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 18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 OAKLAND 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, 15<sup>th</sup> Floor

Judge: Hon. Elizabeth D. Laporte

1 **I. INTRODUCTION**

2 Plaintiffs filed an Administrative Motion to seal (D.I. 515): (1) certain portions of  
3 Plaintiffs' Motion to Compel Production of Damages Related Documents and Information at pp.  
4 6:28-7:1 and 12:5 – 12:16 ("Motion to Compel", D.I. 512), (2) certain portions of the Declaration  
5 of Amy Donnelly in Support of Plaintiffs' Motion to Compel Production of Damages Related  
6 Documents and Information ("Donnelly Declaration", D.I. 513) at ¶ 17, and (3) Exhibit B to the  
7 Donnelly Declaration, which Defendants designated as "Highly Confidential Information –  
8 Attorneys' Eyes Only" under the Stipulated Protective Order in this action. Additionally,  
9 Plaintiffs filed a Proposed Order Granting Plaintiffs' Administrative Motion to Permit Plaintiffs to  
10 File Under Seal Defendants' Information Supporting Plaintiffs' Motion to Compel Production of  
11 Damages-Related Documents and Information (D.I. 518).

12 Pursuant to Local Rule 79-5, Defendants file this Response, the accompanying declaration  
13 of Bernd Mott, and a proposed order in support of a narrowly tailored order authorizing the  
14 sealing of Exhibit B to the Donnelly Declaration on the grounds that there is good cause to protect  
15 the confidentiality of information contained in Plaintiffs' non-dispositive discovery motion. The  
16 sealing order Defendants seek is not based simply on the blanket Protective Order in this action,  
17 but rather rests on proof<sup>1</sup> that particularized injury to Defendants will result if the sensitive  
18 information contained in Exhibit B is publicly released.

19 **II. STANDARD**

20 Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to permit  
21 sealing of court documents for, *inter alia*, the protection of "a trade secret or other confidential  
22 research, development, or commercial information." Fed. R. Civ. P. 26(c). Based on this  
23 authority, the Ninth Circuit has "carved out an exception to the presumption of access to judicial  
24 records for a sealed *discovery* document [attached] to a *non-dispositive* motion." *Navarro v.*  
25 *Eskanos & Adler*, No. C-06 02231 WHA (EDL), 2007 U.S. Dist. LEXIS 24864, at \*6 (N.D. Cal.  
26 March 22, 2007) (emphasis in original) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th

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 Mott Declaration.

1 Cir. 2006)). In such cases, a “particularized showing of good cause” is sufficient to justify  
2 protection under Rule 26(c). *See Navarro*, at \*7. To make such a showing, the party seeking  
3 protection from disclosure under the rule must demonstrate that harm or prejudice would result  
4 from disclosure of the trade secret or other information contained in each document the party  
5 seeks to have sealed. *See, e.g., Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th  
6 Cir. 2006).

### 7 **III. ARGUMENT**

#### 8 Good Cause Supports Filing Exhibit B Under Seal

9 Through the declaration of Bernd Mott, an employee of SAP AG, that accompanies this  
10 Response, Defendants establish good cause to permit filing Exhibit B under seal. As a threshold  
11 matter, Defendants provide testimony that Mr. Mott, who is familiar with the information  
12 contained in Exhibit B, considers that information to be confidential and non-public. *See*  
13 Declaration of Bernd Mott in Support of Defendants’ Response to Plaintiffs’ Administrative  
14 Motion to Seal Documents (“Mott Declaration”), ¶ 1. Moreover, the Mott Declaration  
15 demonstrates good cause to protect and seal Exhibit B because revelation of its contents would  
16 likely cause Defendants to suffer a competitive injury. It contains information about how “SAP  
17 assesses (or does not assess) potential revenue streams from existing customers. Public release of  
18 this information could adversely effect SAP’s future bargaining position with those customers.”  
19 *Id.* The Mott Declaration establishes that Defendants themselves consider and treat the  
20 information as highly confidential.

21 Defendants have continued to protect the information contained in Exhibit B from  
22 improper public disclosure since the initiation of this litigation through a Stipulated Protective  
23 Order (D.I. 32) to prevent their private commercial information from being improperly disclosed.  
24 Under the terms of that Order, Defendants could designate documents, deposition transcripts, and  
25 discovery responses containing private information as “Confidential” or “Highly Confidential”  
26 prior to producing such documents in the course of discovery. Exhibit B contains Defendants’  
27 response to an interrogatory and that response was designated “Highly Confidential.”  
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**IV. CONCLUSION**

Defendants respectfully request that this Court order to be filed under seal Exhibit B to the Donnelly Declaration, which Defendants designated as “Highly Confidential Information – Attorneys’ Eyes Only” under the Stipulated Protective Order in this action.

Dated: October 26, 2009

Respectfully submitted,  
JONES DAY

By: /s/ Jason McDonell  
Jason McDonell

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