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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THE SCO GROUP, INC.)
a Delaware Corporation)
Plaintiff,) Civil Action File No.
v.) CV-S-04-0237-RCJ-LRL
AUTOZONE, INC.)
a Nevada Corporation)
Defendant.)

**DEFENDANT AUTOZONE, INC.'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO TRANSFER VENUE**

Defendant AutoZone, Inc. ("AutoZone") submits this Reply in support of its Motion to
Transfer Venue.

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INTRODUCTION

Plaintiff The SCO Group, Inc. ("SCO") contends that its choice of forum "should not be lightly disturbed." However, under controlling precedent, SCO's choice of forum is entitled to little -- *if any* -- weight because the acts about which it complains occurred in Tennessee (not Nevada) and SCO resides in Utah (not Nevada).

Federal courts agree that the preferred forum for infringement actions is the district where the alleged infringement occurred (in this case, Tennessee) because that is the location of the most relevant sources of evidence. SCO does not contest that the case load is lighter and that cases thus move to trial significantly more quickly in the Western District of Tennessee than in this district. Nor does SCO contest that the Western District of Tennessee has a greater interest than this district in adjudicating the merits of the dispute. In short, all relevant considerations other than SCO's choice of forum -- which is entitled to little weight -- strongly favor transfer of this action to Tennessee.

SCO's request to transfer the case to Utah should be rejected because Utah is just as *inconvenient* to AutoZone as this district. Utah also has no relation to the operative facts of the alleged infringement, and cases proceed to trial significantly slower in Utah than in Tennessee. AutoZone therefore submits that its motion to transfer should be granted and that the case should be transferred to the U.S. District Court for the Western District of Tennessee without consideration of AutoZone's other pending motions.

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ARGUMENT AND CITATION OF AUTHORITY

A. **All Relevant Considerations Support Transfer of this Case to the Western District of Tennessee**

1. **SCO's Choice of Forum is Entitled to Minimal Deference.**

SCO's principal argument in opposition to AutoZone's motion to transfer is that its choice of forum "should not lightly be disturbed," notwithstanding that the operative facts of the case occurred in Tennessee and that SCO is not a resident of Nevada. SCO Brief at p.7. SCO's argument fails to address controlling Ninth Circuit authority cited previously by AutoZone that holds that the plaintiff's choice of forum is given *minimal* consideration where, as here, the operative facts did not occur in the forum and the plaintiff is not a resident of the forum. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); AutoZone Motion to Transfer at pp. 7-8; *see also Miracle Blade, LLC v. Ebrands Commerce Group, LLC*, 207 F. Supp. 2d 1136, 1155 (D. Nev. 2002). As the district court in *Anchor Wall Sys., Inc. v. R&D Concrete Prods., Inc.*, 55 F. Supp. 2d 871, 874 (N.D. Ill. 1999) stated:

[P]laintiff's choice of forum has diminished in significance since the enactment of § 1404(a). Where, as here, the plaintiff is not a resident of the forum district, this factor is merely another factor in the mix and is given no additional weight. The weight accorded plaintiff's choice of forum is further lessened if the chosen forum lacks any significant connection to the claim.

See also Tensor Group, Inc. v. All Press Parts & Equip., Inc., 966 F. Supp. 727, 730 (N.D. Ill. 1997) (granting motion to transfer copyright infringement action) ("[T]he deference to which [plaintiff's] choice of forum is entitled is reduced by the fact that Wisconsin is the situs of material events."); *Prego, Inc. v. Alloc, Inc.*, 262 F. Supp. 2d 122, 130 (S.D.N.Y. 2003) (granting motion to transfer patent infringement action) ("Although the plaintiff's choice of forum is ordinarily entitled to 'substantial consideration,' this choice is accorded less weight where the case's operative facts have little or no connection with the transferor forum. This is particularly

1 the case where the plaintiff brings suit outside his home forum.”); *Amersham Pharmacia*
2 *Biotech, Inc. v. Perkin-Elmer Corp.*, 11 F. Supp. 2d 729, 730 (S.D.N.Y. 1998) (“Where,
3 however, there is, as here, such a tenuous connection between plaintiff’s claims and the [forum],
4 the plaintiff’s selection of this forum has an artificial quality that entitles a court to give it less
5 weight.”).

7 This court has previously granted a motion to transfer where the only basis for
8 maintaining the case in Nevada was the plaintiff’s choice of forum and the defendant’s
9 incorporation in Nevada. *Cambridge Filter Corp. v. Int’l Filter Co.*, 548 F.Supp. 1308, 1311 (D.
10 Nev. 1982) (“The facts that Nevada is Plaintiff’s choice of forum and Defendant’s state of
11 incorporation, standing alone, do not satisfy the criteria of s. 1404(a).”). SCO’s choice of forum
12 should thus be given little if any weight in this Court’s consideration of AutoZone’s motion.

13
14 **2. Memphis is the Most Appropriate Forum for this Case Because the**
15 **Operative Facts Occurred in, and the Relevant Witnesses and Documents**
16 **Reside in, Memphis.**

17 Federal courts “have found that the preferred forum for an infringement claim is in the
18 district where the alleged infringement occurred.” *Lencco Racing Co. v. Artco, Inc.*, 953 F.
19 Supp. 69, 71 (W.D.N.Y. 1997). In *Lencco*, the court granted a motion to transfer because “[t]he
20 operative facts surrounding the alleged infringement” occurred in Michigan and “the bulk of the
21 evidence surrounding the alleged infringement will come directly from [defendant’s] employees
22 in Michigan.” *Id.* Similarly, in *Tensor Group*, the court granted a motion to transfer a copyright
23 infringement case to Wisconsin because “the situs of material events was Wisconsin” and thus
24 “most of the sources of proof in this case are located in Wisconsin.” *Tensor Group*, 966 F.Supp.
25 at 730. The court thus “[g]ave] defendants’ argument credence because infringement actions
26 often focus on the activities of the alleged infringer, its employees, and its documents.” *Id.*;

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2 accord *Amersham Pharmacia*, 11 F. Supp. 2d at 730 (granting motion to transfer patent
3 infringement case to Northern District of California because it “is clearly the locus of most of the
4 operative facts of this case” and “[a]s a result, most of the witnesses, documents, and sources of
5 proof concerning the alleged infringement will be found in the Northern District of California”);
6 *Pergo*, 262 F. Supp. 2d at 129 (granting motion to transfer patent infringement case because “it
7 is clear that the operative facts relating to any alleged infringement would be found at the
8 defendants’ headquarters”); *Brink v. Ecologic, Inc.*, 987 F. Supp. 958, 966 (E.D. Mich. 1997)
9 (granting motion to transfer copyright infringement action to Illinois because, in part, “the
10 alleged infringing conduct occurred in Illinois”).

11
12 In the present case, all of the operative facts relating to the alleged copyright
13 infringement occurred in Memphis. All evaluation and implementation of Linux software on
14 AutoZone’s computers nationwide was done from Memphis by AutoZone information
15 technology staff members located in Memphis, and the AutoZone computers that help manage
16 and operate the AutoZone computer network throughout the country are located in Memphis.
17 Declaration of Jon Bascom (hereinafter “Bascom Decl.”) (attached to AutoZone Motion as Ex.
18 A) ¶ 3. The relevant witnesses, documents, and sources of proof concerning the alleged
19 infringement are thus located almost exclusively in Memphis. Bascom Decl. at ¶¶ 3-5. Indeed,
20 the alleged infringement itself occurred in Memphis. Therefore, a federal court sitting in
21 Memphis has a substantially stronger interest in adjudicating the merits of this case than does a
22 court in Nevada. *Miracle Blade*, 207 F. Supp. 2d at 1157.

23
24 SCO does not dispute that Memphis, Tennessee is a considerably more convenient venue
25 for AutoZone. See AutoZone Motion to Transfer at 6; Bascom Decl. at ¶¶ 4-5. The Western
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District of Tennessee is therefore the more appropriate and more convenient forum for resolution of this action.

The reasons for transferring the case to Memphis clearly outweigh any inconvenience to SCO. SCO contends that Las Vegas is “nearby.” In truth, Las Vegas is approximately 400 miles away from SCO’s headquarters in Linden, Utah. Adjudication of this case in Las Vegas will therefore necessitate air travel by SCO’s witnesses. Travel to Memphis (while further from Linden than Las Vegas) is not significantly more inconvenient than travel to Las Vegas. In light of the overwhelming facts supporting transfer to Memphis, AutoZone submits that this nominal additional inconvenience to SCO does not justify retaining venue of this case in Las Vegas.

3. The Interests of Justice Support a Transfer to Memphis.

SCO acknowledges that the caseloads of judges in the Western District of Tennessee are substantially less than the caseloads of judges in the District of Nevada and that cases proceed to trial much sooner in the Western District of Tennessee; nevertheless, SCO advances the circular argument that this factor is not important because AutoZone seeks a stay of the case. SCO Brief at p. 9 n.3. AutoZone’s motion seeks to transfer the case to the appropriate forum for adjudication – regardless of whether the case is stayed. Indeed, AutoZone respectfully requested that the Court consider the motion to transfer before the motion to stay for this very reason.

The evidence the parties have submitted in connection with AutoZone’s motion demonstrates that judicial efficiency and the interests of justice would be advanced by transfer because AutoZone and SCO can obtain a speedier trial in Memphis. AutoZone Brief at p. 7; *Miracle Blade*, 207 F. Supp. 2d at 1157 (“In its determination of whether to transfer a case pursuant to 28 U.S.C. § 1404(a), a district court may consider which forum will provide a ‘speedier trial.’”). If SCO is truly concerned about the purported irreparable harm it is suffering

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2 by virtue of AutoZone's alleged copyright infringement, SCO would support transfer to the
3 Western District of Tennessee where the case would proceed to trial an average of 14 months
4 sooner than in Nevada (and 9 months sooner than in Utah). In sum, the convenience of the
5 parties and the interests of justice both strongly support transfer of this case to the Western
6 District of Tennessee.

7 **B. Utah is Not an Appropriate Forum for this Case.**

8 Apparently second-guessing its forum selection decision in light of AutoZone's motion,
9 SCO argues in the alternative that the case should be transferred to Utah. SCO Brief at pp. 9-11.
10 Even a cursory examination of the relevant facts demonstrates that Utah is an even less
11 appropriate venue for this case than Nevada.
12

13 AutoZone's only relation to Utah is that it operates a handful of stores in the state.
14 AutoZone is not incorporated in Utah, and its principal place of business and corporate
15 headquarters are not located in Utah. Bascom Decl. at ¶ 2. No relevant AutoZone witnesses or
16 documents are located in Utah. Bascom Decl. at ¶¶ 4-5. Similarly, and most importantly, none
17 of the operative facts regarding the alleged infringement occurred in Utah. Bascom Decl. at ¶ 3.
18 Utah's only relation to the present case is an insignificant one for purposes of an infringement
19 action: it is the location of SCO's principal place of business.
20

21 SCO's statement that Utah would be "equally convenient to AutoZone" ignores all of the
22 evidence discussed in AutoZone's motion to transfer. Indeed, the opposite is true -- Utah would
23 be equally *inconvenient* to AutoZone -- for the same reasons Nevada is inconvenient to
24 AutoZone. The pendency of the *IBM* and *Novell* cases in Utah does not change the substantial
25 inconvenience to AutoZone to litigate this case in a forum having no connection with the
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2 operative facts of AutoZone's alleged infringement and in which none of the AutoZone
3 witnesses or documents reside.

4 Additionally, transfer of this case to Utah will not result in any true judicial economies
5 because it will not make sense for this case to be consolidated with either *IBM* or *Novell*. The
6 *IBM* case is at the close of discovery, and the issues in that case that are related to the issues in
7 the present case are currently before the court for resolution on the merits. *SCO v. IBM*,
8 Def./Countercl.-Pl. IBM's Cross-mot. for Partial Summ. J. on Claim for Decl. J. of Non-
9 Infringement (attached as Ex. C to AutoZone's Reply Brief in Support of its Motion to Stay,
10 filed simultaneously herewith). With regard to *Novell*, the present case involves substantial
11 issues of fact and law that are not at issue in *Novell* and that would do nothing but clutter and
12 delay resolution of the narrow issues involved in that case.

13
14 With regard to court caseloads, the Western District of Tennessee had approximately
15 17% fewer pending cases per judge than the District of Utah for the twelve month period ending
16 September 30, 2003 (361 cases per judge versus 423 cases per judge). U.S. District Court,
17 Judicial Caseload Profile, at <http://www.uscourts.gov/cgi-bin/cmsd2003.pl> (attached hereto as
18 Ex. A). Cases proceeded to trial in the Western District of Tennessee approximately 33% faster
19 than cases pending in the District of Utah during this same time period (18 months from filing
20 versus 27 months). *Id.* Therefore, a transfer to Utah simply creates the same problems as
21 maintaining the case in Nevada.
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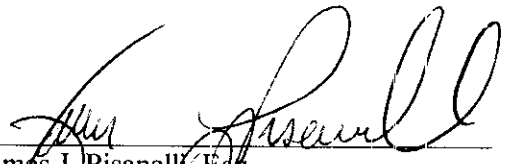
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CONCLUSION

For these reasons and for the reasons set forth in AutoZone's opening brief, AutoZone respectfully submits that this Court should grant this motion and transfer venue of this case to the U.S. District Court for the Western District of Tennessee.

This 4th day of June, 2004.



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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 REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
TO TRANSFER VENUE upon all counsel of record by depositing copies of the same in the United
States mail with adequate postage affixed thereon, addressed as follows:

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This 4th day of June, 2004.


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U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

		12-MONTH PERIOD ENDING SEPTEMBER 30						Numerical Standing		
		2003	2002	2001	2000	1999	1998			
TENNESSEE WESTERN										
OVERALL CASELOAD STATISTICS	Filings*	2,003	1,978	1,826	1,943	1,887	1,913	U.S.	Circuit	
	Terminations	1,716	1,787	1,820	1,923	1,964	1,949			
	Pending	1,803	1,521	1,324	1,301	1,262	1,403			
	% Change in Total Filings	Over Last Year		1.3				49	7	
		Over Earlier Years		9.7	3.1	6.1	4.7	52	6	
Number of Judgeships		5	5	5	5	5	5			
Vacant Judgeship Months**		5.5	10.6	12.0	7.6	.0	.0			
ACTIONS PER JUDGESHIP	FILINGS	Total	401	395	365	389	377	383	62	7
		Civil	269	278	296	328	302	316	68	9
		Criminal Felony	104	100	69	61	75	67	23	2
		Supervised Release Hearings**	28	17	-	-	-	-	21	2
	Pending Cases	361	304	265	260	252	281	59	8	
	Weighted Filings**	484	501	439	431	451	431	48	4	
	Terminations	343	357	364	385	393	390	72	9	
	Trials Completed	24	17	18	25	27	30	24	3	
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	9.1	8.4	7.9	8.3	7.2	8.7	70	7
		Civil**	10.5	9.5	9.7	9.1	10.7	9.1	63	4
	From Filing to Trial** (Civil Only)	18.0	20.0	16.5	17.3	18.5	19.6	17	2	
OTHER	Civil Cases Over 3 Years Old**	Number	31	30	22	13	24	51		
		Percentage	2.5	2.9	2.2	1.2	2.5	4.6	36	4
	Average Number of Felony Defendants Filed Per Case		1.3	1.5	1.7	1.6	1.6	1.5		
	Jurors	Avg. Present for Jury Selection	43.27	40.67	39.53	40.17	37.18	37.90		
		Percent Not Selected or Challenged	42.3	40.5	43.8	47.8	36.8	37.9		

2003 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1344	55	3	399	24	3	47	190	159	19	368	3	74
Criminal*	515	17	12	215	1	35	108	**	21	53	3	13	37

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.
 ** See "Explanation of Selected Terms."

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

		12-MONTH PERIOD ENDING SEPTEMBER 30						Numerical Standing		
		2003	2002	2001	2000	1999	1998			
UTAH										
OVERALL CASELOAD STATISTICS	Filings*	2,397	2,394	1,756	1,723	1,732	1,651	U.S.	Circuit	
	Terminations	2,605	1,975	1,644	1,702	1,700	1,493			
	Pending	2,116	2,359	1,952	1,865	1,854	1,851			
	% Change in Total Filings	Over Last Year		.1				52	7	
		Over Earlier Years		36.5	39.1	38.4	45.2	9	2	
Number of Judgeships		5	5	5	5	5	5			
Vacant Judgeship Months**		.0	7.5	12.0	12.4	12.0	11.8			
ACTIONS PER JUDGESHIP	FILINGS	Total	480	479	351	345	346	330	42	4
		Civil	272	305	232	240	234	216	66	5
		Criminal Felony	162	142	119	105	112	114	8	2
		Supervised Release Hearings**	46	32	-	-	-	-	8	1
	Pending Cases		423	472	390	373	371	370	40	3
	Weighted Filings**		595	534	434	428	435	385	24	2
	Terminations		521	395	329	340	340	299	21	2
	Trials Completed		27	13	15	14	14	14	14	2
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	6.8	6.8	6.4	5.6	6.4	5.1	32	5
		Civil**	8.9	10.7	12.7	10.6	12.1	10.9	30	2
	From Filing to Trial** (Civil Only)		27.0	37.0	26.0	20.0	27.0	24.0	67	7
OTHER	Civil Cases Over 3 Years Old**	Number	101	128	112	110	122	163		
		Percentage	6.7	7.2	7.7	7.5	8.4	11.1	78	7
	Average Number of Felony Defendants Filed Per Case		1.2	1.2	1.2	1.3	1.2	1.2		
	Jurors	Avg. Present for Jury Selection	45.65	51.32	43.50	49.73	42.66	39.62		
		Percent Not Selected or Challenged	28.5	36.2	25.4	29.9	22.9	25.1		

2003 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1358	59	5	171	48	22	92	177	238	107	253	11	175
Criminal*	805	212	8	300	3	28	144	**	5	40	8	15	42

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See "Explanation of Selected Terms."