

1 BINGHAM MCCUTCHEN LLP
 DONN P. PICKETT (SBN 72257)
 2 GEOFFREY M. HOWARD (SBN 157468)
 BREE HANN (SBN 215695)
 3 Three Embarcadero Center
 San Francisco, CA 94111-4067
 4 Telephone: 415.393.2000
 Facsimile: 415.393.2286
 5 donn.pickett@bingham.com
 geoff.howard@bingham.com
 6 bree.hann@bingham.com

7 BOIES, SCHILLER & FLEXNER LLP
 DAVID BOIES (Admitted Pro Hac Vice)
 8 333 Main Street
 Armonk, NY 10504
 Telephone: (914) 749-8200
 9 Facsimile: (914) 749-8300
 dboies@bsflp.com
 10 STEVEN C. HOLTZMAN (SBN 144177)
 FRED NORTON (SBN 224725)
 11 1999 Harrison St., Suite 900
 Oakland, CA 94612
 Telephone: (510) 874-1000
 12 Facsimile: (510) 874-1460
 13 sholtzman@bsflp.com
 fnorton@bsflp.com

14 DORIAN DALEY (SBN 129049)
 15 JENNIFER GLOSS (SBN 154227)
 500 Oracle Parkway, M/S 5op7
 16 Redwood City, CA 94070
 Telephone: 650.506.4846
 17 Facsimile: 650.506.7144
 dorian.daley@oracle.com
 18 jennifer.gloss@oracle.com

19 Attorneys for Plaintiff Oracle International Corp.

20 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 21 OAKLAND DIVISION

22 ORACLE INTERNATIONAL
 CORPORATION

23 Plaintiff,

24 v.

25 SAP AG, *et al.*,

26 Defendants.

No. 07-CV-01658 PJH (EDL)

**PLAINTIFF'S RESPONSE IN SUPPORT
 OF DEFENDANTS' ADMINISTRATIVE
 MOTION TO PERMIT DEFENDANTS TO
 FILE UNDER SEAL ORACLE'S
 INFORMATION IN SUPPORT OF THE
 PARTIES' JOINT STATEMENT
 REGARDING EXHIBIT OBJECTIONS**

27

28

Case No. 07-CV-01658 PJH (EDL)

PLAINTIFF'S RESPONSE IN SUPPORT OF DEFENDANTS' ADMINISTRATIVE MOTION TO PERMIT DEFENDANTS TO FILE
 UNDER SEAL ORACLE'S INFORMATION IN SUPPORT OF THE PARTIES' JOINT STATEMENT REGARDING EXHIBIT
 OBJECTIONS

1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. (collectively,
3 “Defendants”) filed an Administrative Motion to seal (Dkt. 1184) and accompanying Proposed
4 Order (Dkt. 1184-1), Declaration (Dkt. 1184-2), and Stipulation (Dkt. 1184-3) on June 6, 2012.
5 Defendants’ filings moved to seal portions of the Parties’ Joint Statement Regarding Exhibit
6 Objections (Dkt. 1182) (“Joint Statement”). Defendants lodged unredacted copies of the Joint
7 Statement with the Court on June 6, 2012.

8 Under Civil Local Rules 7-11 and 79-5, and this Court’s Standing Order for Cases
9 Involving Sealed or Confidential Documents, Plaintiff Oracle International Corporation
10 (“Oracle”) files this Response and the accompanying Declaration of Jennifer Gloss in Support
11 (“Gloss Decl.”), which establish that compelling reasons exist to support a narrowly tailored
12 order authorizing the sealing of the materials described below.

13 **II. LEGAL STANDARD**

14 As a general matter, “courts have recognized a ‘general right to inspect and copy public
15 records and documents, including judicial records and documents.’” *Kamakana v. City &*
16 *County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (internal citation omitted). However,
17 the Ninth Circuit has recognized that “access to judicial records is not absolute.” *Id.* A party
18 seeking to seal a document or information filed in connection with a dispositive motion may
19 overcome the presumption of public access by meeting the “compelling reasons” standard
20 articulated by the Ninth Circuit. *Id.*; *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122,
21 1135 (9th Cir. 2003); *Medtronic Vascular Inc. v. Advanced Cardiovascular Sys., Inc.*, 614 F.
22 Supp. 2d 1006, 1035-36 (N.D. Cal. 2009) (Hamilton. J.) (granting in part motion to file under
23 seal where requesting party had shown a “compelling need” to file under seal), amended on other
24 grounds, No. C 06-1066 PJH, 2009 WL 1764749 (N.D. Cal. June 22, 2009). Specifically, the
25 requesting party must “articulate[] compelling reasons supported by specific factual
26 findings . . . that outweigh the general history of access and the public policies favoring
27 disclosure.” *Kamakana*, 447 F.3d at 1178-79 (internal citations omitted). Compelling reasons
28

1 sufficient to outweigh the public’s interest in disclosure and to justify sealing court records exist
2 when such “‘court files might have become a vehicle for improper purposes,’ such as the use of
3 records to gratify private spite, promote public scandal, circulate libelous statements, or release
4 trade secrets.” *Id.* at 1179.

5 **III. ARGUMENT**

6 **A. Compelling Reasons Support Filing Portions of the Parties’ Joint** 7 **Statement Under Seal**

8 The Joint Statement the Parties filed with the Court contains the redactions at the
9 following page and line numbers: 9:14-17; 10:6; 12:6-10; 13:6-10; 14:21; 17:10-12; 17:13-15;
10 17:23-24; 18:6-9; 19:3-5; 21:11-14; 22:9-16; 25:6-8; 27:9-14; 31:26-27; 31:28-32:3; 32:18-27;
11 34:9-14; 34:25; 35:17; 35:21-27; 36:6-7; 36:28-37:4; 37:17-18; 37:22-23; 37:24-25; 38:6-9;
12 39:18-23; 39:25-27; 39:28-40:2; and 40:4-6. Upon reviewing the filed version of the Joint
13 Statement, Oracle does not wish to seal the information redacted at the following page and line
14 numbers: 10:6; 17:13-15; 17:23-24; 31:26-27; 31:28-32:3; 37:17-18; 37:24-25; and 39:25-27.
15 Compelling reasons support filing under seal the information in the remaining redactions in the
16 Parties’ Joint Statement, which information consists of excerpts and information from a
17 document Bates-numbered ORCL00033223 and Defendants’ proposed trial exhibits A-0059, A-
18 0367, A-4089, A-5002-1, A-5042, A-5058, A-5193, A-5663, A-5995, A-5997, A-6042-1, A-
19 6086, and A-6329-1.. Gloss Decl., ¶ 2.

20 Exhibit A-0059 is a 228-page print-out of a January 25, 2008 Oracle document
21 that has been commonly referred to as an “At-Risk report.” *Id.* ¶ 3. Information from Exhibit A-
22 0059 has previously been ordered filed under seal on three separate occasions in this case. *Id.*;
23 Dkt. 997, 1002, 1152, 1160, 1163, 1170. The remaining documents are Oracle documents
24 produced in this case and designated “Confidential Information” or “Highly Confidential
25 Information – Attorneys’ Eyes Only.” Gloss Decl., ¶ 4. They contain information from Oracle
26 and third-parties that is similar or identical to the information contained in the At-Risk reports,
27 because much of the information contained in these documents served as the basis for the At-
28

1 Risk reports. *Id.* Oracle compiled and maintained At-Risk reports from May 2005 to January
2 2008. *Id.* ¶ 5. These reports contained information about customers who told Oracle they were
3 considering dropping Oracle support in favor of support from a third party, such as
4 TomorrowNow. *Id.* The reports were in the form of a spreadsheet that was updated and
5 modified over time and was distributed internally at Oracle. *Id.*

6 The redacted excerpts and information in the Joint Statement constitute
7 information that is non-public, commercially sensitive, private and confidential to Oracle and/or
8 non-parties. *Id.* ¶ 6. The public disclosure of this information could result in improper use of the
9 material for scandalous or libelous purposes or infringement upon trade secrets, and would create
10 a significant risk of competitive injury and particularized harm and prejudice to Oracle or to non-
11 parties who are current or former customers of Oracle and/or SAP. *Id.* ¶ 7. Specifically, some of
12 the excerpts and information contain information about Oracle’s response to customers that had
13 indicated they were considering dropping Oracle support in favor of support by a third party. *Id.*
14 A competitor, potential customer, or customer of Oracle could use this information to tailor its
15 competitive negotiation and/or sales strategies, which would result in harm to Oracle. *Id.*
16 Moreover, the majority of the excerpts and information contain details regarding the computer
17 systems purportedly central to the operations of certain non-parties. *Id.* ¶ 8. The disclosure of
18 this information to the competitors of such non-parties could result in the disclosure of and
19 improper use of trade secrets for competitive purposes, and create a risk of significant
20 competitive injury and particularized harm and prejudice to non-parties. *Id.*

21 **B. Plaintiff Has Protected the Materials from Public Disclosure**

22 Oracle has protected the excerpts and information described above from public disclosure
23 through the Stipulated Protective Order in this case by designating their source documents as
24 “Confidential Information” and “Highly Confidential Information – Attorneys’ Eyes Only.” *Id.*,
25 ¶ 4. Further, Oracle has requested that the court file excerpts and information from its At-Risk
26 reports under seal when excerpts or information have been used in documents filed with the
27 Court, and the Court has granted those requests. *See* Dkt. 997, 1002, 1152, 1160, 1163, 1170.
28 The information that Oracle now requests the Court file under seal is also from Oracle’s At-Risk

1 reports or similar, related documents.

2 **C. Plaintiff’s Request to Seal is Narrowly Tailored**

3 Although the Joint Statement contains other information designated
4 “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” by Oracle, Oracle has limited
5 its request to the most commercially sensitive and confidential Oracle and non-party information.
6 Thus, Oracle’s request to seal is narrowly tailored. Gloss Decl., ¶ 9.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Oracle respectfully requests that the Court file under seal
9 portions of the Parties’ Joint Statement.

10 DATED: June 12, 2012

BINGHAM McCUTCHEEN LLP

13 By: /s/ Geoffrey M. Howard
14 Geoffrey M. Howard
15 Attorneys for Plaintiff
16 Oracle International Corporation
17
18
19
20
21
22
23
24
25
26
27
28