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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IRVIN REYES,

 Plaintiff,

 v.

KAISER PERMANENTE,

 Defendant.

No. 2:19-cv-02289-KJM-CKD PS

FINDINGS AND RECOMMENDATIONS
(ECF Nos. 34 & 36)

Presently before the court is plaintiff’s response to the court’s order to show cause why this action should not be dismissed as barred by the doctrine of res judicata.¹ (ECF Nos. 34, 36.) Having considered the record and the arguments in plaintiff’s response, the undersigned concludes that this action is indeed barred by res judicata, and therefore recommends dismissing the case with prejudice against the last remaining defendant, Kaiser Permanente.

BACKGROUND²

From 1988 to 2012, plaintiff worked for the healthcare company Kaiser Permanente at Kaiser’s South Sacramento location. (ECF No. 19 at 22, 38, 42.) In 2009, plaintiff had his

¹ Plaintiff is proceeding pro se, and this action is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21).
² Unless otherwise noted, these facts are drawn from the First Amended Complaint (“FAC”) and its attachments (ECF No. 19), as well as court records from plaintiff’s previous cases, which are

1 gallbladder removed in an operation performed at Kaiser Foundation Hospital. (Id. at 76.) In 2012,
2 plaintiff injured his eye and his knee in separate incidents while working. (E.D. Cal. No. 2:18-cv-
3 622, ECF No. 19 at 36.) In June 2012, plaintiff’s private romantic relationship with a co-worker
4 was exposed, and the co-worker told the human resources department that plaintiff was harassing
5 her; after an investigation, plaintiff’s employment was terminated. (Id. at 35-36.) Plaintiff later
6 applied for unemployment benefits but was denied because he had been discharged for misconduct.
7 (ECF No. 19 at 38-39.) After a December 2012 hearing where both plaintiff and Kaiser appeared,
8 plaintiff’s unemployment benefits appeal was also denied. (Id. at 57-58.)

9 **A. The State Court Action**

10 On May 21, 2013, plaintiff—through counsel—sued Kaiser in Sacramento County Superior
11 Court. (See E.D. Cal. No. 2:18-cv-622, ECF No. 19 at 6-25.) Plaintiff’s first amended complaint
12 filed in October 2013 alleged that his termination was motivated by gender discrimination in the
13 investigation of the unfounded harassment complaint, disability discrimination based on his work
14 injuries, and retaliation for engaging in protected activities including having reported Kaiser to the
15 California Medical Board for the allegedly negligent removal of his gallbladder. (Id. at 36-37.)
16 Plaintiff asserted several state-law claims, including claims for “wrongful termination in violation
17 of public policy,” gender/race/disability discrimination, and retaliation. (Id. at 37-51.) On
18 February 6, 2014, the state court dismissed the entire action with prejudice, as requested by plaintiff
19 through his attorney. (Id. at 60.)

20 **B. The 622 Federal Court Action**

21 In March 2018, plaintiff filed his first federal action against Kaiser, Reyes v. Kaiser
22 Permanente, No. 2:18-cv-622-TLN-EFB-PS (E.D. Cal.) (“the 622 action”). The complaint in the
23 622 action was, like the FAC in the present action, largely devoid of factual allegations, but there
24 too plaintiff attached numerous documents—most of which have also been attached to the FAC in
25 _____
26 properly subject to judicial notice. Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012); Hunt v.
27 Check Recovery Sys. Inc., 478 F. Supp. 2d 1157, 1160-61 (N.D. Cal. 2007) (judicial notice may
28 be taken of court records and pleadings). The court disregards the substantially identical
purported Second Amended Complaint filed on November 4, 2020 without the court’s permission
(ECF No. 35). See Fed. R. Civ. P. 15(a)(2) (requiring leave of court to file further amended
pleadings).

1 this action. In the 622 action, Magistrate Judge Brennan discerned from the attachments that
2 plaintiff's complaint there arose out of the termination of plaintiff's employment with Kaiser; and,
3 because plaintiff had previously voluntarily dismissed with prejudice the prior state court action
4 against Kaiser, the 622 action was dismissed with prejudice as barred by res judicata. Reyes v.
5 Kaiser Permanente, 2018 WL 4732152, at *1, *4 (E.D. Cal. Oct. 2, 2018), report and
6 recommendation adopted, 2018 WL 10716542 (E.D. Cal. Nov. 30, 2018), aff'd, 782 F. App'x 605
7 (9th Cir. 2019), cert. denied, No. 19-8405, 2020 WL 5882510 (U.S. Oct. 5, 2020).

8 **C. The Instant Action**

9 Less than one month after the Ninth Circuit affirmed the dismissal of the 622 action,
10 plaintiff filed the present suit against Kaiser on November 11, 2019. (ECF No. 1.) For several
11 months, plaintiff attempted to serve Kaiser and the other two named defendants but consistently
12 failed to do so in a manner that complied with Federal Rule of Civil Procedure 4. (ECF Nos. 11,
13 13, 16, 17.) The court allowed plaintiff several chances to effectuate proper service, and in a
14 May 22, 2020 order, directed plaintiff once more to properly serve all defendants within 30 days.
15 (ECF No. 18.) Instead, on June 1, 2020, plaintiff filed a First Amended Complaint ("FAC"). (ECF
16 No. 19.) The 159 pages of documents comprising the FAC are scattered and somewhat difficult to
17 follow. Dispersed amongst them are a few completed pages of this district's form civil complaint
18 for pro se parties, with the current case number written across the top. (Id. at 5-6, 8-9, 12.) Plaintiff
19 asserts as the basis for federal jurisdiction: "Unemployment Hearing and my wrongful termination
20 from Kaiser Permanente." (Id. at 12.) The Statement of Claim section is not included, but in the
21 section for Relief, plaintiff states:

22 For my wrong surgery from Kaiser they remove my healthy gall
23 bladder and gave me a second surgery. I am still suffering because
24 of my 2 wrong surgery and my eye and my wrongful termination in
violation of public policy from Kaiser and my unemployment
finances.

25 (Id. at 9 (certain punctuation and capitalization corrected).) The FAC does not specify what
26 damages or other relief plaintiff seeks.

27 Kaiser has yet to appear in this action or respond to either the FAC or the initial complaint,
28 likely because plaintiff still has not properly served Kaiser despite the court's repeated

1 admonishments. On September 21, 2020, the other two defendants—plaintiff’s former union and
2 a union representative—moved to dismiss the claims against them for improper service and failure
3 to state a claim. (ECF Nos. 26-28.)

4 On November 3, 2020, the undersigned ordered plaintiff to show cause why his claims
5 against Kaiser should not be dismissed *sua sponte* as barred by res judicata, and simultaneously
6 recommended that plaintiff’s claims against the other two defendants be dismissed for failure to
7 state a claim. (ECF No. 34.) The undersigned explained the res judicata doctrine and the court’s
8 preliminary understanding of how it would apply here. (Id. at 8-9.) On December 1, 2020, plaintiff
9 filed his response to the show cause order (ECF No. 36), and on December 15, 2020, the district
10 judge dismissed the claims against the other two defendants and referred the case back to the
11 undersigned (ECF No. 37). Having reviewed plaintiff’s response, the court now concludes that all
12 claims asserted against Kaiser should be dismissed with prejudice under the doctrine of res judicata.

13 **LEGAL STANDARDS**

14 As plaintiff was informed in the 622 action and again in the previous show cause order, the
15 doctrine of res judicata—a subset of which is known as claim preclusion—bars a plaintiff from
16 asserting “claims that were, or should have been, advanced in a previous suit involving the same
17 parties.” DKN Holdings LLC v. Faerber, 61 Cal. 4th 813, 824 (2015); see Brodheim v. Cry, 584
18 F.3d 1262, 1268 (9th Cir. 2009) (where previous judgment was entered in state court, federal courts
19 must apply the preclusion law of the rendering state). Claim preclusion arises if a subsequent suit
20 involves: “(1) the same cause of action (2) between the same parties (3) after a final judgment on
21 the merits in the first suit.” DKN Holdings, 61 Cal. 4th at 824. Under California law, courts assess
22 whether a subsequent suit involves the same “cause of action” by analyzing “the primary right at
23 stake.” San Diego Police Officers’ Ass’n v. San Diego City Employees’ Ret. Sys., 568 F.3d 725,
24 734 (9th Cir. 2009) (quoting Le Parc Cmty. Ass’n v. Workers’ Comp. Appeals Bd., 110 Cal. App.
25 4th 1161, 1170 (Ct. App. 2003)). “[I]f two actions involve the same injury to the plaintiff and the
26 same wrong by the defendant then the same primary right is at stake even if in the second suit the
27 plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts
28 supporting recovery.” Id. (quoting Eichman v. Fotomat Corp., 147 Cal. App. 3d 1170, 1174 (Ct.

1 App. 1983)). The focus of the analysis is on “the rights which are sought to be vindicated and the
2 harm for which redress is claimed.” Dunkin v. Boskey, 82 Cal. App. 4th 171, 182 (Ct. App. 2000).

3 “[I]f a court is on notice that it has previously decided the issue presented, the court may
4 dismiss the action *sua sponte*, even though the [preclusion] defense has not been raised,” Arizona
5 v. California, 530 U.S. 392, 416 (2000), provided that the parties have an opportunity to be heard
6 prior to dismissal. Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1054-55 (9th Cir. 2005).
7 “As a general matter, a court may, *sua sponte*, dismiss a case on preclusion grounds ‘where the
8 records of that court show that a previous action covering the same subject matter and parties had
9 been dismissed.’” Id. at 1054-55 (quoting Evarts v. W. Metal Finishing Co., 253 F.2d 637, 639 n.1
10 (9th Cir. 1958)).

11 **DISCUSSION**

12 Having considered the arguments raised in plaintiff’s response to the show cause order, the
13 undersigned concludes that the present action is barred, as all elements of claim preclusion are
14 satisfied.

15 Beginning with the clearest of the three prongs, first, there is no dispute that the state court
16 case was between the same two parties now left standing in this action.³ Second, the state court
17 action was resolved through a final judgment on the merits by virtue of plaintiff’s voluntary
18 dismissal of the action, with prejudice. See Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788,
19 793 (2010) (for purposes of res judicata, voluntary dismissal with prejudice is a final judgment on
20 the merits). Plaintiff argues that he does not know whether or how his state court case was resolved,
21 stating that if it was concluded, it was dismissed by his legal counsel. (ECF No. 36 at 3-4.) As
22 Magistrate Judge Brennan previously found, public court records show the state court granted
23 plaintiff’s request to voluntarily dismiss that case “with prejudice.” (E.D. Cal. No. 2:18-cv-622,

24
25 ³ The state court action named “Kaiser Foundation Hospitals” as the defendant, whereas here
26 plaintiff names “Kaiser Permanente” like he did in the 622 action. In responding to the complaint
27 in the 622 action, Kaiser averred that it was incorrectly sued as “Kaiser Permanente” when the
28 proper corporate entity is Kaiser Foundation Hospitals, Inc. (No. 2:18-cv-622, ECF No. 10 at 2.)
It is clear from the record that plaintiff brought the instant action, the 622 action, and the state court
action against the same entity: his former employer, Kaiser Foundation Hospitals. And plaintiff
makes no argument to the contrary.

1 ECF Nos. 19 at 60 & 27 at 6.) Notwithstanding plaintiff’s suggestion that his state court case is
2 not binding because it “was not properly litigated” or because he did not personally request the
3 dismissal (ECF No. 36 at 3-4), the state court’s entry of the dismissal order requested by plaintiff’s
4 duly appointed legal representative constitutes a final judgment on the merits for purposes of res
5 judicata. See Boeken, 48 Cal. 4th at 793.

6 Third, although it is difficult to ascertain precisely what legal claims plaintiff asserts in the
7 present action, the undersigned is confident that the FAC involves the same “primary right at stake”
8 in the state court action (and in the 622 action). See San Diego Police Officers’ Ass’n, 568 F.3d
9 at 734. Plaintiff’s brief statement requesting relief for his “wrongful termination in violation of
10 public policy” mirrors the identical claim asserted in both of his previous two cases. (Compare
11 ECF No. 19 at 9, with No. 2:18-cv-622, ECF Nos. 1 at 3 & 19 at 10.) Nearly all the documents
12 attached to his complaint in the 622 action are also attached to the FAC here. The overlapping
13 attachments include proof of plaintiff’s employment record with Kaiser (ECF No. 19 at 22-33),
14 medical records from his 2009 gallbladder surgery (id. at 76-81), pictures of and letters regarding
15 the former co-workers allegedly involved in his termination (id. at 88-99), and documents related
16 to his charges of discrimination with the Equal Employment Opportunity Commission and the
17 California Department of Fair Employment and Housing (id. at 124-26, 133-36).

18 The new documents attached to the FAC relate to plaintiff’s 2012 appeal of his post-
19 termination claim for unemployment benefits, which were denied because he was discharged for
20 workplace misconduct. (ECF No. 19 at 38-46, 57-67, 72-74.) And plaintiff seeks some form of
21 relief for his “unemployment finances.” (Id. at 9.) It is unclear what claim plaintiff is attempting
22 to assert against Kaiser related to the state’s denial of unemployment benefits, but the attachments
23 to the FAC indicate that plaintiff argued to the unemployment appeals board that Kaiser
24 discriminated against him “and continues to do so by contesting his unemployment,” and that
25 “Kaiser lied at [his] unemployment hearing.” (Id. at 61, 67.) Even construing the FAC as asserting
26 a Title VII retaliation claim based on Kaiser’s opposition to plaintiff’s pursuit of unemployment
27 benefits, see Bryant v. Covina-Valley Unified Sch. Dist., 2018 WL 6016924, at *3-4 (C.D. Cal.
28 Jan. 10, 2018) (noting that Title VII antiretaliation provisions extend to post-employment actions),

1 such a claim could and should have been raised in plaintiff's prior state court action where he
2 challenged Kaiser's other allegedly retaliatory conduct during the same time period. See Villacres
3 v. ABM Indus. Inc., 189 Cal. App. 4th 562, 576 (Cal. Ct. App. 2010) ("If the matter was within the
4 scope of the action, related to the subject matter and relevant to the issues, so that it could have
5 been raised, the judgment is conclusive on it." (internal quotation omitted)). In his response to the
6 show cause order, plaintiff argues that his state court counsel did not add "the unemployment issue"
7 to his state complaint despite saying that he would. (ECF No. 36 at 2.) This confirms that the
8 unemployment benefits claim arose prior to or during the state court litigation. Plaintiff apparently
9 has filed an ethics complaint against his state court counsel (id. at 3); but however inadequate his
10 representation may have been in that litigation, it does not change the finality of that suit's dismissal
11 which now bars this subsequent suit.

12 The only other claims detectable in the FAC arise from the "wrong" surgeries allegedly
13 performed on plaintiff at a Kaiser location. (ECF No. 19 at 9.) Plaintiff refers to the 2009 removal
14 of his healthy gall bladder and a "second surgery" "which caused [him] to be disabled and unable
15 to work." (Id.; ECF No. 36 at 5.) Plaintiff's response to the show cause order describes this as a
16 claim for "medical malpractice." (ECF No. 36 at 5.) As Judge Brennan noted in recommending
17 dismissal of the 622 action where plaintiff also included documents related to his gallbladder
18 surgery, any medical malpractice claims against Kaiser for surgeries which preceded his 2012
19 termination are barred by the statute of limitations. (No. 2:18-cv-622, ECF No. 27 at 6-7); see Cal.
20 Civ. Proc. Code § 340.5 (3 years from date of injury, or 1 year after discovery of injury). Moreover,
21 plaintiff's workplace injuries and the resulting surgeries undergirded the disability discrimination
22 claims asserted in the state court action. (No. 2:18-cv-622, ECF No. 19 at 9, 19-21.) Thus, any
23 medical malpractice claims asserted here attempt to vindicate the same primary right, thus
24 constituting the same cause of action under California law. See Villacres, 189 Cal. App. 4th at 576;
25 Dunkin, 82 Cal. App. 4th at 182.

26 Plaintiff argues that the present suit is not barred because the issues across the suits are not
27 "identical." (ECF No. 36 at 5.) But, literal identity of claims is not the standard. "[A] judgment
28 for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the

1 same right, even though [s]he presents a different legal ground for relief.” Boeken, 48 Cal. 4th at
2 798 (quotation omitted). All of plaintiff’s claims here seek redress for having been terminated
3 unjustly, the same harm for which he has sought—and been denied—redress in two prior lawsuits.

4 Thus, the undersigned adopts the same conclusion reached in the 622 action: that the
5 present lawsuit is barred by res judicata and likewise should be dismissed with prejudice. Having
6 heard plaintiff’s arguments in opposition, it is within the court’s authority to *sua sponte* dismiss
7 this precluded action, and the undersigned recommends doing so. See Daniels v. Sherman,
8 No. 1:16-CV-01312-LJO-EPG-PC, 2018 WL 1840193 (E.D. Cal. Apr. 18, 2018) (recommending
9 sua sponte dismissal under res judicata, after providing pro se plaintiff opportunity to respond to
10 show cause order), aff’d, 749 F. App’x 616 (9th Cir. 2019).

11 **CONCLUSION**

12 All of plaintiff’s claims against Kaiser are barred as res judicata, and the action should
13 therefore be dismissed in its entirety, as Kaiser is the last remaining defendant. Any amended
14 complaint that plaintiff could bring would be barred by res judicata as well, rendering amendment
15 futile. Therefore, dismissal should be without leave to amend. Hartmann v. CDCR, 707 F.3d
16 1114, 1130 (9th Cir. 2013) (“A district court may deny leave to amend when amendment would
17 be futile.”).

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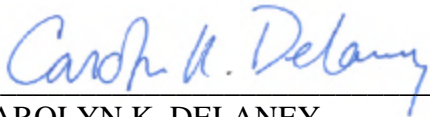
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Accordingly, it is HEREBY RECOMMENDED that this action be dismissed with prejudice, and the case closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served on all parties and filed with the court within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

Dated: December 17, 2020



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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