

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

Guardian Alliance Technologies, Inc.
Petitioner,

v.

Tyler Miller,
Patent Owner

IPR2020-00031
U.S. Patent No. 10,043,188

Decision on Request
under 37 C.F.R. § 90.3(c)(1)(ii)

MEMORANDUM AND ORDER

Before the Director is “Petitioner’s Request for Extension of Time” (“Request”) filed on July 22, 2021, by Petitioner Guardian Alliance Technologies (“Guardian”) in subject *Inter Partes* Review of U.S. Patent No 10,043,188. As explained below, the Director interprets this as a request for a retroactive extension of time to file a Federal Circuit appeal. And for the reasons given below, Guardian’s Request is denied.

The Board denied institution of *inter partes* review of the ’188 patent on March 26, 2020. Guardian requested Precedential Opinion Panel review, which was denied on June 16, 2020, and then requested panel rehearing, which was denied on July 27, 2020. Per 37 C.F.R. § 90.3(a)(1), a Notice of Appeal to the Federal Circuit was due on or before September 28, 2020. Guardian did not file an appeal notice on or before that date.

Citing the USPTO's July 1, 2021 guidance in *Arthrex and the interim procedure for Director review* ("Guidance") and Rule 90.3(c)(1), Guardian requested "an extension of time sufficient for filing a request for Director review of the Board's Decision" on July 22, 2021. The requested extension amounts to 297 days.

As an initial matter, the Director construes Guardian's request as one for extension of time to file an appeal under Rule 90.3(c)(1)(ii). Under the Guidance, a party may file a request for Director review within 30 days after a PTAB decision or a PTAB decision on rehearing. USPTO Arthrex Q&As, A2, *available at* <https://www.uspto.gov/patents/patent-trial-and-appeal-board/procedures/arthrex-qas> (last visited Sept. 20, 2021). The Guidance also provides that a party whose deadline for Director review had expired at the time *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (June 21, 2021) issued may request a waiver of the deadline only if they make that request "before the due date for filing a notice of appeal under 37 C.F.R. § 90.3." USPTO Arthrex Q&As, B2. The Guidance does not specifically address the possibility that a party might seek to have the deadline for its Federal Circuit appeal extended and whether that would have the effect of extending the period for Director review.

Rule 90.3(c)(1) allows parties extra time to file a notice of appeal in the Court of Appeals for 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. Interpreting the Guidance to encompass Rule 90.3(c)(1)(ii) requests made *after* the expiration of the period for filing an appeal would allow parties to retroactively prolong their time within the agency indefinitely. The proper interpretation of the Guidance, rather, allows for a request of waiver of the deadline for Director review only where the time to file an appeal has not passed—under Rule 90.3(c)(1)(i).

Guardian cannot request waiver of the deadline for requesting Director review because the time to file an appeal under Rule 90.3(c)(1)(i) expired on September 28, 2020. The only theory which Guardian may request any extension of time is under Rule 90.3(c)(1)(ii) to file a notice of appeal “upon a showing that the failure to act was the result of excusable neglect.”

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. IpVenture, Inc. v. FedEx Corp.*, Memorandum and Order (Inter Partes Reexamination Control No. 95/001,896) (Apr. 4, 2017).

The “excusable neglect” inquiry is an equitable one, taking account of all

relevant circumstances surrounding the party's omission. In determining excusable neglect, the USPTO applies the standard used by the Federal Courts. *Id.*; *see also, e.g., Mitsubishi Cable Industr., Ltd. v. Goto Denshi Co., Ltd.*, Memorandum and Order at 7-14 (IPR2015-01108) (May 3, 2017). In this case, the inquiry into whether Guardian acted with excusable neglect ends with Guardian's own reasons for delay in filing an appeal. Guardian explains that it did not believe that the Board's decision was subject to further review until the Supreme Court's decision in *Arthrex*. Request at 3, citing 37 C.F.R. § 42.71. Guardian asserts that the *Arthrex* decision calls into question the validity of the final and non-appealable standing of institution decisions, and therefore now requests an extension of time to appeal. *Id.*

Based on Guardian's own explanation, its failure to file an appeal is the result of a deliberate legal decision made during the filing window, not of neglect, excusable or otherwise. Guardian admits that it did not file a notice of appeal because it believed the Board's decision was not reviewable. Rather than engaging in excusable neglect by committing any mistake, omission, miscommunication, or miscalculation, Guardian made an affirmative decision not to appeal. The Supreme Court's decision in *Arthrex*, issued 266 days after the deadline passed, cannot retroactively turn Guardian's decision into excusable neglect.

Furthermore, Guardian is mistaken that *Arthrex* altered the reviewability of institution decisions. Decisions relating to the institution of an *inter partes* review based

on the sufficiency of the information in the petition are final and nonappealable, and thus not reviewable. 35 U.S.C. § 314(d); *Cuozzzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016); *Mylan Laboratories Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1378-1379 (Fed. Cir. 2021).

Because Guardian's failure to comply with the deadline for filing an appeal was a deliberate legal decision, it cannot be excusable neglect. Guardian's request is denied.

ORDER

Upon consideration of the request for an extension of time under 37 C.F.R.

§ 90.3(c)(1)(ii), it is ORDERED that the request is **denied**.

Date: September 20, 2021

ANDREW HIRSHFELD,
Performing the Functions and Duties of the
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