

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE SCO GROUP, INC.,

Plaintiff,

vs.

DAIMLERCHRYSLER CORPORATION,

Defendant.

04-056587-CK



OAKLAND JUDGE RAE LEE CHABOT
COUNTY SCO GROUP INC V DAIMLERCHR

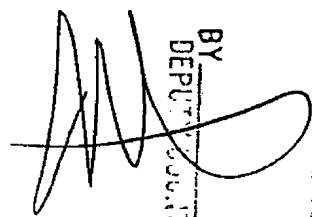
Civil Action No. 04-056587-CKB

Honorable Rae Lee Chabot

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THE SCO GROUP, INC.'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT
DAIMLERCHRYSLER CORPORATION'S MOTION TO STRIKE

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**THE SCO GROUP, INC.'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT
DAIMLERCHRYSLER CORPORATION'S MOTION TO STRIKE**

Plaintiff The SCO Group, Inc. ("SCO") respectfully submits this memorandum of law, along with the Supplemental Affidavit of William Broderick, sworn to on July 15, 2004, in opposition to defendant DaimlerChrysler Corporation's ("Daimler") Motion to Strike Certain Paragraphs of the Affidavit of William Broderick.

PRELIMINARY STATEMENT

Daimler's motion to strike misses the mark. Daimler's motion is largely based on the erroneous premise that Mr. Broderick has no personal knowledge prior to 2001 of the parties' relationship and, more importantly, of the Software Agreement, numbered SOFT-01341, dated September 2, 1988 ("License Agreement"), at the center of this case. To the contrary, the initial affidavit submitted by Mr. Broderick ("June 15 Affidavit") in opposition to Daimler's motion for summary disposition and the Supplemental Affidavit of William Broderick, sworn to on July 15, 2004 ("Supplemental Affidavit") submitted herewith, describe in detail Mr. Broderick's personal involvement with and responsibility for managing software licensing of UNIX System V products in the decade prior to May 2001, as well as his intimate familiarity with the License Agreement. Mr. Broderick properly placed before the Court and described the terms of Daimler's License Agreement and its Supplements, of which he is the custodian. Further, Mr. Broderick properly attested to Daimler's use of Linux and its use and modification of UNIX System V source code based on Daimler's own admissions and his own personal knowledge of the software products provided to Daimler.

None of Mr. Broderick's statements in the June 15 Affidavit exceeded the bounds of his personal knowledge or otherwise failed to meet the standards of evidence competent to oppose a motion for summary disposition.

Moreover, to the extent that Daimler's use and modification of UNIX System V source code remains at issue, summary disposition is premature because facts concerning Daimler's conduct are uniquely within Daimler's control and Daimler has yet to submit to discovery in this case.

ARGUMENT

I. MR. BRODERICK'S JUNE 15 AFFIDAVIT IS PROPERLY BASED ON PERSONAL KNOWLEDGE AND CONSTITUTES ADMISSIBLE EVIDENCE

When considering a motion for summary disposition brought pursuant to Michigan Court Rule 2.116(C)(10), the court must consider the pleadings, depositions, admissions and documentary evidence submitted by the parties to the extent that the content or substance would be admissible as evidence to deny the grounds stated in the motion. MCR 2.116(G)(5) and 2.116(G)(6). Michigan Court Rule 2.119(B)(1) provides that affidavits filed in opposition to a motion must (1) be based on personal knowledge; (2) state with particularity facts admissible as evidence denying the grounds stated in the motion; and (3) show affirmatively that the affiant, if sworn to as a witness, can testify competently to the facts stated in the affidavit. *See Smith v. City of Detroit*, No. 238927, 2003 WL 21995211, at * 3 (Mich. Ct. App. Aug. 21, 2003) (attached hereto as Appendix A); *Regents of the Univ. of Mich. v. State Farm Mut. Ins. Co.*, 250 Mich.App. 719, 728, 650 N.W.2d 129, 134-35 (2002); *Midland Mut. Life Ins. v. Robison*, No. 185868, 1997 WL 33353689, at * 1 (Mich. Ct. App. Feb. 21, 1997) (attached hereto as Appendix B); *Baker v. DEC International*, 218 Mich. App. 248, 261-62, 553 N.W.2d 667, 673 (1996), *aff'd in part and rev'd in part on other grounds*, 458 Mich. 247, 580 N.W.2d 894 (1998); *Hubka v. Pennfield Township*, 197 Mich. App. 117, 119-20, 494 N.W.2d 800, 801 (1992), *aff'd in part and rev'd in part on other grounds*, 443 Mich. 864, 504 N.W.2d 183 (1993).

The whole premise for Daimler's argument – that Mr. Broderick lacks personal knowledge of the facts sworn to in the June 15 Affidavit because he assumed his

current position with SCO in May 2001— is unfounded. The June 15 Affidavit clearly states Mr. Broderick has been involved in sales and licensing of the UNIX software for SCO *and its predecessors since 1991*. See June 15 Affidavit ¶¶ 1-2 (emphasis added). Mr. Broderick further states that he made the affidavit based on personal knowledge and that he is competent to testify to the facts in the affidavit. *Id.*

To lay the matter to rest, Mr. Broderick details more fully in his Supplemental Affidavit the basis for his personal knowledge of the License Agreement and the parties' relationship prior to May 2001. See Supplemental Affidavit ¶¶ 1-12. Mr. Broderick first became involved with the sale of UNIX System V software in December 1991 as the manager of sales operations for UNIX Systems Laboratories, a subsidiary of AT&T. *Id.* ¶ 5. An operating subsidiary of AT&T, AT&T Information Systems, was an original party to the License Agreement. *Id.* Mr. Broderick has been the individual directly responsible for managing software licensing activities for UNIX System V source code license agreements since February 1993, originally as the contracts manager and later as the Director of Software Licensing for SCO and its predecessors. *Id.* ¶¶ 6-8.

When he assumed responsibility for managing UNIX System V source code licensing over a decade ago, Mr. Broderick familiarized himself with all the software agreements then in existence, including any amendments and supplements. Supplemental Affidavit ¶ 10. He became personally familiar with the License Agreement at issue in this case in 1993. *Id.* ¶ 9. For the past eleven years he has worked with the UNIX System V source code License Agreement, researched amendments to the License Agreement, issued supplements to the License Agreement, monitored, along with the finance department, the revenue streams derived from the License Agreement and

answered questions regarding licensees' rights and responsibilities under the terms of the License Agreement. *Id.* Mr. Broderick was trained by the very lawyers and contract managers who were involved with the License Agreement from its inception. *Id.* Further, he has negotiated and managed hundreds of UNIX System V source code license agreements identical to the one at issue here. *Id.* ¶ 12. Daimler's claim that Mr. Broderick has no knowledge of the License Agreement or the parties' relationship prior to May 2001 is simply wrong.

Daimler's effort to strike paragraphs 8, 56 and 57 of the June 15 Affidavit is especially misguided. Those paragraphs merely state that accurate copies of the License Agreement and the Supplements to the License Agreement are attached to the affidavit. Mr. Broderick is the custodian of the License Agreement and its Supplements, which are admissible as SCO's business records. *See* MRE 803(6) (business records are admissible as non-hearsay).

For similar reasons, paragraphs 10 through 24 of the June 15 Affidavit do not improperly interpret the License Agreement, as Daimler contends. *See* Daimler Mem. at 4. Those paragraphs merely quote certain provisions of the License Agreement, *see, e.g.*, June 15 Affidavit ¶ 11 (quoting Section 2.01 of the License Agreement); restate the subject of certain provisions, *see, e.g., id.* ¶ 12 (stating "[t]he License Agreement defines Software Products to include UNIX"); or set forth a general statement of the subject of certain provisions followed by a full quotation of the pertinent provision. *See, e.g., id.* ¶ 16 (stating "[u]nder the License Agreement, Daimler agreed to maintain the confidentiality of UNIX," and quoting in full Section 7.05(a) of the License Agreement). The License Agreement and the Supplements are admissible documents that Mr.

Broderick can properly quote or paraphrase. *See J.L. Dumas & Co. v. Forty-Nine Highland Ltd. Dividend*, No. 186016, 1996 WL 33357155, at *1 (Mich. Ct. App. Sept. 27, 1996) (affidavit testimony regarding the contents of public records and business records was properly considered even in absence of statement that witness was competent to testify) (attached hereto as Appendix C). *See also* Supplemental Affidavit ¶¶ 19-21.

Paragraphs 35, 44, 45 and 59, which Daimler also challenges, are based on Mr. Broderick's personal knowledge and understanding of the application of the terms of the License Agreement, gained in the course of his employment. For over eleven years, Mr. Broderick has been responsible for working with customers that have licensed UNIX System V source code under the License Agreement. Supplemental Affidavit ¶ 22. In order to do his job, he has applied the provisions of the License Agreement, including the provisions relating to certification of compliance, termination and confidentiality. *Id.* ¶¶ 23-24. Based on that personal knowledge, paragraphs 35, 44, 45 and 59 state Mr. Broderick's understanding of what it means to act in accordance with and to comply with Section 2.05 of the License Agreement. *Id.* This includes his estimate of what is a reasonable time within which a UNIX System V source code licensee with a properly functioning IT department should be able to certify compliance with the terms of the License Agreement. *Id.*

Mr. Broderick's twenty years of experience in the computer industry forms the basis of his knowledge of the statements made in paragraphs 25 and 26 of the June 15 Affidavit. During his work for a computer manufacturer before joining AT&T, and after becoming involved in the sale and licensing of UNIX System V software, Mr. Broderick became knowledgeable about business enterprises' use of UNIX and competitive

products. Supplemental Affidavit ¶ 25-27. It is on the basis of this knowledge and industry experience that Mr. Broderick described the nature of commercial reliance on UNIX during the 1980s in paragraph 25 of the June 15 Affidavit. Mr. Broderick's statement in paragraph 26 of the June 15 Affidavit that the parties did not contemplate the commercial use of Linux in 1988, was nothing more or less than a logical observation based on his knowledge of the industry, since Linux was not even invented until 1991 by a student at Helsinki University and the first version of Linux did not appear until 1994. See Supplemental Affidavit ¶ 27.

Daimler erroneously contends that paragraphs 28 and 65 of the June 15 Affidavit should be stricken as inadmissible. In those paragraphs, Mr. Broderick properly states that Daimler has utilized Linux since at least October 2002 and is currently using Linux. Those statements are based on Daimler's own statements and admissions. See Supplemental Affidavit ¶ 28 and Exhibit A. Admissions of a party opponent are not hearsay and are admissible evidence to which Mr. Broderick can properly refer. MRE 801(d)(2); *J.L. Dumas & Co.*, 1996 WL 33357155, at *1 (affiant properly referred to non-hearsay evidence).

Finally, paragraphs 62 through 64 of the June 15 Affidavit, which discuss Daimler's employees' access to and utilization of UNIX System V source code, are also properly based on Mr. Broderick's personal knowledge. It is a requirement of his job that Mr. Broderick have personal knowledge of Daimler's right of access to UNIX System V source code and for how long Daimler enjoyed that access. Supplemental Affidavit ¶ 30. Mr. Broderick's statements in paragraphs 63 and 64 of the June 15 Affidavit regarding Daimler's use of UNIX System V source code are predicated upon his understanding –

based on his licensing experience – that the whole purpose of licensing the UNIX System V source code is to gain access to the source code so it can be used and modified to suit the licensee's commercial needs. Supplemental Affidavit ¶ 31. If a licensee did not want to use and modify the UNIX System V source code, it could obtain a far less expensive packaged product license for a tenth of the license fee it pays for access to the source code. *Id.* The UNIX System V source code can only be modified through an understanding of the source code and the methods and concepts contained within. *Id.* ¶ 32. These observations are all based on Mr. Broderick's knowledge of the software product SCO licensed to Daimler and others. Moreover, Mr. Broderick's statement that Daimler was using UNIX System V source code was based on his knowledge that (1) in 1992 Daimler changed the designated computers on which it was authorized to use UNIX System V source code, (2) Daimler admitted in its letter responding to SCO's certification request that it used UNIX System V source code as recently as seven years ago, and (3) in 1997 Daimler obtained a "read-only" reference license of a later UNIX System V release, which would only have served the purpose of assisting its utilization of the earlier versions of the source code.¹ *Id.* ¶ 33.

¹ The bulk of Daimler's motion to strike is addressed to paragraphs in the June 15 Affidavit that simply identify for the Court those provisions in the License Agreement that are relevant to determining the issues in this case and provide context for the Court's reading of the License Agreement's terms. *See* Daimler Mem. at 2-3 seeking to strike paragraphs 8, 10-24, 35, 44, 45, 56, 57 and 59 of the June 15 Affidavit. Even assuming that those paragraphs of the June 15 Affidavit do not technically meet the requirements for an affidavit on personal knowledge (a position with which SCO does not agree), Daimler has not – and cannot – show any prejudice resulting from the Court's consideration of them. "Where affidavits considered in determining a motion for summary disposition violate the court rules, there must be a showing of prejudice due to the noncompliance or any error is harmless." *Lease Corp. v. Milazzo Enters., Inc.*, No. 214273, 2001 WL 733450, at *1 (Mich. Ct. App. Feb. 20, 2001) (attached hereto as Appendix D). *See also Jones v. Keene*, No. 229281, 2002 WL 14827, at *3 (Mich. Ct. App. July 9, 2002) ("[U]nlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel. Thus resultant error may be harmless.") (attached hereto as Appendix E); *Borum v.*

II. ASSUMING ARGUENDO THAT THE JUNE 15 AFFIDAVIT LACKS A SUFFICIENT BASIS FOR ITS DESCRIPTION OF DAIMLER'S CONDUCT, THE ABSENCE OF DISCOVERY REGARDING THE MANNER IN WHICH DAIMLER USED AND MODIFIED UNIX SYSTEM V SOURCE CODE SHOULD PRECLUDE SUMMARY DISPOSITION

As demonstrated above, the facts in the June 15 Affidavit are within Mr. Broderick's personal knowledge. Further, through the June 15 Affidavit and SCO's memorandum of law in opposition to Daimler's motion for summary disposition, SCO has sufficiently supported its position that Daimler has used UNIX System V source code and has failed to meet its certification obligations under the License Agreement. Indeed, SCO does not believe that facts relating to Daimler's specific utilization of UNIX System V source code are necessary to determine the underlying motion. Nonetheless, Daimler insists that Mr. Broderick lacks personal knowledge of Daimler's use and modification of UNIX System V source code. See Daimler Mem. at 5-6. Assuming *arguendo* that the specifics of Daimler's utilization of UNIX System V source code are material to a determination of Daimler's motion for summary disposition, as Daimler implicitly argues, and Mr. Broderick lacks personal knowledge of such specifics, then Daimler cannot be granted the relief sought in its underlying motion before SCO has an opportunity to take discovery from Daimler officials in possession of the relevant knowledge.

Grand Trunk Western Railroad, No. 204332, 1999 WL 33454907, at *4 (Mich. Ct. App. Feb. 5, 1999) ("Absent a showing of prejudice resulting from noncompliance with the court pleas, any error is harmless.") (attached hereto as Appendix F), *appeal denied*, 462 Mich. 852, 611 N.W.2d 799 (1999); *Baker v. DEC International*, 218 Mich. App. 248, 261-62, 553 N.W.2d 667, 673 (1996) ("Although the affidavits violate the court rules, absent a showing of prejudice resulting from noncompliance with the rules, any error is harmless"), *aff'd in part and rev'd in part on other grounds*, 458 Mich. 247 (1998); *Hubka v. Pennfield Township*, 197 Mich. App. 117, 119-20, 494 N.W.2d 800, 801 (1992) ("[P]laintiff has again failed to show any resulting prejudice"), *aff'd in part and rev'd on other grounds*, 443 Mich. 864, 504 N.W.2d 183 (1993). On this additional basis, Daimler's motion to strike would fail.

Under MCR 2.116(H), when a party shows that the facts necessary to support the party's position cannot be presented because they are known only to persons whose affidavits the party cannot obtain, the Court may enter an appropriate order denying the motion or providing time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories or other discovery.

Mr. Broderick attested to the facts and circumstances of which he was personally aware regarding Daimler's access to and use and modification of UNIX System V source code. If, as Daimler contends, Mr. Broderick does not know how Daimler used and modified the source code and this Court finds that those facts are materially at issue on the present motion, then summary disposition is premature until discovery can be obtained on those issues. That information is within the knowledge of Daimler's IT program manager responsible for the UNIX System V source code licensed from SCO and its predecessors and of those Daimler employees who were granted access to that code. *See* Supplemental Affidavit ¶ 34.

CONCLUSION

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

Dated: July 16, 2004

Respectfully submitted,

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9601001/SCO Oppn to Motion to Strike Paragraph of Broderick Aff