

1 Robert A. Mittelstaedt (SBN 060359)  
 Jason McDonell (SBN 115084)  
 2 Elaine Wallace (SBN 197882)  
 JONES DAY  
 3 555 California Street, 26<sup>th</sup> 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 jlfruchs@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, 15<sup>th</sup> 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 proof<sup>1</sup> 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  
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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 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  
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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.  
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