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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, 15th 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.¹ 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 proof² 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 ¹ 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.

² 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 (9th Cir. 2006). In
 6 such cases, a “particularized showing of good cause” is sufficient to justify protection under Rule
 7 26(c).³ *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 (9th 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 ³ 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 (9th 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,

JONES DAY

24 By: /s/ Scott W. Cowan

Scott W. Cowan

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