

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
Taotao USA, Inc.,)	
Taotao Group Co., Ltd., and)	Docket No.
Jinyun County Xiangyuan Industry)	CAA-HQ-2015-8065
Co., Ltd.,)	
)	
Respondents.)	

**REPLY IN SUPPORT OF MOTION FOR LEAVE FOR FILING POST HEARING
BRIEF**

Respondents Taotao USA, Inc. (“Taotao USA”), Taotao Group Co. Ltd. (“Taotao Group”), and Jinyun County Xiangyuan Industry Co., LTD. (“JCXI”) respectfully file this Reply in support of their motion for leave for filing Post Hearing Brief (“Motion”).

I. The Motion and Relevant Authority in Support Thereof

Upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties," the Presiding Officer may grant an extension of time for the filing of any pleading, document, or motion." 40 C.F.R. § 22.07(b). A motion to extend the time for the filing ... must be filed before [the original time or its extension expires] ..., unless the delay in filing the motion to extend results from excusable neglect. *See Spitzer Great Lakes Ltd. v. United States EPA*, 173 F.3d 412, 414-15 (6th Cir. 1999) (citing to the predecessor rule); *see also* Fed. R. Civ. P. 6(b)(1)(B) (“When an act may or must be done within a specified time, the court may, for good cause, extend the time ... on motion made after the time has expired if the party failed to act because of excusable neglect.”). The agency permits late filings when there are *special circumstances* (emphasis added) to justify the untimeliness. *See In re B & L Plating Inc.*, 11 E.A.D. 183, 190 (EAB 2003); *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995).

In this case, the Parties' initial post-hearing briefs were due on or before 11:59 pm (EST) on December 22, 2017. *See* Order on Motion to Extend Post-Hearing Brief Deadlines. Respondents filed their post-hearing brief on or about 1:30 am (EST) due to an unforeseen issue with the Office of Administrative Law Judge's E-Filing System¹, whereby Respondents were unable to access the System through no fault of their own. *See* Motion at 1. Shortly after filing the Post-Hearing, Respondent informed the Court via email to the Court's Attorney-Advisor of the reason for the short delay. *See* Motion at 2. However, the Court was closed at the time, and remained closed for the weekend and the following Monday, December 25, 2017 (Christmas). *See* 40 CFR § 22.7(a). Respondents filed the Motion the next business day, on Tuesday, December 26, 2017.

Even in cases in which no motion for an extension of time is made or in cases in which § 22.07(b) is inapplicable, however, the Board nonetheless will waive strict compliance with the time limits ... in special circumstances. *See Production Plated Plastics, Inc.*, 1994 EPA App. LEXIS 18, 5 E.A.D. 101, 1994 WL 60923, at *2 (1994) (Referring to the time limits for perfecting an appeal).

In the Motion, Respondents also requested leave to submit the correct version of their Post-Hearing Brief because Respondents had inadvertently, and due to technical difficulties filed an earlier version of the final brief which contained two additional sections: Introduction and Conclusion. *See* Motion at 2. The Motion stated that the additional sections did not contain citations because those sections were not intended for submission. *See* Motion at 2, n. 2. Because

¹ The difficulty in accessing the System was not due to an issue with the log-in or filing errors, but instead due to a possible glitch in the System or other technical failures whereby Respondents multiple attempts to load the E-Filing System's web address resulted in extended wait periods while the browser attempted to load the page, or caused the web browser to close unexpectedly.

the Presiding Officer's Post-Hearing Scheduling Order states that "[M]aterials that are not cited as ordered by this Tribunal will not be considered" (see Post-Hearing Scheduling Order at 1), Complainant will not be prejudiced because those sections would not have been considered regardless. On the other hand, if the Motion is granted, Complainant would not have to spend time responding to the Introduction and Conclusion sections, which will likely not be considered by the Tribunal.

The definition of what constitutes excusable neglect for the purposes of the Federal Rules of Civil Procedure has been liberalized. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395-99, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993); *United States v. Thompson*, 82 F.3d 700, 702 (6th Cir. 1996). The Supreme Court determined in *Pioneer* that excusable neglect is an equitable principle and that, in determining whether a party should be granted a reprieve, a court should consider "all relevant circumstances surrounding the party's omission," including "the danger of prejudice to [other parties], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. Although EPA cases discussing excusable neglect in the context of 40 C.F.R. § 22.07(b) (predecessor rule) are infrequent, it appears that the agency would look to the interpretation of the term as it is used in the Federal Rules for guidance. See *Robert Ross & Sons, Inc.*, TSCA Appeal No. 82-4, 1985 WL 57157, at *2 n.5 (EPA Jan. 28, 1985) (relying on cases interpreting excusable neglect under the Federal Rules); see also *Spitzer Great Lakes Ltd. v. United States EPA*, 173 F.3d at 416-17.

The Board has found "special circumstances" to exist in cases related to the untimely filing of appeals where delays resulted from circumstances outside of the litigant's control. See, e.g., *In*

re Avon Custom Mixing Servs., 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay due to mail sterilization); *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB 1999) (aircraft problems of an otherwise reliable overnight delivery service), *aff'd sub nom Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *see also In re Stonehaven Energy Mgmt., LLC*, UIC Appeal No. 12-02, slip op. at 9-10 (EAB Mar. 28, 2013), 15 E.A.D. 817 (delay attributable to permitting authority erroneously directing petitioners to file appeals with the EPA Administrator); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (delay attributable to permitting authority that mistakenly instructed petitioners to file appeals with EPA's Headquarters Hearing Clerk).

In *Spritzer Great Lakes Ltd*, the court held that a twenty-days, delay in Spitzer's appeal, was minimal, and, “because the order did not become final in the interim and payment had not yet become due, the delay had no impact on the proceedings. 173 F.3d at 417. An hour and a half delay, in comparison is surely minimal.

Here, a consideration of the “relevant circumstances” provided by the Court in *Pioneer* shows that the Motion deserves favorable discretion. See *Pioneer*, 507 U.S. at 395. First, as stated in the Motion, there is no danger of prejudice to Complainant because (1) the delay in filing the Post-Hearing Brief was short and caused by technical difficulties; (2) at the time the Post-Hearing Brief was due, counsel for Complainant had already left for the holidays; and (3) there is no substantial difference between the Post-Hearing Brief that was submitted earlier and the one that was submitted with the Motion on December 26, 2017. See Motion at 3. Second, as stated above, the length of the delay in submitting the brief on December 23, 2018 at 1:30 am and submitting the correct version was short. The post-hearing brief was submitting only an hour and a half after it was due, and the Motion was filed the next business day on December 26, 2017. See Motion at

1-2. Third, the potential impact of the delay, if any, is minimal because between the time the Post-Hearing Brief was due, and the Motion was filed, counsel for Complainant was out for the holidays, and the Clerk's Office was closed. *See* Motion at 3, n. 3. Fourth, the delay was caused due to technical difficulties outside of Respondents control and the time between the filing of the post-hearing brief, and the filing of the corrected correct version consisted of the weekend and a federal holiday. Finally, the movant acted in good faith by immediately notifying the Court and Complainant of the technical difficulties within minutes of filing the brief on December 23, 2018. *See* Motion at 2.

The Motion also warrants a favorable outcome because the reason for delay falls within the Board's "special circumstances" exception to the procedural requirements, because the delay resulted from circumstances outside the litigant's control. *See* Motion at 1-2. The OALJ's E-Filing System is generally reliable and therefore similar to the Board's precedent finding that aircraft problems of an otherwise reliable overnight delivery service qualified as "special circumstance" (*see In re AES Puerto Rico, L.P.*, 8 E.A.D. at 329), technical problems of an otherwise reliable filing system should also meet the "special circumstance" rule. Additionally, the correct version of the brief was submitted with the Motion in accordance with section 22(c)(5), which allows a party to amend and resubmit any document that does not comply with the "[f]orm of the documents," upon motion granted by the Presiding Officer, as appropriate. 40 CFR § 22(c)(5); *see* Motion at 2.

Finally, the Motion warrants a finding of "special circumstances" and/or "excusable neglect" because previously when Respondents had problems with the E-Filing System, the filing

was accepted when Respondent resubmitted the documents upon notice of the filing error, without the need for filing a motion.²

II. Complainant's Response

Complainant filed a Response to the Motion on January 4, 2018. *See* Complainant's Response to Respondents' Motion for Leave for Filing Post Hearing Brief (hereinafter "Response"). In the Response, Complainant opposes the Motion on the ground that "Complainant is concerned that Respondents' long-standing pattern of failure to follow established procedures and rules will continue in this Proceeding if left unchecked." Response at 1. Complainant does not argue that Respondents did not have good cause for filing the Motion, nor does Complainant assert that Respondents' delay in filing the Motion, and the Post-Hearing Brief is not the product of inexcusable neglect. *See generally* Response. The Response does not even suggest that granting the Motion would prejudice Complainant. Rather, the Response merely states Complainant's opinion that "if no opposition is made to the late filing, Respondents will come to expect that Complainant will continue to be held to the standard of practice and conduct required under the Consolidated Rules and the Presiding Officer's Orders, while Respondents may freely set their own standard based upon their own needs and priorities, and then obtain forgiveness afterward." *See* Response at 1-2.

Complainant has not provided a legitimate reason for opposing the present Motion, but generally opposed the granting of any similar motion requesting the acceptance of an untimely

² Respondents filed a motion on June 16, 2017 prior to the deadline for filing said motion. On June 19, 2017, Court's Attorney-Advisor informed Respondents via email that although the Court had received a Motion "just after midnight on June 17, 2017," it did not receive the motion Respondents had attempted to file "a minute or two" prior to that because the System showed a filing error. Respondent resubmitted the motion shortly thereafter and the motion was accepted as timely. *See* electronic correspondence between counsel for Respondent and Matt Barnwell on June 19, 2017.

filing regardless of the reason for the delay. Such a reason attempts to circumvent the administrative rules permitting such motions, prior Board precedent, precedent set by the United States Supreme Court, and the Federal Rules of Civil Procedure, thereby rendering such procedural rules and related precedent meaningless. *See* 40 CFR 22.7(b); Fed. R. Civ. P. 6(b)(1)(B); *Pioneer*, 507 U.S. at 395; *In re B & L Plating Inc.*, 11 E.A.D. at 190.

Complainant's only reason for opposing the *present* Motion as specified in the Response is that "Complainant had previously acquiesced to Respondents' request for an extension of the original deadline by one week." *See* Response at 1. However, said reason is clearly insufficient because the request for an extension of the original deadline was a *joint* request.³ *See* Joint Motion to Extend Post-Hearing Brief Deadlines. While Respondents did ask Complainant if Complainant would oppose a week deadline, Complainant decided to join the motion and additionally request that the time for filing the Reply Brief be extended by two weeks.⁴

Complainant's stated grounds for opposing the Motion are also insufficient because Complainant does not provide justification for its opinion that Respondent has a "long-standing pattern of failure to follow established procedures and rules," while "Complainant ...continue[s] to be held to the standard of practice and conduct required under the Consolidated Rules and the Presiding Officer's Orders." *See* Response at 1. Complainant's foregoing opinion is clearly unfounded. Admittedly, Respondents have requested some extensions and previously filed at least two Motions for leave of the Court to file a motion or response, however, said occasional requests and motions in a case where "nearly 150 motions, brief and requests have been filed" certainly

³ Although the Joint Motion to Extend the Post-Hearing Brief Deadlines was only signed by Respondents, counsel for Complainant confirmed with the Court that the motion was in fact a joint motion and apologized for not signing the motion. *See* email correspondence between the parties and Matt Barnwell on December 13, 2017.

⁴ *Id.*

does not establish a “long-standing pattern.” *See* Order Denying Respondents’ Motion to Dismiss for Lack of Subject Matter Jurisdiction at 1, n. 1.

Furthermore, the Response conveniently ignores that Complainant has also requested multiple extensions, filed a Motion for Leave to Amend the Complaint nearly seven months after the filing of the Original Complaint, and four to five months after the answers were filed;⁵ filed multiple discovery requests requiring Respondents to respond in less than 30 days (*see* Fed. R. Civ. P. 34(b)(2)(A) (generally providing a party 30 days to respond to requests for production));⁶ filed a discovery requests within 30 days of the evidentiary hearing (*see id.*);⁷ filed six motions to supplement the prehearing exchange, the last of which requested the inclusion of documents that were in Complainant’s possession well before the time for filing the Initial Prehearing Exchange (*see* Order on Respondent’s Second Motion Limine at 3);⁸ and filed a “Motion for Leave to File Out of Time & Motion to Correct Expert Report” *one* day before the evidentiary hearing directly in violation of the Presiding Officer’s Order that all non-dispositive prehearing motions must be

⁵ *See* Motion for Leave to Amend the Complaint.

⁶ *See* Complainant’s Motion for Additional Discovery Through Requests for Production and Interrogatories (August 25, 2017) (requesting responses to be filed not later than September 22, 2017); Request for documents and information concerning economic benefit of noncompliance (November 21, 2016) (requesting that responses be *delivered* by December 19, 2016); Request for documents and information concerning claim of inability to pay (October 13, 2016) (requesting that responses be *delivered* by November 4, 2016).

⁷ *See* Motion for Additional Discovery on Ability to Pay Through Requests for Production (Sept. 21, 2017); *see also* Order on Motion for Additional Discovery on Ability to Pay Through Requests for Production (Recognizing that (1) the Agency offers no good cause for waiting until this very late date to submit this very substantial request for additional discovery on ability to pay; (2) Respondents promptly notified the Agency of their refusal to voluntarily comply with such request yet, EPA did not follow up until taking the depositions of Respondents’ witnesses almost a year later, in September 2017, just a month before hearing; and (3) the Respondents’ on the other hand, initiated their requests for depositions in June 2016.

⁸ *See* Complainant’s Sixth Motion to Supplement the Prehearing Exchange.

filed on or before September 22, 2017 (Order on Respondents' Motion for Continuance of the Hearing at 3).

Given that Complaint has itself ignored deadlines specified in the Consolidated Rules, the Federal Rules of Civil Procedure, and the Presiding Officer's Orders, Complainant's assertion that "if no opposition is made to the late filing, Respondents will come to expect that Complainant will continue to be held to the standard of practice and conduct required under the Consolidated Rules and the Presiding Officer's Orders" is clearly unfounded. *See* Response at 2. Contrary to Complainant's position that Respondents' will come to expect that they "may freely set their own standard based upon their own needs and priorities, and then obtain forgiveness afterward," Respondents have not been given any advantage that Complainant has not itself enjoyed.⁹ If anything, the circumstances of this Motion are such that while Respondent has limited cost-effective means of filing documents, having to rely almost exclusively on the OALJ's E-Filing System, Complaint has the additional benefit of hand-delivering documents to the Headquarters Clerk.¹⁰

Having established good cause, lack of prejudice, inexcusable neglect and special circumstances, Respondents additionally provide assurances that contrary to Complainant's Response, the grant of the Motion will not cause Respondents to ignore the procedural requirements for the remainder of the proceedings. Respondents assure Complainant and the Presiding Officer that they fully intend on complying with the remaining deadlines and procedural

⁹ *See* Supra note 5-8.

¹⁰ The Certificate of Service on Complainant's Post-Hearing Brief shows that Complainant's brief was filed by hand delivering it to the Headquarters Hearing Clerk, not via the E-Filing System. *See* Complainant's Post-Hearing Brief.

requirements, and absent good cause and/or extraordinary circumstances, Respondents will so comply.

For these reasons, Respondents request that the Presiding Officer grant the Motion in its entirety, and further hold that the correct version of the Post-Hearing Brief submitted with the Motion is accepted and Complainant need not address the earlier version. *See* Response at 2.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'William Chu', with a large loop at the end.

Date: 1/5/2018

William Chu
Texas State Bar No. 04241000
The Law Offices of William Chu
4455 LBJ Freeway, Suite 1008
Dallas, Texas 75244
Telephone: (972) 392-9888
Facsimile: (972) 392-9889
wmchulaw@aol.com

CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument in the Matter of Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System.

I certify that a copy of the foregoing instrument was sent this day via electronic mail to the following e-mail addresses for service on Complainant's counsel: Edward Kulschinsky at Kulschinsky.Edward@epa.gov, Robert Klepp at Klepp.Robert@epa.gov, and Mark Palermo at Palermo.Mark@epa.gov.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'William Chu', written in a cursive style.

Date: 1/5/2018

William Chu