

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

RF Cyber CORP.,

Plaintiff,

v.

VISA U.S.A. Inc.,

Defendant.

CASE NO.: 6:22-cv-00697

JURY TRIAL DEMANDED

**DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR
INSUFFICIENT SERVICE OF PROCESS**

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I. INTRODUCTION

Plaintiff RFCyber Corp. (“Plaintiff”) concedes that it failed to serve Visa within 90 days of the filing of its Complaint or to seek an enlargement of time to serve prior to Visa’s motion. Because Plaintiff has failed to show “good cause” for its delay and because none of the customary grounds for granting a discretionary extension of time for service exists, Visa respectfully requests that the Court grant the motion to dismiss under Federal Rules of Civil Procedure 12(b)(5) and 4(m) and deny Plaintiff’s belated request for extension of time for service.

II. PLAINTIFF FAILS TO SHOW “GOOD CAUSE” FOR ITS DELAY

The only excuse Plaintiff offers for its failure to comply with the requirements of Rule 4(m) is a “miscommunication by Plaintiff’s counsel.” Opp. at 4. But as to Visa, there was no *mis*communication about the failure to serve; there was no communication at all. This Court’s precedents are clear: “simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.” *Gartin v. Par Pharm. Cos., Inc.*, 289 F. App’x 688, 692 (5th Cir. 2008) (quoting *Lambert v. United States*, 44 F.3d 296, 299 (5th Cir. 1995)).

Even the non-controlling opinion, *DatRec, LLC v. AllegianceMD Software, Inc.*, No. 21-CV-543-TCK-JFJ, 2022 WL 2758527 (N.D. Okla. July 14, 2022), relied upon by Plaintiff determined that delay caused by miscommunication did not rise to the level of “good cause” under Rule 4(m). *Id.* at *2. Although the Oklahoma court in *AllegianceMD* did ultimately grant a discretionary extension, it did so after finding the defendant to be “at least partly responsible for the delay in service, given that it failed to maintain a current address for its registered agent with the Oklahoma Secretary of State.” *AllegianceMD*, at *2. This is not the case here. Visa was not responsible in any way for Plaintiff’s careless delay of service.

Accordingly, there is no good cause for Plaintiff’s failure, and the Court should grant Visa’s motion.

III. THE COURT SHOULD NOT GRANT A DISCRETIONARY EXTENSION OF TIME FOR SERVICE BECAUSE NONE OF THE COMMON GROUNDS FOR EXTENSION EXISTS

Plaintiff requests that the Court grant a discretionary extension of time for service for two reasons: (1) re-filing the complaint would shorten the damages period for its claims; and (2) Visa “waited three weeks after service” to file the instant motion and is not prejudiced by the delay. Neither argument has any merit.

First, the court should not grant Plaintiff’s discretionary extension of service based on Plaintiff’s damages concern. Here, there are no statute of limitations issues, nothing barring Plaintiff from re-filing its complaint for patent infringement, and nothing barring future litigation of Plaintiff’s patent infringement claims.

Plaintiff conflates the concept of being barred from future litigation with that of a limitation on damages. 35 U.S.C. §286 limits *the damages period* to six years prior to the filing of the complaint, but it does not bar the filing of the complaint itself. This court has previously made this distinction clear—“the only statute of limitations involving patent infringement suits merely limits the period of recovery of damages to six years. It does not expressly limit the patentee’s right to maintain an action.” *Kaden v. Chamisa Arts, Inc.*, No. EP-15-CV-146-DB, 2016 WL 7616692, at *6 (W.D. Tex. July 15, 2016) (quoting *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 616 F.2d 1315, 1325 (5th Cir. 1980) (citing 35 U.S.C. § 286)). Plaintiff fails to support its request that the court should grant a discretionary extension of service (absent good cause), merely because damages may be limited in some way by Plaintiff’s own delay.

Second, Plaintiff argues that it should be granted a discretionary extension of service because Visa complied with the rules by responding to the complaint within the 21-day period permitted under Rule 12(a)(1)(A)(i) and allegedly has not been prejudiced. Plaintiff’s argument is meritless both factually and legally. Visa has clearly been prejudiced by having to expend

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