

# **Exhibit 39**

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**Attorneys for Plaintiff**

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**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

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NOVELL, INC., a Delaware corporation,	)	
	)	<b>COMPLAINT</b>
Plaintiff,	)	
	)	
vs.	)	
	)	
CALDERA, INC., a Utah corporation,	)	Civil No. <u>000402011 C</u>
	)	
Defendant.	)	Judge <u>HARDING</u>
	)	
	)	

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Plaintiff Novell, Inc., hereby complains against Defendant Caldera, Inc. as follows:

**PARTIES**

1. Plaintiff Novell, Inc. ("Novell"), is a Delaware corporation with its principal place of business in Utah County, Utah.
2. Caldera, Inc. ("Caldera") is a Utah corporation with its principal place of business in Utah County, Utah.

## FACTUAL BACKGROUND

3. Pursuant to an Asset Purchase Agreement dated July 23, 1996, Caldera purchased Novell's DR DOS and Novell DOS related assets, including, among other things, the claims asserted by Caldera in the case *Caldera, Inc. v. Microsoft Corporation*, Case No. C2:96 CV 645B (Utah Fed. Dist. Ct. 1998) (hereinafter referred to as the "Claims"). A true and correct copy of the Asset Purchase Agreement is attached hereto as Exhibit "A".

4. Caldera and Novell also executed a Novell Cross Platform Services and Novell Products Source Code License Agreement ("License Agreement") on or about July 23, 1996. A true and correct copy of the License Agreement is attached hereto as Exhibit "B".

5. The License Agreement at ¶ 16.b. stated that Caldera would owe License Fees and royalties as set forth in Exhibit "B" to the License Agreement.

6. The License Agreement was amended by Addendum No. One dated September 23, 1998. Hereinafter the License Agreement and the Addendum are referred to as the "License Agreement". A true and correct copy of Addendum No. One is attached hereto as Exhibit "C".

7. Pursuant to Exhibit "B" of the License Agreement, Caldera owed Novell an annual royalty of 18% on the amount of the "Cumulative Annual Royalty Base", subject to various exclusions.

8. Paragraph 3.j. of the License Agreement defined the "Cumulative Annual Royalty Base" as the amount of "Royalty Base accumulated to date as measured in a given year from the Effective Date or anniversary of the Effective Date."

9. Paragraph 3.m.m. of the License Agreement defined "Royalty Base" as "Gross

Revenues less the book value of assets sold.”

10. The “Effective Date” of the License Agreement was July 23, 1996.

11. The License Agreement, at ¶ 3.s., defined “Gross Revenue” as “[a]ll proceeds, gross receipts, and revenues of OEM, net of returns and allowances, relating to any . . . settlement, award, recovery . . . relating to transactions occurring or causes of action arising prior to the fifth anniversary of the Effective Date, including causes of action arising prior to the Effective Date.”

12. The Claims asserted by Caldera against Microsoft, as referred to in ¶ 3, above, were “causes of action arising prior to the fifth anniversary of the Effective Date, including causes of action arising prior to the Effective Date.”

13. Accordingly, any amounts paid by Microsoft in settlement of the Claims were, under the License Agreement, to be included within the “Cumulative Annual Royalty Base”, and 18 % of those amounts were to be paid to Novell as a royalty by Caldera.

14. The License Agreement, at ¶ 16.a. required that Caldera provide to Novell within ten days following the end of each calendar quarter a royalty report for the quarter immediately preceding.

15. Exhibit “B”, ¶ 3. of the License Agreement also requires Caldera was to pay royalties, and make an accounting, to Novell within 45 days of the end of each calendar quarter.

#### **THE MICROSOFT/CALDERA SETTLEMENT**

16. Prior to March 31 2000, Caldera settled the Claims against Microsoft. In settlement of those Claims, Microsoft paid \$280,000,000.00

17. From that \$280,000,000.00, Caldera was entitled to exclude only \$10,000,000.00.. The remaining \$270 million was to be included, under the language in the License Agreement, as part of the "Cumulative Annual Royalty Base" on which Caldera's 18 % royalty to Novell was to be calculated.

18. On January 14, 2000, Caldera caused to be faxed to Novell a preliminary calculation of Caldera's 18 % royalty owed to Novell as a result of Caldera's settlement of the Claims against Microsoft.

19. The communication claimed that Caldera was entitled to exclude from the "Cumulative Annual Royalty Base" two sums which Caldera designated as "Canopy lawsuit costs" of \$11,497,445.52 and "Attorney's contingency fees" of \$64,274,187.14

20. The License Agreement makes no provision for exclusion of "Canopy Lawsuit Costs" from the "Cumulative Annual Royalty Base".

21. The License Agreement makes no provision for exclusion of "Attorney's contingency fees" from the "Cumulative Annual Royalty Base".

22. Thus, the facsimile communication from Caldera improperly calculated the "Cumulative Annual Royalty Base" as \$193,353, 387.34, and excluded at least \$75,771,632.66 from the "Cumulative Annual Royalty Base" on which the 18 % royalty owed by Caldera to Novell should have been calculated.

23. The facsimile communication therefore erroneously calculated the 18 % royalty owed by Caldera to Novell as approximately \$34,000,000.00.

24. The proper "Cumulative Annual Royalty Base" to be used in calculating Caldera's 18 % royalty to Novell was at least \$269,125,020.00.

25. Properly calculated, however, Caldera's 18 % royalty owed to Novell was at least \$47,796,393.87.

26. On May 15, 2000, the Canopy Group, on behalf of Caldera, hand delivered a letter ("the Letter") to Richard C. Rife, Esq., Novell's General Counsel. A true and correct copy of that Letter is attached hereto as Exhibit "D".

27. The Letter was accompanied by a check in the amount of \$35,498,039.16 dated May 15, 2000 and payable to Novell Inc. from Caldera Inc. (the "Royalty Check").

28. The Letter admitted that Caldera owed Novell at least \$35,498,039.16 in royalties under the License Agreement.

29. The royalty check for \$35,498,039.16 that accompanied the Letter was obviously calculated on a "Cumulative Annual Royalty Base" that excluded the so-called "Canopy Lawsuit costs" and the "Attorney's contingency fees" of at least \$76,646,632.66

30. Thus, the royalty check was at least \$13,796,393.87 below the actual 18 % royalty owed by Caldera to Novell.

31. For this apparent reason, Caldera's royalty check contained a restrictive condition on the back of the check where Novell would have endorsed the check. That restrictive condition stated as follows: "The undersigned, by depositing this check acknowledges that this check constitutes payment in full and is complete and full settlement of any royalty obligation owed to payee by the maker through 3/31/00."

32. For this reason, Novell could not and has not endorsed the royalty check.

33. Pursuant to the License Agreement, the additional amount owed to Novell due to Caldera's exclusion of at least \$76,646,632.66 from the "Cumulative Annual Royalty Base" is

at least \$13,796,393.88.

34. Pursuant to statute, Novell is entitled to 10% interest on all amounts owed to Novell by Caldera from and after May 15, 2000, including without limitation the undisputed amount of \$35,498,039.16 as well as the \$13,796,393.88.

35. Caldera has failed to pay amounts owed to Novell under the License Agreement and is therefore in breach of contract.

**FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

36. Novell incorporates by reference paragraphs 1 through 35 above.

37. Caldera acknowledges that even under its calculations, it is undisputed that Caldera owes Novell at least \$35,498,039.16.

38. Caldera, however, has refused to pay Novell the \$35,498,039.16 unless Novell surrenders and relinquishes its claims that Caldera has under-calculated the 18 % royalty and that Caldera still owes royalties to Novell.

39. Caldera is therefore in default on payment of an undisputed amount which even Caldera acknowledges is owed to Novell.

40. Caldera has failed to pay undisputed royalty amounts owed to Novell and is therefore in breach of contract.

41. Caldera owes Novell at least an undisputed amount of \$35,498,039.16. plus interest at ten % (10%) per annum from and after May 15, 2000 on this amount.

42. Novell seeks judgment against Caldera for breach of contract for the undisputed amount of \$35,498,039.16., plus prejudgment interest of 10 % (10%) per annum, plus

attorneys' fees, plus all other relief the Court deems just and proper in the circumstances.

**SECOND CAUSE OF ACTION**  
**(Breach of Contract for Remaining Royalties)**

43. Novell incorporates by reference paragraphs 1 through 42 above.

44. In addition to the undisputed \$35,498,039.16 amount owed by Caldera to Novell without restriction, Caldera also owes Novell an 18 % royalty on the sums improperly excluded by Caldera from the "Cumulative Annual Royalty Base", namely the amounts designated by Caldera as "Canopy lawsuit costs" and "Attorneys contingent fees" in the cumulative amount of \$75,771,632.66 .

45. The proper "Cumulative Annual Royalty Base" to be used in calculating Caldera's 18 % royalty to Novell was at least \$269,125,020.00.

46. Properly calculated Caldera's 18 % royalty owed to Novell was at least \$47,796,393.87.

47. Thus, Caldera owes Novell at least an additional \$13,796,393.87 royalty.

48. Novell therefore seeks judgment against Caldera for at least an additional \$13,796,393.87 royalty, plus interest from and after May 15 2000 at 10 % per annum is allowed by law, plus attorneys fees, and all other relief the court deems just and proper in the circumstances.

**THIRD CAUSE OF ACTION**  
**(Breach of the Covenant of Good Faith and Fair Dealing)**

49. Novell incorporates by reference paragraphs 1 through 48 above.

50. There is no basis in the License Agreement for Caldera to condition payment of any undisputed amount on Novell's relinquishment of any right or claim.



51. Caldera's imposition of a restrictive covenant on the royalty check for the undisputed amount, and Caldera's refusal to pay this amount unless Novell relinquishes its rights and claims to other royalties, and other actions by Caldera, amount to a breach of the covenant of good faith and fair dealing.

52. Novell is entitled to judgment against Caldera for all damages suffered as a proximate result of Caldera's breach of the covenant of good faith and fair dealing, including without limitation all royalties owed, prejudgment interest at 10 % per annum on all amounts owed to Novell, attorneys fees, and all other relief the court is just and proper in the circumstances.

**FOURTH CAUSE OF ACTION**  
**(Accounting)**

53. Novell incorporates by reference paragraphs 1 through 52 above.

54. Novell is entitled to an accounting of all amounts owed by Caldera to Novell under the License Agreement.

55. Novell is entitled to an accounting from Caldera and judgment against Caldera for all amount owed under the License Agreement, plus prejudgment interest at ten % (10%) per annum as allowed by Utah law, plus attorneys' fees, plus all other relief the Court deems just and proper in the circumstances.

**PRAYER FOR RELIEF**

**ON ITS FIRST CAUSE OF ACTION:** Novell seeks judgment against Caldera for breach of contract for the undisputed amount of \$35,498,039.16., plus prejudgment interest of ten % (10%) per annum, plus attorneys' fees, plus all other relief the Court deems just and

proper in the circumstances.

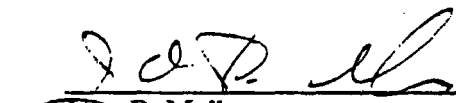
**ON ITS SECOND CAUSE OF ACTION:** Novell seeks judgment against Caldera for at least an additional \$13,796,393.87 royalty, plus interest from and after May 15, 2000 at 10 % per annum is allowed by law, plus attorneys fees, and all other relief the court deems just and proper in the circumstances.

**ON ITS THIRD CAUSE OF ACTION:** Novell is entitled to judgment against Caldera for all damages suffered as a proximate result of Caldera's breach of the covenant of good faith and fair dealing, including without limitation all royalties owed, prejudgment interest at 10 % per annum on all amounts owed to Novell, attorneys fees, and all other relief the court is just and proper in the circumstances.

**ON ITS FOURTH CAUSE OF ACTION:** Novell is entitled to an accounting from Caldera and judgment against Caldera for all amount owed under the License Agreement, plus prejudgment interest at ten % (10%) per annum as allowed by Utah law, plus attorneys' fees, plus all other relief the Court deems just and proper in the circumstances.

DATED: May 23, 2000.

ANDERSON & KARRENBERG

  
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Attorneys for Novell, Inc.

**Plaintiff's Address:**

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