WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION
Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)
David R. Wright (Utah State Bar No. 5164: E-mail: dwright@wnlaw.com)
Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)
Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)
1000 Eagle Gate Tower
60 E. South Temple
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

MORRISON & FOERSTER LLP
Michael A. Jacobs (Admitted *Pro Hac Vice;* E-mail: mjacobs@mofo.com)
Eric M. Acker (Admitted *Pro Hac Vice;* E-mail: eacker@mofo.com)
Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

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 OF POINTS AND AUTHORITIES IN SUPPORT OF LIKELY OBJECTIONS TO DR. CHRISTINE A. BOTOSAN TESTIMONY** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases

Statutes

SCO has advised Novell that it expects to call Dr. Christine A. Botosan 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

Dr. Botosan opined in her May 23, 2007 expert report ("Report," reproduced as Ex. A hereto) that but for Novell's alleged slander, SCO would have realized between $113.979 million and $215.657 million ("upper bound") in lost profits; by augmenting the lower figure with prejudgment interest calculated at 10% per annum, she arrives at a lower bound of $136.965 million (later supplemented to $171.159 million).

Novell will likely be objecting to Dr. Botosan's testimony on three grounds. First, as Dr. Botosan explains in paragraph 3 of her Report, her "upper bound is based on Dr. Pisano's analysis of the potential market." As explained below, Dr. Botosan should not be permitted to give the upper bound opinion she derives from Dr. Pisano's analysis (especially if he will not also testify[1]).

Second, Dr. Botosan should be limited to opinions rendered in her Report. Thus she should not be permitted to testify that SCO was harmed by Novell's December 22, 2003 press release, or indeed by any publication other than that occurring on May 28, 2003; and she should not be permitted to testify to damages arising after October 31, 2007, the end of the "damages period" covered by her Report.

Finally, Dr. Botosan should not be permitted to testify to prejudgment interest, at all, both because this is not a contract case and because SCO's alleged damages are not calculable with mathematical certitude.

[1] SCO appears to be vacillating about whether to call Dr. Pisano. Today, SCO said it would; but just a few days ago, Novell understood it would not.

II. ARGUMENT

A. Dr. Botosan Should Not Be Permitted to Recite Dr. Pisano's Opinions

Dr. Botosan's upper bound opinion is derived by simple arithmetic from a market penetration opinion offered by Dr. Pisano, who in turn drew his figures from a Yankee Group Survey. The Court should not sanction the addition of yet another layer of hearsay by permitting Dr. Botosan to testify about what Dr. Pisano said about what the Yankee Group Survey said.

Novell previously moved to disqualify Dr. Botosan *inter alia* because she relies on pre-litigation third-party projections. SCO responded by citing a practice aid "specifically identif[ying] pre-litigation projections as a yardstick that can be used to estimate the revenues of an affected business" (Dkt. 701 at 4) and the Court denied Novell's motion based on Dr. Botosan's attestation "that 'third-party projections with indicia of reliability are regularly relied upon by accountants when calculating lost profits'" (Dkt. 746 at 6). The issue this time is different because Dr. Pisano's projections are neither pre-litigation nor third-party.

Dr. Botosan has already testified, in deposition:

> Q. And you did not participate in the surveys that are relied upon by Dr. Pisano; correct?
> A. I did not.
> Q. Did you review the questions that were asked in the surveys that are relied upon by Dr. Pisano?
> A. I just relied on Dr. Pisano's expertise. I did not redo any aspect of his work, so I just relied on what he said, so I did not look at the documents, no.[2]

Particularly given those admissions, under *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722 (10th Cir. 1993), Dr. Botosan should not be permitted to give testimony based on Dr. Pisano's opinion.

In *TK-7*, Dr. Boswell "calculate[d] the amount of … lost profits by assuming the sales projections of D.A. Werber." *Id.* at 731. "Neither Mr. Werber nor any other individual involved

[2] Excerpts from the transcript of the February 5, 2010 deposition of Dr. Botosan are reproduced in Exhibit C hereto. The quoted testimony appears at 85:3-12. Dr. Botosan also testified, at 87:22-24, that she is not "an expert in the formulation or implementation of surveys."

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.* The Tenth Circuit reasoned:

> 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.

Id. at 732. Under the holding and reasoning of *TK-7*, Dr. Botosan should not be permitted to offer her upper bound opinion, which is derived Dr. Pisano's market penetration opinion, especially if he is not also called to testify.[3] *See also Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613-14 (7th Cir. 2002).

[3] Even if SCO decides to call Dr. Pisano, still Dr. Botosan should not be permitted to give her upper bound opinion because, as explained in a companion submission directed to Dr. Pisano's likely testimony, Dr. Pisano's own professed ignorance of the methodology underlying the Yankee Group Study likewise renders inadmissible his own opinion drawn from that survey. Because Dr. Pisano's opinion is no more admissible in his own mouth than in Dr. Botosan's, it should not be offered into evidence by either of SCO's experts.

B. Dr. Botosan Should Not Be Permitted to Testify Contrary to or Beyond her Report

Novell made the first of its allegedly defamatory publications on May 28, 2003, the second on December 22, 2003, the third on January 13, 2004, and the fourth in March 2004. Dr. Botosan's proffered testimony on causation is based on an event study, which she claims shows the May 28, 2003 publication caused injury. But in paragraph 21.g of her July 24, 2007 reply declaration (filed under seal), Dr. Botosan admits that her event study "show[s] that after controlling for the return on the market, SCO's stock did not experience *any* significant abnormal return on December 22, 2003 [emphasis in original]." In other words, Dr. Botosan admittedly has no basis for opining that the December 22, 2003 publication caused any harm. More generally, in Appendix 1 (reproduced as Ex. B hereto) to her original Report, Dr. Botosan broadly emphasizes that "[t]he *only* date" in her study "with a significant *negative* abnormal return is May 28, 2003 [emphasis in original]." Thus she also admittedly has no evidence of any harm arising from either of Novell's 2004 publications. Therefore Dr. Botosan should not now be permitted to testify that SCO was harmed by any publication other than the May 28, 2003 publication.

Also, Dr. Botosan's Report only "calculate[s] damages from May 28, 2003 until October 31, 2007." (Report at ¶ 29.) Her Report was never supplemented to include damages arising thereafter. Thus she should not be permitted to testify to damages arising after October 31, 2007. *See* Fed. R. Civ. P. 26(e)(2) ("Any additions or changes to [an expert report] must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due"); 37(c)(1) ("If a party fails to provide information … as required by Rule 26(a) or (e), a party is not allowed to use that information … to supply evidence … at a trial, unless the failure was substantially justified or is harmless.").

C. Dr. Botosan Should Not Be Permitted to Testify to Prejudgment Interest

Dr. Botosan's lower bound includes roughly $57 million in prejudgment interest. As reported in paragraph 61 of her Report, that part of her opinion is based on her "understanding that Utah state law allows pre-judgment simple interest at an annual rate of 10%." Because Dr. Botosan's prejudgment interest opinion is based on legal misinformation, she should not be permitted to render it in trial.

First, the statutory rate Dr. Botosan references is given in Utah Code § 15-1-1(2), which applies to amounts due under "a lawful contract." "However, section 15-1-1 does not provide for the payment of interest outside of the contract setting," *Whitney v. Faulkner*, 95 P.3d 270, 274 (Utah 2004), and this is not a contract case.

Moreover, because "[a]s a matter of public policy, an award of prejudgment interest … deters parties from intentionally withholding an amount that is liquidated and owing," *Trail Mtn. Coal v. Div. of State Lands & Forestry*, 921 P.2d 1365, 1370 (Utah 1996), it is only available when the amount *is* liquidated and owing; i.e., "a court may only award prejudgment interest if damages are calculable within a mathematical certainty." *Lefavi v. Bertoch*, 994 P.2d 817, 823 (Utah App. 2000).

> [T]he law in Utah is clear, viz: where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy … the amount of the damage must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed.

Bjork v. April Indus., Inc., 560 P.2d 315, 317 (Utah 1977). Manifestly, this is a case where "the amount of the damage must be ascertained and assessed by the trier of the fact at the trial," and thus "prejudgment interest is not allowed."

III. CONCLUSION

Dr. Botosan should not be permitted to: give her upper bound opinion, testify that Novell caused harm otherwise than by its May 28, 2003 publication, or opine regarding prejudgment interest.

DATED: March 16, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and
Counterclaim-Plaintiff Novell, Inc.