

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE**

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In the Matter of)	
)	
Kevin P. Correll,)	Proceeding No. D2018-12
)	
Appellant.)	
)	

FINAL ORDER

On February 24, 2021, Kevin P. Correll (“Appellant”) filed a “Request for Reconsideration and/or Modification of the Director’s Final Order Dated February 4, 2021.” (“Request for Reconsideration”). The Request followed the United States Patent and Trademark Office (“USPTO” or “Office”) Director’s Final Order on Appellant’s hearing appeal, dated February 4, 2021. That Final Order affirmed the Initial Decision of the Administrative Law Judge (“ALJ”) that Appellant violated USPTO’s disciplinary rules and suspended Appellant from practice before the USPTO in patent, trademark, and other non-patent matters for 60 months. For the reasons set forth below, Appellant’s Request for Reconsideration is denied.

I. PROCEDURAL BACKGROUND

The Office of Enrollment and Discipline (“OED”) Director issued a Complaint and Notice of Proceedings against Appellant under 35 U.S.C. §§ 2(b)(2)(D), 32, and 37 C.F.R. §§ 11.32, 11.34, 11.39 on January 17, 2018, charging Appellant with two counts of professional misconduct through violations of the USPTO Code and the USPTO Rules.¹ The violations stemmed from

¹¹ Effective May 3, 2013, the USPTO Rules of Professional Conduct (“USPTO Rules”), 37 C.F.R. §§ 11.101 through 11.901, apply to persons who practice before the Office. Prior to May 3, 2013, the USPTO Code of Professional Responsibility (“USPTO Code”) applied to persons practicing before the Office. *See* 37 C.F.R. §§ 10.20-10.112. Appellant engaged in misconduct that violated both the USPTO Rules and the USPTO Code.

allegations that Appellant represented private parties before the USPTO while he was employed by the federal government. Appellant answered the Complaint on February 15, 2018, in which he admitted most of the factual allegations in the Complaint but also raised various affirmative defenses to the disciplinary proceedings.

The parties filed various dispositive motions with the ALJ and, after briefings, on September 27, 2018, the ALJ issued an order on the parties' cross-motions for summary judgment, finding that Appellant violated certain disciplinary rules.² Appellant's defenses and counterclaims, to include both First and Fifth Amendment claims, were rejected. The ALJ denied summary judgment as to sanction.

Following a hearing, the ALJ issued the Initial Decision on October 3, 2019. Having already concluded that Appellant violated multiple provisions of the USPTO Code and USPTO rules in the September 27, 2018 summary judgment order, the Initial Decision considered the issue of sanction. The ALJ thoroughly, and in great detail, considered the factors under 37 C.F.R. § 11.54(b), and concluded that Appellant should be suspended from practice before the USPTO in patent, trademark, and non-patent matters for 60 months.

Appellant filed an appeal of the ALJ's Initial Decision on November 5, 2019, asking the USPTO Director to "dismiss the October 3, 2019 Initial Decision in Proceeding No. D2018-12. . ." However, on February 4, 2021, the USPTO Director denied Appellant's appeal. This Request for Reconsideration followed.

² The ALJ granted summary judgment to the OED Director on Count I with regard to the violations of the USPTO Code, 37 C.F.R. §§ 10.23(a), 10.23(b)(4), 10.23(b)(5), 10.23(c)(20), 10.40(b)(2), and the USPTO Rules, 37 C.F.R. §§ 11.111, 11.116(a)(1), 11.505, 11.804(d). (A.414-40). The ALJ denied summary judgment on Count I with regard to the alleged violations of 37 C.F.R. §§ 10.23(b)(6), 11.804(b), and 11.804(i), as well as to all of the allegations in Count II. (*Id.*).

II. LEGAL STANDARD

Following a final decision of the USPTO Director, either party may make a single request for reconsideration or modification of the decision by the USPTO Director if such request is filed within twenty days from the date of entry of the decision *See* 37 C.F.R. § 11.56(c). The provisions governing reconsideration state:

No request for reconsideration or modification shall be granted unless the request is based on newly discovered evidence or error of law or fact, and the requestor must demonstrate that any newly discovered evidence could not have been discovered any earlier by due diligence.

Id. The standard of review governing requests under § 11.56(c) are not defined beyond what appears in the text of the regulation. However, although the Federal Rules of Civil Procedure are not applicable in administrative proceedings,³ courts have at times looked to them for useful guidance in judging actions taken by the USPTO.⁴ The standard of review used by federal courts for motions to alter or amend a judgment under Rules 59(e) and 60 of the Federal Rules of Civil Procedure are most similar to requests for reconsideration filed pursuant to § 11.56(c). Because of that, the standard set forth in those rules has been previously utilized by USPTO in analyzing reconsideration requests. *See In re Faro*, Proceeding No. D2015-27 (USPTO Feb. 9, 2018); *In re Piccone*, Proceeding No. D2015-06 (USPTO Feb. 9, 2018); *In re Bang-er Shia*, Proceeding No. D2014-31 (USPTO Aug. 1, 2016). Accordingly, that standard is applied here to Appellant's Request for Reconsideration.

Federal courts have viewed the standard of review for Rules 59(c) and 60 as narrow and limited to only circumstances involving new evidence, or to correct errors of law or fact. *See*

³ *See Bender v. Dudas*, No. 04-1301, 2006 WL 89831, at *23 (D.D.C. Jan. 13, 2006), *aff'd*, 490 F.3d 1361 (Fed. Cir. 2007).

⁴ *See Gerritsen v. Shirai*, 979 F.2d 1524, 1532 (Fed. Cir. 1992).

Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Any new evidence submitted must not have been available before the issuance of the final decision. See *Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (“Evidence that is available to a party prior to entry of judgment, therefore, is not a basis for granting a motion for reconsideration as a matter of law.”) (citing *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985)). Furthermore, it is long-settled that requests for reconsideration are not a vehicle to state a party’s disagreement with a final judgment. See *Hutchinson*, 994 F.2d at 1082 (“mere disagreement does not support a Rule 59(e) motion”); *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007), *cert. denied*, 552 U.S. 1040 (2007) (stating that a Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment). A request for reconsideration should not be used to rehash “arguments previously presented” or to submit evidence that should have been previously submitted. *Wadley v. Park at Landmark, LP*, No. 1:06cv777, 2007 WL 1071960, at *2 (E.D. Va. Mar. 30, 2007) (citing *Hutchinson*, 994 F.2d at 1081-82); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (holding improper a motion for reconsideration “to ask the Court to rethink what the Court had already thought through—rightly or wrongly”); *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977) (stating that Rule 59(e) is not intended to give “an unhappy litigant one additional chance to sway the judge”). Instead, reconsideration is appropriate where, for example, “the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.” *Above the Belt, Inc.*, 99 F.R.D. at 101; *United States v. Ali*, No. 13-3398, 2014 WL 5790996, at *3 (D. Md. Nov. 5, 2014).

While requests for reconsideration are permitted they are seldom granted. These types of motions are extraordinary remedies reserved only for extraordinary circumstances. *See Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (limiting relief under Rule 60(b)(6) to “extraordinary circumstances”); *Projects Mgmt. Co. v. DynCorp Int’l, LLC*, 17 F. Supp. 3d 539, 541 (E.D. Va. 2014), *aff’d*, 584 F. App’x 121 (4th Cir. 2014) (reconsideration of a judgment after its entry is an “extraordinary remedy which should be used sparingly” (quoting *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998))); *see also Netscape Commc’ns Corp. v. ValueClick, Inc.*, 704 F. Supp. 2d 544, 546 (E.D. Va. 2010). Consequently, the standard for granting a Request for Reconsideration under § 11.56(c) is very high and requests are granted sparingly and only in extraordinary circumstances. For the reasons discussed below, Appellant has not made any arguments or submitted any evidence that satisfies the standard of review and his Request for Reconsideration is denied. Additionally, the portion of his request that is styled as a Motion to Dismiss is denied.

III. DECISION

A. Appellant Has Not Satisfied the Requirements for Granting Reconsideration Under 37 C.F.R. 11.56(c).

The standard for granting reconsideration under 37 C.F.R. 11.56(c) is that “[n]o request for reconsideration or modification shall be granted unless the request is based on newly discovered evidence or clear error of law or fact. . . .” As detailed below, Appellant’s Request completely and fully fails to satisfy this standard.

There is not a single reference to any “newly discovered evidence” in Appellant’s request. That being the case, a grant of Reconsideration rests on Appellant’s ability to show an error of law or fact. However, a review of his Request shows that he merely reiterates the same arguments, and the same points of law, that have already been raised and rejected. As the OED

Director aptly summarized, “a detailed review of Appellant’s Request shows that Appellant has resubmitted his Appeal Brief, renaming it a Request for Reconsideration.” OED Resp. at 12-16 (comparing Appellant’s appeal brief to Request for Reconsideration). And, as already stated, a request for reconsideration should not be used to rehash “arguments previously presented” or to submit evidence that should have been previously submitted. *See Wadley*, 2007 WL 1071960, at *2 (citing *Hutchinson*, 994 F.2d at 1081-82). Here, Appellant makes no new argument on the issue that was the sole, substantive focus of his appeal: his first amendment claims. Appellant’s arguments as to his first amendment claims were rejected on appeal and, having failed to prove any error of law or fact here, an order granting Reconsideration is not appropriate.

As part of this denial, Appellant’s alternate requests for a stay of the Initial Decision pending further adjudication, as well as the request to remand this matter to the ALJ, are also denied. *See* Request at 1, 29-30.

A reconsideration decision by the USPTO Director is “effective on its date of entry.” 37 C.F.R. §11.56(c). Thus, Appellant’s request for a stay this regulatory provision can only be permitted upon satisfying 37 C.F.R. § 11.3, which states that “In an extraordinary situation, when justice requires, any requirement of the regulations of this Part which is not a requirement of statute may be suspended or waived by the USPTO Director or the designee of the USPTO Director, sua sponte, or on petition by any party. . . .” However, Appellant identifies no extraordinary situation justifying staying the discipline; he merely disagrees with the discipline being imposed and refers to his previously argued First Amendment arguments. All hearing appeals and requests for reconsideration amount to a disagreement with disciplinary action. Granting a stay on this basis is not “an extraordinary situation” and Appellant’s request to stay the effective date of this Order and the discipline imposed pending further adjudication is denied.

The request to remand is denied on the substantive bases stated for denying reconsideration and on the basis that the argument in support of remand was not raised or developed during the appeal. As a result, that request and arguments are waived on reconsideration. *See Smithkline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319-20 (Fed. Cir. 2006).

B. Appellant’s Motion to Dismiss Is Denied.

1. Appellant’s Motion to Dismiss Was Improperly Filed and, Alternatively, the Asserted Grounds for Sections B, C, and D of that Motion Are Without Merit.

Appellant’s Reply Brief to the OED Director’s April 9, 2021 Response was filed on April 22, 2021. However, along with his Reply, Appellant fused to that pleading a variety of arguments identified as a “Motion to Dismiss” alleging newly identified grounds why the disciplinary matter should be dismissed. Because there was no authority or leave granted to file that Motion, the Motion to Dismiss is denied.

The USPTO’s rules governing hearing appeals, of which Requests for Reconsideration are part of the hearing appeal process, are specific as to what pleadings are permitted to be filed and when those pleadings may be filed. 37 C.F.R. §§ 11.55, 11.56. Those rules do not permit the parties to file briefs or motions beyond the appeal and reconsideration briefs without the permission of the USPTO Director. 37 C.F.R. § 11.55(m) (“Unless the USPTO Director permits, no further briefs or motions shall be filed.”). No leave was sought, and no permission given by the USPTO Director, for the Appellant’s “Motion to Dismiss.” Further, none of the Briefing Orders, dated March 2, 2021, March 31, 2021, and April 29, 2021 respectively, permitted Appellant to file additional Motions or Briefs in these proceedings. To the contrary, an order issued on May 26, 2021 explicitly denied Appellant’s request to file an additional reply in these proceedings. Because Appellant was not authorized, by regulation or Order, to file the Motion to

Dismiss, that Motion is denied and Sections B, C, and D are stricken, per the OED Director's request.

As alternative grounds for denying the Motion to Dismiss, it is also noted that Appellant's arguments in his Motion to Dismiss concerning the "law of the circuit," new procedural arguments relating to his First Amendment argument, and statute of limitations are waived and forfeited. Arguments not raised or developed during the appeal are waived on reconsideration. *See Smithkline Beecham Corp.*, 439 F.3d 1312 at 1319-20. The first two arguments were raised for the first time on appeal.⁵ The statute of limitations argument was raised before the ALJ but was not raised in his appeal to the USPTO Director. Thus, as stated, they cannot be raised for the first time in an appeal at the reconsideration stage.

2. The USPTO Possesses Subject-Matter Jurisdiction to Promulgate Rules Under 35 U.S.C. § 32, Including Trademark and Non-Patent Matters.

In Section A of his Motion to Dismiss, Appellant also raises a variety of jurisdictional challenges including claims that the USPTO Director lacked the statutory authority to promulgate and enforce disciplinary rule 37 C.F.R. § 11.34(d) regarding the statute of limitations with respect to trademark matters and other non-patent matters. Reply at 3-5. Further, he argues that 35 U.S.C. § 32 only applies to patent matters because it is part of Title 35. *Id.* Appellant argues that 28 U.S.C. § 2462 contains the appropriate statute of limitations for trademark matters, not 35 U.S.C. § 32. Reply at 4. Even though Appellant's subject-matter jurisdiction argument is being made for the first time on appeal in his "Motion to Dismiss," unlike the other arguments raised, jurisdictional arguments may be raised at any time. *United States v. Cotton*,

⁵ To the extent the new arguments regarding the First Amendment claim are an attempt to qualify as newly discovered evidence or clear error of law or fact, these arguments also fail as they amount to little more than an attempt to relitigate Appellant's unsuccessful claim. As already noted several times in this Order, that basis is insufficient for a grant of reconsideration.

535 U.S. 625, 630 (2002) (the “concept of subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived”); *United States v. Quijada-Gomez*, 360 F. Supp. 3d 1084, 1093 (E.D. Wa. 2018) (citing *Cotton*, 535 U.S. at 629-31).

However, having considered his argument here, Appellant’s argument is without any merit as it is long-settled that the USPTO’s disciplinary jurisdiction is statutory, broad, and applicable to all practitioners before the USPTO.

The Director of the USPTO may suspend or exclude a person from practice before the USPTO if the person is “shown to be incompetent or disreputable, or guilty of gross misconduct,” or if the person violates regulations established by the Office. 35 U.S.C. § 32. In carrying out this role, Congress vested the USPTO with plenary, statutory authority to promulgate regulations “govern[ing] the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.” 35 U.S.C. § 2(b)(2)(D); *see Kroll v. Finnerty*, 242 F.3d 1359, 1364 (Fed. Cir. 2001) (stating that the USPTO has the “exclusive authority to establish qualifications for admitting persons to practice before it, and to suspend or exclude them from practicing before it.”); *Haley v. Lee*, 129 F. Supp. 3d 377, 386 (E.D. Va. 2015) (noting that “Congress gave the USPTO wide latitude to govern the conduct of the members of its bar.”). Accordingly, the USPTO Director has the authority to regulate practice before the Office in both patent and trademark matters. 35 U.S.C. § 2(b)(2)(D); *see also* 37 C.F.R. § 11.19(a) (“[a]ll practitioners engaged in practice before the Office . . . are subject to the disciplinary jurisdiction of the Office.”); *Haley*, 129 F. Supp. 3d at 387 (“Congress also *explicitly* gives the USPTO the power to promulgate regulations related to the conduct of its members.”).

In accordance with its authority, the USPTO has enacted an entire regulatory scheme that defines what constitutes practice before the Office and identifies the disciplinary authority of, and the disciplinary processes available to, the OED Director. The USPTO enacted the former USPTO Code, 37 C.F.R. § 10.20 *et seq.*, and the current USPTO Rules, 37 C.F.R. §§ 11.101 through 11.901, both of which include a number of mandatory rules setting forth the minimum level of conduct for practitioners before the Office. If a practitioner before the USPTO fails to comply with his or her professional obligations under these rules, the USPTO has the authority to suspend or exclude the practitioner from further practice before the Office. *See* 35 U.S.C. §§ 2(b)(2)(D), 32; 37 C.F.R. § 11.19. Because of its broad statutory powers to issue regulations that “govern the recognition and conduct of agents, attorneys, *or other persons representing applicants or other parties before the Office*,” 35 U.S.C. § 2(b)(2)(D) (emphasis added), Appellant’s claims that the USPTO lacked the authority to promulgate and enforce disciplinary rule 37 C.F.R. § 11.34(d) regarding the statute of limitations with respect to trademark matters and other non-patent matters, that 35 U.S.C. § 32 only applies to patent matters because it is part of Title 35, and that 28 U.S.C. § 2462 contains the appropriate statute of limitations for trademark matters is patently incorrect. Reply at 3-5. Furthermore, the USPTO has long used its broad statutory and regulatory to enforce its disciplinary rules against trademark practitioners. *See In re Bang-er Shia*, Proceeding No. D2014-31 (USPTO Mar. 4, 2016) (USPTO rejected Appellant’s claim that the USPTO had no jurisdiction over trademark practitioners). As a result, his jurisdictional challenges are dismissed.

IV. CONCLUSION

Having considered Appellant’s Request for Reconsideration of Director’s Final Order dated February 24, 2021, as well as the other pleadings, it is **ORDERED** that Appellant’s Request for

Reconsideration is **DENIED**. Additionally, Appellant’s Motion to Dismiss was procedurally improper and substantively without merit, and is also **DENIED**.

APPEAL RIGHTS

Appellant is notified that he is entitled to seek judicial review on the record in the U.S. District Court for the Eastern District of Virginia under 35 U.S.C. § 32 “within thirty (30) days after the date of the order recording the Director’s action.” *See* E.D.Va. Local Civil Rule 83.5.

IT IS SO ORDERED.

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David Berdan General Counsel United States Patent and Trademark Office	Date
on delegated authority by Andrew Hirshfeld Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office	