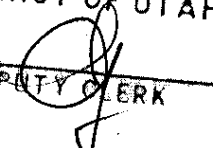


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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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CALDERA, INC.,

No. 2:96 CV 0645B

Plaintiff,

**STIPULATION AND ~~PROPOSED~~  
ORDER MODIFYING OCTOBER  
24, 2002 ORDER PERMITTING  
DESTRUCTION OF DOCUMENTS  
BY CANOPY GROUP, INC.**

v.

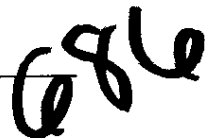
MICROSOFT CORPORATION,

Defendant.

Judge Dee V. Benson

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This action has been settled by Plaintiff Caldera, Inc. ("Caldera") and Defendant Microsoft Corporation ("Microsoft"), but the Court has continuing jurisdiction over matters relating to the protective order it previously entered. On October 18, 2002, Plaintiff Caldera, represented by its successor-in-interest, The Canopy Group, Inc. ("Canopy"), filed a motion to this Court seeking permission to dispose of the hundreds of boxes in its possession, currently stored in a warehouse in Utah, that contain documents



previously produced by Caldera, Microsoft and certain third parties during discovery (referred to herein as Canopy's "Caldera documents"). The Caldera documents also may contain boxes of privileged documents from Caldera's files that were withheld from production. On October 24, 2002, this Court entered an Order Regarding Preservation of Documents Under the Protective Order, granting Canopy's motion and permitting destruction of Canopy's Caldera documents.

Sun Microsystems, Inc. ("Sun") is a plaintiff in an action filed against Microsoft in March 2002, asserting, *inter alia*, claims under the federal antitrust laws.<sup>1</sup> Sun contends that the documents previously produced in this action are relevant to its claims in *Sun v. Microsoft*.<sup>2</sup> Microsoft has in its possession, and has agreed to produce, the document productions by Microsoft, Caldera and third parties in this action, subject to resolution of protective order issues for the third-party productions which are addressed by the notice requirement and related provisions of this Stipulation and Order. Sun, however, is concerned that Canopy's Caldera documents may contain additional documents produced

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<sup>1</sup> 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.

<sup>2</sup> Microsoft does not object to production of documents from this action to Sun, although it does not concede that those documents are relevant to the claims in *Sun v. Microsoft*. Microsoft has already produced to Sun its prior production in this action. It did not produce the productions made to it by Caldera and third parties because of protective order issues. It also could not agree to produce the productions made to Caldera by third parties because it may not have received certain of them. The issue relating to the prior production by Caldera has been partially resolved in *Sun v. Microsoft* pursuant to a ruling by the District of Maryland (those documents had already been produced in other actions pending before that court as part of the coordinated multi-district litigation proceeding). The issue regarding third party productions, however, must be resolved by this Court.

or provided to Caldera by third parties that are not in Microsoft's possession, and neither Microsoft nor Canopy can confirm or deny the existence of any such documents at this point. On November 3, 2002, Sun therefore served a subpoena on Canopy. On November 13, 2002, Sun filed a motion to intervene in this action, seeking modification of the October 24, 2002 Order.

In response to Sun's motion, Canopy and Microsoft have filed timely responses, but they also have engaged in discussions with Sun in an attempt to resolve the issues relating to Sun's motion. The primary issues relate to Canopy's desire to avoid further burden and expense with regard to the Caldera documents and the recognition that third parties are entitled to notice and an opportunity to object before the documents they previously produced in this action are produced to Microsoft (if not previously produced to Microsoft) and Sun, and used in *Sun v. Microsoft*.

In order to address those issues and reach a mutually acceptable resolution of this matter, Canopy, Microsoft and Sun, by and through their respective counsel of record, hereby stipulate and agree that:

1. This Court's October 24, 2002 Order shall be modified to allow Microsoft and Sun an opportunity to review the Caldera documents prior to destruction, provided that (1) Microsoft and Sun shall reimburse Canopy for all reasonable costs relating to storage and review by Microsoft and Sun of the Caldera documents from November 1, 2002 through the date of destruction, including any reasonable additional costs relating to destruction of those documents that Canopy would not have incurred but for Sun's subpoena and motion, the negotiations regarding the subpoena and motion, and

Microsoft's and Sun's review of the documents; and (2) Microsoft and Sun shall have no right to review or copy documents as to which Canopy, as successor-in-interest to Caldera, is entitled to claim attorney-client privilege or work product protection (referred to herein as "privileged documents").

2. In the event that Canopy inadvertently allows Microsoft or Sun access to privileged documents, access to and review of privileged documents by Microsoft or Sun shall not constitute a waiver of any privilege or work product protection. In the event that Microsoft or Sun becomes aware that they are reviewing boxes that contain privileged documents, the review of that box shall terminate and Canopy shall be provided with written identification of the box (or boxes) that contain such privileged documents.

3. Canopy shall have the right to destroy boxes of the Caldera documents once it receives written notice from counsel for Microsoft and Sun that particular boxes can be destroyed. Canopy also shall have the right to destroy boxes of the Caldera documents once it receives written notice from counsel for Microsoft and Sun that particular boxes contain privileged documents. Microsoft and Sun shall make a good faith effort to ensure that this written notice is provided promptly and on a rolling basis as they proceed with review of Canopy's Caldera documents and the index of those documents.

4. Canopy has provided Microsoft and Sun with an index to the Caldera documents. Microsoft and Sun shall review that index and attempt to identify boxes that contain (a) documents duplicative of those in Microsoft's possession, or (b) privileged documents as defined above. Microsoft and Sun shall provide written notice to Canopy

identifying those boxes and allowing Canopy to proceed with destruction of those boxes. Microsoft and Sun shall provide this written notice by no later than ten days after entry of this Order.

5. Prior to review of the Caldera documents, Sun shall provide notice to third parties who produced documents in this action that it is seeking production of those documents for use by Sun and Microsoft in *Sun v. Microsoft*. The notice further shall state that any such documents produced in *Sun v. Microsoft* also may be produced and used in other actions filed against Microsoft by Be, Inc., Netscape Communications Corp. and Burst.com, Inc. because all four of these actions (“competitor actions”) are part of the coordinated multi-district litigation pending in the District of Maryland. The notice shall offer to make available upon request or include a copy of the protective order entered in the competitor actions that would govern the third-party documents once produced in those actions. Finally, the notice shall inform the third party that (a) it may lodge any objections to this production by letter directed to this Court with copies to Canopy, Microsoft and Sun, (b) it shall have thirty days from the date of the notice to lodge such objections, which shall specify the grounds for the objection and identify the contact person or counsel of record for the third party in connection with the objections, (c) it shall have an opportunity to be heard if it raises any objection, and (d) failure to lodge written objections shall be deemed a waiver of any objections to production and use of the documents produced by the third party in *Sun v. Microsoft* and the competitor actions.

6. In order to facilitate this notice, by no later than ten days after entry of this Stipulation and Order, Microsoft shall provide Sun with the identities of the third parties

who previously produced documents in this action as well as the name, address and telephone number (if known) for the counsel of record or other contact person for that third party.<sup>3</sup> Sun shall send the notice to third parties within ten days after receipt of the contact information.

7. If a third party receives notice pursuant to Paragraph 5 of this Stipulation and Order and does not lodge any written objections within the time allotted, Microsoft shall produce to Sun from its set of the document productions in this action the documents produced by that non-objecting third party. In addition, Microsoft and Sun shall be entitled to immediately commence coordinated review of documents produced by that third party that are part of Canopy's Caldera documents. In the event that Microsoft and Sun identify third-party documents not already produced by Microsoft that they wish to copy or image for production and use in *Sun v. Microsoft*, the boxes of Canopy's Caldera documents shall be copied or imaged by a reputable local document processing vendor (who shall deliver the copies or images to Microsoft and Sun) and Canopy then may destroy the original box, either after it is returned to Canopy or, with Canopy's approval, by approving destruction by the document processing vendor or a destruction company retained by that vendor.

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<sup>3</sup> Certain third parties also produced documents in other actions and then received notice that access would be allowed in the competitor actions by Sun, Be, Inc., Netscape Communications Corp. and Burst.com, Inc. A limited number of those third parties raised objections before the court in the District of Maryland. In the event that a third party raised an objection in response to that earlier notice (sent in September 2002) and that party is also entitled to notice under this Stipulation and Order, the notice shall be sent both to the contact person or counsel of record for the third party in this action and, if different, the counsel of record that lodged the objection on behalf of the third party in response to the September 2002 notice in the competitor actions.

8. In the event that a third party lodges any objections within the time allotted, this Court shall resolve such objections. Subject to this Court's rulings and any further restrictions or limitations this Court may impose, Microsoft shall produce to Sun from its set of the document productions in this action the documents produced by that third party. In addition, Microsoft and Sun shall be entitled to immediately commence coordinated review of documents produced by that third party that are part of Canopy's Caldera documents. In the event that Microsoft and Sun identify third party documents not already produced by Microsoft that they wish to copy or image for production and use in *Sun v. Microsoft*, the boxes of Canopy's Caldera documents shall be copied or imaged by a reputable document processing vendor (who shall deliver the copies or images to Microsoft and Sun) and Canopy then may destroy the original box, either after it is returned to Canopy or, with Canopy's approval, by approving destruction by the document processing vendor or a destruction company retained by that vendor.

9. As provided in Paragraphs 5 and 6 above, Microsoft and Sun shall attempt to identify and provide notice to the third parties that previously produced documents in this action, but it is possible that an unknown third party produced documents to Caldera that were never produced to Microsoft. In the event that Microsoft and Sun become aware that they are inadvertently reviewing documents from a third party that has not received notice pursuant to Paragraphs 5 and 6 above or otherwise determine that such documents exist, review of those documents will not proceed (and any ongoing review will be halted) until notice is provided to that third party. Within ten days after it becomes aware of the existence of such documents, Sun shall provide notice to the newly

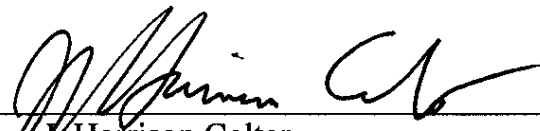
identified third party pursuant to the provisions of Paragraph 5. Further review of those documents shall be governed by the provisions of either Paragraph 7 or Paragraph 8 above, depending upon whether the third party lodges a timely objection.

10. The Court intends to allow Canopy to proceed with destruction of the Caldera documents upon completion of the steps described above and receipt of written notice from Microsoft and Sun that specific boxes can be destroyed or following copying or imaging of selected files or boxes. In order to minimize the further burden on Canopy, such notice and destruction shall proceed on a rolling basis to the extent practicable. Further, upon completing any review of Canopy's Caldera documents that they deem necessary, Sun and Microsoft shall provide final written notice to Canopy that it can destroy all remaining boxes of Caldera documents. With the exception of documents produced by a third party that raises an objection within the time allotted or those identified during the review for which notice was inadvertently not provided, (i) Sun and Microsoft shall make best efforts to complete review by no later than February 28, 2003; and (ii) Canopy may destroy all Caldera documents remaining as of March 15, 2003.

DATED: January 7, 2003

COLTERJENNINGS

By




Harrison Colter

Attorneys for The Canopy Group, Inc.  
(Successor-in-Interest to Caldera, Inc.)



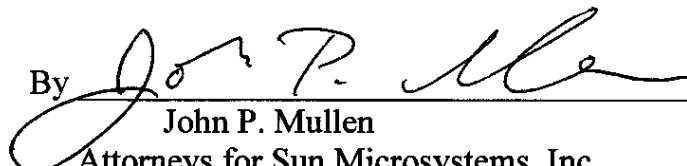
DATED: January 7, 2003

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James Jardine  
Attorneys for Microsoft Corporation


DATED: January 7, 2003

ANDERSON & KARRENBERG

By   
John P. Mullen  
Attorneys for Sun Microsystems, Inc.  
(Intervenor)

IT IS SO ORDERED.

DATED: January 9, 2003

  
The Honorable Dae V. Benson  
UNITED STATES DISTRICT COURT

alt

United States District Court  
for the  
District of Utah  
January 10, 2003

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:96-cv-00645

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