

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

AGIS SOFTWARE DEVELOPMENT, LLC,	:	
	:	Case No. 2:17-cv-514-JRG
Plaintiff,	:	(LEAD)
	:	
v.	:	
	:	
HTC CORPORATION,	:	JURY TRIAL DEMANDED
	:	
Defendant.	:	
	:	
AGIS SOFTWARE DEVELOPMENT, LLC,	:	
	:	Case No. 2:17-cv-517-JRG
Plaintiff,	:	(CONSOLIDATED)
	:	
v.	:	
	:	
	:	JURY TRIAL DEMANDED
ZTE CORPORATION, ET AL.,	:	
	:	
Defendants.	:	

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT, LLC’S SUR-REPLY
IN OPPOSITION TO DEFENDANTS’ OPPOSED MOTION FOR LEAVE TO
FILE A SUR-SUR-REPLY BRIEF (DKT. 54) IN RESPONSE TO PLAINTIFF’S
SUR-REPLY (DKT. 52) IN OPPOSITION TO DEFENDANTS’ MOTION TO
DISMISS PLAINTIFF’S COMPLAINT FOR IMPROPER VENUE OR,
IN THE ALTERNATIVE, TO TRANSFER VENUE (DKT. 46)**

Plaintiff AGIS Software Development, LLC (“AGIS”), by and through its undersigned counsel, hereby submits this sur-reply 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. 46) to Dismiss Plaintiff’s Complaint for Improper Venue or, in the Alternative, to Transfer Venue. ZTE waived its argument that the acts of infringement requirement of 1400(b) was not satisfied as to ZTA by failing to assert that argument in its opening brief. ZTE’s Motion

for Leave is a veiled attempt to assert an argument that it failed to timely and adequately raise in its opening brief, and thus should be denied.

AGIS's sur-reply is factually accurate and is limited to responses to arguments raised by ZTE in its reply, and ZTE has failed to show otherwise. AGIS's sur-reply accurately explains that ZTE's opening brief does not argue that the acts of infringement requirement is not satisfied as to ZTA (Dkt 46 at 17-20), and ZTE improperly attempted to correct this omission by asserting the argument for the first time in its reply (Dkt. 51 at 4). Thus, as set forth in AGIS's sur-reply, ZTE waived this argument. *See Gillaspay v. Dallas Indep. Sch. Dist.*, 278 F. App'x 307, 315 (5th Cir. 2008).

ZTE mischaracterizes AGIS's opposition to ZTE's motion for leave just like it mischaracterized AGIS's sur-reply in opposition to ZTE's motion to dismiss. AGIS has not and does not admit that ZTE argued the acts of infringement requirement was not satisfied as to ZTA. Rather, AGIS specifically argues that ZTE's general statements in its introduction and in its Rule 7(a)(1) statement are insufficient to preserve an acts of infringement argument as to ZTA. Dkt. 57 at 2-3. Further, contrary to ZTE's contention, ZTE is required to timely and "adequately brief" the acts of infringement requirement or it is waived. *See also Chen v. Ochsner Clinic Found.*, 630 F. App'x 218, 228 (5th Cir. 2015) (a point that is not adequately briefed is waived).¹ Indeed, ZTE recognized this when it argued for nearly a page in its opening brief that the acts of infringement requirement was not satisfied as to ZTX. Dkt. 38 at 15-16. Thus, by failing to raise the same argument with respect to ZTA, ZTE waived it.

Accordingly, AGIS respectfully requests that the Court deny ZTE's Motion for Leave.

¹ Even if ZTE timely and adequately contested the acts of infringement requirement—it did not—an allegation of infringement is sufficient to establish venue is proper. *Intellectual Ventures II LLC v. FedEx Corp.*, No. 2:16-CV-00980-JRG, 2017 WL 5630023, at *7–8 (E.D. Tex. Nov. 22, 2017) (Gilstrap, J.).

Dated: March 12, 2018

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**ATTORNEYS FOR PLAINTIFF, AGIS
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 12, 2018, 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).

/s/ Alfred R. Fabricant

Alfred R. Fabricant