

STEPHEN D. SUSMAN
SUSMAN GODFREY L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366

PARKER C. FOLSE III
SUSMAN GODFREY L.L.P.
1201 Third Avenue, Suite 3090
Seattle, Washington 98101
Telephone: (206) 516-3880

MAX D. WHEELER (A3439)
STEPHEN J. HILL (A1493)
RYAN E. TIBBITTS (A4423)
SNOW, CHRISTENSEN & MAR-
TINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

RALPH H. PALUMBO
LYNN M. ENGEL
PHILIP S. McCUNE
SUMMIT LAW GROUP PLLC
1505 Westlake Avenue N., Suite 300
Seattle, Washington 98109-3050
Telephone: (206) 281-9881

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

CALDERA, INC., vs MICROSOFT CORPORATION,

Plaintiff

Caldera, Inc.

Defendant

Microsoft

Case No. 2:96CV 0645B

Judge Dee V. Benson

**CALDERA, INC.'S MEMORANDUM IN
SUPPORT OF THE SAN JOSE MERCURY
NEWS, THE SALT LAKE TRIBUNE, AND
BLOOMBERG L.P. MOTIONS TO INTERVENE
AND UNSEAL COURT FILE**

FILED UNDER SEAL

I. INTRODUCTION

The San Jose Mercury News, The Salt Lake Tribune, and Bloomberg L.P. seek relief that is long overdue. Microsoft has abused the Protective Order in this case by designating virtually all its documents as "confidential," despite the fact that few, if any, meet the criteria for confidentiality established under Federal Rule 26.

Ironically, the magnitude of Microsoft's over-designation - literally hundreds of thousands of documents marked "confidential" and "highly confidential" -- has prevented this Court from performing its proper function in limiting a party's self-designation of confidential documents. In its response to the San Jose Mercury News, Microsoft continues to assert that all documents it has designated "confidential" and "highly confidential" contain trade secrets or proprietary business information that is properly protected under Rule 26. There is only one way to test Microsoft's assertion: The Court must review Microsoft's documents, on a document-by-document basis.

Understandably, the Court has been reluctant to undertake the examination of hundreds of thousands of documents marked confidential by Microsoft. Caldera suggests a practical solution. First, we request that the Court review the small number of "confidential" documents attached hereto, and determine whether they are properly designated confidential. We are confident the Court will find that the attached documents do not meet the Rule 26 criteria for confidentiality.

Second, Caldera will provide Microsoft's counsel with copies of documents it intends to attach to its responses to Microsoft's nine summary judgment motions. If, having received the Court's guidance with respect to the documents attached hereto, Microsoft continues to assert the confidentiality of any document Caldera will use in its summary judgment responses, Microsoft should be required to make the requisite Rule 26 showing, on a document-by-document basis and under penalty of sanctions if it over-designates documents. Finally, Microsoft should be required to make the same showing with respect to every document that has been marked as an exhibit to depositions taken in this case - again, on a document-by-document basis and under penalty of sanctions.

As the Court will note, Caldera filed this memorandum under seal because it quotes and attaches documents Microsoft designated as "confidential," and because the protective order requires that such documents be filed under seal. Nonetheless, Caldera believes there is no basis for filing under seal since none of the attached documents are legitimately confidential. This is, of course, precisely what the newspapers are complaining of.

The American judicial system provides for free and open public access to information, except in extraordinary circumstances. Microsoft is not seeking to protect trade secrets or proprietary business information. Rather, Microsoft is using the protective order to prevent public disclosure of the predatory business practices it used to eliminate DR DOS as a competitor and unlawfully maintain its desktop operating system monopoly. Indeed, if its business practices were fair and legal, why would Microsoft go to such great lengths to prevent them from being disclosed?

The Court's attention to this issue is necessary and timely. Caldera will use many of Microsoft's confidential documents to prove its claims at trial. The Court must determine whether this case is going to be tried behind closed doors or in an open public forum. The answer is obvious and it compels the relief requested by the newspapers and Caldera.¹

1. The United States and Microsoft are currently in trial in a case involving predatory practices similar in nature to, but more recent than, the predatory practices involved in this case. The Court in the government case has not permitted Microsoft to keep the majority of its e-mails and other internal documents secret. There is even less reason to maintain the secrecy in this case. In responding to San Jose Mercury News' motion, Microsoft argues that the Protective Order has been used correctly because "Microsoft has a compelling, constitutionally-protected interest in maintaining the confidentiality of its trade secrets and business contracts with other companies". Microsoft Memoranda at vi. While that may be true, very few of the documents Microsoft does not want to see the light of day, fit into these categories.

1. Microsoft Has Consistently Refused To Remove Confidential Designations From Documents That Do Not Contain Trade Secrets Or Confidential Commercial Information.

Microsoft initially designated 99% of the documents it produced in this case as "Confidential" or "Highly Confidential." Caldera complained - for good reason, as Caldera's factual investigation was hampered - but Microsoft refused Caldera's repeated requests that it remove the designations from documents that are not trade secrets or confidential commercial information (as required under Fed. R. Civ. P. 26(c)(7)).

On two prior occasions, Caldera asked this Court to require Microsoft to stop misusing the Protective Order.²

-
2. See Caldera's First Status Report (May 28, 1997)(request to modify the Protective Order); Caldera's Motion to Modify the Protective Order (February 6, 1998).
-

The first such occasion was in connection with Caldera's First Status Report, which came before the Court on May 30, 1997. In its First Status Report, Caldera complained of Microsoft's abuse of both Confidential and Highly Confidential document designations. At the hearing, Microsoft's counsel acknowledged that Microsoft had made no effort to review documents for confidentiality as mandated by the protective order, but had merely left in place confidentiality stamps that were placed on its documents when they were sent to the Justice Department. While declining to treat Caldera's request as a motion at that time, Judge Benson commented: "[B]ased on what I have seen . . . I would suggest that Microsoft seems to be using the confidentiality issue a little too freely." It was agreed that Caldera's request would be treated as a motion, fully briefed by the parties, and subsequently heard by the Court.³

-
3. Tr. Motion Hearing, May 30, 1997 at 51-62, attached as Exhibit 1.
-

At the subsequent hearing, the Court expressed understandable reluctance to review millions of pages of documents marked "Confidential" or "Highly Confidential." Trusting that Microsoft would be reasonable in removing its improper designations, the Court instructed the parties to work out their differences.⁴

-
4. Tr. Motion Hearing, January 28, 1998 at 22-42, attached as Exhibit 2.
-

Caldera has attempted, without success, to get Microsoft to reclassify a limited number of non-confidential documents that have been marked as exhibits to depositions.⁵

-
5. On June 26, 1998, Caldera requested that Microsoft remove its "Confidential" and "Highly Confidential" designation from 366 documents that had been marked as exhibits to depositions taken in this case. Letter from Philip McCune to Richard Pepperman, dated June 26, 1998, attached as Exhibit 3. The Protective Order requires a response within 10 days. Microsoft took more than 30 days to respond. Letter from Anthony Candido to Philip McCune, dated July 29, 1998, attached as Exhibit 4. Microsoft agreed to remove the confidential designation from some documents, but refused to remove the designation from many other documents that do not meet the criteria for confidential treatment under the Protective Order or applicable law. On September 2, 1998, Caldera requested that Microsoft remove "Confidential" and "Highly Confidential" designations from an additional 67 documents that had been marked as exhibits to depositions. Letter from Philip McCune to Richard Pepperman, attached as Exhibit 5. Microsoft again took 30 days to respond. Letter from Jay Holtmeier to Philip McCune, dated October 2, 1998, attached as Exhibit 6. Again, Microsoft refused to remove confidential designations from documents that do not qualify under the Protective Order.

Microsoft's protective order misuse has not only hindered Caldera's efforts, but is inimical to the public interest.

In *Procter & Gamble v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1995), a case well-known to Microsoft's counsel, the Court commented on the need to limit confidentiality designations to no more than absolutely necessary and on the problems inherent in giving the parties free reign to dictate what is to be treated as confidential:

While District Courts have the discretion to issue protective orders, that discretion is limited by the careful dictates of Fed.R.Civ.P. 26 and "is circumscribed by long established legal tradition" which values public access to court proceedings. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir.1983), cert. Denied, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d. 127 (1984). Rule 26 (c) allows the sealing of court papers only "for good cause shown" to the court that the particular documents justify court-imposed secrecy. In this case, the parties were allowed to adjudicate their own case based upon their own self-interest. This is a violation not only of Rule 26(c) but of the principles so painstakingly discussed in *Brown & Williamson*.

The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties as it did here, allowing them to modify the terms of a court order without even seeking the consent of the court. The protective order in this case allows the parties to control public access to court papers, and it should be vacated or substantially changed.

Removal of Microsoft's improper designations is necessary so Caldera is free to confront potentially hostile witnesses with documents that prove Microsoft's bad acts. Discovery is over. Yet, trial and the opportunity for cross-examination of witnesses still lie ahead. Caldera has interviewed many OEM witnesses and former Microsoft employees who are unwilling to testify regarding Microsoft's predatory business practices because they fear retaliation by Microsoft -- the only remaining supplier of desktop operating system software. Theo Lieven, the former CEO of Vobis (Germany's largest computer manufacturer) summed it up when he said:

They [Microsoft] have one software. It's still - you know, I'm not anymore with Vobis. That's the reason why I dare to say what I'm saying today. If I would be with Vobis, I wouldn't dare to say anything against Microsoft. You know that. Nobody does it, you know.

Lieven Tr. at 223, attached as Exhibit 7.

2. Evidence Of Predatory Conduct Is Not A Trade Secret, Nor Does It Constitute Confidential Commercial Information.

Only trade secrets and confidential commercial information can be designated confidential. Rule 26(c)(7) permits the Court to order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." A trade secret constitutes "information, including a formula, pattern, compilation, program, device, method technique or process" that takes independent economic value from not being generally known to persons who can obtain economic value from its use. Only Microsoft's source code constitutes a trade secret.

Confidential commercial information is material that: (1) contains sensitive business information, (2) is normally kept confidential, and (3) is of a nature such that public disclosure would cause competitive harm. See *Federal Open Market Committee v. Merrill*, 443 U.S. 361-63 (1979) *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 167 (3rd Cir. 1993). The only form of competitive harm that can be protected is harm to business relationships with specific third parties identified in the documents at issue, or harm that would result from instructing competitors on a party's current business and marketing strategies. *Id.* Embarrassment or harm to a party's reputation is not a sufficient justification for protecting material from disclosure. *Welsh v. San Francisco*, 887 F. Supp. 193, 1297 (N.D. Cal. 1995) *United States v. California Medical Review, Inc.* 133 F.R.D. 143, 148 (N.D. Cal. 1990). Likewise, a party cannot protect information regarding its unlawful practices. In any event, the requisite showings must be made with specific facts, not mere conclusory allegations of confidentiality and/or business harm. *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981).

Microsoft has violated the Protective Order by designating evidence of its predatory conduct as confidential. The Protective Order limits the categories of information that parties may designate as confidential. Protective Order at 3 and 4. The order does not permit a party to designate material as confidential simply because the material supports the opposing party's case.

The Court need do nothing more than read a few of the documents designated "confidential" by Microsoft to conclude that Microsoft has violated the Protective Order. These documents are typical of the documents Microsoft insists remain "confidential," so they cannot be publicly disclosed. Yet none of the documents contain trade secrets or confidential commercial information. All are six to nine years old and many discuss versions of software products, such as MS-DOS and Windows 3.x, that Microsoft no longer actively develops, markets or sells. Moreover, all the documents Caldera requested Microsoft re-classify contain evidence that supports the allegations of the Complaint. Here are a few examples:

Our DOS gold mine is shrinking and our costs are soaring - primarily due to low prices, IBM share and DR-DOS ... I believe people underestimate the impact DR-DOS has had on us in terms of pricing.

Bill Gates to Steve Ballmer, May 18, 1989, designated "Highly Confidential," attached as Exhibit 8.

This new contract [per processor license] guarantees MS DOS on every processor manufactured and shipped by Budgetron, therefore excluding DRI.

Microsoft Canada OEM Sales Monthly Report, dated March 1991, designated "Highly Confidential," attached as Exhibit 9.

Hyundai Electronics INC. DRI is still alive. We are pushing them to sign the amendment on a processor-based license. This will block out DR once signed.

Joachim Kempin Status Report, October, 1990, designated "Highly Confidential," attached as Exhibit 10.

It looks like DRI is urging them [Vobis] to focus on DR-DOS ... Lieven [Vobis' President] is complaining about the per processor license - he does not want to pay \$9 with every computer and thinks about shipping DR-DOS and MS-DOS.

Joachim Kempin (in charge of Microsoft OEM Sales) to Mike Hallman (Microsoft President),

Oct. 29, 1991, designated "Highly Confidential," attached as Exhibit 11.

I took the opportunity to negotiate with him [Lieven] in German, sign our offer as is ... Second option - scratch the DOS clause [refuse Microsoft's demand that Vobis sign a per processor license for MS-DOS] and pay \$35 for Windows instead of \$15 ... I have a bet with Jeff that they will sign as is. In my judgment they will hurt if they do not ship WIN and paying \$35 for it is out of the question.

Kempin to Butler, Mar. 26, 1991, designated "Highly Confidential," attached as Exhibit 12.

Microsoft waived its claim of confidentiality by making public statements about the subject matter contained in documents designated confidential. Even if Microsoft's confidential documents actually did contain confidential commercial information - and it's clear that they do not - Microsoft waived its claim of confidentiality by making public statements about the subject matter of those documents.

In the 1995 consent decree between Microsoft and the United States, Microsoft agreed to discontinue its use of per processor licenses, minimum commitment terms, license agreements of more than one year, tying of Windows and MS-DOS, and related predatory acts. Nonetheless, Microsoft has consistently maintained that it offered per processor licenses only because customers requested such licenses and because such licenses were an effective means of combating software piracy and that it did not engage in tying of Windows and MS-DOS. Microsoft has also publicly denied that it was ever its intent to create incompatibilities between DR-DOS and Windows, and Microsoft has denied publicly that it tied Windows and MS-DOS together in Windows 95 for the purpose of excluding competition from DR-DOS.

Moreover, Microsoft has made repeated public statements denying the truth of Caldera claims in this case:

"There is simply no factual basis for Caldera's claims," said Tom Burt, associate general counsel for Microsoft. "Many of Caldera's allegations merely recycle claims that the Federal Trade Commission and Department of Justice reviewed years ago and decided were groundless ... After nearly three more years of investigation, Caldera still has no evidence to support its claims."

Microsoft News Release, Redmond, Wash., Feb. 12, 1999, attached as Exhibit 13.

Microsoft cannot assert that Caldera has "no evidence," and, at the same time, insist that internal e-mail and memoranda which directly contradict Microsoft's public denials of guilt must be protected from disclosure as "confidential" information. The Protective Order should not be construed to allow such an unjust result. Rather, by publicly denying the specific predatory acts alleged by the United States and Caldera, Microsoft has placed information relevant to those acts in the public domain. The Protective Order provides that when information becomes part of the public domain as has occurred here, as a result of Microsoft's press release and other statements, the information is no longer "Confidential Discovery Material." Protective Order at ¶17.

For example, during the FTC/DOJ investigations, Microsoft made repeated statements to the press that the purpose of the per-processor license was to combat software piracy. See "What To Do with the Microsoft Monster," Stuart Taylor, American Lawyer, November 1993, attached as Exhibit 14. Microsoft documents quoted above show that Microsoft's senior executives purposely used per processor licenses not to stop piracy but rather to "block out DR" - that is, to make it virtually impossible for DR-DOS to make sales to OEMs.

Microsoft has done the same thing with respect to the false error messages generated by the Windows 3.1 beta. The messages - which were generated if a user tried to run Windows 3.1 in conjunction with DR-DOS - were intended to scare users and make them switch from DR-DOS to MS-DOS. The secret, encrypted code that generated the error message was uncovered in 1993 by Andrew Schulman. Schulman immediately sent an e-mail to Microsoft:

I have stumbled across a really awful piece of code (with the initials) "AARD"! in four separate programs in Windows ... This AARD code is deliberately obfuscated, encrypted with XORs, attempts to disable a debugger ... But after much effort by myself and Geoff Chappell, we have found that the purpose of this code (in Windows!!) is to check for genuine MS-DOS by checking several otherwise-irrelevant things in the DOS data segment. In two beta versions of Windows, this code when run on DR DOS produced error messages....Brad, I am extremely pissed at Microsoft. I have been trying to defend you guys against what I thought were stupid allegations, and now I find out that in fact the company has done something really bad. I have passed my findings on to the FTC.

Andrew Schulman to Brad Silverberg, June 1, 1993, attached as Exhibit 15.

Schulman's findings were reported in Dr. Dobb's Journal, a software industry publication. Brad Silverberg, the head of Microsoft's Systems Division, responded to Schulman, and his response was published in Dr. Dobbs Journal:

It has never been the practice of this company to deliberately create incompatibilities between Microsoft system software and the system software of other OS (operating system) publishers. ... The intended purpose of this disclosure message was to protect the customer and reduce the product support burden from the use of Windows on untested systems.

Letter from Silverberg to Schulman in Dr. Dobb's Journal, (emphasis added), attached as Exhibit 16.

Silverberg's public statement stands in stark contrast to supposedly confidential Microsoft e-mail. David Cole, a Windows developer, wrote Silverberg asking what "the guy [a user] was supposed to do" when he saw the error message. David Cole to Silverberg, Feb. 10, 1992, designated "Confidential," attached as Exhibit 17. Silverberg responded:

what the guy is supposed to do is feel uncomfortable, and when he has bugs, suspect that the problem is dr dos and then go out to buy ms dos. or decide not to take the risk for the other machines he has to buy for the office.

Silverberg to Cole, Feb. 10, 1992, designated "Confidential," attached as Exhibit 18.

In short, Microsoft has used the Protective Order to prevent Caldera from showing OEMs and other witnesses documents that directly contradict Microsoft's public statements of innocence. Not surprisingly, Microsoft is not anxious for witnesses to see documents that support Caldera's case. But that is not a basis for this Court to restrict Caldera's use of otherwise non-confidential documents to discover and prove its claims.

II. CONCLUSION

Microsoft should be ordered to remove the "confidential" and "highly confidential" designations from all documents that have been marked as exhibits to depositions in this case unless, on a document-by-document basis, and under penalty of sanctions, it can make the requisite showing that the document is entitled to confidential protection under Rule 26. Moreover, Microsoft should be required to remove the confidential designation or make the requisite showing, on a document-by-document basis, with respect to any additional documents Caldera so requests in writing.

DATED this _____ day of March, 1999.

SNOW, CHRISTENSEN & MARTINEAU

By _____

Stephen J. Hill

Ryan E. Tibbitts

Attorneys for Plaintiff, Caldera, Inc.