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16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

19 ORACLE USA, INC., *et al.*,  
20 Plaintiffs,  
21 v.  
22 SAP AG, *et al.*,  
23 Defendants.  
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CASE NO. 07-CV-01658 PJH (EDL)

**PLAINTIFFS' RESPONSE IN  
SUPPORT OF DEFENDANTS'  
ADMINISTRATIVE MOTION TO  
PERMIT DEFENDANTS TO FILE  
UNDER SEAL PLAINTIFFS'  
INFORMATION DISCLOSED IN  
DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES TO  
FOURTH AMENDED COMPLAINT**

## **I. INTRODUCTION AND RELIEF REQUESTED**

Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. (collectively, “Defendants,”) filed an Administrative Motion (Docket No. 438) and accompanying Stipulation (Docket No. 439), Declaration (Docket No. 440) and Proposed Order (Docket No. 441) to seal portions of paragraph 13 from Defendants’ Answer and Affirmative Defenses to Oracle’s Fourth Amended Complaint (“Defendants’ Answer”). Pursuant to Local Rules 7-11 and 79-5, and this Court’s Standing Order on Confidential and Sealed Documents, Plaintiffs Oracle USA, Inc., Oracle International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc. (collectively, “Oracle”) file this Response and the accompanying Declaration of Dorian Daley in Support of Plaintiffs’ Response to Defendants’ Administrative Motion (“Daley Decl.”), in support of a narrowly tailored order authorizing the sealing of portions of Paragraph 13. Oracle is taking the additional step of filing this Response even though not expressly called for by the Court’s Standing Order for Sealed or Confidential Documents because the legal basis for sealing this material was not set forth in the original filing by Defendants.

The portion of Paragraph 13 at issue reveals the content of a confidential settlement discussion, initiated by Defendants. Daley Decl., ¶ 2. The parties agreed that Federal Rule of Evidence 408 would govern these communications. *See* Docket No. 439 (August 26, 2009 Stipulation to Permit Defendants to File Under Seal Plaintiffs’ Information Disclosed in Defendants’ Answer and Affirmative Defenses to Fourth Amended Complaint). The Court has permitted other materials in this case, which Defendants have contended Rule 408 also governed, to be filed under seal. *See, e.g.*, Docket No. 282 (February 18, 2009 Order Granting Plaintiffs’ Administrative Motion to File Draft Stipulation Under Seal). Because good cause exists and the Answer is not dispositive, Oracle requests that the Court grant the motion to seal this limited portion of Paragraph 13 of Defendants’ Answer.

## **II. LEGAL STANDARD**

Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to permit sealing of court documents. As opposed to sealing information at trial, which requires the “most compelling” of reasons, a showing of good cause will suffice for sealing records attached to non-

dispositive motions. *Navarro v. Eskanos & Adler*, Case No. C-06 02231 WHA(EDL), 2007 U.S. Dist. LEXIS 24864 at \*7 (March 22, 2007) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)); Court's Standing Order for Cases Involving Sealed or Confidential Documents ¶ 5 (citing in part, *Foltz v. State Farm Mu. Automobile Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003)). The same standard should apply to the disclosure of confidential information in non-dispositive pleadings not part of the Court's findings on the merits "to this point." *See Navarro*, 2007 U.S. Dist. LEXIS 24864 at \*31 (citing *Reilly v. Medianew Group, Inc.*, 2007 U.S. Dist. LEXIS 8139 at \*14, n.2) (N.D. Cal. Jan. 24, 2007). To show good cause, the party seeking protection from disclosure must demonstrate that it has taken steps to keep the information confidential, and that public disclosure of such information would prejudice the party or create a risk of significant competitive injury. *See Navarro*, U.S. Dist. LEXIS 24864 at \*5, \*8; *Phillips v. General Motors Corp.* 307 F.3d 1206, 1211 (9th Cir. 2006); *In re Adobe Sys., Inc. Sec. Litig.*, 141 F.R.D. 155, 158 (N.D. Cal. 1992) ("Good cause [for granting a protective order] may be that the protected information includes financial information and business strategy information which, if revealed to a competitor, would put a company at a competitive disadvantage.").

Settlement information meets the good cause standard. *See, e.g., Phillips*, 307 F.3d 1206, 1212 (9th Cir. 2006) (Federal Rule of Civil Procedure 26(c) provides broad "authority to grant protective orders for confidential settlement agreements" and citing cases with approval that did grant such protective orders).

### III. ARGUMENT

Disclosure of the portions of paragraph 13 of Defendants' Answer that Oracle requests be filed under seal would prejudice Oracle by revealing a snippet (one that Oracle contends is inaccurate) of a larger settlement dialogue. Disclosure of this information poses a risk of competitive harm to Oracle because it is an inaccurate, incomplete recital of the discussion and may lead customers or other interested parties to the incorrect belief that Oracle acted unreasonably in enforcing its intellectual property rights. Daley Decl., ¶ 3.

Further, Federal Rule of Evidence 408 protects evidence of compromise negotiations and any resulting agreements from admission if offered to prove liability for, invalidity of, or amount

1 of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent  
2 statement or contradiction. *See* Fed. R. Evid. 408. Disclosure of the substance of the parties'  
3 settlement discussion would undermine the incentive for parties to discuss settlement candidly  
4 without fear of disclosure in litigation. For this reason alone, good cause exists to file the portion  
5 of paragraph 13 at issue under seal. *See* Fed. R. Evid. 408 Advisory Notes, Notes of Committee  
6 on the Judiciary, S.R. No. 93-1277 (purpose of rule making evidence of settlement negotiations  
7 inadmissible is to encourage settlement). Oracle believes the same reasoning led Magistrate  
8 Laporte to order filed under seal the other materials that Defendants contended were governed by  
9 Rule 408 as confidential settlement communications, which include a version of a draft  
10 stipulation between the parties. *See* Docket No. 282 (February 18, 2009 Order Granting  
11 Plaintiffs' Administrative Motion to File Draft Stipulation Under Seal).

12 Oracle has maintained the information contained in Paragraph 13 of Defendants' Answer  
13 as confidential. Daley Decl., ¶ 3. Oracle also has narrowly tailored this request as required by  
14 Local Rule 79-5(a), by only requesting redaction or sealing of the specific, limited passage that  
15 contains the most sensitive and confidential information.

16 In sum, the information contained in Paragraph 13 of Defendants' Answer should be filed  
17 under seal under this Court's Standing Order and Federal Rule of Evidence 408 for the reasons  
18 described above, which is the same position that Oracle would take regarding public disclosure  
19 of settlement discussions before Judge Spero.

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

21 For the foregoing reasons, Oracle respectfully requests that the Court file under seal  
22 Paragraph 13 of Defendants' Answer.  
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1 DATED: August 31, 2009

BINGHAM McCUTCHEN LLP

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3 By: \_\_\_\_\_ /s/ Geoffrey M. Howard

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