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

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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**

**STIPULATION AND PROTECTIVE ORDER REGARDING
CONFIDENTIALITY**

IT IS HEREBY STIPULATED BY THE PARTIES AND ORDERED BY THE COURT, with consent of all parties, that each of the parties, and any non-party, that, by itself or through its counsel, agrees to the terms of this Protective Order as provided

herein, shall be governed by the following terms and conditions in connection with the production of Confidential Information (as defined herein) in this action. The parties agree that this stipulation shall become effective upon execution by Counsel for the parties and submission of this stipulation to the Court for its approval and entrance of this Order, and that all parties shall be bound by, and abide by, the terms of this stipulation following the date of its execution by Counsel for the parties.

1. Definitions.

a. The term “Confidential Information” means any information, whether oral or in documentary or other tangible form, so designated by any producing person (as defined herein) that it reasonably and in good faith believes is of the type protectable under Rule 26(c)(7), Fed. R. Civ. P. “Confidential Information” collectively refers to information designated “Confidential” or “Highly Confidential,” pursuant to Paragraph 4 herein.

b. The term “disclose” means to show, give, make available or communicate, in any fashion, to any person, any information, document, information concerning the content of any document, or any portion of the information contained in any document, furnished by any party or non-party in this action.

c. The term “document” is defined to be synonymous in meaning and equal in scope to the usage of the term in Rule 34(a), Fed. R. Civ. P. A draft or non-identical copy is a separate document within the meaning of the term.

d. The term “person” means any natural person, corporation, partnership, sole proprietorship, group, association, organization, business entity, governmental body, or agency.

e. The term “producing person” means any person, whether a party or non-party, who produces any information, whether oral or in documentary or other tangible form, in response to any discovery method permitted by the Federal Rules of Civil Procedure.

f. The term “qualified person” means (i) present employees of the parties to this action who are assisting counsel identified in (ii) and (iii) in this action; (ii) outside counsel engaged to represent one of the parties to this action, including necessary legal assistants and stenographic and clerical employees actually assisting such counsel and outside vendors engaged by such counsel to scan and/or code documents; (iii) in-house lawyers who are engaged in preparation for trial and trial of this litigation, including necessary legal assistants and stenographic and clerical employees actually assisting these persons; (iv) outside independent experts and consultants of the parties who are assisting counsel identified in (i) and (ii) in this action and any necessary assistants and stenographic and clerical employees under their direct supervision and employed by them or their employer or organization; and (v) the Court and Court personnel, including stenographic reporters.

g. The term “receiving party” means any person to whom information is disclosed in this action in response to any discovery method permitted by the Federal Rules of Civil Procedure. Each plaintiff shall be considered a “receiving party” of any information disclosed to it by another plaintiff in response to any discovery request of the defendant.

2. This Order applies to all documents and information produced in this action regardless of whether such documents or information was produced prior to or

after the entry of this Order.

3. Any non-party to this action who desires the protection of this Order with respect to any discovery obtained from it in this action may obtain such protection by, through counsel or otherwise, executing and delivering to each party a copy of the Non-Party Agreement and Acknowledgement to be Bound by Protective Order (See Exhibit A), thereby agreeing to be bound by its provisions. The non-party seeking the protection of this Order shall file the executed copy with the Court.

4. Confidential Information may be designated by any producing person as “Confidential” or “Highly Confidential,” as the case may be. Moreover, parties may designate documents that are produced by non-parties and that contain Confidential Information as “Confidential.” All Confidential Information may be designated as “Confidential.” To designate Confidential Information “Highly Confidential,” a category that the parties intend to use sparingly, the producing party must reasonably and in good faith believe that the Confidential Information reflects: (A) highly confidential business or marketing plans, strategies, or methods, including business planning or financial documents having current or future applicability; or (B) sensitive non-public information that: (i) as of the date of production, has been subject to strict internal controls limiting its dissemination within the producing party; and (ii) if improperly disclosed, is likely to cause the producing party substantial commercial harm. Any information supplied in documentary or other tangible form may be designated by the producing person or producing party as Confidential Information by placing or affixing on each page of such document, or on the face of such thing, the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” as appropriate. In the case of documents produced prior to the entry

of this Order, the producing person shall have fifteen (15) days from the date of entry of this Order to designate in writing each document containing Confidential Information and the appropriate classification and each such designated document shall thereafter be treated as Confidential Information under the terms of this Order.

5. Any information designated as Confidential Information shall be maintained in confidence by any receiving party and shall be stored under the direct control of counsel of record who shall be responsible for preventing any disclosure not in accordance with this Order. Confidential Information may be disclosed only as follows: (i) "Confidential" information may be disclosed only to qualified persons, and (ii) "Highly Confidential" information may be disclosed only to qualified persons, with the exception of those persons identified in Paragraphs 1(f)(i) and 1(f)(iii). Prior to any disclosure, qualified persons shall read this Order and (i) agree to be bound by the terms thereof, (ii) agree to maintain said information in confidence, and (iii) agree not to disclose Confidential Information to anyone other than as set forth herein.

6. All information or documents disclosed in this litigation, whether or not containing Confidential Information, shall be used solely for purposes of preparation for trial, pretrial proceedings and trial of this action and not in connection with any other litigation or judicial or regulatory proceeding or for any business, commercial, competitive, personal or other purpose. Any summary, compilation, notes, or copy containing Confidential Information, and any electronic image or database containing Confidential Information shall be subject to the terms of the Protective Order to the same extent as the material or information from which such summary, compilation, notes, copy, electronic image or database is derived.

7. In the event that any question is asked at a deposition or a pretrial evidentiary hearing that involves or calls for the disclosure of Confidential Information, the witness shall nevertheless answer such question unless he or she has an independent basis for not responding, provided that the only persons in attendance at the deposition or pretrial evidentiary hearing are persons who are qualified to receive the Confidential Information. Counsel for the person claiming confidentiality may designate portions of the deposition or hearing transcript as Confidential Information, either at the deposition or pretrial evidentiary hearing, by making a statement for inclusion in the transcript, or within thirty (30) business days after receipt of the transcript by notifying opposing counsel in writing. All such transcripts shall be treated as “Confidential” or “Highly Confidential,” as the case may be, until thirty (30) business days after receipt thereof by counsel for the parties and counsel for the witness. The reporter for any deposition or evidentiary hearing shall mark pages that contain testimony designated as Confidential Information, and such confidential portions of depositions or hearing transcripts shall be bound separately from non-confidential pages of depositions or hearing transcripts.

8. A non-qualified person not otherwise permitted under this Order to have access to Confidential Information may be interviewed, may be examined as a witness at a deposition or a pretrial evidentiary hearing, may be shown, and may testify concerning, any Confidential Information as follows:

a. A present employee of a producing person may be examined concerning, may be shown, and may testify concerning, any Confidential Information of that producing person.

b. A former employee or consultant of a producing person may be

interviewed, may be examined concerning, may be shown and may testify concerning, any Confidential Information of that producing person if such information (i) relates to the period of the former employee's or consultant's employment or retention with the producing person, and (ii) pertains to the subject matter of his or her employment or consultation or to the subject of his or her communications with that person.

c. A non-party individual may be interviewed concerning, may be examined concerning, may be shown, and may testify concerning: (1) any document containing Confidential Information that appears on its face to have been previously communicated to or from the non-party individual; and (2) any Confidential Information of a party that specific documentary or testimonial evidence by that witness or others indicates was communicated between the non-party individual and the party.

9. Disclosure of Highly Confidential Information may be made to experts who are actively assisting in the preparation and trial of this action. Prior to disclosing any Highly Confidential Information to any expert:

a. Counsel for the party contemplating such disclosure shall determine that (1) disclosure to any expert of particular Highly Confidential Information is, in that counsel's good faith judgment, necessary to that party's prosecution of the case, (2) with the exception of work for the party contemplating such disclosure, the expert is not, and is not believed to intend to become (a) affiliated with or employed by; or (b) a provider of consulting services or business advice to, any person or entity that competes in the marketplace against the producing party ("Competitor"), and (3) counsel has formed a good faith and informed belief that the individual has not previously violated any confidentiality agreement or order and is not likely to violate the terms of this Protective

Order.

b. Prior to disclosure of Highly Confidential Information to an expert, each such expert must execute the confidentiality acknowledgement annexed hereto as Exhibit A ("Confidentiality Acknowledgement"). Counsel for the party obtaining an expert's signature on the Confidentiality Acknowledgment shall retain the original signed acknowledgement, and shall deliver to opposing counsel, at least five (5) business days prior to disclosure of Highly Confidential Information, a copy of the executed Confidentiality Acknowledgment, along with a curriculum vitae setting forth: (1) the background and education of the expert; and (2) the expert's employment history and any relationship or affiliation the expert has or has had with any party or Competitor. If a party, who designates information as Highly Confidential, files or serves on counsel for the disclosing party, within five business days after receipt of the Confidentiality Acknowledgment, an objection to disclosure of Highly Confidential Information to a particular expert and a motion for protective order preventing such disclosure, the disclosing party shall not disclose Highly Confidential Information to such expert until the court has denied such motion.

10. In the event any document is produced that the producing person later claims is protected by attorney-client privilege, work product doctrine or other privilege or immunity, the receiving party shall, within five (5) business days of receipt of a written request by the producing person, return the original to the producing person, destroy all copies thereof, as well as, all notes, memoranda or other documents that summarize, discuss or quote the document, and delete any copy of the document, or any portion thereof, from any word processing or data base tape or disk it maintains.

Production of privileged work-product-protected or otherwise immune documents in the course of discovery in this action shall not constitute a waiver of any privilege, work product protection or immunity, either as to the produced document or as to any other documents or communications, provided that the producing party asserts a claim of inadvertent production in writing to the receiving party with fifteen (15) days of the discovery of the inadvertent production. Return of a document for which the producing person has asserted a claim of privilege, work-product-protection, or immunity under this paragraph shall be without prejudice to the receiving party's right to seek an order from the Court directing production of the document on the ground that the claimed privilege, work product protection or immunity is invalid or inapplicable, provided, however, that mere production of the document in the course of this action shall not be a ground for asserting waiver for the privilege, protection or immunity. Inadvertent failure to designate any information pursuant to this Protective Order shall not constitute a waiver of any otherwise valid claim for protection, so long as such claim is asserted within fifteen (15) days of the discovery of the inadvertent failure. At such time, arrangements shall be made for the return to the designating person of all copies of the inadvertently mis-designated documents and for the substitution, where appropriate, of properly labeled copies.

11. This Order is entered solely for the purpose of facilitating the exchange of information between the parties to this action without involving the Court unnecessarily in this process. Nothing in this Order, nor the production of any documents or disclosure of any information pursuant to this Order, shall be deemed to have the effect of (i) an admission or waiver, including waiver under the rules of evidence, by any party or other

subscriber to this Order; (ii) altering the confidentiality or nonconfidentiality of any such information; or (iii) altering any existing obligation of any party or other subscriber, or the absence of such obligation.

12. Nothing herein shall be taken as indicating that any document or information designated as Confidential Information is entitled to confidential treatment. If the receiving party desires to disclose Confidential Information to a non-qualified person, or if it disagrees with the confidentiality designation by the producing person, then the receiving party shall so notify counsel for the producing person in writing. Counsel for the producing person and the receiving party shall first try to resolve such dispute within five (5) business days after receipt of the receiving party's notice. If the dispute cannot be resolved, the party seeking such disclosure, upon no fewer than three (3) business days' written notice to the producing person may, by specifying the basis on which it claims that such designation is improper or that such disclosure is appropriate, seek a ruling from the Court that the information is not properly designated or that such disclosure may take place because the need for such disclosure outweighs the producing party's interest in limiting the dissemination in the manner set forth in Paragraph 5 of this Order. Pending a determination by the Court, such information shall be treated under this Order as Confidential Information as designated by the producing person.

13. No party shall be obligated to challenge the propriety of a confidentiality designation, and a failure to do so shall not preclude a subsequent attack on the propriety of such designation. This Order shall be without prejudice to the right of any party or other subscriber to this Order (i) to bring before the Court at any time the question of whether any particular document or information is Confidential Information or whether

its use otherwise should be restricted or (ii) to present a motion to the Court under rule 26(c), Fed. R. Civ. P., for a separate protective order as to any such particular document or information, including restrictions differing from those specified herein. This Order shall not be deemed to prejudice any party in any way in any future application for modification of this Order.

14. All documents, including pleadings, motions, and other papers, containing Confidential Information that are filed with the Court shall be filed in a sealed envelope or other appropriate sealed container on which shall be endorsed the title of this action, the word "CONFIDENTIAL," and a statement substantially in the following form:

FILED UNDER SEAL

By order of the Court, entered on [date], this envelope is to remain sealed, and the Clerk of the Court shall not reveal the contents thereof to any person until further order of this Court.

All information subject to confidential treatment in accordance with the terms of this Order that is filed with the Court, and any pleadings, motions or other papers filed with the court disclosing any Confidential Information, shall be filed and kept under seal until further order of the Court. Where possible, only confidential portions of filings with the Court shall be filed under seal.

15. The parties, and any non-party that signs this Order and produces information subject to this Order, shall attempt to agree upon procedures to prevent disclosure of Confidential Information at any hearing or trial, shall, prior to such hearing or trial, submit such proposed procedures to the Court for its approval or modification, and shall submit any disputes relating thereto to the Court for its resolution.

16. If Confidential Information in the possession, custody or control of any

receiving party is sought by subpoena, request for production of documents, interrogatories, or any other form of discovery request or compulsory process, including any form of discovery request or compulsory process of any court, administrative or legislative body, or any other person or tribunal purporting to have authority to seek such information by compulsory process or discovery request, including private parties, the receiving party to whom the process or discovery request is directed, shall (i) on or before the second business day after receipt thereof, give written notice by hand or facsimile of such process or discovery request together with a copy thereof, to counsel for the producing person; (ii) cooperate to the extent necessary to permit the producing person to seek to quash or modify such process or discovery request; and (iii) not make production or disclosure of such Confidential Information until the producing person consents in writing to production or the receiving party is required by a court order to produce such Confidential Information, so long as the order is not stayed prior to the date set for production or disclosure.

17. Upon final termination of this action, including all appeals, all parties and experts and consultants shall (i) at the option of the producing person, return to the producing person or destroy all originals of material produced and designated as Confidential Information and all identical copies, whether in whole or in part, of such documents, and (ii) destroy all copies thereof, as well as, all notes, memoranda or other documents that summarize, discuss or quote materials produced and designated as Confidential Information, except that, with respect to word processing and data base tapes and disks, they shall destroy or erase such tapes or disks to the extent practicable. Outside counsel for each party shall be entitled to retain copies of any documents that

have been filed with the Court or admitted into evidence and that contain or refer to information designated as Confidential Information, provided that all such documents shall remain subject to this Order. Counsel of record for the parties shall certify in writing to each producing person that the foregoing has been complied with.

18. Except as specifically noted herein, this Order shall not limit a producing person's use of its own Confidential Information, nor shall this Order limit the ability of a party to disclose any document to its author or to anyone identified on the face of the document as a recipient.

19. This Order shall survive and remaining full force and effect after termination of this action.

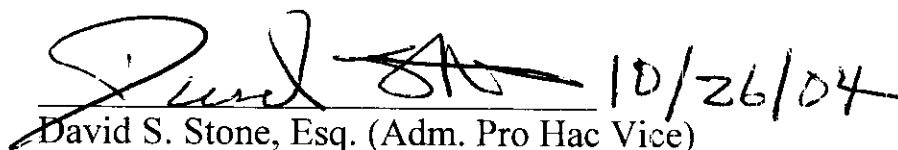
DATED: October 29, 2004

SO ORDERED:



~~Hon. Robert C. Jones~~
UNITED STATES MAGISTRATE JUDGE

Respectfully Submitted,

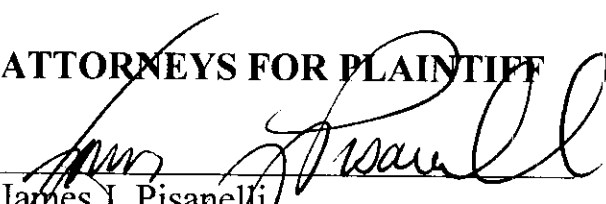


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ATTORNEYS FOR DEFENDANT

EXHIBIT A

Form of Nonparty Agreement and Acknowledgement to
Be Bound by Protective Order

[Name of nonparty] hereby acknowledges that he/she has read and agrees to be bound by all the terms of the attached Protective Order, dated October ____, 2004, in the action captioned: THE SCO GROUP, INC. v. AUTOZONE, INC., Civil No. CV-S-04-0237-RCJ-LRL. [Nonparty] further agrees to consent to the jurisdiction of the United States District Court for the District of Nevada for purposes of enforcement of the Protective Order.

DATED: _____, 2004

NAME AND ADDRESS OF NON-PARTY:
