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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

<p>THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn,</p> <p>Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p>Defendant/Counterclaim-Plaintiff.</p>	<p>SCO'S OPPOSITION TO NOVELL'S DAUBERT MOTION TO DISQUALIFY DR. CHRISTINE BOTOSAN</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Dr. Botosan is a Professor of Accounting at the University of Utah, and has a PhD in Business Administration from the University of Michigan. (Report and Declaration of Christine Botosan, ¶ 4) (hereinafter “Botosan Report”).) She also is a Chartered Accountant in good standing with the Canadian Institute of Chartered Accountants. (*Id.*) For over two decades, Dr. Botosan has taught and published extensively in the area of financial accounting. (*Id.*) Novell concedes her qualifications and fails to identify any reason that her opinions would not be helpful to the finder of fact.

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, 113 S. Ct. 2786 (1993). In general, an expert’s opinion should only be excluded if it is “so fundamentally unsupported that it can offer no assistance to the jury.” *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988). Where a party seeks to attack the factual basis of an expert’s opinion, that challenge goes to the weight, not the admissibility, of the testimony. *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518 (10th Cir. 1996). The argument that an expert used incorrect data or overlooked more relevant data provides no basis for excluding the testimony and is more appropriately the subject of cross examination. *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209 (Fed. Cir. 2006). Novell challenges the factual underpinnings of Dr. Botosan’s conclusions, essentially arguing that she should have based her analysis on other

available data. Such a challenge is best suited for cross-examination, and provides no grounds for excluding Dr. Botosan's testimony. *See Loudermill*, 863 F.2d at 570.

1. Dr. Botosan's Reliance on SCOSource Forecasts Is Well-Reasoned and Methodologically Sound. Contrary to Novell's assertion (at 3), Dr. Botosan did not "cherry-pick" the highest forecast amounts. In fact, Dr. Botosan arrived at a significantly more conservative estimate of damages than if she had used the highest numbers in each of the forecasts. For instance, Dr. Botosan estimates lost revenue of \$105 million for SCO for 2004 and 2005. (Botosan Report ¶¶ 43, 44.) This estimate is based on a Deutsche Bank report, which provides a range of SCOSource forecasts that employ different assumptions. Dr. Botosan uses Deutsche Bank "Scenario 2," which the analysts describe as the projection "that uses the *conservative assumptions*." If Dr. Botosan had "cherry-picked" Deutsche Bank's more aggressive projections, her lost revenue estimate for 2004 and 2005 would have been \$170 million (under Deutsche Bank's Scenario 3) or \$550 million (using Deutsche Bank's "Best Case").

Similarly, in calculating lost revenues, Dr. Botosan used a more conservative estimate of the RTU license price than other estimates available. SCO's initial list price for the RTU license was \$1,399 per license. However, Dr. Botosan adopted Deutsche Bank's lowest assumption of \$100 per license. With respect to 2006 and 2007, the forecasts Dr. Botosan employs assume zero growth in RTU license revenues and only two additional vendor license deals. (Botosan Report ¶ 45.) Finally, the damage report, except for prejudgment interest, only runs through 2007, although the slander continues to this day. (Botosan Report ¶ 29.)

Novell's alternative forecasts are not a basis to exclude testimony. *See Compton*, 82 F.3d at 1518 (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). Dr. Botosan had a reasonable basis for excluding the two alternative projections. The timing of the RRG forecast rendered it obsolete within a month of its release, and it was never updated with more current information. (Botosan Report ¶¶ 35, 36.) Also, since the RRG forecast was created before the release of SCO's RTU licensing program, it only included one of SCO's two impacted revenue streams; thus, any comparison of the RRG forecast figures to the later Deutsche Bank estimates are an apples to oranges comparison.¹ Dr. Botosan also reasonably concluded that the August 2004 SCO forecast was not reliable because it was created over fourteen months *after* Novell's slanderous statements, well after the company and the market had recognized the extreme detrimental impact of Novell's statements on their SCOsource business. (*Id.* ¶ 39.)

2. Dr. Botosan's Use of SCOsource Forecasts Does Not Make Her a "Conduit for Opinion Hearsay." Under Federal Rule of Evidence 703, an expert may base her opinion on evidence not otherwise admissible, including hearsay.² Use of pre-litigation projections is

¹ Novell's argument (at 3 n.2) that there is a tradeoff between the vendor and end user (*i.e.*, RTU) licensing streams is simply wrong. An RTU license was a covenant not to sue an end user of Linux for its use of the code in Linux that infringed SCO's UNIX copyrights. An RTU licenses could be purchased either by an individual end user or by a vendor, but would not have been classified in the "vendor" license stream.

² "The rationale for this aspect of Rule 703 is that experts in the field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance." 29 Charles A. Wright and Victor J. Gold, *Federal Practice and Procedure* § 6273, at 311 (1997) (quoted in *U.S. v. Corey*, 207 F.3d 84, 89 (1st Cir. 2000)). As Novell concedes, Rule 703 permits an expert to rely on the opinion of another

well-accepted by accountants as part of a reliable methodology for computing lost revenues and profits. The American Institute of Certified Public Accountants (AICPA) Practice Aid 06-4 specifically identifies pre-litigation projections as a yardstick that can be used to estimate the revenues of an affected business. Numerous courts have, likewise, approved the use of such projections in calculating lost profits. *Mid-Am. Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1367 (7th Cir. 1996) (damages expert may rely on pre-litigation sales projections in establishing lost profits); *In re Merritt Logan, Inc.*, 901 F.2d 349, 360 (3d Cir. 1990) (same); *see also State Office Sys., Inc. v. Olivetti Corp. of Am.*, 762 F.2d 843 (10th Cir. Kan. 1985) (no abuse of discretion where trial court allowed company president and treasurer to testify as to lost profits based on company's own sales projections). Because such forecasts are the type reasonably relied upon by other experts in her field, Dr. Botosan may base her opinion on them. (*See also* Botosan Decl. ¶ 15.)

Dr. Botosan has not merely “parroted” the projections but rather independently assessed their reliability, employed those she found to be most relevant, discarded those she did not, and adjusted for incremental costs in arriving at her opinion on the lost profits.³

expert, and that expert need not also testify. *See Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002).

³ To the extent that Defendants cite any authority to the contrary, those cases are inapposite. *See United States v. Tomasian*, 784 F.2d 782, 786 (7th Cir. 1986) (Fed. R. Evid. 703 not implicated where witness did not qualify as expert and therefore could not offer testimony based on hearsay); *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991) (improper for testifying expert to use letters from three other experts who were not testifying at trial to bolster his opinion); *6816.5 Acres of Land v. United States*, 411 F.2d 834, 837 (10th Cir. 1969) (rejecting government's estimate of special benefit to plaintiff's remaining land in a takings case where government used no discernable methodology and offered no explanation for its conclusions).

3. Dr. Botosan's Reliance On Statements of Customers' Reasons for Not Purchasing SCOSource Licenses As One of the Bases of Her Causation Opinion Is

Permissible. Dr. Botosan concluded that Novell was a substantial factor in SCO's inability to sell its SCOSource products. In forming her causation opinion, Dr. Botosan reviewed the depositions of the SCO personnel involved in the SCOSource program, and also conducted interviews of SCO personnel. (Botosan Report ¶¶ 18 n.24, 21; Reply and Declaration of Christine Botosan ¶ 23) (hereinafter "Botosan Rebuttal Report").) She concluded from this review that "customers were deterred from purchasing SCOSource licenses by Novell's actions." (Botosan Report ¶ 18.)

Novell argues (at 5-6) that Dr. Botosan cannot "parrot" witnesses' testimony that customers were deterred by Novell's statements. SCO contends that such testimony from SCO personnel is admissible at trial.⁴ However, irrespective of whether the testimony is admissible, Dr. Botosan properly relies on such evidence as one basis for her well-reasoned opinion that Novell's caused SCO's damages. Such evidence strongly corroborates her event study (which is discussed further below).

As discussed above, Rule 703 expressly permits Dr. Botosan to rely on otherwise inadmissible evidence, as long as the evidence is of a type reasonably relied upon by experts in the particular field. *See Global Traffic Techs., LLC v. Tomar Elecs, Inc.*, No. 05-756., 2008 WL

⁴ Statements of a customer as to his reasons for not dealing with a supplier are admissible under Fed. R. Evid. 803(3)**Error! Bookmark not defined.** *See, e.g., Rite-Hite Corp. v. Kelley Co., Inc.*, 774 F. Supp. 1514, 1527 (E.D. Wis. 1991) (admitting salesperson testimony regarding customer statements under Rule 803(3) and finding that "salespersons commonly rely upon what the customers tell them") (vacated in part on other grounds, 56 F.3d 1538 (Fed. Cir. 1995) (*en banc*); *see also Hydrolevel Corp. v. Am. Soc. of Mech. Eng'rs, Inc.*, 635 F.2d 118, 128 (2d Cir. 1980); *Feesers, Inc. v. Michael Foods, Inc.*, No. 1:CV-04-0576, 2008 WL 170663, at *2 (M.D. Pa. Jan. 17, 2008); *U.S. Info. Sys., Inc. v. Int'l Brotherhood of Elec. Workers Local Union No. 3*, 2006 WL 2136249, at *17 n.7 (S.D.N.Y. Aug. 1, 2006); *Consol. Credit Agency v. Equifax, Inc.*, 2005 U.S. Dist. LEXIS 46851 (C.D. Cal. Jan. 26, 2005).

6397825, at *3 (D. Minn. Oct. 1, 2008) (admitting expert testimony based on expert's conversations with company's former customers over plaintiff's hearsay objections); *B.J. Tidwell Indus., Inc. v. Diversified Home Prods*, No. SA-06-CA-0264, 2007 WL 3118300, at *3 (W.D. Tex. Oct. 19, 2007) (same).

Courts routinely permit experts to present opinions based in part on hearsay, including statements of employees. *See U.S. v. Affleck*, 776 F.2d 1451, 1457-58 (10th Cir. 1985) (affirming trial court's admission of expert opinion based, in part, on hearsay statements of employees, which corroborated expert's own preliminary opinion). Such hearsay statements are admitted, not for the truth of the matter asserted, but to establish the basis of the expert's opinion. *See Trepel v. Roadway Exp., Inc.*, 194 F.3d 708, 717 (6th Cir. 1999) (finding district court erred by refusing expert testimony on explanation of the basis of opinion because it was based on hearsay).

Novell also attacks (at 6) Dr. Botosan's reliance on a Merrill Lynch letter that informed SCO that Merrill Lynch was not taking a SCOSource license because of the "legal and factual uncertainty surrounding [SCO's] assertions regarding intellectual property ownership and infringement."⁵ (Botosan Report ¶ 19.) Novell asserts that the letter may be read to acknowledge multiple reasons Merrill Lynch opted not to purchase a SCOSource license at that time. However, even if true, this assertion goes merely to the weight of Dr. Botosan's testimony; it does not raise a legitimate question as to the reliability of her methodology or expertise. *See Goebel v. Denver and Rio Grande Western R.R. Co.*, 346 F.3d 987, 998-99 (10th Cir. 2003) (expert's failure to rule out all possible alternative causal sources does not render the expert's

⁵ The Merrill Lynch letter was merely one piece of evidence that Dr. Botosan relied on in the context of substantial, additional corroborating evidence. (Botosan Report ¶¶ 18-27.)

testimony inadmissible); *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). Novell cites no support for its contention that an expert's opinion is rendered inadmissible by relying in part on evidence that identifies more than one factor potentially contributing to damages, and Plaintiff is aware of no such authority. That is especially true here where the appropriate legal test only requires that Novell's slander be a "substantial factor" in the claimed loss. *See Gen. Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1124 n.1 (6th Cir. 1990) (applying substantial factor test in a slander of title action). Nor does Novell contend that Dr. Botosan failed to take into account the alternative explanations for non-purchases in reaching her conclusions.⁶

4. Dr. Botosan's Reliance On Her Event Study As One of A Number of Bases of Her Causation Opinion Is Permissible. Dr. Botosan's event study provides powerful corroborating evidence that supports Dr. Botosan's conclusion that Novell's statements were a substantial factor in the failure of the SCOSource program. The steep decline in SCO's stock as a result of Novell's first slanderous statement, demonstrated in the event study, reflects that market participants "expected Novell's announcement to diminish SCO's expected future cash flows." (Botosan Report ¶ 23.)

⁶ Novell also inexplicably asserts (at 6) that Dr. Botosan assumes causation from the fact that the SCOSource program did not meet the projected revenue levels. (Botosan Report ¶ 20.) In fact, the observed difference in revenues is consistent with the significant evidence that Novell's slanderous statements had an adverse impact on the SCOSource program – that evidence includes Dr. Botosan's causation analysis of the customer responses, SCO personnel's feedback, and the event study.

Contrary to Novell's suggestion (at 6), Dr. Botosan does not use these event study figures to estimate SCO's damages, and SCO is not seeking as damages the loss in its stock value. Rather, Dr Botosan "employ[s] the event study to demonstrate the connection between Novell's public announcements and *the market's perception of SCO's future business prospects.*" (Botosan Rebuttal Report ¶ 1.) The fact that the market perceived that Novell's announcement would have an adverse impact on SCOSource revenues is another piece of evidence supporting Dr. Botosan's conclusion that Novell's statements caused the SCOSource program to fail.

The event study "employs a widely accepted methodology that is recognized by the finance and accounting professions." (*Id.*) Furthermore, event studies "are widely used to infer causation." (*Id.* ¶ 2.) Significantly, Novell does not contest these points in its *Daubert* motion and admits (at 6) that "a successful event study can support an inference that there is a causal connection between correlated events by eliminating alternative explanations" – in other words, a causal connection between Novell's statements and the steep decline in the market's perception of SCO's earning potential, as reflected in SCO's stock price.

Novell's argument (at 8-9) that Dr. Botosan's event study is logically flawed misses the mark for the same reasons. Dr. Botosan's use of the event study rests on the simple and undisputed logic that a firm's stock price is a reflection of market participants' measure of the firm's future earnings, and that changes in the stock price reflect changes in the market participations' expectations about the firm's future earnings. When Novell made its slanderous announcement, SCO's stock lost 25% of its value. Dr. Botosan fully evaluated all possible causes for the decline, and concluded that the decline in market value was a result of the market's diminished expectations of SCO's earnings potential in light of Novell's statements.

(Botosan Report ¶ 27; Botosan Rebuttal Report ¶¶ 6-11.) The fact that SCO's market value increased in almost the same amount immediately following Novell's short-lived retraction of its slander further bolsters her conclusion. There is no other rational explanation for SCO's loss of 25% of its value on the same day Novell made its announcement that could undermine Dr. Botosan's conclusion, and Novell has pointed to none. Accordingly, Novell's relevance and logic objections to the event study should be overruled.

5. Dr. Botosan's Event Study Is Statistically Significant and Methodologically Sound. Novell argues (at 7) that Dr. Botosan's event study should be excluded because "the underlying regression is statistically insignificant." This argument is based primarily on an erroneous estimation by Novell's expert, Terry Musika, of the analysis underlying the event study.⁷ Novell has failed to establish that Dr. Botosan's study is based on a statistically invalid model or statistically insignificant regression, and her event study should be admitted.⁸

⁷ Novell claims (at 7 n.3) that, as calculated by Mr. Musika, the R2 and P-values for Dr. Botosan's event study are .002639 and .084062, respectively. From these figures, Novell concludes (at 8) that "no meaningful event study can be done with SCO's stock price." However, Mr. Musika's calculations are fundamentally flawed. Not only does he employ the wrong model, but he then violates generally accepted methodology in performing his estimations. As Dr. Botosan has repeatedly clarified, the model selected by Mr. Musika is not the model she used. (Botosan Decl. ¶¶ 4-6.) In fact, Mr. Musika does not perform an event study at all, but merely a regression analysis relating changes in SCO's stock price to the percentage change in the NASDAQ. (*Id.* ¶ 4). None of Mr. Musika's statistical estimations were made using Dr. Botosan's actual model, and therefore his conclusions are irrelevant.

⁸ Finally, Novell argues (at 9-10) that Dr. Botosan makes an "unwarranted and unsupportable leap of logic" when she concludes that it was Novell that caused SCO to miss the SCOSource revenue projections. Specifically, Novell argues that Dr. Botosan's conclusion is undermined by the fact that the Deutsche Bank forecast she uses was made five months after Novell's first slanderous statement on May 28, 2003. Here, Novell wholly overlooks the timing and nature of its own slanderous statements. On May 28, Novell issued its first public renouncement of SCO's ownership rights. However, on June 6, 2003, Novell issued a very public retraction of its slander, resulting in the 28% stock price increase discussed above. Novell did not issue another public assertion of copyright ownership until December 22, 2003, *after* the Deutsche Bank forecast. Thus, the Deutsche Bank forecast was created during a lull between Novell's slanderous statements, when the full impact of Novell's slander on SCO had not yet been perceived. As such, Dr. Botosan's reliance on the Deutsche Bank forecast to estimate SCO's lost

CONCLUSION

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

DATED this 19th day of February, 2010.

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revenue was reasonable and well-supported. That reliance is further bolstered by her causation conclusion, as set out in her report and discussed above.

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, INC.'S DAUBERT MOTION TO DISQUALIFY DR. CHRISTINE BOTOSAN** was filed with the court and served via electronic mail to the following recipients:

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