

1 Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
2 Elaine Wallace (SBN 197882)
JONES DAY
3 555 California Street, 26th 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 jlfuncs@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 USA, INC., et al.,
23 Plaintiffs,
24 v.
25 SAP AG, et al.,
26 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' ADMINISTRATIVE
MOTION TO FILE DRAFT
STIPULATION UNDER SEAL**

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

1 **I. INTRODUCTION**

2 Plaintiffs Oracle USA, Inc., Oracle International Corporation, and Oracle EMEA Limited
3 (collectively, “Oracle”) filed an Administrative Motion (D.I. 266) to seal Exhibit “A” to the
4 February 9, 2009 Joint Discovery Conference Statement. Additionally, Oracle filed a proposed
5 order to grant its Administrative Motion (D.I. 267). Under Local Rule 79-5, Defendants SAP
6 AG, SAP America, Inc., and TomorrowNow, Inc. (collectively, “Defendants,”) file this Response
7 and the accompanying Declaration of Scott W. Cowan Filed in Support of Defendants’ Response
8 to Plaintiffs’ Administrative Motion (“Cowan Decl.”) in support of a narrowly tailored order
9 authorizing the sealing of Exhibit “A.” Good cause exists to protect the confidential information
10 contained in the non-dispositive discovery motion to which Exhibit “A” is attached. Accordingly,
11 the sealing order Defendants seek is based on more than the blanket Protective Order in this
12 action. It also rests on proof¹ that particularized prejudice or harm will result if the sensitive
13 information contained in these documents is publicly released.

14 **II. STANDARD**

15 Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to permit
16 sealing of court documents for, *inter alia*, the protection of “a trade secret or other confidential
17 research, development, or commercial information.” Fed. R. Civ. P. 26(c). Based on this
18 authority, the Ninth Circuit has “carved out an exception to the presumption of access to judicial
19 records for a sealed *discovery* document [attached] to a *non-dispositive* motion.” *Navarro v.*
20 *Eskanos & Adler*, No. C-06 02231 WHA (EDL), 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal.
21 March 22, 2007) (emphasis in original) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th
22 Cir. 2006)). In such cases, a “particularized showing of good cause” is sufficient to justify
23 protection under Rule 26(c). *Navarro* at *7. To make such a showing, the party seeking
24 protection from disclosure under the rule must demonstrate that harm or prejudice would result
25 from disclosure of the trade secret or other information contained in each document the party
26

27 ¹ Because the Local Rules require Court approval based on a declaration supporting
28 sealing even when the parties agree as to the confidential status of the document, Defendants
submit the referenced Declaration of Scott W. Cowan.

1 seeks to have sealed. *See Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir.
2 2006).

3 **III. ARGUMENT**

4 Good Cause Supports Filing Exhibit "A" Under Seal.

5 Exhibit "A" is a "snapshot" from the Parties' inchoate compromise discussions relating to
6 Plaintiffs' claims regarding PeopleSoft HRMS environments and updates/fixes. *See Cowan*
7 *Decl.*, ¶ 1. Federal Rule of Evidence 408 protects evidence of such compromise negotiations and
8 any resulting agreements from admission if offered to prove liability. Fed. R. Evid. 408. Exhibit
9 "A"'s protection under Rule 408 establishes good cause to file the document under seal. *See*
10 *Phillips v. GMC*, 307 F.3d 1206, 1212 (9th Cir. 2002) (concluding it was "clear error" for the
11 lower court not to recognize its "authority to grant protective orders for confidential settlement
12 agreements" and citing cases with approval that did grant such protective orders); *accord*
13 *D'Ambrosio v. Concord*, 1990 U.S. Dist. LEXIS 8256, *5 (N.D. Cal. Apr. 13, 1990) (reaching
14 issue in dicta); *and see Cargill Inc. v. Budine*, 2008 U.S. Dist. LEXIS 46300, *9 (E.D. Cal. June
15 12, 2008). The policy of Fed. R. Evid. 408 is to promote the out-of-court settlement of claims.

16 In addition, Defendants have protected certain information contained in Exhibit "A" from
17 improper public disclosure through the Stipulated Protective Order (D.I. 32) that is designed to
18 prevent the Parties' private commercial information from being improperly disclosed. Under the
19 terms of that Order, Defendants designate certain documents, deposition transcripts, and
20 discovery responses containing private commercial information as either "Confidential" or
21 "Highly Confidential" prior to producing such documents in the course of discovery. Exhibit "A"
22 contains certain information taken from documents and testimony that was so designated. *See*
23 *Cowan Decl.*, ¶ 3.

24 **IV. CONCLUSION**

25 Defendants respectfully request that this Court enter the proposed order tendered with the
26 Administrative Motion (D.I. 267), thereby directing Exhibit "A" to be filed under seal, because:

27 (a) it reflects the Parties' inchoate compromise discussions regarding Plaintiffs' claims regarding
28

1 PeopleSoft HRMS environments and updates/fixes; (b) contains information taken from
2 documents and testimony that Defendants designated as “Confidential Information” or “Highly
3 Confidential Information – Attorneys’ Eyes Only” under the Stipulated Protective Order in this
4 action; and (c) if the information contained in Exhibit “A” were publicly disclosed, such
5 disclosure could prejudice, chill or otherwise harm the Parties’ bilateral negotiations relating to
6 Plaintiffs’ claims regarding PeopleSoft HRMS environments and updates/fixes. Cowan Decl., ¶¶
7 1-4.

8
9 Dated: February 17, 2009

Respectfully submitted,

JONES DAY

11
12 By: /s/ Scott W. Cowan
13 Scott W. Cowan

14 Counsel for Defendants
15 SAP AG, SAP AMERICA, INC., and
16 TOMORROWNOW, INC.
17
18
19
20
21
22
23
24
25
26
27
28