United States, *et al.*, v. Oracle Corporation

July 20, 2004

Section 7 of the Clayton Act

"No person . . . shall acquire . . . the stock . . . of another person . . . where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

§ 7, Clayton Act, 15 U.S.C. § 18

The Court Should Stop the Merger

- The evidence, and the legal and economic principles that apply to it, all lead to the same conclusions:
  - Only Oracle, PeopleSoft and SAP supply high function FMS and HRM applications software
  - The merger would end fierce head-to-head competition that has brought consumers lower prices and better products
- Oracle inconsistently and incorrectly claims:
  - A merger to duopoly or even monopoly is no problem
  - Many others -- Lawson, legacy systems, outsourcers -- can compete in the up-market, yet Oracle cannot compete without this merger

Industry Recognition of the Product

Market boundaries “may be determined by examining such practical indicia as industry or public recognition . . . as a separate economic entity.”

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)

“[E]conomic actors usually have accurate perceptions of economic realities.”

Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986) (Bork, J.)

Company Documents about Competition

“Staples’ and Office Depot’s documents . . . show[] that both Staples and Office Depot focus primarily on competition from other superstores.”

FTC v. Staples, Inc., 970 F. Supp. 1066, 1079 (D.D.C. 1997).

Industry Evidence of High Function Software as a Market

- Oracle, PeopleSoft, and SAP have different products or product packages for mid-market customers
- Oracle, PeopleSoft, and SAP have different sales forces for mid-market customers
- Admissions by Oracle

  See Oracle's 2002 10K, P2051 at 8
- Big Five consulting firms identify mid-market and high function vendors as serving different customers

High Function Software

- Ability to support unlimited levels of an organization
- Scalability
- Support operations across multiple geographic areas (including international capability)
- Highly configurable
- Highly integrated
- Vendors with the capability to support and improve the product

Basic Approach to Market Definition

The basic approach to market definition advocated by both the government and Oracle is the hypothetical monopolist test, which asks whether a hypothetical monopolist or cartel over a group of products, in a particular area, would maximize its profits by raising its prices at least 5-10%.

The Hypothetical Monopolist Test in Ninth Circuit Case Law

- *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1203–04 (9th Cir. 1997).
- *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).
- *Olin Corp. v. FTC*, 986 F.2d 1295, 1299–300 (9th Cir. 1993).

Image Technical Services

Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203–04 (9th Cir. 1997) (finding a relevant market on the basis that "a monopolist or a hypothetical cartel . . . would have market power," quoting Areeda & Hovenkamp 1993 Supp. ¶ 518.1b)

Rebel Oil

Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (citing Areeda & Hovenkamp 1993 Supp. ¶ 518.1b for the proposition that "[a] 'market' is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers.")

Olin Corp.

Olin Corp. v. FTC, 986 F.2d 1295, 1299–300 (9th Cir. 1993) (quoting the *Merger Guidelines*' market delineation discussion at length and affirming an FTC decision based on the hypothetical monopolist test)

Hypothetical Monopolist Test

- Customers testified they would not switch to other alternatives in the face of a 5 to 10% price increase in the price of the software
- Oracle presented evidence about other *possibilities,* but nothing about customers *switching*
- Alternatives do not produce the same kind of value, so customers would not switch for 5-10% increase in a relatively small part of the total cost of owning high function software

Market Definition: Oracle Ignores the Key Question

- Customers could "adopt decentralized IT strategies" O.Br.15.
- Customers could use "country-specific solutions" O.Br.15.
- Customers could buy from other vendors O.Br.15-16.
- BUT NOT: Customers would switch in response to a 5-10% price increase by a hypothetical monopolist

Courts Have Drawn a Line in a Continuum

United States v. Gillette Co., 828 F. Supp. 78, 82 (D.D.C. 1993) ("Although . . . there indeed is a continuum . . . , plaintiff has nonetheless demonstrated that . . . the fountain pen market may be divided into three submarkets . . . .")

Courts Decline to Draw Lines Unsupported by the Evidence

- *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 333 (S.D.N.Y. 1995) ("[C]ross-price elasticities confirm that there is demand-side substitution between cereals inside and cereals outside plaintiff's proposed 'adult' market.")
- *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) ("all grades of ice creams compete with one another for customer preference and for space in the retailers' freezers")

Product Market

- Industry recognition of mid-market vs. high function products
- Hypothetical monopolist test establishes a market for high function software
- Evidence of different functional capabilities between products
- Vendors ability to recognize customers with other options and price accordingly

Charles Phillips: “market is . . . three viable suppliers”

- “[T]he back office applications market for global companies is dominated by an oligopoly comprised of SAP, PeopleSoft, and Oracle. The market is down to three viable suppliers who will help re-automate the back office processes for global enterprises for years to come.”

  P3068, Phillips dep., 6/30/04, 157: 7-22; P2290 at MS 00914.

Other Alleged "Options" Are Not in the Relevant Markets

- Mid-market software
- Legacy systems or the "do nothing" option
- Outsourcers
- "Best of Breed" suppliers

Mid-Market Software

- Mid-market software does not deliver the functionality needed by many customers
- Purchasing mid-market software often results in expensive customization
- Purchasing mid-market software may require changing from a centralized to a decentralized business model
- High function users are already paying more than if they purchased mid-market software

Larry Ellison on Mid-Market

The Court: What segment of the market does J.D.Edwards aim its products at?

The Witness: I would say—well, they have a presence in a lot of large companies, divisions of large companies. I mean, it depends whether the company has central IT or decentralized IT, but I would describe J.D. Edwards' strength is in medium-size companies rather than large companies.

The Court: Mid-market customers.

The Witness: Mid-market customers, sure.

Ellison, 06/30/04, 4340: 21-25-4331: 1-5.

Functional Differences in Mid-Market v. High Function Products

- Prof. Iansiti testified as to the functional differences between mid-market and high function software
- Big 5 systems integrators testified that Peoplesoft, Oracle and SAP offered software with capabilities not offered by other vendors
- Customer witnesses testified that mid-market products could not supply their requirements
- Dr. Hausman acknowledged that the demands placed on software by mid-market and high function customers were different

Legacy Systems

- Expensive and risky to support
- Most customers that start the process of purchasing high function software in fact buy
- “Do nothing” option is not used as leverage to get a better price
- Dr. Elzinga testified that if legacy systems were an option there would not currently be such pricing differences for high function sales

Best of Breed

- More expensive
- Less useful because not integrated well.
- Customers are reducing costs by reducing the number of vendors within their software footprint

Larry Ellison on Best of Breed

- "[T]he best of breed approach, I think is five times more expensive and that's not the worst part. The worst part is because the best of breed approach fragments all your data into separate data bases and it's very hard to get good information out." P3172, Ellison Dep., 01/20/04, 138:5-10.
- "[B]est of breed . . . only works at dog shows and it's really the gift that keeps on giving." P3172, Ellison Dep., 01/20/04, 136:8-9.

Outsourcers

- Most use Oracle, PeopleSoft, or SAP to support their services
- Typically require that customers conform to a preset group of options in order for the outsourcers to achieve economies of scale
- Typically offer only HRM support
- Outsourcer witnesses have minimal sales to large accounts and project small growth

The Geographic Market Is the United States

The issue is whether U.S. customers, the only customers protected by Section 7, would turn to sources outside the proposed geographic market in such numbers as to prevent a hypothetical monopolist from raising price at least 5-10%.

Even in a World Market, the Merger Is Unlawful

- Highly concentrated market
  - 3-to-2 merger
  - No additional competitors
  - Premerger HHI minimum 3300
  - Postmerger HHI minimum 5000
- Presumption: *Philadelphia Nat'l Bank*
- Same evidence of anticompetitive effect by elimination of head-to-head competition
- No rebuttal: entry or efficiencies

Focus on U.S. Competition

- Section 7 of the Clayton Act prohibits mergers that lessen competition in U.S. markets
- International sales should be excluded unless they are inextricably linked to sales in the United States
- There is no such link in this case

Sales of High Function Software Requires a Local Presence

- Purchasers of high function software are buying a relationship rather than just a product
- Sales of high function software require the presence of a well trained sales and support staff
- SAP established a sales and support organization (currently of over 4000 employees) to support its sales in the U. S.
- Customers testified that they would not consider purchasing overseas for their U. S. operations

Foreign Sales Do Not Impact the U. S. Market

- No sellers are alleged to have been excluded from the market
- Pricing in the rest of the world has no effect on pricing in the U. S.
  - Pricing is done on a customer by customer basis
  - There is no arbitrage

The Elzinga-Hogarty Test Is Not Appropriate in this Case

- "the Elzinga-Hogarty test doesn't fit here."

  Elzinga, 6/18/04, 2156:9-10.

- The impossibility of arbitrage makes international price discrimination easy to sustain, which implies that Elzinga-Hogarty test does not work.

  United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1267 n.12 (N.D. Ill. 1989).

The Elzinga-Hogarty Test Does Not Support a World Market

- The location of corporate headquarters is not the point of origin for shipments.
- SAP supplies U.S. customers from the U.S.
  P3036; Knowles dep., 12/3/03, 15:23-16:11; Knowles, 6/23/04, 2902:23-2903:4.
- “if you look at it at the code itself, yes, that’s what the test applied in a mechanical way would suggest,” but the code is not the whole product
  Elzinga, 6/18/04, 2280:13-23, 2155:9-25.

Market Concentration (calculated with non-public vendor data)

- HRM
  - SAP 30%
  - Oracle 18%
  - PeopleSoft 50%
- FMS
  - SAP 39%
  - Oracle 17%
  - PeopleSoft 31%

Herfindahl-Hirschman Index (HHI)

	Premerger	Postmerger	Increase
HRM	3800	5700	1900
FMS	2800	3800	1000

The merger would result in a duopoly in FMS and HRM high function software

The Merger Is Presumed Illegal under *Philadelphia Nat'l Bank*

- "[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."
    - *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

Effect of the Merger

- Loss of aggressive head to head competition between Oracle and PeopleSoft
- Loss of head to head competition will result in a "unilateral" effect on competition
- Increases the possibility of coordinated behavior from the two remaining competitors—Oracle and SAP
- Innovation, list prices, and final prices would all suffer a loss of competitive pressure

The Idea of Unilateral Effects

"Unilateral effects arise when the products of the merging parties place significant competitive constraints on each other prior to the merger."

Jerry A. Hausman & Gregory K. Leonard, *Economic Analysis of Differentiated Products Mergers Using Real World Data*, 5 Geo. Mason L. Rev. 321, 321 (1997).

The Idea of Unilateral Effects

"The merged company may then be able to raise price post-merger, unilaterally, depending on the importance of the pre-merger competitive constraints the merging firms had on each other."

Jerry A. Hausman & Gregory K. Leonard, *Economic Analysis of Differentiated Products Mergers Using Real World Data*, 5 Geo. Mason L. Rev. 321, 321 (1997).

The Idea of Unilateral Effects

The "merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output."

Horizontal Merger Guidelines § 2.2

There Are a Variety of Valid Unilateral Effects Theories

"Unilateral competitive effects can arise in a variety of different settings."

Horizontal Merger Guidelines § 2.2

The Common Theme of Unilateral Effects Theories

The thread running through all unilateral effects theories is that the effect of the merger is to "eliminate significant head-to-head competition," *Staples* at 1082-83, and eliminating that competition really matters, *Swedish Match* at 169 (FTC evidence "elaborated on why Swedish Match will most likely find it profitable to exercise a unilateral price increase"), *Staples* at 1082 ("eliminating this competition with one another would free the parties to charge higher prices ").

Unilateral Effects in *Staples*

"The merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the superstore market."

Staples at 1082-83.

Unilateral Effects in *Swedish Match*

The "weight of the evidence demonstrates that a unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."

Swedish Match at 169.

A Presumption Applies in Unilateral Effects Cases

- The *Philadelphia National Bank* presumption, based on market shares, applies in unilateral effects cases.
  - *FTC v. Swedish Match*
  - *FTC v. Staples, Inc.*

Swedish Match Applied a Presumption

"Because of the market share and concentration levels, the Court finds that the [FTC] has established a presumption under *Philadelphia National Bank* that [the] acquisition . . . is likely to substantially lessen competition . . . ."

FTC v. Swedish Match, 131 F. Supp. 2d 151, 166-67 (D.D.C. 2000).

Staples Applied a Presumption

"By showing that the proposed transaction . . . will lead to undue concentration, . . . the [FTC] establishes a presumption that the transaction will substantially lessen competition."

FTC v. Staples, Inc., 970 F. Supp. 1066, 1083 (D.D.C. 1997).

Philadelphia National Bank Applied a Presumption Based on a 30% Combined Share

"Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."

374 U.S. at 364

The Government's Theory of Unilateral Effects Is Not Novel

Two viable unilateral effects theories are:

- "giving one firm stronger control of its 'niche' in a product-differentiated market;" and
- "strengthening a firm's power to make noncompetitive bids that buyers will be unable to refuse."

4 Philip E. Areeda, *et al.*, Antitrust Law ¶ 910, at 54 (rev'd ed. 1998).

The Governments' Theory Is in the *Merger Guidelines*

Significant unilateral price increase are likely if "a significant share of sales in the market [is] accounted for by consumers who regard the products of the merging firms as their first and second choices."

Horizontal Merger Guidelines § 2.21

The Governments' Theory Is in the *Merger Guidelines*

"[I]n some markets sellers are primarily distinguished by their relative advantages in serving different buyers or groups of buyers, and buyers negotiate individually with sellers. Here, for example, sellers may formally bid against one another for the business of a buyer, or each buyer may elicit individual price quotes from multiple sellers."

Horizontal Merger Guidelines § 2.21 n.21

Loss of Head to Head Competition

- Internal company documents show that Oracle sees PeopleSoft as its closest competitor
- Business records (such as Oracle's Discount Request Forms) reflect fierce price competition between Oracle and PeopleSoft
- Attempts to win new customers and to convert customers from each other's installed base will no longer exert competitive pressure in the market
- Innovations driven by Oracle's and PeopleSoft's desire to "leapfrog" each other will be reduced

PeopleSoft Documents Show That Oracle Is Its Closest Competitor

- “PeopleSoft competes against Oracle more than any other single competitor.”

  P2369, PeopleSoft "How to Beat Oracle" Guide (May 2003) at PS-C174491

- “SAP has become our second largest competitor next to Oracle.”

  P2368, PeopleSoft "How to Beat SAP" Guide (December 2002) at PS-C174529

Loss of PeopleSoft is Likely to Impact Pricing

- Oracle and PeopleSoft are constraints on each others pricing
- SAP is not an attractive option to many customers
  - SAP works well in manufacturing
  - Oracle and PeopleSoft have been most successful in non-manufacturing industries
  - Customers with installations of both PeopleSoft and Oracle see Oracle and PeopleSoft as their best options for consolidation of their software in one vendor

Oracle’s Pricing

- The discounting for high function software is how prices are set for each customer
- The level of discounting is based on a variety of factors including competition
- PeopleSoft routinely competes with Oracle resulting in significant discounts
- Oracle will not be forced to offer discounts at its current levels post merger

Larry Ellison on Pricing

- "[I]f it's a genuine competitor, a company that can really do the job, a genuine competitor – our job is to figure out what we have to bid to win the deal. No magic here." P3171, Ellison Dep., 01/20/04, 294:16-19.

Section 7 Does Not Require Harm to Every Customer in the Market

"No person . . . shall acquire, directly or indirectly, . . . the stock . . . of another person . . . where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

§ 7, Clayton Act, 15 U.S.C. § 18

Section 7 Does Not Require Harm to Every Customer in the Market

- Any unilateral effects case envisions most harm to just some customers in a market.
- "a unilateral price increase by Swedish Match is likely after the acquisition"
  - *Swedish Match* at 169.

Section 7 Does Not Require Harm to Every Customer in the Market

- Oracle’s strained reading of Section 7 implies no violation if a merger doubles price to half of the customers in the market.
- Oracle’s reading creates enormous scope for anticompetitive, but lawful, mergers in markets with individual pricing, i.e., most non-consumer or non-commodity markets.

Section 7 Does Not Require Harm to Every Customer in the Market

Neither Section 7 case that Oracle cites is remotely on point. In *Engelhard* and *SunGard* the courts held that the government did not prove its alleged market.

United States v. Engelhard Corp., 126 F.3d 1302 (11th Cir. 1997).

United States v. SunGard Data Systems, Inc., 172 F. Supp. 2d 172 (D.D.C. 2001).

Ability to Price Discriminate

- Sales process and knowledge of competitors allows vendors to identify those with other options to support their software needs
- Pricing today is done on a customer by customer basis with a key factor being the ability of competitors to serve the customers' business needs
- Oracle likely will use the same "strategy" after the merger, but PeopleSoft will no long be there to "lowball the price to nowhere"

A “Need for 94% Accuracy” Will Not Protect Customers

- Oracle is price discriminating today.
- The prediction is not that Oracle will engage in a new “strategy.”
- Oracle will simply do what it always does – lower price if it must, to meet the competitor – but that will not happen as often without PeopleSoft.
- If PeopleSoft is not a competitor, Oracle knows everything it needs to know to charge a higher price.

Other Factors That Affect Pricing Will Not Protect Customers

- Bundling, buyer power, legacy options, and whatever else are all part of the current context of all of the evidence presented.
- Even in this context, competition between Oracle and PeopleSoft significantly affects prices.
- The only piece of this picture that would change with the merger is the competition.
- But, Oracle implies these other factors will somehow fill the void left by PeopleSoft.

Historical Experience on Repositioning Is Critical

"The defendants may be correct that some of the competition [lost] will be replaced by other competition. . . . [But] defendants have been unable to substantiate their projections of [repositioning] by introducing any historical evidence to this effect. In fact, new[] brands . . . have had . . . at best a nominal effect on constraining the prices of existing brands."

Swedish Match at 170.

SAP Repositioning

- SAP developed its product to support heavy and process manufacturing
- SAP's products have a reputation for being inflexible, difficult to implement, and expensive
- SAP has unsuccessfully attempted to overcome this reputation over a number of years

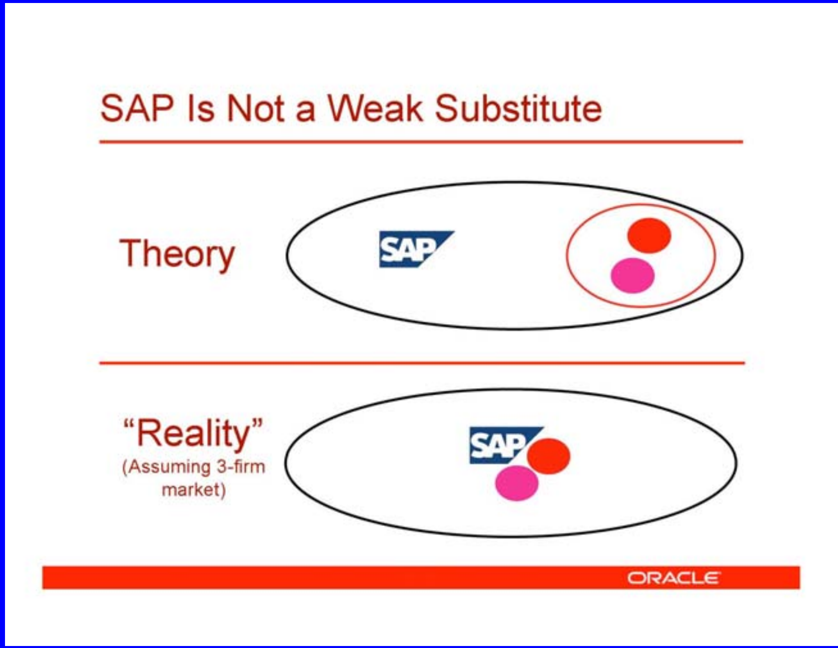
Repositioning Is Difficult

- The development of products to support additional industries is difficult and time consuming
- SAP has unsuccessfully attempted to develop and market products to service oriented industries
- Accenture (SAP’s partner in the financial industry) has suggested that SAP needs to make an acquisition in order to compete in this vertical
- SAP’s incentives to develop products for new verticals may be lessened by the merger

Oracle Incorrect about Closeness of Substitutes

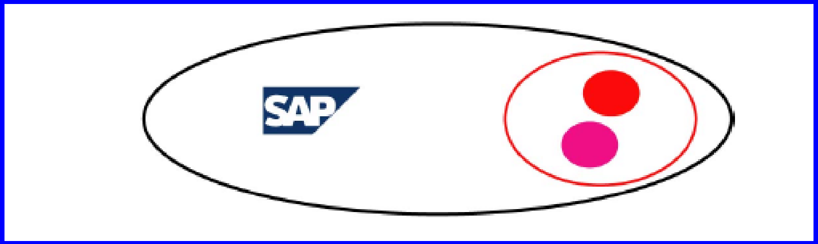
"And for unilateral effects theory to apply in this case what you would want to find is that Oracle and PeopleSoft dominated a kind of locale, a -- a space within the market depicted in the red circle where they were particularly close substitutes for one another; and then SAP would be somewhere off in the distance of that market, not a very good substitute for them at all. Well, the reality of the case looks more like this: . . . The reality, if you can call it reality assuming a three-firm market, is, in fact, that SAP, Oracle, and PeopleSoft are all very good substitutes for one another. And this is a fundamental point why unilateral effects doesn't even apply to this case."

Oracle's Opening Statement, 6/7/04, 52: 5-24



The “Reality” Established at Trial

Customers That Testified Plaintiffs’ “Theory” is Reality



AIMCO

CH2M Hill

Cox Communications

Greyhound

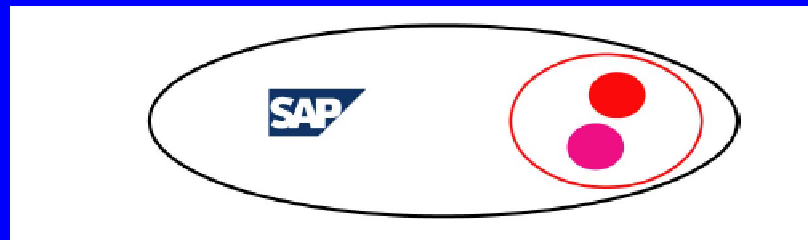
Neiman Marcus

Nextel

State of North Dakota

Metro North Railroad

AIMCO



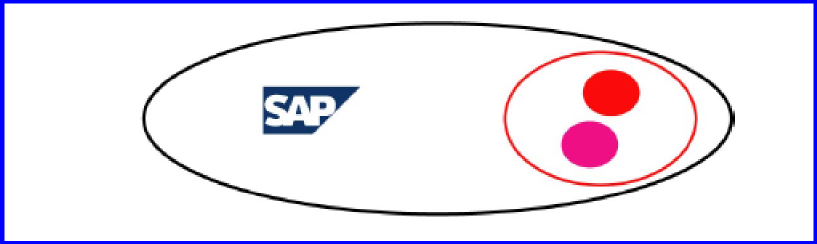
AIMCO learned from a review of its human resources needs that the three firms that could meet those needs were PeopleSoft, Oracle, and SAP.

Wesson, 6/14/04, 1132:4-16.

AIMCO excluded SAP from consideration because configuration of SAP's software is more complex than that of Oracle and PeopleSoft and thus more expensive.

Wesson, 6/14/04, 1182:15-1183:05.

CH2M Hill



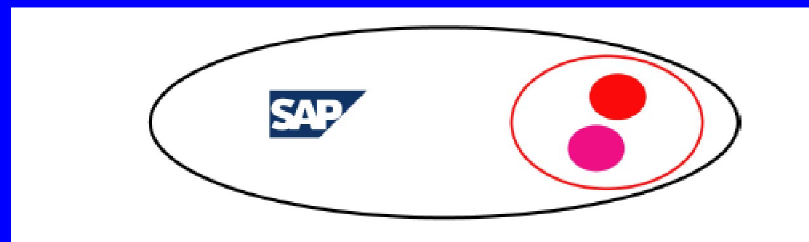
CH2M Hill rejected SAP as an option because it had a reputation of being costly and complex, and it lacked reference clients in the engineering & construction industry.

Bullock, 6/7/2004, 209:13-209:18.

CH2M Hill did not seriously consider Lawson an option.

Bullock, 6/7/2004, 210:5 - 210:8.

Cox Communications



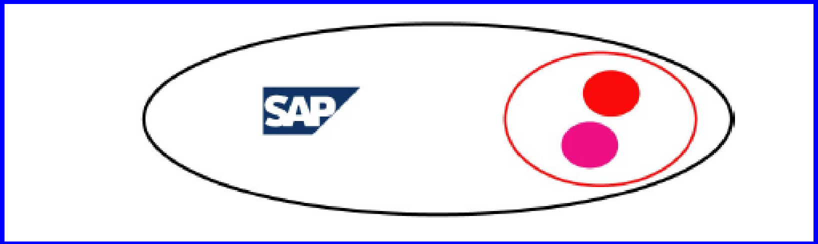
Mr. Hatfield of Cox Communications testified that only Oracle, PeopleSoft and SAP could satisfy Cox’s business case to replace its FMS software.

Hatfield, 6/7/04, 114:22-115:10.

Cox Communications had two good options, PeopleSoft and Oracle, for FMS during its recent procurement. If PeopleSoft were not a separate entity, Cox would have had only one good option.

Hatfield, 6/7/04, 88:22-89:4.

Greyhound



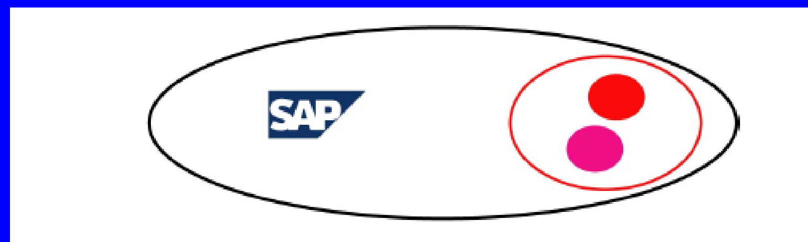
Greyhound determined that Oracle and PeopleSoft were its two best options for human resources management software.

Glover, 6/15/04, 1495:22-23.

Greyhound eliminated mid-market vendors Lawson Software and Ultimate Software based on those firms’ functionality deficiencies.

Glover, 6/15/04, 1470:22-25; 1483:24-1484:05; P4038R, at 54-55.

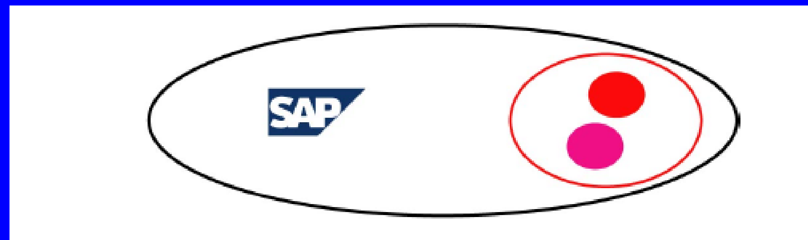
State of North Dakota



North Dakota eliminated SAP during the first round of its procurement process because SAP's price was too high and because SAP did not provide the necessary functionality.

Wolfe, 06/16/04, 1546:13-24.

Kerr-McGee



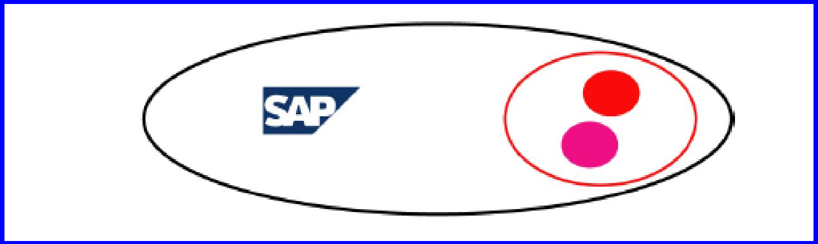
In procuring HR software, Kerr-McGee sent RFPs to Oracle, PeopleSoft, SAP, and Lawson. SAP did not respond. The procurement continued with just Oracle and PeopleSoft.

P3062, Elliott dep., 5/20/04, 76:9-77:7.

Following a review of vendor RFI responses and on-site demonstrations, Kerr-McGee's vendor selection committee concluded that Lawson lacked the non-U.S. functionality and reporting capabilities that Oracle and PeopleSoft had, and eliminated Lawson from the competition.

P3062, Elliott dep., 5/20/04, 108:8-16, 109:13-16, 112:6-12.

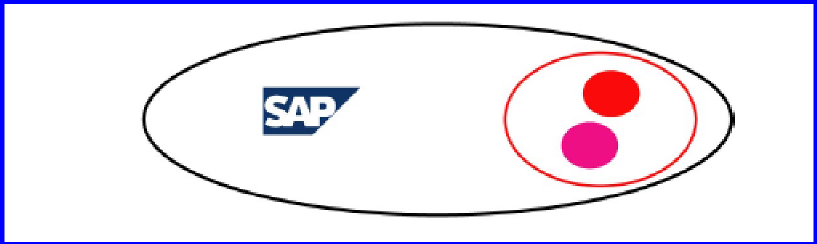
Metro North Railroad



Metro-North Railroad held demonstrations for two software vendors, Oracle and PeopleSoft. Mr. DeSimone testified that Metro-North Railroad would have held demonstrations from a third vendor if a third vendor capable of meeting their requirements had responded to their Request for Proposal.

P4032, at NY-TP-043258; P3061,
P3061, DeSimone Dep., 5/19/04, 156:4-157:9.

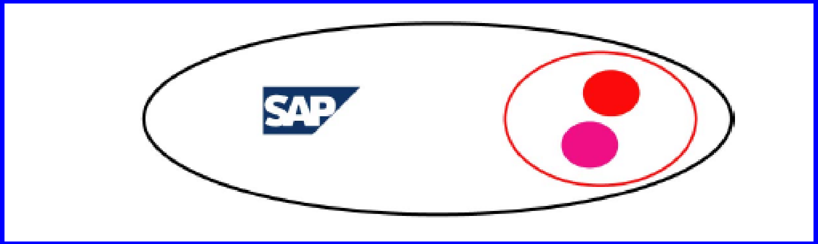
Neiman Marcus



Oracle, PeopleSoft and SAP were the three firms that Neiman Marcus felt could meet the FMS and HRM requirements of a company the size of Neiman Marcus. PeopleSoft and Oracle were the only ones that met Neiman Marcus' criteria.

Maxwell, 6/9/04, 664:21-665:20, 685:21-686:1.

Nextel



Nextel's negotiation was a two stage process: First, identifying three viable alternatives (Oracle, SAP, and PeopleSoft); Second, negotiating with the two best alternatives (Oracle and PeopleSoft).

Cichanowicz, 6/14/04, 1074:01-11.

Nextel did not include SAP in the second stage because Nextel was already using Oracle for financials and PeopleSoft for HR. Replacing both of those products with SAP would have imposed greater risk and greater costs on Nextel.

Cichanowicz, 6/14/04, 1068:4-17.

Larry Ellison on Innovation

- “I guess if there's no competition, innovation would be wasted effort. Yes.” Ellison, 6/30/04, 4314:10-11.
- Innovation is important to customers because “[t]hey want to run their businesses more efficiently next year than the previous year. So, the better automation software we provide, the better information systems we provide, the more efficiently they can run their business, and the more -- the better decisions they make.” Ellison, 6/30/04, 4312:20-24.
- Innovation is “guaranteed by market dynamics.” Ellison, 6/30/04, 4313:3.

Volume of Commerce

- Elzinga's market share calculations support license and maintenance sales of over $500 million annually
- Approximately 1200 accounts have an Oracle/PeopleSoft software footprint that is subject to future consolidation (Keating)
- PeopleSoft's business records identify over 1500 potential customers
- BearingPoint performed over 2000 projects for PeopleSoft, SAP, or Oracle during the past three years with the majority being HRM or FMS

  Keating, 6/10/04, 866:22-867:4; 875:10-18

Coordinated Effects–Case Law

"[I]f conditions are ripe, sellers may not have to communicate or otherwise collude overtly in order to coordinate their price and output decisions; at least they may not have to collude in a readily detectable manner."

FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989) (Posner, J.).

Coordinated Effects–Non-Price

"[A]lternative forms of collusion may prove satisfactory. For example, a product, territorial, or customer division agreement may divide up the market in such a fashion that each firm can set its own profit-maximizing price in its own assigned market niche."

12 Herbert Hovenkamp, *Antitrust Law* ¶ 2002f2, at 23 (1999).

Coordinated Effects–Non-Price

"that's the way the application business works, it's divided by industry."

P3171, Ellison Dep. 01/20/04 143:1-3.

Entry

Issue is whether "entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern."

Horizontal Merger Guidelines § 3.0

Cited in *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1440-41 (9th Cir. 1995).

Entry–Timeliness

The *Merger Guidelines* use 2-year threshold.

Horizontal Merger Guidelines § 3.3

See United States v. Syufy Enters., 903 F.2d 659, 666 n.11 (9th Cir. 1990) (citing *Merger Guidelines* § 3.3 (2 year time frame))

Olin Corp., 113 F.T.C. 400 (1990) (2-year standard in the *Merger Guidelines*), *petition for review denied*, 986 F.2d 1295 (9th Cir. 1993)

Entry–Likelihood

The issue is not whether entry could occur, but rather whether it likely would occur, which requires that "it would be profitable at premerger prices."

Horizontal Merger Guidelines § 3.3

See FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 56 (D.D.C. 1998) (quoting *Merger Guidelines* § 3.3).

Entry Is Time-Consuming, Expensive and Difficult

- High function software requires features to service companies with a variety of business practices in a variety of industries
- The development of high function capability is a lengthy and expensive process
- Customers typically require evidence of prior successful implementations of high function software

High Function Software Is Difficult to Develop

- Oracle, PeopleSoft, and SAP supply high function software to a variety of industries and businesses
- Development of high function software requires detailed knowledge of the practices, reporting and regulatory requirements of multiple industries and business models
- SAP estimates that it could take up to three years for it to develop the capability for its high function product to serve the financial industry

Knowles, 6/23/04, 2945-2846:5

Development Is Lengthy and Expensive

- J.D. Edwards was unsuccessful in developing high function products
- Oracle invested both money and three to four years in upgrading its HRM product
- PeopleSoft needed five to seven years to develop a high function FMS product
- SAP has spent years and significant resources in unsuccessfully attempting to reposition its products for industries such as financial services
- Microsoft's Project Green will take over six years to produce, just for a mid-market product

Reference Customers

- HRM and FMS software support business processes that are mission critical
- Customers are risk averse with these mission critical functions
- High function software must have a track record of success with similarly situated customers in order to be considered

Other Vendors

- Lawson is a mid-market supplier with limited success outside of its target verticals
- AMS is a niche player that specializes in government accounts
- Microsoft is a mid-market company that does not plan to develop a high function product

Lawson

- Mid-market player
- Competes for some larger customers in discrete verticals (retail, healthcare, and state and local government) for customers with simpler needs
- Has not performed well in many larger accounts
- Does not have the resources to become a supplier of high function software

Larry Ellison on Lawson

- Lawson “can’t spent the R&D dollars to compete in every industry.” P3171, Ellison Dep., 01/20/04, 236:11-12.

Lawson Will Not Enter

- Lawson does not believe it would be a good strategy to become a horizontal competitor to Oracle, PeopleSoft and SAP because it is smaller in size and is not in enough industries. It believes it should stay focused on its verticals

- Lawson’s CEO stated last month during an earnings call that Lawson’s vertical focus would not change

Lawson Will Not Enter

- Despite a four year effort, the financial services vertical has yet to generate at least five percent of Lawson's overall revenues

- Lawson's ability to successfully expand beyond its delineated verticals is limited by its lack of industry knowledge

Lawson Will Not Enter

- Lawson's business focuses on only three industry verticals: health care, retail, and public sector

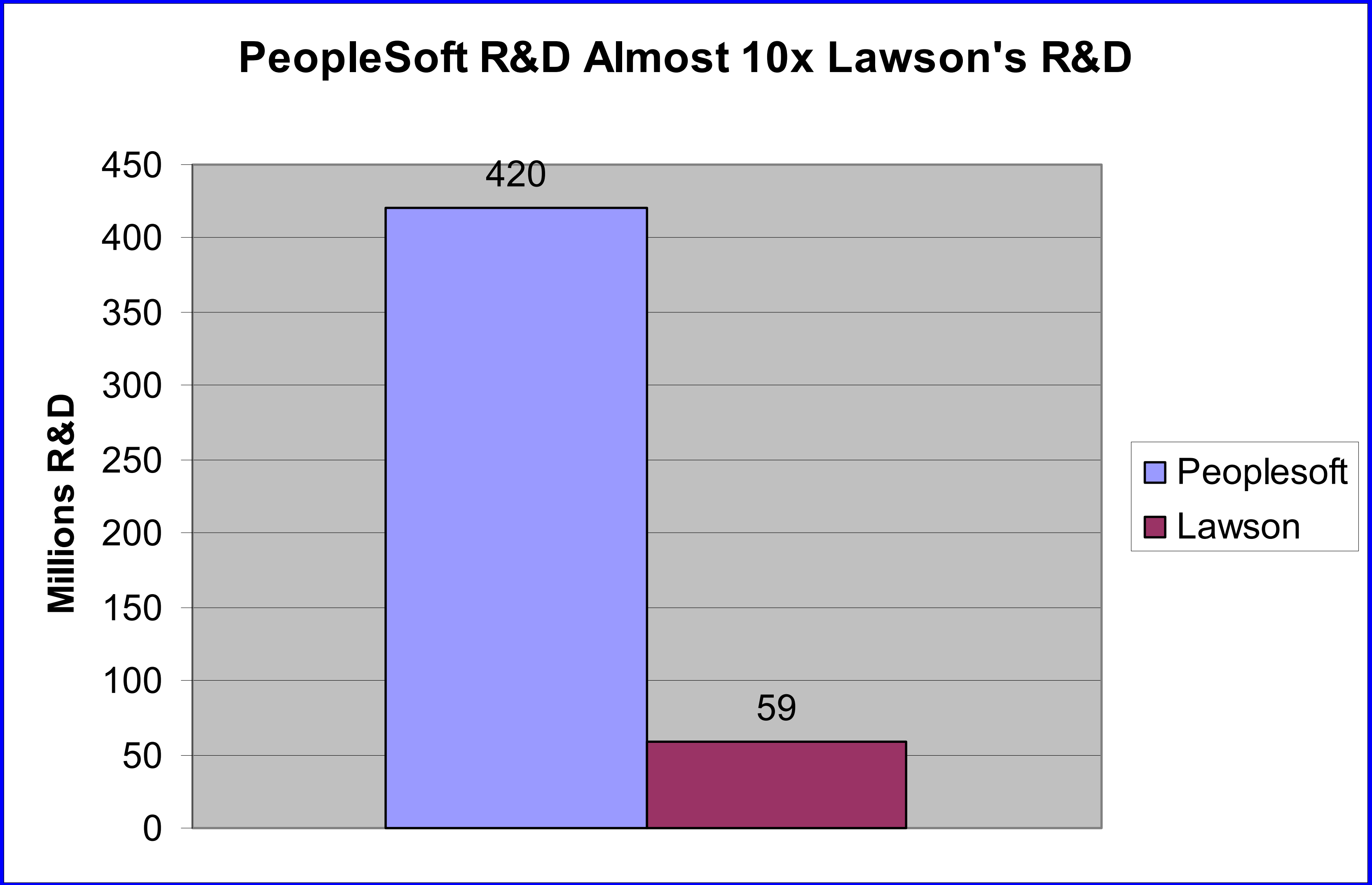
- Lawson's CEO acknowledges that his company's limited, vertical focus distinguishes it from "horizontal" suppliers: Oracle, PeopleSoft, and SAP

- Larry Ellison agrees that Lawson lacks the size, reference customers, sales and marketing resources, and research and development capabilities to compete against Oracle outside Lawson's delineated verticals

Lawson Will Not Enter

- Lawson cautions investors in its most recent 10Q that “it does not have substantial international operations and may not be able to develop our international operations successfully.”

- Hyatt told Lawson that Lawson "does not accommodate the international marketplace" and that, as a result, Hyatt was looking at alternate vendors that offered a configurable product to meet the demands of the international marketplace.



Peoplesoft data: Bergquist estimated current spend at $420 million. (Bergquist, 6/8/04, 337:16 - 338:5).

Lawson data: See P4850, at 16. FY2003 ($59.1 million).

AMS

- Supplies software only to government accounts
- Only has an FMS product for federal government accounts
- Has had limited success outside its current installed base
- Plans on using PeopleSoft for its own HRM and FMS needs

Microsoft

- Has entered the mid-market through acquisition
- Does not have a high function product and does not plan to develop one
- Microsoft sells its products through partners--does not have the direct sales force necessary to sell high function products
- Projects that it would take at least 5 to 7 years to develop a high function product

Microsoft

• Four Microsoft witnesses testified (one live and three via deposition), and all said the same thing: *Microsoft does not have, and does not plan to have, "high-function" software to target the largest enterprises*

• Only one product is targeted at the Corporate Account Space (up to 5,000 employees), and even then that targeting is opportunistic, occasional sales

- • Only 18 sales personnel focused on Corporate Accounts
- • Microsoft has had a "humbling" year and is redoubling its efforts on the mid-market – the larger accounts are a "great way for us to lose money"
- • Missed revenue targets last year by 15-30%

• Project Green will not target Corporate Accounts, and will not be released until at least 2008

• Microsoft's alliance with BearingPoint does not signal any change in market direction or strategy

Microsoft

• Four Microsoft witnesses testified (one live and three via deposition), and all said the same thing: *Microsoft does not have, and does not plan to have, "high-function" software to target the largest enterprises; to do so would require a complete change of Microsoft's business model*

• Microsoft has had a "humbling" year and is redoubling its efforts on the mid-market – the larger accounts are a "great way for us to lose money" **(Humbling year: P3255R, Ayala dep., 5/18/04, 176:19-178:14; Lose money: Burgum, 6/23/04, 3018:12-3019:21)**

• Only one product is target at the Corporate Account Space (up to 5,000 employees), and even then that targeting is opportunistic, occasional sales **(Axapta targets CAS: Burgum, 6/23/04, 3002:2-21; CAS sales are opportunistic: Burgum, 6/23/04, 2990:9-22; 3097:24-3098:7)**

  • Only 18 sales personnel focused on Corporate Accounts **(Burgum, 6/23/04, 2990:9-22; 3099:12-17)**

  • Missed revenue targets last year by 15-30% **(Burgum, 6/23/04, 3009:3-12)**

• Project Green Version 1 will not target the Corporate Accounts, and will not be released until 2008 **(Burgum, 6/23/04, 3058:12-3059:17)**

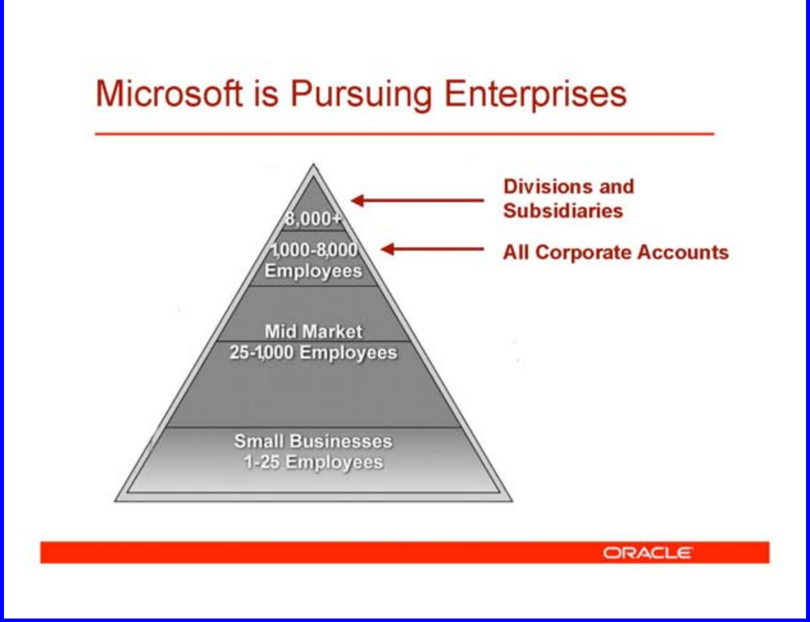
• Microsoft's alliance with BearingPoint does not signal any change in market direction or strategy **(Burgum, 6/23/04, 3052:24-3056:1; P3255R, Ayala dep., 5/18/04, 150:17-152:15, 153:19-155:11)**

Even North Dakota Would Not Purchase Microsoft's Product

- The Governor required the state to extend special treatment to Microsoft's Great Plains product
- Reason: concern that Microsoft would move Great Plains out of North Dakota
- Even after a special re-examination, Great Plains met only 20% of North Dakota's FMS and HRM needs
- Microsoft, the Governor, and even Oracle agreed that Great Plains could not match Oracle or PeopleSoft

Oracle Incorrect about the Microsoft Pyramid

"This pyramid that I talked about earlier is, in fact, a -- our representation of the Microsoft customer taxonomy for all their products . . . ." Opening, 6/7/04, 72:3-11



"Q. [I]s this a taxonomy that Microsoft uses in terms of how it thinks about the market for [MBS] products? A It's not a product that I or anyone on the marketing teams use."

Burgum, 6/23/04, 2985: 11-23

Extraordinary Efficiencies Are Required in this Case

"the high market concentration levels [a 3-to-2 merger] present in this case require, in rebuttal, proof of extraordinary efficiencies, which the appellees failed to supply."

FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001).

The Defendant Has the Burden on Efficiencies

"[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers."

University Health, 938 F.2d at 1223

Efficiencies Must Be Verified

"given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."

FTC v. H.J. Heinz Co., 246 F.3d 708, 721 (D.D.C. 2001).

Efficiencies Must Be Verified

"The Court also finds that the defendants' projected 'Base Case' savings of $5 billion are in large part unverified, or at least the defendants failed to produce the necessary documentation for verification. . . . [T]he entire backup, source, and the calculations of the Goods and Services' cost savings were not included in the Efficiencies Analysis."

Staples at 1089-90.

Efficiencies

- Oracle's claimed efficiencies are not verifiable
- Oracle's claimed efficiencies are not cognizable as they relate to a reduction in output
- Oracle's claimed efficiencies are not merger specific

Oracle's Efficiencies Are Not Verifiable

- Oracle's efficiencies are represented in a spreadsheet developed by Oracle
- There are no back-up calculations or documents supporting the efficiencies
- Efficiencies purport to be based on the undocumented estimates of two of Oracle's executives

Oracle’s Efficiencies Relate to a Reduction in Output

- Post merger Oracle will no longer sell or market the PeopleSoft product line
- Most of the purported cost savings relate to the decision to no longer market PeopleSoft products
- Oracle’s sales projections contemplate a significant reduction in PeopleSoft sales
- Oracle’s projection contemplate a significant reduction in current customers that will maintain the PeopleSoft product post merger

The Superset Product is Not Merger Specific

- The PeopleSoft product features that Oracle will add to its products could be independently developed and offered by Oracle
- Oracle plans to add these features to induce PeopleSoft customers to switch to Oracle's product offering
- Re-creating PeopleSoft features that differentiate its products today would not be necessary if the merger did not involve killing the PeopleSoft products

Oracle is Not Buying PeopleSoft For Its Technology

- Q. You are not buying PeopleSoft in order to acquire their technology.

  A. No.

  Larry Ellison, 6/30/04, 4315:19-22

- Q. In fact, sir, in your deposition, didn't you tell me that you didn't understand how the acquisition would improve Oracle's infrastructure?

  A. Yes, that's correct.

  Dale Kutnick, 6/30/04, 4213:25-4214:23

Oracle Can Achieve Scale By Other Means

- Oracle can obtain scale (i.e. become larger) by competing for customers
- Oracle can add scale by acquiring other vendors
  - Oracle has other vendors under consideration
  - Oracle has admitted that it could obtain scale through one or more of these other transactions

Stack Issues

- Oracle’s “stack” or “infrastructure layer” arguments do not alter the antitrust analysis or mitigate the anticompetitive impact of the acquisition in the relevant FMS and HRM markets

- There is no “paradigm shift” or “tectonic shift” to a “new world” – the infrastructure layer has been in existence for many years, has steadily and gradually evolved during that time, and will continue to gradually evolve

- If this were such a “tectonic shift,” Oracle would have been painfully aware of it – but no contemporaneous Oracle documents or statements of its executives reflect such an awareness

- Neither Microsoft nor IBM – two of the other purported main stack competitors – agree with Oracle’s purported “tectonic shift” claims

Stack Issues

- Oracle now claims it needs to acquire PeopleSoft to compete more effectively against IBM, Microsoft, BEA, and SAP in infrastructure

- Yet Mr. Ellison and Mr. Kutnick admit the acquisition of PeopleSoft will not give Oracle any significant infrastructure technology. Oracle seeks only the customer base and revenue, not new technology

- Oracle's argument boils down to asserting that a competitive market needs <u>five</u> infrastructure layer competitors – Oracle, IBM, Microsoft, BEA and SAP– but only <u>two</u> FMS and HRM applications providers is plenty

Oracle’s Novel Defenses

- One supplier is enough “competition.”
- Some customer might not be harmed.
- The industry is “dynamic.”
- The product is not a commodity with bar codes allowing every sale to be scanned into a detailed database.

Oracle’s “Straw Men” Are Mischaracterizations to Ignore

- Plaintiffs do not argue “single purchaser” markets
- Plaintiffs are not defining markets by customers

Injury to competition

- Ask the customers
- Ask the competitor

15 Customers Testified for the Plaintiffs

- **AIMCO - Randall Scott Wesson**
- **CH2MHill - Robert Bullock**
- **Cox Communications - Scott Allen Hatfield**
- **DaimlerChrysler - Michael Gorriz**
- **Ford - Bipin Pushotam Patel**
- **Greyhound Lines - Mary Elizabeth Glover**
- **Kerr-McGee - Richard Scott Elliott**
- **Metro-North - Sebastian DeSimone**
- **Michigan - Gary Spiekerman**
- **Neiman Marcus Group - Phillip Lynn Maxwell**
- **Nextel - Richard Cichanowicz**
- **North Dakota - Curtis Wolfe**
- **Pepsi Americas - Kenneth Johnsen**
- **Target - Ann Marie Janke**
- **Verizon - Laurette Bradley**

The Court Should Stop the Merger

- Only 3 firms make high function software
- Fierce head-to-head competition brings consumers lower prices and better products; the merger would end that competition
- There will not be timely entry into the up-market
- Oracle has not demonstrated cognizable efficiencies