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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE SCO GROUP, INC., a Delaware corporation, Plaintiff,	Civil Action File No.
v.	CV-S-04-0237-RCJ-LRL
AUTOZONE, INC., a Nevada corporation, Defendant.	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT AUTOZONE'S MOTIONS TO (1) TRANSFER THIS ACTION TO THE WESTERN DISTRICT OF TENNESSEE, AND (2) STAY THIS ACTION OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

COMES NOW, Plaintiff THE SCO GROUP, INC. by and through its attorneys, the law firms of Curran & Parry and Boies, Schiller & Flexner, LLP, hereby files its OPPOSITION TO DEFENDANT AUTOZONE'S MOTIONS TO (1) TRANSFER THIS ACTION TO THE

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WESTERN DISTRICT OF TENNESSEE, AND (2) STAY THIS ACTION OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT. This Motion is based upon the following Memorandum of Points and Authorities as well as upon all other papers and pleadings on file in this action.

DATED this 24th day of May, 2004.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff The SCO Group ("SCO") submits this Memorandum in opposition to AutoZone's motions to (1) transfer this action to Tennessee, and (2) stay this action or for a more definite statement.

SCO filed this action to prevent what it has reason to believe is ongoing infringement by AutoZone of SCO copyrights in connection with AutoZone's use and implementation of versions of the Linux operating system. (*See* Complaint ¶¶ 20-21) AutoZone, in filing its present motion to stay, claims it is seeking only to advance the goal of judicial efficiency. An examination of AutoZone's arguments shows that this claim is not accurate. For example, AutoZone's motion asks this Court to stay this action in deference to several other proceedings (including already *stayed* proceedings, and proceedings in which broad copyright counterclaims were filed *after* the filing of the present case). The cases relied upon by AutoZone also involve different legal theories and different facts. For example, SCO's investigation has given SCO reason to believe that, apart from IBM's challenged conduct, AutoZone has engaged in *separate* improper conduct transgressing SCO's rights. AutoZone's motion to stay overlooks this basic fact. Yet at the same time, AutoZone expressly states that if the courts in those cases use their scarce resources to decide those issues in a way that AutoZone does not like, AutoZone can *then* require this Court to expend its scarce resources to *relitigate* all of the very same factual and legal issues. (*See* AutoZone Motion to stay at 9, n. 5)[1]

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[1] Defendant AutoZone's Memorandum of Law in Support of its Motion to Stay or, in the Alternative, For a More Definite Statement is herein referred to as "AZ. Stay br. at" and Defendant AutoZone's Memorandum of Law in Support of its Motion to Transfer Venue is herein referred to as "AZ. Transfer br. at". Also, throughout this Memorandum, SCO refers to its Complaint and previously filed federal and state cases, of which SCO asks this Court to take

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Even assuming it was proper to consider each of the proceedings (and claims) to which AutoZone refers – and under governing law it is not – AutoZone's arguments in support of its motion to stay still lack merit. For example, there are a great many bases on which those other actions could be decided, including but not limited to decisions in SCO's favor, which would still require all of SCO's copyright claims relating to infringing use of Linux to be litigated in this action. The high number of such possible outcomes further highlights the low likelihood of any savings in judicial resources -- even under AutoZone's legally improper framing of the issues.

On the other side of the balance, SCO – as a plaintiff – has a presumptive ability to proceed in this forum to protect and vindicate its federally secured rights and to seek the opportunity to obtain judicial review and a potential judicial remedy designed to stop the continued violation of those federal rights.

AutoZone's reliance on the *Novell* action as a basis for its motion to stay also warrants close examination. Although a number of specific factors set forth in Section II. C.1, below are independently sufficient to preclude this ground for AutoZone's motion, there is an additional factor that bears emphasis at the outset. The *Novell* matter arises because Novell, Inc. ("Novell") after selling all of its UNIX assets in return for substantial consideration, in addition to the substantial value of a separate income stream, now effectively asserts that the only thing it "gave" SCO in return are obligations and costs (i.e., negative value to SCO, and still more benefit to Novell).[2] Merely by advancing these extraordinary claims, Novell has already severely and improperly prejudiced SCO. It would be highly inequitable if – at AutoZone's

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judicial notice. See *U.S. ex rel Robison Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

[2] After Novell advanced these positions, IBM invested $50,000,000 in Novell.

request – this prejudice could be extended to the point of preventing SCO from obtaining judicial review of the separate and additional continuing violation of its rights here.

AutoZone's motion to transfer also lacks merit. For example, AutoZone asks this Court to move the present action to Tennessee (where AutoZone could have filed a declaratory action), rather than to Utah where AutoZone itself argues that two related actions are venued. If those actions were as closely related to this one as AutoZone contends in support of its motion to stay, and if AutoZone were actually pursuing the goal of judicial efficiency, then it would be logical for AutoZone to also seek a venue where close coordination could most easily be achieved, whether or not a stay were granted. Finally, AutoZone's motion for a more definite statement should be denied. The Complaint fully complies with the notice pleading requirements under federal law and identifies the copyright infringement issues necessary to defend this case. Under basic procedural law, further details are properly the subject of discovery.

In sum, granting AutoZone's motion to stay could result in a great many possible outcomes that would *waste* substantial judicial resources, and a great many outcomes that would not save any judicial resources – each of which would have the effect of insulating AutoZone from judicial review of the propriety of its conduct. At the same time, SCO will suffer substantial prejudice if it is blocked from the opportunity to obtain judicial review of the merits of its present claims and the opportunity to obtain a judicial remedy to stop the continuing violation of its federally secured rights. Under governing law, AutoZone's arguments and the factors AutoZone raises do not approach the level needed to justify precluding a federal plaintiff from obtaining that opportunity.

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RELEVANT PROCEDURAL HISTORY

Plaintiff SCO is the successor in interest to certain assets of the Santa Cruz Operation, Inc. (the "Santa Cruz Operation"). SCO, therefore, owns certain assets which Santa Cruz Operation purchased from Novell, Inc. ("Novell") pursuant to an integrated agreement, The assets include right and title to all of the UNIX operating system technology including, without limitation, all claims that arise from any right or asset purchased from Novell, copyrights in the UNIX software and derivative works thereof, source code, object code, programming tools, and documentation ("the Copyrighted Material").

SCO was informed and believed that AutoZone was infringing SCO's UNIX copyrights. Accordingly on March 4, 2004, SCO therefore initiated this copyright infringement action to protect its rights. SCO alleges that parts or all of the Copyrighted Material or derivative works of that Material has been copied improperly and/or used in or with versions 2.4 and 2.6 of the Linux operating system without the permission of SCO. SCO alleges that AutoZone, a prior licensee of SCO, has infringed and will continue to infringe SCO's copyrights in and relating to the Copyrighted Material by employing one or more versions of the Linux operating system in its business. To date, AutoZone has declined to answer these allegations and has instead filed the instant motions seeking to delay the resolution of the merits of SCO's claims.

LEGAL ARGUMENT

I. AUTOZONE'S MOTION TO TRANSFER SHOULD BE DENIED.

AutoZone's request to shift this action to the site of its headquarters in Memphis, Tennessee should be denied by this Court. No judicial efficiency would result since the majority of SCO's witnesses are located in nearby Utah, and AutoZone subjected itself to this Court's

jurisdiction by incorporating in Nevada. A motion to transfer should be granted only if: (1) the district to which the party seeks a transfer is a district where the suit might have been brought, and (2) the convenience of the parties and witnesses and the interest of justice support the transfer. *See* 28 U.S.C. § 1404(a). Such a transfer "should not be freely granted," *Gherebi v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003) (quoting *Van Dusen v. Barrack*, 376 U.S. 612 (1964)), and is permitted only to a *more* convenient forum, "not to a forum likely to prove equally convenient or inconvenient." *Id.* Moreover, the heavy burden of demonstrating that the transfer is appropriate is squarely on AutoZone. *Id.* at 1302 ("The [movant] must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.").

A. AutoZone's Motion to Transfer Should be Denied Because SCO Correctly Chose to Vindicate its Legal Rights in the District of Nevada.

Under 28 U.S.C. § 1391(c), a corporate defendant is deemed a resident of any judicial district in which it is subject to personal jurisdiction. It is undisputed that AutoZone is incorporated in Nevada. SCO, which resides in Utah, properly chose to bring suit against AutoZone in Nevada, because AutoZone is subject to personal jurisdiction in Nevada *and* because SCO and its principal decision makers, and other witnesses are located in neighboring Utah.

SCO's choice to vindicate its rights in a particular court should not be lightly disturbed. *See Gherebi*, 352 F.3d at 1303 ("[T]here is a strong presumption in favor of plaintiff's choice of forums.") (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)); *see also STX Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1555-56 (N.D. Cal. 1988) ("[A] defendant bears a heavy burden of proof to justify the necessity of the transfer. The plaintiff's choice of forum should not be easily

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overturned.") (citing *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971)).

B. AutoZone's Motion To Transfer Should Be Denied Because Neither Convenience Nor Judicial Efficiency Are Served by Transferring the Action to Tennessee.

AutoZone's motion completely ignores the fact that transferring this action to Tennessee is inconvenient for SCO, which chose to vindicate its rights in Nevada. In evaluating a transfer motion, courts consider the following three factors: (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interests of justice. *See Miracle Blade, LLC v. Ebrands Commerce Group, LLC*, 207 F.Supp.2d 1136, 1155-56 (D. Nev. 2002).

AutoZone's argument that the convenience of the parties requires transfer to the Western District of Tennessee completely ignores the fact that it will be significantly less convenient for SCO's witnesses with knowledge who are located in Utah if this action is transferred. Section 1404(a) is not intended to merely shift the burden of inconvenience from one party's witnesses to the other. *See Gherebi*, 352 F.3d at 1303. Accordingly, there is no merit to AutoZone's convenience argument.

AutoZone also argues that its transfer motion should be granted because it claims that "almost all" of AutoZone's relevant documents related to this litigation are located in Memphis, Tennessee. AutoZone does not, however, explain why this is significant. "[T]he fact that records are located in a particular district is not itself sufficient to support a motion for transfer." *See Royal Queentex Enterprises Inc., v. Sarah Lee Corporation*, No. C-99-4787 MJJ, 2000 WL 246599 (N.D. Cal. March 1, 2000). Furthermore, courts have recognized, in the age of electronic discovery, that the location of documents is a minor factor since documents are often kept in electronic form and, in any event, are easily converted to electronic data which is transmitted wherever needed. *See, e.g., Affymetrix v. Synteni, Inc.*, 28 F. Supp. 2d 192, 208 (D.

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Del. 1998) ("while many (if not all) of the documents are located elsewhere, recent technological advances have reduced the weight of this factor to virtually nothing"); *Coker v. Bank of America*, 984 F. Supp. 757, 766 (S.D.N.Y. 1997) ("In today's era of photocopying, fax machines and Federal Express, [defendant's] documents easily could be sent to [the chosen forum] . . . ."); *Met-L-Wood Corp. v. SWS Industries, Inc.*, 594 F. Supp. 706, 710 (N.D. Ill. 1984) (document location not an important factor in transfer calculus absent substantial difficulties with transporting them).

Finally, AutoZone argues that its motion should be granted because transfer to Tennessee would serve judicial efficiency. (*See* AZ, Transfer br. at 6). Once again, AutoZone fails to address how transferring the case to Tennessee is more efficient than proceeding in Nevada – AutoZone's state of incorporation and a forum in which it clearly expects, and consents, to be subject to suit. Again, AutoZone is only concerned with making it easier and less expensive for it to try this case, to the detriment of SCO – an outcome not intended by Section 1404(a).[3]

C. If This Court Is Inclined To Transfer the Action, It Should Be Transferred To Utah Not Tennessee.

Although SCO maintains that the Court should not transfer this action, should this Court elect to do so, SCO respectfully requests that this case be transferred to the District of Utah. The law is clear that this Court may, on its own initiative, *sua sponte* transfer this action to the District of Utah. *See Washington Public Utilities Group v. U.S. Dist. Court for Western Dist. of Washington*, 843 F.2d 319, 326 (9th Cir. 1987) (Section 1404(a) does not require that a formal motion be made for the court to decide that a change of venue is appropriate). Furthermore, if

[3] Similarly, AutoZone's additional argument that the Western District of Tennessee has fewer cases pending per judge than the District of Nevada at the current time is irrelevant given the fact that AutoZone admittedly seeks to stay this action wherever it is venued.

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necessary, SCO could move to transfer venue on convenience grounds under § 1404(a), even though it had the original choice of forum. *See Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990) (recognizing plaintiff's right to move to transfer pursuant to § 1404(a)). *See Anadigics, Inc. v. Raytheon Co.*, 903 F. Supp. 615, 617 (S.D.N.Y. 1995) (where defendant moved under 1404(a) to transfer to Massachusetts and plaintiff then moved to transfer to New Jersey, defendant's motion to transfer constituted "changed circumstances," so plaintiff's motion was proper).

This Court may transfer this action pursuant to Section 1404(a), because this action "might have been brought" initially in the District of Utah. SCO has alleged in this action that AutoZone illegally infringed upon its copyrights in violation of 28 U.S.C. § 1400(a). In a copyright infringement action, venue is proper in *any* judicial district in which a defendant "may be found." *See* 28 U.S.C. § 1400(a) ("Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights . . . may be instituted in the district in which the defendant or his agent resides or may be found."). As a practical matter, the test for venue in a copyright action is identical to the test for determining personal jurisdiction. *See Milwaukee Concrete Studios, Limited v. Field Manufacturing Company, Inc.*, 8 F.3d 441, 445 (7th Cir. 1993) ("Section 1400(a)'s 'may be found' clause has been interpreted to mean that a defendant is amenable to personal jurisdiction in a particular forum.") Venue also may be appropriate in the district where the infringement allegedly occurred. *See Edy Clover Productions, Inc. v. NBC, Inc.*, 572 F.2d 119, 120-21 (3d Cir. 1978).

Convenience of the parties and witnesses and the interest of justice support a transfer of venue to the District of Utah if any transfer is to occur. First, judicial efficiency will also be served because actions involving related claims are already being litigated there. Second,

transfer to Utah would be much more convenient for SCO and SCO's witnesses and documents that reside there while at the same time it would be equally convenient to AutoZone and its witnesses as Nevada where AutoZone chose to incorporate. Based on the forgoing, AutoZone's motion to transfer should be denied.

II. AUTOZONE'S MOTION TO STAY SHOULD BE DENIED.

A. Standard of Review.

AutoZone's motion to stay should also be denied because the prejudice to SCO would far outweigh any judicial efficiency that might result from such a stay. To determine whether to exercise its discretion to stay a federal action, this Court must first look to the potential prejudice to the parties and, second, to the judicial efficiency that might result from a stay. *See Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1973) (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)).

With respect to the issue of prejudice, SCO initiated this litigation in federal court to invoke the Court's jurisdiction and to seek damages and equitable remedies to protect itself from what it alleges to be AutoZone's ongoing, widespread infringement of its intellectual property. Staying this action would severely prejudice SCO by allowing AutoZone to continue to infringe on its copyrights unimpeded for an unknown period of time without contributing any judicial efficiency to the present action. Conversely, AutoZone has identified no prejudice from having to defend itself now in this action. Thus, on the primary issue of prejudice, this factor clearly weighs in favor of SCO - not AutoZone. *See, e.g., Dunn v. Airline Pilots Ass'n*, 836 F. Supp. 1574, 1584 (S.D. Fla. 1993) (movant must show "a clear case of hardship or inequity if the case proceeds or little possibility the stay will harm others") (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)); *Jouker v. Murphy Motor Freight, Inc.*, 84 B.R. 537, 539 (N.D.

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Ind. 1987) (denying stay where stay could delay proceedings indefinitely to the prejudice of plaintiff); *Valmar Distributors v. N.Y. Post Co.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (basic goal of stay analysis is "to avoid prejudice").

It is axiomatic that this Court has discretion concerning whether or not to stay proceedings before it. This authority is incidental to the power inherent in every court to control its docket. *See Landis*, 299 U.S. at 254. However, AutoZone, the party seeking a stay, bears the burden of establishing its need. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997) ("The proponent of a stay bears the burden of establishing its need."). Specifically, AutoZone must demonstrate "a clear case of hardship or inequality" to itself if this action continues. *See Hertz Corp. v. The Gator Corp.*, 250 F. Supp. 2d 421, 424-25 (D.N.J. 2003) (citing *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)).[4] If there is even a "possibility" that the stay would work damage on SCO, the stay should be denied. *See Hertz Corp.*, 250 F. Supp. at 424-25; *accord Landis*, 299 U.S. at 255.

SCO's right to proceed in this Court should not be denied "except under the most extreme circumstances." *GFL Advantage Fund, LTD v. Colkitt*, No. 02ms475, 2003 WL 21660058 (D.D.C. July 15, 2003) (quoting *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983)). Moreover, the mere fact that a defendant has to defend claims against it does not constitute prejudice. *See Baychar, Inc. v.*

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[4] *See also, Bayoil Supply & Trading of Bahamas v. Jorgen Jahre Shipping*, 54 Supp. 2d 691 (S.D. Tex. 1999) (a court should grant a discretionary stay only upon the showing of "something close to genuine necessity"); *Dawn v. Mecom*, 520 F. Supp. 1194 (D. Colo. 1981) (denying stay where related action sought only limited relief and would not necessarily resolve the claims at issue in the federal action); *Federal Deposit Ins. Corp. v. First National Bank & Trust Co. of Oklahoma City*, 496 F. Supp. 291 (W.D. Oklahoma 1978) (moving party must show "a pressing need for delay and that the other party will not suffer harm from entry of the stay order") (citing *Ohio Environmental Council v. U.S. District Court, Southern District of Ohio, Eastern Division*, 565 F.2d 393 (6th Cir. 1977)).

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Frisby Technologies, No. 01-CV-28-B-S, 2001 WL 856626 * 10 (D. Me. July 26, 2001) ("Just because defending oneself in court takes money and time does not substantiate a motion to stay."). Otherwise, a stay would be appropriate in every case. On the other hand, delaying a plaintiff's ability to vindicate its rights in the forum of its choice to prevent infringement of its intellectual property does constitute prejudice which justifies denial of a motion for stay. *See Filtrol Corp.*, 467 F.2d at 244 (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)).

B. SCO Will Be Substantially Prejudiced If A Stay Is Granted.

This case alleges that AutoZone is infringing valid and valuable copyrights that SCO owns in the UNIX software by using and implementing Linux software in its business. It is well settled that infringement of copyrights such as alleged here constitutes irreparable harm that entitles the copyright holder to injunctive relief. *See Triad Systems Corporation v. Southeastern Express Company*, 64 F.3d 1330, 1335 (9th Cir. 1995) ("In a copyright infringement action . . . [a] showing of a reasonable likelihood of success on the merits raises a presumption of irreparable harm.") Granting a stay under the procedural posture of the cases that AutoZone has relied upon would amount to giving AutoZone free license to continue to infringe upon SCO's copyrights for the foreseeable future, while preventing SCO from even obtaining discovery concerning the breadth of such copyright infringements and the damages such infringements may have caused.

Remarkably, AutoZone has not identified any prejudice to it if this action proceeds. Accordingly, this Court need not even weigh the prejudice between the parties and must resolve the prejudice prong of the analysis in favor of SCO, the plaintiff, and allow this action to

proceed. *See Valmar Distributors*, 152 F.R.D. at 39 (holding that the basic goal of stay analysis is "to avoid prejudice").

C. Judicial Efficiency Will Not Be Served By Staying This Litigation.

This Court need not reach the issue of judicial efficiency, because a stay would cause prejudice to SCO while AutoZone has identified no prejudice to it from allowing this case to proceed. Nevertheless, AutoZone has also failed to meet its burden to show that imposition of a stay in this action would result in judicial efficiency. AutoZone's arguments for judicial efficiency do not support a stay and are, for the most part, illusory. AutoZone identifies three other litigations that it claims are related to this action and that require this action to be stayed. Those actions are: (1) the *Novell* action pending in federal court in Utah; (2) the *Red Hat* action pending and stayed in federal court in Delaware; and (3) the *IBM* action pending in federal court in Utah.

However, AutoZone's papers make it clear that it does not intend to be bound by any decision in SCO's favor in *any* of the three actions it identifies. On the contrary, it intends to re-litigate those issues before this Court. (*See* AZ. Stay br. at 9, n. 5) As explained below, none of these actions are likely to be outcome determinative of issues in this litigation and, therefore, staying this litigation in favor of those actions will not promote judicial efficiency.

1. SCO v. Novell

SCO originally filed the *Novell* action in state court in Utah to address actions by Novell that SCO believes constituted slander of title. In that case, SCO claims that Novell has falsely represented that it owns UNIX copyrights. Accordingly, factual issues concerning statements relating to copyright ownership issues may be involved. But it is equally likely that the case may be resolved by settlement or based on some factual or legal issue having nothing to do with

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copyright issues. For example, Novell has challenged whether or not SCO has made out essential elements of the slander of title cause of action pertaining to issues such as special damages and/or legal elements of slander. If the case is decided on these preliminary issues, the court would not necessarily reach any issues even arguably related to the copyright ownership issues that are at issue in this action. More importantly, AutoZone has stated that it will not be bound by decisions as to ownership and enforcement issues if the *Novell* case is resolved in SCO's favor because AutoZone is not a party to that action. (AZ. Stay br. at 9, n. 5) If AutoZone is right about its ability to re-litigate the ownership issues in the Novell case, very little, if any, judicial efficiency is likely to result if this action were to be stayed in favor of the *Novell* action, and the prejudice to SCO of such a stay far outweighs any such judicial efficiency.

2. Red Hat v. SCO

AutoZone does not and cannot rely on the *Red Hat* declaratory judgment litigation to support a stay in this case because the *Red Hat* litigation itself is stayed and it is unclear when or how that action will proceed in the future. Presently, the *Red Hat* Court has elected to stay the action *sua sponte* and asked the parties to report every 90 days on the progress in the *IBM* litigation. Accordingly, it is uncertain at this time when, if ever, that action will go forward, and its pendency should not be a basis at this time to stay the *AutoZone* action. Moreover, even if the stay is ultimately lifted, as with the *Novell* and *IBM* litigations, the *Red Hat* litigation may be resolved on legal or factual issues having nothing to do with the determinative issues in this case. For example, the Red Hat case is a declaratory judgment action. SCO has defended this action, in part, by asserting *Red Hat* has no reasonable apprehension of being sued. This defense could be

dispositive, thereby precluding the *Red Hat* case from reaching the substance of the infringement issues.[5]

Recognizing this, AutoZone instead relies upon arguments made to the *Red Hat* court regarding the *IBM* litigation.[6] However, as we show below, under the current posture of the *IBM* litigation, those arguments are not a valid basis for a stay of this action.

3. SCO v. IBM

The *IBM* litigation pending in federal district court in Utah is, in large part, a breach of contract action. The action, as it was filed originally, pertained primarily to IBM's alleged unlawful distribution of original and/or derivative and other works in violation of SCO's UNIX licenses. However, on March 29, 2004, almost one month *after* SCO filed this action against AutoZone, IBM attempted to import copyright issues regarding the use by end-users of the Linux

[5] In fact, SCO has not sued Red Hat and as SCO has recently pointed out in its papers in opposition to Red Hat's motion to reconsider the stay, Red Hat's Linux business has actually substantially improved since the filing of its case, belying Red Hat's claim that SCO has damaged its business.

[6] AutoZone argues that its motion is supported by an earlier statement by SCO in Red Hat that the IBM case involved, at that time, "most if not all" of the copyright infringement issues at issue in Red Hat. (See AZ. Stay br. at 8) (emphasis added). SCO continues to believe that the potential copyright (and other even more basic) consequences for Linux of IBM's license violations -- the contract violations at the center of the IBM case -- are of paramount importance compared to the other potential infringement issues that affect Linux. That comparative fact was true then and it remains true now – and it remains true even though, since the time of SCO's quoted statement to the Red Hat court, SCO has the opportunity for further investigation of improper conduct affecting Linux independent of IBM's conduct. The fact that the impact on Linux of IBM's conduct will be comparatively much greater does not mean that SCO may not protect against violations of its rights by other parties *unrelated* to IBM's violations. Nor can it mean that SCO may not, since the time of its quoted statement, engage in continuing investigation and act on the results of that over time. In fact, IBM itself, recognizing the potential impact of such further investigation, has now – after the filing of the AutoZone case -- tried to add a declaratory counterclaim that would add all of those additional issues to the IBM case.

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software itself, including infringement and copying issues that had nothing to do with IBM's contributions to Linux, into the *IBM* litigation.

SCO has moved to dismiss that claim (IBM's Tenth Counterclaim), *inter alia*, on the basis that it is being litigated here in this first-filed action against AutoZone. Accordingly, it is at best uncertain whether the copyright infringement claims to be litigated here will go forward at all in the *IBM* litigation. But, whether or not this happens, it is clearly not a basis to stay this action because SCO filed those claims first in this action and SCO, therefore, has a right to litigate them in the court of its choice. "The first-to-file rule was developed to 'serve the purpose of promoting efficiency well and should not be disregarded lightly.'" *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991) (quoting *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 750 (9th Cir. 1979)).

Also, as with the *Novell* and *Red Hat* actions, there are various procedural and substantive issues that could resolve the *IBM* litigation without implicating issues to be litigated in this case. The *IBM* litigation involves numerous claims such as licensing, interference with contractual and prospective economic relations that are not at issue here. Accordingly, the *possibility* that staying this action in favor of the *IBM* action would promote judicial efficiency is dubious at best.

Finally, none of the cases relied upon by AutoZone supports entering a stay in this litigation. Each case was stayed in favor of parallel litigations between the same parties and involving identical or virtually identical issues. *See Mediterranean Enterprises, Inc. v. Ssangyong Corporation*, 708 F.2d 1458 (9th Cir. 1983) (district court stayed the federal litigation pending binding arbitration between the parties); *Cohen v. Carreon*, 94 F. Supp. 2d 1112 (D. Or. 2000) (district court stayed a federal litigation in Oregon in favor of a virtually identical

litigation between almost identical parties that had been previously filed in California and to which the plaintiff could not establish a prejudice as a result of the stay); *Gen-Probe, Inc. v. Amoco Corporation*, 926 F. Supp. 948 (S.D. Cal. 1996) (district court stayed the federal litigation between the parties pending resolution of a state case that had been filed *two* years prior between the parties). Because the defendants in each of the stayed cases were parties to the parallel litigations, issues of *res judicata* and judicial efficiency played a much more important role in the district courts' balancing of the equities. While defendants in those cases were seeking to avoid litigating similar issues twice in parallel actions, in this case AutoZone is seeking to avoid litigating the issues even once.

Moreover, the one case AutoZone relies upon that is arguably legally and factually similar to the case at hand, *Filtrol Corporation v. Kelleher*, 467 F.2d 242 (9th Cir. 1973), actually supports *denial* of AutoZone's motion to stay. In *Filtrol*, the defendants in a California patent infringement action argued that a negative outcome to the plaintiff in a similar action against a different defendant pending in federal court in Connecticut with respect to the validity of the patent would eliminate the necessity of the California action. *See id.* at 244. The district court refused to stay the infringement issue simply because the patent validity issue was being litigated in another federal court. *See id.* at 245. In affirming, the Ninth Circuit held that the district court did not abuse its discretion and specifically noted that the pendency of the Connecticut action would not guarantee that the patent validity issue would not be re-litigated in the California action. *See id.*

In short, there is no basis to delay this litigation. None of the other three litigations (to which AutoZone is not a party) will necessarily resolve this matter. Moreover, as set forth at length, the prejudice to SCO if the stay is granted far outweighs potential judicial efficiencies in

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this case.

III. AUTOZONE'S MOTION FOR A MORE DEFINITE STATEMENT SHOULD BE DENIED.

AutoZone's argument that SCO's complaint lacks the specificity required by Fed. R. Civ. P. 8(a) is without merit. "Rule 8(a)(2) requires only that the complaint include 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). "To be sufficient under Rule 8 a claim for infringement must state, *inter alia*, which specific original work is the subject of the copyright claim, that plaintiff owns the copyright, that the work in question has been registered in compliance with the statute and by what acts and during what time defendant has infringed the copyright." *Gee v. CBS, Inc.*, 471 F. Supp. 600, 643-44 (E.D. Pa. 1979).

SCO's complaint fully complies with Rule 8. The complaint identifies specific UNIX works that are the subject of the copyright claims, as well as the UNIX works' copy registration numbers. (*See* ¶¶ 15 -17). In addition, SCO specifically alleges ownership of those works. (*See* ¶¶ 11, 15). Finally, SCO alleges that AutoZone, by using and implementing the Linux operating system, has infringed, and continues to infringe, on SCO's UNIX copyrights. (*See* ¶¶ 13, 20-23).

AutoZone's motion for a more definite statement pursuant to Fed. R. Civ. P. 12(e) is nothing more than an improper attempt to obtain discovery. However, "Rule 12(e) is designed to strike at unintelligibility, rather than want of detail." *Woods v. Reno Commodities, Inc.*, 600 F. Supp. 574, 580 (D. Nev. 1984). As such, "[a] motion for more definite statement should not be granted to require evidentiary detail that may be the subject of discovery." *See id.* This Court should reject AutoZone's attempts to exploit IBM's slanted characterizations of discovery issues

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in the *IBM* case to impact this Court's decision on AutoZone's motion. In fact, as AutoZone will learn when it conducts appropriate discovery, SCO has fully complied with its obligations in the *IBM* litigation by providing all information in its possession at this early stage of discovery concerning IBM's improper contributions to Linux. Indeed, the Magistrate Judge in the *IBM* case recognized this in a recent decision where she found that SCO has acted in "good faith" with respect to such discovery.[7] In short, AutoZone's professed need for the "details" of the "lines, files, or organization of Linux code" that is the subject of the litigation is precisely the purpose of discovery, not the purpose of a motion for a more definite statement. Because there is nothing "unintelligible" about SCO's complaint, AutoZone's motion for a more definite statement should be denied. *See id.*

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[7] At this early stage of discovery in the *IBM* case, although SCO has identified numerous specific examples of improper contributions by IBM to Linux, SCO has been prevented from identifying all possible infringements based on IBM contributions because IBM has, thus far, not produced all versions of its AIX operating system which was derived from UNIX. These versions are not publicly available.

CONCLUSION

For all of the foregoing reasons, SCO respectfully request that this Court deny AutoZone's motions in their entirety.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION was hand-delivered on this 24th day of May, 2004, to the following:

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