

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:

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For the Defendant:

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WITNESSES: PLAINTIFF

None

WITNESSES: DEFENDANT

None

OTHER MATERIAL IN TRANSCRIPT:

None

EXHIBITS:

INTRODUCED ADMITTED

None

1 Pontiac, Michigan

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

3 UNIDENTIFIED SPEAKER: Now calling 2004-056587-CK,

4 SCO versus Daimler-Chrysler.

5 THE COURT: Good morning.

6 MR. ROSENBAUM: Good morning, your Honor, Barry

7 Rosenbaum appearing on behalf of the Plaintiff, the SCO

8 Group, Inc.

9 MR. FEENEY: James Feeney appearing on behalf of

10 Daimler-Chrysler, your Honor.

11 MR. ROSENBAUM: And, your Honor, we have some

12 counsel from out of State that would like to be admitted for

13 purposes of this matter.

14 THE COURT: Okay.

15 MR. ROSENBAUM: Motions have been filed on behalf

16 of the Plaintiff, we have Mr. Mark Hice (ph) from Miami, a

17 member of the --

18 MR. HICE: Your Honor?

19 MR. ROSENBAUM: -- Bar of the State of Florida.

20 Mr. Steven Fruit (ph) from a member of the State Bar of New

21 York.

22 THE COURT: Hi.

23 MR. ROSENBAUM: The motion contains the required

24 allegations and I'd ask that the Court admit them to

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1 practice in this jurisdiction.

2 THE COURT: And you are sponsoring them?

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

4 THE COURT: Okay. Any opposition?

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

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

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

20 The issue, your Honor, before the Court today is
21 whether this section, 2.05 of the software license
22 agreement, requires a certification of compliance with the
23 agreement in the detailed enumeration that is set forth in
24 the letter requesting compliance, or, does that section

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

6 And the license agreement itself, which is
7 attached as Exhibit A to the Plaintiff's complaint, in
8 section 2.05 plainly states as follows: "On AT & T-IS's
9 request"--and for purposes of this motion it is not disputed
10 that SCO is a successor and interest to AT & T, but "no more
11 frequently than annually. Licensee, that's now Daimler-
12 Chrysler, at the time that this agreement was entered into,
13 your Honor, it was Chrysler Motor Corporation, shall furnish
14 to AT & T/IS a statement certified by an authorized
15 representative of licensee listing the location, type and
16 serial number of all designated CPU's hereunder and stating
17 that the use by licensee of software products subject to
18 this agreement has been reviewed and that each such software
19 product is being used solely on designated CPU's, or
20 temporarily on backup CPU's, or such software products, in
21 full compliance with the provisions of this agreement."

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

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

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

18 Daimler-Chrysler, before responding to the
19 complaint, and the Plaintiffs were gracious enough to give
20 us an additional time to respond, before responding to the
21 complaint and filing this motion, in part, your Honor, to
22 clarify and frame the issue properly, Daimler-Chrysler
23 responded to the letter on April 6th and that response is
24 set forth as Exhibit A to Exhibit 1, which is an affidavit

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

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

20 And he further certifies that the use of the
21 software product licensed under the agreement has been
22 reviewed, which is the exact language of section 2.05 and he
23 further states that it is--that none of the software product
24 is being used or has been used for more than seven years,

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

5 So, where does that leave us? I think it leaves
6 us in this place. If the Court agrees that section 2.05 is
7 unambiguous, then this is certainly an appropriate matter
8 for summary disposition. SCO, in their response to the
9 motion, acknowledges that section 2.05 is unambiguous. This
10 is a question of what section 2.05 requires. If it requires
11 --if it requires the enumerations of all these paragraphs
12 that were set forth in their letter, then obviously our
13 letter that we submitted does not satisfy or meet those
14 requirements. But if, as we say, your Honor, what section
15 2.05 requires is exactly what it says, which is a statement
16 that we are in compliance, we have complied. And the issues
17 that have been raised in response are really immaterial and
18 have nothing to do with this.

19 Quibbling about whether we responded within 30
20 days when there's no provision for the time period, or 105
21 days really doesn't matter. We haven't used the software
22 for more than seven years. That's really immaterial to the
23 issue of the question of breach, and they don't even allege
24 any harm resulting from a delay of, under their theory, 60

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1 days.

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

10 THE COURT: Thank you.

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

15 THE COURT: Right.

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

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

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

12 And so unlike the situation where your Honor may
13 be familiar, for example, at a personal level where you get
14 Microsoft and you load that on your computer, they give you
15 a CD and they say here, load it on and you're good to go.
16 What companies like Chrysler in the corporate enterprise
17 world get is, they get that CD but they also get everything
18 that underlies it. Microsoft will not ever give you or
19 anyone else their source code, it's the crown jewels.
20 That's the same case here with the UNIX source code and the
21 enterprise or corporate computing market. But the
22 difference is, they got that source code and they were
23 required to treat that confidentially. And it's much more
24 than just, we had the CD on a computer, we stuck it in a

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

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

16 But on the more fundamental issue of, is the
17 certification that they did provide adequate, because where
18 they say we are not using it, have they complied--does that
19 comply with the terms of section 2.05. And clearly it does
20 not. The 2.05 says that it must be solely on such
21 designated CPU's and in full compliance with the provisions
22 of this agreement. There has to be a statement that they're
23 in full compliance with the provisions of this statement.
24 And the question for the Court is, can they unilaterally

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

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

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

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

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1 the--keeping all that confidential.

2 If we were to accept the proposition that we're
3 not using it and they don't want to have to go through the
4 burden of providing the certification, the agreement
5 specifically addresses how that operates. Under section
6 6.02 of the agreement it specifically states what--if you
7 are not going to use it and you want to terminate under the
8 license, you have to return all the source code and related
9 documentation or certify that you've destroyed it. They've
10 not done that.

11 So either they have to provide the full
12 certification indicating that the source code, the methods
13 and concepts, the modifications, all of that has been kept
14 confidential, it's not being used on any other CPU's in any
15 manner whatsoever, or, they can take advantage of 6.02 of
16 the agreement and terminate and specifically identify that
17 they have destroyed all of the source codes so that we, at
18 AT & T, now SCO, know that our source code is not in a
19 position to be made publicly available by Daimler, and that
20 they have, in fact, throughout the years, instructed their
21 employees to maintain the confidential nature of this source
22 code, the derivative works, the modifications. Because it
23 quite simply is not the situation where one can say, we
24 haven't used that computer over there in seven years so as a

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1 result, we must be in compliance. That is not what section
2 2.05 says. It does not give you a, we're not using it
3 exception so it automatically translates into, we are in
4 full compliance.

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

19 So under the undisputed facts before your Honor,
20 they have not provided any notification in the required time
21 limit, they have not identified the CPU's where it's either
22 being stored or where any of the other documentation is
23 located within Chrysler, and they have failed to certify
24 full compliance. They've merely said we're not using it,

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

4 THE COURT: Okay, I understand. Anything else?

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

20 THE COURT: Okay. This is Defendant, Daimler-
21 Chrysler's motion for summary disposition pursuant to MCR
22 2.116(c)(10). Apparently the agreement and the parties
23 indicate that Michigan procedural law applies to this case
24 but New York substantive law applies to the dispute at

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

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

16 Thus, Defendant is not required to certify, for
17 example, that it has not exported the software to a
18 prohibited country. Specifically, Defendant is not required
19 by 2.05 to certify compliance with 2.06, 4.01, 7.05, 7.08,
20 7.09. I assume you mean two point zero six, four point zero
21 one, seven point zero five, seven point zero eight, seven
22 point zero nine, as requested by Plaintiff's correspondence.

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

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

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

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

12 MR. FEENEY: Thank you, your Honor.

13 THE COURT: Thank you.

14 MR. ROSENBAUM: Thank you.

15 MR. HICE: Thank you, your Honor.

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

17

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

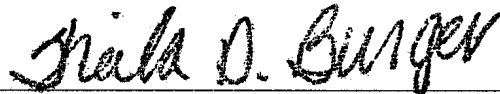
DAIMLER-CHRYSLER CORPORATION

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