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

THE SCO GROUP, INC.,

Plaintiff,

vs.

Civil Action No. 04-056587-CKB

DAIMLERCHRYSLER CORPORATION,

Honorable Rae Lee Chabot

Defendant.

Joel H. Serlin (P20224)
Barry M. Rosenbaum (P26487)
SEYBURN, KAHN, GINN, BESS AND SERLIN, P.C.
Attorneys for SCO
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

DEFENDANT DAIMLERCHRYSLER CORPORATION'S OPPOSITION TO SCO'S MOTION FOR STAY OF PROCEEDINGS

Hearing Date: November 24, 2004

Defendant DaimlerChrysler Corporation ("DCC") opposes SCO's Motion for Stay of Proceedings. As set forth in detail below, SCO's motion for a stay should be denied.

SCO initiated this litigation in February 2004 – nearly a year after it brought suit against IBM. At no time did SCO suggest to this Court that its claims were unripe, or in any way related to or dependent upon the outcome of SCO's litigation against IBM. It is only now that its remaining claim about timeliness is about to proceed to trial – without SCO meeting a single Court-ordered deadline or discovery obligation – that SCO comes before this Court seeking a stay.

SCO has failed entirely to show that the action that SCO ***itself*** initiated against IBM – and which ***was pending at the time SCO initiated this action*** – could have any bearing on the outcome of SCO's remaining claim about the timeliness of DCC's response to the SCO Letter, much less over SCO's original breach of contract action, which this Court adjudicated by way of

summary disposition in July. The stay should be denied and SCO ordered either to proceed to trial or have its remaining claim dismissed with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

In the months since this Court granted DCC partial summary disposition on SCO's breach of contract claim, SCO has abandoned prosecution of this case. It has missed each deadline set by the Court, failed to initiate discovery, failed to respond to DCC's discovery requests that were due prior to SCO's filing of its stay motion, failed to file witness and exhibit lists, and declined to submit a Case Evaluation Summary for the hearing scheduled for November 30, 2004.

SCO's failure to pursue this action is no accident. From July 21, 2004, when the Court heard argument and ruled on DCC's motion for summary disposition, until November 9, 2004, DCC through its counsel contacted SCO on multiple occasions to inquire whether SCO intended to proceed with, settle, or dismiss this case, especially in light of the absence of injury or damage to SCO on its remaining claim concerning the timing of DCC's response to the SCO Letter. In the past months, SCO did not seek to proceed, settle or dismiss; it did nothing at all. Then, having missed every relevant deadline, SCO on November 5, 2004, requested that DCC stipulate to a stay of this action pending the outcome of the unrelated *SCO v. IBM* litigation – an action to which SCO itself is the plaintiff and which was pending when SCO initiated this case.

DCC declined to stipulate to a stay, for two principal reasons. First, SCO had brought the case, and caused DCC to expend resources to defend against it. It would be unfair, having brought its claim, then to leave that claim hanging over DCC while SCO pursues other unrelated, but more financially promising, litigation against third parties.

Second, the remaining issue in this case – the timeliness of DCC's response to the SCO's demand for certification – is not now and never has been an issue in the IBM litigation.

Accordingly, resolution of the IBM litigation – which may be years in the future[1] – will have no impact on the legal issues remaining in this case. Nor is any issue of certification involved in the IBM litigation; the fact is, the two cases have no common legal issues.

In response, SCO on November 9, 2004 stated that it would move to dismiss the remaining claim without prejudice and take an appeal of the Court's order granting DCC partial summary disposition. DCC informed SCO in writing on November 12, 2004 that DCC would oppose any motion to dismiss without prejudice, particularly given SCO's failure to prosecute this action while DCC has incurred legal fees to defend it, and given SCO's transparent attempt to circumvent Michigan's prohibition against interlocutory appeals and piecemeal litigation. On November 15, 2004, SCO reiterated its intention to move for a voluntary dismissal without prejudice.

SCO then filed the present motion on November 17, 2004, hand-delivered a copy to counsel at 5 p.m., seeking a stay of the very action that it initiated, whose deadlines SCO has ignored, and without citation to a single case supporting its position.

ARGUMENT

I. SCO FAILS TO DEMONSTRATE A NEED FOR A STAY.

SCO does not even attempt to meet Michigan's requirements for a stay,[2] instead relying on the irrelevant and facially insupportable argument that the IBM action could provide the Court with "guidance" in determining whether DCC's response to the SCO Letter was timely. *See* Motion for Stay ("Mot.") ¶ 7. SCO's argument has no support under Michigan law.[3] *See*

---

[1] The SCO-IBM case is not scheduled for trial until November 1, 2005.

[2] To authorize a stay of proceedings on account of a pending suit in another court, the two proceedings must be in all respects identical. *See The People on the Relation of George M. Granger v. The Judge of the Wayne Circuit Court*, 27 Mich. 406 (1873); *see also Detroit Trust Co. v. Manilow et al.*, 272 Mich. 211, 215 (1935). SCO does not suggest that this case is identical in any respect to the IBM litigation, nor could it. The parties, the facts, the interests, and the legal issues are all distinct.

[3] The sole case that SCO cites in its motion – for the uncontroversial proposition that courts have the discretion to control their dockets – *denied* the defendant's motion for a stay. *See Amersham Int'l PLC v. Corning Glass Works*, 618 F. Supp. 507 (E.D. Mich. 1984).

Detroit Trust Co. v. Manilow et al., 272 Mich. 211, 215 (1935). Nor does it have any factual basis in the claims asserted in the IBM litigation.

The putative basis on which SCO seeks the stay –that the IBM case will provide guidance on the scope of licensees' obligations – is inapplicable to SCO's only claim, which concerns the reasonableness of the time frame in which DCC responded to the SCO Letter. The issue of whether DCC responded reasonably will not be affected by resolution of the "contract interpretation issue currently pending in the IBM case." *See* Mot. ¶ 7. First, that "contract" is not the same as the license that exists in this case. Certification is not even an issue in the IBM case. Timeliness of response to certification demands is even further from what will be decided in that case.

Second, the only remaining question in this action – timeliness of DCC's certification response – will be evaluated in light of the past conduct of the parties to the contract and the presence or absence of good faith, including the facts that DCC and SCO had no previous dealings on this license agreement prior to the SCO Letter, SCO sent the letter during the holiday break to the wrong company at the wrong address, as well as SCO's absence of prejudice. *See Zev v. Merman*, 73 N.Y.2d 781, 536 N.Y.S3d 739 (1988) (reasonableness inquiry requires consideration of object of the contract, parties' previous conduct, presence or absence of good faith, parties' experience, and possibility of prejudice or harm). The fact-specific reasonableness inquiry thus has *nothing* to do with the interpretation of some different contract between IBM and SCO.

Moreover, the Court has already adjudicated whether DCC has any obligations with respect to "certification." Therefore, the IBM court's interpretation of SCO's contract with IBM could have no bearing on the Court's decision in this case. The IBM litigation is simply

irrelevant to, and will have no effect upon the reasonableness question that remains before the Court, or even on the issues this Court already has resolved.[4]

Indeed, it is clear from the face of SCO's motion that SCO does not seek a stay because the ***merits*** of this action will be in any way affected or "guided" by the IBM litigation. Instead, SCO admits that "it may no longer be *productive for SCO*" to pursue Linux certifications "from UNIX endusers [generally]" if it loses the IBM case. *See* Mot. ¶ 8 (emphasis added). Therefore, "SCO ***may choose*** never to litigate [its remaining claim] against DCC" in the event of such a loss. *Id.* ¶ 9 (emphasis added). In other words, SCO wants to see how its bite at the IBM apple turns out before it expends any resources on the claims it has already forced DCC to defend.[5] Courts, however, do not grant stays to promote this kind of litigation tactic – sue, force the defendant to expend resources, then stay the case while the plaintiff decides if it is really "worth it" to pursue the case at some unknown later date.

SCO's "mootness" argument (*see* Mot. ¶ 12) fares no better. Again, SCO's argument about conserving judicial resources is really an argument about its own strategic choices: if SCO loses the IBM case, it won't bother to appeal this Court's dismissal of its claim. *See id.* Even if a stay could permissibly be granted to serve such an interest – which it cannot – the pure inefficiency of doing so would require a denial of SCO's motion here. The IBM case is unlikely to be resolved until years after a trial on the merits in this action. It makes no sense from a practical or efficiency perspective to have this case on the court's docket for such an indeterminate length of time.[6]

[4] The AutoZone order that SCO itself attached to its motion indicates that SCO *opposed* a motion to stay its case against AutoZone, which asserted copyright infringement claims similar to those in the IBM case.
[5] Notably, SCO elected to spend no resources after the Court dismissed its breach of contract claim, but forced DCC to continue to do so in defense of this action while SCO let every deadline pass.
[6] Though SCO contends the summary judgment motion will resolve various issues, this contention is only true if summary judgment is granted as to particular issues. Even if it is, there may be appeals, but if it is not, the case – which has 22 claims and counterclaims – will continue.)

Finally, the Court should deny SCO's motion because to do otherwise would reward SCO's gamesmanship. The IBM case was pending when SCO initiated this action. SCO therefore made the initial judgment that it would be "worth it" for SCO to pursue this action in tandem with its claims against IBM. If SCO believed that resolution of this case would require "guidance" from the IBM court, it should never have initiated this suit. Having done so, it may not be permitted to manipulate the court system by pursuing two litigations simultaneously and then, when it does not like the way one litigation is going, contend that that suit must be stayed in favor of the other. Nothing has changed since SCO initiated this lawsuit other than the fact that its principal cause of action has been dismissed. If there was ever a risk of wasting resources or losing critical "guidance," SCO embraced that risk by filing suit here, and, having done so, it should not be permitted to stay this case now.[7]

CONCLUSION

The context of SCO's motion, the lack of legal authority to support it, and the absence of any plausible reason for tying the adjudication of this case to the outcome of the IBM litigation reveal SCO's motion for what it is – a naked effort to manipulate the Court system, and DCC, for SCO's own benefit. DCC therefore respectfully requests that the Court deny SCO's Motion For Stay and award DCC its fees and costs incurred in preparing this Opposition.

Dated: November 19, 2004

James P. Feeney (P53335)
Thomas S. Bishoff (P53753)
Stephen L. Tupper (P53918)
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304-2820
(348) 203-0700
Attorneys for Defendant
DaimlerChrysler Corporation

Of counsel

WILMER CUTLER PICKERING
HALE AND DORR LLP
Mark G. Matuschak
Michelle D. Miller
60 State Street
Boston, MA 02109

[7] The two orders SCO attached to its motion do not bolster its argument. In both, the defendant, not the plaintiff, sought the stay.

(617) 526-6000

Robin L. Alperstein
399 Park Avenue
New York, NY 10022
(212) 230-8800

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 19th[h] day of November, 2004, by:

☐ U.S. Mail ☐ Facsimile
☒ Hand Delivery ☐ Overnight Mail

Donna M. Tonelli