

ORIGINAL

1 Stanley W. Parry, Esq.  
2 State Bar No. 1417  
3 Glenn M. Machado, Esq.  
4 State Bar No. 7802  
5 CURRAN & PARRY  
6 300 South Fourth Street, Suite 1201  
7 Las Vegas, Nevada 89101  
8 (702) 471-7000

9 David S. Stone, Esq. (Admitted Pro Hac Vice)  
10 Robert A. Magnanini, Esq. (Admitted Pro Hac Vice)  
11 BOIES, SCHILLER & FLEXNER LLP  
12 150 John F. Kennedy Parkway, 4<sup>th</sup> floor  
13 Short Hills, New Jersey 07078  
14 (973) 218-1111

15 Attorneys for Plaintiff  
16 The SCO Group, Inc.

17 UNITED STATES DISTRICT COURT  
18 DISTRICT OF NEVADA

19 THE SCO GROUP, INC., )  
20 a Delaware corporation, )  
21 )  
22 Plaintiff, )  
23 v. )  
24 )  
25 AUTOZONE, INC., )  
26 a Nevada corporation, )  
27 )  
28 Defendant. )

Civil Action File No.  
CV-S-04-0237-RCJ-LRL

PLAINTIFF THE SCO GROUP, INC.'S MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANT AUTOZONE, INC.'S EMERGENCY MOTION TO STAY

COMES NOW, Plaintiff THE SCO GROUP, INC. ("SCO") by and through its  
attorneys, the law firms of Curran & Parry and Boies, Schiller & Flexner LLP, hereby  
files its OPPOSITION TO DEFENDANT AUTOZONE, INC.'S ("AUTOZONE")  
EMERGENCY MOTION TO STAY.

LAW OFFICES  
CURRAN & PARRY  
300 SOUTH FOURTH STREET  
SUITE 1201  
LAS VEGAS, NEVADA 89101  
(702) 471-7000

ORIGINAL

1 This Opposition is based upon the following Memorandum of Points and  
2 Authorities as well as upon all other papers and pleadings on file in this action.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **INTRODUCTION**

5  
6 In reading AutoZone's motion this Court may have a sense of déjà vu. At oral  
7 argument on July 12, 2004, this Court, knowing that SCO had no preliminary injunction  
8 motion pending, nevertheless granted SCO 60 days to conduct limited expedited  
9 discovery which included interrogatories and "any other discovery necessary but limited  
10 in scope only by the inquiry as to facts predicate to a preliminary injunction..." See July  
11 12, 2004 Hearing Transcript ("Tr."), Certification of Glenn M. Machado, Esq. ("Machado  
12 Cert.") Ex. A, Tr. at 25:8-12. (emphasis supplied). AutoZone's current motion is entirely  
13 based on an unreasonable interpretation of one statement during oral argument on July  
14 12, 2004 which was immediately thereafter clarified by the Court.<sup>1</sup> AutoZone now  
15 claims that the Court has ruled that SCO can take no discovery unless it has the "right"  
16 now to a preliminary injunction without the discovery. However, this Court addressed  
17 this very question at oral argument and clarified that it was giving SCO the opportunity  
18 to take discovery before a preliminary injunction. At that time, AutoZone's Counsel  
19 opposed any discovery on the grounds that (1) SCO had not proven it had the right to a  
20 preliminary injunction; and (2) such discovery would involve substantial unnecessary  
21  
22

23  
24 <sup>1</sup> AutoZone relies entirely on this Court's statement in the midst of a colloquy with counsel to the effect  
25 that, "If you don't have a right to preliminary injunction you shouldn't proceed with discovery at all." See  
26 Tr. at 24: 22-23. SCO believes the context in which the Court made this statement makes it clear that this  
27 Court intended to convey its view that if SCO did not need or want an injunction, or if SCO believed that  
28 it could not establish a right to an injunction even after taking the limited discovery ordered, that it should  
not take the discovery at all. SCO's interpretation was confirmed by the Court when it later rejected  
AutoZone's argument that SCO should not be permitted to conduct any discovery until it first established  
a right to a preliminary injunction. See Tr. at 27:19-25 and 28:1-5.

1 time and expense. In particular, AutoZone's Counsel made the following argument this  
2 Court promptly rejected:

3 Mr. Stewart: Your Honor, these issues are already before the Court  
4 on the papers that are in front of you...And so my point is that giving  
5 them the opportunity to take discovery before a preliminary injunction  
6 that you can already ascertain they can't get will cause the parties to  
7 engage in substantial time and expense that ultimately will not be  
8 fruitful. They cannot –

9 The Court: I don't think 60-days' worth is unnecessary time and expense,  
10 so that will be the order. I'll ask for counsel to prepare an order.

11 Tr. at 27:19-25 and 28:1-5. (emphasis supplied)

12 Now, under the guise of an "emergency motion" based on SCO's Statement of  
13 Basis for a Preliminary Injunction, AutoZone seeks to make the very same argument  
14 based on the very same objections that this Court rejected on July 12, 2004 and render  
15 this Court's reasonable compromise reflected in its July 12<sup>th</sup> ruling (and August 6, 2004  
16 Order) a nullity. AutoZone's motion is procedurally and substantively without merit.<sup>2</sup>

17 This latest motion is merely one in a series of steps AutoZone has taken  
18 unnecessarily burdening SCO in implementing the discovery process ordered by this  
19 Court. Whereas SCO – at every step of this process – has attempted to be reasonable  
20 and to minimize the expense to the parties and the Court, AutoZone, by contrast, has  
21 done the opposite. Although this Court refused to limit the substantive scope of  
22 discovery, SCO accommodated AutoZone's wish to limit discovery to migration issues

23  
24 <sup>2</sup> AutoZone's motion is essentially a motion for reconsideration of a discovery order which – to the  
25 extent it is permissible at all – must be filed within 10 days (see LR IB 3-1 which provides that a motion  
26 for reconsideration must be filed within 10 days of the date of the ruling being contested) and is  
27 substantively deficient because AutoZone has not set forth any of the criteria required upon a motion for  
28 reconsideration. See School Dist. No. 1J, Multnomah County v. Acands, Inc., 5 F.3d 1255, 1263 (9<sup>th</sup> Cir.  
1993) ("Reconsideration is appropriate if the district court (1) is presented with newly discovered  
evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an  
intervening change in controlling law.")

1 although SCO certainly could have pursued discovery on its claims that Linux itself  
2 contains infringing code as SCO has shown in papers filed in the SCO v. IBM case.  
3 Although the Court did not expressly grant discovery to AutoZone, SCO did not contest  
4 AutoZone's attempts to obtain reciprocal discovery. Despite all of these compromises  
5 already made by SCO with respect to this Court's ruling, AutoZone now seeks to nullify  
6 this Court's carefully crafted compromise altogether and grant SCO no discovery. It is  
7 now patently clear that, for some reason, AutoZone desperately wants to avoid any  
8 discovery into its possible infringement of SCO's copyrights. AutoZone's motion should  
9 be denied because as this Court has recognized, it is only fair and equitable that SCO  
10 be permitted to engage in the limited discovery ordered by this Court to confirm whether  
11 or not AutoZone has, in fact, engaged in the infringing conduct SCO describes in its  
12 Statement of Basis for Preliminary Injunction and further, if such infringement is ongoing  
13 and therefore currently irreparably harming SCO.  
14  
15

#### 16 **ARGUMENT**

17 SCO filed its Complaint against AutoZone on March 3, 2004 alleging AutoZone's  
18 infringement of various SCO copyrights. Instead of filing an Answer, on April 23, 2004,  
19 AutoZone filed, among other things, a motion to indefinitely stay all discovery in this  
20 matter. SCO opposed AutoZone's motion, in part, on the grounds that, if SCO is right  
21 and AutoZone is indeed infringing its copyrights, SCO would be irreparably harmed for  
22 an unknown period of time were the stay to be granted. See SCO's Memorandum in  
23 Opposition to AutoZone's Motion for Stay at 13, Machado Cert. Ex. B. This Court,  
24 observing the unfairness of depriving SCO of any discovery, ordered that SCO may  
25 take limited discovery to determine if AutoZone is, as SCO suspects, currently infringing  
26  
27  
28

1 SCO's copyrights and therefore, causing SCO irreparable harm. See Tr. at 24:5-14.  
2 AutoZone's second attempt to deprive SCO of even this limited amount of discovery  
3 should be denied for the following five reasons:  
4

5 First, when the parties appeared before the Court on July 12, 2004 and argued  
6 the motions, this Court crafted a fair and equitable compromise to address the parties  
7 concerns. This Court stayed the proceedings, with the exception of permitting SCO  
8 discovery limited to obtaining "factual predicates to a request for preliminary injunction."  
9 See Tr. at 24:8-10. In doing so, this Court apparently credited SCO's Counsel's  
10 argument that SCO had "reason to believe" that in the course of migrating from SCO's  
11 OpenServer Software to the Linux Operating System, AutoZone may have infringed  
12 SCO's patents by among other things, using or copying SCO's "static shared libraries".  
13 See Tr. at 18:12-16. SCO reasonably believed this because SCO engineers had  
14 previously worked with AutoZone's computer system and were generally familiar with  
15 what would be required to migrate the substantial software used by AutoZone from the  
16 OpenServer UNIX Operating System to a new Linux operating system. As an example,  
17 Linux is not distributed with static shared libraries which were used several years ago in  
18 operating systems such as SCO's OpenServer. These libraries have now been  
19 essentially replaced by more versatile dynamic shared libraries. Linux, which did not  
20 exist when SCO's OpenServer Software was created, uses the more recently created  
21 dynamic shared libraries.  
22

23  
24 Thus, SCO's Counsel argued that while SCO had reason to believe that  
25 AutoZone had, and was currently, infringing various SCO's copyrights in its OpenServer  
26 Software, it could only confirm this fact by conducting discovery which it would be  
27  
28

1 precluded from conducting if this Court were to stay all proceedings indefinitely. The  
2 Court, apparently recognizing the unfairness of such a situation, granted an exception to  
3 permit SCO to conduct limited discovery on these issues. If, as AutoZone now claims,  
4 this Court had intended to condition such discovery upon SCO's demonstration that it  
5 was entitled to a preliminary injunction without the discovery, this Court would have had  
6 no reason to grant the discovery in the first place. Furthermore, a careful reading of the  
7 transcript does not suggest anywhere that this Court placed such a condition on the  
8 limited discovery granted to SCO. At the time of its ruling, this Court was well aware of  
9 the fact that SCO had not filed for a preliminary injunction. The purpose of the  
10 discovery was to permit SCO a limited right to discover whether it was being irreparably  
11 harmed before barring SCO from taking any discovery indefinitely by way of a stay of all  
12 proceedings. Indeed, when AutoZone's Counsel attempted to impose a condition that  
13 SCO prove a right to injunctive relief before any discovery, this Court rejected  
14 AutoZone's argument. See Tr. at 26:19-25, 27:1-25 and 28:1-8.

17 Second, SCO has consistently interpreted the Court's ruling to allow SCO to  
18 conduct sufficient discovery for SCO to decide whether it needed the injunctive relief in  
19 question. This position was confirmed in SCO's letter to the Court with respect to  
20 AutoZone's proposed order which stated in pertinent part "Your honor granted the stay  
21 with the exception of ordering that SCO could take discovery in order to determine  
22 whether or not to file for a preliminary injunction in the case." See July 30, 2004 Letter  
23 from David S. Stone to the Court, Machado Cert. Ex. C. With the knowledge that SCO  
24 was proceeding in this manner, this Court nevertheless entered the Order which  
25  
26  
27  
28

1 provided for SCO to conduct discovery of AutoZone and AutoZone never moved for  
2 reconsideration of the Order.

3  
4 Third, the novel requirement – never discussed by this Court at oral argument –  
5 that SCO serve AutoZone with a “Statement of Basis for Preliminary Injunction” before  
6 discovery, is not a basis for denying SCO the limited discovery sought. No such  
7 document even exists under the Federal Rules of Civil Procedure and like the limited  
8 discovery granted SCO, the Court apparently granted AutoZone's request for such a  
9 statement to ensure that the parties would know going in, the matters at issue in  
10 discovery. SCO fully complied with this mandate and SCO provided a “Statement of  
11 Basis for Claim for Preliminary Injunctive Relief and Nature of Relief” to AutoZone with a  
12 detailed list of each specific copyright at issue and described the matters SCO would  
13 discover to determine whether or not AutoZone infringed SCO's copyrights through the  
14 migration process. It is now apparent that AutoZone created this novel requirement, not  
15 to focus discovery, but instead to raise yet again its argument rejected by this Court at  
16 oral argument that SCO must show a right to a preliminary injunction before SCO  
17 conducts any discovery.

18  
19 Fourth, AutoZone's argument in its emergency motion that such discovery is a  
20 “fishing expedition” which “will be a waste of time, effort and money by the Court, the  
21 litigants, and third party witnesses” (See AutoZone's Emergency Motion to Stay at 4:17-  
22 23) has already been explicitly rejected by this Court. At oral argument, this Court and  
23 Counsel for AutoZone engaged in the following colloquy:  
24

25 Mr. Stewart: Your Honor, these issues are already before the Court  
26 on the papers that are in front of you...and so my point is that giving  
27 them the opportunity to take discovery before a preliminary injunction  
28 that you can already ascertain they can't get will cause the parties to



1            engage in substantial time and expense that ultimately will not be  
2            fruitful. They cannot –

3            The Court: I don't think 60-days' worth is unnecessary time and expense,  
4            so that will be the order. I'll ask for counsel to prepare an order.

5            See Tr. at 27:19-25 and 28:1-5. (Emphasis supplied)

6            AutoZone's claim that the limited discovery ordered by the Court is somehow  
7            burdensome rings hollow given the fact that at the very same time AutoZone has moved  
8            for an "emergency" stay of discovery, it has served extensive and broad discovery  
9            requests upon SCO that are clearly not limited to the migration issue, but rather  
10            encompass every possible copyright violation SCO could claim. See, e.g., AutoZone's  
11            First Interrogatories to Plaintiff The SCO Group, Inc., Interrogatory No. 1, AutoZone's  
12            First Request for Production of Documents and AutoZone's Notice of 30(b)(6)  
13            Deposition, Machado Cert. Ex. D. SCO had proposed that AutoZone need not engage  
14            in any discovery unless and until SCO moved for preliminary relief at which time SCO  
15            agreed to allow AutoZone whatever reasonable discovery it needed to respond to  
16            SCO's motion. AutoZone rejected this proposal and demanded immediate reciprocal  
17            discovery. Thus, AutoZone cannot be heard to complain of an alleged burden it has  
18            placed on itself.

19  
20            Fifth, and finally, SCO has shown a legal right to an injunction if discovery  
21            confirms that AutoZone infringed its copyrights. Contrary to AutoZone's oral argument,  
22            the law is clear in this circuit that SCO would, as a matter of law, be entitled to an  
23            injunction if it establishes a likelihood of success on the merits as to its infringement  
24            claim whether or not it is entitled to monetary damages as well. See Cadence Design  
25            Sys., Inc. v. Avant! Corp., 125 F.3d 824, 872 (9<sup>th</sup> Cir. 1997) ("implicit in our prior  
26  
27  
28

1 decisions, as well as those of other federal courts of appeals, is the rule that a  
2 defendant cannot, by asserting the adequacy of money damages, rebut the  
3 presumption of irreparable harm that flows from a showing of likelihood of success on  
4 the merits of a copyright infringement claim.”) At oral argument, AutoZone argued that,  
5 at most, SCO would be entitled to a lost license fee and that the “loss of the license fee  
6 is not irreparable harm”. See Tr. at 27:3-6. The Court refused to entertain this argument  
7 because it went to the merits of a motion which SCO had not yet filed. See Tr. at 27:15-  
8 18. However, as a matter of law, AutoZone’s Counsel is wrong. As the Cadence Court  
9 made crystal clear when it reversed a district court’s denial of a preliminary injunction  
10 sought by a software company to prevent the defendant from selling software which  
11 infringed Cadence’s copyrights, “the alleged availability of money damages is not a  
12 reason to deny injunctive relief.” Id. at 827. As a result, the Ninth Circuit concluded that  
13 “Avant! could not, and therefore did not, rebut the presumption of irreparable harm by  
14 presenting evidence that Cadence’s damages ‘seem[ed] to be quantifiable’. . . . If this  
15 argument were to prevail, the presumption of irreparable harm would have little meaning  
16 in commercial settings.” Id. at 828. The Court further noted that to hold otherwise  
17 would mean that a court could impose an “involuntary license” on the plaintiff to use  
18 copyrighted material which the defendant could then use to compete with the plaintiff.  
19 Id. at Fn. 8. Since copyright law does not require the owner of a copyright to license its  
20 material to anyone, this would be an improper and unfair result. See Fox Film Corp. v.  
21 Doyal, 286 U.S. 123, 127 (1932) (“The owner of the copyright, if he pleases, may refrain  
22 from vending or licensing and content himself with simply exercising the right to exclude  
23 others from using his property.”); accord, In re Independent Serv. Organizations

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Antitrust Litig., 910 F.Supp. 1537, 1542 (D. Kan. 1995). Thus, just as Cadence had a right to enjoin the defendant in that case from using or selling software that infringed its copyrights, if discovery confirms that SCO has a likelihood of succeeding on its claim that AutoZone is infringing its copyrights, irreparable harm is presumed and SCO would be entitled to an injunction preventing such use or copying of its copyrighted materials.

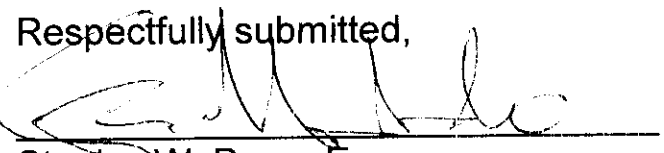
**CONCLUSION**

This Court has crafted a fair and equitable compromise by staying all proceedings while at the same time permitting SCO limited discovery to determine whether it needs to move for a preliminary injunction to prevent ongoing infringement and irreparable harm. This discovery is not burdensome. On the contrary, it is reasonable under the circumstances. AutoZone's attempt to deny SCO any discovery, and to nullify this Court's July 12<sup>th</sup> ruling and August 6<sup>th</sup> Order is unreasonable.

///  
///  
///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Moreover, it is without merit, both as a matter of fact and as a matter of law. For the foregoing reasons, SCO respectfully submits that this Court deny AutoZone's motion and permit SCO to immediately proceed with the limited discovery this Court has ordered.

Respectfully submitted,  


Stanley W. Parry, Esq.  
Nevada Bar No. 1417  
Glenn M. Machado, Esq.  
State Bar No. 7802  
CURRAN & PARRY  
300 S. Fourth Street, Suite 1201  
Las Vegas, Nevada 89101  
(702) 471-7000  
Attorneys for Plaintiff

David S. Stone, Esq.  
Robert A. Magnanini, Esq.  
BOIES, SCHILLER & FLEXNER LLP  
150 John F. Kennedy Parkway, 4<sup>th</sup> floor  
Short Hills, New Jersey 07078  
(973) 218-1111

Dated: September 8, 2004

LAW OFFICES  
**CURRAN & PARRY**  
300 SOUTH FOURTH STREET  
SUITE 1201  
LAS VEGAS, NEVADA 89101  
(702) 471-7000

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing PLAINTIFF THE SCO GROUP, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT AUTOZONE, INC.'S EMERGENCY MOTION TO STAY was deposited by the undersigned into the U.S. Mail, First Class, postage pre-paid and forwarded via Facsimile Transmission on this 8<sup>th</sup> day of September, 2004, to the following:

James J. Pisanelli, Esq.  
State Bar No. 4027  
Nikki L. Wilmer  
State Bar No. 6562  
SCHRECK BRIGNONE  
300 South Fourth Street, Ste. 1200  
Las Vegas, Nevada 89101  
Attorneys for Autozone, Inc.

Douglas Bridges, Esq.  
ALSTON & BIRD, LLP  
One Atlantic Center  
1201 Peachtree Street  
Atlanta, Georgia 30309-3424  
Attorneys for Autozone, Inc.

  
An Employee of Curran & Parry