

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

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

**DEFENDANTS' SUR-SUR-REPLY BRIEF IN RESPONSE TO PLAINTIFF'S SUR-  
REPLY (DKT. 52) IN OPPOSITION TO DEFENDANTS' MOTION (DKT. 38) TO  
DISMISS PLAINTIFF'S COMPLAINT FOR IMPROPER VENUE OR,  
IN THE ALTERNATIVE, TO TRANSFER VENUE**

In accordance with the Court's June 19, 2018 Order,<sup>1</sup> Defendants ZTE (USA), Inc. and ZTE (TX), Inc. ("ZTA" and "ZTX," collectively, "ZTE")<sup>2</sup> submit this Sur-Sur-Reply brief addressing two issues. First, AGIS's Sur-Reply (Dkt. 52) contains factual errors, which AGIS refused to correct. Second, AGIS's Sur-Reply brief includes a new argument not included in AGIS's opening brief (Dkt. 46) based on theories neither relied upon nor disclosed previously.

Both of these issues simply stem from AGIS's erroneous and conclusory rhetoric that blur distinctions between arguing the merits of infringement for a case-in-chief versus arguing the "acts of infringement" requirement of § 1400(b). The "acts of infringement" venue element does not require extensive briefing. *See In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985) ("[t]he issue of infringement is not reached on the merits in considering venue requirements"); *Intellectual Ventures*, 2017 WL 5630023, at \*8. In two errors, AGIS (1) improperly concludes that ZTE's briefing on the "acts of infringement" is deficient and (2) that ZTE does not contest the merits of infringement for the case-in-chief. These two allegations are factually incorrect.

In the opening venue brief (Dkt. 38), ZTE clearly states that "***no Defendant*** resides,<sup>3</sup> ***has committed alleged acts of infringement***, or has a regular and established place of business in this District." Dkt. 38 at 1 (emphasis added). Further, pursuant to Local Rule 7(a)(1), ZTE further clarified: "the Court should dismiss this patent case under 28 U.S.C. § 1406 for improper venue because the ***Defendants*** do not reside in this Judicial District,<sup>4</sup> ***have not committed alleged acts of infringement in this District***, and do not have a regular and established place of business here,

---

<sup>1</sup> On June 19, 2018 this Court granted Defendants' request for leave to file a sur-sur-reply brief in response to the sur-reply brief (Dkt. 52) filed by Plaintiff AGIS Software Development, LLC ("AGIS"), regarding Defendants' Motion to Dismiss Plaintiff's Complaint for Improper Venue, or in the Alternative, to Transfer (Dkt. 38).

<sup>2</sup> ZTE Corporation has not yet been served with the Amended Complaint or appeared in this matter, and the Motion to Dismiss for Improper Venue or, in the Alternative, to Transfer is therefore on behalf of ZTX and ZTA only.

<sup>3</sup> "No Defendant" is defined in the brief as both Defendants ZTE (USA), Inc. and ZTE (TX), Inc.

<sup>4</sup> "Defendants" are again defined in the brief as both Defendants ZTE (USA), Inc. and ZTE (TX), Inc.

as required to support venue under 28 U.S.C. § 1400.” Dkt. 38 (emphasis added). In addition, in the Reply (Dkt. 51), ZTE unambiguously states again that “ZTA also denies any acts of infringement.” Dkt. 51 at 4. Yet, AGIS fails to consider these arguments and twists ZTE’s positions in the Sur-Reply (Dkt. 52), asserting factual errors, which AGIS has refused to correct.

### I. AGIS Refused to Correct Factual Errors in the Sur-Reply

AGIS’s Sur-Reply brief (Dkt. 52) contains misstatements of fact requiring rectification. AGIS overreaches in its Sur-Reply brief, by incorrectly asserting that it “alleged, *without contest*, that ZTA manufactures, uses, sells, offers for sale, imports, and/or induces the sale of infringing products in this District.” *See* Dkt. 52 at 2 (emphasis added). In addition to this incorrect statement on the merits of infringement, AGIS also incorrectly asserts that “Defendants did not argue in its Motion to Dismiss that the ‘acts of infringement’ requirement of 1400(b) was not satisfied.”<sup>5</sup> *Id.* Not only are AGIS’s statements factually incorrect, but they ignore Federal Circuit guidance. As requested by ZTE, these errors should have been corrected by AGIS.<sup>6</sup>

AGIS ignores precedent setting a low threshold for the “acts of infringement” element of §1400(b), by attempting to transform the discussion from “uncontested” briefing to a “lack of adequate briefing.” Dkt. 57 at 2-3. As already addressed, excessive briefing for the “acts of infringement” element is not required. *See In re Cordis Corp.*, 769 F.2d at 737. ZTE argued twice that Defendants do not infringe, yet this is not sufficient for AGIS. AGIS overzealously states in the Sur-Reply (Dkt. 52) that it “alleged, *without contest*, that ZTA manufactures, uses, sells, offers for sale, imports, and/or induces the sale of infringing products in this District.” *See*

---

<sup>5</sup> In fact, eventually under protest, AGIS begrudgingly implies that ZTE *did* contest the “acts of infringement” requirement. *See* Dkt. 57 at 3 (AGIS referencing “[ZTE’s] acts of infringement *argument*”) (emphasis added).

<sup>6</sup> ZTE notified AGIS of these issues (and the additional argument) in the Sur-Reply brief (Dkt. 52). *See* Dkt. 54, Ex. A at 8-9. After several days of negotiations, and a meet-and-confer, AGIS still refused on numerous occasions to correct the issues regarding the erroneous allegations as to the 1400(b) “acts of infringement.” *Id.* at 2-3 and 7-8.

Dkt. 52 at 2 (emphasis added). AGIS's statement is untrue. And, any further briefing by ZTE, as demanded by AGIS, would reach the "merits" of infringement, which is not required of ZTE.

## II. AGIS'S Sur-Reply Includes New Improper Arguments

AGIS's Sur-Reply brief also contains a new argument, which is first raised in the Sur-Reply brief (Dkt. 52) regarding the venue elements of § 1400(b). In the Sur-Reply, AGIS argues that: "Defendants did not argue in its Motion to Dismiss that the 'acts of infringement' requirement of 1400(b) was not satisfied as to ZTA." Dkt. 52 at 2. AGIS had not argued this previously, as AGIS's opposition *only* referenced the "merits of infringement," not "acts of infringement" for 1400(b).<sup>7</sup> See Dkt. 46 at 15. As ZTE had responded to AGIS's original argument regarding the merits of infringement, Dkt. 51 at n.7, ZTE's Reply then confirmed that "ZTA [ ] denies any acts of infringement," Dkt. 51 at 4. Yet, in the Sur-Reply, AGIS alleged (erroneously) for the first time that ZTA had waived the "'acts of infringement' requirement of 1400(b)" (Dkt. 52 at 2), which is demonstrably not true. Not only is the statement wrong, but ZTE provided AGIS an opportunity to correct it--which AGIS refused to do. Dkt. 54, Ex. A. AGIS thus improperly added this inaccuracy in its Sur-Reply,<sup>8</sup> and the Court should strike it.

## III. Conclusion - AGIS Should Correct its Errors, Or the Errors Should be Stricken

In conclusion, in the Sur-Reply brief, AGIS erred and overstepped with (1) erroneous statements regarding ZTE's dispute of infringement and (2) a new argument based thereon. ZTE notified AGIS of these errors and requested correction, but AGIS refused. Therefore, AGIS should correct the errors, or the Court should strike them from the briefing on the current record.

---

<sup>7</sup> In its opposition brief, AGIS erroneously asserted that "[Defendants] concede[ ] that ZTA engaged, and continues to engage, in the infringing activities alleged in the Amended Complaint." Dkt. 46 at 15. Defendants specifically responded to this new argument by AGIS in ZTE's reply brief, denying any such infringement. See Dkt. 51 at 4.

<sup>8</sup> In this District, and indeed in this Circuit (the Fifth Circuit), it is clear that a party is prohibited from arguing "new information" in replies and sur-replies. See *Gillaspy v. Dallas Ind. School Dist.*, 278 Fed. Appx. 307, 315 (5th Cir. 2008) ("It is the practice of [the 5th Cir.] to refuse to consider arguments raised for the first time in reply [and sur-reply] briefs"); see also *Chrimar Sys., Inc. v. Dell, Inc.*, 2016 WL 9275408, at \*1 (E.D. Tex. Feb. 29, 2016).

Dated: June 26, 2018

Respectfully submitted,

/s/ Lionel M. Lavenue

Lionel M. Lavenue

Lionel M. Lavenue (Lead Attorney)

VA State Bar No. 49,005

Bradford C. Schulz

VA State Bar No. 91,057

FINNEGAN, HENDERSON, FARABOW,

GARRETT & DUNNER, LLP

Two Freedom Square

11955 Freedom Drive

Reston, VA 20190

Phone: (571) 203-2700

Fax: (202) 408-4400

ATTORNEYS FOR DEFENDANTS

ZTE (USA) INC. AND ZTE (TX), INC.

# 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.