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.	)	

SUR-REPLY IN OPPOSITION TO AGIS'S
MOTION FOR ALTERNATIVE SERVICE

AGIS seeks extraordinary relief from this Court—an exemption from the requirement to serve the Amended Complaint—by seeking alternative means of service.[1] In AGIS's opening brief, AGIS explained that it sought to serve the original Complaint, but AGIS was silent on service of the Amended Complaint. As ZTE responded, AGIS has never even attempted to serve the Amended Complaint, a fatal defect. In its Reply brief, AGIS does not deny that it has never attempted to serve the Amended Complaint, and, for that reason alone, the remedy requested by AGIS (alternative service) should be denied. AGIS must follow the rules for proper service.

Notwithstanding the failure to even attempt service of the Amended Complaint, AGIS asks that this Court overlook controlling law on service, including both Supreme Court and Fifth Circuit, as well as the plain and ordinary meaning of Fed. R. Civ. Pro. Rule 4. The Supreme Court and Fifth Circuit both confirm that even alternative service methods are required to comport with Due Process, including a state's long arm statute, yet AGIS refuses to even consider Texas state law. Also, in error, AGIS seeks service ***within*** the United States under rules specifically limited to service ***outside*** the United States. And lastly, the facts here are significantly different from every case that is cited by AGIS, such that the extraordinary relief that AGIS requests is not justified. For all of these reasons, the Court should deny AGIS's request for the extraordinary relief of alternative service means and require proper service.

I. AGIS HAS NEVER ATTEMPTED TO SERVE THE AMENDED COMPLAINT

AGIS never even attempted service of the operative Amended Complaint here on ZTE Corp. The only complaint that AGIS attempted to serve was the original Complaint, but the original Complaint was rendered ineffective on October 17, 2017, when AGIS amended it. Dkt.

[1] ZTE (USA), Inc. ("ZTA") and ZTE (TX) Inc. ("ZTX") ("Defendants" or "ZTE") submit this Sur-reply, addressing Plaintiff AGIS Software Development, LLC's ("AGIS") Motion for Alternative Service seeking alternative means to serve ZTE Corporation ("ZTE Corp."). ZTE Corp. is not a party, until AGIS has served the Amended Complaint.

32 at ¶¶ 3, 16; and Dkt. 64 at p. 3. By adding (1) several new legal theories, (2) a new defendant, and (3) a new asserted patent—AGIS superseded its original Complaint. *See* Fed. R. Civ. P. 4(c)(1) and *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994). And, because the Amended Complaint does not "specifically refer[ ] to and adopt[ ] or incorporate[ ] by reference the earlier pleading," the original Complaint has "no legal effect." *Id.*; *see also* Dkt. 32. Of note, in its Reply brief, AGIS does not dispute these facts or this law.[2] Dkt. 70 at 4-5; *see also* Dkt. 68 at 3-4. Thus, the original Complaint is "render[ed] [ ] of no legal effect." *King*, 31 F.3d at 346. In the Response brief, Defendants cited a timeline chart on service, Dkt. 68 at 5, and AGIS has not disputed its veacity. Until AGIS attempts service, any plea for alternative means is premature.

II. AGIS FAILS TO DEMONSTRATE A NEED FOR ALTERNATIVE SERVICE

A. AGIS Fails Service under Rule 4(h)

AGIS seeks alternative service within the United States under Rule 4(f)(3) through 4(h)(2); but, these alternatives contradict the plain meaning of Rule 4(h)(2) (and Rule 4(f)). AGIS seeks alternative service ***within*** the United States—on unrelated U.S. counsel or on other U.S. defendants—but Rule 4(h)(2) only provides for service on a foreign corporation "at a place ***not within any judicial district of the United States***, in any manner prescribed by Rule 4(f)."[3] Rule 4(f) is also limited to service "at a place ***not within any judicial district of the United States***." So, AGIS cites the wrong rule for alternative service. For service in the U.S., AGIS

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[2] AGIS attempts to fashion a legal loophole, by arguing that it is not required to serve the Amended Complaint because the initial Complaint is operative until the Amended Complaint "is properly served, not when it is filed." Dkt. 70 at 4-5. AGIS's understanding of 4(c)(1) should not be adopted, at least because it ignores the controlling Fifth Circuit law, that is, that an Amended Complaint supersedes an original Complaint, irrelevant of service, which means AGIS ***never*** properly served the Amended Complaint. Indeed, here, AGIS is required to serve ZTE Corp. with a copy of the correct effective complaint, i.e. the Amended Complaint, but AGIS has so far refused to do so.

[3] AGIS attempts to distinguish 4(h)(1) and 4(h)(2), by arguing that it is serving ZTE Corp. outside the United States by transmitting documents to agents in the United States. Dkt. 70 at 1-3. No matter how much lipstick AGIS puts on the pig, AGIS's desired other means of service are within the United States and thus cannot comply with 4(h)(2).

must use Rule 4(h)(1), which governs service "in a judicial district of the United States." And, Rule 4(h)(1) is limited by the time restrictions of Rule 4(m), so use of Rule 4(h)(1) is untimely.[4]

B. AGIS Fails Service under Rule 4(f)(1)

At one point, AGIS knew that service through the Hague Convention was required. Specifically, AGIS admits that it originally sought "service of ZTE Corp. under Rule 4(f)(1)." Dkt. 70 at 5. Rule 4(f)(1) is for service through the Hague Convention, which entails transmitting service documents abroad. In fact, AGIS admits that it transmitted service documents abroad for the original Complaint, Dkt. 64-3, and acknowledges "transmittal of documents abroad triggers application of Hague Convention procedures." Dkt. 70 at n. 1. AGIS acknowledged it needed to serve the original Complaint through the Hague Convention, "because the service that plaintiff attempted fell squarely within the scope of Hague Convention, [and] insisting on service [as ZTE Corp. does here] pursuant to its provisions was warranted by existing law." *Sheets v. Yamaha Motors Corp. U.S.A.*, 891 F.2d 533 (5th Cir. 1990). The error now is that AGIS has failed to attempt service of the Amended Complaint through Rule 4(f)(1).

III. No Binding Authority Permits Alternative Service under Rule 4(f)(3)

For *arguendo*, we now turn to the relief that AGIS seeks, or alternative service ***within*** the U.S. under Rule 4(f)(3).[5] Contrary to AGIS's arguments, the Supreme Court has not given a plaintiff *carte blanche* to effectuate service as it sees fit. Instead, service on a foreign entity through a domestic agent, as requested here on U.S. counsel and/or U.S.-based defendants, is

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[4] By seeking alternative service under Rule 4(f)(3), AGIS seeks to circumvent the limits of Rule 4(m), by disguising service in the U.S. as form of service "in a foreign country" under Rule 4(h)(2). Dkt. 70 at 5. But, AGIS continues to insist on service ***within*** the U.S., not in a foreign country, Dkt. 70 at 1-3. Thus, AGIS should comply with the time restrictions of Rule 4(m). AGIS filed the Amended Complaint ***seven months ago***, *and* AGIS has not attempted ***any*** service of any kind since then, and AGIS has not provided any reason for the delay, so dismissal is appropriate.

[5] AGIS contends, without context, that "courts routinely order alternative service," Dkt. 70 at 1; however, the cases that are cited by AGIS all incorporate extreme circumstances, none of which are present here. *See* Dkt. 68 at 7-8.

only valid if it comports with ***both state law*** and with the Due Process Clause. *Volkswagenwerk*, 108 S.Ct. at 2112; *see also Lisson v. ING GROEP N.V.*, 262 Fed. Appx. 567, 570 (5th Cir. 2007); *compare* to Dkt. 70 at 2. Here, however, AGIS has not cited any controlling authority, or other case law or state law, finding that service on unrelated U.S. counsel or on U.S.-based defendants satisfies the "domestic agent" requirement, let alone the Due Process notice requirement. *See Volkswagenwerk*, 108 S.Ct. at 2112 ("[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends").

Indeed, the Fifth Circuit offers guidance on the issue of a "domestic agent,"[6] guidance that AGIS ignores. *See* Dkt. 70 at n. 1. In *Sheets II*,[7] the Fifth Circuit reaffirmed that a court must determine whether the state's long-arm statue permits any contemplated service method and comports with the Due Process Clause. *Sheets II*, 891 F.2d at 537 ("[i]n determining whether service [over an agent] involves the transmittal of documents abroad, courts are to look to the method of service prescribed by the internal law of the forum state"); *see also Volkswagenwerk*, 108 S.Ct. at 2108-11 (1988); and *Lisson v. ING GROEP N.V.*, 262 Fed. Appx.567, 570 (5th Cir. 2007). Yet, rather than applying Texas law, AGIS cites to California law. Dkt. 64 at 5-9 and Dkt. 70 at 3-5. Moreover, AGIS refuses to acknowledge that it's requested means of service must comply with Texas's long arm statute, but again, AGIS fails to prove that the options comply with Texas law. *See* Dkt. 68 at n. 3; and Dkt. 70 at 2 ("[t]hus Defendants are incorrect that alternative service must comply with Texas's long arm statute").

1. **AGIS Has No Legal Basis for Alternative Service on U.S. Counsel**

AGIS seeks to serve U.S. counsel in a different case, and for this option, AGIS cites to

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[6] The Eleventh Circuit offers additional guidance in *Codigo*. *See* Dkt. 68 at 6-7.
[7] *See 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*").

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