

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 MATERIALS  
 OFFERED BY DEFENDANTS 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. 1204) and accompanying Proposed  
4 Order (Dkt. 1204-1), Declaration (Dkt. 1204-2), and Stipulation (Dkt. 1204-3) on August 2,  
5 2012. Defendants’ filings moved to seal portions of Defendants’ exhibits in support of the  
6 Parties’ Joint Statement Regarding Exhibit Objections (Dkt. 1202) (“Supporting Exhibits”).  
7 Defendants lodged unredacted copies of the Supporting Exhibits 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 publicly filed version of Defendants’ Supporting Exhibits redacted excerpts of  
9 Defendants’ proposed trial exhibit A-0059 (“Exhibit A-0059”). Compelling reasons support  
10 filing under seal the excerpts from Exhibit A-0059.

11 Exhibit A-0059 is a 228-page print-out of a January 25, 2008 Oracle document  
12 that has been commonly referred to as an “At-Risk report.” Gloss Decl. ¶ 6. Information from  
13 Exhibit A-0059 has previously been ordered filed under seal on four separate occasions in this  
14 case. *Id.*; Dkt. 997, 1002, 1152, 1160, 1163, 1170, 1191, and 1195. Oracle compiled and  
15 maintained At-Risk reports from May 2005 to January 2008. *Id.* ¶ 8. These reports contained  
16 information about customers who told Oracle they were considering dropping Oracle support in  
17 favor of support from a third party, such as TomorrowNow. *Id.* The reports were in the form of  
18 a spreadsheet that was updated and modified over time and was distributed internally at Oracle.  
19 *Id.*

20 The redacted excerpts of Exhibit A-0059 constitute information that is non-public,  
21 commercially sensitive, private and confidential to Oracle and/or non-parties. *Id.* ¶ 4. The  
22 public disclosure of this information could result in improper use of the material for scandalous  
23 or libelous purposes or infringement upon trade secrets, and would create a significant risk of  
24 competitive injury and particularized harm and prejudice to Oracle or to non-parties who are  
25 current or former customers of Oracle and/or SAP. *Id.* ¶ 5. Specifically, the excerpts contain  
26 information about Oracle’s response to a customer that had indicated it was considering dropping  
27 Oracle support in favor of support by a third party. *Id.* ¶ 9. A competitor, potential customer, or  
28 customer of Oracle could use this information to tailor its competitive negotiation and/or sales

1 strategies, which would result in harm to Oracle. *Id.* Moreover, the excerpts also contain details  
2 regarding the computer systems purportedly central to the operations of a non-party customer.  
3 *Id.* ¶ 10. The disclosure of this information to the competitors of the non-party customer could  
4 result in the disclosure of and improper use of trade secrets for competitive purposes, and create  
5 a risk of significant competitive injury and particularized harm and prejudice to the non-party  
6 customer. *Id.*

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

8 Oracle has protected the excerpts and information described above from public disclosure  
9 through the Stipulated Protective Order in this case by designating their source documents as  
10 “Confidential Information” and “Highly Confidential Information – Attorneys’ Eyes Only.” *Id.*,  
11 ¶ 12. Further, Oracle has requested that the court file excerpts and information from its At-Risk  
12 reports under seal when excerpts or information have been used in documents filed with the  
13 Court, and the Court has granted those requests. *See* Dkt. 997, 1002, 1152, 1160, 1163, 1170,  
14 1191, and 1195.

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

16 Although Defendants’ filing contains other information designated “Confidential”  
17 or “Highly Confidential – Attorneys’ Eyes Only” by Oracle, Oracle has limited its request to the  
18 most commercially sensitive and confidential Oracle and non-party information. Thus, Oracle’s  
19 request to seal is narrowly tailored. Gloss Decl., ¶ 11.

1 IV. CONCLUSION

2 For the foregoing reasons, Oracle respectfully requests that the Court file under seal the  
3 redacted excerpts of Exhibit A-0059.

4  
5 DATED: August 2, 2012

BINGHAM McCUTCHEM LLP

6  
7  
8 By:                     /s/ Geoffrey M. Howard                      
9 Geoffrey M. Howard  
10 Attorneys for Plaintiff  
11 Oracle International Corporation  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28