

FILED

25 APR 2010 3:27
DISTRICT OF UTAH

BY _____

Brent O. Hatch (5715)
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666

Stephen N. Zack (admitted pro hac vice)
Mark J. Heise (admitted pro hac vice)
David K. Markarian (admitted pro hac vice)
BOIES, SCHILLER & FLEXNER LLP
Bank of America Tower, Ste. 2800
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 539-8400
Facsimile: (305) 539-1307

Attorneys for Plaintiff/Counterclaim Defendant

**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

144

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.

Brent O. Hatch

Mark F. James

BOIES, SCHILLER & FLEXNER LLP

Stephen N. Zack

Mark J. Heise

David K. Markarian

Counsel for Plaintiff/Counterclaim defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be emailed and mailed, postage prepaid, this 26th day of April, 2004, to the following:

By Email and U.S. Mail:

Alan L. Sullivan, Esq.
Todd Shaughnessy, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Ste. 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

tshaughnessy@swlaw.com

By U.S. Mail:

Evan R. Chesler, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Donald J. Rosenberg, Esq.
1133 Westchester Avenue
White Plains, New York 10604

Neelima Gladbehadune