UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ACTING DIRECTOR

Askeladden LLC Petitioner, v. ***Intercurrency Software LLC*** Patent Owner. IPR2024-00376 and IPR2024-00377 U.S. Patent No. 10,062,107	Decision on Request for Extension of Time under 37 C.F.R. § 90.3(c)(1)(ii)

MEMORANDUM AND ORDER

On September 16, 2025, patent owner Intercurrency Software LLC ("Intercurrency") filed requests to extend the time to seek judicial review of the Patent Trial and Appeal Board decisions in the underlying IPR proceedings ("Requests"). In both proceedings, the PTAB's decisions issued on July 14, 2025. 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. Thus, Intercurrency's Notices of Appeal were each due to be filed by September 15, 2025. Intercurrency seeks an extension of time until September 16, 2025 to file its Notices of Appeal, one (1) day after the deadline.

Rule 90.3(c)(1) allows parties extra time to file a notice of appeal in 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." The extension requests at issue here, filed after the expiration of the period for filing the appeal notices, fall under the "excusable neglect" provision of 37 C.F.R. § 90.3(c)(1)(ii). The Requests are 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(VI); *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) explained 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. 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. 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.

Under the second *Pioneer* factor, the delay between expiration of the appeal filing deadlines and filing of the Notices of Appeal is extremely modest—only a single day of delay. This brief delay will not result in any meaningful delay in the proceedings, nor is it likely to have any negative impact on any judicial or administrative proceedings.

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*, 1997 WL 473051 at *6 n.7 (T.T.A.B. 1997). Here, with respect to the third factor, Intercurrency explains that the Notices of Appeal were each late due to a "calendaring error, not from willful disregard of the rules." Requests at 3. The Director finds this a reasonable explanation for missing the deadline. The Requests, together with the one-day lapse, show that Intercurrency inadvertently failed to meet the filing deadline.

There is also no indication of bad faith under the fourth *Pioneer* factor. For example, there is no evidence that Intercurrency chose to "flout" the filing deadline. *See Pioneer*, 507 U.S. at 388. The failure to comply was not in bad faith. *See Pioneer*, 507 U.S. at 395.

There is also no evidence of prejudice to the USPTO under the first *Pioneer* factor. These facts all weigh in favor of granting the Requests.

Thus, the Director finds that application of the *Pioneer* factors here weighs in favor of granting Intercurrency's requested one day extension in both proceedings.

ORDER

Upon consideration of Intercurrency's requests for an extension of time under 37 C.F.R. § 90.3(c)(1)(ii), it is ORDERED that the Requests are **granted**. Intercurrency's filing deadline to appeal from the underlying Board decisions are each extended from September 15, 2025 to September 16, 2025.

COKE MORGAN STEWART

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

/s/ Amy J. Nelson

By: Amy J. Nelson
Deputy Solicitor

DATE: September 19, 2025

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