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OFFICE OF PETITIONS

Inceptia LLC
1652 48th Street
Brooklyn NY 11204

In re Application of
Wodarz et al. :
Application No. 09/414,630 :
Filed: October 8, 1999 :
For: DYNAMIC ADVERTISING SCHEDULING, :
DISPLAY, AND TRACKING :

DECISION ON PETITION

This is a decision on the renewed petition under 37 CFR 1.137(b) filed December 22, 2005, and supplemented July 2, and July 5, 2006, requesting revival of the above-identified application.

The petition is denied.

BACKGROUND

This application became abandoned for failure to reply to the Office action of February 23, 2001, which rejected the sole claim on the grounds of same invention double patenting under 35 U.S.C. § 101 over the parent patent and set an extendable shortened statutory period for reply of 3 months. As no extensions of time were obtained under the provisions of 37 CFR 1.136(a), the date of abandonment is May 24, 2001. A Notice of Abandonment was mailed September 10, 2001.

A first petition under 37 CFR 1.137(b) was filed August 14, 2004, supplemented March 3, 2005, and was dismissed in the decision of June 22, 2005.

The instant petition was filed December 22, 2005, and supplemented July 2, and 5, 2006.

STATUTE AND REGULATION

35 U.S.C. § (2)(B)(2) provides, in part, that:

The Office-- may establish regulations, not inconsistent with law, which

(A) shall govern the conduct of proceedings in the Office;

Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." Specifically, 35 U.S.C. § 41(a)(7) provides that the Commissioner shall charge:

On filing each petition for the revival of an unintentionally abandoned application for a patent or for the unintentionally delayed payment of the fee for issuing each patent, \$[1500], unless the petition is filed under section 133 or 151 of this title, in which case the fee shall be \$[500].

37 CFR 1.137(b) provides:

Unintentional. Where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to this paragraph. A grantable petition pursuant to this paragraph must be accompanied by:

- (1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;
- (2) The petition fee as set forth in § 1.17(m);
- (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and
- (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (c) of this section.

OPINION

Petitioner (Mr. Wachsman, an officer of the successor in title of the entire interest since August 11, 2004, (Inceptia LLC ("Inceptia"))) asserts that the delay was unintentional. Petitioner also asserts that (1) the named inventors had appointed Fish & Richardson ("F&R") to prosecute this application, (2) In August 2001, Mr. William P. Carey of Sandbox.com instructed F&R to withhold a reply and thus permit this application to become abandoned, (3) the named inventors found themselves in litigation starting November 19, 2001, with their then employer (Sandbox.com ("Sandbox")) as to ownership of this application, (4) in March 2002, Hall and Fairall settled with Sandbox and assigned their rights, title, and interest to Sandbox, (5) Sandbox filed for bankruptcy on September 6, 2002, (6) the trustee in the ensuing Chapter 7 bankruptcy took no action to revive this application, (7) petitioner bought the part interest from the bankruptcy trustee and later obtained the remaining *pro rata* interest from Wodarz in 2004, and sought revival. Petitioner further asserts that Wodarz, Hall and Fairall never consented to the abandonment and that the actions or inactions of Sandbox and F&R should not bind petitioner. That is, even if the application were intentionally abandoned by Sandbox and F&R, petitioner contends that Wodarz, Hall, and Fairall, and petitioner as the ultimate successor in title to their interests should not be bound by the actions or inactions of Sandbox. The petition is accompanied by declarations by: the 3 named inventors Wodarz, Hall, and Fairall, patent attorney Marvin Glazer who represented the 3 named inventors during the aforementioned ownership litigation with Sandbox, and several exhibits.

Petitioner has not met his burden of showing to the satisfaction of the Director that the entire delay herein was unintentional within the meaning of 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b).

A grantable petition to revive an abandoned application under 37 CFR 1.137(b) must be accompanied by: (1) the required reply (unless previously filed), which may met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute, but must be the payment of the issue fee or any outstanding balance thereof in an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof; (2) the petition fee required by 37 CFR 1.17(m); (3) an adequate statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) in some instances, a terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)). This petition lacks item (3) above.

The patent statute at 35 U.S.C. § 41(a)(7) authorizes the Director to revive an "unintentionally abandoned application." The legislative history of Public Law 97-247 reveals that the purpose of 35 U.S.C. § 41(a)(7) is to permit the Office to have more discretion than in 35 U.S.C. §§ 133 or 151 to revive abandoned applications in appropriate circumstances, but places a limit on this discretion, stating that "[u]nder this section a petition accompanied by either a fee of \$500 or a fee of \$50 **would not be granted where the abandonment or the failure to pay the fee for issuing the patent was intentional** as opposed to being unintentional or unavoidable." [emphasis added]. See H.R. Rep. No. 542, 97th Cong., 2d Sess. 6-7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 770-71. The revival of, as here, an intentionally abandoned application is antithetical to the meaning and intent of the statute and regulation.

35 U.S.C. § 41(a)(7) authorizes the Commissioner to accept a petition "for the revival of an unintentionally abandoned application for a patent." As amended December 1, 1997, 37 CFR 1.137(b)(3) provides that a petition under 37 CFR 1.137(b) must be accompanied by a statement that the delay was unintentional, but provides that "[t]he Commissioner may require additional information where there is a question whether the delay was unintentional." Where, as here, there is a question whether the delay was unintentional, the petitioner must meet the burden of establishing that the delay was unintentional within the meaning of 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b). See *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989). Here, in view of the inordinate delay in resuming prosecution, as well as in view of *inter alia*, the uncontested statement that Sandbox and counsel at Fish & Richardson ("F&R") intentionally withheld a reply to the Office action, there is a question whether the entire delay was unintentional. Petitioner should note that the issue is not whether some of the delay was unintentional by any party; rather, the issue is whether the entire delay has been shown to the satisfaction of the Director to be unintentional. The ownership of this application has passed from a *pro rata* share of the three inventors to a partial ownership by Sandbox in combination with Wodarz, and control of the share of Sandbox passed to a bankruptcy trustee and eventually to entire ownership by Inceptia. Thus what Wodarz, much less Hall and Fairall, would

have intended or did not know does not speak to the entire delay, or ownership, in this case.¹ Petitioner's speculation (petition at 12) as to what the bankruptcy trustee knew or intended and the issue of "abandonment" is merely speculation and not persuasive that the entire delay in this case is unintentional. Petitioner also appears to confuse the meaning of abandoned or abandonment as a term used in the provisions of the bankruptcy code (a formal procedure by which a trustee can petition the court to declare a given asset removed from among the assets of the estate which necessarily are under the control of the trustee and subject to the automatic stay provisions) with the meaning of abandoned in the patent statute. It is merely noted that this application was intentionally abandoned long before it became an asset of the Sandbox bankruptcy estate, and that the record is devoid of any showing that either the bankruptcy trustee or Wodarz, or indeed, Sandbox, took any action towards its revival or to mitigate the initial and accumulating delay while it remained an asset of the Sandbox bankruptcy estate.²

When the issue of revival is addressed, the focus must be on the rights of the parties as of the time of abandonment. See Kim v. Quigg, 781 F. Supp. 1280, 1284, 12 USPQ2d 1604, 1607 (E.D. Va 1989). As petitioner was not associated with this case at the time of abandonment, the statement of unintentional delay by [Inceptia by way of] Mr. Wachsman is not persuasive. It appears that notwithstanding that pursuant to 37 CFR 3.73(a) the named inventors were presumed to be the owners, and further, the power of attorney came from the 3 named inventors, the inventors permitted another (Sandbox) to control the prosecution. But see MPEP 711.03(c)II(E). That is, the question under 37 CFR 1.137 is whether the delay on the part of the party having the right or authority to reply to avoid abandonment (or not reply) was unintentional. Id. The arrangement for prosecuting this case was apparently that while the 3 named inventors granted various counsel at the firm of Fish & Richardson ("F&R") a power of attorney to conduct all business before the USPTO, and while all 3 inventors assert they did not have an obligation to assign this application to Sandbox, it is undisputed that Sandbox paid F&R all fees associated with the filing and prosecution of the parent patent and instant application. (See e.g., Wodarz decl. filed December 22, 2005, at 2, ¶ 4; Hall and Fairall decl. filed July 2, 2006, at 2 ¶ 4.) Nevertheless, Sandbox, via Mr William P. Carey, decided in August 2001, (within the extendable period for reply which ended August 23, 2001) there was no compelling reason to reply to the outstanding Office action and instructed F&R to not file a response. See letter filed herein on the same date it is dated: July 5, 2006, from John Freeman of F&R to Wachsman. F&R did not obtain any extension of time and did not file a reply.

It is thus clear that the abandonment that was caused by the failure to file a reply was not the result of an accident or oversight; it resulted from a course of action (or inaction) that was deliberately chosen. The reply was intentionally and deliberately withheld. Moreover, given the assertions of all 3 named inventors that each was entirely unaware of the outstanding Office action, and further, that F&R did not discuss with them the instant prosecution history before

¹It is incumbent upon any applicant to prosecute his invention with continuing diligence and an eye to the statute. See BEC Pressure Controls Corporation v. Dwyer Instruments, Inc., 380 F.Supp. 1397, 1399, 182 USPQ 190, 192 (D.C. N.Ind. 1974).

² This observation is not intended to suggest that the delay resulting from the deliberate course of action could have been mitigated or overcome even at this point in time.

intentionally withholding a reply as dictated by Sandbox, any contention that each inventor had intended to reply to that Office action must be regarded as untenable. The relevant inquiry in determining whether a delay is intentional is whether the course of action resulting in the delay was, as here, deliberate. See In re Maldaque, 10 USPQ2d 1477 (Comm'r Pat. 1988); In re Application of G, 11 USPQ2d 1378 (Comm'r Pat. 1989); Lawman Armor v. Simon, 2005 U.S. Dist. Lexis 10843, 74 USPQ2d 1633 (DC EMich 2005); Field Hybrids, LLC v. Toyota Motor Corp., 2005 U.S. Dist. LEXIS 1159 (D. Minn Jan. 27, 2005). A deliberate decision, as here, not to pursue further prosecution warrants the conclusion that the abandonment of this application was not unintentional. Lawman, supra. Here, since the delay results from a deliberate cause of action (or inaction), it cannot be considered unintentional delay. Maldaque, supra; G, supra; Lawman, supra; Field Hybrids, supra.

Sandbox intended that this application become abandoned and this application became abandoned due to the deliberate course of action (or inaction) of both Sandbox and F&R.³ As noted in more detail *infra*, both the delay herein in filing the reply during prosecution, and in filing the petition after abandonment, are inconsistent with a finding that the entire delay herein was unintentional, such that revival is warranted. It is noted that 35 U.S.C. § 41(a)(7) does not require an affirmative finding that the delay was intentional, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unintentional. Cf. Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128

³Where the applicant or responsible person deliberately permits an application to become abandoned (*e.g.*, due to a conclusion that the claims are unpatentable, that a rejection in an Office action cannot be overcome, or that the invention lacks sufficient commercial value to justify continued prosecution), the abandonment of such application is considered to be a deliberately chosen course of action, and the resulting delay cannot be considered as "unintentional" within the meaning of 37 CFR 1.137(b). Likewise, where the applicant or responsible person deliberately chooses not to seek or persist in seeking the revival of an abandoned application, or where the applicant deliberately chooses to delay seeking the revival of an abandoned application, the resulting delay in seeking revival of the abandoned application cannot be considered as "unintentional" within the meaning of 37 CFR 1.137(b). An intentional delay resulting from a deliberate course of action chosen by the applicant or responsible person is not affected by: (1) the correctness of the applicant's (or applicant's representative's) decision to abandon the application or not to seek or persist in seeking revival of the application; (2) the correctness or propriety of a rejection, or other objection, requirement, or decision by the Office; or (3) the discovery of new information or evidence, or other change in circumstances subsequent to the abandonment or decision not to seek or persist in seeking revival. Obviously, delaying the revival of an abandoned application, by a deliberately chosen course of action, until the industry or a competitor shows an interest in the invention (a submarine application) is the antithesis of an "unavoidable" or "unintentional" delay. An intentional abandonment of an application, or an intentional delay in seeking either the withdrawal of a holding of abandonment in or the revival of an abandoned application, precludes a finding of unavoidable or unintentional delay pursuant to 37 CFR 1.137. See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53132 at 53158-59 (October 10, 1997), reprinted at 1203 Off. Gaz. Pat. Office, 65 at 86 (October 21, 1997) (citations omitted); MPEP 711.03(c)(II)(G).

(D.C. Cir. 1960)(35 U.S.C. § 133 does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing); see also In re Application of G, supra (petition under 37 CFR 1.137(b) denied because the applicant failed to carry the burden of proof to establish that the delay was unintentional). The language of both 35 USC 41(a)(7) and 37 CFR 1.137(b) are clear and unambiguous, and furthermore, without qualification. That is, the delay in filing the reply during prosecution, as well as in filing the petition seeking revival, must have been, without qualification, "unintentional" for the reply to now be accepted on petition. The Office requires that the entire delay be at least unintentional as a prerequisite to revival of an abandoned application to prevent abuse and injury to the public. See H.R. Rep. No. 542, 97th Cong., 2d Sess. 7 (1982), reprinted in 1982 U.S.C.C.A.N. 771. While petitioner contends otherwise, that is the standard set forth in 37 CFR 1.137(b)(3).⁴

When the issue of revival is addressed, the focus must be on the rights of the parties as of the time of abandonment. See Kim v. Quigg, 781 F. Supp. 1280, 1284, 12 USPQ2d 1604, 1607 (E.D. Va 1989); MPEP 711.03(c)II(E). That is, the question under 37 CFR 1.137 is whether the delay on the part of the party having the right or authority to reply to avoid abandonment (or not reply) was unintentional. While, pursuant to 37 CFR 3.73(a) the named inventors retained their ownership interests herein, and notwithstanding the all 3 named inventors assert that they did not consent to the abandonment, the record is clear that the 3 named inventors gave the unbridled authority to Sandbox to prosecute, or not prosecute, this application, and also did not hinder Sandbox's use of, or intent to use, the instant invention. See Wodarz decl. filed December 22, 2005, (at 2 ¶ 4). Indeed, the 3 named inventors--and petitioner-- seek to avoid the consequences of the deliberate delay herein by Sandbox and F&R by contending that (1) the inventors were unaware of the abandonment until recently, (2) the 3 inventors assumed that Sandbox (and F&R) would somehow--notwithstanding their awareness of the lawsuit for ownership of this application, and F&R's concurrent collaborative relationship with Sandbox, see Wodarz decl. filed December 22, 2005, (at 4 ¶ 14) -- continue prosecution of the application in an allegedly "fiduciary" capacity on their behalf. However, while the previous decision of June 22, 2005 (at 3) requested specific documentary evidence to support the various contentions in the petitions and especially documentation to support the contention that Sandbox had been engaged in a "fiduciary" capacity to prosecute this application on behalf of the 3 named inventors, no meaningful corroborative evidence was adduced. In the absence of such documentation proving that Sandbox (and F&R) was prosecuting this application solely in a fiduciary capacity for the 3 named inventors, the USPTO considers that the 3 named

⁴ Because the USPTO regulations are published in the Federal Register as required by the Federal Register Act, 44 U.S.C. §1505 (formerly 44 U.S.C. §§5, 7), they are binding, even in the absence of actual knowledge. See, e.g., Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947); Timber Access Industries Co. Inc. v United States, 553 F.2d 1250, 1255 (Ct. Cl. 1977); Andrews v. Knowlton, 509 F.2d 898, 905 (2d Cir. 1975), cert. denied, 423 U.S. 873 (1975); In re Pacific Far East Line, Inc., 314 F.Supp. 1339, 1348 (N.D. Cal. 1970), aff'd, 472 F.2d 1382 (9th Cir. 1973). Furthermore, it is well settled that "all persons are charged with knowledge of the provisions of the statutes and must take note of the procedure adopted by them." Rydeen v. Quigg, 748 F. Supp. 900 at 907, 16 USPQ2d 1876, at 1881 (D.D.C. 1990), aff'd 937 F.2d 623 (Fed. Cir. 1991)(table), cert. denied, 502 U.S. 1075 (1992)(quoting North Laramie Land Co. v. Hoffman, 268 U.S. 276, 285 (1925)).

inventors had given Sandbox unbridled discretion to prosecute or not prosecute this application. See MPEP 711.03(c) II(E).⁵

In fact, since all 3 named inventors profess total ignorance spanning a period of several years (2001-2004) as to: (1) the lack of continued prosecution during pendency in 2001, (2) the fact of abandonment of the application in 2001, (3) the intentional abandonment of the application by Sandbox in August 2001, (4) that F&R listened exclusively to the instructions of Sandbox to abandon this application in August 2001, and (5) that F&R did not discuss with any of the 3 named inventors either the possible preparation of a reply to the outstanding Office action, or that based on specific instructions from Sandbox to deliberately withhold a reply and abandon the application, that no reply would be forthcoming in August 2001, reinforces the conclusion that Sandbox, and not the 3 named inventors, was the party having the right or authority to reply to avoid abandonment (or not reply). Rather, the lack of any action by the 3 inventors, as well as their patent counsel Mr. Glazer to further the prosecution of the invention herein indicates that all 3 named inventors abdicated their authority to prosecute this application in favor of Sandbox. See MPEP 711.03(c)II(E). According to the 3 named inventors, neither Sandbox nor F&R ever discussed with them any aspect of the prosecution, the existence of the Office action, or the abandonment. Moreover, even the 3 named inventors other, separately hired, non F&R patent counsel, Mr. Glazer, notwithstanding his concurrent dealings with Sandbox and F&R, took no action or inquiry to ensure that prosecution by Sandbox and F&R was continuing. That is, as Sandbox had the unbridled authority within the meaning of MPEP 711.03(c)II(E) to prosecute (or not prosecute) the application and further, the unchallenged intent to practice the inventions in the instant and patented parent, the assertions of the 3 named inventors, and petitioner, that the abandonment and ensuing delay in prosecution were unintentional on their part(s), does not demonstrate to the satisfaction of the Director that the entire delay herein was unintentional within the meaning of 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b). Rather, as the record is devoid of any participation or even interest of the 3 named inventors in the filing or prosecution of this application, they, and their patent counsel Mr. Glazer are properly considered to have given Sandbox and F&R the unbridled discretion to prosecute (or not prosecute) the application to avoid abandonment and as such, are properly bound by the actions or inactions of Sandbox and F&R. This conclusion is reinforced by the subsequent

⁵"Likewise, where the applicant permits a third party (whether a partial assignee, licensee, or other party) to control the prosecution of an application, the third party's decision whether or not to file a reply to avoid abandonment is binding on the applicant. See *Winkler [v. Ladd]*, 221 F. Supp. [550] at 552, 138 USPQ [666] at 667 [(D.D.C. 1963)]. Where an applicant enters an agreement with a third party for the third party to take control of the prosecution of an application, the applicant will be considered to have given the third party the right and authority to prosecute the application to avoid abandonment (or not prosecute), unless, by the express terms of the contract between applicant and the third party, the third party is conducting the prosecution of the application for the applicant solely in a fiduciary capacity. See *Futures Technology Ltd. v. Quigg*, 684 F. Supp. 430, 431, 7 USPQ2d 1588, 1589 (E.D. Va. 1988). Otherwise, the applicant will be considered to have given the third party unbridled discretion to prosecute (or not prosecute) the application to avoid abandonment, and will be bound by the actions or inactions of such third party."

sale of the rights of Hall and Fairall to Sandbox over one year after abandonment, and the excessive period of time (between 2001-2004) before Wodarz regained any interest in this application and that was only at the instigation of Mr. Wachsman, to then convey his *pro rata* ownership share to Mr. Wachsman. The at least 2 year hiatus in any further activity regarding this application by any of the 3 named inventors in combination with their abdication of prosecution noted above reinforces the conclusion that the delay herein was not unintentional. See Lawman at *17-*19, 74 USPQ2d at 1638.

Assuming, *arguendo*, that in accepting the instructions of Sandbox to the exclusion of seeking or accepting the input of the 3 named inventors, or even their other counsel, Mr. Glazer, prior to intentionally withholding a reply to this application, F&R overlooked any duty owed the 3 inventors in this matter, then petitioner is reminded that the USPTO must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant. Link v. Wabash, 370 U.S. 626, 633-34; Irwin v. Department of Veterans Affairs, 498 U.S. 89, 93; Huston v. Ladner, 973 F.2d 1564, 1567, 23 USPQ2d 1910, 1913 (Fed. Cir. 1992); see also Haines v. Quigg, 673 F. Supp. 314, 317, 5 USPQ2d 1130, 1132 (D.N. Ind. 1987). Furthermore, the record shows that F&R confirmed to the USPTO examiner in charge of this application on September 6, 2001, that no reply had been filed to the outstanding Office action. See memorialization thereof in the Notice of Abandonment mailed September 10, 2001. Whatever the intent or knowledge of the 3 named inventors may have been, that cannot change the deliberate action or inaction with respect to this case by counsel at F&R who were the freely selected representatives of all three named inventors, and what the 3 named inventors, and their patent counsel Mr. Glazer now assert they intended or assumed or did not intend does not show to the satisfaction of the Director that the entire delay herein was unintentional. It is also noted that the USPTO is not the proper forum for resolving a dispute between an applicant and his duly appointed representative(s) with respect to a failure to take a timely action before the USPTO. See Ray v. Lehman, 55 F.3d 606, 610, 34 USPQ2d 1786, 1789 (Fed. Cir. 1989).

Furthermore, petitioner, as the successor in title, is bound by the prior delay in this case. See Winkler v. Ladd, 221 F.Supp 550, 552, 138 USPQ 666, 668 (D.D.C. 1963); Kim v. Quigg, *supra*. That petitioner may have acted with dispatch after obtaining the rights to this abandoned application is immaterial to, and does not overcome, the intentional abandonment and resultant prior delay. Winkler, *supra* (delay caused by a failure to act by or on behalf of the bankruptcy trustee at the time the action needs to be taken is binding on the successor in title); Kim v. Quigg, *supra*. Thus, it is immaterial to the nature of the delay herein that Inceptia may have acted with dispatch in this matter after it acquired total ownership rights. Kim, *Id.* Inceptia cannot undo the prior delay herein. *Id.* This is reasonable, else an intentional delay by, say, an inventor, or assignee, or other responsible party could be laundered to the detriment of the public simply by transfer of title to a third party who could truthfully assert that the delay was unintentional on his part. While Inceptia has made the business decision to purchase a long abandoned application and attempt its revival, this does not change the nature of the abandonment herein and the nature of the resultant delay in this case.⁶ Petitioner is bound by

⁶ The modern technique for purchasing abandoned applications or patents from e.g., a bankruptcy trustee by the canny businessman noted in Winkler, is by way of internet auction. See Furnace Brook v. Overstock.com, Inc., 2006 U.S. Dist LEXIS 56113 (SDNY 2006) at *2-*3.

the deliberate decisions, action(s), or inaction(s) of Sandbox, which was the party having the right or authority to reply *vel non*. See Winkler, supra; Kim v. Quigg, supra. The inventors were likewise bound by the failure of their freely selected representatives at F&R to reply on their behalf. Petitioner is simply unable to overcome an intentional abandonment and rehabilitate the resultant delay attributable to the responsible party, as the entire delay herein results from a deliberate course of action.

DECISION

For the reasons given above, petitioner has failed to meet his burden of showing to the satisfaction of the Director that the entire delay in prosecution in this case is unintentional within the meaning of 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b). The petition is **denied**. This application remains abandoned and will not be revived.

This decision may be regarded as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1002.02. The USPTO will not further consider or reconsider this matter.

Inquiries related to this decision may be made to Petitions Examiner Brian Hearn at (571) 272-3217.



Charles Pearson
Director, Office of Petitions