

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

REPUBLIC TECHNOLOGIES (NA), LLC,

Opposer,

v.

BROOKS ENTERTAINMENT, INC.,

Applicant

Decision on Request for Extension
of Time to Appeal under 37 C.F.R.
§ 2.145(e)

TTAB Opposition No. 91212024

MEMORANDUM AND ORDER

Applicant Republic Technologies, Inc. (“Applicant”), has filed a request for an extension of time to appeal a final decision of the Trademark Trial and Appeal Board (the “Board”) to the United States Court of Appeals to the Federal Circuit. The Director DENIES the request for the reasons stated below.

Background

Opposer Republic Technologies (NA), LLC (“Opposer”) moved for judgment in Opposer’s favor as a sanction for Applicant’s repeated unresponsiveness and noncooperation during the course of this case. *See* TTABVue docket no. 35. Applicant did not file any opposition to the motion. On April 4, 2016, the Board entered a short order granting judgment in Opposer’s favor. *See* TTABVue docket no. 36. Under the then-existing provisions of 37 C.F.R. § 2.145(d), Applicant had two months (until June 4, 2016) to file a notice of appeal to the Federal Circuit under 15 U.S.C. § 1071(a).¹ On November 22, 2016 (over seven (7) months after

¹ Section 2.145(d) was amended on October 7, 2016, and now provides for 63 days. *See* 81 Fed. Reg. 69950, 69969, 69986-87 (Oct. 7, 2016). This change would not have had any effect on this decision, however.

the Board's final decision), Applicant filed with the Board a *nunc pro tunc* request for an extension of time to appeal, requesting that the time for appealing be extended through December 15, 2016. Opposer filed a brief in opposition. By letter dated March 3, 2017, the Board referred the request to the Office of the Solicitor, as designee of the Director, for decision under 37 C.F.R. § 2.145(e).

Analysis

Under 37 C.F.R. § 2.145(e), the Director may extend the time for filing an appeal of a final Board decision in an opposition proceeding. If the request is filed before the time for appeal has expired, the Director assesses the request under a good cause standard. 37 C.F.R. § 2.145(e)(1).² But if, as here, the request is filed after the time for appealing has expired, then the request must satisfy a stricter standard: excusable neglect. 37 C.F.R. § 2.145(e)(2) (now 37 C.F.R. § 2.145(e)(1)(ii)).

The standard for excusable neglect.

As does the Board, the Director seeks guidance as to what constitutes excusable neglect by referring to the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). *Pioneer* concerned a bankruptcy rule that allowed for late filings if the movant could show that its "failure to comply with an earlier deadline 'was the result of excusable neglect.'" 507 U.S. at 382. Noting that the excusable neglect standard applies under several Federal Rules, the Court discerned four nonexclusive factors that could bear on whether a neglectful act or omission is excusable: "[1] the danger of prejudice to the [non-moving party], [2] the length of the delay and its potential impact on

² Subsection (e) was also amended in October 2016. But the amendment changed neither the substantive standards by which requests for extensions of time to appeal are assessed nor any other aspect of the rule that is relevant to the decision on Applicant's request.

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 (brackets added). These factors are addressed below.

Pioneer factor 1 is neutral.

Applicant states that the delay will not prejudice Opposer. (Req. at 1-2.) Opposer, however, in its opposition brief, recounts a series of delays occasioned by the unresponsiveness of Applicant and its counsel during Opposer’s testimony period during the case, delays which required several extra steps that Opposer’s counsel took to try to keep the case on track. Opposer’s frustration with the multiple delays and concern about finality is understandable. But Opposer identifies no concrete prejudice that will result if this request is granted. Thus, the first *Pioneer* factor is neutral in the analysis.

Pioneer factor 2 weighs slightly against an extension.

The length of the delay and the impact on the proceedings (*Pioneer* factor 2), weighs slightly against granting the request. Here, instead of filing its appeal or a request for more time within two months of the Board’s decision, Applicant did not file this request until *seven* months after the decision. So the length of the delay is unusually long for this kind of request. However, the proceedings before the TTAB ended with the decision against Applicant. Whether Applicant appealed immediately, or within two months, or, as here, sought permission to appeal many months later, the impact on the proceedings is the same: they resume (albeit at a higher level). We cannot discern any other impact on the proceedings. Whether this long delay affects Opposer is immaterial in assessing *Pioneer* factor two, because that concern is the subject of factor one, and, in any event, Opposer has not identified any concrete prejudice. On balance, the second *Pioneer* factor weighs slightly against an extension.

Pioneer factor 3 weighs strongly against an extension.

The Federal Circuit has noted that the USPTO's decisions under this standard typically deem the reason for the delay and whether it was within the movant's control to be highly significant. *See FirstHealth of Carolinas, Inc. v. CareFirst of Maryland, Inc.*, 479 F.3d 825, 829 (Fed. Cir. 2007) (citing *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701 (TTAB 2002)) (further citation omitted). Here, Applicant's request itself—there is no sworn statement accompanying it³—recounts that Applicant received the Board's April 4, 2016, decision on the day it issued. (Req. at 3.) The request states that Applicant immediately began "diligently working to respond to the decision," but then it somewhat opaquely states that one of his multiple legal counsel "failed to adequately communicate with [Opposer's] counsel regarding the opposition proceeding." (*Id.*) The request then simply states that these events were "not within the reasonable control of the Applicant." (*Id.*)

This explanation does not show that the neglect was, in fact, due to factors beyond Applicant's control. First, there is no requirement that a party who wants an extension of time to appeal under 37 C.F.R. § 2.145(e) first communicate with opposing counsel. The requester simply files it and sends opposing counsel a copy. So it is impossible to see the connection between this circumstance and the issue of whether the neglect is excusable. Second, no reason is given for the critical omission here: Applicant's failure to file a notice of appeal or a request for more time even though it received the decision on the day the Board issued it. Generally, a client is "accountable for the acts and omissions of their chosen counsel." *Pioneer*, 507 U.S. at 397; *cf. Sneed v. Shinseki*, 737 F.3d 716, 727 (Fed. Cir. 2013) (unless counsel has effectively

³ Because unsworn statements are argument and not actual evidence, *see, e.g., Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1338-39 (Fed. Cir. 2004), the better practice for those requesting an extension of time is to submit a verified request. *See* 37 C.F.R. § 2.2(n).

abandoned the client, counsel's neglect is not considered to be beyond the client's control).

Thus, the highly significant third *Pioneer* factor weighs strongly against the request.

Pioneer factor 4 weighs against an extension.

While Applicant's pattern of delay may not itself amount to prejudice, it is relevant under the fourth *Pioneer* factor because it suggests this request is not made in good faith. Where a belated request for additional time to appeal is the first delay by the requesting party, the request by itself would not suggest bad faith. But where the requesting party's pattern of delays and unresponsiveness resulted in the ultimate sanction of judgment being entered against it, followed by a many months out-of-time request for an extension of time for which only a cryptic and unconvincing explanation is given, good faith is plainly lacking. *See, e.g., United Consumers Club, Inc. v. Prime Time Mktg. Mgmt. Inc.*, 271 F.R.D. 487, 503 (N.D. Ind. 2010) (pattern of unexplained delays evidenced bad faith). Accordingly, the fourth *Pioneer* factor also counsels against granting the request.

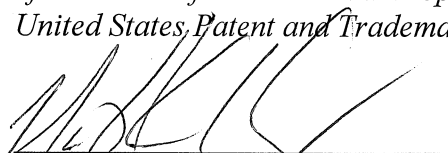
Conclusion

While *Pioneer* factor 1 is neutral, the remaining factors—especially Applicant's failure to demonstrate that the delay was beyond his control—weigh against it. Accordingly, the request is DENIED.

Joseph Matal,
*Performing the functions and duties of the Under Secretary
of Commerce for Intellectual Property and Director of the
United States Patent and Trademark Office*

Date: July 5, 2017

By:


Nathan K. Kelley
Deputy General Counsel for Intellectual Property Law and
Solicitor

cc: Denise DelGizzi (TTAB); Anthony J. McShane (amcshane@ngelaw.com)