

**NON-CONFIDENTIAL**

**2009-1504**

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

i4i LIMITED PARTNERSHIP et al.,

Plaintiffs-Appellees.

---

**Appeal from the United States District Court  
For The Eastern District of Texas in 6:07-CV-00113  
District Court Judge Leonard Davis**

---

**DELL INC.'s *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-  
APPELLANT'S EMERGENCY MOTION TO STAY PERMANENT  
INJUNCTION PENDING APPEAL**

Indranil Mukerji  
FISH & RICHARDSON P.C.  
1425 K Street, N.W.  
11<sup>th</sup> Floor  
Washington, D.C. 20005-3500  
(202) 783-5070

John Thornburgh  
*PRINCIPAL ATTORNEY*  
John Gartman  
FISH & RICHARDSON P.C.  
12390 El Camino Real  
San Diego, California 92130  
(858) 678-5070

Counsel for *Amicus Curiae*  
DELL INC.

August 24, 2009

## CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* DELL INC. certifies the following:

1. The full name(s) of every party represented by me are:  
DELL INC. and HEWLETT-PACKARD COMPANY
2. The name(s) of the real parties in interest represented by me are:  
DELL INC. and HEWLETT-PACKARD COMPANY
3. All parent corporations and any publicly held companies that own 10 percent or more stock of the parties represented by me are: None.
4. The names of all law firms and the partners or associates that appeared for DELL INC. and HEWLETT-PACKARD COMPANY. in the trial court or are expected to appear in this court are:

Indranil Mukerji  
FISH & RICHARDSON P.C.  
1425 K Street, N.W.  
11<sup>th</sup> Floor  
Washington, D.C. 20005-3500  
(202) 783-5070

John Thornburgh  
*PRINCIPAL ATTORNEY*  
John Gartman  
FISH & RICHARDSON P.C.  
12390 El Camino Real  
San Diego, California 92130  
(858) 678-5070

Dated: August 24, 2009

Respectfully submitted,

FISH & RICHARDSON P.C.

By: 

Indranil Mukerji  
Counsel for *Amicus Curiae*  
DELL INC.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. STATEMENT OF INTEREST .....	1
II. ARGUMENT.....	1
a. Dell’s Process For Installing Software.....	2
b. Impact of an October 10, 2009 Injunction of Microsoft Word.....	3
c. The Court Should Weigh the Hardship to Dell and its Customers ....	4
III. CONCLUSION.....	6

**CONFIDENTIAL MATERIAL OMITTED**

Confidential business information of Dell has been omitted. The material omitted on page 1 describes the nature and magnitude of harm to Dell if the injunction is not stayed, and the steps Dell would have to take were the injunction maintained; the material omitted on page 2 describes Dell’s ability to timely comply with the injunction; the material omitted pages 3 describes the contractual provisions governing software changes between Dell and Microsoft; the material omitted on pages 4 describes Dell’s ability to timely comply with the injunction and the harm to Dell arising from the injunction.

## TABLE OF AUTHORITIES

Page(s)

### FEDERAL CASES

<i>Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.</i> , 579 F.Supp.2d 554 (D. Del. 2008) .....	5
<i>eBay, Inc. v. MercExchange LLC</i> , 547 U.S. 388 (2006) .....	5
<i>Hilton v. Braunskill</i> , 481 U.S. 770 (1987) .....	4
<i>Hoots v. Com. of Pa.</i> , 651 F.2d 177 (3d Cir. 1981) .....	5
<i>Standard Havens Products, Inc. v. Gencor Indus., Inc.</i> , 897 F.2d 511 (Fed. Cir. 1990) .....	5
<i>z4 Technologies, Inc. v. Microsoft Corp.</i> , 434 F.Supp.2d 437 (E.D. Tex. 2006) .....	5

**I. STATEMENT OF INTEREST**

Dell Inc. (“Dell”) is a large distributor of Microsoft’s Word software. Microsoft Word is included on [ ] of the desktop and consumer notebook computers that Dell sells. The injunction ordered by the District Court for the Eastern District of Texas (“the District Court”) in this matter [ ]. This is especially true if the injunction is not stayed pending resolution of the appeal in this matter because [ ] [ ]. Dell’s position as a large distributor of Microsoft Word also makes it well-situated to speak to the issues of injury to third parties and to the public interest that are relevant to this Court’s assessment of Microsoft’s motion to stay the injunction.

**II. ARGUMENT**

The District Court’s injunction of Microsoft Word will have an impact far beyond Microsoft. Microsoft Word is ubiquitous among word processing software and is included on [ ] computers sold by Dell. Implementing a revised version of Word to include with Dell computers [ ]

].

[

]

Dell urges the Court to consider the impact of an injunction of Microsoft Word on its business and its customers when weighing the equities involved in Microsoft's motion to stay the injunction pending appeal.

**A. Dell's Process For Installing Software**

Dell sells both desktop and consumer notebook computers that are equipped with Microsoft Word, among other software. For both types of computers, Dell installs software on the computers via "images," which include all of the content of a computer's hard disk. [August 22, 2009 Declaration of Roger Borchers ("Borchers Decl."), ¶ 3] [

]

Dell carefully tests and validates the images that are used in the manufacturing of its computers, both internally and at Dell's various factories. [Borchers Decl., ¶ 6] The testing on the images ensures correct operation on Dell's hardware as well as correct interoperability of the various software components that are included. [*Id.*] Such testing is critical because computers consist of thousands of hardware and software components, and changing one feature usually has unintended consequences. The millions of people who use PCs on a daily basis rely (consciously or not) on Dell's rigorous testing to insure that they can get their work done and not lose their data.

[

]

**B. Impact of an October 10, 2009 Injunction of Microsoft Word**

**CONFIDENTIAL INFORMATION HAS BEEN REMOVED FROM THIS PAGE**

If Microsoft is required to ship a revised version of Word in Dell's computers, a change would need to be made to Dell's images. Making such a change would require extensive time- and resource-consuming re-testing.

[Borchers Decl., ¶ 7] [

]

[

].

**C. The Court Should Weigh the Hardship to Dell and its Customers**



The District Court's injunction thus will impose heavy burdens on Dell, and will also adversely impact the public interest. The Court should consider these factors in weighing the equities relevant to Microsoft's motion to stay the injunction. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (noting that two factors regulating the issuance of a stay of injunction are "whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and ... where the public interest lies"); accord *Standard Havens Products, Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990); see also *Hoots v. Com. of Pa.*, 651 F.2d 177, 178 (3d Cir. 1981) (finding that "the prospect of irreparable injury, harm to third parties, and demands of public interest thus support staying the district court order.")

The adverse impact on Dell is also relevant to the propriety of the injunction. Under *eBay*, one of the factors that the patentee must demonstrate is "that the public interest would not be disserved by an injunction." *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006). Harm to customers is a consideration in evaluating the impact of the injunction on the public interest. *z4 Technologies, Inc. v. Microsoft Corp.*, 434 F.Supp.2d 437, 443-444 (E.D. Tex. 2006) (considering adverse impact of injunction on Microsoft's customers in evaluating the public interest factor); see also *Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 579 F.Supp.2d 554, 561 (D. Del. 2008) (denying an

injunction and noting record evidence of physician preference for the accused products). Dell urges the Court to consider the serious adverse impact of an injunction of Word on Dell, other PC sellers, and the PC-using public in evaluating whether the injunction should stand. At a minimum, should the injunction be affirmed following the Court's scheduled hearing on September 23, 2009, Dell respectfully requests that the injunction not take effect until 120 days following this Court's decision.

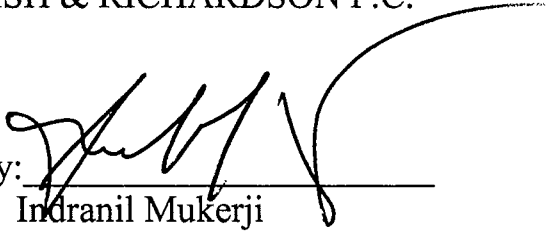
**III. CONCLUSION**

For the foregoing reasons, this Court should grant Microsoft's Emergency Motion to Stay Permanent Injunction Pending Appeal, or alternatively, expand the effective date of the injunction by 120 days from its ruling.

Dated: August 24, 2009

Respectfully submitted,

FISH & RICHARDSON P.C.

By:   
Indranil Mukerji  
Counsel for *Amicus Curiae*  
DELL INC.

# Addendum

Confidential Declaration  
of Roger Borchers

Filed Under Seal

## CERTIFICATE OF SERVICE

It is hereby certified that on August 24, 2009, two true and correct copies of the attached CONFIDENTIAL DELL, INC.'s *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL were caused to be served on the attorneys of record at the following addresses as indicated:

<u>VIA OVERNIGHT DELIVERY</u>	
Matthew D. Powers WEIL GOTSHAL & MANGES LLP 201 Redwood Shores Parkway Redwood Shores, CA 94065 Telephone: (602) 802-3000	Attorneys for Defendant-Appellant MICROSOFT CORPORATION
Donald R. Dunner Finnegan, Henderson, Farabow 901 New York Avenue, N.W. Washington, D.C. 20001-4413 Telephone: (202) 408-4062	Attorneys for Plaintiffs-Appellees i4i LIMITED PARTNERSHIP et al.

I declare under penalty of perjury of the laws of the United States of America that the above is true and correct. Executed August 24, 2009 at Washington, D.C.

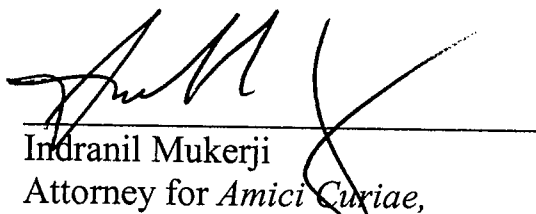
  
\_\_\_\_\_  
Judith Best

**CERTIFICATE OF COMPLIANCE**

The undersigned individual hereby certifies that DELL, INC.'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) limiting briefs to 7,000 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Office 2003, in Times New Roman, 14 point.

Dated: August 24, 2009

  
Indranil Mukerji  
Attorney for *Amici Curiae*,  
DELL Inc.