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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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|---|---|
| IN RE SUBPOENAS SERVED UPON THE LAW FIRM OF SNOW, CHRISTENSEN & MARTINEAU AND THE CANOPY GROUP<br><br>Related to the litigation pending in the United States District Court for the District of Maryland captioned *Novell, Inc. v. Microsoft Corporation,* Civil Action No. JFM -05-1087 (Consolidated into *In re Microsoft Corporation Antitrust Litigation,* MDL Docket No. 1332) | **AFFIDAVIT OF STANLEY J. PRESTON**<br><br>Case No. 2:08-MC-00675-DB-DN<br><br>Judge Dee Benson<br><br>Magistrate Judge David Nuffer |

STATE OF UTAH )
:ss
COUNTY OF SALT LAKE )

STANLEY J. PRESTON, being first duly sworn upon oath, deposes and says:

1. I am an attorney and shareholder in the Law Firm of Snow, Christensen & Martineau ("SCM"), and am competent to testify to the matters stated herein.

2. SCM, along with other law firms, represented Caldera, Inc. ("Caldera") in *Caldera, Inc. v. Microsoft, Corp.*, No. 96-CV-654B (D. Utah) ("Caldera Lawsuit").

3. The Law Firm of Ray Quinney & Nebeker, along with other law firms, represented Microsoft in the Caldera Lawsuit.

4. The Caldera Lawsuit was filed in 1996 before Judge Benson and was settled on the eve of trial in early 2000.

5. SCM has represented, and continues to represent, Novell in various matters. SCM's representation of Novell predates the Caldera Lawsuit.

6. The two lead attorneys at SCM who handled the Caldera Lawsuit were Stephen J. Hill and Ryan E. Tibbitts. In 2000, after the settlement of the Caldera Lawsuit, Stephen J. Hill resigned from SCM to pursue other opportunities. Ryan E. Tibbitts resigned from SCM to pursue other opportunities in 2001.

7. I am informed and believe that, after the Caldera Lawsuit settled, various documents related to the Caldera Lawsuit were destroyed pursuant to the protective order in that case. Several years later, SCM returned a large number of boxes of documents related to the Caldera Lawsuit, which had been stored at an offsite storage facility, to Caldera's parent company, The Canopy Group, Inc. ("Canopy").

8. At some point after the settlement of the Caldera Lawsuit, Novell sued Canopy (the "Canopy Lawsuit"). SCM, having represented Novell and Canopy in other matters, had a conflict of interest and could not represent either party in the Canopy Lawsuit. SCM did not open a file on the Canopy Lawsuit. I am not aware of the location of any documents in SCM's possession related to the Canopy Lawsuit. SCM changed its document management system in 2007. Searching to determine if SCM has any documents related to the Canopy Lawsuit would require SCM's staff to check onsite and offsite document storage locations, as well as prior document management systems for documents, all of which may be very time consuming.

9. SCM has in its possession 158 boxes containing documents related to the Caldera Lawsuit. SCM does not have an index of the documents in these 158 boxes. These 158 boxes do not appear to be organized in a meaningful manner. A substantial number of the documents in the boxes include work product, and appear to be the working files of Stephen J. Hill and Ryan E. Tibbitts. Furthermore, the vast majority of documents in the 158 boxes do not appear to be responsive to the subpoenas in question. The remainder of the documents in the boxes appear to be documents, such as deposition transcripts and exhibits, pleadings and discovery responses, that were produced, created or filed in the Caldera Lawsuit.

10. I estimate that, on average, each box contains approximately 1,500 pages of documents and that it would take, on average, 2 hours to review the documents in each box for work product, privilege and responsiveness. I estimate that the average hourly rate of the attorneys who would be assigned the task is $250. Thus, I estimate that attorneys' fees for reviewing the documents in these boxes would be approximately $80,000.

11. I was informed by Canopy's attorneys that Microsoft also served Canopy with a subpoena.

12. Canopy's attorneys were permitted to review the documents in the 158 boxes related to the Caldera litigation. After Canopy's attorneys quickly reviewed the documents, I was informed by Canopy's attorneys that Canopy did not want to incur substantial expense in responding to Microsoft's subpoena and, thus, was attempting to enter into an agreement with Microsoft whereby Canopy would not waive its privileges but would allow Microsoft to review the documents in the 158 boxes. I informed Canopy that SCM was asserting work product immunity and would not voluntarily allow Microsoft to review the documents.

13. I spoke with Mark Bettilyon, an attorney representing Microsoft, and explained

SCM's objections to Microsoft's subpoena. I also explained the nature of the work product contained in the 158 boxes of documents.

14. I am aware that proposals were made to Microsoft in an attempt to make the subpoenas less burdensome on SCM. These proposals included: (a) SCM looking through the boxes for correspondence files and producing correspondence between SCM and Novell, if any; and (b) Microsoft agreeing to pay SCM for the time and expenses expended in responding to the subpoenas. Microsoft rejected the proposals and, instead, filed a motion to compel.

DATED this 24th day of September, 2008.

Stanley J. Preston

SUBSCRIBED AND SWORN before me on this 24 day of September 2008.

NOTARY PUBLIC
MARILYN L. JONES
10 Exchange Pl., Ste. 1100
Salt Lake City, Utah 84111
My Commission Expires
October 10, 2010
STATE OF UTAH

Notary Public
Salt Lake County, State of Utah

950898

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25th day of September, 2008, I electronically filed the foregoing **AFFIDAVIT OF STANLEY J. PRESTON** with the Clerk of Court using the CM/ECF system which sent notification of such filing via email to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

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s/ Stanley J. Preston