
No. 2008-1016

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LIMITED and
ARISTOCRAT TECHNOLOGIES, INC.,

Plaintiffs/Appellants,

v.

INTERNATIONAL GAME TECHNOLOGY and IGT,

Defendants/Appellees.

Appeal from the United States District Court for the
Northern District of California

**BRIEF OF NEUROTECHNOLOGY INDUSTRY ORGANIZATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS
AND URGING REVERSAL**

Harold J. McElhinny
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000

Seth M. Galanter
Priya B. Viswanath
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
Telephone: (202) 887-6947
Facsimile: (202) 887-0763

December 13, 2007

CERTIFICATE OF INTEREST

Pursuant to Circuit Rules 27(a)(7) and 47.4(a)(1), counsel for the *amicus curiae* certifies the following:

1. The full name of every party represented by me is:

Neurotechnology Industry Organization

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

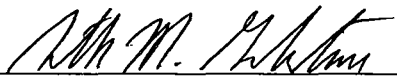
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

From Morrison & Foerster LLP:
Harold J. McElhinny
Seth M. Galanter
Priya B. Viswanath

December 13, 2007



Seth M. Galanter

TABLE OF CONTENTS

CERTIFICATE OF INTEREST	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUE	1
STATEMENT OF THE INTEREST OF <i>AMICUS CURIAE</i>	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	9
I. CONGRESS AUTHORIZED THE PTO IN SECTION 41(a)(7) TO REVIVE UNINTENTIONALLY ABANDONED PATENT APPLICATIONS.....	9
A. The PTO’s Interpretation Of Section 41(a)(7) As A Grant Of Authority To Revive Unintentionally Abandoned Applications, And Not Simply A Fee-Collection Statute, Is Consistent With The Text And Purpose Of The 1982 Act That First Enacted This Provision.....	10
B. Subsequent Statutory Amendments Confirm Congress’s Intent And Ratify The PTO’s Longstanding Interpretation	14
1. The 1999 amendment to Section 41(a)(7) confirms Congress’s intent that the PTO possess the authority to revive unintentionally abandoned applications.....	15
2. Congress’s amendment to the trademark law to add unintentional abandonment in order to make it parallel to the Patent Act would be frustrated if the district court’s reading of Section 41(a)(7) were adopted	18
II. RETROACTIVE APPLICATION OF ANY INTERPRETATION OF SECTION 41(a)(7) OTHER THAN THAT ADOPTED BY THE PTO MORE THAN 25 YEARS AGO WOULD DISRUPT SETTLED EXPECTATIONS AND BE CONTRARY TO THE PURPOSES OF THE PATENT ACT.....	19
A. Accepting The District Court’s Opinion Would Establish A New Principle Of Law.....	21

B. Retroactive Application Of The District Court’s New Rule Would Be
Contrary To The Policies Of The Patent Act And Would Produce
Substantial Inequitable Results..... 24

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

<i>Bender v. Dudas</i> , 490 F.3d 1361 (Fed. Cir. 2007).....	10
<i>Brown v. GSA</i> , 425 U.S. 820 (1976)	19
<i>CFTC v. Schor</i> , 478 U.S. 833 (1986).....	17
<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97 (1971).....	6, 20
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	10
<i>Crowe v. Bolduc</i> , 365 F.3d 86 (1st Cir. 2004).....	21, 25
<i>Disabled American Veterans v. Secretary of Veterans Affairs</i> , 419 F.3d 1317 (Fed. Cir. 2005), <i>cert. denied</i> , 126 S. Ct. 2319 (2006)	12
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001)	13
<i>Enzo Therapeutics, Inc. v. Yeda Research and Development Co.</i> , 477 F. Supp. 2d 699 (E.D. Va. 2007)	23
<i>Ferguson Beauregard v. Mega Systems, L.L.C.</i> , No. 6:99cv437, 2001 U.S. Dist. LEXIS 25682 (E.D. Tex. Aug. 31, 2001)	23
<i>Field Hybrids, LLC v. Toyota Motor Corp.</i> , No. 03-4121, 2005 U.S. Dist. LEXIS 1159 (D. Minn. Jan, 27, 2005).....	23
<i>Futures Technology, Ltd. v. Quigg</i> , 684 F. Supp. 430 (E.D. Va. 1988).....	23
<i>George v. Camacho</i> , 119 F.3d 1393 (9th Cir. 1997) (en banc).....	21
<i>Harper v. Virginia Department of Tax</i> , 509 U.S. 86 (1993).....	20
<i>Holt v. Shalala</i> , 35 F.3d 376 (9th Cir. 1994).....	27

<i>Lawman Armor Corp. v. Simon</i> , 74 U.S.P.Q.2d 1633 (E.D. Mich. 2005)	23
<i>Lindahl v. OPM</i> , 470 U.S. 768 (1985)	19
<i>In re Mersmann</i> , 505 F.3d 1033, 2007 U.S. App. LEXIS 23634 (10th Cir. Sept. 24, 2007) (en banc)	20, 27
<i>Mitchell v. City of Sapulpa</i> , 857 F.2d 713 (10th Cir. 1988).....	27
<i>Morganroth v. Quigg</i> , 885 F.2d 843 (Fed. Cir. 1989)	23
<i>Newell Cos. v. Kenney Manufacturing Co.</i> , 864 F.2d 757 (Fed. Cir. 1988), <i>cert. denied</i> , 493 U.S. 814 (1989).....	26
<i>Overland Motor Co. v. Packard Motor Car Co.</i> , 274 U.S. 417 (1927).....	11
<i>Saint Francis College v. Al-Kazraji</i> , 481 U.S. 604 (1987)	20
<i>Sanofi-Synthelabo v. Apotex, Inc.</i> , 470 F.3d 1368 (Fed. Cir. 2006).....	25
<i>Shah v. Pan American World Services, Inc.</i> , 148 F.3d 84 (2d Cir. 1998)	21
<i>SmithKline Beecham Corp. v. Apotex Corp.</i> , 439 F.3d 1312 (Fed. Cir. 2006)	24
<i>Suntiger, Inc. v. Telebrands Adver., Inc.</i> , No. 97-423-A, 1997 WL 855581 (E.D. Va. July 11, 1997)	23
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	21
<i>Total Containment Inc. v. Buffalo Environmental Products Corp.</i> , 35 U.S.P.Q.2d 1385 (E.D. Va. 1995).....	23
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001)	13

STATUTES

35 U.S.C.

§ 2(b)(2)(A)	10
§ 41(a)(7)	<i>passim</i>
§ 111	13
§ 111(a)(4)	12
§ 119	13
§ 120	13
§ 122	13
§ 133	<i>passim</i>
§ 151	11, 12, 22
§ 305	15, 16, 17
§ 371	22
§ 371(d).....	12
Act of July 19, 1952, ch. 950, 66 Stat. 792	11
Act of Jan. 2, 1975, Pub. L. No. 93-601, 88 Stat. 1956	11
Act of Aug. 27, 1982, Pub. L. No. 97-247, 96 Stat. 317.....	11, 12, 18, 22
Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).....	13
Trademark Law Treaty Implementation Act of 1998, Pub. L. No. 105-330, 112 Stat. 3064	18
District of Columbia Appropriations Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999).....	13, 16

PATENT AND TRADEMARK OFFICE MATERIALS & DECISIONS

37 C.F.R. § 1.137	<i>passim</i>
47 Fed. Reg. 33,086 (July 30, 1982).....	9
58 Fed. Reg. 44,277 (Aug. 20, 1993).....	13

65 Fed. Reg. 57,024 (Sept. 20, 2000).....	17
Manual of Patent Examining Procedure,	
§ 711.03(c) (8th ed. 6th rev. 2007)	22
§ 711.03(c)(C) (8th ed. 6th rev. 2007).....	7, 22, 26
§ 711.03(c)(C)(1) (8th ed. 6th rev. 2007)	22, 26
§ 2268 (6th ed. 3rd rev. 1997)	16
§ 2268 (8th ed. 1st rev. 2001).....	17
<i>In re Application of Mark V. Dahl</i> , App. No. 10/046,427, 2006 Commr. Pat. LEXIS 21 (Com'r Pat. & Trademarks May 18, 2006)	26
<i>In re Egbers</i> , 6 U.S.P.Q.2d 1869, 1988 WL 252498 (Com'r Pat. & Trademarks 1988)	16
<i>In re Application of Honegger</i> , App. No. 09/235,374, 2006 Commr. Pat. LEXIS 18 (Com'r Pat. & Trademarks Mar. 20, 2006)	26
<i>In re Katrapat</i> , 6 U.S.P.Q.2d 1863, 1988 WL 252497 (Com'r Pat. & Trademarks 1988)	15, 16, 17
<i>In re Application of Robert K. Peterson</i> , 1998 WL 35180925 (Com'r Pat. Feb. 9, 1998).....	14
<i>In re Application of Ronald L. Plesh</i> , App. No. 10/877,571, 2005 Commr. Pat. LEXIS 17 (Com'r Pat. & Trademarks Sept. 26, 2005)	22
<i>In re Reissue Application No. 09/442,083</i> , 2006 Commr. Pat. LEXIS 23 (Com'r Pat. & Trademarks Feb. 10, 2006)	26
<i>Sehgal v. Revel</i> , 78 U.S.P.Q.2d 1954 (Bd. Pat. App. & Interf. 2005)	26
<i>In re Application of Takahashi</i> , App. No. 10/064,284, 2005 Commr. Pat. LEXIS 1 (Com'r Pat. & Trademarks May 20, 2005)	22
<i>In re Application of Welchselbaum, Kufe</i> , App. No. 09/545,071, 2006 Commr. Pat. LEXIS 22 (Com'r Pat. & Trademarks May 3, 2006)	26

In re Application of Wodarz, App. No. 09/414,630,
2006 Commr. Pat. LEXIS 24 (Com'r Pat. & Trademarks Oct. 27, 2006)..... 26

MISCELLANEOUS

Chisum on Patents (2005) 24

H.R. Rep. No. 97-542 (1982),
as reprinted in 1982 U.S.C.C.A.N. 765 9, 10

H.R. Rep. No. 105-39 (1997)..... 17

H.R. Rep. No. 105-194 (1997)..... 18, 19

114 Cong. Rec. S6577 (daily ed. June 18, 1998) 18, 19

STATEMENT OF THE ISSUE

Whether the district court erred in invalidating a patent on the ground that the Patent and Trademark Office, consistent with its longstanding regulations and practices based on 35 U.S.C. § 41(a)(7), revived an abandoned patent application on a showing that the abandonment was “unintentional.”

STATEMENT OF THE INTEREST OF *AMICUS CURIAE*¹

Amicus Neurotechnology Industry Organization (NIO) is a non-profit trade association that represents companies involved in neuroscience (neuropharmaceuticals, cell-based therapeutics, neurodevices and neurodiagnostics), academic neuroscience research centers, and brain-illness advocacy groups across the United States and throughout the world. Neurotechnology companies are developing the next generation of treatments and diagnostics for Alzheimer's disease, addiction, anxiety, attention, depression, epilepsy, hearing loss, insomnia, obesity, pain, Parkinson's, schizophrenia, sleep disorders and stroke, which are the major diseases of the brain and nervous system.

NIO advocates for its member organizations on a range of issues related to neurotechnology research and business development, including intellectual property issues. Certainty in the patent system is critical to encourage investment in neuroscience research and development, which is longer and more expensive than in other fields because of the complexity of the brain.

Amicus and its members, like many current patent owners, have taken advantage of the authority of the Patent and Trademark Office (PTO), under 35 U.S.C. § 41(a)(7) and 37 C.F.R. § 1.137, to revive unintentionally abandoned

¹ As required by Federal Rule of Appellate Procedure 29(a), all parties consent to the filing of this brief.

applications for patents. Each year, three to eight thousand petitions to revive are acted on by the PTO, totaling over 60,000 petitions in the last 15 years. *See* page 25 n.8, *infra*. Based on the experiences of its members and their counsel, *amicus* are confident that thousands, if not tens of thousands, of such petitions have been granted under the “unintentionally abandoned” standard.

The district court decision below retroactively invalidating these revivals disrupts settled expectations of patent owners by imperiling thousands of issued patents. If not reversed, the decision will alter a quarter century of settled law and leave patent owners subject to challenges simply for following the rules laid out by the PTO.

INTRODUCTION AND SUMMARY OF ARGUMENT

Obtaining a patent from the PTO is not easy. With regard to the substance of what is patentable, *amicus* have no quarrel with the standards established by Congress and administered by the PTO. But there are also a host of highly technical procedural requirements in the statutes – dates for filing particular pieces of paper with the PTO or paying particular fees – that can overwhelm even experienced practitioners. Sometimes (no one knows how often), unintentional mistakes are made that, under the terms of the statute, constitute an abandonment of a pending patent application.

To mitigate the harshness of this regime, Congress initially provided in 1870 that certain patent applications could be revived if the applicant could show the mistake was “unavoidable.” But that placed a great burden on both the applicant to establish the cause of the mistake and the PTO to adjudicate such claims. Thus, in 1982, Congress authorized the PTO to revive “unintentionally” abandoned patent applications. 35 U.S.C. § 41(a)(7). For 25 years, with the encouragement of Congress, the PTO has relied on that statute to revive untold numbers of applications where “unintentional” procedural mistakes would have otherwise prohibited the issuance of a substantively valid patent for an invention. The district court’s decision in this case has adopted a new rule, contrary to the text of the statute, the purpose of Congress, and the PTO’s consistent interpretation, that declares those revivals in excess of the PTO’s authority and the subsequently issued patents invalid. That decision is wrong and should be reversed. At a minimum, this new rule should not be applied retroactively.

I.A. Congress enacted Section 41(a)(7) in 1982 as part of a broader bill intended to make the PTO more financially self-sufficient and thus reduce government expenditures. Congress sought to increase the PTO’s income in two ways: (1) by imposing fees for matters for which there previously had been no charge and increasing existing fees; and (2) by authorizing the PTO to perform new services and charge fees for them. Section 41(a)(7) served both functions.

The district court's reading of the statute, however, defeats Section 41(a)(7)'s second function because it holds that while Section 41(a)(7) permitted the PTO to *charge fees* for petitions to revive unintentionally abandoned applications, the PTO could never *grant* such petitions because when the new provision was enacted, there were no provisions of the Patent Act that expressly allowed a patent application to be revived for an "unintentional" abandonment. It is for this reason that, contemporaneous with the passage of the 1982 Act, the PTO in notice-and-comment rulemaking rejected the view that Section 41(a)(7) was simply an authorization to collect fees.

B. Congress has remained active in monitoring and, when necessary, amending the Patent Act and other intellectual property statutes in the 25 years since Section 41(a)(7) was first enacted. Instead of indicating any disagreement with the PTO's substantive reading of that provision, Congress has affirmatively approved its reading by *expanding* the scope of Section 41(a)(7) in 1999 and by *relying* on the existence of the unintentionally abandoned standard in Section 41(a)(7) as justification for adopting a parallel standard in the trademark law in 1998. This is more than mere acquiescence by Congress. It is affirmative ratification of the PTO's view, which cannot be overturned by the district court as though Congress had not acted on this very subject on multiple occasions.

II. Regardless of the correctness of the district court's reading of the statute, the district court committed a fundamental error here in invalidating the relevant patents because its new reading of the statute should not be applied retroactively.

Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court held that a court decision interpreting a federal statute should not apply retroactively when the court "establish[ed] a new principle of law" and retroactive application would be "inconsistent with the purpose" of the underlying substantive statute" and would cause "substantial inequitable results." *Id.* at 106-107, 108 n.10. Those circumstances clearly exist in this case.

A. It is beyond dispute that, were this Court to adopt the district court's view about the PTO's authority to revive unintentionally abandoned applications, it would be establishing a new principle of law that constitutes a clear break from past precedent. The PTO first made its view clear in 1982 in the rulemaking that led to the promulgation of 37 C.F.R. § 1.137 and has consistently reaffirmed that position over the past quarter century. The PTO has encouraged applicants whose patents have been deemed abandoned to apply for relief under the unintentionally abandoned standard, rather than the unavoidably abandoned standard, by noting the differences between the two standards and stating that the former was less burdensome on the applicant and likely to be decided more quickly by the PTO, and by providing a special form for such applications. *See* Manual of Patent

Examining Procedure (M.P.E.P.), § 711.03(c)(C), at p. 700-191 to 192 (8th ed. 6th rev. 2007).

The PTO's view has not been rejected by any court until this case. To the contrary, there has been a steady stream of federal cases that have adjudicated whether a particular application was "unintentionally abandoned" without questioning the standard. Leading commentators have also raised no doubts. Thus, any patent applicant would have been entitled to rely on this wealth of authority that a patent application could be revived based on a showing of unintentional abandonment.

B. *Amicus* was unable to locate any public documents that would provide concrete data regarding the number of "unintentionally abandoned" petitions that have been granted by the PTO under Section 41(a)(7). Nonetheless, based on the experiences of *amicus*'s members and their counsel, we are confident that thousands, if not tens of thousands, of such petitions have been granted. In the absence of prospective application, all these patents would be at risk and indeed, under the district court's view, would apparently be invalid.

No purpose of the Patent Act would be served by applying this rule retroactively. To the contrary, the Patent Act is intended to reward innovation, and thus create incentives for investment of time and money into new inventions. For each patent that would be invalidated under this new rule, the PTO determined that

the applicant had, in fact, claimed a useful, novel and non-obvious invention protectable under the U.S. patent system. The only flaw, if any, would be that the inventor (or its agent), *unintentionally* missed a deadline leading to the application being deemed abandoned. Retroactive application of the district court's new rule would not advance whatever interests are served by creating stronger incentives prospectively to avoid unintentional mistakes, as it is too late to prevent or correct those mistakes now.

While certainly mistakes should not be encouraged, the PTO has determined for 25 years that the burden on the administrative system of determining whether such procedural mistakes were "unavoidable" is great, and serves as a sideshow to determining whether an applicant has invented something that is entitled to a patent. Even if the PTO were wrong (and we think it was correctly following Congress's instructions), retroactively enforcing a contrary judgment would benefit no one except those who are currently infringing on otherwise valid patents.

ARGUMENT

I. CONGRESS AUTHORIZED THE PTO IN SECTION 41(a)(7) TO REVIVE UNINTENTIONALLY ABANDONED PATENT APPLICATIONS

As plaintiffs-appellants demonstrate (App. Br. 28-44), when Congress enacted 35 U.S.C. § 41(a)(7) in 1982, it vested the PTO with the authority to revive unintentionally abandoned patent applications.

This has been the view of the PTO for 25 years. Contemporaneous with the passage of the 1982 Act, the PTO rejected the view that Section 41(a)(7) was simply an authorization to collect fees. In notice-and-comment rulemaking preceding the promulgation of 37 C.F.R. § 1.137, a commenter “questioned whether the [PTO] has statutory authority to revive unin[tentionally abandoned applications.” The PTO correctly replied:

If Congress did not intend the [PTO] to have such authority there would have been no reason to establish fees in Section 41(a)(7) in H.R. 6260. The legislative history of H.R. 6260, House Report No. 97-542 (Committee on the Judiciary), also makes the Congressional intent clear. The provisions in H.R. 6260 relating to unintentional abandonment are substantive in addition to setting the fee.

47 Fed. Reg. 33,086, 33,094 (July 30, 1982).

The PTO has adhered to this interpretation in all subsequent editions of the Manual of Patent Examining Procedure (M.P.E.P.), and a slew of administrative decisions that have applied the statute and regulation over the years to revive

unintentionally abandoned applications even when it could not be shown that the abandonment was unavoidable.

This longstanding interpretation by the agency charged by Congress to “establish regulations” that “shall govern the conduct of proceedings in the Office,” 35 U.S.C. § 2(b)(2)(A), requires that the PTO’s interpretation of Section 41(a)(7) be given great deference. *Bender v. Dudas*, 490 F.3d 1361, 1368 (Fed. Cir. 2007) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984)).

The district court misread the statute and erred in failing to accord any weight to the PTO’s views and the settled expectations that developed over the past quarter century.

A. The PTO’s Interpretation Of Section 41(a)(7) As A Grant Of Authority To Revive Unintentionally Abandoned Applications, And Not Simply A Fee-Collection Statute, Is Consistent With The Text And Purpose Of The 1982 Act That First Enacted This Provision

Congress enacted Section 41(a)(7) in 1982 as part of a broader bill intended to make the PTO more financially self-sufficient and thus reduce government expenditures. As the House Committee Report explained, the “overall objective” of the 1982 law “is to provide for increased user support for the [PTO] costs associated with the actual processing of patent applications.” H.R. Rep. No. 97-542, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 765, 766.

Congress sought to increase the PTO's income in two ways: (1) by imposing fees for matters for which there previously had been no charge and increasing existing fees; and (2) by authorizing the PTO to perform new services and charge fees for them. Section 41(a)(7) served both functions.

First, prior to 1982, there were two provisions that expressly permitted the PTO to revive an abandoned application for a patent, but both required the applicant to show the delay was "unavoidable." Section 133 has provided (since its current codification in 1952) that an applicant could revive an application deemed abandoned for failure to timely respond to any PTO action, and its predecessor had permitted such revivals since at least 1870. Act of July 19, 1952, ch. 950, § 1, 66 Stat. 792, 801; *Overland Motor Co. v. Packard Motor Car Co.*, 274 U.S. 417, 422-423 (1927). Section 151 has provided (since 1975) that an applicant could revive an application deemed abandoned for delayed payment of the fee for issuing each patent. Act of Jan. 2, 1975, Pub. L. No. 93-601, § 3, 88 Stat. 1956, 1956. Prior to 1982, however, the PTO could charge only \$15 for petitions filed under those sections. Section 41(a)(7) changed that by modestly increasing the fee to \$50 (since raised to \$510) for petitions "filed under sections 133 or 151." Act of Aug. 27, 1982, Pub. L. No. 97-247, § 3(a)(7), 96 Stat. 317, 318.

But Section 41(a)(7) did not stop there in seeking to generate greater PTO fees. It also authorized collecting a ten-times larger fee for filing a “petition for the revival of an unintentionally abandoned application for a patent or for the unintentionally delayed payment of the fee for issuing each patent.” *Ibid.* Those two categories where petitions for revival were authorized encompassed the same matters as Sections 133 and 151, but the standard adopted in Section 41(a)(7) – “unintentionally” – was less onerous than the “unavoidable” standard established in those provisions. Congress clearly intended that these more expensive to file, but less time-consuming to adjudicate, petitions would be used and would bring in money to the PTO.

The district court’s reading of the statute, however, defeats this purpose because it holds that while Section 41(a)(7) permitted the PTO to *charge fees* for such petitions to revive unintentionally abandoned applications, the PTO could never *grant* such petitions because none of the relevant statutes in 1982 that provided for abandonment, *e.g.*, Sections 111(a)(4), 133, 151, and 371(d), expressly permitted revival for “unintentional ” abandonment. But when Congress enacts a provision “upon the assumption—expressed in the statutory text—that” a government agency has authority to do something, “such action is tantamount to a direct grant of authority” to do that thing. *Disabled Am. Veterans v. Secretary of Veterans Affairs*, 419 F.3d 1317, 1322 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct.

2319 (2006). The legislative history cited by plaintiffs-appellants confirms that this is precisely what Congress intended. App. Br. 35-36.

To read the statute otherwise would have made Section 41(a)(7) completely superfluous when it was enacted because at that time, there were no provisions of the Patent Act that expressly allowed a patent application to be revived for an “unintentional” abandonment. Such a reading would be in violation of a “‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).²

² Provisions of the current Patent Act, apart from Section 41(a)(7), that expressly permit revival based on unintentional delay were all enacted in 1994 or 1999. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 532(b)(3), 108 Stat. 4809, 4986 (1994) (amending Section 111); District of Columbia Appropriations Act, Pub. L. No. 106-113, § 1000(a)(9) & App. I (§§ 4503(a), (b)(2), (b)(1), 4502(a)), 113 Stat. 1501, 1536, 1501A-562 to 564 (1999) (amending Sections 119, 120 and 122). Those amendments do not suggest, as the district court seemed to find, that Section 41(a)(7) itself did not grant the PTO authority to revive for unintentional abandonment. That is so for at least four reasons.

First, the district court’s reading of the statute requires finding that Section 41(a)(7) was a nullity for the first dozen years of its existence, yet Congress is presumed not to enact such pointless provisions. Second, with regard to the 1994 amendments, those simply amended Section 111 to preclude the PTO from returning to a policy initially adopted in 1983, but reversed in 1990, that excluded unintentional abandonments under Section 111 from the scope of 37 C.F.R. § 1.137. *See* Changes in Procedures for Revival of Patent Applications & Reinstatement of Patents, 58 Fed. Reg. 44,277, 44,278 (Aug. 20, 1993). Third, the 1999 amendments to Sections 119 and 120 adopted an unintentional standard for

(continued on next page)

B. Subsequent Statutory Amendments Confirm Congress’s Intent And Ratify The PTO’s Longstanding Interpretation

Congress has remained active in monitoring and, when necessary, amending the Patent Act and other intellectual property statutes in the 25 years since Section 41(a)(7) was first enacted. Subsequent to the promulgation of 37 C.F.R. § 1.137 in 1982, the PTO continued clearly to articulate the view that Congress granted it the authority to revive unintentionally abandoned applications. *See, e.g., In re Application of Robert K. Peterson*, 1998 WL 35180925, at *5 n.3 (Com’r Pat. Feb. 9, 1998) (holding that Section 41(a)(7) “sets forth the Commissioner’s authority to revive an unintentionally abandoned application (without a showing that the delay was unavoidable)” and rejecting the assertion that the provision “deals solely with fees”).

Instead of indicating any disagreement with the PTO’s substantive reading of that provision, Congress has affirmatively approved its reading by *expanding* the scope of Section 41(a)(7) in 1999 and by *relying* on the existence of the unintentionally abandoned standard in Section 41(a)(7) as justification for adopting a parallel standard in the trademark law in 1998. This is more than mere

reversing *waiver* of a priority claim, a concept separate from abandonment of an application and not within the scope of Section 41(a)(7). Finally, the 1999 Amendments cannot be understood to reflect Congress’s intent that Section 41(a)(7) was not substantive, particularly in light of the concurrent amendment of that very provision to expand its scope, as discussed in Part I.B.1 of the text, pages 15-17, *infra*.

acquiescence by Congress. It is affirmative ratification of the PTO's view, which cannot be overturned by the district court as though Congress had not acted on this very subject on multiple occasions.

1. The 1999 amendment to Section 41(a)(7) confirms Congress's intent that the PTO possess the authority to revive unintentionally abandoned applications

Congress amended Section 41(a)(7) in 1999 in order to reverse a PTO decision that prohibited a party from invoking Section 41(a)(7) in reexamination proceedings. In doing so, it ratified the PTO's longstanding view of the substantive nature of Section 41(a)(7).

In *In re Katrapat*, 6 U.S.P.Q.2d 1863, 1988 WL 252497 (Com'r Pat. & Trademarks 1988), the PTO was requested to revive a patent abandoned because of delayed response by a patent owner in a reexamination proceeding (*i.e.*, a proceeding after the patent had been issued). The PTO determined that it could only revive a patent abandoned during reexamination if the patent owner could establish "unavoidable" delay under Section 133 (the statutory provision Section 305, governing reexaminations, incorporated by reference). *Id.* at *5-*6. The PTO did not question that Section 41(a)(7) was a substantive grant of authority to revive abandonments otherwise governed by Section 133. Instead, it held that a patent owner could not rely on Section 41(a)(7) to revive for an unintentional abandonment in a reexamination proceeding because Section 41(a)(7) by its terms

only applied to abandonment during the application process or for failure to pay the issuance fee. *Id.* at *6; *see also In re Egbers*, 6 U.S.P.Q.2d 1869, 1988 WL 252498, at *3 (Com’r Pat. & Trademarks 1988) (“A terminated reexamination proceeding” may not be revived “for ‘unintentional’ delay under § 41(a)(7).”); M.P.E.P., § 2268, at p. 2200-66 (6th ed. 3rd rev. 1997) (petition to revive in reexamination proceedings may be granted only by showing unavoidable abandonment as described in *Katrapat*).

In 1999, Congress overruled *Katrapat* by amending Section 41(a)(7) to add “an unintentionally delayed response by the patent owner in any reexamination proceeding” as a circumstance in which a petition for revival could be filed. District of Columbia Appropriations Act, Pub. L. No. 106-113, § 1000(a)(9) & App. I (§ 4605(a)), 113 Stat. 1501, 1536, 1501A-570 (1999). Congress did not separately amend Sections 133 or 305, the statutes that *Katrapat* had said permitted revival for only unavoidable abandonment. Yet Congress made clear that it intended its amendment to authorize the PTO to revive unintentionally abandoned reexamination proceedings. It explained that the statutory provision

amends 35 U.S.C. § 41(a)(7) to provide the authority for the Director to accept the filing of an unintentionally delayed response by the patent owner in a reexamination proceeding *and* for charging a fee for such filing.

H.R. Rep. No. 105-39, at 80 (1997) (emphasis added).³

By expanding an existing provision that had a settled, and indeed unquestioned, administrative interpretation, Congress's conduct can be understood as nothing but legislative ratification of the agency's view. "Where, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' we cannot but deem that construction virtually conclusive." *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (citation omitted). By contrast, if the district court were correct in its reading of Section 41(a)(7), then this 1999 addition was, and remains, superfluous and *Katrapat* still controls because Congress did not separately amend Sections 133 or 305 to authorize actually granting relief for unintentional abandonment. As noted above, Congress cannot be assumed to engage in such pointless conduct.

³ In response to this statutory amendment, the PTO amended both Section 1.137 and the MPEP to make clear that the unintentional abandonment standard now applies to petitions to revive abandonments occurring in reexamination proceedings. *See* 65 Fed. Reg. 57,024, 57,034 (Sept. 20, 2000); M.P.E.P., § 2268, at p. 2200-90 to 91 (8th ed. 1st rev. 2001) (adding discussion of unintentional abandonment for reexaminations based on revisions to 37 C.F.R. § 1.137).

2. Congress's amendment to the trademark law to add unintentional abandonment in order to make it parallel to the Patent Act would be frustrated if the district court's reading of Section 41(a)(7) were adopted

Congress's understanding that it had already granted the PTO authority in Section 41(a)(7) to revive unintentionally abandoned patent applications was a predicate for additional congressional action involving the trademark laws in order to promote parallel development of the two laws. The district court's holding would defeat that intent.

In the Trademark Law Treaty Implementation Act of 1998, Pub. L. No. 105-330, 112 Stat. 3064, Congress authorized the PTO to revive unintentionally abandoned trademark applications. In discussing the rationale for its decision, both the House and Senate explained that the amendments to trademark law to permit revival of unintentionally abandoned marks would parallel existing patent law.

Congress first described its understanding of the current law regarding patents:

Prior to 1982, patent applications, like trademark applications, could be revived only upon a showing of unavoidable delay. Under Public Law 97-247, § 3, 96 Stat. 317 (1982) codified at 35 U.S.C. 41(a)(7), it became possible to revive an unintentionally abandoned patent application. ... The procedure for petitioning to revive an unintentionally abandoned application is set forth in 37 C.F.R. § 1.137(b), effective October 1, 1982.

H.R. Rep. No. 105-194, at 13 (1997); 114 Cong. Rec. S6577 (daily ed. June 18, 1998).

Congress then explained that its amendments to the trademark law “parallels the unintentional standard for revival available to patent applicants and relaxes the standard for reviving trademark applications.” H.R. Rep. No. 105-194, at 14; 114 Cong. Rec. at S6577.

If the district court’s view is sustained, however, then Congress’s goal to make patent and trademark law (both of which are administered by the same agency) “parallel” will be defeated. This would be contrary to the basic rule of construction that, when Congress acts against a backdrop of prior law, the judiciary must apply what Congress understood the law to be, not what the court might have independently determined the law had been. “For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was” when it amended that statute. *Lindahl v. OPM*, 470 U.S. 768, 790 (1985) (quoting *Brown v. GSA*, 425 U.S. 820, 828 (1976)).

II. RETROACTIVE APPLICATION OF ANY INTERPRETATION OF SECTION 41(a)(7) OTHER THAN THAT ADOPTED BY THE PTO MORE THAN 25 YEARS AGO WOULD DISRUPT SETTLED EXPECTATIONS AND BE CONTRARY TO THE PURPOSES OF THE PATENT ACT

Regardless of the correctness of the district court’s reading of the statute, the district court committed a fundamental error here in invalidating the relevant patents. Such relief is not only not authorized by the Patent Act, as plaintiffs-

appellants demonstrate, App. Br. 12-24, but also improperly applies this new case law retroactively, App. Br. 30 n.9.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court held that a court decision interpreting a federal statute should refuse to apply its decision retroactively when the court “establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;” and when retroactive application would be “inconsistent with the purpose” of the underlying substantive statute and would cause “substantial inequitable results.” *Id.* at 106-107, 108 n.10 (internal citations omitted); *see also Saint Francis College v. Al-Kazraji*, 481 U.S. 604, 608-609 (1987) (sustaining court of appeals’ prospective application of statute under *Chevron Oil*).

The *Chevron Oil* test was later modified by *Harper v. Virginia Department of Tax*, 509 U.S. 86, 97 (1993), which provided that “selective” prospectivity is not permissible; if a new rule is applied to the parties in the rule-creating case, then it must be applied retroactively to persons in all pending cases. With this modification, courts continue to decline to apply a new rule of law retroactively in civil cases when “revisiting” past actions based on a different interpretation of the statute would “disturb[] the finality” of past decisions. *In re Mersmann*, 505 F.3d 1033, 2007 U.S. App. LEXIS 23634, at *43 (10th Cir. Sept. 24, 2007) (en banc);

see also, e.g., Crowe v. Bolduc, 365 F.3d 86, 93-94 (1st Cir. 2004); *Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 91-92 (2d Cir. 1998); *George v. Camacho*, 119 F.3d 1393, 1399 n.9, 1401 (9th Cir. 1997) (en banc). Those circumstances exist in this case.⁴

A. Accepting The District Court’s Opinion Would Establish A New Principle Of Law

First, it is beyond dispute that, were this Court to adopt the district court’s view about the PTO’s authority to revive unintentionally abandoned applications, it would be a establishing a new principle of law that constitutes a clear break from past precedent.

The PTO made its view clear in 1982 in the rulemaking that led to the promulgation of Section 1.137. *See* page 9, *supra*. It has consistently reaffirmed

⁴ Plaintiffs-appellants invoke the retroactivity point in their opening brief and cite *Chevron Oil* in particular. App. Br. 30 n.9. Even if they had not raised this particular ground in support of their argument that the district court erred in invalidating their patents as a remedy for any purported error on the part of the PTO, the question of retroactivity should be addressed in this case because of the case law discussed in the text that holds that if a court of appeals applies a holding to the case before it, then it cannot decide in a subsequent case to give the ruling only prospective effect. It would not be fair to *amicus*, and other existing patent owners who relied on the unintentionally abandoned standard to revive a patent application, to be subjected to retroactive application of this ruling without this Court even considering this purely legal issue. *Cf. Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing retroactivity issue raised only by *amicus* because “[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.”).

that position in the Manual of Patent Examination Procedure. *See, e.g.*, M.P.E.P., § 711.03(c)(C)(1), at p. 700-192 (8th ed. 6th rev. 2007) (“The legislative history of Public Law 97-247, § 3, 96 Stat. 317 (1982), reveals that the purpose of 35 U.S.C. 41(a)(7) is to permit the Office to have more discretion than in 35 U.S.C. 133 or 151 to revive abandoned applications in appropriate circumstances...”).

In addition, the PTO has encouraged applicants whose patents have been deemed abandoned to apply for relief under the unintentionally abandoned standard, rather than the unavoidably abandoned standard, by noting the differences between the two standards and stating that the former was less burden on the applicant and likely to be decided more quickly by the PTO. *See id.* § 711.03(c)(C), at p. 700-191.⁵ Indeed, the PTO has created a special form to use in cases, such as this, seeking revival of an unintentionally abandoned application under Section 371. *See id.* § 711.03(c), at p. 700-194 (reprinting current version of form).⁶

⁵ *See also In re Application of Ronald L. Plesh*, App. No. 10/877,571, 2005 Commr. Pat. LEXIS 17 (Com’r Pat. & Trademarks Sept. 26, 2005) (denying a petition for revival based on unavoidable delay and advising petitioner that it may seek revival for unintentional delay); *In re Application of Takahashi*, App. No. 10/064,284, 2005 Commr. Pat. LEXIS 1 (Com’r Pat. & Trademarks May 20, 2005) (same).

⁶ This PTO form has been available since at least 1999. *See* <http://ftp.cerias.purdue.edu/pub/doc/law+ethics/patents/forms/sb64pct.pdf> (1999 version of form).

The PTO's view has not been rejected by any court until this case. To the contrary, there has been a steady stream of federal cases that have adjudicated whether a particular application was "unintentionally abandoned." *See, e.g., Futures Tech., Ltd. v. Quigg*, 684 F. Supp. 430 (E.D. Va. 1988) (reversing PTO's denial of petition for revival based on unintentional abandonment); *Total Containment Inc. v. Buffalo Envtl. Prods. Corp.*, 35 U.S.P.Q.2d 1385 (E.D. Va. 1995) (PTO's revival based on determination of unintentional abandonment upheld); *Suntiger, Inc. v. Telebrands Adver., Inc.*, No. 97-423-A, 1997 WL 855581 (E.D. Va. July 11, 1997) (same).⁷ Likewise, this Court has examined the scope of Section 41(a)(7) while acknowledging that, within its scope, it authorizes the PTO to revive applications unintentionally abandoned. *See, e.g., Morganroth v. Quigg*, 885 F.2d 843, 848 (Fed. Cir. 1989).

⁷ *See also, e.g., Enzo Therapeutics, Inc. v. Yeda Research and Dev. Co.*, 477 F. Supp. 2d 699 (E.D. Va. 2007) (affirming the authority granted to the PTO under Section 41(a)(7) to revive, using the unintentional standard, applications abandoned by operation of 35 U.S.C. § 133); *Lawman Armor Corp. v. Simon*, 74 U.S.P.Q.2d 1633 (E.D. Mich. 2005) (reversing PTO's determination of unintentional abandonment); *Field Hybrids, LLC v. Toyota Motor Corp.*, No. 03-4121, 2005 U.S. Dist. LEXIS 1159 (D. Minn. Jan. 27, 2005) (same); *Ferguson Beauregard v. Mega Sys., L.L.C.*, No. 6:99cv437, 2001 U.S. Dist. LEXIS 25682 (E.D. Tex. Aug. 31, 2001) (same). As plaintiffs-appellants note (App. Br. 24), in none of these cases did the district courts discuss whether they had the authority to review whether a revival had been improperly granted or what the appropriate remedy would be. Nonetheless, these cases gave patent applicants further grounds to believe that the PTO's use of the unintentional abandonment standard was appropriate.

Further, as plaintiffs-appellants show, one of the “leading commentators” in the patent field, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1318 (Fed. Cir. 2006), has stated that Section 41(a)(7) grants the PTO authority to revive unintentionally abandoned applications. App. Br. 41 (citing and quoting from 4 *Chisum on Patents* §§ 11.02[1][d][ii][B] & 11.03[2][b][vi][A] (2005)).

Thus, any patent applicant would have been entitled to rely on this wealth of authority that a patent application could be revived based on a showing of unintentional abandonment. Such reliance would have extended to decisions about how to devote limited resources to develop and market various inventions, some of which were unintentionally abandoned and then revived and others of which were never abandoned. It would also have affected decisions about whether to expend the resources required to prove to the PTO that the abandonment was “unavoidable” versus paying a larger up-front fee to petition for revival under the unintentional standard.

B. Retroactive Application Of The District Court’s New Rule Would Be Contrary To The Policies Of The Patent Act And Would Produce Substantial Inequitable Results

Amicus was unable to locate specific data regarding the number of “unintentionally abandoned” petitions that have been *granted* by the PTO under Section 41(a)(7). But the data published by the PTO in its annual reports indicates that three to eight thousand petitions to revive are acted on by the PTO *each year*,

totaling over 60,000 petitions in the last 15 years.⁸ Based on the experiences of *amicus*'s members and their counsel, *amicus* is confident that thousands, if not tens of thousands, of such petitions have been granted under the “unintentionally abandoned” standard. In the absence of prospective application, all these patents would be at risk and indeed, under the district court’s view, would apparently be invalid.

No purpose of the Patent Act would be served by applying this rule retroactively. “Applying the rule retroactively to parties who justifiably have relied on a previous rule does not advance any discernible goal.” *Crowe*, 365 F.3d at 94. To the contrary, the Patent Act is intended to reward innovation, and thus create incentives for investment of time and money into new inventions. *See Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383 (Fed. Cir. 2006) (“We have long acknowledged the importance of the patent system in encouraging innovation. Indeed, the ‘encouragement of investment-based risk is the fundamental purpose of the patent grant, and is based directly on the right to exclude.’”). For each patent

⁸ For data from fiscal years 2003-2007, see PTO, *Performance and Accountability Report Fiscal Year 2007*, at 134 (tbl. 24) (line labeled “Revivals”), available at <http://www.uspto.gov/web/offices/com/annual/2007/2007annualreport.pdf>. For data from fiscal years 1998 to 2002, see PTO, *Performance and Accountability Report Fiscal Year 2002*, at 132 (tbl. 24), available at <http://www.uspto.gov/web/offices/com/annual/2002/93-140.pdf>. For data from fiscal years 1993 to 1997, see PTO, *Fiscal Year 1997: A Patent and Trademark Office Review*, tbl. 24, available at <http://www.uspto.gov/web/offices/com/annual/1997/97reptab.pdf>.

that would be invalidated under this new rule, the PTO determined that the applicant had, in fact, claimed a useful, novel and non-obvious invention protectable under the patent system. *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 777 (Fed. Cir. 1988). The only flaw, if any, would be that the inventor (or its agent) unintentionally missed a deadline causing the application being deemed abandoned. A party cannot, of course, under any reading of the statute, revive an application if the conduct resulting in the abandonment was intentional.⁹

⁹ The district court implied that the PTO made it too easy to apply for revival under the “unintentional” standard. As the PTO explains, however, even though “the Office relies upon the applicant’s duty of candor and good faith” in submitting its petition, it “reserve[s] the authority to require further information concerning the cause of abandonment and delay in filing a petition to revive.” M.P.E.P., § 711.03(c)(C), at p. 700-191 (8th ed. 6th rev. 2007). When the circumstances suggest that an abandonment was not unintentional, moreover, the PTO will reject the application if the applicant cannot prove otherwise. *Id.* § 711.03(c)(C)(1), at p. 700-192. Indeed, there is a whole body of PTO administrative decisions denying applicants’ petitions under 35 U.S.C. § 41(a)(7) to revive for unintentional delay. *See, e.g., In re Application of Wodarz*, App. No. 09/414,630, 2006 Commr. Pat. LEXIS 24 (Com’r Pat. & Trademarks Oct. 27, 2006); *In re Application of Mark V. Dahl*, App. No. 10/046,427, 2006 Commr. Pat. Lexis 21 (Com’r Pat. & Trademarks May 18, 2006); *In re Application of Welchselbaum, Kufe*, App. No. 09/545,071, 2006 Commr. Pat. Lexis 22 (Com’r Pat. & Trademarks May 3, 2006); *In re Application of Honegger*, App. No. 09/235,374, 2006 Commr. Pat. Lexis 18 (Com’r Pat. & Trademarks Mar. 20, 2006); *In re Reissue Application No. 09/442,083*, 2006 Commr. Pat. Lexis 23 (Com’r Pat. & Trademarks Feb. 10, 2006); *Sehgal v. Revel*, 78 U.S.P.Q.2d 1954 (Bd. Pat. App. & Interf. 2005). The inquiry in this appeal, of course, is not whether the very brief delay in this case between the abandonment and the petition to revive demonstrates that the undisputed abandonment was unintentional, but whether the PTO has the power to relieve an applicant of the consequences of such abandonment without finding that such abandonment was “unavoidable.”

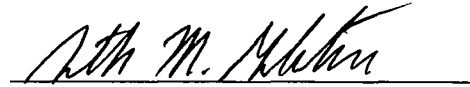
Retroactive application of the district court’s new rule would not advance whatever interests are served by creating stronger incentives prospectively to avoid unintentional mistakes, as it is too late to prevent or correct those mistakes now. *See Holt v. Shalala*, 35 F.3d 376, 381 (9th Cir. 1994) (“retroactive application of this new rule could not advance the rule’s application” when applicants “cannot now comply with [the new rule’s] dictates”) (emphasis added); *In re Mersmann*, 2007 U.S. App. LEXIS, at *43 (“Revisiting past cases” does not further the “purpose of this new rule” which is “to correct a misinterpretation” of the statute); *Mitchell v. City of Sapulpa*, 857 F.2d 713, 719-720 (10th Cir. 1988) (refusing to apply substantive rule of law retroactively when it would “have little deterrent effect” on future conduct).

While certainly mistakes should not be encouraged, the PTO has determined for 25 years that the burden on the administrative system of determining whether such procedural mistakes were “unavoidable” is great, and serves as a sideshow to determining whether an applicant has invented something that is entitled to a patent. Even if the PTO was wrong (and for the reasons discussed in Part I, we think it correctly interpreted the text, structure, and history of the statute on this point), retroactively enforcing a contrary judgment would benefit no one except those who are currently infringing on otherwise valid patents.

CONCLUSION

For the foregoing reasons, and the reasons identified in plaintiffs-appellants' brief, the judgment of the District Court should be reversed.

Respectfully submitted,

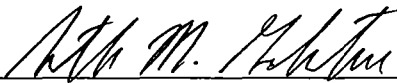


Harold J. McElhinny
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000

Seth M. Galanter
Priya B. Viswanath
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
Telephone: (202) 887-6947
Facsimile: (202) 887-0763

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that, relying on the word count of the word-processing system used to prepare the brief, this brief is proportionately spaced, has a typeface of 14 points, and contains 6414 words.



CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2007, two copies of the foregoing were served on the parties below via First Class Mail.

Brian E. Ferguson
Natalia V. Blinkova
McDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, DC 20005-3096

Jeffrey W. Sarles
Brent A. Batzer
Andrea C. Hutchinson
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606

Jeffrey S. Love
KLARQUIST SPARKMAN, LLP
One World Trade Center
121 S.W. Salmon Street, Suite 1600
Portland, OR 97204

A handwritten signature in black ink, appearing to read "Jeffrey S. Love", is written over a horizontal line.