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

AGIS Software Development, LLC,)
Plaintiff,)
v.)
ZTE CORPORATION, ZTE (USA) INC., AND ZTE (TX), INC.,))
Defendants.)

Case No. 2:17-CV-00517-JRG

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE, OR IN THE ALTERNATIVE, TO TRANSFER

Defendants ZTE (USA) Inc. and ZTE (TX), Inc. ("ZTE" and "ZTX," respectively and collectively, "ZTE")¹ submit the attached ruling on a petition for mandamus, in *In re ZTE (USA) Inc.*, No. 2018-113, Dkt. No. 39 (Fed. Cir. May 14, 2018) ("*In re ZTE*"), which recently issued on May 14, 2018 from the Court of Appeals for the Federal Circuit, as supplemental authority that is relevant to Defendants' Motion to Dismiss for Improper Venue or, in the alternative, Motion to Transfer. Case No. 2:17-cv-00517-JRG (consolidated with Case No. 2:14-cv-00517-JRG. No. 57). This ruling on petition for mandamus issued after the last brief in the pending motion, as filed on January 19, 2018, and is directly relevant to disputed issues. *See* Dkt. No. 46.

In re ZTE is relevant to ZTE's pending Motion to Dismiss, because the Federal Circuit has now rejected many of the same arguments that plaintiff AGIS Software Development, LLC ("AGIS") relies upon in opposing the dismissal of this action. In the ruling on the petition for

¹ Defendant ZTE Corporation has not yet been served or appeared, and thus the Motion to Dismiss for Improper Venue or in the Alternative to Transfer is on behalf of ZTX and ZTA only.

mandamus, the Federal Circuit resolved two issues, that (1) the burden of proof for venue is an issue of Federal Circuit law, and (2) that the plaintiff bears the burden of proof on venue issues. *In re ZTE* at 5-10. The Federal Circuit also addressed the district court's analysis for determining whether a place of business belongs to a defendant. *Id.* at 10-13. The Federal Circuit found that:

- "The mere presence of a contractual relationship between iQor and ZTE USA pursuant to which iQor provides call center services to ZTE USA's customers does not necessarily make iQor's call center "a regular and established place of business" *of ZTE USA* in the Eastern District of Texas." *Id.* at 11-12.
- "While iQor's call center 'has more than sixty dedicated ZTE USA customer service representatives,' neither the magistrate judge nor the district court made any findings on the nature of ZTE USA's relationship with those representatives or whether it has any other form of control over any of them. *Magistrate Report*, 2017 WL 5163605, at *4. While the magistrate judge found that ZTE USA 'has at least two full-time employees (supervisors) on site at the call center,' *id.*, the determining factor is whether those employees render the call center 'a place of *the defendant*, not solely a place of the defendant's employee[s],' *Cray*, 871 F.3d at 1363." *Id.* at 12.
- "The magistrate judge did not consider whether ZTE USA itself possesses, owns, leases, or rents the office space for the call center or owns any of the equipment located there. The magistrate judge also made no findings as to whether any signage on, about, or relating to the call center associates the space as belonging to ZTE USA. Finally, the magistrate judge did not make findings regarding whether the location of the call center was specified by ZTE USA or whether iQor would need permission from ZTE USA to move its call center outside of the Eastern District of Texas or to stop working for ZTE USA. *Id.* at 1363–64. These and any other factors relevant to the question of whether American GNC has met its burden to show that the call center was 'of the defendant' should be considered on remand." *Id.*

Dated: May 17, 2018

Respectfully submitted,

/s/ Lionel M. Lavenue

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ATTORNEY FOR DEFENDANTS ZTE (USA) Inc. and ZTE (TX), Inc.

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 May 17, 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.

<u>/s/ Lionel M. Lavenue</u> Lionel M. Lavenue