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To Whom It May Concern:

I am Barak Richman, the Edgar P. & Elizabeth C. Bartlett Professor of Law and Business Administration at Duke University. I have an A.B. from Brown University, magna cum laude, a J.D. from Harvard, magna cum laude, and an MA in Economics and a Ph.D. in Business Administration from the University of California, Berkeley, where I studied under Nobel Laureate Oliver Williamson. I have researched, taught, and written in the field of antitrust law for 14 years, with 13 articles published in the field. My CV and bibliography are available at: <https://law.duke.edu/fac/richman/>.

I was asked to examine SAP's indirect access licensing-fee arrangement. Recently, SAP started charging clients additional licensing fees when they enable their customers to access their SAP ERP software. Although these additional licensing fees are extremely costly, switching to a different ERP vendor would, for most current SAP clients, result in significantly greater costs. Meanwhile, SAP does not charge licensing fees to clients who use Hybris, SAP's own accessory software product that competes with other software products in the ERP aftermarket.

I have drafted a legal memorandum in which I assess whether SAP's conduct violates the Sherman Act. I was compensated by Corevist, a company that offers software products that compete with Hybris, but I was instructed to offer an independent assessment.

The memorandum reaches a preliminary conclusion, based on publicly available information, that SAP's conduct may violate § 2 of the Sherman Act. SAP appears to have market power in the SAP-ERP software aftermarket. Although other companies offer ERP software products, it is economically impractical for most current SAP clients to switch to other ERP providers. SAP clients are therefore beholden to demands from SAP that force them to purchase SAP's Hybris product, something that consumers would not do in a competitive market.

SAP's conduct can be anticompetitive under one of two antitrust theories: First, SAP may be engaged in illegally tying its ERP software and services with its accessory product, Hybris. Second, SAP's demand for third-party license fees may constitute an illegal refusal to deal with other third-party accessory software providers. After SAP encouraged this market to build up and add value to its ERP products, its current conduct harms its competitors in the aftermarket without an adequate efficiency justification.

In short, SAP's conduct limits consumer choice, gives SAP an anticompetitive advantage in the ERP-accessory market, and undermines a currently competitive and dynamic marketplace for ERP accessories.

SAP's licensing contracts and intellectual property rights do not sanitize anticompetitive conduct. Even if courts are interpreting those licensing contracts in appropriate accord with contract law, those contracts cannot immunize a violation of the Sherman Act. The exercise of intellectual property and contract rights are constrained by competition laws, and accordingly, downstream competitors of SAP have a good argument that SAP is engaging in anticompetitive conduct.

Those interested in obtaining the complete memorandum should contact Sam Bayer, at sam.bayer@corevist.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Barak Richman", with a long horizontal flourish extending to the right.

Barak Richman
Professor of Law and Business Administration