

1 BINGHAM McCUTCHEM LLP  
 DONN P. PICKETT (SBN 72257)  
 2 GEOFFREY M. HOWARD (SBN 157468)  
 HOLLY A. HOUSE (SBN 136045)  
 3 ZACHARY J. ALINDER (SBN 209009)  
 BREE HANN (SBN 215695)  
 4 Three Embarcadero Center  
 San Francisco, CA 94111-4067  
 5 Telephone: (415) 393-2000  
 Facsimile: (415) 393-2286  
 6 donn.pickett@bingham.com  
 geoff.howard@bingham.com  
 7 holly.house@bingham.com  
 zachary.alinder@bingham.com  
 8 bree.hann@bingham.com

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

15 DORIAN DALEY (SBN 129049)  
 JENNIFER GLOSS (SBN 154227)  
 16 500 Oracle Parkway, M/S 5op7  
 Redwood City, CA 94070  
 17 Telephone: 650.506.4846  
 Facsimile: 650.506.7114  
 18 dorian.daley@oracle.com  
 jennifer.gloss@oracle.com  
 19

20 Attorneys for Plaintiffs  
 Oracle USA, Inc., *et al.*

21 UNITED STATES DISTRICT COURT  
 22 NORTHERN DISTRICT OF CALIFORNIA  
 23 OAKLAND DIVISION

23 ORACLE USA, INC., *et al.*,  
 24 Plaintiffs,  
 25 v.  
 26 SAP AG, *et al.*,  
 27 Defendants.

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

**PLAINTIFFS' RESPONSE IN SUPPORT OF  
 DEFENDANTS' ADMINISTRATIVE  
 MOTION TO FILE UNDER SEAL  
 PLAINTIFFS' DOCUMENTS IN SUPPORT  
 OF OPPOSITION TO MOTION NO. 1 TO  
 EXCLUDE EXPERT TESTIMONY OF  
 STEPHEN K. CLARKE**

28

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. No. 857) and accompanying  
4 Declaration (Dkt. No. 857-1), Proposed Order (Dkt. No. 857-2) and Stipulation (Dkt. No. 858)  
5 on September 9, 2010. Defendants’ filings moved to seal (1) portions of Defendants’  
6 Opposition to Plaintiffs’ Motion No. 1 to Exclude Expert Testimony of Stephen K. Clarke  
7 (“Defendants’ Opposition”) at 24:11-23 and 24:27-28, and (2) portions of the Declaration of  
8 Stephen K. Clarke in Support of Defendants’ Opposition (“Clarke Declaration”) at paragraphs 17  
9 through 46, including figures 1 through 4. Defendants lodged copies of these materials with the  
10 Court on September 10, 2010.

11 In deference to the presumption in favor of public access to court records and in  
12 the interest of presenting the most narrowly tailored sealing request possible, Plaintiffs Oracle  
13 USA, Inc., Oracle International Corporation, and Siebel Systems, Inc. (collectively, “Plaintiffs”  
14 or “Oracle”) withdraw their request that the following be filed under seal: (1) portions of  
15 Defendants’ Opposition to Motion No. 1 to Exclude Expert Testimony of Stephen K. Clarke at  
16 24:11-23 and 24:27-28, and (2) portions of the Clarke Declaration at paragraphs 17 through 31,  
17 33 through 46, and figures 2 and 3.<sup>1</sup>

18 Under Civil Local Rules 7-11 and 79-5, and this Court’s Standing Order For  
19 Cases Involving Sealed or Confidential Documents, Oracle files this Response, and the  
20 accompanying Declaration of Jennifer Gloss in Support of Defendants’ Administrative Motion to  
21 Seal (“Gloss Declaration” or “Gloss Decl.”), which establishes that good cause exists to support  
22 a narrowly tailored order authorizing the sealing of portions of the Clarke Declaration at  
23 paragraph 32 and figures 1 and 4.

24 \_\_\_\_\_  
25 <sup>1</sup> Plaintiffs have submitted a revised Proposed Order with this Response to reflect these changes.  
26 In addition, Plaintiffs will work with Defendants to file these documents publicly. However,  
27 Plaintiffs do not waive any of their confidentiality designations, right to file under seal, or other  
28 protections with respect to these documents or other information related or similar to, or referred  
to by, these documents.

1    **II.    GOOD CAUSE EXISTS TO SUPPORT FILING THE REQUESTED**  
2    **INFORMATION UNDER SEAL**

3           Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to  
4 permit sealing of court documents for, *inter alia*, the protection of “a trade secret or other  
5 confidential . . . commercial information.” Fed. R. Civ. P. 26(c). In particular, when the request  
6 for sealing concerns discovery documents attached to a nondispositive motion, a showing of  
7 good cause to seal the documents is sufficient to justify protection under Rule 26(c). *Navarro v.*  
8 *Eskanos & Adler*, Case No. C-06 02231 WHA (EDL), 2007 U.S. Dist. LEXIS 24864, at \*7  
9 (March 22, 2007) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)). To  
10 make such a showing, the party seeking protection from disclosure under the rule must  
11 demonstrate that public disclosure of such information would create a risk of significant  
12 competitive injury and particularized harm or prejudice. *See Phillips v. General Motors Corp.*  
13 307 F. 3d 1206, 1211 (9th Cir. 2006) (good cause standard on motion to seal).

14           Oracle has established good cause to permit filing portions of the Clarke Report at  
15 paragraph 32, and figures 1 and 4 under seal through the Gloss Declaration, as required under  
16 Local Rule 79-5(d). The Gloss Declaration establishes both that Oracle has considered and  
17 treated this information as confidential and proprietary, and that public disclosure of such  
18 information would create a risk of significant competitive injury and particularized harm and  
19 prejudice to Oracle. Gloss Decl., ¶ 3. In addition, Oracle has taken steps to ensure that this  
20 information remains confidential in this litigation. Gloss Decl., ¶ 4. Further, Oracle has  
21 narrowly tailored its request by only requesting sealing of the specific portions of these  
22 documents that contain the most commercially sensitive, private and confidential information.  
23 Gloss Decl., ¶ 5; *see also* page 1, lines 11 through 17 above.

24    **III.    CONCLUSION**

25           For the foregoing reasons, Oracle respectfully requests that the Court file under  
26 seal portions of the Clarke Declaration at paragraph 32, and figures 1 and 4.

