

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

RFCyber CORP.,

Plaintiff,

v.

VISA U.S.A. Inc.,

Defendant.

CASE NO.: 6:22-cv-00697

JURY TRIAL DEMANDED

**DEFENDANT VISA U.S.A. INC.'S MOTION TO DISMISS RFCYBER CORP.'S
COMPLAINT FOR PATENT INFRINGEMENT**

Pursuant to Rule 12(b)(5) and 4(m) of the Federal Rules of Civil Procedure, Defendant Visa U.S.A. Inc. (“Visa”), respectfully requests that the Court dismiss Plaintiff RFCyber’s (“Plaintiff”) Complaint for Patent Infringement (the “Complaint”) against Visa because it was not timely served within 90 days of when the Complaint was filed.

I. BACKGROUND

Plaintiff filed the Complaint against Visa on June 28, 2022, alleging Visa manufactured, used, marketed, distributed, sold, offered for sale, and exported from and imported into the United States devices and software that infringe U.S. Patent Nos. 8,118,218, 8,448,855, 9,189,787, 9,240,009 (collectively, the “Patents-in-Suit”). Compl. ¶ 1, 12. The Patents-in-Suit allegedly cover apparatus and methods for provisioning a card and/or enabling secure contactless payment with a portable device. Compl. ¶ 11.

On October 27, 2022, after 121 days had passed since Plaintiff filed the Complaint, Visa was served.

II. ARGUMENT

a. Federal Rule of Civil Procedure 12(b)(5) and 4(m) Requires Dismissal of the Complaint against Defendant Visa

Rule 12(b)(5) allows a party to file a motion to dismiss for “insufficient service of process.” Fed. R. Civ. P. 12(b)(5). For service to be effective, a plaintiff must comply with Federal Rule of Civil Procedure 4. *See* Fed. R. Civ. P. 4.

Rule 4(m) gives a plaintiff 90 days after filing the complaint to make service. Fed. R. Civ. P. 4(m). If service is not made within this timeframe, the court must dismiss the action without prejudice against that defendant or order that service be made within a specified time. *Id.* However, if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. *Id.* If good cause does not exist, the court *may*, in its discretion, decide whether to dismiss the case without prejudice or extend time. *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996) (emphasis in original).

The Complaint was filed on June 28, 2022. Ninety (90) days after Plaintiff filed the Complaint was September 26, 2022. Plaintiff waited until October 27, 2022, 121 days after filing the Complaint, before serving Visa. Visa should be dismissed based on Plaintiff’s untimely service.

b. Good Cause Does Not Exist to Extend the Time for Service

The “good cause” under Rule 4(m) requires ““at least as much as would be required to show excusable neglect, as to which 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)). In addition, courts normally require “some showing of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified ...” *Id.*

Here, there is no good cause for Plaintiff's failure. Plaintiff has not offered any reason for failing to serve Visa within the required timeframe.

c. This Court Should Not Exercise its Discretion to Extend the Time for Service

When a plaintiff does not show good cause, a court nevertheless “has discretionary power to extend the time for service.” *Millan v. USAA GIC*, 546 F.3d 321, 325 (5th Cir. 2008). A discretionary extension may be warranted, “for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.” *Id.* (quoting Fed. R. Civ. P. 4(m) advisory committee's note (1993)).

Here, none of the common grounds for the Court to exercise its discretion exists. Pursuant to 35 U.S.C. §286, the statute of limitations for patent infringement is six years. 35 U.S.C. §286. Plaintiff does not claim that Visa began infringing on the Patents-in-suit more than six years ago. Moreover, Plaintiff does not claim that Visa has contributed to the insufficiency of service.

III. CONCLUSION

Based on the foregoing, Visa respectfully requests that the Court dismiss the Complaint.

Dated: November 17, 2022

Respectfully submitted,

/s/ James C. Yoon

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Attorneys for Defendant VISA U.S.A. Inc.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing document has been served on all counsel of record via electronic mail on November 17, 2022.

By: /s/ James C. Yoon