

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-00517-JRG

JURY TRIAL DEMANDED

**PLAINTIFF'S SUR-SUR-SUR-REPLY IN OPPOSITION TO
DEFENDANTS' MOTION 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 (Dkt. 73), Plaintiff AGIS Software Development, LLC ("AGIS"), by and through its undersigned counsel, hereby submits this Sur-Sur-Reply.

I. AGIS's Sur-Reply Is Factually Accurate

AGIS's Sur-Reply correctly states that ZTE 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. ZTE does not dispute that it in its argument section of its Motion, ZTE fully briefed the acts of infringement requirement as to ZTX, but failed to brief the same requirement as to ZTA. *Compare* Dkt. 38 at 15-16 (Section V.A.2.a, subheading entitled "ZTX has not Committed Acts of Infringement in the District and Does not Maintain A Regular And Established Place Of Business In This District") *with id.* at 17-20 (Section V.A.2.b, subheading entitled "ZTA Does not Maintain A Regular And Established Place of Business In This District"). Rather, ZTE argues that it is not required to fully brief the acts of infringement prong—despite doing so for ZTX—and that general statements in its introduction to its Motion to Dismiss (Dkt. 38 at 1) and/or in its Local Rule 7(a)(1) statement of issues (*id.*) somehow preserve its acts of infringement argument as to ZTA. Dkt. 75 at 1-2. This argument ignores Fifth Circuit precedent that a point asserted, but "not adequately briefed" is waived. *Chen v. Ochsner Clinic Found.*, 630 F. App'x 218, 228 (5th Cir. 2015); *see also Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.1994); *Watson v. Astrue*, 2013 WL 6662828, at *2 (E.D. Tex. Dec. 17, 2013) (same).¹ As AGIS stated in its Sur-Reply, ZTE's general statements do not adequately contest AGIS's allegations that

¹ *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985) and *Intellectual Ventures II LLC v. FedEx Corp.*, No. 2:16-cv-980, 2017 WL 5630023, at *8 (E.D. Tex. Nov. 22, 2017), relied upon by ZTE, provide that the merits of whether a defendant actually infringed—as opposed to whether the acts of infringement prong has been sufficiently plead to defeat a motion to dismiss for improper venue—is determined at trial. *In re Cordis*, 769 F.2d at 737; *Intellectual Ventures*, 2017 WL 5630023, at *8. These cases do not hold, as ZTE contends, that a defendant preserves its acts of infringement argument in a motion to dismiss for improper venue despite failing to fully brief the issue.

ZTA committed acts of infringement in this District. ZTE waived its argument that the acts of infringement requirement was not satisfied as to ZTA by failing to include this argument in the substance of its Motion to Dismiss. ZTE's argument that its passing statements regarding the acts of infringement requirement preserved its argument as to ZTA because there is a "low threshold" for and because "excessive briefing" is not required as to this requirement (Dkt. 75 at 2) is unavailing. To preserve its acts of infringement argument, ZTE was required to provide at least some briefing on this issue (*Chen*, 630 F. App'x at 228), which it failed to do. Moreover, ZTE's position regarding the sufficiency of its briefing as to ZTA is directly contradicted by the fact that ZTE fully briefed the acts of infringement requirement as to ZTX. Accordingly, ZTE waived its argument that the acts of infringement requirement was not satisfied as to ZTA and cannot contest this issue for the first time in its Reply or Sur-Sur-Reply. *Gillaspy v. Dallas Indep. Sch. Dist.*, 278 F. App'x 307, 315 (5th Cir. 2008) ("It is the practice of this court and the district courts to refuse to consider arguments raised for the first time in reply briefs").²

II. AGIS Made No New Arguments In Its Sur-Reply

AGIS's Sur-Reply was limited to responses to arguments raised by ZTE in its briefing. In its opposition, AGIS argued that ZTE waived its argument that ZTA did not satisfy the acts of infringement requirement of § 1400(b) by arguing "ZTA does not dispute that it has engaged in infringing activities in this District as alleged in the Amended Complaint." Dkt. 46 at 15. Indeed, ZTE even attempted to rebut AGIS's argument in its Reply by arguing for the first time that ZTA denies any acts of infringement. Dkt. 51 at 4; *see also id.* at 4 n.7 ("AGIS incorrectly alleges that 'ZTA does not dispute' infringement . . ."). In AGIS's Sur-Reply, AGIS merely

² ZTE's argument that any "further" briefing regarding the acts of infringement prong as to ZTA would reach the "merits" of infringement, which is not required at this stage of litigation (Dkt. 75 at 2-3), is contradicted by its own briefing. ZTE fully briefed the acts of infringement prong as to ZTX (Dkt. 38 at 15-17), but failed to do the same for ZTA (*id.* at 17-20).

restated its position from its opposition (Dkt. 46 at 15) that ZTE did not contest the acts of infringement requirement of § 1400(b) as to ZTA, and therefore, it waived that argument (Dkt. 52 at 2-3). Accordingly, AGIS's Sur-Reply contained no new argument nor was any new evidence introduced.

III. AGIS'S Allegations Satisfy The Acts of Infringement Requirement of § 1400(b)

As AGIS argued in its Sur-Reply, even if ZTE's untimely argument was to be addressed, AGIS sufficiently alleges that ZTA manufactures, uses, sells, offers for sale, imports, and/or induces the sale of infringing products in this District. *See, e.g.*, Dkt. 52 at 2-3 *citing* Dkt. 32 ¶ 22 (ZTA "manufacture[s], use[s], sell[s], offer[s] for sale, and/or import[s]" infringing electronic devices); *id.* ¶¶ 27, 36, 49, 62 (ZTA "instructs its customers [including those located in this District] to infringe through training videos, demonstrations, brochures, installations and/or user guides"); *id.* ¶¶ 48, 61 (ZTA "actively, knowingly, and intentionally induc[es] others to directly infringe, either literally or under the doctrine of equivalents, by making, using, offering to sell, selling and/or importing into the United States the Accused Devices and by instructing users of the Accused Devices to perform methods claimed"). Since "an allegation of infringement-even if contested-is sufficient to establish venue is proper," AGIS's allegations satisfy the acts of infringement requirement of § 1400(b). *Intellectual Ventures*, 2017 WL 5630023, at *8; *see In re Cordis*, 769 F.2d at 737.

IV. CONCLUSION

For the foregoing reasons, AGIS respectfully requests that the Court deny Defendants' motion to dismiss, or in the alternative, transfer.

Dated: July 3, 2018

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