

As to the first reason for leave, AGIS’s sur-reply brief contains several misstatements of facts that require correction.² Of note, AGIS incorrectly asserts that AGIS “alleged, *without contest*, that ZTA manufactures, uses, sells, offers for sale, imports, and/or induces the sale of infringing products in this District.” *See* Dkt. No. 52 at 2 (emphasis added). AGIS further incorrectly asserts that “Defendants did not argue in its Motion to Dismiss that the ‘acts of infringement’ requirement of 1400(b) was not satisfied.” *Id.* These allegations are not factually correct. In its opening brief, ZTE clearly states that “*no Defendant* resides, *has committed alleged acts of infringement*, or has a regular and established place of business *in this District*.” Dkt. No. 38 at 1 (emphasis added). Further, Defendants, pursuant to Local Rule 7(a)(1), further clarified: “the Court should dismiss this patent case under 28 U.S.C. § 1406 for improper venue because the **Defendants** do not reside in this Judicial District, **have not committed alleged acts of infringement in this District**, and do not have a regular and established place of business here, as required to support venue under 28 U.S.C. § 1400.” Dkt. No. 38 (emphasis added). In addition, in Defendants’ reply, ZTE unambiguously states that “ZTA also denies any acts of infringement.” Dkt. No. 51 at 4. Accordingly, ZTE respectfully requests leave to file a sur-sur-reply in order to address/correct these factual errors in the record from AGIS’s sur-reply brief.

² AGIS’s sur-reply was filed on Friday, January 26, 2018, and on Monday, January 29, 2018, Defendants first notified AGIS of several factual errors in the sur-reply brief. *See* Exhibit A at 8-9. After several days of negotiations, AGIS eventually agreed to correct certain misstatements with respect to an incorrect sworn attorney declaration, infringement contentions, and one attached exhibit; however, AGIS refused to correct other misrepresentations regarding allegations as to the 1400(b) “acts of infringement.” *Id.* at 7-8. ZTE even suggested that a minor revision would rectify the factual error, by correcting AGIS’s sur-reply to state: “Defendants did not argue in its Motion to Dismiss **argument section** that the ‘acts of infringement’ requirement of 1400(b) was not satisfied as to ZTA. Dkt. 38 at 15-20”) (suggested correction emphasized). *Id.* at 3-5. AGIS still refused to reasonably revise the sur-reply brief with respect to the error of fact. *Id.* at 2-3. Ultimately, Defendants did not oppose AGIS’s partial correction of the sur-reply with respect to the first set of errors, but the second set of errors remain. Exhibit A at 1-3. Defendants submit that AGIS should correct all misrepresentations of fact in the sur-reply brief.

As to the second reason for leave, AGIS's sur-reply brief also contains a new argument regarding the venue elements of 28 U.S.C. § 1400(b), first raised in its sur-reply brief. In this District, a party is prohibited from arguing "new information" in replies and sur-replies. *See Gillaspay v. Dallas Ind. School Dist.*, 278 Fed. Appx. 307, 315 (5th Cir. 2008) ("It is the practice of [the 5th Cir.] to refuse to consider arguments raised for the first time in reply [and sur-reply] briefs"); *see also 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"). Yet, for the first time, in the sur-reply brief, AGIS argues that: "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. No. 52 at 2. AGIS had not argued this point previously, as AGIS's opposition only referenced "acts of infringement as to the Amended Complaint," not infringement as to 1400(b) requirements.³ *See* Dkt. 46 at 15. In ZTE's reply, ZTE responded to AGIS's argument regarding the Amended Complaint, Dkt. No. 38 at 1, but AGIS pivoted in its sur-reply, alleging (erroneously) for the first time that ZTA waived the "acts of infringement requirement of 1400(b)." Because it was not until the sur-reply brief that AGIS (erroneously) argued that the "acts of infringement" requirement of 1400(b), AGIS improperly added a new argument in its sur-reply. Thus, as ZTE had no opportunity to respond to the new argument, ZTE respectfully requests leave to file a sur-reply to address/correct these newly-raised (erroneous) arguments from AGIS's sur-reply.

³ In its opposition brief, AGIS erroneously asserted that "[Defendants] concede[] that ZTA engaged, and continues to engage, in the infringing activities alleged in the Amended Complaint." Dkt. No. 46 at 15. Defendants specifically responded to this argument by AGIS in its reply brief, by explaining, in part: "AGIS incorrectly alleges that 'ZTA does not dispute' infringement---even that it 'concedes that ZTA . . . engage[s] in the infringing activities. This conclusory rhetoric is baseless, at least as Defendants have yet to answer the Amended Complaint, given the pending motion to dismiss and/or to transfer". *See* Dkt. No. 51 at 4.

For these reasons, Defendants respectfully request leave to file a sur-sur-reply (of 3 pages) responding to AGIS's sur-reply, specially addressing the factual errors and newly-made argument.

Dated: February 12, 2018

Respectfully submitted,

/s/ Lionel M. Lavenue

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this February 12, 2018. All other counsel not deemed to have consented to service in such manner will be served via facsimile transmission and/or first class mail.

/s/ Lionel M. Lavenue
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