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5 *Also filed on behalf of 10 Plaintiff States (see signature block)*

6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO DIVISION

9
10 UNITED STATES OF AMERICA, et al.,

11 Plaintiffs,

12 v.

13
14 ORACLE CORPORATION

15 Defendant.

) CASE NO. C 04-0807 VRW

) Filed May 19, 2004

) Hearing Date: May 21, 2004 at 9:00 AM

) **PLAINTIFFS' RESPONSE TO THIRD
PARTIES' MOTION SUPPLEMENTING
EXISTING PROTECTIVE ORDER**

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17 **RELIEF SOUGHT**

18 Plaintiffs seek the Court's entry of an Order, pursuant to the Court's inherent supervisory
19 powers and following the Court's suggestion at the May 15, 2004 conference, providing procedures
20 for Third Parties to identify legitimate trade secrets and confidential business information to be
21 sealed from public disclosure at trial, and in any motion, pleading, exhibit, or other paper filed with
22 the Court. Plaintiffs oppose the motion filed by Siebel Systems, Inc.; Cap Gemini, FESCO, and
23 Lawson Software (collectively "Filing Third Parties") as inconsistent with Ninth Circuit law.
24 However, Plaintiffs support the appointment of Judge Charles A. Legge as a special master, and
25 proposes procedures consistent with Ninth Circuit law for consideration by the Court.

26 **ARGUMENT**

1 Plaintiffs respond to the Filing Third Parties' Motion for Supplementing Existing Protective
2 Order filed on May 10, 2004 to ensure that any adopted pre-trial and trial procedures comply with
3 Ninth Circuit law and do not further disrupt either party's trial preparation. Plaintiffs recognize that
4 many third parties are concerned about the treatment of their confidential business information in
5 light of the Court's statements during the April 16, 2004 pre-trial conference. Several third parties
6 have slowed down the production of documents or ceased production of documents altogether since
7 that time. The Court can ensure that the pretrial process will proceed smoothly by establishing
8 procedures now. Plaintiffs submit for consideration recommendations for trial procedures "to
9 accommodate the legitimate confidentiality concerns of third parties." (Tr. at 8 (5/16/04))¹

10 Plaintiffs recognize the strong presumption favoring the openness and transparency of the
11 judicial process. See, Flotz v. State Farm Mutual Auto. Ins. Co., 331 F.3d 1122, 1134-1135 (9th
12 Cir. 2003) (quoting Nixon v. Warner Communications, 435 U.S. 589, 598 (1978)). However,
13 legitimate and identifiable confidential business information is routinely protected from public
14 disclosure in civil trials.² Furthermore, the sealing or redacting of confidential information is the
15 norm in civil antitrust trials.³ The Plaintiffs are unaware of any antitrust merger trial—or its

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17 ¹Although part of the United States, the interests of the Department of Defense and the
18 Department of Justice's Justice Management Division are the same as those of third party
19 customers of HRM and FMS software, and their highly confidential information should be afforded
the same protection.

20 ²See, e.g., Flotz, 331 F.3d at 1137-38 (redacting medical and personnel information;
21 directing district court to "specify sufficiently compelling reasons for maintaining a seal" over
22 defendant's other proffered confidential financial information); In re Petroleum Prods. Antitrust
23 Litig., 101 F.R.D. at 39 & 44 (listing refinery capacities, crude oil values, and past marketing
24 plans; describing procedures for unsealing or continuing seal on certain documents); Pepsico, 46
25 F.3d at 31 (legitimate trade secrets); Home Box Office v. Am. Int'l Cablevision Inds., Inc., 26 F.
26 Supp. 2d 606, 608 & 614 (S.D.N.Y. 1998) (sealing license fee documents, certain operations
27 information, programming strategies, and customer surveys).

28 ³See, e.g., Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1346 (7th Cir.
1986) (Easterbrook, J.) (sealing price information); Mark v. Valley Ins. Co., 275 F. Supp. 2d 1307
(D. Or. 2003) ("The redacted form of the Opinion and Order omits factual material of a

(continued...)

1 accompanying dispositive motions and orders—where all trade secrets or confidential business
2 information was unsealed or presented unredacted. The unsealing and public dissemination of such
3 information would hinder the public interest by hindering the Government’s and the States’ ability
4 to collect material evidence. Such a precedent would impede all future investigations, not just
5 antitrust investigations. Cf. Center for Auto Safety v. Nat’l Highway Traffic Safety Admin., 244
6 F.3d 144, 151-52 (D.C. Cir. 2001); Dow Jones Co., Inc. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal.
7 2003) (same).

8 There are several other reasons supporting the protection of confidential business
9 information in the present case. The disclosure of confidential business information during antitrust
10 trials could frustrate the antitrust laws’ goal of preserving competition. Some of the confidential
11 business information in this litigation may include detailed price, cost and quality information, the
12 very information that antitrust law forbids competitors to exchange in highly concentrated markets.
13 See, e.g., In re Baby Food Antitrust Litig., 166 F.3d 118 (3d Cir. 1999); Ball Mem’l Hosp., Inc.,
14 784 F.2d at 1346 (citing General Leaseways, Inc. v. Nat’l Truck Leasing Ass’n, 744 F.2d 588, 597
15 (7th Cir. 1984)); Areeda, Antitrust Law ¶ 2111.d.1 (2004). Second, by their very position as non-

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18 ³(...continued)
19 proprietary and confidential nature.”); United States v. UPM-Kymmene Oyj, 2003-2 Trade Cases
20 P 74,101 (N.D. Ill. July 25, 2003) (redacted memorandum and order issuing preliminary
21 injunction); Hall v. United Airlines, Inc., 296 F. Supp. 2d 652, 678-80 (E.D.N.C. 2003) (creating
22 procedure to seal competitively sensitive documents); United States v. Sungard Data Systems, Inc.,
23 172 F. Supp. 2d 172 (D.D.C. 2001) (redacted version); FTC v. Swedish Match, 131 F. Supp.2d
24 151 (D.D.C. 2000) (same); United States v. Franklin Elec. Co., Inc., 130 F. Supp. 2d 1025 (W.D.
25 Wis. 2000) (same); FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997) (same); American
26 Rockwool, Inc. v. Owens-Corning Fiberglass Corp., 640 F. Supp. 1411, (E.D.N.C. 1986) (same);
27 see also, e.g., United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942 (7th Cir. 2003) (en
28 banc) (accepting redacted appellate briefs); United States v. AMR Corp., 335 F.3d 1109, 1121
n.16 (10th Cir. 2003) (accepting and sealing redacted appellate briefs) aff’g in part United States
v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001) (accepting redacted summary judgment
briefs); Allied Signal, Inc. v. B.F. Goodrich, Co., 183 F.3d 568 (7th Cir. 1999) (sealing appellate
preliminary injunction briefs’ attachments; remanding with instructions for district court to
determine extent of seal); Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 108 F. Supp. 2d
549 (W.D. Va. 2000) (accepting redacted summary judgment briefs).

1 litigants, third parties face a greater risk of injury as the owner of confidential information because
2 they were “never in a position to accept or reject the risk of disclosure of confidential information.”
3 Dentsply Int’l, Inc., 187 F.R.D. at 180 & n.7 (protecting confidential third party information from
4 disclosure to defendant’s in-house counsel when defendant was third parties’ competitor). Lastly,
5 third parties reasonably relied on the Protective Orders in the course of complying with discovery
6 in this litigation. Courts are more willing to seal confidential financial information if a party
7 reasonably relied on a protective order. See Beckman Ins., Inc. v. Int’l Ins. Co., 966 F.2d 470, 475
8 (9th Cir. 1992). The third parties reasonably relied on the Protective Order entered in this action
9 because: (1) the Protective Order is not a blanket protective order; (2) the Protective Order
10 includes repeated strong language protecting third party confidentiality interests; (3) most third
11 parties designated only documents as highly confidential when they believed in good faith that such
12 documents met the Fed. R. Civ. P. 26(c)(7) requirements; and (4) the Orders provide that the Court
13 will “issue further orders as necessary to protect any protected third party’s or party’s protected
14 information from improper disclosure.” (Revised PO ¶ 24; Original PO ¶ 23.) The concern
15 expressed by third parties since the Court’s April 16, 2004 comments further demonstrate the
16 degree to which third parties relied on the protective orders to shield thier valuable confidences
17 from unwarranted disclosure.

18 It should be noted that most third parties in this action have made an honest and forthright
19 attempt to properly designate documents.⁴ They have not simply labeled every document as
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21 ⁴The entities that have designated only certain documents or portions of documents as
22 Highly Confidential include: (1) BankOne; (2) ADP; (3) Gartner, Inc.; (4) Cap Gemini Ernst &
23 Young; (5) Hewitt Associations LLC; (6) IFS North America, Inc.; (7) BearingPoint, Inc.; (8)
24 American Management Systems, Inc.; (9) CH2M Hill Companies, Ltd.; (10) FESCO; (11) Geac
25 Computer Corp. Ltd.; (12) Greyhound Lines, Inc.; (13) IBM; (14) Intenia Americas, Inc.; (15)
26 Keane, Inc.; (16) KerrMcGee Corp.; (17) Lawson Software, Inc.; (18) Microsoft Corp.; (19)
27 Morgan Stanley & Co.; (20) National Instruments; (21) State of Utah; (22) Nextel Communications,
28 Inc.; (23) QAD; (24) SAP America, Inc.; (25) Systems & Computer Technology Corp.; (26)
Smithsonian Institution; (27) Smurfit-Stone Container Corp.; (28) SunGard Bi-Tech, Inc.; (29)
Sybase, Inc.; (30) United States Department of Defense; (31) PeopleSoft, Inc.; and (32) the United
(continued...)

1 confidential, but have reviewed their documents to make correct designations. To date, only
2 Oracle, and a small handful of the third parties have simply labeled all documents as highly
3 confidential.⁵

4 Plaintiffs do not oppose the sealing of legitimately confidential business information at trial
5 or the Filing Third Parties' goals. However, Plaintiffs cannot support three features in the Filing
6 Third Parties' proposed order:

7 (1) The Filing Third Parties' proposed pre-trial deadlines for the parties to notify third
8 parties if their documents or deposition designations appear on an exhibit list, or will otherwise be
9 proffered at trial, is not administratively achievable.⁶ The May 14, 2004 written notice deadline
10 for documents that appear on exhibit lists is simply too early because it is twelve days prior to the
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16 ⁴(...continued)

17 States Department of Justice (Justice Management Division). In addition, Exult, Inc. provided four
18 documents labeled as Highly Confidential, but informed the parties that redacted versions are
19 publicly available from and on file with the Securities and Exchange Commission.

20 ⁵The third parties that designated all documents as Highly Confidential are: (1) Accenture;
21 (2) Qualcomm, Inc.; (3) Nieman Marcus Group, Inc.; (4) Verizon; (5) Target Corp.; (6) Deloitte
22 Consulting, LLP; (7) Daimler Chrysler; and (8) SSA Global Technologies, Inc.

23 ⁶ The Filing Third Parties' request, ¶ 1.b, for the parties to notify them if their employees
24 will be named on a parties witness list is not needed because the witness lists will be made
25 publicly available and third party witnesses will receive subpoenas. Further, we have no
26 objection to notifying third parties whose deposition testimony is designated or counter-designated
27 by May 28, 2004 as long as the parties need not provide a line-by-line designation by May 28
28 because the administrative burden would be too great. Plaintiffs read the Filing Third Parties
Proposed Supplemental Protective Order ¶ 1.c. to require written notice only that the deposition
testimony has been designated, but not written notice of the actual line designations. Plaintiffs
believe that it would administratively possible to provide line designations to the third parties
within two days after notifying Oracle of the line designations.

1 May 26 deadline set in the parties' recent stipulated agreement.⁷ (Third Parties' Proposed
2 Supplemental Protective Order ¶ 1.a (5/10/04).)

3 (2) Plaintiffs cannot support the procedure allowing third parties to designate, after
4 consultation with the parties, documents and deposition testimony that should be sealed at trial. (Id.
5 ¶ 2.)⁸ Under Ninth Circuit case law, it is the Court—and not the parties—that must articulate
6 findings into the record as to why particular information should be sealed from public
7 dissemination.

8 (3) Plaintiffs likewise cannot support presumptively sealing documents the third parties
9 self-certify as fitting within one of the three categories listed in paragraph 4.a. (Id. ¶¶ 4.a.i-iii.)
10 Again, Ninth Circuit case law requires Court review, which paragraph four would avoid.

11 Plaintiffs' submit for consideration alternative procedures that are commonly used in other
12 antitrust matters for handling confidential information at trial. These procedures comply with Ninth
13 Circuit case law and establish a process by which the Court can accommodate legitimate third party
14 concerns with: (1) minimal disruption to the proceedings; and (2) minimal effects on the public's
15 access to evidence presented.

16 The parties should be responsible for identifying any confidential information likely to be
17 brought out during testimony.

18 It is advisable that any presentation of a third party's confidential evidence take place in
19 camera when the court determines whether to continue its protection. See Flotz, 331 F.3d at 1136
20 n.6 (citing Mueller & Kirkpatrick, Federal Evidence §§ 216, 222 (1994 & Supp. 2001)).

21 Any document determined to contain sealable information that is admissible into evidence
22 should be entered into the Court's record in a redacted format when possible. See Flotz, 331 F.3d

23
24 ⁷The agreement is pending the Court's approval. The May 26th exhibit list exchange
25 deadline was agreed to in writing by the parties on May 9, 2004 and, at that time, Oracle's counsel
26 agreed to draft and submit, by May 10, a motion to the Court seeking the Court's approval of the
27 modification. It was received by Plaintiffs on May 14, and finalized by the parties for filing.

28 ⁸The Filing Third Parties' Proposed Supplemental Protective Order at ¶ 2.b inadvertently
references a non-existent paragraph 2(c). It appears that the correct reference is to ¶ 4.a.

1 at 1137 (unsealing redacted versions of documents when minimal effort required to redact
2 confidential information).

3 Witness testimony should begin in public and if possible, the testimony should be presented
4 in such a manner as to avoid public disclosure. For example, when a sealed or redacted document
5 is introduced during the public portion of the testimony, then the document should be shown to the
6 witness, the Court, and opposing counsel, while the parties' questions and the witness's answers
7 should refer to the document without reciting specific details or numbers. If a witness is asked to
8 disclose business confidential information and cannot be presented in the foregoing manner, then the
9 courtroom should be cleared for a brief session towards the end of a particular witness's testimony.
10 If the witness' testimony does not reveal or discuss confidential information, then the transcript
11 should be released to the public. See Phoenix Newspapers, Inc. v. United States Dist. Court, 156
12 F.3d 940, 947-48 (9th Cir. 1998) (“[T]ranscripts of public trial proceedings must be released when
13 the factors militating in favor of closure no longer exist.”) The party examining a witness should
14 bear the responsibility to present the information in a manner that minimizes disruption to the
15 Court's process.

16 Any motions, pleadings, exhibits, memoranda, Court orders, and Court opinions that contain
17 confidential information could be filed under seal with a redacted version filed for public
18 disclosure. As mentioned above, redacted opinions are routine practice in antitrust cases.⁹ The
19 Department of Justice regularly publishes redacted Court Orders and Memoranda on its Internet
20

21 ⁹ As Judge Easterbrook advised:

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23 Still, the traditional way for judges to accommodate the legitimate competing interests
24 is to keep the secrets themselves under seal, referring to them only indirectly in the
25 opinion. That is the best policy in this case too. The district judge should prepare an
26 opinion suitable for general circulation, rather than preparing an opinion on the
27 assumption that the whole document will remain secret and then releasing copies with
28 sentences and paragraphs blotted out, as if Glavlit (the Soviet Union's censorship
bureau) had got its hands on the document.

Pepsico, 46 F.3d at 31.

1 website at <http://www.usdoj/atr/cases.html>, along with the Department's own redacted pleadings,
2 motions, and memoranda.

3 These procedures will allow the Court to receive all relevant information while minimizing
4 the amount of information withheld from public view. At the same time, the public's need for
5 information can be fulfilled by reading redacted briefs and, if necessary, the Court's redacted
6 decision. Decisions and memoranda that explain the general terms of a contract, the contours of a
7 document, or describe financial terms in generalities will allow the public evaluate the Court's
8 reasoning without harming third parties. Legitimate confidential business information can be
9 withheld in such a way that the public can still adequately monitor these proceedings.

10 CONCLUSION

11 Third parties in this action may have a sufficient compelling reason for sealing certain
12 confidential business information. Sealing or redacting limited documents and testimony will not
13 impede the public's ability to monitor the judicial system because the public record, including
14 redacted motions, pleadings, exhibits, and Court Orders will provide sufficient information.
15 Publicly disclosing certain third-party trade secrets and confidential business information could
16 cause specific harm or prejudice. Balancing competing interests and weighing additional relevant
17 factors in this case clearly require sealing and redacting sensitive information that could further
18 impede competition in this highly concentrated market.

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20 Dated: May 19, 2004

Respectfully submitted,

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22 _____
/s/

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