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

RFCYBER CORP.,	§	Case No. 6:22-cv-00697-ADA
Plaintiff,	§	
	§	**JURY TRIAL DEMANDED**
v.	§	
VISA U.S.A. INC.,	§	
Defendant.	§	

PLAINTIFF RFCYBER CORP.'S OPPOSITION TO DEFENDANT VISA U.S.A. INC.'S MOTION TO DISMISS RFCYBER CORP.'S COMPLAINT FOR PATENT INFRINGEMENT (DKT. 7)

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Visa U.S.A. Inc. ("Visa" or "Defendant") was served with the Complaint on October 27, 2022. Defendant waited three weeks after service, until November 17, 2022, to file the instant motion requesting dismissal of the case due to a mere 31-day delay in service, which Visa does not even allege was prejudicial. Dismissing the case without prejudice now, months after service has been effectuated, would merely delay proceedings, unnecessarily increase work, time, and expenses for the Court and Parties by having to redo service and filings under a new caption, and would go against the intention of Federal Rule of Civil Procedure 4(m) of promoting efficient litigation.

I. BACKGROUND

RFCyber Corp. ("RFCyber" or "Plaintiff") filed its Complaint against Visa on June 28, 2022. Dkt. 1. On October 27, 2022, Visa was served via its registered agent. Dkt. 6. The short delay in service was not intentional, but due to a miscommunication by Plaintiff's counsel. On November 17, 2022, Visa filed the instant motion to dismiss.

II. LEGAL STANDARD

Fed. R. Civ. P. 4(m) states that "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). Courts are not required to dismiss a case merely because service was outside of the 90-day window. *Henderson v. United States*, 517 U.S. 654, 661 (1996) (noting that, under earlier version of Rule 4(m), "the 120–day provision operates not as an outer limit subject to reduction, but as an irreducible allowance").

III. THE COURT SHOULD GRANT A DISCRETIONARY EXTENSION OF TIME FOR SERVICE

Visa moved to dismiss this case under Fed. R. Civ. P. 12(b)(5) for failure to comply with Fed. R. Civ. P. 4(m), which requires service of the complaint within 90 days of filing. Here, Visa was served with the Complaint 31 days after the 90-day deadline imposed by Rule 4(m). The Court should grant a discretionary 31-day extension of time for service for two reasons.

First, if this action is dismissed without prejudice and later refiled, Plaintiff will be statutorily barred from seeking damages for the period dating back to June 28, 2016, *i.e.*, 6 years prior to the filing of the Complaint in this case. 35 U.S.C. § 286. The Complaint in this case does not limit the damages period, and RFCyber seeks to recover for Visa's infringement up to the 6-year statutory maximum. The Complaint states that RFCyber "has the right to recover all damages for past, present, and future infringement of the Patents-in-Suit," and accuses Visa products which were launched in 2013 and 2014, such as Visa Token Service and Visa Ready. Dkt. 1, ¶¶ 10, 12; Exs. 1, 2. A discretionary extension may be warranted "if the applicable statute of limitations would bar the refiled action." *Millan v. USAA GIC*, 546 F.3d 321, 325 (5th Cir. 2008) (quoting Fed. R. Civ. P. 4(m) advisory committee's note (1993)). Here, 35 U.S.C. § 286 would bar RFCyber from seeking damages back to June 28, 2016 in the refiled action. As such, a discretionary extension is warranted.

Second, Visa has been properly served for some time and was not prejudiced in any way by the short delay in service. RFCyber's delay was not intentional, as it was due to a miscommunication. Immediately upon recognizing the issue, RFCyber properly served Visa. The 31-day delay was not inordinate, and Visa has now been properly served for seven weeks. It would be markedly inefficient to dismiss this case now, as RFCyber would simply need to immediately refile the case and serve the complaint again.

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