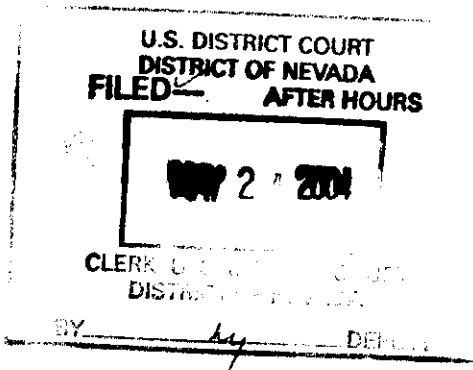


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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

**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

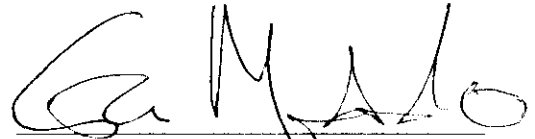
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1 WESTERN DISTRICT OF TENNESSEE, AND (2) STAY THIS ACTION OR, IN THE
2 ALTERNATIVE, FOR A MORE DEFINITE STATEMENT. This Motion is based upon the
3 following Memorandum of Points and Authorities as well as upon all other papers and pleadings
4 on file in this action.
5

6 DATED this 24th day of May, 2004.

7
8
9 

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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

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

10
11 On the other side of the balance, SCO – as a plaintiff – has a presumptive ability to
12 proceed in this forum to protect and vindicate its federally secured rights and to seek the
13 opportunity to obtain judicial review and a potential judicial remedy designed to stop the
14 continued violation of those federal rights.

15 AutoZone’s reliance on the *Novell* action as a basis for its motion to stay also warrants
16 close examination. Although a number of specific factors set forth in Section II. C.1, below are
17 independently sufficient to preclude this ground for AutoZone’s motion, there is an additional
18 factor that bears emphasis at the outset. The *Novell* matter arises because Novell, Inc. (“Novell”)
19 after selling all of its UNIX assets in return for substantial consideration, in addition to the
20 substantial value of a separate income stream, now effectively asserts that the only thing it
21 “gave” SCO in return are obligations and costs (i.e., negative value to SCO, and still more
22 benefit to Novell).² Merely by advancing these extraordinary claims, Novell has already
23 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.

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

3
4 AutoZone’s motion to transfer also lacks merit. For example, AutoZone asks this Court
5 to move the present action to Tennessee (where AutoZone could have filed a declaratory action),
6 rather than to Utah where AutoZone itself argues that two related actions are venued. If those
7 actions were as closely related to this one as AutoZone contends in support of its motion to stay,
8 and if AutoZone were actually pursuing the goal of judicial efficiency, then it would be logical
9 for AutoZone to also seek a venue where close coordination could most easily be achieved,
10 whether or not a stay were granted. Finally, AutoZone’s motion for a more definite statement
11 should be denied. The Complaint fully complies with the notice pleading requirements under
12 federal law and identifies the copyright infringement issues necessary to defend this case. Under
13 basic procedural law, further details are properly the subject of discovery.

14
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16 In sum, granting AutoZone’s motion to stay could result in a great many possible
17 outcomes that would *waste* substantial judicial resources, and a great many outcomes that would
18 not save any judicial resources – each of which would have the effect of insulating AutoZone
19 from judicial review of the propriety of its conduct. At the same time, SCO will suffer
20 substantial prejudice if it is blocked from the opportunity to obtain judicial review of the merits
21 of its present claims and the opportunity to obtain a judicial remedy to stop the continuing
22 violation of its federally secured rights. Under governing law, AutoZone’s arguments and the
23 factors AutoZone raises do not approach the level needed to justify precluding a federal plaintiff
24 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

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

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

14 Under 28 U.S.C. § 1391(c), a corporate defendant is deemed a resident of any judicial
15 district in which it is subject to personal jurisdiction. It is undisputed that AutoZone is
16 incorporated in Nevada. SCO, which resides in Utah, properly chose to bring suit against
17 AutoZone in Nevada, because AutoZone is subject to personal jurisdiction in Nevada *and*
18 because SCO and its principal decision makers, and other witnesses are located in neighboring
19 Utah.
20

21 SCO’s choice to vindicate its rights in a particular court should not be lightly disturbed.
22 *See Gherebi*, 352 F.3d at 1303 (“[T]here is a strong presumption in favor of plaintiff’s choice of
23 forums.”) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)); *see also STX Inc. v. Trik*
24 *Stik, Inc.*, 708 F. Supp. 1551, 1555-56 (N.D. Cal. 1988) (“[A] defendant bears a heavy burden of
25 proof to justify the necessity of the transfer. The plaintiff’s choice of forum should not be easily
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1 overturned.”) (citing *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970), *cert. denied*,
2 401 U.S. 910 (1971)).
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4 B. AutoZone’s Motion To Transfer Should Be Denied Because Neither Convenience
5 Nor Judicial Efficiency Are Served by Transferring the Action to Tennessee.

6 AutoZone’s motion completely ignores the fact that transferring this action to Tennessee
7 is inconvenient for SCO, which chose to vindicate its rights in Nevada. In evaluating a transfer
8 motion, courts consider the following three factors: (1) the convenience of the parties; (2) the
9 convenience of the witnesses; and (3) the interests of justice. *See Miracle Blade, LLC v.*
10 *Ebrands Commerce Group, LLC*, 207 F.Supp.2d 1136, 1155-56 (D. Nev. 2002).
11

12 AutoZone’s argument that the convenience of the parties requires transfer to the Western
13 District of Tennessee completely ignores the fact that it will be significantly less convenient for
14 SCO’s witnesses with knowledge who are located in Utah if this action is transferred. Section
15 1404(a) is not intended to merely shift the burden of inconvenience from one party’s witnesses to
16 the other. *See Gherebi*, 352 F.3d at 1303. Accordingly, there is no merit to AutoZone’s
17 convenience argument.
18

19 AutoZone also argues that its transfer motion should be granted because it claims that
20 “almost all” of AutoZone’s relevant documents related to this litigation are located in Memphis,
21 Tennessee. AutoZone does not, however, explain why this is significant. “[T]he fact that records
22 are located in a particular district is not itself sufficient to support a motion for transfer.” *See*
23 *Royal Queentex Enterprises Inc., v. Sarah Lee Corporation*, No. C-99-4787 MJJ, 2000 WL
24 246599 (N.D. Cal. March 1, 2000). Furthermore, courts have recognized, in the age of
25 electronic discovery, that the location of documents is a minor factor since documents are often
26 kept in electronic form and, in any event, are easily converted to electronic data which is
27 transmitted wherever needed. *See, e.g., Affymetrix v. Synteni, Inc.*, 28 F. Supp. 2d 192, 208 (D.
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1 Del. 1998) (“while many (if not all) of the documents are located elsewhere, recent technological
2 advances have reduced the weight of this factor to virtually nothing”); *Coker v. Bank of America*,
3 984 F. Supp. 757, 766 (S.D.N.Y. 1997) (“In today’s era of photocopying, fax machines and
4 Federal Express, [defendant’s] documents easily could be sent to [the chosen forum]”);
5 *Met-L-Wood Corp. v. SWS Industries, Inc.*, 594 F. Supp. 706, 710 (N.D. Ill. 1984) (document
6 location not an important factor in transfer calculus absent substantial difficulties with
7 transporting them).
8

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10 Finally, AutoZone argues that its motion should be granted because transfer to Tennessee
11 would serve judicial efficiency. (*See AZ, Transfer br. at 6*). Once again, AutoZone fails to
12 address how transferring the case to Tennessee is more efficient than proceeding in Nevada –
13 AutoZone’s state of incorporation and a forum in which it clearly expects, and consents, to be
14 subject to suit. Again, AutoZone is only concerned with making it easier and less expensive for
15 it to try this case, to the detriment of SCO – an outcome not intended by Section 1404(a).³
16

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

19 Although SCO maintains that the Court should not transfer this action, should this Court
20 elect to do so, SCO respectfully requests that this case be transferred to the District of Utah. The
21 law is clear that this Court may, on its own initiative, *sua sponte* transfer this action to the
22 District of Utah. *See Washington Public Utilities Group v. U.S. Dist. Court for Western Dist. of*
23 *Washington*, 843 F.2d 319, 326 (9th Cir. 1987) (Section 1404(a) does not require that a formal
24 motion be made for the court to decide that a change of venue is appropriate). Furthermore, if
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27 ³ Similarly, AutoZone’s additional argument that the Western District of Tennessee has fewer
28 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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2 necessary, SCO could move to transfer venue on convenience grounds under § 1404(a), even
3 though it had the original choice of forum. *See Ferens v. John Deere Co.*, 494 U.S. 516, 524
4 (1990) (recognizing plaintiff's right to move to transfer pursuant to § 1404(a)). *See Anadigics,*
5 *Inc. v. Raytheon Co.*, 903 F. Supp. 615, 617 (S.D.N.Y. 1995) (where defendant moved under
6 1404(a) to transfer to Massachusetts and plaintiff then moved to transfer to New Jersey,
7 defendant's motion to transfer constituted "changed circumstances," so plaintiff's motion was
8 proper).

9
10 This Court may transfer this action pursuant to Section 1404(a), because this action
11 "might have been brought" initially in the District of Utah. SCO has alleged in this action that
12 AutoZone illegally infringed upon its copyrights in violation of 28 U.S.C. § 1400(a). In a
13 copyright infringement action, venue is proper in *any* judicial district in which a defendant "may
14 be found." *See* 28 U.S.C. § 1400(a) ("Civil actions, suits, or proceedings arising under any Act
15 of Congress relating to copyrights . . . may be instituted in the district in which the defendant or
16 his agent resides or may be found."). As a practical matter, the test for venue in a copyright
17 action is identical to the test for determining personal jurisdiction. *See Milwaukee Concrete*
18 *Studios, Limited v. Field Manufacturing Company, Inc.*, 8 F.3d 441, 445 (7th Cir. 1993) ("Section
19 1400(a)'s 'may be found' clause has been interpreted to mean that a defendant is amenable to
20 personal jurisdiction in a particular forum.") Venue also may be appropriate in the district where
21 the infringement allegedly occurred. *See Edy Clover Productions, Inc. v. NBC, Inc.*, 572 F.2d
22 119, 120-21 (3d Cir. 1978).

23
24
25 Convenience of the parties and witnesses and the interest of justice support a transfer of
26 venue to the District of Utah if any transfer is to occur. First, judicial efficiency will also be
27 served because actions involving related claims are already being litigated there. Second,
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1 transfer to Utah would be much more convenient for SCO and SCO's witnesses and documents
2 that reside there while at the same time it would be equally convenient to AutoZone and its
3 witnesses as Nevada where AutoZone chose to incorporate. Based on the forgoing, AutoZone's
4 motion to transfer should be denied.
5

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

7 A. Standard of Review.

8 AutoZone's motion to stay should also be denied because the prejudice to SCO would far
9 outweigh any judicial efficiency that might result from such a stay. To determine whether to
10 exercise its discretion to stay a federal action, this Court must first look to the potential prejudice
11 to the parties and, second, to the judicial efficiency that might result from a stay. *See Filtrol*
12 *Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1973) (citing *Landis v. North American Co.*, 299
13 U.S. 248, 254-55 (1936)).
14

15 With respect to the issue of prejudice, SCO initiated this litigation in federal court to
16 invoke the Court's jurisdiction and to seek damages and equitable remedies to protect itself from
17 what it alleges to be AutoZone's ongoing, widespread infringement of its intellectual property.
18 Staying this action would severely prejudice SCO by allowing AutoZone to continue to infringe
19 on its copyrights unimpeded for an unknown period of time without contributing any judicial
20 efficiency to the present action. Conversely, AutoZone has identified no prejudice from having
21 to defend itself now in this action. Thus, on the primary issue of prejudice, this factor clearly
22 weighs in favor of SCO - not AutoZone. *See, e.g., Dunn v. Airline Pilots Ass'n*, 836 F. Supp.
23 1574, 1584 (S.D. Fla. 1993) (movant must show "a clear case of hardship or inequity if the case
24 proceeds or little possibility the stay will harm others") (citing *Landis v. North American Co.*,
25 299 U.S. 248, 254-55 (1936)); *Jouker v. Murphy Motor Freight, Inc.*, 84 B.R. 537, 539 (N.D.
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1 Ind. 1987) (denying stay where stay could delay proceedings indefinitely to the prejudice of
2 plaintiff); *Valmar Distributors v. N.Y. Post Co.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (basic goal
3 of stay analysis is “to avoid prejudice”).
4

5 It is axiomatic that this Court has discretion concerning whether or not to stay
6 proceedings before it. This authority is incidental to the power inherent in every court to control
7 its docket. *See Landis*, 299 U.S. at 254. However, AutoZone, the party seeking a stay, bears the
8 burden of establishing its need. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997) (“The proponent
9 of a stay bears the burden of establishing its need.”). Specifically, AutoZone must demonstrate
10 “a clear case of hardship or inequality” to itself if this action continues. *See Hertz Corp. v. The*
11 *Gator Corp.*, 250 F. Supp. 2d 421, 424-25 (D.N.J. 2003) (citing *Landis v. North American Co.*,
12 299 U.S. 248, 255 (1936)).⁴ If there is even a “possibility” that the stay would work damage on
13 SCO, the stay should be denied. *See Hertz Corp.*, 250 F. Supp. at 424-25; *accord Landis*, 299
14 U.S. at 255.
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17 SCO’s right to proceed in this Court should not be denied “except under the most
18 extreme circumstances.” *GFL Advantage Fund, LTD v. Colkitt*, No. 02ms475, 2003 WL
19 21660058 (D.D.C. July 15, 2003) (quoting *Commodity Futures Trading Comm’n v. Chilcott*
20 *Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983)). Moreover, the mere fact that a
21 defendant has to defend claims against it does not constitute prejudice. *See Baychar, Inc. v.*
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24 ⁴ *See also, Bayoil Supply & Trading of Bahamas v. Jorgen Jahre Shipping*, 54 Supp. 2d 691
25 (S.D. Tex. 1999) (a court should grant a discretionary stay only upon the showing of “something
26 close to genuine necessity”); *Dawn v. Mecom*, 520 F. Supp. 1194 (D. Colo. 1981) (denying stay
27 where related action sought only limited relief and would not necessarily resolve the claims at
28 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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2 *Frisby Technologies*, No. 01-CV-28-B-S, 2001 WL 856626 * 10 (D. Me. July 26, 2001) (“Just
3 because defending oneself in court takes money and time does not substantiate a motion to
4 stay.”). Otherwise, a stay would be appropriate in every case. On the other hand, delaying a
5 plaintiff’s ability to vindicate its rights in the forum of its choice to prevent infringement of its
6 intellectual property does constitute prejudice which justifies denial of a motion for stay. *See*
7 *Filtrol Corp.*, 467 F.2d at 244 (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55
8 (1936)).

9
10 B. SCO Will Be Substantially Prejudiced If A Stay Is Granted.

11 This case alleges that AutoZone is infringing valid and valuable copyrights that SCO
12 owns in the UNIX software by using and implementing Linux software in its business. It is well
13 settled that infringement of copyrights such as alleged here constitutes irreparable harm that
14 entitles the copyright holder to injunctive relief. *See Triad Systems Corporation v. Southeastern*
15 *Express Company*, 64 F.3d 1330, 1335 (9th Cir. 1995) (“In a copyright infringement action . . .
16 [a] showing of a reasonable likelihood of success on the merits raises a presumption of
17 irreparable harm.”) Granting a stay under the procedural posture of the cases that AutoZone has
18 relied upon would amount to giving AutoZone free license to continue to infringe upon SCO’s
19 copyrights for the foreseeable future, while preventing SCO from even obtaining discovery
20 concerning the breadth of such copyright infringements and the damages such infringements may
21 have caused.
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23 Remarkably, AutoZone has not identified any prejudice to it if this action proceeds.
24 Accordingly, this Court need not even weigh the prejudice between the parties and must resolve
25 the prejudice prong of the analysis in favor of SCO, the plaintiff, and allow this action to
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1 proceed. *See Valmar Distributors*, 152 F.R.D. at 39 (holding that the basic goal of stay analysis
2 is “to avoid prejudice”).
3

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

5 This Court need not reach the issue of judicial efficiency, because a stay would cause
6 prejudice to SCO while AutoZone has identified no prejudice to it from allowing this case to
7 proceed. Nevertheless, AutoZone has also failed to meet its burden to show that imposition of a
8 stay in this action would result in judicial efficiency. AutoZone’s arguments for judicial
9 efficiency do not support a stay and are, for the most part, illusory. AutoZone identifies three
10 other litigations that it claims are related to this action and that require this action to be stayed.
11 Those actions are: (1) the *Novell* action pending in federal court in Utah; (2) the *Red Hat* action
12 pending and stayed in federal court in Delaware; and (3) the *IBM* action pending in federal court
13 in Utah.
14

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

23 SCO originally filed the *Novell* action in state court in Utah to address actions by Novell
24 that SCO believes constituted slander of title. In that case, SCO claims that Novell has falsely
25 represented that it owns UNIX copyrights. Accordingly, factual issues concerning statements
26 relating to copyright ownership issues may be involved. But it is equally likely that the case may
27 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

1
2 dispositive, thereby precluding the *Red Hat* case from reaching the substance of the infringement
3 issues.⁵

4 Recognizing this, AutoZone instead relies upon arguments made to the *Red Hat* court
5 regarding the *IBM* litigation.⁶ However, as we show below, under the current posture of the *IBM*
6 litigation, those arguments are not a valid basis for a stay of this action.
7

8 3. SCO v. IBM

9 The *IBM* litigation pending in federal district court in Utah is, in large part, a breach of
10 contract action. The action, as it was filed originally, pertained primarily to IBM's alleged
11 unlawful distribution of original and/or derivative and other works in violation of SCO's UNIX
12 licenses. However, on March 29, 2004, almost one month *after* SCO filed this action against
13 AutoZone, IBM attempted to import copyright issues regarding the use by end-users of the Linux
14

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

19 ⁶ AutoZone argues that its motion is supported by an earlier statement by SCO in Red Hat that
20 the IBM case involved, at that time, "most if not all" of the copyright infringement issues at issue
21 in Red Hat. (See AZ. Stay br. at 8) (emphasis added). SCO continues to believe that the
22 potential copyright (and other even more basic) consequences for Linux of IBM's license
23 violations -- the contract violations at the center of the IBM case -- are of paramount importance
24 compared to the other potential infringement issues that affect Linux. That comparative fact was
25 true then and it remains true now -- and it remains true even though, since the time of SCO's
26 quoted statement to the Red Hat court, SCO has the opportunity for further investigation of
27 improper conduct affecting Linux independent of IBM's conduct. The fact that the impact on
28 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.

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

3
4 SCO has moved to dismiss that claim (IBM's Tenth Counterclaim), *inter alia*, on the
5 basis that it is being litigated here in this first-filed action against AutoZone. Accordingly, it is at
6 best uncertain whether the copyright infringement claims to be litigated here will go forward at
7 all in the *IBM* litigation. But, whether or not this happens, it is clearly not a basis to stay this
8 action because SCO filed those claims first in this action and SCO, therefore, has a right to
9 litigate them in the court of its choice. "The first-to-file rule was developed to 'serve the purpose
10 of promoting efficiency well and should not be disregarded lightly.'" *Alltrade, Inc. v. Uniweld*
11 *Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991) (quoting *Church of Scientology v. United States*
12 *Dep't of the Army*, 611 F.2d 738, 750 (9th Cir. 1979)).

13
14 Also, as with the *Novell* and *Red Hat* actions, there are various procedural and
15 substantive issues that could resolve the *IBM* litigation without implicating issues to be litigated
16 in this case. The *IBM* litigation involves numerous claims such as licensing, interference with
17 contractual and prospective economic relations that are not at issue here. Accordingly, the
18 possibility that staying this action in favor of the *IBM* action would promote judicial efficiency is
19 dubious at best.

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22 Finally, none of the cases relied upon by AutoZone supports entering a stay in this
23 litigation. Each case was stayed in favor of parallel litigations between the same parties and
24 involving identical or virtually identical issues. See *Mediterranean Enterprises, Inc. v.*
25 *Ssangyong Corporation*, 708 F.2d 1458 (9th Cir. 1983) (district court stayed the federal litigation
26 pending binding arbitration between the parties); *Cohen v. Carreon*, 94 F. Supp. 2d 1112 (D. Or.
27 2000) (district court stayed a federal litigation in Oregon in favor of a virtually identical
28

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

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

25 In short, there is no basis to delay this litigation. None of the other three litigations (to
26 which AutoZone is not a party) will necessarily resolve this matter. Moreover, as set forth at
27 length, the prejudice to SCO if the stay is granted far outweighs potential judicial efficiencies in
28

1
2 this case.

3 III. AUTOZONE’S MOTION FOR A MORE DEFINITE STATEMENT SHOULD BE
4 DENIED.

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

13
14 SCO’s complaint fully complies with Rule 8. The complaint identifies specific UNIX
15 works that are the subject of the copyright claims, as well as the UNIX works’ copy registration
16 numbers. (See ¶¶ 15 -17). In addition, SCO specifically alleges ownership of those works. (See
17 ¶¶ 11, 15). Finally, SCO alleges that AutoZone, by using and implementing the Linux operating
18 system, has infringed, and continues to infringe, on SCO’s UNIX copyrights. (See ¶¶ 13, 20-
19 23).

20
21 AutoZone’s motion for a more definite statement pursuant to Fed. R. Civ. P. 12(e) is
22 nothing more than an improper attempt to obtain discovery. However, “Rule 12(e) is designed to
23 strike at unintelligibility, rather than want of detail.” *Woods v. Reno Commodities, Inc.*, 600 F.
24 Supp. 574, 580 (D. Nev. 1984). As such, “[a] motion for more definite statement should not be
25 granted to require evidentiary detail that may be the subject of discovery.” *See id.* This Court
26 should reject AutoZone’s attempts to exploit IBM’s slanted characterizations of discovery issues
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2 in the *IBM* case to impact this Court’s decision on AutoZone’s motion. In fact, as AutoZone will
3 learn when it conducts appropriate discovery, SCO has fully complied with its obligations in the
4 *IBM* litigation by providing all information in its possession at this early stage of discovery
5 concerning IBM’s improper contributions to Linux. Indeed, the Magistrate Judge in the *IBM* case
6 recognized this in a recent decision where she found that SCO has acted in “good faith” with
7 respect to such discovery.⁷ In short, AutoZone’s professed need for the “details” of the “lines,
8 files, or organization of Linux code” that is the subject of the litigation is precisely the purpose of
9 discovery, not the purpose of a motion for a more definite statement. Because there is nothing
10 “unintelligible” about SCO’s complaint, AutoZone’s motion for a more definite statement should
11 be denied. *See id.*
12

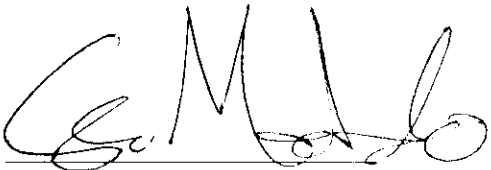
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⁷ At this early stage of discovery in the *IBM* case, although SCO has identified numerous
27 specific examples of improper contributions by IBM to Linux, SCO has been prevented from
28 identifying all possible infringements based on IBM contributions 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.

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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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