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Mark A. Hanni, Attorney at Law
839 Southwestern Run
Youngstown, Ohio 44514

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ENVIR. APPEALS BOARD

Telephone: (330) 726-7777

FAX: (330) 726-7779

FAX COVER SHEET

DATE: 06/22/2016
TO: Clerk FAX NO. 202-233-0121
FROM: Atty. Hanni
RE: Polo Development
CWA-05-2013-0003

NOTES: Attached please find a Reply
Memorandum. The original is
being over-ighted this date.
Thank you.

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ENVIR. APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of :

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

Respondents

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Docket No. CWA-05-2013-0003

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

The legal doctrine that governs whether litigants will be relieved of the consequences of late filings is "excusable neglect." The United States Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates, Limited*, 507 U.S. 380 (1993) discussed excusable neglect in some detail. As a general rule, the Supreme Court characterized excusable neglect as an "elastic concept." The *Pioneer* opinion also states, generally, that a finding of excusable neglect "is not limited strictly to omissions caused by circumstances beyond the control of the movant." 507 U.S. at 392 More specifically, the Supreme Court recited five factors that determine whether excusable exists in any given situation. Those five factors are:

- a. potential prejudice to the other parties;
- b. length of the delay and the impact of the delay on efficient administration;
- c. whether the delay was beyond the reasonable control of the party seeking relief;
- d. good or bad faith; and

e. the extent to which a client should be penalized for counsel's misconduct.

507 U.S. at 385

The Environmental Protection Agency ("agency") rules use the term "special circumstances" when discussing the possibility relief from missing a filing deadline. Whether the appellation used is "excusable neglect" or "special circumstances," the substance of the governing principle remains the same. To decide whether these respondents are entitled to permission to institute an appeal after the stated deadline, the Environmental Appeals Board ("EAB") must evaluate how the five factors listed by the Supreme Court in *Pioneer, supra. p.* Impact upon the facts of this case. Respondents will show that a fair and reasonable assessment of those five factors compels the conclusion that the EAB should accept and process this appeal. The few months delay will not impede or inhibit the agency from presenting its case on this appeal. In its response memorandum, the agency never claims prejudice or potential prejudice if respondents are permitted to appeal. The delay here will not negatively impact upon the EAB's ability to effectively administer or decide this appeal. The few months delay here will not adversely affect the efficient administration of these proceedings.

In assessing factor number 3, the EAB must recognize the predicament that the professional misdeeds of prior counsel created for respondents. This is not a case where an attorney simply forgot about, or overlooked the filing deadline. Respondents' prior counsel was, unbeknownst to respondents, in the final stage of disciplinary proceedings in December 2015-January 2016. Previous counsel no doubt knew that he was about to be sanctioned severely. It stands to reason that respondents' previous counsel's focus upon and attention to this case (and other cases he was handling) was significantly compromised. Respondents had no control over the external pressures that were bearing upon prior counsel during the pendency of the

disciplinary proceedings. There is a very real basis for concluding that the delay in filing an appeal in this case was due to forces beyond respondents' reasonable control.

There is nothing that even suggests that respondents are acting in bad faith in requesting permission to file a late appeal. The EAB must be cognizant of the disciplinary issues that confronted respondents' previous counsel when if respondents satisfy the fifth, and last, *Pioneer* factor. Respondents did not have anything to do with the disciplinary problems that beset their prior counsel. The EAB cannot legitimately say that respondents bear any responsibility, or should be penalized in any way for their prior counsel's misconduct. The last factor, like the previous four factors, support respondent's present motion.

In its response memorandum, the agency does not mention, much less analyze and apply, the five critical *Pioneer* factors. The agency cites EAB rulings that relate to the length of delays that the EAB consider too substantial, and the maxim that a client stands in the shoes of its attorney. The length of the delay here, per se, is not determinative. The Supreme Court has mandated that the length of the delay at issue in a particular case be considered in the context created by the other *Pioneer* factors. Respondents have shown, *supra. p. 2-3*, that when the EAB considers the delay in this case in the proper context, excusable neglect, or special circumstances, exist. The agency minimizes the fact that respondents' prior counsel was involved in serious disciplinary proceedings. At page 8 of its response memorandum, the agency contends:

"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."

Pioneer teaches that whether the client knew about an attorney's discipline problems is not the governing consideration in determining whether to extend a filing deadline. The real issue is how the external pressures attendant to the disciplinary proceedings contributed to the

failure to honor the subject deadline. As respondents have shown, *supra. p.2*, it is reasonable for the EAB to conclude that the disciplinary proceedings were a significant enough distraction to explain the missed appeal deadline. Also, the EAB is obliged to apply the *Pioneer* factors in light of the long-standing rule that cases should be decided on their merits as opposed to procedural considerations. See *Ohio Civil Rights Commission v. Dayton*, 477 U.S. 619, 628 (1986) That principle requires the EAB to construe the effects of prior counsel's disciplinary problems, and the effect of those problems on the delay in filing an appeal, indulgently toward respondents. To honor the principle that it is best to decide case on their merits, and in light of the application of the five *Pioneer* factors, the EAB should grant respondents' motion and set a date by which respondents must file their appellate brief.

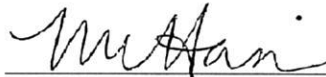
Respectfully submitted,



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 Reply Memorandum in Support of Motion of Respondents for Extension of Time to File Notice of Appeal and Appeal Brief was sent this 22nd day of June, 2016, 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; electronic mail to Eureka Durr, Clerk of the Board, U.S. Environmental Protection Agency Environmental Appeals Board, 1200 Pennsylvania Avenue, NW, Mail Code 1103 M, Washington, D.C. 20460-0001; and electronic mail to LaDawn Whitehead, Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.



Mark A. Hanni
Attorney for Respondents