EXHIBIT 1

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September 26, 2008

Via Electronic Transmission

Jeffrey M. Johnson, Esq.,
Dickstein Shapiro LLP,
1825 Eye Street, N.W.,
Washington, D.C. 20006.

Re: Novell v. Microsoft

Dear Jeff:

I write in response to your letter of September 22, 2008. I will first address the text of your letter and then address some of the many issues presented by the privilege log that was enclosed.

In light of Judge Motz's August 26, 2008 order granting Microsoft's motion to compel, Novell should stop contesting the relevancy of documents sought in Requests 4 through 9 of Microsoft's first set of document production requests. Your characterization of these requests as relating solely to a "lawyer-invented defense" that does not have "anything to do" with the antitrust claims asserted by Novell in this action is at odds with Judge Motz's ruling that Microsoft is entitled to documents responsive to the requests. Novell may be unhappy that Judge Motz is prepared to entertain the argument that Novell sold all of its antitrust claims relating to the PC operating system market to Caldera back in July 1996, but that is not a basis for Novell to refuse to comply with its discovery obligations.

Your assertion that Novell retained what you refer to as its "business application claims" in the transaction with Caldera ignores the fact that those claims are now gone. Counts II through V of the Amended Complaint, alleging monopolization and attempted monopolization of purported markets for word processing applications and spreadsheet applications, were dismissed as time-barred under the statute of limitations, and that dismissal has been affirmed by the Fourth Circuit. Novell's only surviving claims are based on allegedly anticompetitive conduct by Microsoft in the PC operating system market. No sleight of hand can transform Counts I and VI of the Amended Complaint into "business application claims."

Your rhetorical question about why such claims were not explicitly included in the *Caldera* settlement proves our point. If Microsoft had any inkling that Novell was purporting to split its claims based on allegedly anticompetitive conduct by Microsoft in the PC operating system market, it would have impleaded Novell into the *Caldera* case. As explained in detail in Microsoft's response to Novell's motion for summary judgment, Novell is seeking damages in this case for harm allegedly inflicted on WordPerfect and Quattro Pro by Microsoft's allegedly anticompetitive conduct in the PC operating system market, while Caldera (at Novell's behest and on its behalf) sought damages for harm allegedly inflicted on DR DOS by the same alleged conduct in the very same market. The claims asserted in the *Caldera* case and the remaining claims in this case arise out of the same core of operative facts, and consequently Novell is precluded from bringing those claims again. *See Pueschel* v. *United States*, 369 F.3d 345, 355 (4th Cir. 2004).

Your attempt to refute the statement in my September 16, 2008 letter that Novell itself has not produced any documents in response to Requests 4 through 9 falls flat. The fact that documents from the files of Anderson & Karrenberg, Novell's counsel in the *Canopy* litigation, passed through your hands on their way to Microsoft does not convert them into Novell's documents. Novell has—or had—documents in its own files responsive to Requests 4 through 9, and it is those documents that Judge Motz has

ordered Novell to produce. If Novell no longer has such documents, then that is something Microsoft intends to bring to the attention of the trier of fact at an appropriate time. What has never been forthcoming from Novell is a clear answer to the question of whether Novell currently has in its possession any documents responsive to Requests 4 through 9. Pointing to discovery that occurred in the *Caldera* litigation does not absolve Novell of its obligation to respond to Requests 4 through 9, consistent with the order entered by Judge Motz.

The suggestion that your June 16, 2008 letter is a sufficient response to my September 16, 2008 letter is singularly unpersuasive. In your June 16 letter, sent two months before Judge Motz granted Microsoft's motion to compel, you argued that Novell had "fully satisfied the requests" and that there was "no point" in our attempting to obtain documents that we "already have." As an initial matter, documents produced by Novell in the *Caldera* case by their nature do not include documents created during or after that litigation. As you acknowledged in your September 22 letter, Novell may in fact have such documents. It is simply not credible for Novell to contend that there are no documents of this nature other than the February 28, 1997 and January 8, 2000 emails that Microsoft has brought to Novell's attention. Your representation that Novell will "continu[e] to search" for such documents is cold comfort given Novell's lackluster efforts thus far to respond to Requests 4 through 9. Fact discovery in this case is supposed to be completed by March 6, 2009, less than six months from now, and Microsoft needs the documents it has requested before it can proceed with depositions. In such circumstances, vague promises by Novell that it will continue looking for responsive documents do not suffice.

Moreover, Novell notified Microsoft on July 28, 2008 that a large number of backup tapes had been discovered on WordPerfect's former campus in Orem, Utah. Microsoft has yet to see a single document from those backup tapes, which you have said you are searching for responsive documents. Your June 16, 2008 letter—sent *before* the backup tapes were discovered—is hardly a sufficient answer to Microsoft's insistence

that Novell search its own files for documents responsive to Requests 4 through 9. If anything, the representations in your June 16 letter that Novell has "fully satisfied the requests" have been discredited by discovery of these backup tapes. The fact that Novell stumbled across hundreds of backup tapes at this late stage strongly suggests that further search efforts on Novell's part would yield additional responsive documents.

Unless we receive concrete representations about how and when Novell intends to comply with the order granting the motion to compel, Microsoft intends to raise the matter again with Judge Motz. I remind you that Novell is the plaintiff in this case, and Novell had a legal obligation to preserve evidence relevant to the claims it has now asserted against Microsoft. Novell's refusal to search its own files and produce documents responsive to Requests 4 through 9 has gone on far too long.

Turning to the privilege log enclosed with your letter, two things are apparent from a superficial examination. First, the log itself is deficient in numerous respects. Second, many of the privilege claims contained in the log are plainly invalid. Although Microsoft believes that the first order of business is for Novell to provide a proper log that remedies the defects identified below, I will outline some of the reasons why the privilege claims themselves are improper in the hope that Novell will abandon those claims and obviate the need for Microsoft to raise them with Judge Motz.

In terms of deficiencies in the log itself, there are two principal ones that pervade the entire log.

First, the log fails to provide any information about many of the persons named as recipients of allegedly privileged documents. Without knowing the affiliation of these persons, it is impossible to determine whether a particular document is truly privileged. In the instructions accompanying Microsoft's document requests, Novell was asked to provide "the relationship of the author, addressee, custodian, and any other recipient [of the allegedly privileged document] to each other, in a manner that . . . will enable this party to assess the applicability of the privilege." (Instructions 2.A.) The log

enclosed with your letter does not comply with this instruction. For instance, Document No. 113 was apparently sent to five direct recipients and four carbon-copy recipients. We are not familiar with any of these recipients, and do not know what connection they have to the sender of the email, David Bradford. Accordingly, we have no way of assessing the validity of the privilege claim. If any of the recipients was outside Novell, it is likely that the privilege has been waived. We request that you provide us promptly with a log that identifies the individuals mentioned in the log with sufficient clarity to enable us evaluate Novell's privilege claims.

Second, some of the descriptions of documents in the log are hopelessly vague. For instance, Document Nos. 85 through 89 are described merely as "Draft declarations," with no indication of the identity of the potential declarant, the purpose for which the draft declaration was prepared or the subject matters addressed in the draft declaration. From such scant information, it is impossible to assess the validity of the claim of work product immunity. The terse and uninformative descriptions of documents provided by Novell do not comply with the requirement that withheld documents be described "in a manner that . . . will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A)(ii).

With regard to invalid claims of privilege, I will not attempt to provide an exhaustive list because that is impossible given the present condition of the log. I can, however, provide examples that might lead Novell to reassess some of its privilege claims.

First, many allegedly privileged documents listed in the log do not constitute communications between Novell and its lawyers. For instance, Document No. 12 is a March 26, 1996 letter from Stephen Hill at Snow, Christensen & Martineau to Jeffrey Jacobovitz, a lawyer in Washington, D.C. who expressed some interest in pursuing Novell's antitrust claims against Microsoft. Mr. Bradford at Novell received a copy of the letter. Absent some basis for asserting that an attorney-client relationship

ever existed between Novell and Mr. Jacobovitz, which is absent from the log, this document is not privileged.

Second, many of the documents purportedly protected by the attorney-client privilege or work product doctrine involve David Bradford and Steve Bentley, who, although lawyers, performed purely business functions at Novell on occasion. The fact that the person who authored or received a document has a law degree does not make the communication privileged or attorney work product. Where a lawyer serves in a non-legal capacity within a corporation, the presumption is that communications to or from that lawyer are not for the purpose of seeking or providing legal advice. Mr. Bradford testified in the *Canopy* case that he was in charge of Corporate and Business Development at Novell (Bradford Dep. at 11), and Mr. Bentley testified that he was Senior Director in the Mergers and Acquisitions Group. (Bentley Dep. at 7.) Accordingly, documents from or to Messrs. Bradford and Bentley are not privileged unless they clearly involve legal advice, which is not substantiated by relevant entries in the log.

Third, to the extent that documents in the log were produced in the *Canopy* case or other litigation, the privilege has been waived as to those documents and other documents relating to the same subject matter. We notice that most of the documents in the log have Bates numbers, which raises the question of whether they have been produced previously. Please confirm that none of the documents listed in the log has been produced in other litigation.

I should also tell you that Microsoft believes Novell has impliedly waived the privilege as to all communications between Novell and its lawyers that have been placed at issue in this case. In seeking dismissal of Microsoft's claim preclusion defense on summary judgment, Novell denied that it had material involvement in the *Caldera* case and that Caldera was asserting antitrust claims against Microsoft as Novell's proxy. In so doing, otherwise privileged communications that disclose Novell's true role in the *Caldera* case were placed at issue in this case, thereby waiving the privilege. *See*

Baltimore Scrap Corp. v. *David J. Joseph Co.*, 1996 WL 720785, at *24 (D. Md. Nov. 20, 1996). In the leading case of *Hearn* v. *Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975), the court held that a party impliedly waives the privilege when it puts otherwise privileged information at issue in a case and "application of the privilege would [deny] the opposing party access to information vital to his defense."

That is certainly the case here. For example, the log contains numerous communications between Novell's general counsel David Bradford and Stephen Hill, the lawyer at Snow, Christensen & Martineau who represented Caldera in the *Caldera* case. Document Nos. 3, 5, 152 and 181 are all communications between Mr. Hill and Mr. Bradford that occurred after the *Caldera* case was filed. Despite the fact that Mr. Hill was Novell's longtime outside counsel, his communications with Mr. Bradford about a case in which Mr. Hill was purportedly representing another client are not privileged. Unless Novell now wishes to concede that Mr. Hill was representing Novell as well as Caldera in the *Caldera* case, then communications between Mr. Bradford and Mr. Hill about the *Caldera* case are not privileged.

The same is true of Document No. 114, a memorandum from Caldera's counsel at Susman Godfrey to Novell "concerning DRI, Novell, and lawsuit against Microsoft." Unless Susman Godfrey was Novell's counsel in the *Caldera* case, which Novell presumably denies, then communications from Susman Godfrey to Novell about the *Caldera* case are not privileged.

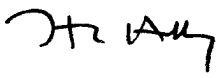
Purportedly privileged communications between Caldera's lawyers and Novell's general counsel Mr. Bradford are vital to Microsoft's defense because they show that Novell was anything but a disinterested bystander with only a passive economic interest in the *Caldera* case. We know from documents Novell has produced that Mr. Hill was consulting with Mr. Bradford about the *Caldera* case, and there is no justification for Novell to hide behind the privilege in seeking to prevent Microsoft from seeing the entirety of those communications.

* * *

In your September 22 letter, you asked me to specify "further steps" that Microsoft wants Novell to take to comply with Judge Motz's order. It is not Microsoft's role to instruct Novell on how to comply with court orders. That said, Novell should search its own files for documents responsive to Requests 4 through 9 and complete that process as quickly as possible. If Novell no longer has documents responsive to Requests 4 through 9, then Novell should certify that fact to Microsoft.

In terms of the privilege log, Novell should first provide a proper log that permits Microsoft to assess the validity of Novell's privilege claims. Given that there are only 259 documents listed on the log, it should be possible to remedy the defects in the log by Friday of next week, October 3. In that process, I urge you to rethink the many invalid privilege claims Novell has asserted. To the extent you determine that documents listed in the log are not privileged, please provide those documents to us as soon as practicable.

Yours sincerely,



Steven L. Holley