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DISTRICT OF NEVADA

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THE SCO GROUP, INC.
a Delaware Corporation

Plaintiff,

v.

AUTOZONE, INC.
a Nevada Corporation

Defendant.

Civil Action File No.

CV-S-04-0237-RCJ-LRL

**DEFENDANT AUTOZONE, INC.'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO STAY OR, IN THE
ALTERNATIVE, FOR A MORE DEFINITE STATEMENT**

INTRODUCTION

Plaintiff The SCO Group, Inc. ("SCO") has effectively conceded in the *Red Hat* litigation that AutoZone, Inc. ("AutoZone") is entitled to a stay of SCO's claims in the present action. As

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AutoZone noted in its opening brief, the District of Delaware stayed the *Red Hat* case *sua sponte* – albeit with SCO’s encouragement – pending resolution of SCO’s lawsuit against IBM in Utah. Red Hat has recently moved the court to open the stay. In opposing Red Hat’s motion, SCO stated:

[T]here is no doubt that, as it is presently constituted, the IBM case will address central issues raised in [the *Red Hat*] lawsuit. Therefore, it would be a ‘waste of judicial resources,’ and the resources of the parties, to litigate [the *Red Hat*] case while a substantially similar question is being litigated in federal district court in Utah.

Red Hat v. SCO, Opp’n to Red Hat’s Mot. For Recons., at 4 (emphasis added) (hereinafter “SCO Opp. to Recons.”) (attached hereto as Ex. A).

SCO further stated to the court:

[T]he Court correctly observed that the IBM case will address a central issue in [the *Red Hat*] case: whether Linux contains misappropriated UNIX code. As noted in the Court’s Order, this issue is raised by SCO’s claim for breach of contract arising from IBM’s contributions of code to Linux in violation of its contractual obligations.

Id. at 3.

How SCO can contend that “there is no doubt” that the *IBM* case will resolve threshold issues in the *Red Hat* case, yet deny the same in this case is unclear in light of the fact that SCO’s claims against AutoZone relate to AutoZone’s use of a version of Linux that AutoZone obtained from Red Hat. Nevertheless, what is clear from SCO’s own admissions, as well as the other facts and authority addressed below, is that this case should be stayed pending resolution of the *IBM* case as well as the *Red Hat* and *Novell* cases.

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UPDATE ON CURRENT LITIGATION INVOLVING UNIX AND LINUX

A. *SCO Group, Inc. v. Novell, Inc.*, No. 2:04CV00139 (D. Utah filed Jan. 20, 2004)

On May 11, 2004, the court in the *Novell* case heard oral argument on Novell's Motion to Dismiss and SCO's Motion to Remand. The court took the motions under advisement and has not issued a ruling to date.

B. *SCO Group, Inc. v. Int'l Bus. Mach. Inc.*, No. 2:03CV294 (D. Utah, filed Mar. 25, 2003)

On April 23, 2004, SCO moved to dismiss or stay IBM's Tenth Counterclaim, which seeks a declaratory judgment that "IBM does not infringe, induce the infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable." *See SCO v. IBM*, Mot. to Dismiss, or to Stay Count Ten of Countercl.-Pl. IBM's Second Am. Countercl. Against SCO (hereinafter "SCO Mot. to Dismiss or Stay Count Ten") (attached hereto as Ex. B); *SCO v. IBM*, Second Am. Countercl. (attached to AutoZone Motion to Stay as Ex. J) ¶ 173. In its motion, SCO argues that the counterclaim should be dismissed or stayed because the subject matter of the counterclaim is directly at issue in SCO's action for copyright infringement against AutoZone. SCO Mot. to Dismiss or Stay Count Ten at 2.

IBM has opposed SCO's motion and moved for summary judgment on its Tenth Counterclaim. *SCO v. IBM*, Def./Countercl.-Pl. IBM's Cross-mot. for Partial Summ. J. on Claim for Decl. J. of Non-Infringement (hereinafter "IBM Mot. for Partial Summ. J.") (attached hereto as Ex. C). The basis for IBM's motion is that discovery is nearly complete, yet SCO has "failed to come forth with evidence to demonstrate infringement" of SCO's copyrights by IBM. *Id* at 2.

Specifically, IBM notes that SCO failed to produce "evidence that IBM's Linux activities infringe SCO's purported copyrights, despite the two court orders requiring it to do so." *Id.*

Briefing on these two motions is underway. A hearing on both parties' motions is scheduled for August 4, 2004.

C. *Red Hat, Inc. v. SCO Group, Inc.*, No. 1:03CV772 (D. Del. Filed Aug. 4, 2003)

On April 21, 2004, Red Hat filed a Motion for Reconsideration of the court's *sua sponte* order staying the proceedings pending resolution of the *IBM* litigation. *Red Hat v. SCO*, Mot. for Recons. (attached hereto as Ex. D). As set forth above, SCO has aggressively opposed the motion on the basis that the previously filed *IBM* case will address the threshold issue of whether Linux misappropriates SCO's copyrights in UNIX. SCO Opp. to Recons. at 3, 4. The motion has been fully briefed by the parties, and is awaiting ruling by the court.

ARGUMENT AND CITATION OF AUTHORITY

A. The Court Should Stay this Case Pending Resolution of Previously Filed Actions.

AutoZone submits that SCO's statements to the court in the *Red Hat* case justify the stay of this case without further consideration of the merits of AutoZone's motion. Nevertheless, consideration of the merits only further supports the appropriateness of the stay AutoZone requests.

1. SCO Will Not be Prejudiced or Suffer Irreparable Harm if This Case is Stayed.

SCO's principal argument in opposition to AutoZone's Motion to Stay is that it will suffer irreparable harm if the case is stayed. SCO Brief at pp. 13-14. However, SCO fails to identify any specific harm that it will suffer that is truly irreparable in nature. SCO simply cites a case for the proposition that a showing of a reasonable likelihood of success on the merits in a

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2 copyright infringement action raises a presumption of irreparable harm in the context of a motion
3 for preliminary injunction. SCO Brief at p. 13.

4 As an initial matter, SCO has made no showing of "a reasonable likelihood of success on
5 the merits" in this case. Indeed, as addressed in AutoZone's alternative motion for a more
6 definite statement, AutoZone cannot even identify with certainty what SCO is claiming. SCO is
7 therefore not properly entitled to a presumption of irreparable harm in this case. Nonetheless,
8 even if such a presumption applied in this case, it would be easily rebutted.

9 This is not a case against a software distributor in which the defendant's continued use
10 and distribution of an infringing product might irrevocably damage SCO's business. AutoZone
11 is in the auto parts business and uses Linux solely for its own internal use. Even if AutoZone
12 were to make additional copies of Linux for use on its internal servers while this case is stayed,
13 the only true harm SCO would suffer from AutoZone's action is the loss of license fees SCO
14 claims it would be owed.¹ The law is well settled that monetary damages do not constitute
15 irreparable harm. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Lydo Enters., Inc. v.*
16 *City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984).

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18 SCO's claim that it will suffer irreparable harm if this case is stayed is further rebutted by
19 at least two other facts. First, SCO knew or should have known that AutoZone was using Red
20 Hat Linux at least as early as 1999 when Red Hat issued a press release announcing the same.
21 *See* Red Hat Inc. News Release – 11/29/1999 (attached hereto as Ex. F). At the very least, SCO
22 knew all facts necessary to file this action at least as early as May 2003, when SCO sent a letter
23 to AutoZone stating that SCO "believe[s] that Linux infringes on [its] Unix intellectual property
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26 ¹ SCO's CEO has stated that SCO is not trying to "blow up Linux" but "to get a transaction fee every time
27 [Linux] is sold." *See* Interview of SCO CEO Darl McBride with CRN.COM dated Nov. 18, 2003, (attached hereto
as Ex. E.) Therefore, it is clear that what SCO is truly interested in is not that AutoZone cease use of Linux, but that
AutoZone (and other end users) pay SCO a license fee.

1 and other rights” and “intend[s] to aggressively protect and enforce these rights.” *See* SCO
2 Letter to AutoZone dated May 12, 2003 (attached hereto as Ex. G). As a distributor of both
3 UNIX and Linux, SCO has long possessed the knowledge necessary to determine whether the
4 source code of Linux infringed any SCO copyrights in the source code of UNIX.
5 Notwithstanding this knowledge, SCO waited at least ten (10) months – and perhaps as long as
6 five (5) years – from its first knowledge of AutoZone’s use of Linux to file suit against
7 AutoZone. Such delay in filing negates SCO’s claim that it will be irreparably injured by a stay
8 of this case. *See Richard Feiner & Co v. Turner Entm’t. Co.*, 98 F.3d 33, 34 (2nd Cir. 1996)
9 (“An unreasonable delay suggests that ... any harm suffered by the plaintiff is not so severe as to
10 be ‘irreparable.’”); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2nd Cir. 1995)
11 (delay of nine (9) months in filing suit evidence of lack of irreparable harm for issuance of
12 preliminary injunction).

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15 Second, SCO has aggressively sought to stay the *Red Hat* case, despite the fact that Red
16 Hat is one of the leading distributors of Linux in the United States. SCO’s case for prejudice or
17 irreparable harm is clearly more relevant in a case against a leading distributor of the alleged
18 infringing product than in a case against a single end user of the product like AutoZone. If SCO
19 was genuinely concerned about irreparable harm associated with the continued distribution and
20 use of Linux, common sense suggests that SCO would be seeking to move the *Red Hat* case
21 forward as quickly as possible – rather than pursuing a single end user.

22 Finally, it is worth noting that a stay of the present case does not mean that this case will
23 start anew when the stay is lifted. The progression of the *Novell*, *IBM*, and *Red Hat* cases will
24 undoubtedly aid discovery and clarify the issues in this case in a meaningful way. Relevant
25 witnesses will be identified, responsive documents will be produced, and issues will be framed in
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1 the pending cases that will assist SCO and AutoZone in preparing this case for trial. The stay of
2 this case will therefore not mean that the case will be truly idle.

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4 **2. AutoZone Will Suffer Meaningful Prejudice if the Case is Not Stayed.**

5 SCO incorrectly contends that AutoZone cannot demonstrate that it will suffer any
6 prejudice if this Motion is denied. SCO Brief at pp. 11-12. AutoZone undoubtedly will be
7 prejudiced if it is forced to engage in the substantial time and expense of defending a copyright
8 infringement action in a forum having no relation to the case while three (3) previously filed
9 actions are pending which address threshold elements of SCO's claims against AutoZone. If any
10 of several threshold issues are decided against SCO in those previously filed actions, SCO will
11 be estopped from asserting its claims against AutoZone.

12 Additionally, the prejudice to the parties is simply one factor, and not a prerequisite, in
13 granting a motion to stay. *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972). For
14 example, the court in the *Red Hat* case stayed its proceedings *sua sponte* without any analysis
15 whatsoever of the respective prejudice on the parties. *Red Hat v. SCO*, Order (attached to
16 AutoZone Motion to Stay as Ex. A) pp. 4-5.

17 In sum, AutoZone will suffer clearly demonstrable prejudice if the requested stay is
18 denied, but SCO will suffer no identifiable prejudice or harm of any kind if a stay is granted.

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20 **3. Possible Settlement or Other Resolution of the IBM, Red Hat, or Novell Cases**
21 **Does Not Affect AutoZone's Motion to Stay.**

22 SCO repeatedly notes that the present case should not be stayed pending resolution of the
23 *IBM*, *Red Hat*, and *Novell* cases because those cases may settle or be resolved on legal or factual
24 grounds unrelated to the issues in the present case. SCO Brief at pp. 14, 15, 17. SCO does not
25 cite any authority for denying a motion to stay because of the possibility that the pending actions
26 might settle or be resolved on grounds unrelated to the present case. Indeed, every case could
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1 potentially settle or be resolved on non-substantive grounds. Therefore, under SCO's logic, no
2 case could ever be stayed pending resolution of a prior filed case that addresses the same or
3 threshold issues. That is clearly not the law, no doubt in large part because it is equally possible
4 that prior filed cases will not settle and will be decided on grounds that are dispositive of issues
5 in later filed cases. *See Gen-Probe, Inc. v. Amoco Corp.* 926 F. Supp. 948, 963 (S.D. Cal. 1996)
6 (granting stay in favor of prior filed case).
7

8 SCO's contention that the other cases might settle is also inconsistent with SCO's public
9 pronouncements about the cases. As the court in *Red Hat* noted, "SCO has publicly stated that
10 ... 'chances for negotiating with companies [like Red Hat] appear to be slim.'" *Red Hat v. SCO*,
11 Order at p. 4 (quoting SCO public pronouncement). SCO's contention that a stay is
12 inappropriate because the prior filed cases may settle is therefore meritless.²
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14 **4. The Previously Filed Cases Involve Seminal, Threshold Issues Regarding
SCO's Claims of Copyright Ownership.**

15 SCO's response brief ignores authority cited by AutoZone in its opening brief that a stay
16 of proceedings is appropriate when issues of the ownership or validity of a patent (like a
17 copyright) are at issue in a previously filed, pending action. AutoZone Motion to Stay at pp. 11-
18 12. AutoZone discussed *Gen-Probe, Inc. v. Amoco Corp.* 926 F. Supp. 948, 963 (S.D. Cal.
19 1996), in which Amoco filed a motion to stay the proceedings pending the resolution of the *CNS*
20 *v. Gen-Probe* case, a previously-filed case addressing the issue of ownership of patents that was
21 an essential element of Gen-Probe's claim against Amoco. After Amoco argued that "if CNS
22 were to succeed in its claims against Gen-Probe, Gen-Probe would be deprived of any ownership
23 interest in the patents in suit, and would lack standing to complain even of Amoco's current acts
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25 ² Other than making self-serving statements that Novell's claims to ownership of UNIX are unfounded,
26 SCO's only argument as to why the present case should not be stayed in favor of *Novell* is that the *Novell* case could
27 settle or be resolved on different grounds. Having disposed of this argument, AutoZone submits that the present
28 case is properly stayed pending resolution of *Novell*.

1 of infringement," the district court granted the motion to stay pending the resolution of the *CNS*
2 v. *Gen-Probe* case. *Id.* at 963-64.

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4 SCO's only attempt to distinguish *Gen-Probe* is its mischaracterization of the case by
5 stating that it involved parallel litigation between the *same* parties. SCO Brief at p. 18. Clearly,
6 the two cases involved in *Gen-Probe* did not involve the same parties – the first case was *CNS v.*
7 *Gen-Probe* and the second case was *Gen-Probe v. Amoco*. *Gen-Probe*, 926 F.Supp. at 963-64.
8 Rather, *Gen-Probe* is directly on point with the present case. If Novell succeeds in establishing
9 that SCO has no ownership interest in the UNIX copyrights, SCO would lack standing to assert
10 any claims of copyright infringement against AutoZone related to the UNIX copyrights.
11 Similarly, if IBM or Red Hat establishes that whatever code or manuals SCO claims to have
12 been infringed by Linux are not copyrightable, SCO would have no copyright to assert against
13 AutoZone. Therefore, like the district court in *Gen-Probe*, this court should stay the present case
14 pending the resolution of the copyright ownership issue in the *Novell* case.

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16 **5. This Case Should be Stayed Under the First-to-File Rule.**

17 SCO claims that AutoZone's Motion to Stay should be denied under the first-to-file rule.
18 SCO's Brief at p. 17. However, the first-to-file rule is inapplicable under the facts of this case,
19 and, even if it were, it would support the grant – not the denial – of this Motion.

20 As an initial matter, the case SCO cites in support of its position that the first-to-file rule
21 justifies denial of AutoZone's motion holds that the rule only applies to actions involving the
22 *same* parties. SCO Brief at p. 17; *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th
23 Cir. 1991) ("[The first-to-file rule] may be invoked 'when a complaint involving the same parties
24 and issues has already been filed in another district.'" (quoting *Pacesetter Sys., Inc. v.*
25 *Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982))). Neither the *Novell*, *IBM*, nor *Red Hat* cases
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share the same parties with each other or with this case. Accordingly, the first-to-file rule is inapplicable to this case under the very authority SCO cites to invoke the rule.

Even if the first-to-file rule did apply, however, it dictates that the present case should be stayed pending resolution of the other, prior filed cases. The *IBM* case was filed on March 25, 2003 – nearly twelve (12) months before the present case; the *Red Hat* case was filed on August 4, 2003 – eight (8) months before the present case; and the *Novell* case was filed on January 20, 2004 – nearly two (2) months before the present case. Therefore, it is undisputed that these cases are all prior filed and that the first-to-file rule would direct that these cases be resolved before the instant action.³

SCO contends that the copyright claims in *IBM* case are junior to the issues in the present case because the issues were not at issue in *IBM* until IBM filed its Second Amended Counterclaims on March 29, 2004 (which added the Tenth Counterclaim). SCO's argument is misplaced because it ignores SCO's own admissions that threshold issues involving whether Linux misappropriates UNIX were already at issue in the *IBM* case well before IBM filed its Tenth Counterclaim. SCO stated in response to Red Hat's Motion for Reconsideration that the issue of whether Linux misappropriates UNIX code "is raised by SCO's claim for breach of contract arising from IBM's contributions of code to Linux in violation of its contractual obligations." SCO Opp. to Recons. at 3. SCO asserted this claim in its original Complaint against IBM (attached to AutoZone Motion to Stay as Ex. C), which SCO filed on March 6, 2003 – one year before SCO filed the present action. SCO expanded and clarified this claim in its First Amended Complaint against IBM (attached to AutoZone Motion to Stay as Ex. O), which SCO filed on June 16, 2003 – nine months before SCO filed the present lawsuit.

³ The fact that the Red Hat case is currently stayed does not change the analysis. That case is stayed, and not dismissed, pending the *IBM* case. Moreover, it is possible that the court will lift the stay in response to Red Hat's pending motion for reconsideration.

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2 Even assuming that the *IBM* case did not address issues of infringement until IBM filed
3 its Second Amended Counterclaims, IBM's amendment relates back to the date on which it filed
4 its original counterclaims for purposes of the first-to-file rule, or August 6, 2003 – eight (8)
5 months prior to SCO's lawsuit against AutoZone. *Ramsey Group, Inc. v. EGS Int'l, Inc.*, 208
6 F.R.D. 559, 564-65 (W.D.N.C. 2002) (amendment to complaint relates back to original filing
7 date for purposes of first-to-file rule); *Employees Savs. Plan of Mobil Oil Corp. v. Vickery*, 99
8 F.R.D. 138, 142 (S.D.N.Y. 1983) (same); *GT Plus, Ltd. v. Ja-Ru, Inc.*, 41 F. Supp. 2d 421, 424
9 (S.D.N.Y. 1998) (amendment to complaint adding claims raised in second-filed suit relates back
10 to original complaint and original filing date applies to first-to-file rule). The first-to-file rule
11 therefore supports, not defeats, AutoZone's Motion for Stay.

12 **6. This Case Should be Stayed Pending Resolution of the *IBM* Case.**

13 SCO has admitted in the *IBM* litigation that the issues involved in the present case are
14 also at issue in *IBM*. See *SCO v. IBM*, SCO's Mem. in Supp. of Mot. to Dismiss or to Stay
15 Count Ten of Pl. IBM's Second Countercl. Against SCO (attached hereto as Ex. F) p. 4 (the *IBM*
16 "case also will determine the enforceability of SCO's claims of infringement arising from the use
17 of Linux, including the enforceability of SCO's copyrights."). SCO has further conceded in the
18 *IBM* litigation that "AutoZone will be litigating the same issues that IBM seeks to inject in this
19 case through Count Ten." *Id.* at 5. SCO then concludes that "two federal courts should not
20 simultaneously be determining whether the same copyrights are infringed." *Id.* On this point,
21 AutoZone is in total agreement with SCO.

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23 Where AutoZone and SCO disagree is whether the *IBM* case or the present case should
24 move forward first. SCO's only argument as to why this case should move forward before *IBM*
25 is based on the first-to-file rule. As set forth above, SCO's reliance upon the first-to-file rule is
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1 misplaced. Because the first-to-file rule actually supports the *IBM* case moving forward first,
2 this case should be stayed pending *IBM* under SCO's own logic.

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4 Ironically, SCO has specifically agreed with the position AutoZone advocates in this
5 motion in statements that SCO has made to the court in the *Red Hat* case. In that case, SCO has
6 aggressively argued that *Red Hat* should be stayed pending resolution of the *IBM* case:

7 ?? "The previously filed SCO v. IBM Case addresses most, if not all, of the issues of
8 copyright infringement and misappropriation. If these issues are decided against
9 SCO in that case, then Red Hat's lawsuit becomes unnecessary." *Red Hat v. SCO*, SCO's Opening Br. in Supp. of its Mot. to Dismiss (attached to AutoZone Motion to Stay as Ex. N) p. 15.

10 ?? "The infringement and misappropriation issues Red Hat seeks to adjudicate in this
11 case are currently before U.S. District Judge Dale A. Kimball in the SCO v. IBM
12 Case pending in Utah Federal District Court." *Red Hat v. SCO*, SCO's Opening Br. in Supp. of its Mot. to Dismiss at 2.

13 ?? [This] Court correctly observed that the IBM case will address a central issue in
14 this case: whether Linux contains misappropriated UNIX code. As noted in the
15 Court's Order, this issue is raised by SCO's claim for breach of contract arising
16 from IBM's contributions of code to Linux in violation of its contractual
17 obligations. *Red Hat v. SCO*, SCO's Opp. to Recons. at 3.

18 AutoZone submits that SCO should be bound by its judicial admissions, and this Court
19 should stay the present case pending resolution of the relevant issues in *IBM*. See *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988).

20 A stay of the present case pending the *IBM* case is also warranted given the respective
21 stages of the actions. It is well-established that an action that has advanced significantly further
22 should proceed before an action that is in the very early stages of litigation. See, e.g., *Coop. Centrale Raiffeisen-Boerenleen Bank B.A. v. Northwestern Nat'l Ins. Co.*, 778 F. Supp. 1274,
23 1279 (S.D.N.Y. 1991) (denying stay in favor of second action because "the parties [in the present
24 case] have conducted substantial discovery, and they have briefed and argued a motion for
25 summary judgment" whereas the defendant in the second action "had not even filed its answer");
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2 *Ward v. Follett Corp.*, 158 F.R.D. 645, 649 (N.D. Cal. 1994) (dismissing case because, in part,
3 “discovery is already underway” in related action); *Marianna Imports, Inc. v. Helene Curtis,*
4 *Inc.*, 873 F. Supp. 308, 309 (D. Neb. 1994) (dismissing case because “[t]he action in Illinois is
5 further developed than this case as discovery there has already commenced”); *Optical Recording*
6 *Corp. v. Capitol-EMI Music, Inc.*, 803 F. Supp. 971, 974 (D. Del. 1992) (denying motion to
7 dismiss or stay because “this action has proceeded further than the New York lawsuit”).

8 Although this case has only recently been filed, relevant discovery in the *IBM* case is
9 nearly complete. IBM recently reported to the court that the parties “have essentially completed
10 their document productions, depositions have commenced, and IBM has moved for summary
11 judgment....” *IBM v. SCO*, IBM’s Mem. In Opp. To SCO’s Mot. To Dismiss or Stay Count Ten
12 of IBM’s Second Am. Countercl. (attached hereto as Ex. I) p. 3. Because the *IBM* case is nearly
13 complete on issues that SCO concedes are largely the same and that are key threshold issues to
14 relevant issues in this case, and because the relevant claims in *IBM* have now been tendered to
15 the court for resolution on the merits, AutoZone submits that considerations of judicial economy
16 strongly support the stay of this case pending the District of Utah’s resolution of the *IBM* case.
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18 **7. This Case Should Be Stayed Pending Resolution of the *Red Hat* Case Because**
19 **The Law Favors Declaratory Judgment Actions By a Product Manufacturer**
20 **or Distributor Over Infringement Actions Against Customers or End Users.**

21 Federal courts have long recognized in the analogous context of patent infringement
22 litigation that a declaratory judgment action by a product manufacturer or distributor against a
23 patent owner should proceed before infringement actions by the patent owner against the
24 manufacturer’s customers or end users. *See, e.g., Ricoh Co. v. Aeroflex Inc.*, 279 F. Supp. 2d
25 554, 557 (D. Del. 2003) (“A manufacturer’s declaratory judgment suit should be given
26 preference over a patentee’s suit against the manufacturer’s customers when those customers are
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2 being sued for their ordinary use of the manufacturer's products"); *see also Katz v. Lear Siegler,*
3 *Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990) ("[L]itigation against or brought by the manufacturer
4 of infringing good takes precedence over a suit by the patent owner against customers of the
5 manufacturer."); *Codex Corp. v. Milgo Elecs. Corp.*, 553 F.2d 735, 737-38 (1st Cir. 1977);
6 *Whelen Techs., Inc. v. Mill Specialties, Inc.*, 741 F. Supp. 715, 715 (D. Ill. 1990) ("In patent
7 infringement actions, stays are appropriate where the first action is brought against the customer
8 of an offending manufacturer and a subsequent action is brought involving the manufacturer
9 itself.").

10 This rule "acknowledges that a patentee's election to sue customers, rather than a
11 manufacturer itself, is often based on a desire to intimidate smaller businesses." *Ricoh*, 279 F.
12 Supp. 2d at 557.

13 The rule set forth in these patent cases applies with equal force in the present case. This
14 case involves an infringement action brought by the copyright holder (SCO) against the product
15 customer or end user (AutoZone) merely on the basis of the customer's or end user's normal use
16 of the manufacturer's or distributor's (Red Hat's) product. The *Red Hat* case is a declaratory
17 judgment action by the "manufacturer" and distributor of Red Hat Linux (Red Hat) against the
18 purported copyright holder (SCO). AutoZone therefore submits that this case should be stayed
19 while Red Hat's claims against SCO proceed to resolution. *Ricoh*, 279 F. Supp. 2d at 557; *Katz*,
20 909 F.2d at 1464; *Whelen Techs.*, 741 F. Supp. at 715.

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22 **B. In the Alternative, the Court Should Direct SCO to Amend its Complaint to Provide**
23 **AutoZone with a More Definite Statement of SCO's Claims.**

24 As set forth in AutoZone's opening brief, SCO's Complaint fails to comply with Rule 8
25 because it does not give AutoZone "fair notice" of SCO's copyright infringement claim and the
26 grounds upon which the claim rests. *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96,
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1 97 (D.D.C. 1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). In support of its position,
2 AutoZone cited to specific ways in which the Complaint fails to give AutoZone proper notice of
3 the nature and basis of SCO's claims. Rather than address any of these issues, SCO responds to
4 AutoZone's motion merely by alleging broadly that its complaint meets Rule 8's pleading
5 requirements. SCO Brief at pp. 19-20.

6
7 SCO implicitly acknowledges the vague nature of its Complaint by its failure to address
8 the mystery surrounding its listing of thirty reference manuals, programmer's guides, and other
9 written documentation related to UNIX within its copyright registrations. Compl. ¶ 15. As
10 stated in AutoZone's initial brief, SCO lists these materials and never mentions the materials
11 again in the Complaint. AutoZone is entitled to know whether SCO is alleging that AutoZone
12 has infringed the copyrights in these materials, and, if so, how.

13
14 SCO similarly fails to address how the problem associated with shared libraries identified
15 by AutoZone in its Motion to Stay is solved or otherwise addressed in the Complaint. Again,
16 SCO has implicitly acknowledged that its broad references to the functionality of UNIX's shared
17 libraries does nothing to reasonably apprise AutoZone of the copyrights SCO claims to own in
18 UNIX.

19 SCO's minimal response in its brief indicates that SCO is intentionally trying to avoid
20 identifying the nature and basis of its purported claims. As AutoZone previously noted, the
21 Linux code is freely available to anyone to examine, and SCO has been in possession of the code
22 for years. SCO can readily identify the lines, files, or organization of Linux code that it claims
23 infringes UNIX, and SCO can likewise readily identify the corresponding lines, files, or
24 organization of UNIX that SCO claims to be infringed. As the Complaint currently stands, Rule
25 8 requires SCO to do so. Without such information, AutoZone cannot determine the
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applicability of specific affirmative defenses and whether any of SCO's claims are subject to dismissal or judgment under Rules 12 or 56 and is left to guess which of the millions of lines of Linux source code, or worse yet, which organizational elements within those millions of lines of code, are the subject of SCO's claims.

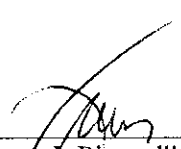

SCO claims that the information AutoZone seeks in its Motion for More Definite Statement is properly the subject of discovery, and that AutoZone's motion should thus be denied. SCO Brief at pp. 19-20. The *IBM* case demonstrates, however, that AutoZone will not get this information from SCO in discovery. IBM has been requesting from the outset of that case that SCO identify the UNIX code that is allegedly copied or otherwise misappropriated in Linux. SCO insists that, following two orders compelling it to provide the information, it has fully complied and produced all evidence in its possession, custody or control responsive to IBM's requests. IBM has recently filed a motion for summary judgment on its Tenth Counterclaim because what SCO has produced does not evidence any infringement of UNIX by Linux. See *IBM Mot. for Partial Summ. J.* at 2. SCO's contention that AutoZone will get the information in discovery that it now seeks thus appears wholly illusory. Accordingly, SCO should be directed to amend its Complaint and provide a more definite statement of its claims.

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1
2 **CONCLUSION**

3 For the foregoing reasons and the reasons set forth in its opening brief, AutoZone
4 respectfully requests that the Court stay this action pending resolution of the *IBM*, *Novell*, and
5 *Red Hat* cases. In the alternative, SCO requests that the Court direct SCO to provide a more
6 definite statement of its claims so that AutoZone can frame a proper responsive pleading.

7 This 4th day of June, 2004.

8
9
10 
11 
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT**
AUTOZONE, INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
TO STAY OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT upon all
counsel of record by depositing copies of the same in the United States mail with adequate postage
affixed thereon, addressed as follows:

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This 4th day of June, 2004.


James J. Pisanello

39

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RED HAT, INC.

Plaintiff,

v.

THE SCO GROUP, INC.

Defendant.

C.A. No. 03-772-SLR

SCO'S OPPOSITION TO RED HAT'S MOTION FOR RECONSIDERATION

STATEMENT OF FACTS

In its Order denying SCO's motion to dismiss Red Hat's complaint, the Court stayed this action pending resolution of the litigation between SCO and IBM in federal district court in Utah, with the proviso that the parties report to the Court every 90 days regarding the status of the IBM case so that the Court can evaluate whether the stay should be lifted prior to final resolution of that matter. See D.I. 34 at 4. On April 20, 2004, Red Hat filed a motion for reconsideration of that Order (D.I. 35-36)¹ contending that:

- The Court mistakenly assumed that the Red Hat litigation and the IBM litigation involved the same core issue – whether Linux contains misappropriated Unix system source code (D.I. 36 at 2); and
- Manifest injustice will result from the Court's Order (D.I. 36 at 2).

¹ Red Hat filed its motion for reconsideration without complying with D.Del. LR 7.1.1. Red Hat made no effort to confer with SCO before filing the motion. Nor did it make the certification required by that rule.

ARGUMENT

As Red Hat acknowledges, a movant seeking to alter or amend a judgment must demonstrate that reconsideration is warranted in light of: (1) a change in the controlling law, (2) new evidence, or (3) a "clear error of law or fact or to prevent a manifest injustice." See *Mar's Seafood Café v. Quinteros*, 176 F. 3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)).

Red Hat's motion does not refer the Court to any new legal authority or new evidence. Nor does Red Hat establish that there has been a clear error of law or fact. Instead, Red Hat's motion reduces to a claim that this Court's April 6, 2004 Order will result in "manifest injustice." This claim is baseless, and Red Hat's reconsideration motion should be denied. See *Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp.2d 385, 419 (D. Del. 1999).

A. There Is No Change In The Law Or New Evidence Warranting Reconsideration

Red Hat's initial argument in favor of reconsideration is that the "the Court did not have the benefit of the law and the facts regarding the first filed rule" when it ordered a stay in this case, and that the Court erred in applying the "first filed rule." (D.I. 36 at 8.) Red Hat presumes that the stay in this case is predicated on the "first filed" rule, but SCO reads the Court's Order differently. Regardless, however, of whether "first filed" principles suggest that this case should be stayed, the Court clearly had ample authority to order a stay as part of its power to manage litigation before it.

Red Hat ignores the wealth of case law explaining that federal courts have inherent power to manage their dockets and stay proceedings. See, e.g., *Alloc, Inc. v. Unilin Décor N.V.*, 2003 WL 21640372, *2 (D. Del. July 11, 2003) ("The decision to stay a case is

firmly within the discretion of the court." As Justice Cardozo explained in *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936):

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

There can be no dispute that the Court had authority to issue a stay in this case.

Red Hat's "first filed" argument is also based on a mistaken belief that the Court ordered a stay based on a "misapprehension" about the nature of the claims at issue in this case and those in the IBM case. (D.I. 36 at 1.) In addition to the fact that the pleadings in the IBM case are a matter of public record and widely available on the internet, Red Hat previously presented the Court with its views about the differences between this case and the IBM matter. See D.I. 13 at 16-18. There is no basis for presuming the Court was under any "misapprehension" about these issues.

Indeed, the Court correctly observed that the IBM case will address a central issue in this case: whether Linux contains misappropriated UNIX code. As noted in the Court's Order, this issue is raised by SCO's claim for breach of contract arising from IBM's contributions of code to Linux in violation of its contractual obligations. This issue is also raised directly by IBM's Tenth Counterclaim against SCO, which seeks a declaratory judgment that "IBM does not infringe, induce infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or

all of SCO's purported copyrights in Linux are invalid and unenforceable."² In claiming that this case is "fundamentally different" from the IBM matter, Red Hat focuses on *SCO's copyright claim against IBM*, ignoring IBM's Counterclaim which focuses on violations of SCO's rights arising from the use, reproduction and use of Linux. There is no doubt that, as it is presently constituted, the IBM case will address central issues raised in this lawsuit.³ Therefore, it would be "a waste of judicial resources," and resources of the parties, to litigate this case while a substantially similar question is being litigated in federal district court in Utah.

B. The Court's Order Will Not Result In "Manifest Injustice"

Red Hat's claim that the Court's Order will result in "manifest injustice" is also unavailing. In fact, all indications are that Red Hat is thriving, and there is serious reason to doubt Red Hat's position that a stay of this case will result in "injustice."

Red Hat asserts that it is suffering "damage" to its business, and that "[t]he damage to Red Hat and its customers has become even more clear from the new evidence of SCO's recent lawsuits against [DaimlerChrysler and AutoZone]." See D.I. 36 at 15 and n. 8. If SCO's claims against DaimlerChrysler and AutoZone posed a grave risk to Red Hat's business, presumably that fact would be disclosed in Red Hat's SEC filings. SCO is unaware of any such disclosures by Red Hat, however. To the contrary, Red Hat's most recent 8-K -- filed several weeks after SCO sued DaimlerChrysler and AutoZone -- is replete with news of Red Hat's

² See IBM's Second Amended Counterclaims at ¶ 173. SCO has moved to dismiss this Counterclaim. IBM's opposition is due May 14, 2004. In accordance with the Court's Order, SCO will keep the Court apprised of that motion, as well as other developments in the IBM case.

³ Red Hat ignores the IBM Counterclaim that placed these issues at the center of that case, even though it is well aware of it, having attached the relevant pleadings to its motion. Of course, this motion must be decided on the basis of the IBM case as it presently stands.

successes, while making no mention of SCO's lawsuits. For instance, a press release attached to the 8-K quotes Red Hat Executive Vice President and Chief Financial Officer Kevin Thompson as stating: "[t]he growth rates in adoption of Red Hat Enterprise Linux has exceeded our expectations to date and we are positive on the outlook for fiscal 2005." See Exh. A at 12 (emphasis added). Red Hat offers no substantiation for its conclusory assertion of harm, or for the idea that SCO's lawsuits against end-users render the stay of this case unjust.

Red Hat's claim of "manifest injustice" also rings hollow in light of the Court's requirement for periodic reports from the parties, and its commitment to review the propriety of the stay as events in the IBM case unfold. See D.I. 34 at 5. In light of these, there is no basis for the grant of Red Hat's motion.

C. Red Hat's Request For An Injunction Is Inappropriate And Unfounded

Red Hat's motion proposes "[i]n the alternative" that "the Court modify its order to enjoin SCO from threatening or initiating additional lawsuits against Red Hat or its customers based on alleged copyright infringement through use of LINUX until the stay is lifted." Red Hat's request is in effect a request for a preliminary injunction. Neither the procedural nor substantive requirements for a preliminary injunction have been met here.

First, Red Hat did not request a preliminary injunction in its complaint, nor did it move this Court for such an injunction. Accordingly, adequate notice has not been provided to SCO as required by Fed. R. Civ. P. 65.

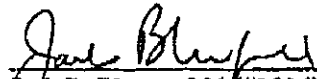
Second, a preliminary injunction may be granted only after the following factors have been weighed by the court: (1) whether the party seeking the injunction demonstrates a reasonable likelihood of success on the merits; (2) whether irreparable harm will occur if an injunction is not granted; (3) whether the balance of hardships weighs in favor of granting the

injunction; and (4) whether granting the injunction is in the public interest. See, e.g., 2660 *Woodley Road Joint Venture v. ITT Sheraton Corp.*, 1998 WL 1469541, *2 (D. Del. Feb. 4, 1998) (preliminary injunction denied; stating that a preliminary injunction is an extraordinary remedy that must be "thoroughly justified"); *Black & Decker Corp. v. American Standard Inc.*, 679 F. Supp. 1183 (D. Del. 1988) (preliminary injunction denied and other factors not examined where irreparable harm was not initially demonstrated). Here, Red Hat has not demonstrated a single factor warranting a preliminary injunction. Accordingly, Red Hat's request for an injunction should be denied.

CONCLUSION

For the foregoing reasons, Red Hat's motion for reconsideration should be denied.

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May 4, 2004

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Attorneys for Plaintiff/Counterclaim Defendant

FILED

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DISTRICT OF UTAH

BY: _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff,

vs.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

**CORRECTED
MOTION TO DISMISS OR TO
STAY COUNT TEN OF
COUNTERCLAIM-PLAINTIFF
IBM'S SECOND AMENDED
COUNTERCLAIMS AGAINST
SCO**

Case No. 2:03CV0294DAK

Hon. Dale A. Kimball

Magistrate Judge Brooke Wells

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Plaintiff/Counterclaim-Defendant The SCO Group ("SCO"), by and through undersigned counsel, hereby moves the Court pursuant to Federal Rule of Civil Procedure 12(b) for dismissal or, in the alternative, to stay Count Ten of Counterclaim-Plaintiff International Business Machines Corporation's ("IBM") Second Amended Counterclaims against SCO.

SCO bases its Motion on the following grounds:

On March 29, 2004, Defendant/Counter-Plaintiff International Business Machines Corp.. ("IBM") filed its "Second Amended Counterclaims Against SCO." In Count Ten of that pleading, IBM added an entirely new claim seeking a declaratory judgment "that IBM does not infringe, induce infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable." ¶ 173. In other words, IBM is seeking to declare that a person or entity using Linux does not infringe upon SCO's copyrights and that some or all of SCO's copyrights are invalid or unenforceable.

These issues are being litigated in a case filed by SCO against AutoZone in federal district court in Nevada; a case that was filed prior to IBM's filing its Tenth Counterclaim. *See The SCO Group Inc. v. AutoZone, Inc.*, Case No. CV-S-04-0237-DWH-LRL (D. Nev. 2004). This newly added counterclaim raises issues separate and apart from the primary breach of contract and other direct claims and counterclaims in this case. Given this fact, and to avoid multiple suits determining substantially similar issues, this Court should decline to exercise jurisdiction over and dismiss Counterclaim Ten. In the alternative, Counterclaim Ten should be stayed pending the outcome in the prior filed *AutoZone* case.

SCO's Motion is supported by the Memorandum in Support of Motion to Dismiss or to Stay Count Ten of Counterclaim-Plaintiff IBM's Second Amended Counterclaims Against SCO submitted concurrently herewith.

DATED this 26th day of April, 2004.

Respectfully submitted,

By:



HATCH, JAMES & DODGE, P.C.

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Mark F. James

BOIES, SCHILLER & FLEXNER LLP

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U.S. DISTRICT COURT
DISTRICT OF UTAH

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DEFENDANT/COUNTERCLAIM-
PLAINTIFF IBM'S CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT ON ITS
CLAIM FOR DECLARATORY JUDGMENT
OF NON-INFRINGEMENT**

(ORAL ARGUMENT REQUESTED)

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

Pursuant to DUCivR 56-1(a) and Federal Rules of Civil Procedure 56 and 37(b)(2),
Defendant/Counterclaim-Plaintiff International Business Machines Corporation ("IBM")
respectfully submits this cross-motion for partial summary judgment on its claim against

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Plaintiff/Counterclaim-Defendant The SCO Group, Inc. ("SCO") for a declaration of non-infringement with respect to IBM's Linux activities (the "Tenth Counterclaim"). IBM is entitled to relief as a matter of law on this claim for the following reasons:

1. SCO claims to hold copyrights to certain UNIX software, which give it the right to control IBM's use of and contributions to Linux, a computer operating system which was pioneered in 1991 by an undergraduate student named Linus Torvalds and has since been continuously developed over the Internet by thousands of programmers worldwide. SCO refuses, however, to disclose its purported evidence that IBM's Linux activities infringe SCO's alleged copyrights, despite two court orders requiring it to do so.

2. IBM asked SCO (more than seven months ago) to identify the precise lines of Linux code in which it claims rights, and the precise lines of code in the UNIX software from which SCO alleges such Linux code is copied or derives. Unless SCO can match up the lines of code in Linux to which it claims rights to the precise lines of code in the UNIX software over which SCO claims copyright protection, SCO cannot show copyright infringement.

3. Based upon SCO's failure to come forth with evidence to demonstrate infringement, summary judgment should be entered in favor of IBM on its claim that IBM's Linux activities do not infringe SCO's alleged copyrights relating to UNIX. After more than a year of litigation, two orders to compel and two affidavits from SCO certifying that it has provided complete responses to IBM's interrogatories, SCO admits—by its silence and failure to provide evidence—that IBM's Linux activities do not infringe SCO's alleged copyrights. Although SCO has identified certain materials in Linux to which it claims rights (albeit without the required specificity), SCO fails altogether to show how IBM's Linux activities infringe SCO's alleged copyrights concerning the UNIX software.

4. Additional discovery is unnecessary here. SCO has had access to all of the information necessary to determine whether and how IBM's Linux activities infringe its

purported copyrights from the outset of this case—the source code to which SCO purports to hold copyrights on the one hand and the publicly available source code for Linux on the other—and yet is unable to proffer any evidence of copyright infringement. Indeed, given SCO's repeated failure to comply with the Court's orders, the fact of IBM's non-infringement should simply be established against SCO, and SCO should not be allowed to adduce evidence on this issue under Rule 37(b)(2).

IBM requests oral argument on its cross-motion for partial summary judgment, and further requests that such argument be heard at the same time as argument on SCO's motion to dismiss or stay the same claim. This motion is further supported by the memorandum of points and authorities and the declarations of Daniel Frye and Todd Shaughnessy, filed and served herewith, and by such argument as shall be presented at hearing.

DATED this 18th day of May, 2004.

SNELL & WILMER L.L.P.



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

----- X
RED HAT, INC., :
 :
Plaintiff, : Civil Action No.: 03-772-SLR
 :
vs. :
 :
THE SCO GROUP, INC. (formerly Caldera :
International, Inc.) :
Defendant. :
----- X

MOTION FOR RECONSIDERATION

Red Hat, Inc. respectfully moves pursuant to Local Rule 7.1.5 for reconsideration the Court's Order dated April 6, 2004 staying this case.


In summary form, the grounds for this motion are as follows:

1) The Court did not have the benefit of briefing on the issue of a stay before it when the Court stayed this case *sua sponte*, and in fact a stay based on the prior pending Utah action would be inappropriate under the facts and caselaw for many reasons; and

2) Red Hat will suffer manifest injustice from a stay, since SCO apparently intends to continue to harass and threaten suit against Red Hat's customers in other jurisdictions, while Red Hat's declaratory judgment suit here, which was intended to prevent this precise harm to it and to its customers, is forced to languish.

The above grounds are fully set forth in Red Hat's Memorandum, filed herewith.

WHEREFORE, Red Hat respectfully requests the Court to grant the within Motion. A form of Order is attached hereto.


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Dated: April 20, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

_____)	
RED HAT, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 03-772 (SLR)
)	
THE SCO GROUP, INC. (formerly Caldera)	
International, Inc.),)	
)	
Defendant.)	
_____)	

ORDER

The Court having considered the motion of Red Hat for Reconsideration of the Court's Order dated April 6, 2004 (the "Motion"), and having considered the parties' arguments thereon, it IS HEREBY ORDERED this ____ day of ____, 2004 that:

The Motion is granted and:

A. The Order of the Court dated April 6, 2004 is hereby vacated, the stay is lifted and the parties are directed to confer and to submit to the Court a proposed Scheduling Order by _____ 2004.

Alternatively,

B. The Court's April 6, 2004 Order is hereby modified, as follows: SCO is enjoined from threatening to initiate suit or initiating any lawsuit against Red Hat or any of Red

Hat's customers based on alleged infringement of SCO's copyrights through the use of LINUX,
for the period during which this case is stayed.

U.S.D.J.

CERTIFICATE OF SERVICE

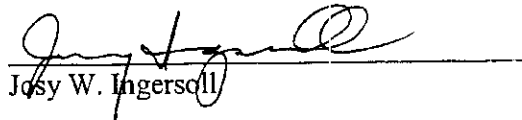
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Josy W. Ingersoll



CRN Interview: SCO's Darl McBride and Chris Sontag

(URL: <http://www.crn.com/sections/BreakingNews/dailyarchives.asp?ArticleID=46153>)

By **Barbara Darrow**
CRN

7:36 PM EST Tues., Nov. 18, 2003

*SCO CEO Darl McBride and Senior Vice President Chris Sontag met with **CRN** Industry Editor Barbara Darrow and **VARBusiness** Senior Executive Editor T.C. Doyle in Las Vegas. The conversation took place just hours after SCO said it made its chief litigator, David Boies, a stakeholder to the tune of 400,000 shares plus \$1 million dollars. Earlier this year SCO charged that IBM had illegally turned over Unix code to the Linux community. Tuesday, SCO said it will likely sue an end-user company using the Linux code at issue in the suit. The SCO-IBM case is slated to hit a Utah courtroom in 18 months.*

CRN: You're paying David Boies [of Boies, Schiller & Flexner LLP] about \$9 million to pursue your claims against IBM?

Darl McBride: We are giving him 400,000 shares of stock and \$1 million in cash. When I said we have \$60 some million in cash [on hand at SCO], reduce the cash by \$1 million and we take non-cash charge. David comes on, he's now a shareholder, he's rowing with us, and let's face it, he's added significant value to our company since February. Our stock was around a buck, now it's \$14. That's some of the best money we've spent, not even money, some of the best stock we've issued. Now we're broadening our scope and going after the cleanup project. The breadth of damage that's been done here, it's like cleaning up the Exxon Valdez... the code violation that is going on inside of Linux between derivative work, copyrighted work, it's not unsubstantial.

CRN: Can suing customers, as you've said you will, be good for any vendor?

McBride: First it's not our customers. I would say we're suing end users. There are only two industries who use the term 'users,' computers and drugs. Not sure if there's a connection there. But the point is, we're not suing our customers. We are going after end users of Linux and I think there's a slight but significant difference there.

CRN: When you talk to your VARs, partners, integrators... what are they saying about this legal battle? Is it confusing their market?

McBride: It's a range. Those who are directly selling SCO Unix products, are cheering us on, saying go, fight, win. Those who have drifted over to the Linux camp are confused. They don't know how to deal with this... 'What do we do?' It depends on where they are in the process.

CRN: Are you trying to evangelize them to speak out in your behalf? It's clear the open source

crowd needs no encouragement to tell their side of the story.

McBride: My first reaction was we needed to create a counterbalance [to the vocal open sourcers]. We're on the side of the silent majority...but at the end of the day it's around who's right. We're rock solid on our claims... and we're not sitting here day in day out trying to counter the stones being thrown at us. We have a business to run. Our employees are reenergized around the movement back to Unix, reenergized around the role SCO is playing... Our roots in the Unix business are strong and won't be blown over by a little bit of Linux wind.

CRN: Conspiracy theorists say you guys are acting as Microsoft's pawn against open source and the General Public License [GPL]. Can you comment?

McBride: The funny part is we didn't even talk to Microsoft about this outside the normal public interest level things... when we talk to them it's about what's happening in the marketplace. [I know] there is this feeling that something's happening here... It's funny when I talked to IBM earlier this year, before we did anything, it wasn't even clear where the IP problems were. We just said we were going to start investigating IP issues, and IBM said, 'You're just giving Bill Gates an early Christmas present.' Bill Gates? This is about our IP! What are you talking about? This was the immediate reaction at IBM and the open source guys. Unfortunately for them, it's just not reality.

If people want to talk about conspiracy theories, they should spend some time poking what IBM, SUSE and Novell are talking about and what the 'Chicago 7' talked about in Chicago in July [2003. That was a group of companies with] a half a trillion dollars in market cap talking about what to do about SCO.

CRN: What is the 'Chicago 7'?

McBride: All the big guys, HP, IBM, Oracle, etc. (For more on the Chicago 7, see [story](#).) Or look at the massive amount of money IBM is pushing into Linux companies all over the world. They should start a division in heart lung machines [to support] all those little companies.

IBM is the master of creating an illusion that they're being attacked by this big brutal bully SCO when they're the ones attacking us. They're the ones doing all the behind-the-scenes work.

CRN: What do you see as the IBM/SUSE/Novell conspiracy?

McBride: We file a suit against IBM and we get a letter from Novell cc'ing IBM's legal counsel? Hmm interesting.

We're protecting our IP and it's turned into a bar-room brawl. What's at stake here at the end of the day is not just between SCO and IBM, it's what's in the balance for the computer industry. Is the future of software free or a traditional license model and the outcome will have a lot of impact on the industry going forward.

CRN: So is the IBM case becoming a test of the GPL?

McBride: We early on looked at GPL-related issues and felt it was an Achilles heel for IBM but we didn't open them up initially. We didn't want to confuse a clear-cut contract issue [with IBM] with the untested GPL and other issues. But when IBM dragged GPL onto the table, our lawyers started sharpening their steak knives. 'Ok, if that's what you want to talk about, we'll talk about it.'

IBM will have a lot of problems trying to hide behind the GPL. Basically the GPL is countering U.S. Copyright law. Is IBM on the side of free software while they are one of the largest IP and IT firms in the world trying to protect their own patents and copy rights? It's just the most bizarre juxtaposition... They're supporting something that's very unfriendly to copyrights.

CRN: Oracle, IBM and other software vendors say they're bleeding the cost out of the operating systems with Linux and hardware with standard, commodity gear, but they're not cutting the price of their own software.

McBride: That's the whole point. 'Let's bleed it out of the database, let's bleed it out of the apps. Let's have hardware all free this year. Let's alternate, we'll do software this year, next year you do hardware.'

It's a weird thing and what it is really is business competition. Underneath all this is hard-core capitalism. They're trying to drive us out of business and we're fighting back. The good news is we have the U.S. Copyright Office on our side to fight with.

VAR Business: Other than the suit, how's business?

McBride: That's the great untold story no one even asks about. We have over two million servers actively running today. Customers continue to come to us. We have laid out a growth map that will be significant for our customers. In the next year expect Legend, which will take OpenServer and update it. Longer term, expect SVR 6, which will be 64-bit Unix on Intel. That is a few years out.

As we look at monetizing this two-million-user installed base, we can sell product for a \$800 to \$1,000 dollars, whatever. We're talking about a couple of billion dollars in upgrade opportunities.

From a financial standpoint. The first part was cleaning the company up. We've done that. Going forward we have three dials. The core business, we think that's bottomed out and there's upside now with new products coming. We haven't had a new product in our OpenServer base in years and years.

The second dial is the 2.5 million Linux servers out there today that are paired with our intellectual property in them. We have a licensed product \$699, \$1,399. Chris [Sontag] is driving that and that's another multi-billion-dollar revenue opportunity.

The third bucket has to do with the IBM settlement. We filed that at \$3 billion. Every day they don't resolve this, the AIX meter is still ticking....

That's in a Utah courtroom 18 months out. That's a down the road revenue opportunity but the first two dials are going right now, and today's announcement today with Boies will really help move the second dial along.

VARBusiness: Have you seen any movement on IBM's part to cease additional AIX development.

McBride: Right now, we're talking about the Linux base. We're a little company we have to choose our battles. Our goal is to take the Linux thing and get that tightened down and then swing back around on AIX. We're sort of fine to let the AIX thing tick, because the longer it goes, when we actually end up in courtroom, we can go back to June 13, 2003, and add damages. We're sort of fine to let that one run. I don't sense they've stopped shipping AIX and both sides right now are kind of on the Linux battlefield.

VARBusiness: What's the issue here?

McBride: It's that they've taken a substantial amount of our code is what creates the battleground. It's interesting to hear Red Hat speak at financial conference yesterday and their comment is, 'We're really scaling Linux up. Linux is really growing up.' If you take IBM out of the equation, Linux would not be growing up, it would not be SMP-enabled, it would not be multi processing, scaling up to hundreds of servers. It is IBM that is enabling that.

VARBusiness: What about others? Sun says they contribute more source code than anyone.

McBride: Sun even though they have the broadest rights of any Unix licensee out there, has been careful to not contribute things that would be outside their license. IBM's been the opposite. It has very limited rights but has been dumping substantial amounts of code. We have a very good relationship with Sun.

CRN: When did Sun sign its licensing agreement with you?

McBride: Originally they signed one back in '94, [then] another one in '99, another deal earlier this year. It's been an ongoing thing.

VARBusiness: Are customers changing their Linux purchasing pattern since SCO sent out warning letters?

McBride: A research report came out saying 80 percent of users had not slowed down. Our take on that is 20 percent have. So one out of five. We sent out our letter three to four months ago and in that period, one out of five have changed. We think that's significant. We only mailed letters out to 1,500 companies. I would argue that is one out of five out there...it could be 100 percent of all [the companies] we sent it to, we don't think that's actually the case. Anecdotally, I can tell you... it has an impact. People are concerned. One transportation company said, 'We don't want to be on the wrong side of you guys on this. What do we do to get clean?'

We think as we head down this path of license or litigate, if look at what we've done over past three months, [it's been] pretty soft in reality. We've focused on playing defense against IBM and Red Hat through August and September. We focused on getting some money raised in October, we wanted our money base underneath us for the fiscal year. We got our legal case in place, taking care of business in defense of other suits. Now it's time to go back on offense.

I think where the barometer is going now, I think you'll see some increased interest in Chris's licensing program

VARBusiness: At the end of the day are you guys going to do to Linux what was done to Napster?

McBride: Our goal is not to blow up Linux. People ask why we don't go after the distributors... 'If you have such a strong case, why not shut down Red Hat?' Our belief is that SCO has great opportunity in the future to let Linux keep going, not to put it on its back but for us to get a transaction fee every time it's sold. That's really our goal.

To the extent that we have to take it down and put it on its back, we're fully prepared and willing to do that. The thing about going after end-users is it doesn't shut down the flow of Linux. If you look at the GPL, it couldn't be more clear, they either have to pull [the offending code] or shut down the distribution. The things we're laying claim to are things you can't pull out very easily....it's very difficult to yank this stuff out. We're not actually shutting down the flow of Linux, just cleaning it up at the end user level.

[When I came aboard at SCO I looked at this issue of code and asked:] 'Why don't you guys do this?' They said, 'Because the Linux community will get mad at us.'

I tell you what, I'll give you the Linux community getting mad at us vs. shareholder value. That was the trade off. They were absolutely right, the Linux community got mad and we were right, shareholder value went up. The last time I checked the CEO was in charge of shareholder value, not standing around the campfire singing Kumbaya with the Linux world. So far, I'm pleased with where we're going..

CRN: The whole issue of customer lawsuits... you will be suing someone within 90 days?

McBride: They said within 90 days [this morning] but I would qualify that and say I'll be surprised if we get beyond 60 days.

CRN: HP I believe is the only vendor who's talked about indemnifying customers, if you guys sue an HP customer, what happens?

Chris Sontag: Well, HP put a lot of provisos in place [to qualify for indemnification.] You have to be an HP customer on HP hardware. You have to have a support agreement with HP which very few of their customers have. And you can't modify the code which may not be a huge issue because a very small number of commercial end users have wanted to modify the code anyway.

If I were a commercial end user independent of anything else, given the nature of the GPL I would avoid modifying the code, I would avoid doing anything that could be considered a distribution of my application. If I'm Merrill Lynch and have a trading application proprietary to Merrill Lynch and deploy it across all my trading desks, if that deployment occurred where the Linux OS and app are distributed together there are arguments that Merrill would have to provide their proprietary trading application in source form to everyone. That's a problem. I'm sure all of Merrill's competitors would love to get that but it's hard for a company to be financially viable when all of the bases are shared.

One of the economic issues in general with Linux under the GPL is there's no ability to carve out and contribute some things and hold back stuff I consider valuable.

CRN: How about the hybrid model like MySQL, where they offer a commercial and GPL version of their software?

Sontag: Even those may ultimately be questioned. There's an issue of what's considered a distribution and just the vagaries of the GPL that you don't really know what you're dealing with. I hear people pontificating on what they think the GPL means, and others argue almost 180 degrees the opposite saying THIS is what the GPL means and the reality is they could both be right but there is no case law nothing on the GPL so therefore you don't know who's right.

CRN: Is the IBM case a test of the GPL or not?

Sontag: SCO had been avoiding testing the GPL. That's why we didn't take action against the distributors. However when IBM added the GPL to their defense, that necessitates that we take action in our case against the GPL and given that no case law on GPL and the weak wording it has, it's not a good defense on IBM's part. I scratch my head sometimes about why they would try to use the GPL as a shield.

Back to your question, yes we'll probably now be taking action against the GPL and given the fact that Novell has acquired SUSE and Red Hat has sued us we're likely now to be taking actions if we so choose against the distributors. It really ends up coming down to the end users who you have to focus on even if you don't want to because of how the GPL structures the relationship. There is no warranty, nothing with the developer, nothing with the distributor, the liability rests with the end user. That's how the GPL is written. It makes it hard for me to understand why people would want to jump on a supposedly free operating system that isn't free anymore. It's not such a good deal anymore.

CRN: Is it true you're using Samba in OpenServer?

Sontag: SCO has for a long time has been a participant in many Open Source projects and has made contributions. We have not contributed our System V code into open source but we have been active participants in many open source activities. We don't have an issue with open source, we have an issue with open source being hijacked for the use of certain companies or individuals to inappropriately contribute a lot of our IP into a given environment. So the concept of companies getting together and sharing source code and working together is not an issue for us and we've participated in that and benefited from a number of projects including Samba and

continue to do so. We haven't identified any specific IP issues with Samba and that's why we continue to work with it. But if there were issues in the future we'd make appropriate decisions then. We've put some open source components into our products and likely will continue to do so in the future. That's not the issue, the issue is the GPL and its pushing IP liability issues unfortunately to the end user when they were likely not the ones causing the problems and those who've inappropriately taken our IP and contributed it predominantly Linux in violation of our contracts, in violation of our copyrights.

CRN: Have you identified exactly what code is at issue here?

Sontag: We've identified a lot of different things. Early on when we filed against IBM, people wanted us to show the code, even though we're fighting a legal case and that's where it's appropriately vetted, we decided to take at least one example and show that. We had to do so under NDA, because if you're comparing our System V code, it is not released without confidentiality agreements. If you sign an NDA -- a number of journalists, analysts and customers have seen the example we showed -- a substantial amount was a cut and paste job, a few lines changed, but substantial body. You don't have to be a programmer at all to see copying had occurred. It wasn't just ten lines of code, that example was over 80 to 100 lines of code. Later some of the Linux people said that code shouldn't have been there, Bruce Perens said it was development problem and 'we've taken it out.' My analogy is [that's] like a bank robber with posse in pursuit swinging back by the bank and throwing the money back in... .

In that one example, copyrighted code had been misappropriated and there's substantial benefit out there that has still not been rectified. There are other literal copyright infringements that we have not publicly provided, we'll save those for court. But there are over one million lines of code that we have identified that are derivative works by IBM and Sequent that have been contributed into Linux that we have identified and there's been no effort by Linux leaders to start acting and rectify that situation.

It's kind of hollow words that we are not showing code, because we have shown examples and if we keep showing it, they'll just take that out and say 'no harm no foul.' That doesn't solve the problem.

CRN: Why in the world would any company take on IBM, which probably has more legal resources than any other company?

Sontag: They have more attorneys than we have employees. But we believe we have a very strong legal position or we would never have filed. Taking on the absolute largest IT and IP organization on the face of the planet that is 10,000 times our size is not something you take on lightly. However, we felt we had a very strong legal position on an IP basis for the legal claims we made.

From the start we took the position that we have to be willing to take this all the way to full legal conclusion and have been structuring the company such that we're financially profitable we're accreting cash. In the last year we've gone from almost no cash to more than \$60 million in cash. Core operations are financially profitable. So we're now in a very good position to take this to full legal conclusion if necessary. Now, if there is an appropriate legal settlement that we think is reasonable and advantageous to our shareholders, certainly we'll consider that, but we have to assume we take this to full conclusion and it may very well happen.

CRN: IBM has shown no sign of negotiating?

Sontag: No.

McBride: They have more attorneys than we have employees. They have those [Cravath, Swaine and Moore] guys and their own people. What they said when they first saw the lawsuit was that 'the skies over Utah would be blackened with attorneys before this is all done.'

CRN: So, aren't you crazy to take this on?

McBride: This is a David and Goliath battle. The might and sheer size of IBM against the legal stone that we have, and it just so happens we have a very good legal stone and we have a guy named David [Boies] carrying the slingshot. So we like our chances.

The legal stone is clearly coming from David. He used to be with Cravath. It is an epic battle. The guy at Cravath supporting IBM used to work for David. [He's] Evan Chessler. So now you've got that sub-plot of the Grasshopper and Master thing.

CRN: How much of your \$60 million in cash derives from those licenses from Sun, Microsoft, etc?

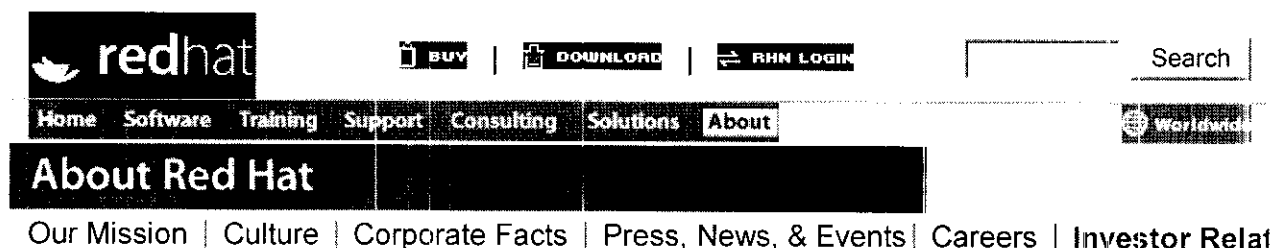
McBride: The combination of those is in the tens of millions of dollars. We're over \$60 million in cash... .

CRN: How can you win suing customers and what happens if you go after HP customer?

McBride: The interesting scenario is, do you go after an HP customer or an IBM customer? That's what David is the master of. That's his final decision

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Red Hat, Inc. (ticker: RHAT, exchange: NASDAQ) News Release - 11/29/1999

AutoZone Chooses Red Hat Services to Support Linux-based Chain-wide Intranet Applications

Red Hat's On-site Consulting Services and Support will Help AutoZone, Inc. Implement Linux-based Intranet Terminals

RESEARCH TRIANGLE PARK, N.C.--(BUSINESS WIRE)--Nov. 29, 1999-- Red Hat(R), Inc. (NASDAQ:RHAT), a leading developer and provider of open source software solutions, today announced that it will be providing on-site consulting, services and support to AutoZone (NYSE:AZO) as part of the auto parts retailer's program to base its chain-wide Intranet systems infrastructure on Red Hat Linux. As part of the agreement, Red Hat's services organization will provide consulting and support services for a network of approximately 3,000 Linux-based Intranet terminals in AutoZone's store locations throughout the United States.

"Red Hat Linux was the logical choice for AutoZone's network because we require a cost-effective and highly reliable operating system that can be customized and upgraded easily," said Jon A. Bascom, Vice President of STS, Customer Satisfaction, AutoZone. "And just as important as the operating system itself is the consulting and support we need to implement and maintain this new IT infrastructure. We're confident that Red Hat's experienced support organization will help us realize the benefits we expect from Linux."

"AutoZone is continuing its tradition of innovation by adding Red Hat Linux to its retail business IT operations portfolio," said Teresa Spangler, Business Unit Leader, Sales, Red Hat, Inc. "By doing this, we believe AutoZone will realize performance, flexibility and reliability improvements. Red Hat will support this initiative for AutoZone, and we'll continue to service and support this operation as it grows."

About Red Hat Services

Red Hat's on-site consulting sets a new standard for enterprise-level support

for Linux-based operating systems. With more than 350 expert consultants, Red Hat and its partners offer Red Hat Linux consulting services, including: on-site consulting; strategy formation; planning; evaluation; classification and organization; training; implementation; recurring operations and audit. Red Hat Linux-based enterprise IT operations can choose anything from initial installation help up to full, ongoing outsourced management of their complete Linux-based information management operation. Red Hat offers all the services needed to successfully install, integrate, manage and support open source solutions in today's rapidly growing enterprises. In recent months, Red Hat has greatly expanded its support offerings, including international training and certification for Red Hat Linux. In addition, Red Hat announced recently that Burlington Coat Factory Warehouse Corporation (NYSE:BCF) purchased support services from Red Hat for its nationwide Linux deployment.

Open Source Momentum

International Data Corp. (IDC) research states that Linux-based operating systems were the fastest-growing server operating environment in 1998, growing more than 190 percent in that year alone and capturing more than 15.8 percent of the 4.4 million revenue shipment server operating environment market. Red Hat's numerous alliances with industry leaders and the demand for Linux-based applications has created open source support from many of the industry's leading software and hardware manufacturers, including Compaq(R), Computer Associates, Corel, Dell, Hewlett-Packard, IBM, Intel, Netscape, Novell, Oracle(R) and SAP(R). Red Hat Linux runs on Intel, Alpha and Sun SPARC platforms.

About AutoZone

AutoZone sells auto and light truck parts, chemicals and accessories through 2,711 AutoZone stores in 39 states in the U.S. and 6 AutoZone stores in Mexico. AutoZone also sells heavy-duty truck parts through 46 TruckPro stores in 14 states, automotive diagnostic and repair software through ALLDATA, and diagnostic and repair information through alldatadiy.com.

About Red Hat, Inc.

Founded in 1994, Red Hat (NASDAQ:RHAT) is a market leader in open source operating system (OS) software and services. Along with its award-winning open source Red Hat Linux OS, Red Hat offers a full line of services, including telephone support, on-site consulting, developer training, certification programs and priority access updates, making Red Hat a leading and complete resource for knowledgeable, innovative, mission-critical open source solutions.

Red Hat shares all of its software innovations freely with the open source community under the GNU General Public License (GPL). The Official Red Hat Linux OS and related services are available directly from the company and through its partner, distributor and reseller programs, which include top PC and server manufacturers such as Compaq, Dell, Gateway, IBM, Hewlett-Packard and Silicon Graphics.

Red Hat and the Official Red Hat Linux OS have received industry praise. Recent accolades include: Red Herring's Top 100 Companies of the Electronic Economy, Upside's Hot 100 Companies, Network World's 10 Companies to Watch, Federal Computer Week's Government Best Buy, Software Development's Jolt Award and InfoWorld's Product of the Year for three years in a row. Red Hat was also voted a "Linux World Favorite" by the attendees of the two most recent Linux World Expos, winning Best Server Distribution at the August show.

Red Hat is based in Research Triangle Park, N.C. and has offices worldwide. Visit Red Hat on the Web at www.redhat.com. For investor inquiries, please contact Lippert/Heilshorn at (212) 838-3777.

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FORWARD-LOOKING STATEMENTS

Forward-looking statements in this press release are made pursuant to the safe harbor provisions of Section 21E of the Securities Exchange Act of 1934. Investors are cautioned that statements in this press release that are not strictly historical statements, including, without limitation, statements regarding current or future financial performance, management's plans and objectives for future operations, product plans and performance, management's assessment of market factors, and statements regarding the strategy and plans of Red Hat and its strategic partners, constitute forward-looking statements which involve risks and uncertainties. These risks and uncertainties include, without limitation, risks associated with Red Hat's dependence upon an open source business model, management of growth, reliance upon strategic relationships, expansion of Red Hat's business focus and operations to offer increased and enhanced services, the possibility of undetected software errors, the enforceability of the GNU General Public License and other licenses under which Red Hat's products are developed and licensed, the scarcity of Linux-based applications, the ability to attract and retain enterprise customers, and in Red Hat's industry specifically, the risks associated with competition and competitive pricing pressures, the viability of the Internet, year 2000 compliance efforts of Red Hat and of third parties on

which Red Hat depends, and other risks detailed in Red Hat's filings with the Securities and Exchange Commission, copies of which may be accessed through the SEC's web site at <http://www.sec.gov>.

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May 12, 2003

Mr. Steve Odland
President & CEO
AutoZone, Inc.
123 South Front Street
Memphis, TN 38103

Dear Steve:

SCO holds the rights to the UNIX operating system software originally licensed by AT&T to approximately 6,000 companies and institutions worldwide (the "UNIX Licenses"). The vast majority of UNIX software used in enterprise applications today is a derivative work of the software originally distributed under our UNIX Licenses. Like you, we have an obligation to our shareholders to protect our intellectual property and other valuable rights.

In recent years, a UNIX-like operating system has emerged and has been distributed in the enterprise marketplace by various software vendors. This system is called Linux. We believe that Linux is, in material part, an unauthorized derivative of UNIX.

As you may know, the development process for Linux has differed substantially from the development process for other enterprise operating systems. Commercial software is built by carefully selected and screened teams of programmers working to build proprietary, secure software. This process is designed to monitor the security and ownership of intellectual property rights associated with the code.

By contrast, much of Linux has been built from contributions by numerous unrelated and unknown software developers, each contributing a small section of code. There is no mechanism inherent in the Linux development process to assure that intellectual property rights, confidentiality or security are protected. The Linux process does not prevent inclusion of code that has been stolen outright, or developed by improper use of proprietary methods and concepts.

Many Linux contributors were originally UNIX developers who had access to UNIX source code distributed by AT&T and were subject to confidentiality agreements, including confidentiality of the methods and concepts involved in software design. We have evidence that portions of UNIX System V software code have been copied into Linux and that additional other portions of UNIX System V software code have been modified and copied into Linux, seemingly for the purposes of obfuscating their original source.

As a consequence of Linux's unrestricted authoring process, it is not surprising that Linux distributors do not warrant the legal integrity of the Linux code provided to customers. Therefore legal liability that may arise from the Linux development process may also rest with the end user.

We believe that Linux infringes on our UNIX intellectual property and other rights. We intend to aggressively protect and enforce these rights. Consistent with this effort, on March 7, we initiated legal action against IBM for alleged unfair competition and breach of contract with respect to our UNIX rights. This case is pending in Utah Federal District Court. As you are aware, this case has been widely reported and commented upon in the press. If you would like additional information, a copy of the complaint and response may be viewed at our web site at www.sco.com/scosource.

For the reasons explained above, we have also announced the suspension of our own Linux-related activities until the issues surrounding Linux intellectual property and the attendant risks are better understood and properly resolved.

Similar to analogous efforts underway in the music industry, we are prepared to take all actions necessary to stop the ongoing violation of our intellectual property or other rights.

SCO's actions may prove unpopular with those who wish to advance or otherwise benefit from Linux as a free software system for use in enterprise applications. However, our property and contract rights are important and valuable; not only to us, but to every individual and every company whose livelihood depends on the continued viability of intellectual and intangible property rights in a digital age.

Yours truly,

THE SCO GROUP

By: 

Darl McBride
President and CEO

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP,

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION TO DISMISS OR**
) **TO STAY COUNT TEN**
) **OF PLAINTIFF IBM'S**
) **SECOND AMENDED COUNTER-**
) **CLAIMS AGAINST SCO**
)
) Case No. 2:03CV0294 DAK
)
) Hon. Dale A. Kimball
)
) Magistrate Judge Brooke Wells
)

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Plaintiff/Counter-Defendant The SCO Group, Inc. ("SCO"), by and through undersigned counsel, hereby submits its Memorandum in Support of its Motion to Dismiss or Stay Count Ten of Counter-Plaintiff IBM's Second Amended Counterclaims Against SCO.

INTRODUCTION

On March 29, 2004, Defendant/Counter-Plaintiff International Business Machines Corp. ("IBM") filed its "Second Amended Counterclaims Against SCO." In Count Ten of that pleading, IBM added an entirely new claim seeking a declaratory judgment "that IBM does not infringe, induce infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable." ¶ 173. In other words, IBM is seeking to declare that a person or entity using Linux does not infringe upon SCO's copyrights and that some or all of SCO's copyrights are invalid or unenforceable. This precise issue will be litigated in a case filed by SCO against AutoZone in federal district court in Nevada; a case filed prior to IBM filing its Tenth Counterclaim. *See The SCO Group Inc. v. AutoZone, Inc.*, Case No. CV-S-04-0237-DWH-LRL (D. Nev. 2004). This newly added counterclaim raises issues separate and apart from the primary breach of contract and other direct claims and counterclaims in this case.¹ Given this fact, and to avoid multiple suits determining substantially similar issues, this Court should decline to exercise jurisdiction over and dismiss Counterclaim Ten. In the alternative, Counterclaim Ten should be stayed pending the outcome in the prior filed *AutoZone* case.

¹ These copyright claims, likewise, have nothing to do with the patent counterclaims, which are separate and apart from all other claims in the case and therefore are the subject of a pending motion for separate trial.

ARGUMENT

The federal declaratory judgment statute provides "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201. While this statute vests the federal courts with power and competence to issue a declaration of rights, see *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam), the question of whether this power should be exercised in a particular case is vested in the sound discretion of the district courts. *Id.*; see also *St. Paul Fire and Marine Ins. Co. v. Runyon*, 53 F. 3d 1167, 1168 (10th Cir. 1995); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1420 n. 8 (10th Cir.1990). Stated differently, "[t]he Declaratory Judgment Act was an authorization, not a command. It gave federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affair Assoc. v. Rickover*, 369 U.S. 111, 112 (1962). Accordingly, any review of this Court's decision to abstain from exercising federal declaratory judgment jurisdiction is limited to deciding whether the court abused its discretion. *Runyon*, 53 F. 3d at 1168.

Count Ten Raises Issues That Are Not At Issue Here And That Are Redundant of Those Presented In A Prior Filed Action and Therefore Should be Dismissed or Stayed.

The only copyright claim SCO has asserted against IBM is primarily for IBM's continuing use of AIX and Dynix after SCO terminated IBM's UNIX licenses. See Second Amended Complaint, Count V. The Second Amended Complaint, however, does not contain a claim against IBM for copyright infringement arising out of its use, reproduction or improvement of Linux. With SCO's Second Amended Complaint being the final amendment and not containing a claim for infringement arising out of IBM's Linux activities, the need for IBM's Tenth Counterclaim seeking such a declaratory judgment is nil.

Although SCO has not sued IBM for copyright infringement arising out of “IBM’s use, reproduction and improvement of Linux” (§171), IBM’s Tenth Counterclaim nonetheless seeks a “Declaratory Judgment of Noninfringement of Copyright” arising out of IBM’s Linux activities. (§173). However, as IBM acknowledges in its counterclaim, SCO filed an earlier copyright action arising from another company’s similar act of using Linux. (§§ 79-80). This earlier filed copyright claim by SCO against another user of Linux implicates the same question presented by IBM’s counterclaim: Whether Linux infringes SCO’s copyrights? Indeed, as detailed below, that case also will determine the enforceability of SCO’s claims of infringement arising from the use of Linux, including the enforceability of SCO’s copyrights. Moreover, the precise issue of copyright infringement arising from the use of Linux is the sole issue in that case, unlike here, where there exist many complex claims. Under these circumstances, this Court should dismiss or stay Count Ten of IBM’s Second Amended Counterclaims.

In the *AutoZone* case referred to in IBM’s Second Amended Counterclaims, the issues of whether the use and reproduction of Linux infringes SCO’s copyrights is squarely at issue. A copy of the Complaint in that action is attached as Exhibit A (of which this Court can take judicial notice).² In that case, SCO has alleged that AutoZone “has infringed and will continue to infringe SCO’s copyrights in and relating to Copyrighted Materials by using, copying, modifying, and/or

² Federal Rule of Evidence 201; see also *St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (holding that federal courts may take notice of proceedings in other courts, both within and outside of the federal judicial district if those proceedings have a direct relation to matters at issue). In addition, because IBM relied upon the *AutoZone* filing in the Second Amended Counterclaim, this Court may properly consider that Complaint filed in *AutoZone* in ruling on the motion to dismiss. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (stating, “[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff’s claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.”).

distributing parts of the Copyrighted Materials, or derivative works based on the Copyrighted Materials in connection with its implementations of one or more versions of the Linux operating system, inconsistent with SCO's exclusive rights under the Copyright Act." AutoZone Complaint, ¶21. Thus, in defending against a claim of infringement based on its use of Linux, AutoZone will be litigating the same issues that IBM seeks to inject in this case through Count Ten.³

Determining in this case the enforceability of SCO's copyrights and whether Linux infringes SCO's copyrights at the same time the issue is being litigated in the federal court in Nevada would entail unnecessary duplication of judicial efforts and run the risk of varying adjudications. With an actual case or controversy regarding whether Linux infringes upon SCO's copyrights pending in another courthouse, this Court should dismiss Count Ten or stay it until the Nevada court has resolved the issue of whether use of Linux infringes SCO's copyrights. Certainly, two federal courts should not simultaneously be determining whether the same copyrights are infringed. This is precisely why federal courts, as noted above, have discretion to entertain declaratory judgment requests. Here, with the plethora of complex issues already pending in this action, this Court should exercise its discretion on this declaratory judgment claim and dismiss Count Ten.

If this Court is inclined to retain jurisdiction over Count Ten, then it should stay the action pending the outcome of the previously filed Nevada action. The stay that SCO seeks here is

³ The only issue that arguably would not be decided by the federal court in Nevada is whether IBM's improvements to Linux infringe upon SCO's copyrights. If this Count Ten was merely based on infringement arising from IBM's improvements to Linux, then SCO would not have sought dismissal or a stay. In fact, the issue of the impropriety of IBM's improvements to Linux is part of the basis for IBM's *Ninth* Counterclaim, also entitled "Declaratory Judgment of Noninfringement of Copyrights," which arises out of IBM's distribution of AIX and Dynix. (¶ 165). SCO did not move to dismiss or stay that count.

virtually identical to that sought in *Apex Hosiery Co. v. Knitting Machines Corp.*, 90 F. Supp. 763 (D. Del. 1950). In that case, Apex brought suit against Knitting Machines for a declaratory judgment on the validity of certain patents. The federal court noted that there was a prior filed suit already pending against another user of similar machinery where the validity of the patents would be heard. Noting that "the needless and burdensome trouble and expense of litigating two identical suits at the same time and at different places [could] be obviated," the court ruled that the Apex case should be stayed. *Id.* These same issues appear here and compel that IBM's later filed, redundant claim be stayed.

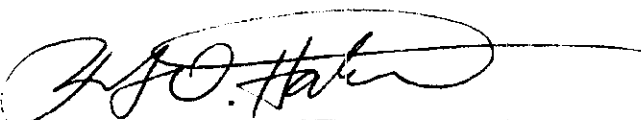
CONCLUSION

Count Ten presents issues already before another federal court, and, on that basis, should be dismissed or, at a minimum stayed pending the outcome of the prior filed *AutoZone* case pending in Nevada.

DATED this 23rd day of April, 2004.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DEFENDANT/COUNTERCLAIM-
PLAINTIFF IBM'S MEMORANDUM IN
OPPOSITION TO SCO'S MOTION TO
DISMISS OR STAY COUNT TEN OF IBM'S
SECOND AMENDED COUNTERCLAIMS**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

Defendant/Counterclaim-Plaintiff International Business Machines Corporation ("IBM") respectfully submits this memorandum in opposition to Plaintiff/Counterclaim-Defendant The SCO Group, Inc.'s ("SCO") Motion to Dismiss or to Stay Count Ten of IBM's Second

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Amended Counterclaims (the "Tenth Counterclaim"), which seeks a declaratory judgment of non-infringement of copyrights with respect to IBM's Linux activities.

Preliminary Statement

SCO moves to dismiss, or in the alternative, stay, IBM's Tenth Counterclaim pending the outcome of a case that SCO filed in March 2004 against AutoZone, Inc. ("AutoZone"), in the United States District Court for the District of Nevada (The SCO Group, Inc. v. AutoZone, Inc., Case No. CV-S-04-0237 (D. Nev.)). The motion should be denied. Dismissing or staying this claim pending resolution of the AutoZone case would waste resources, delay unnecessarily the resolution of an issue that is ready for summary adjudication and work injustice on IBM and others who seek relief from SCO's campaign against Linux.

SCO commenced its lawsuit against IBM more than a year ago, in March 2003, claiming that IBM had misappropriated and misused source code from certain versions of the UNIX operating systems, including in particular a version known as UNIX System V (referred to collectively herein as the "UNIX software"), to which SCO claims rights. Specifically, SCO asserted among other things that IBM improperly contributed, to the publicly-developed Linux operating system, code that was copied or derived from certain code in the UNIX software.

Although SCO's initial complaint against IBM did not include a claim for copyright infringement, SCO publicly accused IBM and others of infringing SCO's copyrights through their use of and contributions to Linux. As is explained in IBM's Counterclaims, SCO's claims in this case and its public accusations are part and parcel of SCO's campaign to foster and maintain fear, uncertainty and doubt in the marketplace about Linux in general and IBM's products and services in particular.

IBM has therefore been seeking, since the very beginning of the case, a full recitation from SCO of exactly what rights (including, of course, copyrights) it claims to have to code in Linux, and how IBM's activities infringe those rights. SCO has resisted discovery at every turn,

requiring IBM to file two motions to compel and leading to the entry of two court orders directing SCO to provide the discovery IBM seeks. In fact, despite the court orders, SCO still has not adequately identified the code in Linux to which it claims rights or explained how that code relates to code in the UNIX software allegedly covered by SCO's copyrights, and IBM has therefore cross-moved for summary judgment on its Tenth Counterclaim.

Rather than disclose the evidence necessary to support its allegations, SCO seeks to dismiss or stay IBM's counterclaim on the grounds that doing so would conserve judicial resources. In contrast to this case, however, in which both parties have essentially completed their document productions, depositions have commenced, and IBM has moved for summary judgment on the instant claim, discovery in AutoZone has not yet begun. Indeed, in lieu of answering SCO's complaint in that case, AutoZone recently moved to stay the case until the conclusion of SCO's suit against IBM and SCO's suit against Novell, Inc., The SCO Group, Inc. v. Novell, Inc., 2:04-CV-139 (D. Utah), both of which are pending before this Court. It makes no sense to dismiss or stay IBM's Tenth Counterclaim pending the outcome of a case that is far less advanced, especially where IBM has spent many months pursuing discovery relevant to its counterclaim, Magistrate Judge Wells has entered two orders compelling SCO to provide that discovery and IBM's claim is susceptible of immediate resolution under Rule 56. Dismissing or staying the counterclaim pending resolution of AutoZone would waste judicial resources and visit injustice upon IBM and all others who seek a prompt end to SCO's campaign to create fear, uncertainty and doubt about Linux.

If the conservation of resources and the interests of justice were SCO's objectives, then SCO would seek prompt resolution of IBM's counterclaim in this Court, where the parties have been litigating for more than a year, not dismissal or a stay. SCO's motion is in fact just another move—which should not be tolerated—in the litigation shell game employed by SCO to avoid judicial review of its assertions of copyright infringement. Nowhere in its brief supporting its

motion does SCO even mention that there is a third federal case pending that raises issues similar to this one. In August 2003, six months after SCO filed its case against IBM (but seven months before SCO sued AutoZone), Red Hat, Inc., a commercial distributor of the Linux operating system, brought an action against SCO in the United States District Court for the District of Delaware seeking a declaration of non-infringement of SCO's alleged copyrights based on Red Hat's use and distribution of Linux (Red Hat, Inc. v. The SCO Group, Inc., Civ. 03-772-SLR (D. Del.)).

SCO moved to dismiss the Red Hat case in part on the theory that "[t]he infringement . . . issues Red Hat seeks to adjudicate in this case are currently before U.S. District Judge Dale A. Kimball in the SCO v. IBM case pending in Utah Federal District Court". (SCO's Opening Br. in Support of Motion to Dismiss at 2, attached as Ex. 1 to the Declaration of Amy Sorenson ("Sorenson Decl.")). The Delaware court denied SCO's motion to dismiss on April 6, 2004, but stayed the case "pending a resolution of the Utah litigation between SCO and IBM". (4/6/04 Memorandum Order at 4, attached as Ex. 2 to the Sorenson Decl.) Although Red Hat recently moved to lift the stay, SCO argued in a brief filed on May 4, 2004 that the case should remain stayed because "the IBM case [and IBM's Tenth Counterclaim specifically] will address central issues raised in this lawsuit" and "it would be 'a waste of judicial resources,' and the resources of the parties, to litigate this case while a substantially similarly question is being litigated in federal district court in Utah." (SCO's Opposition to Red Hat's Motion for Reconsideration at 4, attached as Ex. 3 to the Sorenson Decl.)

In short, SCO has argued successfully in Delaware that SCO's copyright infringement claims should be heard first in Utah, and now argues in Utah that its copyright infringement claims should first be tested in Nevada, in a case that was just filed and in which the defendant (AutoZone) is seeking a stay pending resolution of this case in Utah. SCO should not be allowed continually to put off adjudication of its copyright claims. Rather, summary judgment should be

entered against SCO for the reasons set forth in IBM's memorandum in support of its cross-motion for summary judgment (submitted herewith).

As is discussed further below, SCO's motion to dismiss or stay should thus be denied, and this Court should retain jurisdiction over IBM's Tenth Counterclaim, because (1) it would make no sense to dismiss or stay the counterclaim in deference to an action that was just filed, especially when the counterclaim is ready for resolution in this Court and (2) the so-called "first-filed rule", on which SCO relies to support its motion, does not support SCO's position.

Argument

I. THE COURT SHOULD RETAIN JURISDICTION OVER IBM'S CLAIM FOR A DECLARATION OF NON-INFRINGEMENT AS TO ITS LINUX ACTIVITIES.

Although IBM only recently filed its Tenth Counterclaim, the issues raised by the counterclaim—whether IBM's (and, by implication, others') Linux activities infringe the copyrights SCO purports to own in the UNIX software—have been part of the case from the beginning. IBM has been seeking discovery related to these issues since then. As this case has progressed much further than the other two cases raising similar issues—the Red Hat case, which was filed in August 2003 and has been stayed pending the resolution of this case, and the AutoZone case, which was just filed in March 2004 and in which there is a pending motion to stay—there is no reason to dismiss or stay IBM's Tenth Counterclaim.

As between suits in question, courts routinely refuse to stay or dismiss the suit that has progressed further than the others. See Optical Recording Corp. v. Capitol-EMI Music, Inc., 803 F. Supp. 971, 974 (D. Del. 1992) (permitting case to proceed that had progressed further than in the other jurisdiction); Northwest Airlines v. American Airlines, Inc., 792 F. Supp. 655, 657 (D. Minn. 1992), aff'd, 989 F.2d 1002 (8th Cir. 1993) (permitting action to proceed where "action has developed further than" the other); Cooperative Centrale Raiffeisen-Boerenleen v. Northwestern Nat'l Ins. Co., 778 F. Supp. 1274 (S.D.N.Y. 1991) (refusing to stay action because case had progressed further than the other case).

Here, there is no question that the instant case has progressed further than Red Hat and AutoZone, and in particular has progressed further with respect to the issues common among all three suits—SCO's allegations that using and contributing to Linux infringe SCO's purported copyrights in the UNIX software.

Although SCO's initial complaint against IBM (filed in March 2003) did not specifically include a claim for copyright infringement, SCO for many months repeatedly accused IBM and others publicly of infringing SCO's copyrights, and threatened enforcement litigation. For example:

- In May 2003, SCO sent letters to 1,500 of the world's largest corporations, including IBM, threatening litigation. (See, e.g., Letter from D. McBride to L. Noto, dated May 12, 2003, attached as Ex. 4 to the Sorenson Decl.) In its letters, SCO stated, "We believe that Linux infringes on our UNIX intellectual property and other rights". (Id.) SCO further stated, "We intend to aggressively protect and enforce these rights" against not only the companies involved with "the Linux development process" but also "the end user" companies using any Linux technology. (Id.)
- In a press conference on July 21, 2003, SCO stated that taking out a license with SCO was the "alternative to legal enforcement against Linux end-users". ("SCO Group (SCOX) Conference Call", dated July 21, 2003, attached as Ex. 5 to the Sorenson Decl.)
- On November 18, 2003, SCO's counsel stated at a press conference that SCO "will be looking to identify a defendant" in "the near term" and such defendant will be "a significant user that has not paid license fees and is in fact using the proprietary and copyrighted material". (SCO Conference Call, dated November 18, 2003, audio at www.sco.com/company/confcalls/stowell_11-18_105887.mp3.) During the same call, SCO Chief Executive Darl McBride was asked if the 1500 companies threatened earlier were the same class of companies that SCO would pursue. (See id.) McBride responded: "We will start there. That's not going to be the ending point, but clearly large customers that have, that are using a lot of Linux machines inside of their environment would be the starting point for us." (Id.)
- At a December 5, 2003 hearing in this case concerning discovery issues, SCO represented to the Court that SCO would be filing a copyright infringement action against IBM "within the coming few days or no less than a week". (12/5/03 Hearing Tr. at 23: 19-22, attached as Ex. 6 to the Sorenson Decl.)

- In connection with a December 22, 2003 press release, SCO released a template of a letter that it sent to various “Linux Users”. (See Letter from R. Tibbits to “Linux User”, dated Dec. 19, 2003, attached as Ex. 7 to the Sorenson Decl.) In that letter, SCO wrote that “the use of the Linux operating system in a commercial setting violates our rights under the United States Copyright Act”. (Id.)

These threats, among others, are part of SCO’s “campaign to create the false and/or unsubstantiated impression that SCO has rights to UNIX and Linux that it does not have”, and they form an integral part of the counterclaims that IBM first asserted against SCO in August 2003. (Countercls. ¶ 24; see also Second Am. Countercls. ¶¶ 54-82 (detailing SCO’s improper scheme).) As is explained in detail in IBM’s Counterclaims, SCO is engaged in an improper scheme to create fear, uncertainty and doubt in the marketplace about the Linux operating system and IBM’s products and services, including by making claims that SCO’s alleged copyrights to the UNIX software cover material in Linux.

In view of SCO’s public assertions that the use of Linux infringes SCO’s purported copyrights in the UNIX software, IBM has long sought from SCO details regarding all of the rights—obviously including copyrights—that SCO purports to have to materials in Linux. Specifically, in September 2003, well before the formal assertion of any copyright infringement claims in the case,¹ IBM propounded the following interrogatories:

Interrogatory No. 12.

“Please identify, with specificity (by file and line of code), (a) all source code and other material in Linux (including but not limited to the Linux kernel, any Linux operating system and any Linux

¹ In February 2004, SCO amended its complaint against IBM to formally assert copyright infringement. (See Second Am. Compl. ¶¶ 173-80.) In its claim, SCO alleges that IBM has “infringed, [has] induced infringement of, and [has] contributed to the infringement of, copyright registrations of SCO and its predecessors”. (Id. ¶ 179.) According to SCO, “a significant amount of UNIX protected code and materials are currently found in Linux 2.4.x, 2.5.x and Linux 2.6.x releases in violation of SCO’s contractual rights and copyrights”, and IBM, at least in part, is responsible for such alleged copyright violations. (Id. ¶ 79.) In direct response to SCO’s assertion of its copyright infringement claim, IBM filed its Tenth Counterclaim in March 2004, for a declaration of non-infringement with respect to IBM’s Linux activities, which have involved, among other things, Linux 2.4.x, 2.5.x and 2.6.x releases. (See Second Am. Countercls. ¶¶ 168-73.)

distribution) to which plaintiff has rights; and (b) the nature of plaintiff's rights, including but not limited to whether and how the code or other material derives from UNIX."

Interrogatory No. 13.

"For each line of code and other material identified in response to Interrogatory No. 12, please state whether (a) IBM has infringed plaintiff's rights, and for any rights IBM is alleged to have infringed, describe in detail how IBM is alleged to have infringed plaintiff's rights"

IBM also sought from SCO the production of all documents concerning SCO's rights (including, of course, copyrights) to any materials in Linux.

Rather than respond to IBM's requests, however, SCO has consistently refused to provide its alleged evidence that IBM's (and others') Linux activities infringe SCO's alleged copyrights relating to the UNIX software. In fact, following months of motion practice, Magistrate Judge Wells twice ordered SCO (the second time only because SCO failed to comply with the first order) to disclose the evidence it has been touting publicly but declining to share with IBM. Specifically, Judge Wells ordered SCO among other things to specify in detail how, if at all, IBM infringes SCO's alleged rights to the UNIX software.

Despite these orders, SCO still has not properly responded to IBM's interrogatories. Most importantly, SCO has failed to identify allegedly copyrighted code in the UNIX software that is allegedly infringed by IBM. As a result of SCO's failure to adduce any evidence supporting its assertions that IBM's use of and contributions to Linux infringe SCO's purported copyrights in the UNIX software, IBM's Tenth Counterclaim is susceptible to immediate resolution under Rule 56, and IBM is cross-moving herewith for partial summary judgment. If the conservation of judicial resources and the interests of justice are the relevant considerations, then, rather than dismissing or staying the counterclaim, the Court should grant IBM's cross-motion for partial summary judgment, which would effectively resolve the copyright issues concerning Linux in this case, as well as the issues in the Red Hat and AutoZone cases.

In contrast to this case, where IBM has for months been seeking discovery related to SCO's copyright allegations, the AutoZone case has not even progressed beyond the initial pleading stage. SCO filed its complaint in the District of Nevada charging AutoZone with copyright infringement based on AutoZone's use of Linux on March 3, 2004. On April 23, 2004, AutoZone moved to stay its case pending, among other things, resolution of this case, and SCO's case against Novell (also pending in this Court). (See AutoZone's Motion to Stay, attached as Ex. 8 to the Sorenson Decl.) In addition, recognizing SCO's strategy of delay and obfuscation in responding to IBM's discovery requests, AutoZone moved in the alternative for a more definite statement of SCO's copyright infringement claim. (See *id.*) Until AutoZone's motion to stay is decided, there will be no discovery in the AutoZone case.²

Similarly, there has also been little progress in the Red Hat case. In that case, filed in August 2003 in the District of Delaware, Red Hat sought, among other things, a declaratory judgment that the use or distribution of Linux does not infringe on any of SCO's copyrights. SCO moved to dismiss the case, arguing in part that "[t]he infringement . . . issues Red Hat seeks to adjudicate in this case are currently before U.S. District Judge Dale A. Kimball in the SCO v. IBM case pending in Utah Federal Court". (Sorenson Decl. Ex. 1 at 2.) While the Delaware court refused to dismiss the action,³ it stayed the case until the instant case is resolved, holding that it would be "a waste of judicial resources to have two district courts resolving the same

² Although SCO's opposition to AutoZone's motion was due on May 5, 2004, SCO requested, and was granted, an extension until May 24, 2004 to respond. Oral argument on AutoZone's motion is currently scheduled for June 21, 2004.

³ The primary basis of SCO's motion to dismiss the Red Hat suit was that there was no actual controversy between SCO and Red Hat giving rise to jurisdiction under the Declaratory Judgment Act. The Court rejected SCO's argument and found jurisdiction based upon Red Hat's allegations that SCO is engaged in a "campaign to create fear, uncertainty and doubt about the LINUX operating system" and SCO's lawsuit against IBM. (Sorenson Decl. Ex. 2 at 3.) SCO does not (and could not) challenge the Court's jurisdiction over IBM's Tenth Counterclaim in this case. It is undisputed that there is a justiciable controversy between SCO and IBM regarding SCO's allegations of copyright infringement.

issue, especially when the first filed suit in Utah involves the primary parties to the dispute”.

(Sorenson Decl. Ex. 2 at 5.)

Although Red Hat recently moved to lift the stay in that case, SCO has resisted, arguing on May 4, 2004 (notably, after it moved to dismiss or stay IBM’s Tenth Counterclaim) that the stay should continue because the issue of “whether Linux contains misappropriated UNIX code” is “also raised directly by IBM’s Tenth Counterclaim against SCO” and so should be decided in Utah first. (Sorenson Decl. Ex. 3 at 3.)

Where, as here, discovery relevant to IBM’s Tenth Counterclaim is already at an advanced stage, sound judicial administration counsels against dismissing or staying IBM’s counterclaim in favor of AutoZone, in which AutoZone has not yet even filed an answer to SCO’s complaint (or Red Hat, for that matter, which has been stayed pending resolution of this suit against IBM). IBM has already conducted substantial discovery relevant to its claim in the past year, including filing two motions to compel seeking complete interrogatory responses from SCO that were granted by Magistrate Judge Wells. Moreover, IBM’s Tenth Counterclaim is ripe for summary adjudication under Rule 56, given SCO’s record of failure to adduce evidence supporting its assertions of copyright infringement. It would therefore be an incredible waste of judicial resources (as well as the parties’ resources) to dismiss or stay IBM’s Tenth Counterclaim, which can be summarily resolved (for the reasons set forth in IBM’s cross-motion for summary judgment), in deference to the AutoZone case, in which discovery has not even started. Accordingly, the Court should deny SCO’s motion and retain jurisdiction over IBM’s Tenth Counterclaim.

II. THE “FIRST-FILED” RULE DOES NOT SUPPORT DISMISSAL OR A STAY IN THIS CASE.

Citing no legal authority in support of the argument, SCO appears to contend that the Court should apply the “first-filed” rule to dismiss, or stay, IBM’s Tenth Counterclaim. Under the first-filed rule, a district court has the discretion to retain or decline jurisdiction over a

complaint raising the same issues and involving the same parties as another complaint filed on an earlier date in another district court. See Buzas Baseball, Inc. v. Board of Regents of the Univ. Sys. of Ga., No. 98-4098, 1999 WL 682883, at *2 (10th Cir. 1999); Hospah Coal Co. v. Chaco Energy Co., 673 F.2d 1161, 1163-64 (10th Cir. 1982); Cessna Aircraft Co. v. Brown, 348 F.2d 689, 692 (10th Cir. 1965). In the instant case, the first-filed rule should not be applied to dismiss or stay this case for at least three reasons.

First, as noted, the first-filed rule is properly invoked only when a complaint involving the “same parties” and issues has already been filed in another district. Cessna, 348 F.2d at 692 (emphasis added); Congress Credit Corp. v. AJC Intl., Inc., 42 F.3d 686, 689 (1st Cir. 1994) (holding that although a “district court may certainly dismiss an action which is merely ‘duplicative’ of another action pending in another federal court”, the later-filed “lien action is not at all in that category” because the “plaintiff in the lien action is different from that in the [earlier-filed] preference actions”).⁴ As the parties to this action—SCO and IBM—are plainly not identical to the parties in SCO’s lawsuit against AutoZone—SCO and AutoZone—the first-filed rule does not apply here.

Second, even if this Court were to apply the first-filed rule, it should not dismiss IBM’s Tenth Counterclaim in favor of SCO’s action against AutoZone, because IBM’s counterclaim should be considered first-filed. When a claim that is newly added to an action relates to earlier

⁴ See also United States v. Hirsch, No. 94-C-555, 1994 WL 698632, at *1 (D. Colo. Sept. 30, 1994) (Ex. A) (declining to apply “first-filed rule” to transfer a second-filed action where a defendant in the second filed action was not a party to the first-filed action); Maertín v. Armstrong World Indus., Inc., 241 F. Supp. 2d 434, 453 (D.N.J. 2002) (holding that because “Armstrong brought the [earlier-filed] Pennsylvania action against its insurers for a declaration of coverage [and the] Maertín plaintiffs brought the current New Jersey action against Armstrong and its insurers for payment of the settlement amount. . . the actions are not between the same parties, so this Court cannot dismiss this case under the first-filed rule”); Chubb & Son, Inc. v. Kimes, Civ. No. 92-363, 1992 WL 88112, at *3 (D.N.J. April 6, 1992) (Ex. B) (denying motion to dismiss or stay second-filed action despite the fact that the parties in the first action were parties in the second action because additional parties in the second action were not parties to the first action).

claims raised in the same action,⁵ courts accord the later-filed claim the filing date of the prior pleading for purposes of a motion based on duplicative litigation. See GMT Corp. v. Quiksilver, No. 02 Civ. 2229, 2002 WL 1788016, at *2 (S.D.N.Y. Aug. 1, 2002) (Ex. C) (holding, on a motion to transfer venue, that because an amendment adding a new claim related back to a “first-filed” California complaint, the amendment would be considered “first-filed” even if it was filed after the date of a later-filed proceeding containing parallel claims).⁶

IBM’s Tenth Counterclaim, which seeks a declaration that IBM’s Linux activities do not infringe or contribute to the infringement of SCO’s alleged copyrights to the UNIX software, undeniably relates to earlier filed pleadings in this case. As noted above, SCO’s own representations to the district court in Delaware make clear that SCO considered the IBM action, from its inception in March 2003, to concern issues relating to the infringement of SCO’s purported copyrights. In addition, IBM’s counterclaims filed in August 2003 based on SCO’s “campaign to create the false and/or unsubstantiated impression that SCO has rights to UNIX and Linux that it does not have” (Countercls. ¶ 24) unquestionably concern SCO’s assertions that Linux infringes its copyrights to the UNIX software. IBM’s Tenth Counterclaim obviously also directly relates and responds to SCO’s copyright infringement claim asserted against IBM on

⁵ A new claim relates back to a prior pleading where it arises “out of the conduct, transaction, or occurrence that was set forth or was attempted to be set forth in the original pleading”. Fed. R. Civ. P. Rule 15(c); 6A Fed. Prac. & Proc. Civ. 2d § 1497. Further, the “fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant’s attention by the original pleading”. 6A Fed. Prac. & Proc. Civ. 2d § 1497.

⁶ See also GT Plus, Ltd. v. Ja-Ru, Inc., 41 F. Supp. 2d 421, 424 (S.D.N.Y. 1998) (allowing relation back for purposes of applying the first-filed rule where amendment added a declaratory judgment claim and the earlier claims involved only trademark infringement); SAES Getters S.P.A. v. Aeronex, Inc., 219 F. Supp. 2d 1081, 1090 (S.D. Cal. 2002) (holding that an “action [wa]s the first filed simply because it was the first to bring [the parties] into court” and that it was irrelevant that an amendment that created the required overlap between the two actions occurred after the filing date of the later action); Mattel, Inc. v. Louis Marx & Co., Inc., 353 F.2d 421, 422-24 (2d Cir. 1965) (treating case as first-filed even though common issues were not raised until an amendment was filed after the other case had raised those issues).

February 27, 2004. Thus, IBM's Tenth Counterclaim at least relates back to pleadings filed in March 2003, August 2003 and February 2004, and therefore should be considered filed before SCO's case against AutoZone (which was filed in March 2004).

Third, even if (contrary to fact) SCO's action against AutoZone was the first-filed action, the Court would have discretion not to dismiss or stay IBM's action. The "'first to file' rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration". Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982); accord Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985).

Courts have the discretion to ignore the first-filed rule where, as here, application of the rule would be inequitable, since the second-filed action has progressed further than the first-filed action.⁷ See Tuff Torq Corp. v. Hydro-Gear L.P., 882 F. Supp. 359, 365 (D. Del. 1994) (holding that "it is fundamentally unfair to stay litigation that has proceeded further than another previously filed action" and refusing to stay the later-filed action in favor of the first-filed action).⁸ Accordingly, for the reasons discussed above (in Section I), the Court should deny

⁷ Courts have also declined to apply the first-filed rule where the "competing actions are filed within a short period of time". See Capitol Records, Inc. v. Optical Recording Corp., 810 F. Supp. 1350, 1355 (S.D.N.Y. 1992) (declining to apply the first-filed rule in a motion to dismiss a later-filed case where, among other factors, "[o]nly twenty days elapsed between the filing of the two complaints"). Here, SCO filed its complaint against AutoZone on March 3, 2004, whereas IBM's Tenth Counterclaim was filed on March 29, 2004, a difference of only 26 days.

⁸ See also Fleet Capital Corp. v. Mullins, No. 03 Civ. 6660, 2004 WL 548240, at *5 (S.D.N.Y. March 18, 2004) (Ex. D) (holding that because the later-filed "Texas action has been proceeding for two years and contains issues broader than in this [first-filed] action . . . [and] this action has yet to even begin the discovery stage . . . the Texas action . . . cannot reasonably be stayed in favor of this action nor transferred to this Court."); Bethlehem Contracting Co. v. Lehrer/McGovern, Inc., 800 F.2d 325, 328 (2d Cir. 1986) (noting that "[t]o date, the relevant state court litigation has consisted of little more than the filing of the complaint[;] [n]o party has answered or otherwise pleaded[;] and [t]here has been no formal discovery", whereas "[i]n the present case . . . defendants Gem and Polito filed an answer, a counterclaim, and a crossclaim, and submitted interrogatories to all parties[;] Bethlehem submitted interrogatories to all defendants, received responses thereto, and served notice of Milstein's deposition" and holding that "[g]iven the 'relative progress' of the federal action, the order in which jurisdiction was obtained is not a ground for dismissal of the action").

SCO's motion to dismiss or stay, even if the Court decides that the AutoZone case should be considered "first filed".

Conclusion

For the foregoing reasons, IBM respectfully requests that the Court deny SCO's motion to dismiss or stay IBM's Tenth Counterclaim.

DATED this 18th day of May, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18^h day of May, 2004, a true and correct copy of the foregoing
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