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18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT  
20 NORTHERN DISTRICT OF CALIFORNIA  
21 OAKLAND 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 DEFENDANTS'  
DOCUMENTS UNDER SEAL**

Date: N/A  
Time: N/A  
Courtroom: 3, 3rd Floor  
27 Judge: Hon. Phyllis J. Hamilton

1 **I. INTRODUCTION**

2 Plaintiffs filed an Administrative Motion to seal certain portions of Exhibits A and E to  
3 the Declaration of Nitin Jindal in Support of Plaintiffs' Opposition to Defendants' Motion to  
4 Exclude Expert Testimony of Paul K. Meyer (respectively, "Exhibit A" and "Exhibit E"), which  
5 Defendants designated as "Highly Confidential Information – Attorneys' Eyes Only" under the  
6 Stipulated Protective Order in this action. Additionally, Plaintiffs filed a Proposed Order  
7 Granting Plaintiffs' Administrative Motion to File Under Seal Information Supporting Plaintiffs'  
8 Opposition to Defendants' Motion to Exclude Expert Testimony of Paul K. Meyer.

9 Pursuant to Local Rule 79-5, Defendants file this Response, the accompanying declaration  
10 of Michael Junge, and a proposed order in support of a narrowly tailored order authorizing the  
11 sealing of portions of Exhibits A and E on the grounds that there is good cause to protect the  
12 confidentiality of information contained in Plaintiffs' non-dispositive motions. The sealing order  
13 Defendants seek is not simply based on the blanket Protective Order in this action, but rather rests  
14 on proof<sup>1</sup> that particularized injury to Defendants will result if the sensitive information contained  
15 in portions of Exhibits A and E is publicly released.

16 **II. STANDARD**

17 Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial  
18 court to permit sealing of court documents for, *inter alia*, the protection of "a trade secret or other  
19 confidential research, development, or commercial information." Fed. R. Civ. P. 26(c)(1)(G).  
20 Based on this authority, the Ninth Circuit has "carved out an exception to the presumption of  
21 access to judicial records for a sealed discovery document [attached] to a *non-dispositive*  
22 motion." *Navarro v. Eskanos & Adler*, No. C-06-02231 WHA (EDL), 2007 U.S. Dist. LEXIS  
23 24864, at \*6 (N.D. Cal. Mar. 22, 2007) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th  
24 Cir. 2006)). In such cases, a "particularized showing of good cause" is sufficient to justify  
25 protection under Rule 26(c). *See id.* at \*7. To make such a showing, the party seeking protection  
26 from disclosure under the rule must demonstrate that harm or prejudice would result from

27 <sup>1</sup> 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 Junge Declaration.

1 disclosure of the trade secret or other information contained in each document the party seeks to  
2 have sealed. *See Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2006).

3 **III. ARGUMENT**

4 **A. Good Cause Supports Filing Portions of the Jindal Declaration under Seal.**

5 Through the declaration of Michael Junge, an employee of SAP AG, that accompanies  
6 this Response, Defendants establish good cause to permit filing portions of Exhibits A and E  
7 under seal. As a threshold matter, Defendants provide testimony that Mr. Junge, who is familiar  
8 with the information contained at paragraphs 125, 126, 139, 149, 227, and 445 of Exhibit A, and  
9 the redacted portions of Exhibit E, considers that information to be confidential and non-public.

10 *See Declaration of Michael Junge in Support of Defendants' Response to Plaintiffs'*  
11 *Administrative Motion to File Defendants' Documents Under Seal ("Junge Declaration")* ¶ 5.  
12 Moreover, the Junge Declaration demonstrates good cause to protect and seal paragraphs 125,  
13 126, 139, 149, 227, and 445 of Exhibit A, as well as the redacted portions of Exhibit E, because  
14 revelation of their contents would likely cause Defendants to suffer a competitive injury.

15 Portions of paragraphs 139, 227, and 445 of Exhibit A and the redacted portions of  
16 Exhibit E "reveal non-public information regarding SAP's revenue streams from existing  
17 customers. Public release of this information could adversely affect SAP's future bargaining  
18 position with these customers, as well as violate SAP's non-disclosure agreements with these  
19 customers, which provide that the amounts of these customers' payments to SAP constitute  
20 confidential information not to be publicly disclosed." *Id.* ¶ 2.

21 Similarly, portions of paragraphs 125 and 126 of Exhibit A describe "confidential  
22 information from an internal, non-public October 5, 2008 analysis by Deloitte Financial Advisory  
23 Services LLP of the fair value of certain assets and liabilities of Business Objects S.A., which  
24 SAP acquired on January 21, 2008." *Id.* ¶ 3. "Disclosure of the information contained within  
25 that analysis would grant SAP's competitors, partners, customers, future acquisition targets, and  
26 other interested parties insight into SAP's internal assessments, strategy, and operations,  
27 providing them with an unfair competitive advantage over SAP with respect to current and future  
28 operations and negotiations." *Id.* For these reasons, Defendants requested under seal treatment in

1 this case for portions of the October 5, 2008 analysis from which the information revealed in  
2 paragraphs 125 and 126 of Exhibit A was derived; the Court granted that request. *See* D.I. 495  
3 (9/30/09 Response in Support of Plaintiffs' Administrative Motion to Seal); D.I. 530 (11/2/09  
4 Order).

5 Finally, portions of paragraph 149 describe "highly sensitive, non-public financial  
6 information regarding SAP's revenues and fixed and variable costs, between 2005 and 2008, as  
7 they relate to an account described as 'collect the costs provided for maintenance (code  
8 corrections) of existing software after Release to customer.'" Junge Decl. ¶ 4. "Public release of  
9 this information would disclose SAP's strategies regarding spending on research and  
10 development, as well as on support, and could adversely affect SAP's ability to compete with  
11 other software and support providers." *Id.*

12 Defendants have continued to protect the information contained in the relevant portions of  
13 Exhibits A and E from improper public disclosure since the initiation of this litigation through a  
14 Stipulated Protective Order (D.I. 32) to prevent their private commercial information from being  
15 improperly disclosed. Under the terms of that Order, Defendants could designate documents,  
16 deposition transcripts, and discovery responses containing private information as "Confidential"  
17 or "Highly Confidential" prior to producing such documents in the course of discovery. The  
18 identified portions of Exhibits A and E contain information from an expert report that was  
19 designated "Highly Confidential."

#### 20 **IV. CONCLUSION**

21 Defendants respectfully request that this Court order to be filed under seal portions of  
22 paragraphs 125, 126, 139, 149, 227, and 445 of Exhibit A, and the redacted portions of Exhibit E,  
23 which Defendants designated as "Highly Confidential Information – Attorneys' Eyes Only" under  
24 the Stipulated Protective Order in this action.

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Dated: September 16, 2010

Respectfully submitted,  
JONES DAY

By: /s/ Tharan Gregory Lanier  
Tharan Gregory Lanier

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

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' ADMINISTRATIVE MOTION  
TO FILE UNDER SEAL INFORMATION  
SUPPORTING PLAINTIFFS' OPPOSITION  
TO DEFENDANTS' MOTION TO EXCLUDE  
EXPERT TESTIMONY OF PAUL K. MEYER**

Date: N/A  
Time: N/A  
Courtroom: 3, 3rd Floor  
Judge: Hon. Phyllis J. Hamilton

1 Pending before this Court is Plaintiffs' Administrative Motion to Permit Plaintiffs to File  
2 Under Seal Defendants' Information Supporting Plaintiffs' Opposition to Defendants' Motion to  
3 Exclude Expert Testimony of Paul K. Meyer (D.I. 840, and hereafter "Motion to Seal"). Through  
4 the Motion to Seal and supporting documentation, Plaintiffs Oracle USA, Inc., Oracle  
5 International Corporation, and Siebel Systems, Inc.<sup>1</sup> (collectively, "Plaintiffs"), together with  
6 SAP AG, SAP America, Inc., and TomorrowNow, Inc. (collectively, "Defendants," and with  
7 Plaintiffs, the "Parties"), request an Order sealing certain information contained in Exhibits A and  
8 E to the Declaration of Nitin Jindal in Support of Plaintiffs' Opposition to Defendants' Motion to  
9 Exclude Expert Testimony of Paul K. Meyer (respectively, "Exhibit A" and "Exhibit E").

10 Having considered Plaintiffs' Motion to Seal and the documents filed in support, IT IS  
11 HEREBY ORDERED THAT: Plaintiffs' Motion to Seal is GRANTED. The Clerk of the Court  
12 shall file under seal the unredacted versions of the following documents that were lodged with the  
13 Court on September 10, 2010: portions of paragraphs 125, 126, 139, 149, 227, and 445 of Exhibit  
14 A, and the redacted portions of Exhibit E.

15  
16 DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Hon. Phyllis J. Hamilton

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<sup>1</sup> Oracle EMEA Ltd. is no longer a plaintiff in this case. D.I. 762 (8/17/10 Order) at 25.