

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 SUN MICROSYSTEMS, INC.,

CASE NO. 3:08-CV-01641 EDL

5 Plaintiff/Counterdefendant,

**STIPULATED ADDENDUM TO
PROTECTIVE ORDER**

6 v.

7 NETWORK APPLIANCE, INC.,

8 Defendant/Counterplaintiff.
9

10 Defendant Network Appliance, Inc., Plaintiff Sun Microsystems, Inc. and non-party
11 Microsoft Corporation ("Microsoft"), by and through their respective counsel, hereby stipulate to
12 the following Addendum to the Protective Order ("Protective Order") in this action for the
13 protection of "ATTORNEYS' EYES ONLY – SOURCE CODE" (as defined in Paragraph 11 of
14 the Protective Order) of non-party Microsoft ("Microsoft Confidential Information").

15 WHEREAS, Microsoft is not a party to this litigation; and

16 WHEREAS Microsoft wishes to protect all Microsoft Confidential Information;

17 The parties and Microsoft agree and stipulate to the following Addendum to the Protective
18 Order ("Addendum") as to the treatment of Microsoft Confidential Information:

19 1. Microsoft will make certain source code ("Microsoft Code") available for
20 inspection in a searchable format on a non-networked computer connected to a printer. The
21 Microsoft Code will be available for inspection during business hours on reasonable advance
22 notice (at least three business days in advance) at the offices of Klarquist Sparkman, LLP, One
23 World Trade Center, 121 SW Salmon St., Suite 1600, Portland, Oregon 97204.

24 2. Each party may print no more than 750 pages (which can be negotiated) of
25 Microsoft Code on 8 ½ by 11 inch watermarked pages pre-labeled with Bates numbers and a
26 confidentiality designation of "ATTORNEYS EYES ONLY – MICROSOFT SOURCE CODE."
27 Prior to leaving the office where inspection and printing of Microsoft has occurred, each party

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1 will provide Microsoft's counsel with the pages it has printed to allow Microsoft's counsel to
 2 make and retain a copy of the printed pages. Microsoft may object to allowing a party to print an
 3 unreasonable number of pages of the Microsoft Code. If any party believes in good faith that it
 4 needs to print more than 750 pages of Microsoft Code, the party may seek a modification of this
 5 Protective Order if it can establish that the total number of pages it wishes to print is reasonable
 6 and that it has used its best efforts to limit printing of unnecessary pages. Requests to print more
 7 than a total of 750 pages, however, will be presumed to be unreasonable. In any event, the parties
 8 and Microsoft shall meet and confer if there is a dispute concerning the reasonableness of such
 9 requests.

10 3. No electronic copies may be made of any Microsoft Code, except by Microsoft.
 11 No further copies may be made of any Microsoft Code printed pursuant to paragraph 2 above
 12 (other than to provide a copy to Microsoft's counsel as recited in paragraph 2 above). The parties
 13 also shall not create electronic images of the source code from the paper copy for use on a
 14 computer (e.g., shall not scan the source code to a PDF) and shall not reproduce the source code
 15 in any way (e.g. shall not re-type the source code into a word processing document or email).

16 4. Each party shall maintain and store the paper copy of the Microsoft Code at the
 17 offices of its outside counsel in a manner that prevents duplication of, transmittal from, or
 18 unauthorized access to the source code, including, without limitation, storing the source code in a
 19 locked room or cabinet at all times when it is not in use, and shall return each paper copy of the
 20 Microsoft Code to Microsoft at the conclusion of this action. Likewise, any documents or things
 21 that contain notes regarding or summaries of any portion of Microsoft Code shall be kept in a
 22 secure location to preclude access by those not authorized to review Microsoft Code and shall be
 23 destroyed at the conclusion of this action. Any party eliciting testimony on oral deposition that
 24 contains, summarizes, or discusses Microsoft Code shall designate the testimony ATTORNEYS
 25 EYES ONLY – MICROSOFT SOURCE CODE pursuant to the procedures and protections set
 26 forth in paragraph 19 of the original Protective Order entered by the Court on June 25, 2008.

27 5. The Microsoft Code (including printed pages) may be inspected by outside counsel

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1 of a party and independent experts only. An "independent expert" excludes any expert who is a
 2 party or a current or former officer, director, or employee of a party. In the event that a party
 3 intends to disclose the Microsoft Code to an expert or to allow an expert to inspect the Microsoft
 4 Code, the party proposing such disclosure shall, at least five (5) business days prior to such
 5 disclosure, provide notice to Microsoft (via email to Chris Carraway at
 6 chris.carraway@klarquist.com). Such notice shall include a copy of the expert's completed and
 7 signed copy of Exhibit 1 hereto, as well as disclosure of (1) the expert's name; (2) the expert's
 8 present employer and title, (3) an up-to-date curriculum vitae of the expert; (4) an identification
 9 of any work performed by that expert for or on behalf of any party in this action within the four-
 10 year period before the filing of this action; and (5) a list of cases in which the expert or consultant
 11 has testified at deposition, at a hearing, or at trial within the last four years. If Microsoft objects
 12 to the disclosure of Microsoft Code to the expert, Microsoft will serve a written objection within
 13 five (5) business days of receipt of the information set forth above, which objection shall state the
 14 basis for Microsoft's objection. Microsoft and the party proposing disclosure shall confer in an
 15 attempt to resolve the objection. If Microsoft and the party proposing disclosure are not able to
 16 resolve the objection, Microsoft may file a motion in support of its objection within five (5)
 17 business days after such conference. If no motion is filed, Microsoft shall be deemed to have
 18 withdrawn its objection. In any motion pursuant to this paragraph, Microsoft shall bear the
 19 burden of proof of establishing that the expert should not have access to the Microsoft
 20 Confidential Information. No disclosure of Microsoft Confidential Information shall be made to
 21 the proposed expert until Microsoft and the party proposing disclosure resolve the matter, the
 22 objection is withdrawn, or the Court permits such disclosure.

23 6. Any person, including outside counsel and independent experts, who inspects or
 24 reviews the Microsoft Code, any printed pages thereof, or any documents containing, describing,
 25 or summarizing the Microsoft Code, is precluded for a period beginning upon the person's first
 26 review of Microsoft Code and ending two years after (1) that person's last review of the
 27 Microsoft Code, or (2) the final termination of the litigation, whichever is later, unless Microsoft

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1 agrees otherwise, from: (i) preparing, prosecuting, or amending any patent application (US,
 2 foreign, provisional, non-provisional, reissue, or reexamination) having claims directed to multi-
 3 protocol file serving, opportunistic locks, and/or file locking; (ii) assisting, supervising, or
 4 advising in any of these activities; and (iii) being a named inventor on any patent application
 5 having claims directed to multi-protocol file serving, opportunistic locks, and/or file locking.

6 7. Materials that are designated as "ATTORNEYS EYES ONLY – MICROSOFT
 7 SOURCE CODE" may be disclosed to only the following:

8 (a) Those independent experts who complete Exhibit 1 and are disclosed to and approved
 9 by Microsoft;

10 (b) Outside counsel of record, including employees of outside counsel of record assigned
 11 to and necessary to assist outside counsel in the preparation and trial of this action; and

12 (c) The Court, jury, court personnel, and court reporters or videographers recording the
 13 testimony or argument at a hearing, trial, or deposition in this action or any appeal therefrom.

14 Only those persons identified immediately above (paragraph 7(a) through (c)) may have
 15 access to ATTORNEYS EYES ONLY – MICROSOFT SOURCE CODE. Under no condition
 16 may any person disclose, in whole or in part, copies of or the substance of ATTORNEYS EYES
 17 ONLY – MICROSOFT SOURCE CODE to any unauthorized person, including any officer,
 18 director, in-house counsel, former employees, employees, or other technical or litigation
 19 consultants or experts of a party.

20 8. Notwithstanding any contrary provision of the Protective Order, in the event that a
 21 party wishes to elicit testimony or use or disclose documents or transcripts at trial, hearing or any
 22 other proceeding which contain or refer to Microsoft Code, the party shall request (i) that the
 23 Microsoft Confidential Information be filed under seal, (ii) that the portions of the record of any
 24 proceeding containing Microsoft Confidential Information be sealed; (iii) that persons other than
 25 outside counsel of record in this action, outside consultants and experts (as defined by Paragraph
 26 10(d) of the Protective Order), court personnel, jurors, and court reporters be excluded from the
 27 proceedings during the disclosure of Microsoft Confidential Information.

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1 9. The party planning to use or disclose Microsoft Confidential Information during
2 trial, hearing, or other proceeding shall provide written notice to Microsoft of such intent at least
3 seven (7) business days prior to the proceeding. Such notice shall be served by e-mail on counsel
4 for Microsoft, at chris.carraway@klarquist.com.

5 10. Documents and things produced, including expert reports, that contain, in whole or
6 in part, ATTORNEYS EYES ONLY – MICROSOFT SOURCE CODE, notes pertaining to
7 ATTORNEYS EYES ONLY – MICROSOFT SOURCE CODE, or summaries of any part of
8 ATTORNEYS EYES ONLY – MICROSOFT SOURCE CODE must be designated as such by
9 marking the first page or tangible medium containing such information, if it is an electronic
10 document, or each page if it is a paper document, at or before the time of production with the
11 designation “ATTORNEYS EYES ONLY – MICROSOFT SOURCE CODE.”

12 11. ATTORNEYS EYES ONLY – MICROSOFT SOURCE CODE, any excerpts
13 therefrom, and any documents containing, summarizing, or describing any such source code may
14 only be transported within the direct control of a person authorized under paragraph 7(a) through
15 (c) (“Authorized Person”), except for shipments on paper via Federal Express or other similar
16 courier service directly from one Authorized Person to another Authorized Person for the
17 purposes of filing, lodging, or submitting to the Court or for service upon Authorized Persons to
18 view OUTSIDE COUNSEL EYES ONLY SOURCE CODE. Under no circumstances may
19 OUTSIDE COUNSEL EYES ONLY SOURCE CODE be transmitted electronically.

20 13. Notwithstanding any contrary provisions of the Protective Order, Microsoft
21 Confidential Information shall be used solely in preparation for the trial and/or appeal of the
22 above-identified action. Microsoft Confidential Information shall not be used or disclosed at any
23 other time or for any other purpose whatsoever.

24 14. Subject to the foregoing additional restrictions and limitations, Microsoft
25 Confidential Information shall be subject to the remaining terms of the original Protective Order
26 in this case.

1 IT IS SO STIPULATED.

2 Dated: November 24, 2009

Dated: November 24, 2009

3
4
5 By /s/ Jeffrey G. Homrig

6 MATT POWERS
7 EDWARD R. REINES
8 JEFFREY G. HOMRIG
9 JILL J. HO
WEIL, GOTSHAL & MANGES LLP
Attorneys for Defendant
Network Appliance, Inc.

Counsel for Plaintiff

By /s/ Carrie L. Williamson

MARK D. FOWLER
DAVID ALBERTI
CHRISTINE K. CORBETT
YAKOV M. ZOLOTOREV
CARRIE L. WILLIAMSON
Attorneys for Plaintiff,
Sun Microsystems, Inc.

Counsel for Defendants

11 Dated: November 23, 2009

12
13
14 By /s/ J. Christopher Carraway

15 J. CHRISTOPHER CARRAWAY
16 KLARQUIST PARKMAN, LLP

17 Counsel for Non-Party Microsoft
18 Corporation

19
20 So ORDERED AND SIGNED this 30th day of Nov., 2009.

21 

22 _____
23 Honorable Elizabeth D. Laporte
24 United States Magistrate Judge

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SUN MICROSYSTEMS, INC.,
Plaintiff/Counterdefendant,
v.
NETWORK APPLIANCE, INC.,
Defendant/Counterplaintiff.

CASE NO. 3:08-CV-01641 EDL
[PROPOSED] PROTECTIVE ORDER

CONFIDENTIALITY UNDERTAKING OF: _____

1. My home address is:

2. My present employer is and the address of my present employment is:

3. My present occupation or job description is:

4. I have received a copy of the Protective Order ("Protective Order") in this action, as well as a copy of the Stipulated Addendum to the Protective Order regarding Microsoft ("Addendum").

5. I have carefully read and understand the provisions of the Protective Order and Addendum in this action.

6. I will comply with all of the provisions of the Protective Order and Addendum.

7. I will hold in confidence, will not disclose to anyone not qualified under the Protective Order and Addendum, and will use only for purposes of this action in strict compliance with the terms and conditions of the Protective Order and Addendum, any confidential

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1 information which is disclosed to me. I acknowledge that termination of the litigation does not
2 release me from the obligations set out in this paragraph.

3 8. At the conclusion of this action or my engagement with this action I will return all
4 confidential information that comes into my possession, and documents or things which I have
5 prepared relating thereto, to counsel for the party by whom I am employed or retained in strict
6 accordance with the provisions of the Protective Order and Addendum.

7 9. I acknowledge and agree that, if I review information that has been designated as
8 "Attorney's Eyes Only—Microsoft Source Code," I understand that I will be precluded for a
9 period beginning upon my first review of Microsoft Code and ending two years after (1) my last
10 review of the Microsoft Code, or (2) the final termination of the litigation, whichever is later,
11 unless Microsoft agrees otherwise, from: (i) preparing, prosecuting, or amending any patent
12 application (US, foreign, provisional, non-provisional, reissue, or reexamination) having claims
13 directed to multi-protocol file serving, opportunistic locks, and/or file locking; (ii) assisting,
14 supervising, or advising in any of these activities; and (iii) being a named inventor on any patent
15 application having claims directed to multi-protocol file serving, opportunistic locks, and/or file
16 locking.

17 10. I hereby submit to the jurisdiction of this Court for the purpose of enforcement of
18 the Protective Order in this action.

19 11. Any accompanying resume or curriculum vitae is a complete and accurate
20 statement to the best of my knowledge, and I acknowledge that in submitting such resume or
21 curriculum vitae I know that the receiving party shall rely thereon.

22 Signature: _____

23 Date: _____