

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

BANDSPEED, LLC,

Plaintiff,

v.

REALTEK SEMICONDUCTOR  
CORPORATION,

Defendant.

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CASE NO. 1:20-cv-00765-LY

**BANDSPEED’S RESPONSE TO REALTEK SEMICONDUCTOR CORPORATION’S  
MOTION TO DISMISS UNDER FED. R. CIV. P. 41(B)**

Plaintiff Bandspeed, LLC (“Bandspeed”) files its Response to Realtek Semiconductor Corporation’s (“Realtek”) Motion to Dismiss Under Fed. R. Civ. P. 41(b) (the “Motion”).<sup>1</sup>

**A. BACKGROUND FACTS**

On July 20, 2020, Bandspeed filed this case. Doc. 1. On July 24, 2020, Bandspeed promptly served Realtek through the Texas Secretary of State. Doc. 6. Bandspeed also requested Realtek waive service by letter to Gina Hung dated August 27, 2020, which was received by Realtek on August 31, 2020. *See* Ex. 1 (waiver of service); Ex. 2 (proof of international delivery). Despite these efforts, Realtek did not respond to the Complaint.

On September 10, 2020, U.S. counsel for Realtek contacted counsel for Bandspeed and stated that Realtek would not respond to Bandspeed’s Complaint until it was served through a Request for Judicial Assistance. *See* Doc. 14-1.

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<sup>1</sup> Bandspeed’s Response is limited to Section 5 of Realtek’s Motion. On March 13, 2022, Bandspeed filed an Amended Complaint. *See* Doc. 22. The remainder of Realtek’s Motion to Dismiss is based on Fed. R. Civ. P. 12 and therefore moot due to the Amended Complaint. *See* WDTX L.R. CV-15.

On September 14, 2020, Bandspeed made a Motion for Issuance of Request for International Judicial Assistance. *See* Doc. 8. After the Motion was granted (Doc. 11), on November 5, 2020, Bandspeed sent the requisite letters rogatory package to the United States State Department. Bandspeed received confirmation that the letters rogatory package was received on November 6, 2020. *See* Doc. 14-1; 17-2.

Bandspeed was advised that the process traditionally takes at least 12-18 months. For example, the State Department’s website states “Execution of letters rogatory may take a year or more. Letters rogatory are customarily transmitted via diplomatic channels, a time-consuming means of transmission.” *See* Ex. 3. Bandspeed further understood that during the COVID-19 pandemic, it could take two-to-three times longer—so potentially three years—for the letters rogatory to be served.

After receiving confirmation that the package was delivered to the State Department, in January 2021, a paralegal handling the matter for Bandspeed’s counsel, Natalie Fletcher, called the State Department and left a message with their International Judicial Assistance Division. Mrs. Fletcher was informed that the State Department does not make a practice of providing status updates because once a Request left the State Department it was essentially out of its hands. Bandspeed further understood that the process would require face-to-face meetings in Taiwan and exchange of pertinent documents by hand, a process that would be severely slowed or altogether stopped by the COVID-19 pandemic and closures of judicial buildings within Taiwan.

Bandspeed did not receive any information indicating the letters rogatory package was not received by the appropriate authorities in Taiwan until it received Realtek’s Motion.

On January 14, 2022, Bandspeed filed a Motion for Leave to Effect Alternative Service. Doc. 14. On January 19, 2022, Bandspeed served the Motion for Leave to Effect Alternative

Service. Doc. 15. On February 7, 2022, the Court granted Bandspeed's Motion and permitted alternative service on Realtek. Doc. 16.

## B. ARGUMENT

Realtek argues that Bandspeed's Complaint should be dismissed without prejudice for lack of due diligence or with prejudice for failure to prosecute under Rule 41(b).<sup>2</sup> Doc. 17 at 18-20. But Realtek is wrong on both counts, as Realtek fails to address key facts relating to service, including the expected delay of service on a Taiwanese company using letters rogatory and the impact of the ongoing global COVID-19 pandemic. Indeed, Bandspeed's attempts at service and, eventual service pursuant to this Court's Order Granting Leave to Effect Alternative Service (Doc. 16), meet the flexible due diligence standard under Rule 4 and Rule 41(b). These are not grounds for dismissal.

### 1. Bandspeed Exercised Reasonable Diligence in Effecting Service Under Fed. R. Civ. P. 4; Dismissal Without Prejudice is Not Warranted

As to dismissal without prejudice, the Fifth Circuit has adopted "a relaxed standard with regard to serving a defendant abroad." *A.T.N. Indus., Inc. v. Gross*, 4:14-CV-02743, 2016 WL 362309, at \*8 (S.D. Tex. Jan. 29, 2016). As Realtek acknowledges in its Motion, no fixed deadline governs service of process on foreign defendants. Doc. 17 at 18; Fed. R. Civ. P. 4(f). While "Rule 4(f) authorizes a without-prejudice dismissal when the court determines in its discretion that the plaintiff has not demonstrated reasonable diligence in attempting service," such a dismissal would be inappropriate in this case given Bandspeed's extreme efforts to serve Realtek. *Lozano v. Bosdet*, 693 F.3d 485, 489 (5th Cir. 2012). Rather the standard is one of "flexible due diligence." *Id.* at 488. This standard is met when a plaintiff demonstrates reasonable due diligence in attempting

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<sup>2</sup> As a threshold issue, while Realtek never cites to Rule 12(b)(5), Plaintiff understands that Realtek's first argument (Doc. 17 at 18-19) seeks dismissal without prejudice under that Rule due to purportedly untimely service under Federal Rule of Civil Procedure 4(f), (h).

service after filing, even if the ultimate effectuated service is significantly delayed. In *Wapp Tech Ltd. P'ship v. Seattle SpinCo Inc.*, 4:18-CV-00469, 2020 WL 3791520, at \*2 (E.D. Tex. July 7, 2020), Plaintiff attempted service within 20 days of filing its complaint but did not effectuate service until 83 days later. Likewise, in *A.T.N. Indus., Inc. v. Gross*, service was not untimely when plaintiffs initiated service within a week, but service had not yet been completed nearly 11 months after the filing of the relevant complaint. 2016 WL 362309, at \*2-3 (denying motion to dismiss and noting “Courts recognize that service pursuant to the Hague Convention may be a time-consuming process.”).

Bandspeed sued Realtek in U.S. District Court on July 20, 2020. Doc. 1 at 2. Bandspeed served Realtek through the Texas Secretary of State on July 24, 2020 and requested Realtek to waive service under Fed. R. Civ. P. 4(d) by letter received on August 31, 2020. Doc. 8 at 2. On September 10, 2020, counsel for Realtek contacted counsel for Bandspeed and stated that Realtek would only accept service via letters rogatory. *Id.* Bandspeed timely filed a Motion for Issuance of Request for International Judicial Assistance four days later on September 14, 2020, that was later granted by the Court on September 17, 2020. Doc. 8 and 12. Within six weeks, on November 2, 2020, Bandspeed initiated the process for service *via* letters rogatory through the United States Department of State and received confirmation that the letters rogatory package had been received by the Department of State on November 6, 2020. On January 14, 2022, Bandspeed further requested permission from the Court for alternative service which the Court granted on February 7, 2022. Doc. 14 and Doc. 16.

Given Bandspeed’s efforts to serve Realtek through the Secretary of State, a waiver of service request, letters rogatory and finally alternative service, it is apparent that Bandspeed demonstrated reasonable diligence in attempting service. It is equally obvious that Realtek is

deliberately evading service to avoid answering for its infringing products in the United States. A dismissal without prejudice, the remedy provided under Rule 4(f), would only further delay the proceeding and require Bandspeed to begin the service process again, rewarding Realtek for its gamesmanship. The Court should not exercise its discretion. The case should continue.

2. Realtek Cannot Meet the High Standard for Dismissal With Prejudice Under Fed. R. Civ. P. 41(b)

Realtek also requests the extreme remedy of dismissal *with* prejudice—an adjudication on the merits—under Fed. R. Civ. P. 41(b). Dismissal with prejudice under Rule 41 requires an extremely high bar: the Fifth Circuit requires that the defendant show “a clear record of delay or contumacious conduct by the plaintiff.” *Coleman v. Sweetin*, 745 F.3d 756, 766 (5th Cir. 2014). This lofty standard is not met.<sup>3</sup> There simply is no clear record of delay. Bandspeed took numerous steps to serve Realtek, including serving Realtek through the Texas Secretary of State, requesting Realtek to waive service, filing a Motion for Issuance of Request for International Judicial Assistance, initiating the process for service via letters rogatory, and requesting permission from the Court for alternative service. Realtek claims there is no evidence of efforts by Bandspeed to

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<sup>3</sup> Indeed, Realtek’s cited precedent either supports Plaintiff, *e.g.* *Coleman v. Sweetin*, 745 F.3d 756, 766 (reversing effective dismissal with prejudice where no delay or contumacious conduct) or is readily distinguishable. In *Sealed Appellant v. Sealed Appellee*, foreign service was not required, and the applicable domestic 120-day deadline for service was exceeded by 600 days—nearly two years. 452 F.3d 415, 418-419 (5th Cir. 2006). And in *Bullard v. Burlington N. Santa*, foreign service was also unnecessary, service generally was not an issue, and the Court reversed an effective dismissal with prejudice under Rule 8 because there was no delay and an unclear record on contumacious conduct (including whether plaintiffs had violated court orders and failed to respond to discovery in other litigation). *Fe Ry. Co.*, 368 F. App’x 574, 581–82 (5th Cir. 2010). Further, in *Lawson v. Aleutian Spray Fisheries, Inc.*, plaintiff did not even start service on foreign defendants under the Hague process until a year after the suit had been filed. No. C11-0061JLR, 2012 WL 208111, at \*1 (W.D. Wash. Jan. 24, 2012). To the contrary, as described above, Bandspeed attempted service of Realtek within 4 days of filing its complaint. Finally, in *Veazey v. Young’s Yacht Sale & Serv., Inc.*, plaintiff provided no actual notice until nearly 21 months after the case was filed, and foreign service was not required. 644 F.2d 475, 476 (5th Cir. 1981.)

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