

J. Harrison Colter, Esq. (4018)
COLTERJENNINGS
333 South 520 West, Suite 310
Lindon, Utah 84042
Telephone: (801) 932-6162
Facsimile: (801) 932-6161

FILED
-2 DEC 02 PM 4:04
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

Attorney for Plaintiff Caldera, Inc.
[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)	CANOPY'S RESPONSE TO SUN
-in-interest, THE CANOPY GROUP, INC.])	MICROSYSTEMS, INC.'S MOTION
)	TO INTERVENE UNDER FED. R.
Plaintiff,)	CIV. P. 24(B) TO MODIFY
vs.)	PROTECTIVE ORDER
)	
MICROSOFT CORPORATION)	Civil No. 2:96 CV 0645DB
)	
Defendants.)	Judge Dee V. Benson
)	Magistrate Judge Ronald N. Boyce
)	

The Canopy Group, Inc. ("Canopy"), as the successor-in-interest, by way of a merger, of Caldera, Inc., submits this memorandum in response to the motion of Sun Microsystems, Inc. ("Sun") to intervene for the purpose of modifying the Protective Order entered by this Court on April 1, 1997 (the "Protective Order") and, implicitly, the Stipulation Concerning Preservation of Documents under the Protective Order (the "Stipulation") entered by this Court on May 30, 2000, and this Court's Order of October 24, 2002.

681

FACTUAL BACKGROUND

As stated in Canopy's Motion to Modify the Stipulation, the underlying action was a complex anti-trust proceeding filed in 1996. The parties engaged in extensive discovery and produced numerous documents (the "Documents") pursuant to the Protective Order. The Documents likely include material from unrelated third parties, that is, entities other than Caldera, Canopy or Microsoft.

On October 24, 2002, this Court entered an order permitting Canopy to destroy the Documents. Canopy began the destruction process, which involves the steps of (1) pulling the boxes from the shelves of the storage company, at a cost of \$2.60 per box; (2) shipping the boxes to a document destruction company; and (3) physical destruction of the Documents. On or about October 31, 2002, a subpoena (the "Subpoena") was delivered to Canopy's offices, and was received by a Canopy administrative assistant. Although Canopy questioned the legal effect of such "service" of the Subpoena, Canopy halted the destruction process. Canopy does not believe any of the Documents have yet been destroyed.

Canopy believes that 300-400 boxes had been pulled by the time the Subpoena was delivered. Those boxes were on the shipping dock, but the storage company is likely to re-shelve the boxes, at an additional cost of \$2.60 per box. As a result, the boxes will again have to be pulled (at an additional cost of \$2.60 per box) once Sun's motion is resolved. In addition, Canopy has incurred several hundred dollars of additional legal fees. Thus, Sun's Subpoena has not been without cost to Canopy.

Canopy has obtained what appears to be an index of the Documents. A copy of the index is attached as Exhibit A. As the Court can see, if the index is accurate, the Documents include privileged materials and materials from third parties.

CANOPY HAS NO INTEREST IN RETAINING THE DOCUMENTS

Canopy's position in this matter will come as no surprise. Essentially, Canopy seeks three things:

1. **Relief.** Canopy seeks relief from the continuing expense, obligation and potential liability of storing confidential Documents collected for a case that ended nearly three years ago.
2. **Release.** Canopy wishes to ensure that the Documents are treated in such a manner that Canopy has no liability to the entities that originally produced the Documents.
3. **Reimbursement.** Canopy seeks reimbursement of its expenses relating to responding to the Subpoena, including the additional costs of storage, retention, and securing of the Documents, as well as Canopy's attorneys' fees.

Canopy does not, however, have any interest or desire in seeing a protracted fight over the Documents. Rather, Canopy's preference would be to destroy the Documents immediately and permit Sun to obtain discovery from others.

RELIEF

As set forth in Canopy's original moving papers, Canopy has no corporate interest in retaining the Documents. Canopy would prefer to destroy the Documents, and was in the process of doing so when Sun sought to serve the Subpoena on Canopy. Destruction seems to be the best way of relieving Canopy of any further obligation or expense with regard to the Documents, and also seems to be most consistent with the terms of the Protective Order under which the Documents were produced.

Canopy has discussed the possibility of a stipulation with Microsoft turning custody of the Documents over to Microsoft's local attorney. Canopy is not averse to such a stipulation, but the details would need to be resolved (and Canopy is averse to any further delay in relieving Canopy of the Documents). For instance, Canopy would need to protect the privileged materials, and Canopy has no desire to go to the expense of determining which documents are privileged. Furthermore, the rights of third parties should be considered before the Court enters such a stipulation, and there may be other details that arise during negotiations over such a stipulation. Alternatively, if the issues of expense, privilege and third party rights can be resolved, Canopy is willing to turn the Documents over to Sun (thereby eliminating the need for Sun to incur photocopy charges). Canopy just wants to be rid of the obligation and expense of retaining the Documents, in the most efficient and least costly manner possible.

RELEASE

Of course, the Court must cognizant of the rights of Microsoft and other third parties. Many of the Documents were provided to Canopy at least in partial reliance on the protections of the Protective Order. Canopy sought to destroy the Documents as set forth in the Protective Order. That Sun may be interested in obtaining the Documents is a matter for the Court. Canopy trusts that the Court will render an Order that protects Canopy's and third parties' rights regarding the Documents, and relieves Canopy of liability for the disposition of the Documents.

REIMBURSEMENT

As set forth above, Canopy has incurred, and is likely to further incur, several hundred dollars of costs and fees as a direct result of Sun's Subpoena. These costs and fees would not have been incurred but for

Sun's actions, have been unavoidable, and should have been anticipated by Sun. Thus, Canopy asks that the Court order Sun to pay those fees as part of any order that may issue as a result of Sun's subpoena and motion.

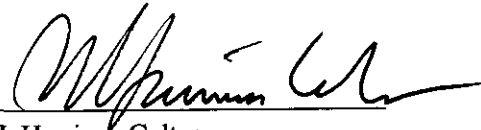
CONCLUSION

As set forth in Canopy's original motion, good cause exists to modify the Stipulation to relieve Canopy, the successor-in-interest to Caldera, Inc., from the burden of storing the Documents. Canopy therefore asks the Court for an order:

1. Relieving Canopy of the obligation of maintaining the Documents, while protecting Canopy's privileges and the rights to third parties;
2. Releasing Canopy from liability relating to the Documents; and
3. Reimbursing Canopy for its costs and fees incurred as a result of Sun's Subpoena.

DATED this 2nd day of December, 2002.

COLTERJENNINGS



J. Harrison Colter
Attorney for Plaintiff The Canopy Group, Inc.
successor-in-interest to Caldera, Inc.

Plaintiff's Address:

333 South 520 West
Lindon, Utah 84042

Certificate of Service

The undersigned hereby certifies that a copy of the above CANOPY'S RESPONSE TO SUN MICROSYSTEMS, INC.'S MOTION TO INTERVENE UNDER FED. R. CIV. P. 24(B) TO MODIFY PROTECTIVE ORDER was mailed via United States mail to:

James S. Jardine, Esq.
RAY QUINNEY & NEBEKER
79 S. Main St.
PO Box 45385
Salt Lake City, UT 84145-0385

John P. Mullen
ANDERSON & KARREBERG
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2006

On December 2, 2002



J. Harrison Colter

Exhibits/
Attachments
to this document
have **not** been
scanned.

Please see the
case file.
