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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

DEFENDANT'S RESPONSE TO PLAINTIFF'S DISCOVERY REPORT

On May 27, 2005, Plaintiff The SCO Group. Inc. ("SCO") filed a document with the Court entitled "Report of Plaintiff The SCO Group, Inc. Regarding Discovery Pursuant to the Order of the Court Dated August 6, 2004" (the "SCO Report"). SCO contends that the SCO Report is submitted pursuant to the terms of the Court's August 6 Order; however, the SCO Report is in no way properly responsive to the Court's Order. SCO's decision not to pursue a motion for preliminary injunction against Defendant AutoZone. Inc. ("AutoZone") renders this case stayed pursuant to the Court's August 6 Order. Thus, no reason exists for SCO to have submitted discovery to the Court at this time or to have filed a lengthy brief that argues the merits of its claims.

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1 AutoZone is reluctant to respond to SCO's unnecessary filing. Nevertheless, because the

2 SCO Report contains numerous material misstatements of the record and attempts to improperly

3 impugn AutoZone's reputation to the Court, AutoZone is compelled to file this Response to

4 correct the record.

I. PROCEDURAL AND FACTUAL BACKGROUND

5 SCO purports to own the copyright in a computer operating system known as UNIX.

6 AutoZone formerly used a version of the UNIX operating system known as "OpenServer" that

7 AutoZone licensed from SCO on its store servers. As a result of an announcement by SCO in

8 1999 that it would no longer support the OpenServer system, AutoZone decided to switch its

9 store servers to the competing Linux operating system. This migration process took

10 approximately three years and was completed in 2003.

11 SCO filed this lawsuit against AutoZone on March 3, 2004, alleging that AutoZone's use

12 of Linux infringes copyrights that SCO purports to own in the code for UNIX System V and

13 various supporting materials. At the time it filed this case, three cases involving SCO were

14 already pending in federal courts in Utah and Delaware that involve seminal issues of fact and

15 law also at issue in this case; namely, whether SCO owns the copyright in UNIX and whether

16 Linux infringes UNIX. On April 23, 2004, AutoZone moved to stay this case pending resolution

17 of the prior filed cases.

18 In its opposition to AutoZone's motion, SCO contended that AutoZone had infringed

19 SCO's purported copyrights in OpenServer "static shared libraries" when AutoZone converted

20 from OpenServer to Linux. (Hearing on Motion to Stay Transcript pg. 17, ln. 19 – pg. 18, ln. 3.)

21 SCO further contended that these alleged infringements were not at issue in the other federal

22 court actions. (Id.)

23 In an Order dated August 6, 2004, the Court stayed this action pending resolution of the

24 three prior filed cases; however, the Court permitted SCO to take expedited discovery for the

25 limited purpose of determining whether it needed to file a motion for preliminary injunction.

26 Through extensions, SCO had until May 30, 2005 to decide whether to file a preliminary

27 injunction motion. Nothing in the August 6 Order or any subsequent orders of the Court

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1 requested or envisioned that SCO would file a document with the Court that reported on what

2 SCO discovered during the expedited discovery process if SCO elected not to move for a

3 preliminary injunction (which SCO has elected not to do), and nothing in the Court's orders

4 requested or anticipated that SCO would file deposition transcripts and other discovery with the

5 Court if SCO elected not to so move.[1] Indeed, SCO's filing of such materials violates the

6 provision in Local Rule 26-8 that "[u]nless otherwise ordered by the court, written discovery,

7 including responses thereto, and deposition transcripts, shall not be filed with the court."

8   The SCO Report contains numerous material misstatements of the facts discovered

9 during discovery and omits certain facts necessary to understand the proper factual and legal

10 significance of the facts discovered. AutoZone is loathe to file with the Court yet another

11 unnecessary document in light of the stay that is now in place; nevertheless, because SCO has

12 attempted to impugn AutoZone's reputation to the Court and argue the facts and merits of the

13 case through its Report, AutoZone believes it has no alternative but to respond.

14   In an effort to limit the amount of information that the Court needs to review to

15 appreciate the inaccuracies in the SCO Report, AutoZone has addressed in summary fashion

16 below the more significant misstatements contained in the Report. For the sake of completeness,

17 AutoZone has included a discussion of additional, but less significant, inaccuracies in the

18 document attached as Exhibit A.

II.   CLARIFICATION OF THE RECORD

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20 **A.**   **AutoZone Has at All Times Been Candid and Truthful With the Court and SCO**

21   When this case began, AutoZone's software developers understood that they had properly

22 migrated all of AutoZone's applications to Linux by recompiling the applications under Linux.

23 All statements that AutoZone made to the Court at the outset of this case regarding the nature of

24 AutoZone's migration from UNIX to Linux were truthful to the best of AutoZone's knowledge

25 and understanding at the time made.

26 _____

27 [1]   The August 6 Order states only that "SCO will file its motion for preliminary injunction and supporting memorandum of authorities within twenty days after the conclusion of

28 discovery." Order dated August 6, 2004.

Upon in-depth analysis of its servers as a result of the discovery process, AutoZone discovered that there were a limited number of programs that had been errantly copied to its store server image that were old OpenServer compiled programs. Because these programs had been compiled under OpenServer, they included copies of certain SCO libraries (an issue that is discussed in detail in Section B below). AutoZone further discovered a limited number of old Xenix files that it did not need, was not using, and that had been copied by mistake to AutoZone's store server image (these issues are also addressed further in Section B below).

As soon as AutoZone discovered these facts, it promptly reported the same to SCO. Significantly, AutoZone made no attempt to hide the fact that its original representations were incorrect. To the contrary, AutoZone went well beyond its discovery obligations by repeatedly volunteering information to SCO as a part of the discovery process that AutoZone could well have left for SCO to attempt to discover on its own. (*See e.g.* Letter from David Stewart dated October 27, 2004, attached as Exhibit B hereto and Letter from David Stewart dated November 24, Exhibit B to Declaration of David S. Stone accompanying the SCO Report.)

In short, AutoZone has been truthful with both the Court and SCO to the best of AutoZone's knowledge, information and belief at all times in this litigation. Moreover, not only has AutoZone discharged its obligations in this case in good faith, it has exceeded the requirements of the discovery process in an attempt to expedite discovery and resolve these issues as efficiently as possible.[2]

B. SCO Materially Overstated the Nature of the Alleged Unauthorized Copying at Issue.

SCO contends that AutoZone has copied tens of thousands "of what SCO believes to be programs containing SCO proprietary code." (SCO Report at 2.) The implication of this and

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[2]   SCO's counsel asserts in the SCO Report that AutoZone hampered SCO's discovery efforts by refusing to produce relevant source code. This assertion is simply untrue. On October 27, 2004, *more than seven months ago*, AutoZone produced all source code that it had in its possession for all AutoZone programs that are on its store servers. (*See* Letter of David J. Stewart to David Stone dated October 27, 2004 discussing and forwarding the requested source code, included in Exhibit B hereto).

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1 similar representations in the SCO Report is that AutoZone has copied tens of thousands of SCO

2 programs or files. In reality, the expedited discovery process revealed the existence of only a

3 handful of unique SCO files on AutoZone's servers, and AutoZone has licenses to use virtually

4 every one of these files.

5 Most of SCO's claims are premised on the allegation that AutoZone is running programs

6 on its Linux servers that include copies of OpenServer libraries. As set forth in more detail in

7 Exhibit A, AutoZone's intention in its migration from OpenServer to Linux was to recompile all

8 of its application programs using a Linux compiler so that none of those programs would contain

9 any OpenServer libraries. (Celmer Deposition 26:5-13, attached hereto as Exhibit C.) AutoZone

10 was surprised to find when it analyzed its servers during discovery that approximately 127

11 programs existed on its store servers (out of thousands of programs on AutoZone's typical store

12 server) that were compiled under OpenServer and therefore included SCO libraries. (*See* Letter

13 from David Stewart dated October 27, 2004.) Of these programs, only two appear to have been

14 used on any of AutoZone's servers at any time since the migration process was completed:

15 Compx, and Decompx. Since they had not been used, the remainder of the 127 programs clearly

16 were copied by mistake to the store servers. Out of all of the OpenServer compiled programs

17 that AutoZone discovered on its servers, AutoZone's initial analysis indicates that only

18 approximately twenty OpenServer libraries were included in the programs.

19 This state of affairs is further underscored by the fact that, as soon as AutoZone

20 discovered the existence of the SCO compiled programs, it immediately deleted or recompiled

21 the programs. Significantly, AutoZone was under no legal obligation to delete or recompile most

22 of the programs because it has valid and subsisting licenses to continue to use them.

23 By virtue of its purchase of a license for a software developer's kit from SCO, AutoZone

24 is licensed to develop programs, compile them under OpenServer and copy the resulting

25 programs on computers running any operating system. Additionally, AutoZone purchased end

26 user licenses from SCO to use SCO compiled code on more than 2900 computers. These

27 licenses cover the vast majority of the copies about which SCO complains in the SCO Report to

28 the Court. Thus, AutoZone's deletion or recompilation of the programs discovered in the

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1   expedited discovery process was almost entirely an accommodation to SCO, and furthermore not

2   an action that AutoZone was legally obligated to undertake.

3   Finally, and most importantly, the totality of the facts revealed in the expedited discovery

4   process has made abundantly clear that any copying that occurred was mistaken and resulted

5   from the complexities of a huge project to transition AutoZone's operating system, rather than

6   SCO's implication of an institutional intent on the part of AutoZone to inappropriately benefit

7   from SCO's alleged proprietary rights.

C.   SCO's Allegations of Proprietary Rights are Subject to Significant Question

8   The SCO Report contends that it has uncovered "extensive copying" of "SCO proprietary

9   OpenServer code." (SCO Report at 2). Despite this broad assertion, there may in fact be nothing

10   that SCO owns -- since the copyrightability of the materials is subject to question, and if the

11   materials are found to be copyrightable, there is significant dispute as to the nature and extent of

12   SCO's ownership rights in them. Also, there is substantial reason to believe that the libraries

13   may not be subject to protection under U.S. copyright laws on functionality or other grounds.

14   (*See* AutoZone's Memorandum of Law in Support of Its Motion to Stay or, in the Alternative,

15   Motion for a More Definite Statement, at 16.)[3]

16   Even assuming for purposes of argument that any of the SCO code is subject to copyright

17   protection, there is no evidence in the record that SCO owns the copyright and this is also the

18   subject of significant dispute.[4] There is also the very real possibility that the code is in the public

19   domain. AutoZone expects to explore both of these issues extensively (among others) if the

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21   [3]   AutoZone has not evaluated this issue for itself because SCO has not produced the source

22   code for the libraries to AutoZone as a result of the parties' agreement that SCO would not have
     to respond to AutoZone's discovery requests unless SCO elected to move for a preliminary

23   injunction.

24   [4]   Novell and SCO agree that SCO could only own the copyright in UNIX System V if

25   Novell assigned those rights to SCO pursuant to an Asset Purchase Agreement dated
     December 6, 1995 or by a later executed amendment to this agreement. In *The SCO Group, Inc.*

26   *v. Novell*, No. 2:04CV00139 (D.Utah), Novell contends that this agreement does not assign the
     copyright to SCO. If Novell is adjudged to be correct, and if the OpenServer libraries at issue in

27   this case are entirely UNIX System V libraries, then SCO would not own the copyright in the

28   libraries.

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issues in this case are not resolved by the *Novell*, *IBM* and/or *Red Hat* cases, and AutoZone expects that one or both of these issues will be fatal to SCO's claims. Thus, given that SCO's claims that AutoZone has copied "proprietary" SCO code are unsupported by any evidence in the record and are further the subject of significant legal and factual questions, to waive the conclusory wand of copyright infringement over the results of limited discovery as SCO has done in its Report is wholly inappropriate.

D. SCO's Ad Hominem Attacks on Jim Greer are Inappropriate and Unfounded

Jim Greer is a developer who was previously employed by AutoZone and who was responsible for AutoZone's initial actions to port AutoZone's code from OpenServer to Linux. Mr. Greer left AutoZone in January 2002, before the migration process was completed. For reasons that AutoZone fails to understand, SCO perceived the need in its Report to level unfounded attacks on Mr. Greer's veracity – a third party with no interest in this litigation.

In footnote 3 of its Report, SCO insinuates that Mr. Greer misrepresented the facts in a pre-litigation Internet post when he stated that AutoZone had not copied SCO libraries in AutoZone's migration to Linux and that Mr. Greer recanted those alleged misrepresentations in his deposition. (*See* SCO Report at 5, n.3.) What the record in fact reflects is that Mr. Greer testified that AutoZone's objective was to recompile all AutoZone programs under Linux such that none of the programs would include any SCO libraries when the migration was completed. (Greer Deposition 43:2 – 46:19, attached hereto as Exhibit D.) When Mr. Greer made his Internet post, it was his understanding that this objective had been met. Mr. Greer only later discovered, as a result of AutoZone's investigations in this case, that some pre-migration OpenServer compiled programs had been copied errantly to the store server image. Significantly, all of this copying occurred <u>after</u> Mr. Greer ' AutoZone's employ. Accordingly, Mr. Greer would have had no way of knowing about the errant copying when he made his Internet post. Mr. Greer's Internet post was therefore wholly truthful to the best of his knowledge and information at the time made, and SCO's ad hominem attacks on Mr. Greer's veracity are utterly unfounded.

III. CONCLUSION

After more than a year of litigation, the evidentiary posture of this case is identical to the *IBM* case. Despite SCO's wide ranging claims in the IBM case that Linux infringes UNIX, SCO has still failed to identify even a single line of Linux code in that case that infringes UNIX. The absence of such evidence prompted Judge Kimball to write in an Order entered on February 5, 2005, that it is "astonishing" that SCO had not offered "any competent evidence" to create a disputed fact regarding SCO's allegations that IBM has infringed SCO's alleged copyrights through IBM's Linux activities.[5]

In this case, despite nine months of discovery, SCO is unable to establish that code found on AutoZone's computers infringes any code in which SCO can legitimately claim to own any rights it could assert against AutoZone. This would appear to be one of the principle reasons SCO decided not to file a motion for preliminary injunction against AutoZone, in addition to the fact that any claim for preliminary injunction would be moot because AutoZone voluntarily deleted all SCO compiled code from its servers as an accommodation to SCO.

Regardless of why SCO elected not to move for a preliminary injunction, no legitimate reason existed for SCO to file its Report with the Court. The Report was unnecessary and contained numerous misstatements and omissions. Because of SCO's decision not to move for a preliminary injunction, AutoZone submits that all issues in this case are now properly stayed
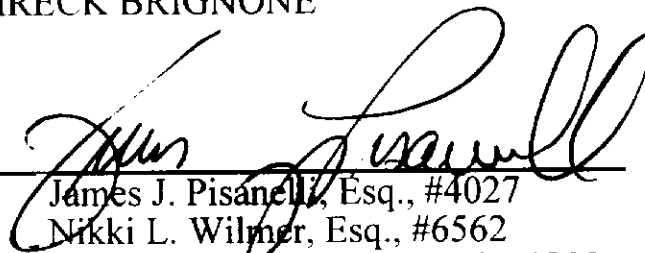
[5]   Judge Kimball noted in the same order that SCO "chose to cavalierly ignore IBM's claims that SCO could not create a disputed fact regarding whether it even owned the relevant copyrights." Nevertheless, the Court resisted the "temptation to grant IBM's motion" and held that summary judgment was premature because of ongoing discovery in the case. *The SCO Group v. International Business Machines Corp.*, No. 2:03CV294 (D.Utah), Memorandum and Order dated February 9, 2005, pg. 10.

pending the resolution of the related *IBM*, *Novell*, and *RedHat* cases without need for further briefing by either party regarding any issue.

DATED this 9th day of June, 2005.

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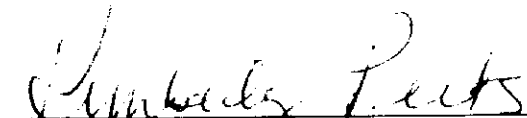Attorneys for Defendant
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT AUTOZONE, INC.'S RESPONSE TO PLAINTIFF'S DISCOVERY REPORT** upon all counsel of record by depositing copies of the same in the United States mail with adequate postage affixed thereon, or hand-delivered, addressed as follows:

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Dated this 9th day of June, 2005.

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An employee of SCHRECK BRIGNON

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