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

AGIS SOFTWARE DEVELOPMENT, LLC,	§	
	§	Case No. 2:17-cv-517-JRG
Plaintiff,	§	
	§	**JURY TRIAL DEMANDED**
v.	§	
	§	
ZTE CORPORATION, ET AL.,	§	
	§	
Defendants.	§	
	§	

PLAINTIFF AGIS SOFTWARE DEVELOPMENT, LLC'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION (DKT. 38) TO DISMISS PLAINTIFF'S COMPLAINT FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

I. INTRODUCTION

Venue is proper over Defendant ZTE (TX), Inc. ("ZTX") because ZTX is incorporated in the state of Texas and resides in this District. Venue is also proper as to Defendant ZTE (USA) Inc. ("ZTA," together with ZTX, "Defendants") because ZTA's admissions establish that it engages in its business at the iQor call center located in this District. Moreover, Defendants have failed to show that transfer to the Northern District of California ("NDCA") is warranted in the interests of justice.

II. VENUE IS PROPER AS TO DEFENDANT ZTX

Defendants' argument that, despite being incorporated in Texas, ZTX does not reside in this District for purposes of venue (Dkt. 51 at 2-3; Dkt. 38 at 14-15) contradicts statute and precedent. Pursuant to 28 U.S.C. § 1400(b), a patent infringement case may be brought against a domestic defendant in the judicial district where the defendant resides. In *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 (2017), the Supreme Court unequivocally explained that "a domestic corporation ***resides*** . . . in its ***State*** of incorporation for purposes of the patent venue statute." (Emphasis added). Consistent with Supreme Court precedent, this Court recently determined that "if th[e] state [where a domestic defendant resides] contains more than one judicial district, the corporate defendant resides in each such judicial district for venue purposes." *Diem LLC v. BigCommerce, Inc.*, 2017 WL 3187473, at *3 (E.D. Tex. Jul. 26, 2017); *see also B.W.B. Controls, Inc. v. C.S.E. Automation Eng'g & Servs., Inc.*, 587 F. Supp. 1027, 1028 (W.D. La. 1984) (same); *Byrnes v. Jetnet Corp.*, 1986 WL 15148, at *1 (D. Neb. June 2, 1986) (same); *Steelcase, Inc. v. Smart Techs., Inc.*, 336 F. Supp. 2d 714, 719 (W.D. Mich. 2004) (same).[1] Because ZTX is incorporated in Texas, it resides in this District.

[1] Defendants' attempt to distinguish *Diem LLC* (Dkt. 51 at 3) falls short. In *Diem LLC*, this Court held that a defendant that was incorporated in Texas resides in each judicial district in the state, including this District, for the

ZTX's arguments to the contrary are unavailing. First, ZTX's reliance on *Stonite Prods., Co. v. Melvin Lloyd Co.*, 315 U.S. 561(1942) is misplaced because the only issue before the *Stonite* court was whether the defendant had a regular and established place of business in the district, not whether the defendant resided in the district . Second, ZTX's argument that because the statutory language of 1400(b) refers to "the district" in the singular ZTX can only reside in the Western District of Texas where it maintains an office (Dkt. 51 at 3) is illogical because "the district" also applies to the second prong of 1400(b)—regular and established place of business—which can be satisfied in more than one district. *See B.W.B. Controls, Inc.*, 587 F. Supp. at 1028. Finally, contrary to Defendants contention, AGIS is not arguing that venue is proper as to ZTA because of ZTX's residence in this District, but rather, that venue is proper as to ZTA because ZTA committed acts of infringement and has a regular and established place of business in this District. *See infra* Section III; Dkt. 46 at 15-20.

Accordingly, venue is proper as to ZTX. *Diem LLC*, 2017 WL 3187473, at *3

III. VENUE IS PROPER AS TO DEFENDANT ZTA

Defendants did not argue in its Motion to Dismiss that the "acts of infringement" requirement of 1400(b) was not satisfied as to ZTA. Dkt. 38 at 15-20. ZTA has, therefore, waived this argument, and its attempt to resurrect it in its Reply fails. *Watson v. Astrue*, 2013 WL 6662828, at *2 (E.D. Tex. Dec. 17, 2013). Nonetheless, AGIS has sufficiently alleged, without contest, that ZTA manufactures, uses, sells, offers for sale, imports, and/or induces the sale of infringing products in this District. *See, e.g.*, Dkt. 32 ¶¶ 22 (ZTA "manufacture[s], use[s], sell[s], offer[s] for sale, and/or import[s]" infringing electronic devices); *id*. ¶¶ 27, 36, 49, 62 (ZTA "instructs its customers [including those located in this District] to infringe through

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purpose of venue, and disregarded the defendant's argument that it had no business presence in the District. *Diem LLC*, 2017 WL 3187473, at *2-3.

training videos, demonstrations, brochures, installations and/or user guides"); *id.* ¶¶ 48, 61 (ZTA "actively, knowingly, and intentionally induc[es] others to directly infringe, either literally or under the doctrine of equivalents, by making, using, offering to sell, selling and/or importing into the United States the Accused Devices and by instructing users of the Accused Devices to perform methods claimed"); *see also Intellectual Ventures II LLC v. Fedex Corp.*, 2017 WL 5630023, at *8 (E.D. Tex. Nov. 22, 2017) (Gilstrap, J.) (an allegation that defendant has done one of the acts that qualify as an act of infringement (i.e., an allegation that the defendant either "makes, uses, offers to sell, []sells any patented invention" or induces such conduct (35 U.S.C. 271 (a)-(b))), "is itself sufficient to establish venue and [the plaintiff] is not required to demonstrate actual infringement by [the defendant]"). Therefore, even if Defendants' untimely argument were to be addressed, AGIS's allegations satisfy the "acts of infringement" requirement of § 1400(b). *See In re Cordis Corp.*, 769 F.2d 733 at 737 (Fed. Cir. 1985); *Intellectual Ventures*, 2017 WL 5630023, at *8.

Defendants' arguments regarding regular and established place of business are incorrect in light of settled facts and law.. ZTA has a regular and established place of business in this District—the iQor call center ("iQor"). Within the last year and after the filing of this suit, this Court has addressed the issue regarding to ZTA's call center. The court in *American GNC* agreed, holding that venue was properly pled in this District as to ZTA because the uncontested allegations showed that ZTA "actually engage[s] in business" at iQor in this District which is sufficient to support venue. *Am. GNC*, 2017 WL 5157700, at *1. The court in *American GNC*, relying on *Cray*, was persuaded by the uncontested allegations showing that ZTA established iQor in this District in order to service its customers here, and that the iQor representatives located at iQor actually *do* service ZTA's customers on behalf of ZTA in this District by

providing customer service and other support to ZTA's customers regarding ZTA's products who call for assistance, making it difficult for ZTA's customers to know whether they are receiving assistance from a representative of iQor or ZTA itself. *Am. GNC Corp. v. ZTE Corp.*, 2017 WL 5163605, at *4 (E.D. Tex. October 4, 2017) *report and recommendation adopted by American GNC*, 2017 WL 5157700. The same is true here, and ZTA has not, and cannot, show otherwise. In an attempt to distinguish its previous losing argument, ZTA improperly chose to inject new facts (which, if taken as true, would not alter the facts **at the time the action was filed**) into a declaration for the first time in its Reply Brief. Dkt 51-2 ¶ 5; Dkt. 38-2 ¶¶ 6, 8-9, 14, 16-18. *See Chrimar Sys., Inc. v. Dell, Inc.*, 2016 WL 9275408, at *1 (E.D. Tex. Feb. 29, 2016) ("This Court has also similarly previously stated that while replies and sur-replies are permitted, the purpose of those briefs are to respond to arguments raised, not to present 'new' information that was known to a party at the time it filed its initial motion. The importance of presenting facts known to a movant in a motion to transfer based upon convenience is particularly important where **the Court must analyze the convenience at the time the action was filed**.") (emphasis added) (citation omitted).

ZTA does not contest that iQor is a physical place located in the District or that iQor is a regular and established place of business in the District (Dkt. 51 at 4-6; Dkt. 38 at 17-20)—two of the three *Cray* factors. *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017) ("*Cray*"). Defendants argue only that iQor is not a regular and established place of business *of* ZTA. Dkt. 51 at 4-6; Dkt. 38 at 17-20. But, based on ZTA's own admissions, ZTA engages in its business from iQor located in this District and, therefore, iQor is a regular and established place of business of ZTA. *American GNC Corp. v. ZTE Corp.*, 2017 WL 5157700, at *1 (E.D. Tex. Nov. 7, 2017) (venue is satisfied if there is a physical place in the district where the defendant

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