

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

----- -X  
 UNITED STATES OF AMERICA, :  
 :  
 PLAINTIFF, :  
 :  
 V. : C.A. NO. 98-1232  
 :  
 MICROSOFT CORPORATION, :  
 :  
 DEFENDANT. :  
 ----- -X

STATE OF NEW YORK, ET AL., :  
 :  
 PLAINTIFFS, :  
 :  
 V. : C.A. NO. 98-1223  
 :  
 MICROSOFT CORPORATION, :  
 :  
 DEFENDANT. :  
 ----- -X

MICROSOFT CORPORATION, :  
 :  
 COUNTERCLAIM-PLAINTIFF, :  
 :  
 V. :  
 :  
 DENNIS C. VACCO, ET AL., :  
 :  
 COUNTERCLAIM-DEFENDANTS. : JANUARY 13, 1999  
 ----- -X WASHINGTON, D.C.

VOLUME 37-B

TRANSCRIBED DEPOSITION EXCERPTS

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1 (DEPOSITION EXCERPTS OF ROBERT E. BERAN.)

2 Q. I WOULD LIKE TO SHOW YOU A DOCUMENT  
3 THAT'S BEEN MARKED FOR IDENTIFICATION AS  
4 GOVERNMENT EXHIBIT 279. I ASK YOU TO TAKE A  
5 SECOND TO LOOK AT IT.

6 A. OKAY.

7 Q. DO YOU RECOGNIZE THIS DOCUMENT?

8 A. YES.

9 Q. WHAT DOES IT APPEAR TO BE?

10 A. THIS WAS A PROPOSAL FROM MICROSOFT ON  
11 THEIR ASK FOR BROWSER DISTRIBUTION DEAL WITH MY  
12 COMPANY.

13 Q. AND I WOULD LIKE TO DIRECT YOUR  
14 ATTENTION TO THE SECOND PAGE OF THE DOCUMENT THAT  
15 HAS A BATES STAMPED NUMBER HEL 0325.

16 A. RIGHT.

17 Q. DO YOU SEE THAT?

18 A. YES.

19 Q. I WOULD LIKE TO DIRECT YOUR ATTENTION  
20 TO THE TOP, ITEM NUMBER SIX, WHICH STATES, "BAIS  
21 WILL DISTRIBUTE THE INTERNET EXPLORER AS ITS,"  
22 UNDERLINED, "EXCLUSIVE," STOP UNDERLINE, "BROWSER  
23 TO ITS ACCESS CUSTOMERS AND WILL PROMOTE," AGAIN  
24 UNDERLINED, "INTERNET EXPLORER AS THE,"  
25 UNDERLINE, "EXCLUSIVE BROWSER RECOMMENDED FOR USE

1 BY BAIS CUSTOMERS FOR ALL PLATFORMS SUPPORTED BY  
2 MICROSOFT."

3 DO YOU SEE THAT?

4 A. YES.

5 Q. DO YOU SEE ALSO THE ANNOTATION IN THE  
6 MARGIN THAT SAYS IN HANDWRITING, "NO," DASH,  
7 "WORK ON COMPROMISE"?

8 A. YES.

9 Q. DO YOU KNOW WHOSE HANDWRITING THAT IS?

10 A. I BELIEVE IT IS BILL HEILIG'S, ONE OF  
11 MY STAFF MEMBERS WHO WORKED--WHO WAS WORKING WITH  
12 MICROSOFT IN THESE NEGOTIATIONS.

13 Q. WHAT IS YOUR UNDERSTANDING, IF ANY,  
14 ABOUT WHAT IT MEANT BY "NO--WORK ON COMPROMISE"?

15 MR. FESSEL: OBJECTION TO THE FORM.

16 BY MR. POPOFSKY:

17 Q. YOU CAN NONETHELESS ANSWER.

18 A. THAT IS OUR NOTE THAT, NO, WE WILL NOT  
19 GO EXCLUSIVE, AND WE NEED TO WORK ON A  
20 COMPROMISE.

21 Q. WHY DID BAIS NOT WANT TO GO EXCLUSIVE?

22 A. EVERY FAIRLY SIMPLE. AS I STATED  
23 EARLIER, OUR VIEW WAS THAT OUR ROLE IN THE  
24 MARKETPLACE WAS TO LET THE CUSTOMER CHOOSE WHICH  
25 BROWSER THEY WANTED TO USE, AND IT WAS OUR JOB TO

1 PROVIDE THEM WITH ACCESS TO THE LEADING BROWSERS.

2 Q. WHY DO YOU VIEW THAT AS YOUR ROLE IN A  
3 MARKETPLACE, TO OFFER CUSTOMERS A CHOICE?

4 A. WE BELIEVE THAT CUSTOMERS KNOW BEST,  
5 AND IT'S NOT OUR JOB TO CHOOSE FOR THEM.

6 Q. WOULD AGREEING TO THIS PROPOSED  
7 PROVISION, WHICH IS NUMBERED SIX, HAVE THWARTED  
8 YOUR OBJECTIVE OF PROVIDING BROWSER CHOICE?

9 A. YES.

10 Q. AND WHY?

11 A. IT WOULD NOT HAVE ALLOWED ME TO OFFER  
12 NETSCAPE TO CUSTOMERS WHO WANTED IT.

13 (EXCERPT.)

14 Q. I WOULD LIKE YOU TO DIRECT YOUR  
15 ATTENTION TO BERAN EXHIBIT 1, WHICH IS THE  
16 CONTRACT WE WERE JUST DISCUSSING.

17 A. RIGHT.

18 Q. THE PAGE THAT'S BEEN BATES STAMPED RAA  
19 0106.

20 A. 106?

21 Q. YES.

22 A. UMM-HMM.

23 Q. ARE YOU THERE, MR. BERAN?

24 A. YES.

25 Q. TOP OF THE PAGE, YOU SEE WHAT'S BEEN

1 MARKED SUBSECTION 3.1, NONEXCLUSIVITY?

2 A. UMM-HMM.

3 Q. DOES THAT REFRESH YOUR RECOLLECTION AS  
4 TO WHETHER THIS AGREEMENT CALLED FOR ANY  
5 PREFERENCES FOR NETSCAPE VIS-A-VIS OTHER  
6 BROWSERS?

7 A. IT WAS NONEXCLUSIVE, IS WHAT THIS SAYS.  
8 WE WERE FREE TO OFFER OTHER BROWSERS IF WE  
9 INTENDED TO.

10 Q. AND WAS THAT IMPORTANT TO YOU AT THE  
11 TIME?

12 A. YES.

13 Q. WHY IS THAT?

14 A. BECAUSE WE KNEW THERE WERE OTHER  
15 BROWSERS COMING.

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