

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**



**In re:** )  
)  
**Polo Development, Inc.,** )  
**AIM Georgia, LLC, and** ) **CWA Appeal No. 16-02**  
**Joseph Zdrilich,** )  
)  
**Docket No. CWA-05-2013-0003** )

**COMPLAINANT’S RESPONSE IN OPPOSITION TO RESPONDENTS’ MOTION FOR  
EXTENSION OF TIME TO FILE NOTICE OF APPEAL FROM DECISION DATED  
DECEMBER 1, 2015 AND APPEAL BRIEF**

**I. Introduction**

Now comes Complainant, the Director of the Water Division, U.S. Environmental Protection Agency (“U.S. EPA”), Region 5, by and through its counsel, and files this Response in Opposition to Respondents’ *Motion for Extension of Time to File Notice of Appeal From Decision Dated December 1, 2015 and Appeal Brief* (Extension Request) in accordance with Sections 22.16(a), (b) and 22.30(e) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (“Consolidated Rules”), 40 C.F.R. §§ 22.16(a), (b) and 22.30(e), and the Environmental Appeals Board’s (“Board’s”) *Order Directing Briefing* dated May 27, 2016.

**II. Factual and Procedural Background**

On December 1, 2015, Administrative Law Judge M. Lisa Buschmann issued her Initial Decision and Order (“Initial Decision”) in this case assessing a penalty of \$32,550 against Respondents for violations of Sections 301(a) and 404 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a) and 1344. Pursuant to 40 C.F.R. 40 C.F.R. §§ 22.16(a), (c) and 22.30(a), Respondents had until January 5, 2016, to file a notice of appeal of the Initial Decision and an



accompanying brief *See In re: Polo Development, Inc.*, CWA Appeal No. 16-01, 2016 EPA App. LEXIS 18, at \*2 (EAB Mar. 17, 2016) (“Order at 2”). However, Respondents, through their counsel-of-record, Dennis DiMartino, filed a “Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal *Nunc pro Tunc*” (“First Appeal Request”) on January 13, 2016 - eight days after the appeal deadline. The First Appeal Request did not include an accompanying appellate brief, a request for an extension of time to file the brief nor a summary of the grounds upon which Respondents sought to appeal the Initial Decision. Instead, Respondents asserted that special circumstances existed to allow late filing of an appeal in this case because Mr. DiMartino had not received a copy of the Initial Decision sent by regular mail; had not monitored his email spam folder; and had not actively monitored the case with the Office of the Administrative Law Judges. *See Order at 2.*

On January 15, 2016, the Board issued its *Order Extending Deadlines for Deciding Whether to Exercise Sua Sponte Review*, (“Extension Order”), in which it set February 1, 2016, as the deadline for Complainant to file a response to the First Appeal Request and February 17, 2016, as the deadline for Respondents to file a reply brief. *See Extension Order.* The Board also extended the time period for it to exercise *sua sponte* review of the case until 30 days after it ruled on Respondents’ First Appeal Request.<sup>1</sup> *Id.* On January 29, 2016, Complainant filed its *Response in Opposition to Respondents’ Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal Nunc pro Tunc.* Respondents did not file a reply brief.

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<sup>1</sup> If the Board decides to exercise *sua sponte* review, it will file a notice with the Regional Hearing Clerk, the Presiding Officer, and the parties. *See* 40 C.F.R. § 22.30(b). The Board will include in the notice a statement of issues to be briefed by the parties and a time schedule for the briefing. *Id.* This notice is typically filed within 45 days of the effective date of service of the Initial Decision. In this case, the period would have expired on January 21, 2016, if the Board had not extended the time period.



On March 9, 2016, Respondent Joseph Zdrilich called and left a voice mail message for Complainant's Counsel, Richard Clarizio. *See Exhibit A, Conversation Record - March 30, 2016 - Rich Clarizio.* Mr. Zdrilich stated that Mr. DiMartino was no longer practicing law and was no longer representing Respondents. *Id.* On March 16, 2016, Mr. Clarizio sent Mr. Zdrilich an email message advising him to notify the Board of the potential change in counsel for Respondents. *See Exhibit B, email from Richard Clarizio to Joseph Zdrilich dated March 16, 2016.* The email message included the names and addresses of the Regional and Headquarters Hearing Clerks, the Presiding Officer, and Mr. Clarizio. *Id.* The email server confirmed that the message was successfully relayed to the email address associated with Mr. Zdrilich. *Id.*

On March 17, 2016, the Board issued its *Order Dismissing Notice of Appeal as Untimely* ("Order") in this case. The Board arranged for service of the Order by first class mail, return receipt requested on March 17, 2016. *See Exhibit C, Domestic Return Receipt.* It was sent to Mr. DiMartino at 839 Southwestern Run, Youngstown, Ohio. Order, Certificate of Service for Order. According to the U.S. Postal Service's (USPS's) tracking service, the copy of the Order was delivered to Mr. DiMartino's address at 12:52 p.m. on March 23, 2016, and the domestic return receipt shows that a person by the name of "Christine Haluska" accepted the mail for Mr. DiMartino.<sup>2</sup> *Id.* at Product & Tracking Information for Tracking Number 7008 3230 0000 9476 6180 reproduced from USPS website.

On March 18, 2016, Mark Hanni left a voice mail message for Mr. Clarizio stating that he had replaced Mr. DiMartino as counsel for Respondents and would be representing Respondents in this matter. *See Exhibit A.* On March 23, 2016, Mr. Clarizio sent Mr. Hanni a copy of the Order and a letter informing Mr. Hanni that he should notify the Board that he was

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<sup>2</sup> Mr. DiMartino's affidavit in support of the First Appeal Request is notarized by a "Shannan Haluska."



replacing Mr. DiMartino as Respondents' counsel. *See* Exhibit D, letter from Richard Clarizio to Mark Hanni dated March 23, 2016. The letter and Order were addressed to Mr. Hanni at 839 Southwestern Run, Youngstown, Ohio. *Id.* They were sent via first class mail, return receipt requested. According to the USPS's tracking service, the letter and copy of the Order were delivered to the identified address at 11:23 a.m. on March 28, 2016, and the domestic return receipt shows that a person by the name of "Debbie Sakura" at the identified address accepted the mail.<sup>3</sup> *Id.* at Product & Tracking Information for Tracking Number 7001 0320 0006 1458 0621 reproduced from USPS website.

On April 14, 2016, Mr. Hanni filed his *Entry of Appearance for Combined Respondents Substitute Counsel* ("Appearance") with the Board.<sup>4</sup> On April 18, 2016, the 30-day period from the date of the Order that the Board set for deciding whether to exercise *sua sponte* review expired.<sup>5</sup> *See* Extension Order. Consequently, on April 18, 2016, the Initial Decision in this case became a Final Order under the Consolidated Rules. *See* 40 C.F.R. § 22.27(c).

Subsequently, on May 19, 2016, Mr. Hanni filed the instant Extension Request.<sup>6</sup> Specifically, Respondents request that the Board use its equitable powers to provide the Respondents with additional time to file a notice of appeal of the Initial Decision and accompanying brief by June 15, 2016. The Respondents assert that "special circumstances"

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<sup>3</sup> The fact that Mr. Hanni did not sign the return receipt is not an impediment to proper service at his address of record. *See*, Order at 4, n. 2 citing to *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (holding that service by certified mail does not require proof of actual receipt by the addressee).

<sup>4</sup> Mr. Hanni's signature block on his Appearance has the typed address as 829 Southwestern Run, Youngstown, Ohio. This is apparently a typographical error and the correct address for Mr. Hanni is 839 Southwestern Run, Youngstown Ohio. *See* Exhibit E, Extension Request, signature block and accompanying envelope with stamped return address.

<sup>5</sup> When the Board elects not to exercise *sua sponte* review no notice is required and the Initial Decision becomes a Final Order. *See*, 40 C.F.R. §§ 22.27(c) and 30(b) and *In re B & L Plating, Inc.*, 11 E.A.D. at 189, n. 11.

<sup>6</sup> The certificate of service indicates that it was only served upon Complainant's counsel, Mr. Clarizio. However, the Extension Request is docketed as received by the Board on May 19, 2016.





exist because their prior counsel was suspended from the practice of law and did not adequately represent their interests.

### **III. Argument**

A party may request the Board to review any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Board within thirty days after the initial decision is served. *See* 40 C.F.R. § 22.30(a). The Board may provide an extension of time upon timely motion; for good cause shown; and after consideration of prejudice to the other party. *See* 40 C.F.R. § 22.7(b). For the second time in this proceeding, Respondents have filed a request for an extension to file a notice of appeal and accompanying brief after the deadline for such filing has passed and without a demonstration of justifiable special circumstances.

Motions for extension of time are to be filed before the due date. *See* 40 C.F.R. § 22.7(b); *see also Outboard Marine Corp.*, 6 E.A.D. at 198 n. 7; *Farmers Union Oil Co.*, 2000 EPA ALJ LEXIS 74 (E.P.A. Nov. 3, 2000) (“Rule 22.7(b) and the preamble explanation leave no doubt that the rule requiring motions for extensions of time to be filed in advance of the due date for the filing of the document in question is to be strictly enforced”). The Board requires strict adherence to filing deadlines. Order at 3. It has stated that “[t]imely filings promote certainty and uniformity in the application of regulatory deadlines; limit reliance on the infinitely variable internal operations of litigants and law firms as determinants of when obligations must be met; preserve the Agency’s adjudicative resources for litigants who timely exercise their appeal rights; and ensure that the Agency’s procedural rules are applied equally to all affected parties.” *Id.* at 3 citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996).



However, the Board has articulated two scenarios under which it may relax a filing deadline. Order at 3. The Board may relax a filing deadline if either: (1) there is a timely filed motion requesting an extension, for good cause shown after considering prejudice to other parties; or (2) on its own initiative. If a request is not timely filed, then the first scenario does not apply and Respondents can only rely upon the equitable authority of the Board to extend the deadline on its own initiative i.e., the second scenario. In the second scenario, the Board will allow for a late filed appeal only if it finds “special circumstances.” *Id.*

Respondents do not argue that their Extension Request is timely and it is clear that it is not timely when viewed in light of the Consolidated Rules and the Board’s precedent. The notice of appeal of the Initial Decision and accompanying brief were due January 5, 2016. *Id.* at 2. The Board has already found that Respondents were untimely when they filed their First Appeal Request on January 13, 2016, eight days after the appeal deadline. *Id.* The Board has similarly dismissed appeals that were received eleven days,<sup>7</sup> sixteen days,<sup>8</sup> and twenty-one days<sup>9</sup> after the expiration of the appeal period in 40 C.F.R. § 22.30. Clearly, an extension request filed four months after the deadline to file the notice and brief on appeal is not timely filed pursuant to 40 C.F.R. § 22.30. Consequently, in order to prevail on their Extension Request, Respondents must demonstrate “special circumstances.”

Similar to their First Appeal Request, Respondents contend that the “special circumstances” for their Extension Request arise from the inadequacy of representation by their previous counsel, Mr. DiMartino. Respondents urge the Board to find special circumstances

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<sup>7</sup> *In re Apex Microtechnology, Inc.*, EPCRA Appeal No. 93-2 (EAB, July 8, 1994).

<sup>8</sup> *In re B&B Wrecking & Excavating, Inc.*, 4 E.A.D. 16 (EAB 1992).

<sup>9</sup> *In re Production Plated Plastics, Inc.*, 5 E.A.D. 101 (EAB 1994).



because Mr. DiMartino did not adequately represent their interests and compromised their appeal rights. Mr. DiMartino admitted as much in the First Appeal Request when he stated that he failed to diligently monitor the case. Order at 4. The Board previously considered and rejected this argument when it decided the First Appeal Request. *Id.* This is consistent with prior Board opinions where special circumstances were not found when there was “insufficient oversight and inattentiveness” by Respondent’s counsel. *See In re Tri-County Builders Supply*, CWA Appeal No. 03-04, 2004 EPA App. LEXIS 25, at \*7-9 (July 26, 2004) (no special circumstances where attorney leaving the office on family emergency assigned no one to monitor the case during his absence, nor did he review the case’s status upon his return); *see also In re Maralex Disposal, LLC*, SDWA Appeal No. 13-01, 2013 EPA App. LEXIS 33, at \*5-6 (EAB Sept. 3, 2013); (no special circumstances where counsel erroneously assumed that the appeal period ran from receipt of service, and not from service itself).

The Board expressly stated in *In re Willie P. Burrell & The Willie P. Burrell Trust*, 15 E.A.D. 677, 688 (EAB 2012): “The neglect of a party's attorney does not excuse an untimely filing. *Pyramid*, 11 E.A.D. at 665 (“[The Board] ha[s] made clear, time and again, that the failings of a client's attorney does not excuse compliance with the Consolidated Rules.”) (citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 531-32 (EAB 1996), and *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990)). The Board has repeatedly held that “an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings.” *Pyramid*, 11 E.A.D. at 667; *accord Four Strong Builders*, 12 E.A.D. at 770; *JHNY*, 12 E.A.D. at 382-83 & n. 15; *Jiffy Builders*, 8 E.A.D. at 320-21; *see also Detroit Plastic Molding*, 3 E.A.D. at 105-06 (pre-Board case). In general, a client voluntarily chooses its attorney as its representative in an action and thus cannot avoid the consequences of the acts or omissions of its



freely selected agent: "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L. Ed. 955 (1879)); accord *United States v. Boyle*, 469 U.S. 241, 249-52, 105 S. Ct. 687, 83 L. Ed. 2d 622 (1985) (tax return must be timely filed regardless of whether a client entrusted its attorney with the duty to make a timely filing).

Respondents state that additional time should be granted because they did not know that Mr. DiMartino was suspended from practicing law in Ohio, nor did they know that he had not taken steps to properly assert Respondents' appeal rights.<sup>10</sup> The Supreme Court of Ohio provides a history of attorney disciplinary proceedings available to the public on-line at [http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/Public\\_AtorneyInformation.asp](http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/Public_AtorneyInformation.asp). A simple search of this site would have informed the Respondents that since 1994 Mr. DiMartino had been disciplined three times for actions related to mismanaging his client accounts or dishonest conduct involving his marital status. The most recent complaint was filed against Mr. DiMartino on September 15, 2015, and decided on February 17, 2016. It was related to his mishandling of an unrelated client account. See Exhibit F, *Mahoning Cty. Bar Assn. v. DiMartino*, Slip Opinion No. 2016-Ohio-536. Respondents selected Mr. DiMartino to represent them. With on-line access to attorney disciplinary actions, they cannot assert ignorance of Mr. DiMartino's disciplinary problems.

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<sup>10</sup> To the extent the Respondents are seeking redress for incompetent representation they may either file a complaint with the Ohio Supreme Court or sue Mr. DiMartino for malpractice. See *Alsobrook v. UPS Ground Freight, Inc.* 352 Fed. Appx. 1 (6<sup>th</sup> Cir. 2009), cert. denied by *Alsobrook v. UPS Ground Freight, Inc.*, 176 L. Ed. 2d 182, (U.S., Mar. 1, 2010) (holding that the appropriate remedy for ineffective assistance of counsel is a malpractice action against the attorney and not an attack on an adverse judgment).





Assuming *arguendo* that Mr. DiMartino's suspension is relevant<sup>11</sup> it is not sufficient to justify an extension. When a Respondent seeks to invoke the equitable authority of the Board the Respondent must demonstrate that it has acted in a timely and responsible manner. The Board has refused to grant an extension where a Respondent failed to communicate their objections during the time for *sua sponte* review. See *Gary Dev. Co.*, 6 E.A.D. at 532, n. 11. By March 9, 2016, at the latest, Respondent Zdrilich knew that Mr. DiMartino had been suspended from the practice of law in Ohio.<sup>12</sup> See Exhibit A. By March 18, 2016, Mr. Hanni had notified Complainant that he was representing Respondents. *Id.* By March 23, 2016, Respondents' new attorney had received the Order. Respondents could have filed their Extension Request shortly after receiving the Order on March 23, 2016. See Exhibit D. They could have filed the Extension Request before April 18, 2016, the date when the Board's *sua sponte* review period ended. They did not.

This is not the first time that Respondents have missed a deadline in this proceeding. In addition to the late filed First Appeal Request, the Respondents failed to meet the deadlines to file their prehearing exchange, and they submitted no post-hearing brief. See Initial Decision at 2. Deadlines "serve an important role in helping to bring repose and certainty to the administrative enforcement process" and "ensure that the Board's resources are reserved for those cases involving both important issues and serious and attentive litigants." *Tri-County*

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<sup>11</sup> Respondents have not identified how Mr. DiMartino's suspension impacted their appeal. He was admitted to the Ohio State bar at the time he filed the First Appeal Request. Although he was suspended at the time Respondents' reply brief was due, the substance of his arguments were presented in the First Appeal Request. That First Appeal Request, unlike the present Extension Request, included a Memorandum of Law citing to cases in support of Respondents' First Appeal Request. Additionally, the Board conducted its own independent review of the Initial Decision to determine if there were any errors of fact or law. It did not find any.

<sup>12</sup> Respondents or their new counsel may have known at an earlier date of Mr. DiMartino's most recent disciplinary problems. Their new attorney, Mr. Hanni, used the same business as Mr. DiMartino and represented him in his most recent disciplinary proceeding. See Exhibits E and F. The Respondents do not indicate in their Extension Request when they first became aware of either Mr. DiMartino's most recent disciplinary problems or his suspension.



*Builders Supply*, 2004 EPA App. LEXIS 14, at \*8. The Board has therefore refused to find special circumstances to excuse a late-filed appeal, as in *B & L Plating, Inc.*, when the late filing is only the most recent oversight in a “succession of . . . failures to abide by the rules and orders designed to promote the efficient resolution of disputes.” *B & L Plating, Inc.*, 11 E.A.D. at 191. In this proceeding, Respondents’ repeated failure to meet the deadlines weighs against the Board’s exercise of its equitable authority to grant Respondents’ late-filed Extension Request.

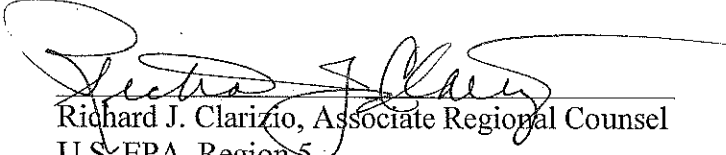
#### **V. Conclusion**

For the reasons stated above, Respondents have failed to demonstrate that special circumstances exist to grant an extension of time to file a notice of appeal of the Initial Decision and accompanying brief. Accordingly, Respondents’ Extension Request should be denied.

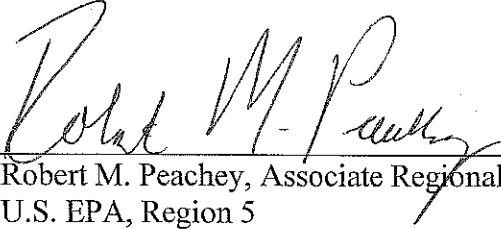


Respectfully submitted,

June 2, 2016  
Date

  
Richard J. Clarizio, Associate Regional Counsel  
U.S. EPA, Region 5  
Office of Regional Counsel (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
(312) 886.0559

2 JUNE 2016  
Date

  
Robert M. Peachey, Associate Regional Counsel  
U.S. EPA, Region 5  
Office of Regional Counsel (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
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Of Counsel:

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

**In re:** )  
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**Polo Development, Inc.,** )  
**AIM Georgia, LLC, and** ) **CWA Appeal No. 16-02**  
**Joseph Zdrilich,** )  
 )  
 )  
**Docket No. CWA-05-2013-0003** )

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing "Complainant's Response in Opposition to Respondents' Motion for Extension of Time to File Notice of Appeal from Decision Dated December 1, 2015 and Appeal Brief," CWA Appeal No. 16-02 was sent this day in the following manner to the addressed listed below:

An electronic filing was made to: Eurika Durr  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1200 Pennsylvania Avenue, NW  
Mail Code 1103M  
Washington, D.C. 20460-0001

Copy by USPS Certified Mail to: Sybil Anderson  
Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

Copy by USPS Certified Mail to: M. Lisa Buschmann  
Administrative Law Judge  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460



Copy hand-delivered to:

LaDawn Whitehead  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard (E-19J)  
Chicago, Illinois 60604-3590

Copy by USPS Certified Mail to:

Polo Development Inc, AIM Georgia, LLC, and  
Joseph Zdrilich  
c/o Mark Hanni, Esq.  
839 Southwestern Run  
Youngstown, Ohio 44514-4688

Receipt No. 7009 1680 0000 7646 8466

Date

6/2/2016



U.S. EPA, Region 5  
Office of Regional Counsel (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
(312) 886.5889



**In re: Polo Development, Inc., AIM Georgia, LLC, and  
Joseph Zdrilich  
CWA Appeal No. 16-02**

**Exhibit A**

**Conversation Record - March 30, 2016, Rich Clarizio.**



Conversation Record - March 30, 2016 - Rich Clarizio

On 3/9/2016 Mr. Joseph Zdrilich left a voicemail message indicating that Mr. DiMartino was not practicing law any more and that he was no longer representing Respondents.

On 3/18/2016 Mark Hanni left a voicemail message indicating that he was taking over the case from Mr. DiMartino. Phone number 330-727-7777.

On or about 3/22, and 29 I returned calls of Mr. Hanni. On 3/22 I left voicemail message informing Mr. Hanni of the Board's decision and that he needed to inform the Board that he was taking over the case. On 3/29 I left message with receptionist that I was returning his call and that he could call me if he thought he still needed to talk to me.

On 3/23/2016 Mark Hanni left a return message to my 3/22 call with same telephone number and cell phone number of 330-540-5469. Call came in from number 330-729-5602.





**In re: Polo Development, Inc., AIM Georgia, LLC, and  
Joseph Zdrilich  
CWA Appeal No. 16-02**

**Exhibit B**

**March 16, 2016, email from Richard Clarizio to Joseph Zdrilich**



**Clarizio, Richard**

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**From:** Clarizio, Richard  
**Sent:** Wednesday, March 16, 2016 9:01 AM  
**To:** Claire Debra Lim; Claire Lim; jmzerlich@aol.com; jmzdrilich@att.net  
**Cc:** Clarizio, Richard; Peachey, Robert  
**Subject:** In re: Polo Development, et al., CWA Appeal No. 15-01  
**Attachments:** Polo - R5 response to R's request FINAL.pdf; Polo - Respondent's Nunc Pro Tunc Motion 1-13-16.pdf

Hello Mr. Zdrilich,

I received your voice mail message of March 9, 2016. In that message you indicated that Mr. DiMartino is no longer practicing law and may not be representing you in CWA Appeal No. 15-01. I would recommend that you notify the U.S. Environmental Appeals Board (EAB) in writing of who is representing you and their address. If you are representing yourself then you should also notify the EAB of that fact and your address. The EAB's address is as follows:

Eurika Durr, Clerk of the Board  
USEPA, EAB  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1103M  
Washington D.C. 20460-0001

You should also send copies of anything you file with the EAB to:

Sybil Anderson, Headquarters Hearing Clerk  
USEPA, Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

M. Lisa Buschmann, Administrative Law Judge  
USEPA, Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

LaDawn Whitehead, Regional Hearing Clerk  
USEPA, Region 5  
77 West Jackson Boulevard (E-19J)  
Chicago, Illinois 60604-3590

Richard J. Clarizio & Robert M. Peachey  
USEPA, Region 5, Office of Regional Counsel  
77 West Jackson Boulevard (C-14J)  
Chicago, Illinois 60604-3590

As you may know, Mr. DiMartino filed a request for an appeal and EPA filed a response. Copies attached. Mr. DiMartino did not file a reply to EPA's response and the time for such a reply has passed (February 16, 2016). The EAB has not yet issued a decision on the appeal request.

Sincerely,

Rich Clarizio

**Clarizio, Richard**

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**From:** Postmaster <postmaster@worldnet.att.net>  
**Sent:** Wednesday, March 16, 2016 9:11 AM  
**To:** Clarizio, Richard  
**Subject:** Delivery Notification  
**Attachments:** ATT00001; In re: Polo Development, et al., CWA Appeal No. 15-01

Your message was successfully relayed via mx.att.yahoo.com for delivery to:  
jmzdrilich@att.net

The Remote mail system does not support confirmation of actual delivery. Unless delivery fails, this will be the only delivery status notification sent.



**In re: Polo Development, Inc., AIM Georgia, LLC, and  
Joseph Zdrilich  
CWA Appeal No. 16-02**

**Exhibit C**

**Domestic Return Receipt  
Product & Tracking Information for Tracking Number 7008 3230 0000 9476 6180  
reproduced from USPS website**





POLO DEVELOPMENT

Case No. 16-01

**SENDER: COMPLETE THIS SECTION**

**COMPLETE THIS SECTION ON DELIVERY**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

A. Signature  
 *Christine Haluska*  Agent  
 Addressee

B. Received by (Printed Name)  
*Christine Haluska*

C. Date of Delivery  
*3-23-16*

1. Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich  
 c/o Dennis A DiMartino, Esq.  
 839 Southwestern Run  
 Youngstown, Ohio 44514-4688

D. In delivery to addressee?  
 Yes  
 No

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  
 Yes

2. Article Number  
 (Transfer from service label) **7008 3230 0000 9476 6180**





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Sign up for My USPS.

Tracking Number: 7008323000094766180

Updated Delivery Day: Wednesday, March 23, 2016

## Product & Tracking Information

## Available Actions

Postal Product:

Features:  
Certified Mail™

DATE & TIME	STATUS OF ITEM	LOCATION
March 23, 2016 , 12:52 pm	Delivered	YOUNGSTOWN, OH 44514

Your item was delivered at 12:52 pm on March 23, 2016 in YOUNGSTOWN, OH 44514.

March 23, 2016 , 7:58 am	Arrived at Unit	YOUNGSTOWN, OH 44514
March 23, 2016 , 5:53 am	Departed USPS Facility	YOUNGSTOWN, OH 44501
March 23, 2016 , 1:54 am	Arrived at USPS Facility	YOUNGSTOWN, OH 44501
March 20, 2016 , 5:57 pm	Departed USPS Facility	CLEVELAND, OH 44101
March 20, 2016 , 7:38 am	Arrived at USPS Facility	CLEVELAND, OH 44101
March 18, 2016 , 10:13 pm	Departed USPS Facility	GAITHERSBURG, MD 20898
March 18, 2016 , 10:08 pm	Arrived at USPS Facility	GAITHERSBURG, MD 20898

## Track Another Package

Tracking (or receipt) number

Track It

## Manage Incoming Packages

Track all your packages from a dashboard.  
No tracking numbers necessary.

Sign up for My USPS ›



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**In re: Polo Development, Inc., AIM Georgia, LLC, and  
Joseph Zdrilich  
CWA Appeal No. 16-02**

**Exhibit D**

**March 23, 2016, letter from Richard Clarizio to Mark Hanni  
Domestic Return Receipt and  
Product & Tracking Information for Tracking Number 7001 0320 0006 1458 0621  
reproduced from USPS website**





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

MAR 23 2016

REPLY TO THE ATTENTION OF:

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**  
**Tracking Number: 7001-0320-0006-1458-0621**

Mark Hanni, Esq.  
Law Offices  
839 Southwestern Run, #1  
Youngstown, Ohio, 44514

**Re: Polo Development, Inc., et alia, CWA Appeal 16-01**

Dear Mr. Hanni,

I received your voice mail message of March 18, 2016, indicating that you are now representing the Respondents in this matter instead of Mr. Di Martino. I have left you two messages in return. Attached is a copy of the U.S. Environmental Appeals Board (EAB) March 17, 2016, Order *Dismissing Notice of Appeal Untimely*. The EAB sent a copy to the attorney of record, Mr. Di Martino at the same address as yours. If you have replaced Mr. Di Martino I recommend you inform the Board of this fact and your address.

The EAB's address is as follows:

Eurika Durr, Clerk of the Board  
USEPA, EAB  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1103M  
Washington D.C. 20460-0001

You should also send copies of anything you file with the EAB to:

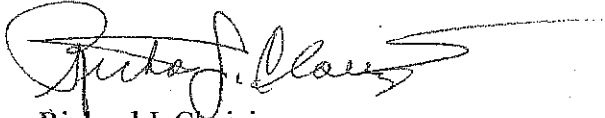
Sybil Anderson, Headquarters Hearing Clerk  
USEPA, Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

M. Lisa Buschmann, Administrative Law Judge  
USEPA, Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

LaDawn Whitehead, Regional Hearing Clerk  
USEPA, Region 5  
77 West Jackson Boulevard (E-19J)  
Chicago, Illinois 60604-3590

Richard J. Clarizio & Robert M. Peachey  
USEPA, Region 5, Office of Regional Counsel  
77 West Jackson Boulevard (C-14J)  
Chicago, Illinois 60604-3590

Sincerely,

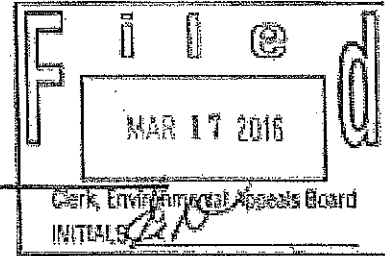
A handwritten signature in cursive script, appearing to read "Richard J. Clarizio", with a long horizontal flourish extending to the right.

Richard J. Clarizio  
Associate Regional Counsel

Attachment

cc: R. Clarizio  
R. Peachey





(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, within sixty (60) days of the issuance of this opinion, of any typographical or other formal errors, in order that corrections may be made before publication.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

In re:	)	
Polo Development, Inc.,	)	
AIM Georgia, LLC,	)	
and Joseph Zdrilich	)	CWA Appeal No. 16-01
Docket No. CWA-05-2013-0003	)	

[Decided March 17, 2016]

**ORDER DISMISSING NOTICE OF APPEAL AS UNTIMELY**

*Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.*

**IN RE POLO DEVELOPMENT, INC., AIM GEORGIA, LLC,  
AND JOSEPH ZDRILICH**

CWA Appeal No. 16-01

***ORDER DISMISSING NOTICE OF APPEAL AS UNTIMELY***

Decided March 17, 2016

**Syllabus**

On January 13, 2016, Polo Development, Inc., AIM Georgia, LLC, and Mr. Joseph Zdrilich ("Respondents") filed a motion seeking to submit an out-of-time appeal of an Initial Decision and Order issued against them on December 1, 2015. Respondents claim that "special circumstances" justify an extension of time in this case.

**Held:** Motion denied and Notice of Appeal dismissed. The Board holds that it retains discretion under the Consolidated Rules of Practice, 40 C.F.R. part 22, to accept late-filed appeals when circumstances warrant. In this case, however, the Board finds that circumstances did not warrant accepting the late-filed appeal. Instead, the evidence established that EPA served the Initial Decision and Order on Respondents, that Respondents' counsel received the Initial Decision and Order at least two weeks before the appeal deadline, and that Respondents' counsel did not exercise due diligence in monitoring the docket of the enforcement proceedings below. The Board concludes that all of these factors weigh against the Board finding special circumstances to exercise its discretion in this instance.

*Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.*

***Opinion of the Board by Judge Ward:***

On December 1, 2015, Administrative Law Judge M. Lisa Buschmann issued an Initial Decision and Order finding Polo Development, Inc., AIM Georgia, LLC, and Mr. Joseph Zdrilich ("Respondents") liable for discharging dredged or fill material into navigable waters in violation of Clean Water Act sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344, and assessing a \$32,550 penalty. On that same date, the U.S. Environmental Protection Agency's Headquarters Hearing Clerk signed a certificate of service attesting that she had sent copies of the Initial

Decision and Order to counsel for Respondents and EPA Region 5 "by Electronic and Regular Mail."

On January 13, 2016, Respondents filed with the Environmental Appeals Board ("Board") a Motion to File Notice of Appeal *Nunc pro Tunc* ("Motion") and a one-page Notice of Appeal. In their Motion, Respondents acknowledge that their appeal is late but assert that they "just learned" that the Initial Decision and Order had been issued. Respondents seek permission to file an untimely Notice of Appeal of Judge Buschmann's Initial Decision and Order and request "a reasonable time to research, write, and file" an accompanying appeal brief. Motion at 1.

Respondents claim that "special circumstances" justify an extension of time in this case: namely, that counsel never received the copy the Headquarters Hearing Clerk sent via "Regular Mail"; that the copy sent via "Electronic Mail" was routed to counsel's spam folder and thus not timely discovered; and that counsel failed actively to monitor the case's status by checking the Office of Administrative Judges' on-line docket or by telephoning that office. Motion at 2, 4-5. Respondents also argue that "good cause" justifies an untimely appeal in this case, for the same reasons presented to support their "special circumstances" claim, and assert that allowing such an appeal to go forward would not prejudice opposing parties. *Id.* at 4-5.

On January 29, 2016, EPA Region 5 filed a Response in Opposition to Respondents' Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal *Nunc pro Tunc* ("Response"). The Region contends that Respondents have not shown any special circumstances to justify their untimeliness and have not established good cause for an extension of time to file an appeal. Response at 7-12.

The Consolidated Rules of Practice ("Consolidated Rules") governing this appeal establish a thirty-day appeal period that begins running the day after an initial decision is served and is extended for an additional five days if service is by mail. 40 C.F.R. §§ 22.7(a), (c), .30(a). Service is complete upon mailing. *Id.* § 22.7(c). In this case, the Headquarters Hearing Clerk's service of the Initial Decision and Order was complete upon mailing on December 1, 2015. Counting from December 2, 2015 (the first day of the appeal period), Respondents had thirty-five days, or until January 5, 2016, to timely file a notice of appeal and accompanying brief. Thus, Respondents' Notice of Appeal, filed January 13, 2016, was eight days late. The Notice also was unaccompanied by an appeal brief or a

summary of the primary issues Respondents intended to dispute, contrary to the Consolidated Rules' requirements at 40 C.F.R. § 22.30(a)(1).

The Board typically requires strict adherence to the filing deadlines contained in the Consolidated Rules. See, e.g., *In re B&L Plating, Inc.*, 11 E.A.D. 183, 189-91 (EAB 2003); *In re Tri-County Builders Supply*, CWA Appeal No. 03-04, at 5-6 (EAB May 24, 2004) (Order Dismissing Appeal) (collecting cases). Timely filings promote certainty and uniformity in the application of regulatory deadlines; limit reliance on the infinitely variable internal operations of litigants and law firms as determinants of when obligations must be met; preserve the Agency's adjudicative resources for litigants who timely exercise their appeal rights; and ensure that the Agency's procedural rules are applied equally to all affected parties. *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996).

The Board may relax a filing deadline in appropriate cases, either: (1) with respect to a timely filed motion requesting an extension, for good cause shown after considering prejudice to other parties; or (2) on its own initiative, 40 C.F.R. § 22.7(b). The first scenario is inapplicable here because Respondents' motion was not timely filed. In the second scenario, the Board has routinely declined to excuse late-filed appeals unless it finds "special circumstances" to justify the untimeliness. *B&L Plating*, 11 E.A.D. at 190-91 & n.15 (citing cases finding "special circumstances" where timely filing delayed by sudden attorney illness or delivery delays beyond litigant's control (e.g., aircraft problems)); *Gary Dev.*, 6 E.A.D. at 533 (citing case finding "special circumstances" where timely filing delayed because Agency provided erroneous filing information in writing, upon which petitioner relied).

In the present case, special circumstances do not exist. First, with respect to Respondents' claim that their counsel never received the copy of the Initial Decision and Order mailed on December 1, 2015, the Board cannot fully credit it. The Headquarters Hearing Clerk mailed that copy to counsel's address, which has not changed throughout these proceedings. Moreover, the EPA Region 5 Hearing Clerk served a second copy of the Initial Decision and Order on Respondents' counsel on December 14, 2015, via certified mail, return receipt requested, using

the same address.<sup>1</sup> That copy successfully arrived on December 17, 2015, as shown by the signed return receipt,<sup>2</sup> raising the implication that the first copy also likely arrived successfully. Even if the first copy did not so arrive, and giving Respondents the benefit of the doubt, Respondents' counsel knew or should have known no later than December 17, 2015, that Judge Buschmann had rendered her decision and that the appeal period had begun to run. Respondents readily could have filed a motion for an extension (or even a proper appeal) at that time, rather than waiting nearly a month before acting, but they did not do so.

Furthermore, Respondents' counsel admits that he failed diligently to monitor the Administrative Law Judges' docket or contact their office for status updates of the pending case. In light of this admission, counsel's claim of special circumstances founders because an attorney "stands in the shoes of his or her client," and "the failings of a client's attorney [do] not excuse compliance with the Consolidated Rules." *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 665, 667 (EAB 2004); see *In re Burrell*, 15 E.A.D. 679, 688-89 (EAB 2012); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 317-21 (EAB 1999); *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990). Without more, counsel's own lack of diligence does not rise to the level of special circumstances.

---

<sup>1</sup> This second service of the Initial Decision and Order appears to have been unnecessary under the provisions of EPA's pilot program on hearing clerk functions. See Memorandum from John Reeder & Lawrence Starfield, U.S. EPA, to Reg'l Counsel & Deputy Reg'l Counsel, *Pilot Program to Migrate Certain Regional Hearing Clerk Functions to the Headquarters Hearing Clerk* (Apr. 27, 2012). The fact that the second service may have been duplicative, however, does not make it irrelevant to the Board's inquiry.

<sup>2</sup> Ms. Christine Haluska signed the return receipt. That counsel himself did not sign the return receipt is no impediment to proper service at his address of record. See, e.g., *Katzman Bros. Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (holding that "when service is effectuated by certified mail, the letter need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual").

The requirements of the Consolidated Rules "are not procedural niceties that parties are free to ignore." *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); see *In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005). Although the Board retains discretion to accept a late-filed appeal when circumstances warrant, the evidence that the Initial Decision and Order was served twice, the documentation confirming counsel's receipt of the Initial Decision and Order two weeks before the appeal deadline, and counsel's lack of diligence in monitoring the docket weigh against the Board exercising its discretion here.

Accordingly, the Board denies Respondents' Motion and dismisses its Notice of Appeal.

So ordered.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing **Order Dismissing Notice of Appeal** as Untimely in the matter of *Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich*, CWA Appeal No. 16-01, were sent to the following persons in the manner indicated:

**By First Class U.S. Mail, Return Receipt Requested:**

Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich  
c/o Dennis A DiMartino, Esq.  
839 Southwestern Run  
Youngstown, Ohio 44514-4688

**By EPA Pouch Mail:**

Richard J. Clarizio, Esq.  
Robert M. Peachey, Esq.  
U.S. Environmental Protection Agency, Region 5  
Office of Regional Counsel (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604

Carol Bussey, Esq.  
National Administrative Litigation Co-Coordinator  
U.S. Environmental Protection Agency  
Office of Civil Enforcement  
75 Hawthorne Street  
San Francisco, California 94105

Date: MAR 17 2016

  
Annette Duncan  
Secretary







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DATE & TIME	STATUS OF ITEM	LOCATION
March 28, 2016 , 11:23 am	Delivered	YOUNGSTOWN, OH 44514

Your item was delivered at 11:23 am on March 28, 2016 in YOUNGSTOWN, OH 44514.

March 28, 2016 , 8:47 am	Arrived at Unit	YOUNGSTOWN, OH 44514
March 28, 2016 , 5:58 am	Departed USPS Facility	YOUNGSTOWN, OH 44501
March 27, 2016 , 10:25 pm	Arrived at USPS Facility	YOUNGSTOWN, OH 44501
March 26, 2016 , 9:01 am	Departed USPS Facility	CLEVELAND, OH 44101
March 26, 2016 , 4:15 am	Arrived at USPS Facility	CLEVELAND, OH 44101
March 25, 2016 , 3:04 am	Departed USPS Facility	BEDFORD PARK, IL 60499
March 24, 2016 , 11:35 pm	Arrived at USPS Facility	BEDFORD PARK, IL 60499

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mark Hanni, Esq.  
Law Offices  
839 Southwestern Run #1  
Youngstown, Ohio 44514

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
*X* *Michael Sekara*  Agent  Addressee

B. Received by (Printed Name) *Debbie Sahara* C. Date of Delivery *3/28/15*

D. Is delivery address different from Item 1?  Yes  
If YES, enter delivery address below:  No

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes

2. Article Number  
(Transfer from service label) **7001 0320 0006 1458 0621**



**In re: Polo Development, Inc., AIM Georgia, LLC, and  
Joseph Zdrilich  
CWA Appeal No. 16-02**

**Exhibit E**

**Extension Request, with accompanying envelope.**



COPY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of :

)  
)  
)  
)  
)  
)

Docket No. CWA-05-2013-0003

Polo Development, Inc.,  
AIM Georgia, L.L.C., and  
Joseph Zdrilich

Respondents

RESPONDENTS' MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF  
APPEAL FROM DECISION DATED DECEMBER 1, 2015 AND APPEAL BRIEF

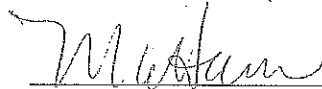
Pursuant to 40 C.F.R. §22.7(b), Respondents Polo Development, Inc., AIM Georgia, L.L.C., and Joseph Zdrilich move for an extension of time until June 15, 2016 to file a notice of appeal and appeal brief from the order issued in this case on December 1, 2015. Respondents state in support of this motion that its previous counsel was, unbeknownst to Respondents subject to proceedings by the Ohio Bar which resulted in the suspension of the attorney from practice. Also unbeknownst to Respondents, that prior attorney either did not take necessary steps to appeal the civil penalty, or improperly took steps to perfect such an appeal. Respondents have recently engaged new counsel who wishes to properly assert Respondent's appeal rights. New counsel needs a reasonable period of time to review the file and prepare the necessary papers to properly file an appeal. The governing regulations afford this body discretion to adjust applicable time periods in such a way that Respondents will preserve their appeal rights. Under the circumstances of this case, permitting a delayed appeal would promote the interests of due process of law and justice. For the reasons set forth in this motion, Respondents should be





granted until June 15, 2016 to file the requisite notice of appeal from the December 1, 2015 decision and the appeals brief.

Respectfully submitted,



MARK A. HANNI (0077475)

839 Southwestern Run

Youngstown, OH 44514

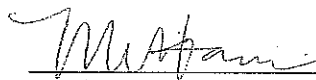
330.726.7777 – phone

330.726.7779 – fax

Attorney for Respondents

#### CERTIFICATE OF SERVICE

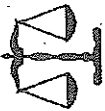
The foregoing Motion of Respondents for Extension of Time to File Notice of Appeal and Appeal Brief was sent by electronic mail and regular United States Mail to Richard J. Clairizio, Esq., U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604 on the 18<sup>th</sup> day of May 2016.



Mark A. Hanni

Attorney for Respondents





ATTORNEY MARK A. HANNI, LLC  
839 Southwestern Run • Youngstown, Ohio 44514

CLEVELAND  
OH 440  
13 MAY '16  
FNS-L

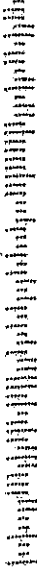
\$0.465  
US POSTAGE  
FIRST-CLASS  
062S0008363293  
FROM 44514



E97963 13

*Richard J. Curvizio, Esq.*  
*U.S. Environmental Protection Agency*  
*Region 5*  
*77 West Jackson Boulevard*  
*Chicago, Illinois 60604*

60604-360655





**In re: Polo Development, Inc., AIM Georgia, LLC, and  
Joseph Zdrilich  
CWA Appeal No. 16-02**

**Exhibit F**

***Mahoning Cty. Bar Assn. v. DiMartino, Slip Opinion No. 2016-Ohio-536.***



[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Mahoning Cty. Bar Assn. v. DiMartino*, Slip Opinion No. 2016-Ohio-536.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

**SLIP OPINION NO. 2016-OHIO-536**

**MAHONING COUNTY BAR ASSOCIATION v. DIMARTINO.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Mahoning Cty. Bar Assn. v. DiMartino*, Slip Opinion No. 2016-Ohio-536.]

*Attorneys—Misconduct—Violations of the Rules of Professional Conduct and a Rule for the Government of the Bar—Indefinite suspension.*

(No. 2014-2250—Submitted September 15, 2015—Decided February 17, 2016.)

ON CERTIFIED REPORT by the Board of Professional Conduct of the Supreme Court, No. 2014-080.

---

**Per Curiam.**

{¶ 1} Respondent, Dennis Armand DiMartino of Youngstown, Ohio, Attorney Registration No. 0039270, was admitted to the practice of law in Ohio in 1987.

{¶ 2} This court has disciplined DiMartino in three previous cases. In 1994, we sanctioned him with a stayed six-month suspension because he had failed to

SUPREME COURT OF OHIO

respond to a client's inquiries, failed to provide that client with a settlement statement, and failed to forward the client's portion of settlement proceeds. *Mahoning Cty. Bar Assn. v. DiMartino*, 71 Ohio St.3d 95, 642 N.E.2d 342 (1994). In 2007, after finding that he had neglected a client matter, we imposed a stayed one-year suspension on conditions. *Mahoning Cty. Bar Assn. v. DiMartino*, 114 Ohio St.3d 174, 2007-Ohio-3605, 870 N.E.2d 1166. In 2010, we determined that he had violated those conditions by engaging in dishonest conduct during his stayed suspension. Specifically, when applying for a marriage license in North Carolina, he falsely represented that he was not married, despite the fact that his Ohio divorce case was still pending. Accordingly, we reinstated the one-year suspension from the 2007 case and also suspended him concurrently for six months for his dishonest conduct. *Mahoning Cty. Bar Assn. v. DiMartino*, 124 Ohio St.3d 360, 2010-Ohio-247, 922 N.E.2d 220. On July 5, 2011, respondent was reinstated in both cases. 129 Ohio St.3d 1201, 2011-Ohio-3603, 950 N.E.2d 560; 129 Ohio St.3d 1202, 2011-Ohio-3604, 950 N.E.2d 560.

{¶ 3} In the present matter, relator, Mahoning County Bar Association, has charged DiMartino with misconduct similar to that in his previous disciplinary cases, including client neglect, failing to account for settlement funds, and dishonesty. Based on the evidence presented at the three-member panel hearing, the Board of Professional Conduct recommends that we indefinitely suspend DiMartino, order that he pay restitution to two former clients, and impose conditions upon any potential reinstatement. Neither party has filed objections to the board's report, and based upon our independent review of the record, we accept the board's findings of misconduct and agree with its recommended sanction.

**Misconduct**

{¶ 4} The board found that DiMartino engaged in professional misconduct in two client matters.



{¶ 5} In the first matter, Ember Harrington retained DiMartino to represent her in a personal-injury case relating to an automobile accident. DiMartino settled a claim against the tortfeasor and then filed a lawsuit on Harrington's behalf against her insurance carrier, invoking the underinsured-motorist provision of the policy. At that time, Harrington was covered under both the auto and health insurance policies of her mother, Rita Chegar. DiMartino settled the lawsuit with the insurer for \$15,000 and deposited the proceeds into his client trust account. He then paid himself \$5,000 in attorney fees and issued a check to Harrington for \$5,400, but he cannot account for the remainder of the \$4,600 from the settlement. In addition, he admitted at the panel hearing that he could not locate a signed copy of the settlement statement specifying the manner in which the funds were disbursed.

{¶ 6} At some point prior to the settlement, Chegar's health insurer asserted a subrogation claim for reimbursement of her daughter's medical expenses. DiMartino negotiated the subrogation claim with the health insurer and agreed to pay a reduced amount from the settlement with the auto insurance carrier. At the panel hearing, he testified that he thought he had sent the health insurer a check for \$4,600, but he also admitted that there is no record of the check and that the insurer was never paid, which he acknowledged was his fault. After a collection company for the health insurer later sent Chegar notices informing her that she was still required to reimburse the insurer from the settlement amount, she informed DiMartino that the matter was not yet resolved, and he assured her that he would correct the problem. But he never did.

{¶ 7} After DiMartino failed to return several of Chegar's phone calls, she filed a grievance against him with relator. DiMartino failed to respond to relator's repeated inquiries requesting information about the grievance. In addition, relator later discovered that DiMartino had overdrawn his client trust account. DiMartino also failed to respond to relator's repeated inquiries requesting more information about the overdraft.

SUPREME COURT OF OHIO

{¶ 8} In the second client matter, Paul and Kathy Melia retained DiMartino to represent them in a medical-malpractice case. DiMartino did not have the Melias execute a fee agreement. During the litigation, DiMartino failed to appear for hearings or to oppose the defendants' motion for summary judgment, and he failed to return his clients' phone calls. At one point, the Melias appeared for a scheduled mediation but were told by court staff that DiMartino had cancelled it—even though he had not mentioned that to his clients. Nor did he inform them that the court eventually dismissed the case. In fact, he met with them after the court's decision, and although he was aware of the judgment, he did not notify them that their case had been terminated. After the Melias learned of the court's decision, Paul filed a grievance with relator. Once again, DiMartino failed to respond to relator's repeated inquiries regarding the grievance.

{¶ 9} Based on this record, the board found—and DiMartino ultimately acknowledged—that he had violated Prof.Cond.R. 1.3 (requiring a lawyer to act with reasonable diligence in representing a client), 1.4(a)(1), (3), and (4) (requiring a lawyer to inform the client of any circumstances with respect to which the client's informed consent is required, to keep the client reasonably informed about the status of the matter, and to comply as soon as practicable with reasonable requests for information from the client), 1.5(b) (requiring a lawyer to communicate the nature and scope of the representation and the basis or rate of the fee and expenses within a reasonable time after commencing the representation), 1.5(c) (requiring an attorney to have set forth a contingent-fee agreement in writing signed by the client, and if the lawyer becomes entitled to compensation under the agreement, requiring the lawyer to prepare a closing statement and have the client sign the statement), 1.15(a) (requiring a lawyer to hold property of clients in an interest-bearing client trust account, separate from the lawyer's own property), 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or

misrepresentation) and former Gov.Bar R. V(4)(G) (now Gov.Bar R. V(9)(G)) (requiring a lawyer to cooperate with a disciplinary investigation).

{¶ 10} We agree with these findings of misconduct. We also agree to dismiss the charges withdrawn by relator.

#### Sanction

{¶ 11} When imposing sanctions for attorney misconduct, we consider several relevant factors, including the ethical duties that the lawyer violated, the sanctions imposed in similar cases, and the aggravating and mitigating factors listed in Gov.Bar R. V(13).

{¶ 12} The board found the following aggravating factors: prior disciplinary offenses, a dishonest or selfish motive, a pattern of misconduct, multiple offenses, lack of cooperation in the disciplinary process, and failure to make restitution. *See* Gov.Bar R. V(13)(B)(1), (2), (3), (4), (5), and (9). At the panel hearing, DiMartino testified that he suffered from depression and that it had contributed to his misconduct. The panel consequently allotted him 14 and 21 days after the hearing, respectively, to submit a psychological report and character references for purposes of mitigation. DiMartino, however, failed to timely submit the mitigation evidence. Accordingly, we concur with the board's findings that no mitigating factors are present here.

{¶ 13} To support its recommended sanction, the board cites *Trumbull Cty. Bar Assn. v. Braun*, 133 Ohio St.3d 541, 2012-Ohio-5136, 979 N.E.2d 326, and *Disciplinary Counsel v. Scacchetti*, 131 Ohio St.3d 165, 2012-Ohio-223, 962 N.E.2d 786. In *Braun*, the attorney neglected a client matter and retained a fee without performing any work. *Braun* at ¶ 4-8, 11. In *Scacchetti*, the attorney commingled personal and client funds in his client trust account, caused the account to be overdrawn, and neglected a client matter. *Scacchetti* at ¶ 4-8. In both cases, the attorneys had prior discipline, failed to establish the presence of any mitigating factors, and failed to cooperate in the disciplinary process. *Braun* at ¶ 12;

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*Scacchetti* at ¶ 10. And in both cases, we indefinitely suspended the attorneys. *Braun* at ¶ 14; *Scacchetti* at ¶ 15.

{¶ 14} We agree with the board that *Braun* and *Scacchetti* are precedents relevant to this case. An indefinite suspension here is consistent with our “rule that an attorney’s neglect of legal matters and failure to cooperate in the ensuing disciplinary investigation warrant an indefinite suspension.” *Disciplinary Counsel v. Mathewson*, 113 Ohio St.3d 365, 2007-Ohio-2076, 865 N.E.2d 891, ¶ 19.

**Conclusion**

{¶ 15} For the reasons explained above, we accept the board’s recommended sanction. Dennis Armand DiMartino is hereby indefinitely suspended from the practice of law in Ohio, and he is ordered to make restitution in the amount of \$4,600 to Ember Herrington and Rita Chegar within 60 days of this court’s order. Any future reinstatement is conditioned on DiMartino’s submission of proof that he has undergone a mental-health evaluation, has a plan of treatment, and has completed appropriate continuing-legal-education courses in law-office management, specifically in the area of client trust accounts. Costs are taxed to DiMartino.

Judgment accordingly.

O’CONNOR, C.J., and PFEIFER, O’DONNELL, LANZINGER, KENNEDY, FRENCH, and O’NEILL, JJ., concur.

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David Comstock Jr. and Ronald E. Slipski, Bar Counsel, for relator.  
Mark Anthony Hanni, for respondent.

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