

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

Brocade Communication Systems, Inc.)	
v. A10 Networks, Inc. (withdrawn))	
<i>Inter Partes Reexam</i>)	Decision on Request
Control No. 95/001,806)	under 37 C.F.R. § 90.3(c)(ii)
U.S. Patent No. 7,545,500)	
BPAI Final Decision: Sept. 30, 2015)	
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MEMORANDUM AND ORDER

On November 11, 2015, patent owner Brocade Communications Systems, Inc.(Brocade) filed a request seeking an extension of time under 37 C.F.R. § 90.3(c)(i)¹ to file a Notice of Appeal in Inter Partes Reexamination Control No. 95/001,806 with the United States Court of Appeals for the Federal Circuit. On September 30, 2015, the Patent Trial and Appeal Board (Board) issued its decision in the '806 reexamination. Because Brocade requested additional time in which to seek appeal within the 63-day filing window, the “good cause” standard applies.

On November 11, 2015, concurrent with filing the underlying time extension request, Brocade filed a separate petition pursuant to 37 C.F.R. § 1.182, requesting continued reexamination to permit the USPTO to consider declaratory evidence. Brocade seeks additional time in which to file an appeal to the Federal Circuit to permit the USPTO to decide its related petition for continued reexamination, which would moot the need for an appeal if granted. Req. at 5. This reason provides the good cause needed to grant the requested extension.

¹ On September 16, 2012, various changes to title 37 of the Code of Federal Regulations took effect. These included replacing the previous regulations governing the seeking of judicial review of Board decisions at 37 C.F.R. §§ 1.301-304, with the provisions at 37 C.F.R. §§ 90.1-90.3. Brocade filed its Request pursuant to the previous regulation, 37 C.F.R. § 1.304(a)(3)(i). Since the Board decision here was issued after the September 16, 2012 effective date, the new rules govern this request. Substantively, however, the rules are effectively equal.


However, Brocade requests an extension equal to two months from the date of the USPTO decision on its petition for continued reexamination. Req. at 5. *But see* Req. at 1 (seeking one month). Two months is too long. If the petition is granted and prosecution reopened, no appeal to the Federal Circuit will be necessary. If the petition is denied, Brocade will be in exactly in the same position as it was before it sought to reopen prosecution, namely, faced with deciding whether to seek review of the Board decision at the Federal Circuit. Brocade's time extension request does not state that it needs additional time in which to make that determination; indeed, it has already had since September 30, 2015 to decide whether to seek appeal at the Federal Circuit. *See* 37 C.F.R. § 90.3(c) (requiring basis for time extension request to be made in writing). Given the statutory requirement of special dispatch, and Brocade's statement that the requested time is designed to permit the USPTO to decide Brocade's request to reopen reexamination, a shorter extension—keyed to the USPTO decision on Brocade's related petition to reopen reexamination—is warranted. If needed, Brocade can file a new time extension request seeking additional time in which to file an appeal at the Federal Circuit pursuant to 37 C.F.R. § 90.3 should the USPTO deny Brocade's request to reopen reexamination.

ORDER

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

Brocade'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 30, 2015, to the date that is 14 days after the USPTO issues its decision on Brocade's petition titled "Patent Owner's Petition Under 37 C.F.R. § 1.182 Requesting Continued Reexamination," filed in the underlying reexamination on November 11, 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: November 30, 2015

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