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

CALDERA, INC.,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

**DEFENDANT'S REPLY MEMORANDUM IN
OPPOSITION TO NOVELL'S MOTION TO
INTERVENE AND IN SUPPORT OF ITS
EXPEDITED MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
WITHHELD BASED ON ALLEGED
ATTORNEY WORK PRODUCT
PROTECTION**

No. 2:96 CV 0645B

Judge Dee V. Benson
Magistrate Judge Ronald N. Boyce

MS-PCA 1126267
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INTRODUCTION

Caldera concedes that it has no standing to assert attorney work product protection for documents created by or on behalf of DRI and Novell. Instead, Caldera belatedly seeks the assistance of its ally Novell—which purportedly sold Caldera the claims at issue in this case for an artificially depressed price to disguise Novell’s subsidization of this litigation, and which retains a substantial stake in any recovery that Caldera may obtain against Microsoft—to prevent Microsoft from obtaining documents to which it is plainly entitled. Despite having opted not to sue Microsoft under the antitrust laws, and despite having transferred the assets relating to the so-called DR DOS business to Caldera two years ago, Novell claims that it still has some unspecified protected interest in documents prepared by its lawyers years ago in an effort to persuade various antitrust enforcement agencies to sue Microsoft for allegedly interfering with a product that it ceased entirely to market in 1994. After having both abandoned the business and having voluntarily provided the relevant documents to Caldera, however, Novell is in no position to prevent their production to Microsoft. Even if Novell did have a sufficient interest to intervene in this case, it has not satisfied its burden of showing that each of the documents at issue was prepared in anticipation of litigation.

ARGUMENT

I. Novell Is Not Entitled to Intervene in This Case.

Novell, which has at every turn obstructed Microsoft’s efforts to obtain the discovery it needs to defend against Caldera’s claims, seeks to intervene for the limited purpose of blocking Microsoft’s access to documents prepared in connection with Novell’s efforts to lobby various antitrust enforcement agencies to take action against Microsoft. This latest effort by

Novell to frustrate Microsoft's legitimate discovery is completely misguided, most importantly because there is no basis for Novell to intervene in this case. Novell does not even attempt to argue that it meets the requirements under Federal Rule of Civil Procedure 24 for such intervention because Novell obviously has no continuing interest in the documents at issue that will be impaired if the documents are provided to Microsoft. *See* Fed. R. Civ. P. 24(a)(2); *United States v. AT&T*, 642 F.2d 1285, 1291 (D.C. Cir. 1980).

None of the authority relied on by Novell supports its position. In *AT&T*, the principal case relied on by Novell, the documents at issue were created by MCI in anticipation of litigation that was pending against AT&T in another judicial district. The court found that this gave MCI a sufficient interest in the documents to intervene under Rule 24(a)(2) in order to prevent the government from disclosing the documents to AT&T. Here, in sharp contrast, the documents being sought by Microsoft *have no bearing on any litigation between Novell and Microsoft in any forum*, and there is no prospect that such litigation will arise in the future because Novell sold the DR DOS business—purportedly including all antitrust claims against Microsoft—to Caldera in July 1996. Since Novell no longer owns the business on whose behalf the lobbying efforts were conducted, and since Novell willingly provided the documents generated in the course of those lobbying efforts to Caldera as an inducement to Caldera to pursue litigation with Microsoft, Novell no longer has any cognizable interest in the documents.

The other cases relied on by Novell are not to the contrary. In each of those cases, the party seeking to intervene to assert attorney work product protection had a substantial interest that would have been impaired if such intervention were not allowed. *See In re Grand Jury Subpoenas*, 1998 WL 247705, at *1 (10th Cir. May 15, 1998) (attached hereto as Exhibit A)

(target of ongoing federal grand jury investigation sought to intervene to prevent attorney work product from being disclosed to grand jury); *Federal Elec. Comm'n v. Christian Coalition*, 178 F.R.D. 61, 64 (E.D. Va.) (party to litigation pending in other court sought to intervene to prevent disclosure of documents prepared in anticipation of that litigation), *aff'd*, 178 F.R.D. 456 (E.D. Va. 1998); *In re Grand Jury Proceedings*, 604 F.2d 798, 799-800 & n.1 (3d Cir. 1979) (target of two separate ongoing grand jury investigations sought to intervene to prevent attorney work product from being disclosed to grand jury); *Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 21 (E.D.N.Y. 1996) (tobacco companies and trade association sought to intervene to prevent disclosure of attorney work product that bore on numerous other pending litigations).

II. Novell Cannot Sustain Its Burden of Showing That the Documents Were Prepared in Anticipation of Litigation.

Even if Novell could satisfy the requirements for intervention under Rule 24, Novell has utterly failed to make the necessary "clear showing" with respect to each and every document withheld, *see Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1199 (1985), that the "primary motivating purpose behind the creation of the [document was] to assist in pending or impending litigation." *McEwen v. Digitran Sys., Inc.*, 155 F.R.D. 678, 682 (D. Utah 1994) (emphasis added).¹ Without this

¹ In seeking to find some support for its views, Novell is forced to rely on cases from other jurisdictions to argue that the Court should not apply the "primary motivating purpose" test. (See Joint Mem. at 6-7 & n.2.) Novell cannot escape the fact, however, that *this* District has adopted that test and, until the Tenth Circuit holds otherwise, it represents the applicable rule of decision. *See Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1509 (D. Utah 1996) (under the doctrine of *stare decisis*, each judgment is a binding statement of the law in future cases before the same court). In any event, even under the "because of" test advanced by Novell, the result is the same. The lobbying documents "would have been created in essentially similar form irrespective of the litigation," and therefore do not qualify for attorney work product protection. *See United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

showing, Novell cannot demonstrate that the documents are immune from production as attorney work product.²

To evade the obvious, *i.e.*, that the withheld documents were generated as part of a lobbying campaign expressly designed to avoid the need for Novell itself to litigate with Microsoft, Novell contends that it “and DRI at all times were contemplating and preparing for a specific civil action . . . arising out of a particular set of circumstances,” and that its various lawyers “were hired to provide legal advice regarding the potential claims, and to prepare responses to government requests for declarations and legal briefs regarding these issues.” (Joint Mem. at 7.) Even accepting these assertions as true, they do not establish that documents prepared in connection with efforts to lobby the government are entitled to attorney work product protection. The mere contemplation of litigation relating to a certain set of facts does not cloak every document that also relates to that set of facts with attorney work product protection without regard to the purposes for which the document was prepared. *See* Fed. R. Civ. P. 26(b)(3) ADVISORY COMM. NOTES (documents prepared by lawyers for non-litigation purposes not entitled to attorney work product protection); *Peterson v. United States*, 52 F.R.D. 317, 320-21 (S.D. Ill. 1971) (not every document containing a lawyer’s mental impressions or opinions is entitled to attorney work product protection).

Moreover, Novell has not even attempted to explain how the individual documents it has withheld are entitled to protection—a burden Novell must satisfy in order to

² Even if Novell were allowed to intervene and could meet its burden, it would still not achieve protection for all of the documents at issue. The joint memorandum and supporting declaration do not even address documents created by DRI, nor do they address documents created in connection with the Department of Justice’s enforcement action.

withhold the documents. In a vague and conclusory declaration, David R. Bradford, Novell's general counsel, seeks to buttress the contention that the documents sought by Microsoft were prepared in anticipation of litigation, but his statements are belied by the documents themselves. For example, the documents attached as exhibits to Microsoft's opening memorandum (*see* Def. Mem. Exs. 5-15)—a tiny sample of the hundreds of documents at issue—show on their face that Novell had decided it would be far preferable to instigate government action against Microsoft than to incur the trouble and expense of filing its own action against Microsoft. Only three of these documents even mention private litigation, and two of those suggest that it would *not* be the appropriate course of action. (*See* Def. Mem. Exs. 14-15.)³

Mr. Bradford nonetheless contends that “[a]ll” of the lawyers retained by Novell were involved in the “preparation for litigating Novell’s claims before a variety of forums, including the European Commission (DG IV), the FTC, and U.S. District Court.” (Bradford Decl. ¶ 3.)⁴ That contention is obviously incorrect because private parties do not litigate in two of the forums he mentions, namely, the FTC and DG IV.⁵ The fact that Novell’s lawyers may

³ The last of the three documents indicates that a dual strategy of government and private action might be pursued. (*See* Def. Mem. Ex. 7.) Novell obviously elected not to adopt such a strategy.

⁴ For ease of reference, the paragraphs of Mr. Bradford’s declaration are referred to herein by number. In the declaration, there are no page numbers and all of the paragraphs are labeled “a.”

⁵ The fact that Novell filed a complaint against Microsoft with DG IV does not mean that Novell was “litigating” the DG IV proceeding. As with the FTC investigation, Novell was simply an instigator of a proceeding handled entirely by government lawyers. *See* C.S. Kerse, E.C. ANTITRUST PROCEDURE § 1.29 (3d ed. 1994). It is DG IV that decides whether to initiate a proceeding based on a complaint filed by a third party like Novell. *Id.* §§ 2.30-2.35. Among other distinctions, in a DG IV proceeding, the subject of an investigation has an absolute right to be heard in the proceedings; whereas the complainant—who is considered a mere third party to the proceeding—must make an application to be heard. *Id.* §§ 4.16-4.19. In short, Novell had a very limited role in the DG IV proceeding that cannot be equated to the role of an actual litigant.

have gathered evidence or even prepared legal analyses in connection with the FTC and DG IV investigations cannot change one indisputable fact: government lawyers, not Novell's lawyers, were handling those investigations. Thus, whatever Novell's lawyers may have done, it was not done in preparation for litigation by Novell.

Mr. Bradford also repeats the argument advanced in the joint memorandum that “[a]t the same time” that Novell was assisting government investigators, Novell's lawyers were investigating facts, preparing evidence and drafting pleadings for a private action. (Bradford Decl. ¶ 4.) Once again, the fact that some lawyers were preparing for private litigation at the same time that other lawyers were lobbying the government does not mean that documents prepared in connection with the lobbying efforts are immune from discovery. A document prepared for the purpose of persuading an FTC Commissioner of the correctness of Novell's position does not become attorney work product merely because similar facts or analysis are contained in documents prepared in evaluating a possible private action against Microsoft.

Mr. Bradford seeks to blur the distinction between these distinct types of documents by asserting that the various law firms retained by Novell “operated jointly, sharing evidence and analysis.” (Bradford Decl. ¶ 3; *see also* Joint Mem. at 7.) Of the documents attached as exhibits to Microsoft's opening memorandum, however, *none* even refer to Wilson, Sonsini, Goodrich & Rosati, the firm that was apparently analyzing the possibility of filing a private lawsuit. Moreover, even if such sharing occurred, it is irrelevant. The same law firm could have created *all* of the documents, but that would not alter the fact that documents prepared for a purpose other than litigation are outside the scope of the attorney work product doctrine.

Finally, Novell's reliance on *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46 (S.D.N.Y. 1979), is misplaced because that case supports Microsoft's position. GAF had provided the government with a memorandum summarizing and analyzing various documents produced to GAF in its own litigation with Kodak. *Id.* at 48. In holding that GAF's memorandum was entitled to attorney work product protection, the court found that it was prepared not only to provide to the government, but also for various purposes in GAF's litigation against Kodak, including (1) as a basis for conducting future depositions, (2) as an initial step in preparing a "trial book," (3) as a means of providing new lawyers to the case with an analysis of the documents described in the memorandum, and (4) as a means of providing GAF with its counsel's analysis of the evidence. *Id.* at 51. Here, as discussed above, Novell has made no showing that the purpose—let alone the primary motivating purpose—for preparing each of the withheld documents was for use in anticipated litigation between Novell and Microsoft.

III. Any Attorney Work Product Protection That May Have Existed Has Been Waived.

As explained in Microsoft's opening memorandum, "[o]nce a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the [attorney work product] privilege disappears." *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993). Here, the joint memorandum concedes that numerous documents that were initially "redesignated" as attorney work product by Caldera were voluntarily produced to Microsoft "in order to avoid pointless litigation over their status." (Joint Mem. at 10.) The documents that Caldera produced relate to the very same subject matters as the documents that it now wishes to keep secret. If Caldera wished to preserve attorney work product protection over any documents relating to those subject matters, it should have raised the issue with the Court

rather than selectively producing the documents. Given Caldera's position on this motion, such litigation would hardly have been "pointless."

Having turned over numerous documents relating to efforts to lobby the government to take action against Microsoft, Caldera cannot now withhold other documents relating to the same subject matters. Caldera was willing to produce documents it did not regard as damaging, and thus Caldera's cynical attempt to withhold other documents concerning the identical subject matters just because it regards them as damaging should not be tolerated. Caldera's selective disclosure is unfair and contrary to established precedent.

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 14th day of July, 1998.

RAY, QUINNEY & NEBEKER

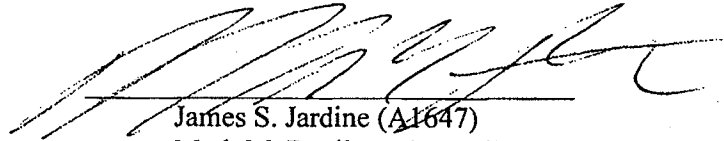
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S REPLY MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO INTERVENE AND IN SUPPORT OF ITS EXPEDITED MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD BASED ON ALLEGED ATTORNEY WORK PRODUCT PROTECTION was hand-delivered this 14th day of July, 1998 to the following:

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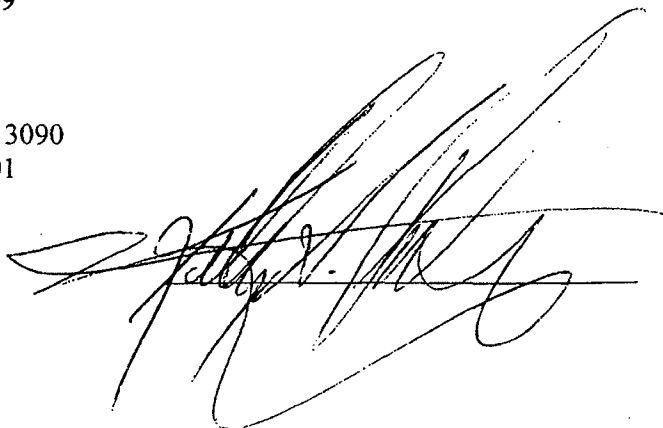
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