

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

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IN RE MICROSOFT CORP.  
ANTITRUST LITIGATION

This Document Relates to:  
*Novell, Inc. v. Microsoft Corporation,*  
Civil Action No. JFM-05-1087

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) MDL Docket No. 1332  
) Hon. J. Frederick Motz  
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**AFFIDAVIT OF DAVID BRADFORD**

1. I am a member of the Bar of the State of California, and former General Counsel for Novell, Inc. I worked at Novell from October 1985 until July 2000. I joined the company as corporate counsel.

2. I have reviewed Microsoft's cross-motion for summary judgment. I submit this affidavit in support of Novell's opposition to Microsoft's cross motion for summary judgment and to provide additional information to the Court about issues raised in Microsoft's brief, including the sale of Novell's DOS business and associated claims to Caldera.

3. Within approximately six months of joining the company, I was promoted to General Counsel. I held that same position until I left the company in 2000. As the General Counsel, I was responsible for the legal functions for Novell. In addition to serving as General Counsel, I also had additional responsibilities with the company, including, from 1994-1996, responsibility for corporate transactions in my capacity as head of the Corporate and Business Development group.

4. In 1991, Novell acquired the DR-DOS operating system by merging with Digital Research, Inc. DR-DOS competed in the DOS market directly against Microsoft's MS-DOS operating system and could run applications written for MS-DOS and Windows operating systems.

5. Prior to Novell's acquisition of DR-DOS, the Federal Trade Commission began investigating Microsoft for anticompetitive practices in the DOS market, and Digital Research retained outside counsel – Ablondie & Foster – to assist it in aiding the FTC's and the Department of Justice's investigation into Microsoft's anticompetitive activity.

6. In late 1991 and early 1992 – shortly after Novell closed the transaction to acquire DR-DOS (later called Novell DOS) – Novell began to learn about certain anticompetitive behavior Microsoft was engaged in to make it more difficult for Novell to sell Novell DOS and to eliminate Novell DOS from the market. Novell started communicating with the FTC in the spring of 1992, in connection with the FTC's investigation of Microsoft's anticompetitive conduct. Novell retained Ablondie & Foster for this purpose. At some later point, Novell retained other law firms to assist it in cooperating with investigations of Microsoft by the FTC, the DOJ, and the European Commission.

7. In 1992 and 1993, during the process of gathering and supplying information to the FTC, DOJ, and European Commission, Novell came to believe that it could bring a private antitrust lawsuit against Microsoft for damages caused to Novell DOS arising from Microsoft's anticompetitive conduct. Based on the evidence gathered, Novell believed that Microsoft engaged in the following anticompetitive conduct, among other anticompetitive behavior, to prevent Novell DOS from being successful in the market:

- requiring exclusionary, long-term per processor agreements for the licensing of its operating system with original equipment manufacturers (“OEMs”);

- creating intentional incompatibilities between Windows 3.x and Novell DOS;
- making premature announcements of product releases with the intent to try to prevent PC manufacturers from licensing Novell DOS instead of MS-DOS; and
- creating a non-fatal error message in Windows for the purpose of causing Novell DOS customers to perceive that Novell DOS would not be compatible with Windows.

8. In 1992, during the course of the FTC's investigation I asked attorneys from Wilson, Sonsini, Goodrich, and Rosati to analyze Novell's potential antitrust claims as they related to the damage Microsoft caused to Novell's DOS business. In 1993, I asked Steve Hill – from the Salt Lake City law firm of Snow Christensen & Martineau – to perform a similar analysis.

9. In June 1994, Novell acquired WordPerfect and Quattro Pro. At the time Novell acquired WordPerfect, I was made aware that WordPerfect was also cooperating in government investigations against Microsoft and believed that it also had a potential private antitrust lawsuit against Microsoft for damages caused to WordPerfect. In fact, in the latter part of 1994, I suggested that Novell could “piggyback” antitrust claims for damage Microsoft caused to Novell's Business Applications onto an antitrust suit for damages that Microsoft caused to Novell's DOS business. But that idea was later dismissed. We thought of, and dealt with, the DOS claims and the Business Applications claims as distinct antitrust claims. Again, notwithstanding my use of the word “piggyback,” Novell always viewed the DOS claims and Business Application claims as separate and distinct causes of action.

10. There was, at one time, a draft complaint that focused on the DOS claims that also briefly pleaded claims for damage caused to Novell's Business applications claims, but the idea of treating all claims in a single complaint was dropped. Any claims for damage caused

to Novell's Business Applications considered, or even drafted, in 1994 obviously did not concern Microsoft's anticompetitive activity with respect to Windows 95.

11. For approximately a two-year period following Novell's acquisition of WordPerfect in June 1994, I took over the Corporate and Business Development group. In my capacity as head of the group, I was responsible for the sale of Novell's Business Applications business to Corel in early 1996. In addition, I was one of the people responsible for the sale of Novell's DOS Assets to Caldera in July 1996. The DOS Assets – which Novell sold to Caldera – included various versions of DR DOS. The DOS Assets also included patents and a potential antitrust claim against Microsoft for damage caused to the DOS Assets. The DOS Assets did not include any of Novell's business applications. To reiterate, in connection with the sale of the DOS Assets to Caldera, Novell unequivocally did not include any claims or assets associated with the Novell's business applications.

12. In July 1994, the DOJ and the European Commission agreed to a consent decree with Microsoft to end Microsoft's exclusionary contracts with OEMs, which harmed Novell DOS. Novell felt the consent decree was lacking because of the damage Microsoft had already done to Novell's DOS business. In the summer of 1994 – as a result of Microsoft's anticompetitive conduct – Novell announced that it would stop marketing and developing Novell DOS. The judgment on the consent decree was entered in or around August 1995.

13. In or around February 1995, I asked Mr. Hill to prepare an antitrust complaint against Microsoft for damage caused to Novell's DOS business. I gave him a draft of another complaint to work from. Mr. Hill was not asked to analyze any claims for damage Microsoft caused to Novell's Business Applications business. I did not ask Mr. Hill to analyze claims concerning Novell's Business Applications because Novell did not know the

full extent of the harm Microsoft caused to Novell's Business Applications business until after Windows 95 was released. Furthermore, based on the facts gathered at that point, it was clear that Microsoft's anticompetitive conduct that injured Novell's DOS business was different from the conduct that harmed Novell's Business Applications.

14. At the time I asked Mr. Hill to draft the complaint for damage caused to Novell's DOS business, Novell considered suing Microsoft for: (1) the injuries Microsoft caused to Novell's DOS business and (2) for infringement of Novell's network client protocols. At the time Novell chose not to pursue either claim because we did not want to risk retaliation from Microsoft, create the impression that Novell could not work with Microsoft, or distract Novell executives from their normal duties. Furthermore, Novell was concerned that the stock market would react unfavorably to Novell bringing claims against Microsoft.

15. In addition, the entry of judgment on the consent decree set an August 1996 deadline for Novell to act on its DOS antitrust claim, due to the end of tolling of the statute of limitations. Since the most damaging acts of Microsoft's anticompetitive conduct occurred during the summer of 1991 through the spring of 1993, if Novell had waited until after August 1996 to file its DOS claims, most of its claims would have been time barred.

16. Consequently, I was tasked by Novell's Board of Directors to try to find a buyer for the DOS business and the antitrust claim against Microsoft for the harm caused to the DOS business. In connection with my task, I again requested that Mr. Hill give his assessment of a possible action against Microsoft for damage caused to Novell's DOS business.

17. Separately, in October 1995, Novell decided to sell most of its Business Applications business, which included WordPerfect, Quattro Pro, and PerfectOffice. In

January 1996, Novell announced that it had agreed to sell WordPerfect, Quattro Pro, and PerfectOffice to Corel Corporation. In that transaction, Novell expressly retained the antitrust claims for harm that Microsoft caused to Novell's Business Applications business as a result of Microsoft's anticompetitive conduct.

18. In the early part of 1996, the Novell Board of Directors again considered bringing an antitrust claim against Microsoft for damage caused to Novell's DOS business. At the time, the Board decided once and for all not to file such an action, and again directed me to find a buyer for the DOS business and the associated antitrust claim against Microsoft for damage caused to the DOS business.

19. After the Board's decision in 1996, I contacted Mr. Hill to inform him that Novell was not going to pursue antitrust claims against Microsoft for damage caused to the DOS business, and I asked if he knew of anyone who might be interested in purchasing the DOS business and DOS antitrust claims from Novell. Again, there was no discussion of selling or assigning any claims that Novell may have had concerning injuries to Novell's Business Applications business – which Novell expressly retained in the transaction with Corel.

20. In July 1996, Novell sold its DOS business and the antitrust claim for damages caused to the DOS business to Caldera, Inc., which was a company controlled by Novell's former CEO, Ray Noorda. As part of the transaction, Caldera committed to pursue the antitrust claim against Microsoft for the damage caused to the DOS business.

21. Under the terms of the transaction, Caldera agreed to pay Novell a certain amount in cash plus a royalty in revenues from the DOS business; the revenues included any amount Caldera recovered from the antitrust claim against Microsoft that Caldera agreed to pursue. We recorded the deal in two documents: the License Agreement – which set forth the royalty

provisions – and the Asset Purchase Agreement – which defined and limited the assets that Novell sold to Caldera.

22. The Asset Purchase Agreement assigned to Caldera claims held by Novell at the date the transaction closed and that were “associated directly and indirectly” with any of the DOS products that were transferred by Novell to Caldera.

23. Microsoft’s speculation that the “directly and indirectly” language should be interpreted to encompass Novell’s antitrust claims against Microsoft for damage caused to Novell’s Business Applications business – which Novell asserts in this case – makes no sense. First of all, to my knowledge, no one from Novell or Caldera ever construed the “directly or indirectly” language to include any claims relating to Novell’s Business Applications business. The “directly and indirectly” language was included because the parties believed there may have been potential causes of action concerning certain patents that were transferred that related to the DOS operating system. Furthermore, to my knowledge, the parties never discussed an interpretation such as Microsoft’s, or even discussed antitrust claims concerning damage caused to Novell’s Business Applications business. Frankly, whether Novell would assign its Business Applications claims to Caldera was never an issue, because the parties understood that the Business Applications claims were not part of the deal.

24. The parties never even contemplated that claims for damage caused to Novell’s Business Applications business would be included in the transaction or otherwise transferred or assigned to Caldera. Caldera was an operating systems company, and Novell sold its DOS business and the associated antitrust claim to Caldera for that reason. It would have made no

sense to sell Novell's Business Applications claims to Caldera because Caldera was not in the applications business.

25. In July 1996 – after Novell closed the transaction with Caldera – Caldera filed an antitrust action against Microsoft for damage caused to the DOS business. A few days before the transaction closed, Caldera retained Snow Christensen to represent Caldera in the DOS-related antitrust lawsuit against Microsoft. Novell was not a party to that lawsuit and had its own counsel representing it in the discovery process.

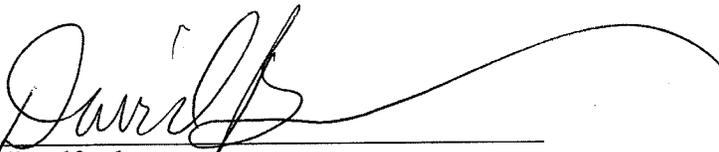
26. After Caldera filed its complaint against Microsoft, Novell permitted Caldera access to Novell employees to discuss issues related to DOS and to Novell warehouses in Utah and England for DOS-related documents. Although Mr. Hill and I had regular communications prior to Caldera retaining Mr. Hill and the filing of its lawsuit against Microsoft, he had very limited contact with me or anyone at Novell after the suit was filed. I had limited communication with him concerning specific discovery issues, but he never conferred with me concerning litigation strategy.

27. I also recall speaking with Mr. Hill briefly concerning Novell's motion to intervene in the Caldera case to assert work product and attorney client privilege to certain DOS-related documents Novell conveyed to Caldera as part of the Asset Purchase Agreement. That motion was denied. Following the denial of that motion I sent Mr. Hill an e-mail expressing my disagreement with the ruling that allowed Microsoft access to information that I believed was protected from disclosure.

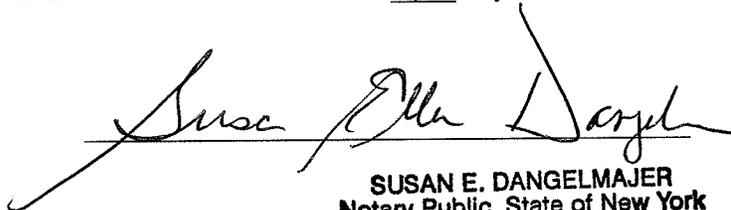
28. I and no one else at Novell had any involvement in the settlement between Caldera and Microsoft. I did not know the amount for which the parties settled until after

they came to an agreement and, even then, was only informed because of Novell's royalty interests.

Dated: December 9<sup>th</sup>, 2009.

  
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David Bradford

SUBSCRIBED AND SWORN before me this 9<sup>th</sup> day of December, 2009 by David Bradford.

  
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**SUSAN E. DANGELMAJER**  
Notary Public, State of New York  
No. 01E86071856  
Qualified in New York County  
Commission Expires March 25, 2010