

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

IpVenture, Inc. v. FedEx Corp.)
Inter Partes Reexamination) Decision on Request
Control No. 95/001,896) under 37 C.F.R. § 1.304(a)(3)(ii)
U.S. Patent No. 7,212,829)

MEMORANDUM AND ORDER

This matter is before the Director again on the “Petition to Proceed with CAFC Appeal or to Reissue Board Decision” (Request), filed July 5, 2016 by IpVenture, Inc. (owner of the involved ’829 patent). Among other relief, the Request seeks an extension of time under 37 C.F.R. § 1.304(a)(3)(ii) (Jul. 2012)¹ for IpVenture to pursue an appeal at the United States Court of Appeals for the Federal Circuit for review of the Board decision in the underlying Inter Partes Reexamination Control No. 95/001,896 between IpVenture and Third-Party Requester FedEx Corp. (FedEx).

The Director denied the Request in a Decision dated August 19, 2016, which explained that the USPTO lacked jurisdiction over the underlying ’896 reexamination to reach the merits of the Request at that time because IpVenture had first filed an appeal arising out of the same reexamination to the Federal Circuit. On October 3, 2016, the Federal Circuit remanded the case back to the USPTO while retaining jurisdiction over the appeal “for the limited purpose of allowing the Patent Office to consider IpVenture’s § 1.304(a)(3) request and as necessary, the other arguments IpVenture raised in its petition before the Patent Office.” However, while the

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. Because this Request arises in an inter partes reexamination requested under pre-AIA 35 U.S.C. § 311, the prior regulations govern. *See* 37 C.F.R. § 90.1. The July 2012 edition of Title 37 of the Code of Federal Regulations is cited herein for the prior regulations. Substantively,

Director now has jurisdiction over the Request, for the reasons given below, IpVenture's Request is denied on its merits.

The August 19, 2016 Request Decision explained the procedural history in the '896 reexamination in detail. *See* Request Decision at 1-2. The Patent Trial and Appeal Board (Board) issued its decision in the '896 reexamination on September 29, 2015. Under 37 C.F.R. § 41.79(a), IpVenture had one month from September 29, 2015, in which to file a request for rehearing with the Board; such a rehearing request was due on or before October 29, 2015. Alternatively, under 37 C.F.R. § 1.304(a)(1), IpVenture had two months from September 29, 2015, to file a notice of appeal to the Federal Circuit; such an appeal notice was due on or before November 30, 2015.² *See also* 37 C.F.R. § 41.81; 37 C.F.R. § 1.983.

On November 24, 2015, IpVenture filed an untimely request for rehearing of the September 29, 2015 Board Decision. On April 1, 2016, the Board issued a paper titled "Decision on Request for Rehearing," explaining that the request was untimely and that the Board did not have authority to address the paper. On May 26, 2016, IpVenture filed a notice of appeal to the Federal Circuit, seeking review of the September 29, 2015, and April 1, 2016 Board Decisions.

On May 27, 2016, the Federal Circuit docketed IpVenture's appeal as Appeal Number 2016-2139. On June 8, 2016, the USPTO filed a "Notice of Non-Filing of Certified List," explaining that the USPTO considered IpVenture's appeal notice to be untimely. *See IpVenture, Inc. v. FedEx Corp.*, Appeal No. 16-2139, ECF No. 2 (Jun. 8, 2016). On June 16, 2016, the Federal Circuit stayed briefing and directed IpVenture to show cause within 30 days "why this

however, the old and new time extension rules are effectively equal.

² The two-month date—November 29, 2015—was a Sunday, making the next day the filing due date.

appeal should not be dismissed as untimely,” while permitting FedEx to respond. *See id.*, ECF No. 17 (Jun. 16, 2016) (Taranto, J.). Both parties responded. *See id.*, ECF Nos. 18 & 19 (Jul. 18, 2016). On July 28, 2016, the Federal Circuit issued an order based on those responses that maintained the stay in the briefing schedule and directed the parties to inform the Court regarding the disposition of the underlying Request within 14 days of the Director’s decision. *See id.*, ECF No. 20 (Jul. 28, 2016) (Bryson, J.).

The Director then issued the August 19, 2016 Decision denying the Request for lack of jurisdiction. Per the Federal Circuit’s July 28, 2016 Order, the parties then filed papers with the Court informing them of the Director’s Decision. FedEx advocated for dismissal (*see id.*, ECF No. 21 (Aug. 25, 2016), while IpVenture urged the Court to decide that the appeal was timely or remand the case to the USPTO for it to reach the merits of IpVenture’s July 5, 2016 Request. *See id.*, ECF No. 22 (Sept. 2, 2016). The Federal Circuit subsequently issued its October 3, 2016 Order remanding the case back to the USPTO to address IpVenture’s Request to the extent necessary.³ *Id.*, ECF No. 23.

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., Rambus, Inc. v. Nvidia, Corp.*, Memorandum and Order on 37 C.F. R. § 90.3 Request (*Inter Partes* Reexam Control No.

³ This decision addresses IpVenture’s request for additional time in which to seek appeal pursuant to Rule 304. The remaining basis for relief will be addressed in a separate decision issued by the Board.

95/001,169) (Jul. 11, 2013).

The “excusable neglect” inquiry 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, 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 390. 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.” *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. *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 (T.T.A.B. 1997).

Turning to the critical third factor, the core issue in IpVenture’s Request is why it failed to file a timely request for rehearing with the Board, which would have tolled the time for seeking judicial review at the Federal Circuit and mooted the need for any extension. The Director finds that IpVenture has failed to reasonably explain its failure to apply the one-month filing deadline recited in 37 C.F.R. § 41.79. *See* Req. at Section D.

Consideration of the “delay” factor must begin with the critical fact that the Board’s September 29, 2015 Decision expressly directed IpVenture to the rule governing rehearing in inter partes reexamination:

In the event neither party files a request for rehearing within the time provided in 37 C.F.R. § 41.79, and this decision becomes final and appealable under 37 C.F.R. § 41.81,

a party seeking judicial review must timely serve notice on the Director of the United States Patent and Trademark Office. *See* 37 C.F.R. § 90.1 and 3 C.F.R. § 1.983.

See Board Decision at 23. Given that fact, it is difficult to see how IpVenture could apply anything other than the one-month window provided therein. In attempting to explain why it nonetheless applied the two-month window provided by a different rule (37 C.F.R. § 41.52), IpVenture asserts that it “believed that there was a two month window for filing a request for rehearing in accordance with 37 CFR § 41.52” and was “confused and thus did not appreciate that the rules may impart different size windows for rehearing different types of reexamination.” Req. at 10; *see* Req. at 12-14.

But IpVenture’s “confusion” argument does not square with the facts presented to support the Request. There is no indication that IpVenture was even aware of 37 C.F.R. § 41.79 and its one-month filing period when it filed its untimely Request for Rehearing pursuant to 37 C.F.R. § 41.52. Instead, C. Douglass Thomas—IpVenture’s counsel, who was also signing IpVenture’s filings during the Board proceedings here—represents that after receiving the Board’s September 29, 2015 decision, he performed an online search for the rules governing rehearing. *See* Req. at 13; Request Exh. A “Declaration of Supporting Facts,” executed by C. Douglass Thomas (“Thomas Decl.”) at ¶ 4. Thomas states that “I was presented with 37 CFR § 41.52” and that after reading the rule, “it appeared to me to be the correct rule.” *Id.* at ¶ 4. There is no indication that Douglas was aware of Rule 41.79 at that time. Rather, Thomas states that he learned of Rule 41.79 “later”—in August, 2016, when FedEx filed their response to IpVenture’s Request for Rehearing. Thomas Decl. at ¶ 6. The record simply does not support “confusion” on IpVenture’s part arising from different rules with different filing windows at the relevant point in time. IpVenture’s attempt to identify “confusion” in the regulations appears rather to be a *post*

hoc attempt to justify its reliance upon Rule 41.52. Thus, whether the rules regarding requests for rehearing are “confusing” cannot be the basis to excuse IpVenture’s negligence.⁴

More potentially beneficial to IpVenture’s Request is the argument that its mistaken reliance upon Rule 41.52, and concomitant failure to apply Rule 41.79, should be excused because nothing in Rule 41.52 says it does not apply to *inter partes* reexamination. Req. at 12-13; Thomas Decl. at ¶ 4. But, again, it is difficult to see how IpVenture could consider any rule other than Rule 41.79 applicable to its situation because, while not obligated to do so, the Board’s September 29, 2015 Decision expressly directed Thomas and IpVenture to the governing rule. *See* Board Decision at 23. And IpVenture knew that *inter partes* reexaminations had its own unique set of regulations, as it was citing and applying them during the proceeding. *See, e.g.*, ’896 Reexamination, IpVenture Rebuttal Brief (dated Dec. 1, 2014) at 1 (citing 37 C.F.R. § 41.71 as providing for IpVenture’s right to submit a brief responding to the Examiner’s Answer).

And IpVenture cannot blame the USPTO regulations for IpVenture’s conduct here. IpVenture acknowledges that the USPTO regulations clearly identify the proceedings to which they apply via the “Subpart” headings. *See* Req. at 13; Thomas Decl. at ¶ 4. Rule 41.52 falls under “Subpart B—*Ex Parte* Appeals,” which clearly instructs that it applies to an *ex parte* appeal, and not an *inter partes* reexamination appeal such as the one in which IpVenture was involved. IpVenture’s argument presumes that each USPTO regulation must individually recite

⁴ Any “confusion” here would not prove an adequate basis to excuse IpVenture’s negligence in any event. First, the recitation of different rehearing windows to different proceedings as reflected in 37 C.F.R. §§ 41.52 and 41.79 does not create “confusion” as to which window applied to IpVenture’s *inter partes* reexamination. As discussed further below, the rules clearly identify the administrative proceeding(s) to which those rules apply, making any professed “confusion” difficult to accept. Second, if IpVenture had located both rules and been genuinely confused regarding which one applied, it was incumbent upon IpVenture to resolve that confusion. IpVenture did not simply get to pick which regulation it wanted to apply, or rely on its “confusion” to apply the one with the longer window.

the proceeding(s) to which it applies. But there is no such requirement, and no logical need to undertake such a cumbersome approach to adequately communicate that information.

IpVenture blames its failure to see the “Subpart” heading for Rule 41.52 on the website from which it viewed the rules, stating that the online presentation did not include the “subpart” header. Thomas Decl. ¶ 4. It is IpVenture’s responsibility to identify the applicable regulations; IpVenture cannot shift the blame for its failure to carry out its responsibilities to the online provider. And, again, it is difficult to see why IpVenture even needed to search online for the governing rehearing regulation since the Board’s decision expressly directed IpVenture to 37 C.F.R. § 41.79.

IpVenture also complains that the electronic ’896 reexamination file contained two entries for the Board’s September 29, 2015 Decision, and that one entry indicated that the Decision contained a new grounds of rejection. *See* Req. at 14. IpVenture argues that “if there is new grounds, then 37 CFR § 41.77(a)(3) would be applicable and essentially yield another month to the rehearing window . . . and rendering the Request for Rehearing timely.” Req. at 14. IpVenture’s “new grounds” argument is irrelevant to whether its failure to adhere to the applicable deadlines was “excusable neglect.” Nowhere does IpVenture allege that it filed its rehearing request when it did based on the mistaken belief that it had two months to do so because the Board Decision contained a “new grounds of rejection.” Instead, IpVenture’s argument appears directed towards the timeliness of its rehearing request, a jurisdictional issue for the Federal Circuit.

The argument is not a reasonable explanation for IpVenture’s delay in any event. First, while true that the electronic file for the ’896 reexamination contains two Board Decision entries on September 29, 2015, and one is labelled as containing a “new ground of rejection,” the

decision so labelled does not contain any indication on the decision itself that it actually contains a “new ground of rejection.” Indeed, the two decisions seem virtually identical; while IpVenture makes much of the fact that one decision has 25 pages while the other one has 24 pages (Req. at 14), review quickly indicates that the “longer” version has an extra “PTOL-90” cover sheet.

Second, the regulations do not provide for a two-month rehearing window in the context of an inter partes reexamination decision containing a “new ground of rejection.” The regulation relied upon by IpVenture—37 C.F.R. 41.77(a)(3) (*see* Req. at 14)—does not exist. To the extent that IpVenture is referring to 37 C.F.R. 41.79(a)(3), its reading of that regulation to provide a patent owner with two months to seek rehearing of an inter partes reexamination decision containing a new ground of rejection is not reasonable. Rule 41.79 provides a rehearing window for both parties to an inter partes reexamination appeal. In the scenario where the Board decision under Rule 41.77 contains a “new ground of rejection,” the first move is the patent owner’s to make, and includes seeking rehearing. *See* 37 C.F.R. §§ 41.77(b)(1-2). Rule 41.77 makes clear that the patent owner has one month to file its rehearing request in that scenario. *See id.* Rule 41.79(a)(2) confirms the one-month window for a request by the patent owner in that scenario, both in its literal language and its reference to 41.77(b). *See* 37 C.F.R. §§ 41.79(a) & (a)(2). If the patent owner’s one-month rehearing window expires without such a filing, 37 C.F.R. § 41.79(a)(3) then gives the third-party requester one month to seek rehearing of the Board’s decision. That Rule 41.79(a)(3) applies only to the third-party requester is confirmed by the plain language of Rule 41.79(a)(3); its one-month window is triggered by the “[t]he expiration of the time for the owner to take action under § 41.77(b)(2)....” (emphasis added). In short, Rules 41.77(b)(2) and 41.79(a)(2) provide the patent owner in an inter partes reexamination with one month for it to seek rehearing of a Board decision containing a new ground of rejection. In turn,

Rule 41.79(a)(3) provides the third-party requester with one month for it to seek rehearing after the expiration of the patent owner's rehearing period. It is not reasonable or logical to read Rule 41.79(a)(3) to provide the patent owner with a second month to seek rehearing after it has already had one month to file such a request.

IpVenture also argues that there is "potential ambiguity" in 37 C.F.R. § 1.304(a) (2012), which "appears to indicate the timing can be as provided in 37 C.F.R. § 41.52 or 37 C.F.R. § 41.79." Req. at 13. IpVenture presumably argues that it is entitled to the tolling of the appeal notice filing window triggered by the filing of a timely request for rehearing because Rule 304 should be read to trigger that tolling so long as a party has filed a request for rehearing meeting the filing deadline of any of the listed rehearing provisions, regardless of whether the provision actually applies. Again, this argument has nothing to do with whether IpVenture's failure to file a timely request for rehearing in its inter partes reexamination was "excusable neglect" under Rule 304. At most, IpVenture's argument speaks to whether it is entitled to the tolling of its appeal notice deadline under Rule 304, an issue going to whether the Federal Circuit should consider IpVenture's notice of appeal to be timely.

And IpVenture's reading of Rule 304 is again unreasonable. Until 2012, the provisions at 37 C.F.R. § 301-304 (2012) applied to multiple different types of proceedings, including ex parte examination. Thus, Rule 304(a)(1) references the rehearing provisions for those different proceedings—including the ex parte examination rehearing regulation at 37 C.F.R. § 41.52(a)—using the alternative "or" because only one will apply in a given scenario. It is not reasonable to read Rule 304 as providing for tolling of the appeal notice deadline in one proceeding when a party to that proceeding files a request for rehearing under a provision that does not apply to the proceeding, as IpVenture has done here.

IpVenture's facts are meaningfully different from those underlying the Supreme Court's conclusion in *Pioneer* that the "excusable neglect" standard had been met there. *See* Req. at 15. The Court in *Pioneer* found "significant" that the Bankruptcy Court decision in that case expressly provided for a due date that was "outside the ordinary course in bankruptcy cases." 507 U.S. at 398 (agreeing with trial court that "'peculiar and inconspicuous placement of the bar date in a notice regarding the creditors['] meeting,' without any indication of the significance of the bar date, left a 'dramatic ambiguity' in the notification"). By contrast, the Board Decision here directed IpVenture to the regulation containing the applicable filing period; IpVenture failed to apply or apparently even consult the regulation.

The facts on the third *Pioneer* factor here are more akin to those in *Baron Phillippe de Rothschild, S.A. v. Styl-Rite Optical Mfg. Co.*, Opposition No. 95170, 2000 WL 1300412 (T.T.A.B. Jun. 23, 2000) (applying the "excusable neglect" standard per *Pioneer* under Fed. R. Civ. P. 6(b)(2)). There, the applicant "erroneously read 37 CFR 2.127(b) rather than 37 CFR 2.127(a)," and mistakenly applied a thirty-day filing response window, resulting in a tardy response to the opposer's motion. *Id.* at *4. The TTAB found that applicant had not shown "excusable neglect" to justify reopening the response period, observing that "[c]ounsel's misunderstanding or misinterpretation of an unambiguous rule does not constitute excusable neglect." *Id.* The TTAB further found counsel's position that he had read the rule and drawn the incorrect conclusion about the applicable deadline "taxes credulity" given the clarity of the rule and the practitioner's experience. *Id.* The Director finds IpVenture's explanation here for how it arrived to apply the incorrect regulation similarly strained, for the reasons discussed above.

While the Supreme Court in *Pioneer* observed that the "excusable neglect" standard "is not limited strictly to omissions caused by circumstances beyond the control of the movant," it is

well settled that “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect,” particularly when the rules are unambiguous. *Pioneer*, 507 U.S. at 392 (internal quotation marks omitted); *id.* at 395 (third factor includes consideration of “whether [reason] was within the reasonable control of the movant”); *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (en banc) (while it does not preclude a finding of “excusable neglect,” “a lawyer’s mistake of law in reading a rule of procedure is not a compelling excuse”); *see also Anheuser-Busch, Inc. v. Mambo Seafood #1, Inc.*, Opposition No 91160250, Decision on Request under 37 C.F.R. § 2.145(e) at 4-5 (T.T.A.B. Aug. 31, 2009) (collecting cases) (“*Anheuser-Busch*”). The Director thus finds that the third *Pioneer* factor weighs heavily against finding “excusable neglect” based upon IpVenture’s failure to substantiate a persuasive explanation for its failure to locate and apply the applicable regulation. *See, e.g., Graphic Commc’ns Int’l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 6 (1st Cir. 2001) (affirming district court finding of no “excusable neglect,” particularly given absence of “unique or extraordinary circumstances” explaining conduct); *Anheuser-Busch*, at 4-5.

Pioneer also contemplates considering the potential for prejudice to other parties, as well as the “potential impact” on related proceedings, under the first and second factors, respectively. *Pioneer*, 507 U.S. at 395; *FirstHealth*, 479 F.3d at 829 (impact on “judicial proceedings” includes administrative proceedings). The Director agrees with IpVenture that the risk of prejudice to other parties here is minimal, even if IpVenture incorrectly downplays “the danger of prejudice” as “since the remedy sought is only a time extension to pursue an appeal.” Req. at 12. The Director recognizes FedEx’s position that it would be prejudiced by having to defend against IpVenture’s appeal here were IpVenture granted additional time. *See* ’896 Reexamination, FedEx Response in Opposition to Patent Owner’s Petition to Proceed with

CAFC Appeal or to Reissue Board Decision at 9-10 (Aug. 2, 2016). The resources and time that FedEx identifies as already incurred, as well as those that would be incurred defending its position on appeal, are present in all requests for additional time to pursue an appeal involving other parties. Absent some additional, unique prejudice resulting from granting IpVenture additional time, the Director finds the “prejudices” identified by FedEx do not weigh against granting IpVenture’s Request.

The Director does find, however, that granting IpVenture’s Request would cause an unacceptable prejudice to USPTO proceedings under the second *Pioneer* factor. The USPTO has a strong interest in deterring delay due to “sloppy practice or inattention to deadlines.” *See Pumpkin*, 43 USPQ2d at 1588; *FirstHealth*, 479 F.3d at 829-30 (citing *Pumpkin* with approval). The Director understands that a failure to apply or understand applicable regulations does not preclude a finding of “excusable neglect.” *See, e.g., Pincay*, 389 F.3d at 859. But 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. The Director finds that granting IpVenture’s Request for additional time under these facts offends that strong institutional interest, and weighs against finding IpVenture’s neglect “excusable.” *See Pumpkin*, 43 USPQ2d at 1588.

The Director does not find IpVenture’s conduct to be in bad faith under the fourth *Pioneer* factor, although it is a close question. *Contrast Baron Phillippe*, 2000 WL 1300412 at *6 (finding bad faith conduct based on similar facts). While IpVenture’s explanation for its failure to locate and apply the correct regulation proves unpersuasive, there is no indication that IpVenture deliberately or intentionally flouted USPTO regulations. And the Director recognizes that while Rule 41.52 was not applicable, IpVenture did file its Request for Rehearing within the

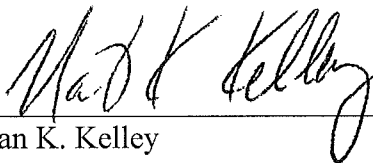
two-month window provided therein.

On balance, the Director finds that application of these facts to the *Pioneer* factors weighs against granting the Request. IpVenture was expressly directed to the applicable rule by the Board Decision, and the regulations are unambiguous, yet IpVenture failed to even review, let alone apply, the correct regulation. And IpVenture does not offer a reasonable explanation for its inattentive and sloppy conduct. Finding IpVenture's negligence nonetheless "excusable" would dilute the effectiveness of USPTO filing deadlines and undermine the ability to place reasonable boundaries on the scope of the "excusable neglect" standard. These critical facts far outweigh the findings that any delay on judicial proceedings has been relatively brief, prejudice to FedEx limited, and evidence of "bad faith" on IpVenture's part equivocal. *See, e.g., Graphic Commc'ns*, 270 F.3d at 6 ("focus" on the third *Pioneer* factor in making "excusable neglect" determination comports with *Pioneer*). The Director therefore finds that IpVenture has failed to establish that it is entitled to additional time under the "excusable neglect" standard.

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 denied.

MICHELLE K. LEE
UNDERSECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES
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By: Nathan K. Kelley
Deputy General Counsel for Intellectual Property
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DATE: April 4, 2017

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