APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2019-1558

RICHARD SOWINSKI, Plaintiff-Appellant,

v.

CALIFORNIA AIR RESOURCES BOARD, Defendant-Appellee.

Filed: August 21, 2020

Appeal from the United States District Court for the Northern District of California

Before NEWMAN, LOURIE, and SCHALL, Circuit Judges.

OPINION

PAULINE NEWMAN, Circuit Judge:

Dr. Richard Sowinski appeals the dismissal, on the ground of *res judicata*, of his patent infringement suit

against the California Air Resources Board.¹ He raises two principal arguments: (1) that *res judicata* does not apply because his present complaint seeks damages only for infringement that occurred after conclusion of his prior suits and (2) that *res judicata* does not apply because the prior suit was resolved on procedural grounds, without reaching the merits of infringement. We conclude that the district court's decision is in accordance with law and precedent and is within the court's discretionary authority, and is affirmed.

BACKGROUND

The first set of State and Federal lawsuits

On November 24, 2015, Dr. Sowinski filed suit in the California Superior Court in Orange County, against the California Air Resources Board ("CARB") and several individual and corporate defendants associated with CARB. The three counts of the complaint were (1) infringement of United States Patent No. 6,601,033 ("the '033 patent"), (2) violation of California Welfare & Institutions Code elder abuse laws, and (3) violation of California Business & Professions Code § 17200 et seq. All three counts are associated with infringement of the '033 patent, entitled "Pollution Credit Method Using Electronic Networks," which describes and claims an electronic method and apparatus for validating and trading consumer pollution-control tax credits. Dr. Sowinski stated that the '033 patent is infringed by California's Cap-and-Trade Program auctions.

¹ Sowinski v. Cal. Air Res. Bd., No. 18-CV-3979-LHK, 2018 WL 9841114 (N.D. Cal. Sept. 25, 2018) ("Dist. Ct. Op."); *id.*, (N.D. Cal. Jan. 18, 2019) (Dkt. No. 29) ("Recon. Op.").

On the motion of a defendant, the suit was removed to the United States District Court for the Central District of California. Pre-trial proceedings included the filing of several motions to dismiss. After Dr. Sowinski moved to file an amended complaint, the parties filed a joint stipulation to withdraw the amended complaint and postpone the hearing on the motions to dismiss. The joint stipulation included the statement that the motions to dismiss were "potentially case dispositive." CARB Br. 8.

Dr. Sowinski did not file a response to the motions to dismiss. After the period set in the local rules for such response, the district court dismissed the complaint "pursuant to Central District of California Local Rule 7-12, which provides that the failure to file a document within a deadline 'may be deemed consent to the granting or denial of the motion." Dist. Ct. Op. at *2. The dismissal was with prejudice and without leave to amend.

Dr. Sowinski appealed to the Federal Circuit. We recognized Ninth Circuit precedent that failure to oppose a motion to dismiss may lead to dismissal with prejudice. *See, e.g., Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 708, 711, 714 (9th Cir. 2001). We affirmed the dismissal, concluding that the district court had considered all of the relevant factors as well as the applicable case law, and that there was no clear error of judgment. We concluded that the dismissal was properly with prejudice because Dr. Sowinski "stipulated that 'the Motions to Dismiss are potentially case dispositive,' but nevertheless conceded and reaffirmed that [he] failed to oppose." *Sowinski v. Cal. Air Res. Bd.,* 720 F. Appx 615 (Fed. Cir. 2017) ("Sowinski I"), at 619. Our mandate issued on December 18, 2017.

The second set of State and Federal lawsuits

On January 31, 2018 Dr. Sowinski filed a complaint in the Superior Court of California in Orange County. The complaint was substantially identical to his prior complaint, except that he sought damages only for infringement after the decision in *Sowinski I*. He soon voluntarily dismissed the Superior Court action, and on July 2, 2018 he filed the same complaint in the United States District Court for the Northern District of California. The complaint stated the same three counts as in *Sowinski I*: infringement of the '033 patent, violation of California elder abuse laws, and violation of the California Business & Professions Code. CARB was the only named defendant.

Dr. Sowinski filed an application in the district court to proceed *in forma pauperis*. CARB moved for dismissal on several grounds: *res judicata*, Eleventh Amendment immunity from suit, and patent invalidity. The district court dismissed the complaint on the ground of *res judicata*, observing that the dismissal of the same claims in the prior litigation against the same defendant "was an adjudication on the merits." Dist. Ct. Op. at *2. The court "[found] that the Complaint is frivolous and fails to state a claim upon which relief can be granted." *Id.* at *3.

This appeal followed.

DISCUSSION

In reviewing a ruling of dismissal, "[t]he trial court's dismissal should not be disturbed unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (citations and quota-

tion marks omitted). For review of the district court's dismissal on the ground of *res judicata*, we apply the procedural law of the regional circuit, and any aspects unique to patent law are reviewed under Federal Circuit law. *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323 (Fed. Cir. 2008).

Res judicata, or claim preclusion, may be based on failure to prosecute

Res judicata arises when the prior case or claim was previously tried and the merits were adjudicated. "In civil cases, a claim generally may not be tried if it arises out of the same transaction or common nucleus of operative facts as another already tried." *Currier v. Virginia*, 138 S. Ct. 2144, 2154 (2018). The Ninth Circuit applies the general rule that preclusion applies when the prior suit: "(1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005) (quoting *Sidhu v. Flecto Co.*, 279 F.3d 896, 900 (9th Cir. 2002)). *See, e.g., Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (same).

Dr. Sowinski argues that the merits of patent infringement were not adjudicated in *Sowinski I*, for the action was dismissed because he did not comply with the district court's local rule for responding to a motion to dismiss. He argues that this was not a final judgment on the merits, because the dismissal was based on the technicality of a local deadline. He states that the imposition of *res judicata* on this basis is "manifestly unjust" because there was no trial of the question of infringement, and that if an infringement suit is now barred his patent is essentially invalidated because the CARB Cap-and-Trade Program is the only known infringing activity.

The district court cited Johnson v. U.S. Department of the Treasury, 939 F.2d 820, 825 (9th Cir. 1991) for the holding that "dismissal for failure to prosecute should be 'treated as an adjudication on the merits for purposes of preclusion." Dist. Ct. Op. at *2. On Dr. Sowinski's request for reconsideration, the district court cited the Federal Circuit's statement in Senju Pharmaceutical Co. v. Apotex Inc., 746 F.3d 1344, 1349 (Fed. Cir. 2014) that: "Claim preclusion will generally apply when a patentee seeks to assert the same patent against the same party and the same subject matter." Recon. Op. at 2.

Federal Rule of Civil Procedure 41(b) provides that a dismissal for failure to prosecute "operates as an adjudication on the merits," with exceptions not here applicable:

41(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits....

The Federal Circuit has applied these principles. *See, e.g., Nystrom v. Trex Co.*, 580 F.3d 1281, 1284-85 (Fed. Cir. 2009) ("In its simplest construct, [claim preclusion bars] the relitigation of a claim, or cause of action, or any possible defense to the cause of action which is ended by a judgment of the court."); *Senju, supra.*

We conclude that the district court properly applied preclusion on this ground.

Preclusion may apply to claims that arise after the prior judgment

Dr. Sowinski argues that preclusion cannot apply, as a matter of law, because he is seeking damages only for the period after conclusion of the Sowinski I litigation. He cites the principle that: "While the [prior] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." Sowinski Br. 3-4. (quoting Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 328 (1955)). He also cites Ninth Circuit precedent that "[f]ailure to gain relief for one period of time does not mean that the plaintiffs will necessarily fail for a different period of time." Sowinski Br. 4 (quoting Harkins Amusement Enters., Inc. v. Harry Nace Co., 890 F.2d 181, 183 (9th Cir. 1989)). However, in those cases the second litigation related to different conduct and different alleged violations or litigants, Lawlor, 349 U.S. at 328, or "facts which by the defendants' own concession are at least 10 percent different from the facts alleged" in the previous litigation and that occurred after the previous litigation, Harkins, 890 F.2d at 183.

Dr. Sowinski alleges no different conduct or acts, and the defendant is the same. However, he argues that a claim "arising subsequent to a prior action . . . [is] not barred by *res judicata*" even if the new claim is "premised on facts representing a continuance of the same course of conduct." Reply Br. 3 (internal quotation marks omitted). He cites *Storey v. Cello Holdings, LLC*, 347 F.3d 370 (2d Cir. 2003), for the position that "[c]laims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by *res judicata* regardless of whether they are premised on facts representing a continuance of the same course of conduct." *Id.* at 383 (internal quotation marks omitted).

It is correct that when an act has been adjudged wrongful, a subsequent suit may be brought if the violation is repeated. However, when the act has been adjudged not wrongful, its repetition cannot be challenged in a subsequent suit. In *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045 (Fed. Cir. 2014), the court considered the effect of a prior judgment of non-infringement; the court explained that preclusion does not apply to new or changed products or methods, but does apply when the accused products or methods are essentially the same. *Id.* at 1054. The court summarized:

The principle that, when an alleged infringer prevails in demonstrating noninfringement, the specific accused device(s) acquires the "status" of a noninfringing device vis-à-vis the asserted patent claims is "[a]n essential fact of a patent infringement claim" And, when the devices in the first and second suits are "essentially the same," the "new" product(s) also acquires the status of a noninfringing device vis-à-vis the same accusing party or its privies.

Id. at 1057 (quoting *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 479-80 (Fed. Cir. 1991)). *See Lawlor*, 349 U.S. at 383 (a claim based on new and different facts is not precluded, whereas a claim based on the same facts is precluded).

Here the accused CARB activity had been held not to be infringing, for Dr. Sowinski's failure to respond to the motions to dismiss was treated as a judgment on the merits. He does not allege any different facts; to the contrary, his complaint states that CARB's on-going activities are the same as existed for *Sowinski I*.

The district court properly held that the dismissal in *Sowinski I* is *res judicata*, for CARB is charged with the same acts of infringement of the same patent. Although Dr. Sowinski stresses the inequity that he did not obtain resolution of the question of infringement, CARB points out that he had the opportunity to do so. The application of preclusion "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes," *Brown v. Felsen*, 442 U.S. 127, 131 (1979). The district court acted within its discretion and in accordance with law, in applying *res judicata*. The dismissal is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

CASE NO. 18-CV-03979-LHK

RICHARD SOWINSKI, Plaintiff,

v.

CALIFORNIA AIR RESOURCES BOARD, Defendant.

Filed: September 25, 2018

ORDER DENYING APPLICATION TO PROCEED IN FORMA PAUPERIS; DISMISSING COMPLAINT WITHOUT LEAVE TO AMEND

Before LUCY H. KOH, United States District Judge.

On July 2, 2018, Plaintiff Richard Sowinski ("Plaintiff") filed a Complaint against the California Air Resources Board ("Defendant"). ECF No. 1 ("Compl."). On August 10, 2018, Plaintiff filed an Application to Proceed in Forma Pauperis ("IFP Application"). ECF No. 11. For the reasons stated below, the Court DENIES Plaintiff's IFP Application and DISMISSES the Complaint without leave to amend. Under the federal in forma pauperis statute, a court may authorize the commencement of a suit without prepayment of the filing fee required by the clerk of the court if the plaintiff submits an affidavit of poverty showing that he or she is "unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a). However, even if the plaintiff makes an adequate showing of poverty, a court may deny leave to proceed in forma pauperis if it determines at the outset "from the face of the proposed complaint that the action is frivolous or without merit." *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987); see also 28 U.S.C. § 1915(e); *Calhoun v. Stahl*, 245 F.3d 845, 845 (9th Cir. 2001) (per curiam) ("[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.").

Plaintiff has declared under penalty of perjury that Plaintiff is not presently employed, that Plaintiff receives \$2,248 per month in Social Security, and that Plaintiff currently possesses assets of \$35 in cash. IFP Application at 1–3. Given Plaintiff's monthly income and expenses, the Court determines that Plaintiff is unable to pay the filing fee in this case.

However, when reviewing an application to proceed in forma pauperis, the Court must also conduct a sua sponte review of the complaint and may dismiss the case if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B).

Upon review of Plaintiff's Complaint, the Court finds that the Complaint is frivolous and fails to state a claim upon which relief can be granted. Plaintiff sues Defendant for patent infringement, elder abuse, and deceptive business practices under California Business and Professions Code Section 17200 *et seq.* Compl. ¶¶ 18–43. Plaintiff's lawsuit concerns Defendant's alleged infringement of Plaintiff's patent of a pollution credit exchange, U.S. Patent 6,601,033 ("Patent '033"). Compl. ¶ 1. Plaintiff's elder abuse claim is predicated on Defendants' alleged wrongful appropriation of Plaintiff's patent. *Id.* ¶¶ 35–36. Likewise, Plaintiff's deceptive business practices claim is predicated on "Defendants' conduct in infringing the SOWINSKI PATENT." *Id.* ¶ 41. Plaintiff alleges damages in excess of \$100 million. *Id.* ¶ 42. Defendant has filed a motion to dismiss, ECF No. 12, and a request for judicial notice. ECF No. 13.

Plaintiff's Complaint fails to state a claim because res judicata bars Plaintiff's claims. The doctrine of res judicata bars suit "on any claims that were raised or could have been raised in a prior action." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (internal quotation marks omitted). Res judicata applies when three requirements are satisfied: (1) the prior proceeding resulted in a final judgment on the merits; (2) the present action involves substantively the same claims or causes of action as the prior proceeding; and (3) the party to be precluded was a party or in privity with a party to the prior proceeding. *See Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005). All three elements are satisfied in this case.

In 2015, Plaintiff filed a patent infringement lawsuit against Defendant and other parties. *See Sowinski v. CARB*, 720 F. App'x 615 (Fed. Cir. 2017) ("*Sowinski I*"). Plaintiff first filed his lawsuit in Orange County Superior Court, and one defendant removed the case to federal court. Id. at 616. Plaintiff brought claims for "patent infringement, elder abuse, and violations of California Business and Professions Code § 17200 et seq." Id. In federal court, the defendants moved to dismiss, and Plaintiff filed a First Amended Complaint ("FAC") rather than oppose the motion. Id. The defendants moved to strike the FAC, at which point the parties stipulated that Plaintiff would withdraw the FAC and defendants would withdraw their motion to strike. Id. The district court accepted the parties' stipulation, and then granted defendants' motion to dismiss Plaintiff's original complaint pursuant to Central District of California Local Rule 7-12, which provides that the failure to file a document within a deadline "may be deemed consent to the granting or denial of the motion." Id. at 617. The Federal Circuit applied Ninth Circuit law and affirmed the district court's dismissal of the Sowinski I complaint. Id. at 619. The Court concludes that the dismissal of Sowinski I precludes Plaintiff's Complaint in the instant matter.

At the threshold, Defendant asks the Court to take judicial notice of Plaintiff's complaint in *Sowinski I*. ECF No. 13. The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Public records, including judgments and other public filed documents, are proper subjects of judicial notice. *See, e.g., United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) ("[Courts] may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue."). Thus, the Court takes judicial notice of the Sowinski I complaint, which is a public record with a direct relationship to the Complaint in this case.

Plaintiff raised all of the claims in the instant Complaint in Sowinski I, which satisfies the first element of res judicata. As explained above, Plaintiff's causes of action in the Complaint are all predicated on Defendant's alleged infringement of Patent '033. Similarly, in Sowinski I, Plaintiff also brought causes of action for patent infringement, elder abuse, and unfair competition predicated on the defendants' alleged infringement of Patent '033. See ECF No. 13 at 8-21 (Plaintiff's causes of action in Sowinski I). As Defendant points out, the instant Complaint even includes the allegation—repeated from the Sowinski I complaint—that "Orange County is a proper venue." Compl. ¶ 3. Plaintiff's instant Complaint thus arises from "the same transactional nucleus of facts" as the Sowinski I complaint. See Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005).

Second, the district court's dismissal was an adjudication on the merits. A dismissal for failure to prosecute "operates as an adjudication on the merits." Fed. R. Civ. Proc. 41(b). As a result, the Ninth Circuit has held that a dismissal for failure to prosecute should be "treated as an adjudication on the merits for purposes of preclusion." *Johnson v. U.S. Dep't of Treasury*, 939 F.2d 820, 825 (9th Cir. 1991). The district court in *Sowinski I* dismissed Plaintiff's complaint for failure to prosecute under Central District of California Local Rule 7-12. 720 F. App'x at 617. That rule provides that "[t]he failure to file any required document, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion." In pertinent part, the rule mirrors Federal Rule of Civil Procedure 41(b), which permits dismissal when a "plaintiff fails to prosecute" an action. The Court thus concludes that the district court's dismissal in *Sowinski I*, which the Federal Circuit affirmed, was a final judgment on the merits.

Third, both Plaintiff and Defendant were parties to the previous suit. See ECF No. 13 at 5. As further evidence of how completely Plaintiff's Complaint mirrors the Sowinski I complaint, the Complaint continues to include allegations against the Sowinski I defendants, even though they are not named defendants in the instant suit. See, e.g., Compl. ¶¶ 25–26.

Accordingly, because Plaintiff's Complaint is clearly barred by res judicata, the Court concludes that Plaintiff's Complaint is frivolous and denies his IFP Application on that basis. *See Minetti v. Port of Seattle*, 152 F.3d 1113, 1115 (9th Cir. 1998) (per curiam) (affirming the district court's denial of an in forma pauperis application because plaintiff's complaint was barred by res judicata).

For the reasons stated above, Plaintiff's Complaint is frivolous and fails to state a claim upon which relief can be granted. The Court thus DENIES Plaintiff's IFP Application and DISMISSES Plaintiff's Complaint without leave to amend.

IT IS SO ORDERED.

Dated: September 25, 2018

<u>s/ Lucy H. Koh</u> LUCY H. KOH United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

CASE NO. 18-CV-03979-LHK

RICHARD SOWINSKI, Plaintiff,

v.

CALIFORNIA AIR RESOURCES BOARD, Defendant.

Filed: January 18, 2019

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Before LUCY H. KOH, United States District Judge.

In this lawsuit, Plaintiff asserts that the same party infringed the same patent through the same conduct as Plaintiff did in Plaintiff's previously dismissed case. Compare ECF No. 13 at 6, ¶ 1 (Plaintiff's complaint in previous case alleging that "[s]ince 2013" Defendant has conducted cap-and-trade auctions that "directly infringe[]" Plaintiff's patent) with ECF No. 1, ¶ 1 (Plaintiff's instant Complaint alleging that "[s]ince 2013" Defendant has conducted cap-and-trade auctions that "directly infringe[]" Plaintiff's patent). In his motion for reconsideration, Plaintiff even acknowledges that the instant lawsuit is predicated on the same conduct as Plaintiff's previous suit. ECF No. 19 at 2 ("Defendant violates the patent on a yearly basis when it runs the CARB Auction.").

As a result, res judicata bars Plaintiff's instant lawsuit. See Senju Pharm. Co., Ltd. v. Apotex Inc., 746 F.3d 1344, 1349 (Fed. Cir. 2014) ("Claim preclusion will generally apply when a patentee seeks to assert the same patent against the same party and the same subject matter."); see also Single Chip Sys. Corp. v. Intermec IP Corp., 495 F. Supp. 2d 1052, 1062 (S.D. Cal. 2007) (dismissing as barred by res judicata a later-in-time suit "assert[ing] identical facts in the type of product and patent action" as the earlier suit). Therefore, the Court DENIES Plaintiff's motion for reconsideration.

IT IS SO ORDERED.

Dated: January 18, 2019

<u>s/ Lucy H. Koh</u> LUCY H. KOH United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2019-1558

RICHARD SOWINSKI, Plaintiff-Appellant,

V.

CALIFORNIA AIR RESOURCES BOARD, Defendant-Appellee.

Filed: October 23, 2020

Appeal from the United States District Court for the Northern District of California

ON PETITION FOR REHEARING EN BANC

Before PROST, Chief Judge, NEWMAN, LOURIE, SCHALL^{*}, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, AND STOLL, Circuit Judges.

PER CURIAM.

ORDER

^{*} Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

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Appellant Richard Sowinski filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on October 30, 2020.

FOR THE COURT

October 23, 2020 Date <u>/s/ Peter R. Marksteiner</u> Peter R. Marksteiner Clerk of Court