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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S OPPOSITION TO NOVELL'S *DAUBERT* MOTION TO DISQUALIFY DR. GARY PISANO** Civil No. 2:04 CV-00139 Judge Ted Stewart

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Cases

The SCO Group, Inc. ("SCO") requests that the Court deny Novell, Inc.'s ("Novell") Daubert Motion to Disqualify Dr. Gary Pisano for the reasons set forth herein:

INTRODUCTION

Dr. Pisano is the Harry E. Figgie Professor of Business Administration at Harvard Business School, with a PhD in business administration from the University of California, Berkeley, and a B.A. degree in economics (with distinction) from Yale University. (Pisano Report ¶¶ 5-6.) For over two decades, Dr. Pisano has lectured, consulted, and published extensively in the areas of business strategy, operations, and technology, including technology licensing.

Novell understandably does not challenge Dr. Pisano's qualifications as an expert. Novell also does not challenge Dr. Pisano's causation opinion that: "For Novell, the entity that had sold the UNIX copyrights to SCO, to publicly reject SCO's ownership claims was a virtual guarantee that customers would be reluctant to purchase a license from SCO, particularly as the SCOsource licenses granted a right-to-use the very IP now being claimed by Novell." (Id. ¶¶ 45, 64.)[1]

In addition to concluding that Novell caused SCO's damages, Dr. Pisano estimated what the demand for SCOsource licenses would have been if not for the uncertainty Novell created over SCO's ownership rights. Dr. Pisano began by estimating the total number of potential customers in North America for SCO's RTU licenses, which he conservatively limits to the

[1] Specifically, Dr. Pisano explained that the "[e]conomic theory of licensing and intellectual property is very clear on the point that the licensing royalty model will only be viable if the licensor has well-defined and well-protected intellectual property." (Pisano Report ¶ 45.) Because SCO did not have the ability to restrict access to Linux, Dr. Pisano explained that the willingness of would-be licensees of SCO "to pay for a license is a function of their belief that SCO owned the rights and would enforce those rights." (Pisano Report ¶ 46.) Because SCO had made clear that it intended to enforce those rights, "Novell's statements interfered with the potential customers' willingness to pay by creating doubt regarding SCO's ownership rights and thus, its ability to enforce those rights." (Pisano Report ¶ 46.)

commercial server operating environment, at 7.4 million units. (Id. ¶¶ 49-56.) Novell does not challenge the reliability of this calculation, but contends that it is not relevant if his penetration analysis is excluded. To the contrary, as set forth herein, this calculation is relevant not only to his penetration analysis, but also is independently useful to the fact-finder as a comparison for Dr. Christine Botosan's estimates of SCOsource RTU lost sales.

Dr. Pisano then estimated the but-for demand for SCOsource RTU within that market of potential customers, and concluded, based on market research and his experience in the industry, that, but for Novell's actions, SCO would have been able to sell its SCOsource RTU licenses to between 19% and 45% of the market. (Id. ¶ 57.) This conclusion is supported by several independent bases:

First, the conclusion is supported by Dr. Pisano's evaluation of prospective purchasers as highly risk averse, with a strong preference for indemnification, particularly following SCO's claims of infringement. (Id. ¶¶ 58-63.) Novell does not challenge this aspect of Dr. Pisano's analysis.

Second, the conclusion is supported by Dr. Pisano's evaluation of the market reaction to Novell's statements and evidence of customer reactions. (Id. ¶¶ 64-68.) Novell also does not challenge this aspect of Dr. Pisano's analysis.

Third, in arriving at his estimate of 19-45% penetration, Dr. Pisano examined a number of industry studies examining Linux users' preferences for intellectual property protection. (Id. ¶ 69.) Novell raises several challenges to his reliance on one of the three surveys, theYankee Group Study, all of which, as discussed herein, go to the weight the trier of fact should give to his conclusion, and not to the admissibility of his testimony. Novell notably ignores that two other surveys also support and corroborate his conclusion.

Fourth, Dr. Pisano comprehensively evaluated the competition to the SCOsource program, and concluded that "these alternative programs would not detract from SCO's realization of 19% - 45% of the Linux Market in the 'but for' world." (Id. ¶¶ 80-92.) Novell claims that this competition renders Dr. Pisano's opinion invalid, and ignores that he thoroughly considered the competing programs and concluded that they would not reduce demand for SCOsource in the but-for world.

Dr. Pisano's final opinion was that he evaluated how the market and SCO had evolved and changed in the years since Novell's slander, and concluded that, even if SCO's ownership rights were vindicated, "SCO's ability to sell SCOsource licenses in the future is highly uncertain." (Id. ¶¶ 93-96.) Novell does not challenge this opinion.

For the reasons set forth herein, none of Novell's challenges are well-founded, and Dr. Pisano's opinions should be admitted.

ARGUMENT

In determining the admissibility of expert testimony on a *Daubert* challenge, the Court is guided by the following non-exhaustive list of considerations: (1) "whether it can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) "general acceptance" within the scientific community. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993). Novell raises no challenge to Dr. Pisano's methods, technique or conclusions sufficient to exclude his testimony, but rather, identifies issues for cross-examination. See, e.g., Loudermill v. Dow Chem. Co., 863 F.2d 566, 570 (8th Cir. 1988) ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.")

Tellingly, Novell challenges Dr. Pisano's basis for opining on the amount of SCO's damages, not the *fact* that SCO suffered damages. Utah law recognizes that the "reasonable level of certainty required to establish the amount of a loss is generally lower than that required to establish the fact or cause of a loss." Cook Assocs., Inc. v. Warnick, 664 P.2d 1161, 1166 (Utah 1983). Novell's attack on Dr. Pisano is a thinly-veiled attempt to raise SCO's burden of proving damages to a level of certainty not imposed by Utah law. See id. ("The certainty requirement is met as to the amount of lost profits if there is sufficient evidence to enable the trier of fact to make a reasonable approximation").

A. Dr. Pisano Had a Sufficient Basis to Rely on the Survey Evidence

The Yankee Group study on which Dr. Pisano relies was conducted independently of this litigation, but in response to the industry recognition of SCO's claims of infringement by Linux.[2] As Dr. Pisano explained at his deposition, the survey asked 1,000 large companies to quantify their concern about Linux indemnification ("top priority," "very concerned," "somewhat concerned"). Dr. Pisano considered two other industry surveys—one also conducted by the Yankee Group less than 6 months later and another conducted by a Forrester Research, Inc.—both of which corroborated his opinion that but for Novell's slanderous statements, SCOsource would have enjoyed a market penetration of between 19-45% of the market.

Dr. Pisano does not have to be aware of every minute detail regarding the studies methodology in order to conclude they are sufficiently reliable Dr. Pisano possessed sufficient information about the industry surveys in order for him to conclude that they could be reasonably relied upon.[3] For example, and as Dr. Pisano notes in his Report, he considered whether the

[2] "Indemnification Becomes Open Source's Nightmare and Microsoft's Blessing," by Didio, Laura, The Yankee Group, Nov. 2004 (cited in Expert Report and Declaration of Gary Pisano ¶ 71 n.90).

[3] Novell does not challenge the results or methodology of the survey.

relative size of the companies surveyed was likely to affect its demand for indemnification because two of the three surveys on which he relies questioned were "large" companies (5,000 plus employees or revenue in excess of $1 billion).[4] Dr. Pisano noted that in academic research, he commonly relies on such surveys conducted by credible sources, including the Yankee group. (Exhibit C at 216). At most, this issue goes to weight and can be explored on cross-examination. See, e.g., Simon & Schuster, Inc. v. Dove Audio, Inc., 970 F. Supp. 279, 289-91 (S.D.N.Y. 1997) (noting that "flawed" surveys would be admitted into evidence though afforded reduced weight); Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833, 845 (11th Cir. 1983).

Novell relies on the Federal Judicial Center's Reference Guide on Survey Research to support its complaint that surveys, like the Yankee Group's survey utilized by Dr. Pisano, not conducted specifically in preparation for litigation often ask irrelevant questions. The Reference Guide, however, notes that pre-litigation surveys are inherently more trustworthy because the likelihood of bias (by the preparing party) is significantly diminished. See Shari Seidman Diamond, Reference Guide on Survey Research, in Reference Manual On Scientific Evidence ("Diamond on Survey Research") at 237 (Federal Judicial Center 2d ed.2000) (attached as Exh. D. to Novell's Motion). That research has been conducted independent of the litigation "provides important, objective proof that the research comports with the dictates of good science." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1318 (9th Cir. 1995).

None of the cases cited by Novell support its contention that an expert's opinion is rendered inadmissible by his reliance on a survey conducted by a professional group, the type commonly relied up by other experts in his field. For example, in United States v. Massey, 594 F.2d 676 (8th Cir. 1979), the court concluded that the trial court had erred by allowing an expert

[4] He concluded that size did not significantly impact the respondent's demand for indemnification. Rep. at 30 n.93.

to bolster the results of his own study by testifying that he was aware of a Canadian study that estimated odds of inaccuracy at "one in 4,500," an error then compounded by the prosecution's repeated reference in closing to the study, about which no other testimony or gauge for reliability was offered. Similarly in Bogacki v. American Machine & Foundry Co., 417 F.2d 400 (3rd Cir. 1969), plaintiff's attempt to admit a statistical study as a basis for his expert's testimony, after failing to admit the study directly into evidence, was properly refused when the court determined the expert could not testify from his own knowledge about the study. By comparison, Dr. Pisano testified that he is familiar with these sources and relies on them regularly in his field, and as his Report reflects, he was sufficiently knowledgeable about this particular study to evaluate its reliability. While Novell relies upon Sheats v. Bowen, 318 F. Supp. 640 (D. Del. 1970), for its contention that Dr. Pisano lacks sufficient knowledge of the survey to justify admission, the court there rejected defendant's attack on appeal of plaintiff's expert, noting that defendant's basis for challenging the expert's adequacy were all addressed at trial: defendant crossed the expert at trial; the court instructed the jury on whether and how to credit his testimony; and defendant could have, but did not produce its own expert witness. Id. at 644-45. Those same safeguards will permit the jury to properly weigh and consider Dr. Pisano's testimony.

B. Dr. Pisano Reasonably Concluded That the Surveys Are a Proxy For Demand for SCOsource Indemnification in the But-For World

Novell complains (at 4-9) that Dr. Pisano's reliance on one of the industry studies discussed above, the November 2004 Yankee Group Report (Pisano Report ¶ 71), is improper because the survey (a) is insensitive to price, (b) does not consider "need" for indemnification, and (c) does not reflect demand for indemnification from the SCO threat versus other threats to Linux. To the contrary, Dr. Pisano properly considers both price, need for indemnification, and

market perception of the threat from SCO versus other factors in arriving at his estimate of penetration.

Regarding price, Novell ignores that Dr. Pisano's 19-45% estimate is also supported by the other evidence and analysis discussed above, including two other surveys, which arrived at comparable results and clearly considered price.[5] Novell also ignores that Dr. Pisano considered the potential impact of price on his estimated penetration, and concluded that it would not be a factor. (Pisano Report ¶¶ 10, 35-36.)[6] Novell's reliance on Crystal Semiconductor Corp. v. Tritech Microelectronics International, Inc., 246 F.3d 1336 (Fed. Cir. 2001) is misplaced because unlike the expert in that case, Dr. Pisano did account for the impact of price on demand.[7]

Regarding need for indemnification, Novell complains (at 7) that the results of the November 2004 Yankee Group Report are invalid because it does not ask respondents if they already had indemnification. However, Dr. Pisano considered this issue, and reasonably

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[5] Specifically, the two other surveys reported that 20-22% of respondents were interested in purchasing Linux indemnification. (Pisano Report ¶¶ 70, 72.) Because these surveys ask questions about intent to purchase, price is clearly considered by the respondents. In addition, a survey cited by Novell's proffered expert, Terry Musika, indicated that 43% of respondents would be willing to pay licensing fees to SCO for the use of Linux, a result that is also consistent with Dr. Pisano's estimate. (Pisano Rebuttal Report ¶ 22.)

[6] For example, Dr. Pisano considered that SCO negotiated the licenses on a case-by-case basis and has experience with varied pricing structures in its server operating system products. (Pisano Rebuttal Report, ¶ 10.) In addition, at the $100 price used by Dr. Botosan, Dr. Pisano concluded that there was no comparable substitute for the SCOsource RTU license. (Pisano Rebuttal Report ¶ 36.) In addition, Dr. Pisano also relied on evidence that Linux users interested in indemnification would be willing to "invest substantial funds in Linux indemnification." (Pisano Rebuttal Report ¶ 10.)

[7] Novell's reliance on Crystal Semiconductor and Monolithic Power Systems, Inc. v. o2 Micro International Ltd., 476 F. Supp. 2d 1143 (N.D. Ca. 2007), is further inapposite because both were infringement actions, which assumed the existence of an adequate substitute to plaintiff's product; the same is not true of the unique SCOSource license.

concluded that "alternative indemnification programs would not detract from SCO's realization of 19% - 45% of the Linux market in the but for world." (Pisano Report ¶ 81.)[8]

Regarding threats from other sources, Novell complains (at 8) that the survey respondents who were interested in buying indemnification would not have purchased a SCOsource license from SCO because they would have been concerned about indemnification from threats *other than* SCO. The only other threats Novell identified (at 8) were Microsoft and IBM, and Dr. Pisano considered this exact issue, and concluded that Linux users did not view either company as a credible threat to Linux, and that the supposed threat would not change his estimate of demand for SCOsource. (Pisano Rebuttal Report ¶ 20.)

At bottom, Novell's arguments about price, need for indemnification, and threats to Linux users from other sources are material for cross-examination, to be put before the fact-finder, not grounds for disqualification. See Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518 (10th Cir. 1996) (alleged "weaknesses in the underpinnings of the opinion go to the weight and not the admissibility of the testimony") (internal citations and quotations omitted); Loudermill, 863 F.2d at 570 (cross examination provides appropriate vehicle for attack on factual basis of expert testimony); In re Universal Serv. Fund Telephone Billing Practices Litig., No. 02-MD-1468-JWL, 2008 U.S. Dist. Lexis 74548, at *9 (D. Kan. Sept. 26, 2008) (objections regarding underlying evidence, as well as manner in which methodology was applied to the facts of the case, affect expert opinion's weight, not admissibility).

[8] Specifically, Dr. Pisano reasoned that these alternative vendors would not have been likely to enter the market in the but-for world, because of the increased risk of litigation by SCO (Pisano Report ¶ 82), and that the programs, because of their limited coverage, did not constitute viable substitutes for SCOsource licenses in the but-for world (id. ¶¶ 85, 86-92).

C. Dr. Pisano's Conclusion About the Size of the Linux Market Is Relevant and Admissible

Novell contends that if Dr. Pisano's market penetration estimate is excluded, his estimate of the size of the Linux market is not relevant. To the contrary, Dr. Pisano's estimate of the size of the Linux market remains relevant to Dr. Botosan's analysis. While Dr. Botosan's analysis does not depend on Dr. Pisano's estimate of the size of the market, it is helpful to the fact finder to compare Dr. Botosan's estimate of loss sales to the total size of the potential market. Furthermore, while Novell does not challenge this, his conclusions about causation and the impact of Novell's statements on SCOsource customers also remain highly relevant and helpful to the fact finder.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's *Daubert* Motion to Disqualify Dr. Gary Pisano.

DATED this 19th day of February, 2010.

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CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 19th day of February, 2010, a true and correct copy of the foregoing **SCO'S OPPOSITION TO NOVELL'S *DAUBERT* MOTION TO DISQUALIFY DR. GARY PISANO** was filed with the court and served via electronic mail to the following recipients:

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