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

THE SCO GROUP, INC.,

Plaintiff,

v.

DAIMLERCHRYSLER CORPORATION

Defendant.



04-056587-CK



OAKLAND JUDGE RAE LEE CHABOT
COUNTY SCO GROUP INC V DAIMLERCHR

Honorable Rae Lee Chabot

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**THE SCO GROUP, INC.'S MEMORANDUM OF LAW
IN OPPOSITION TO DAIMLERCHRYSLER
CORPORATION'S MOTION FOR SUMMARY DISPOSITION**

Plaintiff The SCO Group, Inc. ("SCO") respectfully submits this Memorandum of Law in Opposition to DaimlerChrysler Corporation's ("Daimler") Motion for Summary Disposition under Michigan Court Rule 2.116(C)(10).

PRELIMINARY STATEMENT

SCO licenses its UNIX computer operating system software and technology to Daimler under a License Agreement that indisputably requires Daimler to provide SCO with a certification of its compliance with the terms of the Agreement. When SCO

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requested such a certification from Daimler, Daimler failed to provide any response of any kind for 110 days. Indeed, Daimler failed to respond in any way until SCO was forced to bring the present action in an effort to protect its rights. SCO here seeks to hold Daimler to its obligation to timely certify its compliance with the Agreement.

SCO's complaint presents the issue of whether Daimler may unilaterally decide no longer to comply with even the most basic terms of its license -- contractually agreed-upon terms of its license that allow SCO to protect its intellectual property from misuse. If every licensee followed Daimler's course of conduct in declining to provide a timely or adequate certification of compliance, SCO would be required to sue numerous licensees individually just to receive its bargained-for assurances of compliance. The precise purpose of the License Agreement's certification provisions is to avoid that necessity. Daimler's course of conduct thereby eviscerates the very certification rights the License Agreement seeks to protect.

The License Agreement limits Daimler's use of SCO's intellectual property and permits SCO to obtain a certificate of compliance to ensure that Daimler is not misusing that intellectual property. SCO alleges that Daimler breached the License Agreement in the following specific respects:

- Daimler failed to provide a certification within a reasonable period of time and provided its inadequate certification only after SCO had filed this lawsuit -- 110 days after SCO's written request that Daimler provide a certification;
- Daimler still has failed to identify the computers on which Daimler is entitled to use SCO's intellectual property; and

- Daimler still has failed to certify its full compliance with all of the provisions of the License Agreement.

In response, Daimler in effect contends not only that it can unilaterally determine whether, when, and to what extent it may respond to a certification request, but also that it has no continuing certification obligations -- general or specific -- merely because it alleges that it has unilaterally found a good reason for no longer complying with the License Agreement (in this case, Daimler's claim that it is not using UNIX). If any of Daimler's positions were credited, SCO's thousands of licensees around the world would be entitled to avoid SCO's contractual protections simply by determining that, in their view, there is no longer any need for them to comply with their contractual obligations.

Moreover, Daimler's proffered excuse for non-compliance only highlights why compliance should have been easy, why there was no reason for compliance to have taken *110 days*, and why there is no colorable basis for forcing SCO to sue to obtain the simple certification of compliance that Daimler agreed to provide when it entered into the License Agreement. If indeed Daimler is not using UNIX technology, and has not in the past violated the License Agreement's limits on the permitted use of UNIX technology, then Daimler certainly should have had no difficulty producing its contractually required certification sooner than almost *four months* after SCO's request for its certification, and without requiring SCO to commence this action.

Daimler also argues that it should not have been required to provide a "detailed" certification of compliance. However, if Daimler were in compliance, it would be no more difficult to provide a "detailed" certification than any other. In any event, Daimler did not offer to provide *any* certificate of compliance -- even in the brief form it claims

was appropriate. It refused to do so, even though according to what it now tells this Court, it should have been exceptionally easy to provide such a certification within a matter of a few days -- not more than 100 days. Finally, it refused to do so because -- it now tells this Court -- it unilaterally decided it no longer had the obligation to do so. The question here is whether a licensee may make that unilateral determination, thereby eliminating the licensor's express contractual rights and suggesting to licensees around the world that they may do the same.

Daimler nevertheless argues -- before any discovery has been taken -- that it is entitled to summary disposition. The motion lacks any basis under the standards governing summary disposition. The question of whether Daimler's certification was untimely raises issues of fact for the jury. Moreover, although SCO submits that the plain language of the Agreement unambiguously shows that Daimler's certification was also incomplete, that question at the very least presents a fact issue precluding summary disposition in Daimler's favor.

Accordingly, for the foregoing reasons, the Court should deny Daimler's motion.

COUNTER-STATEMENT OF MATERIAL FACTS

The counter-statement of material facts and the factual background to this motion are set forth in the accompanying Affidavit of William Broderick, Director of Software Licensing at SCO, sworn to on June 15, 2004.

ARGUMENT

I. DAIMLER'S MOTION MUST FAIL BECAUSE THERE ARE DISPUTED ISSUES OF MATERIAL FACT AND NO DISCOVERY OF THOSE ISSUES HAS BEEN CONDUCTED.

Under Michigan Court Rule ("MCR") 2.116(C)(10), the Court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Vitale v. Buffalino*, No. 230560, 2002 WL 1011761, at *1 (Mich. App. May 17, 2002) (attached hereto as Appendix A); *Progressive Timberlands, Inc. v. R&R Heavy Haulers, Inc.*, 243 Mich. App. 404, 407, 622 N.W.2d 533, 535 (2000) (the court "must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ."). The Court may not grant summary disposition unless the affidavits or other documentary evidence demonstrate that there is no genuine issue with respect to any material fact. See *Universal Underwriters Group v. Allstate Ins. Co.*, 246 Mich. App. 713, 720, 635 N.W.2d 52, 56 (2001).

The Court must be "liberal in finding a genuine issue of material fact." *Marlo Beauty Supply, Inc. v. Farmers Ins. Group*, 227 Mich. App. 309, 320, 575 N.W.2d 324, 329 (1998); *Whitmer v. Johnston*, No. 239953, 2003 WL 21958213, at *3 (Mich. App. Aug. 14, 2003) (attached hereto as Appendix B). Further, "a trial court must not make findings of fact or weigh credibility." *Nesbitt v. Am. Community Mut. Ins. Co.*, 236 Mich. App. 215, 225, 600 N.W.2d 427, 429 (1999). That is, "when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted." *Id.*

In addition, "Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed." *Colista v. Thomas*, 241 Mich. App. 529, 537, 616 N.W.2d 249, 254 (2000); *see also* *Spry v. The Grand Hotel*, No. 181447, 1996 WL 33348731, at *1 (Mich. App. Oct. 25, 1996) (attached hereto as Appendix C). If further discovery stands a fair chance of uncovering factual support for the opposing party's position, summary disposition cannot be granted. *Colista*, 241 Mich. App. at 537, 616 N.W.2d at 254; *accord* *Gaines v. Shell Oil Company*, No. 218659, 2001 WL 689910 (Mich. App. Apr. 10, 2001) ("In this case, there had been essentially no discovery at all and under the circumstances, there stood a fair chance that the completion of discovery might result in factual support for plaintiff.") (attached hereto as Appendix D). As the Court of Appeals has held under circumstances similar to those presented here:

In the absence of discovery, we conclude that it was premature to grant summary disposition for plaintiffs' failure to carry this burden. *Plaintiffs are entitled to at least a modicum of discovery to attempt to oppose summary disposition.*

Vitale, 2002 WL 1011761, at *1 (emphasis added).

Accordingly, Michigan courts routinely deny motions for summary disposition made before discovery has begun. *See, e.g., Kammerer v. Meadowbrook*, 456 Mich. 945, 616 N.W.2d 168 (1998), *reversing on basis of dissenting opinion*, No. 193261, 1997 WL 33353302, at *6 (Mich. App. Mar. 11, 1997) (attached hereto as Appendix E); *Townsend v. Chase Manhattan Mortgage Corp.*, 254 Mich. App. 133, 140-141, 657 N.W.2d 741, 745-46 (2003); *Gaines*, 2001 WL 689910, at *3; *Saldana v. Smith*, No. 214282, 2000 WL

33417387, at *2 (Mich. App. July 11, 2000) (attached hereto as Appendix G); *Spry*, 1996 WL 33348731, at *1.¹

Daimler filed its motion for summary disposition with its answer. There has been no discovery in this case. As demonstrated below and in the accompanying Affidavit of William Broderick, Daimler has breached the License Agreement by (i) not responding in a timely manner; (ii) not providing a list of Designated CPUs; and (iii) not certifying its compliance with all provisions of the License Agreement. None of the foregoing issues can be resolved in Daimler's favor on summary disposition.

II. DAIMLER'S UNTIMELY CERTIFICATION CREATES A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY DISPOSITION.

The License Agreement does not specify a time period in which certification must be made. Section 2.05 provides:

On [SCO's]² request, but not more frequently than annually, LICENSEE shall furnish to [SCO] a statement, certified by an authorized representative of LICENSEE, listing the location, type and serial number of all DESIGNATED CPUs hereunder and stating that the use by LICENSEE of SOFTWARE PRODUCTS subject to this Agreement has been reviewed and that each such SOFTWARE PRODUCT is being used solely on DESIGNATED CPUs (or temporarily on back-up CPUs) for

¹ Daimler argues that there is no case or controversy because, in Daimler's view, there is no breach. See Daimler Mem. at 16. Daimler is mistaken. In Daimler's hypothetical, the case would fail for want of an element of the claim. But even Daimler does not contest its obligation to provide a certification. In asking the Court to determine the requisite timing and scope of that required certification, SCO has plainly presented a case and controversy. SCO is entitled (for example) to a declaration that sets forth the parties' rights and obligations related to the certification requirement under the License Agreement. See *QQC, Inc. v. Hewlett-Packard Co.*, 258 F. Supp. 2d 718, 724-25 (E.D. Mich. 2003) ("where there is controversy as to the meaning and effect of a written contract, interpretation may be sought from and made by the declaratory judgment") (quoting *Panhandle E. Pipe Line Co. v. Mich. Consol. Gas Co.*, 177 F.2d 942, 944 (6th Cir. 1949)); *Allstate Ins. Co. v. Hayes*, 442 Mich. 56, 70, 499 N.W.2d 743, 749 (1993) (federal precedent on declaratory judgments relevant to declaratory judgments in state court).

² "SCO" is substituted for "AT&T" throughout the quotations of the Licensing Agreement herein because SCO is AT&T's successor-in-interest to the license as well as the intellectual property rights protected therein. See Broderick Aff. at 3 n.1.

such SOFTWARE PRODUCTS in full compliance with the provisions of this Agreement.

License Agreement, § 2.05. Based on the absence of any express period in the License Agreement, Daimler argues that, as a matter of law, it did not breach the License Agreement by responding to the SCO Letter after 110 days. Under well-established law, genuine issues of material fact preclude summary disposition of Daimler's argument.

Where a contract is silent regarding the time for performance, New York law implies a duty to perform within a reasonable time. *See Savasta v. 470 Newport Assoc.*, 82 N.Y.2d 763, 765, 603 N.Y.S.2d 821, 623 N.E.2d 1171 (1993) ("When a contract does not specify time of performance, the law implies a reasonable time.").³ "What constitutes reasonable time for performance depends upon the facts and circumstances of the particular case." *Id.* The inquiry requires consideration of (1) the nature and object of the contract, (2) the previous conduct of the parties, (3) the presence or absence of good faith, (4) the experience of the parties, and (5) the possibility of prejudice or hardship to either one. *Zev v. Merman*, 73 N.Y.2d 781, 783, 536 N.Y.S.2d 739; 533 N.E.2d 669 (1988); *accord Lake Steel Erection, Inc. v. Egan*, 61 A.D.2d 1125, 1126, 403 N.Y.S.2d 387, 389 (4th Dep't 1978). The question of what is a reasonable period of time for performance in a particular contract is a question of fact for the jury. *See Young v. Whitney*, 111 A.D.2d 1013, 1014, 490 N.Y.S.2d 330, 331 (1st Dep't 1985) ("What is a reasonable time [for performance] is for the jury to determine considering the subject matter of the contract, what the parties contemplated at the time it was entered and the circumstances surrounding performance."); *Lake Steel*, 61 A.D.2d at 1126, 403 N.Y.S.2d

³ Section 7.12 of the License Agreement provides that New York law governs its construction as well as issues relating to performance under the Agreement. Daimler does not suggest otherwise.

at 389 ("The question of whether performance has been delayed beyond a reasonable time is for the jury.").

Moreover, where "there is no contractual provision making time of the essence, either party may subsequently give notice to that effect so long as the notice is clear, distinct and unequivocal and fixes a reasonable time within which to perform." 76 N. Assoc. v. Theil Mgmt. Corp., 132 A.D.2d 695, 696, 518 N.Y.S.2d 174, 176 (2d Dep't 1987) (finding breach of contract where party failed to perform after receiving notice of 32-day extension of time within which to perform). Thirty days is a commercially reasonable amount of time: the Uniform Commercial Code requires merchants responding to requests for further assurances to do so within thirty days. N.Y.U.C.C. § 2-609(4). Accordingly, by demanding that Daimler respond to the SCO letter in thirty days, SCO fixed thirty a reasonable time within which Daimler had to perform.

Daimler has proffered no evidence to show that it performed within a reasonable time or that SCO's request to respond within thirty days was unreasonable. The absence of any evidence that Daimler's delay was reasonable precludes a finding that its performance complied with the agreement as a matter of law. See *Suttman v. Nedow*, No. 204421, 1999 WL 33454999 (Mich. App. Feb. 2, 1999) ("In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence.") (attached hereto as Appendix F).

Daimler argues only that the absence of a specific time in the contract allowed it to respond at any time it wanted. Daimler Mem. at 14 n.5. The absence of a specific time period in the License Agreement itself, however, does not mean that Daimler could

respond *at any time*; at a minimum the law required Daimler to respond within a *reasonable* time. Furthermore, the applicable law permits SCO to specify a time for performance (as it did), provided that its request is reasonable. In light of the law and facts, any argument that thirty days was *unreasonable* as a matter of law must fail.

If accepted, Daimler's argument would require a party in SCO's position to institute litigation every time it sought to receive a certification to which it was contractually entitled. Thirty days is more than sufficient time for a licensee to provide the certification requested by SCO if a licensee is in compliance with all the requirements of the License Agreement, there is a policy in place at the licensee that tracks and controls the handling of third-party software, and the licensee's employees are kept informed of the License Agreement's requirements. See Broderick Aff. ¶ 35.

In addition, SCO acted in good faith in seeking to secure Daimler's compliance with the License Agreement. Daimler complains that SCO never called Daimler after sending the SCO Letter, *see* Daimler Mem. at 5, but the more notable omission was Daimler's failure to make a good-faith attempt to comply with the SCO Requests in a timely fashion. Daimler never even confirmed its receipt of the SCO Requests, much less sought more time to respond.

Daimler's refusal to respond in a timely manner is prejudicial to SCO. There are thousands of UNIX licensees. SCO had made good-faith attempts to contact over 750 of those licensees to secure assurances of their compliance with the terms of their licenses. If each licensee were to disregard the request or unilaterally determine that it may respond whenever it wants, SCO would have to spend extraordinary resources and potentially commence hundreds of court actions to enforce its rights. It would be

impracticable and costly for SCO to have to sue each licensee to obtain basic assurances of performance. *See Broderick Aff.* ¶ 39. In contrast, Daimler can identify no prejudice in having to respond to SCO's reasonable requests within thirty days.

It is undisputed that Daimler did not respond to the SCO Letter within the thirty days requested by SCO. Because the reasonableness of SCO's requested time in which to certify is a question of fact for the jury, summary disposition is inappropriate.

III. DAIMLER'S FAILURE TO PROVIDE A LIST OF DESIGNATED CPUs CREATES A DISPUTED ISSUE OF MATERIAL FACT PRECLUDING SUMMARY DISPOSITION.

Daimler's motion is further premised on its claim that it provided a full and adequate certification in compliance with Section 2.05 of the License Agreement. Daimler's own admissions and documents, however, demonstrate that it failed to provide a certified list of Designated CPUs as required by Section 2.05.

Section 2.05 provides, in part, that Daimler "shall furnish to [SCO] a statement, certified by an authorized representative of Licensee, listing the location, type and serial number of all Designated CPUs hereunder."⁴ Daimler admits that it was required to provide a certified list of Designated CPUs. *See Daimler Mem.* at 10, 11 n.3. However, instead of certifying such a list, the Daimler Response states that

there is no DESIGNATED CPU, or any CPU, on which the SOFTWARE PRODUCT licensed under the subject Agreement is being used. This has been the case for more than seven years. As a result, no list of the location, type and serial number of any DESIGNATED CPU is relevant or possible.

⁴ The License Agreement defines CPUs as computer central processing units identified for the use of UNIX under the License Agreement. The Daimler Response expressly adopts this definition. *See Broderick Aff.* ¶¶ 40-42.

Daimler now simply argues that it "provide[d] SCO with the required information about Designated CPUs (explaining that none are in use)." Daimler Mem. at 14.

No language in Section 2.05 allows Daimler to avoid its obligation to certify a list of Designated CPUs by stating that none are currently in use, *see* Broderick Aff. ¶ 44, and Daimler provides no evidence for such an interpretation. Daimler's interpretation runs counter to the language of Section 2.05, its own admissions of what is required under Section 2.05, and the overall structure of the License Agreement.

Daimler's interpretation of Section 2.05 is unreasonable because there is a separate provision of the License Agreement that expressly provides for a certification of non-use. Section 6.02 provides a mechanism for Daimler to terminate the License Agreement if it certifies that it has discontinued use of UNIX and has returned or destroyed all copies of UNIX. Daimler made no attempt to comply with the requirements of Section 6.02. *See* Broderick Aff. ¶¶ 45-46. Accordingly, if Daimler wanted to terminate its obligation to certify a list of Designated CPUs based on its discontinued use of UNIX, it was required to follow the procedures specified in Section 6.02.

Were Daimler allowed to respond to Section 2.05 by merely asserting its non-use of UNIX, Section 6.02 would be rendered meaningless. Daimler's interpretation contravenes well-established rules of contract interpretation that require a contract to be construed so as to give meaning to all its provisions and to avoid interpretations that render particular provisions meaningless. *See Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46, 150 N.Y.S.2d 171, 174, 133 N.E.2d 688, 690 (1956); *Laba v. Carey*, 29 N.Y.2d 302, 308, 327 N.Y.S.2d 613, 618, 277 N.E.2d 641, 644 (1971); *see also* *Loctite VSI Inc. v. Chemfab N.Y. Inc.*, 268 A.D.2d 869, 871, 701 N.Y.S.2d 723, 725 (3d Dep't 2000)

("courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect").

Although the plain meaning of Section 2.05 should end the issue in SCO's favor, Daimler is incorrect in asserting that no purpose would be served by its compliance with its obligation to provide SCO with a list of Designated CPUs. One of SCO's most important assets is the intellectual property consisting of its UNIX technology. SCO implements significant measures to ensure its control over the dissemination of that intellectual property and its ability to generate revenue from such intellectual property. One such measure is requiring that licensees identify the specific computer on which they will install and use the UNIX technology. See Broderick Aff. ¶¶ 47-58.

By requiring licensees to identify CPUs running UNIX, the License Agreement seeks to ensure that licensees themselves control the use and dissemination of UNIX technology. If a licensee does not know which computers are licensed for UNIX technology, it is difficult, if not impossible, for that licensee to ensure that the technology was properly maintained and controlled, rather than copied, transferred, or removed by a departing employee in violation of the terms of the License Agreement. In addition, part of the UNIX license fee is based on the number of CPUs on which a licensee installs SCO's UNIX technology. By imposing additional costs per Designated CPU, the License Agreement provides further incentives for licensees to control the dissemination of UNIX technology. Finally, requiring licensees to track and notify SCO of the Designated CPUs also permits SCO to properly earn a fair revenue stream from a licensee's use of UNIX technology. See Broderick Aff. ¶¶ 50-53. Apparently, Daimler was fully aware of its responsibility to maintain current and accurate identifications: it

twice updated its Designated CPUs through supplements to the License Agreement. See Broderick Aff. ¶¶ 54-57 & Exhibits D and E.

Daimler's failure to certify a list of Designated CPUs is independently sufficient proof to defeat Daimler's motion for summary disposition. Construing all the evidence in SCO's favor, as is required, see *Vitale*, 2002 WL 101176 at *1, the Court cannot find that Daimler fully complied with Section 2.05.⁵

IV. DAIMLER'S REFUSAL TO CERTIFY ITS COMPLIANCE WITH ALL OF ITS OBLIGATIONS UNDER THE LICENSE AGREEMENT CREATES A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY DISPOSITION.

Daimler further incorrectly argues that the License Agreement did not authorize SCO to require Daimler to certify its compliance with the several specific items listed in the SCO Requests. See Daimler Mem. at 8-13. SCO submits that the language of the Agreement unambiguously precludes Daimler's interpretation. See Broderick Aff. ¶¶ 59-61. At a minimum, because the License Agreement does not unambiguously support Daimler's interpretation, the Court must deny Daimler's motion.

The primary goal in the interpretation of contracts is to determine the intention of the parties. See *Allied Clove Lakes Co. v. Demisay*, 74 A.D.2d 466, 468, 428 N.Y.S.2d 460, 461 (1st Dep't 1980); accord *Portable Spas Plus, Inc. v. Integrated Software Sys., Inc.*, No. 242300, 2003 WL 22976523, at *5 (Mich. App. Dec. 18, 2003) (attached hereto as Appendix H). Ambiguous contractual language precludes the Court from determining the parties' intent on summary disposition. That is,

⁵ At a minimum, Daimler's failure to fulfill the CPU listing requirement presents a question of fact as to whether a licensee's repudiation of that requirement can ever be justified and was justified in this case. Further factual development through discovery may assist the trier of fact in resolving this issue.

in the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are not ambiguous. A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. In an instance of contractual ambiguity, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate.

D'Avanzo v. Wise & Marsac, PC, 223 Mich. App. 314, 319, 565 N.W.2d 915 (1997) (internal citations omitted); *see also Michaels v. Amway Corp.*, 206 Mich. App. 644, 649, 522 N.W.2d 703, 706 (1994) ("If the terms are ambiguous, a factual development is necessary to determine the intent of the parties, and summary disposition is inappropriate."). The same rules apply under New York law. *See Manchester Techs., Inc. v. Didata Inc.*, 303 A.D.2d 726, 757 N.Y.S.2d 439 (2d Dep't 2003) ("While the meaning of the contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact."). That is, "where the language used is ambiguous and admits of different reasonable interpretations, it creates a factual question that cannot be determined on a motion for summary judgment." *Konik v. Anesthesia Assocs.*, 128 A.D.2d 933, 934, 512 N.Y.S.2d 739 (3d Dep't 1987)); *see also Pellot v. Pellot*, 305 A.D.2d 478, 481, 759 N.Y.S.2d 494 (2d Dep't 2003) ("Where the language of a contract is susceptible to varying but reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact.").

Daimler goes to great lengths to argue that Section 2.05 is unambiguous and that it did not compel Daimler to certify compliance with the License Agreement. SCO submits that Section 2.05 is indeed unambiguous -- but not in favor of Daimler's motion.

Section 2.05 (quoted in full in Part II, above) requires Daimler to certify that “each such SOFTWARE PRODUCT is being used solely on DESIGNATED CPUs (or temporarily on back-up CPUs) for such SOFTWARE PRODUCTS *in full compliance with the provisions of this Agreement.*” License Agreement, § 2.05 (emphasis added). Section 2.05 thus plainly requires a certification that Daimler is in full compliance with “the provisions” of the License Agreement. Such provisions include the requirement that Daimler not export UNIX to certain countries (§ 4.01), that Daimler not assign UNIX (§ 7.08), that Daimler maintain the confidentiality of UNIX (§ 7.05(a)), that Daimler appropriately notify its employees about the confidentiality requirements (§ 7.05(a)), and that Daimler not transfer UNIX in any manner (§ 7.08).

Daimler acknowledges that it must provide a certification that its use of UNIX technology is in “full compliance with the contract.” Daimler Mem. at 11. Nonetheless, instead of unconditionally certifying its full compliance with the provisions of the License Agreement, the Daimler Response states that Daimler has not used UNIX in seven years “*and as a result* [Daimler] is in full compliance with the provisions of the subject Agreement.” Broderick Aff. ¶ 42 & Exhibit C (emphasis added). By this self-limiting premise, the Daimler Response fails to certify compliance either with the License Agreement’s restrictions on export, transfer, and assignment of UNIX, or with its confidentiality provisions. *See id.* ¶ 66. Daimler has not certified its full compliance with the License Agreement; it has merely substituted an inadequate conditional statement.

It does not -- and cannot -- follow that because Daimler (allegedly) has discontinued using UNIX, it is in full compliance with the License Agreement. Indeed,

Daimler's obligation to maintain the confidentiality of UNIX survives the discontinued use and even termination of the Agreement. See Broderick Aff. ¶¶ 45-46 & Exhibit A, §§ 6.09, 7.06. Thus, regardless of its current use of UNIX, Daimler must abide by the confidentiality provisions of Section 7.05(a) and must certify that it is currently doing so.

The SCO Requests each track a provision of the License Agreement or are directly derived from a provision of the License Agreement. For example, SCO Requests 1 and 2 directly track the confidentiality obligations of § 7.05(a). Request 2 also seeks evidence of the compliance with the confidentiality obligations and suggests, but does not demand, what types of evidence may be available. Requests 3 and 4 track and combine the obligations of §§ 2.01, 2.02, 2.06 and 7.07. Because SCO believes UNIX technology is being used in Linux, it specifically asks Daimler about such use. Request 5 directly tracks § 4.01. Request 6 directly tracks § 7.09, and Request 7 directly tracks § 7.08. Because the transfer of UNIX source code to Linux is relevant to the crucial issue of the unauthorized use of SCO's intellectual property, SCO asks Daimler directly about Linux.⁶ See Broderick Aff. ¶ 61.

⁶ Daimler argues that if the parties to the License Agreement had intended to require certification regarding the use of UNIX technology in Linux, they would have included such language in Section 2.05. Daimler Mem. at 12. This is mistaken. It was not until well after 1988, when the License Agreement was signed, that Linux came into existence and even later that Linux became a commercial platform capable of replacing UNIX. Broderick Aff. ¶ 26. Neither Daimler nor SCO drafted the License Agreement, and neither party, nor the original licensor and licensee, could have contemplated the use of Linux at that time. *Id.* Where the parties did not contemplate the use of the new technology at the time of executing the contract, their intent must be gleaned from a broader reading of the contract and from the natural implications of the language. See, e.g., *Abkco Music, Inc. v. Westminster Music, Ltd.*, 838 F. Supp. 153 (S.D.N.Y. 1993) (whether contract providing licensee "all rights" in copyrighted songs applied to newly developed technologies was question of fact for the jury).

The SCO Requests that relate to Daimler's use of Linux are the natural outgrowth of the requirement that Daimler comply with the other provisions in the License Agreement and certify that adherence. Daimler has agreed not to assign, transfer, or dispose of UNIX, or to use it for the benefit of others. See Broderick Aff. ¶ 18 & Exhibit A, §§ 2.06, 4.01, 7.08 and 7.09. Daimler

Compliance with the certification provisions of the License Agreement and specifically the SCO Requests has taken on particular significance because of SCO's licensees' conduct. Daimler and its employees, engineers and technicians have had access to and gained an understanding of UNIX and of inner workings. In doing so, they have obtained intimate knowledge of the UNIX source code and the methods and concepts contained therein -- the intellectual property that the License Agreement seeks to protect. *See Broderick Aff.* ¶¶ 62-63. For over fifteen years, Daimler's employees have used this knowledge to modify UNIX to meet Daimler's commercial needs. *Id.* ¶ 64. Daimler and numerous other licensees have publicly stated that they now use (and have been using) Linux, a product that SCO contends wrongfully incorporates its property rights in UNIX. *Id.* ¶¶ 64-65.

Section 2.05 is precisely the type of vehicle that enables licensors such as SCO to secure assurances that their property rights are being protected in accordance with the terms of their license agreements. It is the most practical way for SCO to monitor and to ensure that its numerous licensees are complying with the terms of their licenses. *Id.* ¶ 38. When SCO believes that there has been a specific breach, such as that related to Linux, it must be able to inquire about it. To allow Daimler merely to assert that it has complied with Section 2.05 without certifying compliance with the restrictions on the permitted use of UNIX technology would deprive SCO of the meaningful assurances to which it is entitled under the License Agreement.

has agreed to maintain the confidentiality of UNIX and notify all of its employees of their confidentiality obligations. *See Broderick Aff.* ¶ 16. Therefore, the SCO Requests do not seek to impose new obligations, but merely request that Daimler certify that it has complied with its existing obligations in connection with Linux. *See Broderick Aff.* ¶¶ 31-32 & Exhibit C.

Daimler's certification that it is not currently using UNIX says nothing about whether it exported UNIX, whether it assigned UNIX, whether it transferred UNIX or any derivation of UNIX, or whether it properly maintained the confidentiality of UNIX and provided the appropriate notification to its employees regarding these confidentiality obligations. See *Broderick Aff.* ¶ 66. All of those obligations arise from provisions of the License Agreement -- to which Daimler must certify its compliance. SCO contends that the intent of Section 2.05 is to allow the licensor to secure adequate assurances and certifications that the licensee is performing "in full compliance" with the contract. The language of Section 2.05 is not so clear and plain as to allow only for Daimler's interpretation -- and SCO submits that the plain language provides otherwise. In no event is summary disposition for Daimler warranted.

Indeed, to the extent the provision is ambiguous, discovery would shed further light on the technological context in which the License Agreement was executed, the uses of UNIX at the time of contracting, the uses of UNIX now, and the advent of the commercialization of Linux based on UNIX. Such discovery would further demonstrate why an empty certification is insufficient and is not what is required under the License Agreement. See *D'Avanzo*, 223 Mich. App. at 319, 565 N.W.2d 915; *Pellot*, 305 A.D.2d at 481, 759 N.Y.S.2d 494.

Construing all facts and inferences in SCO's favor, the Court cannot conclude that Daimler's self-limited certification complies as a matter of law with its obligations under Section 2.05. Instead, the final interpretation of the parameters of Section 2.05 must await further factual development through discovery. Because no such discovery has yet been conducted, summary disposition on this issue is particularly inappropriate.

CONCLUSION

For the foregoing reasons, SCO respectfully requests that the Court deny Daimler's motion in all respects.

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Respectfully submitted,

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