

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

In re Boss
Serial No. 14/951,916

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

MEMORANDUM AND ORDER

Before the Director is Applicant Boss's "Request For Extension Of Time To File A Notice Of Appeal" filed on August 25, 2021 seeking an extension of time under 37 C.F.R. § 90.3(c)(1)(ii) to file a Notice of Appeal to the United States Court of Appeals for the Federal Circuit in Application No. 14/951,916. For the reasons given below, the Request is denied.

On July 1, 2020, the Patent Trial and Appeal Board ("Board") issued its decision affirming the Examiner's rejections of claims 1, 5-12, 14, and 17-20. Under 37 C.F.R. § 90.3(a), Boss had until September 2, 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. Boss did not file a notice on or before that date with the USPTO. On September 11, 2020, the USPTO issued a Notice of Abandonment. On July 29, 2021, Boss filed a "Petition For Review" in the Federal Circuit, which the Court docketed as Appeal No. 21-2186. On the same day, Boss filed with the USPTO a Petition for Revival of An Application for Patent Abandoned Unintentionally Under

37 C.F.R. 1.137(a). A decision on that petition is being issued concurrently.

On August 25, 2021, after being contacted by the counsel for the Director in the Federal Circuit appeal, Boss submitted the underlying Request, seeking a 330-day extension on its appeal deadline. Having filed its request after the deadline has passed, Boss seeks 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. And “[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).

On the third *Pioneer* factor, Boss lists three reasons for the almost year-long delay in filing an appeal from the Board’s decision: 1) “Covid-19 Based Delays,” 2) “Client Appeal Approval Instructions Were Received After the 63-day Appeal Deadline,” and 3) “Unfamiliarity With Federal Circuit’s Rules/Procedures.” Req. at 3.

On its first reason for delay, Boss does not provide any specificity about how the COVID-19 pandemic actually contributed to the long delay between September 2,

2020 and July 29, 2021. While it is understandable that the pandemic and ensuing shutdowns created extremely difficult conditions for workplaces, Boss does not provide any specific nexus aside from broadly listing “delays/inefficiencies” resulting from a dispersed workforce, employee turnover, and anxiety. *Id.* Boss does not explain with any detail whose communications were disrupted, how those communications impacted the deadline in this case, how many employee turnover incidents occurred during that time frame, or how stress and anxiety led to the nearly year-long delay in this case. Nor does Boss explain what inefficiencies resulting from the pandemic contributed to the delay. Moreover, Boss fails to explain when it became aware of the deadline for filing the Notice of Appeal or how it worked diligently from that time to finally file it on July 29, 2021.

Boss’s second reason for delay, that its attorney received appeal approval after the 63-day deadline, also does not amount to excusable neglect. The failure to receive approval to appeal does not, in and of itself, establish excusable neglect for failing to meet the appeal deadline. But even if Boss adequately explained the reasons behind that communication delay, Boss still declines to state exactly when its attorney received appeal approval, and importantly why it delayed filing the notice between the day the attorney received approval instructions and July 29, 2021. The lack of justification is especially troublesome if, as Boss states, its attorney’s docket

“continued to be routinely processed after he belatedly received client instructions to appeal.” Boss does not assert that it not timely receive the Board’s decision or the Notice of Abandonment. The Director therefore assumes that Boss knew of both within days of issuance. Still, Boss gives no reasons for failing to file even as its attorney continued to attend to his docket.

Regarding Boss’s third reason for delay, its attorney’s unfamiliarity with Federal Circuit rules and procedures, Boss explains that “Wayne P. Bailey delved into the rules/procedures of the Federal Circuit – and mistakenly determined that a Petition to Revive needed to be filed (since the 63-day appeal due date had passed) concurrently with a Petition for Review at the USPTO, and a Petition for Review needed to be filed at the Federal Circuit concurrently with the filing of the Petition for Review at the USPTO (per Federal Rule of Appellate Practice [sic] Rule 15).” The filing of the Petition to Revive is irrelevant to the reason behind the delay in filing the notice of appeal—indeed, the Petition to Revive was filed on July 29, 2021, the very same day that the belated notice of appeal was filed. Boss does not assert that Mr. Bailey was unaware of the rule requiring the filing a notice of appeal, or that he miscalculated the deadline. To the extent that Mr. Bailey was unaware of that requirement, Boss does not indicate when Mr. Bailey became aware that he should file the notice of appeal or how long he took to navigate the rules to finally do so.

Considering the three reasons set forth by Boss individually and collectively, the Director finds that the conduct leading to the nearly year-long delay in filing the notice of appeal here constitutes neglect under the “excusable neglect” standard. The Director must next determine whether that negligence is excusable. Boss fails to show that its neglect is excusable, because although it cites to the COVID-19 pandemic generally as a reason for the delay, it does not show a nexus between any specific impacts from the pandemic and the delay in filing the notice of appeal between September 2, 2020 and July 29, 2021. Boss’s conduct suggests that it abdicated its responsibility to make a prompt determination of whether to pursue an appeal, reflecting the absence of diligent conduct. *See Pioneer*, 507 U.S. at 388; *See also Mitsubishi*, Mem. Op. at 12-13.

On the first and second *Pioneer* factors, the danger of prejudice and the length of the delay and its potential to impact judicial proceedings, Boss delayed filing the notice of appeal for an extraordinarily long period of 330 days. Granting Boss’s Request would also cause an unacceptable prejudice to USPTO proceedings under the first and second *Pioneer* factors. The USPTO has a strong interest in deterring delay due to “sloppy practice or inattention to deadlines.” *See Pumpkin*, 43 USPQ2d at 1588; *FirstHealth*, 479 F.3d at 829-30; (citing *Pumpkin* with approval). Here, Boss was aware of the Board’s decision and waited eleven months to act on it. The Director finds that

granting Boss's Request for additional time under these circumstances offends that strong institutional interest, and weighs against finding Boss's neglect "excusable." *See Pumpkin*, 43 USPQ2d at 1588. On the fourth *Pioneer* factor the Director does not find Boss's conduct to be in bad faith—there is no indication that Boss deliberately or intentionally flouted USPTO regulations.

On balance, the Director finds that application of the *Pioneer* factors to these facts weighs against granting the Request. Boss does not offer an explanation with adequate specificity for waiting nearly a year to file its appeal. Finding Boss's negligence "excusable" would dilute the effectiveness of USPTO filing deadlines and undermine the ability to place reasonable boundaries on the scope of the "excusable neglect" standard. The Director therefore finds that Boss has failed to establish that it is entitled to additional time under the "excusable neglect" standard.

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 **denied**.

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/ Thomas W. Krause
Thomas W. Krause
Deputy General Counsel for
Intellectual Property Law and Solicitor

DATE: September 7, 2021

Cc (via email):

Wayne P. Bailey
P.O. Box 6669
McKinney, TX 75071
214.730.4330
wbailey@yeeiplaw.com