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

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CALDERA, INC.,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

**ORDER ON PLAINTIFF'S MOTION TO  
COMPEL**

Case No. 2:96CV 0645B

Judge Dee V. Benson

Magistrate Judge Ronald N. Boyce

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589

On May 18, 1999, The Court heard argument on the Plaintiff's Motion to Compel Production of Improperly Withheld Documents. Plaintiff was represented by Ryan E. Tibbitts and Lawrence C. Locker. Defendant was represented by Mark M. Bettilyon and Megan McLemore. After reviewing the written materials submitted by the parties, and considering the arguments offered by counsel, the Court rules on the motion as follows:

**A. Communications Allegedly Lacking Legal Advice.**

Microsoft has reviewed again, according to the instructions provided in Sections A to E of this Order, the approximately 97 documents that Caldera has identified as allegedly lacking legal advice, or which may have been disseminated too broadly. Microsoft is required to produce any document within this category that: (a) does not concern legal advice; or (b) concerns legal advice and is distributed to anyone within or without Microsoft who is beyond the spectrum of persons who were to implement or utilize that advice. Conversely, Microsoft is entitled to withhold as privileged any of the 97 documents that concern legal advice and are distributed exclusively to persons who were going to implement or utilize that advice.

By agreement of the parties, Microsoft will produce to Caldera all of the 97 documents in this category, except for the following documents which are properly withheld as privileged, and require no further description by Microsoft: Entry No. 307 (seeking legal advice); PMSC 28162 (requesting legal advice); PMSC 29809-812 (requesting legal advice); PMSC 30028-31 (requesting legal advice); PMSC 30034-36 (requesting legal advice); and PMSC 39496-539 (requesting legal advice).

**B. Communications Disclosed to Third-Party Waggener Edstrom.**

Microsoft shall review again, according to the instructions provided in Sections A to E of this Order, the communications identified by Caldera that were disclosed to a third party, Microsoft's public relations firm, Waggener Edstrom. All documents prepared in anticipation of

publication, such as press releases, even if in draft form, are not privileged and shall be produced. Microsoft, however, is entitled to withhold as privileged specific communications that discuss the legal ramifications of proposed press releases or other announcements, and that were, as discussed in the prior paragraph, disclosed only to those who were to utilize or implement the legal advice. Communications that simply suggest stylistic changes and the like to proposed press releases and other documents intended for publication or disseminated other than to those who had some legal utility for the information are not privileged and shall be produced.

**C. Documents in Which No Attorney Is Involved.**

Microsoft shall review again, according to the instructions provided in Sections A to E of this Order, the disputed communications identified by Caldera in which no attorney is listed as an author, recipient, or copyee. These documents are privileged only if the nonlawyers were acting as agents for the lawyer or as agents for Microsoft for purposes of the legal advice, and acting under a sense of confidentiality. As an example, directions from one employee to another to gather information to present to a lawyer to obtain legal advice would be privileged.

**D. Allegedly Nonprivileged Attachments and Other Material Accompanying Privileged Communications.**

Microsoft shall review again, according to the instructions provided in Sections A to E of this Order, those documents identified by Caldera as being allegedly nonprivileged attachments or nonprivileged material accompanying a privileged communication. If a business memorandum or other communication, such as, for example, a marketing memorandum, is prepared by one nonlawyer and addressed to another nonlawyer, it is privileged only if it was prepared for the purpose of having a lawyer give legal advice. If, however, the document or other communication was prepared independently of the legal advice, and then submitted to the lawyer, then it is not privileged and shall be produced.

**E. E-Mail Threads.**


Microsoft shall review again, according to the instructions provided in Sections A to E of this Order, the e-mail threads it has withheld as privileged. E-mail communications within the thread that were already in existence, and then later forwarded to a lawyer, are not privileged and shall be produced. It is only the specific transmittal communication within the thread to the lawyer, and the lawyer's return communications that are privileged. Microsoft is not required to produce a revised privilege log for e-mail threads it continues to withhold as privileged.

**F. Lost Documents.**

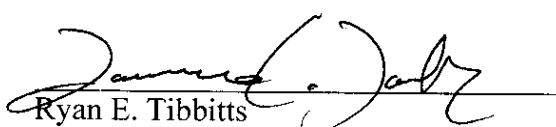
Microsoft shall provide to Caldera a sworn affidavit describing its efforts to look for the lost documents identified in Caldera's motion. The affidavit shall include descriptions of the locations where Microsoft looked for the lost documents, including whether it has searched the files of consultants, attorneys, and persons listed on the communications, the persons with whom it inquired, and the approximate dates these activities were conducted.

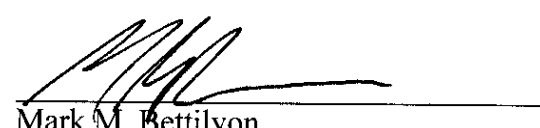
IT IS SO ORDERED.

DATED: 9/25/99

  
UNITED STATES MAGISTRATE JUDGE  
RONALD N. BOYCE

Approved as to form:

  
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Lawrence C. Locker  
Attorneys for Plaintiff Caldera, Inc.

  
Mark M. Bettilyon  
Mary Megan McLemore  
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United States District Court  
for the  
District of Utah  
September 28, 1999

\* \* MAILING CERTIFICATE OF CLERK \* \*

Re: 2:96-cv-00645

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