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March 10, 2009

The Honorable J. Frederick Motz,  
United States District Judge,  
United States District Court for the District of Maryland,  
U.S. Courthouse – Room 510,  
101 West Lombard Street,  
Baltimore, Maryland 21201.

Re: *Novell, Inc. v. Microsoft Corp.*, MDL No. 1332

Dear Judge Motz:

On behalf of Microsoft, I write in response to the March 6, 2009 letter from Novell's counsel, Jeffrey M. Johnson of Dickstein Shapiro, to Your Honor seeking "assistance" to "resolv[e] a discovery dispute" arising out of the March 4, 2009 deposition of Microsoft's founder and former CEO William H. Gates III.

Novell has no basis to complain about the amount of time it had to examine Mr. Gates. As shown below, Novell had ample opportunity to conduct a thorough examination of Mr. Gates, but deliberately chose to waste time asking meaningless questions to which it already knew the answers. Indeed, Novell's examination was so peculiar, and the questions posed were of so trivial a nature, that one must question whether Novell's request to bring Mr. Gates back for further questioning is made in good faith. With apologies for the length of this letter, we must provide some background for the Court so that the context in which Mr. Gates' deposition was conducted is clear.

### **I. This Action**

As the Court knows, this action was commenced in 2004 and pertains to the 18-month period from June 1994, when Novell acquired WordPerfect and Quattro-Pro, through March 1996, when Novell sold those business productivity applications to Corel. Microsoft moved to dismiss the complaint, arguing in part that Novell's six claims were barred by the statute of limitations, given that nearly nine years had passed between the time Novell sold WordPerfect and Quattro-Pro and the time it filed its lawsuit. This Court dismissed all four of Novell's causes of action relating to Microsoft's conduct in purported markets for word processing and spreadsheet applications, and that decision was affirmed by the Court of Appeals in 2007. But this Court and the Court of Appeals permitted Novell to proceed with its two remaining claims concerning Microsoft's conduct in the PC operating system market, determining that, at least on a motion to dismiss, those claims qualified for tolling under 15 U.S.C. § 15b. Novell's two remaining claims allege injury to its business productivity applications based on (i) Microsoft's purported monopolization of the PC operating system market, and (ii) Microsoft's license agreements with original equipment manufacturers of PCs, which allegedly foreclosed Novell's distribution of WordPerfect and Quattro-Pro.

In January 2008, this Court held a pre-trial conference to discuss, *inter alia*, the discovery schedule. Microsoft urged that fact discovery be completed in seven months, arguing that more time was unnecessary because a massive amount of discovery had already been taken of Microsoft in connection with the dozens of antitrust cases litigated over the last decade. All of that discovery has been provided to Novell in the form of a fully searchable database containing 23 million pages of documents, and transcripts of hundreds of depositions and months of trial testimony from previous antitrust cases. The prior discovery includes 14 days of deposition testimony and six days of trial testimony by Mr. Gates, comprising 3,883 transcript pages and referring to 339 exhibits.

Although it already had access to this massive amount of discovery, Novell requested and obtained a very lengthy discovery period. The Court gave the parties until March 6, 2009 — approximately thirteen months — to complete fact discovery. Novell did nothing for most of this time, waiting 10 months before even beginning depositions.

## **II. Novell's Deposition Program**

Novell first provided Microsoft with a proposed list of deponents — containing the names of 35 current and former Microsoft officers and employees — on November 4, 2008. Since then, Microsoft has gone out of its way to assist Novell in locating and scheduling the depositions of current and former Microsoft employees in order to meet Novell's extraordinarily compressed deposition schedule. Thanks to Microsoft's cooperation, Novell has been able to take 30 depositions of present and former officers and employees of Microsoft over the last three months, comprising nearly the entire senior executive staff of Microsoft during the 1994 to 1996 period of relevance to Novell's claims. Those depositions explored in detail Novell's allegations that Microsoft's development of Windows 95 somehow impeded Novell's efforts to produce versions of its WordPerfect and Quattro-Pro business productivity applications for the new operating system.

By the time it deposed Mr. Gates, Novell had already examined every aspect of its allegation that the decision not to document fully certain shell extensibility mechanisms in Windows 95 — a decision that was based on valid business justifications and was never fully implemented in any case — had injured Novell. Among many others who testified about these shell extensibility mechanisms, Novell has deposed: (i) Paul Maritz, the Microsoft executive in charge of all operating system development; (ii) Brad Silverberg, the Microsoft executive responsible for developing Windows 95; (iii) Joe Belfiore, the program manager in charge of the Windows 95 user interface, including the

shell extensibility mechanisms; (iv) Satoshi Nakajima, the senior software developer who wrote the shell extensibility mechanisms; and (v) Brad Struss, the member of Microsoft's Developer Relations Group who communicated directly with Novell about the shell extensibility mechanisms. Having learned the facts from prior depositions, Novell could have focused its questions for Mr. Gates on topics that only he could address, *i.e.*, his rationale for deciding to provide "b-list" documentation of the shell extensibility mechanisms in Windows 95 until Microsoft's user interface strategy for operating systems had been clarified, or questions relating to an October 3, 1994 e-mail he wrote on this subject. As demonstrated below, Novell adopted a very different approach.

### **III. The Agreement to Permit a Deposition of Mr. Gates**

When Novell first advised Microsoft that it wished to depose Mr. Gates, Microsoft was reluctant to agree to yet another deposition of him based on two important considerations. First, it did not appear that Novell had any need to depose Mr. Gates in light of the numerous other witnesses it would be deposing and the fact that Mr. Gates had already been deposed eight times in related antitrust cases. Second, in addition to remaining as Chairman of Microsoft's Board, Mr. Gates now works fulltime as Co-Chair of the Bill & Melinda Gates Foundation. Leadership of the foundation — with its \$35 billion endowment and nearly 700 employees — is a hugely demanding responsibility. Among the foundation's priorities are global health, education reform and fighting homelessness, and Mr. Gates travels and speaks extensively in support of these and other causes. Indeed, Novell's marginal need for Mr. Gates' testimony seemed to be greatly outweighed by the fact that Mr. Gates' time could be better spent doing the work of his foundation.

Although it believed that Novell could obtain virtually all relevant information through other, less intrusive discovery methods, Microsoft agreed to make Mr. Gates available for a half-day deposition. Microsoft agreed to this accommodation in

large part because an October 3, 1994 e-mail sent by Mr. Gates concerning the shell extensibility mechanisms in Windows 95 had been the focus of extensive questioning by Novell in other depositions. While Mr. Gates had testified on the record about this e-mail at least twice previously, he was willing to testify about it again in light of Novell's theory (as improbable as it may be) concerning the impact of the e-mail on WordPerfect and Quattro-Pro.

#### **IV. The Deposition of Mr. Gates**

Contrary to Novell's commitment "to try and complete [its] examination of Mr. Gates within the four hours provided" (January 23, 2009 e-mail exchange between Steven Holley and Jeff Johnson, attached as Ex. 1 to the Johnson Letter ), Novell instead wasted Mr. Gates' time with frivolous questioning on matters about which other witnesses had previously testified, and about which Mr. Gates had no knowledge. There are many, many examples of what appears to be a deliberate waste of time by Novell during the deposition.

Novell claims in its letter to the Court that "a vast majority" of the documents used in the recent deposition "had never been shown to Mr. Gates in prior depositions or at trial." This is not surprising because Mr. Gates neither wrote nor received 12 of the 15 documents used in his deposition. Instead of asking Mr. Gates about issues on which he has unique personal knowledge — or any knowledge at all, for that matter — Novell squandered Mr. Gates' time by asking him to speculate about the content of documents (all of which were written 13 or more years ago) that he had never seen before. The actual authors and recipients of several of the documents shown to Mr. Gates had already testified about what the documents meant, so Novell's questioning of him about such documents was particularly pointless. Novell never even bothered to examine Mr. Gates about his October 3, 1994 e-mail concerning the shell extensibility mechanisms in Windows 95.

In one of many exchanges about a document Mr. Gates had never seen, Novell asked “Do you have any understanding, Mr. Gates, what Mr. Silverberg is talking about when he says that ISVs really want extensibility?” (March 4, 2009 Deposition of William H. Gates III at 49:21-24.)<sup>1</sup> Mr. Gates answered, “No, he does not—I mean, he gives some general sense, but we’d have to ask him.” (*Id.* at 49:25-50:1.) Even after Mr. Gates made clear that he did not have any knowledge about this document, Novell continued to ask Mr. Gates to speculate about Mr. Silverberg’s intentions. This line of questioning was especially odd given that Novell had already deposed Mr. Silverberg, and Mr. Silverberg testified about the very same document. Such questions suggest that Novell had no intention to “try and complete” Mr. Gates’ deposition in a half day.

In another example of its time-wasting tactics, Novell questioned Mr. Gates at length about the names and job responsibilities of Microsoft employees who are listed as senders and recipients of e-mails Mr. Gates had never seen. In fact, through the course of the deposition, Novell asked Mr. Gates about the e-mail aliases of 11 Microsoft officers and employees, and asked for the job titles and responsibilities of 19 officers and employees. (*See, e.g., id.* at 24:3-26:7.) Thirteen of the employees for whom Mr. Gates was asked to identify e-mail aliases or job titles were themselves already deposed by Novell in this action. Rather than attempt to complete the deposition of Mr. Gates in the time available as it had pledged to do, Novell instead plodded through the examination, eliciting mundane information that had already been obtained, or could have been easily discerned, from other sources.

Novell also spent a significant amount of time asking Mr. Gates about the meaning of acronyms that are used widely in the software industry. In just one of many examples, Novell questioned Mr. Gates at some length about the meaning of “API,” an acronym for application programming interface, which is universally known among

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<sup>1</sup> The transcript of Mr. Gates’ deposition is attached hereto as Exhibit A.

software developers and about which many other witnesses had already testified. (*Id.* at 19:16-22:1.) Similarly, Novell asked Mr. Gates several questions about “SDKs,” or software development kits. (*Id.* at 116:25-118:2.) Again, the meaning of this term is universally understood in the software industry.

In yet another example of Novell’s wasteful questioning, it asked Mr. Gates about the meaning of numerous codenames and acronyms used at Microsoft such as “Capone,” “Marvel,” “Ren,” “Cairo” and “DRG.” (*Id.* at 12:9-17:12.) The meaning of codenames and acronyms at Microsoft is something that Novell could — and did — elicit from other witnesses or that it could easily derive from Microsoft documents. Among many others who testified about the meaning of codenames, Novell has deposed: (i) Tom Evslin, who had responsibility for Microsoft’s e-mail products, including the simple e-mail client in Windows 95 code-named Capone; (ii) Russell Siegelman, who had responsibility for the MSN online service, whose client software in Windows 95 was code-named Marvel; (iii) Chris Peters, who managed the Microsoft Office group, which was developing a personal information manager code-named Ren that was eventually released (in substantially altered form) as Microsoft Outlook; (iv) Stephen Madigan, who was responsible for developing the user interface of an advanced operating system code-named Cairo that was never released by Microsoft; and (v) Doug Henrich, who ran the Developer Relations Group commonly referred to as DRG. As Novell was doubtless aware, Mr. Gates was in no position to add anything meaningful about these codenames and acronyms.

As these examples demonstrate, Novell went to great lengths to squander its opportunity to examine the Chairman of the Board and former CEO of a major corporation. The deposition of Mr. Gates was so scattershot, and the lines of questioning so beside the point, that it is difficult to avoid the conclusion that Novell’s purpose was to waste Mr. Gates’ time so that it could ask this Court to order him to return for another day of questioning. Indeed, we respectfully submit that Novell’s current tactic is a

function of the fact that the discovery to date has shown the complete lack of merit of Novell's remaining claims, and that Novell apparently believes that further harassing Mr. Gates is the best way to extract a monetary settlement from Microsoft. We appreciate how busy this Court is, but are compelled to ask that the transcript as a whole be examined by the Court to get the full flavor of Novell's tactics.

**V. Novell Is Not Entitled to A Further Examination of Mr. Gates.**

Novell's questioning of Mr. Gates is precisely the type of harassing, duplicative examination that courts are careful to guard against when parties seek to depose senior executives of major corporations. "Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, \*3 (N.D. Cal. Jan. 25, 2007). As Chairman of Microsoft's Board and Co-Chair of the Bill & Melinda Gates Foundation — the world's largest charitable foundation — Mr. Gates should be protected from harassing and time-wasting depositions by those who seek to distract him from his important charitable work. "This is especially so where the information sought in the deposition can be obtained through less intrusive discovery methods." *Id.* at \*3.

Novell was given the opportunity to ask Mr. Gates about topics that were relevant to its lawsuit, on which Mr. Gates had personal knowledge, and about which other witnesses could not testify. Courts are clear that these are the only appropriate topics for the deposition of a senior executive such as Mr. Gates. Instead of asking Mr. Gates questions about the merits of the case and issues in dispute or, at the least, of relevance, Novell wasted its time with Mr. Gates by asking about irrelevant topics about which Mr. Gates had no personal knowledge, and about which other witnesses could and did testify. Novell's decision to engage in such pointless questioning is no reason to

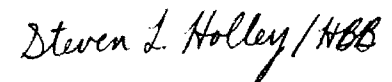


The Honorable J. Frederick Motz

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subject Mr. Gates to another disruptive deposition. Microsoft thus respectfully requests that Novell be denied the opportunity to impose further on Mr. Gates' busy schedule.

Respectfully,

A handwritten signature in black ink that reads "Steven L. Holley / HBB". The signature is written in a cursive, flowing style.

Steven L. Holley

cc: Jeffrey M. Johnson  
R. Bruce Holcomb  
G. Stewart Webb  
Mark M. Bettilyon