support services. Accordingly, a "franchise" was created by virtue of section 3 of the Act, 56 N.J.S.A. §10-3, contract language to the contrary notwithstanding.

1. The Franchise Relationship

39. The relationship between SAP and the CBS Providers was such that the Providers were induced or required to invest in skills and assets that had no value to the Providers outside of their relationship with SAP and its "R/3" software. Paragraph 4.1 of the Provider Agreement required the Provider to maintain sufficient facilities, adequate capital, resources and personnel to adequately market, support and perform the obligations set forth in the Provider Agreement including, but not limited to, annual Performance Targets [Provider Agreement §§4.1, 4.7].

40. The CBS Provider model was designed to provide "one-stop shopping" for its customers. The CBS Provider was required by the Provider Agreement to manage and coordinate the delivery of hardware, software, systems planning, implementation, training, post implementation operational support and value- added consulting services. The Growth Market

customer would thus not have to deal with the hardware vendors or any of the SAP Partners, but would interface primarily with the CBS Provider. Accordingly, the CBS Providers were told by SAP to hire personnel to develop and enhance their ability to provide implementation consulting services.

41. Substantial inducements were offered by SAP to the prospective CBS Providers. SAP reduced its royalty on the first five sales of each Provider from 50% to 30%. It promised free pre-sales support, which typically involved 1-3 days of preparation and 1-3 days of demonstration. SAP provided 250 days free training for CBS Provider employees (and additional free training for new hires). It also provided a cooperative marketing budget whereby it invested substantial dollars into each CBS Provider's marketing effort.

42. The relationship between SAP and the CBS Providers differed substantially from the relationship between SAP and its Implementation and Logo Partners. At inception, CBS Providers were required to use SAP's logo on all of their stationery and marketing materials. Titan, and, on information and belief, the other CBS Providers, had access to SAP's demonstration computer systems, answered the telephone "SAP", and placed the SAP logo on its front doors, office walls, business cards, shipping labels, company shirts and all advertising. Titan contracted for a toll-free number "1-877-TEAM-SAP". Even though Titan sold complementary products, i.e., computer hardware, those products were only sold to meet SAP's requirement that the CBS Provider be the single source for all facets of the implementation. SAP's Internet web site was linked to the CBS Providers, and vice versa. In the marketplace, Titan's name was synonymous with SAP. Everyone knew Titan to be solely an SAP reseller, to the exclusion of all other business.

43. The CBS Provider was the sole contact for the customer. Second level support was available directly from SAP. The CBS Provider had direct access to SAP's Implementation and hardware Partners.

44. SAP retained ownership of the "R/3" modules. The CBS Provider was granted a license which gave it the exclusive right to market, sell and implement the "R/3" software to Growth Market companies within its geographic area [Provider Agreement "Recital"]. SAP did not sign any agreements with the End-User. The CBS Provider would sub-license the software to an End User with a Provider End User License Agreement, which specified the permitted number of users within the sub-license. No modifications to the End-User Agreement were permitted without SAP's approval [Provider Agreement ¶2.2]. A true and correct copy of a Provider End-User License Agreement is attached as Exhibit "B".

45. In the Provider End-User License Agreement, the licensee acknowledged that SAP warranty service would be provided exclusively by Provider [Exhibit B, ¶7.1]. The Agreement also provided for an annual fee for maintenance, which include access to SAP's Online Service System. These fees amounted ultimately to 17% of the SAP list price. Maintenance service from the CBS Provider was only available so long as SAP made such services generally available in the CBS Provider's territory [Exhibit B, ¶8].

46. Suggested list pricing was set by SAP. As users were added to each sub-license, there were additional charges, as there were for "add-on" product purchases. In each instance, the maintenance fees would increase proportionately.

47. CBS Providers were given their own software systems for demonstration purposes. Their computer access cards gave them immediate entry into SAP's own demonstration system, which allowed them to change data and configurations as the End User

demanded during any demonstration. They had access to SAP facilities, conference centers, demonstration facilities and training classrooms. The CBS Providers were required to train End Users on SAP systems [Provider Agreement ¶4.11]. This access, overall identity with SAP and classroom training differentiated the CBS Provider from SAP's Implementation and Logo Partners. The non-CBS Partners, for instance, had to purchase their own systems and did not have access cards into SAP's systems. Upon information and belief, the non-CBS Partners were not permitted to provide classroom training to End Users.

48. The CBS Providers were encouraged to implement the SAP software for their own business operations [Provider Agreement ¶5.7]. If the CBS Provider did implement "R/3", SAP provided the software at no charge.

49. For the first five licenses entered into between a CBS Provider and an End User, SAP was due a royalty of 30%. Thereafter, SAP was owed a royalty of 50%. Any rebates, discounts or incentives deducted from the license fee came out of the CBS Provider's portion of the fee, unless a discount was agreed to by SAP [Provider Agreement ¶7.3]. The CBS Provider collected the maintenance fees. No discounts were permitted without SAP's express approval. SAP invoiced the CBS Provider for its 60% share of those fees [Provider Agreement ¶6.3]. Consulting, training and other related fees earned by the CBS Provider were retained by the Provider.

50. Sections 5.1 and 5.4 of the Provider Agreement set forth procedures for ordering and delivering product and services. All packing, shipping and billing to the End Users came from Titan. After the Provider End User License Agreement was signed, Titan would place an order with SAP for the software and remit 25% of the list price as a deposit. SAP would send the product to Titan with an invoice for the balance which was due 120 days later.

51. All shipments from SAP to Titan were opened, inventoried and inspected for compliance with customer specifications. In those instances when Titan was also selling the hardware, the software was loaded into the hardware, which had been shipped directly to Titan by the hardware supplier, repackaged and shipped using Titan shipping labels and shippers hired by Titan. Titan was responsible for delivering the product according to the customer's specifications.

52. All "add-ons" and software upgrades were shipped to Titan by SAP and processed in the same way as the initial system.

53. Once an order was shipped by SAP and received by Titan, all commercial risk was assumed by Titan. If a customer did not pay, Titan was nevertheless obligated to pay SAP the 25% unpaid balance of the list price [Provider Agreement ¶2.6].

54. In return for the exclusive right to sell SAP software within and to its Growth Market, the CBS Providers agreed not to sell competing products. The Provider Agreement prohibited the CBS Providers from being "a party to any transaction with a third party to distribute any product designed to perform any functionality of the software" [Provider Agreement ¶2.6]. Similar restrictions were not imposed upon SAP's Implementation and Logo Partners, who were permitted to implement competing software. The CBS Provider engaged in no business unrelated to the "R/3" software. To the extent that they sold any computer hardware or provided consulting services to end-users, those sales and services were devoted entirely to promoting the CBS Program, and involved the remittance of a royalty to SAP.

55. The Plaintiffs were completely dependent upon SAP. Their efforts were designed entirely to promote CBS, and were controlled by SAP. They were required by SAP to attend quarterly principals' meetings, which were usually attended by Plattner, either in person

or by video conferencing. They also were required to attend annual SAP sales and marketing meetings, as well as SAP's annual customer-oriented "Sapphire" convention. All of Plaintiffs' marketing and advertising was of SAP, not Titan. All marketing, advertising and sales promotions had to be approved by SAP in advance, as did the hiring of significant employees. All notices or advertisements for employment had to be pre-approved by SAP.

56. Due to its size and its dominance in the marketplace, SAP had the power and the opportunity to dictate not only the terms of the Provider Agreement, but all facets of the parties' performance under the Agreement. The Plaintiffs were completely dependent upon SAP's good faith and fair dealing with them in order to accomplish their goal of building the value of their franchise. If SAP failed to provide "R/3" software to Titan as called for under the Provider Agreement, the Plaintiffs would have been out of business immediately. Accordingly, their success hinged solely on SAP's performance, and by entering into the Provider Agreement, they placed their confidence and trust in SAP that it would perform as promised.

57. The relationship between SAP and the CBS Providers was unique. It was not an ordinary commercial or contractual business transaction. Plattner referred publicly to the CBS Providers as being exactly like SAP employees. One of the principal criterion applied by SAP in deciding upon an applicant's suitability to be a CBS Provider was absolute loyalty to SAP and devotion of 100% of the applicant's time, energy and skill to SAP. SAP published internal business records and external marketing and advertising materials which referred to the CBS Providers as "partners".

58. Due to the unique nature of the relationship between SAP and the CBS Providers, there existed a fiduciary relationship between them which required utmost trust, honesty, good faith and fair dealing.

2. The Assignment Of The Provider Agreement To Titan

59. Upon being awarded the CBS Provider Agreement, Crawford and Belli began to apply resources of Data Dynamics to SAP. Because Data Dynamics had other business interests, SAP expressed displeasure that Crawford and Belli were involved in a business which was not related to SAP, or was not wholly dedicated to SAP. As a result of pressure from SAP to devote 100% of their resources to SAP, they sold Data Dynamics at substantially less than its fair market value in order to concentrate all of their efforts on the CBS business. In addition, Crawford owned and operated a hardware maintenance company, Maintenance Plus, Inc., which he was forced to sell at substantially less than its fair market value to comply with SAP's demand that he apply all of his resources to SAP.

60. Titan was formed in and around June of 1997, specifically for the purpose of assuming the Data Dynamics' CBS Provider Agreement and to secure financing to run the company and ultimately to provide stock options to employees. The ability to provide stock options is considered in the industry to be a critical component of a company's ability to attract and retain key employees. A true and correct copy of the Assignment and Assumption of the Certified Business Solutions Provider Agreement from Data Dynamics to Titan ("The Assignment") is attached as Exhibit "C" and incorporated by reference.

61. Under the terms of the Provider Agreement, the Assignment from Data Dynamics to Titan had to be approved by SAP. Both Belli and Crawford repeated to Vincze that the purpose for the Assignment was that they wished to isolate the assets of the CBS business in order to accomplish their goal of attracting outside investment, including the possibility of a public offering of stock. Vincze had told Crawford and Belli previously, during the contract negotiations and afterward, that the only way they would be able to attract and retain key employees such as Flote was to provide stock options, which would most likely become

available either through a public offering or the sale of the business to a publicly-traded company. There was a scarce supply of SAP consultants, and stock options were proving to be the only way to attract and retain them. The need to attract and retain key employees through stock options was repeated by Crawford and Belli in subsequent telephone calls and meetings with John Burke, who was by this time SAP's National Sales Manager and the individual in charge of managing the CBS Program. SAP agreed to the Assignment knowing the intentions of Crawford and Belli ultimately to sell the franchise, or their interest in it. At no time did SAP express any objection or opposition to Crawford's and Belli's stated objective.

62. The CBS Providers were required by the Provider Agreement to obtain adequate capital, resources and personnel to promote rapid growth and expansion [Provider Agreement ¶4.1]. Following the Assignment of the Provider Agreement to Titan, Crawford and Belli sought funding from numerous outside sources, including venture capitalists and investment bankers. They were successful in securing initial financing through the assistance of a large, regional accounting firm, Richard A. Eisner & Company ("Eisner"), which provided implementation consulting services for software manufacturers. SAP endorsed the approach to Eisner and to other venture capitalists. SAP stated its desire that each CBS Provider develop a stock incentive plan because it knew its consultants were in demand, and were very difficult to hire and retain without the possible benefit of equity in the company.

63. Eisner valued the contract alone, with no sales record, physical location or personnel, to be worth $10,000,000. Raeco was formed and Raeco ultimately purchased 7.5% of the company for $500,000. The Business Plan prepared by Crawford and Belli required a great deal more than $500,000 of capital, but it was critical to them that Titan begin operations as soon as possible in order to start identifying prospects and complete the sales and implementation

cycle in order to attain the sales targets dictated by the Provider Agreement [¶4.7]. The Plaintiffs therefore proceeded with the limited investment from Raeco with the expectation that they would obtain additional funding at a later date.

64. Raeco made the investment in Titan with the understanding and the expectation that SAP would not prohibit, object to or interfere with any potential sale of the Plaintiffs' interests in Titan to a third party.

3. Titan's Performance And Need For Capital

65. Titan built a state-of-the-art sales facility located at 499 Thornall Street, Edison, N.J., designed to accommodate up to 125 professionals dedicated to selling "R/3" and training end users in the implementation and use of "R/3". It was from this fixed place of business that Titan sold "R/3" and provided the other services required by the Provider Agreement. A satellite office was located in New York City.

66. By the time Titan assumed its role as a CBS Provider, the other thirteen CBS Providers had operated as SAP franchises for approximately one and one-half years. Only one or two of them had met their 1997 quotas. Titan, on the other hand, immediately began to exceed expectations. Titan met the 1997 sales target set by SAP, despite only having been in the program for seven months.

67. At the end of 1997, Titan was awarded additional territory, including Southern New Jersey and Eastern Pennsylvania, in return for its outstanding performance. Upon information and belief, Titan was the only CBS Provider to be awarded additional territory.

68. Other CBS Providers were referred to Crawford for advice and were told by SAP that Titan was the model CBS Provider. By the end of 1998, Titan was the leading CBS Provider in total revenue and number of units sold.

69. The Provider Agreement required that Titan be properly capitalized. Additional working capital was needed to expand the business. Crawford, Belli, Flote and Raeco decided against a public offering of stock and in favor of a strategic investor. Initial approaches were made to SAP to invest in Titan. Crawford, Belli and SAP representatives engaged in ongoing communication, both written and oral, concerning the need for additional working capital.

70. During May and June of 1998, Crawford continued to call Burke, Kevin McKay, SAP America, Inc.'s Chief Financial Officer, and Plattner, telling them that Titan required additional capitalization, was looking for alternatives, and considered SAP to be the most desirable alternative. SAP eventually responded by telling Crawford that SAP was not interested in investing in CBS companies at that time.

71. Titan's management team then decided they had to obtain alternate financing. Titan hired Kenneth Traub, a sophisticated businessman with extensive experience in raising capital for start-up technology companies, to act as its Chief Financial Officer and to spearhead its effort to secure vitally needed operating capital. Cash flow was very restricted during this time, and Titan almost missed a payroll in August, 1998.

B. THE MODIS ACQUISITION OF TITAN

72. On September 29, 1998, Crawford received a letter of intent from Modis, Inc. ("Modis") to acquire the interests of the members of Titan for $5,000,000, plus additional payments calculated as a multiple of earnings before interest and taxes (the "earn-out"). The earn-out would expire on December 31, 2001. Assuming certain benchmarks were achieved, this would result in a total acquisition price of not less than $55.538 million, with the expectation that if sales increased as anticipated, the final acquisition price would ultimately be much higher. A true and correct copy of Modis's calculations is attached as Exhibit "D".

73. Modis was at the time a National Logo Partner of SAP and implemented the "R/3" system in national and global accounts through a network of subsidiaries. Modis met all of SAP's criteria for a CBS Provider.

74. On October 20, 1998, Crawford notified Burke of the Modis offer and Titan's intent to accept. A true and correct copy of Crawford's notice letter is attached as Exhibit "E" and is incorporated by reference.

75. SAP never responded in writing to the October 20, 1998, notice of the Plaintiffs' intent to sell the members' interest in Titan.

76. At the request of Modis, on October 27, 1998, Crawford and James Surber, Titan's Vice President of Sales, took Larry Robinson, Executive Vice President In Charge of Mergers and Acquisitions at Modis, and Modis President Timothy Payne to see John Burke and Oly Avidar, SAP's CBS Provider Manager, at SAP's office in Chicago, Illinois to verify the relationship between SAP and Titan, SAP's commitment to CBS and Titan's performance. Burke was by this time Senior Vice President in charge of all national and CBS sales for SAP. Burke was informed by Crawford that the structure of the transaction included the sale of the members' interest in Titan to Modis. Crawford and the Modis representatives also told Burke that nothing would change operationally, and that the Titan management team was staying in place for at least three more years during the earn-out.

77. During the October 27, 1998 meeting, Burke confirmed Titan's performance for Modis, as well as SAP's commitment to the CBS Program. Burke informed the Modis and Titan representatives that he had performed his "due diligence" review of Modis, including an investigation of Modis's financial condition, and was satisfied that Modis was qualified to act as a CBS Provider. He stated that the proposal was a "win" for Modis, a "win" for Titan and a

"win" for SAP, and that Modis should proceed with the acquisition of the Plaintiffs' interest in Titan. As he had stated on many occasions before, Burke also said that Crawford, Belli and Flote did not need SAP's approval to sell their interests in Titan.

78. On November 6, 1998, Kevin McKay, now the Chief Executive Officer of SAP America, Inc., called Crawford and confirmed SAP's support for the transaction with Modis.

79. Closing on the Modis transaction was scheduled for December 24, 1998.

80. The Modis transaction was based upon projected 1998 earnings before interest and taxes ("EBIT") of $500,000 for Titan. In fact, Titan's actual EBIT for 1998 more than doubled that amount, thereby raising the reasonable expectation that the earn-out component of the Modis transaction would amount to far greater than the $48,000,000 reflected in the Modis term sheet. Modis also promised to make a substantial working capital infusion into Titan. The terms of the transaction provided that Crawford, Belli and Flote would remain in place for three years and continue to operate the company. In addition, there would be 100,000 shares of Modis stock options to be used to attract and retain key personnel. This was precisely the kind of transaction which key Titan employees had been promised when agreeing to work for Titan.

81. On December 23, 1998, the day before the closing of the Modis transaction, Burke, at Plattner's direction, called Tim Payne, President of Modis, and told him:

(a) SAP did not want its Channel Partners (i.e., CBS) to benefit financially from selling their companies;

(b) SAP would immediately terminate the Titan Provider Agreement if it missed a quota;

(c) Even if the quota was reached, SAP would only renew the Titan Provider Agreement for one year;

(d) Modis should only acquire Titan if it expected to get its money back in one year;

(e) SAP would see to it that all maintenance revenue would eventually revert to SAP, regardless of the Provider Agreement.

82. As a result of these threats and a perceived threat to its ongoing national logo partnership with SAP, Modis immediately withdrew from the transaction.

83. As a result of the demise of the Modis transaction, Titan was without the financing in place necessary to execute the company's sales plan for 1999 and 2000. It was forced to cut costs and lay off personnel. Morale among company employees plummeted. Titan struggled to retain key employees, who had been promised incentives and stock based on the Modis purchase.

84. On January 7, 1999, Plattner, McKay and Crawford met in Denver, Colorado, to discuss Titan's need for financing, as well as the desire of Titan's principals to receive a return on their investment. Crawford inquired why SAP had forced Modis to cancel its acquisition of Titan and inquired as to what Titan should do from that point forward. McKay responded that SAP could not stop Crawford from selling his company. Plattner did not dispute McKay's statement. Plattner asked Crawford what SAP could do to assist Crawford, Belli and Flote in receiving a return on their investment, and thereby make up for his interference with the Modis transaction. McKay informed Crawford that SAP would be interested in investing in Titan and providing Crawford and his fellow owners with a return on their investment. After the meeting, McKay promised to give Crawford $500,000 to be used as bonuses for key employees.

85. On January 11, 1999, Crawford wrote McKay, at McKay's request, and suggested that SAP purchase 25% of Titan for $7.5 million. He also requested a $2.5 million working capital line of credit from SAP. Crawford emphasized that "time was of the essence", and that he needed to provide the Titan management team with a return on their investment before members of the team disbanded for other opportunities. All members of the Titan management team were working at a level of compensation which was significantly reduced from the compensation they had been earning before working for Titan, and which was below industry standard, given the absence of stock options.

86. On January 25, 1999, McKay informed Crawford that Plattner was disappointed with their request for $7.5 million for a 25% interest in Titan. He said that Plattner objected to Crawford, Belli and Flote receiving such a large return on their investment. Crawford again informed McKay that they were losing key employees, and were attempting to recover from the damage caused by SAP's interference with the sale to Modis.

87. No investment from SAP ever materialized. The bonus money promised by McKay was never sent, and SAP's financial commitment to Titan and the other CBS Providers was reduced over time.

C. SAP'S EFFORTS TO CHANGE THE PROVIDER AGREEMENT

88. On December 10, 1998, Burke sent Crawford a proposed Amendment to SAP America, Inc. ("SAP") Certified Business Solutions Provider Agreement ("Agreement") with Titan Technologies Group ("Provider") (hereinafter referred to as "the Amendment") which substantially restricted the Growth Market by excluding government agencies and municipal organizations and restricting the exclusivity provisions of the Provider Agreement, among other changes. A true and correct copy of the proposed Amendment is attached as Exhibit "F".

89. SAP, through Burke, threatened to terminate Titan's Provider Agreement if Titan did not sign the Amendment. A true and correct copy of Burke's letter of December 10, 1998, is attached as Exhibit "G".

90. Titan did not sign the Amendment.

91. Thereafter, in early 1999, SAP submitted to the CBS Providers a one-year revised Provider Agreement which substantially changed both the operational and financial terms of the original contract. Specifically, the language of the contract which permitted the CBS Providers to sell all or part of the franchise, was amended to require SAP's approval in the event of such a sale. SAP threatened not to renew the Provider Agreements unless the CBS Providers signed the revised Provider Agreement. All of the Provider Agreements other than Titan's expired on December 31, 1999. Titan's Agreement expires on December 31, 2000.

92. The revised Provider Agreement substantially reduced the CBS customer market and all but eliminated its exclusivity. It removed government agencies, municipal organizations, public utilities and quasi-governmental organizations from the Growth Market [¶1.14]. SAP retained the right to enter the Growth Market [¶2.4] and to suborn to itself business opportunities in the Growth Market [¶4.3]. A true and correct copy of the revised Certified Business Solutions Provider Agreement is attached as Exhibit "H".

93. Titan never executed the proposed revised Provider Agreement.

D. <u>THE CONDOR ACQUISITION</u>

94. After the demise of the Modis transaction, and after SAP failed to react positively to Titan's request for investment, Titan was unable to attract and retain the type of quality employees needed to survive, nor was it able to fund the immediate cost of business development and market expansion. Consideration was given to ceasing operations altogether,

given the inability to sustain the company with cash flow from operations. Titan lost key sales personnel and was compelled to lay off its Executive Vice President of Sales and Marketing.

95. In and around the end of January, 1999, a unique prospective buyer was identified in the form of Condor Technologies, which had purchased Global Core Strategies, the consulting arm of another CBS Provider. After brief negotiations controlled by Condor, Crawford, Belli and Flote agreed to a payment at closing of $6.8 million, together with Condor stock and a short-term earn-out which expired on December 31, 1999. The total acquisition price was substantially lower than that set by the Modis transaction. Due to SAP's interference with Titan's sales, and the damage to the company caused by SAP, as is set forth at greater length below, the sales assumptions upon which the Condor acquisition price was based were never achieved, and the earn-out proved to be of no value. The Plaintiffs' present claims against SAP and Plattner were not included in the sale of their interest in Titan to Condor.

E. SAP ENCROACHMENT INTO TITAN'S EXCLUSIVE GEOGRAPHICAL <u>TERRITORY</u>

96. SAP regularly and systematically encroached upon Titan's Growth Market and sold software covered by the Provider Agreement directly to customers who were the exclusive business opportunity of Titan under the Provider Agreement. These customers include, but are not limited to: Macromedia, Inc., Bentley Systems, Centocor, Webbcraft, Cole Hahn, Standard Micro Systems and Intelligroup, Inc.

97. SAP sold to barnes&noble.com directly, despite the fact that barnes&noble.com was a Growth Market company. It refused to relinquish the account when confronted by Titan. It currently uses the barnes&noble.com account in its marketing literature and its internet website advertising the importance of its "mySAP.com" internet portal to its e-business offerings to Growth Market companies, among others.

98. On occasion, when challenged by Crawford and Belli with its illegal activities, SAP agreed to remit a commission on selected accounts for the sale of the software, but refused to remit maintenance fees, consulting service fees, or payments for software upgrades.

99. SAP mandated that Titan was not authorized to provide discounts from SAP's price list, but would itself discount when attempting to sell potential Growth Market customers in Titan's exclusive territory.

100. SAP interfered with accounts that Titan was attempting to develop by attempting to sell software to them directly. This resulted, on occasion, in neither company developing an account which otherwise would have been successfully developed by Titan. Customers falling within this category of illegal encroachment include, but are not limited to, TSR Wireless Co.

101. In addition, SAP, throughout the term of the Titan Provider Agreement, sold directly to government agencies, municipal organizations, public utilities and quasi-government organizations in derogation of the express and implied terms of the Provider Agreement. Examples of such sales include, but are not limited to, Elizabethtown Water and Gas Co. and Ocean County Utilities.

102. SAP's sales representatives, known as account executives, refused to refer Growth Market customers to Titan when they received an inquiry directly from a potential customer falling within that Growth Market. Titan, on the other hand, turned over to SAP all accounts larger than $200 million dollars of annual sales. Upon information and belief, the SAP account executives were instructed not to refer potential customers to Titan and the other CBS Providers.

103. In order to dissuade potential customers from dealing with Titan, SAP told important Implementation Partners of Titan that Titan was about to lose its contract and that all leads for potential customers were to be given to SAP directly. Titan generated approximately one-third of its sales through its Partners.

104. SAP entered into barter arrangements with Growth Market companies whereby in return for free software it received a product or endorsements in return. For example, SAP offered to give its "R/3" software to Jeremy's Ice Cream of Pennsylvania in return for ice cream at its "Sapphire" convention and Jeremy's commitment to use SAP consultants at SAP's list price.

105. SAP entered into an agreement with Lucent Technologies to provide free software to certain Lucent spin off companies. Upon information and belief, SAP and Lucent entered into a deferred payment plan whereby any payment by the spin off company would be deferred until a time after the termination of Titan's Provider Agreement.

F. SAP WITHHOLDING OF ANCILLARY SOFTWARE, DEMONSTRATION SYSTEMS AND "MYSAP.COM"

106. In addition to selling into Titan's Growth Market illegally, SAP restricted the mix of products that it made available to Titan, also in derogation of the Provider Agreement.

107. In and around the fourth quarter of 1997, SAP introduced a product specially designed for the apparel industry called "Apparel Footware Solutions" ("AFS"). Prospective customers for AFS were primarily Growth Market companies.

108. Crawford, Belli and Flote immediately recognized the potential for AFS and invested substantial sums of money, through Titan, for testing, marketing and implementing AFS in the Growth Market.

109. SAP experienced difficulties with AFS. In response to customer complaints it withdrew the product from the market.

110. Thereafter, SAP reintroduced AFS to the market utilizing, upon information and belief, the positive experience of Titan, to redesign and more effectively implement the product.

111. When SAP reintroduced AFS it did not make it available to Titan or the other CBS Providers.

112. SAP refused to make available to Titan the complementary software products which customers wanted. These include, but are not limited to, SAP's "Marketplace" software and the "New Dimension Products", i.e., Advance Planner and Optimizer ("APO"), Business Information Warehouse ("BW"), Customer Relationship Management module ("CRM"), Strategic Enterprise Management ("SEM") and the Logistics Execution System ("LES").

113. Titan was also not given access to demonstration systems for the New Dimension Products, in violation of the Provider Agreement. Consequently, its ability to sell the product was compromised and customers were forced to purchase from SAP directly. SAP did not remit to Titan its share of the fees for the sale and maintenance of these products.

114. In 1999, SAP introduced "mySAP.com", a web portal which SAP marketed as the core of its e-business offerings, and which provides customers access to SAP's inter-enterprise software solutions through the internet. This new product was initially withheld from CBS in its entirety. Although CBS is now permitted to sell it directly, those sales efforts are compromised by the ongoing direct competition from SAP.

G. SAP'S INTERFERENCE WITH TITAN'S KEY EMPLOYEES

115. Section 4.2 of the Provider Agreement requires that the CBS Provider have qualified personnel to carry out its obligations under the contract.

116. At the time of the signing of the Provider Agreement, it was commonly known in the industry that qualified SAP sales personnel and consultants were very much in demand and extremely difficult to hire and retain.

117. At the February 17, 1997 meeting at which Crawford, Belli and Flote presented their business plan, Wahl inquired of them where they would find qualified employees. Wahl promised at the time not to hire any of Titan's employees.

118. Contrary to Wahl's promise, SAP has in fact hired key employees of Titan, including Deborah McArthur, Senior Account Executive, and Fernando DeAllande, Vice President of Pre-Sales.

IV. CAUSES OF ACTION

COUNT I
Negligent Misrepresentation
(Crawford, Belli and Flote v. SAP America, Inc. and SAP AG)

119. The allegations of paragraphs 1 through 114 above are incorporated by reference.

120. During the discussions prior to the presentation and signing of the Provider Agreement, SAP knew, or should have known, that Crawford, Belli and Flote intended to seek outside investment for their CBS franchise, including selling all or part of their interests in their franchise, both to accomplish their business plan and to earn a return on their investment.

121. SAP had a pecuniary interest in having Crawford, Belli and Flote agree to provide their individual efforts and experience to the CBS Program.

122. At all times during discussions prior to the presentation and signing of the Provider Agreement, SAP knew that Crawford, Belli and Flote did not have equal knowledge of the facts and that SAP was in exclusive possession of facts concerning its present intentions as to future acts, specifically its reaction to the sale of all, or part of, the Plaintiffs' franchise. SAP knew that its statements concerning its present intention as to future acts were basic to the transaction.

123. SAP assigned John Vincze to meet with Crawford, Belli and Flote and to conduct discussions concerning their possible involvement in the CBS Program. At all times during discussions prior to the presentation and signing of the Provider Agreement, Vincze acted with the express and implied authority of SAP, on its behalf and in furtherance of its business interests.

124. At all times during discussions prior to the presentation and signing of the Provider Agreement, Vincze made representations of facts which he understood were material to Crawford, Belli and Flote, but failed to make reasonable investigation to determine if the statements were true, given SAP's later objection to the sale to Modis. During discussions prior to the presentation and signing of the Provider Agreement, Crawford, Belli and Flote asked Vincze whether SAP would have any objection to a future sale of all or part of the company, a public offering of stock or private investment.

125. At all times during discussions prior to the presentation and signing of the Provider Agreement, SAP, through Vincze, represented that the information being provided was accurate, knew or should have known that Crawford, Belli and Flote were relying upon the information being accurate, and knew or should have known that the information concerning SAP's present intentions as to future acts would be used and relied upon by Crawford, Belli and

Flote in making their decision to divest themselves of their other business interests, to devote their exclusive efforts to the CBS Program and to authorize the execution of the Provider Agreement.

126. SAP was aware of the demand for "R/3" in the Growth Market, and the likelihood of success of the CBS Program. SAP induced Crawford, Belli and Flote to enter into the CBS Provider Agreement by promising that it would not object to, or otherwise impede, these Plaintiffs' efforts to obtain a return on their investment through either a sale of all or part of the franchise, a public offering of stock, or private investment at any time during the term of the Provider Agreement.

127. By affirmatively representing the potential for a significant return on their investment and their considerable effort, particularly through a possible public offering of stock, by encouraging Crawford, Belli and Flote when they articulated their plan to seek outside investment or to sell their company, and/or remaining silent at a time when it had a duty to respond, SAP induced Crawford, Belli and Flote to believe reasonably that there would be no objection by SAP to any effort by them to sell all or part of the business. This information was incorrect when made, was negligently made, and was made without using the reasonable care and competence required under the circumstances.

128. Although there is no provision in the CBS Provider Agreement which restricts Crawford, Belli and Flote from selling any or all of their interest in Titan, nevertheless SAP's influence in the global computer software market generally, and the enterprise-wide client/server business application marketplace in particular, is so pervasive that any potential buyer of any interest in Titan would want SAP's blessing before proceeding with a transaction. Crawford, Belli and Flote were aware of SAP's influence, and its willingness to wield it, and

would not have divested themselves of valuable businesses in Data Dynamics and Maintenance Plus, and assumed the considerable risk of a start-up company in an uncertain market but for the assurances from SAP that it endorsed their plans ultimately to sell their interests.

129. SAP had a duty to provide accurate information in these circumstances, a duty to inquire and obtain and communicate accurate information, a duty to correct any inaccurate statements and a duty to respond accurately to these Plaintiffs' expressions of their understanding as to SAP's then present intentions as to future acts.

130. SAP failed to exercise reasonable care or competence in fulfilling these duties and in communicating the information to Crawford, Belli and Flote.

131. SAP knew or should have known Crawford, Belli and Flote intended to rely on this information and that if the information were false or erroneous, Crawford, Belli and Flote would be injured.

132. Crawford, Belli and Flote relied upon these statements and were reasonable and justified in doing so under the circumstances.

133. As a result of their reasonable reliance on SAP's representations, Crawford, Belli and Flote incurred damage, including, but not limited to:

(a) The value of Data Dynamics and Maintenance Plus;

(b) The value of the time spent by them developing Titan and the Growth Market;

(c) Reduced value of Titan without SAP's consent; and

(d) Reduction of earnings or shareholder distribution they would have earned given increased profitability.

WHEREFORE, Plaintiffs Crawford, Belli and Flote pray that judgment be entered in their favor and against Defendants, jointly and severally, in an amount in excess of $75,000, together with interest, costs and attorney's fees.

COUNT II
Fraud and Misrepresentation
(Crawford, Belli and Flote v. All Defendants)

134. The allegations of paragraphs 1 through 114 above are incorporated by reference.

135. Included among the many representations made at Plattner's directions by SAP to Crawford, Belli and Flote to entice them to become a CBS Provider were that:

(a) SAP would support their efforts to capitalize the company;

(b) SAP would not object to the sale of all or part of the company to a qualified buyer;

(c) that the only restriction on the right of Crawford, Belli and Flote to divest themselves of all, or part of, their company was that they could not sell more than 25% to a "Big 5" accounting firm;

(d) SAP would promote and support the development of the Growth Market by the CBS Providers; and

(e) The CBS Provider would be the exclusive seller of "R/3" software and related services within the Growth Market.

136. Upon information and belief, Crawford, Belli and Flote believe, and therefore aver, that SAP fraudulently misrepresented its intentions with regard to the CBS Providers and the Growth Market. This belief is supported by the following specific facts:

(a) SAP began immediately to encroach upon Titan's customers, business opportunities and geographic market;

(b) After the initial capitalization of the company, SAP compromised every effort by Titan to secure investment from outside sources;

(c) SAP refused to provide needed capital; and

(d) SAP engaged in the pattern of behavior alleged above which was designed to devalue Titan's franchise, and the interest of the Plaintiffs in that franchise, and reform the franchise to that of a non-exclusive distributor.

137. Crawford, Belli and Flote believe, and therefore aver, that at the time it signed the Provider Agreement with Data Dynamics, SAP and Plattner had the then-present intent to prevent the franchise from becoming truly independent in order to allow SAP, should it choose to do so, to be able to recapture the Growth Market for itself in the event Crawford, Belli and Flote, through their company, were able to develop that market successfully.

138. Crawford, Belli and Flote believe, and therefore aver, that contrary to its express representations to Crawford, Belli and Flote, and the terms of the Provider Agreement, SAP, at Plattner's direction, at the time it signed the Provider Agreement, considered the CBS Program to be nothing more than a trial arrangement, and was considering alternative distribution methods, including direct distribution by SAP once the CBS Providers had successfully penetrated the market.

139. Crawford, Belli and Flote believe, and therefore aver, that at the time it signed the Provider Agreement, SAP, at Plattner's direction, did not intend to honor the exclusivity provision of the Provider Agreement, and that it misrepresented its intent to do so by signing the Provider Agreement. Crawford, Belli and Flote believe, and therefore aver, that at all times prior and coincident to signing the Provider Agreement, SAP intended to sell "R/3" within Plaintiffs' geographical market to any End User SAP wished to, including governmental,

municipal and public work End Users, and to retain complete discretion over which ancillary products would be made available to Titan.

140. At the time SAP made these statements, it had the intent to mislead Crawford, Belli and Flote and misrepresent its true intentions for the purpose of inducing Crawford, Belli and Flote to give up their other business interests and to devote themselves exclusively to SAP's business interests, through the execution of the Provider Agreement.

141. Defendants, through deliberate nondisclosure of material facts and the intentional affirmation of material falsities, wanted to achieve, and did achieve, this exact purpose.

142. Defendants knew that the success of Crawford, Belli and Flote hinged on Defendants' performance of the promises they made to induce Crawford, Belli and Flote into agreeing to execute the Provider Agreement and on the performance of the provisions of the Provider Agreement.

143. But for the misrepresentations of SAP, Crawford, Belli and Flote would not have authorized the execution of the Provider Agreement by Data Dynamics, Inc.

144. SAP's misrepresentations were intentional, and made with the intent that the Crawford, Belli and Flote rely on them in the manner they did.

145. Crawford, Belli and Flote reasonably relied upon SAP's misrepresentations.

146. As a result of their reasonable reliance on the misrepresentations, Crawford, Belli and Flote incurred damages including, but not limited to:

(a) The value of Data Dynamics and Maintenance Plus; or

(b) The value of the time spent by them developing Titan and the Growth Market

(c) The reduced value of Titan without SAP's consent; and

(d) Reduction of compensation they would have earned given increased profitability.

147. SAP's and Plattner's acts were willful and outrageous and justify an award of punitive damages so as to deter future similar conduct and promote the public policy of the State of New Jersey.

WHEREFORE, Plaintiffs Crawford, Belli and Flote pray that judgment be entered in their favor and against Defendants, jointly and severally, in an amount in excess of $75,000, together with interest, costs and attorney's fees and punitive damages.

COUNT III
Interference with Contract
(Plaintiffs v. All Defendants)

148. The allegations of paragraphs 1 through 114 above are incorporated by reference.

149. Plaintiffs expected the economic benefit of the sale of their interest in Titan to Modis. That benefit amounted to $5,000,000, plus a multiple of EBIT over a three-year period, amounting to a reasonable expectation of a total purchase price of not less than $55.538 million.

150. The economic benefit of the sale to Modis was calculated by using actual and projected sales of Titan, which included a consideration of the proposed infusion of capital from Modis. The sales figures used to calculate the projections did not take into consideration the adverse effect of SAP's direct sales into Titan's exclusive territory.

151. Without the effect of SAP's illegal encroachment into Titan's territory and with Modis' plans for substantial investment into the business, the actual economic benefit to the Plaintiffs would have far exceeded the $55.538 million initially calculated by the parties to the transaction.

152. SAP and Plattner knew of the expected economic benefit presented to Plaintiffs by the Modis transaction.

153. SAP and Plattner wrongfully and intentionally interfered with the sale of the Plaintiffs' interest in Titan to Modis by, inter alia, threatening Modis with termination of the Provider Agreement and other retaliations if Modis proceeded with the transaction.

154. Despite its threat to do so, SAP was not entitled under the Act to terminate the Provider Agreement other than for cause or for the specific reasons enumerated in the Act – none of which existed at the time of SAP's interference with the Modis transaction.

155. As a National Logo Partner of SAP, Modis was dependent upon SAP's goodwill and cooperation for a significant amount of its income. Furthermore, SAP's influence in the global software market is such that no entity operating within that market would choose to be adverse to SAP. SAP was aware of its influence over Modis and Modis's susceptibility to being influenced by SAP's threats. By threatening Modis in the manner that it did, SAP intended that Modis would withdraw from the transaction.

156. Plattner and SAP intended to harm the Plaintiffs when they threatened Modis with termination and retaliation. Upon information and belief, Plattner, with no justification and for no good business reason, did not want Plaintiffs to recover such a substantial return on their investment as that represented by the Modis transaction.

157. As a result, Plaintiffs incurred damages amounting to the difference between what they would have been paid by Modis, absent SAP's breaches and non-performance of the Provider Agreement, and the amount they were ultimately paid by Condor.

158. SAP and Plattner's interference with Plaintiffs' contract with Modis was so intentional and outrageous, and motivated solely by an intent to harm the Plaintiffs, that an award of punitive damages is appropriate. An award of punitive damages would not only punish SAP sufficiently to deter future similar conduct, but it would also promote the public policy of the State of New Jersey.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against the Defendants, jointly and severally, in an amount in excess of $75,000, together with interest, costs, attorney's fees and punitive damages.

COUNT IV
Interference with Prospective Advantage
(Plaintiffs v. All Defendants)

159. The allegations of paragraphs 1 through 114 and 145 through 156 above are incorporated by reference.

160. Under the terms of the transaction with Condor, Plaintiffs sold their interests in Titan to Condor in return for a payment at closing of $6.8 million, together with Condor stock and a short-term earn-out which expired on December 31, 1999.

161. During the entire term of the Provider Agreement, including specifically during the earn-out phase of the Condor transaction, SAP systematically encroached upon Titan's geographical market in three discrete ways:

(a) By selling accounts directly through account executives and its mySAP.com internet web portal;

(b) By failing to refer to Titan Growth Market companies who contacted SAP directly; and

(c) By telling Titan's Implementation Partners that Titan's contract would be terminated and that leads to potential accounts should be referred to SAP.

162. SAP further compromised Titan's sales by withholding the following products and/or services in derogation of the Provider Agreement:

(a) New Business Solutions software; and

(b) Demonstration systems for "add-on" software and software upgrades, including New Business Solutions.

163. SAP disparaged Titan to Titan's customers and Implementation Partners. Specifically, SAP Account Executives told Datek, Inc., a Titan End User, that Titan was not qualified to implement "R/3". SAP representatives told Titan Implementation Partners that business opportunities should be referred to SAP because Titan's Provider Agreement was being terminated. These statements, which Plaintiffs believe were repeated to other customers and Implementation Partners, were false, were intended to harm Titan's sales and did in fact harm those sales.

164. SAP was aware that Plaintiffs were seeking outside investment and that the amount of that investment would be determined by the actual and projected revenues of Titan. SAP was also aware of the economic benefit Plaintiffs would earn from increased Titan sales during the Condor earn-out period.

165. SAP knowingly and intentionally interfered with the Titan business with the specific intent of devaluing Titan and thereby reducing the return on Plaintiffs' investment.

166. SAP knowingly and intentionally interfered with the Titan business with the specific intent of punishing the Plaintiffs for proceeding with the sale of the Plaintiffs' interest in Titan without SAP's approval.

167. SAP was neither justified nor privileged to encroach upon Titan's geographical market or to withhold its products and services.

168. Titan had a reasonable expectation of making each and every sale consummated by SAP within its Growth Market. By way of further allegation, there are a substantial number of sales that Titan would have made but for SAP's interference, which SAP was unable to consummate.

169. As a result, Plaintiffs incurred substantial damages including, but not limited to:

(a) The value of their interest in Titan to Condor without SAP's interference;

(b) The difference between what they were paid by Condor during the earn-out phase of the sale and what they would have been paid without SAP's interference;

(c) The reduced value of Condor stock; and

(d) The increased compensation they would have earned from Titan as a result of increased earnings.

170. SAP's interference with Titan's sales within its exclusive geographical territory was so intentional and outrageous, and motivated solely by an intent to harm the Plaintiffs, that an award of punitive damages is appropriate. An award of sufficient punitive damages would not only punish SAP and deter future similar conduct, but it would also promote the public policy of the State of New Jersey.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against the Defendants, jointly and severally, in an amount in excess of $75,000, together with interest, costs, attorney's fees and punitive damages.

COUNT V
Violation of New Jersey Franchise Practices Act
(Plaintiffs v. All Defendants)

171. The allegations of paragraphs 1 through 114 are incorporated by reference.

172. SAP permitted the CBS Provider in general, and Data Dynamics/Titan in particular, to use its trade name in such a manner as to create a reasonable belief in the end users, and other members of the consuming public, that there was a connection between SAP and the CBS Provider by which SAP vouched for the activity of the CBS Providers.

173. The rights and duties of the parties are controlled by the Act, in that the Provider Agreement contemplates that Data Dynamics maintain a place of business in the state of New Jersey, the gross sales of products or services between Data Dynamics/Titan and SAP has at all times exceeded $35,000 for any 12-month period, and more than 20% of Data Dynamics'/Titan's gross sales were derived, or were intended to be derived, from the franchise.

174. Plaintiffs are "persons" as that term is defined in Section 3(b) of the Act, 56 N.J.S.A. §10-3(b), and thereby qualify as a franchise under Section 3(a), of the Act, 56 N.J.S.A. §10-3(a).

175. Titan and its members at all times substantially complied with the provisions of the Act.

176. On October 20, 1998, Crawford notified SAP of the Plaintiffs' intent to sell their interest in Titan to Modis.

177. SAP never responded in writing to the October 20, 1998 letter.

178. Although the nature of the transaction was such that neither the Provider Agreement nor the Act gave SAP the legal right to approve or disapprove of the sale to Modis, to the extent that the transaction is deemed to be a sale or transfer subject to the Act, then Crawford's letter of October 20, 1998, qualifies as notice under section 6 of the Act and SAP, by virtue of its actual knowledge of Modis, its address, financial qualifications and business experience, will have been deemed under the Act to have approved of the sale.

179. SAP gave Titan actual approval of the transaction on October 27, 1998.

180. SAP was prohibited by the Act from disapproving of the sale of the Plaintiffs' interest in Titan to Modis. The telephone call from Burke of SAP to Payne of Modis on December 23, 1998, threatening reprisals in the event that Modis consummated the acquisition of the Plaintiffs' interest in Titan, was itself a prohibited act under the Act.

181. As a result, Plaintiffs incurred damages amounting to the difference between what they would have been paid by Modis absent SAP's encroachment into their Growth Market, and the amount they were ultimately paid by Condor.

182. Section 10 of the Act, 56 N.J.S.A. §10-10, permits a franchisee to bring an action against its franchisor for violation of the Act, to recover damages sustained by reason of any violation of the Act and to recover costs of the action, including attorney's fees.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against the Defendants, jointly and severally, in an amount in excess of $75,000, together with interest, costs, and attorney's fees.

COUNT VI
Breach of Contract
(Crawford, Belli and Flote v. SAP America, Inc. and SAP AG)

183. The allegations of paragraphs 1 through 114 are incorporated by reference.

184. At all times relevant, SAP, in order to accomplish its goal of selling "R/3" to the Growth Market wanted the specific experience and knowledge of Crawford, Belli and Flote as CBS Providers in the particular territory allocated to them.

185. As set forth above, SAP specifically introduced Belli and Crawford to Flote for the purpose of having them participate together in the CBS Program. SAP knew that in order to obtain Plaintiffs' participation in the CBS Program, such participation would be through a company, Data Dynamics, Inc. and later, Titan, and that the Provider Agreement would be executed on behalf of such company. However, SAP knew that unless the Provider Agreement would provide a benefit to Crawford, Belli and Flote, that they would not authorize its execution and SAP would not obtain the expertise, efforts and participation of Crawford, Belli and Flote in their individual capacities. Crawford, Belli and Flote were induced to invest in the CBS Program by the strong personal and financial incentives by SAP to develop a successful business. Accordingly, SAP induced Crawford, Belli and Flote to authorize the execution of the Provider Agreement, with the full knowledge, and intent, that they benefit from it.

186. The direct benefit to Crawford, Belli and Flote was a motivating factor in the execution of the Provider Agreement by SAP America, Inc., SAP AG and Data Dynamics, Inc., and thereafter the assignment of the Provider Agreement to Titan.

187. The compelling circumstances surrounding the execution of the Provider Agreement, including, but not limited to, Crawford's and Belli's personal guarantees of the business line of credit, indicate that Crawford, Belli and Flote were intended beneficiaries of the benefits to be derived from the performance of the Provider Agreement. Accordingly, Crawford, Belli and Flote have individual rights to the performance of the Provider Agreement.

188. SAP breached material terms of the Provider Agreement by, *inter alia,* wrongfully:

(a) Interfering with the sale of the interest of Crawford, Belli and Flote in Titan to Modis; and

(b) Encroaching upon Titan's sales territory by making direct sales into Titan's exclusive geographical area through account executives and mySAP.com;

(c) Withholding "add-ons" and software upgrades, including the New Business Solutions;

(d) Withholding demonstration systems of new software;

(e) Failing to refer leads of Growth Market companies to Titan;

(f) Disparaging Titan by telling its Implementation Partners that its contract would not be renewed and telling customers that Titan was not competent to implement "R/3"; and

(g) Otherwise violating implied covenants of good faith and fair dealing.

189. Titan and its members have at all times substantially complied with the material terms of the contract.

190. As a result of SAP's breach of contract, Crawford, Belli and Flote have suffered substantial damages including, but not limited to:

(a) Reduced earnings resulting in a lower going concern valuation of Titan in the Modis transaction;

(b) Reduced earnings resulting in lower compensation and lower gross income available for reinvestment into Titan;

(c) Impairment of the going concern valuation of Titan resulting in a substantially reduced payment by Condor;

(d) Effective elimination of sufficient earnings to stimulate payments in the earn-out phase of the Condor transaction;

(e) Impairment of the value of Condor stock; and

(f) The difference between what they would have been paid by Modis and what they were ultimately paid by Condor.

WHEREFORE, Plaintiffs Crawford, Belli and Flote pray that judgment be entered in their favor and against SAP America, Inc. and SAP AG, jointly and severally, in an amount in excess of $75,000, together with interest, costs, and attorney's fees.

COUNT VII
Breach of Contract – Implied
Covenant of Good Faith and Fair Dealing
(Crawford, Belli and Flote v. SAP America, Inc. and SAP AG)

191. The allegations of paragraphs 1 through 114 and 184 through 190 are incorporated by reference.

192. SAP has breached the implied covenants of good faith and fair dealing in the Provider Agreement.

193. Crawford, Belli and Flote believe, and therefore aver, that SAP and Plattner lured them into the CBS Program with promises of the possibility of selling all or part of their franchise, thereby earning a substantial return on their investment and a reward for the substantial risk they were assuming. When SAP and Plattner saw the remarkable success of the CBS Program generally, and of Titan in particular, in developing the Growth Market for "R/3" and creating the opportunity for substantial enlargement of that market, SAP, at Plattner's

direction, decided to take the Growth Market back from the CBS Providers, including Titan, and usurp for itself the substantial economic benefit created by the CBS Providers.

194. The first step taken by the Defendants towards taking back the CBS Program was to sell directly into the CBS exclusive geographical territories without regard to the restrictions placed on such conduct by the CBS Provider Agreements. No restrictions were placed on SAP Account Executives. No systems were put in place to minimize accidental intrusions into a CBS Provider territory. When confronted by a Provider about its illegal encroachment, SAP arbitrarily dictated the terms of the resolution, if any, in a way that invariably paid the Provider less than they were entitled to under the Provider Agreement. An example of such conduct is the barnes&noble.com account within Titan's Growth Market.

195. Thereafter, SAP began the process of changing the terms of the Provider Agreements. It eliminated the CBS Providers' right to sell all or part of their franchise to a third party other than one of SAP's choosing. Other changes included eliminating the exclusive rights of the CBS Providers in their Growth Market and restricting the mix of products they could sell.

196. SAP resisted the efforts of Titan and other CBS Providers, including the Chicago and New England CBS Providers, to sell their companies to well-capitalized independent companies which would be better able to resist SAP's efforts to eliminate the franchise and usurp the Growth Market to itself. Crawford, Belli and Flote believe, and therefore aver, that Plattner's objection to the sale of their interests in Titan to Modis was motivated by a personal objection to their individual financial gain and by a desire ultimately to drive Titan out of business and control Titan's market itself. This goal would be compromised by the sale to Modis.

197. On or about December 7, 1998, SAP representatives met with several of the CBS Providers to discuss a "value added reseller strategy and investment proposal". During the meeting, SAP stated that: (i) it viewed the commercial structure between it and the CBS Providers as constraining investment for expansion; (ii) it contemplated a longer term contractual license commitment by SAP; (iii) CBS principals must make a long-term commitment to the business; (iv) SAP was prepared to make a significantly enhanced commitment to CBS, including investing in key CBS Providers through convertible debt or direct equity; and, (v) it would select an investment banker to develop a formula for use in developing CBS firm valuations. SAP concluded the meeting by informing the CBS Providers that "SAP does not support the consolidation and 'buy-out' of the individual providers by large, culturally diverse venture capital/consulting firms."

198. Thereafter, SAP retained the services of an investment banking firm to assess the value of the CBS franchises. That firm, at SAP's behest and instruction, concluded that the new CBS franchise agreements had no value.

199. After Plaintiffs sold their interests in Titan to Condor, without SAP's express approval, SAP engaged in the pattern of conduct alleged above, which included business defamation, encroachment, withholding of software products and hiring Titan key employees, which was designed to depress the value of the Titan franchise.

200. To complete its plan, SAP, through The Schmidt-Vogel Company, a company with which it is related through overlapping Board of Directors membership and stock ownership, has begun to purchase the CBS Provider franchises at substantially less than their fair market value, absent the illegal and bad faith conduct of SAP. After the sale of their interests to Condor, Schmidt-Vogel approached Crawford and Belli to acquire Titan. Schmidt-Vogel

represented that it had Plattner's pre-approval to acquire CBS companies, and asked Crawford and Belli to cancel the transaction with Condor.

201. Crawford, Belli and Flote, individually, intended to benefit from the contract between Titan and SAP and from SAP's good faith adherence to the terms and conditions of the Provider Agreement. SAP intended that Crawford, Belli and Flote so benefit, as was expressed by Paul Wahl at the signing of the Provider Agreement. As intended beneficiaries of the contract between Titan and SAP, Crawford, Belli and Flote have standing to complain of SAP's failure to comply with the implied covenants of good faith and fair dealing contained within the Provider Agreement.

202. As a result of SAP's breach of the implied covenants of good faith and fair dealing contained within the Provider Agreement, Crawford, Belli and Flote have suffered damages in the form of:

(a) Reduced earnings resulting in a lower going concern valuation of Titan in the Modis transaction;

(b) Reduced earnings resulting in lower salaries and lower gross income available for reinvestment into Titan;

(c) Impairment of the going concern valuation of Titan resulting in a substantially reduced payment by Condor;

(d) Effective elimination of sufficient earnings to stimulate payments in the e-earn-out phase of the Condor transaction;

(e) Impairment of the value of Condor stock and decreased value of Plaintiffs' stock options; and

(f) The difference between what they would have been paid by Modis and what they were ultimately paid by Condor.

WHEREFORE, Plaintiffs Crawford, Belli and Flote pray that judgment be entered in their favor and against SAP America, Inc. and SAP AG, jointly and severally, in an amount in excess of $75,000, together with interest, costs, and attorney's fees.

COUNT VIII
Promissory Estoppel
(Plaintiffs v. All Defendants)

203. The allegations of paragraphs 1 through 114, 115 through 132, 149 through 157, 160 through 168 and 184 through 201are incorporated by reference.

204. At the time that they were induced to enter into the Provider Agreement, Crawford and Belli each owned 50% of the outstanding shares of stock in Data Dynamics. Crawford owed 50% of the outstanding shares of stock in Maintenance Plus, Inc.

205. Included among the many representations made by SAP to Crawford, Belli and Flote to entice them to become a CBS Provider were that:

(a) SAP would support their efforts to capitalize the company;

(b) SAP would not object to the sale of all or part of the company, or their interest in the company;

(c) that the only restriction on the right of Crawford, Belli and Flote to divest themselves of all, or part of, their company was that they could not sell more than 25% to a "Big 5" accounting firm.

(d) SAP would promote and support the development of the Growth Market by the CBS Providers; and

(e) Each CBS Provider would be the exclusive seller of "R/3" software and related services within its Growth Market.

206. When the Defendants made these statements, they expected to induce definite action by Crawford, Belli and Flote including, but not limited to, the divestiture of other business interests and the devotion of 100% of their time and energy to the CBS Program, thus increasing Defendants' profit and income.

207. When Defendants made these statements, they made them with the knowledge, understanding and expectation that they would be repeated to potential investors such as Raeco.

208. In reliance upon these promises, and at the insistence of SAP that they devote 100% of their time and energy to SAP, Crawford and Belli divested themselves of their interests in Data Dynamics, Crawford divested himself of his interest in Maintenance Plus, and together they devoted their full time and attention to the CBS Program.

209. Raeco made its investment in Titan based upon its expectation that SAP would support a sale or public offering.

210. The promises of SAP were made with the expectation that Plaintiffs would rely upon them.

211. Plaintiffs did, in fact, reasonably rely on the promises of SAP.

212. There is no provision of the Provider Agreement which is inconsistent with the representations and promises of SAP.

213. As a result of their reliance on the promises of SAP, Crawford and Belli have suffered a definite and substantial detriment consisting of, inter alia:

(a) The difference between the value of their ownership interests in Data Dynamics and the amount actually received from the sale of their interests; and

(b) The difference between their income earned from Data Dynamics and the income earned from Titan.

214. As a result of his reliance on the promises of SAP, Crawford suffered the same substantial detriment as that alleged in the previous paragraph from his sale of his interest in Maintenance Plus. In addition, Crawford's financial detriment included the cost of litigation with his former partner in Maintenance Plus arising out of Crawford's compliance with SAP's demand that he devote 100% of his time to SAP.

215. In reasonable reliance upon the promises of SAP, Flote suffered a definite and substantial detriment by sacrificing his plans for joining an SAP implementation consulting firm in California and earning substantial income therefrom.

216. As a result of their reliance on the promises of SAP, Raeco has suffered a definite and substantial detriment by giving up other investment opportunities and earning substantial income therefrom.

217. Injustice can only be avoided by enforcing the promises of SAP recited above and by awarding Plaintiffs the full value of the franchise they expected. Alternatively, Plaintiffs are entitled to their actual losses.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against Defendants, jointly and severally, in an amount in excess of $75,000, together with interest, costs and attorney's fees.

COUNT IX
Equitable Estoppel
(Plaintiffs v. All Defendants)

218. The allegations of paragraphs 1 through 114, 115 through 132, 149 through 157, 160 through 168 and 184 through 201and 204 through 212 are incorporated by reference.

219. The express and implied conduct of SAP reasonably misled Plaintiffs to their prejudice.

220. SAP is equitably estopped from asserting that its permission was required before Plaintiffs could sell their interests in Titan to Modis; that it was permitted to withhold New Business Solutions, mySAP.com, its Application Service Provider and other products from Titan; or that it could encroach upon Titan's region and sell product directly to barnes&noble.com and governmental agencies, among others.

221. Injustice can only be avoided by enforcing the promises of SAP recited above and by awarding Plaintiffs the full value of the franchise they expected. Alternatively, Plaintiffs are entitled to their actual losses.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against Defendants, jointly and severally, in an amount in excess of $75,000, together with interest, costs and attorney's fees.

COUNT X
Unjust Enrichment
(Crawford, Belli and Flote v. SAP America, Inc. and SAP AG)

222. The allegations of paragraphs 1 through 114 are incorporated by reference.

223. Crawford, Belli and Flote developed a business plan for an Application Service Provider ("ASP") which was designed to reduce the customer's capital expenditure by providing a standardized version of "R/3" primarily to the apparel and footware industry. The customer would not license the software from the CBS Provider, but would instead pay for the use of programs for a monthly fee. Titan provided SAP with a copy of its business plan and asked SAP to fund the project and to make preferred pricing available. Instead, SAP devised its own ASP program using Titan's as a model, and has realized a substantial profit as a result. A true and correct copy of Titan's ASP business plan is attached as Exhibit "T".

224. Six months prior to presenting the business plan to SAP, Crawford, Belli and Flote discussed with Howard Lau, an SAP employee responsible for capital ventures on behalf of SAP, alternatives for possible joint ventures. Lau told plaintiffs that they should bring their ideas to him, and that SAP would keep such ideas confidential. Thereafter, Crawford, Belli and Flote conceived of the ASP model, and approached Lau, who told them that they should develop the concept further. Lau repeated his assurances that the plan would remain confidential.

225. In conjunction with COSI, Inc. and the accounting firm of Mahoney & Cohen, P.C., Crawford, Belli and Flote expended a great deal of time and effort developing a viable ASP business plan, all in reliance upon Lau's promises of confidentiality and promise not to steal the idea of Crawford, Belli and Flote. These promises were repeated numerous times by Lau.

226. Due to the existing relationship between Titan and SAP, which included the obligation that SAP deal with Titan fairly and in good faith, and as a fiduciary, SAP was not justified in usurping the Titan's ASP Business Plan to itself.

227. Due to the unique relationship between Crawford, Belli and Flote and SAP, and in reliance upon that relationship, and the express assurances of SAP, Crawford, Belli and Flote reasonably believed that it was not necessary to take additional measures to protect their interests.

228. During the development of the ASP business plan, Crawford spoke with Burke, at Lau's suggestion, about setting a price for the use of the SAP software in the ASP plan.

229. On August 21, 1998, Burke wrote Crawford with the terms and conditions of an Outsourcing Agreement whereby SAP would offer the "R/3" system for a monthly user fee. A true and correct copy of this letter is attached as Exhibit "J".

230. It was understood between the parties that Titan would not be participating in ownership of "Newco," the company identified in the business plan on the ASP. Instead, it was understood that the owner of Newco would be Crawford, Belli and Flote, SAP, COSI and Mahoney & Cohen.

231. SAP knew, or should have known, that Crawford, Belli and Flote expected to participate in the benefit resulting from the implementation of their ASP business plan.

232. SAP has wrongfully secured or passively received the benefits of the ASP business plan of Crawford, Belli and Flote.

233. It would be unconscionable for SAP to retain the full benefit from the use of the ASP business plan of Crawford, Belli and Flote without compensating Crawford, Belli and Flote for such use.

234. By utilizing the ASP business plan of Crawford, Belli and Flote, SAP has been unjustly enriched by not having to invest substantial resources to design and develop an ASP program, and by the net profit earned by it from its wrongful use of the business plan.

WHEREFORE, Plaintiffs Crawford, Belli and Flote pray that judgment be entered in their favor and against Defendants, SAP America, Inc. and SAP AG, jointly and severally, in an amount in excess of $75,000, together with interest, costs, and attorney's fees.

COUNT XI
Breach of Fiduciary Duty
(Plaintiffs v. All Defendants)

235. The allegations of paragraphs 1 through 114, 115 through 132, 149 through 157, 160 through 168, 184 through 201, 204 through 212 and 223 through 234 are incorporated by reference.

236. Although the Plaintiffs and SAP were partners in the development of the Growth Market, SAP completely dominated their relationship, and controlled all of their dealings with each other. SAP therefore owed the Plaintiffs and Titan a duty of trust, utmost good faith and fair dealing.

237. By virtue of the unique relationship that existed between SAP and the Plaintiffs, and the fact that the Plaintiffs were completely dependent upon SAP's good faith and fair dealing in their business relationship, among the other reasons set forth above, the Plaintiffs and SAP stood in a fiduciary relationship to each other.

238. SAP has breached its fiduciary duty to the Plaintiffs by, inter alia:

(a) Interfering with their efforts to capitalize their company;

(b) Encroaching upon their Growth Market;

(c) Withholding products and demonstration systems;

(d) Failure to refer Growth Market inquiries to Titan;

(e) Enriching itself at Plaintiffs' expense;

(f) Disparaging Titan to its customers and business partners;

(g) Hiring key employees of Titan;

(h) Unfairly competing with Titan in the Growth Market;

(i) Devising a scheme to recover to itself Titan's Growth Market;

(j) Wrongfully interfering with Plaintiffs' contract with Modis; and

(k) Wrongfully usurping the ASP business plan.

239. As a result of SAP's breach of its fiduciary duty to Plaintiffs and to Titan, Plaintiffs have suffered, and continue to suffer, substantial financial injury.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against Defendants, jointly and severally, in an amount in excess of $75,000, including an accounting of all net profits earned by SAP from sales of "R/3" and related products, including mySAP.com, in the Growth Market from 1997 until a reasonable time in the future, together with interest, costs, attorney's fees and punitive damages.

PEPPER HAMILTON, LLP

Dated: December , 2000

By:______________________________

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