



NOTICE

7/5/13

U.S. PATENT & TRADEMARK OFFICE

July 5, 2013

VIA EXPRESS MAIL

EV 950372335 us

Office of the Solicitor
Mail Stop 8
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, Virginia 22313-1450

Attn: Director

ABRAHAM FLORES'S REQUEST FOR AN EXTENSION OF TIME TO FILE APPEAL

Abraham Flores, through the undersigned counsel, herewith requests that the Director accept the late filed Notice of Appeal upon the excusable neglect standard in 37 C.F.R. §2.145(e).

On January 31, 2013, the Trademark Trial and Appeal Board entered an order against Registrant Abraham Flores and thereafter canceled Federal Registration No. 3,542,236 for "PINAR DEL RIO". On April 11, 2013, Flores filed his Notice of Appeal with the Federal Circuit and provided same to the United States Patent and Trademark Office, Office of General Counsel. Pursuant to 37 C.F.R. § 2.145(d), Flores should have filed his Notice of Appeal within two (2) months of the Board's January 31, 2013 Order, namely, on April 2, 2013.¹ Due to circumstances that arise to excusable neglect, the Notice of Appeal was filed ten (10) days late.

An appellant that has received an order to show cause from the clerk of the Federal Circuit may

¹ Two months from January 31, 2013 was March 31, 2013 which was a Sunday. Pursuant to docketing rules, the deadline would then be the next business day. However, since the period included February 28, an additional day is added. As such, the deadline was April 2, 2013. 37 C.F.R. §2.145(d)(ii)(2).

file a request under 37 CFR §2.145(e) for an extension of time to file an appeal, accompanied by a showing that the late filing of the notice of appeal was the result of excusable neglect. The request should be filed in the Office of the Solicitor, which will notify the clerk of the Court of the Director's decision on the request. Trademark Trial and Appeal Board Manual of Board Procedure ("TBMP") §902.02.

Excusable Neglect Standard

The Director may consider four factors when deciding whether to find excusable neglect for a late filed appeal, and to thereafter allow the late filing. Pursuant to Federal Rule of Civil Procedure 6(b) which gives a court discretion to enlarge a scheduled period of time "upon a motion made after the expiration of the specified period ... where failure to act was the result of excusable neglect," the Director also has the discretion to accept the untimely filing. See also 37 C.F.R. §2.116(a) (incorporating the Federal Rules of Civil Procedure for *inter partes* trademark proceedings).

In analyzing excusable neglect in this case and others, the T.T.A.B. has relied on the Supreme Court's discussion of excusable neglect in Pioneer Investment Services, Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993). See e.g., Old Nutfield Brewing Co. v. Hudson Valley Brewing Co., 65 U.S.P.Q.2d 1701, 1702-04 (T.T.A.B. 2002)(applying Pioneer factors for excusable neglect). The Pioneer case dealt with a bankruptcy rule that "empower[ed] a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline 'was a result of excusable neglect.'" Pioneer, 507 U.S. at 382. The Supreme Court defined the inquiry into excusable neglect as:

at bottom an **equitable one**, taking account of all relevant circumstances surrounding the party's omission. These include . . . [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 (emphasis added).

Flores has at all times objected to Habanos' standing to bring the Cancellation Proceeding. On October 11, 2011, Flores raised the affirmative defense that Habanos lacked standing to bring this action. If this appeal is not permitted to be heard because of an untimely filing, then a matter nearly identical in facts will soon be before the Federal Circuit, namely, Cigar King, LLC, v. Corporacion Habanos, et. al. (Trademark Trial and Appeal Board Cancellation Proceeding No. 92053245, Decided June 12, 2013, Notice of Appeal filed with Office of General Counsel, Notice of Appeal to be filed with Federal Circuit). The undersigned counsel will file an appeal based upon the same factual and legal issues to be appealed in this case.

Based upon equity and the totality of circumstances, Flores believes that excusable neglect should be found by the Director such that the short delay in filing should not bar this appeal and should move forward. In support of same, each of the Pioneer factors will be addressed in turn.

1. There Is No Danger of Prejudice to Corporacion Habanos.

There is no danger of legal or factual prejudice to Corporacion Habanos ("Habanos") for a variety of reasons. First, the short delay (discussed more fully below) has not caused Habanos to experience any legal or factual prejudice since the matters to be appealed will also be appealed by a subsequent case, namely, the Cigar King case referenced herein. While the ten day delay is regrettable, the ten days (eight business days) could not have caused any real prejudice to Habanos. Even if this appeal is dismissed as untimely, in the next 30 days Habanos will be the appellee in an appeal that is identical (with the exception of a different appellant) in facts and law. The undersigned counsel and Habanos are no strangers to litigation. Rather, both have been engaged in cases that are similar in law and fact for over ten (10) years. Unlike other cases where a party may be prejudiced because the delay has caused financial harm, i.e., the inability to sell a product under the subject trademark, Habanos will also not be prejudiced by the short delay because Habanos is barred by the United States embargo

against Cuba which is a commercial, economic, and financial embargo imposed on Cuba in October 1960. Therefore, even if Habanos were to ultimately prevail in the Cancellation proceeding, the win would not open the door for Habanos to sell any of its cigar or other tobacco products in the United States. Rather, the real prejudice will befall (and has befallen) Flores, and similarly situated litigants who have had their trademarks properly registered with the United States Patent and Trademark Office only to later have those registrations attacked by an entity (controlled by a totalitarian regime) barred from conducting commercial operations in the United States. Therefore, Flores' main issue to be appealed, standing, will be foreclosed if Flores is not allowed to bring this action at the Federal Circuit.

2. Short Length of the Delay, No Potential Impact on Judicial Proceedings.

The length of the delay, while regrettable, was ten calendar days (eight business days). The short delay had no impact on judicial proceedings. Unlike instances wherein a party fails to prosecute or defend an action at the T.T.A.B. and thereafter requests an extension of time based on excusable neglect, no briefing deadlines in the Federal Circuit have been missed in this matter. Moreover, because the undersigned intends to appeal the above-mentioned "Cigar King, Ltd. v. Corporacion Habanos" matter, the short delay will not impact the instant case. Rather, Flores and Cigar King intend to request that the Federal Circuit consolidate both appeals since the legal and factual issues are nearly identical. If the instant appeal is not allowed to proceed, then any ruling in the subsequent "Cigar King" action may have an impact (or could have had an impact) on this case. For instance, if the Federal Circuit ultimately finds that Habanos did not have standing to bring the Cigar King case, then Flores' T.T.A.B. action should have never been heard. Judicial resources and equity dictate that the Flores case be allowed to proceed to appeal such that it can be thereafter consolidated with the Cigar King appeal.

3. **Reason For The Delay.**

The ten day delay in filing the notice of appeal was within the reasonable control of the undersigned. However, due to a docketing error in cross-docketing of the Cigar King case, the undersigned's office mis-docketed the deadline. The deadline is regrettable, but based upon a weighing of all of the Pioneer factors, Flores believes that excusable neglect will be found to exist. Pioneer's elastic concept" should be found here. In Pioneer the Supreme Court stated:

Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant."

Pioneer, 507 U.S. At 392.

4. **Movant Has Acted In Good Faith.**

Movant has at all times acted in good faith. While the short delay in filing is regrettable, counsel for Flores, a sole practitioner, has represented a multitude of similarly situated trademark owners against Habanos on a pro-bono, or nearly pro-bono basis for twelve years. The undersigned entire legal career has been dedicated to representing clients that are similarly situated in matters against Habanos. Flores has at all times sought to defend this case since it is Flores' contention that Habanos, a legal entity of Cuba, barred by the Cuban Embargo from doing business in the United States, does not ultimately have standing to bring such cases.

WHEREFORE, Flores respectfully submits that when the four Pioneer factors are weighed that the Trademark Director find excusable neglect and allow this appeal to move forward.

Sincerely,

s/FRANK HERRERA

Frank Herrera

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

No. 13-1411

NOT FILED

JUL 11 2013

U.S. COURT OF APPEALS

ABRAHAM FLORES,

Appellant,

v.

CORPORACION HABANOS, ET. AL.

Appellee.

**RESPONSE TO ORDER TO SHOW CAUSE
WHY APPEAL SHOULD NOT BE DISMISSED**

BRIEF OF APPELLANT ABRAHAM FLORES

Frank Herrera
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Suite 408
Delray Beach, Florida 33444
(561) 900-2486

Attorney for Appellant

July 5, 2013

COMES NOW, Abraham Flores (“Appellant” or “Flores”) through the undersigned counsel and in response to this Honorable Court's June 5, 2013 Order, herewith offers factual and legal support as to why this appeal should not be dismissed for the untimely filing of the Notice of Appeal.

On January 31, 2013, the Trademark Trial and Appeal Board entered an order against Appellant Abraham Flores and thereafter canceled Federal Registration No. 3,542,236 for “PINAR DEL RIO”. On April 11, 2013, Appellant filed its Notice of Appeal with the Federal Circuit and provided same to the United States Patent and Trademark Office, Office of General Counsel. Pursuant to 37 C.F.R. § 2.145(d), Appellant should have filed its Notice of Appeal within two (2) months of the Board's January 31, 2013 Order, namely, on April 2, 2013.¹ Due to circumstances that arise to excusable neglect, the Notice of Appeal was filed ten (10) days late.

RESPONSE TO ORDER TO SHOW CAUSE

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expiration of the specified period ... where failure to act was the result of excusable neglect,” the Director also has the discretion to accept the untimely filing. See also 37 C.F.R. §2.116(a) (incorporating the Federal Rules of Civil Procedure for *inter partes* trademark proceedings).

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Appellant has at all times objected to Habanos' standing to bring the Cancellation Proceeding. On October 11, 2011, Appellant raised the affirmative defense that Habanos lacked standing to bring this action. If this appeal is not permitted to be heard because of an untimely filing, then a matter nearly identical in facts will soon be before this Court, namely, Cigar King, LLC. v. Corporacion Habanos, et. al. (Trademark Trial and Appeal Board Cancellation Proceeding No. 92053245, Decided June 12, 2013, Notice of Appeal filed with Office of General Counsel, Notice of Appeal to be filed with Federal Circuit). The undersigned counsel will file an appeal based upon the same factual and legal issues to be appealed in this case.

Based upon the totality of circumstances, Appellant believes that excusable neglect should be found such that the short delay in filing should not bar this appeal and should move forward. In

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1. There Is No Danger of Prejudice to Corporacion Habanos.

There is no danger of legal or factual prejudice to Appellee Corporacion Habanos (“Habanos”) for a variety of reasons. First, the short delay (discussed more fully below) has not caused Habanos to experience any legal or factual prejudice since the matters to be appealed will also be appealed by a subsequent case, namely, the Cigar King case referenced herein. While the ten day delay is regrettable, the ten days (eight business days) could not have caused any real prejudice to Habanos. Even if this appeal is dismissed as untimely, in the next 30 days Habanos will be the appellee in an appeal that is identical (with the exception of a different appellant) in fact and law. The undersigned counsel and Habanos are no strangers to litigation. Rather, both have been engaged in cases that are similar in law and fact for over ten (10) years. Unlike other cases where a party may be prejudiced because the delay has caused financial harm, i.e., the inability to sell a product under the subject trademark, Habanos will not be prejudiced by the short delay because Habanos is barred by the United States embargo against Cuba which is a commercial, economic, and financial embargo imposed on Cuba in October 1960. Therefore, even if Habanos were to ultimately prevail in the Cancellation proceeding, the win would not open the door for Habanos to sell any of its cigar or other tobacco products in the United States. Rather, the real prejudice will befall (and has befallen) Appellant, and similarly situated litigants who have had their trademarks properly registered with the United States Patent and Trademark Office only to later have those registrations attacked by an entity (controlled by a totalitarian regime) barred from conducting commercial operations in the United States. Therefore, Appellant's main issue to be appealed, standing, will be foreclosed if Appellant is not allowed to bring this action at the Federal Circuit.

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entire legal career has been dedicated to representing clients that are similarly situated against Habanos. Appellant has at all times sought to defend this case since it is Appellant's contention that Habanos, a legal entity of Cuba, barred by the Cuban Embargo from doing business in the United States, does not ultimately have standing to bring such cases.

WHEREFORE, Appellant respectfully submits that when the four Pioneer factors are weighed that this Court and the Trademark Director find excusable neglect and allow this appeal to move forward.

Respectfully submitted,

July 5, 2013

s/FRANK HERRERA
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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on July 5, 2013 that I electronically filed this Response to the Order to Show Cause with the Federal Circuit using the cm/ecf system which will automatically send notification to counsel for Appellee:

David B. Goldstein, Esq.
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
45 Broadway, Suite 1700
New York, New York 10006-3791

On this same day, I sent a request for extension of time to the Director at the United States Patent and Trademark Office via United States EXPRESS MAIL:

Director
Office of the Solicitor
Mail Stop 8

U.S. Patent and Trademark Office
PO Box 1450
Alexandria, Virginia 22313-1450

s/FRANK HERRERA
Frank Herrera