

BEFORE THE UNDERSECRETARY OF COMMERCE  
FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE  
UNITED STATES PATENT AND TRADEMARK OFFICE

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In the Matter of: )  
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Bang-er Shia, )

Appellant. )  
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Proceeding No. D2014-31

**ORDER DENYING APPELLANT'S  
REQUEST FOR RECONSIDERATION**

The Director of the Office of Enrollment and Discipline (“OED”) filed a Complaint charging Bang-er Shia (“Appellant”) with the violation of the United States Patent and Trademark Office (“USPTO”) disciplinary rules. Specifically, the OED Director concluded that Appellant engaged in misconduct that violated the following provisions of the USPTO Code of Professional Responsibility: 37 C.F.R. § 10.23(a) (disreputable misconduct); § 10.23(b)(4) (deceit and misrepresentations to the USPTO); § 10.23(b)(5) (conduct prejudicial to the administration of justice); and § 10.77(a) (handling matters she was not competent to handle).<sup>1</sup> The OED Director also concluded that Appellant’s misconduct violated the following provisions of the USPTO Rules of Professional Conduct: 37 C.F.R. § 11.303(a)(1) (failure to correct misrepresentations made to the Office); § 11.505 (aiding others in the unauthorized practice of law); § 11.804(c) (deceit and misrepresentations to the USPTO); and § 11.804(d) (conduct prejudicial to the administration of justice).

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<sup>1</sup> The USPTO Code of Professional Responsibility is applicable for violations of the USPTO disciplinary rules occurring prior to May 3, 2013. For violations occurring on or after May 3, 2013, the USPTO Rules of Professional Conduct apply to persons who practice before the Office. Appellant committed violations both before and after the effective date of the effectiveness of the USPTO Rules of Professional Conduct, and therefore both regulations apply.

An administrative hearing was held before Administrative Law Judge (“ALJ”) Alexander Fernandez, and an Initial Decision was issued on April 22, 2015, which found that Appellant engaged in misconduct that violated the ethics rules. As a sanction, Appellant was excluded from the practice of patent, trademark, and other non-patent matters before the Office.

On May 22, 2015, Appellant appealed the ALJ’s Initial Decision to the Director of the USPTO. After briefing by the parties, the Director of the USPTO issued a Final Order on March 4, 2016 concluding that the ALJ’s findings were fully supported by the record, and that the factors considered by him under 37 C.F.R. § 11.54(b) before imposing the sanction of exclusion, was appropriate.

On March 22, 2016, the Appellant moved for reconsideration of the Final Order by filing the instant Request for Reconsideration (“Request”), pursuant to 37 C.F.R. § 11.56(c). In the Request, the Appellant seeks reconsideration of the sanction imposed by the Director of the USPTO, and challenges the Director’s factual findings and decision by asserting new evidence and alleging that the Director of the USPTO made numerous errors of law or fact in issuing the Final Order.

A Response was filed by the OED Director on April 12, 2016. The Appellant did not submit a reply.

After reviewing Appellant’s arguments, for the reasons set forth below, Appellant’s Request for Reconsideration is **DENIED**.

## **I. Legal Standard**

The regulations authorize the Director of the USPTO to grant a request for reconsideration or modification of the Director’s Final Order if the request is based on newly discovered evidence, or an error of law or fact. *See* 37 C.F.R. § 11.56(c). The standard of review governing requests under § 11.56(c) has not been defined beyond what appears in the

regulations. Although the Federal Rules of Civil Procedure are not applicable in administrative proceedings,<sup>2</sup> the courts have at times looked to them for useful guidance in judging actions taken by the USPTO.<sup>3</sup> Because 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 pursuant to § 11.56(c), that standard is applied to the instant Request.

Federal courts have clarified that the standard of review for Rules 59(c) and 60 are narrow and limited to only certain circumstances involving new evidence, or to correct errors of law or fact. *See 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 (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.”) (quoting *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985)). Reconsideration “would be 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. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983); *United States v. Ali*, No. 13-3398, 2014 WL 5790996, at \*3 (D.Md. Nov. 5, 2014).

It is long-settled that requests for reconsideration<sup>4</sup> 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.*

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<sup>2</sup> *See Bender v. Dudas*, No. 04-13012006 WL 89831, at \*23 (D.D.C. Jan. 13, 2006).

<sup>3</sup> *See Gerritsen v. Shirai*, 979 F.2d 1524, 1532 (Fed. Cir. 1992).

<sup>4</sup> Such request refer to either motions to alter or amend a judgment (Fed. R. Civ. P. 59(e)), or motions for relief from a judgment or order (Fed. R. Civ. P. 60).

*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 which should have been previously submitted. *Wadley v. Park at Landmark, LP*, No. 1:06CV777, 2007 WL 1071960, at \*2 (E.D.Va. 2007) (citing *Hutchinson*, 994 F.2d at 1081-82); *Above the Belt, Inc.*, 99 F.R.D. at 101 (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”).

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. American Nat. 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)).

Thus, the standard of review for a Request for Reconsideration under § 11.56(c) is very high, and such requests should be granted sparingly and only in extraordinary circumstances. For the reasons discussed below, Appellant has not proffered any arguments or evidence that satisfies the standard of review, and therefore the Request is **DENIED**.

## **II. Discussion**

In moving for reconsideration, the Appellant claims the Director of the USPTO committed errors of law or fact, and requests that the Final Order be dismissed. However,

Appellant does not present any newly discovered evidence, or identify errors in law or fact that support her argument that the Final Order warrants dismissal.

A. Appellant Does Not Present New Evidence in the Exhibits Submitted with her Request.

Appellant attaches eight sets of exhibits (labeled AA-AH) to her Request consisting of emails and letter correspondence between Appellant and OED Counsel, briefs, hearing transcripts, trial exhibits, and court documents, such as notices and orders issued by the ALJ, and the Final Order of the USPTO Director. Each set of exhibits includes a cover sheet indicating that it is “evidence” of an error committed by the General Counsel<sup>5</sup> or by OED counsel. However, the case law is clear that only “new evidence” will be considered when evaluating the merits of a request to reconsider a judgement. *See Hutchinson*, 994 F.2d at 1081. Any evidence that was available, or could have been discoverable, before the Final Order was issued cannot be considered in evaluating the arguments in the Request. *See Boryan*, 884 F.2d at 771.

Upon review, the Appellant’s exhibits do not identify any new evidence that support a dismissal of the Final Order. In fact, many of the documents in the eight sets of exhibits are part of the ALJ’s administrative record and was therefore available and considered by the decisionmaker. Those that were not part of the administrative record could have been discovered during the proceeding because they were in the possession of the Appellant, such as the email and letter correspondence between Appellant and OED counsel. Therefore, the documents submitted do not constitute new evidence that would require the dismissal of the Final Order.

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<sup>5</sup> Throughout the Request, the Appellant names the General Counsel, Sarah Harris, as the individual taking action against the Appellant. Although the General Counsel was the official who issued the Final Order, she undertook this action by delegation of the Director of the USPTO who authorized her to act on her behalf on matters pertaining to disciplinary actions under 37 C.F.R. § 11.56(c). Ultimately, the Director of the USPTO is the decisionmaker for final agency actions in disciplinary matters.

B. Appellant Does Not Identify Any Errors of Fact That Warrant Dismissal of the Final Order.

In support of her Request, Appellant argues several errors of fact under the heading “Facts Misrepresented in the Final Order.” However, upon closer review, this section does not appear to be a discussion of errors of fact in the Final Order, but rather it is a mix of a chronology of events, both relevant and irrelevant to the Request, as well as the Appellant’s opinions, commentary, and various mis-statements of the procedural history of the matter. Although Appellant does not specifically label them as errors of fact, Appellant presents the following three arguments in other parts of her Request.

1. Tampering with Evidence by “Concealing” in the Final Order the Appellant’s Testimony of Her Legal Authority to Bind Applicants before the USPTO.

Appellant claims the Director of the USPTO tampered with evidence by “concealing” from the Final Order the Appellant’s testimony that evidenced her legal authority to bind applicants before the USPTO. However, a review of the evidence shows that the Director of the USPTO did consider Appellant’s testimony and documentary evidence regarding her legal authority to bind applicants. At the hearing before the ALJ, Appellant submitted documents that purported to give her “power of attorney” with “legal authority to bind” her clients. Initial Decision at 10-11. However, the ALJ concluded that the evidence did not sufficiently demonstrate that Appellant possessed the necessary legal authority to overcome a violation of the disciplinary rules. Initial Decision at 11-13. The Director of the USPTO also reviewed the “power of attorney” documents submitted into evidence upon appeal of the ALJ’s decision, and upheld the ALJ’s finding. Final Order at 21. When making her decision, the Director of the USPTO is not obligated to expressly acknowledge every piece of documentary evidence in the Final Order. Thus, Appellant’s argument is more correctly characterized as mere disagreement

with the Director's decision as the record is clear that her testimony and evidence was considered by the Director prior to issuing the Final Order. Moreover, as discussed in Section II.A of this Order, although Appellant claimed that Exhibit AD contained evidence of such legal authority, that exhibit did not in fact contain any new evidence that overcomes the Director's determination. Because Appellant has not demonstrated any error of fact made by the Director regarding Appellant's legal authority to bind applicants, this argument is rejected.

2. Tampering with Evidence by Misrepresenting the Meaning of the Word "signatures" in the Final Order by Using It Out of Context.

Appellant also claims the Director of the USPTO "tampered with evidence" by misrepresenting the meaning of the word "signatures" by using it out of context in the Final Order. Appellant argues that the Director of the USPTO's use of the word "signatures," rather than "E-signatures" (electronic signatures) when discussing the Appellant's misconduct, suggests that the Appellant's violation stemmed from the use of a written signature rather than an E-signature. The Appellant argues that there was no evidence that she forged an applicant's written signature, and the USPTO has not offered any instance where she has done so.

When issuing the Final Order, the Director of the USPTO properly framed the Appellant's misconduct as one stemming from the submission of E-signatures. The Final Order acknowledges the three different types of signatures available when using TEAS, Final Order at 4-5, 21-24, and clearly shows that the Director understood that the source of Appellant's misconduct was for improper electronic signatures on trademark applications. Final Order at 21-24. When read in the context of the entire document, it is clear that use of the word "signatures" in the Final Order is a truncated reference to "E-signatures," and not a written signature.

Because Appellant has not submitted any new evidence or argument that demonstrates that the Director made an error in fact regarding the nature of Appellant's misconduct in the

Final Order, this argument is rejected.

3. Evidence in the Final Order That TEAS Would Erase Previously Entered E-signatures.

Appellant next claims the Director of the USPTO admitted in the Final Order that TEAS would erase previously entered E-signatures, which Appellant argues is evidence that her conduct was not a violation of the regulations. The argument put forth by the Appellant does not show evidence of an error of fact. To the contrary, this is merely a restatement of the arguments she proffered to the ALJ and to the Director on appeal as an excuse for why she improperly affixed electronic signatures to the trademark documents at issue. The Director rejected that argument, as did the ALJ.

In sum, Appellant does not identify any error in fact in the Final Order. Rather, she merely proffers an argument that mirrors what she put forth to the ALJ and to the Director on appeal. Those arguments, which were meant to excuse her misconduct, were rejected. Because, she merely reiterates the same objections and argument as previously raised during the disciplinary hearing and on appeal, this argument is rejected.

C. Errors of Law.

Appellant asserts numerous alleged errors of law in a section entitled “Arguments Supported by Fact and Law.” These arguments are inadequately developed and interspersed throughout the Request, but more importantly they are arguments that Appellant asserted previously during either the hearing before the ALJ or in her hearing appeal before the Director of the USPTO, and found to be without merit. Appellant offers no new case law or changes in existing law that would change the outcome of the Final Order. Instead, Appellant merely restates the same legal arguments and authorities that were presented during previous stages of the proceeding.

For example, Appellant asserts that the Director exceeded her statutory authority when she promulgated regulations governing the conduct of practitioners before the USPTO. Appellant argues that those regulations are “substantive,” which Appellant argues is not statutorily authorized since the USPTO has only procedural rulemaking authority. Appellant raised this argument with the ALJ during the administrative proceedings (Answer at 68; Post-Hearing Brief at 16-19), and with the Director of the USPTO in her hearing appeal (Appeal of the ALJ’s Initial Decision at 15-16; and Reply Brief at 13). However, both the ALJ and the Director of the USPTO concluded that this argument had no merit and cited to long-standing case law that support the USPTO’s legal authority to promulgate regulations. (Initial Decision at 2, 26; Final Order at 18-20). Appellant does not present any new information or case law showing that the Director of the USPTO made an error in law in the Final Order in concluding that the USPTO has substantive rulemaking authority to govern Appellant’s conduct.

As already stated, a request for reconsideration is not the place to relitigate old matters, or to rehash arguments previously presented. *See Hutchinson*, 994 F.2d at 1081-82. However, this is precisely what Appellant is doing in her Request. Each of the numerous claims of errors of law in the Request were argued before the ALJ during the hearing, and were rejected. *See generally* Initial Decision. They were argued again almost verbatim in Appellant’s Appeal of the ALJ’s Initial Decision and Reply Brief, which were rejected by the Director as well. *See generally* Final Order. In order to succeed in a reconsideration, there must be a showing that “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. Appellant has not met this burden of proof, and therefore, the claims are rejected.

**Conclusion**

The Request does not support the assertion that the Director of the USPTO committed an error of law or fact, nor is it supported by new evidence. Rather, Appellant recapitulates arguments previously raised and considered by the Director of the USPTO. For the reasons above, the Appellant's Request for Reconsideration is **DENIED**.

**ORDER**

Having considered Appellant's Request under 37 C.F.R. § 11.56(c), it is hereby ordered that the Request is **DENIED**.

If Appellant desires further review, Appellant is notified that she 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.**

8/1/16

Date



Sarah Harris  
General Counsel  
United States Patent and Trademark Office

on behalf of  
Michelle Lee  
Under Secretary of Commerce for Intellectual  
Property and Director of the United States Patent  
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cc:

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Order Denying Appellant's Request For Reconsideration was mailed by certified mail, return receipt requested, on this day to the Appellant at the most recent address provided to the OED Director pursuant to 37 C.F.R. § 11.11(a):

Dr. Bang-er Shia  
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8/11/16

Date



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