

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
ABC DENTISTRY, P.A.,	§	CASE NO: 16-34221
	§	
ABC DENTISTRY OLD SPANISH TRAIL, P.L.L.C.	§	CASE NO: 16-34222
	§	
ABC DENTISTRY WEST OREM, P.L.L.C.	§	CASE NO: 16-34225
	§	Jointly Administered
Debtor(s)	§	CHAPTER 11

**MOTION TO DISMISS BY DEFENDANTS BREWER & PRITCHARD, P.C.,
J. MARK BREWER, AND A. BLAIRE HICKMAN**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THIS RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

Defendants Brewer & Pritchard, P.C.,¹ J. Mark Brewer, and A. Blaire Hickman move to dismiss Plaintiff's Original Petition² styled *Saeed Rohifard v. Brewer & Pritchard, P.C., et al*; (the "Removed Action") of Plaintiff Saeed Rohifard, known to this Court as Saeed Rohi,³ because it is barred by res judicata. The Petition in the Removed Action fails to state a claim upon which relief can be granted⁴ because this Court's Final Order of November 7, 2017 disposed of all the issues which were or could have been raised between Rohi and Defendants.

BACKGROUND

1. ABC Dentistry, P.A., ABC Dentistry West Orem, P.L.L.C., and ABC Dentistry Old Spanish Trail, P.L.L.C. ("ABC" or "Debtors") filed for bankruptcy on August 26, 2016, after the entry of summary judgment against them in Case 2014-41707, 281st Judicial District Court, Harris County, Texas, styled *Saeed Rohi, DDS vs. Iraj. S. Jabbary, et al*. ABC removed the 281st Judicial District Court case the same day. The bankruptcy cases were jointly administered under Case 16-34221 and closed on June 13, 2018 [Docket #384]. They were reopened by the Court on July 9, 2018, on the motion of Defendants. [Docket #396].

2. During the pendency of the bankruptcy, this Court abated the adversary proceeding and ordered ABC and Rohi to mediate with Barbara Radnofsky. [Docket #23]. The mediation took place on November 16, 2016, and resulted in a Term Sheet which called for a total of \$3.5 million payable in equal quarterly payments ending December 2022. The Debtors immediately

¹ "Brewer & Pritchard, a Professional Corporation" is the name of this party. It is referred to herein as "Brewer & Pritchard, P.C."

² **Exhibit 1**, hereafter referred to as the "Petition," was filed in the 151st Judicial District Court of Harris County, Texas as Case No. 2018-36793, and was removed to this Court on July 12, 2018.

³ Dr. Rohi was incorrectly named as Dr. Saeed Rohifard in the petition at issue.

⁴ Federal Rule of Bankruptcy Procedure 7012(b) makes Federal Rule of Civil Procedure 12(b)-(i) applicable in adversary proceedings in a United States Bankruptcy Court.

began paying approximately \$50,798.28 per quarter into the Court's registry. Although the State of Texas did not participate in the mediation, its consent to the Term Sheet was required. By June 2017, it became clear that the State would not consent to the Term Sheet reached at the conclusion of the October 2016 mediation. The State's non-consent revolved around the division of the proceeds between the State, Rohi and Rohi's counsel. Later, the State specifically objected to any sums being awarded to attorney fees and would not consent to the amount of the Relator, Rohi's share. These same issues are at the core of the Petition.

3. The State's dispute over the division of proceeds resulted in a second order of mediation, this time including the State. Rohi, ABC and the State engaged in this second mediation (with Ms. Radnofsky) on July 26, 2017. However, Rohi and the State did not reach agreement as to the proper division of the settlement proceeds with respect to attorney fees and the Relator's share. Subsequently, ABC increased the total settlement proceeds to \$4 million in order to obtain the State's consent to the Term Sheet. The State gave tacit assent to the Term Sheet but not the division of proceeds. Therefore, the Court set a November 14, 2017 trial to determine the division. The Debtors had no interest in and were never involved with the "allocation" issue.

4. At the very outset of the November 7, 2017 pre-trial hearing and after extensive briefing by Rohi and the State⁵ on the issue of how to divide the proceeds, this Court advised that it was "going to pay the attorneys fair compensation for their work done."⁶ In so stating, this Court "implied a finding of quality and value" of the legal services rendered by Defendants. *In re Intellogic Trace, Inc.*, 200 F.3d 382, 387 (5th Cir. 2000). Both Rohi and the State then (1) waived

⁵ Rohi's briefing [Docket #328] and [Docket #334] is attached hereto for the Court's convenience as **Exhibits 5 and 6**.

⁶ Page 4:9-10 of the official transcript of the November 7, 2017 hearing (amended), [Docket #401]; attached as **Exhibit 3**.

an evidentiary hearing; (2) consented to the Court determining the division of the State's share, Rohi's share and attorney fees; and (3) waived all rights to appeal.⁷ Rohi was present at the hearing, as was his wife,⁸ including when counsel stipulated to the waiver of the trial and evidentiary hearing. Rohi consented to the Court making the determination of how the proceeds of the Term Sheet should be divided and did so *after the Court stated what the division would be.*⁹ Rohi and the State also consented to the waiver of appeal of the Court's Order.¹⁰ With Rohi's and the State's express consent, the Court orally announced the following Order, which is reflected in the Official Transcript and the Courtroom Minutes:¹¹

The court announced and ordered the division of the proceeds of \$4,000,000.00 as follows: \$1,599,000.00 to the State of Texas; \$720,000.00 to Dr. Rohi; \$1,681,000.00 to the attorneys representing Dr. Rohi to be divided by the attorneys in accordance to their own agreements. [emphasis added]

This Court's order of the division of the proceeds precisely follows the statutory procedure:

(c) A payment to a person under this section shall be made from the proceeds of the action. A person receiving a payment under this section is also entitled to receive from the defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred. **The court's determination of expenses, fees, and costs to be awarded under this subsection shall be made only after the defendant has been found liable in the action or the claim is settled.**

(d) In this section, "proceeds of the action" includes proceeds of a settlement of the action.

⁷ **Exhibit 3**, 35:7-8.

⁸ **Exhibit 3**, 2:17-18.

⁹ **Exhibit 3**, 16:14-16; 24-25 and 34:18-35:8. This consent was given after Rohi discussed it with his counsel during a break in the hearing. After Rohi consented, the Court actually increased Rohi's division from \$652,000 to \$720,000.

¹⁰ **Exhibit 3**, 35:7-8.

¹¹ The Court's order is separately detailed in the Minutes of the Court from the November 7, 2017 hearing, attached hereto as **Exhibit 2**.

Section 36.110, Texas Human Resources Code [emphasis added]

5. By mid-December 2017, Debtors had paid \$660,377.64 into the Court's registry. Pursuant to this Court's December 13, 2017 Order,¹² all funds held in the Court's registry were disbursed. On January 3, 2018, Rohi received **\$118,867.97**, the portion of the proceeds in the Court's registry allocable to him by the November 7, 2017 Final Order. On April 5, 2018, Rohi received an additional **\$32,211.92**, the allocable portion of the first 2018 quarterly payment. On June 20, 2018, Rohi received an additional **\$32,211.92**, the allocable portion of the second 2018 quarterly payment. As of today, over eight months since the Court entered its November 7, 2017 Final Order, Rohi has received a total of **\$183,291.81** of the total \$720,000 allocated to him by the Court. Thus, Rohi himself was aware of what the division of proceeds would be, agreed to that division, and now after being paid in part, seeks to increase his allocation. Rohi has known for over eight months, since November 7, 2017, the sums of money that he, the State of Texas, and his former attorneys were getting.

6. Yet, on June 1, 2018, Rohi filed suit against his counsel who represented him in the Qui Tam suit against the Debtors, accusing them of theft and breach of fiduciary duty for following this Court's November 7, 2017 order, and asserting clearly frivolous "kitchen sink" claims under the Texas Deceptive Trade Practices Act,¹³ among others. The suit plainly is barred by res judicata because it "concerns the same professional services for which fees were awarded in the bankruptcy proceeding," *Stangel v. Perkins*, 87 S.W.3d 706, 708 (Tex. App. 2002). The Petition would require this Court once again to "consider the very services it had already considered in granting the fee application." *In re Intelogic Trace, Inc.*, 200 F.3d 382, 386 (5th Cir. 2000).

¹² [Docket #359], attached hereto as **Exhibit 4**.

¹³ **Exhibit 1**, page 6.

7. The Petition contains several material omissions of fact, including (1) the fact that the proceeds were obtained as part of a bankruptcy; (2) the fact that Rohi has already accepted payments totaling \$183,291.81, which is 100% of the sums apportioned to him by this Court; (3) the fact that it was \$4,000,000 which was the subject of the Court's division of proceeds — not \$2,041,000 as suggested by the Petition; (4) the fact that \$1,599,000 was allocated to the State of Texas; (5) the fact that under the Term Sheet, as amended, the proceeds were payable over a period of approximately 6 years; (6) the fact that the contingency fee agreement which this Court referred to at the November 7, 2017 hearing contains a broad-form, mandatory, binding arbitration provision; and (7) the fact that this Court ordered the division of proceeds and did so by a Final Order as part of the bankruptcy proceedings on November 7, 2017.

8. In addition to these material omissions, the Petition identifies the plaintiff as “Saeed Rohifard” — not the “Saeed Rohi” as he was known to this Court throughout the bankruptcy of ABC.¹⁴ Further, it includes numerous material, false allegations that Rohi's counsel “took for themselves approximately \$1,681,000 in attorney's fees [which] amounted to more than 70% of the total settlement”.¹⁵ This statement is false in several respects: (1) Rohi's counsel did not “take for themselves” any fees but rather, this Court made a division of the proceeds of the action pursuant to Section 36.110, Texas Human Resources Code and Bankruptcy and in making that division, this Court made a determination of “the nature, the extent, and the value of such services.” 11 U.S.C. § 330(a)(3). In fact, Defendants neither sought nor received zero fees from Rohi's division and have disbursed 100% of his division to him. (2) Of the sum divided by the Court to

¹⁴ Saeed Rohi changed his last name from Rohifard to Rohi by Final Order of the 308th Judicial District Court of Harris County, Texas, on November 19, 2014.

¹⁵ See **Exhibit 1** at p. 4.

Defendants, \$81,000 was not fees but was expressly attributable to expenses which the Court reviewed.¹⁶ (3) The proceeds recovered by Defendants were \$4,000,000, not \$2,041,000 as falsely stated by the Petition; and (4) Neither Rohi nor Defendants will receive their full shares for several more years.

9. The Court's November 7, 2017 order is clearly a Final Order, as discussed in more detail below. Moreover, as previously noted, Rohi and all other parties expressly waived any appeal of the November 7, 2017 Order:

THE COURT: But what I don't want to do is — seriously, I don't want to end up with an appeal. If we're going to have an appeal, I want to give you a chance —

MR. LONG [for Rohi, who was present in the courtroom]: We've already waived our right to appeal.

[**Exhibit 3**, Page 35, lines 4-8.]

STANDARD FOR MOTION TO DISMISS

10. In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must accept as true all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, a court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* These principles are even more relevant when the factual allegations are patently false or when they omit material facts.

¹⁶ *See Exhibit 3* at 14:17 and 15:6-9.

11. “Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* (holding that “[r]espondent’s complaint does not entitle him to relief from petitioners.”) The court should dismiss under Federal Rule of Civil Procedure 12(b)(6) if the plaintiff has not provided plausible factual allegations to support the claim. *Id.* By alleging that Defendants’ fee is the same amount ordered by this Court, the Petition is fatally flawed because the fee determination is res judicata.

ARGUMENT AND AUTHORITIES

12. The Petition does not mention the essential, key fact in this litigation – that this matter is res judicata because it is the subject of a Final Order entered by this Court on November 7, 2017.¹⁷ The Petition fails to mention even the existence of this bankruptcy proceeding at all. Of course, regardless of not mentioning this Court’s November 7, 2017 Final Order, Plaintiff’s lawsuit constitutes a collateral attack on that Final Order for the division of the \$4,000,000 proceeds between Rohi, his then counsel, and the state of Texas.

13. It cannot be disputed that an order such as this Court’s November 7, 2017 Order is a “final order” and res judicata under federal law. *In re Coastal Plains, Inc.*, 338 B.R. 703, 713 (N.D. Tex. 2006):

“For purposes of determining the finality of a bankruptcy order, each matter that arises between the filing of the bankruptcy petition and the issuing of a closing order is treated as a separate proceeding. *Smith v. Revie (In re Moody)*, 817 F.2d 365, 367–68 (5th Cir.1987). A ‘final’ order in a bankruptcy case can be any order that ‘ends a discrete judicial unit in the larger case.’ *Id.* at 368. It is logical to apply this same standard of finality for the purposes of res judicata, especially considering that the Federal Rules of Bankruptcy Procedure define ‘judgment’ as ‘any appealable order.’ Fed. R. Bankr. P. 9001(7). The First Circuit takes this approach, allowing any bankruptcy court order that “‘completely resolve[s] all of the issues pertaining to a discrete claim’ ” to satisfy the res judicata requirement of a final judgment on the merits. *Iannochino v. Rodolakis (In re Iannochino)*, 242 F.3d 36, 43 (1st Cir.2001) (quoting *Official Comm. of Subordinated*

¹⁷ **Exhibit 1**, the lawsuit filed by Rohi on June 1, 2018.

Bondholders v. Integrated Res., Inc., (In re Integrated Res., Inc.), 3 F.3d 49, 53 (2d Cir.1993)).

14. In *Coastal Plains*, after giving an opportunity for objections but not receiving any, the bankruptcy court ordered the Trustee's fees and the proposed distribution of assets. *Id.* at 707. The court then closed the bankruptcy case. *Id.* The court did not receive any objections "to either the fee order or the closing order, and both orders became final." *Id.* at 708. A lawsuit was filed against the Trustee in Texas state court for breach of fiduciary duty and negligent breach of fiduciary duty. *Id.* The bankruptcy court determined that the lawsuit was "barred by res judicata." *Id.*

15. *Stangel v. Perkins, supra*, was a malpractice claim made against former bankruptcy counsel. 87 S.W.3d at 708. The Court of Appeals of Texas held that the malpractice claim was barred by res judicata as a matter of federal law. *Id.* at 710. This was because the bankruptcy court had already ruled on the defendant's, former bankruptcy counsel, fee application. *Id.* When the court made the ruling on defendant's fee application, it impliedly determined the quality and value of counsel's services. *Id.*

16. In *Intelogic Trace, Inc., supra*, the bankruptcy trustee brought a lawsuit in state court against Ernst & Young alleging professional malpractice arising from accounting services Ernst & Young performed during the Chapter 11 bankruptcy proceeding. The case was removed to bankruptcy court under 28 U.S.C.§1452. *Id.* The trustee, on behalf of the debtor, appealed the bankruptcy court's decision, subsequently affirmed by the district court, granting summary judgment in favor of Ernst & Young on the basis that the trustee's claims were barred by res judicata. *Id.* The Fifth Circuit affirmed the holding that the trustee's claims for professional malpractice were barred by res judicata. *Id.*

17. *In re Coastal Plains, Inc., Stangel*, and *In re Intelogic Trace, Inc.* are directly applicable. This Court, after giving an opportunity for objections but not receiving any, made a determination of fees and ordered the distribution of \$4,000,000, including the attorneys' fees for Rohi's counsel. Subsequently, this Court closed the bankruptcy case. The Court did not receive any objections to either the order dividing the proceeds or the closing order. Ignoring the finality of this Court's order and his own assent to it, Rohi sued on the very basis of this Court's division of the proceeds.¹⁸

18. Whether Rohi's claims are barred by res judicata is a matter of federal law, not state law. *Stangel*, 87 S.W.3d at 710. The law is clear that Rohi's claims against his former counsel are res judicata:

“[A] final judgment on a fee application in bankruptcy court is res judicata as to a legal malpractice action subsequently filed in state court that concerns the same professional services for which fees were awarded in the bankruptcy proceeding[.]”

Stangel, 87 S.W.3d at 708.

19. Thus, just as the courts in *In re Coastal Plains, Inc., Stangel*, and *In re Intelogic Trace, Inc.* determined that the lawsuit was barred by res judicata, Rohi's lawsuit is also barred by res judicata.

“The doctrine of res judicata bars claims that have already been litigated as well as claims that ‘could and should’ have been brought in an earlier proceeding. *Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.)*, 200 F.3d 382, 388 (5th Cir.2000). For a claim to be barred by res judicata, four factors must be present: ‘the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.’ *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th

¹⁸ The “Defendants . . . took for themselves approximately \$1,681,000.00 in attorney's fees.” **Exhibit 1**, page 4. This is the precise amount of fees determined by this Court on November 7, 2017 in the presence of Rohi and with his consent.

Cir.1983) (en banc) (quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir.1979)).

In re Coastal Plains, Inc., 338 B.R. at 712.

A. PLAINTIFF’S CLAIMS ARE BARRED BY RES JUDICATA.

1. The Parties are Identical in Both Suits.

20. For res judicata to apply, “both parties must be identical to or in privity with the parties in the prior suit.” *Gulf Island-IV, Inc. v. Blue Streak-Gulf Is Ops*, 24 F.3d 743, 746–47 (5th Cir. 1994). For res judicata purposes, a “person can be shown to be in privity with a party in at least three ways: (1) he can control the action even though not a party to it; (2) his interests can be represented by a party; or (3) he can be a successor in interest.” *In re Rodriguez*, 524 B.R. 111, 121 (Bankr. S.D. Tex. 2014).

“Parties for purposes of res judicata does not mean formal, paper parties only, but also includes parties in interest, that is, that (sic) persons whose interests are properly *placed before the court* by someone with standing to represent them are bound by the matters determined in the proceeding.” *Gulf Island-IV, Inc. v. Blue Streak-Gulf Is Ops*, 24 F.3d 743, 746–47 (5th Cir. 1994), citing *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir.1990) (emphasis in original) (internal quotation marks and citations omitted).

21. This Court’s November 7, 2017 Final Order determined the proper allocation of the settlement proceeds between the State, Rohi and Rohi’s counsel. Thus, the State, Rohi, and Rohi’s counsel were the parties in interest to the allocation dispute, the subject of the November 7, 2017 Final Order. Rohi now has made his former counsel parties to the instant lawsuit. Therefore, the first factor for a claim to be barred by res judicata has been met – Rohi and the Defendants are the same parties as in the prior matter.

2. The Prior Judgment was Rendered by a Court of Competent Jurisdiction.

22. Bankruptcy courts obviously have discretion to determine the amount of reasonable compensation of attorneys. *In re Woerner*, 783 F.3d 266, 273 (5th Cir. 2015); *In re Pilgrim's Pride*

Corp., 690 F.3d 650, 656 (5th Cir. 2012), as revised (Aug. 14, 2012); *In Re Intellogic Trace, Inc.*, 200 F.3d at 387 (“an award of fees for professionals...represents a determination of ‘the nature, the extent, and the value of such services’”); 11 U.S.C.A §330(a)(3); *See also In re Temple Retirement Community*, 97 B.R. 333, 337 (Bankr.W.D.Tex.1989) (“[T]his court holds with numerous other courts that it ‘has the independent authority and responsibility to determine the reasonableness of all fee requests, regardless of whether objections are filed.’”) (internal citations omitted).

23. Further, this Court’s order of the division of the proceeds follows the statutory procedure precisely:

(c) A payment to a person under this section shall be made from the proceeds of the action. A person receiving a payment under this section is also entitled to receive from the defendant an amount for reasonable expenses, reasonable attorney’s fees, and costs that the court finds to have been necessarily incurred. **The court’s determination of expenses, fees, and costs to be awarded under this subsection shall be made only after the defendant has been found liable in the action or the claim is settled.**

(d) In this section, “proceeds of the action” includes proceeds of a settlement of the action.

Section 36.110, Texas Human Resources Code [emphasis added]

24. In exercising such discretion in the determination of expenses, attorney’s fees, and costs to be awarded, this Court reviewed the proofs of claim, extensive briefing by Rohi and the State, the fee agreement with Charles Long, and the fee agreement with Rohi and Defendants.¹⁹ The law clearly establishes that the November 7, 2017 Final Order of this Court was a prior judgment rendered by a court of competent jurisdiction, thus satisfying the second prong for a claim to be barred by res judicata. .

¹⁹ See **Exhibit 3** at 3:24-25 and 19:24 – 20:14.

3. There was a Final Judgment on the Merits.

25. As explained above, it is well-settled law that the Court’s November 7, 2017 Order is a “final order”, including the attorneys fees payable to Rohi’s counsel. *In re Coastal Plains, Inc.*, 338 B.R. at 713. “A ‘final order’ in a bankruptcy case can be any order that ‘ends a discrete judicial unit in the larger case.’” *Id.* (citing *Smith v. Revie (In re Moody)*, 817 F.2d at 367-68). As was held in *In re Coastal Plains, Inc.*, the Court’s order here, including the determination of attorneys fees payable to Rohi’s counsel,

“satisfies the final judgment on the merits requirement because it is a final judgment on the value of [Rohi’s attorneys’ services], and it ends the fee determination unit of the larger bankruptcy case. Thus, the [November 7, 2017] Order is considered a ‘final judgment’ on the merits...” *In re Coastal Plains, Inc.*, 338 B.R. at 713.

Therefore, the third element for res judicata to apply has been satisfied because there was a final judgment on the merits.

4. The Same Cause of Action is Involved in Both Cases.

26. “In deciding whether a case involves the same cause of action as a previous proceeding, courts within the Fifth Circuit employ the transactional test to determine whether the two actions are based on ‘the same nucleus of operative facts.’” *Id.*; citing *In re Intellogic Trace, Inc.*, 200 F.3d 382, 386 (5th Cir. 2000) (quoting *Howe v. Vaughan (In re Howe)*, 913 F.2d 1138, 1144 (5th Cir.1990)). Rohi’s causes of action in his petition²⁰ and this Court’s determination of Defendants’ fee award are all based upon the same nucleus of operative facts: the amount of attorneys fees to Defendants.

27. In *In re Coastal Plains, Inc.*, the court explained that the

“determination of professional fees by the court represented a determination of ‘the nature, the extent, and the value of such services.’” *In re Intellogic Trace, Inc.*, 200

²⁰ See **Exhibit 1**.

F.3d at 387 (quoting 11 U.S.C. § 330(a)(3)). Thus, the malpractice claim essentially required the court to consider the very services it had already considered in granting the fee application. *Id.* The court, therefore, found that there is a common nucleus of operative facts between the fee application hearing and the professional malpractice claim. *Id.* at 388.” *In re Coastal Plains, Inc.*, 326 B.R. 102, 110 (Bankr. N.D. Tex. 2005), *aff’d*, 338 B.R. 703 (N.D. Tex. 2006).

28. Further, the Court of Appeals in *Stangel*, using the federal law “transactional test”, held that the client’s malpractice claims against his former bankruptcy counsel arose out of the same nucleus of operative facts as the bankruptcy counsel’s fee application that was already ruled on by the bankruptcy court. *Stangel*, 87 S.W.3d at 710.

29. This is further explained in *In Re Intelogic Trace, Inc.*, 200 F.3d at 387-88:

“By granting Ernst & Young's fee application, the bankruptcy court implied a finding of quality and value in Ernst & Young's services. Similarly, the Trustee's claims in the present suit arise from Ernst & Young's alleged omissions in rendering the very same services considered by the bankruptcy court in the fee application hearing. The Trustee's malpractice claims, challenging the sufficiency and value of Ernst & Young's services, ‘inevitably involve[] the nature of the services performed for the debtor's estate and the fees awarded under superintendence of the bankruptcy court; [they] cannot stand alone.’” *In re Southmark Corp.*, 163 F.3d 925 at 931 (5th Cir.), *cert. denied*, 527 U.S. 1004, 119 S.Ct. 2339, 144 L.Ed.2d 236 (1999). Therefore, we conclude that the award of professional fees and the Trustee’s malpractice claims concern ‘the same nucleus of operative facts’ and meet the transactional test. Accordingly, there is an identity of claims between the fee application hearing and this malpractice suit.”

30. Similarly, here, the malpractice claim essentially requires the Court to consider the very services it already considered in the determination of the \$4,000,000 proceeds which were allocable to attorneys fees. Therefore, as the Courts found in *In re Coastal Plains, Inc.*, *Stangel*, and *In re Intelogic Trace, Inc.* there is a common nucleus of operative facts between the November 7, 2017 Final Order and Rohi’s claims in his Petition. Therefore, the fourth element required for the application of res judicata has been satisfied – the two actions are based on the same nucleus of operative facts.

5. *Rohi's claims Could Have Been Brought as Part of the Prior Proceedings.*

31. “Once the four elements required for the application of res judicata have been satisfied, the key question is whether the claim *could or should* have been brought as part of the prior proceedings.” *In re Coastal Plains, Inc.*, 338 B.R. at 714 (emphasis in original). To determine whether the claims could or should have been brought, this Court must decide whether: 1) Rohi had actual or imputed awareness at the time of the attorney fee determination of a real potential for claims against the Defendants of the same type currently being asserted; and 2) whether the bankruptcy court possessed procedural mechanisms through which Rohi could have pursued his claims. *Id.* Here, as the Court held in *In re Coastal Plains, Inc.*, any concerns about the division of the \$4,000,000 proceeds should have been brought as an objection to the Court’s stated division.

32. However, as explained above, Rohi and his wife were present at the November 7, 2017 hearing, including when their bankruptcy counsel stipulated to the waiver of the trial and evidentiary hearing; consented to the Court making the allocation determination *after the Court stated what the allocation would be*; and consented to the waiver of appeal of the Court’s Order.²¹ It was only after the Court stated what the allocation would be and after Rohi consulted with his counsel about it that Rohi’s counsel consented to the allocation determination.²² Rohi himself was aware that the Court was making a final determination of the division of the \$4,000,000 proceeds, including the amount to be paid to his attorneys, and Rohi had the opportunity to object to the allocation and to proceed to an evidentiary hearing and trial, but Rohi chose not to make such objection.

²¹ See **Exhibit 3** at 16:14-16; 24-25 and 34:18-35:8. This consent was given after Rohi discussed it with his counsel during a break in the hearing.

²² *Id.*

33. It was not until June 1, 2018, more than 6 months after this Court's Final Order and after receiving \$183,291.81 of the total \$720,000 allocated to him by the Court, did Rohi file a lawsuit complaining about the Court's division of the proceeds. Any objections by Rohi *could and should have been brought* on November 7, 2017, when the attorneys' fee award was determined by the Court and when the Court specifically gave Rohi an opportunity to object and proceed to the already scheduled trial. Since Rohi did not bring his objections to the attorney fee distribution when they could and should have been brought, Rohi is "barred from pursuing those claims now by the doctrine of res judicata. *In re Coastal Plains, Inc.*, 338 B.R. at 715.

34. The "law of the Fifth Circuit does not require a party to have understood the legal implications of the facts giving rise to a claim in order for the claim to be barred by res judicata." *Id. See In re Howe*, 913 F.2d at 1147 (finding lender liability plaintiffs' "ignorance an inadequate excuse for the failure to raise their claims in the earlier proceedings"). Therefore, even if Rohi claims that he did not understand the legal implications of his failure to object to the division of proceeds during the bankruptcy proceedings, that does not change the fact that Rohi's claims are barred by res judicata.

35. Rohi's failure to state a claim upon which relief can be granted cannot be cured by amendment of his petition. "Leave to amend may be denied for undue delay, bath faith, or dilatory motive and when the amendment would be futile – for instance when the amended claim would not survive a Fed. R. Civ. P. 12(b)(6) review." *Johnson v. PPI Tech. Servs., L.P.*, 605 F. App'x 366, 373 (5th Cir. 2015) (holding that "[t]he district court did not err in failing or refusing to permit [the Plaintiff] to amend his pleading..."). Amendment would be futile because this matter was the subject of a Final Order by this Court.

36. Finally, even if the November 7, 2017 order is not res judicata, which it is, Rohi's Petition must be dismissed because it is subject to the mandatory arbitration provision of Rohi's contingency fee agreement with Brewer & Pritchard, P.C. — the agreement referred to by this Court during the November 7 hearing:²³

6. **This agreement is subject to binding arbitration.** If any dispute should arise between us or under this agreement, all claims, disputes, controversies, differences or other matters in question arising out of our relationship to each other (including, but not limited to compensation for services rendered by Counsel) shall be resolved by binding arbitration in Houston, Harris County, Texas, in accordance with the rules for expedited, documents only proceedings of the American Arbitration Association (the "Rules"). This agreement to arbitrate shall be specifically enforceable only in the District Court of Harris County, Texas.

CONCLUSION

Rohi's suit is barred by res judicata and this Court's Final Order of November 7, 2017, and accordingly, Defendants respectfully move for dismissal of the Petition, including all of Plaintiff's claims, without leave to amend. Defendants further ask for such other and further relief to which they may be justly entitled.

Date: July 19, 2018

²³ Page 20:13-14; **Exhibit 3.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 19, 2018, the foregoing document was filed electronically with the Court and served on counsel as follows:

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