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**OCT 17 2003**

**OFFICE OF PETITIONS**

**DECISION ON PETITION**

In re Patent No. 4,683,593 :  
Issued: 4 August, 1987 :  
Application No. 06/788,321 :  
Filed: 17 October, 1985 :  
Attorney Docket No. 60259-2D :

This is a decision as a reconsideration, *sui sponte*, on the renewed petition filed on 18 October, 2002, to accept the delayed payment of the maintenance fee for Patent No. 4,683,593 (the '593 patent).

The decision of 9 December, 2002, hereby is VACATED and the request to accept the delayed payment of the maintenance fee is DENIED.<sup>1</sup>

I. JURISDICTION

The '593 patent issued on 4 August, 1987. The grace period for paying the third maintenance fee expired at midnight on 4 August, 1999. Thus, the original petition, filed 22 October, 2001, was not timely filed within twenty-four months after the six-month grace period provided in 37 C.F.R. §1.362(e).

Thus, Petitioner's only avenue for relief is under 37 C.F.R. §1.378(b).

The Commissioner may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable," 35 U.S.C. 41(c)(1), and a petition can be filed under 37 C.F.R. §1.378(b).

II. UNDERLYING STATUTES, REGULATIONS AND CASE LAW

Under the applicable provisions of 35 U.S.C. §41(b) and (c):

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<sup>1</sup>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 Commissioner shall charge fees for maintaining in force all patents filed on or after 12 December, 1980, at the 3-year-6-month, 7-year-6-month, and 11-year-6-month intervals; and
- unless payment of the applicable maintenance fee is received in the Office on or before the date the fee is due or within a grace period of six months thereafter when the grace-period surcharge is paid with maintenance fee, the patent will expire as of the end of the grace period; except that
- the Commissioner may accept the payment of any maintenance fee required by the statute if the payment is made:

--within 24 months after the six-month grace period if the delay is shown to the satisfaction of the Commissioner to have been unintentional;<sup>2</sup> or

--at any time after the six-month grace period if the delay is shown to the satisfaction of the Commissioner to have been unavoidable.<sup>3</sup>

A late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. 133 because 35 U.S.C. 41(c)(1) uses the identical language, *i.e.*, "unavoidable" delay.<sup>4</sup>

In determining if a delay was unavoidable, decisions on reviving abandoned applications have adopted the standard of the reasonably prudent person acting in their most important business

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<sup>2</sup> The burden is less onerous to show unintentional delay under the provisions of 37 C.F.R. §1.378(c), the application of that portion of the regulation is limited to those cases in which the 24-month time limitation is satisfied. The payment was not tendered herein within that period.

<sup>3</sup> In particular, 35 U.S.C. § 41(c)(1) states that:

The Commissioner may accept the payment of any maintenance fee required by subsection (b) of this section . . . after the six-month grace period if the delay is shown to the satisfaction of the Commissioner to have been unavoidable.

And the regulations at 37 C.F.R. 1.378(b)(3) provide that any petition to accept delayed payment of a maintenance fee must include:

A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date, and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

<sup>4</sup> Ray v. Lehman, 55 F3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)).

matters.<sup>5</sup>

In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account."<sup>6</sup>

Finally, a petition to revive an application or patent as unavoidably abandoned or expired cannot be granted where a Petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay.<sup>7</sup>

The regulations at 37 C.F.R. §1.378(b)(3) require a showing that:

- "the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely," and
- the showing must "enumerate the steps taken to ensure timely payment of the maintenance fee" as well as the reasons why payment was not timely made.

This showing should include, but is not limited to, docket records, tickler reports, and file jacket entries for this application, and documents regarding the alleged cause of the delay and copies of any documents referred to in Petitioner's statement as to the cause of the unavoidable delay are required. All the causes which contributed to the failure to timely pay the maintenance fee must be presented and supported with appropriate evidence.<sup>8</sup>

Further, Petitioner should identify the party(ies) responsible for making the payment: A showing must be made (with supporting documents) outlining the efforts made to ensure timely payment of the maintenance fee--including scheduling and calendaring information, appointment of an individual with the authority and responsibility to pay the fee, and detailing of the causes for a failure in that process.

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<sup>5</sup> Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913).

<sup>6</sup> Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

<sup>7</sup> Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

<sup>8</sup> The showing must also enumerate the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly. The showing can be verified by using the attached petition form which includes a declaration according to 37 C.F.R. §1.68. Statements from all persons who contributed to the delay are also required.

Petitioner must "provide any *direct evidence* proving exactly"<sup>9</sup> what records and systems were in place to satisfy the showing required under 37 C.F.R. §1.378(b). As the court found in Krahn:

The Commissioner did not abuse his discretion in ruling that this evidence was insufficient to prove an unavoidable delay \* \* \*. The \* \* \* procedure[s] set out in the PTO regulations were specifically designed to provide patent applicants with a clear procedure to protect themselves from exactly the situation which has arisen in this case. Plaintiff failed to follow these procedures. The Commissioner properly ruled that the alternative means employed by the plaintiff were inadequate \* \* \*. Plaintiff still failed to provide any direct evidence proving exactly [his allegations]. The procedures set out in the PTO's regulations are designed to provide the type of direct evidence needed \* \* \*. Had plaintiff's counsel followed these procedures, as a 'prudent and careful man' would have done in conducting 'his most important business,' then he would have been able to produce sufficient evidence to support a showing of unavoidable delay." (Emphasis supplied.)<sup>10</sup>

### III. BACKGROUND

#### Persons/Offices

Kappler Safety Group (Kappler)--Petitioner, Assignee;

Armstrong, Westerman, Hattori, McLeland & Naughton (Armstrong Law Firm)--formerly represented Kappler in certain intellectual property matters;

Computer Patent Annuities (CPA)--a maintenance-fee-payment service utilized by Veal & Associates on behalf of its clients to attend to certain maintenance fee duties for intellectual property matters;

Ann Holland (Ms. Holland)--Kappler office manager;

Don Kelley (Mr. Kelley)--formerly a Kappler employee;

John Langley (Mr. Langley) --inventor and a Kappler employee;

Law Offices of Charles A. Phillips, P.C. (the Phillips Law Firm)--formerly represented (in the

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<sup>9</sup> See: Krahn v. Commissioner, 15 USPQ2d 1823 (E.D. Va. 1990).

<sup>10</sup> Krahn, at 1825.

person of Joseph H. Beumer (Mr. Beumer) Kappler in certain intellectual property matters;

Robert J. Veal (Mr. Veal)--Counsel to Petitioner;

Veal & Associates (Veal Law Firm)--Mr. Veal's law firm, formerly Veal & Marsh, also formerly Veal & Bush, and merged into Burr & Forman LLP in May 2000.

#### Payment Windows

After the issue of the '593 patent on 4 August, 1987, the windows for payment of the third maintenance fee opened and closed as follows:

- the first window opened on Tuesday, 4 August, 1998, and closed at midnight on Thursday 4 February, 1999, for payment without surcharge;
- the second window opened on Friday, 5 February, 1999, and closed at midnight on Wednesday, 4 August, 1999, for payment with surcharge under 37 C.F.R. §1.20(h);
- the third window opened on Thursday, 5 August, 1999, and closed at midnight on Monday, 6 August, 2001, for payment as unintentionally delayed under 37 C.F.R. §1.20(I)(2); and
- the fourth window also opened on Thursday, 5 August, 1999, for payment as unavoidably delayed under 37 C.F.R. §1.20(I)(1).

As noted above, payment of the third maintenance fee was not tendered until the filing of the petition on 22 October, 2001--well after the deadline for payment unintentionally delayed (37 C.F.R. §1.20(I)(1)), and allowing only payment unavoidably delayed (37 C.F.R. §1.20(I)(1)).

#### Showing

For completeness of the record, this decision reviews not only the submissions on the renewed petition, but also those on the original petition.

In addition to the fee, Request for Reconsideration (nine (9) pages), a Power of Attorney (with statement under 37 C.F.R. §3.73(b)), and Notice of Change of Address, attached to and in support of that submission are:

- the one- (1-) page Declaration of Mr. Kelley;<sup>11</sup> and
- the one- (1-) page Declaration of Ms. Holland.<sup>12</sup>

In addition to the fee and 22 October, 2001, original petition transmittal form (four (4) pages), attached with and in support of that submission are:

- an eight- (8-) page petition narrating Petitioner's history of the matter;
- a one- (1-) page letter (with a one- (1-) page appended listing) dated 23 January, 1997, from Mr. Kelley to Mr. Beumer requesting that all Kappler trademark and patent files be sent by Mr. Beumer to Mr. Kelley (Exhibit A, *in globo*);<sup>13</sup>

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<sup>11</sup> The Kelley Declaration is as follows:

**Declaration of Don Kelley**

I, Don Kelley, do declare under penalty of perjury under the laws of the United States of America, that the following statement and facts attested to therein are true to the best of my knowledge and belief.

I was formerly employed at Kappler Safety Group ("Kappler") in Guntersville, Alabama, as Treasurer of the Company. I am making this declaration in support of a petition to revive a number of patents owned by Kappler. These patent include: U.S. Patent No. 4,670,073; No. 4,683,593; No. 4,920,575; No. 4,924,525; No. 4,938,817; No. 5,375,275; and No. 5,409,761 (collectively, "the expired patents.").

On January 21, 1997, I, along with John Langley and Craig Woodward, met with Robert Veal at his office to discuss consolidation of Kappler's Intellectual Property matters at one law firm. Thereafter, Robert Veal and his firm, Veal & Associates, corresponded with me regarding these matters, and I consulted with John Langley and Craig Woodward on these matters on an as needed basis. Based on the meeting with Robert Veal, I believed that Mr. Veal would attend to the payment of the maintenance fees for Kappler's patents, including the Expired Patents. I June 1998, I left Kappler to pursue other ventures. I first learned that the maintenance fees had not been attended to for the Expired Patents in August 2001.

I affirm that the foregoing factual account is true to the best of my knowledge and belief.

/s/Don Kelley  
Date: 4-10-02.

<sup>12</sup> The Holland Declaration is as follows:

**Declaration of Ann Holland**

I, Ann Holland, do declare under penalty of perjury under the laws of the United States of America, that the following statement and facts attested to therein are true to the best of my knowledge and belief.

I was formerly employed at Kappler Safety Group ("Kappler") in Guntersville, Alabama, as Office Manager. I am making this declaration in support of a petition to revive a number of patents owned by Kappler. These patent include: U.S. Patent No. 4,670,073; No. 4,683,593; No. 4,920,575; No. 4,924,525; No. 4,938,817; No. 5,375,275; and No. 5,409,761 (collectively, "the expired patents.").

I worked directly with John Langley at Kappler. At the request of Mr. Langley, I compiled a listing of all of the patent owned by Kappler and the attorneys Kappler looked to for assistance in maintaining these patents: The Expired Patents were included in the listing and Robert Veal and his firm, Veal and Associates, were listed as the responsible attorney. On January 6, 1999, I sent the listing to Robert Veal and asked him to make sure that all patents they maintained for Kappler were listed. In as much as I received no response from Robert Veal or his firm, I believed my listing to be accurate and correct. I further believed that Robert Veal and his firm were maintaining the patents on the listing, including the payment of any maintenance fees. In August 2001, I learned for the first time that the maintenance fees had not been paid on the Expired Patents.

I affirm that the foregoing factual account is true to the best of my knowledge and belief.

/s/Ann Holland  
Date: 4-12-02

<sup>13</sup> The instant patent is not among the items listed.

- a three- (3-) page confirmation letter (with two copies of a one- (1-) page appended listing) dated 11 April, 1997, from the Armstrong Law Firm to Mr. Veal regarding transferral and shipment of Kappler files to the Veal Law Firm, with specification of maintenance fees then due on the files transferred (Exhibit B, *in globo*);<sup>14</sup>
- a four- (4-) page letter dated 26 February, 1997, from the Phillips Law Firm to Mr. Veal regarding transferral and shipment of Kappler trademark files to the Veal Law Firm, with specification of maintenance fees then due on the files transferred (Exhibit C, *in globo*);<sup>15</sup>
- a one- (1-) page letter dated 23 July, 1997, from the Mr. Veal to Mr. Kelley confirming a list of patent files for the product "composite chemical barrier fabric" (Exhibit D);<sup>16</sup>
- a one- (1-) page letter dated 22 April, 1997, from the Mr. Veal to Mr. Kelley confirming a list of patent files for the product "composite chemical barrier fabric" with the maintenance or "annuity" dates for each (unlabeled as an Exhibit--hereinafter the 22 April letter);<sup>17</sup>
- a one- (1-) page FAX dated 22 July (but bearing on the upper left corner a FAX-transmittal date of 21 July, 1997, from the Ms. Sisk at Kappler to Ms. Stough at the Veal Law Firm attempting to correlate the listing of the files actually transferred to the Veal Law Firm by the Armstrong Law Firm (unlabeled as an Exhibit--hereinafter the 22 July FAX);<sup>18</sup>
- a collection of declarations by Mr. Langley (the Langley Declaration),<sup>19</sup> Mr. Veal (the Veal

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<sup>14</sup> The instant patent is not among the items listed.

<sup>15</sup> The instant patent is not among the items listed.

<sup>16</sup> The instant patent is not among the items listed.

<sup>17</sup> The instant patent is not among the items listed.

<sup>18</sup> The instant patent is not among the items listed.

<sup>19</sup> The Langley Declaration is as follows:

**Declaration of John Langley**

I, John Langley, do declare under penalty of perjury under the laws of the United States of America, that the following statement and the facts attested to therein are true to the best of my knowledge and belief:

I am employed at Kappler Safety Group in Guntersville, Alabama[,] and have been for a number of years. I am an inventor and have been named as an inventor in a number of issued United States patents. I am making this declaration in support of a petition to revive a number of patents owned by Kappler Safety Group. These patent include: U.S. Patent No. 4,920,575, No. 4,924,525, No. 4,683,593, No. 4,670,073, No. 5,375,275, No. 4,938,817; and No. 5,409,761.

On January 21, 1997, I, along with Don Kelley and Craig Woodward, met with Robert Veal at his office to discuss consolidation of Kappler's Intellectual Property matters at one law firm. Mr. Kelley left Kappler in June of 1988 (sic). In February 1998, I called Mr. Veal to determine what maintenance fees were to be paid on the Kappler properties. Mr. Veal responded by a letter dated February 25, 1998, listing a number of U.S. and foreign patents and their due dates. I believed that Mr. Veal would attend to the payment of the maintenance fees.

In October 1998, I requested that Veal & Associates provide me with a listing of the patents that they were maintaining for Kappler. I received

Declaration),<sup>20</sup> Ms. Childers (the Childers Declaration),<sup>21</sup> Ms. Kustos (the Kustos

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a one-page spreadsheet from Veal. In a letter dated January 6, 1999, Ann Holland of Kappler provided Veal & Associates with a list of patents that Kappler understood were being maintained by the firm. Kappler received no correspondence or other communication from Veal & Associates reflecting any unwillingness or refusal to maintain each of the patents listed in the letter dated January 6, 1999, including the expired patents. Kappler was under the belief that these matters were being handled by Veal & Associates.

On August 22, 2001, Kappler discovered that the Expired (sic) patents had expired for failure to pay the maintenance fees at the proper times. On September 5, 2001, I contacted Robert Veal about the situation and had him speak with attorneys at Alston & Bird about the matter. I have been in consultation with my attorneys and reviewing files since that time. On October 16, 2001, I instructed Veal to file petitions to revive the patents.

I believe that I have acted diligently to protect and preserve the rights in the subject patents. I was under the belief that Veal was maintaining the subject patents and would advise me as to the necessary payments of the maintenance fees. Although I relied on Veal to maintain the Patents, I repeatedly inquired as to the maintenance fees and was shocked to learn of the failure to pay the fees. I have been diligently working since August 22, 2001, to determine what events lead to the failure.

I affirm the foregoing to be a true account of the events known to me.

/s/John Langley

Date: 10-22-01

<sup>20</sup> The Veal Declaration is as follows:

**Declaration of Robert J. Veal**

I, Robert J. Veal, do declare under penalty of perjury under the laws of the United States of America, that the following statement and the facts attested to therein are true to the best of my knowledge and belief.

I was the senior attorney in the law firm of Veal & Associates until its merger into Burr & Forman LLP, in May of 2000. Over the years the firm had been known as Veal & Marsh and Veal & Bush. Kappler Safety Group has been an Intellectual Property client of the firm for many years. In January of 1997, I met with employees of Kappler to discuss consolidating their IP work in our office. It was my understanding at that time that Mr. Don Kelley of Kappler would retain the U.S. Patent Files (sic) at Kappler and would be responsible for the maintenance fees on those files. It has always been my practice to maintain the full prosecution history of a file in my office when I have been tasked to maintain the patent or trademark. Accordingly, I was a little surprised by the arrangement, but Kappler had had issues with law firms and maintenance fees previously and I perceived that they wanted to have hands on control of the maintenance fees. Kappler directed that their trademark files and foreign patent files be sent to Veal & Associates for maintenance. When these files came in they were duly reviewed, placed in file cabinets, entered into our tickler system and where appropriate listed with a commercial maintenance fee firm. Over the course of the next year we sent reminders to Mr. Kelley regarding the files we had cognizance of in our possession.

In February of 1998, John Langley of Kappler called and asked me to provide information on maintenance fees due on Kappler properties. Inasmuch as we did not have the files on the Kappler properties, I had to research the information via the electronic databases available at the time, which would have included Cassis and the IBM patent server on the internet. My records show that I spent about fifty minutes on February 24, 1998[,] researching the information. A letter for my signature was prepared by Tiffany McClain, my legal assistant, and sent to Mr. Langley containing this information. It was my understanding that Mr. Langley would advise as to which if any of the patents we were to assume responsibility for and pay the maintenance fees on inasmuch as this would take some review of the cost and value of the various patents. Accordingly, Tiffany prepared information sheets on each of the patents to submit to CPA when Mr. Langley gave his approval. I have no recollection or record that he ever gave his approval.

Ms. McClain left Veal & Associates in July of 1998. Shortly thereafter Ms. Childers assumed the job of communicating with clients and CPA. Concurrently, another employee, Sheila Bird, set about entering data on our patent files into an Excel worksheet as a back up to our index card tickler and CPA. In October 1998, Mr. Langley requested a list of the patents we maintained for Kappler. Sheila sent him the database listing for the patents we considered we were responsible for. No reply was received at that time. In January 1999, Ann Holland wrote a letter setting out that Kappler thought we were responsible for. Neither I, nor anyone I have consulted who would have had anything to do with the payment or entry of the information into our system can recall receiving the letter. If we had received the letter, it would have surely prompted us to respond inasmuch as it contained far more patents than I considered to be our responsibility.

Consequently, at no time prior to this declaration did I consider that Kappler had engaged my firm to maintain all of its patent properties.

I attest that the foregoing is a true and accurate statement to the best of my knowledge and recollection.

Signed this 22 day of October, in the year 2001.

/s/Robert J. Veal.

<sup>21</sup> The Childers Declaration is as follows:

**Declaration of Jenny H. Childers**

I, Jenny H. Childers, do declare under penalty of perjury under the laws of the United States of America, that the following statement and the facts attested to therein are true to the best of my knowledge and belief.



Declaration),<sup>22</sup> and Ms. Weidman (the Weidman Declaration)<sup>23</sup> (Exhibit E, *in globo*);

- page 2 only of what appears to be a two- (2-) page letter dated 25 February, 1998, from Mr. Veal to Mr. Langley listing 17 patents and inquiring as to questions Mr. Langley might have regarding those matters (Exhibit F);<sup>24</sup>
- a one- (1-) page letter (with a one- (1-) page appended listing) dated 6 October, 1998, from Mr. Veal to Mr. Langley listing the patent files the Veal Law Firm maintain[ed]"for Kappler.

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From August 1998 until the merger of Veal & Associates into Burr & Forman LLP, on May 1, 2000, I was the office manager and administrative assistant to Mr. Robert J. Veal. Part of my duties included corresponding with clients and Computer Patent Annuities, a commercial maintenance fee payment firm, regarding payment of maintenance fees and annuities.

I have reviewed a copy of a letter addressed to Veal & Associates from Ann Holland dated January 6, 1999. I do not recall seeing this letter at any previous time. If this letter had been received at Veal, the information contained in the letter would have been checked against our files and records and any inconsistencies would have been brought to the client's attention.

I attest that the foregoing is a true and accurate statement to the best of my knowledge.

Signed this 22 day of October, 2001.

/s/Jenny H. Childers

<sup>22</sup> The Kustos Declaration is as follows:

**Declaration of Paula Kustos**

I, Paula Kustos, do declare under penalty of perjury under the laws of the United States of America, that the following statement and the facts attested to therein are true to the best of my knowledge and belief.

I am a legal secretary at the law firm of Burr & Forman LLP in the Intellectual Property group. I have assisted in looking for the files related to certain patents owned by Kappler Safety Group which have become abandoned. On the morning of October 22, 2001, I observed Mr. Veal open a file folder containing transmittal sheets used to transmit information to Computer Patent Annuities. In the folder Mr. Veal found a bundle of transmittal forms dated 2-24-1998 for patent belonging to Kappler. Attached to the bundle was a note which read "Awaiting instructions from Langley" "Kappler". Copies of this bundle have been submitted as an exhibit to petitions to revive the patents at issue.

I attest that the foregoing is true and accurate to the best of my knowledge and belief.

/s/Paula Kustos

10/22/2001

<sup>23</sup> The Weidman Declaration is as follows:

**Declaration of Barbara Weidman**

I, Barbara Weidman, do declare under penalty of perjury under the laws of the United States of America, that the following statement and the facts attested to therein are true to the best of my knowledge and belief.

I am employed as a legal secretary at Burr & Forman LLP, where I work in the Intellectual Property Group. I am secretary to Mr. Robert J. Veal. I was employed at Veal & Associates in January 2000 before the firms merged. All of the files retained by Veal & Associates were transferred to Burr & Forman LLP, on May 1, 2000. They are maintained in a number of file cabinets at various locations. Some have been shipped to long term storage.

I have personally gone through the files looking for patents assigned to Kappler Safety Group in connection with the revival of certain patents. I have also gone through the correspondence files relating to Kappler and dating back to 1996, looking for correspondence from Kappler.

Specifically, I have not found a copy of a letter from Ann Holland of Kappler to Veal & Associates dated January 6, 1999. Further I have not found prosecution files for the following United States Patents: No. 4,920,575, No. 4,924,525, No. 4,683,593, No. 4,670,073, No. 5,375,275, No. 4,938,817, and No. 5,409,761. I have been assisted in this search by the file room staff and by Paula Kustos, another legal secretary. Additionally, I accompanied Mr. Robert J. Veal on a search of the file room as well.

I attest that the foregoing is true and accurate to the best of my knowledge and belief.

Signed this 22 day of October, 2001.

/s/Barbara Weidman

<sup>24</sup> The instant patent is not among the items listed.

and erroneously listing on the appendix the instant patent as one for which a "petition to revive 3/4/98" had been filed (Exhibit G, *in globo*);

- an undated one- (1-) page hand-written document addressing the maintenance fee schedule for US Patent Nos. 4,920,575 and 4,924,525 (Exhibit H);<sup>25</sup>
- a one- (1-) page letter (with a three- (3-) page appended listing) dated 6 January, 1999, from Ms. Holland to Mr. Veal setting forth the patent files--including that of the instant patent--for which Kappler believed the Veal Law Firm was responsible in attending to maintenance fees (Exhibit I, *in globo*);
- a one- (1-) page partially completed form entitled "C.P.A. - Patent Input/Update Form" (Exhibit J);
- a series of 24 one- (1-) page completed forms entitled "C.P.A. - Patent Input/Update Form" for Kappler patents, including the instant patent, with the annotation "Awaiting instructions from Langley Kappler" (Exhibit K *in globo*).

The declarations by Tiffany McClain (the McClain Declaration)<sup>26</sup> and Traci Ryan (the Ryan

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<sup>25</sup> The instant patent is not among the items listed.

<sup>26</sup> The McClain Declaration is as follows:

**Declaration of Tiffany McClain**

I, Tiffany McClain, do declare under penalty of perjury under the laws of the United States of America, that the following statement and the facts attested to therein are true to the best of my knowledge and belief.

I am a legal assistant employed by the law firm of Sirote and Permutt. Prior to my employment at Sirote, I was a legal assistant and office manager at the law firm of Veal & Associates, formerly Veal & Marsh. I left Veal & Associates in July of 1998.

Part of my duties at Veal & Associates was to attend to the payment of maintenance fees and annuities for clients relative to their US and foreign patents. In most instances, Veal & Associates utilized the services of Computer Patent Annuities (CPA), as the payor on the fees for the clients. In some instances, where foreign agents were paying the annuities, Veal & Associates did not use CPA. To initiate the process of paying maintenance fees, I would notify CPA using a preprinted form that I faxed to them, containing the pertinent information on the patent, including issue date, inventor name, patent title, and the first year that CPA was to be responsible for paying the fee. Additionally, I would create an index card record that maintained in a tickler system which would be reviewed each month to determine which maintenance fees were due. All correspondence with a client regarding maintenance fees would be maintained in the same folder as the patent prosecution history. All receipts from CPA or the Patent Office showing payment of the maintenance fee or lapse of the patent were likewise maintained in the patent file.

When cases prosecuted by other attorneys were transferred into the office, I, or one of the other legal assistants, would go through the files to ascertain the information needed to enter the case into our tickler system. I would then prepare the information for transmittal to CPA and prepare the tickler card. I believe that it was rarely Veal & Associates practice to maintain a patent without the original prosecution file, because, the legal assistants had no way to obtain the pertinent information and verify that the maintenance fees were in order. If such a file was created, the information regarding the patent was conveyed to the legal assistant from one of the attorneys.

I do not recall ever receiving a large number of patent files from Kappler. I have reviewed the letter dated February 25, 1998[,] from Mr. Veal to Mr. Langley. The initials ["tdm"] at the bottom are mine. Mr. Veal provided me with the information. I have also reviewed the packet of transmittal forms intended for CPA dated 2-24-1998. The handwriting on the note is also mine. I have no recollection of ever having received any instruction to transmit the forms to CPA or to enter the patents referenced in the document into our tickler system.

I have also reviewed the tickler cards created for the patents issued to Bodigard. I created these cards. At the time of their creation I was under the belief that the second maintenance fee had already been paid. Had I not believed this I would have noted the due date for the second maintenance fee on the card and would have requested instruction from the client to pay the second maintenance fee.

Declaration)<sup>27</sup> accompany the 30 October, 2001, supplement.

The 31 January, 2002, supplement is virtually identical to materials filed on 22 October, 2001, save that also includes copies of the receipt card and check in payment of the petition fee.

Finally, the 26 July, 2002, supplement contains the entirety of the two- (2-) page letter dated 25 February, 1998, from Mr. Veal to Mr. Langley--the first page of which previously was missing from Exhibit F of the 22 October, 2001, petition (and 31 January, 2002, supplement). The instant patent, with the maintenance fee due date is referenced on page one of the letter.

#### IV. ANALYSIS

The Statutes and Rules of Practice before the Office provide many tools for applicants, patentees and practitioners to protect their prospective or actual property rights and those of their clients. However, persons who fail to use the tools, fail to gain the protections.

Moreover, the twenty-four- (24-) month period following expiration is not a time to reconsider mistaken choices,<sup>28</sup> it is a period within which to accomplish decisions made but unperfected.<sup>29</sup>

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I was my practice to check and recheck all of the patent files that Veal & Associates maintained for their clients. This procedure involved physical inspection of the files to ensure (sic) that all tasks had been completed. In as much as Veal & Associates did not have the files from Kappler, it was impossible for me to verify that all matters have been attended to.

I attest that the foregoing is true to the best of my knowledge and recollection.

October 23, 2001

/s/Tiffany D. McClain

<sup>27</sup> The Ryan Declaration is as follows:

#### Declaration of Traci Townley Ryan

I, Traci Townley Ryan, do declare under penalty of perjury under the laws of the United States of America, that the following statement and the facts attested to therein are true to the best of my knowledge and belief.

From July 1997 to December 1999, I was a legal assistant in the offices of Veal & Associates. I also served as a docket manager for most of 1999. As part of my job, I assisted in the integration of new files into the office tickler system. On occasion, when files would be received from other law firms, I would assist Tiffany McClain, who was the office manager, in reviewing the files and ascertaining the information needed to enter the files into our file maintenance system.

I do not recall ever having received a large number of patent files from Kappler Safety Group, although we worked on many Kappler trademarks and at least one litigation matter.

I have reviewed a copy of a letter addressed to Veal & Associates from Ann Holland and dated January 6, 1999. I do not recall seeing this letter at any previous time. If this letter had been received at Veal, the information contained in the letter would have been checked against our files and records and any inconsistencies would have been brought to the client's attention.

/s/Traci Townley Ryan

Date: 10/24/01

<sup>28</sup> In re Maldaque, 10 USPQ2d 1477, 1478 (Comm'r Pat. 1988).

<sup>29</sup> In re Application of Li, 11 USPQ2d 1378, 1380 (Comm'r Pat. 1989).

Petitioner asserts unavoidable delay in that assignee Kappler "consistently attempted to ascertain the status of its property and Patent Owners asserted reliance on the Patent Attorney, with whom the Patent Owner had an ongoing professional relationship in other matters, alone should be sufficient to establish the case as one in which the level of diligence and care are acceptable."

Petitioner has not carried its burden of proof to establish to the satisfaction of the Commissioner that the delay was unavoidable.

The gravamen of Petitioner's argument is that since Veal was managing a variety of intellectual property matters for Kappler at the time the first maintenance fee was due for the present patent, Petitioner Kappler was justified in assuming that Veal had assumed responsibility for and was tracking and monitoring the maintenance fee payments for the present patent. Petitioner states "[t]his is not a case where counsel was engaged and left to their own doings, under a mere assumption that all would be well."<sup>30</sup>

However, failure of communication between an attorney and his client does not constitute unavoidable delay.<sup>31</sup> While the context of this matter, for example, is not that of *In re Kim*,<sup>32</sup> in which a single communication occurred between Petitioner and Counsel, the record herein reveals there is at heart little difference between the instant matter and *Kim* because here, despite more than one communication between Petitioner and Counsel, there is no showing that Counsel had agreed to maintain the '593 patent.

While it is true that more than a single communication transpired between Kappler and Veal, the communications that occurred provide no showing that Kappler and Veal were in agreement as to whether maintenance fees for the '593 patent were to be docketed and tracked by Kappler or by Veal.

A review of the record reveals that a letter dated 23 January, 1997, from Don Kelley, Treasurer and CFO of Kappler to patent attorney Joe Beaumer, a copy of which was forwarded to attorney Veal, stated that files referenced therein were to be transferred from Kappler to Veal. No U.S. patents were listed in that letter. Likewise, letters dated 11 April, 1997, from the law firm of Armstrong, Westerman, Hattori, McLeland & Naughton to Veal, and 26 February, 1997, from attorney Beaumer to Veal regarding the transfer of Kappler patent and trademark files to Veal make no mention of the present patent.

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<sup>30</sup> Petition under 37 C.F.R. 1.378(e), page 2

<sup>31</sup> *In re Kim*, 12 USPQ2d 1595 (Comm'r Pat. 1988).

<sup>32</sup> *Id.*

Furthermore, letters dated 22 April and 23 July, 1997, from Veal to Mr. Kelley at Kappler, apparently sent to confirm receipt of and responsibility for tracking of the maintenance fees for Kappler patent files by Veal, make no mention of the present patent.

The first mention of the present patent is on the listing of patents dated 25 February, 1998, sent by Veal to Langley. In his declaration, dated 22 October, 2001, attorney Veal states

In February of 1998, John Langley of Kappler called and asked me to provide information on maintenance fees due on Kappler properties. Inasmuch as we did not have the files on the Kappler properties, I had to research the information via the electronic databases available at that time...It was my understanding that Mr. Langley would advise as to which if any of the patents we were to assume responsibility for and pay the maintenance fees on inasmuch as this would take some review of the cost and value of the various patents...I have no recollection or record that he ever gave his approval.

In 22 October, 2001, petition, Mr. Veal states that “[n]ormally, when files are transferred from another office, the physical patent file and all documents are requested by Veal.”

However, the petition goes on to indicate that the ‘593 never was “transferred prior to [the] departure [of Veal law firm legal assistant Ms. McClain], nor does she recall any further instruction from Kappler.”

Finally, the petition states: “The files of Veal & Associates have been diligently searched and none of the patent files or further instruction has been found.”

Given those facts, it is not unreasonable to conclude that neither Mr. Veal nor his firm had reason believe that they were responsible for the maintaining fee for the ‘593 patent.

The showing of record, therefore, is that the communications between Veal and Kappler specifically identified which patents Veal would monitor for Kappler and that the ‘593 patent was not one of those Veal agreed to maintain.

Furthermore, the letter dated 6 October, 1998, from Mr. Veal to inventor Mr. Langley reads “enclosed herewith is a list of the patents we maintain for Kappler.” It is noted that the ‘593 patent is not on this list. There is no indication that Kappler reviewed this transmission to verify that it included all of the patents to be maintained by Veal.

As stated in the original petition, “[a]t the time October 6, 1998 letter was sent, it is clear that personnel at Veal & Associates did not understand that Kappler thought Veal was maintaining the patents in issue, or that there was any issue (*sic*) fee due on any patents maintained by Veal.”

The only communication supporting Kappler's assertion that Veal was responsible for monitoring the maintenance fee for the '593 patent is the letter dated 6 January, 1999, from Ms. Holland, Office Manager at Kappler, to Mr. Veal purportedly seeking to verify that he was responsible for the present patent--a letter which Mr. Veal states in his declaration that he has no recollection of ever having received.

The fact that Mr. Veal and/or his firm agreed to assume responsibility for other Kappler intellectual properties did not entitle Kappler to assume that the '593 patent would necessarily be included, particularly when the present patent was not included in the confirmation communications from Mr. Veal to Kappler sent on 22 April and 23 July, 1997.

Kappler has shown no basis for its belief that the present patent was to be maintained by Mr. Veal. The showing of record is that the present patent was not included because of a failure of communication between attorney and client.

Failure of communication between attorney and client is not unavoidable delay.<sup>33</sup>

In that Petitioner asserts that responsibility for payment of maintenance fees on all Kappler patents was to be transferred to Mr. Veal, Mr. Veal's statement in the request for reconsideration that it is unequivocal that in January, 1997, Kappler personnel sought to consolidate the company's patent work in one law firm is inconsistent with his declaration dated 22 October, 2001, in which Mr. Veal states that "at no time prior to this declaration did I consider that Kappler had engaged my firm to maintain all of its patent properties."

Petitioner's argument in the request for reconsideration that Mr. Langley was unsuccessful in receiving a response from Mr. Veal regarding whether Mr. Veal was tracking the present patent is not supported by the showing of record. Rather, the letter dated 6 October, 1998, from Mr. Veal to Mr. Langley states which patents were being maintained for Kappler. The '593 patent is not on that list. As such, the showing of record is that Veal did inform Langley that the '593 patent was not among those being maintained by Veal. Although Mr. Langley's declaration dated 22 October, 2001, states that he believed that Mr. Veal would "attend to the payment of the maintenance fees," it is not clear if he believed that Mr. Veal would monitor the maintenance fee for the present patent, and, if Mr. Langley did so believe, the basis for that belief is not clear since the present patent was not included in the correspondence received from Mr. Veal.

Furthermore, Petitioner's assertion that since the 6 January, 1999, letter from Ms. Holland to Mr. Veal "was worded such that it required no response, if the recipient agreed with all of the information in the letter" and no response was received, that Kappler was justified in assuming

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<sup>33</sup> See note 9, *supra*.

that Mr. Veal was maintaining the present patent is not merited. At the outset, assuming, *arguendo*, that the letter did not require a response if Mr. Veal agreed with its contents, petitioner Kappler had no way of knowing whether the failure to respond was due to receipt and agreement with the letter or lack of receipt or mishandling thereof. Certainly a prudent and careful individual acting in relation to his or her most important business would take steps to confirm whether such a communication had been received.

Likewise, Petitioner's contention that the letter by its wording required no response if the recipient agreed with its contents is not a reasonable interpretation of the letter itself. The letter requests Mr. Veal's "help by checking the attached list to make sure all patents you maintain for Kappler are listed." Nowhere does the 6 January, 1999, letter state that Mr. Veal need not respond. Rather, the purpose of the list is to verify that Kappler and Mr. Veal were in agreement as to which Kappler patents were to be maintained by Veal. It is to be assumed that had Veal received the list, he would have promptly informed Kappler, his client, as to whether it contained any discrepancy *vel non*.

Last, in his 22 October, 2001, declaration Mr. Veal states that he does not recall receiving the communication from Kappler dated 6 January, 1999.

In summary, Petitioner essentially seeks to establish Mr. Veal's responsibility for tracking the maintenance fee for the present patent based on the lack of a response to a single request for clarification, a communication which counsel declares he did not receive. Such a showing does not rise to the level of unavoidable delay.

Rather than unavoidable delay, the showing of record is that a failure of communication occurred between Petitioner and Counsel.

It is noted that Counsel now asserts that since the 6 January, 1999, letter cannot be located in Counsel's records, that it may have been lost in the mail, citing delayed receipt in December, 1998, of items that had apparently been mishandled by the U.S. Postal Service. Petitioner's argument is unpersuasive, however. At the outset, letters which are properly mailed are presumed to be timely delivered, and Petitioner has provided no evidence to the contrary.<sup>34</sup> Additionally, Petitioner has provided no evidence supporting a claim of failure of the mail. Rather than being a "plausible explanation," Counsel's assertion amounts to mere speculation.

Petitioner implores the Commissioner not to require Kappler to demonstrate that it was itself tracking the maintenance fees for the present patent in a reliable tracking system. Petitioner complains that requiring such a showing "clearly places on Kappler a burden greater than the

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<sup>34</sup> Rosenthal v. Walker, 111 U.S. 185, 193-94 (1884)

standard for reasonable diligence requires," because all Kappler personnel who have submitted declarations state that they believe that Mr. Veal was responsible for tracking the maintenance fee for the present patent. Unfortunately, although declarants may believe that Mr. Veal intended to track the maintenance fee for this patent, the correspondence filed with the first petition does not substantiate declarants' interpretation:<sup>35</sup>

- according to in his 22 October, 2001, declaration, Mr. Veal agreed to monitor the maintenance fees for some, but not all of Kappler's patents; and
- the showing of record is that the present patent was not among those patents Mr. Veal agreed to track.

As such, absent a documented showing of a reliable tracking system on the part of Kappler, the showing of record is not of unavoidable delay but rather a failure of communication between an attorney and his client.

Lastly, regarding Petitioner's statement that a reasonable person would not have discovered the mistake leading to the delay in payment of the maintenance fee is not supported by the record. Petitioner states that "[g]iven the letters of October 1998 and January 1999 and the failure of the January letter to reach [Mr.] Veal, there would have been no reasonable way for either party to have learned of the failure to pay the maintenance fees prior to the discovery in 2001."

This assertion is not supported by the showing of record.

First, if Kappler had promptly reviewed the letter to Mr. Langley dated 6 October, 1998, Kappler would have discovered that the Mr. Veal did not believe he was responsible for maintaining the '593 patent. Additionally, if Kappler or another entity had been tracking the maintenance fees prior to the purported transfer of the file to Mr. Veal, the predicament at hand would not have occurred.

Petitioner states that "[e]ven if the Patent Office had sent reminder notices out regarding the Maintenance Fees, the letters would have been sent to the prosecution addresses, which have done no good."

A delay due to the failure of patentee to provide the Office with a current correspondence address is not unavoidable because it resulted from a lack of diligence on the part of Petitioner in

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<sup>35</sup> See, e.g., *Kim*, 12 USPQ2d at 1003.



notifying the Office that counsel's correspondence address had changed.<sup>36</sup> The failure to receive a maintenance fee reminder does not constitute unavoidable delay. Nor does the patentee's lack of knowledge of the need to pay the maintenance fee constitute unavoidable delay.<sup>37</sup> It is solely the responsibility of the patentee to insure that the maintenance fee is paid timely to prevent expiration of the patent.

Rejection of Petitioner's arguments herein is consistent with the holding in *Kim*, where, as here, Petitioner believed his (its) attorney would take "appropriate action," but because Petitioner failed to clearly communicate its intention, the delay was not unavoidable.

Here it was never clearly communicated that Kappler intended that Mr. Veal track and submit the maintenance fees for the present patent. A "failure of communication" which occurs because a part fails to clearly communicate their intentions does not constitute unavoidable delay.<sup>38</sup>

Additionally, in order to establish unavoidable delay, Petitioner must demonstrate diligence in prosecution of the matter.<sup>39</sup> In as much as Kappler did not review the communications from Mr. Veal to verify that all of the patents Kappler wished that Mr. Veal maintain were listed therein, the showing is of a lack of diligence on the part of Kappler.

The U.S. Patent and Trademark Office is charged with applying patent laws and regulations as enacted and promulgated by Congress and the Office, respectively. The Office is not unmindful of the effort expended by Petitioner to obtain this and other patents, and that these patents may represent a significant commercial value to Petitioner. Nevertheless, review of the instant matter does not support granting the relief requested. And while Petitioner may be dissatisfied with the outcome of these proceedings, the outcome and the dissatisfaction do not render the decision arbitrary or unfair.

The record as thoroughly reviewed above (either in summary or detailed footnote) indicates that:

- the Veal Law Firm had in place a maintenance tickler system, as well as mechanisms for incorporating items into its maintenance tickler system and operating that system;

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<sup>36</sup> A delay caused by the failure on the part of petitioner, or petitioner's representative, to provide the Patent and Trademark Office with a current correspondence address does not constitute an unavoidable delay. See *Ray v. Lehman*, 55 F.3d 606, 34 USPQ2d 1786 (Fed. Cir. 1995).

<sup>37</sup> See *In re Patent No. 4,409,763*, 7 USPQ2d 1798 (Comm'r Pat. 1988), *aff'd* *Rydeen v. Quigg*, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990); *aff'd without opinion (Rule 36)*, 937 F.2d 623 (Fed. Cir. 1991), *cert. denied*, 60 U.S.L.W. 3520 (January 27, 1992). See also "Final Rules for Patent Maintenance Fees," 49 Fed. Reg. 34716, 34722-23 (Aug. 31, 1984), reprinted in 1046 Off. Gaz. Pat. Office 28, 34 (September, 25, 1984).

<sup>38</sup> See *Ex parte Wright*, 1 Gour. 84:16 (Comm'r Pat. Nov. 23, 1889) in *Kim*, 12 USPQ2d at 1603.

<sup>39</sup> See *Douglas v. Manbeck*, 21 USPQ2d 1697, 1700 (E.D. Pa. 1991), *aff'd* 975 F.2d 869, 24 USPQ2d 1318 (Fed. Cir. 1992).

- Kappler initially transferred only trademark and foreign patent intellectual property matters to the Veal Law Firm, and Kappler may have maintained some or all of its domestic patent intellectual properties in-house;
- Kappler apparently asked for and received from the Veal Law Firm in the letter of 25 February, 1998, a listing of foreign and domestic intellectual property matters--including the instant patent--for which maintenance fees would be due;
- Kappler may have decided to transfer other intellectual property matters (including the instant patent) to the Veal Law Firm for maintenance, but there is no clear evidence of that delegation;
- as evidenced by the draft CPA forms and the attached note "Awaiting instructions from Langley Kappler" (Exhibit K, *in globo*), the Veal Law Firm likely had been informed that there was a body of additional intellectual property matters--including that of the instant patent--that Kappler might eventually transfer to the Veal Law Firm for handling and/or maintenance.

However there is no evidence that the Veal Law Firm understood that it was to incorporate and/or incorporated the instant patent, *inter alia*, into its system of maintenance for intellectual property.

Thus, the evidence submitted does not demonstrate that Petitioner Kappler had in place--on its own, through Counsel, or other third party--a system of tracking and/or paying the maintenance of this particular item of intellectual property, to wit: Patent No. 4,683,593.<sup>40</sup>

Therefore, with regard to the payment windows:

The first payment window: It appears that, as to an inquiry of whether Petitioner (on its own, through Counsel or a third party payment entity--had in place a method to ensure timely payment of the maintenance fee for the '593 patent in the period from 4 August, 1998, through 4 February, 1999) the period within which the first payment window opened, the fee became due, and the first window closed--the answer is: No.

The second payment window: Thereafter, it appears that nothing was done between 5 February, 1999, and midnight Wednesday, 4 August, 1999, to change conditions and/or otherwise place the maintenance fee for the '593 patent in position for payment.

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<sup>40</sup> This is not the forum for a dispute as between Kappler and its Counsel as to who bore maintenance responsibility.

Therefore, as to an inquiry of whether Petitioner had in place a method for seeing that the maintenance fee for the '593 patent was timely paid from 5 February, 1999, through 4 August, 1999--the period within which the second payment window opened, the fee and small surcharge became due, and the second window closed--the answer is: No.

The third payment window: The record fails to reveal that anything was done by Petitioner to resolve the payment condition with regard to the '593 patent between 5 August, 1999, and midnight Monday, 6 August, 2001.

Therefore, as to an inquiry of whether Petitioner had in place a method for seeing that the fee for the '593 patent was timely paid from 5 August, 1999, and midnight Monday 6 August, 2001--the period in which the third payment window opened, the fee and large surcharge became due, and the third window closed--the answer is: No.

The fourth payment window: Similarly, as to an inquiry of whether or not Petitioner had in place a method for seeing that the fee (with surcharge) for the '593 patent was timely paid as unavoidably-delayed in the fourth window before midnight Wednesday 4 August, 1999, the answer is: No. In truth, the fourth window never could have opened for Petitioner because the record is void of any documentary evidence that the Petitioner had in place the method to ensure that the fee for the '593 patent was paid timely.

Even if a breach of duty by Petitioner as Counsel is the cause of the failure to maintain the patent and/or demonstrate unavoidable delay, those actions or inactions are imputed to the patent owner, who selected his counsel.<sup>41</sup> Rather, in the absence of a showing that the attorney/agent has acted to deceive the client,<sup>42</sup> the neglect of a party's attorney is imputed to and binds the party by the consequences.<sup>43</sup> At bottom, the question is one of diligence.<sup>44</sup> And the record does not demonstrate Petitioners' diligence as to the maintenance of the '593 patent.

#### Direct Evidence

The expiration/abandonment of this patent took place by operation of law, *inter alia*, for failure

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<sup>41</sup> Link v. Wabash Railroad Co., 370 U.S. 626, 633-634, 82 S.Ct. 1386, 1390-91 (1962).

<sup>42</sup> When an attorney intentionally conceals a mistake he has made, thus depriving the client of a viable opportunity to cure the consequences of the attorney's error, the situation is not governed by the stated rule in Link for charging the attorney's mistake to his client. In re Lonardo, 17 USPQ2d 1455 (Comm'r. Pat. 1990).

<sup>43</sup> See Huston v. Ladner, 973 F.2d 1564, 23 USPQ2d 1910 (Fed Cir. 1992); Herman Rosenberg and Parker-Kalon Corp. v. Carr Fastener Co., 10 USPQ 106 (2d Cir. 1931).

<sup>44</sup> See: Changes to Patent Practice and Procedure, Final Rule Notice, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 *Off. Gaz. Pat. Office* at 86-87 (October 21, 1997). See also: Ray v. Lehman, *supra*.

to pay timely the maintenance fee. Petitioner's burden, as set out at pages 2-4, above, requires that Petitioner "provide . . . *direct evidence* proving exactly"<sup>45</sup> a factual basis supporting the showing of unavoidable delay required for relief to be granted. Petitioner has failed to carry its burden.

Absent such direct evidence, the petition cannot be granted.

#### IV. CONCLUSION


In summary, Petitioner's showing of record has failed to demonstrate the due care and to be devoted to one's most business affairs as to the instant patent.

The prior decision which refused to accept under § 1.378(b) the delayed payment of a maintenance fee for the above-identified patent has been reconsidered. For the above stated reasons, the delay in this case cannot be regarded as unavoidable within the meaning of 35 U.S.C. § 41(c)(1) and 37 C.F.R. 1.378(b).

Since this patent will not be reinstated, a refund check covering, the maintenance fee and surcharge fee, less the \$130.00 fee for the present request for reconsideration, has been scheduled.

As set forth in 37 C.F.R. 1.378(e), no further reconsideration or review of this matter will be undertaken.

Telephone inquiries should be directed to Senior Attorney John J. Gillon, Jr., at (703) 305-9199.

  
Beverly M. Flanagan  
Supervisory Petitions Examiner  
Office of Petitions

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<sup>45</sup> See also: Krahn v. Commissioner, 15 USPQ2d 1823 (E.D. Va. 1990) (Emphasis supplied).