# Appendix

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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| RICHARD POLIDI | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | 1:17-cv-1133 (LMB/IDD) |
| | ) | |
| MICHELLE K. LEE, et al. | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

Defendants having established good cause for the relief requested, their Motion to Vacate Scheduling Order [Dkt. No. 20] is GRANTED, and it is hereby

ORDERED that the Scheduling Order issued on November 16, 2017, be and is VACATED.

The Clerk is directed to forward a copy of this Order to counsel of record and to the plaintiff, pro se.

Entered this 29th day of November, 2017.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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| RICHARD POLIDI, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 1:17-cv-1133 (LMB/IDD) |
| | ) | |
| UNITED STATES OF AMERICA, et al., | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

Before the Court is the United States of America's ("defendant" or the "United States") Motion to Dismiss Plaintiff's First Amended Complaint [Dkt. No. 13], on the ground that the Court lacks subject matter jurisdiction to consider the Declaratory Judgment Act ("DJA") claim filed against the defendant. The motion has been fully briefed and the Court, having reviewed the papers, finds that oral argument would not aid the decisional process. Because the United States has not waived its sovereign immunity for this DJA claim, there is no subject matter jurisdiction over this claim against the United States and defendant's motion will be granted.

Plaintiff Richard Polidi ("plaintiff" or "Polidi"), a former attorney proceeding pro se, initiated this civil action in Virginia state court seeking to overturn the United States Patent and Trademark Office's ("USPTO") decision to disbar him from practicing before it and asserting various state law tort claims against multiple USPTO officials. Compl. [Dkt. No. 1]. On October 4, 2017, the United States Attorney for the Eastern District of Virginia certified that the USPTO officials were acting within the scope of their employment when they made the disbarment decision at issue, removed the action to federal court, and substituted the United States as party defendant pursuant to 28 U.S.C. § 2679(d). [Dkt. No. 2].

On November 3, 2017, plaintiff filed a First Amended Complaint that abandoned all of his state law claims, and named as defendants the United States of America; Michelle K. Lee, the former Director of the USPTO; James O. Payne, the former USPTO Deputy General Counsel for General Law; USPTO employees Elizabeth U. Mendel, John Heaton, and Kimberly C. Weinreich; and ten John Does who are described as "parties who encouraged or otherwise acted in concert with the other Defendants." First Amended Complaint ("FAC") ¶ 15 [Dkt. No. 9]. The First Amended Complaint contains three counts: Count I is the DJA claim against all defendants; Count II is a Bivens claim against only the individual defendants in their individual capacities; and Count III is a civil RICO claim under 18 U.S.C. § 1964 also against only the individual defendants in their individual capacities. See FAC ¶¶ 34-51.[1] In Count I, Polidi seeks a declaration that the orders entered by Payne in USPTO Proceeding No. D2015-11 are void; that "violations by defendants . . . including but not limited to violations of 18 U.S.C. § 1964 as well as Constitutional due process violations, took place;" and he appears to seek damages from all defendants "to be determined at a trial of this matter." See FAC at 9.

Polidi was previously licensed to practice law in North Carolina and was admitted to the bar which practices before the USPTO. FAC ¶¶ 1, 12. On July 21, 2014, he voluntarily surrendered his North Carolina license after "conceding that he could not successfully defend himself in a pending professional misconduct investigation." Polidi v. Matal, 2017 WL 4551200, at *1 (Fed. Cir. Oct. 12, 2017). Accordingly, the North Carolina State Bar disbarred him by consent order. Id. The USPTO then instituted reciprocal discipline proceedings, notifying plaintiff that he had 40 days in which to file a response establishing a "genuine issue of material fact that the imposition of [identical] discipline . . . would be unwarranted." Id. Although plaintiff sought and received three extensions of

[1] Because none of the individual defendants has been served, the United States' motion does not apply to the claims filed against them.

time to respond, he failed to submit any response to the USPTO's notice, and on July 14, 2015, the USPTO imposed reciprocal discipline which resulted in plaintiff being barred from practicing before it. Id.; FAC ¶¶ 16, 19, 21.

Polidi petitioned the Eastern District of Virginia for review of the USPTO decision, pursuant to 35 U.S.C. § 32, but the district court upheld his disbarment and the Federal Circuit affirmed that decision. See Polidi, 2017 WL 4551200, at *2. Plaintiff has filed five unsuccessful separate lawsuits in this district against the USPTO, the North Carolina State Bar, and various officials of both institutions, all essentially attacking his disbarment. See Polidi v. Bannon, 226 F. Supp. 3d 615, 617 (E.D. Va. 2016) (reviewing plaintiff's litigation history in connection with his disbarment). In this, his sixth action, plaintiff's sole claim against the United States is the DJA claim. FAC ¶ 53. The United States argues that the Court lacks subject matter jurisdiction to review plaintiff's claim against it because the claim is barred by sovereign immunity.

Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.' FDIC v. Meyer, 510 U.S. 471, 475 (1994). Absent waiver, sovereign immunity precludes a district court from entertaining a cause of action against the United States. See Welch v. U.S. 409 F.3d 646, 650–51 (4th Cir.2005). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 518 U.S. 187, 192 (1996). The plaintiff bears the burden of showing that such an unequivocal waiver exists for his particular claim. See Welch, 409 F.3d at 651; see also Williams v. United States, 50 F.3d 299, 304 (4th Cir.1995).

Even construing Polidi's pro se complaint liberally, he has failed to meet this burden. It is well established that the DJA itself does not serve as a waiver of the United States' sovereign immunity nor does it create subject matter jurisdiction on its own. See Schilling v. Rogers, 363 U.S. 666, 667

("[T]he Declaratory Judgment Act is not an independent source of federal jurisdiction"); Circuit City Stores, Inc. v. EEOC, 75 F. Supp. 2d 491, 504 (E.D. Va. 1999) ("Nor does the Declaratory Judgment Act constitute a waiver of sovereign immunity or create jurisdiction); Ocean Breeze Festival Park, Inc. v. Reich, 853 F. Supp. 906, 917 (E.D. Va. 1994) (same). Therefore, there must be a separate express waiver of sovereign immunity for the Court to entertain this claim.

The logical starting point is §702 of the Administrative Procedure Act ("APA"), which allows a person aggrieved by a final agency action to seek judicial review. 5 U.S.C. § 702.[2] The Fourth Circuit has held that § 702 operates as a waiver of sovereign immunity for actions seeking nonmonetary relief unless Congress has enacted a statutory review process for the claim at issue or a preclusion-of-review statute. See Hostetter v. United States, 739 F.2d 983, 985 (4th Cir. 1984). That is, where Congress has provided a special statutory review procedure for certain agency action, the APA does not waive the United States' sovereign immunity. See Ocean Breeze Festival Park, Inc., 853 F. Supp. at 917. A plain reading of 35 U.S.C. § 32 shows that Congress intended that statute to provide the single avenue for judicial review of USPTO disciplinary proceedings. 35 U.S.C. § 32; Swyers v. U.S. Patent & Trademark Office, No.1:16-cv-1042, 2016 WL 6897788, at *1 (E.D. Va. Nov. 21, 2016) (recognizing that § 32 provides the sole remedy for an individual seeking review of a USPTO disbarment proceeding). Accordingly, because Congress has provided a separate statutory review process for USPTO disbarment decisions, the APA does not waive sovereign immunity in these circumstances. See Cornish v. United States, 885 F. Supp. 2d 198, 207-208 (D.D.C. 2012)

[2] Polidi did not assert the APA in his Amended Complaint or in his opposition to the motion to dismiss. That omission does not preclude assessment of his claim pursuant to the APA provided his claim is cognizable under that statute. See Randall v. United States, 95 F.3d 339, 346 (4th Cir.1996) ("[f]ederal jurisdiction may be sustained on the basis of a statute not relied upon or alleged in the pleadings. Thus, if the allegations in Plaintiff's complaint are sufficient to support jurisdiction under a provision ... such as the APA, this court is authorized to examine the case under that provision.").

(finding that sovereign immunity barred an attorney's claim for reinstatement to the patent attorney register).

Moreover, although plaintiff references other statutes within his DJA claim, he fails to properly assert any cause of action under any other statute. For example, he complains that "the conduct of Defendants did not comport with either the Freedom of Information Act ["FOIA"] or the United States Privacy Act", FAC ¶ 38; however, he does not allege that he ever filed a FOIA or Privacy Act request. Similarly, he claims that defendants violated due process, id ¶ 39, but fails to identify any process he believes was denied.

"Mere conclusory allegations in the complaint are insufficient to support [subject matter] jurisdiction." Burgess v. Charlottesville Sav. & Loan Ass'n, 477 F.2ed 40, 43 (4th Cir. 1973). Instead, the complaint must "contain allegations affirmatively and distinctly establishing federal jurisdiction." Id.; see also Hegab v. Long, 716 F.3d 790, 796-97 (4th Cir. 2013) (finding that conclusory constitutional allegations are not sufficient to establish subject matter jurisdiction). Because plaintiff has not identified any valid waiver of the United States' sovereign immunity as to the DJA claim in this action, the Court finds that it lacks subject matter jurisdiction to consider the DJA claim against the United States.

Even if the Court were to have jurisdiction, it is abundantly clear that the claim against the United States is barred by the doctrine of res judicata.[3] Under the principles of res judicata, a plaintiff who does not raise claims he could have raised in one judicial proceeding may not come back into court to raise those claims in a future proceeding. Res judicata "bars any action that (1) arises from the same conduct, transaction, or occurrence, whether or not the legal theory or rights asserted in the

[3] The United States has filed a separate motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiff's complaint is barred by res judicata. [Dkt. No. 14] Because the Court finds that it lacks subject matter jurisdiction over plaintiff's DJA claim against the United States, it may not dismiss the claim on those grounds, see Invention Submissino Corp. v. Rogan, 357 F.3d 452, 456 (4th Cir. 2004), but includes the discussion to ensure that the record is complete.

second or subsequent action were raised in the prior suit, (2) has been previously decided on the merits by a final judgment, and (3) contains the same parties or parties in privity to those from the prior suit." Biggers v. Wells Fargo Bank, N.A., No. 3:16-cv-431, 2017 WL 465855, at *3 (E.D. Va. Feb. 3, 2017).

Plaintiff cannot credibly argue that his DJA claim does not involve the same "transaction or serious of transactions" that was at issue in the earlier litigation. The entirety of plaintiff's case consists of nothing more than his continued disagreement with the USPTO's denial of discovery in his disciplinary proceeding and ultimate disbarment—decisions that both the Eastern District of Virginia and the Federal Circuit have already upheld. See Order, Polidi v. Lee, 1:15-cv-1030 (E.D. Va. Nov. 24, 2015), aff'd sub nom., Polidi v. Matal, 2017 WL 4551200, at *2 (Fed. Cir. 2017).

Polidi argues that res judicata should not apply because his previous petition for judicial review was brought under 35 U.S.C. § 32, rather than as a DJA claim, see Pl.'s Opp. at 2-4; however, he is essentially asking for the same relief—reversal of the disbarment decision. The Fourth Circuit has expressly rejected attempts to thwart the finality of a previous decision through creative pleading. See Pueschel v. United States, 369 F.3d 345, 355 (4th Cir. 2004) ("Were we to focus on the claims asserted in each suit, we would allow parties to frustrate the goals of res judicata through artful pleading and claim splitting given that '[a] single cause of action can manifest itself into an outpouring of different claims, based variously on federal statutes, state statutes, and the common law.'" (quoting Kale v. Combined Ins. Co. of Am., 924 F.2d 1161, 1166 (1st Cir. 1991))).

Moreover, in his opposition to defendant's motion to dismiss, Polidi raises the exact same arguments that were rejected in his § 32 action. For example, in this action, he disputes the USPTO's decision to deny him discovery, Pl.'s Opp. at 3-4; however, the Federal Circuit expressly upheld the USPTO's discovery decisions in plaintiff's § 32 proceedings, see Polidi, 2017 WL 4551200, at *2 (finding that the USPTO's denial of plaintiff's discovery requests "was not arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law"). Similarly, he claims that his North Carolina disbarment was somehow fraudulent, Pl.'s Opp. at 4, but raised the identical argument before the Federal Circuit, see Appellant's Brief, at 3-8, Polidi, 2017 WL 4551200 [Dkt. No. 14]. Because plaintiff does nothing more than seek to "frustrate the goals of res judicata through artful pleading" by renaming his failed § 32 arguments as DJA claims, his claim would be dismissed on this ground if the Court had jurisdiction to consider defendant's Rule 12(b)(6) motion.

For the reasons stated above, the United States of America's Motion to Dismiss [Dkt. No. 13] is GRANTED, and it is hereby

ORDERED that the United States be and is DISMISSED as a defendant from this action; and it is further

ORDERED that the United States' Motion to Dismiss for Failure to State a Claim [Dkt. No. 14] be and is DENIED AS MOOT.

The Clerk is directed to forward copies of this Order to counsel of record and to plaintiff pro se.[4]

Entered this 28th day of December, 2017.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

[4] Because this decision is not a final order which disposes of the entire lawsuit, the time in which plaintiff may appeal has not started. See 28 U.S.C. § 1291; Fed. R. App. P. 4.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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| RICHARD POLIDI, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 1:17-cv-01133-LMB-IDD |
| | ) | |
| MICHELLE K. LEE, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**ORDER**

Before the Court is a Motion to Dismiss filed by defendants Michelle K. Lee ("Lee"), former Director at the United States Patent and Trademark Office ("USPTO"); James O. Payne ("Payne"), former Deputy General Counsel at the USPTO; Elizabeth U. Mendel ("Mendel"), Associate Solicitor at the USPTO; John Heaton ("Heaton"), Associate Counsel at the USPTO; and Kimberly C. Weinreich ("Weinreich"), Staff Attorney at the USPTO (collectively, the "individual defendants"), docketed as two motions. In their motion, the individual defendants seek to dismiss plaintiff Richard Polidi's ("plaintiff" or "Polidi") First Amended Complaint ("FAC") in its entirety on the ground that the Court lacks subject matter jurisdiction [Dkt. No. 27] or, alternatively, for failure to state a claim [Dkt. No. 28]. The motions have been fully briefed and the Court, having reviewed the pleadings, finds that oral argument would not aid the decisional process.

For the reasons explained below, Polidi's FAC will be dismissed for lack of subject matter jurisdiction due to the individual defendants being entitled to absolute immunity. Even if the Court had jurisdiction to consider this Complaint, it would be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to allege a plausible due process claim and a plausible violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) ("RICO").

I.

Polidi, proceeding pro se, was previously licensed to practice law in North Carolina and was a registered member of the USPTO's patent bar. FAC [Dkt. No. 9] ¶ 1. In 2014, the North Carolina State Bar ("NCSB") brought disciplinary proceedings against him for mishandling client funds. Id. ¶¶ 6-7. Polidi did not contest the charge and voluntarily surrendered his license to practice law after "conceding that he could not successfully defend himself in a pending professional misconduct investigation." Polidi v. Matal, 709 Fed. App'x 1016, 1017 (Fed. Cir. 2017). On July 21, 2014, Polidi was disbarred in North Carolina by a consent order. Id.

Based on the North Carolina disbarment order, the USPTO initiated a reciprocal discipline proceeding on February 10, 2015 by notifying Polidi in accordance with 37 C.F.R. § 11.24 of the proceeding and ordering him to file a response within forty days.[1] Polidi, 709 Fed. App'x at 1017. Instead of complying with the order to respond, Polidi submitted a discovery request asking the USPTO to "disclose material in its possession that tends to assist in the defense of the present matter." Id. He renewed that discovery request on June 10, 2015. Id. Polidi had obtained three

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[1] Title 37 C.F.R. §11.24 provides in pertinent part:

> (b) Notification served on practitioner. Upon receipt of a certified copy of the record or order regarding the practitioner being so... disbarred... the USPTO Director shall issue a notice directed to the practitioner in accordance with § 11.35 and to the OED Director containing:
>
> (1) A copy of the record or order regarding the...disbarment...;
>
> (2) A copy of the complaint; and
>
> (3) An order directing the practitioner to file a response with the USPTO Director and the OED Director, within forty days of the date of the notice establishing a genuine issue of material fact...that the imposition of the identical...disbarment...would be unwarranted and the reasons for that claim.
>
> ....

extensions of the date by which he had to respond to the notice, the last extension was to June 11, 2015. Id. The USPTO denied both discovery requests because Polidi failed to identify "any basis for why he thought the [USPTO] might have exculpatory evidence." Id. at 1017-18. The USPTO also explained that discovery was only allowed in "contested" cases and his case was not "contested" because he had not yet filed a response to the notice. Id. at 1018. Although Polidi sought and received three extensions of time to respond to the USPTO's notice, he failed to file a response. Id. On July 14, 2015, the USPTO issued an order imposing reciprocal discipline which resulted in Polidi being disbarred from practicing before the agency. Id.; FAC [Dkt. No. 9] ¶ 21.

Polidi petitioned for judicial review of the disbarment order in this court asserting that the USPTO erred by denying his discovery requests. Polidi v. Lee, 2015 U.S. Dist. LEXIS 191329, at *4 (E.D. Va. Nov. 24, 2015). Finding that there was no basis to conclude that the USPTO's order was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," the court upheld the disbarment decision. Id. at *9-10. Polidi's motion for reconsideration of that decision was denied, Polidi v. Lee, 2016 U.S. Dist. LEXIS 191363, at *10 (E.D. Va. Jan. 21, 2016), and the Federal Circuit affirmed the decision, upholding both the USPTO's decisions denying Polidi discovery and disbarring him from practicing before the agency, Polidi, 709 Fed. App'x at 1019. Since these rulings, Polidi has continued to fight the disbarment decision and has filed multiple unsuccessful lawsuits[2] in this court against the USPTO, the NCSB, and various officials of both agencies, including the individual defendants in this litigation.

[2] Polidi v. Bannon, 226 F. Supp. 3d 615, 624-25 (E.D. Va. 2016) (dismissing § 1983 and § 1985 claims pursuant to § 1915(e) and the remaining state-law claims under § 1367(c)); Polidi v. Lee, No. 1:15-cv-1030 (E.D. Va. Nov. 24, 2015) (affirming the disbarment decision and dismissing petition), appeal docketed, No. 16-1997 (Fed. Cir. May 5, 2016); Polidi v. Lee, et al., No. 1:15-cv-1141 (E.D. Va. Jan. 6, 2016) (voluntarily dismissing all claims against the defendants); Polidi v. North Carolina State Bar, et al., No. 1:16-cv-1322 (E.D. Va. Oct. 31, 2016) (dismissing the civil action pursuant to § 1915(e)), and Polidi v. North Carolina State Bar, et al., No. 1:16-cv-1322 (E.D.

## II.

On July 14, 2017, Polidi filed this civil action [Dkt. No. 1]. He amended the complaint on November 3, 2017 [Dkt. No. 9] by abandoning all state-law claims and naming as defendants the United States of America, which has since been dismissed [Dkt. No. 26], the individual defendants, and ten John Does who are described as "parties who encouraged or otherwise acted in concert with the other Defendants." FAC [Dkt. No. 9] ¶ 15. The FAC alleges three counts against the individual defendants solely in their individual capacities. Count 1 alleges that the USPTO's reciprocal discipline proceeding was void and that the individual defendants engaged in various statutory and constitutional violations. Id. ¶¶ 34-43. Count 2 alleges due process violations under Bivens,[3] id. ¶¶ 44-48, and Count 3 alleges a RICO violation, id. ¶¶ 49-51.

For relief, Polidi seeks a declaration that the USPTO's disbarment order is void and that the individual defendants violated his due process rights and committed RICO violations, for which he seeks damages from the individual defendants jointly and severally.

## III.

In their motions to dismiss, the individual defendants raise numerous grounds for dismissing the Complaint, all of which are meritorious. They first properly argue that the Court lacks subject matter jurisdiction because all of the individual defendants have absolute immunity due to the quasi-judicial or prosecutorial nature of the actions at issue. "In Bultz, the Supreme Court held that agency officials who perform quasi-judicial functions are entitled to absolute immunity from suit.

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Va. Nov. 30, 2016) (denying the motion to reconsider); Polidi v. Cheshire Parker Schneider & Bryan, PPLC, et al., No. 1:16-cv-1534 (E.D. Va. Dec. 22, 2016) (dismissing § 1983 and § 1985 claims pursuant to § 1915(e) and the remaining state-law claims under § 1367(c)); Polidi v. North Carolina State Bar, et al., No. 1:16-cv-1535 (E.D. Va. Dec. 28, 2016) (dismissing § 1983 and § 1985 claims pursuant to § 1915(e) and the remaining state-law claims under § 1367(c)).

[3] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

Absent such immunity, the fear of subsequent litigation might hamper quasi-judicial officials in exercising their duties." Richter v. Connor, 1994 U.S. App. LEXIS 6961, at *10-14 (4th Cir. Apr. 8, 1994) (quoting Bultz v. Economou, 438 U.S. 478 (1978)). "[A] court must engage in a functional analysis of an official's conduct to determine whether it is quasi-judicial in nature, and whether absolute immunity attaches." Id. Applying Bultz, the Fourth Circuit has adopted a three-part test to determine whether an official is entitled to absolute immunity. The test involves deciding: "(1) if the official's functions are similar to those of a judge, in that the official determines the law and the facts of the case; (2) if the official makes decisions sufficiently controversial that they are likely to foster suits for damages by disappointed parties; and (3) if sufficient procedural safeguards are in place to protect against constitutional deprivations." Id. Moreover, "officials who make the decision to initiate administrative proceedings, as well as those who present evidence on the record at an administrative hearing, perform functions analogous to that of a prosecutor, and as such, also are entitled to absolute immunity. These officials perform functions integral to the judicial process and must be free to perform their duties without the threat of civil damages." Id.

This court has found that USPTO disciplinary proceedings "bear many of the same hallmarks as traditional litigation." Swyers v. USPTO, et al., 2016 U.S. Dist. LEXIS 71530, at *8-9 (E.D. Va. May 27, 2016). For example, the statutory framework for USPTO disciplinary proceedings provides guidelines for filing motions, 37 C.F.R. § 11.43; hearings, § 11.44; amending pleadings, § 11.45; evidence, § 11.50; depositions, § 11.51; and discovery, § 11.52.

The FAC contains specific allegations concerning the conduct of each of the individual defendants, which demonstrate that their involvement in the disbarment proceeding entitles them to absolute immunity. For example, the FAC alleges that Payne "adjudicated each matter," "signed each Order," "made the decisions regarding the Orders," and "entered an Order excluding Plaintiff

from practice before the USPTO," FAC [Dkt. No. 9] ¶¶ 17, 21; that Lee oversaw the entire disciplinary proceeding, id. ¶ 18; that "Heaton provided assistance to Payne in connection with adjudicating the disciplinary matter and improperly entering the Orders," id. ¶ 23;[4] that "Weinreich and other Defendants conducted the preliminary investigation in the USPTO disciplinary matter," id. ¶ 24; and that Weinreich and Mendel assisted in initiating and prosecuting in the disciplinary proceeding, id. ¶¶ 26-27. Based on these allegations, all of the individual defendants performed quasi-judicial or prosecutorial roles in the disciplinary proceeding, thereby meeting the first part of the Bultz test.

The individual defendants' roles in the USPTO disciplinary proceeding further satisfy the remaining two elements of the test. USPTO disciplinary proceedings are "sufficiently controversial" and are "likely to foster suits for damages by disappointed parties," as evidenced not only by the instant action, but also by the abundance of other similar actions filed in this court. See, e.g., Piccone v. USPTO, et al., 2015 U.S. Dist. LEXIS 145765, at *1-7 (E.D. Va. Oct. 27, 2015), aff'd, 706 Fed. App'x 663 (Fed. Cir. 2017); Swyers, 2016 U.S. Dist. LEXIS 71530, at *11-22; Haley v. Under Secretary of Commerce for Intellectual Prop., 129 F. Supp. 3d 377, 379-81 (E.D. Va. 2015). USPTO disciplinary proceedings also involve extensive procedural safeguards under the comprehensive statutory framework which permits a claimant to seek judicial review of the USPTO disciplinary findings by petitioning for review in this court and appealing decisions by the district court to the Federal Circuit. See 35 U.S.C. § 32. For these reasons, all claims against the individual defendants will be dismissed for lack of jurisdiction.

In addition, even if the individual defendants were not entitled to absolute immunity, Polidi's Bivens claim fails because this court has expressly declined to create a Bivens remedy in

[4] To the extent that Polidi alleges that the individual defendants engaged in inappropriate actions, such allegations do not abrogate their immunity. Richter, 1994 U.S. App. LEXIS 6961, at *16.

the context of USPTO disciplinary proceedings. See, e.g., Piccone, 2015 U.S. Dist. LEXIS 145765, at *11 (dismissing plaintiff's Bivens claim concerning USPTO disciplinary proceedings); Haley, 129 F. Supp. 3d at 382-83 ("The Court will not extend Bivens to cover [the plaintiff's] claims...because 35 U.S.C § 32 provides [the claimant] with an alternate means of redress, and because the special factor of exposing government officials to greater liability counsels against authorizing a new type of Bivens claim.").[5]

As to the RICO claim, it does not survive a Fed. R. Civ. P. 12(b)(6) analysis because, other than listing various criminal statutes, it fails to specify how any of the individual defendants violated any statute or how such violations proximately caused Polidi to suffer an injury. See, e.g., Goodrow v. Friedman & MacFadyen, P.A., 2013 U.S. Dist. LEXIS 105395, at *80-82 (E.D. Va. July 26, 2013) ("To state a claim under [18 U.S.C.] §1962(c), [a plaintiff] must allege '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Plaintiff[s] must additionally show that (5) [they were] injured in [their] business or property (6) by reason of the RICO violation.'") (internal citations omitted). In his response to the motion to dismiss, Polidi did not address these defects in his RICO claim. Therefore, under Iqbal, Count 3 must be dismissed. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'").

[5] Both Piccone and Haley were decided before the Supreme Court's decision in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), which further reinforced that courts should be hesitant to extend Bivens. As this Court recently stated in declining to find a Bivens cause of action available where the plaintiffs alleged that high-level executive officials had authorized or directed illegal electronic surveillance of their home and computers, the "Supreme Court has made clear" in Abbasi that "courts should exercise 'caution' before" recognizing a new Bivens remedy. Attkisson v. Holder, 2017 U.S. Dist. LEXIS 181815, at *19 (E.D. Va. Nov. 1, 2017).

## IV.

For the reasons stated above, the individual defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim [Dkt. Nos. 27 and 28] are GRANTED, and it is hereby

ORDERED that this civil action be and is DISMISSED.[6]

To appeal this decision, plaintiff must file a written Notice of Appeal with the Clerk of this court within sixty (60) days of the date this Order is filed. Failure to file a timely appeal waives the right to appeal this Order.

The Clerk is directed to enter judgment in the individual defendants' favor pursuant to Fed. R. Civ. P. 58, forward copies of this Order to counsel of record and plaintiff, pro se, and close this civil action.[7]

Entered this 2nd day of May, 2018.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

[6] Polidi is cautioned that if he continues to file meritless and repetitive claims in this court related to his disbarment, he may face sanctions.

[7] Because none of the John Doe defendants have been served, this Complaint is dismissed as to them as well.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**

**Alexandria Division**

| | | |
|---|---|---|
| Richard Polidi | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No. 1:17cv1133 |
| | ) | |
| | ) | |
| Michelle K. Lee, et al | ) | |
| | ) | |
| Defendant. | ) | |

**JUDGMENT**

Pursuant to the order of this Court entered on May 2, 2108 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the Defendant and against the Plaintiff.

FERNANDO GALINDO, CLERK OF COURT

By:_____/s/_____
D. Van Metre
Deputy Clerk

Dated: 05/02/2018
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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| RICHARD POLIDI, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 1:17-cv-01133-LMB-IDD |
| | ) | |
| MICHELLE K. LEE, et al., | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

Acting pro se, plaintiff, Richard Polidi ("plaintiff" or "Polidi") has filed a Motion for a New Hearing pursuant to Fed. R. Civ. P. 52(b) and 59(a) ("Motion") in which he seeks to have the Court vacate the decision dismissing his Amended Complaint. The defendants have filed an opposition to the Motion and the Court finds that oral argument will not assist the decisional process. For the reasons that follow, plaintiff's Motion will be denied.

Polidi, an attorney who is not admitted to practice in this district, was disbarred by the North Carolina State Bar after he failed to contest disciplinary charges concerning the mishandling of client funds and voluntarily surrendered his law license. As a result, the United States Patent and Trademark Office ("USPTO") initiated reciprocal discipline proceedings against Polidi, who was also a member of the bar appearing before that agency. As the record shows, Polidi failed to respond appropriately to the USPTO proceedings and as a result, on July 14, 2015, he was disbarred from practicing before that agency.

Since then Polidi has filed numerous unsuccessful lawsuits in this court against the USPTO, the North Carolina State Bar, and officials of both agencies. In the present action, he has sued the former director of the USPTO as well as numerous other former or current USPTO

officials on various theories including a claim under the Declaratory Judgment Act, a due process claim under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and a civil RICO claim under 18 U.S.C. § 1964(c).

On May 2, 2018, this lawsuit was dismissed after the Court determined that the defendants were immune from suit, that Bivens cannot be extended to the claims and defendants at issue in plaintiff's Amended Complaint, and that plaintiff failed to allege a plausible RICO violation under Fed. R. Civ. P. 12(b)(6).

A Rule 59 motion allows a court to reconsider a final judgment for very limited reasons: "1) to accommodate an intervening change in controlling law; 2) to account for new evidence not available at trial; or 3) to correct a clear error of law or prevent manifest injustice." United States v. Dickerson, 971 F. Supp. 1023, 1024 (E.D. Va. 1997). Moreover, such motions are improper when they essentially ask the Court to "rethink" its prior decision. Id.

As the defendants correctly argue, plaintiff has neither cited to any "intervening change in controlling law" nor identified any new evidence that was not available before judgment. In fact, most of plaintiff's references to evidence are qualified as "on information and belief," Motion [Dkt. No. 40] ¶¶ 4, 6, or based on surmise, i.e. "a possibility that a vindictive third party committed furtive misconduct in connection" with the North Carolina Bar, id. at ¶ 14, or "it is plausible that multiple defendants in this matter were aware of the misconduct," id. at ¶ 17. Lastly, given that plaintiff has already attacked the USPTO's decision in numerous other lawsuits, all of which have resulted in affirmance of the USPTO's decision, he has not established either a clear error of law or that the decision is unjust.[1] In sum, all of the arguments

[1] In Polidi v. Matal, 709 Fed. Appx. 1016, 1018 (Fed. Cir. 2017) the Federal Circuit affirmed dismissal of plaintiff's attack on the USPTO disbarment proceedings, which affirmed the finding that "there is no basis to conclude that the PTO's decision to exclude petitioner from practice

in the defendants' opposition are meritorious and clearly show that plaintiff is merely asking the Court to change its mind, which is not a proper use of Rule 59. For all these reasons, plaintiff's Motion [Dkt. No. 40] is DENIED.

Lastly, given plaintiff's extensive repetitive litigation about his disbarment and the Court having previously warned him that continuing with such improper repetitive litigation may subject him to sanctions,[2] it is hereby

ORDERED that plaintiff will be assessed the litigation expenses and some portion of government or private counsel's hourly rates if he files another meritless pleading in this court raising any issues related to his disbarment from the USPTO or the North Carolina State Bar.

To appeal this decision, plaintiff must file a written Notice of Appeal with the Clerk of this court within sixty (60) days of receipt of this Order. Failure to file a timely Notice of Appeal waives the right to obtain appellate review of this Order.

The Clerk is directed to forward a copy of this Order to counsel of record and plaintiff, pro se.

Entered this 19th day of June, 2018.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

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before the agency was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"

[2] See Order of May 2, 2018 [Dkt. No. 38] 8 at n. 6.

NOTE: This order is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**RICHARD POLIDI,**
*Plaintiff-Appellant*

**v.**

**MICHELLE K. LEE, JAMES O. PAYNE, ELIZABETH U. MENDEL, JOHN HEATON, KIMBERLY C. WEINREICH, UNITED STATES,**
*Defendants-Appellees*

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2018-2277

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Appeal from the United States District Court for the Eastern District of Virginia in No. 1:17-cv-01133-LMB-IDD, Judge Leonie M. Brinkema.

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**ON MOTION**

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PER CURIAM.

**O R D E R**

Richard Polidi moves to "vacate the Orders currently being appealed and remand this case." The appellees oppose the motion. Mr. Polidi replies.

Mr. Polidi has been disbarred from the practice of law in North Carolina and the United States Patent and Trademark Office. Mr. Polidi filed the instant action against the United States and various PTO officials in their individual capacities, alleging that the PTO's discipline proceeding was void and that the individual defendants engaged in various statutory and constitutional violations.

The district court initially issued an order scheduling discovery but then vacated that order and ultimately dismissed the claims on immunity grounds (among others) without allowing for discovery. Mr. Polidi now moves to vacate and remand with instructions that the district court require his former attorney to turn over materials in his client file Mr. Polidi believes may be relevant.

The court deems it more appropriate for Mr. Polidi to raise his arguments in his merits briefs.

Accordingly,

IT IS ORDERED THAT:

(1) The motion to vacate and remand is denied.

(2) Mr. Polidi may file a reply brief within 21 days of the date of filing of this order.

FOR THE COURT

June 27, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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NOTE: This disposition is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**RICHARD POLIDI,**
*Plaintiff-Appellant*

**v.**

**MICHELLE K. LEE, JAMES O. PAYNE, ELIZABETH U. MENDEL, JOHN HEATON, KIMBERLY C. WEINREICH, UNITED STATES,**
*Defendants-Appellees*

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2018-2277

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Appeal from the United States District Court for the Eastern District of Virginia in No. 1:17-cv-01133-LMB-IDD, Judge Leonie M. Brinkema.

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Decided: November 8, 2019

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RICHARD POLIDI, Raleigh, NC, pro se.

KIMERE JANE KIMBALL, Office of the United States Attorney for the Eastern District of Virginia, Alexandria, VA, for defendants-appellees. Also represented by G. ZACHARY TERWILLIGER.

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Before LOURIE, DYK, and MOORE, *Circuit Judges.*

PER CURIAM.

Richard Polidi appeals the decision of the United States District Court for the Eastern District of Virginia dismissing his complaint for lack of subject matter jurisdiction. We conclude that we lack jurisdiction over this appeal but decline to transfer because Polidi's claim is frivolous. We therefore dismiss Polidi's appeal.

BACKGROUND

On July 21, 2014, Polidi surrendered his license to practice law in North Carolina after conceding that he could not successfully defend himself in a pending professional misconduct investigation. He was subsequently disbarred. In 2015, the United States Patent Office ("USPTO") initiated reciprocal disciplinary proceedings against Polidi based on his disbarment in North Carolina. After Polidi failed to file a response to the USPTO's notice within the response deadline,[1] the USPTO imposed reciprocal discipline and excluded Polidi from practicing before the USPTO. Polidi petitioned for judicial review of the USPTO's decision, and the district court affirmed that decision and dismissed his petition for judicial review. We affirmed the district court's decision, holding that, *inter alia*, Polidi failed to demonstrate "any reasonable basis as to why his request [for discovery] was appropriate" and his argument that the USPTO disciplinary proceedings violated his due process rights was meritless. *Polidi v. Matal*, 709 F. App'x 1016, 1018 (Fed. Cir. 2017).

On July 14, 2017, Polidi filed a civil action in Virginia state court alleging various state tort law claims against certain USPTO officials. Those officials were: Michelle K.

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[1] Polidi received three extensions to the forty-day deadline under 37 C.F.R. § 11.24.

Lee, former USPTO Director; James Payne, former Deputy General Counsel; Elizabeth U. Mendel, Associate Solicitor; John Heaton, Associate Counsel; and Kimberly Weinreich, Office of Enrollment and Discipline Staff Attorney (collectively, "appellee USPTO officials"). The case was subsequently removed to the district court, where Polidi amended his complaint, dropping his state tort claims and adding claims for (1) declaratory judgment against the United States and appellee USPTO officials, (2) monetary damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) against appellee USPTO officials, and (3) relief under 18 U.S.C. § 1964(c) ("RICO") against appellee USPTO officials.

The district court dismissed Polidi's claims against the United States for lack of subject matter jurisdiction on ground of sovereign immunity. The district court noted that even if it did have jurisdiction, Polidi's claims would have been barred under the doctrine of claim preclusion by our earlier decision in *Polidi v. Matal*. The district court dismissed Polidi's claims against the appellee USPTO officials for lack of subject matter jurisdiction on ground of absolute quasi-judicial immunity. The district court held in the alternative that Polidi's complaint (1) failed to allege a plausible due process claim as to his request for declaratory judgment and monetary damages under *Bivens*; and (2) failed to allege a plausible claim under RICO. Polidi appeals.

## DISCUSSION

This circuit has exclusive jurisdiction over any appeal of a district court's final judgment "in any civil action arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Our jurisdiction extends "only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law."

*Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988). When a cause of action is not created by federal patent law, it nonetheless "aris[es] under" federal patent law if it presents a patent issue that is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Jang v. Bos. Sci. Corp.*, 767 F.3d 1334, 1336 (Fed. Cir. 2014) (quoting and applying *Gunn v. Minton*, 568 U.S. 251, 258 (2013), to 28 U.S.C. § 1295(a)(1)).

Polidi's amended complaint contains three claims for relief: (1) declaratory judgment under 28 U.S.C. § 2201, (2) monetary damages under *Bivens*, and (3) relief under 18 U.S.C. § 1964(c) ("RICO"). None of Polidi's claims "arises under" federal patent law. First, no claims here allege a cause of action created by federal patent law. Second, Polidi's amended complaint fails to raise any substantial issue of patent law that is necessary for the disposition of his case. *See Jang*, 767 F.3d at 1336. Thus, we lack jurisdiction to review Polidi's appeal. *See Goldstein v. Moatz*, 364 F.3d 205, 210 n.8 (4th Cir. 2004).

Under 28 U.S.C. § 1631, this court may transfer an action that is filed in the wrong court "if it is in the interest of justice." We conclude that transfer is not in the interest of justice since Polidi's claims are frivolous. *See Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1005 (Fed. Cir. 1987) (finding that "[j]ustice does not require transfer to any other court" under 28 U.S.C. § 1631 when appellant's claim was frivolous).

"[T]he general rule is that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1303 (2015) (quoting Restatement (Second) of

Judgments § 27); *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 937 F.3d 1359, 1373 (Fed. Cir. 2019) ("Defensive collateral estoppel is issue preclusion in which the defendant seeks to bar the plaintiff from relitigating an issue on which the plaintiff has lost against a different defendant in a prior case."). Polidi's declaratory judgment and *Bivens* claims are premised on assertions that the USPTO violated his due process rights in his disciplinary proceeding—the same assertions he raised and were decided in the prior case—and those claims are barred by issue preclusion. *Polidi v. Lee*, No. 1:15-cv-1030, 2015 WL 13674860, at *3, 2015 U.S. Dist. LEXIS 191329, at *6–7 (E.D. Va. Nov. 24, 2015), *aff'd sub nom. Polidi v. Matal*, 709 F. App'x 1016 (Fed. Cir. 2017). That judgment remains conclusive here. His RICO claim is likewise facially without substance. *See* 18 U.S.C. §§ 1962(c), 1964(c).

Accordingly, we dismiss Polidi's appeal.

**DISMISSED**

COSTS

Costs to appellees.

# United States Court of Appeals for the Federal Circuit

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**RICHARD POLIDI,**
*Plaintiff-Appellant*

v.

**MICHELLE K. LEE, JAMES O. PAYNE, ELIZABETH U. MENDEL, JOHN HEATON, KIMBERLY C. WEINREICH, UNITED STATES,**
*Defendants-Appellees*

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2018-2277

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Appeal from the United States District Court for the Eastern District of Virginia in Nos. 1:17-cv-01133-LMB-IDD, United States District Judge Leonie M. Brinkema.

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**JUDGMENT**

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THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

**DISMISSED**

ENTERED BY ORDER OF THE COURT

November 8, 2019

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**RICHARD POLIDI,**
*Plaintiff-Appellant*

**v.**

**MICHELLE K. LEE, JAMES O. PAYNE, ELIZABETH U. MENDEL, JOHN HEATON, KIMBERLY C. WEINREICH, UNITED STATES,**
*Defendants-Appellees*

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2018-2277

---

Appeal from the United States District Court for the Eastern District of Virginia in No. 1:17-cv-01133-LMB-IDD, Judge Leonie M. Brinkema.

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**ON MOTION**

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Before LOURIE, DYK, and MOORE, *Circuit Judges.*

PER CURIAM.

**O R D E R**

Appellant Richard Polidi requests "[t]hat the Court separate its analysis of the ethics issues and resolve them prior to further adjudication."

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied as moot.

FOR THE COURT

November 8, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**RICHARD POLIDI,**
*Plaintiff-Appellant*

**v.**

**MICHELLE K. LEE, JAMES O. PAYNE, ELIZABETH U. MENDEL, JOHN HEATON, KIMBERLY C. WEINREICH, UNITED STATES,**
*Defendants-Appellees*

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2018-2277

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Appeal from the United States District Court for the Eastern District of Virginia in No. 1:17-cv-01133-LMB-IDD, Judge Leonie M. Brinkema.

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**ON MOTION**

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Before LOURIE, DYK, and MOORE, *Circuit Judges.*

PER CURIAM.

**O R D E R**

Richard Polidi submits a document titled "Motion in the Cause."

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

January 6, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**RICHARD POLIDI,**
*Plaintiff-Appellant*

**v.**

**MICHELLE K. LEE, JAMES O. PAYNE, ELIZABETH U. MENDEL, JOHN HEATON, KIMBERLY C. WEINREICH, UNITED STATES,**
*Defendants-Appellees*

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2018-2277

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Appeal from the United States District Court for the Eastern District of Virginia in No. 1:17-cv-01133-LMB-IDD, Judge Leonie M. Brinkema.

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**ON PETITION FOR PANEL REHEARING**

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Before LOURIE, DYK, and MOORE, *Circuit Judges.*

PER CURIAM.

**O R D E R**

Appellant Richard Polidi filed a petition for panel rehearing.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue on January 23, 2020.

FOR THE COURT

January 16, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court