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20 UNITED STATES DISTRICT COURT
 21 NORTHERN DISTRICT OF CALIFORNIA
 22 SAN FRANCISCO DIVISION

23 ORACLE CORPORATION, et al.,
 Plaintiffs,
 24 v.
 25 SAP AG, et al.,
 26 Defendants.

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

**DEFENDANTS' MOTION TO
 STAY OR EXTEND TIME TO
 COMPLY WITH JULY 3, 2008
 DISCOVERY ORDER**

1 Defendants hereby move for an order staying or extending the time by which they must
2 comply with that part of this Court's July 3, 3008 discovery order relating to grand jury
3 documents.

4 BACKGROUND

5 On July 3, 2008, this Court issued a discovery order requiring Defendants SAP AG and
6 TomorrowNow to respond by July 15, 2008 to two requests for production from Plaintiff Oracle.
7 See Dkt. 106. The requests at issue seek documents based on whether Defendants provided them
8 to a federal grand jury. Defendants are today filing objections seeking review of the order by the
9 Honorable Phyllis J. Hamilton.

10 On July 13, 2008, Defendants filed a Stipulation and [Proposed] Order to Extend Time to
11 Comply with Discovery Order requesting an extension until July 23, 2008, in part so that
12 Defendants could determine whether to appeal to Judge Hamilton. See Declaration of Jason
13 McDonell in Support of Motion to Extend Time ("McDonell Decl."), ¶ 2. In connection with that
14 stipulation, Defendants stated that should they decide to appeal they would seek an additional stay
15 of the discovery order. *Id.* ¶ 3. This Court granted that extension on July 17, 2008. Dkt. 115.
16 Defendants now move for a stay of or a further extension of time to comply with the order until a
17 date seven (7) days after disposition by Judge Hamilton of Defendants' objections.

18 DISCUSSION

19 A magistrate judge's authority to hear pretrial matters is derived from 28 U.S.C.
20 § 636(b)(1)(A). Under this section, nondispositive pretrial matters, such as the discovery issue
21 here, may be referred to a magistrate judge for hearing and determination. The District Court
22 *must* review a magistrate judge's nondispositive pretrial orders upon a party's objection, and set
23 aside any order that is "clearly erroneous or contrary to law." *Id.*; Fed. R. Civ. P. 72(a). The
24 District Court has 15 days to decide whether to deny the motion or set a briefing schedule, after
25 which the motion is deemed denied. Civ. L.R. 72-2. To allow the District Court an opportunity
26 to review Defendants' objections before they must produce the materials at issue, an extension of
27 time during the pendency of review is appropriate.

28 If Defendants are required to comply with the order before their objections are decided by

1 Judge Hamilton, the resulting production of documents may moot some or all of Defendants'
2 objections. Without an extension of time sufficient to allow Judge Hamilton to consider
3 Defendants objections, the production will disclose grand jury matters that Defendants maintain
4 are protected by grand jury secrecy under Fed. R. Crim. P. 6(e), and once that disclosure has been
5 made it cannot be undone. If Defendants are correct that disclosure of the documents will violate
6 the principle of grand jury secrecy embodied in Rule 6(e), disclosure will irreparably harm the
7 grand jury proceedings to the detriment of potential witnesses and subjects of that investigation.
8 Individuals who may be identified in the documents will be irreparably harmed because they will
9 be publicly disclosed as persons of interest to the grand jury. Potential witnesses may be
10 intimidated by the knowledge that whatever information they provide to the grand jury will be
11 subject to immediate disclosure to Oracle and potentially the public. Disclosure of which
12 documents the grand jury has sought will reveal the direction of the grand jury proceedings to the
13 detriment of the grand jury's ability to pursue its tasks.

14 The legal issues raised by Defendants are serious, as they concern the integrity of grand
15 jury proceedings and the interrelationship between grand jury proceedings and discovery in civil
16 actions. The balance of hardships tips sharply in favor of Defendants. Oracle, on the other hand,
17 will not be harmed if a short extension of time is granted. Oracle has already received, and will
18 continue to receive, documents that have also been produced to the grand jury, provided those
19 documents are responsive to legitimate discovery requests propounded by Oracle. The extension
20 of time requested here will not harm Oracle because the delay in any required production will be
21 relatively short in relation to the length of this litigation, including the fact discovery cut-off date
22 of June 19, 2009. McDonell Decl., ¶ 8.

23 Finally, the public interest will be served by granting an extension of time. The public
24 and this Court have an interest in maintaining the integrity of grand jury proceedings and
25 protecting all the participants in those proceedings, as the Supreme Court explained in *Douglas*
26 *Oil Co. of Calif. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979):

1 First, if preindictment proceedings were made public, many
2 prospective witnesses would be hesitant to come forward
3 voluntarily, knowing that those against whom they testify would be
4 aware of that testimony. Moreover, witnesses who appeared before
5 the grand jury would be less likely to testify fully and frankly, as
6 they would be open to retribution as well as to inducements. There
7 also would be the risk that those about to be indicted would flee, or
8 would try to influence individual grand jurors to vote against
9 indictment. Finally, by preserving the secrecy of the proceedings,
10 we assure that persons who are accused but exonerated by the grand
11 jury will not be held up to public ridicule.

12 Given the irreparable harm that may result from disclosure of the materials, the importance of the
13 legal issues raised, and the lack of harm to Plaintiff if an extension stay is granted, a short
14 extension to allow Defendants to seek review by the District Court is appropriate.

15 The Defendants met and conferred with Oracle and sought their agreement to this further
16 extension of time, but Oracle declined to stipulate to the extension unless the Defendants agreed
17 to allow Oracle to file their second amended complaint not under seal. McDonell Decl., ¶ 6. For
18 reasons discussed in the McDonell Declaration, Defendants declined to agree to Oracle's
19 proposal. *Id.* ¶ 6. We believe that this requested extension of time will have no material
20 detrimental effect on the schedule of this case. *Id.*

21 CONCLUSION

22 For the foregoing reasons, Defendants request a stay of or a further extension of time to
23 comply with the portions of this Court's July 3, 2008 order relating to grand jury documents until
24 a date seven (7) days after Judge Hamilton has resolved Defendants' objections.

25 Dated: July 18, 2008

JONES DAY

26 By: /S/ Jason McDonell

27 Jason McDonell

28 Counsel for Defendants
SAP AG, SAP AMERICA, INC., and
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