


 COUNTY JUDGE RAE LEE CHABOT
 COUNTY SCO GROUP INC V DAIMLERCHR

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**

THE SCO GROUP, INC.,

Plaintiff,

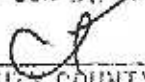
vs.

DAIMLERCHRYSLER CORPORATION,

Defendant.

 RECEIVED FOR FILING
 OAKLAND COUNTY CLERK

2004 JUN 30 10 3: 17

 BY:  Civil Action No. 04-056587-CKB
 DEPUTY COUNTY CLERK

Honorable Rae Lee Chabot

Joel H. Serlin (P20224)
 Barry M. Rosenbaum (P26487)
 SEYBURN, KAHN, GINN, BESS AND
 SERLIN, P.C.
 Attorneys for SCO
 2000 Town Center, Suite 1500
 Southfield, MI 48075
 (248) 353-7620

James P. Feeney (P13335)
 Thomas S. Bishoff (P53753)
 Stephen L. Tupper (P53918)
 DYKEMA GOSSETT PLLC
 Attorneys for DaimlerChrysler Corporation
 39577 Woodward Avenue, Suite 300
 Bloomfield Hills, Michigan 48304-2820
 (248) 203-0700

**DAIMLERCHRYSLER CORPORATION'S MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION TO STRIKE CERTAIN PARAGRAPHS OF THE AFFIDAVIT OF
WILLIAM BRODERICK**

Of counsel:

WILMER CUTLER PICKERING
 HALE AND DORR LLP

Mark G. Matuschak
 Michelle D. Miller
 60 State Street
 Boston, MA 02109
 (617) 526-6000

Robin L. Alperstein
 300 Park Avenue
 New York, NY 10022
 (212) 937-7200

Attorneys for Defendant
 DaimlerChrysler Corporation

Defendant DaimlerChrysler Corporation ("DCC") submits this memorandum in support of its Motion to Strike Certain Paragraphs of the Affidavit of William Broderick ("Broderick Affidavit") from the record. The Broderick Affidavit, which the SCO Group, Inc. ("SCO") submitted in support of its Memorandum of Law in Opposition to DaimlerChrysler Corporation's Motion for Summary Disposition ("SCO Mem."), fails to comply with and is incompetent as evidence under Michigan law. It is clear from the face of the Affidavit that Mr. Broderick lacks personal knowledge about at least Paragraphs 8, 10-26, 28, 35, 44-45, 56-57, 59, and 62-65 of the Affidavit. As a result, these paragraphs do not present competent evidence capable of raising a genuine issue of disputed material fact for trial.

ARGUMENT

I. Legal Standard.

The Michigan Court Rules provide that an affidavit offered in opposition to a motion for summary disposition under MCR (C)(10) "shall only be considered to the extent that the content or substance would be *admissible* as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6); see also *Veenstra v Washtenaw Country Club*, 466 Mich 166, 163; 645 NW2d 643 (2002) (the existence of a disputed fact must be established by admissible evidence); *Reinhold Group, Inc v Dep't of Treasury*, No 248025, 2004 WL 790438, at * 3 (Mich App, Apr 13, 2004) (attached as Exhibit A) (same, citing MCR 2.116 (G)(6)). To be admissible, an affidavit submitted in support of or in opposition to a motion for summary disposition must affirmatively show that the affiant, if sworn as a witness, could testify competently to the facts stated in the affidavit. See *Reinhold Group*, 2004 WL 790438, at *3 (citing MCR 2.119(B)(1)); *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002). Competence requires that the statements attested to be within the personal knowledge of the affiant. See MCR 2.119(B); MRE 602.

II. The Court Should Strike Paragraphs 8, 10-26, 28, 35, 44-45, 56-57, 59, and 62-65 of the Broderick Affidavit as Incompetent.

SCO submitted the Broderick Affidavit for the purpose of attempting to identify a genuine issue of disputed material fact for trial. (See SCO Mem at p 4.) However, the Broderick Affidavit does not meet the minimum threshold requirement for admissibility under Michigan law. Indeed, not only does it fail to "affirmatively show" that Mr. Broderick could testify competently to the facts stated therein, it demonstrates the contrary, namely, Mr. Broderick cannot testify competently to Paragraphs 8, 10-26, 28, 35, 44-45, 56-57, 59, and 62-65 because he lacks personal knowledge of the statements contained therein. See *Tugender v Henry Ford Health Sys, Inc*, No 225554, 2002 WL 433352, at * 1 (Mich App Mar 19, 2002) (the affidavit must be based on personal knowledge, stating, with particularity, the facts admissible as evidence that establish or deny the grounds stated in the motion)(citing MCR 2.119(B)(1)(a) and (b)) (attached as Exhibit B); see also *McDonald v Vaughn*, No 244687, 2004 WL 1103926, at *2 (Mich App May 18, 2004) (affirming finding that plaintiff failed to establish a genuine issue of material fact, in part, because affidavit was not based on personal knowledge)(attached as Exhibit C); *Faraj v Hadous*, No 213144, 2000 WL 33418843, at *2 (Mich App June 13, 2000)(affirming summary judgment granted in defendant's favor and finding that mere opinions are insufficient to show that a factual dispute exists)(attached as Exhibit D); *Sanit Air, Inc v Safety King, Inc*, No 203852, 1999 WL 33409645, at *1 (Mich App Nov 30, 1999)(finding that affidavits not made on personal knowledge were insufficient to oppose the defendant's motion for summary disposition)(attached as Exhibit E).

As a result, the Court should strike Paragraphs 8, 10-26, 28, 35, 44-45, 56-57 59, and 62-65 of the Broderick Affidavit and find that SCO has failed to meet its burden under MCR

2.119(B)(1) and 2.116(G)(6) of showing by evidentiary materials that a genuine issue of disputed material fact exists. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

A. Paragraphs 8, 10-24, 35, 44-45, 56-57 and 59 Regarding the Purpose, Interpretation and Course of Performance of the License Agreement are Not Within Mr. Broderick's Personal Knowledge.

Though Mr. Broderick claims that he submitted the Affidavit "based on my personal knowledge" and that if sworn as a witness could "testify competently to the facts stated herein" (Broderick Aff ¶ 1), his statement that he has been employed by SCO as Director of Software Licensing since May 2001 shows the contrary. (See Broderick Aff ¶¶ 1-2.) SCO claims to be the successor-in-interest to the License Agreement, a document signed in 1988 by DCC's predecessor, Chrysler Motors Corporation, and AT&T. (*Id.* ¶ 8.) Mr. Broderick does not (and could not) have personal knowledge about the purpose, interpretation, negotiation, or course of performance of an agreement executed by two entities with which he has never been affiliated, 14 years before he assumed the position that he contends afforded him personal knowledge. (See *id.* ¶ 2.) The Broderick Affidavit contains no evidence that even suggests that Mr. Broderick could have gleaned such knowledge; it asserts merely that SCO "presently owns all right, title, and interest in and to UNIX and all related license rights."¹ (*Id.* ¶ 6.) It does not indicate a date by which SCO purports to have assumed such rights, and does not purport to evidence any interaction whatsoever between SCO, as purported successor-in-interest to AT&T, and DCC, prior to December 18, 2003. Likewise, Mr. Broderick's efforts to characterize or otherwise interpret the License Agreement, which in any event speaks for itself, are not based on his personal knowledge.

¹ While immaterial for purposes of this motion or DCC's Motion for Summary Disposition, this statement is itself also inadmissible as a legal conclusion – a conclusion that is currently being disputed in various lawsuits pending around the country, including by IBM and Novell. See, e.g. *The SCO Group, Inc. v International Business Machines Corp*, 2:03CV294DAK (D. Utah); *The SCO Group, Inc. v Novell, Inc.*, 2:04CV139DAK (D. Utah).

Paragraphs 8, 10-24, 35, 44-45, 56-57 and 59 of the Broderick Affidavit purport to interpret the License Agreement by characterizing its requirements, and the purpose of those requirements, to support's SCO's interpretation of the License Agreement. However, the purpose of contract interpretation is to ascertain the intent of the parties, *Greenfield v Philles Records, Inc*, 98 NY2d 562, 569; 780 NE2d 166 (2002), a matter outside Mr. Broderick's personal knowledge. For example, Paragraph 19 purports to explain why DCC "agreed to provide certified assurances with the Agreement to SCO," contending that that purpose was to "monitor compliance with the terms of the License Agreement." (Broderick Aff ¶ 19.) Paragraphs 10-24 purport to interpret the License Agreement by stating SCO's view of what the contract provides (e.g., *id.* ¶¶ 10-14, 22), what DCC did or "agreed to" do under that Agreement (e.g., *id.* ¶¶ 14-19), and what the Agreement requires (e.g. *id.* ¶¶ 20-21, 23-24). Mr. Broderick has no personal knowledge of why DCC's predecessor agreed to any provision of the License Agreement, or what any provision of the License Agreement was meant to accomplish. (See *id.* ¶¶ 1-2.)

Mr. Broderick likewise has no personal knowledge regarding the intent of AT&T and DCC's predecessor when they entered into the License Agreement. Mr. Broderick avers no facts to suggest he has any knowledge of the parties' course of performance after they executed the License Agreement. The only fact Mr. Broderick does allege that speaks to course of performance shows that there has been none with respect to SCO and DCC. (See Broderick Aff ¶¶ 2-3, 31.) Thus, rather than "show affirmatively" that that Mr. Broderick has personal knowledge of the parties' intent, the Broderick Affidavit conclusively demonstrates that there is no foundation for his testimony regarding the interpretation of the License Agreement or the purpose of any of its provisions. As a result, the Court should strike Paragraphs 8, 10-24, 35, 44-

45, 56-57 and 59 of the Broderick Affidavit and conclude that the Affidavit fails to raise a genuine issue of material fact for trial.

B. Paragraphs 19, 25-26, 28, 62-65 Regarding DCC's Decisions, Actions, Reasons for Acting, and Knowledge are Not Within Mr. Broderick's Personal Knowledge.

Paragraphs 19, 25-26, 28, and 62-65 of the Broderick Affidavit are also inadmissible evidence due to Mr. Broderick's lack of personal knowledge. In these paragraphs, Mr. Broderick makes statements about what DCC is doing or has done, and for what purpose, or what DCC has known or been aware of:

- *"To monitor compliance with the terms of the License Agreement...Daimler agreed...."* (Broderick Aff ¶ 19 (emphasis added));
- *"When Daimler first entered into the License Agreement, Daimler...relied on UNIX as the core operating system..."* (*Id.* ¶ 25 (emphasis added))
- *"Neither ...Daimler, nor the original parties to the License Agreement could have contemplated...."* (*Id.* ¶ 26)
- *"Daimler has utilized Linux since at least October 2002"* (*Id.* ¶ 28)
- DCC's employees have had access to "and worked on" UNIX source code and technology for over 15 years (*Id.* ¶ 62);
- *"it is my understanding" that "Daimler personnel would have gained a detailed understanding of UNIX..."* (*Id.* ¶ 63);
- DCC personnel "have used that knowledge and expertise to modify UNIX" (*Id.* ¶ 64); and
- DCC "is now using Linux." (*Id.* ¶ 65).

Again, not one of these statements is within Mr. Broderick's personal knowledge. By its terms, the phrase "it is my understanding that..." is an admission of lack of personal knowledge.

The statements regarding what DCC's predecessor "relied upon" or "contemplated" in 1988 when the License Agreement was executed, as well as those concerning what DCC's employees have known or done, are without any foundation whatsoever. Mr. Broderick cites to no evidence in support of these statements. Nor does he claim ever to have been employed by DCC or have some other means of knowing how DCC functions in any regard. In fact, the Broderick Affidavit purports to evidence no interaction between Mr. Broderick and DCC prior to December 18, 2003, and none after other than SCO's lawsuit. (See Broderick Aff ¶¶ 31, 36-37.) Likewise, the Affidavit provides no foundation for Mr. Broderick's claim to know what DCC knew, or why DCC acted in any fashion. Indeed, having had no contact with DCC other than a single letter in December 2003, Mr. Broderick could not possibly have personal knowledge of these statements. Accordingly, they should all be stricken as contrary to MCR 2.119(B)(1), MCR 2.116(G)(6), and the basic principle of evidence that testimony must be competent. (See MCR 602.)

CONCLUSION

For the foregoing reasons, this Court should grant this Motion and strike Paragraphs 8, 10-26, 28, 35, 44-45, 56-57, 59, and 62-65 of the Broderick Affidavit from the record.

Dated: June 30, 2004

Respectfully Submitted,

James P. Feeney
James P. Feeney (P13335)
Thomas S. Bishoff (P53753)
by *Stephen L. Tappin* *SK*

PROOF OF SERVICE

To: _____
i. _____
c. _____
d. _____
of: *June 30, 2004* *X* *Hand Delivery*
☐ *Personal*
Signature: *James Tappin*