

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

In re Godo Kaisha IP Bridge 1
Patent Owner

Reexamination Control No. 90/014,645
Patent No. 7,515,635

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

MEMORANDUM AND ORDER

On June 26, 2023, Patent Owner Godo Kaisha IP Bridge 1 (“IP Bridge”) filed a request to extend the time to seek judicial review of the Patent Trial and Appeal Board decision in the underlying *ex parte* reexamination proceeding. The PTAB’s decision issued on March 31, 2023. Under 37 C.F.R. § 90.3(a)(1), judicial review of a Board decision must be sought within sixty-three (63) days of the Board decision, making the deadline June 2, 2023. IP Bridge filed a Notice of Appeal with the Director on June 26, 2023, 24 days after the deadline. IP Bridge also filed a copy of the Notice of Appeal with the United States Court of Appeals for the Federal Circuit.

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. IP Bridge does not deny that IP Bridge neglected to adhere to the June 2, 2023 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.” *Pioneer*, 507 U.S. at 395. 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. *Id.* 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, 829 (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, IP Bridge’s counsel explains that he missed the June 2, 2023 filing deadline as the result of a miscalculation. There is no evidence that IP Bridge’s counsel chose to “flout” the filing deadline. *See Pioneer*, 507 U.S. at 388. Instead, the Request and supporting documentation indicate that IP Bridge’s counsel was, at most, careless. *See Pioneer*, 507 U.S. at 381 (“Congress plainly contemplated that the courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party’s control.”); *Mitsubishi*, Mem. Op. at 11 (*Pioneer* “adopted a broader and more flexible test for excusable neglect . . . to include more than simply intervening circumstances beyond the party’s control.”) (internal citations and quotes omitted).

There is also no indication of bad faith under the fourth *Pioneer* factor. IP Bridge acted to remedy the missed deadline immediately, by filing a Notice of Appeal with the Director on June 26, 2023. The failure to comply was inadvertent

and done in an affirmative effort to comply with the Notice of Appeal deadline. 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”—found to be “excusable neglect” in context of Fed. R. Civ. P. 60(b) given absence of prejudice and bad faith conduct).

There is no evidence of prejudice to the USPTO 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 24-day extension.

ORDER

Upon consideration of IP Bridge’s request for an extension of time under 37 C.F.R. § 90.3(c)(1)(ii), it is ORDERED that the request is granted. IP Bridge’s filing deadline to appeal from the underlying Board decision is extended from June 2, 2023, to June 26, 2023.

KATHERINE K. VIDAL
Under Secretary of Commerce for
Intellectual Property and Director of the
U.S. Patent and Trademark Office

By: /s/ Thomas W. Krause
Thomas W. Krause
Solicitor

DATE: June 29, 2023

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