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 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 DEFENDANTS'
 DOCUMENTS 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 (1) certain portions of the
3 Declaration of Geoffrey M. Howard in Support of Plaintiffs’ Motion to Compel Production of
4 Documents, Answers to Interrogatories, and Rule 30(b)(6) Testimony Related to Hyperion,
5 Retek, and EBS Products (“Howard Declaration”), and (2) Exhibits A, D, E, and F to the Howard
6 Declaration, which Defendants designated as “Confidential Information” or “Highly Confidential
7 Information – Attorneys’ Eyes Only” under the Stipulated Protective Order in this action.

8 Pursuant to Local Rule 79-5, Defendants file this Response and the accompanying
9 declarations in support of a narrowly tailored order authorizing the sealing of portions of the
10 Howard Declaration and Exhibits A, D, E, and F and on grounds that there is good cause to
11 protect the confidentiality of information contained in that non-dispositive discovery motion. The
12 sealing order Defendants seek is not based simply on the blanket Protective Order in this action,
13 but rather rests on proof¹ that particularized injury to Defendants will result if the sensitive
14 information contained in these documents is publicly released.

15 **II. STANDARD**

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

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 declarations with regards to all documents for which a sealing order is sought.

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 There Is Good Cause to Support the Filing Under Seal of Information Contained in the
5 Documents That Are the Subject of the Administrative Motion.

6 Through the declarations from SAP AG and SAP America, Inc. (collectively “SAP”)
7 personnel that accompany this Response, Defendants readily establish good cause to permit filing
8 under seal. As a threshold matter, Defendants provide testimony that the SAP personnel who
9 created the documents at issue, or whose documents are quoted in the Howard Declaration,
10 considered the information contained therein to be confidential and thus limited circulation to
11 persons within their corporate organizations. For example, the Vice President of Service Solution
12 Management – Global Services and Support of SAP testifies that he considers the contents of a
13 PowerPoint presentation he prepared for SAP management (SAP-OR00252116 through SAP-
14 OR00252137) to be a “highly confidential, non-public internal SAP document.” *See* Declaration
15 of Thomas Ziemann in Support of Defendants’ Response to Plaintiffs’ Administrative Motion to
16 Seal Documents (“Ziemann Declaration”), ¶ 2. Defendants provide declarations concerning their
17 consistent protection of confidential information found in both the documents at issue and the
18 Howard Declaration containing detailed descriptions of these documents subject to the requested
19 sealing order. *See* Ziemann Declaration and the Declaration of Anne Tuman in Support of
20 Defendants’ Response to Plaintiffs’ Administrative Motion to Seal Documents. These
21 declarations establish that Defendants themselves treated the information and documents they
22 seek to keep confidential as such within their own organizations.

23 Defendants have continued to protect the information contained in these documents from
24 improper public disclosure since the initiation of this litigation through a Stipulated Protective
25 Order (D.I. 32) to prevent their private commercial information from being improperly disclosed.
26 Under the terms of that Order, Defendants could designate documents, deposition transcripts, and
27 discovery responses containing private information as “Confidential” or “Highly Confidential”
28

1 prior to producing such documents in the course of discovery. Each of the documents filed under
2 seal contain information that was so designated.

3 Defendants offer declarations that demonstrate good cause to protect and seal because
4 revelation of the contents of these documents would likely cause Defendants to suffer a
5 competitive injury. For example, Thomas Zieman testifies to the concerns he has regarding the
6 revenue data contained in Exhibit D to the Howard Declaration (SAP-OR0001189 through
7 SAP-OR0001195), particularly that the release of this information could adversely impact SAP's
8 bargaining position in future dealings with current and potential clients. *See* Zieman Declaration,
9 ¶ 1.

10 **IV. CONCLUSION**

11 Defendants respectfully request that this Court affirm its order filing under seal (1) certain
12 portions of the Declaration of Geoffrey M. Howard in Support of Plaintiffs' Motion to Compel
13 Production of Documents, Answers to Interrogatories, and Rule 30(b)(6) Testimony Related to
14 Hyperion, Retek, and EBS Products ("Howard Declaration"), and (2) Exhibits A, D, E, and F to
15 the Howard Declaration, which Defendants designated as "Confidential Information" or "Highly
16 Confidential Information – Attorneys' Eyes Only" under the Stipulated Protective Order in this
17 action.²

18 Dated: January 22, 2009

Respectfully submitted,

JONES DAY

21 By: /s/ Scott W. Cowan
22 Scott W. Cowan

23 Counsel for Defendants
24 SAP AG, SAP AMERICA, INC., and
25 TOMORROWNOW, INC.

26
27
28 ² Defendants have not filed a proposed order together with this Response because the Court has already granted the Sealing Order.