

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 John 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 jlfuchs@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; OAKLAND DIVISION

21 ORACLE USA, INC., et al.,
22 Plaintiffs,
23 v.
24 SAP AG, et al.,
25 Defendants.

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

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
ADMINISTRATIVE MOTION TO PERMIT
PLAINTIFFS TO FILE UNDER SEAL
DEFENDANTS' INFORMATION SUPPORTING
PLAINTIFFS' MOTION TO MODIFY THE
PROTECTIVE ORDER AND TO COMPEL
DEPOSITION TESTIMONY AND FURTHER
RESPONSES TO REQUESTS FOR ADMISSIONS**

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

1 **I. INTRODUCTION**

2 Plaintiffs filed an Administrative Motion to Permit Plaintiffs to File Under Seal
3 Defendants' Information Supporting Plaintiffs' Motion to Modify the Protective Order and to
4 Compel Deposition Testimony and Further Responses to Requests for Admissions (D.I. 575, and
5 hereafter "Administrative Motion"), specifically Plaintiffs moved to file under seal Exhibit T to
6 the Declaration of Chad Russell in Support of Oracle's Motion to Modify the Protective Order
7 and to Compel Deposition Testimony and Further Responses to Requests for Admissions
8 ("Exhibit T"). Additionally, Plaintiffs filed a proposed order granting their Administrative
9 Motion (D.I. 575-1).

10 Pursuant to Local Rule 79-5, Defendants file this Response, the accompanying declaration
11 of John Youri, and a proposed order in support of a narrowly tailored order authorizing the
12 sealing of Exhibit T on the grounds that there is good cause to protect the confidentiality of
13 information contained in Plaintiffs' non-dispositive discovery motion. The sealing order
14 Defendants seek is not based simply on the blanket Protective Order in this action, but rather rests
15 on proof¹ that particularized injury to Defendants will result if the sensitive information contained
16 in Exhibit T is publicly released.

17 **II. STANDARD**

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

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 Youri Declaration.

1 protection from disclosure under the rule must demonstrate that harm or prejudice would result
2 from disclosure of the trade secret or other information contained in each document the party
3 seeks to have sealed. *See, e.g., Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th
4 Cir. 2006).

5 **III. ARGUMENT**

6 Good Cause Supports Filing Exhibit T Under Seal

7 Through the declaration of John Youri, an employee of SAP AG, that accompanies this
8 Response, Defendants establish good cause to permit filing Exhibit T under seal. As a threshold
9 matter, Defendants provide testimony that Mr. Youri, who is familiar with the information
10 contained in Exhibit T, considers that information to be confidential and non-public. *See*
11 Declaration of John Youri in Support of Defendants' Response to Plaintiffs' Administrative
12 Motion to Permit Plaintiffs to File Under Seal Defendants' Information Supporting Plaintiffs'
13 Motion to Modify the Protective Order and to Compel Deposition Testimony and Further
14 Responses to Requests for Admissions ("Youri Declaration"), ¶ 1.

15 Moreover, the Youri Declaration demonstrates good cause to protect and seal Exhibit T
16 because revelation of its contents would likely cause Defendants to suffer a competitive injury.
17 Exhibit T is a Microsoft PowerPoint document. A number of the slides reference and describe
18 SAP's standard license agreements with its customers, the terms of which are non-public. Public
19 release of this information could adversely effect SAP's future bargaining position with
20 customers and provide competitive advantage to SAP's business competitors. Because of the
21 competitively sensitive information contained in the document, the disclosure of it could likely
22 cause competitive and business injury. *Id.* The Youri Declaration establishes that Defendants
23 consider and treat the information as highly confidential. Defendants have continued to protect
24 the information contained in Exhibit T from improper public disclosure since the initiation of this
25 litigation through a Stipulated Protective Order (D.I. 32) to prevent their private commercial
26 information from being improperly disclosed. Under the terms of that Order, Defendants could
27 designate documents, deposition transcripts, and discovery responses containing private
28

1 information as “Confidential” or “Highly Confidential” prior to producing such documents in the
2 course of discovery. Exhibit T was designated “Highly Confidential.”

3 **IV. CONCLUSION**

4 Defendants respectfully request that this Court order to be filed under seal Exhibit T,
5 which Defendants designated as “Highly Confidential Information – Attorneys’ Eyes Only” under
6 the Stipulated Protective Order in this action.

7 Dated: December 16, 2009

Respectfully submitted,

8 JONES DAY

9
10 By: /s/ Patrick Delahunty

Patrick Delahunty

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