

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Randi Black,

Plaintiff

v.

Ce Soir Lingerie Co., Inc.,
Bragel International, Inc.,
Dillard's, Inc.,
Federated Department Stores, Inc.,
Gap, Inc.,
The Neiman Marcus Group, Inc.
Nordstrom, Inc., and
Victoria's Secret Stores, LLC,

Defendants

Civil Action No. 2:06-cv-544 (DF-JDL)

Jury Demanded

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF PATENT
INVALIDITY ON THE GROUNDS THAT THE PATENT IN SUIT ISSUED FROM
AN UNLAWFULLY REVIVED APPLICATION**

Defendants move this Court pursuant to Rule 56(b), Fed. R. Civ. P., for an order granting summary judgment that United States Patent No. 7,152,606 (the "'606 Patent") is invalid because it issued from an application that was abandoned and then unlawfully revived. Therefore, Defendants have not directly infringed or induced infringement of the '606 Patent.

Plaintiff has alleged that Defendants have infringed the '606 Patent by their sale of a product known as NuBra. However, the application that matured into the '606 Patent, Application Serial No. 09/152,992 (the '992 Application), was abandoned by Plaintiff in 1999 and revived in 2006 based on Plaintiff's statements that the entire delay in prosecuting the application was "unintentional." The revival of the '992 Application was unlawful because the only basis for reviving an application that had been abandoned on the basis that the application was not timely prosecuted is a showing that the delay was "unavoidable," a showing that Plaintiff did not make. In view thereof, revival of the '992 Application by the United States Patent and Trademark

Office constituted an abuse of discretion. Consequently, the '606 Patent is invalid and summary judgment that Defendants have not infringed the '606 Patent is in order because, as a matter of law, an invalid patent cannot be infringed.

I. INTRODUCTION.

This litigation involves a claim by Plaintiff Randi Black ("Black") that Defendants infringe U.S. Patent No. 7,152,606 ("the '606 Patent"). The '606 Patent issued from U.S. Patent Application Serial No. 09/152,992 ("the '992 Application"), which was filed on September 14, 1998. On March 16, 1999, the U.S. Patent and Trademark Office ("PTO") issued an Office action rejecting the '992 Application. Black failed to file a timely response to the Office action, and, as a result, the '992 Application went abandoned. On November 9, 1999, the PTO provided notification of the abandonment.

Over five years later, on March 28, 2005, Black filed a petition to revive the '992 Application on the basis that the entire delay in responding to the Office action of March 16, 1999, was unintentional. The PTO granted Black's petition on March 20, 2006, and the '606 Patent issued from the '992 Application on December 26, 2006.

Because Black's petition merely addressed an "unintentional" standard rather than the higher "unavoidable" standard required under 35 U.S.C. § 133, the PTO abused its discretion in reviving the '992 Application. As such, the Court should find that the PTO's revival of the '992 Application was unlawful and that the resulting '606 Patent is invalid.

II. STATEMENT OF ISSUES.

1. Whether the United States Patent and Trademark Office unlawfully revived Patent Application No. 09/152,992 because the Applicant failed to show that her delay in prosecuting the application was unavoidable as required by 35 U.S.C. §133.

2. Whether U.S. Patent No. 7,152,606 is invalid because it issued from an application which had been abandoned and then unlawfully revived.

III. STATEMENT OF MATERIAL FACTS.

The PTO file history of the '606 Patent¹ and the pleadings in this action provide the following undisputed facts.

On September 14, 1998, Black filed the '992 Application using the law firm of Kleinberg & Lerner ("the KL firm"). (Schwartz Decl., Exh. A, pp.P4883-4892.) On November 12, 1998, the PTO issued a first Office action, and a response to the first Office action was filed on December 29, 1998. (*Id.* pp. P4931-4934 and P4935-4940, respectively.) On March 16, 1999, the PTO issued a final Office action. (*Id.* pp. P4941-4944.) The final Office action included the following statement:

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR § 136(a). (*Id.* p. P4941)

In a declaration filed with the PTO on March 28, 2005, Black alleged that she had instructed the KL firm to respond to the final office action. (*Id.* at p. P4972.) However, the KL firm did not file a timely response. (*Id.* p. P5040)

On June 15, 1999, the '992 Application was abandoned. (See *Id.* p. P5040) On November 9, 1999, the PTO issued a Notice of Abandonment to the KL firm. (*Id.* p. P4945)

In a petition filed with the PTO in March 2005, Black alleged that, on March 31, 2000, the KL firm filed a petition to revive the '992 Application on the grounds that the entire delay in responding was unintentional. Black also alleged that payment of a petition fee was submitted. (*Id.* p. P4967) However, Black acknowledged that no record of the petition or fee could be

¹ A true copy of excerpts from the file history of the '606 Patent as produced during discovery by Plaintiff is attached as Exhibit A to the Declaration of Edward R. Schwartz ("Schwartz Decl.") submitted herewith. Page references to the exhibit refer to the document numbers designated by Plaintiff, i.e., "P____."

located in PTO records. (*Id.* p. P4968)

Between December 2001 and April 2004, Black transferred the '992 Application to several different firms and/or attorneys. (*Id.* p. P4946-4950)

In April 2004, Black spoke with Larry Schwartz of the PTO Customer Service Center, who informed Black that the '992 Application had been abandoned in November 1999. (*Id.* p. P4973)

Almost one year later, on March 28, 2005, Attorney David L. Hoffman ("Hoffman") filed a "Petition To Revive Unintentionally Abandoned Application and Verified Response" on behalf of Black. (*Id.* pp. P4964-4970) The petition included declarations signed by Hoffman and Black. (*Id.* pp. P4964-4970 and 4972-4973) Both declarations included the following statement: "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." Black did not attempt to show that the delay was unavoidable. (*Id.* pp. P4968 and P4973; See also P5033-5034)

On or around March 20, 2006, the PTO issued a decision granting Black's petition. (*Id.* pp. P5040-5043) Regarding the petition allegedly filed by KL, the PTO noted:

Petitioner alleges a petition under 37 CFR 1.137(b) and a check for the \$605 petition fee were submitted to the office on March 31, 2000. A copy of the petition and check have been submitted. Office records do not indicate the receipt of the petition or the check. The March 31, 2000 petition does include a certificate of mailing signed by Helen Benninger, an employee of [the KL firm]. However, a statement by Ms. Benninger, or a member of Kleinberg, has not been submitted. (*Id.* p. P5041).

The PTO further noted:

Attorney Hoffman was not an attorney of record at the time the application became abandoned. Attorney Hoffman was not in a position to have firsthand or direct knowledge of all the facts and

circumstances of the delay. Nevertheless, the statement by Hoffman that the entire delay was unintentional is being treated as having been made as the result of a reasonable inquiry into the facts and circumstances of the delay. (*Id.* p. P5042)

Despite the above reservations, the PTO granted the petition to revive the '992 Application. (*Id.*) Examination of the '992 Application proceeded, and the '606 Patent issued from the '992 Application on December 26, 2006. (*Id.* p. P4852)

On December 27, 2007, Black commenced this action alleging that Defendants infringed the '606 Patent.

IV. LEGAL STANDARDS REGARDING SUMMARY JUDGMENT.

Rule 56(c) of the Federal Rules of Civil Procedure authorizes a Court to grant summary judgment where “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A party moving for summary judgment can satisfy its initial burden of establishing its right to judgment by showing that “there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Once the moving party has met this initial burden, the burden shifts to the opposing party, which is required to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party opposing summary judgment “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

V. THE '606 PATENT IS INVALID BECAUSE THE '992 APPLICATION WAS ABANDONED UNDER 35 U.S.C. § 133 AND REVIVAL OF THE ABANDONED APPLICATION WAS UNLAWFUL.

A. 35 U.S.C. § 133 Requires A Showing Of An "Unavoidable" Rather Than Merely An "Unintentional" Delay.

The statutory requirement at issue is unambiguous. 35 U.S.C. § 133 provides:

Upon failure of the applicant to prosecute the application within six months after an action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Director in such action the application **shall** be regarded as abandoned by the parties thereto, **unless it be shown** to the satisfaction of the Director that such delay was **unavoidable**. (Emphases added.)

"Shall" is a term used in statutes to impose an affirmative, non-discretionary obligation. *Lopez v. Davis*, 531 U.S. 230, 241 (2001). ("Congress use[s] 'shall' to impose discretionless obligations.") [T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

"Unless" introduces a condition that must be satisfied. See Webster's Third New International Dictionary (2002) "Shown" means that proof is required. See Black's Law Dictionary (8th Ed. 2004)

"Unavoidable" here means that the failure and delay must be shown to be both "unintentional" and not negligent. See *Ray v. Lehman*, 55 F.3d 606, 608-609 and n.1 (Fed. Cir. 1995), cert. denied 516 U.S. 916 (1995) ("unavoidable" standard is higher than "unintentional" standard and requires proof that reasonable care was exercised); *Haines v. Quigg*, 673 F. Supp. 314, 316-317 (N.D. Ind. 1987) (proof of reasonable care required).

"If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Board of*

Governors of Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986) (holding that a regulation was invalid because it conflicts with an unambiguous statute). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) (citations omitted).

1. Congress Distinguishes "Unavoidable" From "Unintentional" Failures.

Where Congress intends to authorize the Patent Office to revive an abandoned application for merely "unintentional" failures, it says so. *See, e.g.*, 35 U.S.C. § 111(a)(4) and (b)(3)(C) (application abandoned for failure to timely file certain fees or oath unless delay was "unavoidable or unintentional"); 35 U.S.C. § 122(b)(2)(B)(iii) (application abandoned for failure to timely notify PTO of the filing of an international application unless delay "unintentional"); *Ray*, 55 F.3d at 608-609, n.1 (35 U.S.C. § 41(c) authorizes revival for "unintentional" delays, in addition to "unavoidable" delays).

2. The Patent Office Has No Authority to Disregard the Statute.

The Patent Office has no authority to ignore or dilute the explicit "unavoidable" standard. *See Lorenz v. Finkl*, 333 F.2d 885, 891 (CCPA 1964) ("Section 133 permits revival of an abandoned application when 'it be shown to the satisfaction of the Commissioner' that delay in prosecuting was unavoidable and no such showing was made."); *In re Recreative Techs. Corp.*, 83 F.3d 1394, 1398 (Fed. Cir. 1996) ("Although Congress may entrust the administrative agency with administration of a statute, the agency cannot depart from the statutory purpose"); *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543, 1549-1550 (Fed. Cir. 1996), cert. denied 519 U.S. 1101 (1997) ("Because Congress has not vested the [Patent Office] Commissioner with any general substantive rulemaking power," there is no controlling deference afforded to the Patent Office's interpretation of substantive provisions of the Patent Act). *Cf. Board of Governors of Federal Reserve System*, 474 U.S. at 368 (holding regulation invalid because it conflicts with statute).

The foregoing issues were recently discussed in detail in *Aristocrat Technologies v. Int'l Game Tech.*, 491 F. Supp. 2d 916 (N.D. Cal. 2007). In determining that § 133 requires application of the "unavoidable" standard **exclusively**, the court in *Aristocrat Technologies* examined the plain meaning of the statutory text and analyzed the relevant legislative history. *Id.* at 925-927.

The Court first found the plain language of § 133 to be "clear and unambiguous." *Id.* at 925. It observed that, without referring to an "unintentional" standard, the statute "explicitly prescribe[s] that a patent application 'shall be regarded' as abandoned unless it can be shown that the delay was 'unavoidable.'" *Id.* (quoting 35 U.S.C. § 133). Citing other portions of the Patent Act, the Court found that Congress "intended a distinction between the 'unavoidable' and 'unintentional' standards." *Id.* at 926 (citing 35 U.S.C. §§ 111(a)(4), 111(b)(3)(C), and 122(b)(2)(B)(iii)). This distinction, the Court reasoned, supported the conclusion that "Congress created different standards [to be used] in evaluating certain delays [by a] patentee." *Id.* Because the express language of § 133 only referred to the "unavoidable" standard, the Court concluded that the "unavoidable" standard was the sole standard which governed the evaluation of delays under § 133. *Id.*

Although the Court noted that its conclusion could rest solely on the plain meaning of § 133, it nevertheless also examined the relevant legislative history to bolster its conclusion. Here, the Court found that the legislative history "contemplate[s] application of the 'unavoidable' standard and not the 'unintentional' standard. *Id.* It first observed that "the 'unavoidable' standard 'as it is contained in . . . § 133 has remained unchanged since first enacted in 1861.'" *Id.* (citing *Haines*, 673 F. Supp. at 316-17). The Court further noted that Congress could have amended the statute to include an "unintentional" standard -- for example, when it enacted 35 U.S.C. § 41(a)(7)² -- but that it chose not to do so. *Id.* As such, the Court discerned that Congress did not intend to add an "unintentional" standard to the existing "unavoidable" standard

² Enacted in 1982, § 41(a)(7) established the amount of certain statutory fees for revival of an "unintentionally" abandoned patent application. *Id.* (quoting 35 U.S.C. § 41(a)(7)).

set forth in § 133. *Id.* Therefore, the legislative history also supported the conclusion that the "unavoidable" standard exclusively governs the review of delays under § 133.

Finally, the Court found that another section of the Patent Act, namely, 35 U.S.C. § 41, did not compel a different conclusion. *Id.* at 927-928. It reasoned that § 41 "[did] not state, or otherwise indicate, an intent to change or curtail the 'unavoidable' standard set forth in [§ 133]." *Id.* at 927. Rather, the language of § 41(a)(7) "explicitly refer[red] to other sections of the Patent Act that are exclusively subject to the 'unavoidable' standard," including § 133, and therefore recognized the continuing existence of the exclusive standard set forth in § 133. *Id.* at 927-928. Therefore, § 41 "[did] not modify or alter Section 133 . . . which expressly require[d] 'unavoidable' delays in order to revive abandoned applications." *Id.* at 928.

In sum, the Court in *Aristocrat Technologies* concluded that § 133 requires a showing of an "unavoidable" delay.

B. The '992 Application Should Not Have Been Revived Because Black Failed To Prove That Her Delay In Responding To The Action of March 16, 1999, Was "Unavoidable," And Therefore The '606 Patent Is Invalid.

A patent is invalid if it issued from an abandoned application that the Patent Office lacked statutory authority to revive. *See Lawman Armor Corp. v. Simon*, 74 U.S.P.Q. 2d 1633 1638 (E.D. Mich. 2005) (patent invalid where Patent Office unlawfully revived abandoned application); *Arrow Int'l v. Spire Biomedical*, 443 F. Supp. 2d 182, 185 (D. Mass. 2006) ("failure of a revival petition is effectively a determination of abandonment and consequent invalidity"); *BEC Pressure Controls Corp. v. Dwyer Instruments, Inc.*, 380 F. Supp. 1397, 1400 (N.D. Ind. 1974) (summary judgment of patent invalidity where Patent Office unlawfully revived abandoned application); *See New York Univ. v. Autodesk, Inc.*, 466 F. Supp. 2d 563 (S.D.N.Y. 2006) (in infringement action, "Court has the power to review a PTO determination granting revival of abandoned application for whether it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'").

When an applicant fails to respond to a PTO action within the statutorily-prescribed time period and fails to prove that the delay in responding was unavoidable, the subject application is abandoned. See 35 U.S.C. § 133. Absent proof that the delay was unavoidable, revival of the abandoned application by the PTO constitutes an abuse of its discretion. *Aristocrat Technologies*, 491 F. Supp. 2d at 933-934; See also *Eby v. King*, 158 U.S. 366, 371-372 (1895) (affirming invalidity of patent reissued with broader claims where patentee made no attempt to satisfy the statutory standards, stating that it was "exceedingly doubtful" that the Patent Office "obtains any jurisdiction to act at all" in the absence of some attempt to satisfy the statutory standards); *Camp v. Pitts*, 411 U.S. 138, 138-141 (1973) (agency action invalid when it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law).

As stated in the concurring opinion in *Lorenz* 333 F.2d at 895-896 (CCPA 1964):

. . . Thus, it seems to me that 35 U.S.C. 133 is controlling. Under these circumstances, applicant had not prosecuted the application within 6 months from the date of the final rejection and this section of the statute requires that in such case the application 'shall be regarded as abandoned by the parties thereto.' The abandonment stands 'unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.' It is clear from the record here that appellant made no such showing.

There is no provision in Title 35 U.S.C. which authorizes the *sua sponte* revival by the Patent Office of an application which has been abandoned under 35 U.S.C. 133. Section 133 authorizes revival of such an abandoned application only upon a showing 'to the satisfaction of the Commissioner' that the delay was unavoidable. There is no such showing here.

1. Black Never Attempted to Show "Unavoidable" Delay.

Black made no attempt to meet the statutory standard that the entire period of her delay in prosecuting the '922 Application was "unavoidable." Instead, she merely filed a petition to revive alleging that the "entire delay" was "unintentional." That is the wrong standard and is not a "showing" of "unavoidable" delay. Accordingly, the '606 Patent that issued from the unlawfully revived '992 Application is invalid. See *Aristocrat Technologies* at 936-937.

In *Aristocrat Technologies*, the PTO issued a notice to plaintiffs' attorney of record on June 5, 2001, reaffirming abandonment of plaintiffs' patent application. *Id.* at 920.³ The notice stated: "The application remains ABANDONED. Any reconsideration on the merits of this petition must be filed within TWO (2) MONTHS from the mail date of this decision." *Id.* (emphases and capitalization in original). Over one year later, on July 18, 2002, plaintiffs' attorney filed a petition to revive the application. *Id.* at 921. The petition stated that "[t]he entire delay in filing the required reply until the filing of a grantable petition . . . was unintentional." *Id.* On September 3, 2002, the PTO granted plaintiffs' petition to revive the abandoned application, and U.S. Patent No. 7,056,215 ("the '215 Patent") later issued from the revived application. *Id.* at 922.

The court in *Aristocrat Technologies* held that the '215 Patent was invalid because it was unlawfully revived. *Id.* at 936-937. The court first explained that "[a] PTO action is generally reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., and 'may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 931 (citing *Ray*, 55 F.3d at 608 (quoting 5 U.S.C. § 706(2)(A))). The court then set aside the PTO's revival of the application, finding that the PTO had abused its discretion in granting plaintiffs' petition. The court reasoned that the statutory requirements governing such circumstances were set forth in § 133. *Id.* at 933. It agreed with defendants that the petition was flawed because the petition merely stated in a

³ The PTO had previously notified plaintiffs that the application was abandoned for failure to pay a fee by a required deadline. *Id.* at *6-7.

conclusory fashion that "[t]he entire delay . . . was unintentional." *Id.* at 932. In more detail, it found that, because § 133 requires a showing that the delay was "unavoidable," "the PTO's decision to revive the [application] -- without a showing to the Director that the failure was unavoidable -- was an abuse of discretion because the PTO's decision was 'not in accordance with law.'" *Id.* at 934 (citing *Ray*, 55 F.3d at 608). Because the application was abandoned and revival of the application was unlawful, the court concluded that the claims of the '215 patent were invalid. *Id.* at 936-937.

Similar to the situation in *Aristocrat Technologies*, the PTO mailed a final office action to Black's then-attorney of record at the KL firm on March 16, 1999. Black failed to meet both the shortened three-month deadline set forth in the final office action and the six-month deadline set forth in § 133. Whereas plaintiffs in *Aristocrat Technologies* did not file a petition to revive their application until over a year after abandonment of their application was reaffirmed, Black did not file the petition to revive the '992 Application until March 28, 2005 -- **over five years** after the respective mailing dates of both the final office action and the notice of abandonment.⁴ Furthermore, both Black and Hoffman stated in their respective declarations that "[t]he 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**." (Emphasis added.) Neither Black nor Hoffman attempted to explain that the delay was unavoidable.

Indeed, the declaration submitted by Black with her Petition to Revive demonstrates that Black's delay was not "unavoidable" since a purposefully chosen course of conduct that results in a delay does not qualify as an unintentional delay, much less an "unavoidable" delay. *Field Hybrids, LLC v. Toyota Motor Corp.*, 2005 U.S. Dist. LEXIS 1159, *18-19 (D. Minn. 2005).⁵ In *Field Hybrids*, the Court found that plaintiffs "dawdled" in attempting to revive an abandoned

⁴ Black alleges that a prior petition to revive had been filed on March 31, 2000 although the PTO had no record of such a filing. However, even the alleged prior petition, like the petition in *Aristocrat Technologies*, merely stated that the delay in filing the reply was unintentional and did not provide any basis for finding that the delay was unavoidable. See Schwartz Decl. Exh. A., pp. P4975-4978; P4980-4981.

⁵ A true copy of this decision is attached as Exhibit B to the Schwartz Declaration.

application and held that this delay alone precluded revival of the application. *Id.* at *22-23. In the present case, Black stated in her declaration that she learned that the '992 Application was abandoned in April 2004 when she contacted Mr. Schwartz at the PTO. Nevertheless, Black did not file a petition to revive the '992 Application until nearly a year later, on March 28, 2005. The declarations submitted by Black and her attorney Hoffman in support of Black's Petition to Revive did not even attempt to explain why this year-long delay was "unavoidable." (See Schwartz Decl., Ex. A, pp. 4972-4973; P4966-4969) Because Black did not show in her petition for revival of the '992 Application that this delay in prosecuting the Application was "unavoidable," revival of the '992 Application was an abuse of discretion.

In summary, Section 133 requires a showing that a delay in excess of six months in responding to a PTO action was unavoidable and not merely unintentional. Consequently, Black's petition to revive the '992 Application was flawed because she did not show that the entire, over-five-year-long delay in responding to the final Office action was unavoidable. Instead, her petition merely alleged that the delay was unintentional. Even so, without requiring any further information that the entire delay was unavoidable, the PTO granted Black's petition. Just as the PTO had abused its discretion in reviving the application at issue in *Aristocrat Technologies*, the PTO similarly abused its discretion in reviving the '992 Application. Because revival of the '992 Application was unlawful and the '992 Application should have remained abandoned, the '606 Patent is invalid.

VI. CONCLUSION.

The PTO's revival of the '992 Application was unlawful because Black did not prove that her entire delay in responding to the PTO office action rejecting the '992 Application was unavoidable. Therefore, the revival of the '992 Application by the PTO constituted an abuse of discretion. Consequently, the Court should find that the '992 Application was abandoned and should enter judgment that the '606 Patent is invalid.

Dated: September 12, 2007

Respectfully submitted,

/s/ E. Glenn Thames, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on September 12, 2007 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by U.S. first class mail.

/s/ E. Glenn Thames, Jr.

E. Glenn Thames, Jr.

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