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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Sol Jaffe,

9 Plaintiff,

10 v.

11 Cardworks Servicing, LLC,

12 Defendant.

No. CV12-1058-PHX-DGC

ORDER

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15 Defendant Cardworks Servicing, LLC filed a motion to dismiss Plaintiff Sol
16 Jaffe's complaint on the grounds of *res judicata* and failure to state a claim. Doc. 8.
17 Plaintiff filed a motion to strike Cardworks' motion to dismiss, which the Court will
18 construe as Plaintiff's response (Doc. 11), and Cardworks filed a reply (Doc. 12). The
19 Court will grant Cardworks' motion and dismiss the complaint with prejudice.

20 "Res judicata bars relitigation of all grounds of recovery that were asserted, or
21 could have been asserted, in a previous action between the parties, where the previous
22 action was resolved on the merits." *United States ex rel. Barajas v. Northrup Corp.*, 147
23 F.3d 905, 909 (9th Cir. 1998). A dismissal for failure to state a claim constitutes a ruling
24 on the merits for *res judicata* purposes. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956
25 (9th Cir. 2002).

26 Plaintiff previously filed an action against multiple defendants alleging
27 substantially the same violations of the Fair Debt Collection Practices Act, 15 USC
28 § 1662, ("FDCPA"), gross negligence, and intentional infliction of physical and

1 emotional distress as those alleged in this case. *Compare* No. 2:11-cv-01839-NVW,
2 Doc. 1, ¶¶ 25-34; 35-38; 39-42 *with* Doc. 1, ¶¶ 4-13; 14-18; 19-21. Judge Neil V. Wake
3 screened the complaint and dismissed it for failure to state a claim and improper joinder
4 of defendants. *See* No. 2:11-cv-01839-NVW, Doc. 24. Judge Wake gave Plaintiff leave
5 to amend as to one defendant and provided detailed guidance on how Plaintiff could cure
6 the pleading deficiencies in his complaint. *Id.* Plaintiff failed to file an amended
7 complaint, and, pursuant to Judge Wake’s order, the Clerk entered final judgment for the
8 defendants and against Plaintiff on December 9, 2011. *Id.*, Doc. 43, 44.¹

9 Subsequent to this dismissal, Plaintiff filed substantially the same action in
10 Maricopa County Superior Court. Doc. 8-1 at 26-38. Superior Court Judge John Rea
11 dismissed the complaint with prejudice on May 11, 2012, on the grounds of *res judicata*
12 and failure to state a claim. Doc. 8-1 at 41.

13 Plaintiff argues that *res judicata* does not apply to this case because Cardworks
14 was not a party to the case before Judge Wake and the state case – to which Cardworks
15 was a party – was wrongly decided, and it applied state standards of *res judicata* that do
16 not apply here. Plaintiff also argues that he has raised different claims than those raised
17 in the state case. Doc. 11 at 1, ¶ 1, 3, ¶ 1.

18 Although Cardworks was not named as a party in the first complaint, *res judicata*
19 applies where “privity between parties” exists. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe*
20 *Reg’l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). Privity is met when a party
21 is “so identified in interest with a party to former litigation that he represents precisely
22 the same right in respect to the subject matter involved.” *In re Schimmels*, 127 F.3d 875,
23 881 (9th Cir. 1997). Plaintiff’s first complaint alleged that all defendants engaged in
24 unlawful credit reporting and debt-collection practices – the same allegations made here.
25 One of these defendants was Merrick Bank Corporation (“Merrick”), and Plaintiff

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27 ¹ Judge Wake denied Plaintiff’s motion to proceed *in forma pauperis* on appeal on
28 the grounds that an appeal in lieu of amendment is frivolous, and Plaintiff’s appeal was
not taken in good faith. No. 2:11-cv-01839-NVW, Doc. 43 at 2.

1 acknowledged in his second complaint that Merrick and Cardworks are related
2 companies. Doc. 8-1, ¶ 17(D). Cardworks argues, and Plaintiff does not dispute, that it
3 serviced the debt that Plaintiff alleged he did not owe to Merrick, and that the two
4 companies are thus in privity as to Plaintiff's claims. Doc. 12 at 4.

5 Even if Cardworks is not in privity with Merrick for purposes of the first
6 complaint, Plaintiff clearly named Cardworks as a defendant in his state complaint.
7 Doc. 8-1. Plaintiff's claims in the state complaint rested on the same allegations of
8 wrongful credit reporting and debt collection that served as the basis for his claims in the
9 first complaint and that Plaintiff now alleges for the third time. *Compare* Doc. 8-1, ¶
10 17(C)&(D) *with* Doc. 1, ¶¶ 7-12. The fact that Judge Rea applied state *res judicata*
11 standards to determine that the claims in that complaint were precluded is immaterial to
12 whether Judge Rea's final judgment is entitled to preclusive effect here. The case was
13 resolved on the merits as *res judicata* requires. Moreover, Judge Rea found, as Judge
14 Wake had, that Plaintiff failed to state a claim as to any defendant. Doc. 8-1 at 41.
15 Plaintiff's disagreement with Judge Rea's decision does not entitle him to ignore the
16 effect of that judgment on this third attempt to bring the same or similar claims.

17 Plaintiff's argument that he has raised claims here that he did not raise in the prior
18 complaints also lacks merit. Identity of claims exists when two suits "arise from the
19 same transactional nucleus of facts." *Owens v. Kaiser Found. Health Plan, Inc.*, 244
20 F.3d 708, 714 (9th Cir. 2001) (internal quotation marks and citation omitted). Although
21 Plaintiff's allegations in this case are somewhat vague and conclusory, Plaintiff does not
22 point to any new facts raised here that he did not raise in his first two complaints.
23 Moreover, whether Plaintiff previously brought the same claims against Cardworks on
24 the basis of these facts is immaterial because *res judicata* applies both to claims that were
25 brought and those that could have been brought. *See, e.g., United States ex rel. Barajas*,
26 147 F.3d 905, 909 (9th Cir. 1998). Plaintiff's claims are therefore precluded, and leave to
27 amend would be futile.

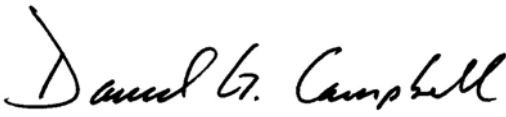
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IT IS ORDERED:

1. Defendant's motion to dismiss (Doc. 8) is **granted**.
2. Plaintiff's motion to strike (Doc. 11) is **denied** and his complaint (Doc. 1) is **dismissed** with prejudice.
3. The Clerk of the Court is directed to **terminate** this matter.

Dated this 19th day of September, 2012.



David G. Campbell
United States District Judge