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U.S. DISTRICT COURT
DISTRICT OF UTAH

Attorneys for Microsoft Corporation

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

<p>CALDERA, INC., Plaintiff, vs. MICROSOFT CORPORATION, Defendant.</p>	<p>MICROSOFT CORPORATION'S RESPONSE TO SUN MICROSYSTEMS, INC.'S MOTION TO INTERVENE TO MODIFY PROTECTIVE ORDER</p> <p>Civil No. 2:96 CV 0645B Judge Dee V. Benson</p>
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Microsoft Corporation ("Microsoft") hereby responds to the motion to intervene filed by Sun Microsystems, Inc. ("Sun") in this action on November 13, 2002 seeking modification of the protective order previously entered by this Court.

In March 2002, Sun filed an action against Microsoft asserting claims under the federal antitrust laws.¹ Sun contends that the documents previously produced in this action are relevant

¹ That action, *Sun Microsystems, Inc. v. Microsoft Corp.* (referred to herein as *Sun v. Microsoft*), was initially filed in the United States District Court for the Northern District of California and is now part of Case No. MDL 1332 pending in the District of Maryland.

682

to its claims in *Sun v. Microsoft*. (See Sun Microsystems, Inc.'s Memorandum in Support of its Motion to Intervene Under Fed. R. Civ. P. 24(B) to Modify Protective Order ("Sun Mem."), November 13, 2002, at 2, 6-7.) Sun therefore requests modification of this Court's Order Regarding Preservation of Documents Under the Protective Order, to require that Plaintiff Caldera, Inc.² turn over to Sun the documents previously produced in this action instead of destroying those documents as permitted by the Court's Order.³

It is not apparent that Sun needs to obtain these documents from Canopy – these are copies of productions also available from Microsoft – but notice must be provided before third party documents can be produced. With regard to Microsoft's productions in the *Caldera* action, without conceding relevance, Microsoft already has produced a complete set of the prior Microsoft production to Sun. Microsoft also has in its possession copies of the productions made by Caldera and third parties in this action. It has not produced these documents to Sun in *Sun v. Microsoft* because this is not permitted under the Court's Protective Order governing these productions.

In any event, whether the documents are to be produced from Microsoft or from Canopy's warehoused production sets, third parties are entitled to notice and an opportunity to object before their documents can be produced and used in *Sun v. Microsoft*. Sun argued in its motion to intervene that no further notice was required, seeking to rely upon the notice of

² In connection with the modification to the protective order and Sun's motion to intervene, Plaintiff Caldera, Inc. is represented by its successor-in-interest, The Canopy Group, Inc., and referred to herein as "Canopy."

³ A copy of this Court's October 24, 2002 Order is attached as Exhibit E to the Declaration of Paul S. Grewal in Support of Sun Microsystems, Inc.'s Motion to Intervene Under Fed. R. Civ. P. 24(B) to Modify Protective Order.

Canopy's prior motion to modify the protective order. Microsoft, however, raised objections to Sun's attempt to avoid providing notice, noting that (1) Canopy's motion was not adequate notice that third party documents actually were to be turned over for use in another action (this was raised only as one of three alternatives and then only "if such a course of action would not prejudice the rights of the entities that originally produced the Documents")⁴; (2) as Sun concedes, this alternative would have been further "subject to notice to the party producing the document,"⁵ notice which has not been provided; and (3) this Court's October 24 Order did not permit the documents be turned over to a third party and instead ordered destruction only.

Microsoft therefore proposed that the parties adopt a third party notice procedure similar to that recently followed in the multidistrict litigation that includes *Sun v. Microsoft*, with written notice to each third party that allows an opportunity to object to such production.⁶ Sun now has agreed to follow this notice procedure provided that steps are taken to prevent destruction of the documents in Canopy's possession during the notice period. Once the notice period expires and any third party objections are resolved, Microsoft would produce the plaintiff and third party

⁴ See Memorandum in Support of Motion to Modify Stipulation Regarding Preservation of Documents under the Protective Order, dated October 18, 2002, at 4 (attached as Exhibit E to the Grewal Declaration).

⁵ See Sun Mem. at 3.

⁶ The need for notice is demonstrated by the third party responses in the multidistrict proceeding. Documents were produced by third parties in that multidistrict proceeding before the actions by Sun and certain other competitors were transferred and became part of that proceeding. Following this transfer, notice was sent to those third parties that Sun and the other competitor plaintiffs would be provided with access to the prior productions absent objection from the producing party. While most third parties have raised no objections, there are unresolved objections still pending from certain significant third parties that also may have produced documents in this action.

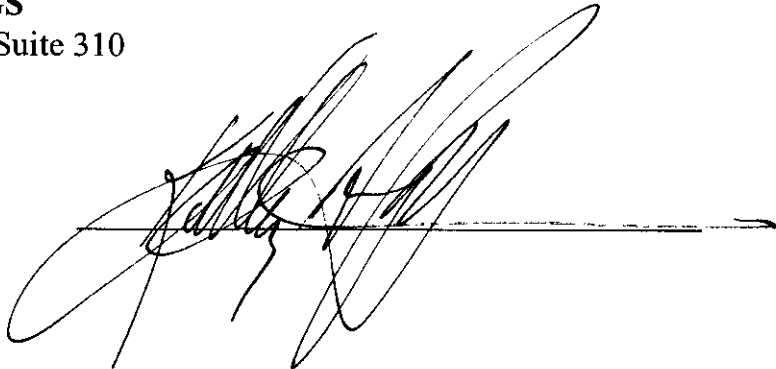
CERTIFICATE OF SERVICE

I hereby certify that a correct copy of was mailed, postage prepaid, by United States mail on this 2nd day of December, 2002 to the following:

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