IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MISSOURI
EASTERN DISTRICT

DAVIDSON & ASSOCIATES, INC., D.B.A. BLIZZARD ENTERTAINMENT, and VIVENDI UNIVERSAL GAMES, INC., Plaintiffs v. INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS, ROB CRITTENDEN, YI WANG and JOHN DOES 1-50, Defendants.	Case No. 4:02CV498CAS

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS AND ROB CRITTENDEN'S MOTION TO TRANSFER VENUE

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I. INTRODUCTION

Blizzard's Memorandum in Opposition to Defendants' Motion to Transfer ("Opposition") is more remarkable for what it admits than for what it denies.

Blizzard admits that the very form contracts that it drafted and now asserts against the Defendants require that not only the contract claims, but all of the claims asserted by Blizzard, be transferred to the Central District of California. The case law of this Circuit is clear that, when the parties to a purported contract specify the forum in which their disputes are to be resolved, those disputes should be resolved in the specified forum.

Blizzard also admits that the proposed transferee district – the Central District of California – is its home district. Blizzard's two corporate headquarters are both in the Central District of California, all of its identified witnesses are in the Central District of California, and all of its development and marketing activities at issue in this case took place in the Central District of California. These undisputed facts reveal the fallacy of Blizzard's assertion that its convenience is somehow best served by litigating this case almost two thousand miles to the east in St. Louis.

Blizzard further admits that Mark Baysinger, the key third-party witness, could not be compelled to testify in this Court, but could be compelled to testify in the Central District of California. Nor does Blizzard dispute that Mr. Baysinger would find the Central District of California far more convenient even if he is willing to testify in this case: whereas he could drive to the federal courthouse in Los Angeles in an hour or two, he would have to purchase a ticket, fly in an airplane across two time zones, and secure hotel accommodations in downtown St. Louis in order to testify at a trial in the Eastern District of Missouri.

Rather than address these overwhelming admissions, Blizzard's Opposition

California;

3. Blizzard's corporate headquarters, all of its material employees, and all of its material marketing and engineering activities are located in the Central District of California;

In the Eighth Circuit, these facts compel the conclusion that the Central District of California is the preferred forum. In the seminal case in this Circuit on section 1404(a) motions to transfer, *Terra International, Incorporated v. Mississippi Chemical Corporation*,[1] the district court granted a motion to transfer the case from Iowa to Mississippi. Despite its conclusion that neither the "convenience" factors nor the "interest of justice" factors tipped decidedly in either Iowa or Mississippi's favor, the district court nevertheless granted the motion based on the presence of what it found to be an unambiguous forum selection clause in the defendant's license agreement with the plaintiff.[2]

On appeal, the Eighth Circuit affirmed, even though: (1) the Court found that "the clause is ambiguous" as to the types of claims the clause covers; and (2) the Court "tend[ed] to believe that the convenience factors weigh in favor of an Iowa forum."[3] The Court held that neither one of these considerations could ultimately "outweigh the significance of the agreed-upon forum selection clause," because "a forum selection clause 'is a significant factor that figures centrally in the district court's calculus' in a motion to transfer."[4]

If anything, the facts of this case weigh even more heavily in favor of a transfer

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[1] 119 F.3d 688 (8th Cir. 1997).

[2] *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 922 F. Supp. 1334, 1387 (N.D. Iowa 1996).

[3] *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 692, 697 (8th Cir. 1997).

[4] *Id.*

than those in *Terra International*. Like *Terra International*, this case concerns purported contracts drafted by the plaintiffs that include a forum selection clause specifying precisely the venue for resolving any dispute between the plaintiffs and the defendants: "any state or federal court located in the State of California, County of Los Angeles, having subject matter jurisdiction with respect to the dispute between the parties."[5] Moreover, unlike in *Terra International*, there is nothing ambiguous about the types of claims that fall within the scope of the clauses: the clauses explicitly apply to "any claim asserted in any legal proceeding by one of the parties against the other."[6]

Nor is there any doubt that the "convenience factors" weigh heavily in favor of the proposed transferee forum. Blizzard does not even address, let alone dispute, that the Central District of California is the location of its corporate headquarters and is therefore its "home district." It does not dispute that each of its potential witnesses identified in its initial discovery responses – Mike Morhaine, Brian Fitzgerald, Matthew Versluys, Robert Bridenbecker, Tony Tribelli, James Anhalt, Neal Hubbard, Stuart Weiss, Paul Sams, Rod

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[5] Plaintiffs' Second Amended Complaint Ex. E.

[6] Although not addressed by the Eighth Circuit in its affirmance on appeal, the district court in *Terra International* held that whatever burden borne by a party moving for transfer shifts where, as here, there is a forum selection supporting the transfer. *See Terra International,* 922 F. Supp. at 1387 ("In these circumstances, the court does not find it inappropriate for [plaintiff] Terra to bear the burden of showing why it should not be bound by a forum selection clause to which it agreed, in that forum selection clause is applicable to the claims Terra asserts. To hold otherwise would allow a party to escape a forum selection clause to which that party has agreed simply by winning the race to the courthouse. Such a result is inappropriate in light of the Supreme Court's general recognition of the applicability of forum selection clauses except in cases of 'fraud, influence, or overweening bargaining power.'") (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995); *M/S Bremen v. Zapata Off-Shore Co.*, 207 U.S. 1, 12-13 (1972)). Other courts have agreed. *See, e.g., In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989); *Cable-La, Inc. v. Williams Communs., Inc.*, 104 F. Supp.2d 569, 574-75 (M.D.N.C. 1999); *Huntingdon Eng'g & Env'l v. Platinum Software Corp.*, 882 F. Supp. 54, 57 (W.D.N.Y. 1995); *Shaw Group, Inc. v. Natkin & Co.*, 907 F. Supp. 201, 205 (M.D. La. 1995).

Rigole and Eric Roeder – all work in the Central District of California or elsewhere in California. And it does not dispute that Mark Baysinger, the founder of the "bnetd" software project charged in this case and the key potential third-party witness identified so far by either party, lives less than 100 miles from the Central District of California but almost 2000 miles from the Eastern District of Missouri.

B. BLIZZARD'S OPPOSITION TO TRANSFER DISTORTS THE RELEVANT LAW AND FACTS

Rather than addressing these facts, Blizzard distorts the issues made relevant by these facts. According to Blizzard, its convenience "is not an issue" because it wants to litigate this suit in this district.[7] But of course the issue is not simply whether the plaintiffs find the transferor district convenient for litigating the case. Rather, the Court must determine whether the "balance" of the parties' and witnesses' convenience between the transferor district and the proposed transferee district favors a transfer. Not once does Blizzard explain how the very district in which its headquarters, employees, documents, and computer files are located (the Central District of California) could

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[7] Curiously, at the same time as Blizzard urges its willingness and the willingness of it employees to litigate in St. Louis as a proxy for the "balance of convenience" test, it contend that Mr. Jung's willingness to travel to Los Angeles – as required under the forum selection clause – not be considered. This of course ignores the established view that a defendant's personal residence in the transferor district in no way precludes a transfer if a transfer is warranted by other factors. *See, e.g., Brown v. Woodring*, 174 F. Supp. 640 (M.D. Pa. 1959). Moreover, Blizzard's professed willingness to travel to St. Louis has no bearing on the numerous former employees responsible for writing the most relevant portions of the Battle.net computer code at issue in this case, such as Mike O'Brien, the lead programmer, original creator and architect of Battle.net. *See* 7/1/03 Grewal Decl. Ex. A at 1.

Plaintiffs also suggest Mr. Combs and Mr. Crittenden would somehow find St. Louis more convenient than Los Angeles because the trip to St. Louis "is obviously shorter for each than the trip to California." Opposition at 6. But as held in *Versosol B.V. v. Hunter Douglas, Inc.*, 806 F. Supp. 582, 593 (E.D. Va. 1992), the relative convenience of travel to one location versus another is not a factor when either location would require significant travel.

possibly be less convenient to it than a district almost two thousand miles away in which its only discernible presence consists of local counsel to this case.

Just as incredible as Blizzard's claim to greater convenience in St. Louis is Blizzard's further contention that St. Louis is the "nexus of the conduct complained of," because St. Louis is the "center" of Defendants' infringing activity. First, Blizzard provides absolutely no factual basis for this assertion, either in the form of a declaration or affidavit. Second, this contention fundamentally misrepresents the nature of the Defendants' bnetd software development project. The bnetd project is not, as Blizzard suggests, a small group of individuals centered in one geographical location and focused on one development task. It is, like other open source software projects, a non-profit cooperative effort of many different computer hobbyists located all around the country and around the world to develop different aspects of a computer program.[8] Because these hobbyists work for free and are scattered around the globe, open source projects often use the Internet as a way of rendering the location of any and all the hobbyists entirely irrelevant.

In this case, none of the software development took place in St. Louis. Blizzard concedes this, as it must, because the only witness identified in connection with St. Louis is Tim Jung, and Mr. Jung never wrote any code as part of the design or development of the bnetd server program.[9] The only "conduct" that Blizzard can point to that is tied to

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[8] "Open source" software does not mean unlicensed or unauthorized access to source code. It refers to a method of developing and licensing software that improves the reliability and quality of the software by encouraging programmers to grant unfettered access to their source code. With this access, other members of the software community can provide independent peer review of the source code that is more exacting and creative than any review they might obtain from within a closed organization. *See* 7/1/03 Grewal Decl. Ex. B.

[9] *See* 7/1/03 Grewal Decl. Ex. C at 3-6. In addition, as Blizzard concedes, the two

St. Louis is the presence at one time of certain computer code files stored on the computers of Defendant Internet Gateway, Inc. But even this connection to St. Louis is tenuous. Since the filing of this lawsuit, Internet Gateway, Inc. has removed all of the files related to the bnetd source code. In addition, Internet Gateway, Inc. has already produced all of these files to Blizzard. Moreover the former presence of files relevant to a litigation is hardly the "conduct" at issue in the litigation. The "conduct" at issue is the development of the bnetd code itself, and as discussed above that development took place in locations around the world, not specifically in St. Louis.

Moreover, the bnetd project code files are not unique to St. Louis; they are also located on computers in many other locations around the world. In contrast, the files of Blizzard's Battle.net server application – which lies at the heart of each of Blizzard's claims – are not only stored in a unique location but were developed, marketed and sold from that same location: Irvine, California, in the heart of the Central District of California.[10]

Finally, Blizzard makes much of the fact that at one time Mark Baysinger – the key third-party witness – offered in an email to testify on behalf of the Defendants.[11] Yet Blizzard fails to explain how Mr. Baysinger could be compelled to testify in St. Louis if this motion were denied and he were to change his mind at any point. Instead, Blizzard challenges the assumption that Mr. Baysinger will not testify voluntarily in this District,

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Defendants who did write computer code for the bnetd project, Ross Combs and Rob Crittenden, have no ties to St. Louis.

[10] 7/1/03 Grewal Decl. Ex. D at 3.

[11] This email, of course, is hearsay lacking any authentication whatsoever, by declaration or otherwise. As such, it is inappropriate for consideration by this Court.

without denying that this very Court made the very same assumption in *Biometics*.[12] According to Blizzard, because Mr. Baysinger's testimony would somehow be "peripheral", Defendants could alternatively and reasonably rely on a deposition or affidavit from Mr. Baysinger in the event he does not wish to testify. But nowhere does Blizzard address the key facts that establish the importance of Mr. Baysinger's testimony:

1. Mr. Baysinger founded the bnetd software project accused in this case;

2. Mr. Baysinger is believed to have negotiated with Blizzard regarding the use of the project code in 1998 and subsequently endorsed the Defendants' further development of the bnetd software project;

3. Mr. Baysinger likely understands the history, structure and operation and thus the noninfringing nature of the very software code targeted by each Blizzard's allegations in this case.

This stands in marked contrast to those witnesses in *Biometics* described by the Court as "not key witnesses, as they would testify only about using the accused product" rather than "whether the accused project infringes."[13]

Blizzard then distorts the law that governs this motion by asserting that "under controlling Eighth Circuit authority" the forum selection clause "applies only to the breach of contract cause of action in the complaint, and not to the multiple federal statutory claims."[14] Blizzard notes that in *Terra International*, the Court determined

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[12] *See Biometics, LLC v. New Women, Inc.*, 112 F. Supp.2d 869, 876 (E.D. Mo. 2000) (Shaw, J.) ("The Court will assume the three identified non-party witnesses would not voluntarily appear at trial in Illinois.").

[13] *Id.*

[14] Opposition at 4. Blizzard thus appears to concede that, at a minimum, its breach of contract claims do not belong in this District and should therefore be severed and transferred to the Central District of California. *See Toro Co. v. Alsop*, 565 F.2d 998, 1000-01 (8th Cir. 1977).

whether the plaintiff's tort claims fell within the scope of the parties' forum selection clause "under three different tests adopted by other courts."[15] What Blizzard fails to note, however, is that the Court applied those three different tests because the particular clause at issue – which provided the venue for "any dispute or disputes arising between the parties hereunder" – was ambiguous as to whether tort claims related to the contract providing the clause arose "hereunder" and thus fell within scope of the clause. Accordingly, the Court turned to three separate tests for determining the relationship between contract claims and tort claims.[16]

Here, there is no dispute about the scope of each forum selection clause: on its face each applies to "any claim asserted in any legal proceeding by one of the parties against the other."[17] Clearly, "any claim" says what it means, and means what it says. As the Court in *Terra International* explained, whether the claims at issue "are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case."[18] Thus, the wording of the particular clauses in the contracts asserted by Blizzard resolves any doubt that the clauses apply to all of Blizzard's claims.

Blizzard also ignores the reality of its own complaint by arguing that its contract claims are somehow "ancillary" to other claims. Each and every one of the 122 numbered paragraphs in Blizzard's Second Amended Complaint addresses the activities

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[15] Opposition at 4.

[16] *Terra International*, 119 F.3d at 693-95.

[17] As the Defendants noted in their moving papers, by pointing to the forum selection clauses that are present in the purported contracts asserted by Blizzard, the Defendants do not concede in any way that the contracts are otherwise enforceable.

[18] *Id.* at 693 (*quoting Berrett v. Life Ins. Co. of the Southwest*, 623 F. Supp. 946, 948-49 (D. Utah 1985)).

that Blizzard accuses of violating the contracts' prohibitions against "anti-disassembling", "decompiling", "reverse engineering", "no-hosting", "matchmaking", "emulating" and "no-commercial exploitation."[19] And each of trademarks and copyrights at the heart of Blizzard's claims for trademark infringement, copyright infringement, and violations of the Digital Millenium Copyright Act are allegedly licensed by these supposed "ancillary" contracts.[20]

As a final stab at saving itself from its own forum selection clauses, Blizzard cites to *Stewart* for the proposition that such clauses "do not control the determination" of a section 1404(a) motion.[21] Blizzard fails, however, to cite to the Eighth Circuit's discussion of *Stewart* in *Terra International*, which – as discussed by Defendants in their moving papers – notes (and repeats) that a forum selection clause is nevertheless a "significant factor that figures centrally in the district court's calculus."[22] Thus, by encouraging the Court to give no significance to the plain language of forum selection clauses that it drafted and that unquestionably require a transfer of this case to the Central District of California, Blizzard encourages nothing less than plain error.

Relying upon the Eight Circuit's decision in *McGraw-Edison Company v. Van Pelt*, Blizzard's Opposition ultimately asks the Court to sweep aside all of the factors

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[19] *See* Second Amended Complaint, Count VII—BREACH OF END USER LICENSE AGREEMENTS AND BATTLE.NET TERMS OF USE, ¶ 121 ("Blizzard repeats and realleges the allegations set forth in each of the above paragraphs"); ¶ 122 ("Defendants' actions, as stated above, constitute breach of the End User License Agreements and BATTLE.NET Terms of Use entered into or agreed to by Defendants or any of them for each of Blizzard's computer games and its BATTLE.NET service in violation of the laws of the state of Missouri, and of other states, by reason of which Blizzard has suffered and will continue to suffer harm and irreparable injury.").

[20] *See* Plaintiffs' Second Amended Complaint Ex. E.

[21] Opposition at 4 (citing *Stewart Org., Inc. v. Ricoh Corp.* 487 U.S, 22, 32 (1988)).

[22] *Terra International*, 119 F.3d at 691, 697 (citing *Stewart*, 487 U.S. at 29).

strongly supporting a transfer, because the Defendants should have "timely voiced their objection to the convenience of the forum at the inception."[23] But as even a cursory review of *McGraw-Edison* confirms, that case concerned a review of a denial of a motion to transfer sought pursuant to a petition for a writ of mandamus. Applying the "narrow range of scrutiny" appropriate to such an extraordinary petition, the Eight Circuit held simply that the denial was not a "manifest judicial arbitrariness" based on the record before it.[24] The Circuit did not, as Blizzard suggests, establish a limitations period of less than five months for filing a section 1404(a) transfer motion.

Furthermore, the Court in *McGraw-Edison* noted that "there had occurred extensive preparation and expense on the part of the plaintiffs' [local] Nebraska counsel in getting the cases ready for local trial."[25] In addition, the Court noted that the defendant had "invoked the court's time and consideration on motions and other incidents as aspects of a purported moving toward trial there."[26]

The facts of this case could not be any more different. Blizzard has not offered any declaration or other evidence that it has similarly engaged in "extensive preparation and expense" in preparing for trial, and for good reason. After Blizzard agreed to extend the Defendants' time to answer for over eight months, Blizzard amended its complaint

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[23] Opposition at 10.

[24] *McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 363 (8th Cir. 1965).

[25] *Id.*

[26] *Id.* Blizzard also cites to the unpublished decision in *DeBruce Grain, Inc. v. Farmland Mut. Ins. Co.*, No. 90-0428-CV-W-6, 1990 U.S. Dist. LEXIS 15689, at *8 (W.D. Mo. Nov. 16, 1990) for the proposition that a transfer would inconvenience both parties "because they would have to adapt to a new tribunal." This of course is true of any transfer. Here, Blizzard's claim that it would have involve new lawyers in the case makes no sense, when the primary lawyers litigating this case reside in Chicago and could just as easily seek admission *pro hac vice* in the Central District of California as they have in this Court.

not once, but twice. And as Blizzard admits, each time Blizzard amended its complaint, it significantly altered the nature of its case. Blizzard did not file its Second Amended Complaint until November 2002, and secured the Court's permission to add parties and amend its complaint further as late as January 2003. Despite the passing of the deadline to add parties, Blizzard has yet to dismiss Defendant Yi Wang (whom Blizzard apparently has not served) or the various "Doe" defendants.

Blizzard's delay in producing discovery has been even worse. Blizzard did not provide any names of its key employees for this case until January 2003, and has only this week produced many additional names and identifying information in response to interrogatories requesting this information that were served by the Defendants over six months ago.[27] Blizzard initial responses to other interrogatories directed at understanding Blizzard's theory of the case were hopelessly vague, and Blizzard has again only this week supplemented these responses despite its promise to do so months ago.[28] Finally, Blizzard's representation in its Opposition that its document production to Defendants is "complete" is in fact a misrepresentation. As Blizzard has acknowledged in its correspondence, Blizzard has not completed its production: just last week it finally promised to provide the server and client computer source code that are essential to the preparation of Defendants' expert opinions.[29]

Unlike the defendant in *McGraw-Edison*, the Defendants in this case have not "invoked the court's time and consideration on motions and other incidents."[30] Other

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[27] 7/1/03 Grewal Decl. ¶ 2.

[28] 7/1/03 Grewal Decl. ¶ 2.

[29] 7/1/03 Grewal Decl. Ex. E.

[30] *McGraw-Edison,* 350 F.2d at 363.

than the proposed Case Management Schedule, this motion is the first significant pleading filed by either party in this case. Moreover, the Defendants filed this motion promptly just weeks after Blizzard produced the documents and interrogatory responses that confirmed what Defendants suspected after reviewing Blizzard's Second Amended Complaint: the Central District of California would provide the most appropriate forum for resolving this litigation.

III. CONCLUSION

Blizzard's Opposition to the Defendants' motion to transfer defies both common language and common sense. When Blizzard drafted the language of its forum selection clauses, it made clear that

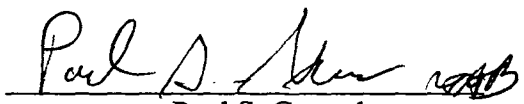
> "any claim asserted in any legal proceeding by one of the parties against the other shall be commenced and maintained in any state or federal court located in the State of California, County of Los Angeles, having subject matter jurisdiction with respect to the dispute between the parties."

Having forced these terms on consumers like the Defendants, and countless others, Blizzard should not be permitted simply to ignore the terms at its whim. Because the jurisdiction required by the clause is in fact the home district for Blizzard, its employees, its development and marketing activities and its records, Blizzard's efforts to escape its own words are especially unjustified. Having suffered Blizzard's consistent delays in discovery and uncovered the evidence that confirms the wisdom of a transfer, the Defendants have established that a transfer would serve "the convenience of the

parties and witnesses, in the interest of justice." Accordingly, the Defendants' motion to transfer should be granted.

Dated: July 2, 2003

Respectfully submitted,

By: 
Paul S. Grewal

Robert M. Galvin, *pro hac vice*
Paul S. Grewal, *pro hac vice*
Richard C. Lin, *pro hac vice*
Day Casebeer Madrid & Batchelder LLP
20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014
(408) 873-0110

Jason M. Schultz, *pro hac vice*
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333

Matthew Braunel (109915)
Mark Sableman (4244)
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101-1611
(314) 552-6000

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 2003 a true and correct copy of REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS AND ROB CRITTENDEN'S MOTION TO TRANSFER VENUE was served via facsimile and first-class mail, postage prepaid upon:

Carol Anne Been
Gerald E. Fradin
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, IL 60606
Facsimile: (312) 876-7934

Stephen H. Rovak
Kirill Abramov
One Metropolitan Square
Suite 3000
ST. Louis, MO 63102
Facsimile: (314) 241-5959

Matt Be