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

IN RE: ABC DENTISTRY, P.A., et al. Debtor(s)	§ § § § § §	 CASE NO: 16-34221 (Chapter 11) Jointly Administered
SAEED ROHIFARD Plaintiff, v. BREWER & PRITCHARD, A PROFESSIONAL CORPORATION, J. MARK BREWER, AND A. BLAIRE HICKMAN Defendants.	§ § § § § § § § § §	 Adv. Proc. No. 18-03205

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEFING ON RES JUDICATA AND SUBJECT MATTER JURISDICTION

COME NOW, Defendants Brewer & Pritchard, P.C. ("B&P"), J. Mark Brewer and A. Blaire Hickman, collectively referred to herein as "Defendants," and file this Response to Plaintiff's Supplemental Briefing on Res Judicata and Subject Matter Jurisdiction (Adv. Dkt. 30).[1]

The Court posed a narrow question at the September 20, 2018 hearing that Plaintiff Saeed Rohi's attorneys asserted to have case law to support. Namely, the Court allowed Plaintiff two weeks to file a supplemental brief on the question of whether a legal malpractice claim, however styled, is precluded when a bankruptcy court has ordered an award of fees. The answer to this

[1] Defendants respectfully incorporate by reference their Motion to Dismiss (Adv. Dkt. No. 2), Response to Plaintiff's Motion to Remand and Abstain and Brief in Support of Subject Matter Jurisdiction (Adv. Dkt. 21), and Reply to Plaintiff's Response to Motion to Dismiss (Adv. Dkt. 23) as if set forth fully herein.

question is in the affirmative and, as the Court observed, Rohi's newly-brought claims herein are analogous in substance to newly-brought claims of legal malpractice following a court's allocation of attorney's fees. Rather than providing this Court with a case holding that a malpractice claim is not precluded when a bankruptcy court has ordered an award of fees, as Rohi represented to the Court he could and would do, Rohi instead cited the same case law and re-briefed the same arguments that he made in previous briefings.

SUBJECT MATTER JURISDICTION

1. This Court has subject matter jurisdiction. *See In re Intelogic Trace, Inc. (Osherow v. Ernst & Young, LLP)*, 200 F.3d 382, 386-88 (5th Cir. 2000) (Bankruptcy Court had subject matter jurisdiction over second case with 'same nucleus of operative facts' as first bankruptcy adjudication.) The Fifth Circuit in *Intelogic* **affirmed** a bankruptcy court ruling that the second case was barred by res judicata. *Id.* at 391. The Fifth Circuit necessarily held that the Bankruptcy Court had subject matter jurisdiction to reach the affirmative defense of res judicata.[2]

2. In *Grausz v. Englander*, 321 F.3d 467 (4th Cir., 2003), the Fourth Circuit directly addressed subject matter jurisdiction in a case with similar facts. In *Grausz*, a Chapter 11 debtor filed a professional malpractice against the law firm that represented him in his bankruptcy case. *Id.* at 468. The Fourth Circuit held that the district court had **bankruptcy jurisdiction** over this action

[2] Several U.S. Courts of Appeals have held that when a party to the bankruptcy had on actual or constructive notice of the alleged malpractice or breach of fiduciary duty by a professional when the professional's final fee application was filed, the Bankruptcy Court's approval of the professional's final fee application operated as a res judicata bar to the debtor's subsequent malpractice claim challenging the quality of the services that were the subject of the final fee application and the previous interim fee applications allowed by the Bankruptcy Court. *See Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 490-92 (D.C. Cir. 2009); *see also Grausz v. Englander*, 321 F.3d 467, 472-75 (4th Cir. 2003); *Iannochino v. Rodolakis (In re Iannochino)*, 242 F.3d 36, 47-49 (1st Cir. 2001); *and In re Intelogic Trace, Inc. (Osherow v. Ernst & Young LLP)*, 200 F.3d at 387-88.

under 28 U.S.C. § 1334 because the malpractice claim arose in the bankruptcy case. *Id.*[3] Additionally, the Fourth Circuit affirmed the district court's award of summary judgment to the law firm because the malpractice claim is barred on res judicata grounds by an earlier order of the bankruptcy court. *Id. at 475.*

3. Second case. The instant proceeding is the "second" case involving Defendants' attorney fees. The "first" case was the prior bankruptcy proceedings. During the November 7, 2017 pre-trial hearing in the first case, and after extensive briefing by Rohi and the State[4] on the issue of how to divide the proceeds, the Court announced that it had determined how the proceeds should be divided between all interested parties, including the attorneys for their fees and expenses. 11/7/2017 Hrg. Tr., p. 23, l. 2-7 ("I told you-all what findings I'm going to make, unless you want to argue against it…").

4. In the first suit, this Court, after giving an opportunity for objections but not receiving any, made its determination of fees and ordered the distribution of $4,000,000, including the attorneys' fees for Rohi's counsel. In doing so, this Court "implied a finding of quality and value" of the

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[3] The Fourth Circuit held that the district court had bankruptcy jurisdiction over a malpractice action against professionals under "arising in" jurisdiction under 28 U.S.C. § 1334(b). See *Grausz*, 321 F.3d at 471-72; citing *A.H. Robins Co. v. Dalkon Shield Claimants Trust*, 86 F.3d 364 (4th Cir. 1996). Analyzing jurisdiction, the *Grausz* Court observed that proceedings or claims arising in Title 11 are those that "are not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy." *Grausz*, 321 F.3d at 471. In other words, a "controversy arises in Title 11" when "it would have no practical existence *but for* the bankruptcy." *Id.* The *Grausz* court concluded that "arising in" jurisdiction surely means that jurisdiction exists over a malpractice claim against a lawyer for providing negligent advice to a debtor in a bankruptcy case. *See, e.g., In re Simmons*, 205 B.R. 834, 841 (Bankr. W.D.Tex.1997) (citing *A.H. Robins* and stating that "claims of malpractice which originated out of pre- and post-petition advice of counsel concerning the *bankruptcy itself* are matters that fall within 'arising in' jurisdiction").

[4] Bankr. Dkts. 327, 328, 334, 335, and 337.

legal services rendered by Defendants. *In re Intelogic Trace, Inc*., 200 F.3d at 387. This second suit by Dr. Rohi involves the same nucleus of operative facts adjudicated by the Court last year.

5. Stated another way, on November 7, 2017, the Court ordered what the attorneys were to receive.[5]

6. Rohi disingenuously states that "no fee hearing occurred" in that case. Rohi's supplemental brief (Adv. Dkt. 30) at p. 4. The November 7, 2017 hearing unquestionably was a fee hearing. It was about attorneys fees and the division of the proceeds between the State and Rohi — nothing else. Further, before the hearing, extensive briefing by Rohi and the State[6] was filed on the issue of how to divide the proceeds, including attorneys fees and expenses. The November 7, 2017 hearing was not a fee hearing or award under 11 U.S.C. §330,[7] but it was still a hearing where the Court considered and awarded attorneys fees.

7. Similarly, Rohi argues "[t]here was no fee application filed by Defendants." Rohi's supplemental brief (Adv. Dkt. 30) at p. 4. However, this is incorrect because Rohi's own proofs of claim and briefing requested an award of attorneys fees, so there was a formal, written request for fees.

8. After its determination of fees and the order distributing the $4,000,000, this Court closed the bankruptcy case. The Court did not receive any objections to either the order dividing the

[5] Rohi's discussion on page 4 of his supplemental briefing (Adv. Dkt 30) about the attorney fees award being part of the "gross recovery" misconstrues the B&P Fee Agreement that this Court considered during the November 7, 2017 hearing. The B&P Fee Agreement states that B&P shall receive 40% of the "gross recovery." Indisputably, the "gross recovery" was $4,000,000, and in the prior case, this Court awarded a 40% fee out of that gross recovery. In this second suit, Dr. Rohi seeks to add to the Relator's share that same fee and calling the sum "gross recovery."

[6] Bankr. Dkts. 327, 328, 334, 335, and 337.

[7] Importantly, Rohi admits he is unable to cite to any cases that required the fee hearing or award to be pursuant to 11 U.S.C §330 for a malpractice claim to be precluded.

proceeds or the closing order. 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. Rohi also could have objected after the November 7 hearing but instead, he signed the ballots and began receiving his portion of the proceeds. Ignoring the finality of this Court's order and his own assent to it, Rohi brought new claims on the very basis of this Court's division of the proceeds.

9. Although the Court awarded B&P fees and expenses in keeping with the terms of the B&P Fee Agreement, it did not have to do so. The Court was not constrained by the terms of the contract between Rohi and B&P or by the attorney's fee provision in that contract. It awarded what it determined was reasonable and necessary. See *In re 804 Congress, LLC*, 756 F.3d 368, 376 (5th Cir. 2014) (where applicable statutory provision required fees to be "reasonable," the contractual fee percentage did not control). As in *804 Congress*, the Court here adjudicated the division disputes and overruled the State's opposition to award reasonable fees and expenses in the amount of $1,681,000, and the Court awarded those fees directly to the attorneys—not to Rohi.[8] 11/7/17 Hrg. Tr. P. 37, l. 2-7.

10. Rohi's argument ignores several key facts, including that the Court interpreted the B&P Fee Agreement during the division hearing, considered and rejected the State's objections to an award of fees, determined the amount of reasonable and necessary fees and expenses that would be awarded, and awarded those directly to the attorneys—not to Rohi.

11. 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 5- year payout of $720,000 allocated to him by the Court, did Rohi file a lawsuit complaining about the Court's division of the proceeds. The Court's ruling on

[8] The fees were awarded pursuant to the Texas Human Resources Code § 36.110(c) (allowing an award of "reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred").

the division was very clear, and Rohi was present in the courtroom when it was made. With respect to the award of fees and expenses, the Court specifically ordered that the fee award was being made directly to the attorneys and was "to be divided by the attorneys." 11/7/17 Hrg. Tr. P. 37, l. 2-7 (emphasis added).

12. As briefed extensively in Defendants' Brief in Support of Subject Matter Jurisdiction (Adv. Dkt. 21) and specifically in paragraphs 19-46 of that brief, the Court has jurisdiction to hear and determine the disputes raised in this second suit (Rohi's lawsuit) because the proceedings are core, in that they would arise only in bankruptcy. The Court has core jurisdiction over this dispute for many reasons, including, but not limited to: (1) the Court has jurisdiction to interpret and enforce its orders; (2) the Court would still have jurisdiction if the post-confirmation limitation is found to apply; and (3) by filing his Proofs of Claim, Rohi consented to the jurisdiction of this Court and the pending dispute was adjudicated with such Proofs of Claim.

13. Under *Travelers*, the Court clearly has authority to interpret and enforce its orders.[11] *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009). Like *Travelers*, the first suit here was a pre-confirmation settlement that cleared the way for confirmation and was incorporated into the Plan. *Id.* The Court confirmed the Debtors' Plan of Reorganization on December 13, 2017, and both the Confirmation Order and Plan incorporated the terms of the underlying settlement and division (Bankr. Dkt. 360 and 360-1). The Plan explicitly reserves jurisdiction for the Court to, among other things, "interpret and enforce the terms of and obligations set forth in the Rohi Settlement. Plan § 11.1.19. The Plan also required the Court to determine what portion of the Rohi Settlement Payment was payable to the State under Section 5.2. Plan §§ 1.1.92. The settlement was the

[11] The *Travelers* case is discussed in detail in paragraphs 22-27 of Defendants' Response to Plaintiff's Motion to Remand and Abstain and Brief in Support of Subject Matter Jurisdiction (Adv. Dkt. 21).

centerpiece of the Debtors' Plan of Reorganization and was the key means for its implementation. Thus, no matter how Rohi seeks to redefine his claims to escape this Court's jurisdiction and the effect of this Court's November 7, 2017 final order in the first suit, those efforts must fail.[12]

RES JUDICATA APPLIES HERE.

14. Dr. Rohi cites *Intelogic*[13] for the proposition that "[w]hether subsequent malpractice claims are precluded by a fee award from a bankruptcy court must be determined by principles of res judicata." Rohi's supplemental brief (Adv. Dkt. 30) at p. 2 (emphasis added). The *Intelogic* opinion is not so narrow. Nothing in *Intelogic* opinion states that whether subsequent malpractice claims are precluded by a fee award solely must be determined by res judicata. *In re Intelogic Trace*, 200 F.3d at 386. In *Intelogic*, the professional moved for summary judgment based on res judicata, collateral estoppel, or wavier. *Id*. at 386. The Court's opinion focused on whether the claims were barred by res judicata, but the Court in no way held that whether subsequent malpractice claims are precluded by a fee award must be determined by res judicata. *Id.*

15. However, Rohi's suit plainly is barred by res judicata because it is a second suit that "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). Rohi's petition would require this Court once again to "consider the very services it had already considered in granting the fee application." *Intelogic Trace*, 200 F.3d at 386.

16. In *Intelogic*, the malpractice action was brought in state court after the bankruptcy court's fee award was final. *Id*. at 383-84. The case was removed to the bankruptcy court. *Id*. Despite

[12] Rohi's arguments on page 6 of his supplemental briefing are directly contradicted by *Travelers. Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009). Therefore, to the extent the cases cited by Rohi state that Defendants cannot remove the lawsuit to get the Court to enforce its own order, they were impliedly overruled by the Fifth Circuit in *Travelers.*

[13] Rohi cites the *Intelogic* case throughout his supplemental brief as "*Interlogic*".

being the same court that issued the original fee order, the court applied res judicata and the Fifth Circuit affirmed based on res judicata. *Id*. To the extent res judicata can only be applied by the "second" court, the Fifth Circuit clearly must have agreed that the bankruptcy court upon removal is the "second" court. The Fifth Circuit did not address the issue directly in *Intelogic*, but it applied res judicata; thus, the requirements for applying res judicata by the bankruptcy court must have been satisfied by the removal of the state court action.

17. Rohi's June 1, 2018 lawsuit is the second case that makes res judicata applicable. The first case was the initial bankruptcy proceeding. Rohi's lawsuit was separately filed in state court and merely removed to the same Court presided over by the Judge who made the Final Order that Rohi's suit seeks to circumvent. It is clear that this instant case **is** the second lawsuit.

CONCLUSION

For the reasons stated in Defendants' Motion to Dismiss (Adv. Dkt. No. 2), Response to Plaintiff's Motion to Remand and Abstain and Brief in Support of Subject Matter Jurisdiction (Adv. Dkt. 21), Reply to Plaintiff's Response to Motion to Dismiss (Adv. Dkt. 23), and for the reasons stated herein, Defendants respectfully request this Court deny Plaintiff's Motion to Remand and Abstain and grant Defendants' Motion to Dismiss this entire action. Defendants further ask for such other and further relief to which they may be justly entitled.

October 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 12, 2018, the foregoing document was filed and served electronically by the Court's ECF System for the United State Bankruptcy Court for the Southern District of Texas.

/s/ *Sean Buckley*
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