

1 Robert A. Mittelstaedt (SBN 060359)  
Jason McDonell (SBN 115084)  
2 Elaine Wallace (SBN 197882)  
JONES DAY  
3 555 California Street, 26<sup>th</sup> Floor  
San Francisco, CA 94104  
4 Telephone: (415) 626-3939  
Facsimile: (415) 875-5700  
5 ramittelstaedt@jonesday.com  
jmcdonell@jonesday.com  
6 ewallace@jonesday.com

7 Tharan Gregory Lanier (SBN 138784)  
Jane L. Froyd (SBN 220776)  
8 JONES DAY  
1755 Embarcadero Road  
9 Palo Alto, CA 94303  
Telephone: (650) 739-3939  
10 Facsimile: (650) 739-3900  
tglanier@jonesday.com  
11 jfroyd@jonesday.com

12 Scott W. Cowan (Admitted *Pro Hac Vice*)  
Joshua L. Fuchs (Admitted *Pro Hac Vice*)  
13 JONES DAY  
717 Texas, Suite 3300  
14 Houston, TX 77002  
Telephone: (832) 239-3939  
15 Facsimile: (832) 239-3600  
swcowan@jonesday.com  
16 jl fuchs@jonesday.com

17 Attorneys for Defendants  
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' RESPONSE TO  
PLAINTIFFS' ADMINISTRATIVE  
MOTION TO FILE UNDER SEAL**

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

1 **I. INTRODUCTION**

2 Plaintiffs' have filed an Administrative Motion to seal certain portions of their motion to  
3 compel and incorporated exhibits to the Declaration of Geoffrey M. Howard In Support Of  
4 Plaintiffs' Motion to Compel Production of Clawed Back Documents ("Howard Decl.") which  
5 Defendants designated as "Confidential Information" or "Highly Confidential Information –  
6 Attorneys' Eyes Only" under the Stipulated Protective Order in this action. Since the filing of  
7 that motion, the parties have met and conferred, and agree on the following: (1) Exs. J, W, and X  
8 should be filed under seal; (2) redacted versions of Exs. B and U need not be filed under seal;  
9 and, (3) Exs. A, D, I, K through T, and Y, some of which never had a confidentiality designation,  
10 also need not be filed under seal.<sup>1</sup> The parties disagree whether Exs. C, and E through H should  
11 be sealed. The non-redacted versions of Exs. B, C, U, V, and W (the "Contested Documents" in  
12 Oracle's Motion to Compel) are privileged attorney-client communications that have been lodged  
13 by Defendants for *in camera* review only and in order to preserve that privilege have not been  
14 submitted for filing in any manner (public, sealed, or otherwise).

15 Pursuant to Local Rule 79-5, Defendants file this Response and the accompanying  
16 declarations in support of a narrowly tailored order authorizing the sealing of portions of  
17 Plaintiffs' Motion to Compel and supporting Exs. C, E through H, J, W, and X on grounds that  
18 there is good cause to protect the confidentiality of information contained in that non-dispositive  
19 discovery motion. The sealing order Defendants seek is not based simply on the blanket  
20 Protective Order in this action, but rather rests on proof<sup>2</sup> that particularized injury to Defendants  
21 will result if the sensitive information contained in these documents is publicly released.

22 **II. STANDARD**

23 Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to permit  
24 sealing of court documents for, *inter alia*, the protection of "a trade secret or other confidential

25 \_\_\_\_\_  
26 <sup>1</sup> The parties' agreement is conditioned on a reservation of rights that the agreement will  
27 not be used in any way by either party against the other to assert a waiver of rights regarding the  
28 confidentiality designation of other documents or testimony of the same or similar subject matter.

<sup>2</sup> Because the Local Rules require Court approval based on a declaration supporting  
sealing even when the parties agree as to the confidential status of the document, Defendants  
submit declarations with regards to all documents for which a sealing order is sought.

1 research, development, or commercial information.” Fed. R. Civ. Proc. 26(c). Based on this  
2 authority, the Ninth Circuit has “carved out an exception to the presumption of access to judicial  
3 records for a sealed *discovery* document [attached] to a *non-dispositive* motion.” *Navarro v.*  
4 *Eskanos & Adler*, Case No. C-06 02231 WHA (EDL), 2007 U.S. Dist. LEXIS 24864 (March 22,  
5 2007) (emphasis added) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9<sup>th</sup> Cir. 2006). In  
6 such cases, a “particularized showing of good cause” is sufficient to justify protection under Rule  
7 26(c).<sup>3</sup> *Navarro*, at \*7. To make such a showing, the party seeking protection from disclosure  
8 under the rule must demonstrate that harm or prejudice would result from disclosure of the trade  
9 secret or other information contained in each document the party seeks to have sealed. *See*  
10 *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9<sup>th</sup> Cir. 2006).

### 11 **III. ARGUMENT**

#### 12 A. There is Good Cause To Support the Filing Under Seal of Information Contained 13 in the Documents which are the Subject of the Administrative Motion.

14 Through the declarations from TomorrowNow and SAP personnel which accompany this  
15 Response, Defendants readily establish good cause to permit filing under seal. As a threshold  
16 matter, Defendants provide testimony that the TomorrowNow and SAP personnel who created the  
17 documents at issue considered the information contained therein to be confidential and thus  
18 limited circulation to persons within their corporate organizations. For example, the Vice  
19 President of PeopleSoft Enterprise Support at TomorrowNow testifies that she considers the  
20 contents of an email that she wrote and sent to TomorrowNow employee Chris Jackson (Bates  
21 labeled TN-OR00868717 through TN-OR00868719 and attached as Ex. W to the Howard Decl.)  
22 to involve “extremely sensitive, highly confidential non-public information.” Declaration of  
23 Shelley Nelson in Support of Defendants’ Response to Plaintiffs’ Motion to Compel Production  
24 of Clawed Back Documents (“S. Nelson Decl.”), ¶¶ 1-2. Defendants provide similar declarations  
25 concerning their consistent protection of confidential information found in the remaining  
26 documents subject to the requested sealing order. *See* Declaration of Thomas Zieman in Support

27 <sup>3</sup> The documents at issue in this Administrative Motion have not been used as part of a  
28 dispositive motion in this or any other case. Declaration of Arlen Shenkman in Support of  
Defendants’ Response to Plaintiffs’ Administrative Motion to File Their Motion to Compel and  
Supporting Documents Under Seal (“Shenkman Decl.”) at ¶ 8.

1 of Defendants' Response to Plaintiffs' Motion to Compel Production of Clawed Back  
2 Documents ("Zieman Decl."), ¶ 1 (re: Howard Decl. Ex. C); Shenkman Decl., ¶¶ 1-2 (re:  
3 Howard Decl. Exs. E through H); Declaration of Mark R. White in Support of Plaintiffs'  
4 Administrative Motion to File Motion to Compel and Supporting Documents Under Seal ("White  
5 Decl."), ¶ 1. (re: Howard Decl. Ex. J); Declaration of Gregory Nelson in Support of Defendants'  
6 Response to Plaintiffs' Motion to Compel Production of Clawed Back Documents ("G. Nelson  
7 Decl.") at ¶¶ 1-2 (re: Howard Decl. Exs. U, V); Declaration of Albert Van Wissen in Support of  
8 Defendants' Response to Plaintiffs' Administrative Motion to File Their Motion to Compel and  
9 Supporting Documents Under Seal ("Van Wissen Decl.", ¶¶ 2-3 (re: Howard Decl. Ex. X).  
10 These declarations establish that Defendants themselves treated the information and documents  
11 they seek to keep confidential as such within their own organizations.

12 Defendants have continued to protect the information contained in these documents from  
13 improper public disclosure since the initiation of this litigation through a Stipulated Protective  
14 Order (Dkt. 32) to prevent their private commercial information from being disclosed improperly.  
15 Under the terms of that Order, Defendants could designate documents, deposition transcripts, and  
16 discovery responses containing private information as "Confidential" or "Highly Confidential"  
17 prior to producing such documents in the course of discovery. Each of the documents filed under  
18 seal contain information which was so designated.

19 Beyond the mere demonstration that Defendants consistently have treated the information  
20 for which they seek protection as confidential, the declarations submitted with this Response also  
21 establish that there are good reasons to protect and seal each of these documents. First, and as  
22 described in more detail in the accompanying Opposition to the Motion to Compel, Exs. B, C, U,  
23 V and W, which have been only been lodged for *in camera* review, contain information which is  
24 protected under the attorney-client privilege. *See* Zieman Decl., ¶ 2 (re: Ex. C); Declaration of  
25 Markus Geng in Support of Defendants' Response to Plaintiffs' Motion to Compel Production of  
26 Clawed Back Documents ("Geng Decl.", ¶ 2 (re: Ex. C); G. Nelson Decl., ¶¶ 1-3 (re: Exs. U and  
27 V; S. Nelson Decl., ¶ 2 (re: Ex. W). The Ninth Circuit has recognized that Rule 26(c) authorizes  
28 "protective orders that prevent disclosure of many types of information, such as letters protected

1 under attorney-client privilege which ...was inadvertently sent to the opposing side.” *Phillips v.*  
2 *General Motors Corp.*, 307 F.3d 1206, 1212 (9<sup>th</sup> Cir. 2002). Thus, the clawed back documents  
3 (*i.e.*, the unredacted versions of Exs. B, C, U, V, and W) should be protected from public  
4 disclosure simply because such protection is necessary to prevent disclosure of privileged  
5 communications.

6 In addition to protection based upon privilege, Defendants offer declarations that  
7 demonstrate good cause to protect and seal because revelation of the contents of these documents  
8 would likely cause Defendants to suffer a competitive injury. For example, SAP employee Arlen  
9 Shenkman testifies as to the privacy concerns justifying sealing of several exhibits to the Howard  
10 Declaration. Shenkman was a participant in the email chain attached as Ex. E to the Howard  
11 Declaration. He explains that this email discusses SAP’s competitive business strategies as well  
12 as SAP’s specific and general acquisition business practices and strategies. For that reason and  
13 the others described by Shenkman, public release of the private corporate information described  
14 in Ex. E would benefit existing competitors at SAP’s expense. Declaration of Arlen Shenkman in  
15 Support of Defendants’ Response To Plaintiffs’ Administrative Motion To File Their Motion To  
16 Compel And Supporting Documents Under Seal (“Shenkman Decl.”), ¶ 3. Shenkman offers  
17 similar testimony with regards to Exs. F, G and H. Shenkman Decl., ¶¶ 4-6.

18 Other employees of SAP and TomorrowNow offer testimony of likely competitive injury  
19 or the violation of individuals’ privacy rights if confidential information in the sealed documents  
20 is released. *See* A. Nelson Decl., ¶ 2 (re: Ex. B); Zieman Decl., ¶ 2 (re: Ex. C); Geng Decl., ¶ 1  
21 (re: Ex. C); White Decl., ¶¶ 1-2 (re: Ex. J); G. Nelson Decl., ¶¶ 1-2 (re: Exs. U-V); S. Nelson  
22 Decl., ¶¶ 1-2 (re: Ex. W); Van Wissen Decl., ¶¶ 2-4 (re: Ex. X).

23 B. Defendants Withdraw the Confidential Designation with Regards to the  
24 Information Contained in Certain Documents Attached as Exhibits to the Howard  
25 Declaration.

26 Defendants withdraw their confidentiality designations with regards to the information  
27 contained in the following Exhibits attached to the Howard Declaration: D, I, K through P, and  
28 Y. Although Defendants complied in good faith with the Stipulated Protective Order in initially  
designating these documents as “Confidential” or “Highly Confidential,” the factual

1 circumstances regarding TomorrowNow's ongoing business operations have changed such that  
2 less harm will result from the public disclosure of the information contained therein. And, Oracle  
3 has agreed that Defendants' agreement to de-designate these documents will not be used in any  
4 way by Oracle against Defendants to assert a waiver of rights regarding the confidentiality  
5 designations of other documents or testimony containing the same or similar subject matter.  
6 Thus, to ensure that the requested sealing order is narrowly tailored to reflect this change in  
7 circumstances, Defendants will not pursue sealing of these documents. Such withdrawal should  
8 not be interpreted as an admission that the documents were incorrectly designated in the first  
9 instance, or that other portions of the designated documents (such as the portions of Ex. K's  
10 discovery responses which were not excerpted or the portions of the deposition transcripts not  
11 included in Exs. M through P) do not contain confidential information.

12 **IV. CONCLUSION**

13 Defendants respectfully request that this Court: (1) permit filing under seal for the  
14 redacted versions of Exs. C and W, as well as Exs. E through H, J, and X to the Howard Decl. and  
15 the portions of the Motion to Compel which include information contained in those Exhibits; and  
16 (2) protect in the Court's chambers all the non-redacted versions of Exs. B, C, U, V and W to the  
17 Howard Decl that have been lodged by Defendants for *in camera* review only and order that they  
18 shall not be filed in any manner (public, sealed, or otherwise) and instead shall remain in the  
19 Court's chambers pending the resolution of Oracle's motion to compel production of clawed back  
20 documents. A proposed order granting the requested relief is lodged and filed herewith.

21 Dated: August 13, 2008

Respectfully submitted,

22 JONES DAY

23  
24 By: /s/ Scott W. Cowan

Scott W. Cowan

25  
26 Counsel for Defendants  
SAP AG, SAP AMERICA, INC., and  
27 TOMORROWNOW, INC.  
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