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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

CALDERA, INC.,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO INTERVENE

No. 2:96 CV 0645B

Judge Dee V. Benson
Magistrate Judge Ronald N. Boyce

INTRODUCTION

Rather than address the issue that was raised by the Court at the hearing on July 16, 1998, Novell has reverted back to its original position — *i.e.*, the mere existence of a claim of attorney work product protection is sufficient to allow a third party to intervene in any lawsuit, regardless of whether the third party has shown a protectible interest in asserting that attorney work product protection. The Court already has expressed its view that the mere existence of a claim of attorney work product protection does not automatically give rise to an interest sufficient to allow intervention under Rule 24, and Novell has not set forth any argument that should change the Court's view. As for the issue about which the Court expressed concern— *i.e.*, what type of interest should the law recognize for purposes of allowing intervention solely to assert a claim of attorney work product protection — the policies behind intervention under Rule 24 and work product protection under Rule 26 dictate that a third party should not be permitted to intervene in a case solely to assert a claim of attorney work product protection where that party has no litigation-related interest to protect.

Novell does not deny that the documents at issue have no bearing on any pending or threatened litigation to which Novell itself is a party. Instead, Novell has only a contingent economic interest in any recovery that Caldera may obtain against Microsoft in this case. Accordingly, Novell's motion to intervene should be denied.

ARGUMENT

I. The Mere Existence of a Claim of Attorney Work Product Protection Is Not a Sufficient Interest to Intervene Under Rule 24.

The bulk of Novell's brief is devoted to the assertion that it need merely make a "colorable claim" that attorney work product protection exists in order to allow it to intervene to assert that interest in a litigation to which it is not a party. (*See* Joint Supplemental Mem. at 1.) According to Novell, "[I]f Novell is denied an opportunity to intervene for purposes of this motion, Novell will be prevented from even raising its interest in protecting the documents from disclosure, and to the extent that such protection exists, it would be lost." (*Id.* at 1-2.) This argument begs the question before the Court because the Court has assumed for purposes of addressing the intervention question that some attorney work product protection exists. (*See* July 16 Tr. at 25.) The question before the Court at this stage is not whether attorney work product protection exists under Rule 26, but whether Novell has a sufficient interest of the type contemplated by Rule 24 to allow Novell to intervene to assert it *in this case.*[1]

It goes without saying that the assertion of a privilege like attorney work product protection interferes with the truth seeking goals of the adversary system, and therefore privileges should not be applied outside the context for which they were designed. *See United States* v. *Nixon*, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the

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1 Microsoft has argued in its opening memorandum that the documents at issue are not entitled to attorney work product protection. Microsoft does not dispute, however, that a threshold inquiry currently before the Court is whether Novell should be permitted to intervene to assert a claim of attorney work product protection. For that purpose, a colorable claim of protection is sufficient for the Court to assume its existence and reach the issue of sufficient interest under Rule 24. *See United States* v. *AT&T*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (third party "has asserted a claim of privilege which is plausible on its face and must be accepted by us *for purposes of determining* the intervention issue.") (emphasis added).

demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."). Thus, a third party should not be allowed to intervene in litigation to assert such a privilege, unless assertion of that privilege is necessary to advance its fundamental purposes. *See* 7C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1904 (2d ed. 1986) (intervenor must have sufficient interest to outweigh the interest of the original parties in the orderly disposition of their controversy).

Here, Novell has not explained how the purposes of attorney work product protection would be advanced if it is permitted to intervene. As it did at the hearing on July 16, 1998, Novell continues to rely on the purposes of the attorney-client privilege as a basis for arguing that the mere existence of a claim of attorney work product protection creates a sufficient interest under Rule 24. As the Court recognized at the hearing (*see* July 16 Tr. at 6), however, the attorney-client privilege and attorney work product protection serve significantly different goals. The purpose of the attorney-client privilege is "'to encourage clients to make full disclosure to their attorneys.'" *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (*quoting Fisher* v. *United States*, 425 U.S. 391, 403 (1976)). This purpose is served regardless of whether litigation is anticipated, and the privilege is therefore virtually absolute. *Admiral Ins. Co.* v. *United States District Court*, 881 F.2d 1486, 1493-94 (9th Cir. 1989).

Attorney work product protection, on the other hand, serves an entirely different purpose, and the disclosure of once-protected materials in no way thwarts that purpose. The purpose of the attorney work product protection "is not to protect the evidence from disclosure to the outside world but rather to protect it only from the knowledge of *opposing counsel and his*

client, thereby preventing its use against the lawyer gathering the material." 8 C. WRIGHT, A. MILLER & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2024 (1993 Supplement). By definition, the interest that attorney work product protection encompasses must be a litigation-related interest. *See* Fed. R. Civ. P. 26(b)(3) (attorney work product protection applies only to materials "prepared in anticipation of litigation or for trial").

Attorney work product therefore is entitled to a much more limited protection than information protected by the attorney-client privilege. Indeed, Rule 26(b)(3) contemplates that materials prepared by or on behalf of lawyers in anticipation of litigation are discoverable in many circumstances. For example, Rule 26(b)(3) allows for the production of attorney work product where the opposing party can show a "substantial need." *See* Fed. R. Civ. P. 26(b)(3). In addition, the Rule expressly allows assertion of attorney work product protection only where the materials at issue were prepared on behalf of a "party," and thus attorney work product prepared by or for third parties is routinely discoverable in cases where the party to the suit did not prepare it. *See Hendrick* v. *Avis Rent A Car Sys. Inc.*, 916 F. Supp. 256, 259 (W.D.N.Y. 1996); *Bartley* v. *Isuzu Motors*, 158 F.R.D. 165, 167 (D. Colo. 1994); *Bohannon* v. *Honda Motor Co.*, 127 F.R.D. 536, 541 (D. Kan. 1989). Thus, Novell's suggestion that the goals of attorney work product protection will be thwarted if Novell is denied intervention to assert it is entirely misplaced — a decision denying intervention in this instance will not have a chilling effect on lawyers who fear that their work product will someday be disclosed because there has never been

an absolute protection for work product in the first place.[2] Novell must therefore show more than the mere existence of a claim of attorney work product protection in order to intervene.

II. Novell's Remote Economic Interest in Caldera's Profits Is Not a Sufficient Interest to Intervene Under Rule 24.

Having failed to show that the mere existence of a claim of attorney work product protection is a sufficient interest to intervene, Novell takes a brief stab at claiming that its interest in Caldera's profits constitutes a sufficient interest to intervene. (Joint Supplemental Mem. at 8.) This "interest" is far too remote to provide a basis for intervention, especially for the sole purpose of asserting a claim of attorney work product protection.

Novell's "interest" is the result of its sale to Caldera of the so-called DR DOS business and its retention of a right to a share of Caldera's profits pursuant to a license agreement. Novell admits, however, that its right to share in Caldera's profits does not relate directly to its purported transfer of the cause of action in this case. (July 16 Tr. at 18.) Payments to Novell under its licensing agreement with Caldera are based on Caldera's gross revenues, not on the outcome of this litigation. (*Id.* at 19-20.) In light of these facts, Novell is wrong in claiming that its financial interests in this case "are direct, in that they do, in fact, arise directly out of the revenues both from this suit and from the future sales of software that would result from the injunctive relief sought by Caldera." (Joint Supplemental Mem. at 8-9.)

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2 Although Novell again cites the cases cited in its opening memorandum to support its position that the mere existence of a claim of attorney work product protection is a sufficient interest under Rule 24 (*see* Joint Supplemental Mem. at 4), it cannot avoid what the Court already has recognized — each of those cases involved intervenors who stood to be damaged in another *litigation*. (*See* July 16 Tr. at 4; *see also* Def. Reply Mem. at 2-3.)

In any case, Novell's argument proves too much. Under Novell's reasoning, because its purported "interest" arises from a right to share in Caldera's profits, it would presumably be entitled to intervene in *any* case in which Caldera was a party because any such case could affect the amount of Caldera's profits and, in turn, the payment made by Caldera to Novell. Novell has not provided any authority that such a remote interest is a sufficient basis for intervention under Rule 24, and it is clear that the authorities are to the contrary. *See City of Stilwell* v. *Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996) (interest must be direct, substantial and *legally protectible*); *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) ("it is plain that something more than an economic interest is necessary"); *Meridien Homes Corp.* v. *Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) (50% interest in joint venture's profits insufficient to allow intervention in case to determine the status of the joint venture).

Novell's interest is even more remote when viewed in the context of an attempt to intervene solely to assert a claim of attorney work product protection. As discussed above, attorney work product protection exists to allow parties to *litigation* to keep the legal strategies of their lawyers from being disclosed to their opponents. Here, Novell has no litigation opponent with regard to the documents at issue. Novell sold the DR DOS business two years ago; the government enforcement actions precipitated by Novell are long over with; Novell has no pending litigation with Microsoft on any subject; and there is no prospect of any future litigation between Novell and Microsoft to which the documents sought by Microsoft would be relevant. In short, Novell has no litigation-related interest in asserting a claim of attorney work product

protection. Its interest is at best a remote economic one; Novell clearly has no right to participate in the trial of the case or to influence Caldera's tactical decisions about how to litigate the case. Novell therefore has no interest that is sufficient under Rule 24 to allow Novell to intervene in this case for any purpose, including the assertion of a claim of attorney work product protection.

CONCLUSION

For the foregoing reasons, Novell's motion to intervene should be denied, and the Court should order Caldera to produce all documents identified on its privilege logs as "work product" that were not created by or for Caldera in anticipation of this litigation.

DATED this 24th day of July 1998.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO INTERVENE was hand-delivered this 24th day of July, 1998 to the following:

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