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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	Case No. 2:04CV00139 **MEMORANDUM IN SUPPORT OF NOVELL, INC.'S *DAUBERT* MOTION TO DISQUALIFY G. GERVAISE DAVIS III** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

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I. INTRODUCTION

Pursuant to the APA, Novell transferred its UNIX and UnixWare business and certain associated assets to SCO's predecessor in interest. Schedule 1.1(b) of the September 19, 1995 APA enumerated assets expressly excluded from the transfer, including "all copyrights." Amendment No. 2 revised that schedule, effective October 16, 1996, so that instead of expressly excluding *all* copyrights, without limitation, it instead excluded "[a]ll copyrights … except … copyrights … required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." The parties disagree about what rights fall within that category.

Novell does not dispute that SCO acquired, e.g., the rights "to reproduce," "to prepare derivative works," and "to distribute copies" of UNIX and UnixWare, as set forth in the Copyright Act. *See* 17 U.S.C. § 106(1)-(3). Likewise, Novell does not deny that SCO might have the right to exclude others from exercising those same rights with respect to derivative works that SCO has authored since acquiring the code. What Novell *does* deny is that SCO acquired the right to exclude Novell (and others) from exercising those rights retained by Novell under the APA with respect to UNIX.

SCO hired G. Gervaise Davis III, a retired lawyer, to testify as an "expert" in support of its contention that to run the acquired business, SCO required the disputed rights to exclude. Davis was not involved in the preparation of the Asset Purchase Agreement ("APA") or Amendment No. 2, or in the underlying transaction. Therefore he should not be permitted to opine on the *meaning* of the phrase "required for SCO to exercise its rights" (or any related language) because there is no suggestion that language has any specialized meaning. *See TCP Indus., Inc. v. Uniroyal, Inc.,* 661 F.2d 542, 549 (6th Cir. 1981) ("Absent any need to clarify or define terms of art, science, or trade, expert opinion testimony to interpret contract language is inadmissible"). If Davis proposes to testify not to what the language of Amendment No. 2 means but to how it applies—i.e., to opine regarding whether the disputed rights to exclude *are*

"required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies"—he should not be permitted to do so for reasons explained below.

II. LEGAL PRINCIPLES

In pertinent part, Federal Rule of Evidence ("Rule") 702 provides: "If … specialized knowledge will assist the trier of fact … a witness qualified as an expert … may testify thereto in the form of an opinion or otherwise." Thus a witness testifying under this rule must be "qualified as an expert," and the testimony he proposes to give must "assist the trier of fact."

To satisfy the first prong of Rule 702, an expert must possess "the necessary qualifications *in the relevant field,*" *In re Williams Securities Litigation,* 496 F. Supp. 2d 1195, 1233 (N.D. Okla. 2007) (emphasis added), and those qualifications must also be "relevant to the opinion sought," *Zuzula v. ABB Power T&D Co.,* 267 F. Supp. 2d 703, 713 (E.D. Mich. 2003). As explained below, those conditions are not met, here.

As to the second prong:

> Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for the exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which … merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of old.

Rule 704, Advisory Comm. Cmt; *see also Specht v. Jensen,* 853 F.2d 805, 808 (10th Cir. 1988) (en banc) ("testimony which articulates and applies the relevant law" does not *help* the trier, but instead "*circumvents* the jury's decision-making function by telling it how to decide the case [emphasis added]").[1] As explained below, Davis's proposed testimony should be excluded because instead of assisting the trier of fact, it would impermissibly "usurp" "the trial judge['s]

[1] *Specht* came "before the court for rehearing *en banc* of one issue … The question considered is whether Fed. R. Evid. 702 will permit an attorney, called as an expert witness, to state his views of the laws which governs the verdict and opine whether defendants' conduct violated that law." *Id.* at 806. The court "conclude[d] the testimony was beyond the scope of the rule and thus inadmissible," *id.,* and held that the trial court's admission of the evidence constituted reversible error, *id.* at 809.

role of adjudicating the law for the benefit of the jury" by giving improper opinion testimony on ultimate questions of law, and thus "circumvent[] the jury's decision-making function by telling it how to decide the case." *See Specht,* 853 F.2d at 809, 808; *see also Marx & Co. v. Diners' Club Inc.,* 550 F.2d 505, 509, 512 (2d Cir. 1977) ("We hold that the District Court erred in permitting [attorney], an expert witness called by plaintiffs, to give his opinion as to the legal obligations of the parties under the contract"); *Loeb v. Hammond,* 407 F.2d 779, 781 (7th Cir. 1969) ("It was not error to refuse to permit … an attorney … to testify as an expert witness as to the legal significance of the various papers …. The question of interpretation of the contract is for the jury and the question of legal effect is for the judge. In neither case do we permit expert testimony.").

III. ARGUMENT

A. Davis's Expertise Is in the Wrong Field

The "specialized knowledge" that Davis brings to this case is irrelevant to the issues upon which he opines. Davis has substantial experience representing software companies as a lawyer, but none running them. Thus he is not qualified to opine regarding what is required to do so and his opinion testimony concerning what would be required to run a software business is inadmissible under Rule 702. *See also Marx,* 550 F.2d 505 at 512 ("experience is hardly a qualification for construing a document for its legal effect when there is a knowledgeable gentleman in a robe whose exclusive province it is to instruct the jury on the law")

B. Davis's Opinions Are Inadmissible

The "question addressed" in Davis's report is "whether the copyrights … would be required for SCO to exercise various legal rights with respect to the acquisition of UNIX and UnixWare technologies." (Report & Decl. of G. Gervaise Davis III ["Report"], reproduced as Ex. A hereto, ¶ 13.) That report concludes: "my opinion is that the UNIX and UnixWare copyrights were and are necessary for SCO to operate its software business and to exercise its

rights and obligations under the APA with respect to the UNIX and UnixWare technologies." (*Id.* at ¶ 31.)

Davis bases his conclusion on two premises. One is that "[w]ithout any license … the copyrights … are necessary." (Report at ¶ 28.) The other is that "no express or implied licenses exist here." (*Id.* at ¶ 26.) According to Davis, because SCO requires either licenses or copyrights, and it has no licenses, it requires the copyrights. (*Id.* at ¶¶ 28-29.) "This is a classic example of a disjunctive syllogism. Either A or B; but not A; therefore, B." *National Shipments Traffic Conf., Inc. v. United States,* 887 F.2d 443, 445 (3d Cir. 1989); *see also Herrin v. United States,* 349 F.3d 544, 547 n. 3 (8th Cir. 2003) ("A disjunctive syllogism has as its first premise a statement of alternatives: *Either p or q*; it continues: *not q, therefore p.*"); *Kolling v. Goodyear Tire & Rubber Co.,* 272 N.W.2d 54, 60 (N.D. 1978) (Pederson, J., dissenting) ("a syllogism, shows a deductive, logical scheme consisting of a major premise and a minor premise and then a conclusion that follows therefrom").

As explained below, Davis's minor premise that "no … licensees exist here" is a legal conclusion on which opinion testimony is inadmissible; and without that premise, the statement of alternatives comprising his major premise—viz., that SCO requires either a license or the copyright—is inadmissible because it does not does not "assist the trier of fact," *see* Rule 702.

1. Davis Should Not Be Permitted to Testify that No License Exists because the Existence of a License is an Issue of Law for the Court

Here, "the starting point for analysis of admissibility" is the distinction "between testimony on issues of law and testimony on ultimate facts." *Specht,* 853 F.2d at 808. *Id.* "[O]ur system reserves to the trial judge the role of adjudicating the law for the benefit of the jury." *Id.* at 809. Thus "testimony on ultimate issues of law … is inadmissible because it is detrimental to the trial process." *Id.* "In no instance can a witness be permitted to define the law

of the case." *Id.* at 810; *see also id.* at 808 ("There is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness").

Davis should not be permitted to testify that "no express or implied licenses exist" because whether the APA conveys an *express* license is a question of contract interpretation for the Court, and the existence of an *implied* license is likewise a question of law. *TCP Indus.,* 661 F.2d at 549 ("expert opinion testimony to interpret contract language is inadmissible"); *Met-Coil Sys. Corp. v. Korners Unlimited,* 803 F.2d 684, 687 (Fed. Cir. 1986) ("the existence of an implied license, is a question of law"); *see also United States v. Jensen,* 608 F.2d 1349, 1356 (10th Cir. 1979) ("an expert witness cannot state legal conclusions by applying law to the facts").

2. The Opinion that SCO Requires a License or the Copyright Does Not Assist the Trier of Fact

According to Davis, activities incident to the operation of a software business—such as the development of derivative works, the copying and distribution of software, and even the operation of software—would constitute infringements unless SCO had either a license or the copyright. (*See* Report at ¶¶ 22-24.) That is why, according to Davis, SCO requires either a license or the copyright to operate the business it acquired under the APA. Indeed, the opinion that SCO requires either a license or the copyright is, at bottom, just a reformulation of the underlying legal conclusion that activities incident to the operation of a software business would constitute infringement unless SCO had either a license or the copyright. As such, it is inadmissible because "testimony which articulates and applies the relevant law … circumvents the jury's decision-making function." *See Specht,* 853 F.2d at 808.

Moreover, without the inadmissible minor premise that "no express or implied licenses exist here," Davis cannot complete the syllogism set up by the major premise that SCO required either a license or the copyright; and the major premise, standing alone, is inadmissible because

it does not assist the jury. "[T]he court must ensure that the proposed expert testimony logically advances a material aspect of this case," *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 n. 2 (10th Cir. 2005) ; and the major premise, without the inadmissible minor premise to complete the syllogism, does not advance any material aspect of this case.

IV. CONCLUSION

Novell respectfully requests that the Court disqualify Davis because (1) his qualifications are irrelevant to his proposed testimony and (2) his opinions will not assist the trier of fact.

DATED: February 8, 2010

Respectfully submitted,

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