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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 DRAFT
 STIPULATION UNDER SEAL**

Date: N/A

Time: N/A

Courtroom: E, 15th 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. 421) to seal Exhibit “B” to the
4 August 18, 2009 Joint Discovery Conference Statement. Additionally, Oracle filed a proposed
5 order to grant its Administrative Motion (D.I. 421-1). 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 “B.” Good cause exists to protect the confidential information
10 contained in the non-dispositive discovery motion to which Exhibit “B” 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 proof¹ 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 Mar. 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
26 seeks to have sealed. *See Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

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 referenced Declaration of Scott W. Cowan.

1 **III. ARGUMENT**

2 Good Cause Supports Filing Exhibit “B” Under Seal.

3 Exhibit “B” is a “snapshot” from the Parties’ inchoate compromise discussions relating to
4 Plaintiffs’ claims regarding PeopleSoft HRMS environments and updates/fixes. *See* Cowan
5 Decl., ¶ 1. Federal Rule of Evidence 408 protects evidence of such compromise negotiations and
6 any resulting agreements from admission if offered to prove liability. Fed. R. Evid. 408. Exhibit
7 “B”’s protection under Rule 408 establishes good cause to file the document under seal.
8 *See Phillips*, 307 F.3d at 1212 (concluding it was “clear error” for the lower court not to
9 recognize its “authority to grant protective orders for confidential settlement agreements” and
10 citing cases with approval that did grant such protective orders); *accord D’Ambrosio v. Concord*,
11 No. C 89 2367 TEH, 1990 U.S. Dist. LEXIS 8256, *5 (N.D. Cal. Apr. 13, 1990) (reaching issue
12 in dicta); *and see Cargill Inc. v. Budine*, No. CV-F-07-349-LJO-SMS, 2008 U.S. Dist. LEXIS
13 46300, *9 (E.D. Cal. June 12, 2008).

14 In addition, Defendants have protected certain information contained in Exhibit “B” from
15 improper public disclosure through the Stipulated Protective Order (D.I. 32) that is designed to
16 prevent the Parties’ private commercial information from being improperly disclosed. Under the
17 terms of that Order, Defendants designate certain documents, deposition transcripts, and
18 discovery responses containing private commercial information as either “Confidential” or
19 “Highly Confidential” prior to producing such documents in the course of discovery. Exhibit “B”
20 contains certain information taken from documents and testimony that was designated as
21 confidential. *See* Cowan Decl., ¶ 3.

22 **IV. CONCLUSION**

23 Defendants respectfully request that this Court enter the proposed order tendered with the
24 Administrative Motion (D.I. 421-1), thereby directing Exhibit “B” to be filed under seal because:
25 (a) it reflects the Parties’ inchoate compromise discussions regarding Plaintiffs’ claims regarding
26 PeopleSoft HRMS environments and updates/fixes; (b) contains information taken from
27 documents and testimony that Defendants designated as “Confidential Information” under the
28 Stipulated Protective Order in this action; and (c) if the information contained in Exhibit “B”

1 were publicly disclosed, such disclosure could prejudice, chill or otherwise harm the Parties'
2 bilateral negotiations relating to Plaintiffs' claims regarding PeopleSoft HRMS environments and
3 updates/fixes. Cowan Decl., ¶¶ 1-4.
4

5 Dated: August 25, 2009

Respectfully submitted,

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JONES DAY

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

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

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