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

IN RE SUBPOENAS SERVED UPON SNOW,  
CHRISTENSEN & MARTINEAU AND THE  
CANOPY GROUP

Relating to the litigation pending in the United  
States District Court for the District of Maryland  
captioned *Novell, Inc. v. Microsoft Corp.*,  
Civil Action No. JFM-05-1087 (Consolidated into  
*In re Microsoft Corp. Antitrust Litigation*, MDL  
Docket No. 1332)

**MICROSOFT'S REPLY  
MEMORANDUM IN FURTHER  
SUPPORT OF ITS MOTION TO  
COMPEL SNOW, CHRISTENSEN  
& MARTINEAU TO PRODUCE  
DOCUMENTS IN RESPONSE TO  
TWO SUBPOENAS**

Case No. 2:08-mc-00675-DB-DN

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There is no dispute that Snow, Christensen & Martineau (“Snow Christensen” or “the firm”) is in possession of documents responsive to the subpoena served on The Canopy Group. The firm also concedes that it may have additional documents responsive to a second subpoena (a subpoena served on Snow Christensen itself), including documents concerning the *Canopy* litigation. Snow Christensen’s arguments for resisting compliance with these subpoenas center around undue burden. These arguments fail, for the document review effort that may be necessary here is relatively modest. The Court should order Snow Christensen to produce the documents requested by Microsoft and bear the expense of that production, consistent with common practice in responding to subpoenas under Fed. R. Civ. P. 45.

## **ARGUMENT**

### **A. Subpoena Served on The Canopy Group**

Snow Christensen is in possession of 158 boxes of documents that belong to The Canopy Group and contain documents responsive to the subpoena served on The Canopy Group. The firm’s assertion that it would be unduly burdensome to produce those documents rings hollow. Snow Christensen has no right to veto the clearly expressed wishes of The Canopy Group, its former client, that Microsoft be allowed access to the documents, and there is no need for the firm to conduct an independent review of them. All Snow Christensen has to do is provide Microsoft with access to the 158 boxes of documents, which ought to be a painless process. Even if it were necessary for the firm to conduct its own review, such a review would hardly impose any undue burden.

Snow Christensen’s undue burden argument is not helped by its claim that “there are a significant number of documents intermixed in [The Canopy Group’s] boxes that contain

work product and/or are privileged.”<sup>1</sup> As an initial matter, reviewing documents for privilege is a standard aspect of most document productions, and Snow Christensen provides no authority for the proposition that the existence of some purportedly privileged documents in a collection of documents makes reviewing that collection unduly burdensome. More importantly, there is no need for Snow Christensen to undertake a privilege review at all. The privilege belongs to The Canopy Group, and it has agreed to a process whereby privileged documents can be “clawed back” from the set of documents selected for copying by Microsoft.<sup>2</sup> Pursuant to that agreement, Microsoft will review the 158 boxes of documents and designate for copying those documents that it deems to be of interest. The Canopy Group will conduct a privilege review of the selected documents and provide copies to Microsoft of those as to which it does not assert privilege, along with a privilege log for the withheld documents. Given that The Canopy Group has consented to Microsoft reviewing the 158 boxes of documents in the first instance, Snow Christensen should not be allowed to interfere with that sensible arrangement by refusing to provide the documents to Microsoft.

While a lawyer in certain circumstances may have an independent interest in protecting his own work product, “[w]hen lawyer and client have conflicting wishes or interests with respect to work-product material, the lawyer must follow [the] instruction[s] of the client.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 90 cmt. c (2000). The client, *i.e.*, The Canopy Group, is content to have Microsoft review the 158 boxes of documents. If Snow

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<sup>1</sup> Memorandum in Opposition to Microsoft’s Motion to Compel (“Opposition Memorandum”) at 2.

<sup>2</sup> Aug. 13, 2008 letter from Anthony C. Kaye to Mark M. Bettilyon, attached as Ex. 17 to the Declaration of Mark M. Bettilyon, executed on September 5, 2008, submitted in support of this motion.

Christensen nevertheless believes it has a protectable interest in work product purportedly included in those documents — a dubious proposition given that its client does not object and the *Caldera* litigation ended more than eight years ago — then Snow Christensen should seek to protect that interest in a way that does not disrupt or delay Microsoft's access to the documents. For example, there is no reason why Snow Christensen cannot review the documents designated for copying by Microsoft at the same time The Canopy Group is conducting its own review. This would preserve Snow Christensen's ability to raise its purported claims of privilege without hindering the pace of discovery in this action. Moreover, if Snow Christensen is intent on pursuing its work product claims independent of its former client's wishes, it should be required to pay for the document review that will entail.

Even if Snow Christensen were correct that it needs to review The Canopy Group's documents in advance of providing them to Microsoft, that would hardly be a reason to refuse to provide them altogether. For a sophisticated law firm such as Snow Christensen that regularly engages in complex commercial litigation, reviewing 158 boxes of documents is not onerous. Given that Snow Christensen is counsel to Novell in this action, it presumably has a team of lawyers already working on this matter who are familiar with the issues and available to handle the review. Curiously, the firm argues that the supposed burden would be heightened by the fact that the 158 boxes are disorganized and not properly indexed.<sup>3</sup> Maintaining client files in an orderly fashion is standard operating procedure for a law firm, and Snow Christensen's apparent failure to do so cannot be grounds for avoiding production of these documents. The firm should be ordered to provide Microsoft access to the 158 boxes of The Canopy Group's documents in its possession.

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<sup>3</sup> Opposition Memorandum at ii.

**B. Subpoena Served on Snow Christensen**

Snow Christensen concedes that it may be in possession of additional documents that are responsive to a second subpoena (the one served on it), including documents concerning the *Canopy* litigation. The firm should not be permitted to flout that subpoena by refusing to search its own files for those documents. Although conceding that it may have such documents, Snow Christensen complains that it would be burdensome to search through prior document management systems and offsite storage locations to find them.<sup>4</sup> Again, a law firm whose business depends on maintaining client information in an orderly fashion should not be significantly burdened by such a search. Snow Christensen should be ordered to search all of its files — including prior document management systems and offsite storage locations — for responsive documents and produce them to Microsoft.

**C. Issues Common to Both Subpoenas**

Snow Christensen repeatedly invokes its status as a nonparty to this litigation in asking that Microsoft bear the cost of the firm's response to the subpoenas. This conveniently ignores the fact that the firm is counsel to Novell in this case rather than a true stranger to this action. "A non-party can be required to bear some or all of its expenses where the equities of a particular case demand it." *Behrend v. Comcast Corp.*, 248 F.R.D. 84, 86 (D. Mass. 2008) (quoting *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 302-03 (S.D.N.Y. 2003)). Such is the case where, as here, the one from whom documents are sought "is not a classic disinterested non-party." *Honeywell Int'l*, 230 F.R.D. at 303; *see also Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc.*, 2007 WL 2122436, at \*7 (D. Kan. July 20, 2007) (requiring nonparty doctor and medical practice group to bear expense of production

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<sup>4</sup> See Opposition Memorandum at iv-v, 9.

where nonparties had financial interest in plaintiff hospital and, indirectly, in outcome of litigation). As Novell's counsel in this action, Snow Christensen must act not only on behalf of The Canopy Group and itself in responding to the subpoenas but on behalf of Novell as well.<sup>5</sup> The firm has a clear interest — and, indeed, a professional obligation — in helping Novell to prevail in this litigation. Under these circumstances, Microsoft should not be required to bear the expense of Snow Christensen's compliance with the subpoenas, particularly where most of that expense would result from the firm's undertaking a privilege review that is entirely unnecessary to protect its former client's interests.<sup>6</sup>

Snow Christensen's last objection is that the documents sought by the subpoenas are more conveniently obtainable from other sources or are already in Microsoft's possession. This is not correct. As Microsoft's opening brief explained, Snow Christensen is likely to have documents that cannot be obtained from Novell or other parties.<sup>7</sup> Although Microsoft was a party to the *Caldera* litigation, the subpoenas request documents that were generated during and after that action that could not possibly have been produced to Microsoft during the *Caldera*

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<sup>5</sup> A further consequence of Snow Christensen's role as counsel for Novell is the possibility that the firm might pass on to Novell the cost of responding to the subpoenas.

<sup>6</sup> Snow Christensen's reliance on *Angell v. Kelly*, 234 F.R.D. 135 (M.D.N.C. 2006), is misplaced. (Opposition Memorandum at 7.) The first cited portion of *Angell* stands for the proposition that where a nonparty is otherwise entitled to reimbursement of expenses incurred in complying with a subpoena under Fed. R. Civ. P. 45, attorneys' fees for conducting a privilege review are also likely reimbursable. *Id.* at 137. Where, as here, the nonparty is not entitled to reimbursement of such expenses, this proposition is inapposite. Snow Christensen also cites *Angell* for the proposition that where a party subpoenas documents from a law firm rather than the owner of the documents, it should expect to bear the cost of a privilege review. *Id.* at 140 n.1. Here, however, Microsoft *has* subpoenaed the owner of the 158 boxes (The Canopy Group). It is Snow Christensen that is using the purported need to review the documents as an excuse to ignore its client's wishes.

<sup>7</sup> See Microsoft's Memorandum in Support of Its Motion to Compel at xvi, 6.



litigation. In addition, some documents that were withheld as privileged during the *Caldera* litigation may no longer be privileged due to their subsequent production in the *Canopy* litigation or their disclosure to third parties in other circumstances. Moreover, as counsel to a named party in the *Caldera* litigation, Snow Christensen is likely to have documents that Novell does not. Finally, Snow Christensen's suggestion that Novell has a comprehensive set of documents that includes all of the documents in Snow Christensen's possession that would be responsive to the subpoenas is belied by Novell's meager production of documents thus far. Novell has yet to comply with Judge Motz's August 26, 2008 order granting Microsoft's motion to compel: to date it has not produced any of its own documents in response to the document requests that were the subject of that motion.<sup>8</sup> This failure is due at least in part to Novell's apparent failure to retain documents pertinent to the antitrust claims it intended to assert against Microsoft.<sup>9</sup> In short, Microsoft cannot obtain the information requested in the subpoenas from other sources.

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<sup>8</sup> See Sept. 26, 2008 letter from Steven L. Holley to Jeffrey M. Johnson, attached as Ex. 1 to the Supplemental Declaration of Mark M. Bettilyon, executed on October 6, 2008, submitted in support of this motion.

<sup>9</sup> See *id.*

**CONCLUSION**

Microsoft respectfully requests that the Court grant the motion to compel.

DATED this 6th day of October, 2008.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of October, 2008, I served by electronic filing the foregoing **MICROSOFT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO COMPEL SNOW, CHRISTENSEN & MARTINEAU TO PRODUCE DOCUMENTS IN RESPONSE TO TWO SUBPOENAS** on the following:

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