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

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

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

**MEMORANDUM IN OPPOSITION TO  
MICROSOFT'S MOTION TO COMPEL  
SNOW, CHRISTENSEN & MARTINEAU  
TO PRODUCE DOCUMENTS IN  
RESPONSE TO TWO SUBPOENAS**

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

Judge Dee Benson

Magistrate Judge David Nuffer

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The Law Firm of Snow, Christensen & Martineau ("SCM") respectfully submits its memorandum in opposition to Microsoft's Motion to Compel production of documents in response to subpoenas served upon SCM and The Canopy Group, Inc., a former client of SCM.

## INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 45 and the Court's inherent powers,<sup>1</sup> Microsoft's motion to compel should be denied. Microsoft, as the party serving the subpoenas, bears the burden of showing the appropriateness of the subpoenas served on SCM and Canopy, neither of whom are parties to the litigation. Microsoft, or its attorneys, also have an obligation to take reasonable steps to avoid undue burden or expense on SCM.

The only documents SCM is aware of in its possession that are responsive to Microsoft's subpoenas would be certain documents scattered throughout 158 boxes which contain various documents relating to SCM's representation of Caldera in *Caldera, Inc. v. Microsoft Corp.*, No. 2:96-CV-0654B (D. Utah) (the "Caldera Lawsuit"). The Caldera Lawsuit was filed in 1996 before Judge Benson and was settled on the eve of trial in early 2000. SCM does not have an index of the documents in these 158 boxes. In addition, the 158 boxes do not appear to be organized in a meaningful manner. A substantial number of the documents in the boxes include work product, and appear to be the working files of the two lead attorneys from SCM who worked on the Caldera Lawsuit, neither or whom is still with SCM. Furthermore, the vast majority of documents in the 158 boxes are not responsive to the subpoenas in question. The remainder of the documents in the boxes appear to be documents, such as pleadings and discovery responses, that were produced, created or filed in the Caldera Lawsuit. Thus,

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<sup>1</sup>See *Gregg v. Clerk of United States Dist. Ct.*, 160 F.R.D. 653, 654 (N.D. Fla. 1995) ("a federal court has the inherent power to protect anyone from oppressive use of process"); *Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605, 606 (D.D.C. 1969) ("the Court has inherent power to protect anyone from oppressive use of process, even if no oppression is actually intended"; and "it is possible for a subpoena *duces tecum* to be unreasonable or oppressive, even though the evidence sought to be procured may prove to be thereafter relevant at the trial.").

Microsoft should have in its possession a copy of most of the documents in the 158 boxes that are responsive to the subpoenas, other than some correspondence and the documents that contain attorney work product or attorney-client communications.

SCM has exercised its independent right to assert that documents containing attorneys' work product are protected by the attorney work product doctrine. SCM is willing to produce documents responsive to Microsoft's subpoenas that are not protected or privileged. Microsoft, however, has refused to agree to pay the reasonable costs that will be incurred by SCM in reviewing and copying the documents. SCM, a nonparty to the litigation, should not be forced to shoulder the substantial expense associated with reviewing the documents in the 158 boxes for responsiveness, work product and privilege, particularly when any non-privileged or non-protected documents which Microsoft has a right to see have likely already been produced to Microsoft. Microsoft indisputably has the resources to pay the reasonable costs of review and copying and its failure to agree to do so implies that the burdens and costs of production outweigh the benefits of such production. The Court should deny Microsoft's motion to compel.

### **MATERIAL FACTS**

Thirteen pages of Microsoft's memorandum is devoted to what Microsoft purportedly refers to as "Facts." Although SCM disputes some of Microsoft's purported "facts," SCM will not address those purported "facts" that are not material to the motion before the court. The facts that are material to Microsoft's motion are as follows:

1. SCM, along with other law firms, represented Caldera in the Caldera Lawsuit. The Law Firm of Ray Quinney & Nebeker, along with other law firms, represented Microsoft in

the Caldera Lawsuit. The Caldera Lawsuit was filed in 1996 before Judge Benson and was settled on the eve of trial in early 2000. *See* Preston Aff. ¶¶ 2-4.

2. SCM has, and continues to, represent Novell in various matters. SCM's representation of Novell predates the Caldera Lawsuit. *See id.* ¶ 5.

3. The two lead attorneys at SCM who handled the Caldera Lawsuit were Stephen J. Hill and Ryan E. Tibbitts. In 2000, after the settlement of the Caldera Lawsuit, Stephen J. Hill resigned from SCM to pursue other opportunities.<sup>2</sup> Ryan E. Tibbitts resigned from SCM to pursue other opportunities in 2001. *See id.* ¶ 6.

4. Upon information and belief, after the Caldera Lawsuit settled, various documents related to the Caldera Lawsuit were destroyed pursuant to the protective order in that case. Several years later, SCM returned a large number of boxes of documents related to the Caldera Lawsuit, which had been stored at an offsite storage facility, to Caldera's parent company, The Canopy Group, Inc. ("Canopy"). *See id.* ¶ 7.

5. At some point after the settlement of the Caldera Lawsuit, Novell sued Canopy (the "Canopy Lawsuit"). SCM, having represented Novell and Canopy in other matters, had a conflict of interest and could not represent either party in the Canopy Lawsuit. SCM did not open a file on the Canopy Lawsuit. SCM changed its document management system in 2007 and is not aware of the location of any documents in SCM's possession related to the Canopy Lawsuit. Searching for any documents related to the Canopy Lawsuit would require SCM's staff

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<sup>2</sup>Microsoft refers to Stephen J. Hill as a shareholder of SCM. *See, e.g.,* Microsoft Memorandum at 5. Mr. Hill resigned from SCM in 2000. *See* Preston Aff. ¶ 6. Mr. Hill's declaration is dated May 2, 2002, which is after he left SCM.

to check onsite and offsite document storage locations, as well as prior document management systems for documents, all of which may be very time consuming. *See id.* ¶ 8.

6. SCM has in its possession 158 boxes containing documents related to the Caldera Lawsuit. SCM does not have an index of the documents in these 158 boxes. These 158 boxes do not appear to be organized in a meaningful manner. A substantial number of the documents in the boxes include work product, and appear to be the working files of Stephen J. Hill and Ryan E. Tibbitts. Furthermore, the vast majority of documents in the 158 boxes do not appear to be responsive to the subpoenas in question. The remainder of the documents in the boxes appear to be documents, such as deposition transcripts and exhibits, pleadings and discovery responses, that were produced, created or filed in the Caldera Lawsuit. *See id.* ¶ 9.

7. SCM estimates that, on average, each box contains approximately 1,500 pages of documents and that it would take, on average, 2 hours to review the documents in each box for work product, privilege and responsiveness. SCM also estimates that the average hourly rate of the attorneys who would be assigned the task is \$250. Thus, SCM estimates that attorneys' fees for reviewing the documents in the 158 boxes would be approximately \$80,000. *See id.* ¶ 10.

8. Microsoft served a subpoena on SCM on June 30, 2008.<sup>3</sup> *See* Proof of Service at Ex. 1 to Mark Bettilyon Declaration.

9. SCM served Microsoft with its objection to Microsoft's subpoena on July 10, 2008. *See* Objection to Subpoena, attached as Exhibit A.

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<sup>3</sup>On page xi of Microsoft's Memorandum, Microsoft asserts that the subpoenas were served on June 27, 1998. That assertion does not make sense and may be a typographical error.

10. SCM was informed by Canopy (Caldera's successor) that it had also been served with a subpoena. *See* Preston Aff. ¶ 11.

11. Canopy was permitted to review the documents in the 158 boxes. SCM was later informed by Canopy's attorneys that Canopy did not want to incur substantial expense in responding to Microsoft's subpoena and, thus, was attempting to enter into an agreement with Microsoft whereby Canopy would not waive its privileges but would allow Microsoft to review the documents in the 158 boxes in SCM's possession. SCM informed Canopy that SCM was asserting work product immunity and would not voluntarily allow Microsoft to review the documents. *See id.* ¶ 12.

12. SCM spoke with Microsoft's attorneys and explained SCM's objections to Microsoft's subpoenas. SCM also explained the nature of the work product contained in the 158 boxes of documents. Proposals were made to Microsoft in an attempt to make the subpoenas less burdensome on SCM. These proposals included: (a) SCM looking through the boxes for correspondence files and producing correspondence between SCM and Novell, if any; and (b) Microsoft agreeing to pay SCM for the time and expenses expended in responding to the subpoenas. Microsoft rejected the proposals and, instead, filed a motion to compel. *See id.* ¶¶ 13-14.

## ARGUMENT

Microsoft bears the burden of showing the appropriateness of the subpoenas it served on SCM and Canopy, neither of whom are parties to the litigation. *See In re Natural Gas Commodity Litigation*, 235 F.R.D. 199, 208 (S.D.N.Y. 2005).<sup>4</sup> Rule 45 of the Federal Rules of Civil Procedure governs subpoenas issued to third parties. *See* Fed. R. Civ. P. 34(c) (“A person not a party to the action may be compelled to produced documents . . . as provided in Rule 45”). Courts are directed, however, that they must limit discovery otherwise allowed by the rules if “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive” or “the burden or expense of the proposed discovery outweighs its likely benefit . . . .” Fed. R. Civ. P. 26(b)(2)(C). Courts “give extra consideration to the objections of a non-party, non-fact witness in weighing burdensomeness versus relevance.” *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D. N.C. 2005) (internal quotation and citation omitted); *Travelers Indemnity Co. v. Metropolitan Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005) (“courts also give special weight to the burden on non-parties of producing documents to parties involved in litigation”). Furthermore, courts have been directed to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. P. 26(b)(3)(B).

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<sup>4</sup>The magistrate judge also explained: “In addition, where, as here, the discovery is sought from a nonparty, the Court should be particularly sensitive to weighing the probative value of the information sought against the burden of production on the non party.” *Id.* The magistrate judge’s decision was set aside in part, on other grounds, by *In re Natural Gas Commodities Litigation*, 235 F.R.D. 241 (S.D.N.Y. 2006).

**I. SCM HAS ASSERTED THE BOXES OF DOCUMENTS AT ISSUE CONTAIN SCM'S WORK PRODUCT AND PRIVILEGED DOCUMENTS**

SCM has in its possession 158 boxes containing documents related to its representation of Caldera in the Caldera Lawsuit. The vast majority of the documents in these 158 boxes are not responsive to the subpoena. Also, scattered throughout the boxes of documents are documents with SCM's work product and communications with its client. This is particularly problematic to SCM because it does not want the very law firm, Ray Quinney & Nebeker, who represented Microsoft in the Caldera Lawsuit, to review and sift through SCM's work product related to the Caldera Lawsuit.

Microsoft's argument regarding attorney client privilege and work product misses the point.<sup>5</sup> SCM has not asserted that **all** of the documents in the boxes are privileged or contain work product. *See* Exhibit A; Letter from Stanley J. Preston to Boyd L. Rogers, dated August 20, 2008, attached as Exhibit B. Nor does SCM dispute that the law recognizes exceptions to the privilege that attaches to attorney-client communications and to the immunity for work product (hereafter referred to as "privileges"). The issue currently before this Court, however, is not whether a particular document falls within privileges recognized under the law. SCM's objection to the subpoena based on privileges is that there are a significant number of documents intermixed in the boxes that contain work product and/or are privileged and it would be very

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<sup>5</sup> It is curious that Microsoft cites and relies on Utah Rule of Evidence 504 and Utah state cases. *See* Microsoft's Memorandum at 1. The litigation between Microsoft and Novell was filed in federal court, not state court. Thus, federal rules and case law apply, not state law.



expensive and burdensome for SCM to review all documents in the boxes to locate, log and remove the privileged documents.<sup>6</sup>

SCM has explained,

much of the material in the 158 boxes is protected by the attorney work product doctrine, and contains the mental impressions of SCM attorneys who worked on the *Caldera v. Microsoft* lawsuit. This is particularly true since a significant portion of the 158 boxes comprises the “working files” of these attorneys.

Exhibit B; *see also* Preston Aff. ¶13; Exhibit A. Canopy and SCM both hold the privilege with regard to work product, and either one can assert that privilege.<sup>7</sup> *See, e.g., In re Grand Jury Proceedings*, 401 F.3d 247, 250 (4<sup>th</sup> Cir. 2005) (both attorney and client hold the work-product privilege); *Koch v. Specialized Care Servs.*, 437 F.Supp.2d 362, 372 n.12 (D. Md. 2005) (“ . . . both the client and attorney have an interest in work-product materials and have standing to assert the protection”).

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<sup>6</sup>SCM would also have to review the documents for responsiveness to the subpoena.

<sup>7</sup>At page 9 of its Memorandum, Microsoft cites two cases as support for its argument that SCM has no privilege independent of its client’s wishes. In the *Martin* case, the court found that the law firm could not withhold work product from **its client** or subvert the client’s interest. *See Martin v. Valley Nat’l Bank of Arizona*, 140 F.R.D. 291, 320 (S.D.N.Y. 1991) (“the rule does not give an attorney the right to withhold work from his own client”). SCM has not withheld work product from Canopy. Nor is SCM subverting Canopy’s interest by asserting its work product immunity. Asserting work product immunity is not against Canopy’s interests. Canopy has not waived, and has not directed SCM to waive, SCM’s work product immunity. *See* paragraph 3 of Ex. 17 to Mark Bettilyon Aff. (conditioning inspection of the documents on execution of a Non-Waiver Agreement). The *Martin* court even recognized that “a number of courts have held that the attorney may invoke the work-product rule in his own right even if the client cannot assert it or has not directed counsel to assert it.” *Martin*, 140 F.R.D. at 321.

Likewise, the other case Microsoft relies upon, *M & C Corp. v. Erwin Behr GmbH & Co.*, 2008 WL 3066143 at \*2-3 (E.D. Mich. Aug. 4, 2008), does not support Microsoft’s argument. In the *M & C* case, the client had waived its work product protection and requested that the law firm produce the documents. Even under those circumstances, the court stated that there may be documents that the law firm should not be required to disclose.

Moreover, the “opinion” work-product of an attorney is especially privileged based on the interests of litigation. For example, in *In re Grand Jury Proceedings*, in a situation whether the crime/fraud exception to privilege applied, the Fourth Circuit reversed the district court’s finding that the exception *did* apply, and remanded with orders for the district court to assess the documents in camera. The court noted:

The work product privilege protects an attorney’s work done in anticipation of litigation. It is premised on the idea that “[n]ot even the most liberal of discovery theories can justify unwarranted inquires into the files and mental impressions of an attorneys.” *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). The privilege encompasses both “fact” work product and “opinion” work product. Fact work product, which consists of documents prepared by an attorney that do not contain the attorney’s mental impressions, “can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternative means without undue hardship.” *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4<sup>th</sup> Cir. 1994), *in re John Doe*, 662 F.3d 1073, 1076 (4<sup>th</sup> Cir. 1981) (defining fact work product). Opinion work product, which does contain the fruit of an attorney’s mental processes, is “more scrupulously protected as it represents the actual thoughts and impressions of the attorney.” *In re Grand Jury Proceedings*, 33 F.3d at 348. Because the work product privilege protects not just the attorney-client relationship but the interests of attorneys to their own work product, the attorney as well as the client, holds the privilege.

*In re Grand Jury Proceedings*, 410 F.3d at 250 (some internal citations omitted). Opinion work product “includes or reflects an attorney’s thoughts, such as impressions, theories, or conclusions.” *Koch*, 437 F. Supp. 2d 362, 384 (citation omitted). Opinion work product typically is discoverable only in extraordinary circumstances. *See id.* at 384. Other examples of opinion work product are: (1) draft letters to a client that contain relevant facts and opinions about the case; (2) letter from lawyer that contains mental impressions and legal theories, (3) draft response letter from attorney which reflects a decision to file or alter the letter. *See id.* at 384 n.32.

Other circuits have recognized this same high privilege for opinion work product. For example, in *In re Murphy*, the Eighth Circuit recognized that work product “fact” documents prepared in terminated litigations are also protected from discovery, and the party requesting the documents must still satisfy the requirement of substantial need for the documents and inability to obtain in any other way. *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977). Opinion work product documents from terminated litigations also continue to have protection and this type of work product enjoys “a nearly absolute immunity and can be discovered only in rare and extraordinary circumstances” *Id.* at 334, 336 (relying on *Hickman v. Taylor*). Indeed, the court noted that it did not allow absolute immunity for opinion work product only because “there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and proper administration of justice would militate against the nondiscovery of an attorney’s mental impressions.” *Id.*

At this point, SCM is not required to prepare a privilege log.<sup>8</sup> Rather, all that is required is that SCM has expressly made the claim of privilege/immunity and has described the nature of the withheld documents in a manner that, without revealing information itself privileged or protected, will enable the parties to assess SCM’s claim. *See* Fed. R. Civ. P. 45(d)(2)(A). SCM has satisfied this requirement. *See* Preston Aff. ¶¶ 9, 13; Exhibits A, B.

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<sup>8</sup>The *Digecor* case cited by Microsoft did not involve a subpoena to a third party. Thus, it is neither instructive nor persuasive. Rule 45(d)(2)(A) sets forth the standard applicable to third-party subpoenas.

## II. MICROSOFT HAS FAILED TO TAKE REASONABLE STEPS TO AVOID IMPOSING UNDUE BURDEN OR EXPENSE ON SCM

Microsoft or its attorneys are required to “take reasonable steps to avoid imposing undue burden or expense on” SCM. Fed. R. Civ. P. 45(c)(1).<sup>9</sup> This Court, as the issuing court, must enforce this duty and impose a sanction on Microsoft or its attorneys if they fail to comply with that requirement. *See id.* Furthermore, any order compelling production of the documents must protect SCM “from significant expense resulting from compliance.” Fed. R. Civ. P. 45(c)(2)(ii).

SCM has explained to Microsoft that to respond to the subpoenas Microsoft served on SCM and Canopy, SCM would have to review the documents in the 158 boxes for responsiveness, work product and privilege.<sup>10</sup> SCM asked Microsoft whether it was willing to bear this expense without court intervention and Microsoft declined. SCM also offered to determine if there is a correspondence file containing correspondence between SCM and Novell in the 158 boxes and if so, to produce any such correspondence. Microsoft also rejected that proposal. Microsoft, rather than coming up with a reasonable proposal as to how to minimize the

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<sup>9</sup>At page 6 of its Memorandum, Microsoft cites *E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) as support for its argument that SCM must show that compliance with the subpoena would subject SCM to great burden and seriously hinder normal operations. The *Citicorp Diners* case is not on point. The subpoena issued by the EEOC was an administrative subpoena issued to an employer of a person who had complained of sex and race discrimination. The issue before the court was whether the employer had to compile certain information to comply with the subpoena. The court noted: “The EEOC seeks to vindicate the public interest, which is broader than the interest of the charging parties.” *Id.* at 1039 (internal quotation and citation omitted). The quote from the *Citicorp Diners* case that Microsoft relies upon is referencing an employer’s obligation to respond to subpoenas from the EEOC. Microsoft is not tasked by Congress or anyone else to vindicate the public interest; nor has it been given investigatory and enforcement powers. Thus, the case does not support Microsoft’s position.

<sup>10</sup>SCM estimates that, on average, it would take an attorney, on average, 2 hours of time to review the documents in each box for responsiveness, work product and privilege. Thus, the cost of reviewing the documents would be approximately \$80,000. *See Preston Aff.* ¶ 10.

burden or expense on SCM, filed a motion to compel. *See* Preston Aff. ¶ 14. Thus, pursuant to Rule 45(c)(1), Microsoft's subpoenas should not be enforced.

Alternatively, if the Court compels SCM to produce documents in response to the subpoenas, the Court should order Microsoft to pay the costs and expenses associated with SCM's review and production of the documents. SCM, a nonparty, should not be forced to subsidize an unreasonable share of the costs of litigation to which it is not a party. *See Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F.Supp. 232, 264-65 (D. Del. 1992) (quoting *United States v. Columbia Broadcasting Sys., Inc.*, 666 F.2d 364, 371-72 (9th Cir. 1982)). Courts, on numerous occasions, have ordered the party serving a subpoena on a nonparty to compensate the nonparty for work performed by attorneys in conducting privilege review of documents the nonparties were compelled to produce. *See, e.g., Angell v. Kelly*, 234 F.R.D. 135, 137 (M.D. N.C. 2006) (and cases cited therein); *see also id.* at 140 n.1 (noting that because the party had subpoenaed documents from a law firm, the party had "created a situation where it not only might be responsible for paying for an attorney-client privilege review, but an additional payment for a privilege review for work product.").

Microsoft undisputedly has sufficient means to compensate SCM for the time and costs SCM would incur in responding to Microsoft's subpoena. A reasonable implication that can be drawn from Microsoft's refusal to do so, is that Microsoft recognizes that the costs associated with reviewing and copying such documents outweigh the value of such documents.<sup>11</sup> Microsoft

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<sup>11</sup>Microsoft's subpoenas and refusal to compensate SCM for its time and costs associated with responding to the subpoenas could also be intended to punish SCM for previously representing Caldera in a lawsuit against Microsoft.

may want the documents, but only if it is not required to pay the reasonable fees and expenses associated with production of such documents.

### **III. MICROSOFT HAS FAILED TO SHOW THAT IT DOES NOT ALREADY HAVE, OR CANNOT OBTAIN, THE DOCUMENTS FROM OTHER SOURCES**

Courts have recognized that “[n]ecessity for production is sharply reduced where an available alternative for obtaining the desired evidence has not been explored.” *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 328 (D.D.C. 1966); *cf. Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 228 F.R.D. 111, 114 (D. Conn. 2005) (holding that a subpoena served on a non-party placed an unreasonable burden of production on a non-party because the defendant could obtain the information from a publicly available source or from a party to the litigation). Microsoft was a party to the Caldera Lawsuit. Thus, Microsoft should have in its possession copies of most, if not all of the documents sought in the 158 boxes possessed by SCM, except for those documents that contain SCM’s work product.<sup>12</sup> Microsoft has not explained why it cannot just go into its own files, or the files of its own attorneys, to review the documents from the Caldera Lawsuit.

Furthermore, Microsoft has represented that Judge Motz of the District of Maryland recently granted Microsoft’s motion to compel against Novell and that the subpoenas at issue in the motion before this Court seek the same category of documents from SCM that were at issue in Microsoft’s motion to compel Novell. *See* Microsoft’s Memorandum at x. Microsoft has not

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<sup>12</sup>The documents in the boxes that Microsoft has not seen, for the most part, are documents protected by work product; such as copies of the documents produced or filed in the Caldera Lawsuit which contain writing or highlighting by SCM’s attorneys, internal legal research memoranda, notepads containing attorneys’ handwritten notes, outlines for depositions, drafts of pleadings, memoranda and correspondence, etc.

established that the documents responsive to the subpoena in SCM's possession have not been, and will not be produced by Novell.

Finally, SCM is not aware of any documents in its possession concerning the Canopy Lawsuit. SCM, having previously represented Canopy in matters and having previously represented Novell in other matters, had a conflict of interest that precluded SCM from representing either party in that litigation. *See* Preston Aff. ¶ 6. SCM changed the system it uses for document management in 2007 and because there was not a file opened for the Canopy Lawsuit, locating copies of correspondence and subpoenas related to that litigation in SCM's possession, if any, would be burdensome and expensive. *See id.* The court should not compel SCM to expend its resources to search through its prior document management programs and document storage facilities to see if it even has documents related to the Canopy Lawsuit, particularly when it is highly unlikely that SCM has any such documents since SCM did not represent either party in that case, and when the documents may be obtained more easily from other sources.

### **CONCLUSION**

Microsoft's motion to compel should be denied because Microsoft has failed to take reasonable steps to avoid undue burden or expense on SCM.

DATED this 25<sup>th</sup> day of September, 2008.

**SNOW, CHRISTENSEN & MARTINEAU**

/s/ Stanley J. Preston

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25<sup>th</sup> day of September, 2008, I electronically filed the foregoing **MEMORANDUM IN OPPOSITION TO MICROSOFT'S MOTION TO COMPEL SNOW, CHRISTENSEN & MARTINEAU TO PRODUCE DOCUMENTS IN RESPONSE TO TWO SUBPOENAS** with the Clerk of Court using the CM/ECF system which sent notification of such filing via email to the following:

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