IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

AGIS SOFTWARE DEVELOPMENT, LLC, *Plaintiff*, v. ZTE CORPORATION, ZTE (TX), INC., ZTE (USA) INC., *Defendants*.	§ § § § § § § § § § §	**CIVIL ACTION NO. 2:17-CV-00517-JRG**

ORDER GRANTING MOTION TO TRANSFER FOR IMPROPER VENUE

Before the Court is Defendants ZTE (TX) Inc.'s and ZTE (USA) Inc.'s Motion to Dismiss Plaintiff's Amended Complaint for Improper Venue or in the Alternative to Transfer (the "Motion") (Dkt. No. 38.) Having considered the Motion, the Court is of the opinion that the Motion should be **GRANTED** and the case **TRANSFERRED** to the Northern District of California in the interests of justice for the reasons set forth herein.

I. BACKGROUND

AGIS Software Development, LLC, ("AGIS") filed its Complaint on June 21, 2017, accusing Defendants ZTE Corporation ("ZTE"), ZTE (TX) Inc. ("ZTX"), and ZTE (USA) Inc. ("ZTA") (collectively, the "ZTE Defendants") of patent infringement under 35 U.S.C. § 271. (Dkt. No. 1.) ZTX and ZTA filed the instant Motion on November 21, 2017. (Dkt. No. 38.) This Court ordered the above-captioned case consolidated with Lead Case *AGIS Software Development LLC v. Huawei Device USA Inc. et al*., No. 2:17-cv-513 for all pretrial purposes. (Dkt. No. 48.)

During the pendency of this Motion, a sister court in this District addressed the propriety of venue in this District as to ZTA in a separate case. Specifically, in *American GNC Corporation*

v. ZTE Corporation, that Court, applying § 1400(b) pursuant to the Supreme Court's holding in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017), found that ZTA had a regular and established place of business within the meaning of the statute and, thus, that the statutory requirements for proper venue under the special patent venue statue were met. As a result, it denied ZTA's motion to dismiss, in that case. No. 417-cv-620-ALM-KPJ, 2017 WL 5163605, at *4 (E.D. Tex. Oct. 4, 2017). This finding, from the Magistrate Judge, was adopted by the District Court, which conducted *de novo* review of the report and recommendation and overruled ZTA's objections regarding it. No. 4:17-cv-620, 2017 WL 5157700 (E.D. Tex. Nov. 7, 2017).

The basis for this holding was the Magistrate's finding that ZTA has "a dedicated call center in Plano, Texas, with 60 plus dedicated ZTE representatives," which could be properly considered to be a regular and established place of business within the meaning of the statute. 2017 WL 5163605, at *3. ZTA's argument "that because the call center was established in partnership with a third party (iQor), no products are sold from the call center, and the representatives are employed by iQor—not ZTE, the call center does not qualify as a regular and established place of business in the District" was not found to be persuasive. *Id*.

On mandamus petition, the Federal Circuit held that trial court erred in placing the burden on the defendant to demonstrate that venue was improper, finding that, "upon motion by the Defendant challenging venue in a patent case, the Plaintiff bears the burden of establishing proper venue." *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018). The Federal Circuit granted the petition for mandamus on that basis alone and vacated the District Court's denial of ZTA's motion to dismiss for improper venue on that basis. The case was remanded to the District Court "to reconsider ZTE USA's motion to dismiss consistent with this order, placing the burden of

persuasion on the propriety of venue on American GNC." 890 F.3d at 1016. The reconsideration "consistent with" the Federal Circuit's order required the District Court to "give reasoned consideration to all relevant factors or attributes of the relationship in determining whether those attributes warrant iQor's call center being deemed a regular and established place of business of ZTE USA," which the Federal Circuit found "the district court did not do." *Id*. at 1015.[1]

The Defendants in the above-captioned case filed a notice of supplemental authority in support of the instant Motion directing this Court to the holding of the Federal Circuit in *In re ZTE (USA) Inc.* (Dkt. No. 63.) AGIS responded to this notice of supplemental authority, (Dkt. No. 66), and this Court granted leave for both Plaintiff and Defendants ZTX and ZTA to file supplemental briefing addressing the issue of venue in this case. (Dkt. No. 67.) The Parties filed their respective briefing, (Dkt. Nos. 69, 72), and the Court has considered all of the briefing permitted by rule and this Court's orders.

II. DISCUSSION

Venue lies only "in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). "[A]s a matter of Federal Circuit law [], upon motion by the Defendant challenging venue in a patent case, the Plaintiff bears the burden of establishing proper venue." *In re ZTE (USA) Inc.*, 890 F.3d at 1013. "[Section] 1400(b) requires that 'a defendant has' a 'place of business' that is 'regular' and 'established.' All of these requirements must be present." *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017). "[T]he first requirement is that there must be a physical place in the district"; "[t]he second requirement . . . is that the place must be a regular and established place of business"; and "the third requirement . . . is that the regular and established

[1] On remand from the Federal Circuit following the grant of mandamus, the case was stayed pending settlement negotiations. (4:17-cv-620, Dkt. No. 143).

place of business must be the place of the defendant." *Id*. at 1362–63 (internal quotation marks omitted).

In this case, the question of whether ZTA has a regular and established place of business under the special patent venue statute centers around the activities of the iQor call center, located within this District. AGIS's opposition to ZTA's Motion to Dismiss for Improper Venue was largely predicated upon the findings of the District Court in *American GNC Corporation* which were the subject of the Federal Circuit's mandamus action in *In re ZTE (USA) Inc.* (*See id*. at 15–19).

There is no dispute that the iQor call center is a physical place located in this District. There is no dispute that the call center is a regular and established place of business. The dispute is whether the call center is a place of business *of ZTA*. As to this issue, the Court finds that AGIS has failed to properly support its allegation that the call center is such. AGIS's argument amounts to "ZTA engages in its business from iQor located in this District and, therefore, iQor is a regular and established place of business of ZTA." (*Id*. at 4). This is not sufficient to meet the statutory requirements. Indeed, the instructions provided by the Federal Circuit specifically addressing the facts of this particular defendant reveal how this is insufficient. Specifically, the control ZTA exercises over the call center itself and the control ZTA exercised over the employees in the call center, along with ZTA's ratification, if any, of the *place* of the call center are factors which must be considered. *In re ZTE (USA) Inc.*, 890 F.3d at 1015.

AGIS argues that the following facts are sufficient to demonstrate that ZTA has a regular and established place of business within this District pursuant to the Federal Circuit's instruction:

- ZTA established the call center in the District for the purpose of providing customer support services to ZTA customers;

- ZTA provides the call center with materials that explain the operation of and changes to ZTA which the call center uses to train customer service representatives;
- ZTA's customer-facing website advertises a customer support telephone number and a telephone number for online purchase and sales, both of which are automatically routed to the call center;
- Individuals call the call center seeking assistance with, and the call center representatives provide advice about, ZTA's products;
- ZTA employees perform work on behalf of ZTA at the call center; and
- ZTA directs its customer service representatives at the call center to affirmatively contact customers in order to resolve issues and concerns and that the call center customer service representatives research, draft, publish, and approve articles pertaining to Defendants' devices, policies, and procedures.

(Dkt. No. 66 at 2–3). These facts are not sufficient. The record to which AGIS points does not show how ZTE controls the work conducted at the call center, does not show how ZTE controls the call center generally, does not show how ZTE ratifies the call center,[2] and does not demonstrate how the relationship between ZTE and iQor is more intimate and controlling than a traditional arms-length contractual relationship.[3]

[2] To the extent that AGIS argues that routing a phone call to the call center constitutes ratification, that act alone, without more, is insufficient to constitute ratification to the public. If the routing included a statement that, for example, "your call is being transferred to ZTA customer service in Texas," a finding of ratification would likely be proper. Seamless routing with no indication of where the call was being directed to, as here, however, is insufficient.
[3] AGIS requested venue discovery in the event that this Court found venue was improper. While it is certainly the case that venue discovery should be liberally granted, especially given the placement of the burden in proving venue upon the Plaintiff by the holding of *In re ZTE (USA) Inc.*, this request amounts to seeking a "do over." AGIS's request lacks specificity in what it will seek (stating it will generally "further elucidate the relationship between ZTA and its local call service center and/or 'ZTA employee home offices.'"), how this information was not available to AGIS, and why AGIS is unable to address these issues at the time it filed its opposition. This Court will entertain motions for venue discovery where the plaintiff demonstrates that discovery could or will be useful in addressing the issue of venue *and* shows the Court that such discovery is narrowly drawn and properly tailored to open question unable to be addressed by publically available information. *See, e.g.*, *SEVEN Networks, LLC v. Google LLC*, No. 2:17-cv-442-

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