

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re : Chapter 11
:
The SCO GROUP, INC., *et al.*,¹ : Case No. 07-11337 (KG)
: (Jointly Administered)
Debtors. :
: Re Dkt No. 942

**OBJECTION OF CHAPTER 11 TRUSTEE TO MOTION OF WAYNE R.
GRAY FOR ENTRY OF ORDER LIFTING AUTOMATIC STAY TO
PERMIT THE DEBTOR, THE SCO GROUP, INC., TO PARTICIPATE IN
FLORIDA FEDERAL COURT ACTION AND PENDING ELEVENTH
CIRCUIT COURT OF APPEALS PROCEEDING**

Edward N. Cahn, Esq. (the “Chapter 11 Trustee” or “Trustee”), in his capacity as chapter 11 trustee for The SCO Group, Inc. and SCO Operations, Inc. (collectively, the “Debtors”), hereby files this objection (this “Objection”) to *the Motion of Wayne R. Gray for Entry of Order Lifting Automatic Stay to Permit the Debtor, The SCO Group, Inc., to Participate in Florida Federal Court Action and Pending Eleventh Circuit Court of Appeals Proceeding [Docket No. 942] (the “Gray Lift Stay Motion”)*. In support of this Objection, the Chapter 11 Trustee respectfully submits as follows:

JURISDICTION

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these proceedings and this Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

¹ The Debtors and the last four digits of each of the Debtors’ federal tax identification numbers are as follows: (a) The SCO Group, Inc., a Delaware corporation, Fed. Tax Id. #2823; and (b) SCO Operations, Inc., a Delaware corporation, Fed. Tax Id. #7393.

The statutory predicates upon which this Court should consider the relief sought in the Gray Lift Stay Motion is 11 U.S.C. § 362(d).

BACKGROUND

2. On September 14, 2007 (the “Petition Date”), the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

3. On September 18, 2007, this Court entered an Order Authorizing Joint Administration of Related Chapter 11 Cases: 07-11337 and 07-11338 [Docket No. 25]. The Debtors continued in the management and operation of their businesses and property as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108 until August 25, 2009 (the “Appointment Date”) when this Court appointed a chapter 11 trustee.

4. On September 28, 2007, the Office of the United States Trustee filed its Statement that an Unsecured Creditors’ Committee has not been Appointed [Docket No. 67].

5. In connection with contested motions to convert the Debtors’ chapter 11 cases to chapter 7 cases, on or about July 27, 2009, this Court directed the United States Trustee to appoint a chapter 11 trustee.

6. On the Appointment Date, the Office of the United States Trustee filed its Notice of Appointment of Edward N. Cahn, Esquire as Chapter 11 Trustee [Docket No. 898] and, on the same day, this Court entered an Order Approving Appointment of Chapter 11 Trustee [Docket No. 900].

OBJECTION

7. By the Gray Lift Stay Motion, the movant (“Gray”) seeks the entry of an order lifting the automatic stay to *compel* the Trustee to participate in an appeal pending before the

United States Court of Appeals for the Eleventh Circuit. In the underlying litigation, in which the Debtor, The SCO Group, Inc., is a named defendant, the United States District Court for the Middle District of Florida granted summary judgment and dismissed Gray's claims against all of the defendants. See *Wayne R. Gray v. Novell, Inc., The SCO Group, Inc., and X/Open Company Limited*, Case No. 8:06-CV-01950-VMC-TGW (the "District Court Litigation"). Gray's appeal is pending in the Eleventh Circuit, and Gray asks this Court to *compel* the Trustee to investigate, take discovery, and issue a written report to Gray's counsel regarding the merits, if any, of the assertions and claims made by Gray in the District Court Litigation and the appeal pending before the United States Court of Appeals for the Eleventh Circuit, styled as *Wayne R. Gray, Appellant v. Novell, Inc., The SCO Group, Inc. and X/Open Company Limited*, Appeal No. 09-11374-CC (the "Eleventh Circuit Appeal").

8. To characterize the Gray Stay Relief Motion as highly irregular is an understatement. It asks this Court to direct a Chapter 11 Trustee to analyze and defend a lawsuit in which the debtor is a named defendant, solely to benefit Gray's claims against a non-debtor third party.

9. In its 42 page Lift Stay Motion, Gray fails to properly inform this Court of two very important documents.

a. The Court is first directed to the motion to dismiss and brief filed in the District Court Litigation by SCO on January 31, 2007, which motion sought dismissal of all of Gray's asserted claims against the Debtors for failure to state any actionable claims. The SCO Group Inc.'s Motion to Dismiss filed in the District Court Litigation is attached hereto as *Exhibit "A"* (the "SCO Motion to Dismiss"). Therein, SCO argued for dismissal of all of Gray's

allegations against SCO – clearly evidencing SCO’s position that it has no interest in the Gray litigation.

b. In addition, while Gray intimates that his litigation in Florida is inextricably linked to the Debtors’ litigation against Novell and IBM in Utah, Gray fails to advise this Court of the finding in an order entered in the District Court Litigation on February 20, 2009 (the “District Court Order”) which rejects, among other things, Gray’s contention that the estates’ litigation pending in the District Court in Utah affects the issue of UNIX *trademarks* – Gray’s issue. (*See* D. Ct. Order, pp. 29-30.) The District Court Order is attached hereto as *Exhibit “B.”*

c. Finally, as the District Court Order notes, “SCO has not disputed X/Open’s lawful ownership of the marks”. (D. Ct. Order, p. 3.) In fact SCO points out in the SCO Motion to Dismiss that “there is no doubt that X/Open is, in fact, the registrant of certain UNIX marks as Gray alleges in paragraph 73 and 74 [of the Complaint].” *See* SCO Motion to Dismiss, p. 12, ftnt 18. The Gray Lift Stay Motion conveniently ignores the conclusion reached by SCO more than two years ago that it does not own the UNIX trademark.

10. While purportedly asserting his right to relief under section 362 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”), Gray fails to direct this Court to any cases to support his curious demand. Moreover, the Gray Lift Stay Motion does not even address the burden of a movant seeking stay relief, nor how Gray’s motion satisfies the requirements to demonstrate “cause” for relief.

11. It is uncontroverted that the filing of a bankruptcy petition operates to stay litigation involving prepetition claims against the debtor. 11 U.S.C. § 362(a). An interested party may obtain relief from the automatic stay “for cause” upon application to the court. 11

U.S.C. § 362(d). As the party seeking relief from the stay, the movant bears the initial burden of demonstrating that cause exists to lift the stay. See *In re Rexene Prod. Co.*, 141 B.R. 574, 577 (Bankr. D. Del. 1992). “Cause” is not defined in the Bankruptcy Code; it must be determined on a case-by-case basis. See *Baldino v. Wilson*, 116 F.3d 87, 90 (3d Cir. 1997); *Int’l Bus. Machines v. Fernstrom Storage and Van Co. (In re Fernstrom Storage and Van Co.)*, 938 F.2d 731, 735 (7th Cir. 1991) (citing *In re Tucson Estates*, 912 F.2d 1162, 1166 (9th Cir. 1990)). Courts “generally consider the policies underlying the automatic stay [and]...the competing interests of the debtor and the movant.” *In re Continental Airlines, Inc.*, 152 B.R. 420, 424 (Bankr. D. Del. 1993). In particular, a court will typically consider the following factors in balancing the competing interests of the parties when considering whether to grant relief from the automatic stay:

- (a) the prejudice that would be suffered by the debtors should the stay be lifted;
- (b) the balance of hardships facing the parties if the stay is lifted; and
- (c) the probable success on the merits if the stay is lifted.

In re Pursuit Athletic Footwear, Inc., 193 B.R. 713, 718 (Bankr. D. Del. 1996) (citing *In re Rexene Prod. Co.*, 141 B.R. at 576; *Continental*, 152 B.R. at 424). Moreover, certain courts have provided that when analyzing whether “cause” to lift the automatic stay exists in the case at issue, a court must be cognizant of “the entire bankruptcy case and its progress,” and adjudicate “stay relief issues from this perspective.” *In re Santa Clara County Fair Ass’n*, 180 B.R. 564 (9th Cir. BAP 1995). In the Lift Stay Motion, Gray has failed to carry his burden with respect to each of these factors and considerations.

12. First, the prejudice suffered by the Debtors’ estates if the stay is lifted outweighs any prejudice to Gray if the stay remains in effect. The Trustee and these estates would be

required to expend very limited resources on preparing for and participating in a dispute among non-debtor third-parties with no discernable benefit to these estates. At the same time, the Trustee necessarily is focused on steadying the Debtors' business operations and, as directed by this Court, evaluating the more critical litigation with Novell and IBM pending in the District Court in Utah, the resolution of which undoubtedly will determine the fate of the Debtors' reorganization. Gray should not be permitted to unilaterally haul these estates into a costly, third-party controversy with no direct impact on the interests of the estate.

13. Second, the balance of hardships to the parties if the stay is lifted also militates in favor of the Trustee and the Debtors' estates. Simply put, the burden to the Trustee of participating in unnecessary third-party litigation outweighs any potential for hardship to Gray. In fact, Gray's ability to prove his allegations that X/Open does not own the UNIX trademark are not affected by whether the Trustee participates in either the District Court Litigation or the Eleventh Circuit Appeal. Gray bears the sole burden of proving his "mere suspicions and unsupported theories", which the District Court Order concluded did not support any triable issues of fact. *See* District Court Order at pp. 28-29. Whether the stay is lifted, or not, does not impact Gray's ability to prove his case. Finally, it is unclear what benefit can be derived by Gray if the stay were lifted and the estate were to resume its opposition to Gray's assertions made in connection with the District Court Litigation.²

14. By contrast, compelling the Debtors' participation in the District Court Litigation and the Eleventh Circuit Appeal will be burdensome to these estates, including to its officers and professionals responsible for stabilizing its operations, thereby disrupting the administration of

² Gray has alleged conspiracy and RICO causes of action, among other things, against the Debtors in connection with the District Court Litigation. Even if Gray is right that the Debtors own the trademarks, which is not SCO's position, it logically follows that the Debtors may have a claim against Gray for infringement of the trademarks.

the Debtors' estates to the detriment of all creditors. Critically, such participation will serve to distract the Trustee from his additional responsibility of assessing the claims by and against IBM and Novell, among others, for the benefit of these estates.

15. Lastly, Gray has little, if any, probability of success if the stay is lifted. Notwithstanding Gray's efforts to have yet another Court recognize the merits of his claims, the fact remains that Gray's claims against SCO and the other defendants have been squarely rebuffed by the District Court.

16. Gray conveniently ignores SCO's consistent position that it does not have ownership rights to the UNIX trademark and frivolously asserts that the Trustee and the estates are failing to pursue valuable assets. The Trustee and the SCO estates have no reason to become involved in Gray's attack on X/Open and give no credence to Gray's inflammatory statements. As a fiduciary, the Trustee takes seriously his statutory duties under the Bankruptcy Code, including, without limitation, those specifically enumerated in Bankruptcy Code sections 1106 and 704. Since the Appointment Date, the Trustee, with the able assistance of counsel and other retained professionals, continues to work diligently towards fulfilling the responsibilities outlined by this Court in connection with the Trustee's appointment in these cases. Any suggestion by Gray that the Trustee is being dilatory or ignoring what Gray alleges are valuable estate assets, is simply untrue.

17. In conclusion, granting the relief requested by the Gray Lift Stay Motion will compel the Trustee to expend critical estate resources on third party litigation that is of no consequence to these estates and will distract the Trustee from his efforts to restructure the Debtors' businesses and assess the claims by and against Novell and IBM, among others.

Conversely, the Trustee believes that Gray will not suffer any prejudice as a result of a denial of the Gray Lift Stay Motion.

WHEREFORE, the Trustee respectfully requests that this Court enter an order denying the Gray Lift Stay Motion and granting such other and further relief as this Court deems just, proper and necessary.

Dated: Wilmington, Delaware
November 13, 2009

Respectfully submitted,

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