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THE SCO GROUP, INC. v. AUTOZONE, INC.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SCHRECK BRIGNONE
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Las Vegas, Nevada 89101
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14 THE SCO GROUP, INC.
15 a Delaware Corporation

16 Plaintiff,

17 v.

18 AUTOZONE, INC.
a Nevada Corporation

19 Defendant.

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

DEFENDANT AUTOZONE, INC.'S EMERGENCY MOTION TO STAY

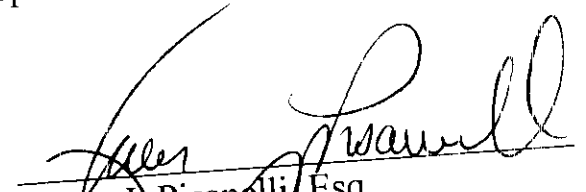
21 Defendant AutoZone, Inc. ("AutoZone") moves the Court for an order
22 staying all remaining proceedings related to the issue of preliminary injunctive relief.
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The grounds in support of AutoZone's Motion are set forth in detail in
AutoZone's Memorandum of Law filed concurrently herewith.

Respectfully submitted, this 1st day of September, 2004.


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DEFENDANT AUTOZONE, INC.'S MEMORANDUM OF LAW
IN SUPPORT OF ITS EMERGENCY MOTION TO STAY

Defendant AutoZone, Inc. ("AutoZone") moves the Court for an order staying all remaining proceedings related to the issue of preliminary injunctive relief.

INTRODUCTION

The Court has stayed all action in this case with the exception that the Court has authorized Plaintiff The SCO Group, Inc. ("SCO") to conduct limited expedited discovery in advance of the filing of a motion for preliminary injunction on SCO's claims that AutoZone infringed SCO's copyrights when AutoZone migrated from UNIX to Linux. Nevertheless, the Court has made clear to SCO that it can *only* pursue such discovery if it has a right to preliminary injunctive relief *and* if it intends to file a motion to pursue such relief.

SCO has recently stated in writing that it does not know whether it is entitled to a preliminary injunction but that it intends to pursue expedited discovery nonetheless in order to determine whether it has grounds to file such a motion. SCO's intent to pursue discovery at this time is therefore nothing more than a fishing expedition that is directly contrary to the Court's ruling, and AutoZone requests that all further action in this case be stayed pending resolution of the previously filed *IBM, Novell* and *Red Hat* cases.

STATEMENT OF FACTS

On March 3, 2004, SCO filed its Complaint alleging one cause of action for copyright infringement and broadly asserting that AutoZone's internal use, distribution, and copying of the Linux operating system infringes copyrights that SCO purports to own in the UNIX operating system. *See generally* Complaint. SCO

1 did not state in its Complaint that it is entitled to, or that it intends to move for,
2 preliminary injunctive relief on any of its claims.

3 On April 23, 2004, AutoZone filed two motions: (a) a Motion to Stay or, in
4 the Alternative, for More Definite Statement, and (b) a Motion to Transfer Venue.
5 The Court heard oral argument on AutoZone's motions on July 12, 2004.

6 At the July 12 hearing, the Court granted AutoZone's Motion to Stay as it
7 relates to the code within Linux itself, but the Court noted SCO's allegations that
8 AutoZone had independently infringed code in UNIX when AutoZone migrated
9 from UNIX to Linux.¹ Accordingly, the Court ruled that SCO could conduct limited
10 discovery on "facts predicate to [a motion for] preliminary injunction" on the alleged
11 migration infringements. See July 12, 2004 Hearing Transcript ("Hearing
12 Transcript"), attached hereto as Exhibit A, 25:10. Importantly, however, the Court
13 admonished SCO: "[i]f you don't have the right to a preliminary injunction, you
14 shouldn't proceed with discovery at all." Hearing Transcript, 24:22-23 (emphasis
15 added). The Court further instructed SCO: "you shouldn't go on a free-ranging
16 discovery course preparatory to a trial." Hearing Transcript, 25:10-12. Therefore,
17 the Court authorized SCO to conduct limited discovery *only* if SCO had a right to
18 preliminary injunctive relief *and* it intended to pursue such relief.

19 The Court instructed AutoZone to confer with SCO and submit a proposed
20 order on the motions. The parties conferred in good faith but were unable to reach
21 agreement on several important issues. As a result, the parties agreed to submit
22 separate orders to the Court. AutoZone submitted its proposed order on July 30,
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27 ¹ The Court stated at the July 12 hearing: "The only reason for doing that is because [SCO]
28 raised that issue in their responses that they would be harmed if the Court simply held off and did not
let them proceed here one way or the other." Hearing Transcript, 24:11-14.

1 2004. See Letter from David J. Stewart to Hon. Robert C. Jones, dated July 30,
2 2004. SCO did not submit an order. On August 6, 2004, the Court entered an Order
3 on AutoZone's motions in substantially the same form as AutoZone had proposed.
4 See Order, attached hereto as Exhibit B.

5 The Order required SCO to "serve on AutoZone a statement of the basis for
6 its claim for preliminary injunctive relief and the nature of the relief it seeks on those
7 claims" within fifteen (15) days from the date of the Order, or Monday, August 23,
8 2004. See Order, ¶ 2. On August 23rd, counsel for SCO contacted counsel for
9 AutoZone and requested an extension until Friday, August 27th to serve the required
10 statement. AutoZone agreed to the requested extension. On Friday, August 27th,
11 counsel for SCO again contacted counsel for AutoZone and requested a second
12 extension until Monday, August 30th to file the required statement. Again,
13 AutoZone agreed to the requested extension.

14 On August 30th, SCO served AutoZone with SCO's Statement of Basis for
15 Claim for Preliminary Injunctive Relief and Nature of Relief ("Injunctive Relief
16 Statement"), a copy of which is attached hereto as Exhibit C. In its Injunctive Relief
17 Statement, SCO states that "[t]he Court has permitted SCO to conduct limited
18 expedited discovery on [AutoZone's migration from a Unix Operating System to a
19 Linux Operating System] in order to determine whether or not to file a motion for
20 preliminary injunctive relief." See SCO's Injunctive Relief Statement, pp. 1-2
21 (emphasis added). SCO's Injunctive Relief Statement further states that SCO
22 "intends to conduct limited discovery into the above issues in order to determine
23 whether or not, under the circumstances, an application for a Preliminary Injunction
24 is warranted." See SCO's Injunctive Relief Statement, p. 4 (emphasis added). SCO
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1 therefore seeks to conduct discovery to determine whether or not it has a right to a
2 preliminary injunction, notwithstanding the Court's ruling that the right to a
3 preliminary injunction is prerequisite to conducting discovery. *See* Hearing
4 Transcript, 24:22-23.²

5 ARGUMENT AND CITATION OF AUTHORITIES

6 This Court possesses the inherent discretion to stay these proceedings.
7
8 *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion
9 to stay proceedings as an incident to its power to control its own docket."). As this
10 Court has previously explained, "[e]very court has the inherent power to stay causes
11 on its docket with a view to avoiding [the] ... waste of time and effort by itself, the
12 litigants and counsel." *Stern v. United States*, 563 F. Supp. 484, 489 (D. Nev. 1983).

13 Here, the Court should stay the remaining proceedings related to the issue of
14 preliminary injunctive relief because, contrary to the Court's directive, SCO has no
15 idea at this time whether it is entitled to a preliminary injunction or whether it even
16 intends to move for such relief. Instead, SCO has announced through its Injunctive
17 Relief Statement that it intends to use the expedited discovery period for what
18 amounts to a fishing expedition to determine whether or not it has any legitimate
19 basis to file a motion for preliminary injunction on any issue. Such a fishing
20 expedition violates the Court's ruling, and will be a waste of time, effort and money
21 by the Court, the litigants, and third party witnesses.
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26 ² SCO states in its Injunctive Relief Statement that it "believes that it is reasonably likely that
27 AutoZone copied SCO's copyrighted material during the migration process ...;" however, this
28 statement does not amount to a statement by SCO that it has a right to a preliminary injunction and
can satisfy the onerous elements necessary to be entitled to such relief. *See* SCO's Injunctive Relief
Statement, p. 2.

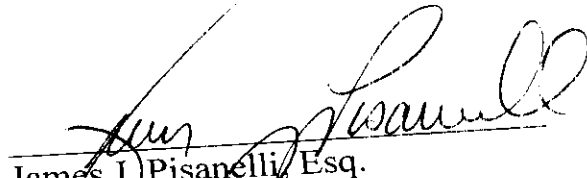
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1 SCO's Injunctive Relief Statement and its plan to conduct discovery is based
2 entirely on SCO's erroneous statement that:

3 The Court has permitted SCO to conduct limited discovery on
4 [AutoZone's migration from a Unix Operating System to a Linux
5 Operating System] in order to determine whether or not to file a
6 motion for preliminary injunctive relief.

7 SCO's Injunctive Relief Statement, pp. 1-2 (emphasis added). The Hearing
8 Transcript clearly demonstrates that the Court never authorized SCO to conduct
9 discovery "to determine whether or not" to file a motion for preliminary injunction.
10 To the contrary, the Court clearly stated: "[i]f you [SCO] don't have the right to a
11 preliminary injunction, you shouldn't proceed with discovery at all." Hearing
12 Transcript, 24:22-23 (emphasis added).³ SCO's intent to pursue expedited discovery
13 is therefore not authorized by this Court, and AutoZone respectfully requests that all
14 further proceedings in this case be stayed pending resolution of the previously filed
15 *IBM, Red Hat and Novell* cases.

16 This 1st day of September, 2004.

17
18 
19 James J. Pisanelli, Esq.
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24 ³ SCO's deliberate waffling "whether or not to" language in its Injunctive
25 Relief Statement is not surprising. Given that SCO did not seek a preliminary
26 injunction when it originally filed its Complaint, SCO now wants to cover itself in
27 the event that SCO elects not to file a motion for preliminary injunction. SCO can
28 then point to the language in its Injunctive Relief Statement after it subjects
AutoZone to expedited discovery and does not file a motion, and explain to the Court
that it subsequently learned that it did not have grounds for preliminary injunctive
relief, notwithstanding that such grounds were a prerequisite to conducting discovery
in the first place.

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Attorneys for Defendant
AutoZone, Inc.

CERTIFICATE OF SERVICE

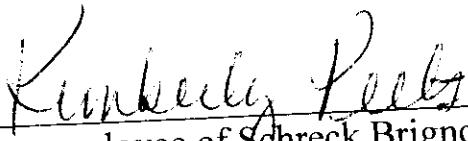
I hereby certify that I have this day served a copy of the within and foregoing
DEFENDANT AUTOZONE, INC.'S MEMORANDUM OF LAW IN SUPPORT
OF ITS EMERGENCY MOTION TO STAY upon all counsel of record addressed as
follows:

Stanley W. Parry, Esq.
Glenn M. Machado, Esq.
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(Via Hand-Delivery)

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This 1st day of September, 2004.


An employee of Schreck Brignone

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

THE SCO GROUP, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Case No.
)	CV-S-04-237-RCJ (LRL)
AUTOZONE, INC.,)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS
OF
ORAL ARGUMENT ON DEFENDANT AUTOZONE, INC.'S
MOTION FOR A STAY
OR, IN THE ALTERNATIVE,
FOR A MORE DEFINITE STATEMENT
AND
DEFENDANT AUTOZONE, INC.'S MOTION TO TRANSFER VENUE
VOLUME 1
BEFORE THE HONORABLE ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

Monday, July 12, 2004

Court Recorder: Lilia Abarca de Carter

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 And so if we are going to go down this road, I would
2 ask the Court to enter additional guidance on the scope of
3 the discovery, so that it is, perhaps, very limited to just
4 what, if anything --

5 THE COURT: I think the way I would limit it is I
6 would give them 30 days to propound it. The normal 30-day
7 response time follows, of course.

8 And I'm not going to limit scope other than to say that
9 it is limited to any factual predicates or to obtain factual
10 predicates to a request for preliminary injunction.

11 The only reason for doing that is because they raise
12 that issue in their responses that they would be harmed if
13 the Court simply held off and did not let them proceed here
14 one way or the other.

15 MR. STONE: Your Honor, I just want to be clear.
16 We'll be permitted to take depositions? It will be any type
17 of discovery that is permitted under the rules?

18 THE COURT: My contemplation was to allow you
19 during 30 days to propound discovery sufficient to form a
20 factual presentation to the Court. That you had the right
21 to a preliminary injunction.

22 If you don't have the right to preliminary injunction,
23 you shouldn't proceed with discovery at all, but to answer
24 your complaint that, yeah, you would be prejudiced by a stay
25 because then users, end users, can proceed to use your

1 copyrighted materials without royalties.

2 It occurred to me that I should give you the
3 opportunity to present a motion for preliminary injunction,
4 and that would be the only exception to the stay, so there
5 would be a brief period.

6 The discovery would be limited in time, 30 days, plus
7 the normal -- if it's interrogs, the 30-day response time to
8 follow from your presentation -- and any other discovery
9 necessary but limited in scope only by the inquiry as to
10 facts predicate to preliminary injunction; otherwise, you
11 shouldn't go on a free-ranging discovery course preparatory
12 to a trial.

13 MR. PARRY: Your Honor, there is the Rule 26
14 procedure that I consider discovery. Are we dispensing with
15 that right now or did the Court want us to --

16 THE COURT: We'll be staying --

17 MR. PARRY: -- (indiscernible)?

18 THE COURT: -- the lawsuit.

19 MR. PARRY: Okay.

20 THE COURT: So you will not go through the normal
21 26 or 16 time periods and procedures with the magistrate
22 judge.

23 MR. PARRY: And then, your Honor, just so it's
24 kind of clear, so we don't have to come back, why doesn't
25 the Court say you can take like five depositions or three

Received

AUG 13 2004

James J. Pisanelli

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

FILED
ENTERED
COUNSEL/PARTIES OF RECORD

RECEIVED
SERVED ON
COUNSEL/PARTIES OF RECORD

2004 AUG -6 P 4: 58

CLERK OF DISTRICT COURT
DISTRICT OF NEVADA

BY [Signature] DEPUTY

ORDER

Defendant AutoZone, Inc. ("AutoZone") has filed a motion to stay this case or, in the alternative, for a more definite statement as well as a motion to transfer venue to the Western District of Tennessee pending the resolution of related litigation pending in federal district courts in Utah and Delaware. Plaintiff The SCO Group, Inc. ("SCO") has opposed the motion and, in so doing, has alleged that AutoZone is infringing SCO's OpenServer software product in ways that are not at issue in the related pending cases; and that SCO is suffering irreparable harm as a result of the alleged infringements.

Having read and considered the briefs of the parties, and having heard oral argument from counsel for the parties,

It is HEREBY ORDERED that:

1. AutoZone's motion is GRANTED. This action is stayed pending further order of the court. The parties shall each submit a letter to the Court every 90 days as to the status of the following cases: *The SCO Group, Inc. v. International Business Machines Corporation*, No. 2:03CV294 (D. Utah); *The SCO Group, Inc. v. Novell, Inc.*, No. 2:04CV00139 (D. Utah); and *RedHat, Inc. v. The SCO Group, Inc.*, No. 1:03CV772 (D. Del.). The parties' letters shall be sent

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14 days following the dates on which SCO's status letters are due to the court in the *Red Hat* case.

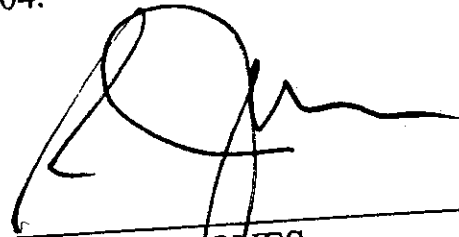
2. Notwithstanding the stay of this case, the court will allow the parties to take limited expedited discovery related to the issue of preliminary injunctive relief. In that regard, *RJ* SCO shall, within ~~ten~~ ^{*fifteen*} days from the date of this Order, serve on AutoZone a statement of the basis for its claim for preliminary injunctive relief and the nature of the relief it seeks on those claims.

3. Discovery and briefing shall occur according to the following schedule and limitations:

- RJ* (a) The parties shall have ~~30~~ ^{*45*} days from the date of this Order to propound written discovery pursuant to Federal Rules of Civil Procedure.
- RJ* (b) All relevant party and non-party discovery must be completed within ~~60~~ ^{*90*} days of the date of this Order.
- (c) The parties may take no more than six depositions each, including 30(b)(6) and third party depositions.
- (d) SCO will file its motion for preliminary injunction and supporting memorandum of authorities within twenty days after the conclusion of discovery.
- (e) AutoZone shall have 33 days from the date of service of SCO's motion for preliminary injunction to file a brief in opposition to SCO's motion for preliminary injunction. The motion will thereafter be scheduled for hearing at the court's earliest opportunity.
- (f) Defendant AutoZone's alternative motion for a more definitive statement and its motion to transfer this matter pursuant to 28 U.S.C. § 1404(c) are ~~stayed pending further~~ ^{*denied without*} *prejudice*.

RJ ~~order of this Court.~~

SO ORDERED, this 6 day of ^{Aug} July, 2004.



ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

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The SCO Group, Inc.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

THE SCO GROUP, INC.,
a Delaware corporation,

Plaintiff,

v.

AUTOZONE, INC.,
a Nevada corporation,

Defendant.

**STATEMENT OF BASIS FOR
CLAIM FOR PRELIMINARY
INJUNCTIVE RELIEF AND
NATURE OF RELIEF**

Civil Action File No.

CV-S-04-0237-RCJ-LRL

Pursuant to the Court's Order dated August 6, 2004, the Plaintiff, SCO Group, Inc. ("SCO") hereby serves upon Defendant AutoZone, Inc. ("AutoZone") its Statement of Basis for Claim for Preliminary Injunctive Relief and Nature of Relief as follows:

1. In its August 6, 2004 Order, the Court stayed all discovery on SCO's claims in the above-referenced matter with the limited exception of discovery concerning AutoZone's migration from a Unix Operating System to a Linux Operating System. The

Court has permitted SCO to conduct limited expedited discovery on this issue in order to determine whether or not to file a motion for preliminary injunctive relief.

Migration from Unix to Linux

2. SCO is informed and believes that AutoZone may have infringed SCO's copyrights in various SCO Software Products including, without limitation, SCO's OpenServer version of Unix. SCO is informed and believes that AutoZone's servers and other hardware were migrated from SCO's Software Products to the Linux Operating System. Santa Cruz Operations ("old SCO"), a predecessor in interest to SCO, provided consulting services on-site to AutoZone between 1998 and 2000 and became familiar with the hardware and software utilized by AutoZone in its business. Based upon SCO's employees' knowledge of the AutoZone System, SCO is informed and believes that AutoZone "copied"¹ certain copyrighted material contained in SCO's Software including, without limitation, SCO's static shared libraries during its transition to Linux. At least one of the versions of OpenServer utilized by AutoZone operates using static shared libraries. In order to cause Linux to function effectively with legacy applications previously designed for OpenServer Software, SCO believes that it is reasonably likely that AutoZone copied SCO's copyrighted material during the migration process in violation of its contracts with SCO and in violation of Federal Copyright laws. Specifically, SCO is informed and believes that AutoZone has infringed the following

¹ The term "copying" as used herein includes verbatim copying of code or man pages, and copying where the resulting product is substantially similar to the original considering structure, sequence and organization, and other non-literal elements of the code. In addition to copying, SCO's rights may be violated by preparation of derivative works based on the original, gaining beneficial use of the copyrighted materials through interfaces or other means supplied by third parties, or any other act which interferes with the exclusive rights of the copyright owner protected under 17 U.S.C. §106.

SCO copyrights pertaining to code used in or with Open Server versions 5.0.2, 5.0.4 and 5.0.5: TX 5 750-268, TX 5 763-235, TX 2 611-860 and TX 2 605-292.

SCO is further informed and believes that it is reasonably likely that AutoZone has also improperly used and/or copied the following additional copyrighted code and manuals during and after the migration process:

- (a) Dynamic shared libraries;
- (b) Dynamic linking code;
- (c) Kernel optimization features;
- (d) Documentation pertaining to the above including, without limitation, manual pages.

This list is not exhaustive and SCO reserves the right to supplement it in accordance with the rules once SCO has had an opportunity to conduct discovery.

Potential Injunctive Relief

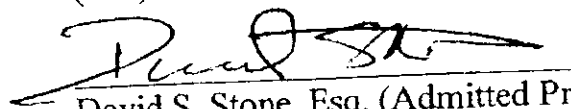
3. Under applicable law in this Circuit, any use of copyrighted materials i.e., source code and manuals, in a way that is inconsistent with exclusive rights of the copyright owner protected under 17 U.S.C.A §106, constitutes a prima facie copyright infringement. See, e.g., MAI Sys. Corp. v. Peak Computer, Inc., 991F.2d 511, 519 (9th Cir. 1993). Furthermore, irreparable harm is presumed and it is not a defense that the defendant could have paid a royalty. See Cadence Design Systems, Inc. v. Avant! Corp., 125 F.3d 824, 827 (9th Cir. 1997) (“It is well settled that availability of money damages does not rebut the presumption of irreparable harm in a copyright case”).

4. Pursuant to the Court's Order, SCO intends to conduct limited discovery into the above issues in order to determine whether or not, under the circumstances, an application for a Preliminary Injunction is warranted.

5. In the event SCO determines Preliminary Relief is warranted, SCO will seek a Preliminary Injunction enjoining AutoZone from using any of the copyrighted materials identified in its motion pending final resolution of this action.

Dated: August 30, 2004

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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

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4 a Delaware corporation.)

5 Plaintiff,)

6 v.)

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8 a Nevada corporation,)

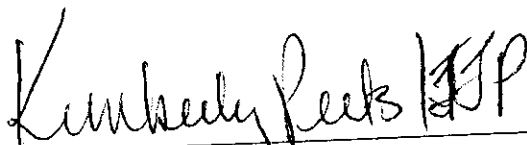
9 Defendant.)

Case Number: CV-S-04-0237-RCJ-(LRL)

10 RECEIPT OF COPY

11 RECEIPT OF COPY of the documents is hereby acknowledged this 30th day of August
12 30, 2004:

13
14 1. **STATEMENT OF BASIS FOR CLAIM FOR PRELIMINARY INJUNCTIVE
15 RELIEF AND NATURE OF RELIEF**

16 

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