UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

Mexichem Amanco Holding S.A. de C.V. v. Honeywell Int'l Inc.	)	Decision on Request
Inter Partes Reexamination Control No. 95/001,783	)	under 37 C.F.R.
U.S. Patent No. 8,033,120	)	§ 1.304(a)(3)(ii)

MEMORANDUM AND ORDER

Before the Director is the "Petition for Extension of Time to File an Appeal with the U.S. Court of Appeals for the Federal Circuit" ("Request"), filed on July 17, 2020, by Patent Owner Honeywell International Inc. ("Honeywell") in the above-captioned inter partes reexamination proceeding. Appellee Mexichem Amanco Holding S.A. de C.V ("Mexichem") did not oppose the requested extension. For the reasons given below, Honeywell's Request is granted.

The Patent Trial and Appeal Board (Board) issued its decision in the above-captioned inter partes reexamination involving U.S. Patent No. 8,033,120 ("the '120 patent") on May 1, 2020. On July 6, 2020, Honeywell filed its Notice of Appeal to the Federal Circuit in this matter with the Director, and served copies on Mexichem and the Federal Circuit. On July 14, 2020, the Federal Circuit docketed Honeywell's appeal as Appeal No. 20-1991. *See Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V.*, Appeal No. 20-1991, ECF No. 1 (Jul. 14, 2020). The issue underlying the Request here is when Honeywell's Notice of Appeal from the Board decision was due and, thus, whether the July 6th filing was timely.

On September 16, 2012, various changes to title 37 of the Code of Federal Regulations took effect. Among other changes, the provisions governing the seeking of judicial review for ex parte and America Invents Act ("AIA") proceedings were installed at 37 C.F.R. §§ 90.1-90.3. Rule 90.3 provides 63 days for filing a notice of appeal without specifying the type of proceedings to which it applies. However, per 37 C.F.R. § 90.1, "[j]udicial review of decisions arising out of inter partes reexamination proceedings that are requested under [pre-AIA] 35 U.S.C. § 311…continue to be

governed by the pertinent regulations in effect on July 1, 2012." The "pertinent regulations in effect on July 1, 2012" regarding judicial review of decisions in inter partes reexamination are 37 C.F.R. §§ 1.301-1.304 (2012). *See* 37 C.F.R. § 1.983 (providing that a party wishing to appeal a PTAB decision in an inter partes reexamination should "timely file a written notice of appeal directed to the Director in accordance with §§ 1.302 and 1.304"). In particular, Rule 1.304 provided only "two months" for filing a notice of appeal. However, the regulatory text of 37 C.F.R. §§ 1.301-1.304 (2012) does not appear in post-2012 versions of the C.F.R.. *See* MPEP § 2683 (providing guidance for appeals in inter partes reexaminations, and quoting 37 C.F.R. §§ 90.1, 1.983, and 1.302-304 (2012)). The "good cause" and "excusable neglect" standards applicable to requests for additional time, however, are the same under the old and new regulations.

The difference in the filing deadlines articulated in Rule 90.3 (63 days) and Rule 1.304 (two months) is generally three days. In this case, the difference between the due date under the two rules was six days. If Rule 90.3 applied, Honeywell's due date would have been July 3rd, which was a Federal Holiday, making July 6th the actual due date and Honeywell's filing on the same date timely. But Honeywell's due date under 37 C.F.R. § 1.304(a)(1) (2012), was June 30, 2020. Thus, under Rule 1.304, Honeywell's appeal notice was late by six days, requiring an extension of that length under the "excusable neglect" standard to make the notice timely.

Returning to the relevant facts here, after the Court docketed the underlying appeal here as Appeal No. 20-1991 on July 14, 2020, Appellant Honeywell filed a motion to consolidate the appeal with two related appeals: Appeal Nos. 20-1981 and 20-2023. *See Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V.*, Appeal No. 20-1991, ECF No. 10 (Aug. 19, 2020). As Honeywell's consolidation motion explains, all three appeals involve 1) inter partes reexaminations of related Honeywell patents, and 2) Mexichem as a party, but 3) only Appeal No. 20-2023 involves Appellee

Daikin Industries, Ltd ("Daikin") as a party. *Id.* at 2, 5 n.5. Briefly:

> Appeal No. 20-1981: Requester Mexichem filed the appeal, seeking review of the Board's decision in inter partes reexamination 95/002,030, involving Honeywell's U.S. Patent No. 8,065,882 ("the '882 patent"). There are no appeal-notice timeliness issues or related time-extension requests associated with the 20-1981 appeal.
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> Appeal No. 20-2023: Honeywell filed the appeal, seeking review of the Board's decision in inter partes reexaminations 95/002,189 and 95/002,204, involving Honeywell's U.S. Patent No. 7,534,366 ("the '366 patent"). As noted above, both Mexichem and Daikin are Appellees in the 20-2023 appeal. Honeywell has filed a separate Rule 1.304 request with the Director for additional time to pursue the 20-2023 appeal. The operative facts, and basis for relief, in the request there are virtually identical to those here.[1] The crucial difference between the 20-2023 and 20-1991 appeals is that Daikin has filed a motion to dismiss Honeywell's 20-2023 appeal, and opposes Honeywell's related time-extension request with the Director. *See Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V. & Daikin Industr., Ltd.*, Appeal No. 20-2023, ECF No. 19 (Aug. 26, 2020). Conversely, Appellee Mexichem—the lone Appellee in the 20-1991 appeal here—has not moved to dismiss the appeal or opposed Honeywell's time-extension request with the USPTO.

Mexichem responded to Honeywell's consolidation motion. *See Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V.*, Appeal No. 20-1991, ECF No. 12 (Aug. 31, 2020). Honeywell replied. *Id.*, ECF No. 13 (Sept. 8, 2020).

On Sept. 24, 2020, the Court consolidated Appeal Nos. 20-2023 and 20-1991, while keeping Appeal No. 20-1981 as a companion appeal. *Id.*, ECF No. 14 (Reyna, J.) (Sept. 24, 2020). Given Daikin's pending motion to dismiss Appeal No. 20-2023, and Honeywell's Rule 1.304 time-extension requests in the inter partes reexaminations underlying consolidated Appeal Nos. 20-1991, -2023, the Court ordered briefing stayed in consolidated Appeal Nos. 20-1991, -2023 pending resolution of those time-extension requests. *Id.*

During the appellate consolidation motion briefing, the USPTO submitted a "Notice of Non-Filing of Certified List." *Id.*, ECF No. 11 (Aug. 26, 2020). In that Notice, the USPTO

[1] A decision in the request filed in the time-extension request in the '2189/'2204 reexamination, reaching the same result as here, was issued separately.

explained that Honeywell's Notice of Appeal was untimely based on Rule 1.304's two-month filing window, observing that Honeywell had since filed the underlying Request for additional time to cure that defect. *Id.*

We turn now to Honeywell's Request in the underlying reexaminations here. The Director may extend the time for filing an 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. § 1.304(a)(3)(ii) (Jul. 2012). 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 Cable Industr., Ltd., et al. v. Goto Denshi Co., Ltd.*, Memorandum and Order at 7-14, Dkt. No. 28 (IPR2015-01108) (May 3, 2017) ("*Mitsubishi*"); *IpVenture, Inc. v. FedEx Corp.*, Memorandum and Order (Inter Partes Reexamination Control No. 95/001,896) (Apr. 4, 2017) ("*IpVenture II*"); *Rambus, Inc. v. Nvidia, Corp.*, Memorandum and Order (*Inter Partes* Reexamination Control No. 95/001,169) (Jul. 11, 2013).

> The "excusable neglect" inquiry is
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> > 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, 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. 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 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 one factor does not control. *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).

Before turning to the merits of Honeywell's Rule 1.304 extension request, Honeywell alternatively requests the USPTO to waive the appeal deadline under 37 C.F.R. § 1.183. *See* Req. at 18-19. 37 C.F.R. § 1.4(c) forecloses reaching any argument for relief under Rule 1.183. Rule 1.4(c) requires a party seeking distinct bases for relief to do so in separate papers because "different matters may be considered by different branches or sections of the Office." *See also* MPEP § 1002 ("37 CFR 1.4(c) requires a separate petition for each distinct subject, inquiry or order to avoid confusion and delay in answering the petition. Therefore, each petition should ordinarily only be filed under a single authorizing provision (e.g., 37 CFR 1.181)"). The USPTO typically addresses the basis of relief articulated in a filing violating Rule 1.4(c) that makes the most sense to address. *See, e.g.*, *Google Inc. v. Vederi, LLC*, Memorandum and Order (Inter Partes Reexamination No. 95/000,682) (Jul. 11, 2017). Rule 1.304 expressly addresses the situation here (*i.e.*, extending the time to file a notice of appeal), while Rule 1.183 is a rule of general applicability. Accordingly, the Director treats Honeywell's combined filing as a Rule 1.304 request for additional time to file an appeal from the Board decision in the underlying reexamination here.[2]

Turning to the *Pioneer* analysis and the third factor, Honeywell maintains that it failed to apply the two-month appeal window proscribed in Rule 1.304 because it "plausibly misconstrued the

[2] In opposing Honeywell's time-extension request in the '2189/'2204 reexaminations, Daikin argues that the USPTO lacks jurisdiction to decide Honeywell's extension request. While there are no jurisdiction issues directly raised here, the Director observes that the USPTO may properly adjudicate Honeywell's Request. *See Mitsubishi*, at 2-7 (explaining why the USPTO has jurisdiction to

applicable mix of statutory and regulatory rules defining the deadline for filing a notice of appeal." Req. at 2. Honeywell offers two arguments in support of this position. First, Honeywell argues that it plausibly believed Rule 90.3 applied. *Id.* at 7-8. Second, Honeywell argues that "excusable neglect" lies "'where the language of a rule is ambiguous or susceptible to multiple interpretations, or where an apparent conflict exists between two rules.'" *Id.* at 4-5 (quoting *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250 (2d Cir. 1997), and citing other decisions). Honeywell argues that Rule 90.3 and Rule 1.304 are "susceptible to multiple interpretations when taken together." *Id.* at 8; *see id.* at 8-11.

Honeywell's excuses for failing to apply the correct regulation are not particularly compelling one way or the other. Honeywell first argues that it was justified in relying on Rule 90.3 because that provision expressly states that it provides the "[f]iling deadline" for appeals under 35 U.S.C. §§ 141 and 142, and Honeywell's appeal here falls under those statutory provisions. Req. at 7. True enough. But Honeywell's protest that its "counsel had no indication that any other rule [besides Rule 90.3] governed the time within which Honeywell had to file a notice of appeal" (*id.*) loses force because Honeywell gives no indication that it did anything other than read Rule 90.3. On the one hand, that was not a facially unreasonable choice, given that Rule 90.3 does not indicate that it applies to some § 141 appeals but not others. Honeywell's counsel explains that he relied on Rule 90.3 here based on experience with other appeals from other USPTO proceedings where that rule governed. *See* Frank Decl. ¶ 4. On the other hand, the Board decision expressly directed Honeywell to Rule 90.1. *See* PTAB Dec., at 27 (May 1, 2020). Rule 90.1 defines the "[s]cope" of Part 90 and makes plain that appeals from inter partes reexamination fall outside the rule: "Judicial review of decisions arising out of *inter partes* reexamination proceedings ... continue to be governed by the pertinent regulations in

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resolve a time-extension request when a party has taken an untimely appeal).

effect on July 1, 2012." Honeywell makes no representation as to whether it read Rule 90.1, making its statement that it had no indication that Rule 90.3 did not apply here difficult to accept.

Which brings us to Honeywell's second explanation, asserting that confusion and ambiguity resulting from reading Rules 90.1-90.3 and Rules 1.301-1.304 supports finding "excusable" neglect in Honeywell's reliance upon Rule 90.3. *See* Req. at 8-14.[3] As just discussed, there is no indication that Honeywell consulted anything other than Rule 90.3 before pursuing its appeal. Honeywell could not have been confused by allegedly conflicting regulations when Honeywell makes no representation that it did anything more than read Rule 90.3. At a minimum, reading Rule 90.1 would have told Honeywell that Rule 90.3 did not apply.

Honeywell protests that Rule 90.1 would not have clarified things because Rule 90.1 does not clearly say what regulations are "pertinent" to appealing from an inter partes reexamination. *See* Req. at 10. Again, a fair, but incomplete, point. While Rule 90.1 does not identify Rule 1.304 as the "pertinent" regulation for filing the notice of appeal, that information is provided at 37 C.F.R. § 1.983—a regulation to which the Board also sent Honeywell. *See* PTAB Dec., at 27. Rule 1.983 expressly states that to appeal from the Board decision in an inter partes reexamination, "(b) [t]he

[3] Honeywell argues that Rule 90.3 governs appeals from inter partes reexaminations. *See, e.g.*, Req. at 8, 14. The issue need not be resolved here in light of the granted extension under Rule 1.304. Further, the issue of whether Rule 90.3 governs appeals arising from inter partes reexaminations has been presented to the Court in the context of Daikin's motion to dismiss Appeal No. 20-2023, an appeal not directly at issue here and to which the USPTO is not a party. The separately granted time extension in inter partes reexaminations 95/002,189 and 95/002,204 should similarly moot Daikin's dismissal motion in Appeal No. 20-2023. However, for completeness, Director observes that the USPTO has already taken the position in this appeal that Rule 1.304 governs the deadline for the notice of appeal here. *See* Notice of Non-Filing of Certified List, ECF No. 11 (Aug. 26, 2020). In that Notice, the USPTO explained that Honeywell's Notice of Appeal was untimely because Rule 1.304's two-month filing window applied and the Notice was filed after that deadline. The Director observes that the plain text of Rules 90.1 and 1.983, discussed above, supports that position. USPTO guidance regarding appeals for inter partes reexaminations reinforces that "37 CFR 1.302 and 37 CFR 1.304, as in effect on July 1, 2012, are still applicable to *inter partes* reexamination

appellant must take the following steps: (1) In the U.S. Patent and Trademark Office, timely file a written notice of appeal directed to the Director in accordance with §§ 1.302 and 1.304." 37 C.F.R. § 1.983 (2020). Honeywell counters that even if it had uncovered that Rule 1.304 governed, it is hard to fault them for failing to apply it when that rule does not appear in the current Code of Federal Regulations. *See* Req. at 9. Also true, but MPEP § 2683 contains the text of Rule 1.304. Further, MPEP § 2683 confirms that Rule 1.304 governs this appeal. Honeywell was aware of MPEP § 2683, since it cited that section in its notice of appeal here.

All of this said, Honeywell's explanations collectively illustrate that the regulations governing appeal from an inter partes reexamination after 2012 are not a model of clarity. It is difficult to fault a party for relying on Rule 90.3 when it is the only regulation governing appeals from USPTO proceedings written in Title 37 of the Code of Federal Regulations. Toward that end, while Rule 90.1 unambiguously states that Rule 90.3 does not apply to appeals arising from inter partes reexamination, that's as far as it goes. An interested party then has to discover the applicable regulation using an objectively ambiguous patchwork of guidance and regulation, including 37 C.F.R. § 1.983 and MPEP § 2683—the latter apparently being the only place to find the regulatory text providing the text of Rule 1.304. Honeywell correctly points out that different arms of the USPTO have referenced Rule 90 as applying to appeals from inter partes reexaminations. *See* Req. at 13-14. While those errors do not support, as Honeywell asserts, the conclusion that Rule 90.3 actually governs such appeals (Req. at 14), they do illustrate the relative ease with which the mistake that Honeywell made here can be made. While there is still the difficulty of the fact that Honeywell never actually consulted the allegedly conflicting regulatory text, Honeywell's point that identifying the governing provision, and its text, proves objectively confusing has force in the "excusable

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proceedings." MPEP § 2683.

neglect" determination here. *See, e.g.*, *Pioneer*, 507 U.S. at 389-399 (considering "significant" in the "excusable neglect" analysis there the confusion caused by the "unusual form" of the notice from the Bankruptcy Court supplying the relevant filing date). In sum, the Director finds that the third *Pioneer* factor is, at best, neutral; at worst, it weighs slightly against a finding of excusable neglect.

While the third *Pioneer* factor holds heightened importance, it does not control; *Pioneer* requires a holistic consideration of all relevant factors. The Director finds that other relevant factors weigh in favor of finding "excusable neglect" and granting the requested extension. *Pioneer* contemplates examining the length of the delay, along with any prejudice to other parties or proceedings under its first two factors. *Pioneer*, 507, U.S. at 395. The Director finds no evidence of prejudice to another party under these facts. There is no apparent prejudice to Mexichem. The stay in consolidated Appeal Nos. 20-1991, -2023 moots any prejudice concerns there. *See Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V.*, Appeal No. 20-1991, ECF No. 14 (Sept. 24, 2020). And briefing in companion Appeal No. 20-1981, involving only Honeywell and Mexichem, is well underway. *See Mexichem Amanco Holdings S.A. de C.V v. Honeywell Int'l Inc.*., Appeal No. 20-1981, ECF Nos. 29 (Jan. 4, 2021) (Appellant Mexichem's opening brief) & 38 (Mar. 26, 2021) (Honeywell's responsive brief). The Director does not see any prejudice to Daikin either. Daikin is involved only in Appeal No. 20-2023 (now consolidated with Appeal No. 20-1991), where briefing has been stayed.

For these same reasons, the facts here do not support finding prejudice to judicial proceedings. Related district court proceedings have been stayed since 2013. *See* Req. at 7. While the Director laments that the need to stay briefing in consolidated Appeal Nos. 20-1991, -2023, awaiting disposition of pending extension requests, that time is not directly attributable to Honeywell missing its filing deadline by six days. Similarly, the Director finds the length of delay here to be short. Under

Rule 90.3, Honeywell's notice of appeal was due on or before June 30, 2020. Honeywell filed its notice of appeal here on July 6, 2020. The brief six-day delay between the due date and filing date is inconsequential in the appellate proceedings.[4]

The Director finds that Honeywell's conduct evinces good faith under the fourth *Pioneer* factor, favoring a finding of "excusable neglect." The Director finds Honeywell's belief that Rule 90.3 governed this appeal genuine; Honeywell's timely compliance with that provision evinces good faith, rather than a deliberate or intentional flouting of USPTO regulations. Moreover, Honeywell's compliance with Rule 90.3 demonstrates that it made a timely determination to appeal. *See Pioneer*, 507 U.S. at 388, 395; *Amgen Inc. v. Hoechst Roussel, Inc.*, 25 F. App'x 923, 924-25 (Fed. Cir. 2001) (delayed filing, while within the reasonable control of party, was not an attempt to ignore judicial deadlines).

The Director agrees with Honeywell that the facts here are unlike those in *IpVenture II*. Req. at 11. The *Pioneer* inquiry is uniquely fact-dependent, and there are important distinctions between this situation and *IpVenture II*. On the third *Pioneer* factor, *IpVenture II* placed significant emphasis on IpVenture's failure to offer a reasonable explanation for its failure to apply 37 C.F.R. § 41.79 in calculating its time to seek rehearing (and thus toll its appeal deadline), with the result that it filed an untimely rehearing request and resulted in an untimely Federal Circuit appeal. There, the Board cited § 41.79 to IpVenture and the rule unambiguously provided the window for seeking rehearing. *IpVenture II*, at 4-7. Here, as the discussion above on the third factor indicates, the Board did not

[4] Daikin's Opposition to the time-extension requests in the '2189/'2204 reexaminations makes several legal arguments about Honeywell's "delay" there. While not directly implicated here, to the extent relevant, the Director incorporates by reference the explanation there rejecting Daikin's arguments. *See Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V. & Daikin Industr., Ltd.*, Memorandum and Order, at 11-12 (Inter Partes Reexamination Control Nos. 95/002,189 and 95/002,204) (Apr. 15, 2021).

actually point Honeywell to Rule 1.304. At most, the Board pointed Honeywell to regulations indicating that another (unidentified) regulation governed. Moreover, unlike the applicable regulation in *IpVenture II*, the regulation governing Honeywell's filing—Rule 1.304—cannot be found in the Code of Federal Regulations, and Honeywell's explanation for conflicting and confusing regulatory provisions has weight. Conversely, *IpVenture II* rejected the argument of conflicting or confusing regulations. *IpVenture II*, at 6 n.4.

Further, *IpVentureII* rejected finding "excusable neglect" based on concerns that "granting IpVenture's Request would cause an unacceptable prejudice to USPTO proceedings under the second *Pioneer* factor." *IpVenture II*, at 12; *see id.* at 12-13. *IpVenture II* explained that "where, as here, the offending party is expressly directed to the applicable regulation, and the regulations are otherwise clear, the need to preserve the integrity of the administrative proceedings gains importance." *Id.* at 12. The Director does not find the admittedly important goal of ensuring the integrity of USPTO proceedings at significant risk here. As already discussed, it cannot be said that the patchwork collection of regulations and guidance here possesses the same "clarity" as the regulation at issue in *IpVenture II*. Moreover, non-compliance with the rehearing regulation at issue in *IpVenture II* had a direct and meaningful impact on the conduct of USPTO proceedings. The USPTO relies on timely filings in its proceedings to identify active disputes and issues that require adjudication; if a party misses an internal filing deadline, the risk of prejudice to the USPTO significantly increases. By extension, the USPTO's interest in enforcing those internal deadlines takes on heightened importance to encourage compliance. While the USPTO has interest in encouraging compliance with all regulations, the judicial appeal filing deadline at issue here has less direct impact on the integrity and orderly administration of USPTO administrative proceedings, as those proceedings have ended. Thus, the relative posture of this situation and the one in *IpVenture II*

meaningfully differ. Where, as here, there is no evidence of prejudice to another proceeding or party, prejudice concerns are largely satisfied.

The factors specifically enumerated in *Pioneer* are not exclusive; the inquiry affords consideration of all relevant facts and circumstances. *Pioneer*, 507 U.S. at 395. Honeywell maintains that work and home disruptions caused by the COVID-19 pandemic contributed to the delay here, including by preventing collaboration with colleagues about the appropriate deadline, and thus supports granting the extension requested under Rule 1.304. *See* Req. at 14-15. Honeywell argues that the USPTO's prior recognition that the COVID-19 outbreak is an "extraordinary circumstance" within the meaning of 37 C.F.R. § 1.183 "must meet '*Pioneer*'s flexible approach.'" Req. at 14 (citing USPTO Notice, "Relief Available to Patent and Trademark Applicants, Patentees and Trademark Owners Affected by the Coronavirus Outbreak" (Mar. 16, 2020)).[5] While it is difficult to see a causal link between the COVID-19 disruptions identified by Honeywell's counsel, and the failure to apply Rule 1.304 here, the Director understands that the pandemic caused unforeseen and significant disruption in both personal and professional lives, as averred to here by Honeywell's attorney. *See* Frank Decl. ¶¶ 11-15. The Director accordingly declines to reject completely any impact of the unprecedented pandemic on the missed deadline here, and finds that the identified impacts on Honeywell's counsel weigh marginally in favor of finding "excusable neglect."

The Director additionally finds relevant the high degree of interrelatedness between Appeal Nos. 20-1981, -1991, and -2023. Appeal Nos. 20-1991 and 20-2023 have been consolidated and will

[5] Honeywell appears to alternatively argue that significant disruptions caused by the COVID-19 outbreak support relief under 37 C.F.R. § 1.183. Per the discussion above, that separate basis for relief is not considered here, pursuant to 37 C.F.R. § 1.4(c). Further, relief under § 1.183 is moot in light of the time-extension provisions available under Rule 1.304 (the same would be true if Rule 90.3 applied here, based on the same extension provisions). The Director can consider whether the identified disruptions support granting a requested extension under the "good cause" or "excusable

be briefed together. Appeal No 20-1981 has been designated a companion case, and will be argued with Appeal Nos. 20-1991, -2023. Yet, only Appeal No. 20-2023 is subject to a dismissal motion based on an untimely notice of appeal. It would be anomalous for the parties to brief one-half of that otherwise consolidated case. Further, inter partes reexamination control no. 95/002,204—involved in Appeal No. 20-2023—has previously been appealed to this Court, supporting additional consideration by the Court in these appeals. *Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V. & Daikin Industr., Ltd.*, Appeal No. 20-2023, ECF No. 14 (Aug. 6, 2020) (Daikin docketing statement identifying prior Appeal No. 16-1996).

Moreover, even if both Appeal Nos. 20-2023 and 20-1991were dismissed for timeliness issues, Appeal No. 20-1981 would continue, as there is no timeliness issue regarding Mexichem's appeal there. The parties do not dispute that the three patents involved in these reexaminations are closely related. *See, e.g.*, *Honeywell Int'l Inc. v. Mexichem Amanco Holdings S.A. de C.V.*, Appeal No. 20-1991, ECF No. 10, at 5 n.5 (Aug. 19, 2020); *id.*, ECF No. 4 (Jul. 27, 2020) (Honeywell docketing statement identifying the three appeals as involving "related patents"); *id.*, ECF No. 8 (Jul. 28, 2020) (Mexichem docketing statement identifying same). The Court will hear the substantive issues on the '882 patent involved in Appeal No. 20-1981; the interests of the parties and public are best served by similarly addressing issues regarding the related '120 or '366 patents in Appeal Nos. 20-1991 and 20-2023. These additional considerations support granting Honeywell a short extension. *See Pioneer*, 507 U.S. at 395 (excusable neglect determination permits consideration of "all relevant circumstances"); *Facebook, Inc., et al. v. Uniloc 2017 LLC*, Memorandum and Order, at 12-13 (IPR2017-01427) (Jan. 21, 2020).

The "excusable neglect" determination is an equitable one that requires balancing all the

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neglect" standards for providing an extension.

competing and relevant factors. *Pioneer*, 507 U.S. at 395. On balance, the Director finds that the facts weigh in favor of finding "excusable neglect" and granting Honeywell a six-day extension on its filing deadline in the underlying reexamination here. The USPTO recognizes that Honeywell could have figured out that Rule 1.304, and not Rule 90.3, governed its appeal. Yet, the path of patchwork regulations and guidance to divining that fact is less than clear. As discussed above, the Director finds that the third *Pioneer* factor is, at best, neutral; at worst, it weighs slightly against a finding of excusable neglect.

Even if the third *Pioneer* factor weighs against finding "excusable neglect," the error here is "not so egregious" as to outweigh the remaining considerations, which all favor finding the standard met. *See In re Gilman*, 887 F.3d 956, 963-64 (9th Cir. 2018) (standard contemplates "relief even when counsel makes an unreasonable mistake"); *M.D. by and through Doe v. Newport-Mesa Unified School District*, 840 F.3d 640, 643 (9th Cir. 2016) (holding that trial court abused its discretion under Fed. R. Civ. P. 60(b)(1) in finding no excusable neglect where only factor weighing against relief related to the reason for the late filing); *see also Moczek v. Secretary of Health and Human Services*, 776 F. App'x 671, 675 (Fed. Cir. 2019) (relying upon M.D. in finding special master abused discretion in Vaccine Act case for letting reasons for the delay control that were not "so egregious" as to outweigh countervailing considerations). Honeywell acted in good faith to timely comply with the lone appeal-filing regulation appearing in the Code of Federal Regulations, rather than evincing a careless disregard for applying relevant USPTO regulations or otherwise making a timely determination as to whether to appeal.

While the USPTO recognizes the need to maintain the integrity of its proceedings by ensuring that parties recognize and apply the correct regulations, the Director finds the risk of prejudicing those concerns by excusing the conduct here very small under these facts. The failure of

Honeywell to apply the timing requirement of Rule 1.304 here is, frankly, not particularly meaningful. The minimal delay caused by filing on July 6th (the Rule 90.3 deadline) instead of June 30th (the Rule 1.304 deadline) did not prejudice either the appeal, another proceeding, or another party. Further, the interplay between existing related appeals, as well as prior appeals, further counsels for granting the limited extension. Under these facts, the USPTO is reluctant to deprive Honeywell and the public of judicial review of agency action regarding patentability matters. *See Gilman*, 887 F.3d at 964 (noting preference for "resolv[ing] cases on the merits" in affirming Rule 60(b) relief).

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 the request is granted. Honeywell's due date for filing its notice of appeal under Rule 1.304 in the underlying inter partes reexamination is extended from June 30, 2020, to July 6, 2020. Accordingly, the USPTO deems timely Honeywell's notice of appeal filed in the identified reexamination on July 6, 2020.

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

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

DATE: April 15, 2021

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