

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

NHK Seating of America, Inc.)	
Petitioner)	IPR2014-00925
)	U.S. Patent No. 8,434,818
v.)	
)	Decision on Request
Lear Corporation)	under 37 C.F.R. § 90.3(c)(1)(ii)
<u>Patent Owner</u>)	

MEMORANDUM AND ORDER

On January 27, 2017, Petitioner NHK Seating of America, Inc. (“NHK”) filed a request seeking an additional 63 days in which to file a notice of appeal in this IPR proceeding involving Patent Owner Lear Corporation (“Lear”). The Board issued its Rehearing Decision in the underlying IPR on September 23, 2016. Per Rule 90.3(a), any Notice of Appeal to the Federal Circuit was due on or before November 25, 2016. Because this Request was filed after the expiration of the period for seeking judicial review, the Director may extend the time 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). 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; *see, e.g., Acqis LLC v. Hewlett-Packard Co.*

(withdrawn) & IBM (withdrawn), Memorandum and Order on 37 C.F.R. § 90.3

Request (*Inter Partes* Reexam Control No. 95/001,475) (Oct. 2, 2015); *Rambus, Inc. v. Nvidia, Corp.*, Memorandum and Order on 37 C.F. R. § 90.3 Request (*Inter Partes* Reexam Control No. 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, [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.

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 395 (1993).

Excusable neglect “is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 390; *see also*

Information Sys. and Networks Corp. v. United States, 994 F.2d 792, 796 (Fed. Cir. 1993)

(holding that a party’s failure to answer a counterclaim based on the mistaken belief that no answer was required constituted excusable neglect for purposes of Fed. R.

Civ. P. 60(b)). 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.” *Pioneer*, 507 U.S.

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 (TTAB 1997).

NHK explains that it did not meet the 63-day filing deadline because it was unaware that the Board had issued its Rehearing Decision. NHK asserts that it never received the Rehearing Decision and only became aware of its existence on December 13, 2016. *See* Req. at 2. NHK states that it then “immediately called the Board and the representative of the Board informed Petitioner that the Board records indicated that the Board inadvertently did not serve the Decision.” *Id.* NHK maintains that the Board indicated it would schedule a conference call and re-date the Rehearing Decision. *See id.* The record indicates that on January 24, 2017, NHK sent an email to the Board regarding the conference call and decision “re-dating.” *See* Lear’s Opposition to NHK’s Petition for Extension of Time (“Lear Opp.”) at Exh. B. On January 25, 2017, the Board communicated with NHK and Lear, explaining that the Board would not schedule a conference call or “re-date” the Rehearing Decision. *See* Req. at 1-2; Lear Opp. at Exh. B. Rather, the Board instructed NHK to the “guidance provided in 37 C.F.R. § 90.3(c)” regarding extensions of time for filing an appeal. Lear Opp. at Exh. B; *see* Req. at 1-2. Lear then filed the underlying Request two days later on January 27, 2017.

On the critical third factor, NHK represents that it missed the deadline because it did not receive the Rehearing Decision and did not become aware of it until after

the deadline had passed. There is no affirmative evidence in the record that the Rehearing Decision was not mailed in accordance with usual PTAB practice other than NHK's representations. But Lear's Opposition here did not proffer any objection to that representation. And NHK's January 24, 2017 email to the PTAB contained the allegation, and the PTAB's January 25th email response did not disagree with it. Thus, the Director accepts NHK's representation that it did not receive notice of the Rehearing Decision before the filing deadline. Under those circumstances, the third *Pioneer* factor weighs in favor of granting the requested relief.

The other *Pioneer* factors similarly weigh in favor of granting the request. The Director finds that there is no danger of prejudice to other proceedings or parties based on the existing record. Nor is there evidence of bad faith conduct by NHK. As discussed above, the Director accepts that NHK's representation that it did not receive the Rehearing Decision in a timely fashion. While parties should make efforts to monitor the status of their judicial and administrative proceedings, it cannot be debated that the PTAB typically communicates decisions and other relevant papers to the involved parties. Relying on that normal practice is certainly reasonable. Lear protests that NHK's failure to act cannot be the result of "excusable neglect" because "NHK failed to seek this relief as soon as reasonably possible." Lear Opp. at 1. While the amount of time elapsed between the missed deadline and when additional time is sought is relevant under the *Pioneer* factors, the Director does not find that the period

between the missed November 25, 2016 deadline and the January 27, 2017 filing of the underlying Request is abnormally or impermissibly long. That is particularly true under the circumstances of this case, where the record indicates that NHK took reasonable steps to remedy the missed deadline once it became aware of it. NHK promptly contacted the Board about how to proceed after learning of the Rehearing Decision on December 13, 2016, and then immediately filed the underlying Request after receiving the Board's response in January, 2017. Lear suggests that NHK should have done something between calling the Board and filing the underlying Request (*see* Lear Opp. at 3), but it was reasonable for NHK to await action from the Board given the posture of the proceedings. NHK's conduct certainly does not rise to the level of "bad faith" conduct.

Thus, on balance, the Director finds that application of the *Pioneer* factors here weighs in favor of granting NHK's Request. However, NHK's Request seeks 63 additional days from the date of this Order in which to file its notice of appeal, which is the appeal period provided under Rule 90. NHK does not offer a reason for why it needs such a long extension and none is apparent. NHK already had more than a month to consider the merits of seeking judicial review in this IPR proceeding when it filed the Request. And NHK has had the period between the filing of its Request and this Decision for that deliberation as well. Given these considerations, the Director will grant a shorter extension period of 30 additional days from the date of this Order.

ORDER

Upon consideration of the Request for an extension of time under 37 C.F.R. § 90.3(c)(1)(i), it is ORDERED that the Request is granted.

NHK's time for seeking judicial review of the Board decision in the underlying IPR proceeding here under 37 C.F.R. § 90.3(a)(1) is extended from November 25, 2016 to April 19, 2017.

MICHELLE K. LEE
UNDERSECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE



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DATE: March 20, 2017

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