

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

Silvergate Pharmaceuticals, Inc.

Appellant,

Appealed From  
Size Determination No. 04-2012-058

SBA No. SIZ-5418

Decided: November 8, 2012

**ORDER DISMISSING APPEAL**

On September 24, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2012-058. The Area Office found Silvergate Pharmaceuticals, Inc. (Appellant) to be other than a small concern. According to the appeal petition, Appellant received the size determination on September 28, 2012.

On October 22, 2012, Appellant filed the instant appeal with SBA's Office of Hearings and Appeals (OHA).

On October 22, 2012, Appellant was ordered to show cause, no later than October 31, 2012, why its appeal should not be dismissed as untimely.

On October 29, 2012, Appellant responded. Appellant's counsel asserts that on October 12, 2012, within fifteen days of receiving the size determination, she timely served SBA's Office of General Counsel (OGC), the Area Office, and the Food and Drug Administration (FDA). Appellant's counsel explains, due to a misreading of the regulation, she served these parties, but failed to file with OHA. Appellant's counsel points to 13 C.F.R. § 134.305(b) "Service of Size Determination Appeals", and asserts she complied with this regulation.

Appellant's counsel asserts she learned of 13 C.F.R. § 134.204, which governs the filing and service of pleadings, only upon contacting OHA on October 22, 2012. This provision requires that an appeal must be filed with OHA. Appellant argues that OHA retains the discretion to take this appeal, because the judge has the authority to "[T]ake all appropriate action to ensure the efficient, prompt, and fair determination of a case", citing 13 C.F.R. § 134.218(b). Appellant argues intent of the regulations limiting discretion to extend the deadline for filing an appeal is not to set a procedural trap, but to ensure each party enjoys the same amount of time to prepare its appeal. (Appellant cites to no authority for this argument.)

Appellant argues that its error here is merely excusable neglect, and should be excused as

OHA has such matters in the past. *Size Appeal of U.S. Grounds Maintenance Inc.*, SBA No. SIZ-4601 (2003) (accepting late motion for leave to file a pleading): *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430 (2001) (excusable neglect justifies late submission). Appellant requests that OHA excuse counsel's neglect and treat its appeal as “constructively filed”.

In accordance with 13 C.F.R. § 134.304(a), a size appeal must be filed at OHA within fifteen days after an appellant receives the size determination. Appellant received the size determination on September 28, 2012. Appellant's appeal was received at OHA, via email on October 22, 2012, 24 days later. Although Appellant timely served OGC, the Area Office and the FDA within the fifteen-day timeframe of 13 C.F.R. § 134.304(a), Appellant unfortunately did not file the appeal at OHA until October 22, 2012.

Under OHA's regulations, filing is the receipt of pleadings at OHA. 13 C.F.R. § 134.204(b). Service is the dispatch to the other parties of copies of the pleadings filed at OHA. 13 C.F.R. § 134.204(c). An OHA judge may modify almost any time period or deadline, but not the time period governing the commencement of a case. 13 C.F.R. § 134.202(d)(2)(i)(a). Further, the regulations explicitly require that an untimely size appeal must be dismissed. 13 C.F.R. § 134.304(c). Although Appellant properly served OGC, another office within SBA, service fails to meet the requirements of filing. *Size Appeal of ARGO/LRS, JV*, SBA No. SIZ-5027 (2009). OHA has consistently held that an appeal that is timely served upon the parties but not timely filed with OHA must be dismissed as untimely. *Size Appeal of REES Group, Inc.*, SBA No. SIZ-5387 (2012). The cases Appellant relies upon for a finding of excusable neglect are not apposite, because the regulation explicitly denies to the Administrative Judge the discretion to extend the time limit for filing an appeal.

Appellant's claim of confusion does not support an overturning of OHA precedent. Filing and service have two distinct meanings, as any attorney should know. The definition of “file” is “To deliver a legal document to the court clerk or record custodian for placement into the official record.” BLACK'S LAW DICTIONARY 642 (7th ed. 1999). This is to be distinguished from “service”: “1. The formal delivery of a writ, summons, or other legal process . . . 2. The formal delivery of some other legal notice, such as a pleading.” BLACK'S LAW DICTIONARY 1372 (7th ed. 1999). Appellant should have known that service is not filing, and that in order to commence an appeal, such appeal must be filed with the adjudicative body an appellant seeks to decide its appeal, and found and followed the clear regulation on filing. There are no such concepts under OHA's regulations or case law as “perfecting” filings or “constructive filings”. An appeal is either timely filed with OHA or it is not.

Accordingly, the appeal is untimely and I must dismiss it; I have no discretion to waive the time limit for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A), 134.304(c).

For the above reasons, I DISMISS the instant appeal as untimely. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge