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

AGIS SOFTWARE DEVELOPMENT, LLC, Plaintiff, v. ZTE CORPORATION, ZTE (TX), INC., ZTE (USA) INC., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 2:17-CV-00517-JRG

ORDER

Before the Court is Plaintiff AGIS Software Development, LLC's ("AGIS") Motion for Alternative Service of Defendant ZTE Corporation Pursuant To Fed. R. Civ. P. 4(f)(3) ("the Motion"). (Dkt. No. 64). Having considered the Motion and the relevant authorities, the Court is of the opinion that the Motion should be **DENIED** for the reasons set forth below.

I. Background

On June 21, 2017, AGIS initiated the present patent infringement action against ZTE Corp. ("ZTE"), and its subsidiary ZTE (TX), Inc. (Dkt. No. 1 ¶¶ 7-10). Following commencement of the action, AGIS began the process of serving ZTE, a Chinese company, through the Hague Convention, a process that AGIS represents "was expected to take three to six months." (Dkt. No. 64 at 2; Dkt. Nos. 64-2, 64-3). Through its process server, AGIS provided copies and translations of the Summons and the Complaint to the Central Authority of China, specifically, the Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China ("Central Authority"), for service on ZTE in China. (*Id.*) The Central Authority received the Summons and the Complaint on August 24, 2017. (*Id.* (citing Dkt. No. 64-4)).

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On October 17, 2017, AGIS amended the initial Complaint under Rule 15(a)(1)(B) to, *inter alia*, add ZTE (USA), Inc., another wholly-owned subsidiary of ZTE Corp., as a defendant and add allegations of infringement as to another AGIS patent. (Dkt. No. 32 ¶¶ 3, 16). AGIS has not, to date, been served with even the original Complaint. (Dkt. No. 64 at 10 (estimating that the earliest that ZTE will be served is "sometime in August")). AGIS has identified McDermott Will & Emery LLP as counsel for ZTE in an unrelated case in this District and in proceedings before the PTAB (*Id*. at 3). AGIS sought a waiver of service from ZTE permitting "informal service of the Summons and the Complaint and the Amended Complaint by electronically serving ZTE Corp.'s U.S. Counsel" on April 21, 2018. (*Id*.) No response was received, and no indication that ZTE would consent to such service is present in the briefing. (*Id*.; *see generally* Dkt. Nos. 64, 68, 70, 74).

On May 21, 2018, AGIS filed the instant Motion.

II. Discussion

Pursuant to Fed. R. Civ. P. 4(c)(1), after a case is filed, the Plaintiff must serve upon the named Defendants both a copy of the complaint filed with the Court and a summons. Service of a complaint without the summons is not effective; service of a summons without a copy of a complaint is equally 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); *see also Boelens v. Redman Homes, Inc.*, 759 F.2d

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504, 508 (5th Cir. 1985); *Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 345, 440 (5th Cir. 2015).

Service on an entity outside of the United States is governed by Federal Rule of Civil Procedure 4(h)(2), which permits service in any manner permitted by Rule 4(f) for serving an individual in a foreign country. Fed. R. Civ. P. 4(h)(2). Rule 4(f) 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, federal courts have discretionary authority pursuant to Rule 4(f)(3) to direct service "by other means not prohibited by international agreements." Fed. R. Civ. P. 4(f)(3). A court may order any method of service so long as it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

AGIS's argument in support of its motion is based on three core assertions: (i) that service on ZTE's counsel or domestic subsidiaries is not prohibited by the Hague Convention; (ii) that service on ZTE's counsel or domestic subsidiaries comports with due process; and, (iii) that service in such a manner is warranted in the interests of judicial economy. (Dkt. No. 64 at 5–9).

However, as this Court recently noted in *Blitzsafe Texas LLC v. Geely Sweden Holdings AB, et al.*, "[t]his is not a case where the Court must consider the relief of alternative service because defendants are hiding, being evasive, or otherwise engaging in trickery and gamesmanship in order to skirt proper summons." 2:17-cv-420-JRG, Dkt. No. 83, slip copy at 2 (E.D. Tex. June 27, 2018); *see also id.* at 2 n.2 (collecting cases permitting alternative service where subterfuge

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was present). To the contrary, service of the original complaint remains ongoing and appears close to completion.

AGIS argues that the "unnecessary delay associated with serving a foreign defendant through the Hague Convention" warrants disregarding its availability and relying on the extraordinary measure of alternative service. (Dkt. No. 64 at 9). In support, AGIS points to the Advisory Committee's Notes to Rule(f)(3) which note the use of alternative methods of service is warranted when "the foreign country's Central Authority [fails] to effect service within the six-month period provided by the [Hague] Convention."

However, AGIS rendered its Original Complaint non-operative upon filing its Amended Complaint a mere two months after it began service through the Hague Convention. (Dkt. No. 32). It is not disputed that the Amended Complaint adds several new legal theories, a new defendant, and a new asserted patent. The original Complaint has been superseded and rendered of "no legal effect." *King*, 31 F.3d at 346.[1]

The Court cannot ignore the procedural posture of the request from Plaintiff. Despite denials to the contrary, AGIS does not come to the Court merely to seek relief from an alleged slow-walk by the Central Authority.[2] Rather, AGIS comes to the Court seeking relief from its own procedural

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[1] The present case is even more compelling than *Blitzsafe*. In that case, the superseded Original Complaint was actually served at the time the Motion for Alternative Service was made, unlike here, where the Original Complaint has not yet been served. However, there, as here, the superseding of the Original Complaint by the Plaintiff's action in filing an Amended Complaint rendered the Original Complaint of no legal effect *prior* to its service. Accordingly, even when service of the Original Complaint is completed, it is unable to effectuate service in a case; the Plaintiff must take into account pending service of Complaints when it seeks to amend, and thus supersede, them.

[2] Although the Court notes the potential for such a slow-walk and will consider taking actions, when appropriate, to ensure that conformance with the timelines envisioned by the Hague Convention are adhered to. *See* 1993 Advisory Committee Notes to Rule 4 ("The Hague Convention does not specify a time within which a foreign country's Central Authority must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, resort may be had to the provision set forth in subdivision (f)(3).").

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misstep wherein it, by its own action, rendered the currently processing original Complaint against ZTE of no legal effect by virtue of its Amended Complaint. As this Court noted in *Blitzsafe:*

> [T]he situation in which Plaintiff finds itself in is entirely of its own making. Had it not filed an amended complaint before service under the Hague Convention was completed, this Motion would not be necessary and this request for circumvention of the Hague Convention would not be before the Court. The Court will not exercise its discretion and permit the international framework embodied in the Hague Convention to be short-changed for the mere convenience of the Plaintiff. The Defendants are not obligated to waive service under the Hague Convention; and, while it is commonly done, it is a privilege of the Defendants and one which they are entitled to insist upon. Further, requiring litigants to follow the treaties governing such issues in international litigation promotes "international comity, which is concerned with maintaining amicable working relationships between nations and mutual respect for the laws of foreign countries." *C & F Sys., LLC v. Limpimax*, S.A., No. 1:09-cv-858, 2010 U.S. Dist. LEXIS 973, at *3 (W.D. Mich. Jan. 6, 2010) (citing *Tucker v. Interarms*, 186 F.R.D. 450, 452–53 (N.D. Ohio 1999)).

2:17-cv-420-JRG, Dkt. No. 83, (slip copy at 2–3).

The Court finds it deeply concerning that, as of the date of this Order, AGIS has not attempted service of the Amended Complaint, apparently turning first to a request for extraordinary relief, rather than seeking service through conventional channels as an initial move. Even with knowledge that the Amended Complaint has superseded the first and will require service,[3] AGIS has, apparently, not attempted such service. Indeed, between the filing of its Amended Complaint on October 17, 2018, and its request for alternative service on May 21, 2018,

[3] The Court notes AGIS's odd rationale regarding amended complaints. (Dkt. No. 70 at 4 ("The Complaint is the operative pleading as to ZTE Corp. because an initial complaint is only superseded "when the amended complaint is properly served, not when it is filed." *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1180 (C.D. Cal. 1998), *aff'd and adopted*, 248 F.3d 915 (9th Cir. 2001)."). However, this is not the law of the Fifth Circuit, which appears not to have directly addressed the issue. Having considered the question, the Court finds the Fourth Circuit's position more persuasive: "a *properly filed* amended complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint 'of no effect.'" *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (citing *Young v. City of Mt. Ranier*, 238 F.3d 567, 573 (4th Cir. 2001)). Indeed, in *Fawzy*, as here, the Plaintiff "filed his amended complaint as a matter of right" and it was *that* action which "rendered his original complaint 'of no effect.'" *Id*. Accordingly, the Court rejects the notion that the Original Complaint which has not yet been served may effectuate service, as "service of a superseded complaint with the summons does not fulfill the requirements of [Rule 4]" as "a superseded complaint is 'a mere scrap of paper.'" Wright & Miller, 4A Fed. Prac. & Proc. Civ. § 1093 (4th ed.).

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