APPENDICES

APPENDIX A

ORDER AND JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED ON

JULY 16, 2024

NAZIR KHAN, Plaintiff-Appellant IFTIKHAR KHAN, Plaintiff

v.

MERIT MEDICAL SYSTEMS, Inc. , Defendant-Appellee

2023-2329

APPENDIX A

Appeal from the United States District Court for the District of Utah in No. 2:21-cv-00337-HCN-CMR, Judge Howard C. Nielson, Jr.

Decided: July 16, 2024

NAZIR KHAN, Burr Ridge, IL, pro se.

BRENT P. LORIMER, Lorimer IP, PLLC, Midvale, UT, for defendant- appellee. Also represented by DAVID R. TODD, THOMAS R. VUKSINICK, Workman Nydegger, Salt Lake City, UT

APPENDIX A

Before MOORE, Chief Judge, LOURIE and STARK, Circuit Judges.

PER CURIAM.

Nazir Khan, owner of a patent directed to an arteriovenous shunt with several parts, filed a patent infringement suit against Merit Medical Systems, Inc. ("Merit Medical") in the United States District Court for the District of Utah. Merit Medical counterclaimed for a declaratory judgment of non-infringement. The district court granted judgment for Merit Medical and against Khan. Khan appeals [1]. We affirm.

APPENDIX A

---

[1] The complaint was filed by Nazir Khan along with Iftikhar Khan. We granted Iftikhar Khan's motion to be removed from the appeal. Our references throughout to "Khan," therefore, are to Nazir Khan.

I

Mr. Khan owns U.S. Patent No. 8,747,344 (the ""344 patent"). The "344 patent" is directed to a shunt used for hemodialysis and methods for using that shunt. Claim 13, the sole claim at issue here, recites in pertinent part (with emphasis added):

APPENDIX A

13. A system for performing hemodialysis on a patient comprising:

a. an arteriovenous shunt means comprising:

i. an arterial graft means comprising a body, a lead end and a terminal end...., and

ii. a single lumen venous outflow catheter means comprising an intake end and depositing end...., and

iii. a cuff means comprising an inlet and an outlet, wherein:

APPENDIX A

1. said cuff is disposed about said terminal end of said subcutaneous graft; and

2. said cuff is disposed about said intake end of said venous outflow catheter; and

3. wherein the cuff provides a secure fit for said arterial graft first diameter and said venous outflow catheter second diameter; and

b. a hemodialysis apparatus.

APPENDIX A

U.S. Patent No. 8,282,591 (the "'591 patent") is the parent to the '344 patent." Initially, the claims contained in the application that eventually yielded the '591 patent" required the "inlet" and "outlet" of a "cuff" to be "connected to" a graft and a catheter, respectively. See S. App'x 424-27.[2] These claims were rejected by a patent examiner as obvious over U.S. Patent No. 6,102,884("Squitieri"), which disclosed a device "connected to" a graft and a catheter. In response to the rejection, Khan proposed amended claims, which required that in addition to being "connected to" a graft and a catheter, the cuff also be "disposed about" the ends of the graft and

APPENDIX A

catheter. After the examiner rejected these proposed amended claims, Khan appealed to the Board of Patent Appeals and Interferences ("Board"), which found Khan's distinction of Squitieri persuasive, concluding that the cuff of Khan's amended claims "encircles" and "wraps around" the graft and catheter while Squitieri's cuff was disposed "within" the graft and catheter. S. App'x 468-74, 705-06. The "591 patent" was issued with the "disposed about" limitation in 2012.

The "344 patent" was issued in 2014. S. App'x 53. Similar to the prosecution of the "591 patent", Khan originally proposed claims in which the cuff was broadly permitted to be

APPENDIX A

"connected to" the graft and the catheter. After the claims of the "591 patent" were approved, Khan amended his proposed claims to require a "cuff means" instead of a "cuff". After receiving a rejection based on Squitieri, Khan further amended the proposed claims to require that the cuff means be "disposed about" the graft and catheter. Only after this amendment were the claims allowed.

Subsequently, Khan filed a reissue application for the "591 parent patent". In doing so, he sought claims that would have eliminated the "disposed about" limitation, explaining that he needed these broader claims in order to pursue infringement cases against companies, including Merit Medical,

APPENDIX A

"who cannot be sued without [claims] having a connector with broadened scope so that [the accused] connector can be [found to infringe if it is] used in a disposed or non-disposed way." S. App'x 374; see also S. App'x 372-73 ("The patent owner cannot literally sue the infringer unless the cuff connector is broadened in scope to connect the graft and the catheter in different ways, disposed or non-disposed."). The examiner rejected the reissue application, which the Board and then this court affirmed. See In re Khan, 722 F. App'x 1038, 1041 (Fed.Cir. 2018).

Merit Medical markets the accused product, the HeRO Graft, a shunt used for hemodialysis. It is undisputed that, as even Khan has described it, the

APPENDIX A

HeRO Graft has a connector that is "disposed within" or "in" the ends of the graft and catheter. S. App'x 70. This is in contrast to Claim 13 of the "344 patent", which requires a connector "disposed about" the graft and catheter.

Khan's complaint alleged that the HeRO Graft infringes the "334 patent" literally and under the doctrine of equivalents, directly and indirectly, and willfully. The district court granted Merit Medical's motion for summary judgment of non-infringement, as well as its counterclaim for declaratory judgment of non-infringement, after concluding that no reasonable juror could find that the accused HeRO Graft met the "disposed about"

limitation, under any of Khan's theories of infringement.

After we dismissed a premature appeal by Khan, see Khan v. Merit Medical Systems, Inc., No. 23-1054 (Fed. Cir. Dec. 29, 2022), the district court entered final judgment of non-infringement and Khan timely appealed. [3]

---

[3] The district court had jurisdiction under 28 U.S.C.§§ 1331 and 1338(a). We have jurisdiction under 28 U.S.C.§ 1295(a)(1). However, to the extent Khan is challenging the district court's order requiring him to pay Merit Medical's attorney fees, pursuant to 35 U.S.C. § 285, we lack jurisdiction, as the district court did not enter a final order with respect to

attorney fees. See Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC, 927 APPENDIX A F. 3d 1292, 1303-06 (Fed. Cir. 2019).

II

We review a grant of summary judgment applying the law of the regional circuit, here the Tenth Circuit, which reviews a grant of summary judgment de novo. See D Three Enters., LLC v. SunModo Corp., 890 F.3d 1042, 1046 (Fed. Cir. 2018).

Summary judgment is appropriate if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

APPENDIX A

Issues unique to patent law, such as claim construction and infringement, are reviewed according to Federal Circuit law. See AbbVie Deutschland GmbH & Co., KG v. Janssen Biotech, Inc., 759 F.3d 1285, 1295 (Fed. Cir.2014). Infringement generally requires a factual determination as to whether all of the limitations of a claim, properly construed, are met by an accused device. See Akzo Nobel Coatings, Inc. v. Dow Chem. Co., 811 F.3d 1334, 1339 (Fed. Cir. 2016) ("Infringement, whether literal or under the doctrine of equivalents, is a question of fact."). "As such, it is amenable to summary judgment where, inter alia, no reasonable fact finder could find infringement." Ethicon Endo-

APPENDIX A

Surgery, Inc. v. U.S. Surgical Corp., 149 F.3d 1309, 1315 (Fed. Cir.1998). With respect to "questions of claim construction, including whether claim language invokes 35 U.S.C. § 112[(f)], the district court's determinations based on evidence intrinsic to the patent as well as its ultimate interpretations of the patent claims[,] are legal questions that we review denovo." Williamson v. Citrix Online, LLC, 792 F.3d 1339, 1346 (Fed. Cir. 2015). However, "[t]o the extent the district court, in construing the claims, makes underlying findings of fact based on extrinsic evidence, we review such findings of fact for clear error." Id.

APPENDIX A

III

Khan's arguments on appeal are somewhat confusing. What is clear, however, is that the district court committed no error in granting summary judgment to Merit Medical determining that its accused HeRO Graft product does not infringe claim 13 of the "344 patent" under any theory of infringement. We agree with Merit Medical and the district court that there is no genuine dispute of material fact and summary judgment of non-infringement is warranted.

Khan cannot prove literal infringement. Claim 13 requires a "cuff means" "disposed about" the graft and the catheter. Khan does not challenge

APPENDIX A

the district court's (correct) construction that "disposed about" requires a cuff means that is "wrapped around, encircles, and covers the outside of the outlet end of an arterial graft and the inlet end of a venous outflow catheter." App'x 4. It is further undisputed that the HeRO Graft has a cuff that is "disposed within" the graft and catheter and, therefore, is not literally "disposed about" the graft and catheter. See S. App'x 70.

These realities are not dispositive, Khan contends, because he also asserts infringement under the doctrine of equivalents. Under the doctrine of equivalents, "a product or process that does not

literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." *Warner-Jenkinson Co. v. Hilton Da- vis Chem. Co., 520 U.S.17, 21 (1997).* Among the several fatal deficiencies to Khan's contention is that he, during prosecution of both the "344 patent and the parent '591 patent, amended his proposed claims and made arguments disclaiming cuffs that are connected within the graft and catheter, as in Squitieri. [4] A patentee may not rely on the doctrine of equivalents to assert infringement against a device that falls within the scope of what the patentee disclaimed during prosecution. See Spectrum Int'l, Inc. v. Sterilite Corp., 164 F.3d

1372, 1378-79 (Fed. Cir. 1998). ("[B]y distinguishing the claimed invention over the prior art, an applicant is indicating what the claims do not cover.") (internal quotation marks omitted).

---

[4] Khan's contention that he did not amend his claims during prosecution is plainly belied by the prosecution history. See S. App'x 468-74, 505-14, 516-21; see also App'x 20 ("Plaintiff['s] claim that [he] did not amend Claim 13 to overcome Squitieri by adding the 'disposed about' limitation is false.").

APPENDIX A

Moreover, Khan himself repeatedly explained during prosecution that he could not assert claim 13 of the "344 patent against a device, including specifically the HeRO Graft, in which the cuff means was "disposed within" the graft and catheter.

S. App'x 373-74, 348. His clear and unambiguous disclaimer of claim scope estops him from asserting that embodiments such as the HeRO Graft and Squitieri – infringe. See Augustine Med., Inc. v. Gaymar Indus., Inc., 181 F.3d 1291, 1299 (Fed. Cir. 1999) ("If sufficient to evince a clear and unmistakable surrender of subject matter, arguments made during prosecution may . . . estop an applicant from recapturing that surrendered matter

under the doctrine of equivalents.") (internal quotation marks omitted).

Khan also insists that claim 13 is a means-plus-function claim, governed by 35 U.S.C. § 112(f). We need not decide whether "cuff means" is a means-plus-function element because, as Merit Medical correctly points out, "even if 'cuff means' is a means-plus-function element, satisfaction of that element would not somehow make up for the absence of the 'disposed about limitation." Response Br. at 32. To raise a triable issue of infringement, Khan must produce sufficient evidence from which a reasonable juror could find that all of the elements of claim 13 are present in the HeRO Graft.

APPENDIX A

See Odetics, Inc. v. Storage Tech. Corp., 185 F.3d 1259, 1268 (Fed. Cir. 1999) ("Thus a claim limitation written in § 112[(f)] form, like all claim limitations, must be met, literally or equivalently, for infringement to lie."). He has failed to adduce such evidence with respect to the "disposed about" limitation, so he cannot prove infringement even if all of the other limitations of his claim are present in the accused device.

Infringement is an element of induced, contributory, and willful infringement. See Novartis Pharms. Corp. v. Eon Labs Mfg., Inc., 363 F.3d 1306, 1308 (Fed. Cir. 2004); Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. 93, 94 (2016).

Therefore, Khan's inability to prove infringement likewise dooms his other claims. We have considered Mr.

APPENDIX A

Khan's other arguments and find them unpersuasive. We affirm the district court's grant of Merit Medical's motion for summary judgment of non-infringement.

AFFIRMED

APPENDIX A

ORDER AND JUDGEMENT OF

United States Court of Appeals for the Federal Circuit filed on

July 16, 2024

NAZIR KHAN,

Plaintiff-Appellant

IFTIKHAR KHAN,

Plaintiff

v.

ARTIVION, INC.,

Defendant-Appellee

2023-2347

APPENDIX A

Appeal from the United States District Court for the Northern District of Georgia in No. 1:21-cv-02291-SCJ, Judge Steve C. Jones.

Decided: July 16, 2024

NAZIR KHAN, Burr Ridge, IL, pro se.

KATRINA M. QUICKER, Quicker Law, LLC, Atlanta, GA, for defendant-appellee. Also represented by KATHRYN ALLISON VANCE.

APPENDIX A

Before MOORE, *Chief Judge,* LOURIE and STARK, *Circuit Judges.*

PER CURIAM.

Nazir Khan,1 owner of U.S. Patent No. 8,747,344 ("'344 patent"), filed a complaint against Artivion, Inc. 2 ("Artivion") in the United States District Court for the Northern District of Georgia (the "Georgia Action"). Khan alleged that a product made by Artivion, the "HeRO Graft," a de- used for hemodialysis, infringed claims of the '344 patent' literally, under the doctrine of equivalents, and also under 35 U.S.C. § 112(f), governing means-plus-function claiming. On the same day, Khan filed suit against another company, Merit Medical, Inc. ("Merit Medical"), on the same causes of action, in the United States District Court for

APPENDIX A

the District of Utah (the "Utah Action"). Merit Medical had purchased the HeRO product line from Artivion. Khan's complaint in the Georgia Action, therefore, was based on alleged infringement by the same product accused of infringing the same claims in the Utah Action. After the district court entered judgment of non-infringement for Merit Medical in the Utah Action, the court in the Georgia Action granted Artivion's motion to dismiss based on the collateral estoppel effect of the Utah Action judgment.

Khan filed a timely appeal, over which we have jurisdiction. *See* 28 U.S.C. § 1295(a)(1). Khan focuses his appeal on the purported merits of his infringement claims,

APPENDIX A

1. The amended complaint, filed on September 1, 2022, by Nazir and Iftikhar Khan, is the operative complaint. Iftikhar Khan is not participating in this appeal.
2. Artivion formerly did business as Cryolife, Inc. which is the name used in the complaint (along with Hemosphere, Inc., which was dismissed as a party after it ceased operating on May 15, 2012).

Barely addressing collateral estoppel. Artivion argues that collateral estoppel applies and, therefore, the district court properly dismissed Khan's complaint. We agree with Artivion.

By separate order issued today, we have affirmed the Utah court's judgment of non-

APPENDIX A

infringement. *See Khan v. Merit Medical Systems, Inc.,* No. 23-2329 (Fed. Cir. Jul. 16, 2024). We now affirm the district court's dismissal order in the Georgia Action.

"On procedural issues not unique to this circuit's exclusive jurisdiction, we apply the law of the regional circuit, which in this case is the Eleventh Circuit." *Dana v. E.S. Originals, Inc.,* 342 F.3d 1320, 1323 (Fed. Cir. 2002). This includes the review of a district court's determination of whether collateral estoppel applies, which we review de novo. *See Soverain Software LLC v. Victoria's Secret Direct Brand Mgmt., LLC,* 778 F.3d 1311, 1314 (Fed. Cir. 2015); *Matter of McWhorter,* 887 F.2d 1564, 1566 (11th Cir. 1989). The Eleventh

APPENDIX A

Circuit applies clear error review to factual determinations. *See Bryant v. Rich,* 530 F.3d 1368, 1377 (11th Cir. 2008). It "subject [s] [a] district court's decision to dismiss a complaint pursuant to Federal Rule of Civil Procedure

12(b) to *de* novo review." *Pleming v. Universal-Rundle Corp.,* 142 F.3d 1354, 1356 (11th Cir. 1998). For issues addressed by the district court that are particular to patent law, such as whether claims for patent infringement are identical in two different actions, we apply FederalCircuit law. *See Aspex Eyewear, Inc. v. Zenni Optical Inc.,* 713 F.3d 1377, 1380 (Fed. Cir. 2013).

In the Eleventh Circuit, a party seeking application of collateral estoppel "must show that: (1) the issue at stake is identical to the one involved in the prior proceeding;

(2) the issue was actually litigated in the prior proceeding;

(3) the determination of the issue in the prior litigation must have been 'a critical and necessary part of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Pleming,* 142 F.3d at 1359. We find no error in the district court's determination that each of these elements is met here.

The Utah Action and the Georgia Action both involved the identical issue: whether the HeRO Graft line of products infringe claim 13 of Khan's '344 patent. The fact that counterclaims for non-infringement were asserted in Utah but not in Georgia, as Khan emphasizes, makes no difference. The

APPENDIX A

pertinent inquiry for collateral estoppel is whether the identical issue is asserted in both actions, not whether additional issues (with respect to which no one is asserting collateral estoppel) are also litigated in one actionand not the other. *See generally Cromwell v. Sac Cnty.*, 94 U.S. 351, 353 (1876) ("[T]he judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.").

The identical issue of infringement was also actually litigated in both cases. Khan does not dispute this undeniable reality, instead turning his complaints to the manner in which the Utah Action was litigated. *See* Reply Br. at 16 (arguing case was "unfairly,

APPENDIX A

wrongly litigate[d]" in Utah). His dissatisfaction with the result in Utah does nothing to change the fact that the very same issues he sought to litigate in the Georgia Action had already been actually litigated in the Utah Action. *See Uniloc USA, Inc. v. Motorola Mobility LLC,* 52 F.4th 1340, 1350 (Fed. Cir. 2022) ("Generally, collateral estoppel cannot be denied because [a party argues that] the [prior] decision was incorrect."); *see also In re St. Laurent,* 991 F.2d 672, 675 (11th Cir. 1993) (explaining that collateral estoppel "bars relitigation of an issue previously decided"). Additionally, as we already noted, we have today affirmed the judgment of noninfringement in the Utah Action. The identical, actually litigated issue of patent infringement was also plainly

APPENDIX A

"a critical and necessary part" of the judgment in the Utah Action. The Utah court could not have entered judgment of non-infringement without determining that Khan could not prove the HeRO Graft infringes claim 13 of the '344 patent. *See* S.App'x 172 (Utah District holding that "there is no literal infringement of Claim 13 as a matter of law"); S. App'x 172-77 (holding that doctrine of equivalents and means-plus-function do not apply or create question of infringement); S. App'x 187 (granting summary judgment of non-infringement in favor of Merit Medical). That is the very question that is central to, and therefore "a critical and necessary part" of, Khan's complaint against Artivion here in the Georgia Action.

Finally, Khan had a "full and fair opportunity to litigate the issue" in the Utah Action. He filed a complaint against Merit Medical on June 1, 2021 and moved for summary judgment of infringement after both sides attached evidence to their briefs. He also filed a brief opposing Merit Medical's motion for summary judgment. Mr. Khan had numerous filings, over a year of proceedings, and a plethora of chances to address the relevant issues directly. This factor, then, was satisfied.

We have considered Khan's other arguments and find them unpersuasive. Accordingly, because the district court rightly found Khan is collaterally estopped from proving infringement on any of the grounds

APPENDIX A

he asserted in that court, we affirm its order dismissing his complaint.

AFFIRMED

APPENDIX B

ORDER AND JUDGEMENT OF THE

United States Court of Appeals for the Federal Circuit

Filed on October 2, 2024, denying hearing

NAZIR KHAN,

Plaintiff-Appellant

IFTIKHAR KHAN,

Plaintiff

v.

MERIT MEDICAL SYSTEMS, INC.,

Defendant-Appellee

2023-2329

Appeal from the United States District Court for the District of Utah in No. 2:21-cv-00337-HCN-CMR, Judge Howard C. Nielson, Jr.

APPENDIX B

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge,* LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges.*

1 Circuit Judge Newman did not participate.

PER CURIAM.

ORDER

On August 15, 2024, Nazir Khan filed a combined petition for panel rehearing and rehearing en bane [ECF no. 73]. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

APPENDIX B

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en bane is denied.

The mandate of the court will issue October 9, 2024.

FOR THE COURT

October 2, 2024 /s/ by

Date Jarret B. Perlow

Clerk of the Court

APPENDIX B

ORDER AND JUDGEMENT OF THE

United States Federal Court of Appeals filed on

October 2, 2024, denying rehearing

NAZIR KHAN, *Plaintiff-Appellant*

v.

ARTIVION, INC., *Defendant-Appellee*

2023-2347

Appeal from the United States District Court for the Northern District of Georgia in No. 1:21-cv-02291-SCJ, Judge Steve C. Jones.

Before MOORE, *Chief Judge,* LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges.*[1]

1 Circuit Judge Newman did not participate.

APPENDIX B

PER CURIAM

ORDER

On August 15, 2024, Nazir Khan filed a combined petition for panel rehearing and rehearing en banc [ECF No. 46]. The petition was referred to the panel that heard the appeal, and thereafter the petition 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 October 9, 2024.

APPENDIX B

FOR THE COURT

October 2, 2024

Date

/s/

Jarrett B. Perlow

Clerk of Court

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT OF UTAH MAGISTRASTE JUDGE'SS REPORT AND RECOMMENDATION FILED ON JULY 17, 2023

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

KHAN, et al.,	REPORT AND
Plaintiffs,	RECOMMENDATION RE:
v.	ECF 83 AND 84
MERIT MEDICAL SYSTEMS, INC.,	
Defendant.	Case No. 2:21-cv-00337-HCN-CMR
	District Judge Howard C. Nielson, Jr.
	Magistrate Judge Cecilia M. Romero

This matter is referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) (ECF 23). Before the court are two motions filed by Defendant Merit Medical Systems, Inc. (Defendant):

APPENDIX C

(1) Motion for Judgment on its Counterclaim for Declaratory Judgment of Non-Infringement (Motion for Judgment) (ECF 83); and (2) Motion to Dismiss its Counterclaims for Declaratory Judgment of Invalidity and Tortious Interference with Economic Relations without Prejudice (Motion to Dismiss) (ECF 84) (collectively, Motions).

Having carefully considered the relevant filings, the court finds that oral argument is not necessary and will decide this matter on the basis of written memoranda. *See* DUCivR 7-1(g). For the reasons set forth below, the undersigned RECOMMENDS that the court GRANT Defendant's Motions.

APPENDIX C

I. BACKGROUND

Plaintiffs Nazir Khan and Iftikhar Khan (Plaintiffs) initiated this patent infringement action on June 1, 2021 (ECF 2). Defendant filed an Answer (ECF 13) with the following counterclaims: (1) Declaratory Judgment of Non-Infringement; (2) Declaratory Judgment of Invalidity; and (3) Interference with Economic Relations. On July 28, 2021, Plaintiff filed an Amended Complaint (ECF 15) with leave of court (ECF 14). Defendant then filed its Answer to Amended Complaint (ECF 17) asserting the same counterclaims.

On November 1, 2021, Defendant filed a Motion for Summary Judgment (ECF 40) on all of Plaintiffs' claims as set forth in the Amended Complaint. On August 17, 2022, the undersigned issued a Report and Recommendation (ECF 67) that the court grant summary judgment to Defendant on Plaintiff's claims but noted that

APPENDIX C

Defendant had not addressed its counterclaims. The court entered an Order (ECF 72) adopting this recommendation in its entirety. On September 27, 2022, the court entered Judgment (ECF 74) in Defendant's favor and closed this case. Plaintiffs appealed this ruling to the Federal Circuit (ECF 91).

On October 11, 2022, Defendant filed the instant Motion for Judgment (ECF 83) and Motion to Dismiss (ECF 84). On October 14, 2022, the court entered a docket text order (ECF 87) noting that its judgment was premature given Defendant's pending counterclaims and directing the reopening of this case. On December 29, 2022, the Federal Circuit entered an order (ECF 104) dismissing Plaintiff's appeal for lack of jurisdiction because the court's Judgment (ECF 74) was not a final judgment due to Defendant's pending counterclaims.

APPENDIX C

On January 3, 2003 the court entered a docket text order (ECF 105) striking its judgment in light of the Federal Circuit court's ruling. The next day the Defendant submitted its Motions for Decision (ECF 107). On January 13, 2023 months after the Motions were filed, Plaintiffs filed a Response (ECF 109) and Defendant thereafter filed a Reply (ECF 110). [1]

---

[1] Without leave of court to file a sur-reply, Plaintiffs filed a Notice (ECF 111) reasserting their arguments, which the court declines to consider as procedurally improper. DUCivR 7-1(a)(8) ("Unless otherwise ordered, the court will not consider additional memoranda.").

APPENDIX C

II. DISCUSSION

A. Motion for Judgment

Defendant asks the court to enter judgment in its favor and against Plaintiffs on one of its three counterclaims, specifically its counterclaim for declaratory judgment of noninfringement (ECF 83 at 2). In support of this request, Defendant relies solely on the reasoning in the undersigned's Report and Recommendation (ECF 67) and the court's subsequent Order (ECF 72) and Judgment (ECF 74). In these rulings, the court granted summary judgment to Defendant on Plaintiffs' claims for infringement (ECF 67; ECF 72), specifically finding that "all of Plaintiff's claims necessary[ily] fail because, as a matter of law, Plaintiff cannot establish infringement"(ECF 72).

APPENDIX C

Defendant does not identify the applicable standard or provide any authority for granting such a request. The court notes that the Motion for Judgment appears to be procedurally improper for failure to comply with the requirements of Federal Rule of Civil Procedure 56 and DUCivR 56-1.

Considering the nature of the request, and in the interests of the justice, speedy and inexpensive determination of this action, *see* Fed. R. Civ. P. 1, the court will none the less construe the Motion for Judgment as a motion for summary judgment.

The court notes that Plaintiffs failed to file a timely response to the Motion for Judgment. Plaintiffs filed their Response (ECF 109) to Defendant's Motions over two months after any applicable deadline. *See* DUCivR 7-1(a)(4)(B)(iii) ("A response to a motion must be filed within 28 days after service of the motion.").

APPENDIX C

Plaintiffs' failure to timely respond is grounds for granting the Motion for Judgment. *See* DUCivR 7-1(f); DUCivR 56-1(f) ("When a party fails to timely respond, the court may grant the motion without further notice if the moving party has established that it is entitled to judgment as a matter of law."). Even if Plaintiffs' Response was timely, Plaintiffs' arguments are largely indecipherable and lacking in merit.

Accordingly, because Plaintiffs failed to timely or meaningfully oppose the Motion for Judgment and because infringement was previously decided in Defendant's favor (ECF67; ECF72), the undersigned RECOMMENDS that the court GRANT Defendant's Motion for Judgment (ECF 83) and enter judgment in Defendant's favor on its counterclaim for declaratory judgment of noninfringement.

APPENDIX C

See Aqua Shield, Inc. v. Inter Pool Cover Team, No.2:09-cv-13TS, 2013WL 164244, at *4 (D. Utah Jan. 15, 2013) (granting summary judgment on a counterclaim of noninfringement where infringement was previously decided in the moving party's favor).

B. Motion to Dismiss

Defendant moves the court for dismissal without prejudice of its two remaining counterclaims for declaratory judgment of invalidity and tortious interference with economic relations (ECF 84 at 1). Defendant requests dismissal by court order pursuant to Rule41(a)(2) and in the interests of judicial economy (*id.* at 2). An order of dismissal under Rule 41(a)(2) may be "on terms that the court considers proper" and the dismissal is without prejudice"[u]nless the order states otherwise." *See* Fed. R. Civ. P. 41(a)(2).

APPENDIX C

"When considering a motion to dismiss without prejudice, the important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties." Newbold v. HealthEquity, Inc., No. 2:22-cv-00412-TS-JCB, 2022 WL 14644645, at *2 (D. Utah Oct. 25, 2022) (quoting Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993)). Absent prejudice to the opposing party, "the district court normally should grant such a dismissal." Id. (quoting Ohlander v. Larson, 114 F.3d 1531, 1537 (10th Cir. 1997)).

As explained above, Plaintiffs' Response (ECF 109) to Defendant's Motions was patently meritless and untimely filed over two months late. See DUCivR 7-1(4)(D)(ii) ("A response to a motion must be filed within 14 days after service of the motion.").

APPENDIX C

Once again, this alone is grounds for granting the Motion to Dismiss. See DUCivR 7-1(f) ("[F]ailure to respond timely to a motion may result in the court granting the motion without further(notice."). Moreover, the court agrees that dismissal of Defendant's remaining counterclaims would be in the interests of judicial economy. See Fed. R. Civ. P. 1. Dismissal of these counterclaims would not unduly prejudice Plaintiffs considering that all of Plaintiffs' claims in this action already been dismissed.

The undersigned therefore RECOMMENDS that the court GRANT Defendant's Motion to Dismiss (ECF 84) and DISMISS Defendant's counterclaims for declaratory judgment of invalidity and tortious interference with economic relations without prejudice.

APPENDIX C

RECOMMENDATION

For the foregoing reasons, the court RECOMMENDS as follows:

1. Defendant's Motion for Judgment (ECF 83) be GRANTED and judgment be entered in favor of Defendant on its counterclaim for declaratory judgment of noninfringement; and

2. Defendant's Motion to Dismiss (ECF 84) be GRANTED and Defendant's counterclaims for declaratory judgment of invalidity and tortious interference with economic relations be DISMISSED without prejudice.

NOTICE

Copies of the foregoing Report and Recommendation are being sent to all parties who are hereby notified of their right to object. Within fourteen (14) days of being served with a copy, any party may serve and file written objections.

APPENDIX C

See Fed. R. Civ. P. 72(b)(2). Failure to object may constitute a waiver of objections upon subsequent review.

IT IS SO ORDERED.

DATED this 17 July 2023.

/s/

Magistrate Judge

Cecilia M. Romero

United States District

Court for the District of Utah

APPENDIX C

ORDER AND JUDGMENT OF THE

United States District Court

District of Utah

FILED ON JULY 31, 2023

Nazir Khan and Iftikhar Khan,

Plaintiffs,

v.

Merit Medical Systems Inc.,

Defendant.

JUDGMENT IN A CIVIL CASE

Case Number: 2:21-cv-00337-HCN-CMR

APPENDIX C

IT IS ORDERED AND ADJUDGED

1. That summary judgment is granted in favor of Defendant on its First Counterclaim for Declaratory Judgment of Non-Infringement.

2. That the Merit HeRO® Graft does not infringe any claim of the '344 patent.

3. That Defendant's Second and Third Counterclaims are dismissed without prejudice.

July 31, 2023 — BY THE COURT:

Date — /s/

Howard C. Nielson, Jr.

United States District Judge

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION FILED ON AUGUST 4, 2023 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

NAZIR KHAN, IFTIKHAR KHAN,

PLAINTIFFS

v CIVIL ACTION

FILE NO 1:21-CV-2291-SCJ

ARTIVION, INC.,

Defendant

APPENDIX C

ORDER

This matter appears before the Court on Defendant Artivion, Inc.'s Motion to Dismiss Plaintiffs' Amended *pro se* patent infringement Complaint (Doc. No. [35-3]) and Plaintiffs' Motion to Enter into Court Docket the ruling of the District Court of Utah (Doc. No. [40]).

[1] All citations are to the electronic docket unless otherwise noted and all page numbers are those imprinted by the Court's docketing software.

APPENDIX C

2022, Plaintiffs filed an Amended Complaint that alleges literal, direct, induced, and willful infringement of U.S. Patent No. 8,747,344 (the "Asserted Patent" or "'344 Patent") against Defendant Artivion, Inc. (hereinafter "Defendant"). Doc. No. [31].[2]

As correctly stated by Defendant, Plaintiffs have filed an almost identical civil action in the Utah District Court against Merit Medical Systems, Inc. ("Merit Medical")—the subsequent owner of the HeRO product line—in the United States District Court for the State of Utah ("Utah Action"). Doc. No. [35-1], 10; see also Doc. Nos. [35-2], 17 (complaint); [35-2], 33 (amended complaint).

Plaintiffs advance the same infringement allegations relating to the same

patent/HeRO Graft in both actions, with the exception of the dates of damages. Defendant has also submitted

APPENDIX C

exhibits that show that the Utah court has considered completed summary judgment briefing in the matter and granted the

[2] When, as here, a complaint is filed by a pro se plaintiff, lly construed." Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998). Nonetheless, pro se plaintiffs are subject to the same law and rules of court as a litigant represented by counsel. See Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1it is "held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be libera989); Trawinski v. United Techs., 313 F.3d 1295, 1299.

BACKGROUND

A review of the record shows that on September 1,

11th Cir. 2002); see also Ottah v. Fiat Chrysler, 884 F.3d 1135, 1141 (Fed. Cir. 2018) (applying this same standard to a pro se plaintiff-filed patent case). motion for summary judgment filed be Merit Medical. See Doc. Nos.

APPENDIX C

[35-2], 70–141; [45] (judgment). As correctly summarized by Defendant Artivion, "the Court in the Utah Action—considering the very same claims at issue here against the very same medical device—granted summary judgment of no infringement in favor of Merit Medical and against Plaintiffs on each of their patent infringement claims related to the HeRO Graft." Doc. No. [35-1], 14; see also Doc. No. [35-2],

112–41. In a report and recommendation by the magistrate judge (subsequently

adopted by the district judge), the court stated that "the undisputed facts show that under the 'disposed about' limitation, the HeRO® Graft does not as a matter of law infringe Claim 13 of the '344 patent, literally, under the doctrine of equivalents, or under 35 U.S.C. § 112(f)." Doc. No. [35-2], (R&R, page 11). The court also found that "Plaintiffs' claims for direct and induced infringement, copying and willful infringement, and injunctive relief

APPENDIX C

[were] subject to dismissal." Id. (R&R, page 27). The court further stated that Plaintiffs' claim for "copying and willfulness" were to be "dismissed as baseless." Id. (R&R, page 26).

The Utah district court adopted the R&R by docket text order stating: On August 17, 2022, Magistrate Judge Romero entered

67 Report and Recommendation recommending that the court grant Defendant's motion for summary judgment. On August 29, 2022, Plaintiffs filed

APPENDIX C

objections. Having carefully reviewed the Report and Recommendation and the objections, the court concludes that Plaintiffs' objections are not well taken. The court agrees with Judge Romero that all of Plaintiffs' claims necessary fail because, as a matter of law, Plaintiffs cannot establish infringement. First, Plaintiffs concede that they cannot establish literal infringement. See Dkt. No. 68 at 9. Second, Plaintiffs' attempt to establish infringement under 35 USC § 112(f) fails as a matter of law because the relevant limitation is not a means plus function limitation. To be sure, the limitation does refer to a cuff "means," but on the one hand, it does not identify any function, and on the other hand, it does identify a specific structure. Finally, Plaintiffs' attempt to establish infringement under the doctrine of equivalents fails as a matter of law because of prosecution history estoppel. The

APPENDIX C

court agrees with Judge Romero that Plaintiffs clearly surrendered the scope that they are trying to reclaim through their infringement by equivalents argument. The court recognizes that in Khan v. Cryolife Inc., No. 1:21-CV- 2291-SCJ (N.D. Ga. August 04, 2022), the court held that Plaintiffs had sufficiently pleaded infringement to survive a motion to dismiss. It does not follow, however, that summary judgment is inappropriate. To the contrary, it is well settled that "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (cleaned up). Plaintiffs have failed to do so here.

Doc. No. [35-2], 141.

The Utah court entered judgment on July 31, 2023. Doc. No. [45-1].

APPENDIX C

I. LEGAL STANDARDS AND ANALYSIS

In its Motion to Dismiss, Defendant raises arguments that range from standing to collateral estoppel to failure to state a claim. This Court will first consider the standing and collateral estoppel issues—as the first implicates the authority of this Court and the latter is determinative. After that, the Court will address aspects of Plaintiffs' various motions and arguments.

A. Standing[3]

In its standing argument, Defendant asserts that Plaintiff Iftikhar Khan lacks standing to bring this action because the Asserted Patent only identifies Plaintiff Nazir Khan as an inventor/owner and there is nothing to show that Iftikhar Khan is an assignee. Doc. No. [35-1], 17, 54.

In response, Plaintiffs state Plaintiff Iftikhar Khan

APPENDIX C

has standing based on being a named inventor in the parent patent (i.e., the '591 patent) and the allegation that he has suffered monetary loss based upon the '344 patent being a continuation of the '591 parent patent. Doc. No. [36], 19.

[3] Because it is jurisdictional and implicates the authority of a federal court to decide a case, this Court must consider standing first. Rojas v. City of Ocala, 40 F. 4th 1347, 1350 (11th Cir. 2022).

APPENDIX C

Because only one plaintiff in a lawsuit must have standing to seek each form of relief requested in the Complaint and there is no issue as to Plaintiff Nazir Khan's standing, the Court declines to address Defendant's standing arguments concerning Iftikhar Khan. See Naval Logistics, Inc. v. M/V PETRUS, No. 21-12934, 2022 WL 4128603, at *3 n.8 (11th Cir. Sept. 12, 2022) ("And because only one plaintiff must have standing to seek each form of relief requested in the complaint, we decline to address [defendant's] arguments that Pack and the vessel lack standing."); see also Town of Chester, N.Y. v. Laroe Ests., Inc., 581 U.S. 433, 439 (2017) ("The same principle applies when there are multiple plaintiffs. At least one plaintiff must have standing to seek each form of relief requested in the complaint.");

APPENDIX C

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 n.9 (1977) ("'Because of the presence of this plaintiff [who has demonstrated standing], we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.'").

APPENDIX C

B. Collateral Estoppel

As the collateral estoppel issue is determinative, the Court addresses that issue now.[4]

The Court recognizes that in a patent case, decisions of the United States Court of Appeals for the Federal Circuit provide controlling authority; however, the Federal Circuit will apply Eleventh Circuit law to procedural issues, which this Court will do likewise. See Dana v. E.S. Originals, Inc., 342 F.3d 1320, 1323 (Fed. Cir. 2003) ("On procedural issues not unique to this circuit's exclusive jurisdiction, we apply the law of the regional circuit, which in this case is the Eleventh Circuit."); see also Arlaine & Gina Rockey, Inc. v. Cordis Corp., No. 02-22555-CIV, 2004 WL 5504978, at *17 n.5 (S.D. Fla. Jan. 5,

APPENDIX C

2004) ("Decisions by the

U.S. Court of Appeals for the Federal Circuit provide controlling authority on the aspects of this case that are unique to patent law. Decisions by the Eleventh Circuit govern issues that are not unique to patent law ") (citations omitted).

---

[4] To the extent that the term "issue preclusion," is the more appropriate term, this ruling also constitutes an issue preclusion analysis. See e.g., Harvey v. United States, 770 F. App'x 949, 953 (11th Cir. 2019) ("The Supreme Court has clarified that the term 'issue preclusion' should be used in place of 'collateral estoppel' and, for consistency, we do so here.") (citing Taylor v. Sturgell, 553 U.S. 880, 892 n.5 (2008)).

APPENDIX C

"The doctrine of collateral estoppel precludes relitigation . . . of issues that were actually litigated in the initial suit, whether or not the second suit is based on the same cause of action." Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1501 (11th Cir. 1984). Here, the Court is specifically examining defensive collateral estoppel, which a defendant may "use to prevent a plaintiff from relitigating an issue that he has already lost in a previous case." Id. (footnote omitted) (citing Deweese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir. 1982)). "Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.'" Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329–30 (1979) (footnote omitted) (citing Bernhard v. Bank of Am. Nat'l Trust & Sav.

APPENDIX C

Ass'n., 19 Cal. 2d 812, 813, 122 P.2d 892 (1942). "In general, collateral estoppel is applied against the losing party in the original action even in situations where the party asserting collateral estoppel was not a party to the original action. In other words, non-mutual collateral estoppel is available." Uniloc USA, Inc. v. Motorola Mobility LLC, 52 F.4th 1340, 1347 (Fed. Cir. 2022) (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 334 (1971); Hartley v. Mentor Corp., 869 F.2d 1469, 1470–71 (Fed. Cir. 1989); Peloro v. United States, 488 F.3d 163, 175 (3d Cir. 2007)). "For defensive collateral estoppel . . . to

APPENDIX C

apply, the party to be precluded must have had a 'full and fair' opportunity to litigate the issue in the first action." Uniloc USA, Inc., 52 F.4th at 1347 (citing Peloro, 488 F.3d at 174–75). In addition, "[g]enerally, collateral estoppel cannot be denied because [a party argues that] the [prior] decision was incorrect." Uniloc USA, Inc., 52 F.4th at 1350.[5]

The legal standard governing collateral estoppel is as follows:

> A party asking the court to apply collateral estoppel must establish that: "(1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding;[6] (3) the

APPENDIX C

[5] Another summary of def eollateral estoppel of patent areinvsuit involving one alleged infringer, an unrelated party who is

sued for infringement of those claims may reap the benefit of the invalidity decision under principles of collateral estoppel. Mutuality of estoppel is no longer required. Thus, the benefits of collateral estoppel (now generally termed issue preclusion) arising from a final judgment of patent invalidity were extended to an alleged infringer other than the defendant who earlier successfully litigated the matter and those in privity therewith.

Mendenhall v. Barber-Greene Co., 26 F.3d 1573, 1577 (Fed. Cir. 1994), as corrected on reh'g (Sept. 14, 1994).

[6] "In determining when an issue has been 'actually litigated,'" the Eleventh Circuit has "cited with approval the Restatement's formulation that '[w]hen an issue is properly raised, by the pleadings or otherwise, and is

APPENDIX C

submitted for determination, and is determined, the issue is actually litigated.'" Christo v. Padgett, 223 F.3d 1324, 1339–40

APPENDIX C

determination of the issue in the prior litigation must have been 'a critical and necessary part' of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding." Pleming v. Universal–Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998); see also Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir. 2000).

Dana v. E.S. Originals, Inc., 342 F.3d 1320, 1323 (Fed. Cir. 2003).

In the case *sub judice*, all of the elements for issue preclusion have been satisfied in that: (1) the issues decided in the Utah patent action are identical to those asserted in the case *sub judice*; (2) those issues were actually litigated; (3) determination of those issues was

APPENDIX C

essential to the court's judgment in the Utah litigation; (4) and the record of the Utah court shows that Plaintiffs had a full and fair opportunity to present their evidence on the issues.

Plaintiffs' opposition argument that the Utah court was incorrect is without merit for purposes of collateral estoppel as the Federal Circuit has stated that "[g]enerally, collateral estoppel cannot be denied because [a party argues that] the [prior] decision was incorrect." Uniloc USA, Inc., 52 F.4th at 1350.

(11th Cir. 2000) (citing Pleming v. Universal–Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998) (quoting Restatement (Second) of Judgments § 27 cmt. d (1982)).

APPENDIX C

Accordingly, Plaintiffs are precluded from relitigating the patent issues raised in this litigation. Defendant's Motion to Dismiss is subject to being granted on the ground of collateral estoppel.[7] The Court's prior plausibility ruling on the Motion to Dismiss does not prohibit application of the doctrine of collateral estoppel as the Court stated in footnote 16 of its order at Doc. No. [28] that it was not a merits determination in that "[t]he 'purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits.'" Nalco Co. v. Chem-

Mod, LLC, 883 F.3d 1337, 1350 (Fed. Cir. 2018).

C. Plaintiffs' Motion to Enter into Court Docket the ruling of the District Court of Utah

In their Motion, Plaintiffs ask the Court to enter the Utah District Court's January 3, 2023 docket text

APPENDIX C

order in which the Utah court struck its September 27, 2022 judgment and reopened the case "[i]n light of the Federal Circuit's order dismissing Plaintiffs' appeal for lack of jurisdiction." Doc. No. [40], 1, 6. The December 29, 2022 order of the United States Court of Appeals for the Federal Circuit is in the Utah docket at Doc. No. [104].

[7] As the collateral estoppel issue is determinative, no ruling is made on the sanctions allegation on page 15 of the Amended Complaint (Doc. No. [31], 15) — or on Defendant's additional dismissal arguments (in Doc. No. [35]) concerning failure to correct deficiencies, etc.

APPENDIX C

The Court construes Plaintiffs' Motion as one for judicial notice pursuant to Federal Rule of Evidence 201. The Motion is **GRANTED**. See Schwartz v. Cap. Liquidators, Inc., 984 F.2d 53, 54 (2d Cir. 1993) (taking judicial notice of filings in a district court).

D. Plaintiffs' Opposition Brief

In its reply brief, Defendant request that the Court disregard Plaintiffs' opposition brief as untimely. Doc. No. [37], 13.

Because Plaintiffs were served with Defendant's motion by mail, they had an additional three days to act/file a response brief in accordance with Federal Rule of Civil Procedure 6(d).[8] See e.g., Claiborne v. JPMorgan Chase Bank, N.A.,

No. 1:18-CV-5542-SDG-CCB, 2022 WL 469128, at *3 n.2 (N.D. Ga. Jan. 3, 2022),

APPENDIX C

report and recommendation adopted sub nom. Claiborne v. JP Morgan Chase Bank, N.A., No. 118CV05542SDGCCB, 2022 WL 1285690 (N.D. Ga. Mar. 24, 2022) (reading Federal Rule of Civil Procedure 6(d) and LR 7.1(C), NDGa together).

[8] The Court warns Plaintiffs (and provides clarification) that the additional three days only applies to general service rules/deadlines. If a court provides a date certain to file a document, Plaintiffs must comply with the date certain.

APPENDIX C

As Defendant's motion does not account for Rule 6(d), the Court declines to find Plaintiffs' opposition brief untimely. The Court has given full consideration to Plaintiffs' opposition brief.

E. Plaintiffs' Request for Sanctions

In their response brief, Plaintiffs request sanctions against Defendant and Defense Counsel. Doc. No. [36], 19–23. Said request is denied as procedurally improper in that Plaintiffs have failed to file a separate motion in accordance with Federal Rule of Civil Procedure 11(c), which states in relevant part: "[a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11(c)(2).

IV. CONCLUSION

Defendant Artivion, Inc.'s Motion to Dismiss

APPENDIX C

Plaintiffs' Amended Complaint (Doc. No. [35-3]) is **GRANTED** on the ground of collateral estoppel. As the collateral estoppel issue is determinative, the Court declines to consider the remaining grounds of Defendant's motion. The Court also declines to strike Plaintiffs' opposition brief as untimely. And the Court finds Plaintiffs' sanctions/opposition brief arguments procedurally improper.

Plaintiffs' Motion to Enter into Court Docket the ruling of the District Court of Utah (Doc. No. [40]) construed as a motion for judicial notice pursuant to Federal Rule of Evidence 201 is **GRANTED**. The Court has taken judicial notice of the Utah District Court's rulings filed by both parties, as well as independently reviewed the Utah District Court's docket in Civil Action No. 2:21-cv-0037.

This case stands **DISMISSED WITH PREJUDICE.**

The Clerk is **DIRECTED** to enter judgment and close

APPENDIX C

this case.

IT IS SO ORDERED this 4th day of August, 2023.

/s/

HONORABLE STEVE C. JONES

UNITED STATES DISTRICT JUDGE

APPENDIX D

APPENDIX D SHOWING THE DATE OF FINAL WRITTEN DECISION OF PATENT TRIAL AND APPEALS BOARD

UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE
10/812,380	03/29/2004

Nazir A Khan MD 150 Glenmora Drive

Burr Ridge, Il 60527

APPENDIX D

FIRST NAMED INVENTOR	Iftikhar Khan
ATTORNEY CONFIRMATION NO.	1800-0000012606
EXAMINER	
DEAK, LESLIE R	
ART UNIT I PAPER NUMBER	3761
MAIL DATE	07/27/2012
DELIVERY MODE	PAPER

APPENDIX D

FINAL WRITTEN DECISION OF PATENT TRIAL AND APPEALS BOARD (PTAB) FILED ON JULY 27, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte IFTIKHAR KHAN and NAZIR KHAN

Appeal 2012-006569

Application 10/812,380

Technology Center 3700

Before STEVEN D.A. McCARTHY, PHILLIP J. KAUFFMAN and GAY ANN SPAHN, *Administrative Patent Judges.*

McCARTHY, *Administrative Patent Judge.*

APPENDIX D

DECISION ON APPEAL

1 The Appellants' appeal under 35 U.S.C.

§ 134 from the Examiner's

2 final decision rejecting claims 1-20. The

Examiner rejects under 35 U.S.C.

3 § 103(a) claims 1-5, 7-10, 12-14, 17

and 18 as being unpatentable over

4 Squitieri (US 6,102,884, issued Aug.

15, 2000);

Twardowski (US 5,509,897,

5 issued Apr. 23, 1996); and Parks (US

5,399,173, issued Mar. 21, 1995); and

The Appellants are the real party in interest.

APPENDIX D

Application No. 10/812,380

claims 6, 11, 15, 16, 19 and 20 as being unpatentable over Squitieri, Twardowski, Parks and Trerotola (US 5,591,226, issued Jan. 7, 1997). An oral argument was held on June 5, 2012. We have jurisdiction under 35U.S.C. § 6(b).

We REVERSE.

2. Claims 1-20 as entered by the Examiner on November 30, 2011 are at issue in this appeal. Claims 1, 13 and 17 are independent. Claim 17 is illustrative of the claimed subject matter:

3. A method of performing hemodialysis on a patient comprising:

a. Surgically inserting an arteriovenous shunt into a patient, wherein said arterio venous shunt comprises:

APPENDIX D

i. An arterial graft comprising a body, a lead end and a terminal end, said lead end being configured for subcutaneous connection to an artery by anastomosis, wherein said arterial graft has a first diameter of about 2-8 imi; and

[2] We also recommend that the Appellants consider whether they intended method claims 18-20 to depend from system claim 16 or method claim 17.

3. The version of claim 17 reproduced in this opinion is taken from an amendment which was filed November 3, 2011 and entered November 30, 2011. Strikeouts and underlining are omitted.

APPENDIX D

Appeal No. 2012-006569

Application No. 10/812,380

ii. A single lumen venous outflow catheter comprising an intake end and depositing end, said depositing end being configured for insertion through a vein into the right atrium of the heart, wherein said venous outflow catheter has a second diameter of about 1-7mm different from said first diameter; and

APPENDIX D

111. A cylindrical cuff operable to direct passage of blood from said arterial graft to said venous outflow catheter, said cuff comprising an inlet in blood communication with an outlet:

I. Said inlet being disposed about and connected to said terminal end of said arterial graft; and

APPENDIX D

II. Said outlet being disposed about and connected to said intake end of said venous outflow catheter, wherein said cuff provides a secure fit for said arterial graft first diameter and said venous outflow catheter second diameter;

APPENDIX D

Appeal No. 2012-006569

Application No. 10/812,380

b. connecting said arterial graft to a hemodialysis apparatus;

c. collecting blood from the patient through said arterial graft with a dialysis catheter;

d. passing said blood through the hemodialysis apparatus;

e. collecting purified blood from hemodialysis apparatus with a dialysis cannula to the graft; and

f. Transmitting said purified blood through said cuff into said venous outflow catheter which is located in the right atrium and the blood is directly deposited into the right atrium.

APPENDIX D

Claims 1 and 13 each recite an arterio venous shunt including an arterial graft, a single lumen venous outflow catheter and a cylindrical cuff. Claim 17 recites a method including the step of surgically inserting an arteriovenous shunt into a patient. The arteriovenous shunt inserted into the patient includes an arterial graft, a single lume venous outflow catheter and a cylindrical cuff. The shunts of claims 1, 13, and 17 each have an inlet of the cylindrical cuff disposed about and connected to a terminal end of the arterial graft. Likewise, an outlet of the cuff is disposed about and connected to an intake end of the venous outflow catheter. In a Final Decision mailed August 24, 2010 in Appeal 2010-003194 ("Prior Decision"), a panel of this Board sustained the rejection of claim 17 under § 103(a) as being unpatentable over Squitieri, Parks and Twardowski.

APPENDIX D

The panel did not sustain rejections of claims 1-5, 7-10, 12-14, 17 and 18 as being unpatentable over Squitieri and Parks; claims 6, 11, 15, 16, 19 and 20 under § 103(a) as being unpatentable over Squitieri, Parks and Trerotola; and claim 10 under § 103(a) as being unpatentable over Squitieri and Trerotola. The dispositions of these rejections were based on the language

APPENDIX D

of the claims at issue and the arguments presented by the Appellants in that appeal. As in FF 1 of the Prior Decision, we adopt the Examiner's finding

that: Squitieri discloses an arteriovenous shunt system comprising an arterial graft 53 with a lead end 62 anastomosed to an artery and [a] terminal end connected to needle access site [20], which acts as a connector that corresponds to applicant's cuff. The access site [20], corresponding to applicant's cuff, directs passage of blood from the arterial catheter to the venous catheter, and is in communication with the terminal end of the arterial graft and the inlet end of the venous catheter (see FIGS 6-9, column 5, lines 19-60).

APPENDIX D

(Ans. 5). Squitieri further discloses that the access site *20* includes an in line aperture *16* conducting a blood stream accessible by needles *15*. (Squitieri, col. 4, 11. 15-18). Squitieri teaches that the access sites *20* "are designed in such a way to preserve laminar flow as far as possible (i.e. not a reservoir arrangement)." (Squitieri, col. 4,11. 32-35). Figure 11 of Squitieri depicts a connection between the arterial graft*53* and a port 46 of an access site *20*. *(Squitieri,* col. 5, 11. 66-67; fig. 11). In this depiction, the port *46* itself is not disposed around the terminal end of the graft *53*. Instead, the port *46* fits within the terminal end of the graft *53*.

Figure 12 of Squitieri depicts an access site having inlet and outlet couplings 73, 74 which fit within tubing *(e.g., 88)* to which the access site is to be connected. *(See* Squitieri, col. 6, 11. 14-20).

APPENDIX D

In their briefs, the Appellants seek to identify structural differences between the claimed subject matter and the prior art. For example, the Appellants state that: In Claimed Invention, the cuff connects the graft and the venous outflow catheter. The cuff is made of biocompatible material. *It encircles the inlet end qf the venous out .flow catheter* and it is sutured to the outlet end of the graft by an anastomosis (see specification and abstract of the published patent application, US 2005/0215938 Al)..... In Squitieri's art, the cuff consists of two reservoirs which connect the graft and the venous outflow catheter (see fig 9, US Patent US 6.582,409, B 1, Sheets 5 of 8). The reservoirs are metallic chambers with a silicone membrane.

APPENDIX D

(App. Br. 8 (italics added)). The Examiner has not provided reasoning with some rational underpinning sufficient to show that one of ordinary skill in the art would have had reason to modify Squitieri's catheter to include a cuff having an outlet end *disposed about* and connected to an intake end of the venous outflow catheter. In particular, Parks discloses an enteral feeding device including a ferrule.

(Parks, col. 3,11. 67-68; *see* Prior Decision at 7 (FF 11)). Parks describes embodiments in which tubing connects to the ferrule by means of a taper lock. *(See, e.g.,* Parks, col. 6,11. 60-63; col. 7,11.50-54; and figs. 7, 9 and 13). In each case, the upstream end of the ferrule engages the tubing by being disposed about and connected to ends of the tubing. Parks does not appear to disclose any embodiment in which the downstream end of the ferrule engages tubing by being disposed about and connected to ends of the tubing. *(See, e.g.,* figs. 8 and 10).

APPENDIX D

This conclusion is not inconsistent with the Prior Decision. Although the Prior Decision addressed the recited cuff in general terms, the Prior Decision did not specifically address the manner in which the outlet end of the cuff connects to the inlet end of the venous outflow catheter.*(See, e.g.,* Prior Decision at 12, 1. 9 -13, 1. 22). Since neither Squitieri, nor Twardowski, nor Parks discloses at least one limitation recited in each of independent claims 1, 13 and 17; and since the Examiner articulates no persuasive reason for modifying Squitierr s shunt system to include this

limitation, we do not sustain the rejection of claims 1-5, 7-10, 12-14, 17 and 18 under § 103(a) as being unpatentable over Squitieri; Twardowski; and Parks.

APPENDIX D

Furthermore, since the Examiner does not cite Trerotola for any teaching which might remedy the deficiencies in the combined teachings of Squitieri, Twardowski and Parks *(see* Ans. 9; Prior Decision at 8-9 (FF 18)), we do not sustain the rejection of claims 6, 11, 15, 16, 19 and 20 under § 103(a) as being unpatentable over Squitieri, Twardowski, Parks and Trerotola.

APPENDIX D

DECISION

We REVERSE the Examiner's decision rejecting claims 1-20.

REVERSED

Klh

APPENDIX E

UNITED STATES PATENT AND TRADEMARK OFFICE LETTER DEMONSTRATING THAT PATENT US 8,747,344 – A NEW AND USEFUL INVENTION WITH EXCLUSIVE RIGHTS TO EXCLUDE OTHERS IN MAKING THE PATENTED INVENTION

The Director of the United States Patent and Trademark Office

Has received an application for a patent for a new and useful invention. The title and description of the invention are enclosed .The requirements of law have been com-plied with, and it has been determined that a patent on the invention shall be granted under the law.

APPENDIX E

Therefore, this

United States Patent

Grants to the person(s) having title to this patent the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States of America or importing the invention into the United States of America, and if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States of America, or importing into the United States of America, products made by that process, for the term set forth in 35 US.C. 154 (a)(2) or (c)(1), subject to the payment of maintenance fees as provided by 35 U.S.C. 41(b). See the Maintenance Fee Notice on the inside of the cover.

APPENDIX E

/S/

Michelle K. Lee

Deputy Director of

the United States

Patent and

Trademark Office

APPENDIX F

COMPARATIVE EXHIBITS: EXHIBIT A FIG 1, EXHIBIT A FIG 2, EHIBIT A FIG 3 DEMONSTRATING MERIT AND ARTIVION USED VENOUS OUTFLOW CATHETER OF PATENT US 8,747,344 OF CLAIM 13 IN THE CONSTRUCTION OF ACCUSED HeRO GRAFT

APPENDIX F

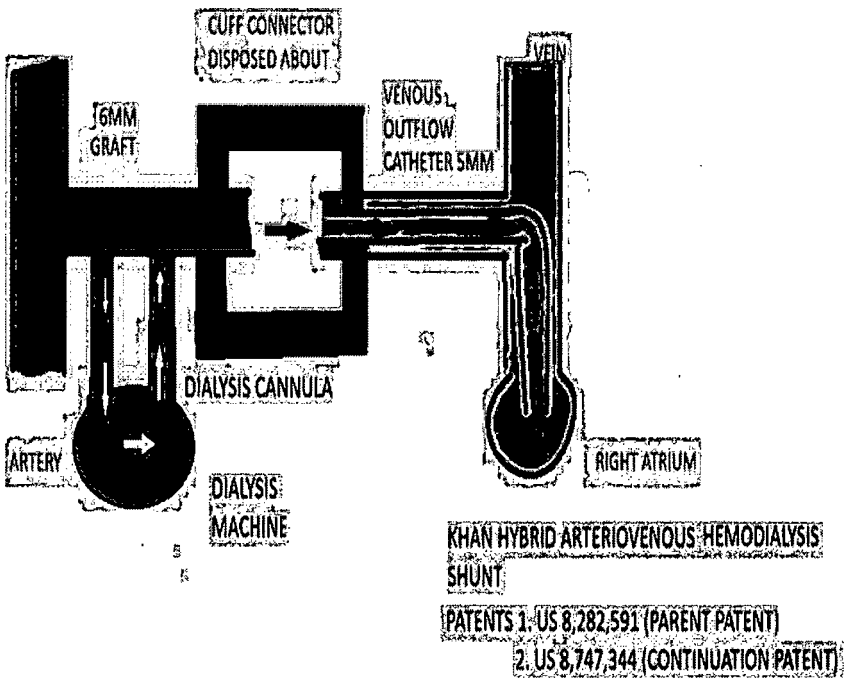
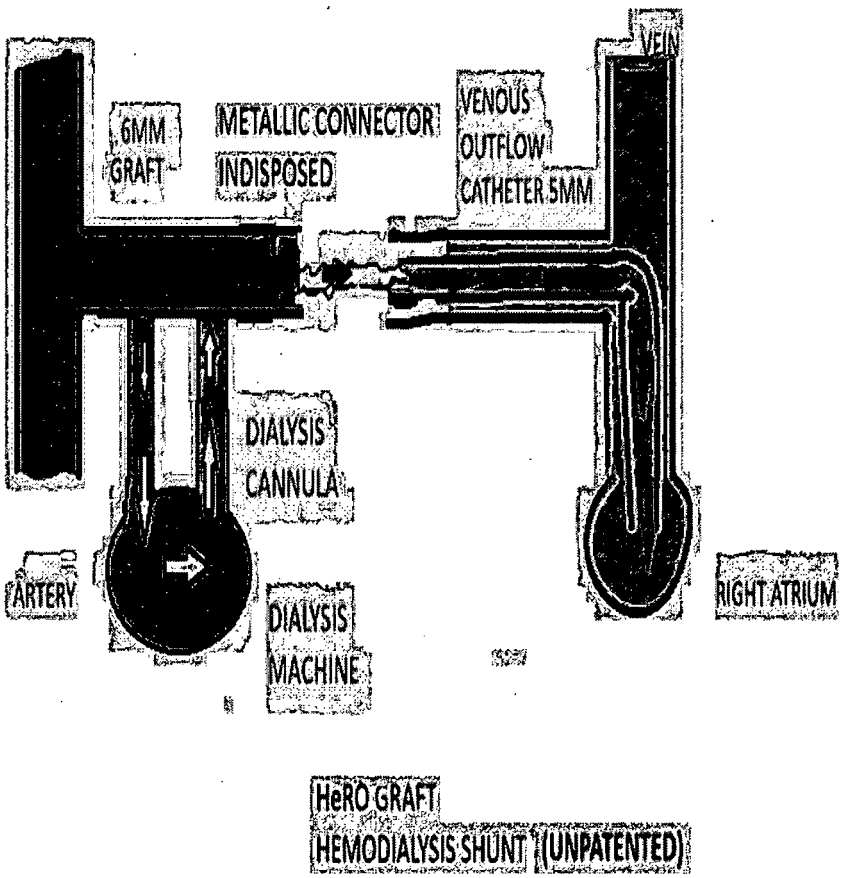


EXHIBIT A FIG 1

APPENDIX F



HeRO GRAFT
HEMODIALYSIS SHUNT (UNPATENTED)

EXHIBIT A FIG 2

APPENDIX F

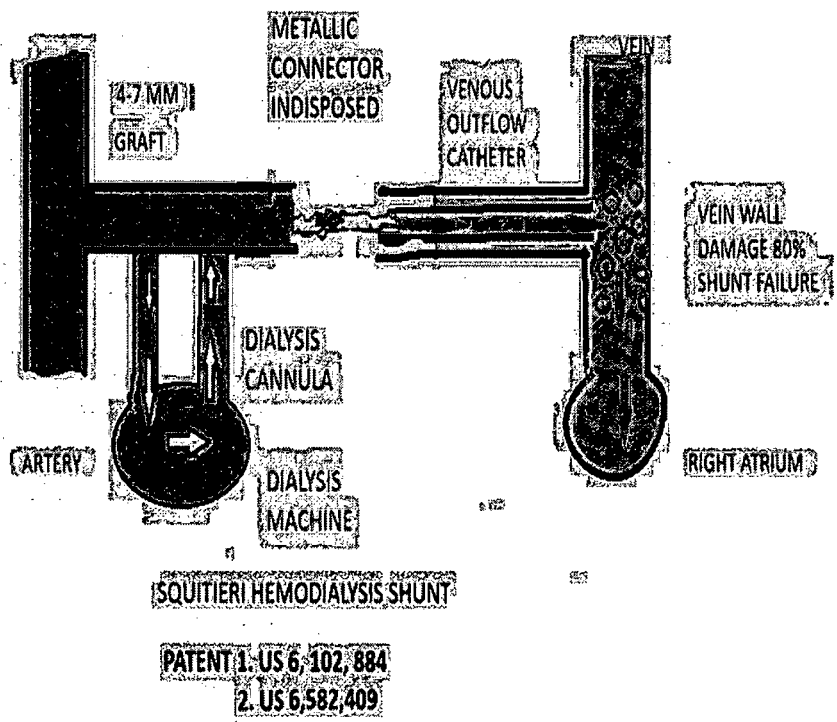


EXHIBIT A FIG 3

APPENDIX F

Assignee 1. Merit Medical Inc

2.Artivion, Inc.

APPENDIX G

FIVE INFRINGEMENT CLAIMS WITH RELIEF OF US PATENT 8,747,344 IN THE AMENDED COMPLAINT 15 CASE NO. 2:21-CV-00337-CMR FILED IN THE UTAH COURT ON JUNE 6, 2021

We, Nazir Khan, Iftikhar Khan, representing ourselves without a lawyer, move to/for motion to Merit Medical Systems, Inc. under the following statute(s)/rule(s) (if known) for the following reason(s):

1. Infringement of patent 8,747,344 B2 under 35 USC para 112 equivalent insubstantial connector change functional identity requirement. Plaintiff seeks damage of more than $6,000,000.

APPENDIX G

2. Direct infringement for making and selling the copied HeRo Graft under 35 U.S.C. 271(a) plaintiff seeks damage of $2,000,000 from Merit Medical Systems, Inc.
3. Induced infringement for selling the three components of the HeRo Graft to the hospitals to make and implant the accused HeRo Graft into the patients. Plaintiff seeks damage of $2,000,000 from Merit Medical Systems, Inc. under 35 U.S.C. section 271(b)
4. Intentional copying and willful infringement of patent 344. Merit Medical Systems, Inc. under their two assigned patents of Rafael Squitieri US 6,582,409 B1, dated June 24th 2003 and US RE44,639 E dated December 10th, 2013.

APPENDIX G

The venous outflow catheter remains in the vein, not in the right atrium. Intentionally copied Plaintiff's venous outflow catheter No.12. See Fig.2 of patent 344 in the manufacture of accused HeRo graft, where the position of the catheter is in the right atrium of the heart, not in the vein. The plaintiff seeks damage for $2,000,000 to be tripled to $6,000,000 if plaintiff prevails.

/s/

Nazir Khan

Iftikhar Khan

APPENDIX H

FIVE INFRINGEMENT CLAIMS WITH RELIEF OF US PATENT 8,747,344 IN THE AMENDED COMPLAINT 31 CASE NO. 1:21-CV-02291-SCJ FILED IN THE GEORGIA COURT ON JUNE 6, 2021

We, Nazir Khan, Iftikhar Khan, representing ourselves without a lawyer, move to/for motion to Artivion, Inc. under the following statute(s)/rule(s) (if known) for the following reason(s):

1. Infringement of patent 8,747,344 B2 under 35 USC para 112 equivalent insubstantial connector change functional identity requirement. Plaintiff seeks damage of more than $6,000,000.

APPENDIX H

2. Direct infringement for making and selling the copied HeRo Graft under 35 U.S.C. 271(a) plaintiff seeks damage of $2,000,000 from Artivion, Inc.
3. Induced infringement for selling the three components of the HeRo Graft to the hospitals to make and implant the accused HeRo Graft into the patients. Plaintiff seeks damage of $2,000,000 from Artivion, Inc. under 35 U.S.C. section 271(b)
4. Intentional copying and willful infringement of patent 344. Artivion, Inc. under their two assigned patents of Rafael Squitieri US 6,582,409 B1, dated June 24th 2003 and US RE44,639 E dated December 10th, 2013.

APPENDIX H

The venous outflow catheter remains in the vein, not in the right atrium. Intentionally copied Plaintiff's venous outflow catheter No.12. See Fig.2 of patent 344 in the manufacture of accused HeRo graft, where the position of the catheter is in the right atrium of the heart, not in the vein. The plaintiff seeks damage for $2,000,000 to be tripled to $6,000,000 if plaintiff prevails.

/s/

Nazir Khan

Iftikhar Khan