

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

**AGIS SOFTWARE DEVELOPMENT,
LLC,**

Plaintiff,

v.

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

Defendants.

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) Case No. 2:17-CV-00517-JRG
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**DEFENDANTS' OPPOSED MOTION TO SUPPLEMENT THE RECORD IN
SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE,
OR IN THE ALTERNATIVE, TO TRANSFER**

Defendants ZTE (USA) Inc. and ZTE (TX), Inc. (“ZTA” and “ZTX,” respectively and collectively, “ZTE”) ¹ respectfully submit this opposed motion to supplement the record in support of their pending Motion to Dismiss for Improper Venue or, in the alternative, Motion to Transfer to the Northern District of California (the “Motion to Transfer Venue”). Dkt. 38.

I. BACKGROUND

On November 21, 2017, ZTE moved to transfer the above-captioned action filed by AGIS Software Development LLC (“Plaintiff” or “AGIS”) to the Northern District of California. *See* Dkt. 38. In support of a change in venue, Defendants submitted evidence that the core of the accused applications in this case is provided by third-party Google LLC (“Google”), and the relevant witnesses and information about those functionalities are located in and around Northern California. *See* Dkt. 38 at 24; *see also* Dkt. 51 at 8-10. ZTE submitted declarations from Google witnesses establishing that, for the accused functionality for Google Maps for Mobile application (“GMM”) and Google’s Find My Device (formerly known as Android Device Manager), the relevant source code and other information regarding these applications is confidential and proprietary, and that those documents and relevant Google witnesses are located in the Northern District of California. Dkt. 51-4 ¶¶ 2-3 and 51-5 ¶¶ 2-3. AGIS itself confirmed that these were the core accused applications for the case when it served its Disclosure of Asserted Claims and Infringement Contentions on January 19, 2018. 514 Dkt. 27, Ex. 1.

At the time of briefing for the Motion to Transfer Venue, AGIS dismissed the relevance, location and convenience of non-party Google, arguing that “much of that information

¹ Defendant ZTE Corporation has not yet been served or appeared, and thus the Motion to Dismiss for Improper Venue or in the Alternative to Transfer is on behalf of ZTX and ZTA only.

[concerning the accused functionality related to Google’s Android Operating System] is publicly available through either open source code or public application programming interfaces (‘API’).” Dkt. 46 at 2, 24. In fact, AGIS explicitly disputed Google’s possible role as a non-party” and took the position that any discovery into Google’s confidential and proprietary source code and other information for GMM and Find My Device is irrelevant to the claims asserted against the Android defendants, such as ZTE.² Dkt. 46 at 25. Plaintiff further argued that:

- “To the extent Google witnesses may have relevant information--which AGIS believes they do not have--Defendants’ suggestion that relevant Google witnesses are located in California is mere speculation.” Dkt. 46 at 7.
- “Defendants’ statements that . . . third-party employees with relevant knowledge, including Google witnesses, are located in or near California, without more, is insufficient.” Dkt. 52 at 7.
- “As discussed above, the relevance of the listed [Google witnesses] is doubtful.” Dkt. 46 at 26.
- “Google’s possible role as a non-party in this case--the extent of which is disputed by AGIS--should not be a determining factor to transfer venue of a case.” Dkt. 46 at 25.
- “Although AGIS has accused functionality related to Google’s Android Operating System, AGIS expects to submit infringement contentions that do not invoke Local Patent Rule 3-1(g), and that they rely only on publicly-available open source code or public APIs.” Dkt. 46 at 24.
- “As for Google, to date, AGIS has not relied on any confidential Google code in its infringement contentions, but rather, relied upon publicly available source code.” Dkt. 52 at 8.
- “The Northern District of California is not appreciably closer to the sources of proof than the Eastern District of Texas.” Dkt. 46 at 25.³

New evidence has recently emerged confirming Defendants’ argument that the location and convenience of non-party Google weighs in favor of transfer to the Northern District of

² AGIS asserts the same claims against all Android Defendants LG Electronics, Inc. (“LGEKR”), Huawei Device USA Inc. et al. (“Huawei”), HTC Corporation (“HTC”), and ZTE in the two consolidated cases (Case No. 17-cv-513 (Huawei) and Case No. 17-cv-514 (LGEKR, HTC, and ZTE)).

³ As of August 14, 2018, AGIS has offered its own source code for inspection outside the Eastern District of Texas, specifically in New York City, New York. Alternatively, since May 23, 2018, source code from ZTE has been available for inspection in California.

California. On August 23, 2018 and August 29, 2018, AGIS served deposition and document subpoenas on Google in both of the consolidated cases against Android Defendants, *AGIS Software Development LLC v. Huawei Device USA Inc., et al.*, No. 2:17-cv-513-JRG (E.D. Tex.) and *AGIS Software Development LLC v. HTC Corp.*, No. 2:17-cv-514-JRG (E.D. Tex.). See Notice of Subpoenas to Google LLC attached as Exhibit A.

AGIS's subpoena undermines the credibility of its previous efforts to discount the relevance of Google's witnesses, source code and other information to this action.

Notwithstanding AGIS's representations that AGIS's infringement contentions rely only on "publicly available open source code or public APIs," Dkt. 46 at 24 and Dkt. 52 at 8, AGIS's subpoenas seek the confidential and proprietary source code for Google Maps and Find My Device. AGIS also seeks from Google other technical documents that show the operation, design, development, functionality, features, testing, and manufacture of Google Maps and Find My Device. Furthermore, AGIS also seeks the communication protocols used with Android Applications between one or more Google Servers and/or one or more other Android Devices and the source code for Google Servers.

Indeed, the subpoenas confirm that the key sources of evidence regarding the operation, design, and function of the applications identified in AGIS's Infringement Contentions reside with Google in and around the Northern District of California. Because Google's documents and witness testimony helps resolve critical issues regarding the accused applications, ZTE respectfully submit that AGIS's service of the subpoenas on Google confirms the appropriateness of transferring the present litigation to the Northern District of California pursuant to 28 U.S.C. § 1404(a).

II. ARGUMENT

When resolving a challenge to the propriety of venue, this Court enjoys broad discretion to allow the moving party to supplement the record with additional facts and evidence. *See, e.g., Murungi v. Touro Infirmary*, No. 6:11-cv-0411, 2011 WL 3206859, at *2 (W.D. La. June 29, 2011) (noting the broad discretion to consider supplemental evidence when ruling on a motion to transfer venue); *accord Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) (noting the Court's broad discretion to consider supplemental evidence when ruling on a Rule 12(b)(1) or 12(b)(3) motion). Exercise of such discretion is appropriate when new information emerges that can assist the Court's consideration of the transfer motion. *See, e.g., Nationwide Mutual Ins. Co. v. The Overlook, LLC*, No. 4:10-cv-00069, 2010 WL 2520973, at *10 (E.D. Va. June 17, 2010) (granting motion to supplement a transfer motion because it assisted the court's consideration of the matter).

In the present matter, Defendants respectfully submit that the subpoena on Google will advance the Court's consideration of the Motion to Transfer Venue by, *inter alia*, demonstrating that the relative ease of access to sources of proof and convenience for witnesses factors favor transfer, and confirming that AGIS's arguments downplaying the relevance of Google's documents and witnesses was an argument of convenience during transfer briefing that AGIS has abandoned now that it actually must litigate the merits of its claims.

In Defendants' Motion to Transfer Venue, Defendants argued that relevant documents, including highly proprietary source code, and witnesses with knowledge relating to the operation, design, and function of the third-party Accused Applications are located in the Northern District of California or at locations far more convenient to the Northern District of California than to the Eastern District of Texas. *See* Dkt. 38 at 24; *see also* Dkt. 51 at 8-10. In its

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