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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| RED HAT, INC. | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 03-772-SLR |
| | ) | |
| THE SCO GROUP, INC. | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

ORIGINAL

**SCO'S OPPOSITION TO RED HAT'S MOTION FOR RECONSIDERATION**

**STATEMENT OF FACTS**

In its Order denying SCO's motion to dismiss Red Hat's complaint, the Court stayed this action pending resolution of the litigation between SCO and IBM in federal district court in Utah, with the proviso that the parties report to the Court every 90 days regarding the status of the IBM case so that the Court can evaluate whether the stay should be lifted prior to final resolution of that matter. *See* D.I. 34 at 4. On April 20, 2004, Red Hat filed a motion for reconsideration of that Order (D.I. 35-36)[1] contending that:

- The Court mistakenly assumed that the Red Hat litigation and the IBM litigation involved the same core issue – whether Linux contains misappropriated Unix system source code (D.I. 36 at 2); and
- Manifest injustice will result from the Court's Order (D.I. 36 at 2).

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[1] Red Hat filed its motion for reconsideration without complying with D.Del. LR 7.1.1. Red Hat made no effort to confer with SCO before filing the motion. Nor did it make the certification required by that rule.

## ARGUMENT

As Red Hat acknowledges, a movant seeking to alter or amend a judgment must demonstrate that reconsideration is warranted in light of: (1) a change in the controlling law, (2) new evidence, or (3) a "clear error of law or fact or to prevent a manifest injustice." *See Max's Seafood Café v. Quinteros*, 176 F. 3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

Red Hat's motion does not refer the Court to any new legal authority or new evidence. Nor does Red Hat establish that there has been a clear error of law or fact. Instead, Red Hat's motion reduces to a claim that this Court's April 6, 2004 Order will result in "manifest injustice." This claim is baseless, and Red Hat's reconsideration motion should be denied. *See Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp.2d 385, 419 (D. Del. 1999).

### A. There Is No Change In The Law Or New Evidence Warranting Reconsideration

Red Hat's initial argument in favor of reconsideration is that the "the Court did not have the benefit of the law and the facts regarding the first filed rule" when it ordered a stay in this case, and that the Court erred in applying the "first filed rule." (D.I. 36 at 8.) Red Hat presumes that the stay in this case is predicated on the "first filed" rule, but SCO reads the Court's Order differently. Regardless, however, of whether "first filed" principles suggest that this case should be stayed, the Court clearly had ample authority to order a stay as part of its power to manage litigation before it.

Red Hat ignores the wealth of case law explaining that federal courts have inherent power to manage their dockets and stay proceedings. *See, e.g., Alloc, Inc. v. Unilin Décor N.V.*, 2003 WL 21640372, *2 (D. Del. July 11, 2003) ("The decision to stay a case is

firmly within the discretion of the court." As Justice Cardozo explained in *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936):

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

There can be no dispute that the Court had authority to issue a stay in this case.

Red Hat's "first filed" argument is also based on a mistaken belief that the Court ordered a stay based on a "misapprehension" about the nature of the claims at issue in this case and those in the IBM case. (D.I. 36 at 1.) In addition to the fact that the pleadings in the IBM case are a matter of public record and widely available on the internet, Red Hat previously presented the Court with its views about the differences between this case and the IBM matter. *See* D.I. 13 at 16-18. There is no basis for presuming the Court was under any "misapprehension" about these issues.

Indeed, the Court correctly observed that the IBM case will address a central issue in this case: whether Linux contains misappropriated UNIX code. As noted in the Court's Order, this issue is raised by SCO's claim for breach of contract arising from IBM's contributions of code to Linux in violation of its contractual obligations. This issue is also raised directly by IBM's Tenth Counterclaim against SCO, which seeks a declaratory judgment that "IBM does not infringe, induce infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or

all of SCO's purported copyrights in Linux are invalid and unenforceable."[2] In claiming that this case is "fundamentally different" from the IBM matter, Red Hat focuses on *SCO's copyright claim against IBM*, ignoring IBM's Counterclaim which focuses on violations of SCO's rights arising from the use, reproduction and use of Linux. There is no doubt that, as it is presently constituted, the IBM case will address central issues raised in this lawsuit.[3] Therefore, it would be "a waste of judicial resources," and resources of the parties, to litigate this case while a substantially similar question is being litigated in federal district court in Utah.

### B. The Court's Order Will Not Result In "Manifest Injustice"

Red Hat's claim that the Court's Order will result in "manifest injustice" is also unavailing. In fact, all indications are that Red Hat is thriving, and there is serious reason to doubt Red Hat's position that a stay of this case will result in "injustice."

Red Hat asserts that it is suffering "damage" to its business, and that "[t]he damage to Red Hat and its customers has become even more clear from the new evidence of SCO's recent lawsuits against [DaimlerChrysler and AutoZone]." *See* D.I. 36 at 15 and n. 8. If SCO's claims against DaimlerChrysler and AutoZone posed a grave risk to Red Hat's business, presumably that fact would be disclosed in Red Hat's SEC filings. SCO is unaware of any such disclosures by Red Hat, however. To the contrary, Red Hat's most recent 8-K – filed several weeks *after* SCO sued DaimlerChrysler and AutoZone – is replete with news of Red Hat's

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[2] *See* IBM's Second Amended Counterclaims at ¶ 173. SCO has moved to dismiss this Counterclaim. IBM's opposition is due May 14, 2004. In accordance with the Court's Order, SCO will keep the Court apprised of that motion, as well as other developments in the IBM case.

[3] Red Hat ignores the IBM Counterclaim that placed these issues at the center of that case, even though it is well aware of it, having attached the relevant pleadings to its motion. Of course, this motion must be decided on the basis of the IBM case as it presently stands.

successes, while making no mention of SCO's lawsuits. For instance, a press release attached to the 8-K quotes Red Hat Executive Vice President and Chief Financial Officer Kevin Thompson as stating: "[t]he growth rates in adoption of Red Hat Enterprise Linux has *exceeded our expectations* to date and we are positive on the outlook for fiscal 2005." *See* Exh. A at 12 (emphasis added). Red Hat offers no substantiation for its conclusory assertion of harm, or for the idea that SCO's lawsuits against end-users render the stay of this case unjust.

Red Hat's claim of "manifest injustice" also rings hollow in light of the Court's requirement for periodic reports from the parties, and its commitment to review the propriety of the stay as events in the IBM case unfold. *See* D.I. 34 at 5. In light of these, there is no basis for the grant of Red Hat's motion.

### C. Red Hat's Request For An Injunction Is Inappropriate And Unfounded

Red Hat's motion proposes "[i]n the alternative" that "the Court modify its order to enjoin SCO from threatening or initiating additional lawsuits against Red Hat or its customers based on alleged copyright infringement through use of LINUX until the stay is lifted." Red Hat's request is in effect a request for a preliminary injunction. Neither the procedural nor substantive requirements for a preliminary injunction have been met here.

First, Red Hat did not request a preliminary injunction in its complaint, nor did it move this Court for such an injunction. Accordingly, adequate notice has not been provided to SCO as required by Fed. R. Civ. P. 65.

Second, a preliminary injunction may be granted only after the following factors have been weighed by the court: (1) whether the party seeking the injunction demonstrates a reasonable likelihood of success on the merits; (2) whether irreparable harm will occur if an injunction is not granted; (3) whether the balance of hardships weighs in favor of granting the

injunction; and (4) whether granting the injunction is in the public interest. *See, e.g., 2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 1998 WL 1469541, *2 (D. Del. Feb. 4, 1998) (preliminary injunction denied; stating that a preliminary injunction is an extraordinary remedy that must be "thoroughly justified"); *Black & Decker Corp. v. American Standard Inc.*, 679 F. Supp. 1183 (D. Del. 1988) (preliminary injunction denied and other factors not examined where irreparable harm was not initially demonstrated). Here, Red Hat has not demonstrated a single factor warranting a preliminary injunction. Accordingly, Red Hat's request for an injunction should be denied.

## CONCLUSION

For the foregoing reasons, Red Hat's motion for reconsideration should be denied.

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May 4, 2004

## CERTIFICATE OF SERVICE

I, Jack B. Blumenfeld, hereby certify that copies of the foregoing were caused to be served on May 4, 2004 upon the following in the manner indicated:

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