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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.

AND RELATED COUNTERCLAIMS.

Case No. 2:04CV00139

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
LIKELY OBJECTIONS TO
DR. GARY A. PISANO
TESTIMONY**

Judge Ted Stewart

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SCO has advised Novell that it might call Dr. Gary A. Pisano to offer expert testimony in the ongoing trial in the near future. To minimize the risk of and need for lengthy sidebar discussions, Novell submits the following points and authorities in support of objections it expects to make to questions it expects SCO will ask.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

If SCO calls Dr. Pisano, Novell expects he will testify “that SCO would have sold a SCOsource license to between 19% and 45% of the Linux market.” (*See* Mem. Decision & Order Denying *Daubert* Motion [“Order”] at 2, Dkt. 747.) Dr. Pisano takes those figures from a survey conducted by the Yankee Group. (*Id.* at 5.) But in deposition, Dr. Pisano testified that he had not independently investigated or assessed the survey’s methodology but was instead relying on the Yankee Group’s reputation.¹ Under *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722 (10th Cir. 1993) , that renders Dr. Pisano’s opinion, insofar as it adopts the survey’s figures, inadmissible hearsay.

The Court previously denied Novell’s *Daubert* motion, seeking to disqualify Dr. Pisano on this ground. (*See* Order.) That prior ruling was made without the benefit of guidance from the Tenth Circuit’s opinion in *TK-7*, which Novell respectfully submits requires a different result.

II. ARGUMENT

A. Dr. Pisano Accepts the Yankee Group Survey Based Solely on the Yankee Group’s Reputation

During Dr. Pisano’s deposition, he was asked numerous questions about the reliability of the Yankee Group survey. Each time, Dr. Pisano ultimately resorted to his basic premise: because the Yankee Group is reputable, its survey must be reliable. First, with respect to sample size and characteristics:

¹ The transcript of Dr. Pisano’s July 27, 2007 is excerpted in Exhibit A hereto.

- Q. Is it your understanding ... that a thousand organizations were surveyed?
(Witness read document.)
- A. Yes.
- Q. And do you see from the question in Exhibit 1, which is the box on page 3, it says that midsize or large organizations with 5,000-plus employees were asked to respond?
- A. Right, yes.
- Q. And is that in itself sufficient to convince you that this survey was reliable?
- A. It appears to be a reliable survey. I have no reason to doubt it.
- Q. Well, aside from having no reason to doubt it, what do you base your conclusion that it's a reliable survey on?
- A. Again, this is an organization, Yankee, that does these kind of surveys routinely.

(Ex. A at 213:2-21.) Then, with respect to response rate:

- Q. We don't know anything about who responded, right?
- A. I'd have to sort of look at that. I don't recall offhand if all have the numbers on -- on that, if that was reported.
- Q. Does it matter?
- A. Response rate? Yes ...
- A. ... The overall response rate matters. I have -- I can't recall whether they report the response rate. [¶] My presumption would be ... in an organization like this, that they're getting certain high enough response rates; otherwise, they wouldn't be -- [¶] You know, this is a company, again, whose primary -- they're in the primary kind of business of doing these kind of surveys ... [¶] You can get actually -- there's surveys with very low response rates, which, again, as long as the responses are, you know, sort of randomly distributed, not biased in the response, you actually have a very robust study.
- Q. And how do you know in this case whether you have those conditions?
(Witness read document.)
- A. I -- I don't know 100 percent for sure. Again, I'm relying on the fact that Yankee is a well-respected organization ...

(*Id.* at 214:12-19, 215:13-216:12.) And finally, in response to questions about the presumed reliability of Yankee Group:

- Q. Do you know what checks were employed to make sure that this survey was done on a sound basis, what kind of procedural mechanisms?
- A. I don't have the details on that, no.
- Q. Do you know generally?

- A. No. [¶] I mean, there's a standard -- I mean, again, doing survey research, there's a very standard set of approaches that are -- that are kind of used in terms of, you know, sending it out, getting response rates, tracking. [¶] ... [¶] Again, a company like Yankee that does this kind of stuff would be really, I think -- you know, this -- [¶] You know, it's like Toyota making cars. They know how to make cars. These guys know how to do surveys.

(*Id.* at 217:6–218:2.) “It’s like Toyota making cars.” Not an encouraging analogy.

As the foregoing makes clear, Dr. Pisano’s ignorance runs much deeper than not being able “to recall all of the minute details of the methodology.” (*See* Order at 6.) Dr. Pisano knows nothing whatsoever about the survey, other than what the survey says on its face and that it came from a source he considers credible; and as explained below, under *TK-7*, that is not enough. *See TK-7*, 993 F.2d at 732 (“That rationale [for permitting expert testimony based on hearsay] is certainly not satisfied ... where the expert failed to demonstrate any basis for concluding that another individual’s opinion on a subjective financial prediction was reliable, other than the fact that it was the opinion of someone he believed to be an expert”).

B. Dr. Pisano’s Reliance on Yankee Group’s Reputation Does Not Satisfy the Requirements of Federal Rule of Evidence 703, as Applied by the Tenth Circuit in *TK-7*

In *TK-7*, Dr. Boswell “adopted the projections of Mr. Werber.” 993 F.2d at 732. But “[n]either Mr. Werber nor any other individual involved in the preparation of the market study was called to testify.” *Id.* at 730. Instead “Boswell testified that he was satisfied as to the credentials of the individuals preparing the study,” *id.* at 730, and “that he took steps after his deposition ‘to corroborate’ Mr. Werber’s projections,” *id.* at 732. The Tenth Circuit held: “The fact that Dr. Boswell relied upon the report in performing his calculation of lost profits did not relieve the plaintiffs from their burden of proving the underlying assumptions contained in the report,” and “Dr. Boswell’s use of the projections to form his opinion as to the amount of lost profits clearly failed to meet the requirements of [Federal Rule of Evidence (“Rule”)] 703.” *Id.*

Dr. Pisano and SCO are in the same position as Dr. Boswell and his client. SCO will not be calling anyone who prepared the Yankee Group survey to testify, and Dr. Pisano is relying solely on Yankee Group's credentials to vouch for the survey. Thus Dr. Pisano's adoption of the survey's results "to form his opinion ... clearly fail[s] to meet the requirements of Rule 703."

The Tenth Circuit's reasoning in *TK-7* is similarly apposite:

Hearsay is normally not permitted into evidence because the absence of an opportunity to cross-examine the source of the hearsay information renders it unreliable. Rule 703 permits experts to rely on hearsay, though, because the expert's "validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." Rule 703, *Advisory Committee Notes*. That rationale is certainly not satisfied ... where the expert failed to demonstrate any basis for concluding that another individual's opinion on a subjective financial prediction was reliable, other than the fact that it was the opinion of someone he believed to be an expert Dr. Boswell's lack of familiarity with the methods and the reasons underlying Werber's projections virtually precluded any assessment of the validity of the projections through cross-examination of Dr. Boswell.

993 F.2d at 732. This Court's prior Order was based, at least in part, on the assumption that Novell "does not challenge the underlying methodology of the Yankee Group Survey." (Order at 6.) But just as, in *TK-7*, "Dr. Boswell's lack of familiarity with the methods and the reasons underlying Werber's projections virtually precluded any assessment of the validity of the projections through cross-examination," *id.*, so too in this case Dr. Pisano's ignorance deprived Novell of its opportunity to conduct the inquiry necessary to ascertain whether the methodology underlying the Yankee Group survey he adopted as his opinion was subject to challenge.

III. CONCLUSION

The Yankee Group survey is hearsay, and SCO should not be permitted to dress it up and introduce it as Dr. Pisano's unexamined and untestable opinion.

DATED: March 16, 2010

Respectfully submitted,

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