

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Raymond P. Moore**

Case No. 13-cv-01812-RM-CBS

ZAHOUREK SYSTEMS, INC.  
JON ZAHOUREK,

Plaintiffs,

v.

BALANCED BODY UNIVERSITY, LLC,

Defendant.

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**ORDER**

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On April 7, 2016, this Court entered an Order that, *inter alia*, granted in part and denied in part defendant Balanced Body University, LLC's motion for summary judgment. (ECF No. 143.)<sup>1</sup> On May 5, 2016, plaintiffs Zahourek Systems, Inc. ("ZSI") and Jon Zahourek ("Zahourek") (collectively, "plaintiffs") filed the pending motion for reconsideration of the April 7, 2016 Order ("the motion for reconsideration"). (ECF No. 148.) Plaintiffs wish the Court to reconsider granting summary judgment as to: (1) Zahourek's copyright infringement claim; and (2) ZSI's Ai3D trademark claim. (*Id.*) Defendant has filed a response to the motion for reconsideration (ECF No. 150), and plaintiffs have filed a reply (ECF No. 153).

The motion for reconsideration is DENIED. Contrary to plaintiffs' apparent belief, the Federal Rules of Civil Procedure do not contemplate the procedural mechanism they attempt to use

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<sup>1</sup> This Order uses the terms defined in the April 7, 2016 Order.

to re-litigate the April 7, 2016 Order mid-way through this action. Plaintiffs rely upon the premise that a court may revise its rulings until the entry of final judgment. (*See* ECF No. 148 at 2-3.) This premise relies upon Fed.R.Civ.P. 54(b) (“Rule 54(b)”), which provides that a court may “revise” any order or decision prior to the entry of final judgment. Plaintiffs, however, do not wish the Court to *revise* its April 7, 2016 Order, they, instead, propose to gut two significant parts of it. Put another way, they wish for the Court to turn around mid-stream and start paddling in the opposite direction.

Plaintiffs make the interesting proposition that the Court “if anything” has more discretion to revise interlocutory orders, such as the April 7, 2016 Order, than it does to revisit final orders pursuant to the clear dictates of Fed.R.Civ.P. 59(e) (“Rule 59(e)”) or 60(b) (“Rule 60(b)”). Plaintiffs, loosely, cite *Raytheon Constructors, Inc. v. ASARCO Inc.*, 368 F.3d 1214 (10th Cir. 2003), for this proposition. *Raytheon* provides no such support. In *Raytheon*, the Tenth Circuit Court of Appeals concluded that a district court erred in treating a motion for reconsideration of an interlocutory order as a motion under Rule 60(b). *Id.* at 1216-17. The Tenth Circuit, thus, did not review the district court’s denial of the motion for reconsideration on an abuse-of-discretion basis as it would a Rule 60(b) motion. *Id.* at 1217. Instead, importantly, the Tenth Circuit reviewed the district court’s legal conclusions *de novo*, as it would in any other situation. *See id.*

In other words, the Tenth Circuit treated the district court’s legal conclusions in the order addressing the motion for reconsideration the exact same way the Tenth Circuit would have treated the district court’s legal conclusions from the underlying order. It is, thus, unfathomable how the Court is meant to draw the conclusion that it has “if anything” broader discretion to revise its decisions under Rule 54(b) than Rules 59 or 60. If anything, the only conclusion the Court draws from *Raytheon* is that there is little purpose in addressing Rule 54(b) motions on the merits because

the Tenth Circuit will do what it will do whether or not the Court revises what it has previously done. Take *Raytheon* for an example. If the district court had *not* considered the motion for reconsideration on any basis, the Tenth Circuit, on appeal, would have considered the *original* legal conclusions *de novo*. Then, take what actually happened. The district court addressed the motion for reconsideration, albeit as a Rule 60(b) motion. The Tenth Circuit considered the district court's legal conclusions of the motion for reconsideration *de novo*. Both results are the same. The same legal conclusions are considered by the Circuit on the same basis of review. As such, as far as the Court can discern, there is no purpose to a motion for reconsideration that is filed for the purpose plaintiffs seek.<sup>2</sup>

That being said, the Court will use this opportunity to clarify a purported error in its April 7, 2016 Order; a purported error which the Court believes to be properly brought in a motion under Rule 54(b). The Court alludes to a purported typographical error that without correction could leave a legal conclusion sounding, well, out of step with the statutory language. Hence the possible need for revision.

More specifically, the Court refers to pages 28 through 30 of its April 7, 2016 Order. (ECF No. 143 at 29.) In those pages, the Court found that the “Maniken” was a “useful article” for purposes of the Copyright Act, and thus, was not copyrightable. (*Id*) In amongst that overarching finding on page 29, the Court also stated: “The Maniken has an intrinsic utilitarian function that is

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<sup>2</sup> Plaintiffs also seem to cite the Tenth Circuit's decision in *Servants of Paraclete v. Does*, 204 F.3d 1005 (10th Cir. 2000). (*See* ECF No. 148 at 3). In that decision, the Circuit briefly mentioned when motions for reconsideration under Fed.R.Civ.P. 59(e) or 60(b) may be warranted. *Servants of Paraclete*, 204 F.3d. at 1012. Here, plaintiffs do not argue that they are moving under either of those rules. Thus, the Court does not discern how *Servants of Paraclete* is relevant. In any event, the Circuit's decision in *Raytheon*, which specifically tells this Court not to treat a motion for reconsideration of an interlocutory order as one under Rule 60(b), would seem to suggest the contrary of plaintiffs' position.

merely to portray the appearance of a life-like form.” (*Id.* at 29.) As plaintiffs point out in their motion for reconsideration, this sentence does not mesh perfectly with the statutory definition of a “useful article” because the statute defines that phrase as: “an article having an intrinsic utilitarian function that is *not* merely to portray the appearance of the article or to convey information.” *See* 17 U.S.C. § 101 (emphasis added). According to plaintiffs, failing to use the word “not” means that the Maniken falls out of the statutory category of “useful article,” and thus, the Maniken must be copyrightable. (ECF No. 148 at 3.) If only life was so easy.

First, to remove plaintiffs from their temporary dream land, the Court makes clear that its overarching finding—that the Maniken *was* a “useful article” for purposes of the Copyright Act, and thus, was not copyrightable—*was* its intended finding. That much is apparent from all of the Court’s other findings in pages 28 through 30 of its April 7, 2016 Order, particularly the Court’s findings that the “overriding intention” of the Maniken was to provide a meaningful armature upon which one could explore muscular ideas; not to create some artistic endeavor. (ECF No. 143 at 28-29.)<sup>3</sup>

Second, plaintiffs misconstrue the statutory definition of “useful article”. As far as plaintiffs are concerned without the word “not,” the Maniken must have fallen out of the statutory definition. The Court does not think so. As already explained, “useful article” means “an article having an intrinsic utilitarian function that is *not merely* to portray the appearance of the article or to convey information.” 17 U.S.C. § 101 (emphasis added). The important phrase here is “not merely” because it subsumes merely. Put simply, the Court’s finding in its April 7, 2016 Order—that the Maniken has an intrinsic utilitarian function to merely portray the appearance of a life-like

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<sup>3</sup> As such, the Court is not attempting to re-write history, but only making clear its findings. The Court leaves re-writing history to plaintiffs’ motion for reconsideration, which, evidently, is something plaintiffs are very familiar. (*See* ECF No. 148 at 13-19 & n.21.)

form—*falls within* the statutory definition of “useful article”. In other words, the intrinsic utilitarian nature of an article can be more than merely portraying its appearance to be a useful article, but here, the Maniken does not even reach that level—it merely portrays its appearance.<sup>4</sup>

Accordingly, for the reasons discussed herein, the motion for reconsideration (ECF No. 148) is DENIED.

**SO ORDERED.**

DATED this 3rd day of April, 2017.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Raymond P. Moore", written over a horizontal line.

RAYMOND P. MOORE  
United States District Judge

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<sup>4</sup> Put another way, it cannot be said that an intrinsically utilitarian product that merely portrays itself is *not* a useful article, while an intrinsically utilitarian product that does not merely portray itself is a useful article. As far as the Court is concerned, they both are.