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CLERK U.S. BANKRUPTCY COURT
Central District of California
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

ARTURO GONZALEZ,

Debtor.

Case No. 2:15-bk-25283-RK

Chapter 7

Adv. No. 2:20-ap-01647-RK

**MEMORANDUM DECISION ON MOTION BY
CHAPTER 7 TRUSTEE, WESLEY H.
AVERY, JOINED BY DEFENDANT ANERIO
ALTMAN, FOR ORDER DISMISSING
COMPLAINT PURSUANT TO FRCP 12(b)(6)
WITHOUT LEAVE TO AMEND DUE TO
ISSUE PRECLUSION, CLAIM PRECLUSION
AND FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED**

ARTURO GONZALEZ,

Plaintiff,

v.

WESLEY H. AVERY, as Chapter 7
Trustee for the Bankruptcy Estate of
Arturo Gonzalez; ANERIO ALTMAN,
DOES 1-20,

Defendants.

Telephonic Hearing

Date: December 15, 2020

Time: 2:30 p.m.

Courtroom: 1675

Roybal Federal Building

255 East Temple Street

Los Angeles, California 90012

HEARING CONDUCTED TELEPHONICALLY

1 This adversary proceeding came on for hearing on December 15, 2020 before
2 the undersigned United States Bankruptcy Judge on the Motion of Defendant Wesley H.
3 Avery ("Defendant Avery"), Chapter 7 Trustee, for Order Dismissing Complaint Pursuant
4 to FRCP 12(b)(6) without Leave to Amend Due to Issue Preclusion, Claim Preclusion
5 and Failure to State a Claim Upon Which Relief can be Granted ("motion"), Docket No.
6 6, filed on November 12, 2020, and the Joinder in Trustee's Motion to Dismiss without
7 Leave to Amend ("joinder") by Defendant Anerio Altman ("Defendant Altman"). Docket
8 No. 10, filed on November 16, 2020. Brett Curlee, of the Law Offices of Brett Curlee,
9 appeared on behalf of Defendant Avery. William J. Wall, of the Wall Law Office, a
10 Professional Corporation, appeared on behalf of Defendant Altman. Plaintiff Arturo
11 Gonzalez appeared and represented himself.

12 The court notes that Defendant Avery also filed a request for judicial notice in
13 support of the Motion. Docket No. 7. The court further notes that the case docket
14 reflects that no party filed a written opposition to the Motion. Having considered the
15 motion, request for judicial notice, joinder and the arguments made at the December 15,
16 2020 hearing, the court rules as follows.

17 On October 14, 2020, Plaintiff commenced this adversary proceeding by filing his
18 complaint entitled "Complaint for: 1. Damages to Plaintiff, Home Been Unnecessarily
19 Sold, 2. Fraud upon the Court, 3. Bankruptcy Proceeding be Vacated Due to a Fraud
20 upon the Court." Complaint, Adv. No. 2:20-ap-01647-RK ("the pending adversary
21 proceeding"), Docket No. 1. Plaintiff alleges five claims for relief in this complaint: (1)
22 the first claim for relief is for declaratory relief that the actions of Defendant Avery, the
23 Chapter 7 Trustee, and Defendant Altman, Plaintiff's former attorney, were a "Fraud
24 upon the Court"; (2) the second claim for relief is for declaratory relief that this Chapter 7
25 bankruptcy case be vacated as a "Fraud Upon the Court," and vacating the court's prior
26 turnover judgment; (3) the third claim for relief is for monetary damages against
27 Defendant Avery on grounds that "he committed a 'Fraud Upon the Court' and he never
28 represented actual facts he presented in the motion to convert [the case] in the

1 complaint for turnover and it caused damages to Plaintiff namely sold Plaintiff's home
2 unnecessarily"; (4) the fourth claim for relief is for monetary damages against Defendant
3 Altman on grounds that "he committed a 'Fraud Upon the Court' and he never
4 represented actual facts he presented in the motion to convert [the case] in the
5 complaint for turnover and it caused damages to Plaintiff namely sold Plaintiff's home
6 unnecessarily"; and (5) the fifth claim for relief is for declaratory relief that this Chapter 7
7 bankruptcy case be vacated as a "Fraud Upon the Court," and vacating the court's prior
8 turnover judgment. *Id.*

9 In the Motion filed by Defendant Avery, which is joined by Defendant Altman,
10 Defendants seek to dismiss this adversary proceeding for failure to state a claim upon
11 which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). *See also*,
12 Federal Rule of Bankruptcy Procedure 7012, which makes Federal Rule of Civil
13 Procedure 12(b)(6) applicable to this adversary proceeding. Specifically, Defendants
14 contend that Plaintiff has failed to state a claim upon which relief can be granted based
15 on his allegations that Defendants perpetrated "fraud upon the court."

16 In pleading a claim for relief, Plaintiff must comply with Federal Rule of Civil
17 Procedure Rule 8(a)(2), which provides that a claim for relief must contain a short and
18 plain statement of the claim showing that the plaintiff is entitled to relief. *See also*,
19 Federal Rule of Bankruptcy Procedure 7008, which makes Federal Rule of Civil
20 Procedure 8(a)(2) applicable to this adversary proceeding. In order to survive a motion
21 to dismiss failure to state a claim upon which relief can be granted pursuant to Federal
22 Rule of Civil Procedure 12(b)(6), the "complaint must contain sufficient factual matter,
23 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v.*
24 *Iqbal*, 556 U.S. 662, 678 (2009); quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
25 570 (2007). Facial plausibility exists when the plaintiff pleads facts that allow the court
26 to draw a reasonable inference the defendant is liable for the misconduct alleged. *Id.*
27 The plausibility standard asks for more than a sheer possibility that a defendant acted
28 unlawfully. *Id.* "Where a complaint pleads facts that are 'merely consistent with' a

1 defendant's liability, it 'stops short of the line between possibility and plausibility of
2 entitlement to relief.'" *Id.* The principle that the court must accept as true all allegations
3 contained in a complaint is inapplicable to legal conclusions. *Id.* "Threadbare recitals of
4 the elements of a cause of action, supported by mere conclusory statements, do not
5 suffice." *Id.* Only a complaint that states a possible claim for relief can survive a motion
6 to dismiss. *Id.* at 679.

7 Plaintiff's claims in the complaint are predicated upon his allegations that
8 Defendants engaged in "fraud upon the court." As the United States Court of Appeals
9 for the Ninth Circuit has stated, "Fraud upon the court includes both attempts to subvert
10 the integrity of the court and fraud by an officer of the court. Furthermore, it 'must
11 involve an unconscionable plan or scheme which is designed to improperly influence
12 the court in its decision.'" *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131
13 (9th Cir. 1995) (internal citations omitted). As this court by Judge Robles has stated,
14 the focus is whether the alleged fraud harms the integrity of the judicial process.
15 *Ehrenberg v. Roussos (In re Roussos)*, 541 B.R. 721, 729 (Bankr. C.D.Cal. 2015), citing
16 *Anand v. CITIC Corp. (In re Intermagnetics Am., Inc.)*, 926 F.2d 912, 916–917 (9th Cir.
17 1991).

18 Plaintiff alleges in the complaint as follows:

19 The officers of the Court defrauded the Court. The Officer's also defrauded
20 Plaintiff by collaborating in not presenting facts in the case and benefitting the
21 Trustee to generate fees with no benefit to any unsecured creditor as the
22 evidence stands. The evidence will clearly show that the Fraud was committed
23 by Officer's of the Court. The officer's also filed False Declarations in this case.
24 Plaintiff's Attorney clearly expressed certain information through emails that now
25 Plaintiff has put this information together and is now bringing these causes of
26 action. The evidenced used to obtain decisions in this case were based on False
27 Declarations by both the Trustee and Plaintiff's Attorney and a False Declaration
28 written for Plaintiff by Plaintiff's Attorney. Plaintiff's Attorney clearly was in
collaboration with the Trustee. We may ask why did Plaintiff's Attorney Anerio
Altman cooperate with the Trustee? The answer is simple, Attorney Anerio
Altman had a 'conflict of interest', he states that he 'generates fees' for Trustees
when he works for the Trustee System (Exhibit 1). Anerio Altman also states in
an email to Plaintiff that he works for Trustee's and one of the Trustee's he has
worked with Richard Marshack is friends with the Trustee (exhibit 2) in this case

1 Wesley Avery. Attorney Anerio Altman also goes on to state that he has worked
2 for David Goodrich.

3 Complaint at 3–4.

4 Regarding what is specifically a “fraud on the court,” Plaintiff alleges:

5 Let’s keep in mind that there was a complaint filed against Plaintiff and Trustee
6 obtained the Commissions belonging to Long Beach Realty in the amount of
7 \$24,554. This is clearly a ‘Fraud on the Court.’ The Trustee misrepresented the
8 facts when he filed the complaint for Turnover of Commissions belonging to the
9 Estate. The Trustee failed to present his and his CPA stand when he wanted the
10 Commissions belonging to the Estate in the adversary Complaint. Consequently,
11 the commissions didn’t come from the Debtor but rather theses commissions
12 came from the Long Beach Realty California Corporation, of which 2 checks that
13 were written to the Long Beach Realty Corporation were signed over to the
14 Trustee. As we can clearly see, the Trustee understands the formalities,
15 however, he clearly failed to present these facts in the adversary and this would
16 be a ‘Fraud upon the Court.’

17 Complaint at 5–6. Plaintiff further alleges:

18 Also, because the Plaintiff’s Attorney didn’t present the facts that all of Plaintiff’s
19 debt was non-dischargeable and also didn’t present the fact that all unsecured
20 claims were time barred this would be considered a ‘Fraud upon the Court’
21 because Plaintiff didn’t present these facts to the Court and didn’t present
22 Plaintiff’s case. Plaintiff’s Attorney had a Conflict of Interest. Plaintiff’s Attorney
23 was notified on the following dates that all of his unsecured debts were time
24 barred, yet Plaintiff’s Attorney failed to present these facts to the Court and this
25 would be a ‘Fraud on the Court’; Jan. 31, 2016 (Exhibit 3), March 22, 2016
26 (Exhibit 3), April 1, 2016 (Exhibit 3), June 28, 2016 (Exhibit 3), October 26, 2016
27 (Exhibit 3), November 1, 2016. On March 22nd, 2016 Plaintiff told his Attorney
28 that all his debt was time barred, Attorney and Trustee were given instructions to
submit pleadings in regards to the tools of the Trade facts and conclusion and
were given instruction to rebut each others pleading by March 29th, 2016 (exhibit
4) Pg 7 lines 13-16, this was not done by Plaintiff’s Attorney. Plaintiff’s Attorney
didn’t present the fact that Plaintiff’s debt was time barred.

Complaint at 6. Plaintiff additionally alleges:

Trustee and Anerio Altman were aware that there was \$10,742 in unsecured
claims and the rest of the claims were secured (exhibit 5). Consequently,
Plaintiff’s home didn’t need to be sold because he would receive no benefit from
a Chapter 7 Bankruptcy and the ‘Fraud on the Court’ Damaged Plaintiff.

Complaint at 6–7.

None of the above allegations made by Plaintiff in the Complaint constitutes a

1 plausible claim for “fraud on the court,” that is, the allegations do not support a claim of
2 “fraud upon the court” either as an “attempt to subvert the integrity of the court” or as
3 “fraud by an officer of the court,” which “must involve an unconscionable plan or scheme
4 which is designed to improperly influence the court in its decision.” *Pumphrey v. K.W.*
5 *Thompson Tool Co.*, 62 F.3d at 1131.

6 The first specific claim of “fraud on the court” made by Plaintiff is that Defendant
7 Avery as the trustee misrepresented facts in seeking turnover of the sales commissions
8 earned by Plaintiff through Long Beach Realty. As the court previously found in this
9 bankruptcy case, Plaintiff listed some but not all of the sales commissions on
10 transactions entered into prepetition as personal property assets on his petition (i.e.,
11 \$9,500.00 as “accounts receivable”) and as “contingent interests” of \$44,303.00 on his
12 amended bankruptcy schedules filed on December 14, 2015, even though they were
13 earned through Long Beach Realty. These commissions were properly subject to the
14 trustee’s adversary proceeding seeking their turnover because the commissions were
15 prepetition assets of Plaintiff and thus assets of the bankruptcy estate in this case under
16 the trustee’s supervision because either Plaintiff was the sales agent/broker who earned
17 the commissions through Long Beach Realty or he was the 100 percent shareholder of
18 Long Beach Realty, a California Subchapter S Corporation, whose income flowed
19 through to him as the sole shareholder. *Memorandum Decision on Motions of*
20 *Defendant to Alter or Amend Judgment, or for New After Trial in Adversary Proceeding*
21 *Pursuant to Federal Rule of Bankruptcy Procedure 9023 and to Amend Findings of Fact*
22 *and Conclusions of Law Pursuant to Federal Rules of Bankruptcy Procedure 7052*, Adv.
23 No. 2:16-ap-01037-RK, Docket No. 169 at 5-8 and n. 1, Exhibit 5 to Request for Judicial
24 Notice. Thus, as a factual matter determined by the court, the trustee did not
25 misrepresent in the adversary proceeding that he was improperly seeking turnover of
26 assets belonging to another party, that is, Long Beach Realty, because the sales
27 commissions earned prepetition belonged to Plaintiff either as the sales agent/broker
28 who generated the commissions or as the sole shareholder of California S Corporation

1 whose income flowed through to him. Plaintiff's allegations of misrepresentation by
2 Defendant Avery as the trustee cannot state a plausible claim for relief as a fraud on the
3 court because the allegations taken as true do not "involve an unconscionable plan or
4 scheme which is designed to improperly influence the court in its decision" because the
5 sales commissions earned by Plaintiff prepetition were assets of the bankruptcy estate
6 subject to turnover. *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d at 1131.

7 The second specific claim of fraud on the court made by Plaintiff is that
8 Defendant Altman as his attorney failed to present facts to the court on Plaintiff's behalf
9 in this case, namely, Defendant Altman failed to present the facts about his unsecured
10 debts were time barred claims, because Defendant Altman had a conflict of interest.
11 While Plaintiff is not specific as to when Defendant Altman failed to present these
12 alleged facts to the court, apparently, Plaintiff meant the litigation in this case relating to
13 his opposition to the trustee's adversary proceeding for turnover and Plaintiff's motion to
14 convert the case to Chapter 13. Thus, Plaintiff seems to be alleging that it was a fraud
15 on the court that due to a conflict of interest, Defendant Altman failed to properly
16 present Plaintiff's case by failing to assert alleged facts that the unsecured debts were
17 time barred. However, these allegations fail to state a plausible claim for relief based on
18 a fraud on the court because Plaintiff does not allege any actionable conflict of interest
19 on the part of Defendant Altman and is not "fraud by an officer of the court," which "must
20 involve an unconscionable plan or scheme which is designed to improperly influence
21 the court in its decision." *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d at 1131.
22 Plaintiff's allegations that Defendant Altman had previously represented bankruptcy
23 trustees such as Richard Marshack and David Goodrich in other cases and that Trustee
24 Marshack and Defendant Avery are friends are insufficient to allege an actual conflict of
25 interest by Defendant Altman in representing Plaintiff in this case.

26 Moreover, the alleged fact that Plaintiff's unsecured debts are time barred claims
27 is not relevant to a defense to the trustee's turnover action as Plaintiff as the debtor in
28 this case was and is obligated to turn over assets of the bankruptcy estate, such as the

1 prepetition sales commissions earned by him, to Defendant Avery as the trustee, and is
2 not relevant as to Plaintiff's motion to convert the case to Chapter 13 as the issue there
3 was whether Plaintiff was eligible to be in Chapter 13, which the court determined he
4 was not because Plaintiff's bankruptcy schedules showed that he did not have regular
5 income to fund a Chapter 13 plan.¹ Therefore, Plaintiff's allegation that Defendant
6 Altman as Plaintiff's attorney failed to present the alleged fact that Plaintiff's unsecured
7 debts were time barred claims to the court regarding litigation matters of the trustee's
8 turnover action and of Plaintiff's motion to convert to Chapter 13 is insufficient to plead a
9 claim of "fraud by an officer of the court," which "must involve an unconscionable plan or
10 scheme which is designed to improperly influence the court in its decision." *Pumphrey*
11 *v. K.W. Thompson Tool Co.*, 62 F.3d at 1131.

12 The third specific claim of fraud on the court made by Plaintiff is that Defendant
13 Avery as the trustee and Defendant Altman as Plaintiff's attorney "were aware that there
14 was \$10,742 in unsecured claims and the rest of the claims were secured . . . and
15 Consequently, Plaintiff's home didn't need to be sold because he would receive no
16 benefit from a Chapter 7 Bankruptcy and the 'Fraud on the Court' Damaged Plaintiff."
17 These allegations do not sufficiently plead "fraud by an officer of the court," which "must
18 involve an unconscionable plan or scheme which is designed to improperly influence
19 the court in its decision." *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d at 1131. That
20 is, these allegations do not specifically allege acts by these defendants to constitute an
21 unconscionable plan or scheme by these defendants to improperly influence the court in
22 its decision.

23 Moreover, the factual circumstances of this case relating to the sale of Plaintiff's
24 residence do not indicate "an unconscionable plan or scheme which is designed to

25 ¹ It appears that Plaintiff is dissatisfied with Defendant Altman's representation in the case because his unsecured
26 debts are time barred claims, and such dissatisfaction may give rise to a malpractice claim, which Plaintiff
27 apparently has prosecuted against Defendant Altman in state court. However, Defendant Altman filed Plaintiff's
28 bankruptcy petition based on the facts known to him on October 5, 2015, which was months before the first date of
January 31, 2016 alleged in the Complaint that Defendant Altman as Plaintiff's Attorney was notified of the fact that
Plaintiff's unsecured debts were time- barred claims. Thus, it would appear that Plaintiff's malpractice claim is
problematic based on these alleged facts.

1 improperly influence the court in its decision,” *Pumphrey v. K.W. Thompson Tool Co.*,
2 62 F.3d at 1131, because the defendants were fulfilling their responsibilities in this case.
3 Plaintiff filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11
4 U.S.C., and as Chapter 7 is the liquidating chapter of the Bankruptcy Code, the trustee
5 is supposed to liquidate nonexempt assets to pay creditor claims, which was what
6 Defendant Avery as the trustee was doing in this case, and Defendant Altman was
7 representing Plaintiff as his counsel. 11 U.S.C. § 704. Defendant Avery as the trustee
8 in this case filed his motion to sell the residence on July 5, 2016 (Main Bankruptcy Case
9 Docket No. 116), and at the time, the case docket reflected that Plaintiff had scheduled
10 \$97,045.00 as general unsecured claims on his bankruptcy petition filed on October 5,
11 2015 (Main Bankruptcy Case Docket No. 1 at 9, 23–25), Discover Bank had filed proofs
12 of claim asserting general unsecured claims of \$7,562.92 and \$866.73 on December
13 29, 2015, Unify Federal Credit Union filed a proof of claim asserting a general
14 unsecured claim of \$1,916.00 on January 4, 2016 and the Internal Revenue Service
15 filed a proof of claim asserting a secured claim of \$32,926.98 and a priority unsecured
16 claim of \$765.76 on January 4, 2016. See Claims Register, Main Bankruptcy Case
17 Docket. Later, the California Franchise Tax Board filed a proof of claim asserting a
18 priority unsecured claim of \$3,976.14 and a general unsecured claim of \$1,974.00 on
19 August 19, 2016, and Discover Bank and Unify Federal Credit Union withdrew their
20 proofs of claim. *Id.* Defendant Avery as the trustee filed his motion for sale on June 16,
21 2016 (Main Bankruptcy Case Docket No. 100) after the secured creditor holding the lien
22 on Plaintiff’s residence filed a motion for relief from stay (Main Bankruptcy Case Docket
23 No. 53, filed on February 16, 2016, and hearings continued several times through July
24 2016) to undertake collection action contending that Plaintiff was delinquent 14 monthly
25 mortgage payments totaling \$14,415.29 and after Defendant Avery and Plaintiff litigated
26 Plaintiff’s claim of exemptions to the personal property real estate sales commissions
27 allowing Plaintiff to retain over \$20,000 based on his claim of personal property
28 exemptions which is inconsistent with his later claim of a homestead exemption in the

1 residence. Plaintiff filed a written opposition to the sale motion filed by Defendant Avery
2 (Main Bankruptcy Case Docket No. 116), which opposition was heard at the hearing on
3 the sale motion on July 19, 2016. The court filed and entered an order granting the sale
4 motion of Defendant Avery as trustee, and Plaintiff did not appeal the sale order. (Main
5 Bankruptcy Case Docket No. 135). These circumstances do not indicate any fraud on
6 the court as Defendant Avery acted within his reasonable business judgment to sell the
7 real property asset to realize value from the real property asset to pay creditor claims in
8 light of the general unsecured claims of \$97,045 listed by Plaintiff on his bankruptcy
9 schedules, the then filed proofs of claim of over \$10,000 in unsecured claims, the
10 threatened loss of the real property asset from foreclosure of the secured lender as
11 shown by the lender's pending stay relief motion due to Plaintiff's failure to make timely
12 mortgage payments on the property and the incurrence of administrative expense
13 claims in professional fees of counsel in litigating the trustee's turnover action and
14 objections to Plaintiff's exemption claims and as Defendant Altman as Plaintiff's attorney
15 in opposing the sale motion. Plaintiff is dissatisfied with the result of his filing his
16 bankruptcy case, apparently thinking that his unsecured debts would be discharged and
17 his real property asset, his residence, would pass through bankruptcy without liquidation
18 based on his valuation of the property showing that its value was less than the amount
19 of the liens on the property, but the market value of the property turned out to be higher
20 than he thought. This cannot be the trustee's fault nor his counsel's, and as such, this
21 does not constitute any fraud on the court. Plaintiff would have benefitted from a
22 discharge of his unsecured debts of which he scheduled a total of \$97,045 had his
23 discharge not been revoked due to his failure to disclose and turn over his real property
24 sales commission income. That not all of his scheduled creditors filed proofs of claim
25 does not necessarily mean that the debts were not owed or could have been discharged
26 as creditors apparently forewent filing proofs of claim in this case as not worth the effort.

27 Because Plaintiff has failed to allege a plausible claim of relief based on fraud on
28 the court, defendants' motion to dismiss for failure to state a claim upon which relief can

1 be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted. In
2 granting a motion to dismiss a first complaint on a Rule 12(b)(6) motion to dismiss for
3 failure to state a claim upon which relief can be granted, there is a general rule that a
4 plaintiff must be given at least one more chance to amend the complaint before the
5 action is dismissed with prejudice, though the court has the discretion to dismiss an
6 action with prejudice if any amendment of the complaint would be futile. *Reddy v. Litton*
7 *Industries, Inc.*, 912 F.2d 291, 296 (9th Cir. 1990).

8 As the Ninth Circuit stated in *National Council of La Raza v. Chagavskis*, 800
9 F.3d 1032 (9th Cir. 2015),

10 It is black-letter law that a district court must give plaintiffs at least one chance to
11 amend a deficient complaint, absent a clear showing that amendment would be
12 futile. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th
13 Cir.2003) (“Dismissal with prejudice and without leave to amend is not
14 appropriate unless it is clear on de novo review that the complaint could not be
15 saved by amendment.”); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct.
16 227, 9 L.Ed.2d 222 (1962) (“In the absence of any apparent or declared
reason—such as undue delay, bad faith or dilatory motive on the part of the
movant, repeated failure to cure deficiencies by amendments previously allowed,
undue prejudice to the opposing party by virtue of allowance of the amendment,
futility of amendment, etc.—the leave sought should, as the [Federal Rules of
Civil Procedure] require, be ‘freely given.’”).

17 *Id.* at 1041-1042.

18 “Leave to amend may also be denied for reason of undue delay, bad faith,
19 repeated failure to cure deficiencies by previous amendments allowed, futility of the
20 amendment and prejudice. (But, these reasons are rarely grounds to deny plaintiff at
21 least one opportunity to amend.) [*Foman v. Davis* (1962) 371 US 178, 182, 83 S.Ct.
22 227, 230; *Abagninin v. AMVAC Chem. Corp.* (9th Cir. 2008) 545 F3d 733, 742].”

23 Phillips and Stevenson, *Rutter Group Practice Guide: Federal Civil Procedure Before*
24 *Trial: California and Ninth Circuit Edition*, ¶ 9:294.1 (online edition April 2020 update).

25 Defendant Avery argues that the doctrines of claim preclusion (also known as res
26 judicata) and issue preclusion (also known as collateral estoppel) bar Plaintiff’s claims in
27 this adversary proceeding and the complaint should be dismissed with prejudice without
28 leave to amend. Motion at 7–16. In requesting dismissal of the complaint in this

1 adversary proceeding without leave to amend, Defendant Avery apparently argues that
2 any amendment from Plaintiff would be futile because Plaintiff is precluded from
3 asserting the same claims that he made in prior adversary proceedings and contested
4 matters which have been decided adversely to him. *Id.*

5 In discussing claim and issue preclusion, the Ninth Circuit has observed:
6 Generally, the preclusive effect of a former adjudication is referred to as “res
7 judicata.” The doctrine of res judicata includes two distinct types of preclusion,
8 claim preclusion and issue preclusion. Claim preclusion “treats a judgment, once
9 rendered, as the full measure of relief to be accorded between the same parties
10 on the same ‘claim’ or ‘cause of action.’” *Kaspar Wire Works, Inc. v. Leco Eng’g*
11 *& Mach., Inc.*, 575 F.2d 530, 535 (5th Cir.1978); *see also McClain v. Apodaca*,
12 793 F.2d 1031, 1033 (9th Cir.1986). Claim preclusion “prevents litigation of all
13 grounds for, or defenses to, recovery that were previously available to the
14 parties, regardless of whether they were asserted or determined in the prior
15 proceeding.” *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60
16 L.Ed.2d 767 (1979), *quoted in Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754
17 F.2d 1524, 1529 (9th Cir.1985).

18 *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321-322 (9th Cir. 1988).

19 Claim preclusion (or res judicata) is appropriate where: (1) the parties are identical or in
20 privity; (2) the judgment in the prior action was rendered by a court of competent
21 jurisdiction; (3) there was a final judgment on the merits; and (4) the same claim or
22 cause of action was involved in both suits. *Rein v. Providian Financial Corp.*, 270 F.3d
23 895, 899 (9th Cir. 2001), citing *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d
24 708, 713 (9th Cir.2001); *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525,
25 528–29 (9th Cir.1998). “[T]he doctrine of res judicata bars all grounds for recovery
26 which could have been asserted, whether they were or not, in a prior suit between the
27 same parties, on the same cause of action.” *Costantini v. Trans World Airlines*, 681
28 F.2d 1199, 1201 (9th Cir. 1982), quoting *Ross v. IBEW*, 634 F.2d 453, 457 (9th Cir.
1980). The factors to consider determining whether successive lawsuits involve a
single cause of action:(1) whether rights or interests established in the prior judgment
would be destroyed or impaired by prosecution of the second action; (2) whether
substantially the same evidence is presented in the two actions; (3) whether the two
suits involve infringement of the same right; and (4) whether the two suits arise out of
the same transactional nucleus of facts.

Id. at 1201-1202, citing *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980). The last
factor is most important. *Id.* at 1202.

Regarding issue preclusion, the Ninth Circuit has observed:

The doctrine of issue preclusion prevents relitigation of all “issues of fact or law
that were actually litigated and necessarily decided” in a prior proceeding. *Segal*
v. American Tel. & Tel. Co., 606 F.2d 842, 845 (9th Cir.1979), *quoted in*
Americana, 754 F.2d at 1529. “In both the offensive and defensive use situations

1 the party against whom estoppel [issue preclusion] is asserted has litigated and
2 lost in an earlier action.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99
3 S.Ct. 645, 650, 58 L.Ed.2d 552 (1979). The issue must have been “actually
4 decided” after a “full and fair opportunity” for litigation. 18 C. Wright, A. Miller & E.
5 Cooper, *Federal Practice & Procedure: Jurisdiction* § 4416, at 138 (1981)
6 [hereinafter 18 Wright].

7 *Robi v. Five Platters, Inc.*, 838 F.2d at 322.

8 “Federal law governs the collateral estoppel effect of a federal case decided by a
9 federal court.” *Fireman’s Fund Ins. Co. v. International Market Place*, 773 F.2d 1068,
10 1069 (9th Cir. 1985) citing *Blonder-Tongue Laboratories v. University of Illinois Found.*,
11 402 U.S. 313, 324 (1971). “Issue preclusion generally requires that there be: (1) the
12 same issue; (2) actually litigated and determined; (3) by a valid and final judgment; (4)
13 as to which the determination is essential to the judgment.” *In re Pine*, 283 B.R. 33, 39
14 (9th Cir. BAP 2002), citing RESTATEMENT (SECOND) OF JUDGMENTS § 27; *Robi v.*
15 *Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir.1988).

16 Defendant Avery contends that under the doctrine of res judicata (or claim
17 preclusion), the judgment in the prior adversary proceeding that Plaintiff filed against
18 him in *Gonzalez v. Avery*, No. 2:19-ap-01483-RK, bars Plaintiff from suing him in this
19 adversary proceeding because the claims in this adversary proceeding have the same
20 factual grounds as the claims in the prior adversary proceeding decided adversely to
21 Plaintiff. Motion at 12–14.

22 In that adversary proceeding, No. 2:19-ap-01483-RK, Plaintiff alleged three
23 claims for relief against Defendant Avery: (1) the first claim for relief was for breach of
24 fiduciary duty under 11 U.S.C. § 704(a)(5) on grounds that Defendant Avery, as the
25 Chapter 7 trustee, failed to object to time barred claims following the claims bar date in
26 this case; (2) the second claim for relief was for breach of fiduciary duty under 11 U.S.C.
27 § 704(a)(5) on grounds that Defendant Avery, as the Chapter 7 trustee, damaged
28 Plaintiff because Defendant Avery had no reason have sold Plaintiff’s home as
Defendant Avery breached his fiduciary duty in not objecting to time barred claims (i.e.,
as Plaintiff alleges, he was not “Bankrupt,” if time barred claims did not have to be paid
in the bankruptcy case); and (3) the third claim for relief was for declaratory relief on

1 grounds that Defendant Avery unnecessarily adjudicated Plaintiff as a “Bankrupt” and
2 that the revocation of Plaintiff’s discharge in this case was unnecessary. Complaint,
3 Adv. No. 2:19-ap-01483-RK, Exhibit 9 to Request for Judicial Notice. Defendant Avery
4 was the only party named as defendant in that adversary proceeding. *Id.*

5 On December 20, 2019, the court entered its order granting Defendant Avery’s
6 motion to dismiss that adversary proceeding 2:19-ap-01483-RK, without leave, for
7 failure to state a claim for which relief can be granted. *Order After Hearing on Motion by*
8 *the Defendant and Chapter 7 Trustee, Wesley H. Avery, for Order Dismissing Complaint*
9 *Pursuant to FRCP 12(b)(6) Without Leave to Amend Due to Lack of Subject Matter*
10 *Jurisdiction, Issue Preclusion, and Claim Preclusion*, Docket No. 16, Adv. No 2:19-ap-
11 01483-RK. The court’s order dismissing adversary proceeding 2:19-ap-01483-RK is a
12 final order, which Plaintiff had appealed from, though his appeal was later dismissed.

13 In granting Defendant Avery’s motion to dismiss Plaintiff’s prior adversary
14 proceeding against him in Adv. No. 2:19-ap-01483-RK, the court issued a tentative
15 ruling which it adopted and was incorporated in the order granting the motion. The
16 adopted tentative ruling stated in pertinent part:

17 Grant motion to dismiss for failure to state a claim upon which relief can be
18 granted under Federal Rule of Civil Procedure 12(b)(6) as follows: (1) issue
19 preclusion bars plaintiff from bringing the first cause of action that trustee
20 breached his fiduciary duty because the same issue of whether the trustee
21 breached his fiduciary duty was decided in favor of trustee when the court
22 decided that debtor was equitably estopped from claiming a homestead
23 exemption; (2) issue preclusion bars plaintiff from bringing the second cause of
24 action that trustee breached his fiduciary duty in selling the residence because
25 the same issue of whether the trustee breached his fiduciary duty was decided in
26 favor of trustee when the court decided that debtor was equitably estopped from
27 claiming a homestead exemption; (3) plaintiff fails to state a claim upon which
28 relief can be granted by alleging that trustee unnecessarily adjudicated plaintiff
as a bankruptcy [sic] because there was no such adjudication since plaintiff
became a debtor when he filed his voluntary petition for relief under Chapter 7 of
the Bankruptcy Code, 11 U.S.C. 301; (4) claim preclusion bars plaintiff from
bringing the third cause of action that trustee unnecessarily revoked plaintiff’s
because the same claim of whether plaintiff’s discharge should be revoked was
decided in favor of trustee when the court entered judgment revoking plaintiff’s
discharge. Pursuant to Federal Rule of Evidence 201, the court takes judicial
notice of decisions in trustee’s favor determining that he did not breach any
fiduciary duty and that plaintiff’s discharge should be revoked. Appearances are
required on 12/18/19, but counsel and self-represented parties may appear by

1 telephone in accordance with the court's telephone appearance procedures
2 posted online on the court's website.

3 *Order After Hearing on Motion by the Defendant and Chapter 7 Trustee, Wesley H.*
4 *Avery, for Order Dismissing Complaint Pursuant to FRCP 12(b)(6) Without Leave to*
5 *Amend Due to Lack of Subject Matter Jurisdiction, Issue Preclusion, and Claim*
6 *Preclusion*, Docket No. 16, Adv. No 2:19-ap-01483-RK, at 4–5.

7 In this ruling in this adversary proceeding of Plaintiff against Defendant Avery,
8 the court referred to its prior decision holding that Plaintiff was equitably estopped from
9 claiming a homestead exemption as the basis for issue preclusion on his claims against
10 Defendant Avery for breach of fiduciary duty. In that decision, the court specifically
11 addressed and ruled upon Plaintiff's claim that Defendant Avery breached his fiduciary
12 duty as the Chapter 7 trustee in this case regarding time-barred claims, and held that
13 there was no such breach. *Memorandum Decision Amending Prior Decisions After Trial*
14 *on Contested Matter of the Chapter 7 Trustee's Motion Objecting to the Debtor's*
15 *Claimed Homestead Exemption in Real Property Located at 329 Hawaiian Avenue,*
16 *Wilmington, CA and Ruling on Contested Matter of Chapter 7 Trustee's Motion*
17 *Objecting to Debtor's Amended Claimed Homestead Exemption on Same Property and*
18 *Tools of the Trade Exemption*, No. 2:15-bk-25283-RK, Docket No. 364 at 48–56, Exhibit
19 1 to Request for Judicial Notice. The order thereon is a final order entitled to preclusive
20 effect. *Order Amending Prior Decision Amending Prior Decisions After Trial on*
21 *Contested Matter of the Chapter 7 Trustee's Motion Objecting to the Debtor's Claimed*
22 *Homestead Exemption in Real Property Located at 329 Hawaiian Avenue, Wilmington,*
23 *CA and Ruling on Contested Matter of Chapter 7 Trustee's Motion Objecting to Debtor's*
24 *Amended Claimed Homestead Exemption on Same Property and Tools of the Trade*
25 *Exemption*, No. 2:15-bk-25283-RK, Docket No. 373, Exhibit 2 to Request for Judicial
26 Notice.

27 Also, in this ruling in the prior adversary proceeding of Plaintiff against Defendant
28 Avery, the court referred to its prior decision holding that Plaintiff's discharge was
revoked for fraud as the basis for issue preclusion on his claims against Defendant

1 Avery for breach of fiduciary duty. In that decision, the court specifically addressed and
2 ruled upon Plaintiff's claim that Defendant Avery breached his fiduciary duty as the
3 Chapter 7 trustee in this case regarding time-barred claims, and held that there was no
4 such breach. *Findings of Fact and Conclusions of Law After Trial on (1) the Sixth Claim*
5 *for Relief in the Complaint to Revoke the Debtor's Discharge for Fraud under 11 U.S.C.*
6 *§ 727(d)(1); and (2) the Seventh Claim for Relief in the Complaint to Revoke the*
7 *Debtor's Discharge for Fraudulent Acquisition of Estate Assets under 11 U.S.C. §*
8 *727(d)(2), Adv. No. 2:16-ap-01037-RK, Docket No. 123 at 43-46, Exhibit 3 to Request*
9 *for Judicial Notice. The order thereon is a final order entitled to preclusive effect.*
10 *Judgment for Plaintiff and Chapter 7 Trustee, Wesley H. Avery Against Defendant and*
11 *Debtor, Arturo Gonzalez, an Individual, dba Long Beach Realty, Inc., dba South Bay*
12 *Realty; dba Mindset, aka Art Gonzalez; aka Art Gonzalez, Jr., After Trial on (1) the Sixth*
13 *Claim for Relief in the Complaint to Revoke the Debtor's Discharge for Fraud under 11*
14 *U.S.C. § 727(d)(1); and (2) the Seventh Claim for Relief in the Complaint to Revoke the*
15 *Debtor's Discharge for Fraudulent Acquisition of Estate Assets under 11 U.S.C. §*
16 *727(d)(2), Adv. No. 2:16-ap-01037-RK, Docket No. 129, Exhibit 4 to Request for*
17 *Judicial Notice.*

18 In other litigation between Plaintiff against Defendant Avery, that is, Defendant
19 Avery's adversary proceeding against Plaintiff in Adv. No. 2:16-ap-01037-RK, the
20 parties litigated, and the court addressed, the claim of Plaintiff that the court's decision
21 in that adversary proceeding was erroneous and should be amended or altered on
22 grounds that income from the real estate sales commissions belonged to Long Beach
23 Realty, Inc., Plaintiff's wholly owned California S corporation, as a separate legal entity,
24 and that it was thus error for the court to have granted relief to Defendant Avery as the
25 trustee to revoke Plaintiff's bankruptcy discharge for Plaintiff's failure to report and
26 deliver this income to Defendant Avery as the trustee. *Memorandum Decision on*
27 *Motions of Defendant to Alter or Amend Judgment, or for New After Trial in Adversary*
28 *Proceeding Pursuant to Federal Rule of Bankruptcy Procedure 9023 and to Amend*

1 *Findings of Fact and Conclusions of Law Pursuant to Federal Rules of Bankruptcy*
2 *Procedure 7052*, Adv. No. 2:16-ap-01037-RK, Docket No. 169 at 5-8 and n. 1, Exhibit 5
3 to Request for Judicial Notice. In that decision, the court specifically addressed and
4 ruled upon Plaintiff's claim that judgment in favor of Defendant Avery revoking his
5 discharge was in error on grounds that the income of Long Beach Realty, Inc., was not
6 attributable to him because Plaintiff had earned the sales commissions as the
7 participating real estate broker and sales agent for generating the commissions,
8 whether directly payable from escrow or indirectly through Long Beach Realty, Inc., his
9 wholly owned and controlled California S corporation. *Id.* The order thereon is a final
10 order entitled to preclusive effect, although Plaintiff had taken an appeal, which was
11 later dismissed. *Order Denying Motions of Defendant to Alter or Amend Judgment, or*
12 *for New After Trial in Adversary Proceeding Pursuant to Federal Rule of Bankruptcy*
13 *Procedure 9023 and to Amend Findings of Fact and Conclusions of Law Pursuant to*
14 *Federal Rules of Bankruptcy Procedure 7052*, Adv. No. 2:16-ap-01037-RK, Docket No.
15 170.

16 In the pending adversary proceeding, Adv. No. 2:20-ap-01647-RK, Plaintiff
17 alleged four claims for relief against Defendant Avery: (1) the first claim for relief was
18 for declaratory relief based on "fraud on the court" on grounds that Defendant Avery, as
19 the Chapter 7 trustee, and Defendant Altman, as Plaintiff's bankruptcy attorney, took
20 actions which were a "fraud on the court" which were as described above: (a) Defendant
21 Avery misrepresented the facts when he filed the complaint for turnover of sales
22 commissions earned by Plaintiff as they were earned through Long Beach Realty, Inc.;
23 and (b) Defendant Avery and Defendant Altman knew that Plaintiff's home was being
24 unnecessarily sold because there was only about \$10,000 in filed unsecured claims to
25 be paid in this case as the other filed unsecured claims were time-barred; (2) the
26 second claim for relief was for declaratory relief that the bankruptcy case and the court's
27 turnover judgment be vacated on grounds that the actions of Defendant Avery, as the
28 Chapter 7 trustee, described above constituted a "fraud on the court"; (3) the third claim

1 for relief was for damages on grounds that the actions of Defendant Avery described
2 above were a “fraud on the court” resulting in the unnecessary sale of Plaintiff’s home;
3 and (4) the fifth claim for relief was for declaratory relief that the bankruptcy case and
4 the court’s turnover judgment be vacated on grounds that the actions of Defendant
5 Avery, as the Chapter 7 trustee, described above constituted a “fraud on the court” (this
6 claim for relief appears to be redundant of the second claim for relief). Complaint, Adv.
7 No. 2:20-ap-01647-RK, Exhibit 15 to Request for Judicial Notice.

8 Claim preclusion (or res judicata) bars Plaintiff from suing Plaintiff again in this
9 adversary proceeding because (1) the parties are identical in this adversary proceeding
10 as in Plaintiff’s prior adversary proceeding against Defendant Avery in Adv. No. 2:19-ap-
11 01483-RK; (2) the judgment in the prior action, Adv. No. 2:19-ap-01483-RK, was
12 rendered by this court as a court of competent jurisdiction; (3) there was a final
13 judgment on the merits in the prior action, Adv. No. 2:19-ap-01483-RK; and (4) the
14 same claim or cause of action was involved in both suits. *Rein v. Providian Financial*
15 *Corp.*, 270 F.3d at 899. Because “the doctrine of res judicata bars all grounds for
16 recovery which could have been asserted, whether they were or not, in a prior suit
17 between the same parties, on the same cause of action,” *Costantini v. Trans World*
18 *Airlines*, 681 F.2d at 1201, Plaintiff could have sued Defendant Avery in the prior action
19 for “fraud on the court” as “breach of fiduciary duty” as he did not. As previously noted,
20 the factors to consider determining whether successive lawsuits involve a single cause
21 of action:

22 (1) whether rights or interests established in the prior judgment would be
23 destroyed or impaired by prosecution of the second action; (2) whether
24 substantially the same evidence is presented in the two actions; (3)
whether the two suits involve infringement of the same right; and (4)
whether the two suits arise out of the same transactional nucleus of facts.

25 *Id.* at 1201-1202, citing *Harris v. Jacobs*, 621 F.2d at 343. In both actions, Plaintiff is
26 asserting the same claims arising out of the same transactional nucleus of facts that
27 Defendant Avery should not have taken actions to administer this bankruptcy case as
28 the Chapter 7 trustee, such as selling Plaintiff’s residence, an asset of the bankruptcy

1 estate, or have brought actions for turnover of Plaintiff's sales commissions, also assets
2 of the bankruptcy estate, or instituted an adversary proceeding to revoke Plaintiff's
3 discharge based on Plaintiff's failure to report and deliver the sales commissions to
4 Defendant Avery, which matters have been litigated to finality.

5 Collateral estoppel or issue preclusion also bars Plaintiff from suing Defendant
6 Avery again in this adversary proceeding regarding the lack of objections to time-barred
7 claims, the sale of Plaintiff's residence and the characterization of the sales
8 commissions earned through Long Beach Realty, Inc., as: (1) these issues are the
9 same issues previously litigated as discussed above; (2) actually litigated and
10 determined in such prior litigation; (3) by valid and final judgments as discussed above;
11 (4) as to which the determination is essential to the judgment as discussed above. *In re*
12 *Pine*, 283 B.R. at 39. As discussed above, the parties litigated, and the court
13 determined, in Plaintiff's prior adversary proceeding against Defendant Avery that
14 Defendant Avery did not breach his fiduciary duty in not objecting to time-barred claims
15 and selling Plaintiff's residence, and in Defendant Avery's prior adversary proceeding
16 against Plaintiff that there was no error in attributing the income earned from sales
17 commissions through Long Beach Realty, Inc., to Plaintiff.

18 Accordingly, the court grants Defendant Avery's motion to dismiss this adversary
19 proceeding without leave to amend due to futility because Plaintiff is asserting claims
20 and issues barred by claim and issue preclusion as Plaintiff is seeking to relitigate his
21 same grievances relating to time barred claims, the sale of the residence and the real
22 estate sales commissions against Defendant Avery, which are matters already litigated
23 to finality.

24 In the pending adversary proceeding, Adv. No. 2:20-ap-01647-RK, Plaintiff
25 alleged four claims for relief against Defendant Altman: (1) the first claim for relief was
26 for declaratory relief based on "fraud on the court" on grounds that Defendant Avery, as
27 the Chapter 7 trustee, and Defendant Altman, as Plaintiff's bankruptcy attorney, took
28 actions which were a "fraud on the court" which were as described above: (a) Defendant

1 Avery misrepresented the facts when he filed the complaint for turnover of sales
2 commissions earned by Plaintiff as they were earned through Long Beach Realty, Inc.;
3 and (b) Defendant Avery and Defendant Altman knew that Plaintiff's home was being
4 unnecessarily sold because there was only about \$10,000 in filed unsecured claims to
5 be paid in this case as the other filed unsecured claims were time-barred; and (2) the
6 fourth claim for relief was for damages on grounds that the actions of Defendant Avery
7 described above were a "fraud on the court" resulting in the unnecessary sale of
8 Plaintiff's home. Complaint, Adv. No. 2:20-ap-01647-RK, Exhibit 15 to Request for
9 Judicial Notice.

10 Plaintiff's claims against Defendant Altman as Plaintiff's former attorney are that
11 the bankruptcy case should not have been filed, the bankruptcy case should be
12 vacated, and Defendant Altman owes Plaintiff damages for the filing of this bankruptcy
13 case. Defendant Altman argues in his joinder in Defendant Avery's motion to dismiss
14 that "[i]nstead of making any showing of fraud on the court, plaintiff seems to have
15 written a complaint for legal malpractice." Docket No. 10 at 2. The court agrees that
16 Plaintiff's claims against Defendant Altman that Defendant Altman failed to present
17 certain facts to the court and had an alleged conflict of interest, having represented
18 other trustees on other cases, are insufficient to plead a claim for relief based on fraud
19 on the court as discussed previously and that Plaintiff's claims based on the theory that
20 the bankruptcy case should not have been filed are legal malpractice claims against
21 Defendant Altman. Accordingly, Plaintiff's claims against Defendant Altman for fraud
22 on the court are not plausible and fail to state a claim upon relief can be granted.

23 Defendant Altman's joinder to Defendant Avery's motion to dismiss stated that
24 since Plaintiff's state court malpractice action against him was dismissed with prejudice,
25 the motion to dismiss as to him should be granted based on collateral estoppel. Docket
26 No. 10 at 2-3. In footnote 1 of the joinder, Defendant Altman indicated there is a
27 pending motion for reconsideration of the state court's order sustaining the demurrer of
28 the Plaintiff's first amended complaint related to the malpractice claim, and a hearing

1 was set on this motion for January 25, 2021. Because the state court malpractice
2 action is still pending on Plaintiff's motion for reconsideration, this court cannot make a
3 determination, at this time, as to collateral estoppel (or issue preclusion) regarding any
4 malpractice claim that the bankruptcy case was improperly filed.

5 A bankruptcy court gives a state court judgment the same preclusive effect as
6 would another court of that state. *Marrese v. American Academy of Orthopaedic*
7 *Surgeons*, 470 U.S. 373, 380 (1985). Thus, California preclusion law applies here
8 because the claimed judgment on Plaintiff's malpractice claim against Defendant
9 Altman is a state court judgment.

10 Regarding California preclusion law, the California Supreme Court has stated:
11 "The law of preclusion helps ensure that a dispute resolved in one case is not relitigated
12 in a later case." *Smara v. Matar*, 5 Cal.5th 322, 326 (2018) (citations omitted).

13 Claim preclusion applies only when 'a second suit involves (1) the same
14 cause of action (2) between the same parties [or their privies] (3) after a
15 final judgment on the merits in the first suit.' Issue preclusion, by contrast,
16 prevents 'relitigation of previously decided issues,' rather than causes of
17 action as a whole. It applies only '(1) after final adjudication (2) of an
18 identical issue (3) actually litigated and necessarily decided in the first suit
19 and (4) asserted against one who was a party in the first suit or one in
20 privity with that party.'

21 *Id.* at 327 (internal citations omitted). Both claim preclusion and issue preclusion under
22 California law require a final decision. "[I]n California the rule is that the finality required
23 to invoke the preclusive bar of res judicata is not achieved until an appeal from the trial
24 court judgment has been exhausted or the time to appeal has expired. *Franklin &*
25 *Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal.App.4th 1168, 1174 (2000),
26 *citing, Producers Dairy Delivery Co. v. Sentry Insurance Co.*, 41 Cal.3d 903, 910–911
27 (1986) "For res judicata purposes, the judgment sought to be invoked in bar must be
28 the 'last word' of the rendering court—a 'final' judgment." *Id.*, *citing and quoting,*
Sandoval v. Superior Court, 140 Cal.App.3d 932, 936 (1983) (internal quotation marks
omitted). Since the state court malpractice action is still pending, the court cannot
make a determination based on claim or issue preclusion as requested by Defendant

1 Altman.

2 Additionally, to the extent that Plaintiff has any claim for relief against Defendant
3 Altman that the bankruptcy case was improperly filed, it is a state law claim for legal
4 malpractice, and this court should abstain from ruling on such claim. Such a claim that
5 Defendant Altman failed to perform his duties as Plaintiff's lawyer are based on
6 allegations of malpractice which is purely a state law claim which does not affect the
7 administration of the bankruptcy estate, but to vindicate Plaintiff's personal rights
8 against a nondebtor party based on nonbankruptcy state law. Because Plaintiff's
9 malpractice claim is based in state law, this court will abstain from ruling on any
10 malpractice issues to allow these issues to be resolved in state court where Plaintiff
11 already has pending litigation against Defendant Altman for legal malpractice. See 28
12 U.S.C. § 1334(c)(1) and (2); *In re Eastport Associates*, 935 F.2d 1071, 1078 (9th Cir.
13 1991) (predominance of state law issues should weigh in favor of abstention under 28
14 U.S.C. § 1334). Accordingly, the court dismisses Plaintiff's claims against Defendant
15 Altman based on fraud on the court for failure to state a claim upon which relief can be
16 granted, and the dismissal of such claims are with prejudice and without leave to amend
17 based on abstention as such claims may be cognizable as state law legal malpractice
18 claims for which Plaintiff is already maintaining an action in state court.

19 As noted previously, Plaintiff did not file a written response or opposition to the
20 motion to dismiss pursuant to Local Bankruptcy Rule 9013-1(f). Local Bankruptcy Rule
21 9013-1(f)(1) provides that "each interested party opposing or responding to the motion
22 must file and serve the response (Response) on the moving party and the United States
23 trustee no later than 14 days before the date designated for the hearing," and Local
24 Bankruptcy Rule 9013-1(f)(2) provides that "[a] Response must be a complete written
25 statement of all reasons in opposition thereto or in support, declarations and copies of
26 all evidence on which the responding party intends to rely, and any responding
27 memorandum of points and authorities." Local Bankruptcy Rule 9013-1(f)(3) also
28 provides that "[t]he failure of the responding party to raise its objection or challenge in a

1 Response will be deemed consent to the bankruptcy court's authority to enter a final
2 order on the underlying motion." Local Bankruptcy Rule 9013-1(h) further provides that
3 "if a party does not timely file and serve documents, the court may deem this to be
4 consent to the granting or denial of the motion, as the case may be." Since Plaintiff did
5 not file a response or opposition to the motion, the court may deem that Plaintiff
6 consented to the relief requested in the motion. Accordingly, this is an alternative basis
7 for granting the motion to dismiss.

8 On November 25, 2020, Plaintiff filed a document entitled "Summons Service
9 Executed. Note: Plaintiff has a need to amend complaint and plaintiff will submit a
10 motion to amend, plaintiff has spent hours upon hours looking through the record and
11 evidence and listening to CD's from the case, some of the CD's have malfunctioned and
12 need to be remade." Docket No. 11. This court does not consider this document to be
13 a proper response to the motion to dismiss within the meaning of Local Bankruptcy Rule
14 9013-1(f) because it was not a complete written statement of all reasons in opposition to
15 the motion with copies of all evidence on which Plaintiff intended to rely and a
16 responding memorandum of points and authorities.

17 The day before the hearing on the motion to dismiss, on December 14, 2021,
18 Plaintiff filed a request for a continuance of the motion to dismiss which the court
19 denied. See Docket Nos. 12 and 15. Also, on that same day, Plaintiff also filed a
20 motion for leave to amend the complaint stating that he needed to clarify his allegations
21 relating to "fraud on the court" relating to the real estate sales commissions. Docket No.
22 13. This document was not a timely response to the motion to dismiss under Local
23 Bankruptcy Rule 9013-1(f), and is not a proper motion to amend a pleading because a
24 copy of the proposed amended pleading was not attached as an exhibit to the notice of
25 motion to amend a pleading as required by Local Bankruptcy Rule 7015-1. In any
26 event, Plaintiff in the motion to amend did not detail any new claims in this document
27 other than referring again to "fraud on the court" relating to the real estate sales
28 commissions.

1 Since Plaintiff failed to oppose the motion to dismiss, the court also deems the
2 lack of opposition a consent to enter a final order adverse to Plaintiff as the party not
3 filing a timely written opposition to the motion pursuant to Local Bankruptcy Rule 9013-
4 1(f) and (h).

5 Accordingly, for the foregoing reasons, the court grants the motion to dismiss the
6 adversary proceeding with prejudice and without leave to amend, and a final order
7 granting the motion will be filed and entered concurrently herewith.

8 IT IS SO ORDERED.

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24 Date: March 4, 2021



Robert Kwan
United States Bankruptcy Judge