

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Circuit Mediation Office

Phone (415) 355-7900 Fax (415) 355-8566

<http://www.ca9.uscourts.gov/mediation>**MEDIATION QUESTIONNAIRE**

The purpose of this questionnaire is to help the court's mediators provide the best possible mediation service in this case; it serves no other function. Responses to this questionnaire are *not* confidential. Appellants/Petitioners must electronically file this document within 7 days of the docketing of the case. 9th Cir. R. 3-4 and 15-2. Appellees/Respondents may file the questionnaire, but are not required to do so.

9th Circuit Case Number(s):	12-16944, 12-17053	
District Court/Agency Case Number(s):	4:07-cv-1658 PJH (EDL)	
District Court/Agency Location:	Northern District of California, Oakland Division	
Case Name:	Oracle Corp., et al.	v. SAP AG, et al.
If District Court, docket entry number(s) of order(s) appealed from:	ECF No. 1213	
Name of party/parties submitting this form:	Defendants-Appellants SAP AG, SAP America, Inc., and TomorrowNow	

Please briefly describe the dispute that gave rise to this lawsuit.

On March 22, 2007, Oracle filed suit against SAP AG, SAP America, Inc. and TomorrowNow, Inc. As later amended, the lawsuit asserted copyright infringement and various other federal and state law claims. Specifically, the lawsuit alleged that TomorrowNow--a provider of third-party support for Oracle products--unlawfully copied and misappropriated copyrighted software products and other confidential materials developed by Oracle to service its own customers. Oracle further alleged that, by virtue of the TomorrowNow support offering, SAP was able to entice Oracle customers to switch their software solutions from Oracle to SAP. Prior to the first trial in this matter, TomorrowNow stipulated to liability for each of Oracle's ten claims, and SAP AG and SAP America stipulated to liability for vicarious and contributory copyright infringement.

During the district court litigation, which ultimately was limited to determining damages for copyright infringement as a result of various stipulation, Oracle claimed that it suffered billions of dollars in alleged damages based on TomorrowNow's conduct. In reality, TomorrowNow served only a tiny fraction of Oracle's customers (customers that already planned to drop Oracle support), TomorrowNow never made a profit, and no customers chose to purchase SAP software because of TomorrowNow.

Briefly describe the result below and the main issues on appeal.

On November 23, 2010, a jury awarded Oracle \$1.3 billion in actual damages for copyright infringement in the form of hypothetical license damages. On September 1, 2012, the district court granted SAP's post-trial motions for judgment as a matter of law and for a new trial, holding that Oracle was not entitled to recover hypothetical license damages for copyright infringement as a matter of law and that the jury award was contrary to the weight of the evidence and grossly excessive. The district court granted a new trial as to damages for copyright infringement in the form of lost profits and infringer's profits, conditioned on Oracle's rejection of a remittitur to \$272 million. On

February 6, 2012, Oracle rejected the remittitur and opted to proceed to a new trial. To save the time and expense of this new trial, the parties stipulated to entry of judgment in the amount of \$306 million.

The main issues on cross-appeal will be, among other things, the damages that Oracle properly may recover in this case and the appropriate types of damages evidence that may be offered in support of each side's damages computations.

Describe any proceedings remaining below or any related proceedings in other tribunals.

There are no proceedings remaining below or any related proceedings in other tribunals.

Provide any other thoughts you would like to bring to the attention of the mediator.

Defendants note Oracle's position on mediation but continue to believe that this dispute over the appropriate amount of damages where infringement was stipulated can and should be resolved and are therefore open to mediation.

Any party may provide additional information *in confidence* directly to the Circuit Mediation Office at ca09_mediation@ca9.uscourts.gov. Please provide the case name and Ninth Circuit case number in your message. Additional information might include interest in including this case in the mediation program, the case's settlement history, issues beyond the litigation that the parties might address in a settlement context, or future events that might affect the parties' willingness or ability to mediate the case.

CERTIFICATION OF COUNSEL

I certify that:

a current service list with telephone and fax numbers and email addresses is attached

(see 9th Circuit Rule 3-2).

I understand that failure to provide the Court with a completed form and service list

may result in sanctions, including dismissal of the appeal.

Signature

("s/" plus attorney name may be used in lieu of a manual signature on electronically-filed documents.)

Counsel for

Note: Use of the Appellate ECF system is mandatory for all attorneys filing in this Court, unless they are granted an exemption from using the system. **To file this form electronically** in Appellate ECF, complete the form, and then print the filled-in form to PDF (File > Print > PDF Printer/Creator). Then log into Appellate ECF and choose Forms/Notices/Disclosure > File a Mediation Questionnaire.