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SAP AG, SAP AMERICA, INC., and
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

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: 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

1 **I. INTRODUCTION**

2 Plaintiffs filed an Administrative Motion to seal certain portions of Exhibit A to the
3 Declaration of Holly A. House in Support of Plaintiffs’ Motion No. 1: To Exclude Testimony of
4 Defendants’ Expert Stephen Clarke (“Exhibit A”), which Defendants designated as “Highly
5 Confidential Information – Attorneys’ Eyes Only” under the Stipulated Protective Order in this
6 action. Additionally, Plaintiffs filed a Proposed Order Granting Plaintiffs’ Administrative Motion
7 to File Under Seal Information Supporting Plaintiffs’ *Daubert* Motions, Oppositions to
8 Defendants’ Motions *in Limine* and 17 U.S.C. § 410(c) Motion (D.I. 784-4).

9 Pursuant to Local Rule 79-5, Defendants file this Response, the accompanying declaration
10 of Michael Junge, and a proposed order in support of a narrowly tailored order authorizing the
11 sealing of portions of Exhibit A on the grounds that there is good cause to protect the
12 confidentiality of information contained in Plaintiffs’ non-dispositive motions. The sealing order
13 Defendants seek is not simply based on the blanket Protective Order in this action, but rather rests
14 on proof¹ that particularized injury to Defendants will result if the sensitive information contained
15 in portions of Exhibit A is publicly released.

16 **II. STANDARD**

17 Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to permit
18 sealing of court documents for, *inter alia*, the protection of “a trade secret or other confidential
19 research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). Based on this
20 authority, the Ninth Circuit has “carved out an exception to the presumption of access to judicial
21 records for a sealed *discovery* document [attached] to a *non-dispositive* motion.” *Navarro v.*
22 *Eskanos & Adler*, No. C-06-02231 WHA (EDL), 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal.
23 Mar. 22, 2007) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)). In such
24 cases, a “particularized showing of good cause” is sufficient to justify protection under Rule
25 26(c). *See id.* at *7. To make such a showing, the party seeking protection from disclosure under
26 the rule must demonstrate that harm or prejudice would result from disclosure of the trade secret

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 Junge Declaration.

1 or other information contained in each document the party seeks to have sealed. *See Phillips v.*
2 *General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2006).

3 **III. ARGUMENT**

4 **A. Good Cause Supports Filing Portions of the House Declaration under Seal.**

5 Through the declaration of Michael Junge, an employee of SAP AG, that accompanies
6 this Response, Defendants establish good cause to permit filing portions of Exhibit A under seal.
7 As a threshold matter, Defendants provide testimony that Mr. Junge, who is familiar with the
8 information contained at pages 51, 126, and 244-247 of Exhibit A, considers that information to
9 be confidential and non-public. *See* Declaration of Michael Junge in Support of Defendants’
10 Response to Plaintiffs’ Administrative Motion to Seal Documents (“Junge Declaration”) ¶¶ 1, 4.
11 Moreover, the Junge Declaration demonstrates good cause to protect and seal pages 51, 126, and
12 244-247 of Exhibit A because revelation of its contents would likely cause Defendants to suffer a
13 competitive injury. Pages 51 and 247 contain information about how “SAP assesses (or does not
14 assess) potential revenue streams from existing customers. Public release of this information
15 could adversely affect SAP’s future bargaining position with these customers.” *Id.* ¶ 2.
16 Similarly, page 126 describes “confidential information of a third party disclosed to Defendants
17 pursuant to the terms of a non-disclosure agreement. Disclosure of this information would place
18 Defendants at risk of violating the terms of this non-disclosure agreement.” *Id.* ¶ 3. Finally,
19 pages 244-246 contain “highly sensitive, non-public financial information regarding SAP’s
20 revenues and fixed and variable costs, between 2005 and 2008, as they relate to the specific
21 revenue accounts of Subscriptions, Training, and Other Services.” *Id.* ¶ 4. “Public release of this
22 information would disclose SAP’s strategies regarding spending on research and development, as
23 well as on support, and could adversely affect SAP’s ability to compete with other software and
24 support providers.” *Id.* The Junge Declaration establishes that Defendants themselves consider
25 and treat the information as highly confidential.

26 Defendants have continued to protect the information contained in Exhibit A from
27 improper public disclosure since the initiation of this litigation through a Stipulated Protective
28 Order (D.I. 32) to prevent their private commercial information from being improperly disclosed.

1 *See id.* ¶ 5. Under the terms of that Order, Defendants could designate documents, deposition
2 transcripts, and discovery responses containing private information as “Confidential” or “Highly
3 Confidential” prior to producing such documents in the course of discovery. Exhibit A contains
4 information from an expert report that was designated “Highly Confidential.”

5 **IV. CONCLUSION**

6 Defendants respectfully request that this Court order to be filed under seal portions at
7 pages 51, 126, and 244-247 of Exhibit A, which Defendants designated as “Highly Confidential
8 Information – Attorneys’ Eyes Only” under the Stipulated Protective Order in this action.

9
10 Dated: August 26, 2010

Respectfully submitted,

11 JONES DAY

12
13 By: /s/ Tharan Gregory Lanier

14 Tharan Gregory Lanier

15 Counsel for Defendants
16 SAP AG, SAP AMERICA, INC., and
17 TOMORROWNOW, INC.
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