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

19 UNITED STATES DISTRICT COURT  
20 NORTHERN DISTRICT OF CALIFORNIA  
21 SAN FRANCISCO DIVISION

22 ORACLE CORPORATION, et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

Case No. 07-CV-1658 PJH

**DEFENDANTS' ADMINISTRATIVE  
REQUEST TO FILE EXHIBITS 3 AND  
4 TO THE DECLARATION OF  
ELAINE WALLACE UNDER SEAL**

Date: TBD  
Time: TBD  
Courtroom: E, 15<sup>th</sup> Floor  
Judge: Hon. Elizabeth D. Laporte

1 Pursuant to Local Rules 79-5(c) and 7-11, Defendants SAP AG, SAP America, and  
2 TomorrowNow, Inc. (“Defendants”) hereby request that the Court order the Clerk of the Court to  
3 file under seal Exhibits 3 and 4 to the Declaration of Elaine Wallace in Support of Defendants’  
4 Opposition to Plaintiffs’ Motion to Compel Production of Clawed Back Documents (“Wallace  
5 Decl.” or “Wallace Declaration”).

6 Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to permit  
7 sealing of court documents for, *inter alia*, the protection of “a trade secret or other confidential  
8 research, development, or commercial information.” Fed. R. Civ. Proc. 26(c). Based on this  
9 authority, the Ninth Circuit has “carved out an exception to the presumption of access to judicial  
10 records for a sealed *discovery* document [attached] to a *non-dispositive* motion.” *Navarro v.*  
11 *Eskanos & Adler*, Case No. C-06 02231 WHA (EDL), 2007 U.S. Dist. LEXIS 24864 (March 22,  
12 2007) (emphasis added) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9<sup>th</sup> Cir. 2006). In  
13 such cases, a “particularized showing of good cause” is sufficient to justify protection under Rule  
14 26(c). *Navarro*, at \*7. To make such a showing, the party seeking protection from disclosure  
15 under the rule must demonstrate that harm or prejudice would result from disclosure of the trade  
16 secret or other information contained in each document the party seeks to have sealed. *See*  
17 *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9<sup>th</sup> Cir. 2006).

18 Defendants have established good cause to permit filing under seal through the declaration  
19 of Christopher Faye below. In addition, in order to narrowly tailor the requesting sealing to only  
20 sealable material, Defendants have limited their request to Exhibits 3 and 4 of the Wallace  
21 Declaration.

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Dated: August 13, 2008

Respectfully submitted,  
JONES DAY

By: /s/ Scott W. Cowan  
Scott W. Cowan

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

1                                   **DECLARATION OF CHRISTOPHER FAYE IN SUPPORT OF**  
2                                   **DEFENDANTS' ADMINISTRATIVE REQUEST TO FILE EXHIBITS 3**  
3                                   **AND 4 TO THE DECLARATION OF ELAINE WALLACE UNDER SEAL**

4                   I, CHRISTOPHER FAYE, declare:

5                   1.       I was licensed as an attorney in the State of California in December 1996 and, at  
6 all times relevant to the documents discussed in this declaration, was practicing law providing  
7 legal advice to all of the Defendants in this case. I am currently the head of Global IP  
8 Transactions in the Global IP Department of SAP AG, one of the Defendants in this case. I make  
9 this declaration based on personal knowledge and, if called upon to do so, could testify  
10 competently thereto.

11                   2.       I have reviewed the documents identified by the Bates numbers TN-OR00000016-  
12 20 and TN-OR00000025-28 produced by Defendants and designated as "Confidential  
13 Information" under the protective order in effect in the case. These documents describe the  
14 "Rules of Engagement," a set of rules adopted by SAP's Executive Board and implemented by  
15 TomorrowNow ("TN") and SAP's business executives to create a figurative "firewall" between  
16 SAP and TN to minimize the possibility that any Oracle proprietary information that TN handled  
17 on behalf of its customers could be passed to SAP.

18                   3.       These documents contain confidential and non-public information and describe in  
19 detail several aspects of the global day-to-day working relationship between SAP and its  
20 subsidiary, TN. SAP and TN consider this to be competitively sensitive information. If it were  
21 to fall into the hands of a competitor or customer of SAP or TN, it would provide insights into the  
22 details of SAP's and TN's daily operations and the functional relationship between the two  
23 companies. Public disclosure of this information could thus cause SAP and TN to be at a  
24 competitive disadvantage because it would reveal sensitive information regarding the internal  
25 operations of TN and SAP that is not intended to be made available to SAP's and TN's  
26 competitors and customers or the public generally.

27                   4.       Both SAP and TN have, and continue to, treat this information as confidential  
28 business information. SAP is in the process of winding down TN and intends to conclude that

1 process prior to October 31, 2008. The Rules of Engagement are currently in force and will  
2 remain in effect at least until the wind down is complete.

3 I declare under penalty of perjury under the laws of the United States and the State of  
4 California that the foregoing is true and correct. Executed on August 13, 2008 in San Francisco,  
5 California.

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8 Christopher Faye

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