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**In the Supreme Court of the United States**

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INDIEZONE, INC. and EOBUY, LIMITED,

*Petitioners,*

CONOR FENNELLY, CEO and  
DOUGLAS RICHARD DOLLINGER, Counsel,

*Petitioners,*

v.

TODD ROOKE; et al.,

*Respondents.*

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**On Application For Extension Of Time  
To File A Petition For A Writ Of  
Certiorari To The United States Court  
Of Appeals For The Ninth Circuit**

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November 27, 2023

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**Petitioners' Application To Extend Time  
To File A Petition For A Writ Of Certiorari**

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**To the Honorable Elena Kagan, as Circuit Justice for the  
United States Court of Appeals for the Ninth Circuit:**

Petitioners are Indiezone, Ltd a domestic corporation formed under Delaware law, eoBuy Licensing Ltd a company duly formed under the laws of Ireland as the proposed substitute plaintiff for the assignee eoBuy Ltd, the assignor, a defunct Irish company and former plaintiff, their CEO, Conor Fennelly and their Attorney, Douglas R. Dollinger. Each respectfully requests that the time to file their Petition for a Writ of Certiorari in this matter be extended forty-five days to and including January 22, 2024.

The Court of Appeals issued its opinion on May 23, 2023, affirming the District Court's January 28, 2021, denial for relief to file a late Notice of Appeal. The denial was based on a finding of a lack of jurisdiction to review Petitioners' claims of error in the district court concerning their Fed R. Civ. P. 144, 455 & Fed R. Civ. P. 60 (b)(6), (d)(1) & (3) Motions. (App. A & B.) No party appeared or opposed the Motions or the Appeal. On June 6, 2023, Petitioners timely sought *en banc* review. On September 8, 2023, the Court of Appeals issued its order (App. C.) in which it denied a petition for *en banc* review.

Absent an extension of time, the Petition would therefore be due on December 7, 2023. Petitioner is timely filing this Application before that date and requests the enlargement for the reasons stated below. See S. Ct. R. 13.5. This Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1).

### **Background**

Fed. R. App. P. 4 (A) provides that in a civil case the notice of appeal required by Fed. R. App. P. 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from. In matters of late filing Fed. R. App. P. 4(a)(5)(A) provides the district court may extend time for filing a notice of appeal upon a showing of “excusable neglect” or “good cause.”

Congress unmistakably intended these two terms to be treated separately. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court had the occasion and previously acknowledged that Congress intended to distinguish the two terms recognizing the district courts discretion in matters of excusable neglect, citing equitable powers to deny or grant the application. Based on a four-factor analysis provided in *Pioneer* this Court explained that the

factors to be considered include “[1] the danger of prejudice to the [nonmovant], [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.

Although *Pioneer* settled the dispute among the lower courts by guiding the analysis in applying equitable power to forgive late filings under the “excusable neglect” standard, it did not articulate guidance, or provide a standard based on “good cause” for intervening circumstances from which congress intended to excuse a late filing in the absence of a filers fault.

The result is that the lower circuit courts have subsumed the good cause term without due consideration of its separate domain simply applying *Pioneer’s* third equitable factor “the reason for the delay, including whether it was within the reasonable control of the movant”.

By doing so the lower courts have ignored congressional intent differing late filings of right for “intervening circumstances” where there is no fault on the part of the filer being late.

The uncontested and unopposed record in the proceedings below show that Petitioners’ former counsel was a registered filer with the

district court's Electronic Court Filing System ("ECF"). On December 23, 2020, within the 30 days provided by Rule 3, counsel as attorney of record made multiple timely attempts to lodge a notice of appeal on the district court's ECF system seeking review from the district court's denial of Petitioners' collective Motions, but was unable to do so because it was inaccessible due to a system lockout; that the clerk's office was unavailable during regular business hours to timely assist and correct or remove the lockout; that the after-hours drop box was also inaccessible, each due to COVID-19 shelter in place protocols; that Petitioners' counsel timely served all parties by email and the Clerk's office by overnight courier on December 23, 2022, within the 30 days of the Orders being appealed; that Petitioners' filed their Notice of Appeal the next day via ECF, and timely moved to file late asserting good cause under Fed. R. App. P. 4(a)(5)(A) on December 30, 2022.

The District Court denied the Petitioners' Motion to file late ignoring the good cause factors showing intervening circumstances without fault of the Petitioners; ruling Petitioners were inexcusably negligent; ruling it was Petitioners fault they did not have ECF access. The holding expresses or otherwise constitutes a *pre-se rule* blaming a filer for an ECF failure or

malfunction. The Panel ruled it could not reverse based on the district court's discretion, explaining that the court "must affirm" unless there is a definite and firm conviction that the district court committed a clear error of judgment, citing *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (*en banc*). Petitions can establish that congress intended otherwise limiting to power of the district court's to deny relief as to matters beyond the court's discretion and equitable powers with the proper standard being *de novo* review concerning a question of law without fault of the filer.

### **Reasons For Granting the Extension of Time.**

The time to file a Petition for a Writ of Certiorari should be extended for forty-five days for these reasons:

1. This Court's decision in *Pioneer Id.* had a substantial impact providing guidance on the issue of "excusable neglect" supporting its reasoning and legal principles which were at the core of the lower courts confusion concerning excusable neglect. The issue of "good cause" as a separate domain was not fully developed with a review of what congress intended the differing terms to mean and the rights afforded a filer who is late without fault.

2. Noteworthy, the *Pioneer* Court recognized, but did not fully provide guidelines in agreement with the 2002, Advisory Committee Notes to Fed. R. Civ. P. 4. The Notes clarify what congress intended recognizing a distinction between excusable neglect and good cause standards holding that they occupy “different domains.”

3. The Notes embody congressional intent defining them as separate principles of law providing:

The good cause and excusable neglect standards have “different domains.” *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations where there is no fault. (Committee Notes on Rules—2002 Amendment Rule 4.)

4. The Ninth Circuit’s reliance on *Pincay v. Andrews*, at 389 F.3d 853, departs from the mandates issued by the *Pioneer* Court involving the fundamental question of the district courts’ power and how best to address questions related to the separate domains the two different terms occupy as congress intended the law to operate when applying Rule 4.

5. Seeking review of the matter by this Court requires the integration of the Court’s most recent rulings and should be presented in

the Petition for Certiorari for review against the backdrop of the this and other circuit court decisions which will affect the possible extension of the *Pioneer* guidance and mandate already issued.

6. Moreover, this case is uniquely important because the Court's guidance applying the *Pioneer* factors was provided before the mandatory ECF filing protocols became effective.

7. Relative to the limited case law as well as applied rules available among the circuit's a renewed mandate of the *Pioneer* factors will clarify the issues for circuit uniformity in the application of the laws and rules issued by this Court involving the different treatment congress intended among the differing terms of excusable neglect and good cause.

8. The Ninth Circuit's Decision and its application without first determining the congressional intent of the Rules at issue presents confusion on the standard of methodology which should be applied against the backdrop of fault and no fault on the part of a filer and improperly denies review of the district court's rulings.

9. There is a substantial likelihood that this Court will grant certiorari and, indeed, a substantial probability of reversal with a mandate to follow.



10. In addition to the matter involving the important issues of congressional intent, the decision of the Court of Appeals conflicts with the majority of this Court's rulings in other matters and concerning Petitioners' motions as the subject of the appeal below and their right to appeal those matters.

11. Additional time is necessary and warranted for, *inter alia* counsel's review of the relevant legal precedents and historical materials the issues involved in this matter center on.

12. No party below opposed the motions or appeal, and no meaningful prejudice would arise from the extension, as this Court would hear oral argument and issue its opinion in the 2024 term.

13. A final factor exists for relief. Petitioners' former counsel passed away. Co-Counsel has in the past seven days recovered documents from former counsel's estate which impact on preparation of Petitioners' claims and additional time is necessary to review the contents of those files.

### **Conclusion**

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended forty-five days to and including January 22, 2024.

Respectfully submitted,

*Jose Z. Marin*

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