

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

ASKELOADDEN L.L.C.)	
Petitioner,)	Case IPR2017-00726
)	Patent No. 8,285,648
v.)	
)	
VERIFY SMART CORP.)	Decision on Request
Patent Owner.)	under 37 C.F.R. § 90.3(c)(1)(i)
_____)	

MEMORANDUM AND ORDER

On September 21, 2018, Patent Owner Verify Smart Corp. (“Verify”) filed a “Request For Extension Of Time To File An Appeal With The Federal Circuit Under 37 C.F.R. § 90.3(c).” The final decision in the underlying IPR issued on July 23, 2018, making Verify’s appeal notice due on or before September 24, 2018. Verify’s Request is thus under the “good cause” standard of Rule 90.3(c)(1)(i). On September 27, 2018, Petitioner Askeladden L.L.C. filed an “Opposition” to Verify’s request for additional appeal time.¹

¹ Neither 37 C.F.R. § 90.3 nor its predecessor 37 C.F.R. § 1.304(a)(3) (2012) provides for opposing or otherwise responding to a time-extension request. Thus, as explained in prior time-extension decisions, “parties should not expect the opportunity to file responsive papers, or that they will be considered if submitted.” *UWA v. AZL*, Decision on Request Under 37 C.F.R. § 1.304(a)(3)(i) at 3, Int. No. 106,013 (Feb. 26, 2016) (“*UWA*”); see *Ho v. Furcht*, Decision on Request Under 37 C.F.R. § 1.304(a)(3)(i) at 2 n.2, Int. No. 105,953 (Dec. 12, 2014) (“*Ho*”). As those decisions explain, however, the Director has discretion to consider any “opposition” or “reply” thereto. While unnecessary to disposition of Verify’s Request, Askeladden’s Opposition has been considered here.

Verify seeks an additional 63 days in which to file its notice of appeal here; if granted, the new appeal filing deadline would be November 26, 2018. Verify's primary basis for the extension explains that the Final Written Decision raises real-party-in-interest/privy issues, an area of "rapidly evolving Federal Circuit law," including the decision in *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018). Req. 2. Verify argues that Appellee RPX filed a petition for rehearing *en banc* in the *Applications in Internet Time* appeal on September 7, 2018, raising real-party-in-interest/privy issues that are germane to the IPR here. *Id.* Verify argues that granting the additional time requested here on Verify's appeal window will permit the Federal Circuit to decide the *en banc* request in *Applications in Internet Time*, and thus "help ensure that the law governing the present case becomes more settled, and does not change during the briefing." *Id.* Verify also asserts that the additional 63 days are needed to "permit new counsel to make an appearance." Req. at 2-3.

The Director may extend the time for filing an appeal notice "upon written request if . . . [r]equested before the expiration of the period for filing an appeal . . . and upon a showing of good cause." 37 C.F.R. § 90.3(c)(1)(i). Verify's basis for the requested time does not constitute "good cause" for granting the extension for the same reasons given in the time-extension decision in *UWA*. The Federal Circuit may not decide whether to grant the *en banc* request in *Applications in Internet Time* during the

requested 63-day period, which will necessitate additional extensions.² More importantly, the law is no more “settled” even if the Federal Circuit grants RPX’s *en banc* petition in *Applications in Internet Time* during that window; any such clarity would potentially result only from the *en banc* decision on the merits, which itself must be preceded by additional briefing and argument. The period for that to play out would require additional time extensions of an indeterminate length. “The time extension provisions do not contemplate what would effectively be a stay of an appeal before it is even filed . . .” *UWA* at 5. The Federal Circuit should decide whether to stay any appeal in this IPR, both because the Federal Circuit should control its own docket and because the governing rules there contemplate the type of briefing that the time-extension regulations applicable here do not. *See id.* Nothing in this Decision precludes Verify from filing the notice of appeal in this IPR and asking the Federal Circuit to stay its appeal pending resolution of *en banc* consideration in the *Applications in Internet Time* appeal (or some other reason). Good cause is also not shown based on a need to permit new counsel to make an appearance. Verify does not give a reason why more time—let alone 63 days—is needed for an attorney to simply enter an appearance (and no appeal has been filed in which to make that appearance anyway).

² The Federal Circuit requested a response to Appellee RPX’s *en banc* rehearing petition from Appellant Applications in Internet Time, LLC; the response was filed on October 5, 2018. The *en banc* petition remains outstanding as of the date of this Decision.

Verify's appeal period expired on September 24, 2018. Because Verify sought the additional time prior to that date and to avoid forfeiture of Verify's appeal rights, the Director will grant a limited extension of 23 days from the original appeal deadline to permit Verify to file a notice of appeal to the Federal Circuit in this IPR. Verify's notice of appeal should be filed on or before October 17, 2018.

ORDER

Upon consideration of Verify's request for an extension of time under 37 C.F.R. § 90.3(c)(1)(i), it is ORDERED that the request for a 63-day extension is denied but a 23-day extension is granted. Verify's new deadline for filing its notice of appeal in this IPR is October 17, 2018. No additional extensions should be contemplated.

ANDREA IANCU
UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE

By: Joseph Matal
Joseph Matal
Acting Deputy General Counsel for
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DATE: October 11, 2018

cc:

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