

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

file
BOS

THE SCO GROUP, INC.,
a Delaware corporation,

2004 NOV 22 P 4: 04



Plaintiff,

OAKLAND COUNTY CLERK
BY: *[Signature]*
DEPUTY COUNTY CLERK

OAKLAND JUDGE RAE LEE CHABOT
COUNTY SCO GROUP INC V DAIMLERCHRYSLER

-vs-

Case No. 04-056587-CK
Hon. Rae Lee Chabot

DAIMLERCHRYSLER
CORPORATION, a Delaware
corporation,

Hearing Date: November 24, 2004

Defendant.

JOEL H. SERLIN (P20224)
BARRY M. ROSENBAUM (P26487)
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)
Attorney for Defendants
39577 Woodward Avenue, Ste. 300
Bloomfield Hills, MI 48304-2820
(248) 203-0700

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR STAY OF PROCEEDINGS**

SEYBURN, KAHN, GINN,
BESS AND SERLIN
PROFESSIONAL CORPORATION
2000 TOWN CENTER, SUITE 1500
SOUTHFIELD, MICHIGAN 48075-1195

(248) 353-7620

SEYBURN, KAHN, GINN,
BESS AND SERLIN
PROFESSIONAL CORPORATION
2000 TOWN CENTER, SUITE 1500
SOUTHFIELD, MICHIGAN 48075-1195

(248) 353-7620

Plaintiff The SCO Group, Inc. ("SCO"), respectfully submits this memorandum of law in order to correct several factual and legal errors contained in defendant DaimlerChrysler Corporation's ("DCX") opposition to SCO's motion for a stay of proceedings. As discussed below, Daimler has failed to articulate a reasoned basis for denial of SCO's request for a stay of proceedings pending a determination of the motion for summary judgment in the related IBM case. DCX's feigned umbrage at SCO's request for a stay is insufficient to overcome the advantages to judicial efficiency and conservation of party resources that counsel in favor of a limited stay of these proceedings.

Factual Background

Following a court appearance on July 21, 2004, the Court entered an order on August 9, 2004, granting in part and denying in part DCX's motion for summary disposition. Contrary to the suggestion in DCX's papers, DCX contacted SCO's counsel on only two occasions to discuss the conduct of further proceedings in this case – during the last week of August and on September 15, 2004. In fact, in August, counsel worked together to propose an Amended Scheduling Order in the case that contained extended dates for discovery of the remaining timeliness claim.

DCX also erroneously states that SCO did nothing until November 5, 2004, when it requested that DCX stipulate to a limited stay of this action. To the contrary, SCO contacted DCX counsel on October 20, 2004, in an attempt to propose a limited stay of proceedings, before receiving DCX's initial discovery demands relating to the timeliness claim. After an exchange of telephone messages between counsel, SCO formally requested DCX's consent to a limited stay on October 26, 2004 in the course of a telephone conversation with DCX counsel. DCX did not respond to SCO's request until November 5, 2004, when DCX counsel indicated that his client would not consent. In the course of the November 5 telephone conversation, SCO

SEYBURN, KAHN, GINN,
BESS AND SERLIN
PROFESSIONAL CORPORATION
2000 TOWN CENTER, SUITE 1500
SOUTHFIELD, MICHIGAN 48075-1195

(248) 353-7620

requested that DCX reconsider the stay proposal, and proposed the alternative of a voluntary dismissal of the remaining claim in the case. On November 8, 2004, SCO, by email, reiterated its request that DCX reconsider a limited stay of proceedings, and in the alternative, forwarded a proposed "Stipulated Order of Dismissal Without Prejudice and Without Costs" for DCX's consideration. DCX responded to SCO's proposals by letter dated November 12, 2004, in which it stated that it would oppose a dismissal of the remaining claim without prejudice.

Finally, the efforts expended by DCX's counsel on the remaining timeliness claim have consisted of limited discovery demands received October 20, 2004; brief witness and exhibit lists dated October 27, 2004; and a four-page case evaluation summary dated November 16, 2004. Much of DCX's limited efforts were expended following notice from SCO that it intended to seek a stay of proceedings or a voluntary dismissal of the remaining timeliness claim.

What should not be lost in the face of DCX's posturing and hyperbole regarding SCO's alleged "gamesmanship," "tactic[s]," and "naked effort to manipulate the Court system" is that this action would not have been brought but for *DCX's admitted failure to respond to SCO's request for a certification of its compliance with its UNIX license agreement until after this lawsuit was filed – a certification that DCX has conceded was required by its very conduct in supplying a certification 110 days after it was requested.*

Legal Analysis

As stated in SCO's stay motion, this Court clearly has the authority to exercise its discretion and stay proceedings in any case on its docket for good cause. The authority to stay an action while another case is proceeding is inherent and, contrary to the statement footnoted in DCX's response (DCX Mem. at 3 n.2), is not subject to the requirement that the two cases involve the identical parties and issues.

SEYBURN, KAHN, GINN,
BESS AND SERLIN
PROFESSIONAL CORPORATION
2000 TOWN CENTER, SUITE 1500
SOUTHFIELD, MICHIGAN 48075-1195

(248) 353-7620

The authority DCX cites for its erroneous conclusion is based on two cases involving the former "plea of abatement by prior action." The defense of plea of abandonment is now codified as a ground for summary disposition in MCR 2.116(C)(6). When another action has been initiated between the same parties involving the same claim, the second action is subject to dismissal. The rule is designed to stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation. Kowry v University of Michigan, 441 Mich 1, 20 (1992) (Riley, J. concurring).

Since a plea of abatement is not being offered in this case by either party, the rule cited by DCX is not applicable to SCO's request for a stay. Furthermore, a stay of proceedings has been authorized by the Michigan Supreme Court in order to promote judicial economy. In Consumers Power Co v Michigan Public Utilities Commission, 270 Mich 213 (1935), three citizens started an action against the City of Saginaw and Consumers Power Company to invalidate a contract for the furnishing of natural gas. While that suit was pending, the City filed a petition before the Public Utilities Commission to fix the rate for natural gas. Rather than dismiss the second action, the Supreme Court ordered the commission to stay the proceedings while the validity of the underlying contract was being litigated:

But it is apparent that the Michigan public utilities commission cannot proceed to a determination of a reasonable rate for natural gas in the city of Saginaw except upon the assumption that the city is not bound by the contract of June, 1933. If in so assuming the utilities commission should be in error, appellant will have been uselessly subjected to the expense and inconvenience of a proceeding before the utilities commission to determine the charge to be made in Saginaw for natural gas furnished by appellant. **To avoid even the possibility of a useless and burdensome proceeding before the commission, as well as to preserve the orderly administration of justice, we think the proceedings pending before the Michigan public utilities commission should be held in abeyance until decision of the case pending in the Federal court.**

Id. at 217-218 (emphasis added).

SEYBURN, KAHN, GINN,
BESS AND SERLIN
PROFESSIONAL CORPORATION
2000 TOWN CENTER, SUITE 1500
SOUTHFIELD, MICHIGAN 48075-1195

(248) 353-7620

SCO's request for a stay of proceedings is fully appropriate under the standard adopted in the Consumers Power case. First, as a practical matter, litigation of the timeliness issue in this case – which is important to establish that UNIX licensees like DCX are required to timely provide a certification in response to the licensor's request, rather than ignore such a request – will only be necessary if the license agreement at issue is interpreted in such a way as to protect SCO's rights to control its intellectual property (beyond the mere literal source code) in UNIX. It is important to recall that prior to the filing of this law suit, while the IBM case was ongoing, SCO had merely sought to collect information about compliance with its UNIX licenses from hundreds of its licensees here and abroad. To accomplish this purpose, SCO used letters, not litigation. It was only because DCX ignored SCO's request that SCO went to court to enforce its certification right. The issue of the scope of the certification was raised by DCX's own motion, which this Court decided on summary disposition was significantly narrower than urged by SCO. Once this Court ruled as it did, the usefulness of obtaining certifications from DCX and other licensees was greatly reduced. In other words, SCO's effort to collect information in advance of a ruling in the IBM case has been substantially impeded, and it now makes practical sense, both from the standpoint of both the Court's and the parties' resources, to await a summary judgment ruling in the IBM case before proceeding to litigate either the timeliness claim in this case or to appeal this Court's order regarding the scope of the required certification under the UNIX license agreement.

Thus, SCO is not suggesting in its motion for stay that the issues in the IBM case and the instant case are identical. The issues are, however, as explained above, closely related in a practical sense. Moreover, a ruling in the IBM case as to the scope of the protections and restrictions contained in the UNIX license agreement will have the further consequence of informing SCO and its licensees what their rights are under the license agreement, and this, in

SEYBURN, KAHN, GINN,
BESS AND SERLIN
PROFESSIONAL CORPORATION
2000 TOWN CENTER, SUITE 1500
SOUTHFIELD, MICHIGAN 48075-1195

(248) 353-7620

turn, will make the certification requests and licensees' responses thereto, more meaningful than they would be in the absence of such a ruling.

Conclusion

For all of the foregoing reasons and the reasons stated in its Motion for Stay of Proceedings, SCO respectfully requests that its motion for stay be granted.

Respectfully submitted,

**SEYBURN, KAHN, GINN,
BESS AND SERLIN, P.C.**

By: 

Barry M. Rosenbaum (P26487)
Attorneys for Plaintiff
2000 Town Center, Suite 1500
Southfield, MI 48075-1195
(248) 353-7620

Dated: November 22, 2004

Steven I. Froot, Esq.
Co-Counsel for Plaintiff
Boies, Schiller & Flexner
570 Lexington Avenue, 16th Floor
New York, NY 10022
(212)-446-0230

Mark J. Heise, Esq.
Co-Counsel for Plaintiff
Boies, Schiller & Flexner LLP
Bank of America Tower
100 South East 2nd Street, Ste. 2800
Miami, FL 33131
(305) 539-8400