

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION and HP INC.,
Petitioners

v.

SYNKLOUD TECHNOLOGIES, LLC,
Patent Owner

Case IPR2020-01270
U.S. Patent 9,219,780

SynKloud Technologies, LLC's Unopposed Motion To Excuse Late Action

I. Introduction

Patent Owner, SynKloud Technologies, LLC (“SynKloud”) hereby respectfully asks the Board to excuse Patent Owner’s late filing of the Patent Owner’s Response. Petitioners do not oppose this motion.

Three IPRs were filed against Patent No. 9,219,780 (“the ‘780 patent”): IPR2020-01301, IPR2020-01269, and IPR2020-01270. Patent Owner’s counsel inadvertently entered the due date for the Patent Owner Response for IPR2020-01301 (July 1, 2021) in his docket for IPR2020-01269 and IPR2020-01270. Exhibit 2040, ¶¶ 4 and 5. According to the Scheduling Order for IPR2020-01269 and IPR2020-01270, the due date was June 30, 2021. As a result of the docketing error, Patent Owner filed the Patent Owner Response on July 1, 2021, one (1) day after the due date. *Id.* at ¶¶ 4-6.

Patent Owner’s counsel notified the Board of the unintentional error via email on July 2, 2021 (Exhibit 2041) and the Board authorized Patent Owner to file this motion via email on July 11, 2021 (Exhibit 2042). Exhibit 2040, ¶¶ 7, 8.

“A late action will be excused on a showing of good cause or upon a Board decision that consideration on the merits would be in the interests of justice.” 37 C.F.R. § 42.5(c). Patent Owner respectfully submits, for the

reasons explained in detail below, that the late action should be excused for good cause and the interests of justice.

II. The Board Should Excuse Patent Owner's Late Filing Due To The Presence Of Good Cause

The determination of whether a party's neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership*, 507 U.S. 380, 395 (1993). In determining whether to allow late filings, courts consider various factors including "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Ibid.*

As supported by the declaration (Exhibit 2040) of Gregory Gonsalves (SynKloud's lead counsel in this IPR), SynKloud's tardiness was the result of a docketing error. SynKloud's counsel unintentionally and inadvertently entered on his docket for IPR2020-01269 and -01270 the due date for the Patent Owner Response for a different IPR (2020-01301) that was also filed against the '780 patent (July 1, 2021). Exhibit 2040, ¶¶ 4-5. The due date for IPRs 2020-01269 and -01270 was, in fact, one day earlier on June 30, 2021. *Id.* at ¶ 5.

SynKloud's lead counsel was unaware of the mistake until he was informed by his backup counsel around 3 pm on July 1st. *Id.* at ¶¶ 4-5. Immediately thereafter, SynKloud's counsel began assembling for filing the Patent Owner Response along with about 35 associated exhibits and a motion to seal for each of the two IPRs. SynKloud's lead counsel also left a voice mail with Petitioners' lead counsel informing him of the unintentional error. *Id.* at ¶ 6. SynKloud's lead counsel completed the filings for IPR2020-01269 and 01270 by 6 pm on July 1st and uploaded service copies of all the filed documents to a shared folder on his Box account by 6:50 pm on July 1st and Petitioners' counsel's Sharefile storage later that evening. *Id.* at ¶ 6. Shortly thereafter, two large trees fell due to a violent storm and knocked down power lines into the driveway of SynKloud's lead counsel's house, thereby cutting power and internet cable to the house. *Id.* at ¶ 7. After the firemen and power company workers had cleared the downed power lines to make it safe to leave the house the following day on July 2nd, SynKloud's lead counsel drove to a library that had internet access, sent an email to Petitioners' counsel following up on his voice mail message to ask if Petitioners would oppose SynKloud's request to the Board to excuse the late filing, and after receiving a response, sent an email to the Board reporting the unintentional error and asking the Board to excuse the late filing. *Id.* at ¶ 7.

The first *Pioneer* factor supports the requested relief because there is no prejudice to Petitioners. Petitioners and Patent Owner have agreed to extend the due date for Petitioners' Reply by two days to address any impact arising from Patent Owner's late filing.

The second Pioneer factor also supports relief because less than one (1) day passed between the July 30th deadline and the filing of the Patent Owner Response and associated documents the following day. Allowing the proceeding to move forward on the merits does not affect any deadline in this IPR after Petitioners' Reply.

The third and final Pioneer factor also favors relief because SynKloud's error was unintentional and because SynKloud acted in good faith. After learning of his error, SynKloud's counsel promptly began the process of filing and serving the Patent Owner Responses and associated exhibits, asked Petitioners' counsel if they would oppose a request to the Board to excuse the late filing, and notified the Board of the error. Exhibit 2040, ¶¶ 5-7.

Under similar circumstances, the Director applied the *Pioneer* factors to excuse a late filing. *See e.g., Mitsubishi Cable Industr., Ltd. et. al. v. Goto Denshi Co., Ltd.*, IPR2015-01108, Paper 28 (May 3, 2017), p. 13 (finding good cause to grant a 7-day extension where "good faith conduct [by Patent Owner's attorneys]

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