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VIA FEDERAL EXPRESS & ELECTRONIC FILING

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, MD 21201

Re: *Novell, Inc. v. Microsoft Corp.*, Civil Action No. JFM 05-1087, MDL No. 1332

Dear Judge Motz:

Having read Microsoft's nine-page discourse chronicling why William H. Gates III is somehow immune from the truth-seeking processes embodied in the Federal Rules of Civil Procedure, one can only conclude, with apologies to William Shakespeare, that Microsoft "doth protest too much, methinks."

Mr. Gates is the Chairman of the Board of Microsoft. During the relevant time period, Mr. Gates served as President and CEO of Microsoft. A notorious micro-manager, Mr. Gates' fingerprints are all over the anti-competitive conduct that is at the heart of this action. The conclusion that Mr. Gates is a principal witness and actor to the events giving rise to the complaint is shared by Microsoft, who identified Mr. Gates in response to contention interrogatories as a person with knowledge of the facts.

Mr. Gates personally ordered the de-documentation of certain API's known as shell extensions from the operating system code-named Chicago (later Windows 95) that would have enabled Novell and other ISV's to build office productivity applications that would have threatened Microsoft's operating system monopoly. The evidence will show that he did this for the express purpose of disadvantaging Novell in order to own "the key 'franchises' built on top of the operating systems" to "dramatically widen the moat that protects the operating system business." *See Novell Incorp. v. Microsoft Corp.*, 505 F.3d 302, 310 n.15 (4th Cir. 2007). It is now allegedly inconvenient, disruptive and an imposition on Mr. Gates' busy schedule for him to be questioned about those facts. The arrogance of Microsoft is palpable.

In the 3 hours 16 minutes of examination "permitted" by Microsoft, we learned some things about the anti-competitive scheme perpetrated by Microsoft at the direction of Mr. Gates. It

is quite notable that Microsoft failed to provide you with the exhibits actually used at the deposition, while complaining long and hard that they were somehow irrelevant to Mr. Gates' personal knowledge. We attach to this letter the exhibits used thus far. As the Court will see, some are documents authored by Mr. Gates, some name Mr. Gates and talk about decisions he made, and some memorialize the work done in carrying out his orders. All are relevant to this action. We review Mr. Gates' testimony about a few of those documents here.

On June 10 through June 12, 1993, Microsoft held an Executive Retreat at Hood Canal. Exhibit 2 to Mr. Gates' deposition was a slide presentation by Mike Maples, Jon Lazarus, Tandy Trower, Steve Madigan, David Cole, Chris Graham, Ed Fries and Nathan Myhrvold that, we have reason to believe, was presented at the Executive Retreat. This group of Microsoft employees notably includes both applications and systems executives. Microsoft complains that we had the temerity to ask Mr. Gates about the positions and responsibilities of these individuals. We must treat the deposition as a trial deposition, which necessarily requires laying a foundation. In this instance, the positions and responsibilities of these high-level Microsoft executives leave little room for debate on the importance of the proposal made.

In an apparent attempt to hide the presentation from outside scrutiny, the slide show was labeled: "Note: Client-Attorney Privileged Material." We were able to confirm through Mr. Gates that none of the team members was an attorney. One of the slides presented a proposal entitled "**The Radical Extreme: The Office Shell**." The "Basic Approach" presented was to "[h]old extensible shell for Office," Microsoft's suite of office productivity applications. In order to preserve this differentiation feature for Office, the Chicago shell (Windows 95) would be "non-extensible." The excuse to be offered ISV's for Chicago being non-extensible was "'we couldn't get it done in time . . .'".

Mr. Gates professed ignorance about the meaning of "extensible shell." "I don't know what they are referring to here. Extensibility is just the general idea that you can add something in addition to what's already there." Gates p. 30. He claimed not to remember the executive retreat or the plan to withhold extensibility from the Chicago shell and use it in the Office shell. Gates p. 32-34.

On June 14, 1993, Dennis Adler, a Chicago Program Manager, sent notes from the Hood Canal Executive Retreat to Brad Silverberg, the Microsoft Vice-President responsible for Chicago, and David Cole, the Group Program Manager for Chicago. Gates Exhibit 6. Under the heading "Notes from Breakout Presentations & wrap-up 6/12/93," the following bullet point appears:

> ◆ **Ship extensible shell in Office!!! Wire the features we need for Chicago into the Explorer (e.g. mail integration, printman, CPanel, Fonts, etc.).** Billg sez do it! (emphasis in original).

In his deposition, Mr. Gates denied that there was any plan to ship an extensible shell in Office, claiming that there was some confusion in Mr. Adler's notes, and that what Mr. Adler meant when he said "Ship extensible shell in Office" was having Office take advantage of a shell that is part of an operating system. Gates p. 65-66. Mr. Gates' obscuration becomes manifest from documents created after the Hood Canal Retreat.

In a document dated July 3, 1993, Chris Graham, one of the team members proposing the "Radical Extreme" produces a paper entitled "Office Shell Ideas and Issues." Gates Exhibit 3. Mr. Graham states that the proposal "originated at a senior technical retreat at Hood Canal in June/93." The plan called for an enhanced Windows shell to be bundled with the next major version of Office to ship after Chicago. "The Office shell would be functionally a superset of the Chicago shell." Enhancements to the proposed Office shell included "increasing the extensibility of components such as the Explorer, the Desktop and the Tray." It would be only **after** the Office shell ships that the enhanced shell would become the next standard Windows shell for both Chicago and Cairo (Windows NT). The new shell would not be "initially available with Windows itself."

The Chicago shell, on the other hand, would have "limited extensibility." Trays would be "not [be] extensible, and not replaceable." Chicago would not include "[e]xtensibility e.g. Explorer not extensible (Capone [MS Mail] hardcoded into explorer)." Why do this? Mr. Graham expressly states the motivation:

- Office gets a big jump on competition in creating apps optimized for the new shell.

- We could gain a much bigger advantage from the Office shell. We could pull off the "UI Paradigm shift" to document centricity possibly two years sooner than if we did not follow this plan . . . . This would give us a very significant lead over our competitors, and make our competitors' products look "old".

At the same time that Mr. Gates was ordering the creation of the Office shell, the Systems Group, together with the Developer Relations Group (DRG) at Microsoft, was busy evangelizing the benefits of Chicago and its shell to the ISV community, including the people at WordPerfect. Mr. Gates acknowledged at his deposition that Microsoft spent hundreds of millions of dollars evangelizing its operating systems products to ISV's during the 1990's. Brad Silverberg, the Microsoft executive in charge of Chicago, reported the results of a Chicago UI [user interface] design preview event with ISV's in July of 1993. Gates Exhibit 4.

Silverberg writes that "ISV's thought we were on the right track. . . . **They *really* want extensibility. They continued to press for this in every way**, whether cabinet extensibility so they could put in their own right pane handler; add properties to prop sheets; hook find file; etc.

What's more, they were afraid and angry that Microsoft would use the hooks for its own purposes (apps, mail, etc) but not provide to isv's. This was a very hot button." (emphasis added). As events would unfold, the ISV's fear and anger that Microsoft would use the hooks for its own purposes but not provide them to ISV's proved prescient.

In several email chains in September of 1993, the Microsoft internal debate about whether to publish or document to ISV's the mechanisms available in Chicago for extending the Chicago shell came to a head over Microsoft's email product known as Capone. Not surprisingly, Gates attempted to downplay the significance of Capone, referring to it as a "little toy mail thing." Gates p. 69. Tom Evslin, the General Manager of the Workgroup Division (in charge of the Microsoft Mail product family), inquired whether there was anything Microsoft has "done in integrating capone with Chicago that a 3d party (Lotus, for example) won't be able to do." Gates Exhibit 7. This inquiry was bumped up to Joe Belfiore, the Chicago Product Manager who reported that "[t]here's no schedule (or even plan) to publish any of these interfaces now. They aren't ready for regular use. . ." Mr. Evslin responded by asking what made the interfaces "not ready for regular use," asking for a quick response because it was on a list of things "for me to discuss with **billg** tomorrow." (emphasis added).

Mr. Belfiore replied:

It's unclear whether we'll publish them or not for our release. **Bill** is *very* aware of this issue, so you can bring it up with him. He may be instrumental in deciding whether or not it's important for us to do the work to make these "palatable." (emphasis added)

The email chain is joined by Jonathan Lazarus, the Vice President for Systems Strategy (overseer for the DRG) who makes his feelings on the issue unambiguously clear. "If we use them we have to publish them."[1]

Tom Evslin has the last word, reporting on his conversation with Mr. Gates:

I went over this in some detail with **Bill** yesterday and he says "no" since Capone is part of Chicago. If you [Mr. Lazarus] think this is wrong, you should talk to him about it . . . . The Chicago guys own the API's. As of now, there are interfaces used in Capone which Chicago does not plan to publish." (emphasis added)

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[1] In an email three days later, Mr. Silverberg expressed his complete agreement with Mr. Lazarus to various systems executives. Gates Exhibit 9. "We clearly have to publish whatever api's capone uses." Mr. Lazarus responded privately: "Thanks, sanity is refreshing."

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The debate over publishing the extensions being used by Microsoft's mail product Capone continued within the Systems Division and the DRG. Doug Henrich, the head of DRG, in an email dated September 25, 1993, let Brad Silverberg, Dennis Adler and David Cole know about the potential downside of not publishing the API's Capone was using. Gates Exhibit 8:

> I am not sure what your thinking is about publishing the interfaces/API's
> that Capone uses but I know Lotus will make a big deal of this. (Manzi has
> already mentioned it to **Billg**). And I am afraid that the press will have
> another field day with this. (emphasis added)

Manzi refers to Jim Manzi, who was at that time the President of Lotus. Mr. Gates claimed categorically that he was certain the subject of not publishing the API's Capone was using never came up with Mr. Manzi. Gates p. 85-86.

Gates Exhibit 11 memorialized an evangelizing event led by David Cole and members of the DRG to WordPerfect's offices in November of 1993 to talk to them about creating an application for Chicago. In it Mr. Cole reported that WordPerfect "will bet on Chicago, they've never had any doubts about that." Moreover, "**[t]hey were very happy about us deciding to document the shell extensions.**" (emphasis added). In all the depositions of Microsoft executives taken in this case (or any other case for that matter), no one has acknowledged making the decision to document the shell extensions in Chicago and selling ISV's on their use. Mr. Gates was no exception. He repeatedly refused to give straight answers to any question about who made the decision to tell the WordPerfect developers that Microsoft had decided to document the shell extensions. Gates p. 107-115

Microsoft correctly observes that we didn't even get the chance to get to the point in the chronology when Mr. Gates personally makes the decision to **de-document** the shell extensions needed by Novell/WordPerfect to create office productivity applications that would have threatened Microsoft's Operating Systems monopoly. The last document that Microsoft allowed Mr. Gates to be partially examined on showed that the Product Manager charged with creating the Office shell for use in Office 96 was intent on using the very shell extensions that Mr. Gates had de-documented. Gates Exhibit 15. "The Office Explorer implementation strategy is to leverage the Chicago shell team's work as much as possible. Chicago provides some of the crucial interfaces that will simply our work, these include IShellFolder [and] IShellView."

We also didn't get a chance to discuss Mr. Gates' knowledge and approval of the continued use of the same shell extensions by Microsoft application products. We have yet to cover the half-truths and lies told to ISV's about the reasons for de-documenting the shell extensions. We have not been able to go through the documents which show that the shell extensions were not republished in any form until long after Windows 95 shipped. None of these subjects were covered because Microsoft apparently believes it has the power to unilaterally limit a deposition without applying to the court for a protective order.
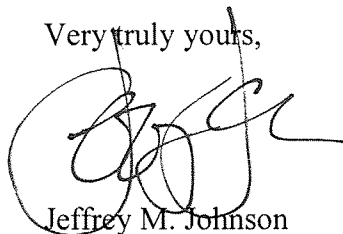
Moreover, even if Microsoft had sought a protective order prior to Mr. Gates' scheduled deposition, it could not have met the good cause requirement, which this Court has defined as a "high hurdle for proponents." *Baron Fin. Corp. v. Natazon*, 240F.R.D. 200, 202 (D. Md. 2006). This Court has noted that protective orders "should be sparingly used and cautiously granted" only when justice requires an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.*; FRCP 26(c). There has been no showing that Mr. Gates is being annoyed, embarrassed, oppressed or subject to any undue burden or expense. Indeed, the only undue burden and expense falls on Novell, who will now have to pay for another expensive trip to Seattle, Washington to complete Mr. Gates' deposition.

Finally, it is somewhat curious that Microsoft engages in lengthy *ad hominim* attacks, repeatedly accusing me of wasteful questioning, squandering opportunities and harassing Mr. Gates as "the best way to extract a monetary settlement from Microsoft." While I don't agree with the characterizations, I can't remember an occasion when defense counsel was unhappy over plaintiff's counsel squandering opportunities or wasting questioning. I also can't remember a single case where I was able to extract a monetary settlement from an opponent by harassing its Board Chairman through a deposition. Perhaps there is something deeper at work here.

Mr. Gates is one of the richest and most powerful persons in this country. His foundation is engaged in good works. Yet we are all equal under the law. Despite his central role in this action, we have requested nothing more than would be expected of any other litigant, a deposition not exceeding 7 hours in length in accordance with Fed. R. Civ. P. 30(b)(1). Novell thus respectfully requests that Mr. Gates be required to appear for the completion of his deposition at a mutually agreeable time and place sometime over the next 30 days.

Very truly yours,

Jeffrey M. Johnson

JMJ/csg

Encl.

cc: David B. Tulchin, Esq. (by First class and electronic mail)
        Steven L. Holley, Esq. (by First class and electronic mail)
        G. Stewart Webb, Jr., Esq. (by First class and electronic mail)