

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR

MODERN HOUSE WINES LLC,

Petitioner

v.

HIDDEN WINERIES INC.,

Respondent

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

Canc. No. 92/058,885

MEMORANDUM AND ORDER

On October 11, 2017, Respondent Hidden Wineries Inc. (Respondent) filed a Petition to the Director, pursuant to 37 C.F.R. § 2.146, seeking an extension of time of unspecified length to seek judicial review of the Trademark Trial and Appeal Board's August 7, 2017, decision sustaining the petition, filed by Petitioner Modern House Wines, Inc. (Petitioner), to cancel Respondent's Reg. No. 3,771,513. Because Respondent's petition seeks relief authorized pursuant to 37 C.F.R. § 2.145(e), for which a petition to the Director is unnecessary, the Director will treat this as a request under § 2.145(e). The request is GRANTED for the reasons set forth below.

Analysis

Under 37 C.F.R. § 2.145(e), the Director may extend the time for seeking judicial review of a final Board decision in an opposition proceeding. If the request is filed before the specified time of sixty-three days has expired, the Director assesses the request under a good cause standard. *See* 37 C.F.R. § 2.145(e)(1)(i). But if the

request is filed after the specified time has expired, then the request must satisfy a stricter standard: excusable neglect. *See* 37 C.F.R. § 2.145(e)(1)(ii).

The Board's decision granting the petition to cancel Respondent's registration was mailed on August 7, 2017. TTABVue Docket No. 45. Under 37 C.F.R. § 2.145(d), the period for filing a notice of appeal or a civil action expires sixty-three (63) days from the date of the final decision of the Board. Thus, to be timely, any request for an extension of time to seek judicial review was due on or before October 10, 2017. Respondent, however, filed its request on October 11, 2017, a day late.

The request contains a sworn statement from Respondent's owner MaDonna White, who is appearing *pro se* for her company, that she first attempted to file this request on October 6, 2017, the last day for filing a notice of appeal or civil action. But she avers that she was unable to do so because she was out of the country and had defective Internet access at that time. The Director has no reason to doubt this statement. But it does not change the fact that the request was filed a day late. As a result, this request must satisfy the excusable neglect standard of 37 C.F.R. § 2.145(e)(1)(ii).

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 identified 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 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).

Applying the factors, first, there is nothing to indicate that Petitioner is likely to be prejudiced by extending the time to seek judicial review. Second, the request was filed only one day after the 63-day window within which to seek judicial review such that the potential impact on judicial proceedings is minimal.

Third, the asserted reasons for the delay, including whether the delay was within the reasonable control of the movant, also do not weigh against a finding of excusable neglect. 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 control of the party requesting that the delay be excused, to be highly significant. *See FirstHealth of Carolinas, Inc. v. CareFirst of Md., 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, Respondent’s owner avers lack of Internet access while she was out of the country on the last day of the period as the primary reason for the one-day delay in submitting the request. Ensuring access to the Internet in order to make a timely filing with the USPTO is something that is under Respondent’s reasonable control. However, Respondent also avers a number of

reasons why she needs additional time to seek judicial review, including her ultimately unsuccessful recent attempts to obtain counsel, water pipe damage to her home office, and a recent serious auto accident in which her daughter was injured. These reasons do not appear to have been under Respondent's reasonable control.

Fourth, the sworn request suggests that Respondent is acting in good faith, such that the fourth *Pioneer* factor also does not weigh against finding excusable neglect.

Having considered the relevant factors in light of Ms. White's sworn statement, the Director finds that the minimal delay here was the result of excusable neglect. The Director notes that parties appearing before the Agency must take reasonable measures to assure timely compliance with USPTO timelines and requirements. However, the "excusable neglect" standard dictates balancing all the facts where no one factor is determinative and, on balance here, the facts ultimately weigh in favor of granting the requested additional time to seek judicial review of the Board's decision.

Decision

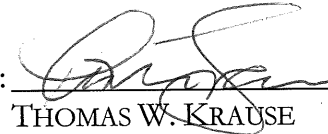
The Director GRANTS Respondent an additional thirty (30) days from the date of this order (*i.e.*, through and including April 12, 2018) within which to seek judicial review of the Board's decision.

ANDREI IANCU

*Under Secretary of Commerce for Intellectual
Property and Director of the United States
Patent and Trademark Office*

Date: March 13, 2018

By: _____



THOMAS W. KRAUSE
Deputy Solicitor

COPIES SENT BY EMAIL TO:

Hidden Wineries Inc. c/o MaDonna White
P.O. Box 891081
Temecula, CA 92589
madonna@gotcheers.com

Respondent pro se

Kathleen E. Letourneau, Esq.
Owen Wickersham & Erickson P.C.
455 Market Street
Suite 1910
San Francisco, CA 94105
kel@owe.com

Counsel for Petitioner