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

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| CALDERA, INC. | No. 2:96 CV 0645B |
| Plaintiff, | **SUN MICROSYSTEMS, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO INTERVENE UNDER FED. R. CIV. P. 24(B) TO MODIFY PROTECTIVE ORDER** |
| vs. | |
| MICROSOFT CORPORATION | |
| Defendant. | Judge Dee V. Benson |

## I. INTRODUCTION

The issue before the Court is straightforward: should the Court modify the protective order it entered in *Caldera, Incorporated v. Microsoft Corporation* so that Intervenor Sun Microsystems, Incorporated can minimize the discovery burden to itself and third parties in its collateral litigation?



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## II. BACKGROUND

Intervenor Sun Microsystems, Incorporated ("Sun") is a manufacturer and distributor of computer systems, software and services. On March 8, 2002 Sun filed suit against Microsoft Corporation ("Microsoft") for violations of various state and federal antitrust and unfair competition laws, including the Sherman Act, the Clayton Act and California's Unfair Competition Law.[1]

After transfer for pretrial coordination by the Judicial Panel on Multidistrict Litigation, the suit is presently before the Honorable J. Frederick Motz in the United States District Court for the District of Maryland. Pursuant to various scheduling orders entered by Judge Motz and his predecessors prior to transfer, Sun and Microsoft have proceeded with extensive discovery in the case, including document subpoenas on various third parties.[2]

Sun's antitrust and unfair competition claims include claims concerning Microsoft's purposeful incompatibilities and other anticompetitive actions in the market for personal computer operating systems, akin to Microsoft's purposeful incompatibilities and anticompetitive actions against Caldera, Incorporated ("Caldera") and its predecessors during the late 1980's and early 1990's.[3] As this Court is undoubtedly well-aware, these incompatibilities and anticompetitive actions were at the heart of the antitrust suit filed by Caldera in this Court in 1996.

Caldera settled its suit against Microsoft on January 7, 2000. As part of the settlement, on May 30, 2000 the Court entered a stipulation between the parties modifying the April 1, 1997

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[1] 11/13/02 Grewal Decl. ¶ 1.
[2] 5/24/02 Order Regarding Discovery Plan (11/13/02 Grewal Decl. Ex. B).
[3] 8/26/02 Sun's Amended Compl. ¶¶ 117, 118 (11/13/02 Grewal Decl. Ex. A).

protective order ("Protective Order") that had governed the handling of materials gathered during the discovery phase of the case.[4] Under the terms of this stipulated modification, Caldera agreed to preserve all documents produced to it by Microsoft or any third party, rather than return or destroy the documents as had originally been permitted.[5]

Two years after the settlement agreement was reached and the Protective Order was modified by stipulation, The Canopy Group, Inc. ("Canopy") (successor-in-interest to Caldera) moved this Court for relief from the stipulation.[6] Specifically, Canopy filed a motion asking that, with respect to any document produced pursuant to the Protective Order that it was required to preserve, Canopy be permitted instead to either: (1) return the documents to the individual or entity that produced it; (2) destroy the document; or (3) turn over the document to any interested third party, subject to notice to the party producing the document.[7]

Canopy served this motion on Microsoft, as well as a whole host of other potentially interested parties.[8] Despite the potential implications for disclosure made explicit in Canopy's motion, not one party came forward to object or even respond: not Microsoft, and not any other party.[9] In the absence of any opposition, the Court proceeded to decide Canopy's motion on October 24, 2002 by signing the proposed order filed by counsel.[10]

But the proposed order, rather than granting Canopy's request for permission to elect any

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[4] 5/30/00 Stipulation Modifying April 11, 1997 Protective Order (11/13/02 Grewal Decl. Ex. C).
[5] *Id.* at 1.
[6] Motion to Modify Stipulation Regarding Production of the Documents Under the Protective Order at 1 (11/13/02 Grewal Decl. Ex. D).
[7] *Id.* at 2.
[8] *Id.* at 4-5.
[9] *See* Civil Docket for Case No. 96-CV-645, *Caldera v. Microsoft* (11/13/02 Grewal Decl. Ex. K).
[10] 10/24/02 Order Regarding Preservation of Documents Under the Protective Order (11/13/02 Grewal Decl. Ex. E).

one of the three stated procedures for handling any document produced pursuant to the Protective Order, instead modified the Protective Order to authorize only one procedure: destruction of the documents.[11] As a result, the Protective Order now appears to authorize the destruction of documents regardless of any lawful request or subpoena from any collateral party asking that the documents be produced.

Unfortunately, Sun was not one of the potentially interested parties served with notice of Canopy's motion to modify the Protective Order.[12] As a result, by the time Sun learned of Canopy's motion after the close of business on October 29, 2002, the motion had already been granted.[13] This left Sun with little time to secure any documents it might require for its litigation before Canopy had destroyed the documents pursuant to the Court's order.

Counsel for Sun called counsel for Canopy the next morning to learn of the condition of the documents subject to the Protective Order. After being informed that Canopy could not confirm the status of any of the documents, Sun then served its subpoena on October 31, 2002, requesting that Caldera make available for inspection "all documents produced to Caldera in Caldera, Inc. v. Microsoft Corp."[14]

In response to the subpoena, Canopy asserted that it may not make the documents at issue available to Sun for inspection without an order from this Court modifying the Protective Order to allow such an inspection.[15] Canopy further asserted that in the absence of such an order, it

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[11] *Id.* at 3.
[12] 11/13/02 Grewal Decl. Ex. D at 4-5.
[13] *See* 11/13/02 Grewal Decl. ¶ 14, Ex. L.
[14] Sun's 10/31/02 subpoena to Canopy (11/13/02 Grewal Decl. Ex. F).
[15] 11/6/02 Colter letter to Grewal at 2, ¶ 7 (11/13/02 Grewal Decl. Ex. G).

would proceed with its destruction of the documents.[16] Accordingly, Sun has filed the instant application to secure this Court's modification of the Protective Order to permit Canopy to provide the documents to Sun pursuant to Sun's subpoena. Because such a modification is called for under the law of the Tenth Circuit, Sun's application should be granted.

## III. ARGUMENT

### A. Sun is entitled to intervene to modify the Protective Order under Fed. R. Civ. P. 24(b).

Sun's motion to modify the Protective Order is an application for permissive intervention under Fed. R. Civ. P. 24(b). Rule 24(b) provides that "[u]pon timely application anyone may be permitted to intervene in an action: . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Thus, Rule 24(b) requires that Sun's application for intervention be granted so long as the application (1) is timely and (2) has a question of law or fact in common with any of Caldera's claims. Sun's application easily meets both these requirements.

First, Sun's application is timely. In the seminal Tenth Circuit case governing applications for permissive intervention to modify a protective order, *United Nuclear Corporation v. Cranford Insurance Company,*[17] the Court held that "[w]hile it is true that an application for intervention must be timely," a party can bring a timely application for intervention to modify a protective order even three years after the underlying suit has settled, because "[t]imeliness is to be determined from all the circumstances and the point to which the

[16] *Id.* at 3.
[17] 905 F.2d 1424 (10th Cir. 1990).

suit has progressed is not solely dispositive."[18] In this instance, Sun has brought its application two years–not three–after Caldera and Microsoft settled their case, and only days after it first learned about changes to the Protective Order that affect its ability to seek discovery. Under these circumstances, as in *United Nuclear*, there is "nothing improper in allowing intervention to challenge a protective order still in effect, regardless of the status of the underlying suit."[19]

Second, Sun's claims against Microsoft share much in common with the claims brought by Caldera. As an initial matter, the Tenth Circuit has adopted a lenient standard for commonality under Rule 24(b). In *United Nuclear,* the Court noted that "courts have widely recognized that the correct procedure for a non-party to challenge a protective order is through intervention for that purpose."[20] It then held that "[w]hen a collateral litigant seeks permissive intervention solely to gain access to discovery subject to a protective order, no particularly strong nexus of fact or law need exist between the two suits."[21]

Here, the nexus between Sun's suit and Caldera's suit is in fact particularly strong. Both Sun and Caldera have challenged Microsoft's anticompetitive behavior in the market for personal computer operating systems. In particular, both Sun and Caldera have alleged that Microsoft has purposefully engaged in anticompetitive acts to discourage original equipment manufacturers (OEMs) from considering any operating system that competes with Microsoft's

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[18] *Id.* at 1427.
[19] *Id.* Nor is there any doubt that this Court has jurisdiction to consider Sun's application. "As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed." *Id.*
[20] *Id.* at 1427 (citing *Public Citizen v. Liggett Corp., Inc.* 858 F.2d 775, 783 (1st Cir. 1988)).
[21] *Id.* (citing *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 164 (6th Cir. 1987)).

Windows Operating System.[22] Accordingly, Sun's application for intervention more than satisfies the Tenth Circuit's lenient standard.

### B. Sun's Request to Modify the Protective Order is Fair and Reasonable

Just as the Tenth Circuit has adopted a lenient standard for applications to intervene to modify a protective order, it has adopted a practical standard for reviewing applications on their merits. In *United Nuclear*, the Court acknowledged the improved discovery efficiency of protecting against disclosure of confidential information, but then held that "when a collateral litigant seeks access to discovery produced under a protective order, there is a countervailing efficiency consideration—saving time and effort in the collateral case by avoiding duplicative discovery."[23] It then adopted the standard set forth by Seventh Circuit in *Wilk v. American Medical Association*: "[W]hen an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any

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[22] *Cf. Caldera, Inc. v. Microsoft Corp.*, 72 F.Supp.2d 1295, 1300-01 (D. Utah 1999) ("Caldera alleges that following the launch of DR DOS 5.0 Microsoft refined and dramatically expanded a campaign of 'fear, uncertainty, and doubt' (FUD) against DRI and all of its forthcoming versions of DR DOS. Plaintiff alleges that account managers were directed to share purported 'serious problems' with OEMs considering a switch to DR DOS 5.0. Caldera asserts that Microsoft deliberately withheld from these same OEMs independent tests confirming DR DOS 5.0 compatibility with MS-DOS and Windows, while creating its own tests to give the appearance of 'incompatibility.'); 11/13/02 Grewal Decl. Ex. A ¶¶117, 118 ("Sun has directly competed with Microsoft in the Intel-compatible PC operating system market (as well as workgroup server operating system market) with a version of its Solaris operating system that can run on Intel-compatible microprocessors. On information and belief, Sun alleges that Microsoft engaged in anticompetitive acts designed to threaten, discourage, or prevent computer OEMs from distributing the Intel-edition of the Solaris operating system.").

[23] *United Nuclear*, 905 F.2d at 1427-28.

possible modification of the protective order."[24]

Here, there is no question that the parties affected by Sun's request will be in no worse a position as they would be if Sun were to pursue this discovery directly. Microsoft can have no legitimate claim to the contrary. It has already agreed to tender to Sun all of the documents it produced to Caldera in the *Caldera, Incorporated v. Microsoft Corporation* litigation and has already begun to do so.[25] Nor can any third party that produced documents to Caldera argue that it would suffer tangible prejudice from a modification to the Protective Order. The materials that Sun seeks could alternatively be secured by subpoena on the third party, which would only be more costly and burdensome to the third party in addition to adding to the cost and burden to Sun.[26] Sun's subpoena on Canopy, if anything, reduces the burden on these third parties by sparing them the cost and effort of producing the documents themselves.[27] As for any third-party confidentiality concerns, the modification proposed by Sun would provide at least as much protection as the documents currently enjoy. Along with the other parties to the MDL proceeding, Microsoft and Sun have negotiated a careful protective order that affords Sun only limited access to and use of any confidential and "attorneys' eyes only" materials from previous litigations.[28] The MDL protective order imposes strict limits on Sun's internal access to

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[24] *Id.* at 1428 (*quoting Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1986)).
[25] *See* 9/30/02 Wagner letter to Armstrong (11/13/02 Grewal Decl. Ex. M).
[26] Neither Microsoft nor any third party justify its opposition to giving Sun limited access on its desire to make more burdensome for Sun to pursue its litigation. Such a "desire to make it more burdensome for Intervenor[] to pursue [its] collateral litigation is not legitimate prejudice." *Id.* at 1428.
[27] Because the documents that Sun seeks include materials produced by third parties to Caldera but not necessarily to Microsoft, the burden on these third parties cannot be avoided simply by requesting the materials directly from Microsoft.
[28] 11/6/02 Amended Stipulated Protective Order re Competitor Cases ¶ 5 (11/13/02 Grewal Decl. Ex. L).

materials designated "attorneys' eyes only" in any previous litigation and prohibits Sun from publicly disclosing any materials designated in the previous litigation either "attorneys' eyes only" or "confidential."[29] Critically, these provisions offering only limited access and use of confidential materials applies not only to materials produced by either Sun or Microsoft, but third parties like those that may have produced materials to Caldera.[30] As a result, Sun and Microsoft have already acted to accommodate what the Tenth Circuit has described as "any legitimate interest the defendants [or third parties] have in continued secrecy."[31]

Both Microsoft and the third parties who may have produced documents to Caldera have confirmed the absence of any tangible prejudice from disclosure through their recent (in)actions. As noted earlier, when Canopy filed its motion seeking to modify the stipulation amending the Protective Order, it included a request that it have the option to turn over the documents to an interested third party—just as Sun now asks the Court. But rather than draw a hail of protests from these parties about the prejudice from such a disclosure, Canopy's motion drew utter silence. This silence is a recognition that any concerns that these parties may have had about disclosure have long since passed the point where the disclosure would prejudice any of the parties' present interests.[32]

## IV. CONCLUSION

Sun's present motion to modify the Protective Order seeks nothing more than to avoid

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[29] *Id.* ¶¶ 10, 11.
[30] *Id.* ¶ 5.
[31] *United Nuclear*, 905 F.2d. at 1428.
[32] Nor would amending the Protective Order to permit Sun access to the documents it has subpoenaed impose any burden or other harm on Canopy. Sun has offered to assume all of Canopy's reasonable costs in maintaining the documents as of the date of the subpoena. *See* 11/13/02 Grewal Decl. ¶ 17. By saving Canopy the cost of destroying the documents, Sun would in fact reduce the burden that Canopy presently faces.

duplicative discovery and the attendant expense and burden of such discovery. At the same time, a modification would impose no tangible prejudice to any of the parties affected and would only reflect the relief recently sought by Canopy that draw no substantive opposition from any potentially interested party. Accordingly, Sun's request to modify the Protective Order to permit Canopy to respond to Sun's subpoena for documents produced to Caldera under the Protective Order should be granted.

Dated: November 13, 2002

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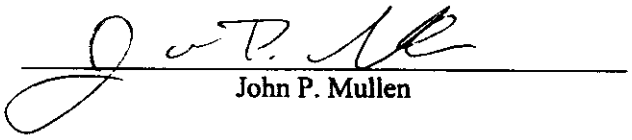

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