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OFFICE OF PETITIONS

In re Patent No. 6,042,175 :
Issue Date: 03/28/2000 :
Application Number: 09/100,808 : DECISION ON PETITION
Filing Date: 06/19/1998 :
Attorney Docket Number: :
10.18.15.USP :

This is a decision on the petition, filed on December 8, 2010, under 37 CFR 1.378(e) requesting reconsideration of a prior decision which refused to accept under § 1.378(b)¹ the delayed payment of a maintenance fee for the above-referenced patent.

The petition under 37 CFR 1.378(e) is DENIED.²

¹ A grantable petition to accept a delayed maintenance fee payment under 37 CFR 1.378(b) must be include

(1) the required maintenance fee set forth in § 1.20(e) through (g);

(2) the surcharge set forth in §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 As stated in 37 CFR 1.378(e), no further reconsideration or review of the decision refusing to accept the delayed payment of the maintenance fee under § 1.378(b) will be undertaken. This decision may be regarded as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1001.02.

BACKGROUND

The patent issued March 28, 2000. The first maintenance fee was timely paid. The second maintenance fee could have been paid from March 28 through September 28, 2007, or, with a surcharge during the period from September 29, 2007, through March 28, 2008. Accordingly, the patent expired at midnight on March 28, 2008, for failure to timely submit the first maintenance fee.

The initial petition under 37 CFR 1.378(b) was filed on June 30, 2010. On October 8, 2010, the petition was dismissed.

In the initial petition, petitioner stated that he relied upon his registered patent practitioner, Glenn L. Webb (hereinafter "Webb") to track and pay the maintenance fee, but that payment of the maintenance fee had been unavoidably delayed because Webb had failed to track and pay said maintenance fee.

Specifically, petitioner asserted that Webb delayed payment of the maintenance fee because of a docketing error, and because Webb had been suffering from chronic depression.

In the decision dismissing the petition, petitioner was advised that a showing of unavoidable delay due to docketing error required evidence supporting such a finding. In this case, the showing required was that: (a) the error was the cause of the delay at issue; (b) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and (c) the employee(s) were sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employees represented the exercise of due care. Petitioner was further advised that the following items must be provided: (a) statements by persons with direct knowledge of the circumstances of the delay, setting forth the facts as they know them; (b) a thorough explanation of the docketing and call-up system in use, including, but not limited to, copies of documentation which would substantiate an error in docketing, and include an indication as to why the system failed to provide adequate notice that a reply was due, and (c) 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.

Further, petitioner was advised that while physical or mental incapacitation can be a cause of delay, a showing of "unavoidable" delay based upon incapacitation must establish that the practitioner's incapacitation was of such a nature and degree as to render practitioner unable to conduct business (e.g. correspond with the Office) during the period between March 28, 2008, and June 30, 2010, the date of filing of the initial petition. Such a showing must be supported by a statement from practitioner's treating physician, and such statement must provide the nature of practitioner's incapacitation during the above-mentioned period.

Further, it was noted that petitioner continued to correspond with Webb by email regarding various patents held by petitioner during the period from at least June 18, 2008, through March 4, 2010, and the showing of record suggested that petitioner had made an intentional decision to delay payment of the maintenance fee in the subject patent. A statement from Webb was also provided, indicating (i) that problems arose in his docketing system after his former law firm broke up in 2004, and (ii) that Webb believed there was a "miscommunication" with petitioner as to whether Webb had been instructed in 2008 to file a petition to reinstate the subject patent.

Lastly, it was noted that the showing of record suggested that petitioner had been aware that the patent was expired in 2008, but had not requested that his attorney take action to reinstate the expired patent, thus leading to a conclusion that applicant had intentionally delayed the payment of the maintenance fee.

In response, the subject request for reconsideration was filed. Petitioner again asserts that the delay in payment of the maintenance fee was unavoidable due to a docketing error on the part of Webb, Webb's depression, and petitioner's reliance upon Webb. Petitioner further asserts that no reminders were received from the USPTO notifying petitioner or Webb that the maintenance fees were due.

Additionally, petitioner asserts that he did not intentionally delay the payment of the maintenance fee, but rather requested that Webb take the necessary action to reinstate the patent after petitioner was informed that the patent had expired. To this end, petitioner has provided a copy of an email from petitioner to Webb, dated June 19, 2008, in which petitioner states that the subject patent and others "need to stay active" as evidence that petitioner affirmatively instructed Webb to file a petition to reinstate the subject patent.

STATUTE AND REGULATION

35 U.S.C. § 41(c)(1) states that:

The Director may accept the payment of any maintenance fee required subsection (b) of this section which is made within twenty-four months after the six-month grace period if this delay is shown to the satisfaction of the Director to have been unintentional, or at any time after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable.

37 CFR 1.378(b)(3) states that any petition to accept an unavoidably delayed payment of a maintenance fee must include:

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

37 CFR 1.378(c)(3)(1) provides that a petition to accept an unintentionally delayed payment of a maintenance fee must be filed within twenty-four months of the six-month grace period provided in § 1.362(e)

OPINION

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable".³ A patent owner's failure to pay a maintenance fee may be considered to have been "unavoidable" if the patent owner "exercised the due care of a reasonably prudent person."⁴ This determination is to be made on a "case-by-case

³ 35 U.S.C. § 41(c)(1).

⁴ Ray v. Lehman, 55 F.3d 606, 608-09 (Fed.Cir.), cert. denied, -- U.S. ---, 116 S.Ct. 304, L.Ed.2d 209 (1995).

basis, taking all the facts and circumstances into account."⁵ Unavoidable delay under 35 U.S.C. § 41(b) is measured by the same standard as that for reviving an abandoned application under 35 U.S.C. § 133.⁶ Under 35 U.S.C. § 133, the Director may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Director to have been "unavoidable". Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable.⁷ However, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay.⁸ In view of In re Patent No. 4,409,763,⁹ this same standard will be applied to determine whether "unavoidable" delay within the meaning of 37 CFR 1.378(b) occurred.

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

As 35 U.S.C. § 41(c) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.¹⁰ That is, an adequate showing that the delay 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.¹¹

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unavoidable.¹² Petitioner is reminded that it

⁵ Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

⁶ In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (PTO Comm'r 1988).

⁷ Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913).

⁸ Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

⁹ 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988), aff'd sub nom. Rydeen v. Quigg, 748 937 F.2d 623 (Fed. Cir. 1991) (table), cert. denied, 502 U.S. 1075 (1992).

¹⁰ Ray, 55 F.3d at 609, 34 USPQ2d at 1788.

¹¹ Id.

¹² Cf. Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960) (35 U.S.C. § 133 does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing).

is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Director that the delay in payment of a maintenance fee is unavoidable.¹³

In this regard, in view of the copy of the June, 2008 email, the showing of record suggests that petitioner did not intentionally delay the filing of a petition to accept late payment of the maintenance fee in that petitioner requested that Webb reinstate the patent upon petitioner's learning that the patent had become expired. Nonetheless, the showing of record is that the delay in payment of the maintenance fee was not unavoidable.

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) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance;

(3) and 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.¹⁴

An adequate showing requires:

(A) Statements by all persons with direct knowledge of the circumstances surrounding the delay, setting forth the facts as they know them.

(B) Petitioner must supply a thorough explanation of the docketing and call-up system in use and must identify the type of records kept and the person responsible for the maintenance of the system. This showing must include copies of mail ledgers, docket sheets, filewrappers and such other records as may exist which would substantiate an error in docketing, and include an indication as to why the system failed to provide adequate notice that a reply was due.

¹³ See Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd 937 F.2d 623 (Fed. Cir. 1991) (table), cert. denied, 502 U.S. 1075 (1992); Ray v. Lehman, supra.

¹⁴ See MPEP 711.03(c) (III) (C) (2).

(C) Petitioner must supply 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.

The petition lacks items (1), (2), and (3).

In the Decision on Petition mailed on October 8, 2010, petitioner was requested to provide the information described above. However, the showing provided with the subject renewed petition falls far short of that which is required to show unavoidable delay due to a docketing error.

Petitioner has not shown that (1) the alleged docketing error was the cause of the delay at issue; (2) there was in place a business routine 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.

At the outset, it is noted that petitioner has not provided the documentation regarding the docketing system as requested in the Decision mailed on October 8, 2010. Petitioner states, in the subject renewed petition, that petitioner has no further information and "[i]f Mr. Webb maintains a personal file wrapper it can only be assumed that no notices or any other correspondence would be contained therein that leads any more proof that a docketing error existed."¹⁵ However, petitioner has not shown that any efforts were made to contact Webb and verify whether the subject documentation could be obtained.

Rather, petitioner has provided no statements from any persons, save the statement from Webb himself provided with the initial petition. Further, it is stated that "Petitioner believes that once Mr. Webb left his previous law firm and went out as a solo practitioner that Mr. Webb was the party who was most likely in charge and responsible for the maintenance of the system."¹⁶ As such, the showing of record is that the attorney himself, rather than a trained and experienced employee, was responsible for the alleged docketing error. In short, not only has petitioner failed to provide an adequate showing of a docketing error, but the showing of record mitigates away from a finding of

¹⁵ Renewed Petition filed December 8, 2010, Page 13 of 21.

¹⁶ Id., Page 12 of 21.

unavoidable delay, and in favor of a finding of a mistake of counsel.

In this regard, it is noted that petitioner denies that there was a "miscommunication" between Webb and petitioner, and disputes the Office's conclusion of such. Petitioner further notes that the Office "relies heavily on Webb's statement."¹⁷

37 CFR 1.2 states that the action of the Patent and Trademark Office will be based exclusively upon the written record in the Office. As Webb's statement is a statement from a person with first-hand knowledge of the details surrounding the delay, the Office **must** rely upon this statement. Petitioner apparently disagrees with Webb's assessment of the cause of the delay, such disagreement, at most, is a dispute between petitioner and his former counsel, however, the Patent and Trademark Office is not the proper forum for resolving disputes between applicants and their representatives.¹⁸

The U.S. Patent and Trademark Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and applicant is bound by the consequences of those actions or inactions.¹⁹ Specifically, petitioner's delay caused by the mistakes or negligence of his voluntarily chosen representative does not constitute unavoidable delay within the meaning of 35 U.S.C. § 133.²⁰

A delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP does not constitute an "unavoidable" delay.²¹ A delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable" due to: (1) the applicant's reliance upon oral advice from Office employees; or (2) the Office's failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action.²²

¹⁷ Id., Page 3 of 21.

¹⁸ See Ray v. Lehman, 55 F.3d 606, 34 USPQ2d 1786 (Fed. Cir. 1995).

¹⁹ Link v. Wabash, 370 U.S. 626, 633-34 (1962).

²⁰ Haines v. Quigg,); 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. 130, 131 (Comm'r Pat. 1891).

²¹ Id.

²² See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985); see also In re Colombo, Inc., 33 USPQ2d 1530, 1532 (Comm'r Pat. 1994) (while the Office attempts to notify applicants of deficiencies in their responses in a manner permitting a timely

In this regard, petitioner asserts that Link v. Wabash,²³ is inapplicable to this case inasmuch as it states that an applicant is bound by the consequences of those actions or inactions of his chosen representative, because Link "is not a patent case and has entirely different facts."²⁴

Petitioner's argument is unavailing. In Smith v. Mossinghoff,²⁵ the Court of Appeals for the D.C. Circuit accepted the district court's citation of Link in determining that counsel's nonawareness of PTO rules did not constitute unavoidable delay.²⁶ More recently, in Chiuminatta Concrete Concepts, Inc. v. Cardinal Industries, Inc.,²⁷ the United States District Court for the Central District of California, in denying a motion for relief from judgment to a defendant in a patent infringement case, cited Link in stating that the Supreme Court has long held that clients are held accountable for the acts and omissions of their attorneys.²⁸

Petitioner further argues that Haines v. Quigg,²⁹ is not applicable to this case because in Haines, counsel provided no reasons for the delay. Petitioner's argument is not well taken, as it is undisputed that Webb is a registered patent practitioner and that petitioner appointed Webb to represent him on patent matters. Rather, petitioner's argument appears to be that, since in this case, unlike Haines, Webb has offered "reasons" for the delay, (i) the Office must accept these "reasons" as evidence of unavoidable delay without question; or (ii) the Office must consider petitioner not bound by the actions or inactions of Webb. Neither argument is persuasive.

Further still, petitioner argues that Douglas v. Manbeck³⁰ is not applicable to this case because, in Douglas, patent counsel died and prior to his death notified the patentee of the status of the patent. Petitioner's argument is not persuasive. At the outset, while the attorney sent the client a copy of the Office action, there is no showing in Douglas that the attorney ever mailed the

correction, the Office has no obligation to notify parties of deficiencies in their responses in a manner permitting a timely correction).

²³ 370 U.S. 626, 633-34 (1962).

²⁴ Renewed Petition, page 17.

²⁵ 213 USPQ 977, 671 F.2d 533 (D.C. Cir. 1982).

²⁶ Id., at 983.

²⁷ 49 USPQ2d 2005, 1999 U.S. Dist. LEXIS 4749 (C.D. Cal. 1999), aff'd 1 Fed. Appx. 879, U.S. App. LEXUS 233 (Fed. Cir. 2001).

²⁸ Id., at 8.

²⁹ 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

³⁰ 21 USPQ2d 1697 (E.D. Pa. 1991).

applicant a copy of the notice of abandonment.³¹ Further, in a patent, expired for failure to pay the maintenance fee, unlike an application abandoned for failure to respond to an Office action, there is no obligation on the part of the Office to inform the patentee of the need to pay a maintenance fee. As such, whether or not Webb received notification from the USPTO does not relieve Webb, or petitioner, from the requirement to timely pay the maintenance fee.

A patentee's lack of knowledge of the need to pay the maintenance fee and the failure to receive the Maintenance Fee Reminder do not constitute unavoidable delay.³² Under the statute and regulations, 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. The Office mailing of Maintenance Fee Reminders is carried out strictly as a courtesy. Accordingly, 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/or 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.³³

Turning to petitioner's assertion that Webb delayed payment of the maintenance fee due to chronic depression. As stated previously, while physical or mental incapacitation can be a cause of delay, a showing of "unavoidable" delay based upon incapacitation must establish that petitioner's incapacitation was of such a nature and degree as to render petitioner unable to conduct business (e.g. correspond with the Office) during the period between March 28, 2008, and the date of filing of the initial petition.

Such a showing must be supported by a statement from practitioner's treating physician, and such statement must provide the nature of practitioner's incapacitation during the above-mentioned period.

Petitioner, however, has provided no such statement, stating, instead, in essence, that the fact that Webb's failure to deny

³¹ See *Id.*

³² See Patent No. 4,409,763, *supra*; see also "Final Rules for Patent Maintenance Fees" 49 Fed. Reg. 34716, 34722-34723 (August 31, 1984), reprinted in 1046 Off. Gaz. Pat. Office 28, 34 (September 25, 1984).

³³ *Rydeen v. Quigg*, 748 F. supp. at 900.

that he suffered from depression should be accepted as an admission that he did in fact suffer from said affliction.³⁴

Petitioner has failed to provide a sufficient showing of unavoidable delay due to incapacitation of petitioner's registered patent practitioner. In the absence of a documented showing, including a statement from the practitioner's physician which would establish that petitioner's incapacitation was of such a nature and degree as to render petitioner unable to conduct business (e.g., correspond with the Office) during the period between March 28, 2008, and the date of filing of the initial petition, the Office is unable to conclude that the delay was unavoidable.

In order to show unavoidable delay due to incapacitation of petitioner's attorney, the burden is on petitioner to provide evidence that the attorney was incapacitated during the time period in question. The purpose of requiring such a showing is not to asperse the attorney, or his conduct with regards to petitioner's matters, but rather to show that the cause of the delay, from the date the patent became expired until the date a grantable petition was filed, was unavoidable due to the incapacitation of the attorney.

Further, in this regard, it is noted that petitioner asserts that "The Petition's attorney, Mr. Douglas Wood, hereinafter "Wood," claims that Webb asserted in his statement that he was not suffering from chronic depression. Petitioner has reviewed Webb's statement numerous times and can find no such assertion."³⁵

Petitioner is correct to the extent that no such assertion exists, because no such assertion was ever made. Rather, the Decision mailed on October 8, 2010, states that petitioner has not provided a sufficient showing of unavoidable delay due to Webb's alleged incapacitation.

In summary, the showing of record is petitioner has not provided sufficient evidence supporting a conclusion that the delay was unavoidable due to the incapacitation of attorney Webb.

Petitioner concedes that neither the cause of the delay, nor the person whose commission or omission resulted in the error, can be identified. In the absence of a documented showing of the

³⁴ See Renewed Petition, Page 2.

³⁵ Id.

existence of a reliable tracking system, an explanation of the error that occurred, and that a showing that the error occurred despite the exercise of due care, the Office is precluded from finding that the error resulted from unavoidable delay. Simply put, the burden is on petitioner, not the Office, to show that the delay was unavoidable. Petitioner has not met its burden of showing the delay was unavoidable.

It is noted that the petition states "Petitioner agrees that a failure of Webb's docketing system was the proximate reason for nonpayment."³⁶ In this regard, the Decision mailed on October 8, 2010, stated the requirements for showing unavoidable delay due to a docketing error, and explained the requirements (lay out again) for a showing of unavoidable delay due to a docketing error. The petition also noted that, based on Webb's own account, was that there was a miscommunication between petitioner and Webb. Further, petitioner concedes that Webb's docketing system became unreliable when he left the firm at which he was practicing and began a solo practice.³⁷ The fact that Webb's tracking system may have once been reliable, but later become unreliable, does not render the delay unavoidable, as a showing of unavoidable delay based on docketing error requires a documented showing that the entire delay was due to the failure of a reliable tracking system.³⁸ As such, the showing of record is clearly that petitioner's counsel lacked a reliable tracking system for maintenance fees. Therefore, petitioner must show that he himself had the maintenance fee properly docketed.

It is further stated that "Petitioner believes that once Mr. Webb left his previous law firm and went out as a solo practitioner that Mr. Webb was the party who was most likely in charge and responsible for maintenance of the system."³⁹ Assuming Webb himself was in charge of the docketing system, any error which occurred would not be a docketing error, by a reliable and trained employee, but an error by counsel.

As petitioner has not shown that it exercised the standard of care observed by a reasonable person in the conduct of his or her most important business, the petition will be denied.⁴⁰

³⁶ Id., Pages 2-3.

³⁷ Id., Page 8.

³⁸ Id.

³⁹ Id., Page 12.

⁴⁰ See note 7, supra.

CONCLUSION

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

Since this patent will not be reinstated, the maintenance fee(s) and surcharge fee(s) submitted by petitioner will be refunded to counsel's deposit account. The \$400.00 fee for reconsideration will not be refunded, and will be deducted from the amount refunded.

As stated in 37 CFR 1.378(e), no further reconsideration or review of this matter will be undertaken.

The patent file is being returned to Files Repository.

Telephone inquiries should be directed to Senior Petitions Attorney Douglas I. Wood at 571-272-3231.



Anthony Knight
Director, Office of Petitions