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OF THE
STATE OF DELAWARE

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Re: *In re Novell, Inc. Shareholder Litigation*
Consolidated C.A. No. 6032-VCN
Date Submitted: June 7, 2011

Dear Counsel:

After Novell, Inc. ("Novell" or the "Company") announced that it had agreed to its acquisition by Attachmate Corporation ("Attachmate") and, in a related transaction, to sell over 800 of its patents to CPTN Holdings LLC ("CPTN"), various lawsuits were filed by Novell shareholders challenging those transactions. The Court ordered the consolidation of the Delaware actions and appointed Louisiana Municipal Police Employees' Retirement System, Operating Engineers Construction Industry and Miscellaneous Pension Fund, Oklahoma Firefighters

Pension and Retirement System, and Robert Norman as co-lead plaintiffs (the "Co-Lead Plaintiffs").[1] They have filed an interim application for an award of attorneys' fees and expenses (the "Application"), in which they seek $3 million in fees and $116,435.53 in expenses on the basis that the consolidated actions caused Novell to make corrective disclosures. Because the Court concludes that the Application is premature, the Court will defer ruling on the Co-Lead Plaintiffs' request for an award of fees and expenses until their remaining claims have been litigated.

I. BACKGROUND

The Co-Lead Plaintiffs have been shareholders of Novell at all relevant times. Novell, a Delaware corporation, provides information technology products and services. It entered into an agreement and plan of merger on November 21, 2010, under which it will be acquired by Attachmate through that company's wholly owned subsidiary Longview Software Acquisition Corp. (the "Proposed Acquisition"). Attachmate is a software company owned by an investment group

[1] The Co-Lead Plaintiffs brought claims sounding in breach of fiduciary duty for (1) failing to maximize shareholder value; (2) conducting an improper sales process; (3) providing disparate consideration to Novell's shareholders in connection with the sale of the Company; and (4) filing false, misleading, and incomplete disclosure materials. They also brought claims against Attachmate, CPTN, and others for aiding and abetting those breaches.

led by Francisco Partners, L.P., Golden Gate Private Equity, Inc., and Thoma Bravo, LLC.

In a separate agreement, also entered into on November 21, Novell agreed to sell over 800 of its patents to CPTN (the "Patent Transaction"). CPTN, a Delaware limited liability company, is comprised of a consortium of technology companies organized by Microsoft Corporation ("Microsoft"). Although the closing of the Proposed Acquisition is conditioned upon the closing of the Patent Transaction, the patent sale may be consummated regardless of the status of the Novell-Attachmate transaction.

In February 2010, Elliott Associates, L.P. and its affiliates ("Elliott") filed a Schedule 13D with the Securities and Exchange Commission indicating that it held 7.1%—or 24,700,000 shares—of Novell's outstanding common stock. Elliott representatives—after requesting a meeting to discuss Novell's acquisition strategies—met with certain members of the Company's management. Thereafter, Elliott conveyed to Novell's board of directors (the "Board") an unsolicited, non-binding proposal to acquire the Company for $5.75 per share in cash. On that same day, Elliott filed an amendment to its Schedule 13D indicating that it held an

additional 1.4% economic interest (in addition to its 7.1% stake) in Novell common stock pursuant to notional principal amount derivative agreements. After several meetings during which it discussed the Elliott proposal and received advice from its legal and financial advisors, the Board announced in March 2010 that the $5.75 per share proposal was inadequate. It did, however, undertake to explore the Company's strategic alternatives, an effort which was conducted primarily by its financial advisor, J.P. Morgan, from March 2010 until August 2010.

During that exploratory period, J.P. Morgan solicited interest from over fifty strategic and financial entities. Of those contacted, more than thirty entered into a non-disclosure agreement with the Company. The Board was continuously apprised of the solicitation process.

In May 2010, Attachmate and two of its primary shareholders, after receiving Board authorization, submitted a preliminary proposal to Novell. Around that same time, the Board also received eight other non-binding proposals. The Attachmate proposal was for $6.50 to $7.25 per share, while the others ranged from $5.50 to $7.50 per share. Thereafter, the Board decided to pursue further discussions with five of the entities—among them Attachmate—that had submitted preliminary

proposals. As a result, members of Novell's management made presentations to representatives of those five entities in June 2010. Around that same time, J.P. Morgan continued to solicit interest from other potential acquirors.

At the end of July 2010, Attachmate—having experienced difficulty in securing financing for its proposed transaction with Novell—sought the Board's approval to consider additional financial partners, including Elliott. For that reason, J.P. Morgan sought Elliott's interest in a relationship of that sort. Elliott later agreed to a non-disclosure agreement, under which it and the Company agreed to a sixty-day standstill provision.

After considering various proposals throughout August and September 2010, the Board granted Attachmate exclusivity until September 27, 2010, based on its revised proposal to acquire the Company (excluding some portions of the enterprise and the Company's patent portfolio) for $4.80 per share in cash. The Board had also entered into a separate exclusivity agreement with another entity around that same time based on its proposal to acquire Novell's patents and business platforms that had been excluded from Attachmate's offer. In October 2010, that entity withdrew from discussions with the Board. As a result, the Board entered into a

new exclusivity period with Attachmate through October 25, 2010, during which the parties discussed a possible acquisition of Novell as a whole. The Board also explored (1) the viability of a stand-alone entity that would include the businesses and patents that Attachmate had previously not been interested in acquiring; and (2) interest from other entities in a transaction involving those businesses and/or patents.

On October 21, 2010, the Board received a non-binding letter of intent from Microsoft either to license or to acquire some of Novell's patent portfolio. Thereafter, exclusivity with Attachmate was again extended until November 1, 2010. On October 28, Attachmate submitted a revised letter of intent to acquire all of Novell's stock for $5.25 per share in cash. On that same day, the Board also received an unsolicited, non-binding proposal from another entity to acquire all of Novell for $5.75 per share. On October 29, Microsoft submitted a revised letter of intent indicating its interest in acquiring certain patents and patent applications for $450 million.

The Board, with its advisors, subsequently met to discuss the Company's strategic options. In particular, the Board discussed pursuing a transaction with

Attachmate for Novell as a whole, exclusive of the patents encompassed by the Microsoft offer. Management later approached personnel from Attachmate to solicit its interest in an offer of that kind and, as a result, Attachmate submitted a revised letter of intent to acquire all of Novell's outstanding shares of common stock for $6.10 per share in cash. It conditioned that offer, however, on a patent sale for no less than $450 million, with after tax proceeds of no less than $315 million.

At a November 1st meeting to deliberate on the Company's options, the Board decided to pursue continued discussions with Attachmate and Microsoft. Accordingly, during the month of November, documents and draft agreements were exchanged and negotiations continued. At a November 21st special meeting, the Board approved the Proposed Acquisition and the Patent Transaction. As a result, the agreements governing those transactions were executed that same day, and the deals were announced on the following morning. Under the terms of the Proposed Acquisition, holders of Novell common stock will receive $6.10 per share in cash. Based on equity commitment letters—also executed on November 21, 2010—Elliott has agreed to provide equity financing to Attachmate for the Proposed Acquisition by contributing Novell common stock to Wizard Parent, Attachmate's ultimate

parent entity. In exchange, Elliott, unlike other Novell shareholders, will receive a post-merger equity interest in Wizard Parent. Under the terms of the Patent Transaction, CPTN will pay $450 million in cash for certain of Novell's patents and patent applications.

From November 23, 2010 to December 16, 2010, various purported shareholder class actions were filed in this Court challenging the Proposed Acquisition and the Patent Transaction. Novell filed its preliminary proxy statement on December 14, 2010, which was later revised on December 27, 2010. Thereafter, the Delaware actions were consolidated and the Co-Lead Plaintiffs were appointed. They filed an amended complaint on January 6, 2011, and, on that same day, the Court entered a scheduling order that set February 9, 2011 as the time for argument on the Co-Lead Plaintiffs' motion for a preliminary injunction.

On January 14, 2011, Novell filed its definitive proxy statement (the "Definitive Proxy"), which, according to the Co-Lead Plaintiffs, addressed many of their disclosure claims. For that reason, after the Defendants agreed not to dispute the Co-Lead Plaintiffs' ability to pursue any money damages claims, they withdrew their request for a preliminary injunction. Subsequently, counsel for the Co-Lead

Plaintiffs identified for Novell's counsel additional purported disclosure defects based on the Definitive Proxy. On February 3, 2011, Novell issued a supplemental proxy statement (the "Supplemental Disclosures"), which addressed some of the Co-Lead Plaintiffs' concerns.

On February 17, 2011, Novell's shareholders voted in favor of the Proposed Acquisition. The Patent Sale required no shareholder vote; however, that sale cannot be consummated until its antitrust review has been completed.

II. CONTENTIONS

The Co-Lead Plaintiffs contend that their lawyers are entitled to a fee award because the Defendants mooted the disclosure claims asserted in this action by making two sets of disclosures—specifically, those in the Definitive Proxy and the Supplemental Disclosures. Moreover, although their damages claims remain viable, an interim fee award of the sort requested is appropriate, according to the Co-Lead Plaintiffs, because the disclosures (1) achieved the benefit sought, and (2) that benefit cannot be reversed since the Novell shareholders have already voted on the Proposed Acquisition. The Co-Lead Plaintiffs further contend that the requested amount is proper based on the benefit achieved and because it "will have the added

benefit of putting corporate boards on notice that there is a real price to pay for flagrantly disregarding their duty of disclosure when asking shareholders to approve merger transactions."[2]

In response, the Defendants offer various grounds as to why the Application should be denied outright or, if granted, should result in a fee award significantly less than the $3 million requested by the Co-Lead Plaintiffs. Moreover, as a threshold matter, according to the Defendants, the Application should be dismissed because interim fee awards are disfavored and the Co-Lead Plaintiffs have not offered a sufficient basis to justify deviating from that general position. Because the damages claims remain viable, the Defendants contend that the Court should not entertain the Application at this stage.

[2] Br. in Supp. of Pls.' Application for an Award of Attorneys' Fees and Expenses at 2.

III. DISCUSSION

The American Rule generally requires that litigants bear the burden of paying their own attorneys' fees and expenses.[3] Nevertheless, Delaware recognizes certain well-established exceptions to that rule, including the corporate benefit doctrine.[4] Under that doctrine, "the Court may order the payment of counsel fees and related expenses to a plaintiff whose efforts result in . . . the conferring of a corporate benefit."[5] A plaintiff invoking that exception may be entitled to a fee award in instances where the lawsuit produces a substantial benefit for the corporation or its stockholders, even if no pecuniary benefit has been achieved.[6]

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[3] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043-44 (Del. 1996).
[4] *See, e.g.*, *id.* at 1044; *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990).
[5] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).
[6] *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006); *see also Dunkin' Donuts*, 1990 WL 189120, at *4 ("In a corporate benefit case, there is no creation of a fund, yet a . . . 'therapeutic' benefit, worthy of compensation, has been conferred."). Because the corporate benefit achieved need not be economic in nature to justify a fee award, "a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees." *Tandycrafts, Inc.*, 562 A.2d at 1165 (citing *Chrysler Corp.*, 223 A.2d at 386; *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980)).

If a corporation or board of directors moots a plaintiff's claims, attorneys' fees may still be awarded.[7] In that instance, an award may be appropriate if (1) the suit was meritorious when filed, (2) the action producing the corporate benefit was taken by the corporation before a judicial resolution, and (3) the resulting corporate benefit was causally related to the lawsuit.[8] A defendant challenging a fee application in that context must demonstrate that no causal link exists between the benefit produced and the filing of the plaintiff's action.[9]

Whether to award attorneys' fees is committed to the Court's discretion.[10] Because the Application seeks an interim fee award, the Court must first consider whether it should deny the Application as premature. This Court generally disfavors interim fee awards.[11] Thus, it often denies "applications for attorney[s'] fees . . . if

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[7] *Off v. Ross*, 2009 WL 4725978, at *4 (Del. Ch. Dec. 10, 2009).
[8] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (citing *Allied Artists*, 413 A.2d at 878).
[9] *Id.* at 1080.
[10] *Dunkin' Donuts*, 1990 WL 189120, at *3.
[11] *Emerald Partners v. Berlin*, 1994 WL 48993, at *1 (Del. Ch. Feb. 4, 1994); *see also In re Art Tech. Group, Inc. S'holders Litig.*, C.A. No. 5955-VCL, at 3 (Del. Ch. May 16, 2011) (TRANSCRIPT) ("We do have these cases mainly from then-Vice Chancellor Hartnett that say we generally shouldn't [grant interim fees] and that it's generally disfavored."); *Kurz v. Holbrook*, C.A. No. 5019-VCL, at 3 (Del. Ch. July 19, 2010) (TRANSCRIPT) (awarding interim fees, but observing that "interim legal fees are discouraged"); *In re Emulex S'holder Litig.*, C.A. No. 4536-

the litigation has not been completed"[12] because "[j]udicial economy and the orderly conduct of litigation are usually better served if interim awards of attorneys' fees are avoided . . . ."[13]

Although exigent or other special circumstances may counsel in favor of awarding interim fees, the Court will generally only consider an application for attorneys' fees after a lawsuit has concluded.[14] The Co-Lead Plaintiffs' argument in support of an interim fee award in this instance does find some support in Delaware case law; specifically, an "interim fee award[] may be appropriate where the plaintiff has achieved the benefit sought by the claim that has been mooted or settled and that benefit is not subject to reversal or alteration as the remaining portion of the litigation proceeds."[15] They contend that curative disclosures were achieved in this instance by way of the Definitive Proxy and the Supplemental Disclosures, which mooted the disclosure claims they asserted. Even though a sufficient basis may

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VCS (Del. Ch. Dec. 18, 2009) (ORDER) ("Piecemeal requests for attorneys fees are not favored, and for good reason.").
[12] *Gans v. MDR Liquidating Corp.*, 1993 WL 193526, at *1 (Del. Ch. May 28, 1993).
[13] *Id.*; *see also La. State Employees' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *3 (Del. Ch. Sept. 19, 2001).
[14] *Emulex*, C.A. No. 4536-VCS (Del. Ch. Dec. 18, 2009) (ORDER).
[15] *Citrix Sys.*, 2001 WL 1131364, at *4.

exist for the Court to make a determination on the Application, "the decision to entertain [an interim fee request] remains at the discretion of the trial court."[16] Accordingly, the Court may defer ruling on the Co-Lead Plaintiffs' fee request until they have fully litigated the remaining damages claims.[17]

The Co-Lead Plaintiffs may be correct in their assertion that a fee award is appropriate based on the disclosures made by Novell in the Definitive Proxy and the Supplemental Disclosures. The Court, however, need not determine that issue at this stage. Moreover, although there is some support for the Co-Lead Plaintiffs' view that an interim fee award may be proper under these circumstances—e.g. where, despite ongoing litigation, a benefit that is incapable of being reversed has been achieved—there is no exigency or special circumstance that counsels in favor of immediate consideration of the Application. Accordingly, the Court will exercise its discretion to defer ruling on the Application until the remaining claims have been litigated. At that stage, the Court will be better positioned to award an appropriate

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[16] *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *7 (Del. Ch. June 27, 2011); *see also Art Tech. Group*, C.A. No. 5955-VCL, at 3 (Del. Ch. May 16, 2011) (TRANSCRIPT) ("[W]hether to entertain [an interim fee request] is up to the discretion of the Court.").
[17] *Del Monte Foods*, 2011 WL 2535256, at *7.

fee based on an assessment of all of the benefits that have been secured by the Co-Lead Plaintiffs' efforts.

In *Frank v. Elgamal*,[18] the Court observed that "[p]rocessing fee applications will generally delay the processing of the remaining substantive claims. Moreover, piecemeal consideration of attorneys' fee applications presents added risk that the Court's fee determination effort may generate even less confidence."[19] In this instance, counsel for the Co-Lead Plaintiffs agreed that any attempt to parse out counsel's efforts in prosecuting the disclosure claims from those involving the still-viable damages claims would be difficult or, perhaps, impossible.[20] For that reason, to avoid the risk of awarding a fee without fully understanding the entirety of counsel's efforts and the scope of the benefits achieved (and to be achieved), the Court will defer ruling on the Application until the Co-Lead Plaintiffs' damages claims have been fully litigated.[21]

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[18] 2011 WL 3300344 (Del. Ch. July 28, 2011).
[19] *Id.* at *3.
[20] *See* Oral Arg. on Pls.' Application for an Award of Attorneys' Fees and Expenses, Tr. 20-21.
[21] This outcome is consistent with the Court's general preference, based on efficiency concerns, for making a single fee determination once the litigation has concluded. *See Art Tech. Group*, C.A. No. 5955-VCL, at 4 (Del. Ch. May 16, 2011) (TRANSCRIPT) ("There are good prudential reasons in many cases why one wouldn't entertain an interim fee award. One of them is the

IV. CONCLUSION

For the foregoing reasons, the application for an award of attorneys' fees and expenses is denied as premature. The Court will reconsider the Application after the Co-Lead Plaintiffs have fully litigated their remaining claims. An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

cc: Srinivas M. Raju, Esquire
Collins J. Seitz, Jr., Esquire
Stephen P. Lamb, Esquire
Register in Chancery-K

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reason repeatedly cited by Vice Chancellor Hartnett, which is it makes sense to do everything once at the end of the case."); *Emulex*, C.A. No. 4536-VCS (Del. Ch. Dec. 18, 2009) (ORDER) (concluding that "[e]fficiency concerns suggest that, absent some exigency, requests for fees all be heard one time at the end of a case"). As noted in *Frank*, however, "[t]his, of course, is not to say that the Court should never, in the exercise of its discretion, award interim fees." *Frank*, 2011 WL 3300344, at *3 n.18.