UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

In re WebXchange, Inc.	)	
Ex Parte Reexam Control No. 90/010,417	)	Decision on Request
U.S. Patent No. 6,212,556	)	under 37 C.F.R. § 90.3(c)(ii)
PTAB Final Decision: Sept. 23, 2015	)	

MEMORANDUM AND ORDER

On December 4, 2015, patent owner Dr. Lakshmi Arunachalam (Arunachalam) filed a Request seeking an extension of time under 37 C.F.R. § 190.3(c)(ii) to file a Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit in Ex Parte Reexamination Control No. 90/010,417. For the reasons given below, Arunachalam's request is granted.

On September 23, 2015, the Patent Trial and Appeal Board affirmed the rejection of claims 1-24, and 25-29 in U.S. Patent No. 6,212,556, issued to Arunachalam. Under 37 C.F.R. §§ 90.3(a), Arunachalam had until November 25, 2015 (*i.e.*, 63 days from the Board decision) in which to file a Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit (Notice). Arunachalam did not file any Notice, or seek additional time to do so, on or before November 25, 2015. On December 4, 2015, Arunachalam received a call from the USPTO about the status of any appeal in the '417 reexamination. *See* Req. at 3. Arunachalam then filed this Request.

The Director may extend the time for filing an appeal after the expiration of the period for filing an appeal where requested in writing and "upon a showing that the failure to act was the result of excusable neglect." 37 C.F.R. § 90.3(c)(ii). The authority to decide such requests has been delegated to the Solicitor. MPEP § 1002.02(k)(3). In determining excusable neglect, the USPTO applies the standard used by the Federal Courts. MPEP § 1216; *see, e.g., Rambus v. Nvidia, Corp.* (Inter Partes Reexam Control No. 95/001,169) (Memorandum & Order, dated Jul. 11, 2013) (*Rambus*); *Acqis LLC v. Hewlett-Packard Co & IBM* (Inter Partes Reexam Control No.

95/001,475) (Memorandum & Order, dated Oct. 2, 2015) (*Acqis*). Determining whether the failure to properly pursue juridical review within the stated time period is the result of "excusable neglect" 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, [and 3] 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). Excusable neglect "is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 390; *see also Information Systems and Networks Corp. v. United States*, 994 F.2d 792, 796 (Fed. Cir. 1993) (holding that a party's failure to answer a counterclaim based on the mistaken belief that no answer was required constituted excusable neglect for purposes of Fed. R. Civ. P. 60(b)). 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 control of the movant." *Pioneer*, 507 U.S. at 392. The third *Pioneer* factor–relating to why the filing was delayed–is generally considered the most important factor in the analysis. *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 (TTAB 1997).

On the third factor, Arunachalam explains that the failure to timely file a Notice here is the result of handling, *pro se*, multiple legal proceedings arising out of federal district court and

the USPTO litigation, involving various patents issued to her. *See* Req. at 3-4.[1] In particular, Arunachalam states that her attention has recently been focused on preparing a petition for a writ of certiorari to the United States Supreme Court in *Pi-Net Intl, Inc. & Dr. Lakshmi Arunachalam v. JPMorgan Chase & Co.*, Fed. Cir. Appeal No. 14-1495. *See* Req. at 3. Arunachalam filed that cert petition on November 19, 2015; Arunachalam states that she represents herself in that litigation. *See* Req. at 3; *Arunachalam v. JPMorgan Chase & Co.* (S.Ct. 15-691). Arunachalam also states that she is individually handling "ongoing patent prosecution at the USPTO and patent re-examination work" at the USPTO. *See* Req. at 4. Collectively, Arunachalam asserts, these matters have been "time-consuming." Req. at 4. Arunachalam states that she also suffers from various physical ailments (including diabetes), which have been exacerbated by her various patent-related litigations; she suggests her medical issues have contributed to her inability to meet the appeal filing deadline here. *See* Req. at 3-4. Arunachalam requests additional time in light of these circumstances to permit her to pursue Federal Circuit review of the reexamination decision here and "to ensure that she will have adequate time to do analysis." Req. at 4.

Application of the *Pioneer* factors to the reasons advanced by Arunachalam for her failure to file a timely Notice is difficult. Arunachalam essentially argues that the reason she missed the filing deadline in this matter was because she was busy handling, *pro se*, other legal matters. While an individual is within their rights to handle their legal affairs *pro se*, electing to proceed without legal representation may have negative consequences, particularly when the individual is embroiled in so many active legal disputes as Arunachalam. Among those

[1] Arunachalam filed a Declaration in support of the Request containing the same salient facts and statements.

consequences may be that the individual cannot keep track of deadlines and filings. Accordingly, the fact that Arunachalam missed the filing deadline here because she was busy with other legal matters constitutes "negligence;" the question is whether it was "excusable" under the rule. *See Pioneer*, 507 U.S. at 394 ("'[E]xcusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence."). As in *Rambus* and *Acqis*, the most troubling aspect for Arunachalam is that but-for a courtesy call from the USPTO, there is absolutely nothing to indicate that Arunachalam would have realized the appeal-filing deadline had passed, let alone taken steps to procure additional time to file any Notice. *See Rambus* at 4; *Acqis* at 4. Parties—whether or not represented by legal counsel—should not rely on the USPTO to remind them of the deadlines for judicial review, and then expect they will be granted additional time to pursue that review. Similarly, the USPTO and the public should be able to conduct their affairs with the reasonable expectation that parties such as Arunachalam are conducting theirs in a timely manner; it would be grounds for denying additional time under Rule 90.3(c)(ii) if resurrecting a parties' appeal rights would cause prejudice or issues for other parties. *See Pioneer*, 507 U.S. at 398 (indicating that prejudice to private parties or "judicial administration" would be grounds for declining to find neglect "excusable").

Critically, there is no evidence that extending Arunachalam's time to pursue an appeal here would prejudice either the USPTO or a private party. This reexamination is *ex parte*, meaning that any appeal would not involve a third party. Further, it appears that the legal actions identified in the underlying reexamination as involving the '556 patent have all concluded. And the USPTO has not closed the reexamination proceedings. Consideration of this factor weighs in favor of granting the request. But, as explained in *Rambus*,

> [t]hat would not be the case, however, if the USPTO had issued a reexamination certificate, or even a NIRC, in this reexamination. It would have been entirely proper for the USPTO to close these reexamination proceedings once the deadline for seeking judicial review of the Board decision had passed without receiving proper Notice of such a suit. *See* MPEP §§ 2687, 2688; 35 U.S.C. § 316 (pre-AIA version governing inter partes reexaminations). In that scenario, the USPTO and public at large should be able to rely upon the timely and proper conclusion of the reexamination proceedings. Thus, the USPTO hastens to make clear to practitioners that future requests presenting that fact scenario will likely not result in the same favorable outcome. *Cf. Pioneer*, 507 U.S. at 398.

Rambus, at 5; *see Acqis*, at 5 (quoting *Rambus*). The Director wishes to again reinforce that cautionary point.

Considering the other *Pioneer* factors, the absence of any bad faith conduct here weighs in favor of granting the relief. *See Pioneer*, 507 U.S. at 395; *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996) ("excusable neglect" in context of Fed. R. Civ. P. 60(b)). There is no indication that Arunachalam deliberately disregarded the Notice filing deadline. And Arunachalam acted promptly and diligently to seek additional time to file her Notice once she became aware that she had missed the filing deadline. Toward that end, the length of delay here between the decision date and any judicial review is not long. Lastly, the Director is mindful of Arunachalam's allegations that her medical issues contributed to the delay.

Given these considerations, and the equitable nature of the "excusable neglect" standard, the balance of the *Pioneer* factors weighs in favor of granting the extension. *See* 507 U.S. at 395 (determining whether "excusable neglect" occurred is "an equitable one, taking account of all relevant circumstances surrounding the party's omission"). Arunachalam sought an extension until December 18, 2015 (*i.e.*, 14 days from filing the Request). Arunachalam will be given 14 days from the date of decision here in which to file her Notice.

ORDER

Upon consideration of the request for an extension of time under 37 C.F.R. §90.3(3)(ii), it is ORDERED that the request is granted.

Arunachalam's time for filing a Notice of Appeal to the Federal Circuit for review of the Board decision in this reexamination is extended from November 25, 2015 to December 30, 2015.

MICHELLE K. LEE
UNDERSECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE

By: Thomas W. Krause
Acting Deputy General Counsel for
Intellectual Property Law and Solicitor

DATE: December 16, 2015

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