

by Joyce Janetski

PARADISE



^ At home with sharks, Ryan Tibbitts and other Caldera team members relax in the waters of the South Pacific.

START

BITTER FEBRUARY WINDS AND INCESSANT PHONE CALLS WERE HALF A WORLD AWAY

TWO JRCLS GRADUATES SURVIVE CALDERA V. MICROSOFT



FOUND

AS STEVE HILL ('77) AND RYAN TIBBITTS ('84) LOOKED OUT AT THE BRILLIANT HORIZON FROM BORA BORA.



Stephen J. Hill

IT WAS NO WONDER THAT A YOUNG NAVAL OFFICER STATIONED THERE IN 1942 HAD CALLED THIS SPECK IN THE SOUTH PACIFIC "THE MOST BEAUTIFUL ISLAND IN THE WORLD," THEY THOUGHT. JAMES MICHENER'S PARADISE 140 MILES OFF TAHITI WAS THE PERFECT ANTITHESIS TO THE PAST THREE-AND-A-HALF YEARS OF THE ATTORNEYS' LIVES. ✨ THE CALMNESS AND NATURAL BEAUTY OF THE POLYNESIAN RETREAT CONTRASTED SHARPLY WITH THE GIGANTIC CANNONS SURROUNDING, AND ONCE GUARDING, THE U.S. AIR BASE BUILT ON THE ISLAND DURING WORLD WAR II. STEVE CONTEMPLATED THE POISED, UNFIRED GUNS AND THE TERRIBLE BATTLES FOUGHT IN THE PACIFIC. OCCASIONALLY SOLDIERS WERE SENT TO BORA BORA TO REST AND RECUPERATE FROM THE FIGHTING. ✨ ALTHOUGH THAT IMMENSE CONFLICT WAS FOUGHT BY AN EARLIER GENERATION AND EXACTED THE HIGHEST PAYMENT, STEVE AND RYAN WERE VETERANS OF A NEW KIND OF COMBAT: TECHO-WAR. THE COMPANY THEY REPRESENTED, CALDERA, INC., HAD JUST SETTLED A MAJOR LAWSUIT AGAINST MICROSOFT, THE BIGGEST OF THE "BIG GUNS" OF THE COMPUTER WORLD, A STRUGGLE THAT HAD LASTED ALMOST AS LONG AS WORLD WAR II. TO CELEBRATE ONE OF THE LARGEST PRIVATE ANTITRUST SETTLEMENTS IN HISTORY, THE ENTIRE CALDERA LEGAL TEAM HAD GONE TO TAHITI FOR SOME REST AND RECUPERATION. THEY HAD FINALLY MADE IT TO BALI HAI.

At the law offices of Snow, Christensen & Martineau, in Salt Lake City, Utah, a few weeks later, Steve Hill talks about Bora Bora and the remnants of World War II on the island. As he begins an interview with *Clark Memorandum*, law partner Ryan Tibbitts enters the conference room. For a few moments the splendors of Tahiti provide a pleasant memory for the two J. Reuben Clark Law School graduates who are about to relate the battle that got them there.

TROUBLE BREWING

The road leading to the January 10, 2000, settlement of a lawsuit brought by Caldera against Microsoft ended just short of a jury trial. Steve Hill and Ryan Tibbitts, two of the dozen attorneys representing



Ryan E. Tibbitts

Caldera, lived and breathed the case since it was filed in July 1996. It is a story worth retelling.

The beginning of the rivalry was fair enough: In 1981 Bill Gates began licensing his MS-DOS computer operating system to IBM, beating out a rival operating system, CP/M, created by Digital Research, Inc.

(DRI). Though MS-DOS traced its roots back to CP/M, Gates took the lead, retained licensing rights, and laid the foundation of his fame and fortune: free enterprise in the emerging computer industry.

The battle against Microsoft began in 1988 when Digital Research released a new rival to MS-DOS called DR DOS. Soon DR DOS began to receive praise as a superior alternative to Microsoft's MS-DOS software, which then dominated the personal computer market. In 1989 MS-DOS still had 90 percent of the computer operating system market. DR DOS got a boost when Novell, the world's second-largest software company, bought DRI in October 1991 for \$125 million in stock. By 1992 DR DOS briefly surpassed MS-DOS in retail sales. However, by March DR DOS sales began to plummet. By 1993 they were dead.

As early as 1989, Federal Trade Commission attorneys were investigating Microsoft. By fall 1993 the Department of Justice got involved and eventually sued Microsoft over its DOS business practices. Ray Noorda had his own plans.

For years, Noorda—the man who brought Novell back from bankruptcy in 1983—had urged his board to sue Microsoft for killing competition in the DOS market using illegal tactics. But not until he retired from Novell in 1994 and formed a company named Caldera was Noorda able to make his move. In July 1996 Caldera bought DR DOS from Novell for \$400,000 and the same day filed suit against Microsoft.

Noorda's small company accused the software giant of leading computer users to believe that DR DOS would not work with Microsoft's Windows by writing code that caused error messages to appear when Windows ran on top of DR DOS. The lawsuit also alleged that Microsoft made illegal licensing deals with computer manufacturers who installed its software in the computers they sold, that it deliberately announced overly optimistic release dates for its products to beat out the competition, and that it illegally tied together two products, MS-DOS and Windows, to create Windows 95.

By July 1996 Steve Hill and Ryan Tibbitts had entered the picture.

RECRUITMENT

"The statute of limitations set a deadline for us," says Steve, as he leans forward to emphasize his words. "In 1994 [the Department of] Justice had filed essentially the same case we did and then settled in August of '95 with Microsoft. So we had until mid-August of 1996 to file our case."

The "we" included litigators hired that summer by Ray Noorda and Caldera president Bryan Sparks: Ralph Palumbo, from Seattle, Stephen Susman, a Houston attorney, and the strong legal team they gathered around them. They had taken the Caldera case on a contingency basis.

Reflecting on his early involvement with the Caldera lawsuit, Steve recalls, "If I was really going to pick a date when the seeds were planted, it was just before my 10-year law school reunion in 1987." He recounts that one of the former classmates he was asked to call to donate money to the Law School was David Bradford, who is general counsel for Novell.

"As a result of that contact, I started doing a little bit of Novell work that grew over time," he says. "In early '93 David told me that the FTC was investigating Microsoft. They and Novell were seriously considering a civil case at that point. I filled him in on my antitrust background, which started in Seattle. I practiced there for four years, doing mainly antitrust work, and I made friends with a lot of good antitrust lawyers and even knew people that worked in Microsoft's Seattle law firm."

Steve expounds: "I studied economics as an undergraduate at BYU. I always had an interest in antitrust. When I started working with Novell and I learned about the industry, this particular issue became one of extreme interest to me. It's just funny how the threads of your life weave together. It seems like everything that I've done from my undergraduate background to the Law School association to the acquaintances I made in Seattle all came together to create the opportunity."

"In 1995 we had actually been involved representing Novell and had some real live, ongoing antitrust experience in a monopolization case," he explains. "Obviously, it was pretty important."

Steve continues to tell how in early 1996, when he was in Germany, he got a

call from Novell wanting an assessment of what he thought of the case, because the company was thinking of selling the DR DOS business. "A couple of months went by—I thought the case was just going to die. Then later in the spring, I got a call from Dave Bradford. . . . I contacted a friend of mine named Ralph Palumbo. . . . That led to a meeting at Novell between me, Ralph Palumbo, and Steve Susman of Susman Godfrey. . . . Bradford was convinced that we had a good legal team. But Novell was in the process of selling the business to

Digressing from the story for a moment, Ryan talks about how he came to be involved in *Caldera v. Microsoft*. "Unlike Steve," he says, "nothing in my life prepared me for the case. . . . Rex Lee was my stake president at BYU. He was a big BYU football fan, and I was on the team down there. I'd occasionally run with him after football practice. He really twisted my arm to go to law school. The only way I could justify going to law school in my mind was saying, 'Okay. I'll go and become a sports agent.'" But after meeting some sports agents, Ryan changed his

or four associates from each of the three main law firms—Susman Godfrey; Summit Law Group; and Snow, Christensen & Martineau.

OVERSEAS OPERATIONS

The *Caldera v. Microsoft* case took its lawyers beyond the valleys of Utah and shores of Seattle chasing evidence in Europe and Asia. Two countries that played key roles in the lawsuit were areas where, coincidentally, Steve and Ryan had served Church missions: Germany and Korea. The language skills they developed



Caldera, a company chiefly owned by Ray Noorda. At that point, Ryan came into the picture."

Ryan jumps into the interview, explaining how Steve told him that Novell was going to sell the DR DOS business to Ray Noorda. "As it turned out," Ryan says, "a friend of mine named Ralph Yarro is Ray Noorda's right-hand man. . . . So I called Ralph and brought him up to speed on what Steve had been doing with the claim with Novell, shepherding it through the FTC and the DOJ. . . . [By] July of 1996, we had the complaint filed."

mind. He graduated from the J. Reuben Clark Law School in 1984 and ended up at Snow, Christensen & Martineau. "Working in a large law firm on antitrust cases is the last thing I thought I would be doing," he says. Although Ryan chose not to become a sports agent, photographs on a wall of his office suggest that he does represent at least one professional athlete—former teammate Steve Young.

Although he entered the case in July 1996, Ryan became more involved by the spring of 1997. The legal team he joined had grown to 12 main lawyers, plus three

and the contacts they made during those two-year periods put them at a distinct advantage as they returned to those lands on a different type of mission.

"Steve served a mission in Germany. I served a mission in South Korea," Ryan says. "As it turned out, those two countries both had big parts of the story [surrounding] our case. There were quite a few trips abroad. I spent more time going to Asia, and Steve went to Germany quite a few times."

"DR DOS programmers were actually based in England," explains Steve. "At that

time the biggest PC manufacturer in Europe was Vobis, based in Aachen, Germany. Vobis was the biggest account that [DR DOS] had ever had. In 1989 and 1990 Vobis was a 100-percent DR DOS shop; they didn't use any Microsoft operating systems.

"So it was a huge deal to Microsoft to get the Vobis account," Steve emphasizes. "More importantly, they were concerned that if other OEM's in Europe had seen Vobis' success, they would go to DR DOS rather than MS-DOS. So it became a big deal to Microsoft to win the Vobis account, which they ultimately did. Digging out

CEO of Vobis, Theo Lieven. We sent [Lieven] several e-mails and called and called. Finally, he agreed to see us. He owns a chateau just across the border in Belgium."

Steve and others convinced Lieven to sit for a deposition in Los Angeles, which, he says, "turned out to be pretty important evidence for us."

Explaining why Korea was important in the Caldera case, Ryan says, "When Digital Research launched their competing operating system—DR DOS—part of their strategy was to go places that weren't very important to Microsoft, that were kind

in a deposition of a Korean witness when he learned that I could understand what the witness and the interpreter were saying."

IN THE TRENCHES

Ryan explained that "in a typical large commercial case, you're going to win or lose your case on your witnesses and your documents, because you get very little from the other side." Consequently, as lawyers for the underdog, Ryan, Steve, and their colleagues had to scrutinize seemingly endless leads to come up with some ammunition.

that story took a lot of time and was a fairly significant piece of the story we would have told at trial."

"Well, that's a whole other unbelievable episode," Steve continues. "We eventually managed to talk to the CEO of Vobis. . . . While in England we made contact with one of the top guys at Vobis through one of the salespeople at Novell Duesseldorf. The Vobis guy wouldn't talk to us on the phone, but said he would meet us the next day in Aachen. I felt like I was in a spy novel. . . . We made good friends with him, and then he gave us the contact information for the

of off the Microsoft radar screen. So they started going to small OEM accounts in Asia, including Korea and Taiwan. They opened their first office in Taiwan and their second office in Korea.

"Microsoft viewed Korea as a beachhead where DR DOS might make some gain into their market," he continues. "So they really unloaded on DR DOS in Korea, and ultimately the Korean government reviewed some of Microsoft's activities there. That was a story we were able to develop from people I met over there. . . . I was also able to surprise a Microsoft lawyer

"Every witness we got was a 'romance,'" Steve says. "We had to go find them, and they were scattered all over the world. Then once we found them, we had to make friends with them and convince them that our cause was just, that we had a chance of succeeding, and we were good guys."

"And that it was worth it for them to donate all kinds of time getting ready for depositions," Ryan breaks in.

"Everybody worried what would be the consequence to them personally if they testified, . . . what it would mean professionally if they went public," Steve says.



Other kinds of evidence were not much easier to discover, but did yield rewards. "The judge ordered Microsoft to turn over all of their memos and e-mails," Ryan relates. "We spent literally weeks in Seattle going through boxes of documents. We found some amazing smoking guns in there. Many of the Microsoft documents were so good for us it almost made our client's documents unimportant."

Steve says, "We felt like, 'Wow, our case is every bit as good as we had hoped. In fact, better really than we thought it would turn out to be, once we saw their documents.'"

In more ways than one, e-mail turned out to be the salvation of the Caldera attorneys. Not only was it their most effective form of communication as they investigated the case, but, ironically, e-mail provided them with their best evidence. Retrieved Microsoft e-mails verified what Caldera was trying to prove: that the Microsoft tactics Caldera complained about were designed to undermine DR DOS and further monopolize the market.

THE DARKEST HOURS

The three-and-a-half-year pursuit of Microsoft proved to be a bumpy ride for the Caldera attorneys, sometimes with little light at the end of the tunnel. When asked if they were discouraged during the experience, Steve and Ryan didn't hesitate to respond.

"The DRI people were very self-critical because they knew they weren't getting sales like they should have," says Ryan. "DR DOS was winning awards, but they couldn't make the sales. They didn't know what Microsoft was doing behind the scenes then. So there were all of these bad memos about DRI and its people. And that's what I got hit with in depositions. . . . I remember the plane ride home from the first one; I was pretty dejected and thinking, 'Boy, we've got some problems here.' . . . I think that was my low point. But, because of what we found in Microsoft memos and e-mail, we found a way to deal with it."

"Just the process of being opposed to somebody so powerful caused us problems," says Steve. "Gathering witnesses was a much more difficult and unusual process than I had ever been through before."

Sometimes the diversity of expectations within the legal team created challenges. "You can imagine," Ryan says, "with three different law firms and 15 different lawyers involved, there were many different views as to whether we ought to settle or go to trial, or if we do settle, what the value of the case is."

"But all of that finally turned out fine," Steve stresses. "I'd say that working with these other two firms, you would have thought there would have been prima donnas and ego plays. I would say that never happened. What tended to happen, believe it or not, was there was so much to do and people had different talents and experiences, that the lawyers seemed to self-select the things that they could do the best. We had very few issues about who should do what. We were really in accord throughout the whole process."

COUNTERATTACKS AND SETTLEMENT

"It was real hardball litigation," Steve admits. "I'll bet Microsoft filed dozens of motions on various issues. And of all of those, we could only count a handful that they won. But it's amazing that with all of that, the relations between counsel were actually really quite good, very professional and cordial."

"They just wanted to keep us distracted," Ryan adds. "They clearly wanted to get rid of the case. We were at the right place at the right time in a lot of respects, because they were dealing with what was going on in Washington, D.C., and they didn't want to be going through our trial at the time that Judge [Thomas Penfield] Jackson was trying to figure out what to do with them back there."

Although the case against Microsoft did not go to trial, the settlement was a substantial win for Caldera and its attorneys. (Analysts contend that the evidence that would have been revealed in court promised to hurt Microsoft even more than any monetary fine.) The lawyers cannot disclose the settlement figure because of a confidentiality agreement; however, the *Salt Lake Tribune* reported the settlement at \$250 million ("Caldera, Microsoft Settle for \$250M," *Salt Lake Tribune*, 11 January 2000), whereas the *Wall Street Journal*

reported it at \$275 million ("Microsoft to Settle Suit by Caldera," *Wall Street Journal*, 11 January 2000).

Thus, the trip to Tahiti.

NOT WITHOUT COST

As in any battle, many kinds of sacrifice were made during the long course of Caldera's investigation of Microsoft's practices. During the time they were involved in the lawsuit, Ryan and Steve and their families felt the force of this commitment.

"I traveled a lot," begins Ryan. "I went to Europe two or three times and Asia two or three times. . . . There were literally times when I had to have my wife, Nan, meet me at the airport just long enough to grab a different suitcase of stuff and head off somewhere else. But the way I dealt with it, I let other things slip in my life rather than not spend time with my wife or my kids. . . . It was something we talked about, but it didn't cause major problems."

Steve confesses, "For the most part I was having the time of my life. But while I was having this experience, my wife, Tauni, and my kids were at home dealing with my absence. There were periods where I was pretty distracted, and they had to deal with my emotional ups and downs as well."

When asked if his children, who range between nine and 21 years of age, are interested in going into law, Steve responds, "No, but they're interested in technology. In fact, all of them are involved with it in one fashion or another."

Ryan, whose five children are 10 and under, comments, "At least my two oldest kids were interested in the case. A few times my name made it into the paper with quotes, and that was cool for the kids to talk about with their teachers at school."

He continues, "Our last two boys were born during the course of this case. I remember with the first one, one of the things that I did in order to spend more time with the family would be to go home at 6:00 at night and take two or three boxes of documents that I needed to review to prep for these depositions I was defending. I can remember quite a few nights with that baby when he would wake up at 2:00 in the morning for feedings, sitting out on the couch holding him and going through documents while I was up."

Steve takes his turn: "I guess I turned into kind of a cell phone addict. At one point my family was complaining that when I was home, I was on the 'dang' telephone. . . . I came to the realization that once I was home, I had to be home, and I wouldn't take or make calls."

Calculating that he spent two-thirds to three-fourths of his legal time involved in the case, Steve notes, "The last year, it was most of the time. . . . We [the legal team] spent so much time together, we may have seen more of members of the trial team than we did of our own spouses over the past three-and-a-half years." Ryan puts his commitment at 60 to 70 percent of his time.

In addition to their time away from their families, both attorneys were worried about the length of time they were devoting to a contingency case. "It was very risky," Ryan admits. "I know both of us lost a lot of sleep—many people in our firm were very supportive, but, as you can imagine, and justifiably so, there were some people that were pretty skeptical because we were spending up to three-quarters of our time [on the case], which meant we were not bringing in any money for the firm. They were wondering what we were really contributing to the mix. . . . But the settlement healed all of those wounds," Ryan laughs.

Steve confides, "There was a lot of pressure. . . . I was concerned about what my partners here were thinking and the fact that they were paying us to be off doing this while they were doing things that actually brought in money. . . . Those kinds of considerations made [the case for us] less exciting."

GAINS

Of course the magnitude of Caldera's claim against Microsoft made the case *very* exciting. And the fact that Caldera eventually obtained a large settlement made the pursuit all the better. But, as Steve recently expressed in an e-mail to his case colleagues, "While the money is wonderful, this case certainly was not entirely about money."

Reflecting on his personal feelings about the experience, Steve says, "For me as a lawyer in private practice, I couldn't imagine anything that would be more

THE THREE-AND-A-HALF-YEAR PURSUIT OF MICROSOFT

PROVED TO BE A BUMPY RIDE FOR THE CALDERA ATTORNEYS, SOMETIMES WITH LITTLE LIGHT AT THE END OF THE TUNNEL.

important, because I always saw this case as a significant case for the industry. I always felt like we were doing something that really needed to be done. . . . I decided you just couldn't worry about failure."

Perhaps the greatest result of the case, Steve says, was the effect it had on the computer industry. "We made some history. . . . [Caldera] deserves a lot of praise for having the courage and conviction to undertake the case. They did what many in the industry have talked about but never attempted before we filed [the lawsuit]."

The adventures they had and the friends they made also made their involvement a rich experience. "A great aspect of the case," Ryan says, "is that we worked with and we went up against some of the greatest lawyers in the country. . . . Susman Godfrey is known as one of the top commercial litigation firms in the country. The main Susman Godfrey lawyers—Susman, Parker Folse, and Charles Eskridge—all clerked at the U.S. Supreme Court. The Summit Law Group lawyers were also outstanding. One of them, Matt Harris, knew the technology better than Microsoft."

"A big part of the job is dealing with the press all the way through," says Steve. "I was on a friendly basis with one of the lead reporters for the *Wall Street Journal*, and never in my experience had I had anything like that happen."

As for their experience "being a little bit like a spy novel," Ryan says, "I would know there would be a big deposition of a Microsoft witness going on in Seattle at the same time I was in California defending somebody else. . . . It was fun to check the e-mail. Somebody would report, 'Oh, this deposition was awesome. This witness said, 'A, B, C, and D.' And we really nailed

him with this document.' Or you would call people at the various law firms to find out what intrigue was going on with them at the time. That made it exciting."

When asked the obvious question, Ryan answers, "I met Bill [Gates] at his deposition in October of '97. We spent two days out at the Microsoft headquarters in Redmond taking his deposition."

THE FABRIC OF LIFE

One of the aspects of Steve's and Ryan's experience with *Caldera v. Microsoft* was the reality of life outside of the case. Many things happened during the three-and-a-half years besides the lawsuit.

"It was so all-encompassing that it seemed like we all lived through these shared experiences that were real life that were going on while we were totally engaged in a lawsuit," Steve conveys. "Collectively, we experienced births, deaths, illnesses, marriages, divorces, and a few lawyers coming and going. In doing so, we formed deep friendships. . . . We pretty much saw the entire fabric of life."

"One of the things that came of this was . . . I developed a real interest in going and trying to do something outside of the law firm," he says. As Steve leaves Snow, Christensen & Martineau to work as vice president of business development at Alta Technology Corporation in Sandy, Utah, Ryan buckles down to his role of president of Snow, Christensen & Martineau.

Bora Bora, with its pristine beaches and silent guns, is now only a pleasant memory for the Caldera lawyers. Although they have moved on to other cases or new careers, none of them will soon forget the four-year journey that took them to this paradise in the South Pacific.