Exhibit I

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

CALDERA, INC.

Plaintiff

vs.

MICROSOFT CORPORATION

Defendant.

JOINT SUPPLEMENTAL MEMORANDUM OF CALDERA AND NOVELL IN SUPPORT OF NOVELL'S MOTION TO INTERVENE

Case No.: 2:96CV 0645B
Judge Dee V. Benson
U. S. Magistrate Judge Ronald N. Boyce

INTRODUCTION

At the hearing held on July 16, 1998, on Microsoft's motion to compel production of documents which have been withheld due to a claim of work product protection, the Court requested that the parties submit additional briefing on the issue of Novell's right to intervene in these proceedings in order to prevent disclosure of its attorneys' work product.

Specifically, the Court requested additional argument on the issue of whether intervention as of right under Fed. R. Civ. P. 24(a)(2) requires that Novell, as a proposed intervenor, claim something more than that documents which are protected as its attorney work product may be subject to disclosure. If, indeed, some greater interest is required beyond a simple claim that protected work product may be subject to disclosure, the Court has requested argument on the issue of whether Novell can claim such an interest sufficient to allow intervention.

ARGUMENT

1. A Claim of Work Product Protection Is Itself Sufficient for Intervention under Fed. R. Civ. P. 24(a)(2).

It is undisputed that Novell, in seeking to intervene in this case, has made a colorable claim that the documents which Microsoft seeks to obtain are, in fact, work product of Novell attorneys. The documents were created by attorneys hired by Novell, and Novell has submitted evidence that these documents were created in the course of Novell's efforts to investigate and pursue specific, identifiable claims against Microsoft. Thus, although Microsoft has disputed whether the specific documents withheld were, in fact, prepared in anticipation of litigation, Novell's claim is at least valid on its face. If 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.

This type of asserted interest in protecting documents from disclosure has always been held to be a sufficient interest for intervention, and Microsoft has not cited to any case in which a court relied upon some other type of interest in deciding whether to allow intervention for purposes of protecting a privilege.

In arguing that intervention is the appropriate means for Novell to assert its interest in protecting its attorneys' work product, Novell cited to a number of cases which held that Rule 24(a)(2) intervention was proper in such situations. *United States v. AT&T*, 642 F.2d 1285 (D.C.Cir. 1980); *In re: Grand Jury Subpoenas,* — F.3d —, 1998 WL 247705 (10th Cir. May 15, 1998); *Federal Election Comm'n v. Christian Coalition*, 178 F.R.D. 61, 64 (E.D.Va 1998) *aff'd*, 178 F.R.D. 456 (E.D.Va 1998); *H.L. Hayden Co. of New York v. Siemens Medical*, 797 F.2d 85, 88 (2nd Cir. 1986); *In re Grand Jury Proceedings*, 604 F.2d 798, 801 (3d Cir. 1979); *Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 20 (E.D.N.Y. 1996).

In response, Microsoft does not dispute that intervention is the appropriate procedure for a third party to challenge disclosure of its work product, but argues that Novell does not have a sufficient interest in protecting its work product due to the fact that Novell is not currently involved in any litigation against Microsoft.

However, Microsoft's argument misconstrues what is at issue in intervention. If the documents are Novell's work product, Novell's motive (or purported lack thereof) in keeping

the documents confidential is simply not relevant to the intervention issue. The documents are either Novell's work product, which can only be protected by intervention, or they are not work product, and Novell would have no legal interest in preventing their disclosure. It is Novell's colorable claim that the documents are work product which itself provides a basis for intervention. None of the cases cited above imply any other standard. Although it may be true that the intervenors in those cases generally had other litigation or the threat of other litigation as a *motive* for seeking to intervene, *in none of those cases did the court consider the adequacy of that motive as a basis for allowing intervention*. To the contrary, it was made explicit that the only basis for allowing intervention was the simple raising of a colorable claim that the documents at issue might be work product of the party seeking intervention.

> To be protected by means of intervention, the interest must be "a legal interest as distinguished from interests of a general and indefinite character . . ." *Privileges such as the work product privilege satisfy this definition of legal interest* and can be directly lost through the operation of a discovery order. Without the right to intervene in discovery proceedings, a third party with a claim of privilege in otherwise discoverable materials could suffer "the obvious injustice of having his claim erased or impaired by the court's adjudication without ever being heard."

United States v. AT&T, 642 F.2d at 1292 (emphasis added). Thus, the issue is whether a valid work product claim may be lost, not whether the intervenor has a certain type of motive for seeking to protect its legal interests in the documents. The court in *AT&T* also compared *Donaldson v. United States*, 400 U.S. 517 (1971), a case in which a third party sought to intervene in a subpoena enforcement proceeding in which the IRS was seeking to obtain records from the third party's employer. Even though the third party would obviously be at risk of litigation with the IRS arising out of the documents obtained from the employer, the

Court denied intervention, due to the fact that the third party had no legal interest in the documents themselves, such as a claim of privilege. As the *AT&T* court noted, such a situation is distinguished from this case by the fact that here, the 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." *United States v. AT&T*, 642 F.2d at 1292.

Accordingly, the 'interest' which Microsoft proposes as the determinative factor for purposes of intervention (a threat of litigation in which the documents might be used) has been rejected by the Supreme Court as a basis for intervention, and was wholly ignored as a factor by the court in *AT&T*.

All of the other cases cited above for the principle that a claim of work product is sufficient to allow intervention are to similar effect. None of them even mention the existence of other litigation as a factor in granting intervention, instead simply noting that the claim of an interest in the documents is itself a sufficient interest. *See, e.g., In re: Grand Jury Subpoenas*, --- F.3d --- ("Intervenor's ability to satisfy the elements required for standing is inextricably tied to his ability to claim the attorney-client privilege. If the attorney-client privilege does exist . . . then Intervenor has standing."); *Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 20 (E.D.N.Y. 1996) (although the court felt that possible injury to reputation due to disclosure of the third party's privileged documents would be sufficient for permissive intervention under Rule 24(b), such a ruling is not necessary, since third party's interest in asserting its privileges is itself sufficient to support intervention as of right).

Other cases involving intervention by third parties in order to assert a privilege are to the same effect: the mere assertion of the privilege is sufficient to allow intervention. *In re Grand Jury Proceedings (John Doe)*, 575 F.Supp. 197, 199 (N.D. Ohio 1983) ("To the extent that [the intervenor's attorney] is being subpoenaed to disclose information which may fall within the attorney-client relationship, John Doe's Motion to Intervene is well taken . . ."); *In re Grand Jury Matter*, 735 F.2d 1330, 1331 (11th Cir. 1984) (district court erred in denying anonymous clients' motion to intervene in proceeding to compel production of attorney's records; although it was unknown whether there was any privilege, or whether production of the records would impact the privilege, the "'district court should allow intervention [by a client] in the first instance . . . as soon as the [attorney-client] privilege issue is raised.'"), *quoting In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571, 1575 (11th Cir. 1983).

The fact that Novell itself may or may not be prejudiced in future litigation in which it is a party by disclosure of its attorneys' work product is simply not a relevant factor in determining whether Novell should be allowed to intervene and assert its privilege. If the privilege exists, intervention to assert it is appropriate. The court need not undertake an evaluation of Novell's current motives for asserting its rights; Novell has legally recognized rights with regard to the documents, and must be allowed to protect those rights.

Of course, in this case, intervention is only necessary due to the fact that Novell has provided its work product to Caldera (under the terms of a confidentiality agreement); otherwise, Microsoft would have to subpoena the documents directly from Novell, and Novell would be able to object in the context of a subpoena enforcement proceeding. The fact that the

documents are now in Caldera's possession is in no way relevant to the issue of whether they retain their status as work product,[1] and Novell should be allowed to assert this right regardless of whether the documents are being sought from Caldera or directly from Novell.

The Court has inquired about the appropriateness of a party such as Novell continuing to protect its work product after having transferred the claims which gave rise to the privilege. However, the issue of whether a party such as Novell should be entitled to assert the work product protection is addressed as part of deciding whether the protection continues to exist. Microsoft has acknowledged that work product is protected even after litigation has ended, and has not made any argument that the work product doctrine itself precludes an entity such as Novell from protecting its work product under these circumstances.

The purposes behind the work product doctrine also support Novell's intervention. Since the purposes of the work product doctrine extend beyond the litigation context in which the documents were created, intervention should be allowed whenever work product needs to be protected. As articulated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), the purpose of the work product privilege is to allow an attorney to create necessary documents and files in the course of representation of a client without fear that those files may, at some point, be disclosed to others to the detriment of either the client or the attorney.

> The work product privilege would be attenuated if it were limited to documents that were prepared in the case for which discovery is sought. What is needed, if we are to remain faithful to the articulated policies of *Hickman*, is a perpetual protection for work product, one that extends beyond the termination of the litigation for which the

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[1] Microsoft has not made any argument that the work product status of the documents has been waived due to the transfer.

> documents were prepared. Any less protection would generate the very evils that the Court in *Hickman* attempted to avoid.

In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977). If the purposes of the work product rule are to extend beyond the litigation for which it was prepared, a party's ability to intervene and assert this interest is necessary. This reasoning applies directly to the situation presented in this case. If an attorney's work product is subject to automatic disclosure if a cause of action is later transferred, attorneys working on the case prior to the transfer would be inhibited in their representation, since their professional evaluation of claims, witnesses, legal theories, and evidence could be used to diminish the value of the claim. It is thus clear that the existence and nature of current harm to the client is irrelevant to the intervention issue; the application of the work product doctrine is based upon a desire to protect the professional efforts of attorneys, as much as to protect the immediate interests of the parties to litigation. *See Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483 (4th Cir. 1973) ("the rationale [of *Hickman*] is scarcely less applicable to a case which has been closed that to one which is still being contested. The decision was not in any manner based upon the rights or posture of the litigants vis-a-vis each other."). If the interests underlying the work product doctrine in protecting attorney's thought processes are to be protected after the litigation has ended, later intervention must be allowed without special proof regarding possible harm to the client if the documents are disclosed.

2. Novell Will Suffer Cognizable Harm Beyond the Loss of its Work Product If Intervention Is Not Allowed.

Novell's significant financial stake in the outcome of this litigation is not disputed. As such, Novell's interest in the litigation is as immediate and substantial as a party to the litigation. The possible harm to Novell's interest in this litigation if the work product materials are disclosed is therefore clear. Further, with regard to this particular issue and its effect on the litigation, Novell is the only party able to protect its interests. Even if the court requires that Novell show the existence of harm beyond the loss of its work product in order to intervene, Rule 24 requires only that the intervenor's interest be direct, substantial and that it not be adequately represented by an existing party. Novell's direct financial interest in the outcome of the litigation and the financial prospects of the software which is the subject of the litigation, coupled with the fact that Novell claims an interest in its work product which cannot be adequately represented by an existing party, clearly constitutes a sufficient interest to qualify for intervention under Rule 24.[2]

For example, in *City of Stillwell v. Ozarks Rural Electric Cooperative Corp.*, 79 F.3d 1038, 1042-43 (10th Cir. 1996), the Tenth Circuit upheld the trial court's denial of a motion to intervene based on the fact that the proposed intervenor's financial interest in the outcome of the litigation did not arise directly out of the revenues that the plaintiff would gain if the suit was successful; rather, the proposed intervenor only claimed that if plaintiff's suit was successful, it would indirectly gain by being able to sell additional quantities of power to the plaintiff's customers. *Id.* In this case, Novell's financial interests are direct, in that they do,

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[2] There is no dispute that if Novell had retained an ownership interest in some portion of the lawsuit itself, that its would have a right to protect its work product in this litigation. That Novell's interest takes the form of a financial stake in the case should not alter this result.

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 being sought by Caldera.

In addition, intervention in *Stillwell* was denied due to the fact that the proposed intervenor failed to assert any interest which was not adequately represented by the existing party. *Id.* As explained above, Novell is the only party able to protect its work product in this case, and should be allowed to intervene so that the issue can be addressed.

CONCLUSION

For the reasons stated, Novell's Motion to Intervene in this action for purposes of protecting the work product of its attorneys should be granted.

DATED this 21 day of July. 1998.

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