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Office of Proceedings  
Proceedings Clerk

**11:33 am, May 30, 2023**

Respondents.

ORDER

On March 8, 2023, I granted the Complainants' request for an extension for them to appeal the dismissal by March 22, 2023. Six of the complainants, not including Mr. Vogel, filed Notices of Appeal by March 22, 2023. On March 23, 2023, counsel for the Complainants notified the Office of Proceedings that Mr. Vogel had informed them the previous evening that he mailed them his executed Notice of Appeal on March 20, 2023, and that he still wished to appeal the dismissal. Counsel had previously received notice of Mr. Vogel's intent to appeal the dismissal but had not yet received his Notice of Appeal. Counsel therefore asked whether the Commission would accept his untimely appeal. On March 24, 2023, Mr. Vogel filed his appeal and paid his filing fee.

On April 10, 2023, I ordered Mr. Vogel to show cause why the Commission should not dismiss his untimely appeal and permitted GAIN to submit a response to Mr. Vogel's arguments. On April 21, 2023, Mr. Vogel and the other six complainants filed appeal briefs in support of reversing the Administrative Judge's decision. The Complainants' briefs are nearly identical and present the same arguments in support of reversing the Administrative Judge's decision. On May 1, 2023, Mr. Vogel submitted a brief in support of the Commission accepting his appeal. GAIN did not file a brief in response to Mr. Vogel's arguments.

CFTC Rule 12.401(a) states that a party's failure to file a timely notice of appeal and pay the appellate filing fee shall constitute a waiver of any objection to the initial decision. 17 C.F.R. § 12.401(a). The requirement to file a timely notice of appeal is "mandatory and jurisdictional," but the Commission will accept late-filing petitions in cases of "excusable neglect." *Torbin v. Nat'l Futures Assoc.*, CFTC No. 08-04, 2008 WL 1930793, at \*2 & n.4 (CFTC May 1, 2008).

In determining whether the neglect is excusable, the Commission follows the equitable test adopted by the Supreme Court in *Pioneer Insurance Service Co. v. Brunswick Ass'n*, 507 U.S. 380 (1993). *In re Ligammari*, CFTC No. 02-05, 2005 WL 1536804 (CFTC June 28, 2005). The test considers four factors: (1) the risk of prejudice to the appellee; (2) the length of delay and its potential prejudice upon the judicial proceeding; (3) the reasons for the delay, including whether it was in the reasonable control of the late-filing party; and (4) whether the late-filing party acted in good faith. *Id.* (citing *Pioneer*, 507 U.S. at 393-94). Federal courts have indicated that factor 3, the reasons for the delay, is the most important factor. CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3950.3 (5th ed. 2022) (citing *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003)). This standard is

nonetheless a “flexible analysis” and within the decisionmaker’s reasonable discretion. *Zipperer ex rel. Zipperer v. Sch. Bd. of Seminole Cty.*, 111 F.3d 847, 849 (11th Cir. 1997).

Several of the *Pioneer* factors weigh in Mr. Vogel’s favor. We discern no risk of prejudice to GAIN, who did not file an opposition to accepting the late appeal, or any lack of good faith, and Mr. Vogel filed his appeal only two days late. The reason for Mr. Vogel’s untimely filing weighs against finding excusable neglect but not enough to counterbalance the factors in his favor. Mr. Vogel mailed his executed Notice of Appeal to his attorneys before the extended deadline, although he should have allowed more time to ensure timely arrival. Federal courts have found excusable neglect in cases where mailed filings arrived slightly late and the other *Pioneer* factors weighed in favor of accepting the untimely filing. *Mendez v. Knowles*, 556 F.3d 757, 765-66 (9th Cir. 2009); *Zipperer* 111 F.3d at 850. Because the *Pioneer* standard is a balancing test, an untimely appeal may be excused “even where the reasons for the delay are not particularly compelling.” *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (quoting *United States v. Brown*, 133 F.3d 993, 997 (7th Cir. 1998)). Mr. Vogel’s neglect was therefore excusable, and his Notice of Appeal and Appeal Brief are accepted for filing.

IT IS SO ORDERED.\*

/s/ Robert A. Schwartz  
Robert A. Schwartz  
General Counsel  
U.S. Commodity Futures Trading Commission

Dated: May 30, 2023

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\* By the Commission pursuant to delegated authority under 17 C.F.R. § 12.408(a)(4).