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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, et al., Plaintiffs, v. ORACLE CORPORATION Defendant.	CASE NO. C 04-0807 VRW Filed June 1, 2004 Hearing Date: June 2, 2004 **PLAINTIFFS' DAUBERT MOTION TO EXCLUDE CERTAIN OPINION TESTIMONY OF DALE KUTNICK** **ORIGINALLY FILED UNDER SEAL**

NOTICE OF MOTION

On June 2, 2004, Plaintiffs will move for an Order, pursuant to Federal Rules of Evidence. 702, precluding certain testimony of Defendant Oracle Corporation's ("Oracle") expert witness Dale Kutnick.

RELIEF SOUGHT

Plaintiffs seek the Court's entry of an Order precluding the testimony of Dale Kutnick on matters outside his area of expertise.

ISSUES TO BE DECIDED

Whether a party's designated "industry expert" may opine on the economic pricing effects the proposed merger or the definition of the relevant antitrust product market when the subject is beyond his expertise, the witness admits he lacks economic expertise, and the report offers no factual basis for his "expert" opinion.

INTRODUCTION AND STATEMENT OF FACTS

Oracle served a report from Dale Kutnick, Chairman of the META Group, on May 7, 2004. A copy of his report is attached as Exhibit A. As the report makes clear, Oracle designated Mr. Kutnick as their sole technology and industry expert. See also Ex. B: Letter from Daniel M. Wall to Claude F. Scott (4/5/04) (designating Mr. Kutnick as Oracle's "industry expert"). Mr. Kutnick's stated expertise is as an IT advisor and a lecturer "on the growing importance of application services and/or infrastructure in customers' decision making."[1] Mr. Kutnick readily admits that he is not an economic or antitrust expert.[2] Among other things, his report purports to set forth opinions defining the relevant antitrust market, and assessing the proposed Oracle-

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[1]See Kutnick, Expert Report, ¶¶ 1, 2 & 4 (5/07/04).

[2]During Mr. Kutnick's recent deposition, Mr. Kutnick stated:

- "I don't consider myself an economist." Dep. at 118:15-16
- "Obviously, we've talked about I don't consider myself an economist—or, you know, a market, whatever, economist kind of details or an antitrust expert or things like that." Dep. at 123:4-6.
- "Q: Based on all the work you've done to prepare for your report and your testimony in this case, what is your opinion of how Oracle will benefit if it is able—if—from acquiring PeopleSoft if it's permitted to do so? . . .

  The Witness: "Okay. Again, I stated I'm not an economist, so obviously I have to take Chuck [Phillips] at his word that the—what Oracle's done is the financials and understands the consolidations. I'm not here to comment on that." Dep. at 306:11-22.

The relevant portions of Mr. Kutnick's deposition are attached as Exhibit C in rough format.

PeopleSoft merger's effect on market prices. Mr. Kutnick has no expertise and no basis on which to opine as to the issues just identified. The numerous opinions outside his expertise include:

- "Oracle's acquisition of PeopleSoft would not reduce competition." ¶ 19.
- "The 'market' identified by the DOJ does not exist because: (i) the functions it describes—HRM and FMS as sold by each vendor—come in one single version, not in "high function" and "regular" versions . . . ." ¶ 19.a
- "There is no reason to believe that Oracle, if combined with PeopleSoft, would be able to raise prices or otherwise exploit HRM, FMS, or full suite customers." ¶ 19.c
- "DOJ's hypothesized market does not exist." page 11.
- "There is no identifiable category of customers purchasing 'high function' HRM or FMS software for whom the only vendor choices are Oracle, SAP and PeopleSoft." ¶ 20.
- "Again, the standardization of the infrastructure will only accelerate competition and choices of best of breed applications—I expect them to become even less expensive as this competition grows." ¶ 32.
- "I expect more competition and cheaper prices for business applications . . . ." ¶ 44.
- "Oracle's acquisition of PeopleSoft will not result in higher prices or less innovation." page 17.
- "Customers will have plenty of competitive alternatives to constrain Oracle pricing and motivate innovation." ¶ 54.
- "It would be irrational, in my view, for Oracle to risk losing a deal with one of these large customers just to raise the price of the initial software license by a few percentage points as hypothesized by Plaintiffs." ¶ 57.

Mr. Kutnick should be precluded from proffering opinions outside his area of expertise at trial, or in a submitted report.

ARGUMENT

Plaintiffs' Complaint alleged that a combined Oracle-PeopleSoft would be able to substantially lessen competition in the high-function Human Resource Management ("HRM") and

Financial Management Services ("FMS") markets. See Compl. ¶¶ 23, 27-32, 37-40. The relevant products at issue are distinct from other products such as "best-of-breed," outsourcing, "mid-market," or general business market software applications that have less functionality, flexibility, and scalability. To aid the court's analysis and to demonstrate the technical differences between the these different products and the capabilities of firms to create such products, Plaintiffs designated Professor Marco Iansiti as their technical expert. Oracle discussing products not at issue in the present case, designated Mr. Kutnick to opine on the enterprise software applications industry. Although Mr. Kutnick's expert report does not state, explain, or outline the general parameters of his charge, Mr. Kutnick was proffered by Oracle as an "industry expert," and not an economic expert.[3] As stated previously, Mr. Kutnick does not consider himself and economic or antitrust expert. See supra note 2 and accompanying text.

Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony in the federal courts, setting the following parameters:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702; see Reiffin v. Microsoft Corp., 270 F. Supp. 2d 1132, 1145 (N.D. Cal. 2003) (Walker, J.). Although Rule 702 affords a court wide latitude to admit expert testimony, such testimony is inadmissible if it does not meet two related requirements: (1) it must be based on the special knowledge of the expert; and (2) it must be helpful to the finder of fact. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-91 (1993); Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (2d Cir. 1989) ("For an expert's testimony to be admissible.

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[3]Oracle designated Mr. Kutnick as its sole "industry expert" and designated three economic experts. See Ex. C.

. . it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help."); United States v. Jackson, 425 F.2d 574, 576 (D.C. Cir. 1970) ("'To warrant the use of expert testimony . . . two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.'") (quoting McCormick, Evidence § 13)). The burden is on the party offering the proposed expert opinion testimony to prove by a preponderance of the evidence that the testimony satisfies the requirements for admissibility. See Daubert, 509 U.S. at 592 n.10. An expert for one purpose is not an expert for all purposes. "Even where a witness has special knowledge or experience, qualification to testify as an expert also requires that the area of the witness's competence matches the subject matter of the witness's testimony." See 29 Charles A. Wright, et al., Federal Practice & Procedure § 6265 at p. 255 & nn.34 & 35 (1997).

Accordingly, not all opinions that happen to be held by an expert are "expert opinions." See United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991). Opinions falling outside the expert's area of expertise are inadmissible. See, e.g., Watkins v. Schriver, 52 F.3d 769, 771 (8th Cir. 1995) (affirming exclusion of neurologist's testimony "that the [plaintiff's neck] injury was more consistent with being thrown into a wall than with a stumble into the corner"); Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339-40 (7th Cir. 1989) (rejecting economist's opinion that defendant's conduct "was contrary to good faith and fair dealing").

I. Mr. Kutnick is Not Qualified or Capable to Opine on Economic Issues

Mr. Kutncik's testimony regarding the relevant markets, the constraints on Oracle's ability to raise prices, and the proposed merger's effect on prices should be excluded because Mr. Kutncik is not qualified to testify as an expert on these economic subjects, and his opinions will not be helpful to this Court. See Fed. R. Evid. 702.

Although Mr. Kutnick may have experience in IT strategy, and "the growing importance of application services and/or infrastructure in customers' decision making,"[4] he lacks any education or training in economics or industrial organization. Mr. Kutnick thus does not have the requisite training or experience to determine: (1) whether best-of-breed, outsourcing, mid-market applications, and high-function HRM and FMS applications are in the same product market, (2) what competitive pressures presently constrain Oracle, and (3) what competitive pressures would constrain a merged Oracle-PeopleSoft.

General industry experience does not qualify a witness to conduct the analysis required to define a product market for purposes of an antitrust case, and Mr. Kutnick is no more qualified to testify about relevant markets than other non-economist witnesses who have been precluded from offering such testimony in similar circumstances.

In Berlyn v. Gazette Newspapers, 214 F. Supp. 2d 530, 536 (D. Md. 2002), for example, the plaintiffs' proposed expert witness had considerable experience in publishing, having held several prominent positions with newspapers throughout his career. Id. at 533. Nonetheless, the court determined that the witness was not qualified to opine that the relevant product market was community newspapers and some editions of metropolitan newspapers because the witness's background was "completely devoid of specific education, training or experience in economics or antitrust analysis." Id.; see also id. at 536 ("[G]eneral business experience unrelated to antitrust economics does not render a witness qualified to offer an opinion on complicated antitrust issues such as defining relevant markets.").

Similarly, in Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 98 F. Supp. 2d 729 (W.D. Va. 2000), the court prevented a geological engineer with some background in economics and substantial mineral industry experience (including experience performing market analyses for clients) from testifying as an expert about the geographic market for vermiculite. Id. at 732-734. The court noted that "there are differences between an analysis for business investment and an

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[4]See Kutnick, Expert Report, ¶¶ 2 & 4.

analysis for antitrust purposes," that "market analyses for antitrust markets generally require some expertise in the field of industrial organization," and that individuals with experience in analyzing the mineral market but not in antitrust "would not possess the skill and training of a professional economist necessary to define a relevant market for antitrust purposes." Id. at 732-33.

Like the witnesses in Berlyn and Virginia Vermiculite, Mr. Kutnick does not have the qualifications to offer an expert opinion relating to market definition. Accordingly, Mr. Kutnick's testimony that best-of-breed, outsourcing, mid-market applications, and high-function HRM and FMS applications are in the same product market should be precluded.

II. Mr. Kutnick Has Not Applied a Stated Methodology to Define a Relevant Antitrust Market and Is Not Qualified to Do so

Mr. Kutnick provides a scattering of random conclusory sentences without citations to the documents or evidence at his disposal regarding whether best-of-breed, outsourcing, mid-market applications, and high-function HRM and FMS applications are in the same product market. These statements demonstrate his lack of qualification to testify on the subjects. As an initial matter, Mr. Kutnick's observation that "each vendor licenses the same basic packaged software code to its customers regardless of the customer's size and complexity," even if true, does not mean that the vendor's products are in the same market as each other's, or that a mid-market vendor's code could satisfy the requirements of large complex customers. While products may compete in some general sense for a segment of the customers does not suffice to address whether an antitrust product market exists for high-function HRM or FMS software applications. See FTC v. Staples, Inc., 970 F. Supp. 1066, 1075 (D.D.C. 1997) ("[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.").

Nothing in Mr. Kutnick's report suggests that he is competent to conduct rigorous economic analysis, much less that he did so. Cf. Bailey v. Allgas, Inc., 284 F.3d 1237, 1246 (11th Cir. 2002) (Expert's "cursory and unclear" assessment of the relevant product market did not "provide a sufficient basis upon which a reasonable jury could find [defendant] possessed

monopoly power.") Notwithstanding his sweeping statements about the state of the industry, Mr. Kutnick fails to address whether customers view best-of-breed, outsourcing, mid-market applications, and high-function HRM and FMS applications as interchangeable, he fails to consider any other issues relevant to determining whether the products are in the same market. Indeed, Mr. Kutnick offers no methodology for defining a product market beyond his own opinions, that a high-function software applications market "does not exist." (Kutnick, Report ¶ 19.a). Mr. Kutnick has thus failed to employ "the same level of intellectual rigor that characterizes an expert in the field of economics and industrial organization." Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1025 (10th Cir. 2002) (affirming district court order that excluded testimony regarding relevant market on that basis); see also Bailey v. Allgas, Inc., 148 F. Supp. 2d 1222 (N.D. Ala. 2000) (relevant market testimony excluded because the "methodology is not professionally sound and valid"), aff'd, 284 F.3d 1237 (11th Cir. 2002).

In sum, Mr. Kutnick's conclusion that best-of-breed, outsourcing, mid-market applications, and high-function HRM and FMS applications are in the same product market is an unsupported "bottom-line" that must be excluded. See Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.") (quoting Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)).

III. Mr. Kutnick's Opinion that There Exist No High-Function Markets Is Unhelpful

It is well-settled that to be admissible, expert testimony must be not only reliable, but helpful to resolve an issue in the case. See, e.g., In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 786 (7th Cir. 1999). Because Mr. Kutnick's cursory and unclear analysis does not properly address whether best-of-breed, outsourcing, mid-market applications, and high-function HRM and FMS applications are in the same relevant market for antitrust purposes, his analysis is not helpful in resolving market definition issues. See Bailey v. Allgas, Inc., 284 F.3d 1237, 1246 (11th Cir. 2002) (Expert's "cursory and unclear" assessment of the relevant product

market did not "provide a sufficient basis upon which a reasonable jury could find Allgas possessed monopoly power.").

IV. Mr. Kutncik's Testimony About Future Pricing Behavior in the Relevant Market Should Be Excluded

Mr. Kutnick's cursory analysis does not end with his product market observations, but continues with his speculation about likely price effects an Oracle-PeopleSoft merger would cause. See Kutnick, Report ¶¶ 19.c, 54 & 57. He believes that "customers will have plenty of competitive alternatives to constrain Oracle pricing" because there is "the range of alternatives."

Mr. Kutnick is not qualified to analyze what effect the proposed merger will have on Oracle's pricing or prices in the relevant market, and he has not undertaken the analysis that would be necessary to reach such a conclusion. His conculsory statements on future pricing is unreliable because it does not consider the many economic factors that would be relevant to such an analysis. See Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056-57 (8th Cir. 2000) (expert's opinion "should not have been admitted because it did not incorporate all aspects of the economic reality"). Mr. Kutnick does not state (nor could he) how much high-function software application prices might fall or how long that might take in response to the "inflection point this industry is about to experience." See Kutnick, Report ¶¶ 44 & 46. Nor does he provide any other information sufficient to make his conclusion relevant to whether Oracle will be constrained to restrain post-merger prices. Id. ¶¶ 19.c, 54 & 57. In short, Mr. Kutnick offers nothing more than an unhelpful "bottom line" conclusion based on no particular expertise or other specialized knowledge that would distinguish him from any other executive [lay witnesses in this case.][5] See Rosen, 78 F.3d at 319. Accordingly, his testimony regarding future prices for high-function HRM or FMS markets should be excluded. See, e.g., Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 799 (4th Cir. 1989) (upholding exclusion of a non-economist financial analyst from testifying about price discrimination).

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[5]Text altered to correct an error in the non-public version.

CONCLUSION

At the end of the day, much of Mr. Kutnick's report amounts to an impermissible effort "to plug holes in [Oracle's] case, to speculate, and surmise." In re Aluminum Phosphate Antitrust Litig., 843 F. Supp. 1497, 1506 (D. Kan. 1995). Oracle should not be permitted to offer Mr. Kutnick's as essentially a "channeler" of second-hand industry information that, if valid, should come first-hand from unpaid fact witnesses. See Law v. NCAA, 185 F.R.D. 324, 341 (D. Kan. 1999). Mr. Kutnick is not qualified to offer many of these opinions, they lack any reasonable foundation, and they are not helpful to resolving the issues in this case.

Mr. Kutnick should not be permitted to offer opinions relating to the relevant antitrust product market (Kutnick, Report ¶¶ 19.a, 20, & 54), or the effect of the proposed merger's likely effects on market prices (id. ¶ 19.c, 32, 44, 54 & 57). For the reasons stated above, Plaintiffs respectfully request the Court to enter an Order to exclude portions of Mr. Kutnick's testimony.

Respectfully Submitted,

Dated: May 26, 2004

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