I.   IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
 	
                    Plaintiff,
 	
          v.
 	
MICROSOFT CORPORATION,
 	
                    Defendant.
	Civil Action No. 98-1232 (TPJ)

STATE OF NEW YORK *ex rel*.
Attorney General DENNIS C. VACCO, *et al.*,
 	
                    Plaintiffs,
 	
          v.
 	
MICROSOFT CORPORATION,
 	
                    Defendant.
	Civil Action No. 98-1233 (TPJ)

PLAINTIFF UNITED STATES' AND PLAINTIFF STATES' OPPOSITION TO MICROSOFT'S MOTION TO MODIFY STIPULATION AND PROTECTIVE ORDER

On July 31, 1998 Microsoft filed a motion with the Court seeking a fundamental

alteration in the terms of the Protective Order that has efficiently and effectively governed

discovery in this case since May 22, 1998. Microsoft's motion would dramatically change -- not

just in the middle of the game but quite near the end of it -- the rules upon which dozens of third

parties have relied in producing some of their most sensitive business information to Microsoft.

Microsoft's justification for now renouncing the assurances it drafted and agreed to in May is the

purported necessity of having a handful of in-house Microsoft lawyers assist its outside counsel -

- two large and capable law firms -- in preparing for depositions and defending this case. This

convenience is hardly sufficient to warrant the last-minute, highly disruptive change Microsoft's

motion seeks, an alteration that is likely to undermine the legitimate competitive interests of

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third parties, potentially wreak havoc with the ongoing, orderly discovery in this case, and almost certainly delay the Court's pretrial and trial schedules. Accordingly, the motion should be denied.

I.   MICROSOFT HELPED DRAFT, AND EXPRESSLY AGREED TO, THE PROTECTIVE ORDER ABOUT WHICH IT NOW COMPLAINS

On May 22, 1998, following the Court's initial scheduling conference, Microsoft drafted and sent to plaintiffs a proposed stipulated protective order. The parties then jointly negotiated a final version of the protective order and stipulated to its terms, and it was entered by the Court on May 27, 1998. The Protective Order provides a mechanism for parties and non-parties alike to designate trade secrets and other commercially confidential material as either "confidential" or, in the case of such material needing "a higher level of protection . . . due to its commercial sensitivity," as "highly confidential." (Protective Order, ¶¶ A.9; A.10) In a fairly standard provision, Microsoft expressly agreed, and the Order provides, that access to material designated as "highly confidential" shall be restricted to Microsoft's outside counsel only and may not be disclosed to "an employee of the defendant," including in-house counsel. (Protective Order, ¶¶ A.6; D.2.b)

Of particular significance to Microsoft's current motion, the stipulated Protective Order also provides a mechanism for any party, including Microsoft, to challenge a confidentiality designation that it believes is not appropriate under the Order. (Protective Order, I.1.) This provision requires that the challenging party first confer with the producing party to attempt to resolve the dispute and then, if unsuccessful, move the Court for a ruling that the material is not properly designated.

Immediately following entry of the Protective Order on May 27, 1998, plaintiffs notified at least 54 non-parties that documents they had produced to plaintiffs would be provided to Microsoft in discovery, and that under the Protective Order they would have an opportunity to designate appropriate documents as either "confidential" or "highly confidential." During late May and the first week or so of June, pursuant to terms and protection assured by the Court's

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Protective Order, virtually all of those third parties made confidentiality designations for their documents which were then produced by plaintiffs to Microsoft.

The Protective Order has assured smooth and effective discovery in this matter; because of the various levels of protection it provides, not a single third party has found it necessary to apply to the Court for special or additional protection for its documents. Significantly, during the two months since the designation process began, to the plaintiffs knowledge Microsoft has only once (two days ago) invoked Paragraph I.1 of the Order to challenge any third party's confidentiality designation. In spite of this record, Microsoft now asks the Court to essentially strip away the protection upon which third parties relied in producing their most sensitive, "highly confidential" documents.

II. MICROSOFT CANNOT JUSTIFY THE REQUESTED DRASTIC MODIFICATION OF THE PROTECTIVE ORDER

Where a party seeks to modify a protective order for "private reasons," the Court should weigh the following factors: (1) whether "good cause" exists which justifies modification; (2) the nature of the protective order; (3) the "foreseeability" at the time of the original protective order of the modification request; and (4) "reliance" on the protective order." *Bayer AG v. Barr Lab., Inc.*, 162 F.R.D. 456, 462-63 (S.D.N.Y. 1995). All four factors weigh against Microsoft's motion to modify the Protective Order.

A. Microsoft Has Not Shown "Good Cause" For Modifying the Order

Under Rule 26(c) of the Federal Rules of Civil Procedure, a court may enter a protective order upon a showing of "good cause" by the parties seeking protection. Good cause existed for entry of the Protective Order in this case. In the "Preamble" of the Order, the parties agreed and the Court ordered that "certain information produced or to be produced by defendant and third parties . . . contains Confidential Information . . . the unauthorized disclosure of which would be detrimental to the legitimate commercial interest of the party or third party that produced this information." (Preamble, ¶ 2.)

Given this initial showing of good cause, the burden is now on Microsoft to show good cause why modification of the Protective Order is necessary. *See Bayer*, 162 F.R.D. at 464. In *Bayer*, the court denied a similar request brought by a defendant seeking to modify a stipulated protective order to permit access by its in-house counsel to materials designated by the plaintiff as "confidential." *Id.* The parties had negotiated a protective order which limited disclosure of "confidential" materials to outside counsel. The defendant in *Bayer* argued that it was necessary for its in-house counsel to "be present at depositions so that she may 'evaluate the testimony and demeanor' of key witnesses, and 'consult with outside counsel regarding strategy'." *Id.* Moreover, the defendant argued, similar to Microsoft's assertions here, that if its in-house counsel could not actively participate in the litigation, its "right to control its own defense is being severely hampered." *Id.*

The *Bayer* court held that the defendant's request did not constitute "good cause." First, the defendant was represented by two outside law firms, which the defendant did not contend were unable to adequately represent the defendant's interests in the litigation. *Id.* at 465. Second, a method was in place by which non-confidential material that had been designated "confidential" could be changed or challenged and the defendant's in-house counsel given access to the materials that were redesignated as non-confidential. *Id.* This procedure was deemed adequate to balance the defendant's interest in having its in-house counsel participate in the litigation without exposing confidential information to a competitor's employee. *Id.*

Similar to the defendant in *Bayer*, Microsoft is represented in this matter by two large and capable law firms, Sullivan & Cromwell and Preston, Gates, Ellis, & Rouvelas Meeds. While Microsoft asserts a certain convenience in also utilizing four of its in-house lawyers to assist in discovery and to defend depositions, Microsoft has not suggested that it's outside lawyers are not capable of handling these matters where "highly confidential" material is involved. Plainly, Microsoft's convenience in preparing parts of its case does not warrant the requested wholesale, eleventh-hour withdrawal of critical confidentiality protection for

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numerous third parties. Moreover, as discussed below, the Protective Order as drafted provides

Microsoft with an adequate and far less-disruptive means of obtaining access for its in-house

lawyers to all but appropriately designated "highly confidential" information of its competitors.

Consequently, Microsoft has failed to demonstrate "good cause" that would warrant modifying

the current Protective Order.

        B.   Microsoft Negotiated And Agreed To The Protective Order And Its Protection
              Of Highly Confidential Material From Disclosure To Microsoft Employees

The fact that Microsoft and the plaintiffs stipulated to the Protective Order further

undermines Microsoft's request to modify the Order. *See A.T.T. v. Grady*, 594 F.2d 594, 597

(7th Cir. 1978) (stating "where a protective order is agreed to by the parties before its

presentation to the court, there is a higher burden on the movant to justify the modification of the

order"), also *Bayer*, 162 F.R.D. at 465. In this case, Microsoft recognized, and agreed, that

certain categories of highly sensitive third-party documents and information simply should not

be seen by *any* Microsoft employees, attorneys or otherwise. (See Protective Order, ¶ A.10.)

Indeed, the Protective Order to which Microsoft agreed in this case is a "blanket" protective

order, one which expressly provides a procedure whereby a party or third party may designate as

confidential documents and information that it in good faith believes contains trade secrets or

commercially sensitive information, without first making an individualized showing of such

confidentiality, subject to challenge for inappropriate designation.[1]

A blanket protective order is particularly important in this case because many of the

third-parties either compete with Microsoft or have sensitive commercial relationships with

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[1] Blanket or "umbrella" protective orders are generally viewed as essential for the efficient operation of the discovery process in complex litigation matters because they avoid the time-consuming process of reviewing and entering separate protective orders for each document or party. *Bayer*, 162 F.R.D. at 465. *See*, Manual For Complex Litigation, 3d, § 21.432 (A "blanket" protective order streamlines the discovery process because it will "expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication."). While a party or non-party under a blanket protective order need not make a particularized showing of good cause before initially identifying a particular document as confidential, a showing must be made if such a designation is challenged.

Microsoft or its competitors. (*See*, Manual For Complex Litigation, 3d, § 21.432, n.146.).

Absent the assurances provided by the Protective Order that designated highly sensitive material

would not be disclosed to Microsoft's employees, it is likely that many of these third parties

would have applied to the Court for additional, specific protection for their most sensitive

documents and information, a process that would have involved (and, if Microsoft's motion to

modify is granted, will involve) extensive, contentious, and time-consuming motions and

hearings. Instead, the Protective Order to which Microsoft stipulated, and under which over 50

third parties and the parties have been conducting discovery for some 10 weeks now, has

allowed for smooth and orderly discovery and adherence to the Court's pre-trial schedule.

> C.   Microsoft's Desire For Its In-House Lawyers To Have Access To All Third
>   Party Material Was Foreseeable When Microsoft Agreed To The Protective Order

The need for access of documents and information by certain Microsoft in-house lawyers

was entirely foreseeable when the parties agreed to the Protective Order. *See Bayer*, 162 F.R.D.

at 466, also *Jochims v. Isuzu*, 145 F.R.D. 499, 502 (S.D.Iowa 1992) (stating "a party's oversight

in not negotiating a provision in a protective order concerning a matter which should have been

reasonably foreseeable at the time of the agreement has been held to not constitute good cause

for relief from the protective order").

Microsoft's in-house lawyers worked with its outside counsel, including preparing for

and defending investigative depositions, during the plaintiffs' investigation and the United

States' consent decree enforcement action. There is no basis to believe that Microsoft's desire to

continue to have them involved in the litigation of this case was not foreseen and taken into

account by Microsoft when it stipulated to the Protective Order in May. In fact, the Order as

entered does not preclude the participation of in-house lawyers, but only restricts their access to

a particular category of the most sensitive third-party information; they continue to have full

access to materials designated as "confidential." (Protective Order, ¶¶ D1, D2.)

Similarly, the possibility that Microsoft might believe that certain "confidential" or

"highly confidential" designations by third parties were excessive or inappropriate, and might

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wish to challenge those designations, was both foreseeable and foreseen at the time Microsoft

agreed to the Protective Order. The Order provides a straightforward mechanism by which

confidentiality designations may be challenged and the designating party required to justify the

designation. (*See*, Protective Order ¶I.1) Moreover, while Microsoft's motion to modify claims

in part that "over designation" by third parties of materials as "highly confidential" requires a

drastic alteration of the Protective Order, that claim is belied by Microsoft's conduct over the

last two months. [2] Although most third parties submitted confidentiality designations for their

documents in early June, Microsoft has never, until last Friday, utilized Paragraph I.1 either to

try to persuade a third party to change a designation or to have the Court order the

"undesignation" of a particular document or piece of deposition testimony.[3]

More importantly, although parts of Microsoft's motion raise the "over designation"

issue, the core "Argument" section of the motion (pp. 7-11) makes clear that Microsoft's true

complaint with the Protective Order is that Microsoft simply no longer likes the terms to which it

stipulated in May. For example, the motion argues that there is no competitive concern in

granting Microsoft-employee attorneys access even to the appropriately designated, most "highly

confidential" secrets of Microsoft's competitors, because Microsoft's in-house lawyers are

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[2]Furthermore, even if some over designation by certain third parties has occurred, the solution Microsoft proposes -- wholesale elimination of the "highly confidential" category of protection -- is not only unnecessary and excessive, but also would seriously harm all the third parties whose"highly confidential" designation are entirely appropriate. Microsoft's alteration would strip from every third party any ability to shield their most-important trade secrets and commercial confidences from in-house Microsoft employees -- a protection expressly guaranteed by the agreed-upon Order and relied on by those third parties.

[3]The single example occurred just two days ago, *after* Microsoft had filed its current motion, when Microsoft sent a letter to counsel for Netscape objecting to various "highly confidential" designations Netscape made to its documents and deposition transcripts. Exhibit A. Netscape responded the next day with a letter in which it advised Microsoft that it had reviewed almost all of the documents and deposition designations raised in Microsoft's letter and that it would re-designate those materials from "highly confidential" to "confidential." Exhibit B. This prompt resolution of confidentiality disputes is precisely what Paragraph I.1 of the Protective Order was intended to achieve. Indeed, while Microsoft's motion baldly asserts that, having waited two months without taking any action to correct allegedly improper designations, "it is not practicable" now for Microsoft to do so (Motion at 6), the above example demonstrates precisely how "practicable" use of Paragraph I.1 continues to be.

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"officers of the court" who are subject to the Court's discipline. *Id.* at 7-8. Plainly this argument has nothing to do with the validity of the confidentiality designations made by third parties. Instead, it relates only to an issue that was entirely foreseeable, and about which Microsoft expressly agreed -- exclusion of in-house counsel from highly confidential material. Similarly, Microsoft's motion argues that in-house counsel's access to "all the material evidence," "the most critical documents" and "most central deposition testimony" in this case, whether or not properly designated by third parties as "highly confidential," is important because those attorneys have been "assigned responsibility for important aspects of the preparation" of this case. *Id.* at 9-10. Again, there is nothing about this argument that relates to the propriety of any designations or that was not true and foreseeable in May when Microsoft expressly agreed that in-house counsel would not have such access. Having by its express promises lulled third parties into producing their most sensitive documents, Microsoft should not now be permitted, under the guise of litigation conveniences that were foreseeable at the time of those promises, to rewrite the rules governing confidentiality.

D.   Dozens Of Non-Parties Have Relied On The Microsoft-Stipulated
Protective Order In Agreeing To Disclose Their Confidential Documents

Reliance on the strict terms of the current Protective Order by some 59 non-parties is a particularly compelling reason that Microsoft's motion should be denied. *See Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 658-59 (D.D.C. 1986) ("The Court must consider the fact that [the party's] cooperation in this process was obtained in reliance upon the blanket protective order"); *see also Bayer*, 162 F.R.D. at 467 (stating that a party "must know that they can rely on protective orders to protect sensitive commercial information from disclosure to competitors").

Microsoft served copies of its motion on 59 non-parties, notifying them that it is in effect now seeking to modify the core protection assured them by the Protective Order. As noted above, the Order has been very successful in allowing smooth discovery of third party material. Not one of the many companies served by Microsoft has found it necessary to seek additional protection from this Court. When each of these non-parties made the decision to allow its highly

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confidential documents to be turned over to Microsoft, it did so pursuant to, and no doubt relying

on, the assurances of the Protective Order that certain commercially sensitive and trade secret

materials would not be seen by any Microsoft employees.[4]

III.   MICROSOFT'S MOTION IS LIKELY TO RESULT IN
        NUMEROUS THIRD-PARTY REQUESTS TO THIS COURT FOR
        PROTECTION AND IN A DELAY OF THE TRIAL OF THIS CASE

For the reasons stated above, plaintiffs respectfully request that the Court immediately

deny Microsoft's motion to modify the Protective Order. If the Court does not do so, plaintiffs

believe that all of the third parties Microsoft notified of its motion must be given an adequate

opportunity to respond to the motion, apprise the Court of any objections they have to the

requested withdrawal of protection for their "highly confidential" materials, and appear before

the Court to seek whatever additional protection they believe their materials will require, before

any change in the order is granted. Plaintiffs anticipate that this process will be unnecessarily

time-consuming, contentious, and likely chaotic   Such a massive expenditure of the Court's and

the parties' limited time in the now less than 5 weeks remaining before trial, and the likelihood

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[4] For example, Microsoft recently filed a motion in the District of Utah to compel Novell, a third-party operating system vendor, to produce commercially sensitive and trade secret information which Novell had declined to produce on confidentiality grounds. Microsoft argued that a protective order was in place that would guard against disclosure of Novell's confidential information, and in particular that "[c]ourts routinely hold that protective orders that limit disclosure to outside counsel and outside experts -- *such as the one in place in the underlying actions against Microsoft* -- are sufficient to protect a third party's trade secrets." ("Microsoft Corporation's Memorandum In Support of Its Motion To Compel Novell, Inc. To Comply With the Subpoena Dated June 10, 1998," filed July 14, 1998, C.D. Utah) (emphasis added). Novell subsequently agreed to disclose its confidential documents to Microsoft without judicial intervention, presumably relying on the protections ensured by the Protective Order.

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that the process could not adequately be completed before the scheduled trial date, warrant

rejecting Microsoft's motion outright.

      Accordingly, for the foregoing reasons Microsoft's motion should be denied.

DATED: August 5, 1998   _____/s/_____
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