

a claim the plaintiff has previously litigated and lost against another [party]' in an earlier action." *Ligato v. Wells Fargo Bank, NA.*, Civ. No. 16-5683, 2018 WL 1141328, at *6 (E.D. Pa Mar. 2, 2018) (quoting *Parldane Hosiery Co., Inc. v. Shore*, 439 U.S. 322,326 n.4 (1979)). "Defensive use promotes judicial economy because the estoppel 'precludes a plaintiff from relitigating identical issues by merely switching adversaries.'" *Ligato*, 2018 WL 1141328, at *6 (quoting *Parklane Hosiery*, 439 U.S. at 329).

"The prerequisites for the application of issue preclusion are satisfied when: (1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." *Peloro v. United States*, 488 F.3d 163, 174-75 (3d Cir. 2007) (internal quotation marks and citations omitted). Additionally, for defensive issue preclusion to apply, "the party to be precluded must have had a 'full and fair' opportunity to litigate the issue in the first action/" *Id* at 175 (citing *Parklane Hosiery*, 439 U.S. at 328, 332). All of the prerequisites for the application of issue preclusion are easily satisfied here.

First, the issue sought to be precluded is the same as that involved in the Prior Ohio Litigation - in both instances, Plaintiff's claim that the Breathe Right Dilator infringes his patents. As the district court explained in the Prior Ohio Litigation, "Plaintiff, Morris S. Glover, alleges in the complaint that defendant, CNS, Inc.'s product, the Breathe Right® device, infringes Design Patent No. 351,924 ... and Patent No. 5,466,456 ... owned by [P]laintiff." (Docket No. 32-7 at 3). Once again in this case, Plaintiff asserts that the Breathe Right Dilator

infringes the '924 Design Patent and the '456 Utility Patent. (Docket No. 1 at 3-6).

Second, Plaintiff and CNS actually litigated the issue of whether the Breathe Right Dilator infringed the '924 Design Patent and the '456 Utility Patent in the Prior Ohio Litigation. As Plaintiff concedes in his Complaint, he "filed a lawsuit against the companies in question in the Federal Court of Cleveland, Ohio for infringement. The Defendants filed for a Summary Judgment which the Court granted." (Docket No. 1 at 6). In granting summary judgment, the district court in the Prior Ohio Litigation thoroughly addressed the issue of infringement, ultimately finding that the Breathe Right Dilator did not infringe the '924 Design Patent because "there is no real resemblance between the two designs" that would "deceive an ordinary observer," and it did not infringe the '456 Utility Patent because it "has none of the key elements of claim 1." (Docket No. 32-7 at 8, 11-12). Therefore, the issue of infringement was actually litigated because it was resolved by the district court in the Prior Ohio Litigation. *See Hofmann v. Pressman Toy Corp.*, 193 F. App'x 121, 123 (3d Cir. 2006) (citing *Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1570 (Fed. Cir. 1983)("An issue is 'actually litigated' if it was disputed by the parties to the original action and resolved by the trier of fact.")).

Third, the issue of non-infringement was determined by a final and valid judgment.⁵ After

⁵ The Court notes that much of Plaintiff's Complaint in the present case focuses on his apparent disagreement with the district court's decision in the Prior Ohio Litigation granting summary judgment in favor of CNS. To that end, Plaintiff complains that the district court in the Prior Ohio Litigation "made [his] patents invalid" and "ruled to invalidate [his]

briefing was complete in the Prior Ohio Litigation, the district court found in its reasoned opinion that CNS "presented evidence supporting its noninfringement motion and [P]laintiff [did] not proffer[] any evidence that would raise a genuine issue of material fact on noninfringement.... The Breathe Right® device is completely distinct from [P]laintiff's facial cleanser." (Docket No. 32-7 at 13). Given that determination,

patents" by granting summary judgment. (Docket No. 1 at 6, 7). As previously noted, Plaintiff asks this Court to "declare the Summary Judgment a void judgment ruling and to reinstate [his] patents so that [he] can prove that he is the original owner of the 'Nose Bridge' idea and that Bruce C. Johnson and others infringed upon his idea." (*Id* at 11). By these statements, Plaintiff either misapprehends or chooses to ignore what occurred in the 'Prior Ohio Litigation. There, the district court granted summary judgment because it found that there was no genuine issue of material fact on noninfringement, meaning the district court determined that the Breathe Right Dilator did not infringe the '924 Design Patent and the '456 Utility Patent. To be clear, the district court ruled concerning noninfringement; it did not "invalidate" the '924 Design Patent and the '456 Utility Patent as Plaintiff now erroneously maintains. The patents remained valid until they expired.

With regard to the patents' expiration, as explained in Defendants' briefing, the '924 Design Patent expired on October 25, 2008, and the '456 Utility Patent expired on November 14, 2012. (*See* Docket Nos. 32 at 12-13; 51 at 13). A patent can be infringed only during the term of the patent, and the statute of limitations for infringement extends up to six years after a patent expires. *See* 35 U.S.C. §§ 271(a), 286. Therefore, even if Plaintiff's patent infringement claim was not barred by issue preclusion or was not otherwise deficient as explained herein, Plaintiff cannot pursue an infringement claim on the '924 Design Patent or the '456 Utility Patent because they expired and the statute of limitations on any associated claims have run. *See SCA Hygiene Prods. Aktieholag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 961 (2017) (a patent holder may recover damages for infringement committed within the 6-year limitations period).

the district court granted CNS's motion for summary judgment in the Prior Ohio Litigation, (*see id*), which is a final and valid judgment for issue preclusion purposes. *See Free Speech Coal., Inc. v. Attorney Gen.*, 617 F.3d 519, 541 (3d Cir. 2012) (factors that courts consider when determining whether a prior determination was sufficiently firm to constitute a final judgment include: whether the parties were fully heard; whether a reasoned opinion was filed; and whether that decision could have been, or actually was, appealed); *Prospect Funding Holdings, LCCv. Breen*, Civ. No. 2:17-CV-3328-KM-MAH, 2018 WL 734665, at *6 (D.N.J. Feb. 5, 2018) (concluding that prior federal court ruling granting summary judgment was a final and valid judgment for issue preclusion purposes).

Fourth, the determination that the Breathe Right Dilator did not infringe the '924 Design Patent and the '456 Utility Patent was essential to the judgment in the Prior Ohio Litigation, because summary judgment could not have been granted in favor of CNS if this issue had presented a "genuine issue of material fact." *See Hofmann*, 173 F. App'x at 123 (citing Fed. R. Civ. P. 56(c)).

Finally, Plaintiff had a "full and fair opportunity" to litigate his patent infringement claim in the Prior Ohio Litigation. As explained in the district court's decision, although Plaintiff contended that summary judgment was premature and he should have been allowed to obtain discovery, he had adequate time to have done so. (Docket No. 32-7 at 4). Plaintiff filed his case in October 1995, CNS's summary judgment motion was ripe for ruling in February 1996, but the district court did not rule on it until May 15, 1996. (*Id* at 3). Following the grant of summary judgment in favor of CNS, Plaintiff pursued

an appeal. *See Hofmann*, 193 F. App'x at 123 (finding that *pro se* plaintiff's appeal of judgment in prior litigation indicated that she had a full and fair opportunity to litigate the issue for purposes of issue preclusion). As Plaintiff had a "full and fair opportunity" to litigate the issue of whether the Breathe Right Dilator infringed the '924 Design Patent and the '456 Utility Patent in the Prior Ohio Litigation, he is precluded from raising it again here over two decades later.

B. Plaintiff's Claims Otherwise Fail as a Matter of Law.

Even if Plaintiff's patent infringement claim was not barred by issue preclusion, that claim, and all other claims he purports to assert in his Complaint, fail as a matter of law.

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, the well-pleaded factual content in the complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and also "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). When analyzing a motion to dismiss, the factual allegations should be separated from allegations that merely recite the legal elements of the claim. *Fowler v. UPMC Shadyside*, 578 F.3d 203,210 (3d Cir. 2009). The well-pleaded facts are accepted as true, but legal conclusions may be disregarded. *Id.* at 210-11. Next, a determination is made as to "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211 (quoting

Iqbal, 556 U.S. at 679). This "plausibility" determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Given that Plaintiff is proceeding *pro se*, the Court liberally construes his Complaint and employs less stringent standards than when judging the work product of an attorney. *Erickson v; Pardus*, 551 U.S. 89, 94 (2007). However, there are limits to the Court's procedural flexibility - "pro se litigants still must allege sufficient facts in their complaints to support a claim ... they cannot flout procedural rules - they must abide by the same rules that apply to all other litigants." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (citations omitted).

1. Even if Plaintiff's Patent Infringement Claim Was Not Barred by Issue Preclusion, the Complaint Fails to State a Plausible Claim for Patent Infringement.

To plead a patent infringement claim, a complaint must place the "potential infringer...on notice of what activity...is being accused of infringement." *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1350 (Fed. Cir. 2018). Regarding a utility patent, "[t]o provide notice, a plaintiff must generally do more than assert that the product infringes the claim; it must show *how* the defendant plausibly infringes by alleging some facts connecting the allegedly infringing product to the claim elements." *Boston Sci. Corp. v. Nevro Corp.*, 415 F. Supp. 3d 482, 489 (D. Del. 2019) (emphasis in original) (citing *SIPCO, LLC v. Streetline, Inc.*, 230 F. Supp. 3d 351, 353 (D. Del. 2017) (granting a motion to dismiss an

infringement claim because "[t]he complaint contains no attempt to connect anything in the patent claims to anything about any of the accused products"). As to a design patent, a complaint must set forth a "basis on which to reasonably infer that an ordinary observer would confuse the pleaded patented designs with the accused [product]." *Colida v. Nokia, Inc.*, 341 F. App'x 568, 570 (Fed. Cir. 2009). Plaintiff's conclusory allegations in his Complaint, which primarily focus on his disagreement with the decision in the Prior Ohio Litigation, satisfy none of these requirements and therefore fail to state a claim for infringement of the '924 Design Patent or the '456 Utility Patent, even if the patent infringement claim was not barred by issue preclusion.

2. Plaintiff's Remaining Claims Fail to State a Plausible Basis for Relief.

In addition to patent infringement, the cover sheet of Plaintiff's Complaint lists "42 U.S.C. §§ 1983, 1985 and 1986," "conspiracy for a summary judgment making Plaintiff's patents invalid," and "[d]enial of due process of law, VII Amendment to the Constitution which renders a void judgment." (*See* Docket No. 1 at 1). Even applying the most liberal construction possible to Plaintiff's Complaint, it fails to specify which Defendants these claims are asserted against, let alone contain allegations sufficient to plausibly state a claim for relief under any of these theories. Overall, it appears that Plaintiff's purported claims stem from his dissatisfaction with the decision granting summary judgment in favor of CNS in the Prior Ohio Litigation, given his assertions that the district court "functioned as a clairvoyant as to how a jury would decide the case, a denial of [his] right to a

trial by a jury," and that he was "denied due process of law." (Docket No. 1 at 9, 10).

As an initial matter, 42 U.S.C. § 1983 does not create any substantive rights, but rather provides a remedy for deprivations of rights created by the Constitution or federal law. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). "To state a claim for relief in an action brought under § 1983, [a plaintiff] must establish that [he was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). As the Court deciphers Plaintiff's Complaint, he apparently alleges that the district court's grant of summary judgment in favor of CNS in the Prior Ohio Litigation somehow denied him due process and violated his Seventh Amendment right to a jury trial, which gives rise to a § 1983 claim. Plaintiff fails to state a plausible claim for relief under § 1983, however, because the Complaint does not contain any factual allegations to suggest or infer that any of the named Defendants are state actors or that they acted under color of state law at any relevant time.⁶

⁶ Furthermore, Plaintiff claim that the district court's grant of summary judgment in favor of CNS in the Prior Ohio Litigation somehow denied him of his Seventh Amendment right to a jury trial provides no basis for relief. As the Third Circuit Court of Appeals has explained, "[i]t is well settled that summary judgment, when properly granted, does not violate the Seventh Amendment." *McLoud v. Industrial Res., Inc.*, 715 F. App'x 115, 120 n.4 (3d Cir. 2017) (citing *In re TMI Litig.*, 193 F3d 613, 725 (3d Cir. 1999)). There is no dispute that summary judgment was properly granted in the Prior Ohio Litigation, given that the Federal Circuit Court of Appeals affirmed the district court's decision on appeal. Moreover, to the extent that Plaintiff claims that unspecified individuals "conspir[ed] for a summary

Plaintiff's bald, unsupported assertions in his Responses that Defendants were operating under color of law does not overcome this deficiency. (See Docket Nos. 53 at 3, ¶¶ 5, 9; 55 at 1). Additionally, any § 1983 claim is time-barred because the applicable two-year statute of limitations has run.⁷

Finally, although Plaintiff lists 42 U.S.C. § 1985 on the cover sheet of his Complaint, even when liberally construed in the light most favorable to him, the Complaint alleges none of the required elements to state a claim for conspiracy to interfere with his civil rights against any of the Defendants. See *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 828-29 (1983) (listing elements of § 1985 claim as

judgment making Plaintiff's patents invalid," (see Docket No. 1 at 1), he has failed to allege any plausible basis for relief based on this unsupported and inaccurate assertion. As explained, the district court's grant of summary judgment- in favor of CNS in the Prior Ohio Litigation did not invalidate Plaintiff's patents. See *supra* n.5.

⁷ The statute of limitations for a § 1983 claim is governed by the personal injury tort law of the state where the cause of action arose. *Wallace v. Kato*, 549 U.S. 384,387 (2007). It appears that Plaintiff's purported claims arise from the Prior Ohio Litigation, therefore Ohio law would apply. "The statute of limitations for a § 1983 claim arising in Ohio is two years." *Ruffin v. Kudley*, 2019 WL 2059605, at *2 (N.D. Ohio May 9, 2019). Even if Pennsylvania law would apply, the statute of limitations also is two years. See *Kach v. Hose*, 589 F3d 626,634 (3d Cir. 2009) ("The statute of limitations for a § 1983 claim arising in Pennsylvania is two years."). The conduct Plaintiff complains of in his Complaint leading up to and culminating in the Prior Ohio Litigation occurred in the late 1980's and into the 1990's, and concluded when the Federal Circuit Court of Appeals affirmed the district court's decision on April 7, 1997. Any claims arising out of the Prior Ohio Litigation would have accrued on or about that time. Thus, the two-year statute of limitations for any § 1983 claim arising from the Prior Ohio Litigation has long since run.

"(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is injured in his person or property or deprived of any right or privilege of a citizen of the United States."). Because a sufficiently pled claim under § 1985 is a prerequisite to a § 1986 claim for failure to prevent a conspiracy, Plaintiffs listed § 1986 claim likewise fails. *See Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994) ("[T]ransgressions of § 1986 by definition depend on a preexisting violation of § 1985."). Furthermore, any claim under § 1985 or § 1986 is time-barred because the applicable statute of limitations has run.⁸

3. Curative Amendment is Not Warranted.

The Court must allow amendment by the plaintiff in a civil rights case brought under § 1983 before dismissing pursuant to Rule 12(b)(6), irrespective of whether it is requested, unless doing so would be "inequitable or futile." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir. 2007); *see also Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004) (where a complaint is

⁸ There is a two-year statute of limitations for a § 1985 claim under both Ohio and Pennsylvania law, *see Dotson v. Lane*, 360 F. App'x 617, 619n.2 (6th Cir. 2010); *Garland v. US Airways Inc.*, 270 F. App'x 99, 103 (3d Cir. 2008), and a one-year statute of limitations for a § 1986 claim. *See* 42 U.S.C. § 1986 ("[N]o action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.").

vulnerable to dismissal pursuant to Rule 12(b)(6), the district court must offer the opportunity to amend unless it would be inequitable or futile). Though cognizant of these holdings, the Court finds that allowing Plaintiff to amend his Complaint would be futile as to all claims for the reasons discussed herein. As such, dismissal of Plaintiff's Complaint with prejudice is warranted.

IV. CONCLUSION

For the reasons set forth above, the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by Defendant Suzanne Kameese (Docket No. 27), Defendants Bruce C. Johnson and Creative Integration & Design, Inc. (Docket No. 31), and Defendant Daniel E. Cohen (Docket No. 50), each are GRANTED and Plaintiff's Complaint is DISMISSED in its entirety as to all Defendants Willi PREJUDICE.

An appropriate order follows.

Date: February 19, 2021 s/ W. Scott Hardy
W. Scott Hardy
United States District Judge

cc/ecf: All counsel of record

Morris S. Glover (via U.S. mail)
6361 Stonehaven Lane
Bedford Heights, OH 44146

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MORRIS S. GLOVER,)	
	Plaintiff,)
v.)	Civil Action
)	No. 19-734
DANIELE. COHEN, BRUCE C.)	
JOHNSON, SUZANNE KAMEESE,)	
LOWELL FRENCH and CREATIVE)	
INTEGRATION & DESIGN, INC.,)	
	Defendants.)

ORDER OF COURT

AND NOW, this 19th day of February, 2021, in accordance with the foregoing Memorandum Opinion, IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant Suzanne Kameese (Docket No. 27), Defendants Bruce C. Johnson and Creative Integration & Design, Inc. (Docket No. 31), and Defendant Daniel E. Cohen (Docket No. 50) each are GRANTED;

IT IS FURTHER ORDERED that Plaintiff's Complaint (Docket No. 1) is DISMISSED in its entirety as to all Defendants WITH PREJUDICE; and

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case CLOSED.

s/
W. Scott Hardy
United States District Judge

cc/ecf: All counsel of record

Morris S. Glover (via U.S. mail)
6361 Stonehaven Lane
Bedford Heights, OH 44146

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MORRIS S. GLOVER,)
Plaintiff,)
v.) Civil Action
) No. 2:19-cv-
) 00734-RJC
DANIEL E. COHEN, BRUCE C.)
JOHNSON, SUZANNE KAMEESE,) AFFIDAVIT
LOWELL FRENCH and CREATIVE) OF JOSEPH
INTEGRATION & DESIGN, INC.,) SPRAGNER
Defendants.)

U.S. EXPRESS
MAIL NO.:
EJ215503733US.

State of Ohio)
) SS
Cuyahoga County)

Being first duly sworn and cautioned, Affiant Joseph Spragner, deposes and states as follows:

1. I am the Plaintiff's witness in the above-captioned action, and make this Affidavit based upon my first-hand knowledge of the facts set forth herein.

2. I was a witness at Mr. Glover first and only case management conference in the winter of January 17, 1996.

3. At that day and time in the conference I witnessed that the Judge Matia and the defendant was not present at the time of the meeting on

January 17, 1996 at all.

4. I also witnessed that Mr. Glover did not see Mr. Cohen in person but only talk to him on the intercom. In the Judge office we wonder why?

5. I also witnessed that something was not right at all with this meeting because the defendant and the judge was not present at the time. On January 17, 1996.

6. I also witnessed that the man in the judge's office stated to Mr. Glover and the defendant that the next meeting will be held on May 15, 1996.

7. I also witnessed that on May 15, 1996 the judge granted CNS, INC.'s Motion for Summary Judgment without looking at the evidence of Mr. Glover. And the defendant did not show a date of conception to the plaintiff Mr. Glover, or the court in Cleveland, Ohio, at that day and time.

FURTHER AFFIANT SAYETH NAUGHT.

s/ _____
Joseph Spragner, Witness

SWORN TO AND SUBSCRIBED in my presence
this 17 day of June, 2020.

s/ _____
Stephanie Weigel
Notary Public, State of Ohio
My Comm. Expires January 15,
2023