

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

Corliss O. Burandt
Applicant

Decision on Request for
Extension of Time under
37 C.F.R. § 90.3(c)(1)(ii)

Appl. Ser. No. 07/516,757

MEMORANDUM AND ORDER

On December 13, 2024, patent applicant Corliss O. Burandt filed a request to extend the time to seek judicial review of the Patent Trial and Appeal Board decision in the underlying proceeding (“Request”), in the Federal Circuit, under 35 U.S.C. § 141. The Board issued its decision on May 17, 2023. Burandt subsequently filed a Request for Reconsideration on July 16, 2023, which the Board denied on January 31, 2024.

Burandt sought judicial review of the Board’s decision under 35 U.S.C. § 145, in the United States District Court for the Eastern District of Virginia, in accordance with 37 C.F.R. § 90.3(a)(3). *Burandt v. Vidal*, No. 1:24-cv-751 (E.D. Va.). On December 6, 2024, Burandt moved to voluntarily dismiss the district court case. *Id.* at ECF No. 34. That same day, the district court granted the dismissal without prejudice. *Id.* at ECF. No. 35.

Rule 90.3(c)(1) allows parties to seek extra time to file a notice of appeal in the Federal Circuit under two circumstances: Rule 90.3(c)(1)(i), in which the Director may extend the time for filing an appeal for good cause when requested

before the expiration of the period for filing an appeal, and Rule 90.3(c)(1)(ii), in which the Director may extend the time for filing an appeal requested after the expiration of the period for filing an appeal due to excusable neglect. The extension request at issue here, filed after the expiration of the period for filing the appeal notice, falls under the “excusable neglect” provision of 37 C.F.R. § 90.3(c)(1)(ii). The request is GRANTED for the reasons set forth below.

The Director may extend the time for filing a notice of appeal after the expiration of the period for filing an appeal “upon a showing that the failure to act was the result of excusable neglect.” 37 C.F.R. § 90.3(c)(1)(ii); *see also Mitsubishi Cable Indus., Ltd., et al. v. Goto Denshi Co., Ltd.*, Memorandum and Order at 2-7, Paper 28 (IPR2015-01108) (May 3, 2017) (“*Mitsubishi*”) (explaining why the Director retains authority to decide Rule 90 time-extension requests where an untimely notice of appeal has concurrently or subsequently been filed). The authority to decide such requests has been delegated to the Solicitor. *See* MPEP § 1002.02(k)(3).

In determining excusable neglect, the USPTO applies the standard used by the Federal Courts. *See* MPEP § 1216(VI); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993); *see, e.g., Mitsubishi*, Mem. Op. at 7-14; *IpVenture, Inc. v. FedEx Corp.*, Memorandum and Order (*Inter Partes*

Reexamination Control No. 95/001,896) (Apr. 4, 2017). The Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) explained that determining whether “excusable neglect” occurred is “an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer*, 507 U.S. at 395. Generally, the factors to be considered in determining whether neglect is excusable include: [1] the danger of prejudice to another party, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith. *Id.*

The third *Pioneer* factor—relating to the reason for the delay in filing—is generally considered the most important factor in the analysis, although it does not control the inquiry. *See, e.g., FirstHealth of the Carolinas, Inc. v. Carefirst of Maryland, Inc.*, 479 F.3d 825, 829 (Fed. Cir. 2007); *Pumpkin Ltd. v. The Seed Corps*, 1997 WL 473051 at *6 n.7 (T.T.A.B. 1997). Here, this factor supports the requested extension.

Burandt explains that he initially filed an action under 35 U.S.C. § 145 earlier this year with the understanding that he would be able to secure funding for additional expert testimony. Request at 1. However, Burandt was not able to secure

the necessary funding. Request at 1-2. In addition, Burandt had hoped to fully participate in the proceedings in the Eastern District of Virginia, but health-related challenges prevented him from doing so. Request at 2. Burandt's Request explains that an appeal to the Federal Circuit, under 35 U.S.C. § 141, would mitigate these challenges and allow him to more fully participate in appellate proceedings. *Id.*

Notably, there is no evidence of negligence on Burandt's part, as is typically present in "excusable neglect" situations. In such cases, a party misses the Rule 90 deadline to file their notice of appeal and thus must explain, among other things, why they missed the deadline in order to establish "excusable neglect." Here, Burandt did not miss the filing deadline; he timely exercised his judicial review rights under Rule 90 by filing an action under § 145. Burandt now asks for time to instead pursue an appeal at the Federal Circuit, under § 141, providing reasonable explanations for electing a different remedy at this stage.

Under the fourth *Pioneer* factor, Burandt's explanations demonstrate no indication of bad faith. The fact that he did not actually miss his filing deadline (by timely pursuing the § 145 action) further demonstrates the absence of bad faith in pursuing his review remedies.

The first *Pioneer* factor, addressing prejudice to the USPTO, also favors granting the extension, as there is no evidence of prejudice. Similarly, under the

second *Pioneer* factor, the length of delay has no potential negative impact to any judicial or administrative proceedings. These facts all weigh in favor of granting the Request.

Thus, the Director finds that application of the *Pioneer* factors here weighs in favor of granting Burandt's requested extension.

ORDER

Upon consideration of Burandt's request for an extension of time under 37 C.F.R. § 90.3(c)(1)(ii), it is ORDERED that the Request is **granted**. Burandt's filing deadline to appeal from the underlying Board decision is extended to seven (7) days beyond the date of the issuance of this Order.

DERRICK BRENT

Acting Under Secretary of Commerce for
Intellectual Property and Acting Director of
the U.S. Patent and Trademark Office

By: /s/ Farheena Y. Rasheed
Farheena Y. Rasheed
Solicitor

DATE: December 17, 2024

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