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

In the Matter of:	)	
James Michael Baker,	)	Proceeding No. D2019-08
Respondent.	)	

FINAL ORDER PURSUANT TO 37 C.F.R. § 11.24

Pursuant to 37 C.F.R. § 11.24, James Michael Baker ("Respondent") is hereby reprimanded for violation of 37 C.F.R. § 11.804(h), having been disciplined by a duly constituted authority of a state.

I. BACKGROUND

1. On November 4, 1991, Respondent was admitted to practice law in Oregon (Bar No. 915144). *See* Stipulation for Discipline, *In re Complaint as to the Conduct of James Baker*, Case No. 14-27 (Supreme Court of Oregon, Oct. 5, 2015) ("Stipulation"). At all times relevant to this reciprocal discipline matter, Respondent has been registered to practice in patent matters before the United Stated Patent and Trademark Office ("USPTO"). Respondent's USPTO Registration Number is 47,207. He is, therefore, subject to the USPTO Rules of Professional Conduct set forth at 37 C.F.R. § 11.101 *et seq.*

2. Respondent was employed by the Law Office of John J. Humphrey. *See* Stipulation ¶ 5. Respondent made numerous appearances on behalf of the defendants in *RW Hayes dba Hays Oil Co. v. Nat'l Naft Corp.*, Case No. 12-5530-L3, in Jackson County Circuit Court, Oregon (the "Hayes Case"). *Id.*

3. Trial of the Hayes Case was set for September 10, 2013. *See* Stipulation ¶ 6.

4. At a September 3, 2013 pretrial conference before the trial judge, Judge Grensky, Respondent asked for a continuance but that request was denied. *See* Stipulation ¶ 6. In response to the denial, Respondent reasserted arguments made in a motion for reconsideration, arguing that certain earlier rulings by Judge Grensky established that neither Respondent, nor the Law Office of John J. Humphrey, was defendants' attorney of record and therefore he was not obligated to appear at trial. *Id.* Judge Grensky disagreed with Respondent's assertion and notified Respondent that he should appear for trial on September 10, 2013. *Id.*

5. Respondent did not file either a consent to withdraw or a motion to withdraw as required by Oregon Revised Statutes (ORS) 9.380(1), Uniform Trial Court Rules (UTCR) 3.140, and Oregon Rules of Professional Conduct ("RPC") 1.16. *See* Stipulation ¶ 7.

6. On September 10, 2013, the parties appeared for trial in the Hayes Case. *See* Stipulation ¶ 8. Respondent did not appear for the trial. *Id.* Because the defendants were unrepresented, the trial could not proceed. *Id.* Judge Grensky ordered Respondent to appear in court the next day. *Id.*

7. On September 11, 2013, Respondent appeared before Judge Grensky as ordered. *See* Stipulation ¶ 9. Respondent reiterated his position that neither he, nor the Law Office of John J. Humphrey, was defendants' attorney of record. *Id.* Judge Grensky then continued the trial to allow defendants time to retain new counsel. *Id.* A motion to withdraw as counsel was later filed on behalf of Respondent and the Law Office of John J. Humphrey, and it was granted. *Id.*

Oregon Proceeding and Discipline

8. On August 27, 2014, a Formal Complaint was filed against Respondent pursuant to the authorization of the State Professional Responsibility Board ("SPRB") of Oregon. *See*

Stipulation ¶ 4. The Complaint alleged that Respondent RPC 1.16(c) (duty to obtain court permission when terminating representation) and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). *Id.*

9. On September 10, 2015, Respondent executed the Stipulation, which stated that "being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe." Stipulation ¶ 7. As a result of the Stipulation, Respondent admitted that he "failed to file a motion or consent to withdraw and did not follow the court's order regarding terminating his representation of his clients, which was contrary to RPC 1.16(c)."[1] Stipulation ¶ 10. He also admitted that his conduct, combined with his failure to appear at trial, interfered with the procedural functioning of the court and wasted court resources, and constituted conduct prejudicial to the administration of justices in violation of RPC 8.4(a)(4).[2] *Id.*

10. Respondent entered into the Stipulation freely and voluntarily. *See* Stipulation ¶ 3. Respondent was represented by counsel in that proceeding. *Id.* Respondent and the Oregon State Bar ("OSB") agreed that the Stipulation set forth all relevant facts and violations, and that the agreed-upon sanction was a final disposition of the proceeding. *Id.* ¶ 4.

11. Respondent and the OSB agreed that the Disciplinary Board should consider the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards") in setting Respondent's sanction. *See* Stipulation ¶ 11. Accordingly, Respondent's misconduct was analyzed by considering the ABA Standards' four factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the

[1] RPC 1.16(c) states that "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

[2] RPC 8.4(a)(4) states that "[i]t is professional misconduct for a lawyer to[] engage in conduct that is prejudicial to the administration of justice."

actual or potential injury; and (4) the existence of aggravating and mitigating circumstances. *Id.* Utilizing the ABA Standards, OSB concluded that Respondent violated his duty to the legal system by engaging in conduct prejudicial to the administration of justice and by improperly withdrawing from his clients' representation. *See* Stipulation ¶ 11(a) (citing ABA Standards §§ 6.2, 7.2).

12. Under the second ABA Standard, Respondent's conduct was concluded to be negligent in determining whether he had properly withdrawn from his clients' representation, and knowing when he chose not to appear for trial. *See* Stipulation ¶ 11(b) (citing Standards § 9).

13. The Stipulation further set forth that both actual and potential injury are relevant to determining the sanction in a disciplinary case. *See* Stipulation ¶ 11(c) (citing *In re Williams*, 840 P.2d 1280 (Or. 1992)). The parties agreed that Respondent's conduct caused actual injury to the judicial system including to: the opposing party (who prepared their case and showed up to court, ready to try it); the witnesses (who showed up for court); and the court itself (which was forced to reschedule a multi-day trial, wasting both time and resources). *Id.*

14. The Stipulation also discussed aggravating and mitigating circumstances relevant to Respondent's misconduct. *See* Stipulation ¶ 11(d) - (e) (citing ABA Standards §§ 9.2 and 9.3). In terms of aggravation, Respondent committed multiple offenses and had substantial experience in the practice of law. *Id.* ¶ 11(d) (citing ABA Standards §§ 9.22(d) and (i)). Mitigating circumstances included the absence of prior disciplinary record and the absence of a dishonest or selfish motive. *Id.* ¶ 11(e) (citing ABA Standards §§ 9.32(a) and (b)).

15. Respondent and OSB agreed that, consistent with the ABA Standards and Oregon case law, Respondent should be, and was, reprimanded for violating RPC 1.16(c) and RPC 8.4(a)(4). *See* Stipulation ¶¶ 12-14.

16. The Stipulation for Discipline was approved by the Oregon Supreme Court in *In re James Baker*, Case No. 14-27 (Or. 2015). Respondent was publicly reprimanded.

USPTO Reciprocal Discipline Proceeding

17. On March 4, 2019, the OED Director filed a Request for Notice and Order pursuant to 37 C.F.R. § 11.24, requesting that the USPTO Director impose on Respondent the identical discipline imposed by the Supreme Court of Oregon in its disciplinary matter against Respondent. The OED Director sought to impose reciprocal discipline upon Respondent for violating 37 C.F.R. § 11.804(h)(1), by being reprimanded on ethical grounds by a duly constituted authority of a State.

18. On March 6, 2019, a "Notice and Order Pursuant to 37 C.F.R. § 11.24" ("Notice and Order") was sent by certified mail (receipt no. 70172620000001052801) notifying Respondent that the Director of the Office of Enrollment and Discipline ("OED Director") had filed a "Complaint for Reciprocal Discipline Pursuant to 37 C.F.R. § 11.24" ("Complaint") requesting that the Director of the United States Patent and Trademark Office impose reciprocal discipline upon Respondent identical to the discipline imposed by the October 5, 2015 Order of the Oregon State Bar in *In re James Baker*, Case No. 14-27. The Notice and Order provided Respondent an opportunity to file, within forty (40) days, a response opposing the imposition of reciprocal discipline based on one or more of the reasons provided in 37 C.F.R. § 11.24(d)(1).

19. On April 22, 2019, Respondent filed his Response with the USPTO Director and claims that "the first due process violation was for the [Oregon State Bar] failing to consider the issue of respondent superior-vicarious liability of [Respondent's law firm] for its refusal to stay on the case [without] payment for its services by the court receivership." Response to Notice and Order ("Response") at 4. He also claims it was a violation of due process for the Oregon State Bar to

not have considered the unethical conduct of his opposing counsel in the Oregon civil litigation, or the judicial complaint filed against the trial judge. *See id.* at 6-7. Respondent also argues it was a grave injustice for the court in the underlying litigation to force Respondent and Respondent's law firm to litigate a complex civil matter without wages. *See id.* Also, the result of the underlying corporate litigation had a negative outcome for the corporate defendants, which he claims was a grave injustice. *See id.* at 7. Finally, he challenges the language of the state issued reprimand. *See id.* at 8.

20. On May 1, 2019, the USPTO Director ordered the OED Director to respond to the Response. The OED Director filed a timely response ("OED Response"). Although Respondent was permitted to file a Reply to the OED Director's filing, he did not do so.

II. LEGAL STANDARD

Pursuant to 37 C.F.R. § 11.24(d), and in accordance with *Selling v. Radford*, 243 U.S. 46 (1917), the USPTO has codified standards for imposing reciprocal discipline based on a state's disciplinary adjudication. Under *Selling*, state disbarment creates a federal-level presumption that imposition of reciprocal discipline is proper, unless an independent review of the record reveals: (1) a want of due process; (2) an infirmity of proof of the misconduct; or (3) that grave injustice would result from the imposition of reciprocal discipline. Federal courts have generally "concluded that in reciprocal discipline cases, it is the respondent attorney's burden to demonstrate, by clear and convincing evidence, that one of the *Selling* elements precludes reciprocal discipline." *In re Kramer,* 282 F.3d 721, 724 (9th Cir. 2002); *In re Friedman*, 51 F.3d 20, 22 (2d Cir. 1995). "This standard is narrow, for '[a Federal court, or here the USPTO Director is] not sitting as a court of review to discover error in the [hearing judge's] or the [state] courts' proceedings.'" *In re Zdravkovich*, 634 F.3d 574, 578 (D.C. Cir. 2011) (quoting *In re*

Sibley, 564 F.3d 1335, 1341 (D.C. Cir. 2009)) (second and third alternations in original).

The USPTO's regulation governing reciprocal discipline, 37 C.F.R. § 11.24(d)(1), mirrors the standard set forth in *Selling*:

> [T]he USPTO Director shall consider any timely filed response and shall impose the identical public censure, public reprimand, probation, disbarment, suspension, or disciplinary disqualification unless the practitioner clearly and convincingly demonstrates, and the USPTO Director finds there is a genuine issue of material fact that:
>
> (i) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute deprivation of due process;
>
> (ii) There was such infirmity of proof establishing the conduct as to give rise to the clear conviction that the Office could not, consistently with its duty, accept as final the conclusion on that subject;
>
> (iii) The imposition of the same public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification by the Office would result in a grave injustice; or
>
> (iv) Any argument that the practitioner was not publicly censured, publicly reprimanded, placed on probation, disbarred, suspended or disciplinarily disqualified.

Id.

To prevent the imposition of reciprocal discipline, Respondent is required to demonstrate that there is a genuine issue of material fact as to one of these criteria by clear and convincing evidence. *See id.* As discussed below, however, Respondent has not shown by clear and convincing evidence that there is a genuine issue of material fact with regard to any of the factors set forth in 37 C.F.R. § 11.24(d)(1).

III. ANALYSIS

As stated, Federal courts have generally "concluded that in reciprocal discipline cases, it is the respondent attorney's burden to demonstrate, by clear and convincing evidence, that one of the *Selling* elements precludes reciprocal discipline." *In re Kramer,* 282 F.3d at 724; *In re Friedman*, 51 F.3d at 22. Thus, Respondent's recourse to mitigate or negate reciprocal discipline here is limited to arguing the *Selling* factors precludes reciprocal discipline. He cannot satisfy

this burden.

A. Respondent's Reciprocal Discipline Would Not Constitute a Deprivation of Due Process.

Under *Selling*, state disbarment creates a federal-level presumption that imposition of reciprocal discipline is proper, unless Respondent satisfies one of the factors set forth at § 11.24(d). Here, in an effort to show that reciprocal discipline would constitute of due process, Respondent makes several claims. Respondent first claims that "the first due process violation was for the [Oregon State Bar] failing to consider the issue of respondent superior-vicarious liability of [Respondent's law firm] for its refusal to stay on the case [without] payment for its services by the court receivership." Response at 4. He also claims it was a violation of due process for the Oregon State Bar to not have considered the unethical conduct of his opposing counsel in the Oregon civil litigation, or the judicial complaint filed against the trial judge. *See id.* at 6-7. He also challenges the language of the state issued reprimand. *See id.* at 8. None of these arguments, however, constitute a deprivation of due process under § 11.24.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re Karten*, 293 F. App'x. 734, 736 (11th Cir. 2008) (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (internal quotation marks omitted)). In disciplinary proceedings, an attorney is entitled to due process, such as reasonable notice of the charges before the proceedings commence. *See In re Ruffalo*, 390 U.S. 544, 551 (1968); *In re Cook*, 551 F.3d 542, 549 (6th Cir. 2009) (procedural due process includes fair notice of the charge). Due process requirements are satisfied where a respondent "attended and participated actively in the various hearings, and was afforded an opportunity to present evidence, to testify, to cross-examine witnesses, and to present argument." *In re Squire,* 617 F.3d 461, 467 (6th Cir. 2010) (quoting *Ginger v. Circuit Court for Wayne Cnty.,* 372 F.2d 620, 621 (6th Cir. 1967)); *see*

also In re Zdravkovich, 634 F.3d 574 (D.C. Cir. 2011) (stating that attorney could not satisfy claim of due process deprivation where he was given notice of the charges against him, was represented by counsel, and had hearing at which counsel had the opportunity to call and cross-examine witnesses, make arguments, and submit evidence). Due process requirements are also met where a respondent is given "an opportunity to respond to the allegations set forth in the complaint, testify at length in [his] own defense, present other witnesses and evidence to support [his] version of events . . ., [and is] able to make objections to the hearing panel's findings and recommendations." *In re Squire*, 617 F.3d at 467 (quoting *In re Cook*, 551 F.3d at 550) (ellipsis and third alteration in original).

Here, Respondent was represented by counsel during his state level disciplinary proceeding. Nowhere in his response does he claim that he was not able to be heard or was prevented from participating in those proceedings. Rather, and as the OED Director points out, he simply is seeking to relitigate substantive issues and arguments in connection with the underlying state disciplinary matter. Simply put, that is not a deprivation of due process.

It is noted that Respondent also challenges the language of the state issued reprimand. *See* Response at 8. He does not identify under which of the *Selling* factors he makes this argument and it is not clear that this argument, in fact, properly falls under one of those factors. Nevertheless, it is considered here as whether or not there was a due process violation associated with the language of the Stipulation. It is concluded that there is no such violation.

Respondent plainly noted in his Response that he "drafted the language" of the Stipulation. Response at 8. That Stipulation was voluntarily entered into with the advice of counsel and, by doing so, he admitted various facts, agreed to various admissions, and admitted both the violations of the state disciplinary rules and the sanction imposed. The OED Director points out

that Respondent's Stipulation is permitted by the Oregon rules of procedure and contains all of the requirements consistent with the applicable procedural rules. *See* Response at 10-11. Respondent does not dispute that point. Consequently, having agreed to the Stipulation, having drafting language in the Stipulation, and having voluntarily signed it with the advice of counsel, he cannot claim a deprivation of due process such that reciprocal discipline is improper here.

B. The Imposition of Reciprocal Discipline Would Not Result in a Grave Injustice.

Respondent also argues it was a grave injustice for the court in the underlying litigation to force Respondent and Respondent's law firm to litigate a complex civil matter without wages. *See* Response at 6-7. Also, the result of the underlying corporate litigation had a negative outcome for the corporate defendants, which he claims was a grave injustice. *See id.* at 7. However, under the applicable standard, and even crediting his argument as true, this argument does not rise to the level of a grave injustice.

The grave injustice analysis focuses on whether the severity of the punishment "fits" the misconduct and allows for consideration of various mitigating factors. *See In re Thav*, 852 F. Supp. 2d 857, 861-62 (E.D. Mich. 2012); *see also In re Kramer*, 282 F.3d at 727 (on challenge to imposition of reciprocal discipline, "we inquire only whether the punishment imposed by [the first] court was so ill-fitted to an attorney's adjudicated misconduct that reciprocal disbarment would result in grave injustice"); *In re Attorney Discipline Matter*, 98 F.3d 1082, 1088 (8th Cir. 1996) (no grave injustice where disbarment imposed by the state court "was within the appropriate range of sanctions"); *In re Benjamin*, 870 F. Supp. 41, 44 (N.D.N.Y. 1994) (public censure within range of penalties for misconduct and thus censure was not a grave injustice). "As long as the discipline from the state bar was within the range of appropriate sanctions, it is not grave injustice for the [USPTO] to impose reciprocal discipline." *See Persaud v. Director of the*

USPTO, No. 1:16–cv–00495, 2017 WL 1147459, at *2 (E.D. Va. Mar. 27, 2017).

Here, Respondent does not argue that his reprimand is not within the range of appropriate penalties. And as already stated, he voluntarily stipulated not only to the facts of the underlying disciplinary matter and to the violations of the state disciplinary rules, but to the sanction here received. "[T]he parties agree that [Respondent] shall be reprimanded for violation of RPC 1.16(c) and RPC 8.4(a)(4), the sanction to be effective upon approval by the Disciplinary Board." Stipulation ¶ 14. Respondent also agreed that a reprimand was consistent with the ABA Standards and Oregon state law, a point that is clearly probative on the issue of whether or not his reprimand was a grave injustice.

Courts have regularly found that there is no grave injustice in imposing reciprocal discipline when the underlying discipline was voluntarily agreed to by the practitioner. *See Haley v. Lee*, 129 F. Supp. 3d 377, 390 (E.D. Va. 2015) (USPTO's reciprocal discipline of practitioner that was predicated on practitioner's voluntary resignation in lieu of discipline was not a grave injustice); *In re Lebowitz*, 944 A.2d 444, 453 (D.C. 2008) (finding no grave injustice in imposing reciprocal discipline where respondent voluntarily resigned from practice of law in another state in the face of pending disciplinary charges); *In re Steinberg*, No. 09-01, 2009 WL 1324067, at *3 (W.D. Pa. May 12, 2009) (imposition of same discipline as that based on a voluntary resignation in another jurisdiction is not a grave injustice). Here, Respondent drafted the language and voluntarily agreed to the Stipulation that resolved the state disciplinary matter, with the aid of counsel, and he admitted to both misconduct and the sanction imposed. Finally, he agreed that a reprimand was consistent with the ABA Standards and Oregon state law. Having agreed to the sanction, and the propriety of that sanction, he cannot now escape reciprocal discipline on the basis of a "grave injustice."

ORDER

ACCORDINGLY, it is ORDERED that:

1. Respondent is publicly reprimanded;

2. The OED Director shall publish a Notice in the *Official Gazette* that is materially consistent with the following:

Notice of Reprimand

This notice concerns James Michael Baker of Pacheco, California, who is a registered patent agent (Registration Number 47,207). In a reciprocal disciplinary proceeding, the Director of the United States Patent and Trademark Office ("USPTO") has ordered that Mr. Baker be publically reprimanded for violating 37 C.F.R. § 11.804(h), predicated upon being reprimanded by a duly constituted authority of a State during a time in which Mr. Baker was registered as an active attorney in Oregon.

On October 5, 2015, the Oregon State Bar, in *In re James Baker*, Case No. 14-27, reprimanded Mr. Baker for violating Oregon Rules of Professional Conduct 1.16(c), for failing to file a motion or consent to withdraw and not following the court's order regarding terminating his representation of his clients, and 8.4(a)(4), for conduct prejudicial to the administration of justice, via an Order Approving Stipulation for Discipline, based on a Stipulation for Discipline signed and executed by Mr. Baker on September 10, 2015, and by the Oregon State Bar on September 16, 2015. In the Stipulation for Discipline, Mr. Baker acknowledged that he, during a pre-trial conference in an Oregon court, argued that, according to the court's rulings, he and the law firm he worked for were no longer the defendants' attorney of record and therefore not obligated to appear at trial. The court disagreed with Mr. Baker and notified Mr. Baker to appear for trial on September 10, 2013. Thereafter, Mr. Baker did not file a consent to withdraw or a motion to withdraw. On September 10, 2013, the parties appeared for trial but Mr. Baker did not. The court ordered Mr. Baker to appear the next day. On September 11, 2013, Mr. Baker appeared in court, reiterated his position that neither he, nor the law firm he worked for, were the defendants' attorney of record. The court continued the trial to allow the defendants time to retain new counsel. A motion to withdraw was later filed on behalf of Mr. Baker and the law firm that employed Mr. Baker.

This action is taken pursuant to the provisions of 35 U.S.C. § 32 and 37 C.F.R. § 11.24. Disciplinary decisions are available for public review at the Office of Enrollment and Discipline's FOIA Reading Room, located at: http://e-

foia.uspto.gov/Foia/OEDReadingRoom.jsp;

3. The OED Director give notice pursuant to 37 C.F.R. § 11.59 of the public discipline and the reasons for the discipline to disciplinary enforcement agencies in the state(s) where Respondent is admitted to practice, to courts where Respondent is known to be admitted, and to the public; and
4. Respondent shall comply with the duties enumerated in 37 C.F.R. § 11.58.

Pursuant to 37 C.F.R. § 11.57(a), review of the final decision by the USPTO Director may be had by a Petition filed with 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.

8/8/19
Date

Sarah T. Harris
General Counsel for General Law
United States Patent and Trademark Office

on delegated authority by

Andrei Iancu
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office