(A)

STATE OF MICHIGAN

6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE SCO GROUP,

Plaintiff,

File No. 2004-056587-CK

v

DAIMLER-CHRYSLER CORPORATION,

Defendant.

_____/

MOTION HEARING

BEFORE THE HONORABLE RAE LEE CHABOT, CIRCUIT COURT JUDGE

Pontiac, Michigan - Wednesday, July 21, 2004

APPEARANCES:

For the Plaintiff: **BARRY ROSENBAUM (P26487)**
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Pontiac, Michigan

Wednesday, July 21, 2004 - 09:46:25 a.m.

UNIDENTIFIED SPEAKER: Now calling 2004-056587-CK, SCO versus Daimler-Chrysler.

THE COURT: Good morning.

MR. ROSENBAUM: Good morning, your Honor, Barry Rosenbaum appearing on behalf of the Plaintiff, the SCO Group, Inc.

MR. FEENEY: James Feeney appearing on behalf of Daimler-Chrysler, your Honor.

MR. ROSENBAUM: And, your Honor, we have some counsel from out of State that would like to be admitted for purposes of this matter.

THE COURT: Okay.

MR. ROSENBAUM: Motions have been filed on behalf of the Plaintiff, we have Mr. Mark Hice (ph) from Miami, a member of the --

MR. HICE: Your Honor?

MR. ROSENBAUM: -- Bar of the State of Florida. Mr. Steven Fruit (ph) from a member of the State Bar of New York.

THE COURT: Hi.

MR. ROSENBAUM: The motion contains the required allegations and I'd ask that the Court admit them to

practice in this jurisdiction.

THE COURT: And you are sponsoring them?

MR. ROSENBAUM: I am sponsoring them, your Honor.

THE COURT: Okay. Any opposition?

MR. FEENEY: No, your Honor. We have--I am sponsoring Mr. Mark Matuchiak (ph) from--who is a member of the Massachusetts Bar and I would ask that he be admitted, your Honor.

THE COURT: Okay. Motion granted as to all three counsel.

MR. FEENEY: Thank you. Your Honor, this is Daimler-Chrysler's motion for summary disposition and I know the Court has read the papers. It's a little--for me, it's --probably not for the Court, but for me, it's a little bit technical dealing with software and computers. I didn't grow up in the age of computers so if I could just take 30 seconds to frame the issue for you, because really, at the end of the day, your Honor, this is a very simple, straight forward breach of contract case.

The issue, your Honor, before the Court today is whether this section, 2.05 of the software license agreement, requires a certification of compliance with the agreement in the detailed enumeration that is set forth in

the letter requesting compliance, or, does that section

Tape No. 04-108A, 07-21-04, 09:48:31

require, as it plainly states, that the party to whom the certification is--from whom the certification is sought merely state that the licensee has, in all respects, complied with the agreement. That's really the long and the short of it, your Honor.

And the license agreement itself, which is attached as Exhibit A to the Plaintiff's complaint, in section 2.05 plainly states as follows: "On AT & T-IS's request"--and for purposes of this motion it is not disputed that SCO is a successor and interest to AT & T, but "no more frequently than annually. Licensee, that's now Daimler-Chrysler, at the time that this agreement was entered into, your Honor, it was Chrysler Motor Corporation, shall furnish to AT & T/IS a statement certified by an authorized representative of licensee listing the location, type and serial number of all designated CPU's 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 CPU's, or temporarily on backup CPU's, or such software products, in full compliance with the provisions of this agreement."

Now, the letter that was sent to Chrysler--to the chief executive officer of Chrysler Motors Corporation in Highland Park on December 18th, 2003, which is attached as

Tape No. 04-108A, 07-21-04, 09:50:20

Exhibit B to the complaint, on the second page of the letter accurately set forth the literal language of paragraph 2.05 but then proceeded to enumerate a demand, which the letter claimed was required by that paragraph, requiring certifications setting forth paragraphs 1 through 7 in some detail of what it was required to do, including a bunch of certifications pertaining to the use or non-use of an operating software system called Lennox (ph).

Now, that was what was sent to Daimler-Chrysler. Daimler-Chrysler did not respond to that request until after the lawsuit was filed. But the lawsuit itself was filed basically claiming that Daimler-Chrysler had breached the software license agreement because it had not provided the certification that was demanded. So clearly, the Court can see that a fundamental issue is, well was what was demanded was what was set forth in section 2.05? I mean, that's really the ultimate issue.

Daimler-Chrysler, before responding to the complaint, and the Plaintiffs were gracious enough to give us an additional time to respond, before responding to the complaint and filing this motion, in part, your Honor, to clarify and frame the issue properly, Daimler-Chrysler

responded to the letter on April 6th and that response is set forth as Exhibit A to Exhibit 1, which is an affidavit

signed by Paul Eichbauer (ph) attached to our motion.

In the response, your Honor, there are some reservations that are provided, but most importantly, the response specifically says in the third paragraph--second full paragraph, "As a result and without waiving, any of its rights under the SA," software agreement, "or under applicable law, including without limitation its right to assert that SCO has no rights under the SCA--under the SA, that SCO has no right to seek the certified statement that its letter requests, that licensor has waived intentionally any right to seek a certified statement," etcetera, "Daimler-Chrysler provides the attached information to SCO." And the attachment simply states that on April 6th, 2004 that--signed by Norman Powell, who's a senior manager, tech services for Daimler-Chrysler, he certifies that as of the date indicated there is no designated CPU or any CPU on which the software product, as defined by the agreement, is being used. And that this has been the case for more than seven years.

And he further certifies that the use of the software product licensed under the agreement has been reviewed, which is the exact language of section 2.05 and he further states that it is--that none of the software product

is being used or has been used for more than seven years,

Tape No. 04-108A, 07-21-04, 09:53:39

and as a result, Daimler-Chrysler is in full compliance with the provisions of the subject agreement. Section 2.05 requires a statement that the licensee is in full compliance.

So, where does that leave us? I think it leaves us in this place. If the Court agrees that section 2.05 is unambiguous, then this is certainly an appropriate matter for summary disposition. SCO, in their response to the motion, acknowledges that section 2.05 is unambiguous. This is a question of what section 2.05 requires. If it requires --if it requires the enumerations of all these paragraphs that were set forth in their letter, then obviously our letter that we submitted does not satisfy or meet those requirements. But if, as we say, your Honor, what section 2.05 requires is exactly what it says, which is a statement that we are in compliance, we have complied. And the issues that have been raised in response are really immaterial and have nothing to do with this.

Quibbling about whether we responded within 30 days when there's no provision for the time period, or 105 days really doesn't matter. We haven't used the software for more than seven years. That's really immaterial to the

issue of the question of breach, and they don't even allege any harm resulting from a delay of, under their theory, 60

days.

And second, your Honor, the issue of the failing to list CPU's. Number one, they didn't even ask for a list of CPU's in their letter, and number two, listing CPU's that aren't using software when we've certified that we're not using it and haven't used it for seven years, is certainly immaterial as well. Therefore, your Honor, we would ask the Court to find that there is no genuine issue of material fact and grant the motion.

THE COURT: Thank you.

MR. HICE: Morning, your Honor. Your office indicated that you've thoroughly read everything and for us to keep it brief. I'm not gonna be as brief as your first hearing--or first motion--

THE COURT: Right.

MR. HICE: --but I will keep it brief and limit my response. However, before getting into that I think it's important as counsel for Daimler stated, that there be a fundamental understanding of this license agreement and why, in fact, to simply assert, we're not using it and as a result we're in full compliance, is inadequate and not

allowed for under the agreement.

Under the software agreement that was entered into in the 1980's between AT & T and Chrysler at the time, they

Tape No. 04-108A, 07-21-04, 09:56:22

got much more than what is being ascribed--or described to you today in the Court. What they got under this software agreement is, they got full access to source code. They also got the right to use that source code, to modify it, to create derivative works and they agreed that they would keep the source code confidential, they would keep the derivative works and the modifications confidential if they contained any of the original source code, they also agreed to keep the methods and concepts confidential and there were all sorts of requirements to protect the integrity of this software.

And so unlike the situation where your Honor may be familiar, for example, at a personal level where you get Microsoft and you load that on your computer, they give you a CD and they say here, load it on and you're good to go. What companies like Chrysler in the corporate enterprise world get is, they get that CD but they also get everything that underlies it. Microsoft will not ever give you or anyone else their source code, it's the crown jewels. That's the same case here with the UNIX source code and the enterprise or corporate computing market. But the difference is, they got that source code and they were

required to treat that confidentially. And it's much more than just, we had the CD on a computer, we stuck it in a

Tape No. 04-108A, 07-21-04, 09:58:42

closet seven years ago and haven't looked at it since then so we therefore must be in full compliance. They are obligated to treat all of that product, the source code, their modifications to it, their derivative works, the methods and concepts and keep the related documentation that goes with all of that confidential.

They are required to instruct their employees that they must keep all of this confidential. And what they have done, in their certification, which they've acknowledged, as they must, that they did not ever provide one, and they're required to do so by the agreement. And I don't think there's any case that supports that as a matter of law waiting almost four months and beyond 30 days after suit was filed it is sufficient. So on that grounds, certainly summary disposition is incorrect.

But on the more fundamental issue of, is the certification that they did provide adequate, because where they say we are not using it, have they complied--does that comply with the terms of section 2.05. And clearly it does not. The 2.05 says that it must be solely on such designated CPU's and in full compliance with the provisions

of this agreement. There has to be a statement that they're in full compliance with the provisions of this statement. And the question for the Court is, can they unilaterally

Tape No. 04-108A, 07-21-04, 09:59:59

limit what they're providing the certification to. Can they say, we're not using it, so therefore, we must be in full compliance? They're obligated to identify where this code appears on any CPU, whether it's the designated CPU or any others. They state that they're not using it. If it's stored on a CPU, we're entitled to know where that is because if they don't know where it is, how can they certify that they are keeping it confidential and secure so that it's not being made publicly available.

So it's a fundamental and incorrect limitation on the requirement of the certification. They have to be able to provide a full and complete certification.

The items that are enumerated in items 1 through 7 of the letter correspond directly to limitations that they agreed to in the agreement, to keep it confidential, to inform their employees to keep it confidential, to make sure that the source code stays in the United States, that it does not get exported outside the United States, so, for example, in this case, that it's not appearing in Germany now that Daimler is part of this company.

And they have wholly failed to provide that type of certification that makes clear that they are, in fact, complying with all of the requirements, to keep the source code, the modifications to that source code, to keep it to

Tape No. 04-108A, 07-21-04, 10:00:18

the--keeping all that confidential.

If we were to accept the proposition that we're not using it and they don't want to have to go through the burden of providing the certification, the agreement specifically addresses how that operates. Under section 6.02 of the agreement it specifically states what--if you are not going to use it and you want to terminate under the license, you have to return all the source code and related documentation or certify that you've destroyed it. They've not done that.

So either they have to provide the full certification indicating that the source code, the methods and concepts, the modifications, all of that has been kept confidential, it's not being used on any other CPU's in any manner whatsoever, or, they can take advantage of 6.02 of the agreement and terminate and specifically identify that they have destroyed all of the source codes so that we, at AT & T, now SCO, know that our source code is not in a position to be made publicly available by Daimler, and that they have, in fact, throughout the years, instructed their employees to maintain the confidential nature of this source

code, the derivative works, the modifications. Because it quite simply is not the situation where one can say, we haven't used that computer over there in seven years so as a

Tape No. 04-108A, 07-21-04, 10:01:42

result, we must be in compliance. That is not what section 2.05 says. It does not give you a, we're not using it exception so it automatically translates into, we are in full compliance.

They are only in full compliance if, in fact, they have maintained it in confidence, if they have not exported it outside of the United States, that they have informed their employees that they must keep it confidential, that they're not using it in whole or in part in any other place, which is much more than just that one CD. They can't take the source code, the written documentation, and use it now in this new operating system that they've publicly stated that they're using, Lennox, and assist in that. If they do that, they must tell us about it. It's as simple as that. They've absolutely--they initially absolutely refused to do it, then they decided to prepare this letter that equates non-use with full compliance, which is clearly inadequate under the terms of this agreement.

So under the undisputed facts before your Honor, they have not provided any notification in the required time

limit, they have not identified the CPU's where it's either being stored or where any of the other documentation is located within Chrysler, and they have failed to certify full compliance. They've merely said we're not using it,

Tape No. 04-108A, 07-21-04, 10:02:54

and as a result, we're in full compliance. And that is clearly not a statement of being in full compliance. Thank you, your Honor.

THE COURT: Okay, I understand. Anything else?

MR. FEENEY: Very briefly, your Honor. Your Honor, this is a fishing expedition. There is no basis for any claim of any breach of the confidentiality provision. They don't even make that claim in the complaint. There's no basis to claim that Daimler-Chrysler has disclosed any of this material improperly. That's not what this lawsuit--the lawsuit, as filed, was a lawsuit claiming a breach of section 2.05. And it doesn't require certification as to confidentiality, it doesn't require certifications as to anything else. If they think they've got a breach of duty or some sort of a lawsuit that they want to bring against Daimler-Chrysler, that's their choice to make. But to bring a lawsuit asserting a breach of section 2.05, given what they asked for, is not the right way to go about it, your Honor, and we'd ask that the motion be granted.

THE COURT: Okay. This is Defendant, Daimler-Chrysler's motion for summary disposition pursuant to MCR 2.116(c)(10). Apparently the agreement and the parties indicate that Michigan procedural law applies to this case but New York substantive law applies to the dispute at

Tape No. 04-108A, 07-21-04, 10:04:25

issue. Thus, Michigan Court Rules govern the application of New York law.

In this case, the Court is going to grant the motion for summary disposition pursuant to (c)(10) as to all claims except for alleged breach of contract for failing to respond to the request for certification in a timely manner. The agreement is silent as to the time period Defendant is allotted to respond to the request for certification and thus, the law implies a reasonable time period. The issue of what is reasonable must be decided by a finder of fact, thus making summary disposition inappropriate pursuant to (c)(10) as to the timeliness issue. However, the contract very clearly does not require certification of the various clauses contained in the agreement as 2.05 relates to the current use of the software by its unambiguous terms.

Thus, Defendant is not required to certify, for example, that it has not exported the software to a prohibited country. Specifically, Defendant is not required by 2.05 to certify compliance with 2.06, 4.01, 7.05, 7.08,

7.09. I assume you mean two point zero six, four point zero one, seven point zero five, seven point zero eight, seven point zero nine, as requested by Plaintiff's correspondence.

Therefore, any claim for failing to certify compliance with those sections of the agreement are properly

Tape No. 04-108A, 07-21-04, 10:05:55

dismissed pursuant to (c)(10) as Defendant has no contractual obligation to make such certifications.

As to the claim seeking a declaratory judgment, this is also dismissed pursuant to (c)(10) as there is not a controversy at issue requiring any such declaratory judgment, nor has Plaintiff addressed this requested relief in its response to the motion for summary disposition.

Regarding Defendant's motion to strike certain paragraphs of the affidavit, this motion is denied. The Court has reviewed the affidavit and given the statements contained therein, the appropriate weight.

MR. FEENEY: Thank you, your Honor.

THE COURT: Thank you.

MR. ROSENBAUM: Thank you.

MR. HICE: Thank you, your Honor.

(At 10:06:38 a.m., hearing concluded)

CERTIFICATION

This is to certify that the attached videotaped proceeding, consisting of eighteen (18) pages, before the 6th Judicial Circuit Court, Oakland County in the matter of:

THE SCO GROUP

v

DAIMLER-CHRYSLER CORPORATION

Location: Circuit Court

Date: Wednesday, July 21, 2004

was held as herein appeared and that this is testimony from the original transcript of the videotape thereof, to the best of my ability, for the file of the Bureau.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the video of the proceedings.

_____

Sheila Burger, CER 6651
Certified Electronic Recorder

Dated: July 28, 2004