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OFFICE OF PETITIONS

In re Application of
Penny Eskstein
Application No. 08/345,562
Patent No. 5,501,627
Filed: November 8, 1994
Issue Date: March 26, 1996
Title: CHILDREN'S TOY WITH PEEK-A-BOO ACTIVATION

DECISION ON RENEWED PETITION UNDER 37 C.F.R. §1.378(E)

This is a decision on the renewed petition filed November 21, 2005, under 37 C.F.R. §1.378(e), requesting reconsideration of a prior decision pursuant to 37 C.F.R. §1.378(b)[1], which refused to accept the delayed payment of the 3½ year maintenance fee for the above-referenced patent.

The request to accept the delayed payment of the maintenance fee is **DENIED**[2].

The patent issued on March 26, 1996. The grace period for paying the 3½ year maintenance fee provided in 37 CFR 1.362(e) expired at midnight on March 26, 2000,

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[1] Any petition to accept an unavoidably delayed payment of a maintenance fee filed under 37 C.F.R. §1.378(b) must include:

(1) The required maintenance fee set forth in 37 C.F.R. §1.20 (e) through (g);
(2) The surcharge set forth in 37 C.F.R. §1.20(i)(1), and;
(3) 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.

2 This decision may be regarded as a final agency action within the meaning of 5 U.S.C. §704 for the purposes of seeking judicial review. See MPEP 1002.02.

with no payment received. Accordingly, the patent expired on March 26, 2000.

On August 1, 2005, Petitioner filed a petition under 37 C.F.R. §1.378(b), which was dismissed via the mailing of a decision on September 20, 2005.

With the original petition, Petitioner submitted the surcharge associated with a petition to accept late payment of a maintenance fee as unavoidable, along with the 3½ and 7½ year maintenance fees and a statement of facts.

Petitioner has met the first and second requirements under 37 C.F.R. §1.378(b)(1) and (b)(2). With this renewed petition, Petitioner submitted a fee in the amount of $130, since the decision on the original petition erroneously listed the fee as such. The Office regrets this error, as the fee associated with the filing of a petition under 37 C.F.R. §1.378(e) is $400. The additional $270 has been charged to Petitioner's Deposit Account, as authorized in the renewed petition.

With the present petition pursuant to 37 C.F.R. §1.378(e), Petitioner has again failed to meet the showing requirement under 37 C.F.R. §1.378(b)(3). A discussion follows.

The standard

35 U.S.C. §41(c)(1) states:

The Director may accept the payment of any maintenance fee... after the six-month grace period if the delay[3] is shown to the satisfaction of the Director to have been unavoidable.

§1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 37 C.F.R. §1.137(a). This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

> The word '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[4].

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3 This delay includes the entire period between the due date for the fee and the filing of a grantable petition pursuant to 37 C.F.R. §1.378(b).

4 In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913)

In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account."[5] Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."[6]

An adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely payment of the maintenance fees for this patent. Where the record fails to disclose that the patentee took reasonable steps, or discloses that the patentee took no steps, to ensure timely payment of the maintenance fee, 35 U.S.C. 41(c) and 37 C.F.R. §1.378(b)(3) preclude acceptance of the delayed payment of the maintenance fee under 37 CFR 1.378(b).
Furthermore, under the statutes and rules, the Office has no duty to notify patentees of the requirement to pay maintenance fees or to notify patentees when the maintenance fees are due. It is solely the responsibility of the patentee to assure that the maintenance fee is timely paid to prevent expiration of the patent. The lack of knowledge of the requirement to pay a maintenance fee and the failure to receive the Maintenance Fee Reminder will not shift the burden of monitoring the time for paying a maintenance fee from the patentee to the Office. Thus, in support of an argument that the delay in payment was unavoidable, evidence is required that despite reasonable care on behalf of the patentee and/or the patentee's agents, and reasonable steps to ensure timely payment, the maintenance fee was unavoidably not paid.[7]

Even if the Office were required to provide notice to applicant of the existence of maintenance fee requirements, such notice is provided by the patent itself.[8]

Docketing error

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay.

Such a showing should identify the specific error, the individual who made the error, and the business routine in place for performing the action which resulted in the error. The showing must establish that the individual who erred was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. The showing should include information regarding the training provided to the personnel responsible for the

5 Smith v. Mossinghoff, 671 F.2d at 538, 213 U.S.P.Q. at 982.
6 Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.
7 See MPEP 2590 (Manual of Patent Examining Procedure, Rev, Aug. 1, 2001).
8 See Ray v. Lehman, 55 F.3d 606, 610; 34 USPQ2d 1786, 1789 (Fed. Cir. 1995). The Letters Patent contains a Maintenance Fee Notice that warns that the patent may be subject to maintenance fees if the application was filed on or after December 12, 1980. While it is unclear as to who was and is in actual possession of the patent, Petitioner's failure to read the Notice does not vitiate the Notice, nor does the delay resulting from such failure to read the Notice establish unavoidable delay.

docketing error, degree of supervision of their work, examples of other work functions carried out, and checks on the described work which were used to assure proper execution of assigned tasks.

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that:

(1) the error was the cause of the delay at issue,
(2) a business routine was in place for performing the clerical function that could reasonably be relied upon to avoid errors in its performance, and;
(3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care.

See MPEP 711.03(c)(III)(C)(2).

An adequate showing should include (when relevant):

(1) statements by all persons with direct knowledge of the circumstances surrounding the delay, setting forth the facts as they know them;
(2) a thorough explanation of the docketing and call-up system in use;
(3) identification of the type of records kept;
(4) identification of the persons responsible for the maintenance of the system;
(5) copies of mail ledger, docket sheets, filewrappers and such other records as may exist which would substantiate an error in docketing;
(6) include an indication as to why the system failed in this instance, and;
(7) information regarding the training provided to the personnel responsible for the docketing error, degree of supervision of their work, examples of other work functions carried out, and checks on the described work which were used to assure proper execution of assigned tasks.

Portions of the Code of Federal Regulations and the MPEP relevant to the abandonment of this application

37 CFR 1.362. Time for payment of maintenance fees, states, in part:

(a) Maintenance fees as set forth in § § 1.20(e) through (g) are required to be paid in all patents based on applications filed on or after December 12, 1980, except as noted in paragraph (b) of this section, to maintain a patent in force beyond 4, 8 and 12 years after the date of grant.

(d) Maintenance fees may be paid in patents without surcharge during the periods extending respectively from:
(1) 3 years through 3 years and 6 months after grant for the first maintenance fee,
(2) 7 years through 7 years and 6 months after grant for the second maintenance fee, and
(3) 11 years through 11 years and 6 months after grant for the third maintenance fee.

(e) Maintenance fees may be paid with the surcharge set forth in § 1.20(h) during the

respective grace periods after:

(1) 3 years and 6 months and through the day of the 4th anniversary of the grant for the first maintenance fee.

(2) 7 years and 6 months and through the day of the 8th anniversary of the grant for the second maintenance fee, and

(3) 11 years and 6 months and through the day of the 12th anniversary of the grant for the third maintenance fee.

(f) If the last day for paying a maintenance fee without surcharge set forth in paragraph (d) of this section, or the last day for paying a maintenance fee with surcharge set forth in paragraph (e) of this section, falls on a Saturday, Sunday, or a federal holiday within the District of Columbia, the maintenance fee and any necessary surcharge may be paid under paragraph (d) or paragraph (e) respectively on the next succeeding day which is not a Saturday, Sunday, or Federal holiday.

(g) Unless the maintenance fee and any applicable surcharge is paid within the time periods set forth in paragraphs (d), (e) or (f) of this section, the patent will expire as of the end of the grace period set forth in paragraph (e) of this section. A patent which expires for the failure to pay the maintenance fee will expire at the end of the same date (anniversary date) the patent was granted in the 4th, 8th, or 12th year after grant.

MPEP 2515 Information Required for Submission of Maintenance Fee Payment states, in part:

If a patent expires because the maintenance fee and any necessary surcharge have not been paid in the manner required by 37 CFR 1.366, the patentee could proceed under 37 CFR 1.378 (see MPEP § 2590), if appropriate, or could file a petition under 37 CFR 1.377 (see MPEP § 2580) within the period set therein seeking to have the maintenance fee accepted as timely even though not all of the required identifying data was present prior to expiration of the grace period

2575 Notices

Under the statutes and the regulations, the Office has no duty to notify patentees when their maintenance fees are due. It is the responsibility of the patentee to ensure that the maintenance fees are paid to prevent expiration of the patent. The Office will, however, provide some notices as reminders that maintenance fees are due, but the notices, errors in the notices or in their delivery, or the lack or tardiness of notices will in no way relieve a patentee from the responsibility to make timely payment of each maintenance fee to prevent the patent from expiring by operation of law. The notices provided by the Office are courtesies in nature and intended to aid patentees. The Office's provision of notices in no way shifts the burden of monitoring the time for paying maintenance fees on patents from the patentee to the Office.

Application of the standard to the current facts and circumstances

In the original petition, Petitioner asserted that the patentee entrusted her patent application to one Mr. Garber, a non-registered practitioner. Not being qualified to prepare and prosecute the application, the non-registered practitioner retained the services of one Thomas Twomey. Mr. Twomey prosecuted the application to issuance in 1996. Mr. Twomey would bill Mr. Garber, and Mr. Garber would bill the patentee[9].

9 Declaration of patentee submitted with original petition, paragraphs 2-7

In 1996, Mr. Garber joined the law firm of Cooper and Dunham, and the patentee instructed Mr. Garber to track the maintenance fee payments for her patents[10]. Since Mr. Garber was not registered to practice before the Office, Cooper and Dunham assigned one Wendy Miller to represent the patentee in patent matters[11].

In 1996, Ms. Miller filed a design application for the patentee. In 1997, Ms. Miller sent patentee an invoice for the maintenance fee for design patent Des. 336,943[12]. Petitioner enclosed a copy of this invoice, and the invoice clearly identifies the billing as pertaining to this design patent, and sets forth that the 3½ year maintenance fee is due for this design patent[13]. The letter was sent from Cooper and Dunham to the patentee, was signed by Ms. Miller, and sets forth that the maintenance fee must be submitted no later than June 29, 1997. Petitioner has included a copy of a check dated June 13, 1997 which is for the same amount as that set forth in the invoice - $730.

It does not appear that Cooper and Dunham has refunded this money to the patentee.

Patentee received this invoice (which clearly indicates that it is associated with a design patent) and she assumed that it was associated with the present utility patent[14]. Patentee sent the required funds to Cooper and Dunham, thinking that she had just effectuated the payment of the 3½ year maintenance fee for the present patent.

Earlier this year, Mr. Garber advised patentee that the present patent had expired for failure to submit the 3½ year maintenance fee. After looking at the invoice, she realized that she had been billed for a maintenance fee for a patent other than the present one[15].

Patentee concluded that the law firm of Cooper and Dunham mistakenly entered the design patent into its docketing system. Petitioner states that she "never received notification from Wendy Miller that she had mistakenly identified a design patent as requiring payment of maintenance fees, and Cooper and Dunham, LLP never informed me of the oversight and never issued me a refund[16]..."

With the present renewed petition, Petitioner has indicated why the inventor was never informed that a maintenance fee was due for this utility patent – Cooper and Dunham's internal tickler system never generated a maintenance fee prompt. Cooper and Dunham did not prosecute the present application, and as such, the file was not in Petitioner's computer system. In such a case, in order for the maintenance fee information to be in the computer tracking system, the information would have had to have been input manually[17]. It has been established that Mr. Garber asked his

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10 Declaration of patentee submitted with original petition, paragraph 10.
11 Declaration of patentee submitted with original petition, paragraphs 11 and 12.
12 Declaration of patentee submitted with original petition, paragraphs 13, 17, and Appendix C.
13 It is noted that pursuant to 37 C.F.R. §1.362(b), maintenance fees are not required for design patents.
14 Declaration of patentee submitted with original petition, paragraph 13.
15 Declaration of patentee submitted with original petition, paragraphs 16-17.
16 Declaration of patentee submitted with original petition,, paragraph 18.
17 Katz declaration, paragraph 9.

secretary to open a patent file.[18] This did not occur[19]. She instead opened a patent infringement matter,[20] the problem being that patent files track maintenance fees, and patent infringement matters do not. As such, the present patent was never entered into Cooper and Dunham's maintenance fee tracking system, and a tickler was never generated for this utility patent. Why a tickler was generated for a design patent that does not carry a maintenance fee requirement remains a mystery.

Petitioner's explanation of the delay has been considered, and it has been determined that it fails to meet the standard for acceptance of a late payment of the maintenance fee and surcharge, as set by 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3). The period for paying the 3½ year maintenance fee without the surcharge extended from March 26, 1999 to September 27, 1999 and for paying with the surcharge from September 30, 1999 to March 26, 2000. Thus, the delay in paying the 3 ½ year maintenance fee extended from March 26, 2000 at midnight to the filing of the instant petition on August 1, 2005.

While this error might be considered unintentional if the situation was described by one having firsthand knowledge of the underlying events, it does not rise to the high standard associated with the characterization of a failure to respond as "unavoidable".

Petitioner has not fully addressed each of the issues raised in the decision on the original petition. As developed above, the patentee blames the failure to submit the maintenance fee in a timely manner on the fact that she thought that she had in fact paid it. The patentee averred that she received a maintenance fee invoice for her design patent, mistakenly thought that it was for her utility patent, and sent the money off, believing that the maintenance fee for her utility patent would be paid.

As set forth on page 7 of the previous decision,

> Patentee states that she received a maintenance fee reminder for her design patent, however it does not appear that she has stated that she never received a maintenance fee reminder concerning the present patent.

With this renewed petition, it is clear that a maintenance fee invoice was never sent for the utility patent. However, this renewed petition addresses only the reason why the maintenance fee invoice was never sent. Issues were raised in the decision on the original petition which have not been addressed with this renewed petition.

On page 7 of the decision on the original petition, it was asserted that upon receiving this notice, the patentee should have realized that something was amiss for two reasons:

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18 Garber declaration, paragraph 8.
19 Larmon declaration, paragraph 6.
20 Garber declaration, paragraphs 9.

- The invoice contains the Design patent number and title, both differ from the number and title of the utility application. It is not clear why one would confuse the two.
- Since the invoice was dated 14 months after the issuance of the utility patent, it is not clear why one would have thought that the 3½ year maintenance fee was due.

This renewed petition addresses neither of these points. As such, it has not been established that the entire period of delay has been unavoidable, on the part of the patentee.

Assuming arguendo that the patentee was not at least partially culpable for the delay, the analysis will next turn to the actions of Cooper and Dunham. Petitioner would have the Office determine that the mere hiring of a law firm to oversee the maintenance fee tracking should result in the finding of an unavoidable delay. On the fourth page of the renewed petition, Petitioner sets forth:

> by virtue of Cooper and Dunham's reputation and experience, patentee submits that patentee's reliance on Cooper and Dunham was reasonable, and demonstrates an exercise of due care with regard to ensuring timely payment of maintenance fees.

Such is not the case. It is well settled that the actions of the attorney are imputed to the client and clients are therefore bound by the actions of their lawyers[21]. Accordingly, where a patentee relies upon counsel to track and pay maintenance fees, the focus shifts to whether counsel's delay was unavoidable[22]. The actions of the attorney are imputed to the client, for when a petitioner voluntarily chooses an attorney to represent him, the petitioner cannot later distance avoid the repercussions of the actions or inactions of this selected representative, for clients are bound by the acts of their lawyers/agents, and constructively possess "notice of all facts, notice of which can be charged upon the attorney[23]." The Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and the applicant is bound by the consequences of those actions or inactions[24]. Specifically, Petitioner's delay caused by the mistakes or negligence of his voluntarily chosen representative does not constitute unavoidable delay within the meaning of the statue[25]. Courts hesitate to punish a client for its lawyer's gross negligence, especially when the lawyer affirmatively misled the client, but "if the client freely chooses counsel, it should be bound to counsel's actions[26]."

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21 See Winkler v. Ladd, supra.
22 California Medical Products v. Technol Medical Products, 921 F. Supp. 1219, 1259 (D. Del. 1995).
23 Link at 633-634.
24 Link v. Wabash, 370 U.S. 626, 633-634 (1962).
25 Haines, 673 F.Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32; Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 103, 131 (Comm'r Pat. 1891).
26 Inryco, Inc. v. Metropolitan Engineering Co., Inc., 708 F.2d 1225, 1233 (7th Cir. 1983). See also, Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985); LeBlanc v. I.N.S., 715 F.2d 685, 694 (1st Cir. 1983).

With this renewed petition, Petitioner has submitted that the secretary employed by Mr. Garber, the individual who erroneously entered the patent not as a patent file but rather as a patent infringement matter, was one Jennifer Torres[27]. Petitioner has concurrently filed an amended submission, where it is set forth that the secretary was not Ms. Torres, but rather one Erin Lehn[28]. Since both the petition and the amended submission were presented together, Petitioner was aware of this error at the time he presented his petition. It is not clear why he would choose to submit erroneous information to the Office, rather then merely correcting his petition and presenting a submission that is not accurate.

Mr. Katz has indicated that Cooper and Dunham is not in possession of the file jacket[29], and that Cooper and Dunham's records do not indicate the training which was provided to Ms. Lehn[30]. Mr. Katz proffers the level of training which is customarily provided to Mr. Garber's secretaries, but whether this was provided to Ms. Lehn is unknown.

The petition makes reference to another secretary who worked for Mr. Garber, but it does not appear that any of the involved individuals are able to recall this person's name[31]. It seems plausible that this unknown individual could have been the one to make the erroneous entry which led to the failure to timely submit the maintenance fee. Confusion as to who precisely was the secretary for Mr. Garber at the relevant times is reflected in the Felber declaration (at paragraph 7).

Cooper and Dunham records have established that Ms. Lehn was employed by the firm from March 4, 1996 to January 30, 1997.

Petitioner has established the error which was the cause of the delay at issue, provided a thorough explanation of the docketing and call-up system in use, provided identification of the type of records kept, and has included an indication as to why the system failed in this instance.

Petitioner has not submitted statements by all persons with direct knowledge of the circumstances surrounding the delay, setting forth the facts as they know them. First, Petitioner has not submitted a statement of facts from Ms. Lehn, because Mr. Felber has not been able to locate her. He called a few telephone numbers which Cooper and Dunham provided him with, as well as directory assistance in the area where she was last known to live. However, it is noted that Ms. Lehn left the employ of Cooper and Dunham in January of 1997 – therefore, these leads appear to be close to 9 years old. Petitioner would be hard pressed to characterize leads as aged as these as reliable. Furthermore, it is not clear why Mr. Felber would limit his search to the area in which she lived almost a decade ago, since it is entirely plausible that she has moved since

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27 Katz declaration, paragraph 6 and Greenbaum declaration, paragraph 6.
28 Amended submission, page 1.
29 Katz declaration, paragraph 7.
30 Katz amended declaration, paragraph 10.
31 Garber declaration, paragraph 7, Garber amended declaration, paragraph 7, Miller amended declaration, paragraph 10.

that time. The narrowness of Mr. Felber's search appears to have been destined to fail. Due to the prevalence of a plurality of free to low-cost online directories which are capable of locating people anywhere in the US, it is not clear why Mr. Felber did not expand his search to one which had a greater probability of locating the target.

Furthermore, Petitioner has not submitted a statement of facts from Mr. Garber's other secretary, and no search can be attempted because nobody is able to remember this individual's name. It follows that without this person's name, Petitioner will not be able to identify each of the persons responsible for the maintenance of the system.

Cooper and Dunham is not in possession of the file jacket, and as such, they are not in a position to provide a copy of the filewrapper which might be able to explain why the error in docketing occurred.

Petitioner is also not in a position to provide information regarding the training provided to either Ms. Lehn or the unnamed party.

Petitioner has not provided the degree of supervision of the work provided to either of these individuals. However, if the secretaries are free to mis-characterize patent files as patent infringement files, and nobody determines these errors for years, this would suggest that very little supervision is provided to them, and no checks are performed on the described work in order to assure proper execution of assigned tasks.

Regarding the unnamed individual, her level of experience is not clear. In regards to Ms. Lehn, she was hired on March 4, 1996. Therefore, she had just over three months of experience on the day when this patent issued on March 26, 1996. Since the level of training provided to Ms. Lehn has not been established, the Office cannot determine if 3 months of work provided sufficient experience to Ms. Lehn such that unsupervised and unchecked reliance on her constituted a reasonable entrustment.

CONCLUSION

Petitioner has not fully addressed each of the issues raised in the decision on the original petition. Furthermore, Petitioner has not met the requirements of 37 C.F.R. §1.378(b)(3), as discussed at length above. For the reasons enumerated in this decision, Petitioner has not established that the entire period of delay has been unavoidable.

The prior decision which refused to accept, under 37 C.F.R §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, the petitioner is entitled to a refund of the surcharge and the 3½ and 7½ year maintenance fees, but not the $400 fee associated with the filing of the instant renewed petition under 37 C.F.R. §1.378(e). The money will be refunded to Petitioner's Deposit Account in due course.

It is noted that the address listed on the petition differs from the address of record. The application file does indicate that a change of correspondence address has been filed in this case, however the request appears to contain a typographical error. The request indicates that the inventor has expressed her desire to have the correspondence address for the present patent changed to the address associated with Customer Number "2352." Unfortunately, this is not the correct number of digits for a Customer Number, as Customer Numbers are 5 digits in length. Accordingly, the correspondence address cannot be changed.

The general phone number for the Office of Petitions which should be used for status requests is (571) 272-3282. Telephone inquiries regarding this decision should be directed to Senior Attorney Paul Shanoski at (571) 272-3225.

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Director
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cc: Douglas Miro
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