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

AGIS Software Development, LLC,	)	
***Plaintiff*,**	)	
v.	)	Case No. 2:17-CV-00517-JRG
ZTE CORPORATION, ZTE (USA) INC., AND ZTE (TX), INC.,	)	
***Defendants*.**	)	

RESPONSE IN OPPOSITION TO AGIS'S
<u>MOTION FOR ALTERNATIVE SERVICE</u>

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

Plaintiff AGIS Software Development, LLC ("AGIS") has filed a Motion for Alternative Service ("Motion"), seeking alternative means to serve ZTE Corporation ("ZTE Corp."), in a case currently pending against ZTE (USA), Inc. ("ZTA"), and ZTE (TX) Inc. ("ZTX") (collectively the "Defendants"), but AGIS has not even attempted (not once) to serve the pleading at issue (namely, the Amended Complaint) on ZTE Corp. via the Hague Convention.

Further, the Fifth Circuit is clear that a foreign defendant is entitled to proper service under the Hague Convention, and ZTE Corp. should not be denied the right to correct and proper service. *See Sheets v. Yamaha Motors Corp., U.S.A*., 849 F.2d 179, 185 n.5 (5th Cir. 1988).

AGIS seeks extraordinary relief from this Court—an exemption from serving the Amended Complaint under the Hague Convention— but the issue of service is AGIS's own dilly-dallies. AGIS did attempt to serve the original Complaint via the Hague Convention on ZTE Corp., but AGIS then later filed an Amended Complaint, which rendered the original Complaint a legal nullity. Yet, although the Amended Complaint became the operative pleading, AGIS never served or even attempted to serve ZTE Corp. with the new, amended pleading.

Given the failure by AGIS to attempt to serve the Amended Complaint on ZTE Corp., there is no basis for this Court to consider the requests for alternative service, as none of the alternatives can be justified under the Federal Rules. *See* Fed. R. Civ. P. 4(c)(1). In simple terms, AGIS's unexplained delay in seeking service of the operative pleading undermines its plea for alternative service. Also, AGIS's two requests for alternative means of service—either (1) service on the U.S. Defendants or (2) service on other U.S. counsel—do not comport with Rule 4(h) for service on foreign defendants, and the plea also entirely ignores the distinction between 4(h)(1) and 4(h)(2). For these reasons, this Court should deny AGIS's motion, and it should enforce the proper Hague Convention procedures for foreign service of the Amended Complaint.

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

I. FACTUAL BACKGROUND

On June 21, 2017, AGIS filed the original Complaint, asserting four patents, against two ZTE entities, namely, (1) ZTX and (2) ZTE Corp. Dkt. 1. AGIS then delayed ***several months*** before seeking service of ZTE Corp., a foreign defendant in China. AGIS did not begin the process of serving ZTE Corp. through the Hague Convention in China until approximately August 2017, two months after filing the original Complaint. Dkt. 64 at 1. AGIS then waited another four months—until December 26, 2017—before checking with its vendor on the service of ZTE Corp. Dkt. 64-2. Next, AGIS waited another two months—until February 19, 2018, and eight months in total from the original Complaint filing date—before checking on the service vendor again. Dkt. 64-3. During this period of delay, AGIS never (1) sought to expedite the service process with the Chinese Central Authority; (2) contacted the Chinese Central Authority itself; or (3) sought an explanation from the Ministry of Justice in China regarding the service timeline of the original Complaint (other than hearsay from its own service processor). *Id*.

In the meantime, on September 26, 2017, ZTX (which had been served) filed a Motion to Dismiss AGIS's original Complaint, for (1) failure to state a claim and (2) improper venue, or in the alternative, to transfer. Dkt. 28. Rather than responding to ZTX's motion, AGIS took advantage of Rule 15(a)(1)(B) and amended its Complaint, without leave of Court, on October 17, 2017, Dkt. 32, which was twenty-one days after ZTX's motion. In the voluntary amendment of the original Complaint, which allowed AGIS to avoid responding to ZTX's motion, AGIS added new legal theories of infringement, including a fifth patent, and added new theories against the newly-added ZTE defendant, ZTA. Dkt. 32. Thus, the Amended Complaint mooted ZTX's motion and required an additional round of briefing. This decision to file an Amended Complaint, aimed at keeping Defendants in this inconvenient forum, rendered the original

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

Complaint non-operative and triggered AGIS's obligation to serve the Amended Complaint on all parties in the case. *See King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) ("[an] amended complaint supersedes the original complaint and [thus] renders it of no legal effect").

Next, instead of attempting service ***of the operative*** pleading, that is, the Amended Complaint on ZTE Corp. through the Hague Convention, AGIS then did nothing. AGIS did not contact its service processor in China and did not attempt to effectuate service of the operative pleading (the Amended Complaint). Dkt. 64-3. In fact, AGIS made no attempt of the new pleading at service at all, and instead AGIS waited ***more than six months*** after filing the Amended Complaint to act on it—which was ten months after the original Complaint—and then requested a waiver of service. Further, at that late date (in April 2017), AGIS refused to agree to proper service of the Amended Complaint, as AGIS asserted that no further service activities were needed. AGIS had ample time to serve the Amended Complaint, and indeed, if AGIS had acted to try to serve ZTE Corp. properly, it is possible service would be complete. But, instead, due to inaction by AGIS (and unexcused delay), the lack of service of ZTE Corp. falls squarely on AGIS, not the Hague Convention requirements or even the Chinese Central Authority.

II. STATEMENT OF THE LAW

A summons must be served with a copy of a complaint, under Federal Rule of Civil Procedure 4(c). Fed. R. Civ. P. 4(c)(1). Service of a complaint without the summons is not effective, and likewise, service of a summons without a copy of a complaint is not effective. *See Wright & Miller*, 4A Fed. Prac. & Proc. Civ. § 1093 (4th ed.). Moreover, service of a superseded complaint with summons also does not satisfy Rule 4, because a superseded complaint is "a mere scrap of paper." *Id.* It is clear that an "amended complaint supersedes the original complaint and ***renders it of no legal effect*** unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading." *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994)

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

(emphasis added); *see also Boelens v. Redman homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985); and *Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 345, 440 (5th Cir. 2015).

Rule 4(h)(1)-(2) governs service on a foreign corporation. Rule 4(h) has two options of service--either in the U.S. or outside the U.S. Rule 4 states that a foreign corporation "***must be served***: (1) in a judicial district of the United States," or "(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving [an individual in a foreign country], except personal delivery under (f)(2)(C)(i)." Fed. R. Civ. P. 4(h)(1)-(2) respectively (emphasis added). In turn, Rule 4(f)--through 4(h)(2)--provides that service ***in a foreign country*** may be made "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." Fed. R. Civ. P. 4(f)(1). As an alternative, a court may order service "by other means not prohibited by international agreements," *i.e.*, the Hague Convention. Fed. R. Civ. P. 4(f)(3). However, and notably, Rule 4(f), and the alternative service means, ***does not pertain to service within the United States***. Fed. R. Civ. P. 4(f).

Service of a foreign corporation ***within the*** United States, as through Rule 4(h)(1), does not apply Rule 4(f) and it is time sensitive. Under Rule 4(m), "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—***must dismiss the action*** without prejudice against that defendant." Fed. R. Civ. P. 4(m) (emphasis added). A court may extend the time for service under Rule 4(m) "for an appropriate period" of time, if the plaintiff "shows good cause for the failure" to properly serve within the time limit. *Id*. But, absent a showing of good cause for a delay beyond 90 days, then it is appropriate to dismiss the case for that defendant.

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

WHAT WILL YOU BUILD? | sales@docketalarm.com | 1-866-77-FASTCASE

fastcase®
Smarter legal research.