

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

AGIS SOFTWARE DEVELOPMENT,
LLC,

Plaintiff,

v.

ZTE CORPORATION, ET AL.,

Defendants.

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Case No. 2:17-cv-517-JRG

JURY TRIAL DEMANDED

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT, LLC'S REPLY
IN SUPPORT OF ITS MOTION FOR ALTERNATIVE SERVICE OF DEFENDANT
ZTE CORPORATION PURSUANT TO FED. R. CIV. P. 4(f)(3) (Dkt. 64)**

Plaintiff AGIS Software Development, LLC (“AGIS”) submits this reply in support of its motion for alternative service on Defendant ZTE Corporation (“ZTE Corp.”) pursuant to Federal Rule of Civil Procedure 4(f)(3) (Dkt. 64) seeking an order permitting AGIS to serve ZTE Corp. via its domestic counsel McDermott Will & Emery LLP and Pillsbury Winthrop Shaw Pittman LLP (collectively, “ZTE Corp.’s U.S. Counsel”), or in the alternative, ZTE Corp.’s U.S. wholly owned subsidiary ZTE (USA), Inc. (“ZTE Corp.’s Domestic Subsidiary”)

I. THE REQUESTED ALTERNATIVE SERVICE IS PERMITTED BY RULE 4(f)(3)

Federal Rule of Civil 4(h)(2) governs service of a corporation outside of the United States, like ZTE Corp., and provides service is permitted in any manner prescribed by Rule 4(f) except for personal delivery. Pursuant to Rule 4(f)(3), the Court may authorize service on a foreign defendant by other means not prohibited by international agreement so long as it is reasonably calculated to apprise the defendant of the pendency of the action. *Affinity Labs of Texas, LLC v. Nissan N. Am. Inc.*, 2014 WL 11342502, at *1 (W.D. Tex. July 2, 2014).

Defendants are incorrect that Rule 4(f)(3) only authorizes service outside of the U.S. Dkt. 68 at 4, 8-10. Rather, courts routinely order alternative service on a foreign defendant via its domestic counsel or domestic subsidiaries. *See e.g., Nuance Comms., Inc. v. Abby Software House*, 626 F.3d 1222, 1239 (Fed. Cir. 2010); *Affinity Labs*, 2014 WL 11342502, at *4.

A. Service on ZTE Corp.’s Domestic Subsidiary is Permitted by Rule 4(f)(3)

Serving ZTE Corp.’s Domestic Subsidiary complies with Rule 4(f)(3). *See, e.g., Affinity Labs*, 2014 WL 11342502, at *4. Service on ZTE Corp. via its Domestic Subsidiary is permissible because such service does not transmit documents abroad, and therefore, does not implicate or violate the Hague Convention. Rule 4(f)(3) governs requests for court ordered alternative methods of service and permits service by means other than the Hague Convention.

See Nuance, 626 F.3d at 1239; *Affinity Labs*, 2014 WL 11342502, at *1, 4.¹ Thus Defendants are incorrect that alternative service must comply with Texas's long arm statute and that ZTE Corp. is entitled to service exclusively through the Hague Convention. Dkt. 68 at 11-12.

Service on ZTE Corp.'s Domestic Subsidiary also comports with due process.

Defendants do not contest: (1) the close relationship between ZTE Corp. and ZTE (USA), Inc., a defendant in this action; (2) that ZTE Corp. and ZTE (USA), Inc. share at least two executive officers—Messrs. Cheng and Bell; or (3) that Messrs. Cheng and Bell are on notice of the instant action. Dkt. 68 at 8-11.² Based on these uncontested allegations, service on ZTE Corp. via its Domestic Subsidiary is “reasonably calculated” to apprise ZTE Corp. of the action (to the extent ZTE Corp. is not already aware of the action). *Nuance*, 626 F.3d at 1240. Contrary to Defendants’ contention, AGIS does not argue that ZTE Corp. should be considered served because of its knowledge of the pending lawsuit. Rather, ZTE Corp.’s knowledge of the lawsuit is a factor in ensuring that the method of service requested by AGIS comports with due process. Defendants’ argument that notice of the lawsuit to Messrs. Cheng and Bell is not sufficient to provide “ZTE Corp. with notice of the events and theories” of the case (Dkt. 68 at 10) is unavailing. Due process requires *only* that service on ZTE (USA), Inc. be reasonably calculated to “*apprise*” ZTE Corp. “*of the pendency of the action.*” *Affinity Labs*, 2014 WL 11342502, at *4. The close relationship between ZTE Corp. and its Domestic Subsidiary, including Messrs.

¹ Defendants’ reliance on *Lisson v. ING GROEP N.V.*, 262 Fed. App’x 567 (5th Cir. 2007), *Sheets v. Yamaha Motors Corp., U.S.A.*, 849 F.2d 179 (5th Cir. 1988) (“*Sheets I*”), and *Sheets v. Yamaha Motors Corp., U.S.A.*, 891 F.2d 533 (5th Cir. 1990) (“*Sheets II*”) (Dkt. 68 at 11-12) is inapposite. *Lisson*, 262 F.3d App’x at 570-71 (remanding for analysis of the validity of service on a foreign defendant’s subsidiary in connection with motion for improper service, not for alternative service); *Sheets I*, 849 F.2d at 185, 185.5 (remanding for clarification of sanctions explaining that is no basis for awarding sanctions on defendant who refuses to waive formal service of process pursuant to the Hague Convention); *Sheets II*, 891 F.2d at 537 (explaining in *dicta* that transmittal of documents abroad triggers application of Hague Convention procedures).

² Indeed, based on the uncontested overlap in these key executives and their uncontested knowledge of the instant action, it is reasonably certain that ZTE Corp. is already on notice of the instant action.

Cheng's and Bell's employment at both entities, makes it reasonably certain that if ZTE (USA), Inc. is served with the pleadings, ZTE Corp. will be apprised of the action.

B. Service on ZTE Corp.'s U.S. Counsel is Permitted by Rule 4(f)(3)

In March, the Northern District of Texas permitted alternative service under Rule 4(f)(3) on ZTE Corp. via its U.S. counsel McDermott Will & Emery—the same relief AGIS seeks here—because such method of service “would not require the transmittal of documents abroad, so the Hague Convention would not apply;” and “would provide ZTE Corporation with notice of the action.” *Fundamental Innovation Sys. Int’l, LLC v. ZTE Corp.*, No. 3:17-cv-1827, Dkt. 91 at 11 (N.D. Tex. Mar. 16, 2018). Here, service on ZTE Corp. via its U.S. Counsel is permitted by Rule 4(f)(3) for the same reasons. Defendants do not contest that serving a foreign defendant’s domestic counsel does not transmit documents abroad, and therefore, does not implicate or violate the Hague Convention. Dkt. 68 at 8-11. Defendants also do not contest that ZTE Corp. is in contact with its U.S. Counsel (*id.* at 8-11). Thus, it is reasonable to conclude that, if the U.S. Counsel received the pleadings, they could and would apprise ZTE Corp. of the pendency of the action. *See Fundamental Innovation Sys.*, No. 3:17-cv-1827, Dkt. 91 at 11; *Gramercy Ins. Co. v. Kavanagh*, 2011 WL 1791241, at *1 (N.D. Tex. May 10, 2011).

Defendants argue, without citing to a single authority, that serving ZTE Corp.’s U.S. Counsel is insufficient because neither U.S. Counsel has appeared on behalf of ZTE Corp. in this case. Dkt. 68 at 9. However, due process merely requires that service on ZTE Corp.’s U.S. Counsel will reasonably apprise ZTE Corp. of the instant litigation. *See e.g., Gramercy Ins.*, 2011 WL 1791241, at *1; *Nuance*, 626 F.3d at 1239-1222.³

³ *Nuance* is applicable here because, in that case, the Federal Circuit held that service on defendant’s domestic agent was proper pursuant to Rule 4(f)(3). That the defendant was also personally served in Russia is irrelevant, as the court expressly declined to opine as to the sufficiency of that form of service. *Nuance*, 626 F.3d at 1238-39.

C. AGIS Is Not Required To Demonstrate Justification To Avail Itself of Rule 4(f)(3)

Contrary to Defendants' contention, the overwhelming majority of courts do not require any showing of justification by plaintiffs for seeking alternative service. *See e.g., Canal Indem. Co. v. Castillo*, 2011 WL 13234740, at *2 (W.D. Tex. Mar. 30, 2011); *Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560, 565 (C.D. Cal. 2012). In arguing that "justification" is required Defendants cherry-pick certain facts from the case law cited by AGIS and argue that those facts "justified" the courts' decisions to authorize alternative service. Dkt. 68 at 7. But in each of these cases, the court authorized alternative service because it determined that, based on a totality of the circumstances, the method of service would provide notice to the defendant sufficient to comport with due process. That test is satisfied here, and nothing more is required. *See e.g., Brown*, 285 F.R.D. at 565.

Even if AGIS was required to justify its request for alternative service, the facts of this case warrant granting the request. AGIS provided the Central Authority with the Complaint over ten months ago. Dkts. 64-2; 64-3. The earliest ZTE Corp. will be served is August 2018, but even this date is uncertain because of the Central Authority's practice of purposefully delaying service of U.S. documents. *Id.* Alternative service methods have been found to be appropriate where, like here, the Central Authority has been dilatory in its obligation to effectuate service. *RSM Prod. Corp. v. Fridman*, 2007 WL 2295907, at *3 (S.D.N.Y. Aug. 10, 2007).⁴ Defendants' argument that AGIS is not entitled to alternative service because it has not attempted to serve the Amended Complaint on ZTE Corp. through the Hague Convention (Dkt. 68 at 7) is unavailing. The Complaint is the operative pleading as to ZTE Corp. because an initial complaint is only

⁴ "The Advisory Committee Notes to the sweeping amendments of Rule 4(f) in 1993 plainly contemplated alternative avenues of service when it noted that if the Hague Service Convention procedures are unavailable to a plaintiff, such as when a signatory state is 'dilatory or refuse[s] to cooperate for substantive reasons,' court-directed service pursuant to Rule 4(f)(3) may be available." *Id.*

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