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

THE SCO GROUP, INC.,

Plaintiff,

vs.

DAIMLERCHRYSLER CORPORATION,

Defendant.

Civil Action No. 04-056587-CKB

Honorable Rae Lee Chabot

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DAIMLERCHRYSLER CORPORATION'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

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In its Opposition, the SCO Group, Inc. ("SCO") fails to identify a single genuine issue of disputed material fact. Instead, SCO simply disagrees about the legal meaning of what it admits to be an "unambiguous" provision of the License Agreement. But a legal dispute about an unambiguous contractual provision is exactly what the summary disposition procedure was designed to address. SCO attempts to manufacture a factual dispute where none exists, demands a list of CPUs that it already has, and argues about an immaterial time period. Indeed, because DaimlerChrysler ("DCC") undisputedly has not used the licensed software in many years, the time SCO had to wait to receive that information can hardly form the basis of denial of DCC's motion. At bottom, SCO's arguments, though full of sound and fury, serve only to demonstrate that summary disposition should be granted.

I. SCO DOES NOT DISPUTE THE FACTS MATERIAL TO ITS CLAIMS.

This Court should grant DCC's motion because SCO fails to respond to DCC's statement of undisputed facts with evidence that identifies a ***genuine*** issue of ***material*** fact for a jury to decide. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(C)(10), (G)(4)). In particular, SCO does not dispute that:

- SCO requested a certification from DCC purportedly pursuant to Section 2.05 of the License Agreement (*see* June 15, 2004 Affidavit of William Broderick ("Broderick Aff.") ¶ 32);[1]
- DCC certified that there is no Designated CPU, or any CPU, on which the UNIX software licensed under the License Agreement is being used (*id.* ¶ 42);
- DCC certified that there is no Designated CPU, or any CPU, on which the UNIX software licensed under the License Agreement has been used, for more than for seven years (*id.*);
- DCC certified that it "is in full compliance with the License Agreement" (*id.*); and
- the License Agreement did not require DCC to respond to a request for certification within 30 days. (*Id.* ¶ 33.)

[1] Nothing in the Broderick Affidavit raises a genuine issue of material fact. Moreover, as discussed in DCC's accompanying Motion to Strike, much of the Broderick Affidavit should be stricken as incompetent in any event.

These facts establish that there is no dispute that DCC did not breach the License Agreement because DCC provided the certification required by the plain terms of Section 2.05. Inasmuch as the only facts SCO even attempts to dispute are immaterial, this Court should "render judgment without delay" against SCO. See *Pinnacle Express Inc v Trout*, No 01-441 CZ, 2002 WL 1547540, at *2 (Mich Cir Ct Jun 16, 2002) (attached as Exhibit A).

II. SCO ADMITS THAT SECTION 2.05 IS UNAMBIGUOUS.

SCO concedes that Section 2.05 is not ambiguous: "SCO submits that Section 2.05 is indeed unambiguous – but not in favor of Daimler's motion." (See The SCO Group, Inc.'s Memorandum of Law in Opposition to DaimlerChrysler Corporation's Motion for Summary Disposition ("SCO Mem.") at p. 15.) Because SCO concedes that Section 2.05 is not ambiguous, this Court should not look outside the four corners of the License Agreement to construe that provision. See, e.g., *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 605-606; 576 NW2d 392 (1998)("Here, because defendant tacitly concedes that the indemnification provisions are not ambiguous, neither this Court nor the circuit court should be viewed as possessing the authority to look beyond the four corners of the documents."); see also *Nichols v Nichols*, 306 NY 490, 496; 119 NE2d 351 (1954). SCO also concedes that a contract term is only ambiguous "if the language is susceptible to two or more *reasonable* interpretations." (SCO Mem. p. 15 (quoting *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997)(emphasis added).) The mere fact that SCO urges an alternative interpretation, no matter how nonsensical, does not render the contract ambiguous or create a genuine issue of fact. See *Stroll v Epstein*, 818 F Supp 640,643 (SDNY 1993)("Unambiguous contractual language is not rendered ambiguous simply because the parties urge different interpretations in litigation.").

Section 2.05 requires DCC to provide a certification " listing the location, type and serial number of all DESIGNATED CPUs hereunder and *stating that* ....the SOFTWARE PRODUCT *is being used* solely on DESIGNATED CPUs [...] for such SOFTWARE PRODUCTS *in full compliance* with the provisions of this Agreement." (Emphasis added.) Section 2.05's mandate to provide a certification "stating that" the use "is in full compliance" cannot be tortured to require separate certifications with respect to other specific provisions of the License Agreement selected by SCO, much less to require DCC to make certifications unrelated to the License Agreement at all (as well as to provide evidence of such compliance).[2] (See SCO Mem. pp. 14-19.) SCO's argument that DCC must make other specific statements, in addition to the express recitation described in Section 2.05, is contrary to the most basic principles of contract interpretation. (See DCC's Opening Br. pp. 11-13.) The restrictive clause "stating that" indicates that DCC is required to make the statement that follows the clause. (*Id.* at 12-13.) That is precisely what DCC did, a fact SCO does not (and cannot) dispute. (See Broderick Aff. ¶ 42.)

SCO's interpretation of Section 2.05 is facially unreasonable and unsupported by law. Moreover, to the extent SCO's interpretation is based on the Broderick Affidavit, it may not be considered, as that affidavit constitutes parol evidence admissible only if this Court determines that Section 2.05 is ambiguous – which even SCO admits it is not. See *Teitelbaum Holdings Ltd v Gold*, 48 NY2d 51, 56; 396 NE2d 1029 (1979). Accordingly, there is no dispute that DCC provided the information required under the plain terms License Agreement, and this Court should rule as a matter of law that there has been no breach.

[2] It is noteworthy that SCO never explicitly requested the list of designated CPUs in its letter to DCC (See Broderick Aff. ¶ 32), but instead sought to use Section 2.05 to demand unauthorized and unrelated certifications to which it is not entitled. SCO's effort to misuse Section 2.05 to further its campaign against the Linux operating system is transparent and should not be permitted to proceed.

III. THE LACK OF A "LIST" OF DESIGNATED CPUS IS NOT MATERIAL.

SCO's second attempt to create an issue of fact where none exists is equally unavailing. SCO does not dispute that DCC sent SCO a certification stating that DCC "is in full compliance with the provisions of the subject Agreement." (Broderick Aff. ¶ 42.) SCO also does not dispute that DCC certified that it is not running the software that was the subject matter of the License Agreement on any of DCC's CPUs and has not done so for seven years. (*Id.*) Despite these certifications, SCO now argues that it requires a list of the designated CPUs that DCC is *not* using and has *not* used for more than seven years,[3] (see SCO Mem. pp. 11-12), even though DCC has explained that, based on DCC's years of non-use, such a list is no longer "relevant or possible." (See Broderick Aff. ¶ 42.)

As the License Agreement defines a designated CPU as "any CPU listed as such for a specific SOFTWARE PRODUCT in a Supplement to this Agreement" (License Agreement §1.03), SCO need only look to the Supplements to the License Agreement to see a list of the designated CPUs that DCC is *not* using and has *not* used for more than seven years. SCO even attached these Supplements as Exhibits to the Broderick Affidavit. See Broderick Aff. Ex. D, E. Inasmuch as DCC has already certified that there is *no* designated CPU or any CPU on which the software product is being used, it serves no purpose for DCC to itemize the CPUs on which it is *not* using and has *not* been using UNIX software.

IV. THE REASONABLENESS OF ANY CLAIMED "DELAY" IS IMMATERIAL.

Because there is no underlying contractual breach, any claimed "delay" in SCO's receipt of DCC's certification is immaterial. SCO does not contend that DCC's inability to respond to the SCO Letter within thirty days constitutes an independent breach of the License Agreement

[3] SCO also argues that if DCC is no longer using the software, then it must comply with Section 6.02. However, Section 6.02 does not require DCC to certify nonuse unless DCC elects to terminate the License Agreement, and it does not require termination based on non-use. (See License Agreement § 6.02.)

that actually caused harm to SCO, nor could it in good faith do so.[4] Instead, SCO claims "prejudice" because "if each [of SCO's hundreds of] licensee[s] were to disregard the request or unilaterally determine that it may respond whenever it wants, SCO would have to spend extraordinary resources." (SCO Mem. at p. 10.) This assertion cannot raise a material factual dispute.

First, as set forth above, SCO has sought to use Section 2.05 to demand unauthorized and unrelated certifications to which it is not entitled. SCO can hardly cry prejudice because DCC took too long to refuse to provide that information, or to send the one certification to which SCO is entitled. Further, whether DCC's "delay" is reasonable has no effect on how other SCO licensees respond to SCO's demands to those licensees; that is plainly not damage caused by DCC. In any event, SCO has proffered no evidence that it was "forced" to "spend extraordinary resources" to obtain a certification from DCC. It is undisputed that other than a single letter addressed to "Chief Executive Officer of Chrysler Motors Corporation,"[5] SCO made no attempt to obtain a certification from DCC prior to initiating this lawsuit. (See Broderick Aff. ¶¶ 31-37; Opening Br. ¶ 15.) In the absence of any underlying breach of the License Agreement or harm, the reasonableness of any claimed "delay" is immaterial, and summary disposition is appropriate. See, e.g., *A&R Kaliman, LLC v Breger, Gorin & Leuzzi, LLP*, 301 AD2d 813, 813; 753 N.Y.S.2d 589 (NY 2003) (affirming summary judgment dismissing breach of contract claim where no harm was sustained).

Respectfully Submitted,

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[4] In contrast to SCO itself, the plaintiff in each of the cases SCO cites for the proposition that a delay in the provision of the certification is material (see SCO Mem. at pp. 8-9) alleged actual harm stemming from the alleged delay, *i.e.*, the plaintiff sought either specific performance, damages resulting from the delay, or lost profits caused by the delay.

[5] Chrysler Motors Corporation ceased to exist 15 years ago, in 1989.