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FILED
CLERK U.S. DISTRICT COURT
18 OCT 02 AM 9:35
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

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[represented by its successor-in-interest,
The Canopy Group, Inc.]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

CALDERA, INC., [represented by its successor
-in-interest, THE CANOPY GROUP, INC.])

Plaintiff,)

vs.)

MICROSOFT CORPORATION)

Defendants.)

**MEMORANDUM IN SUPPORT OF
MOTION TO MODIFY
STIPULATION REGARDING
PRESERVATION OF DOCUMENTS
UNDER THE PROTECTIVE ORDER**

Civil No. 2:96 CV 0645DB

Judge Dee V. Benson
Magistrate Judge Ronald N. Boyce

This memorandum is submitted in support of the motion of The Canopy Group, Inc. ("Canopy"), as the successor-in-interest, by way of a merger, of Plaintiff Caldera, Inc., to modify the Stipulation Concerning Preservation of Documents under the Protective Order (the "Stipulation") entered by this Court on May 30, 2000.

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BACKGROUND

This action was a complex anti-trust proceeding filed in 1996. The parties engaged in extensive discovery and produced numerous documents (the “Documents”) pursuant to a Protective Order entered by this Court on April 1, 1997. On January 7, 2000, the parties reached a settlement and the case was dismissed.

At the conclusion of the Action, Caldera intended to comply with the Protective Order and either destroy the Documents or to return them to Microsoft or other originating entity. At the time, various other cases were pending against Microsoft in both state and federal courts. Certain third parties involved in those other cases indicated an interest in preserving the Documents and served Caldera with one or more subpoenas requesting the documents. To resolve issues regarding the subpoenas, Caldera and Microsoft entered into a Stipulation Concerning Preservation of Documents under the Protective Order (the “Stipulation”) providing that Caldera would retain the Documents, which Stipulation was entered by this Court on May 30, 2000.

In late January, 2000, Caldera, Inc. was merged into its parent, The Canopy Group, Inc. (“Canopy”). Caldera, Inc. thus no longer exists, and Canopy has taken charge of, and has incurred expenses for, retention of the Documents. Canopy is thus now the real party in interest.

THE DOCUMENTS

The Documents are currently being stored in an archival location, specifically at Redman Records in Salt Lake City, Utah. Approximately 937 boxes are stored in various locations around the Redman site. Canopy’s lawyer has briefly reviewed the contents of the boxes (but has not read or

reviewed any specific document in any of the boxes). Based on that review, it appears that there could be an average of 3000 to 4000 pages in each box (assuming the boxes reviewed are typical). Thus, well over 3,000,000 pages could be included in the Documents.¹

The current cost of storage of the documents is \$0.16 per box per month, or approximately \$150.00 per month or \$1800.00 per year, plus the administrative expenses of the storage. Although this is not an enormous sum, it has been nearly three years since the underlying litigation ended. Canopy cannot perceive any corporate benefit to retaining the Documents, an obligation that is of indefinite length or scope, and in fact Canopy has at least some risk of liability should the documents be inadvertently disclosed.

The Documents have also caused Canopy to incur additional costs. For instance, from time to time Canopy receives requests that it produce the Documents to third parties. These requests require Canopy to engage counsel to respond to the requests, thus resulting in additional costs for which Canopy receives no corporate benefit. To date, those costs have not been extreme; Canopy calculates that the outside counsel costs have been approximately \$2000-3000 per year for the last two years.

However, even though the costs have not yet been enormous, this is an open-ended commitment to Canopy, one for which the costs could escalate at any time, one for which the potential liability for inadvertent disclosure could be enormous, and one for which Canopy receives no corporate benefit. Thus, Canopy seeks relief from this Court by way of a modification of the Stipulation to permit Canopy (1) to destroy the Documents; or (2) to return the Documents to the originating party, which would be

¹Canopy understands that there are additional documents being held by The Summit Law Group in Seattle. Canopy does not speak for The Summit Law Group, and thus this motion does not have any bearing on those documents.

Microsoft or a third party; or (3) to deliver the Documents (and the associated costs of storage) being preserved to a third party having an interest in ongoing preservation of the Documents, if any such party exists and if such a course of action would not prejudice the rights of the entities that originally produced the Documents; or (4) to take such other action as the Court may order, in the interests of justice, that would relieve Canopy of the obligation and costs of retaining the Documents.

ARGUMENT

A court retains the power to modify a protective order as long as that order is in effect. United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1991); Grundberg v. Upjohn Co., 140 F.R.D. 459, 463 (D.Utah 1991). The decision to modify the order is left to the sound discretion of the district court. United Nuclear, *supra*, at 1427; Grundberg, *supra*, at 464. Factors other courts have considered in determining whether to modify a protective order are (1) good cause; (2) the nature of the protective order; (3) the foreseeability of the requested modifications; and (4) the parties' reliance on the protective order. Bayer AG and Miles, Inc. v. Barr Laboratories, Inc., 162 F.R.D. 456, 462-63 (S.D.N.Y. 1995); 6 Moore's Federal Practice, §26.106[3][a] (Matthew Bender, 3d Edition). In this instance, each of these factors supports a modification of the order.

Good Cause

Canopy seeks a modification of the Stipulation to relieve Canopy of the financial and administrative burden of storing a large volume of documents that relate to a case that has been settled and dismissed. Although there may be good reasons to preserve such documents for others, Canopy

should not be burdened with that obligation. Canopy receives no corporate benefit to maintaining the documents, and thus believes good cause exists for modifying the Stipulation.

Nature of the Protective Order

The Protective Order was essential to the conduct of the litigation, but that litigation has ended. The Stipulation is not essential to the litigation or to the interests of the parties to the litigation. The ongoing obligation to preserve secrecy is important; the ongoing obligation to store documents relating to a closed case is not. In fact, destruction of the documents would support the intent of the Protective Order. Thus, the nature of the Stipulation and of the Protective Order are such that the Court should allow modification of the Stipulation to permit the documents to be destroyed or otherwise removed from Canopy's custody.

Foreseeability of the Requested Modifications

Canopy is requesting merely that it be permitted to destroy the documents in question or, if destruction is not desirable, permission to return the documents to the producing person or entity, or turn the documents over to a third party who is willing to abide by the Protective Order and the Stipulation, and pay the costs associated with retaining the documents, or take such other action as the Court may order in the interests of justice. The Stipulation is open ended; that is, there is no termination date. Canopy should not be expected to store a large volume of documents forever. Thus, modification to relieve Canopy of that obligation is not only foreseeable, it would have been illogical for anyone to believe that such a modification would not be ultimately granted. The only question is when such relief would be granted; Canopy respectfully submits that a modification two and a half years later was foreseeable to all concerned.

Parties' Reliance on the Protective Order

Typically, there is a presumption against modification of a protective order, both because the parties rely on the order and because a party may not be as willing to cooperate in discovery if a protective order is likely to be modified later. Bayer, supra, at 229-230. However, the usual reason for petitioning a court to modify a protective order is to permit third parties to review the protected information, see e.g., United Nuclear, supra, Grundberg, supra, and Bayer, supra. In this case, Canopy merely wants to be relieved of the financial and administrative burden of indefinitely storing documents that relate to a case that ended nearly three years ago.

The parties to this litigation did rely on the Protective Order. Canopy's preferred course of conduct, the destruction of the documents, would support that reliance. Canopy does not seek to affect any party's reasonable expectation that the Protective Order would not be modified to that party's detriment. Rather, Canopy seeks modification of the Stipulation to permit destruction of the documents as originally contemplated by the Protective Order. Thus, the requested modification should be granted.

CONCLUSION

Good cause exists to modify the Stipulation to relieve Canopy, the successor-in-interest to Caldera, Inc., from the burden of storing documents by modifying the order to permit Canopy to:

1. Destroy the Documents being preserved in accordance with the Stipulation; or
2. Deliver the Documents being preserved to Microsoft or other originating entity of the documents, with the consent of those entities; or

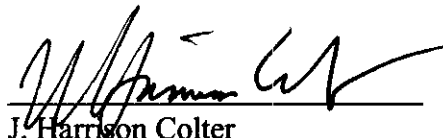
3. Deliver the Documents being preserved to a third party having an interest in preserving the Documents, if any such party exists and if such a course of action would not prejudice the rights of the entities that originally produced the Documents; or

4. Take such other action as the Court may order that would relieve Canopy from the obligation to retain the Documents yet preserve the Documents for interested parties, if any.

Such a modification is consistent with the nature of the Protective Order, was and is foreseeable to the parties to the litigation, and rather than defeating the parties' reliance on the Protective Order would actually support that reliance. Therefore, Canopy respectfully requests that the Court grant this motion.

DATED this 18th day of October, 2002.

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Certificate of Service

The undersigned hereby certifies that a copy of the above MEMORANDUM IN SUPPORT OF MOTION TO MODIFY STIPULATION REGARDING PRESERVATION OF DOCUMENTS UNDER THE PROTECTIVE ORDER was mailed via United States mail to:

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