

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

In re Martin Joseph Bodo

Applicant

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

Application No. 14/691,433

MEMORANDUM AND ORDER

On December 16, 2021, Applicant Martin Joseph Bodo filed a request to extend the time to seek judicial review of the Patent Trial and Appeal Board decision in the underlying application. The Board decision affirming the unpatentability of all pending claims in the underlying application issued on July 30, 2021. Under 37 C.F.R. 90.3(a), judicial review of a Board decision must be sought within sixty-three (63) days of the Board decision, making the deadline October 1, 2021. Bodo filed a Notice of Appeal with the Director on December 1, 2021, 61 days after the deadline. Bodo also filed a copy of the Notice of Appeal with the United States Court of Appeals for the Federal Circuit. On December 10, 2021, the Court docketed Bodo's appeal as *In re Bodo*, Appeal No. 2022-1244. *See Notice of Docketing*, ECF No. 1 (Dec. 10, 2021).

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

requested *before* the expiration of the period for filing an appeal with good cause, 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. Accordingly, 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; *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) made clear that “‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *See Pioneer*, 507 U.S. at 394. Bodo does not deny that he neglected to adhere to the October 1 deadline. The question remains, however, whether the negligence was excusable.

In *Pioneer*, the Court explained that determining whether “excusable neglect” occurred is “an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” And in determining whether a party’s failure to comply with a deadline was excusable, it is proper to rely on the acts and omissions of a party’s chosen counsel where relevant. *Id.* at 396-97. “Although 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). Generally, the factors to be considered in determining whether negligence 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. *Pioneer*, 507 U.S. at 395.

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, 1587 n.7 (T.T.A.B. 1997). Here, with respect to the third factor, Bodo’s counsel explains that he missed the October 1, 2021 filing deadline as the result of the death of his wife on October 15, 2021. Bodo’s counsel also explains that his wife had been hospitalized since January 1, 2019. There is no evidence that Bodo’s counsel chose to “flout” the filing deadline. *See Pioneer*, 507 U.S. at 388. Instead, the Request and supporting documentation indicate that Bodo’s counsel experienced the passing of his wife very near to the time of the October 15, 2021 deadline, and that previous to that deadline, she was hospitalized for a lengthy period of time. Her illness and death, as well as the time of her passing, were very much outside of his control and provide a well-founded explanation for his failure to comply with the filing deadline.

There is also no indication of bad faith under the fourth *Pioneer* factor. Applicant acted to remedy the missed deadline at the beginning of December,

2021. *See Pioneer*, 507 U.S. at 395; *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996) (delayed filing—an “omission[] caused by carelessness” as a result of “failure in communication” between different counsel—found to be “excusable neglect” in context of Fed. R. Civ. P. 60(b) given absence of prejudice and bad faith conduct) (internal citations omitted).

There is no evidence of prejudice to the PTO or another party under the first *Pioneer* factor. Nor is there evidence of potential negative impact to any judicial or administrative proceedings, as relevant under the second *Pioneer* factor. The delay between expiration of the appeal filing deadline and filing of the underlying Request and Notice of Appeal did not result in any meaningful delay in the proceedings under the second *Pioneer* factor. 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 Applicant’s requested 61-day extension.

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. Bodo's filing deadline to appeal from the underlying Board decision is extended from October 1, 2021, to December 1, 2021.

Date: December 23, 2021

ANDREW HIRSHFELD,
Performing the Functions and Duties of
the Under Secretary of Commerce for
Intellectual Property and Director of
the United States Patent and Trademark
Office

By: /s/ Amy J. Nelson
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