

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE DIRECTOR

*In re Robbins, et al.* )  
Serial No. 13/675,440 ) Decision on Request  
 ) under 37 C.F.R. § 90.3(c)(1)(ii)  
 )  
\_\_\_\_\_ )

MEMORANDUM AND ORDER

Before the Director is Applicant Robbins’ “Request for Extension under § 12004 of the CARES Act and 37 C.F.R. § 90.3(c)(1)(ii),” filed on August 17, 2020. For the reasons given below, the Request is granted.

On May 29, 2020, the Patent Trial and Appeal Board (“Board”) issued its decision denying Robbins’ request for rehearing in this ex parte application. Under 37 C.F.R. § 90.3(a), Robbins had until July 31, 2020, to file with the USPTO a Notice of Appeal to the United States Court of Appeals for the Federal Circuit for review of the PTAB decision. Robbins did not file an appeal notice on or before that date with the USPTO. On August 17, 2020, Robbins filed the underlying Request, seeking an additional 14 days on its appeal deadline, running from the date of any decision on the Request, with a supporting declaration (Packman).

Robbins seeks the relief under the “excusable neglect” standard of 37 C.F.R. § 90.3(c)(1)(ii). The Director may extend the time for filing an appeal notice 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*

*Industr., Ltd., et al. v. Goto Denshi Co., Ltd.*, Memorandum and Order at 2-7, Paper No. 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; *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 “excusable neglect” inquiry is

an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These 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.

*Pioneer*, 507 U.S. at 395. Excusable neglect “is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394. Moreover, “[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect, it is clear that excusable neglect . . . is a somewhat elastic concept and is not limited strictly to omissions caused by circumstances beyond the control of the movant.” *Id.* at 392 (internal quotation marks omitted). The third *Pioneer* factor—relating to why the filing

was delayed—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 (Fed. Cir. 2007); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 n.7 (T.T.A.B. 1997).

Here, Robbins more than adequately demonstrates entitlement to relief under the “excusable neglect” standard. On the third *Pioneer* factor, Robbins demonstrates a connection between the COVID outbreak and the communication errors resulting in the missed July 31, 2020 filing deadline. Robbins explains that its New York offices, where the responsible attorneys practice, shuttered under New York Governor Cuomo’s March 7, 2020 closure order. *See* Packman Decl. (¶¶ 3-4). The Board had not rendered its decision on the rehearing request at that time. Robbins’ attorneys adopted new mail routing procedures to accommodate the COVID shutdown, using a “skeleton crew” to send all paper mail to Mr. Packman, who then forwarded it to the responsible attorneys. *Id.* (¶ 4). Given the office’s closure, Robbins’ attorneys were unable to monitor the limited staff available to execute those procedures. *Id.* While the New York offices received the Board decision on June 5, 2020, the interim procedures failed to route the decision to Mr. Packman. *Id.* (¶ 6). Robbins’ attorneys were not aware of the Board decision until August 12, 2020, when Mr. Packman received the USPTO Notice of Abandonment (dated August 10, 2020). *Id.* (¶¶ 5-6).

The communication error here resulted from interim procedures necessitated by the COVID pandemic. Under the circumstances, those interim procedures reflect

reasonable steps to mitigate the direct impact of the COVID pandemic on Robbins' ability to meet his deadline. The failure of those steps was not within the reasonable control of Robbins' attorneys. These facts support granting the request relief under the third *Pioneer* factor.

Further, the other *Pioneer* factors weigh in favor of the requested relief. There is no apparent prejudice to another party or proceeding by granting the requested extension. Robbins acted in good faith to carry out its responsibility to keep apprised of USPTO communications, and then seek additional time once it learned it had missed a filing deadline. Robbins then sought additional time to file its appeal notice within a reasonable time after learning of the lapsed deadline. There is no indication that Robbins abdicated the responsibility to make a prompt determination of whether to pursue appeal or otherwise "flout[ed]" the filing deadline. *See Pioneer*, 507 U.S. at 388. Thus, on balance, the Director finds that application of the *Pioneer* factors here weighs in favor of granting Robbins' requested extension.

Robbins also separately seeks relief under the USPTO "CARES Act" notice relating to extensions of time for PTAB filings impacted by the COVID pandemic. Req. at 3 (citing *June 2020 Update Regarding Certain Patent-Related Timing Deadlines under the Coronavirus Aid, Relief, and Economic Security Act and Other Relief Available to Patent Applicants and Patentees* ("June 2020 Notice") at 1 (June 29, 2020) (available at <https://www.uspto.gov/sites/default/files/documents/Patents-Notice-CARES-Act-2020-06.pdf>)). It is unnecessary to determine whether Robbins is separately entitled

under the CARES Act to relief based on impacts of the COVID pandemic, since Robbins is entitled to relief under the pre-existing extension provisions of Rule 90.

ORDER

Upon consideration of the request for an extension of time under 37 C.F.R. § 90.3(c)(1)(ii), it is ORDERED that the request is granted. Robbins' filing deadline to appeal from the underlying PTAB proceedings is extended from July 31, 2020, to October 27, 2020.

ANDREI IANCU  
UNDER SECRETARY OF COMMERCE  
FOR INTELLECTUAL PROPERTY AND  
DIRECTOR OF THE UNITED STATES  
PATENT AND TRADEMARK OFFICE

By: /s/ THOMAS W. KRAUSE  
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