



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

THE SCO GROUP, INC., MAR 15 P 4:27

Plaintiff,

vs.

OAKLAND COUNTY CLERK

Civil Action No. 04-056587-CKB

BY: _____

DAIMLERCHRYSLER CORPORATION,

Honorable Rae Lee Chabot

DEPUTY COUNTY CLERK

Defendant.

Joel H. Serlin (P20224)
 Barry M. Rosenbaum (P26487)
 SEYBURN, KAHN, GINN, BESS AND
 SERLIN, P.C.
 Attorneys for Plaintiff
 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 FOR SUMMARY DISPOSITION**

Defendant DaimlerChrysler Corporation ("DaimlerChrysler") submits this Memorandum of Law in Support of its Motion for Summary Disposition pursuant to Michigan Court Rule ("MCR") 2.116(c)(10).

This case presents the rare circumstance where summary disposition at the initial stage of the litigation is not only appropriate, but required. The SCO Group, Inc. ("SCO") alleges a sole cause of action for breach of contract and declaratory judgment. However, the two documents that SCO itself attaches to the complaint in ostensible support of its claim instead defeat the claim as a matter of law. The documents – a letter from SCO seeking a certification it says DaimlerChrysler is required to provide pursuant to a license agreement, and the license agreement itself – show that there is no genuine issue of material fact as to whether

DaimlerChrysler breached the agreement. The license agreement delineates, in unambiguous terms, what the certification must include, and by those plain terms, DaimlerChrysler has no contractual duty to provide the information that SCO demands in its letter. In addition, DaimlerChrysler has provided SCO with the only certification required under the license, demonstrating that DaimlerChrysler is not even using and has not used the licensed software for more than seven years. Accordingly, there is no genuine issue of material fact, and SCO's claim fails as a matter of law.

STATEMENT OF UNDISPUTED FACTS

1. In 1988, Chrysler Motors Corporation ("Chrysler"), and AT&T Information Systems, Inc. ("AT&T-IS") entered into the AT&T Information Systems, Inc. Software Agreement, Agreement No. SOFT-01341 (the "License Agreement") for the license of certain AT&T-IS software products. *See* Complaint ("Cmpl.") Exhibit A (License Agreement) at 1.
2. DaimlerChrysler is Chrysler's successor-in-interest to the License Agreement. *See* Affidavit of Paul R. Eichbauer ("Eichbauer Aff.") (attached hereto as Exhibit A) Exhibit 1.
3. The software products that AT&T-IS licensed to DaimlerChrysler pursuant to the License Agreement included "UNIX System V Release 3.0 Source Code" and certain modifications and certain derivative works based thereon. *See* Cmpl. Exhibit A (License Agreement) § 2.01 and attached Schedule at 4, 5, 6.
4. Section 2.05 of the License Agreement provides:

On AT&T-IS's request, but no more frequently than annually, Licensee 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 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 such Designated CPUs* (or temporarily on back-up CPS) *for such Software Products in full compliance with the provisions of this Agreement.*

Cmpl. Exhibit A (License Agreement) § 2.05 (emphases added).

5. SCO claims to be the successor to AT&T-IS's rights under the License Agreement. *See* Cmpl. ¶ 19 and Exhibit B (Letter from Bill Broderick to Chrysler Motors Corp. dated December 18, 2003 ("SCO Letter")).

6. On or about December 18, 2003, SCO sent a letter addressed to the "Chief Executive Officer of Chrysler Motors Corporation" in Highland Park, Michigan purporting to seek a certification from DaimlerChrysler pursuant to Section 2.05 of the License Agreement. *See* Cmpl. Exhibit B (SCO Letter).

7. However, the SCO Letter actually demanded that written certification pursuant to Section 2.05 "must include certifications that:

1. You have held, at all times, all parts of the Software Products (including methods and concepts) in confidence for SCO.
2. You have appropriately notified each employee to whom you have disclosed the software products, and taken steps to assure that such disclosure was made in confidence and must be kept in confidence by such employee. Please provide evidence of your compliance with this obligation. This evidence may include, but not be limited to, nondisclosure agreements, employee policies or manuals, or other such evidence of compliance.
3. Neither you nor your employees with access to the Software Products have contributed any software code based on the Software Products for use in Linux or any other UNIX-based software product.
4. Neither you or you employees have used any part of the Software Products directly for others, or allowed any use of the Software products by others, including, but not limited to use in Linux or any other UNIX-based software product.
5. Neither you nor your employees have made available for export, directly or indirectly, any part of the Software Products covered by this Agreement to any country that is currently prohibited from receiving such supercomputing technology, including Syria, Iran, North Korea, Cuba, and any other such

country, through a distribution under the General Public License for Linux, or otherwise.

6. Neither you nor your employees have transferred or disposed of, through contributions to Linux or otherwise, any part of the Software Product.

7. Neither you nor your employees have assigned or purported to assign, any copyright in the Software Products to the General Public License, or otherwise for use in Linux or another UNIX-based software product.”

Id. at 2-3 (the “Linux Certifications”).

8. The SCO Letter also demanded “written certification ...within 30 days of receipt of this letter.” *Id.* at 2.

9. By its terms, Section 2.05 of the License Agreement does not require DaimlerChrysler to respond to the Licensor’s request for certification within 30 days of receipt. *See* Cmpl. Exhibit A (License Agreement) § 2.05.

10. No other provision of the License Agreement imposes a requirement that DaimlerChrysler respond to a certification request within 30 days of receipt of such request. *See generally* Cmpl. Exhibit A (License Agreement).

11. Section 2.05 of the License Agreement specifies the required contents of a proper certification:

- (i) a list of the location, type and serial number of all Designated CPUs under the License Agreement;
- (ii) a statement that the Licensee has reviewed the use of Software Products subject to the License Agreement; and
- (iii) a statement that “each such Software Product is being used solely on such Designated CPUs (or temporarily on back-up CPS) for such Software Products in full compliance with the provisions of this Agreement.”

See Cmpl. Exhibit A (License Agreement) § 2.05.

12. By its unambiguous terms, Section 2.05 does not require DaimlerChrysler to include the Linux Certifications in response to a request from the Licensor. *See* Cmpl. Exhibit A (License Agreement) § 2.05.

13. By its terms, Section 2.05 does not require DaimlerChrysler to “provide evidence of compliance by producing copies” of its policies or manuals, which SCO demanded DaimlerChrysler provide in its second Linux Certification. *See* Cmpl. Exhibit B (SCO Letter) at 2.

14. After receiving the SCO Letter, DaimlerChrysler did not furnish SCO with the Linux Certifications. *See* Eichbauer Aff. Exhibit 1.

15. SCO did not contact DaimlerChrysler after sending the SCO Letter and prior to initiating this lawsuit.

16. Instead, SCO filed its Complaint on March 3, 2004, claiming it had been “compelled” to do so by DaimlerChrysler’s “refusal” to respond to the SCO Letter. *See* Cmpl. ¶¶ 4-5, 26-27.

17. DaimlerChrysler responded to the SCO Letter on April 6, 2004. *See* Eichbauer Aff. Exhibit 1 (Letter from Susan J. Unger to Bill Broderick (the “DaimlerChrysler Letter”)).

18. The DaimlerChrysler Letter attached a letter from Norman A. Powell, Senior Manager of Tech Services for DaimlerChrysler, which provided SCO with the following certification: “No SOFTWARE PRODUCT licensed under the subject Agreement is being used or has been used in more than seven years, and as a result there is full compliance with the provisions of the subject Agreement.” *Id.*

19. Because the DaimlerChrysler Letter satisfies any certification obligation that DaimlerChrysler may have had to SCO under Section 2.05 of the License Agreement,¹ DaimlerChrysler requested in its letter that SCO withdraw its Complaint. *Id.*

20. To date, SCO has neither withdrawn its Complaint nor otherwise responded to the DaimlerChrysler Letter.

ARGUMENT

SCO claims that DaimlerChrysler breached the License Agreement by failing to provide SCO with the Linux Certifications. Put simply, this claim fails because DaimlerChrysler has no obligation under the plain terms of the License Agreement to provide SCO with the Linux Certifications. SCO's inability to identify any express contractual provision that DaimlerChrysler breached requires dismissal of its claim. *See, e.g., Hesse v. Chippewa Valley Schools*, No. 209080, 2001 WL 789540, at *5 and n.6 (Mich App, Jan. 12, 2001) (per curiam) (attached hereto as Exhibit B) (reversing trial court's refusal to grant defendant summary disposition where plaintiff's breach claim was based on an argument that the agreement was "not controlled by its express terms," and finding that plaintiffs had submitted no evidence that defendants "failed to honor their obligations under the plan."); *Pirrerera v. Bath & Tennis Marina Corp*, 2 AD3d 613; 769 NYS2d 565 (2003) (reversing denial of summary judgment where unambiguous terms of license agreement constrained plaintiff's use of a boat slip to a specific time period; absence of right of renewal in license defeated plaintiff's claim that failure to renew constituted a breach).

¹ DaimlerChrysler contests that it owes SCO any obligation under the License Agreement. *See, e.g., Answer and Affirmative Defenses of Defendant DaimlerChrysler Corporation* ¶¶ 2, 4-5, 27-29.

I. STANDARD OF REVIEW.

MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *See Singerman v. Mun Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997); *see also Spiek v. Mich Dep't of Trans*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Podorsek v. Lawyers Title Ins Co*, No. 241450, 2003 WL 22928819, at * 3 (Mich App, Dec. 11, 2003) (per curiam) (attached hereto as Exhibit C) (citing *Amer Cmty Mut Ins Co v. Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992)). A motion for summary disposition under MCR 2.116(C)(10) may be raised at any time. MCR 2.116(D)(3).

A motion seeking summary disposition pursuant to MCR 2.116(C)(10) must specifically identify the issues as to which the movant believes that there is no genuine issue of material fact. *LoPiccolo Homes, Inc. v. Grand/Sakwa of Brooklane*, No. 241386, 244800, 2003 WL 23018549, slip op. at * 2 n.1 (Mich App, Dec. 23, 2003) (per curiam) (attached hereto as Exhibit D) (citing MCR 2.116(G)(4)); MCR 2.116(G)(4)). The movant has the initial burden of supporting its position with affidavits, pleadings, admissions, and other documentary evidence. *Id.* (citing *Quinto v. Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996)). The burden then shifts to the opposing party to set forth specific facts showing a genuine issue of material fact for trial. *Id.* (citations omitted). If there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law. *See Maiden v. Roxwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The test is whether the kind of record that might be developed will leave open an issue upon which reasonable minds might differ. *Singerman*, 455 Mich at 139.

This case presents no issue on which reasonable minds might differ. The unambiguous terms of Section 2.05 of the License Agreement are susceptible to only one reasonable interpretation, and bar SCO's claim for breach and declaratory judgment as a matter of law.

Moreover, because the License Agreement's terms are unambiguous, no amount of discovery would enable SCO to develop a record that would leave open the issue of breach. Accordingly, this Court should grant summary disposition in favor of DaimlerChrysler on SCO's claims.

II. THERE IS NO GENUINE ISSUE OF FACT AS TO WHETHER DAIMLER CHRYSLER BREACHED THE LICENSE AGREEMENT.

A. The Plain Terms of the License Agreement Do Not Require DaimlerChrysler to Provide the Linux Certifications.

A trial court "should grant summary disposition" on a breach of contract claim where the terms of the contract are plain and unambiguous, and subject to only one reasonable interpretation.² See *Henderson v. State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); see also *LoPiccolo*, No. 241386, 244800, 2003 WL 32018549, at * 2 (the meaning of unambiguous contract terms may be determined in a summary disposition proceeding); *R/S Assocs v. NY Job Dev Auth*, 98 NY2d 29, 32-33; 771 NE2d 240 (2002) (citations and internal quotations omitted) (affirming grant of summary judgment to defendant on ground that contract term was unambiguous, and rejecting plaintiffs' interpretation as unreasonable); *Sutton v. East River Sav Bank*, 55 NY2d 550, 555; 435 N.E.2d 1075 (1982) (if a contract term is unambiguous on its face, its proper construction is a question of law). Cf. *SSC Assoc Ltd P'ship v. Gen Ret Sys of the City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1992) (a contract term is ambiguous, and summary judgment inappropriate, where its terms are subject to more than one reasonable interpretation); *Leon v. Lukash*, 121 A.D.2d 693, 694; 504 N.Y.S.2d 455 (1986) (when language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment).

² Though Michigan procedural law applies, New York law applies to the construction and performance of the License Agreement. See Cmpl. Exhibit A (License Agreement) § 7.12. DaimlerChrysler therefore cites the law of both jurisdictions in support of its motion.

In both New York and Michigan, “[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accordance with the parties’ intent.” *Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 569; 780 NE2d 166 (2002); *see also Klever v. Klever*, 333 Mich 179, 186; 52 NW2d 653 (1952) (“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties.”). “The best evidence of what the parties to a written agreement intended is what they say in their writing.” *Slamow v. Del Col*, 79 NY2d 1016, 1018; 594 NE2d 918 (1992); *see also Nichols v. Nichols*, 306 NY 490, 496 119 NE2d 351(1954)(“The first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein.”); *Qual Prods and Concepts Co v. Nagel Precision, Inc.*, 469 Mich 362, 375; 666 NW2d 251 (2003) (an unambiguous contractual provision is reflective of the parties’ intent as a matter of law).

Thus, when the terms of an agreement are clear and unambiguous, the contract “is to be interpreted by its own language...[and the] writing should be enforced according to its terms.” *R/S Assocs*, 98 NY2d at 32 (citations omitted); *see also Teitelbaum Holdings Ltd v. Gold*, 48 NY2d 51, 56; 396 NE2D 1029 (1979) (reinstating trial court’s refusal to read settlement agreement as providing defendant a right of set-off where agreement expressly provided for set-off in only one circumstance, and noting, “matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.”); *Mich Chandelier Co v. Morse*, 297 Mich 41, 48; 297 NW 64 (1941) (where contract language is clear and unambiguous and has definite meaning, court must determine parties’ intent from the words used in the contract); *Zurich Ins Co v. CCR and Co*, 226 Mich App 599, 603-604; 576 NW2d 392 (1998)(affirming summary disposition based on contract’s clear and unambiguous language,

and refusing to permit plain meaning of the words, and parties' intent, to be impeached by extrinsic evidence).

A contract is unambiguous if the language it uses has a "definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." *Greenfield*, 98 NY2d at 569 (internal quotations and citations omitted); *see also SSC Assocs Ltd.*, 192 Mich App at 363 (ambiguity exists if the terms of a contract are subject to two or more reasonable interpretations). "An ambiguity never arises out of what was not written at all but only out of what was written so blindly and imperfectly that its meaning is doubtful." *Greenfield*, 98 NY2d at 573 (quoting *Trs of Freeholders & Commonality of Town of Southampton v. Jessup*, 173 NY 84, 90; 65 NE 949 (1903)).

These fundamental principles of contract law dictate dismissal of SCO's action here.

SCO bases its breach claim on Section 2.05 of the License Agreement, which provides:

On AT&T-IS's request, but no more frequently than annually, Licensee 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 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 such Designated CPUs (or temporarily on back-up CPS) for such Software Products in full compliance with the provisions of this Agreement.

Cmpl. Exhibit A (License Agreement) § 2.05. Thus, Section 2.05 expressly delineates the requirements for certification: (1) a statement, (2) certified by an authorized representative, (3) listing the location, type and serial number of all Designated CPUs and (4) stating (a) that the Licensee has "reviewed its use of the Software Products" and (b) "that each such Software Product is being used on such Designated CPUs for such Software Products in full compliance with the provisions of the Agreement." *Id.*

By these plain terms, DaimlerChrysler's certification obligations are limited to listing the required information about Designated CPUs and making the required statements (1) that DaimlerChrysler has reviewed its use and (2) that its use is in full compliance with the contract. Nothing in the language of Section 2.05 manifests the slightest intent by the parties to permit the Licensor to demand, or to require DaimlerChrysler to provide, additional statements, more detailed statements, or any further information, documentation or "evidence of compliance" such as that sought in the Linux Certifications.³ See Cmpl. Exhibit B (SCO Letter).

Indeed, Section 2.05's express recitation of the requirements for certification precludes reading that language to require DaimlerChrysler to provide the seven Linux Certifications. See, e.g., *Teitelbaum*, 48 NY2d at 56 (finding that contract provided right to set-off in only one instance and that there was "simply [. . .] no basis for viewing this language as ambiguous or covering situations not expressly mentioned"); *Maysek v. Moran, Inc.*, 284 AD2d 203, 204; 726 NYS2d 546 (2001) (affirming summary judgment where agreement unequivocally stated that plaintiff was retained for a particular purpose, and refusing to read into contract broader purpose in the absence of language indicating broader purpose).

A finding to the contrary also would violate the time-honored canon of contract construction known as "*expresso unius est exclusion alterius*" (the express mention of one thing implies the exclusion of another). Under this interpretive principle, the specific description in Section 2.05 of the certification's contents – including the setting forth the language to be used in each of the two required statements – compels a finding that the omission of the Linux Certifications is intentional and unambiguous. See *Uribe v. Merch Bank of NY*, 91 NY2d 336,

³ SCO contends that it is entitled to the Linux Certifications because Section 2.05 constitutes "a monitoring and reporting mechanism designed to detect (and thus deter) violations of [the License Agreement]." See Cmpl. ¶ 1. Even if that characterization were accurate, which it is not, the sole "reporting" obligation defined in Section 2.05 is the obligation to provide the specified information about Designated CPUs and the specified statement of compliance, and the sole "monitoring" right is the right to receive that specified information. No language in Section 2.05 gives the Licensor the right to demand anything further.

340-341; 693 NE2d 740 (1998) (affirming rejection of plaintiff's argument that term "valuable papers" was ambiguous and could include cash, applying principle of "*inclusion unius est exclusion alterius* (the inclusion of one is the exclusion of another)" to conclude that the omission of "cash" was "intentional and unambiguous," and noting that plaintiff's proposed definition "rest[ed] on an impermissibly strained reading to find an ambiguity which otherwise might not be thought to exist.")(internal quotation and citation omitted); *Two Guys From Harrison-NY, Inc v. S.F.R. Realty Assocs*, 63 NY2d 396, 403-04; 472 NE2d 315 (1984) (invoking doctrine of *inclusion unius est exclusion alterius* to affirm conclusion that express specification of certain authorized alterations should be read as implicitly prohibiting other alterations); *Payne v. Palisades Interstate Park Comm'n*, 226 AD2d 902, 902; 640 NYS2d 683 (App Div 1996) (agreement's delineation of express rights to one party to construct dwellings on land compelled finding that contract implicitly prohibited other party from constructing dwellings on land). Moreover, if the parties to the License Agreement – two sophisticated business entities – had intended to require that Licensees provide the seven Linux Certifications, or anything like them, they would and could have included such language in Section 2.05. See *Uribe*, 91 NY2d at 340-341.

Nor is there any ambiguity in Section 2.05's terms that could justify expanding it into an obligation to make the seven additional affirmative representations, or to provide the additional internal documentation, described in the Linux Certifications. The phrase "stating that" is a restrictive clause with a clear and definite meaning, and is not susceptible to alternate reasonable interpretations. See, e.g., *Webster's Modern Office Dictionary* (Random House 1999) at 362-363 (defining "state" as "to express in speech or writing") and 385 (defining "that" as a conjunctive "(used to introduce a subordinate clause expressing cause, purpose, result, etc.): *I'm sure that*

you'll like it" (emphasis in original)). As a result, Section 2.05's requirement that the certification "state[] that each such Software Product is being used on such Designated CPUs for such Software Products in full compliance with the provisions of the Agreement" can only be read as obligating the Licensee to provide the statement specified, *i.e.*, "each such Software Product is being used...in full compliance with the provisions of the Agreement." There is nothing indefinite or ambiguous about what the certification must state, and no basis for enlarging the Licensor's rights beyond this specific and limited requirement.

DaimlerChrysler's certification obligation is limited to the unambiguous terms of Section 2.05, which cannot be read to include the Linux Certifications. As a result, DaimlerChrysler did not breach the License Agreement when it elected not to provide the Linux Certifications to SCO.⁴ SCO's effort to rewrite the License Agreement 16 years after it was written by other parties, and more than seven years after DaimlerChrysler stopped using the licensed software, fails as a matter of law.

B. SCO's Failure to Identify a Contractual Breach is Fatal to its Claim.

SCO's failure to identify an express provision of the License Agreement that DaimlerChrysler allegedly breached entitles DaimlerChrysler to judgment as a matter of law. It is axiomatic that a requisite element for a breach of contract claim is an actual breach. *See Uribe*, 91 NY2d at 342 (affirming summary judgment dismissing claim for breach of contract where court found that plain language of agreement precluded plaintiff's claim for breach); *Old Kent Bank v. Sobczak*, 243 Mich App 57, 69-70; 620 NW2d 663 (2000)(reversing a denial of summary judgment to defendants where the court found that defendants were not in default of

⁴ To the extent that SCO claims that DaimlerChrysler breached the License Agreement's confidentiality provisions, *see* Cmpl. ¶ 28, that claim fails based on the absence of breach under Section 2.05. SCO expressly predicates its allegation on the assumptions: (1) that failure to make the Linux Certifications constitutes a breach; and (2) that the only basis for not making the Linux Certifications is an underlying breach of the confidentiality provisions. *See id.* Thus, SCO's inability to establish a breach based on the Linux Certifications negates the assumptions on which SCO bases its claim that DaimlerChrysler somehow violated the confidentiality provisions of the License Agreement, and that claim also fails as a matter of law since it is entirely predicated on SCO's faulty argument about Section 2.05.

contract based on the contract's plain language). SCO cannot establish any genuine issue of material fact as to breach because the undisputed evidence demonstrates that DaimlerChrysler acted in accordance with its contractual obligations and that no breach occurred.

The SCO Letter provides the purported basis for SCO's contention that it requested certification pursuant to Section 2.05 and that DaimlerChrysler breached the License Agreement by failing to provide the "contractually required compliance certification." See Cmpl. ¶¶ 2, 26-27. However, the SCO Letter makes clear that SCO unilaterally purported to define DaimlerChrysler's alleged obligation under Section 2.05 as a duty to provide the Linux Certifications. See Cmpl. Exhibit B at 1. Because the License Agreement does not impose such an obligation on DaimlerChrysler, DaimlerChrysler was not required to respond to the SCO Letter.⁵ Further, DaimlerChrysler acted in accordance with the Agreement by not providing SCO with the Linux Certifications. Absent a contractual duty to provide that information, there was no breach. See, e.g., *Pirrerera*, 769 NYS2d at 566 (reversing denial of summary judgment because defendant's failure to renew could not constitute breach where unambiguous terms of agreement did not provide plaintiff with right of renewal).

In any event, DaimlerChrysler has provided SCO with a certification that complies with the express requirements of Section 2.05. See Eichbauer Aff. Exhibit 1. Specifically, the DaimlerChrysler Letter provides SCO with the required information about Designated CPUs (explaining that none are in use); certifies that an authorized person reviewed DaimlerChrysler's use; and states that "no software product licensed under the subject Agreement is being used or has been used in more than seven years, and as a result there is full compliance with the provisions of the subject Agreement." *Id.* In so doing, DaimlerChrysler has discharged any

⁵ Even if DaimlerChrysler had been required to respond to SCO's letter, the License Agreement contains no provision requiring DaimlerChrysler to respond within a particular time frame, much less within 30 days. See Cmpl. Exhibit A (License Agreement) § 2.05 and generally. Accordingly, DaimlerChrysler did not breach the License Agreement by responding on April 6, 2004 rather than within 30 days.

conceivable certification obligation it may have under Section 2.05. DaimlerChrysler has not breached the License Agreement, and SCO's claim fails as a matter of law.

C. There is No Reasonable Chance That Discovery Will Result in Factual Support For SCO's Claim of Breach.

Summary disposition before the completion of discovery is proper "where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Prysak v. R.L. Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992) (affirming grant of summary disposition in defendant's favor); *see also Greenbaum v. Barthman*, 210 AD2d 160, 160-161; 620 NYS2d 954 (App Div 1994) (affirming summary judgment and denial of plaintiff's requests for additional discovery where contract was unambiguous and plaintiff failed to establish that facts essential to justify opposition to summary judgment existed). For a court to rule against summary disposition and allow discovery to continue, the party opposing the motion must identify the disputed issue and support that issue with independent evidence. *See Hyde v. Univ of Mich Bd Of Regents*, 226 Mich App 511, 519; 575 NW2d 36 (1997)(affirming grant of summary disposition where "plaintiff failed to show by affidavit that further development would support his claims").

Summary disposition should be granted here because SCO cannot support its breach claim with independent evidence. The sole basis for SCO's claim is its contention in the SCO Letter that a certification pursuant to Section 2.05 of the License Agreement must include the Linux Certifications. Because the plain terms of the License Agreement itself contradict that contention, extrinsic evidence may not be introduced to rewrite the License Agreement's plain terms, and no amount of factual discovery would enable SCO to uncover factual support for its

position.⁶ *See, e.g., Prysak*, 193 Mich App at 11 (concluding that summary disposition was not granted prematurely because discovery would not have uncovered factual support for plaintiff's claim); *Wright v. DaimlerChrysler Corp.*, 220 F Supp 2d 832, 844 (ED Mich, 2002)(granting defendant's motion for summary judgment where plaintiff did not show that additional discovery was necessary). Therefore, this Court should grant summary disposition in DaimlerChrysler's favor on SCO's claim for breach of contract.

III. SCO'S CLAIM FOR DECLARATORY JUDGMENT FAILS FOR LACK OF AN ACTUAL CONTROVERSY.

SCO's failure to identify an actual breach by DaimlerChrysler requires dismissal of its claim for declaratory judgment as well. Under the Michigan Court Rules, a party may only obtain a declaratory judgment "[i]n a case or actual controversy..." *See* MCR 2.605(A); *McGill v. Auto Ass'n of Mich.*, 207 Mich App 402, 407; 526 NW2d 12 (1994). An "actual controversy" exists when the judgment is "necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v. Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978). If what a party seeks to protect is merely hypothetical, there is no "actual controversy," and no basis for a declaratory judgment. *Id.*

Because the undisputed facts here demonstrate that DaimlerChrysler has not breached the License Agreement, there is no "actual controversy" on which SCO can base a claim for declaratory judgment.⁷ *See id.* at 589 (["B]efore affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, plead facts entitling him to the judgment he seeks and proves each fact alleged, *i.e.*, a plaintiff must allege and prove an actual justiciable

⁶ Likewise, no amount of discovery could support SCO's allegation, *see* Cmpl. ¶ 28, that "refusal" to provide the Linux Certifications is evidence of a breach of the License Agreement's confidentiality provisions. *See* discussion n. 4, *supra*.

⁷ SCO drafted the single cause of action in its Complaint as "Breach of Contract/Declaratory Judgment." *See* Cmpl. p. 4. Because SCO identifies no basis for a declaratory judgment other than the faulty basis alleged for breach of contract, SCO has no viable claim for declaratory judgment either.

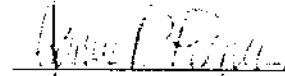
controversy.”); *McGill*, 207 Mich App at 407 (affirming trial court’s denial of declaratory judgment where the “review of the record reveals no evidence that plaintiffs have suffered injury as a result of defendants’ partial payment of their medical bills; nor is any injury threatened”). The Court should therefore also grant summary disposition to DaimlerChrysler on SCO’s cause of action for “Declaratory Judgment,” to the extent that that it deems that cause to be distinct from SCO’s breach of contract claim.

CONCLUSION

For the foregoing reasons, DaimlerChrysler respectfully requests that the Court grant summary disposition in its favor and against SCO, and deny SCO its requested relief in its entirety.

Dated: April 15, 2004

Respectfully Submitted,



James Feecey, Esq.
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304-2820
(348) 203-0700
Attorneys for Defendant
DaimlerChrysler Corporation

Of Counsel:

HALE AND DORR LLP

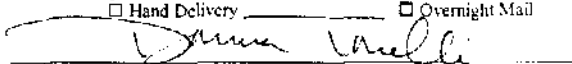
Mark G. Matuschak
Michelle D. Miller
60 State Street
Boston, MA 02109
(617) 526-6000

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

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties and/or attorneys of record for all parties to the above cause at their respective addresses as indicated on the pleadings, on the 15th day of April, 2004, by:

U.S. Mail Facsimile
 Hand Delivery Overnight Mail



Donna Tonelli

DET01401761.1
IDVTSB