

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

AGIS SOFTWARE DEVELOPMENT, LLC,	§	
	§	
Plaintiff,	§	Case No. 2:17-cv-00517-JRG
	§	
	§	<u>JURY TRIAL DEMANDED</u>
	§	
v.	§	
	§	
ZTE CORPORATION, ET AL.,	§	
	§	
Defendants.	§	

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ OPPOSED MOTION (DKT. 54)
FOR LEAVE TO FILE A SUR-SUR-REPLY BRIEF IN RESPONSE TO
PLAINTIFF’S SUR-REPLY (DKT. 52) IN OPPOSITION TO DEFENDANTS’
MOTION (DKT. 38) TO DISMISS PLAINTIFF’S COMPLAINT FOR IMPROPER
VENUE OR, IN THE ALTERNATIVE, TO TRANSFER VENUE**

Plaintiff AGIS Software Development, LLC (“AGIS”), by and through its undersigned counsel, hereby submits this response in opposition to Defendants ZTE (TX) Inc. (“ZTX”) and ZTE (USA) Inc.’s (“ZTA” together with ZTX, “ZTE”) Opposed Motion for Leave to File a Sur-Sur-Reply Brief in Response to Plaintiff’s Sur-Reply (Dkt. 52) in Opposition to Defendants’ Motion (Dkt. 38) to Dismiss Plaintiff’s Complaint for Improper Venue or, in the Alternative, to Transfer Venue. By failing to counter AGIS’s allegations in its Amended Complaint that ZTA engaged in acts of infringement sufficient to satisfy 28 U.S.C. § 1400(b), ZTA waived this argument. Just like it is improper for ZTE to attempt to resurrect this argument in its Reply, it is improper for ZTE to attempt or do so under the guise of a Motion for Leave. ZTE’s Motion for Leave is nothing more than a bald attempt to rewind the clock and correct its own error.

A. AGIS's Sur-Reply Is Factually Accurate

AGIS's Sur-Reply correctly states that ZTE did not argue in its Motion to Dismiss that the "acts of infringement" requirement was not satisfied as to ZTA. Dkt. 52 at 2. In its Motion to Dismiss, ZTE separates its improper venue arguments for ZTX and ZTA. Dkt. 46 at 15-20. ZTE argues that ZTX does not satisfy *either* requirement of 1400(b)—that ZTX does not maintain a regular and established place of business in this District *and* that ZTX has not committed acts of infringement in this District. *Id.* at 15-17. Notably, however, the Motion to Dismiss only argues that ZTA does not maintain a regular and established place of business in this District; it did not argue that ZTA has not committed acts of infringement in this District. *Id.* at 17-20. AGIS identified ZTE's failure to address this argument in its opposition (Dkt. 46 at 15), to which ZTE responded for the *first time* in reply that ZTA "denies any acts of infringement" and that AGIS failed to properly allege infringement (Dkt. 51 at 4, 4 n.7). But, as AGIS pointed out in its sur-reply, ZTE waived its argument that the acts of infringement requirement was not satisfied as to ZTA by failing to make such an argument in its Motion to Dismiss, and any attempt to resurrect it in its reply fails. Dkt. 52 at 2-3; *see Gillaspay v. Dallas Indep. Sch. Dist.*, 278 F. App'x 307, 315 (5th Cir. 2008) ("It is the practice of this court and the district courts to refuse to consider arguments raised for the first time in reply briefs").

ZTE's argument that it did not waive its acts of infringement argument as to ZTA (Dkt. 54 at 2-3) fails.¹ Despite failing to cite any authority for its position, ZTE argues that its general statement in its introduction of its Motion to Dismiss (Dkt. 38 at 1) and/or in its Local Rule

¹ ZTE's discussion of a clerical error made in AGIS's sur-reply and declaration of Vincent Rubino (Dkt. 54 at 2 n.2) is irrelevant to the instant motion. As stated in AGIS's *unopposed* motion for leave to file a corrected sur-reply (Dkt. 53), AGIS explained that after being notified by counsel for ZTE that AGIS submitted an incorrect exhibit and cited the incorrect exhibit in the Rubino Declaration, AGIS agreed to correct such clerical error, and in fact did so on February 7, 2018.

7(a)(1) statement of issues (*id.*) that that no Defendant has committed acts of infringement somehow preserves its acts of infringement argument as to ZTA. Dkt. 54 at 2. ZTE is wrong. Pursuant to Fifth Circuit precedent, a point asserted, but “not adequately briefed” is waived. *Chen v. Ochsner Clinic Found.*, 630 F. App’x 218, 228 (5th Cir. 2015); *see also Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.1994) (“A party who inadequately briefs an issue is considered to have abandoned the claim.”); *Watson v. Astrue*, 2013 WL 6662828, at *2 (E.D. Tex. Dec. 17, 2013) (same). It is indisputable that ZTE did not adequately brief the acts of infringement requirement as to ZTA in its Motion to Dismiss, particularly in light of the full briefing on the same issue as to ZTX. *Compare* Dkt. 38 at 17-20 (arguing that neither requirements of the second prong of 1400(b) were satisfied as to ZTX), *with id.* at 15-17 (arguing only that ZTA does not maintain a regular and established place of business in this District). Thus, as AGIS accurately addressed in its sur-reply, ZTE waived this argument.

B. AGIS Made No New Arguments In Its Sur-Reply

AGIS’s arguments in its sur-reply were limited to responses to arguments raised by ZTE in its briefing. Additionally, no new evidence was introduced in the sur-reply. ZTE moved to dismiss for, *inter alia*, improper venue pursuant to § 1400(b). Dkt. 38 at 12-20. The second prong of § 1400(b) provides that venue in a patent infringement case is proper “where the defendant has committed acts of infringement and has a regular and established place of business.” 28 U.S.C. § 1400(b). After setting forth this exact standard in the “Legal Standard” section of its opposition (Dkt. 46 at 9-10), AGIS addressed venue as to ZTA in two sub-sections with clearly delineated headings: 1) ZTA Has Engaged in Acts of Infringement in This District; and 2) ZTA Has a Regular and Established Place of Business in This District. Dkt. 46 at 15. In

the “Acts of Infringement” section, AGIS argues that ZTA does not dispute that it engaged in infringing activities in this District as alleged by AGIS. *Id.*

ZTE’s argument that AGIS asserted for the first time in its sur-reply that ZTA waived the acts of infringement requirement of 1400(b), and thus, ZTE has had no opportunity to respond to this argument (Dkt. 54 at 3) is wrong. As discussed above, in its opposition, AGIS argued that ZTA waived its argument that ZTA did not satisfy the acts of infringement requirement of 1400(b) by arguing “ZTA does not dispute that it has engaged in infringing activities in this District as alleged in the Amended Complaint.” Dkt. 46 at 15. Not only did AGIS make this argument in its opposition (Dkt. 46 at 9), ZTE indeed attempted to rebut AGIS’s argument in its reply (Dkt. 51 at 4 n.7 (“AGIS incorrectly alleges that ‘ZTA does not dispute’ infringement”); *id.* at 4 (“ZTA also denies any acts of infringement)).² In AGIS’ sur-reply, no new argument was made, nor was any new evidence introduced. ZTE does not now get a second bite at the apple to make an argument that it failed to make in its opening brief by making erroneous allegations about the arguments timely and appropriately raised by AGIS. *Gillaspy*, 278 F. App’x at 315.

Accordingly, ZTE’s Motion for Leave should be dismissed in its entirety.

II. CONCLUSION

For the foregoing reasons, AGIS respectfully requests that the Court deny ZTE’s Motion for Leave.

² ZTE also argues that it limited its response to AGIS’s argument to discussion of allegations in the Amended Complaint. Dkt. 54 at 3. This argument ignores the fact that ZTE cannot raise an argument (i.e., that ZTA does not satisfy the acts of infringement requirement) for the first time in reply (*Gillaspy*, 278 F. App’x at 315). Moreover, ZTE cannot submit a motion for leave seeking additional briefing because it is not satisfied with the arguments it made in its original briefing.

Dated: February 26, 2018

BROWN RUDNICK LLP

/s/ Vincent J. Rubino, III

Alfred R. Fabricant

Texas Bar No. 2219392

Email: afabricant@brownrudnick.com

Peter Lambrianakos

NY Bar No. 2894392

Email: plambrianakos@brownrudnick.com

Vincent J. Rubino, III

NY Bar No. 4557435

Email: vrubino@brownrudnick.com

Alessandra C. Messing

NY Bar No. 5040019

Email: amessing@brownrudnick.com

John A. Rubino NY Bar No. 5020797

Email: jrubino@brownrudnick.com

Enrique W. Iturralde

NY Bar No. 5526280

Email: eiturralde@brownrudnick.com

BROWN RUDNICK LLP

7 Times Square

New York, NY 10036

Telephone: 212-209-4800

Facsimile: 212-209-4801

Samuel F. Baxter

Texas State Bar No. 01938000

sbaxter@mckoolsmith.com

Jennifer L. Truelove

Texas State Bar No. 24012906

jtruelove@mckoolsmith.com

McKOOL SMITH, P.C.

104 East Houston Street, Suite 300

Marshall, Texas 75670

Telephone: 903-923-9000

Facsimile: 903-923-9099

**ATTORNEYS FOR PLAINTIFF,
AGIS SOFTWARE DEVELOPMENT, LLC**

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