

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

YOLDAS ASKAN,

Plaintiff,

v.

Case No: 6:21-cv-1366-PGB-DCI

FARO TECHNOLOGIES INC.,

Defendant.

ORDER

This cause is before the Court on Defendant Faro Technologies, Inc.'s (hereafter, "**Faro**") Brief in Support of Preclusion (Doc. 146) and Faro's Motion to Dismiss Complaint with Prejudice Pursuant to Federal Rule of Civil Procedure 37 (Doc. 167). Plaintiff submitted Responses in Opposition to both filings. (Docs. 149, 169). Upon due consideration, Faro's requests are due to be granted.¹

I. BACKGROUND

A. The Prior Litigation

In June 2018, the Plaintiff sued Faro for its alleged infringement of the following patents: Patent No. 8,705,110 (the "**110 Patent**"); Patent No. 9,300,841 (the "**841 Patent**"), and Patent No. 10,032,255 (the "**255 Patent**"). *Askan v. Faro*

¹ The Complaint is due to be dismissed with prejudice on two distinct grounds: for preclusion and as a sanction for violation of the Court's Order. The latter ground for dismissal is not rendered moot by virtue of preclusion. Otherwise, a party who disobeys the Court's Orders would be immune from sanctions simply because he improvidently began the litigation.

Techs., Inc., Case No. 6:18-cv-01122, Doc. 1 (M.D. Fla. 2018). An Amended Complaint alleging infringement of Claim 1 of each of these three patents was filed in November 2018. *Askan*, Case No. 6:18-cv-01122, Doc. 59 (M.D. Fla. 2018). Ultimately, Faro filed a Motion for Sanctions, requesting dismissal with prejudice due to Plaintiff's numerous discovery violations. *Askan*, Case No. 6:18-cv-01122, Doc. 94 (M.D. Fla. 2019). The United States Magistrate Judge considered the request and submitted a report recommending that the action be dismissed. *Askan*, Case No. 6:18-cv-01122, Doc. 97 (M.D. Fla. 2019). This Court reviewed the Magistrate Judge's Report and Recommendation ("**R & R**"), adopted the R & R, and dismissed the action with prejudice. *Askan*, Case No. 6:18-cv-01122, Doc. 103 (M.D. Fla. 2019). The Federal Circuit affirmed. *Askan*, Case No. 6:18-cv-01122, Docs. 144, 145, 151 (M.D. Fla. Apr. 2020).

Thereafter, in April 2021, Plaintiff filed suit against Faro in the Eastern District of Pennsylvania, alleging infringement of same Claims of the '841 and '255 patents that were at issue in the prior litigation. The case was transferred to the Middle District of Florida and assigned to the undersigned District Judge. (Doc. 32). The Eastern District of Pennsylvania transferred the case to this District because Plaintiff's previous action "involves the same parties, patents, and technology as the present action." (Doc. 25, p. 2).² Accordingly, the Court

² In response to an Order to Show Cause as to why Plaintiff should not be sanctioned for his failure to disclose the relationship between the instant litigation and *Askan*, Case No. 6:18-cv-1122 (M.D. Fla. 2018), Plaintiff acknowledged that "in the present case, same parties and same patents however, a different product is involved." (Doc. 47, ¶ 7).

instructed the parties to brief what effect, if any, the prior dismissal with prejudice has on the instant litigation. (Doc. 141).

B. Discovery Violations³

On May 18, 2022, the Magistrate Judge entered an Order granting Faro's Motion to Compel Responses to its Request for Production. (Doc. 154). Faro served its First Set of Production Requests ("**Faro's RFP**") on Plaintiff on October 8, 2021. (*Id.* at p. 1). The same day, Plaintiff served a request for production ("**Plaintiff's RFP**") on Faro "which is identical word by word to [Faro's] present first request for production." (*Id.*). Plaintiff did not produce any documents in response to Faro's RFP, and on November 8, 2021, Plaintiff responded to Faro's RFP by asserting the same objection to each of the 77 requests. (*Id.* at pp. 1–2). Plaintiff's objection asserted that if Faro believes it has complied with Plaintiff's RFP, then Faro has fulfilled its own request. (*Id.* at p. 2). That is, since the Plaintiff requested the same documents from Faro, any production by Faro satisfied Plaintiff's duty to produce. (*Id.*).

The Magistrate Judge correctly, and very kindly, observed that the "Plaintiff's response to Defendant's RFP, while creative, is wholly deficient." (*Id.*). The Magistrate Judge also found the objection to constitute an improper general

³ For the sake of context—and not as a basis for imposing sanctions in the instant case—the Court notes that Plaintiff's prior patent infringement suit was dismissed with prejudice for "repeated violations" of the rules and orders of this Court. *Askan*, Case No. 6:18-cv-01122, Doc. 103 (M.D. Fla. 2019). As Magistrate Judge Irick observed in the first Order to Show Cause entered in the instant case, the "prior action was dismissed . . . for violations [which] established a 'clear record of delay or willful contempt,' far beyond mere negligence or confusion." (Doc. 43, p. 1).

objection, because it was repeated verbatim to each of Faro's requests. (*Id.* at p. 3). And, so, the Magistrate Judge ruled Plaintiff's objections were waived except for privilege, and Plaintiff was ordered to respond to Faro's RFP by May 25, 2022. (*Id.* at p. 5).

On May 27, 2022, Plaintiff filed a Motion for Reconsideration of the Magistrate Judge's Order directing him to produce responsive documents by May 25, 2022. (Doc. 156). Plaintiff asserted the same arguments that were rejected by the Magistrate Judge as well as objections, including relevance and proportionality, that were deemed waived. (*Id.*). On June 3, 2022, nine days after the deadline for producing documents responsive to Defendant's RFP, Plaintiff filed an untimely Motion for Enlargement of Time to comply with the Magistrate Judge's Order. (Doc. 159). Before the Court could rule on the Motion, Plaintiff responded to the Faro's RFP by again requesting production of the same documents requested by the Defendant:

Plaintiff YOLDAS ASKAN, by and through its undersigned counsel, and pursuant to Rule 34 of the Federal Rules of Civil Procedure, requests that Defendant FARO Technologies, Inc. produce the documents requested below for copying and inspection at the address 51 Pinfold St, Suite 542, Birmingham B2 4AY, UNITED KINGDOM and via emailing yoldas.askan@gmail.com within thirty days of service.

(Doc. 163-2). And Plaintiff once again asserted the same general objection that was rejected by the Magistrate Judge to each of Faro's 77 requests. (*Id.*).

II. LEGAL STANDARDS

A. Summary Judgement on Preclusion⁴

1. Summary Judgment

To prevail on a summary judgment motion, the movant must show “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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “An issue of fact is ‘material’ if, under the applicable substantive law, it might affect the outcome of the case. An issue of fact is ‘genuine’ if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.” *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014).

The Court must “view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party and resolve all reasonable doubts about the facts in favor of the non-movant.” *Davila v. Gladden*, 777 F.3d 1198, 1203 (11th Cir. 2015) (quoting *Carter v. City of Melbourne*, 731 F.3d 1161, 1166 (11th Cir. 2013) (per curiam)). “A mere ‘scintilla’ of evidence supporting the opposing party’s position will not suffice; there must be enough of a showing that the jury could reasonably find for that party.” *Brooks v. Cnty. Comm’n of Jefferson Cnty.*, 446 F.3d 1160, 1162 (11th Cir. 2006) (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)). However, “[c]redibility determinations, the weighing of evidence,

⁴ Faro raised preclusion under the *Kessler* Doctrine as its Eighth Affirmative Defense. (Doc. 49, pp. 29–32).

and the drawing of legitimate inferences from the facts are jury functions, not those of a judge” when ruling on summary judgment. *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Summary judgment should only be granted “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

2. Preclusion

The doctrine of claim preclusion requires “a judgment on the merits in a prior suit [to] bar[] a second suit involving the same parties or their privies based on the same cause of action.” *In re PersonalWeb Techs., LLC*, 961 F.3d 1365, 1374 (Fed. Cir. 2021) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)). Claim preclusion does not, however, bar re-litigation where the accused products in the later-filed suit are “essentially the same” as the products accused in the prior suit. *Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F.3d 1275, 1299 (Fed. Cir. 2017).⁵

Issue preclusion is more restrictive in that its application requires the issue to have been litigated on the merits in the prior suit, and the issue(s) must form a “critical and necessary” part of the prior judgment. *See, e.g., Powrzanas v. Jones Util. & Contracting Co.*, 822 F. App’x 926, 928 (11th Cir. 2020); *see also Brown v.*

⁵ Faro is correct that the law is not crystal clear on this point and that claim preclusion has been applied where changes in the new accused products are unrelated to the limitations in the claim of the previously litigated patent. (Doc. 146, p. 4 n.2).

R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1332 (11th Cir. 2010) (stating that issue preclusion bars “re-litigating an issue where the same issue has been fully litigated by the same parties or their privies, and a final decision has been rendered by a court”).

“In addition to the two traditional pillars of preclusion law—claim and issue preclusion—there is a separate and less frequently invoked doctrine that derives from the Supreme Court’s decision in *Kessler v. Eldred*.” *In re PersonalWeb Techs.*, 961 F.3d at 1376. The *Kessler* doctrine “fills the gap’ left by claim and issue preclusion” and does not require that the issue of noninfringement or invalidity be “actually litigated.” *Id.* at 1377. For example, the *Kessler* doctrine may be applied to voluntary dismissals with prejudice; thus, the Federal Circuit has rejected the contention that the issue of noninfringement must be litigated to invoke the *Kessler* doctrine. *Id.* at 1379. Thus, a dismissal with prejudice “resolve[s] the dispute about liability for the alleged patent infringement” and confers “a limited trade right to continue producing, using, and selling” the accused product or device without further harassment by the patent holder. *Id.*

In determining if products are the same or essentially the same with regard to preclusion, the Federal Circuit applies its own precedent. *See, e.g., Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323 (Fed. Cir. 2008). Under that precedent, the “essentially the same standard” provides that products are “essentially the same” for preclusion purposes if any differences are “merely ‘colorable’ or ‘unrelated to the limitations in the claim of the patent.’” *Acumed*, 525 F.3d at 1324 (citation

omitted); *Nystrom v. Trex Co.*, 580 F.3d 1281, 1285 (Fed. Cir. 2009) (explaining that only changes relevant to the patent claims are considered in a preclusion analysis).

B. Sanctions: Discovery Abuse

Federal Rule of Civil Procedure 37 allows district court judges broad discretion to fashion appropriate sanctions for the violation of discovery orders. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993). This Rule allows for sanctions when a party fails to comply with a discovery order or fails to attend its own deposition. *See* FED. R. CIV. P. 37(b)(2)(A), (d)(1)(A)(i). For both offenses, the Rule authorizes a variety of sanctions, such as: striking pleadings; dismissing an action in whole or in part; rendering a default judgment; and holding the disobeying party in contempt of court. FED. R. CIV. P. 37(b)(2)(A)(iii), (b)(2)(A)(v)–(vii), (d)(3); *see also United States v. Certain Real Prop. Located at Route 1, Bryant*, 126 F.3d 1314, 1317 (11th Cir. 1997).

The Supreme Court has also held that the intent behind Rule 37 sanctions is both “to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763–64 (1980) (quoting *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam)). This deterrence is necessary because “it is not the court’s function to drag a party kicking and screaming through discovery.” *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 134 (S.D. Fla. 1987). Therefore, Rule 37

provides that “the court must order the disobedient party, attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified, or other circumstances make an award of expenses unjust.” FED. R. CIV. P. 37(b)(2)(C), (d)(3); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258 (1975).

Specifically, the sanctions of dismissal or default are seen as a “last resort,” but a party’s “willful or bad faith disregard” for discovery orders may call for this type of sanction, especially in cases where the party failed to comply with a court order compelling discovery and warning that the failure to comply might result in sanctions. *See Certain Real Prop. Located at Route 1*, 126 F.3d at 1317–18; *see also BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1050 (11th Cir. 1994). Bad faith may be found through “delaying or disrupting the litigation or hampering enforcement of a court order.” *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1306 (11th Cir. 2009). The key to unlocking a court’s inherent power is a finding of bad faith. *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1223–24 (11th Cir. 2017).

III. DISCUSSION

A. Preclusion

Because *Askan*, Case No. 6:18-cv-01122 (M.D. Fla. 2018), was dismissed with prejudice, and because the dismissal was affirmed on appeal, the *Kessler* doctrine mandates that the accused products in that case are treated as non-infringing. *In re PersonalWeb Techs.*, 961 F.3d at 1379. The question, therefore, is

whether the accused products in the instant case are “essentially the same” as those in the prior case. *See SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1170 (Fed. Cir. 2018) (explaining that the *Kessler* doctrine precludes patent infringement assertions against “‘essentially the same’ accused activity” subject to the prior judgment); *see also Brain Life LLC v. Eleckta Inc.*, 746 F.3d 1045, 1058 (Fed. Cir. 2014) (applying the *Kessler* doctrine when subsequently accused products are “essentially the same” as products subject to a final judgment in a prior case).

Faro argues, and the Court agrees, that the infringement contentions submitted by Plaintiff Askan in the 2018 case and in the subject case are identical. *Compare* (Doc. 146-1) (describing the 2018 infringement contentions) *with* (Doc. 146-2) (describing the 2021 infringement contentions). Each of the asserted Claims (Claim 1 of the ‘841 patent and Claim 1 of the ‘255 patent) addresses a system that executes a looping process for average distance values in scan data from a laser scanner to achieve a noise free and smoothed result. (Doc. 123-1, col. 127, lines 8–41; Doc. 123-2, col. 13, lines 10–36). Faro contends it is immaterial that the accused product in the 2018 case was the Focus 3D scanner and the accused product in the 2021 case is the SCENE software product and the Focus 3D scanner. (Doc. 146, p. 8 n.3). The Court agrees that Plaintiff cannot side-step the *Kessler* doctrine by combining the previously adjudicated device with an additional product (the SCENE software) when the infringement contentions are unchanged from the prior case to the instant one.

Mr. Juergen Gittiner, Faro’s Technical Supervisor for Europe, prepared a declaration in which he concludes, after reviewing the source code for the SCENE software, that “each version of the SCENE code from the 2019 Code to SCENE 2022.0 performs the same general function of controlling the reading of scan data from the FOCUS scanner.” (Doc. 146-3, ¶¶ 5–8). Mr. Gittiner concludes that the changes in the intervening versions of the SCENE code from 2019 to 2022.0 relate only to functions more specific than the general function. (*Id.* ¶ 8). Accordingly, “[n]either the 2019 Code nor the 2022 Code, nor any other version from the 2019 Code to SCENE versions 2022.0, executes any other algorithm that addresses averaging distance values of scan points.” (*Id.* ¶ 9). Simply put, Faro’s accused SCENE software has not changed any processing steps for averaging scanner distance data since the prior lawsuit. (*Id.*). The fact that the Focus scanner has added a fast scan mode does not modify distance value averaging, and the accused products in the instant suit are “essentially the same” as those in the prior dismissed action. (Doc. 146-5, ¶ 12). The same is true for the modification to the Focus firmware eliminating scan point values as certain angular positions without changing distance value averaging. (Doc. 146-4, ¶ 13).

Plaintiff does not attempt to rebut Faro’s factual assertions and opts instead to stand on the argument that the *Kessler* doctrine does not apply because the 2018 case was not decided on its merits. (Doc. 149, p. 13). Rather than point to material differences between the accused products at issue in the 2018 case and the 2021 case, Plaintiff moves the Court to “[r]ecognize and rule that whether Defendant’s

products are ‘essentially the same’ or not is not a matter for consideration. . . .” (*Id.* at p. 14). Unfortunately, the Court is bound to apply the law, in this case the *Kessler* doctrine, to the facts of the case and to determine whether there is any genuine issue of fact that prevents application of preclusion.⁶ The evidence before the Court is uncontroverted and warrants dismissal with prejudice pursuant to the *Kessler* doctrine.

B. Sanctions

The sanction of dismissal is properly viewed as a “last resort,” but a party’s “willful or bad faith disregard” for discovery orders may call for this type of sanction. *See Certain Real Prop. Located at Route 1*, 126 F.3d at 1317–18. The instant case is unique in that Plaintiff’s prior case was dismissed due to repeated violations of the Court’s Orders. *Askan*, Case No. 6:18-cv-01122, Docs. 97, 103 (M.D. Fla. 2019). The Magistrate Judge’s R & R summarized the violations, which included the failure to fully comply with Faro’s Request for Production. *Askan*, Case No. 6:18-cv-01122, Doc. 97 (M.D. Fla. 2019). Notwithstanding an award of attorney’s fees in favor of Faro and an Order directing Plaintiff to comply with Faro’s Request for Production by January 30, 2019, Plaintiff disobeyed the Order.

⁶ Plaintiff is no doubt frustrated by the dismissal of his 2018 patent infringement case. But he is reminded that the case was dismissed due to his failure to participate in discovery, causing the Magistrate Judge, this Court, and the Court of Appeals to conclude the conduct amounted to bad faith that warranted the severe sanction of dismissal. Whether fault lies with Plaintiff or his trial counsel is not relevant. But a dismissal with prejudice has consequences, and those consequences are not excused by Plaintiff’s accusation that his “previous representatives . . . were ultimately corrupted by the Defendant,” or by accusing opposing counsel of deception, or by claiming opposing counsel is biased against him due to his Jewish heritage. (Doc. 149, pp. 8–9).

Id. The Magistrate Judge found the Plaintiff “willfully, in bad faith, and in disregard of his responsibilities failed to comply with the Court’s Order.”⁷ *Askan*, Case No. 6:18-cv-01122, Doc. 97 at 6 (M.D. Fla. 2019). The Court reiterates that it recites this history not as a basis or justification for imposing sanctions in the instant case but only to highlight Plaintiff’s familiarity with the importance of complying with the Court’s Orders and the potential for sanctions to include dismissal.

Armed with this knowledge, Plaintiff repeats his pattern and practice of disregarding the Court’s Orders and, in the process, “delaying or disrupting the litigation [and] hampering enforcement of a court order,” which forms the predicate for a finding of bad faith. *See Eagle Hosp. Physicians, LLC*, 561 F.3d at 1306. In response to Faro’s RFP, Plaintiff served an RFP that was identical word for word to Faro’s RFP. (Doc. 154, p. 1). On the last possible day, Plaintiff responded to the Faro’s RFP by objecting to each of the 77 requests and asserting, in pertinent part, the following:

[Plaintiff] has served his third request for production on October 8, 2021 which is identical word by word to [Defendant’s] present first request for production. Therefore, if [Defendant] believes it complied with [Plaintiff’s] request for production then it has fulfilled its own request.

(Doc. 154, p. 2) (quoting Doc. 129-2, p. 5).

⁷ The Magistrate Judge also observed that Plaintiff, via his counsel, failed to appear for a hearing and failed to timely file a case management report. *Askan*, Case No. 6:18-cv-01122, Doc. 97 at 2 (M.D. Fla. 2019).

Plaintiff did not produce any documents in response to Faro's RFP, and the Magistrate Judge found the objections constituted improper general objections. (Doc. 154, p. 3). Accordingly, the Magistrate Judge ruled Plaintiff's objections were waived except for privilege, and Plaintiff was ordered to respond to Faro's RFP by May 25, 2022. (*Id.* at p. 5). After the deadline for producing responsive documents had expired, Plaintiff filed a Motion for Reconsideration, where he repeats the arguments previously rejected by the Court and asserts objections to the relevance of the requested documents and proportionality.⁸ (Doc. 156). On June 3, 2022, the Plaintiff filed a belated Motion for Extension of Time to File Response/Reply to comply with the Court's Order.⁹ (Doc. 159). Ultimately, Plaintiff responded to the Faro's RFP by resending the same response, consisting of his own RFP, identical to Faro's, and the same general objections previously rejected by the Court. (Doc. 163-2). In so doing, Plaintiff engaged in conduct delaying or disrupting the litigation and hampering enforcement of a Court Order, and the Court finds this conduct to be part of a pattern than began in the prior litigation, resulted in

⁸ The Magistrate Judge has not ruled on Plaintiff's Motion for Reconsideration. That said, a motion for reconsideration does not stay a deadline established by Order of the Court especially where, as here, the motion is filed after the deadline passed. Moreover, the Motion for Reconsideration is frivolous. The Plaintiff rehashes arguments previously rejected by the Court and fails to show of one of the following: (1) an intervening change in law, (2) the discovery of new evidence which was not available at the time the Court rendered its decision, or (3) the need to correct clear error or manifest injustice. *Fla. Coll. of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc.*, 12 F. Supp. 2d 1306, 1308 (M.D. Fla. 1998). "A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (internal quotation marks omitted). In short, the Motion for Reconsideration is merely a delay tactic.

⁹ The Plaintiff's Motion for Extension of Time was untimely, having been filed after the operative deadline passed.

dismissal and the imposition of attorney's fees in favor of the Faro, and which has failed to deter Plaintiff.

The intent behind Rule 37 sanctions is both “to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Roadway Express*, 447 U.S. at 763–64 (quotation omitted). This deterrence is necessary here, because “it is not the court’s function to drag a party kicking and screaming through discovery.” *Telectron, Inc.*, 116 F.R.D. at 134. Plaintiff’s willful disobedience of the Court’s Order compelling the production of discovery is not excusable, nor is it justified. The Court finds, as it must, that the sanction of dismissal is appropriate and is required under these facts. Moreover, the Court is required to order the disobedient party to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified, or other circumstances make an award of expenses unjust. FED. R. CIV. P. 37(b)(2)(C), (d)(3). The Court does not find the failure to comply with its Order was substantially justified or that other circumstances make an award of expenses unjust.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED**, as follows:

1. Faro’s Motion to Dismiss the Complaint with prejudice based on preclusion pursuant to the *Kessler* doctrine (Doc. 146) is **GRANTED**.
2. Faro’s Motion to Dismiss the Complaint with prejudice pursuant to Federal Rule of Civil Procedure 37 (Doc. 167) is **GRANTED**, and Faro

is entitled to expenses, including reasonable attorneys' fees upon application.

3. All remaining Motions are **DENIED AS MOOT**.
4. The Clerk of Court is **DIRECTED** to close the case.

DONE AND ORDERED in Orlando, Florida on July 8, 2022.



PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

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

YOLDAS ASKAN,	:	CIVIL ACTION
	:	NO. 21-1916
Plaintiff,	:	
	:	
v.	:	
	:	
FARO TECHNOLOGIES, INC.	:	
	:	
Defendant.	:	

O R D E R

AND NOW, this **19th** day of **August, 2021**, it is hereby **ORDERED** that Defendant’s Motion to Transfer (ECF No. 21) is **GRANTED**.¹ This case shall be transferred to the

¹ This case involves five claims of patent infringement. Defendant Faro Technologies, Inc. moves to transfer this action from the Eastern District of Pennsylvania to the Middle District of Florida pursuant to 28 U.S.C. § 1404(a). Plaintiff originally brought a case involving the same parties, patents, and technology at issue in the Middle District of Florida. That action was dismissed with prejudice as a sanction after the Plaintiff failed to appear at hearings, failed to comply with various court orders, and failed to respond to Defendant’s motions, among other reasons. See Askan v. Faro Tech., Inc., No. 18 Civ. 1122, 2019 WL 2210690, at *2-*3 (M.D. Fla. Feb. 22, 2019). The Middle District of Florida’s decision to dismiss the action was affirmed by the Federal Circuit. See Askan v. Faro Tech., 809 F. App’x 880, 883 (Fed. Cir. 2020) (noting Plaintiff “en-gaged in inappropriate and unprofessional behavior” during the course of proceedings in the Middle District of Florida).

Section 1404(a) provides that “[f]or the convenience of parties and witness, in the interest of justice, a district court may transfer a civil action to any district or division

where it might have been brought.” 28 U.S.C. § 1404(a). A threshold question is whether this case may have been brought in the Middle District of Florida. It is not contested that venue would be proper in the Middle District of Florida. In fact, the previous action in the Middle District of Florida progressed into discovery.

Pursuant to Jumara v. State Farm Ins. Co., the Court must weigh various public and private interest factors. 55 F.3d 873, 879 (3d Cir. 1995). The public interest factors include: (1) “the enforceability of the judgment”; (2) “practical considerations that could make the trial easy, expeditious, or inexpensive”; (3) “the relative administrative difficulty in the two fora resulting from court congestion”; (4) “the local interest in deciding local controversies at home”; (5) “the public policies of the fora”; and (6) “the familiarity of the trial judge with the applicable state law in diversity cases.” Reed v. Weeks Marine, 166 F. Supp. 1052, 1057 (E.D. Pa. Aug. 20, 2021) (citing Jumara, 55 F.3d at 879).

Given that the Plaintiff’s previously filed action involves the same parties, patents, and technology as the present action, Plaintiff’s choice to subsequently file suit in this District appears to be a clear attempt to engage in forum-shopping. Allowing Plaintiff to proceed in this District would be offensive to public policy as this District is attuned to the dangers of forum shopping.

Additionally, the Middle District of Florida would have the greater interest in adjudicating this case. Defendant maintains its headquarters in the Middle District of Florida while Plaintiff is domiciled in the United Kingdom. The Eastern District of Pennsylvania does not have a connection to either party or to the dispute at issue.

Because public policy cautions against permitting parties to engage in forum shopping, and because the Middle District of Florida has a greater interest in handling this matter, the public interest factors weigh in favor of transfer. The Court need not consider the applicability of each additional public interest factors.

Further, the private interest factors include: “(1) the “plaintiff’s forum preference as manifested in the original choice;” (2) “the defendant’s forum preference;” (3) “whether

Orlando Division of the Middle District of Florida.²

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

the claim arose elsewhere”; (4) “the convenience of the parties as indicated by their relative physical and financial condition”; (5) “the convenience of witnesses - but only to the extent that the witnesses may actually be unavailable for trial in one of the fora”; and (6) “the location of books and records. Reed, 166 F. Supp. 2d at 1057 (citing Jumara, 55 F.3d at 879).

The Plaintiff is located in the United Kingdom and contends that the alleged patent infringement occurred in Germany. Defendant maintains its headquarters in Lake Mary, Florida, which is located in the Middle District of Florida. Given that Plaintiff chose to bring suit in the United States when the alleged infringement occurred abroad, the most convenient forum in this action will be the Middle District of Florida, where one party resides.

As the public and private interest factors weigh in favor of transfer, this case shall be transferred to the Middle District of Florida.

² The pending motion to dismiss (ECF No. 7) shall be decided by the Middle District of Florida.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

YOLDAS ASKAN,

Plaintiff,

v.

Case No: 6:21-cv-1366-PGB-DCI

FARO TECHNOLOGIES INC.,

Defendant.

ORDER

This cause comes before the Court for consideration of a document filed by the *pro se* Plaintiff titled, “Plaintiff’s Objection in Part to this Court’s Order Denying without Prejudice 7 Motion to Dismiss Under Rules of Civil Procedure 12(b)(4) and 12(b)(5).” Doc. 46 (the Filing). Attached to the Filing is a document titled “Request for Entry of Clerk’s Default.” Doc. 46-1 (the Attachment). In the Filing, Plaintiff appears to request that the Court direct entry of a clerk’s default against Defendant and preclude them from responding to the Complaint. Doc. 46.

First, it is unclear what the Filing is. If it is a motion, it fails to contain a memorandum of law as required by Local Rule 3.01(a). If it is an objection to the undersigned’s prior Order (Doc. 42)—as it is titled—it fails to identify any error with the undersigned’s prior Order or otherwise make clear that it is an objection. If Plaintiff intends that the Attachment be construed as a motion, he needs to file it as a motion; the Court will not search through the docket in an attempt to determine in which documents Plaintiff seeks relief. Regardless, even if construed as a motion, the Attachment fails to contain a memorandum of law as required by Local Rule 3.01 and, as such, is due to be denied. In this and his related case, Plaintiff has been reminded time and again

concerning his obligation to follow the rules and orders of this Court, and though he is *pro se*, he will be held to follow those rules and orders.

But this is all besides the point. On September 3, 2021, the Court denied without prejudice Defendant's motion to dismiss and directed Defendant to respond to the Complaint. Doc. 41. Following that Order, Defendant timely responded by filing an answer on September 17, 2021—and Plaintiff should recognize that Defendant has apparently abandoned its motion to dismiss in filing that answer. Doc. 17. Thus, Plaintiff's case is now set to move forward. Further, even if the Court directed the Clerk to enter default as requested, given Defendant's clear intention to litigate this case and Defendant's assertion of defenses, that default would inevitably be set aside on proper motion, wasting the Court's and the parties' resources. *See Fl. Physician's Ins. Co., Inc. v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993) (per curiam) (“[D]efaults are seen with disfavor because of the strong policy of determining cases on their merits.”).

Accordingly, it is **ORDERED** that to the extent either the Filing (Doc. 46) or the Attachment (Doc. 46-1) are intended as a motion, they are denied. If Plaintiff intended to file an objection, he should state that clearly and argue based upon the appropriate rule. *See Fed.R.Civ.P.* 72; *In re Authority of United States Magistrate Judges*, Case No. 8:20-mc-100-T-23 (MDFL Oct. 29, 2020), available at [Standing Orders/Plans/Procedures | Middle District of Florida | United States District Court \(uscourts.gov\)](https://www.uscourts.gov/standing-orders/plans/procedures/middle-district-of-florida).

ORDERED in Orlando, Florida on September 30, 2021.



DANIEL C. IRICK
UNITED STATES MAGISTRATE JUDGE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

YOLDAS ASKAN,

Plaintiff,

v.

Case No: 6:21-cv-1366-PGB-DCI

FARO TECHNOLOGIES INC.,

Defendant.

ORDER

Before the Court are Plaintiff’s Motion for Protective Order (Doc. 86), Plaintiff’s Motion to Compel (Doc. 87), and Defendant’s Request for Protective Order (Doc. 90 at 10–11).¹

The Court first turns to Plaintiff’s Motion for Protective Order and Defendant’s Request for Protective Order, which are essentially each party’s proposed confidentiality order for discovery in this case. Docs. 86; 90 at 10–11; 90-16. There appears to be agreement on the entirety of Defendant’s proposed protective order, save for the portion regarding the “Attorney Eyes Only” designation. *See* Doc. 90-11. This disagreement is to be expected—any documents designated “Attorney Eyes Only” are effectively unavailable to Plaintiff, who is proceeding *pro se*.

It is axiomatic that Plaintiff has a right to proceed *pro se*. *See* 28 U.S.C. § 1654. But the Court is unconvinced that simply filing a case and proceeding *pro se* is sufficient to allow a person—especially a person alleged to be a competitor²—unfettered access to a defendant’s highly

¹ Though Defendant did not request this relief in a separate motion, *see* Local Rule 3.01(a), the Court will consider it in order to avoid delay in these proceedings. Further, as Plaintiff was given leave to respond to Defendant’s request, and in fact did respond, *see* Doc. 97, the Court will exercise its discretion to consider Defendant’s request here.

² The Court presents no opinion on whether Plaintiff is a competitor to Defendant.

confidential information. *See, e.g., Medina v. Microsoft Corp.*, 2014 WL 3884506, at *3 (N.D. Cal. Aug. 7, 2014). Indeed, Defendant has a strong interest in protecting its source code and other proprietary information. And as the Court found in the previous case, Plaintiff may not be an appropriate custodian of such information.³ *See Askan v. Faro Technologies, Inc.*, No. 6:18-cv-1122-PGB-DCI, Doc. 132 at 3–5 (M.D. Fla. Jun. 6, 2019). Finally, confidentiality agreements akin to Defendant’s proposed protective order are standard practice, especially in patent cases such as this. *See id.*

Accordingly, having reviewed Defendant’s proposed protective order, and noting that Plaintiff has agreed to all but one provision of it, the Court finds that Defendant’s Protective Order is due to be entered. Doc. 90-16.⁴

Having addressed the confidentiality order for this case, the Court turns to Plaintiff’s Motion to Compel. Doc. 87. Plaintiff’s point here is well-taken; absent some leeway, he is essentially foreclosed from proceeding with this case *pro se*. But again, it is doubtful that Plaintiff would be an appropriate custodian of Defendant’s highly confidential information. *See Askan*, No. 6:18-cv-1122-PGB-DCI, Doc. 132 at 3–5 (M.D. Fla. Jun. 6, 2019). Thus, while it is not appropriate to require Defendant to turn over custody of its highly confidential information to Plaintiff, some narrower relief is proportional, necessary, and appropriate.

³ Plaintiff was represented by counsel in the prior case, but these concerns are still relevant in this case.

⁴ The signature block in Defendant’s proposed protective order names the presiding district judge in this case. Doc. 90-16 at 25. It bears noting that the undersigned is entering this proposed order, not the presiding district judge.

That is, the Court will compel Defendant to make the requested information—what Plaintiff terms the “Post Processing Source Code”⁵—reasonably available, in an unredacted form, for Plaintiff’s inspection. *See* Fed. R. Civ. P. 34(a). To be clear, *only* for Plaintiff’s *inspection*; Plaintiff will not be permitted to make copies of, photograph, video, store, take notes concerning, or otherwise retain this information.

This relief is especially appropriate here, where Plaintiff’s chief complaint is that Defendant has appropriated his patented process and spliced it into Defendant’s source code. In other words, an inspection is sufficient for Plaintiff to verify if his process truly has been appropriated. *See* Doc. 87 at 8 (“[Plaintiff] only wants to determine if Defendant FARO is infringing on his patents when executing ‘Post Processing on the Data’ . . .”).

Further, this relief fairly accommodates Defendant’s interest in protecting its highly confidential information. Defendant will not have to turn over this information to Plaintiff’s custody, so there is little risk of public disclosure.

The Court finds Defendant’s cited cases unpersuasive in this regard. It appears that none of the courts contemplated allowing inspection of the documents in lieu of compelling production to the opposing party’s custody—inspection, especially in this case, more appropriately balances Plaintiff’s right to proceed *pro se* with Defendant’s interest in protecting its highly confidential information from public disclosure.

Of course, as Plaintiff resides in England, the parties will need to confer concerning how and where inspection will occur. It appears from the record that Defendant has offices in England, so if this inspection can occur there, it seems that the burden would most fairly be balanced by

⁵ Though Plaintiff does not explicitly define what “Post Processing Source Code” is, Defendant has not objected to the request as vague or ambiguous, so the Court assumes that the parties understand what this phrase encompasses.

having the inspection occur in England. As to the format of the inspection, while Plaintiff will not be able to retain the source code he reviews, he must be able to designate, during the review process, any discrete portions of source code he deems relevant.⁶ Defendant shall record these designations in some manner that would allow the Court or the parties, on short notice, to pull up and review the designated data.

Accordingly, it is **ORDERED** as follows:

- 1) Plaintiff's Motion for Protective Order (Doc. 86) is **DENIED**;
- 2) Plaintiff's Motion to Compel (Doc. 87) is **GRANTED in part**, such that:
 - a. Defendant shall make the requested information available for Plaintiff's inspection; and
 - b. The Motion (Doc. 87) is **DENIED** in all other respects; and
- 3) Defendant's Request for Protective Order (Doc. 90) is **GRANTED**, such that the Proposed Protective Order attached at Doc. 90-16 will be entered by the Court.

ORDERED in Orlando, Florida on February 3, 2022.



DANIEL C. IRICK
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

⁶ The parties should bear in mind that Plaintiff should be allotted enough time to meaningfully review the requested information. But the Court expects that the parties will be able to resolve the nuances of this relief between themselves.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

YOLDAS ASKAN,

Plaintiff,

v.

Case No: 6:21-cv-1366-PGB-DCI

FARO TECHNOLOGIES INC.,

Defendant.

ORDER

This cause is before the Court on Plaintiff Yoldas Askan’s Motion for Recusal of the undersigned. (Doc. 178 (the “**Motion**”). Upon due consideration, the Motion is denied.

I. BACKGROUND

In June 2018, Plaintiff sued Defendant Faro Technologies Inc. (“**Faro**”) for its alleged infringement of the following patents: Patent No. 8,705,110 (the “**110 Patent**”); Patent No. 9,300,841 (the “**841 Patent**”), and Patent No. 10,032,255 (the “**255 Patent**”). *Askan v. Faro Techs., Inc.*, Case No. 6:18-cv-01122, Doc. 1 (M.D. Fla. 2018). An Amended Complaint alleging infringement of Claim 1 of each of these three patents was filed in November 2018. *Askan*, Case No. 6:18-cv-01122, Doc. 59 (M.D. Fla. 2018). As a result of numerous discovery violations, the Court dismissed the action with prejudice, and the Federal Circuit affirmed. *Askan*, Case No. 6:18-cv-01122, Docs. 144, 145, 151 (M.D. Fla. Apr. 2020).

Plaintiff sued Faro again, but this time he brought the action in the Eastern District of Pennsylvania, alleging infringement of the same claims of the ‘841 and ‘255 patents. The presiding judge in the Eastern District of Pennsylvania transferred the case to this Court, finding the previous action commenced in the Middle District of Florida “involves the same parties, patents, and technology as the present action.” (Doc. 25, p. 2). The case was assigned to the undersigned, and discovery disputes were presided over by the Magistrate Judge. This Court dismissed the instant action with prejudice, applying the *Kessler* doctrine after finding the accused products to be essentially the same as those involved in the first lawsuit. (Doc. 173). This Court further found dismissal with prejudice was an appropriate sanction for continued discovery abuse by Plaintiff. (*Id.*). Plaintiff, being understandably unhappy with the Court’s ruling, now seeks recusal of the undersigned. (Doc. 178).

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 455, the Court must view all the circumstances to determine whether recusal is appropriate. “[T]he standard for determining whether a judge should disqualify himself [or herself] under § 455 is an objective one, whether a reasonable person knowing all the facts would conclude that the judge’s impartiality might be questioned.” *United States v. Greenough*, 782 F.2d 1556, 1559 (11th Cir. 1986). “Ordinarily, a judge’s rulings in the same or a related case may not serve as the basis for a recusal motion. The judge’s bias must be personal and extrajudicial; it must derive from something other than that which

the judge learned by participating in the case.” *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (citations omitted).¹

As the Supreme Court observed in *Liteky v. United States*, 510 U.S. 540, 550–51 (1994):

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge’s task.

Quoting Judge Jerome Frank, the Court held that “[i]mpartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.” *Id.* at 551 (citation omitted). The Court explains that, therefore, “[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.” *Id.* Accordingly, judicial remarks during a trial “that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Id.* at 554.

¹ Only personal bias, not judicial bias, is sufficient to justify recusal of a judge. *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988). Moreover, the bias must “stem from personal, extrajudicial sources’ unless ‘pervasive bias and prejudice is shown by otherwise judicial conduct.’” *First Ala. Bank of Montgomery, N.A. v. Parsons Steel, Inc.*, 825 F.2d 1475, 1487 (11th Cir. 1987) (citation omitted).

III. DISCUSSION

Plaintiff argues that recusal is proper because the Court dismissed the case without “properly applying case laws to the merits of [his] case.” (Doc. 178, p. 3). Plaintiff takes issue with the Court’s “fail[ure] to see the merits of this patent infringement case.” (*Id.*). Plaintiff argues the Court’s rulings on discovery disputes were incorrect and criticizes the Court’s reliance on the *Kessler* doctrine as proof of bias. (*Id.* at pp. 4–5). Without any justification, Plaintiff contends the Court’s application of the *Kessler* doctrine “stems from strong favoritism for the defendant.” (*Id.* at pp. 8, 11).

The Court recognizes that Plaintiff is proceeding *pro se* and that he wants the Court, or a jury, to reach the merits of his infringement claims.² That said, Plaintiff was represented by counsel when the first-filed patent infringement suit was dismissed for significant and repeated discovery violations. The Court does not profess to know whether the discovery abuse resulted from Plaintiff’s obstruction or from his counsel’s inaction. Either way, the result was the same, and the first lawsuit was dismissed with prejudice. Plaintiff cannot circumvent dismissal of his patent infringement suit by refile in the Eastern District of Pennsylvania. The district judge presiding over the Pennsylvania suit recognized the striking similarity between that action and the case dismissed by this Court and transferred the case to this district. The extraordinary similarity between the case

² The Court urged Plaintiff at the technology tutorial to retain counsel, cautioning him that intellectual property litigation is complex. Plaintiff chose to proceed *pro se* and promptly ran afoul of his discovery obligations.

transferred from the Eastern District of Pennsylvania and the lawsuit dismissed by this Court triggered application of the *Kessler* preclusion doctrine.

Preclusion by its very nature prevents the Court from reaching the merits of the case. Plaintiff submits the Court erred in applying the *Kessler* doctrine, and the Court of Appeals may ultimately agree and may find the sanction imposed by the undersigned for continued discovery abuse was too stern. Regardless, Plaintiff's disagreement with the Court's application of the law and his frustration over his inability to litigate the merits of the infringement claim do not give rise to recusal. Otherwise, every litigant dissatisfied with a judge's rulings could use recusal to shop for a judge whose rulings are more to the litigant's liking. Simply put, none of Plaintiff's complaints demonstrate that the Court's alleged bias is personal and extrajudicial. Rather, Plaintiff simply disagrees with the Court's rulings and assumes adverse rulings are the result of bias and prejudice. Plaintiff is free to seek appellate review of the Court's rulings, but he is not entitled to select his trial judge.³ Accordingly, the Motion (Doc. 178) is **DENIED**.

DONE AND ORDERED in Orlando, Florida on July 26, 2022.



PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

³ The timing of Plaintiff's Motion is curious in that nothing remains to be decided except the Defendant's Motion to Quantify Its Attorney's Fees and Costs, currently pending before the Magistrate Judge. (Doc. 177).

Counsel of Record
Unrepresented Parties