

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE DIRECTOR

In re PepperBall Tech., Inc. )  
*Ex Parte* Reexamination Nos. 90/008, 728 ) Decision on Request  
and 90/008,731 ) under 37 C.F.R. § 1.304(a)(3)(ii)  
BPAI Final Decision: June 30, 2010 )  
\_\_\_\_\_ )

MEMORANDUM AND ORDER

On October 5, 2010, patent owner PepperBall Technologies, Inc. (PepperBall) filed a request seeking an extension of time under 37 C.F.R. §1.304(a)(3)(ii) to file a Notice of Appeal in *ex parte* reexamination nos. 90/008,728, and 90/008,731.

PepperBall's petition is granted.

On June 30, 2010, the Board of Patent Appeals and Interferences (Board) issued a final decision in both reexaminations, affirming-in-part the final rejection of PepperBall's claims. PepperBall faxed a Notice of Appeal to the Court of Appeals for the Federal Circuit for review of both Board decisions (Appeal Notices) on August 30, 2010. However, PepperBall erroneously sent the Appeal Notices to the Federal Circuit Clerk's Office, and not the USPTO as required. PepperBall has since filed the underlying request for extensions of time in which to properly file the Appeal Notices.

PepperBall alleges in support of its request for additional time that the Federal Circuit Clerk's Office contacted them on August 30th, and told them that they must file the Appeal Notices with the USPTO. Per the Clerk's Office suggestion, PepperBall immediately contacted the Solicitor's Office. After discussing the matter with a paralegal in the Solicitor's Office, PepperBall submitted the underlying time-extension request to the Director. PepperBall explains

that a lack of resources compelled them to handle their Federal Circuit appeal in-house.

Similarly, PepperBall CEO John Stiska – who signed the request and indicates that he handled submitting the Notices – states that while he is a lawyer, he has not practiced since 1990, and has never practiced patent law. PepperBall states that given these circumstances, their incorrect belief that they had properly filed the Notices was excusable neglect, and supports providing additional time to remedy their filing errors.

The Director may extend the time for filing a civil action or appeal “after the expiration of the period for filing an appeal or commencing a civil action upon a showing that the failure to act was the result of excusable neglect.” 37 C.F.R. § 1.304(a)(3)(ii). In determining excusable neglect, the PTO applies the standard used by the Federal Courts. MPEP § 1216. The determination of what kinds of neglect are excusable is “an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include . . . the danger of prejudice to [another party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993).

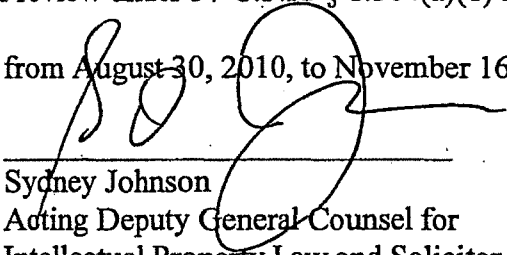
Applying the *Pioneer* factors to this situation ultimately weighs in favor of PepperBall. Of particular relevance to granting the request is the fact that PepperBall attempted to file the Notices within the required two-month window, a strong indication of good-faith conduct. While they did so with the wrong entity and using an improper filing mechanism (the Federal Circuit only accepts filing by facsimile in limited circumstances, *see* Fed. Cir. R. 25), PepperBall attempted to remedy those errors as quickly as possible, thus minimizing the length of the delay.

Further, there does not appear to be any danger to another party, or impact on judicial proceedings.<sup>1</sup> Given these considerations, and the equitable nature of the “excusable neglect” standard, the Director concludes that the balance of the *Pioneer* factors weighs in favor of granting the extension.

ORDER

Upon consideration of the request for an extension of time under 37 C.F.R. § 1.304(a)(3)(ii), it is ORDERED that that request is granted.

PepperBall’s time for seeking judicial review under 37 C.F.R. § 1.304(a)(1) in both the above-captioned reexaminations is extended from August 30, 2010, to November 16, 2010.

  
\_\_\_\_\_  
Sydney Johnson  
Acting Deputy General Counsel for  
Intellectual Property Law and Solicitor

DATE: October 20, 2010

cc: John Stiska  
Chief Executive Officer  
PepperBall Technologies, Inc.  
6142 Nancy Ridge Drive  
Suite 101  
San Diego, CA 92121

---

<sup>1</sup> While the reexaminations arose by request of a third party – Security with Advanced Technology, Inc – and were related to litigation with that party, that proceeding has settled.