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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

BARNEY PERRY/PERRYAL MUSIC
COMPANY,

Plaintiffs,

vs.

FANTASY RECORDS, SAUL ZAENTZ
COMPANY and PAUL ZAENTZ,

Defendants.

Case No: C 13-1158 SBA

**ORDER GRANTING
MOTION TO DISMISS**

Docket 14

The instant action is the latest attempt by pro se Plaintiff Barney Perry (“Perry”) to recover royalties and damages for alleged copyright infringement arising out of his relationship in the 1970’s with the musical group called The Blackbyrds. Perry has previously litigated two nearly identical actions in this district, with both suits resulting in judgment being entered against him. The parties are presently before the Court on Defendants’¹ motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. 14. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS Defendants’ motion, for the reasons stated below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

¹ The named Defendants are Fantasy Records (“Fantasy Records”), Saul Zaentz Company (“Zaentz Company”) and Paul Zaentz (“Zaentz”) (collectively, “Defendants”).

1 **I. BACKGROUND**

2 **A. Underlying Dispute**

3 Perry was a member of a musical group called The Blackbyrds during the 1970's.
4 See Defs.' Request for Judicial Notice ("RJN"), Exh. A ¶ 2.² Donald Byrd was the
5 President of Black Byrd Productions, Inc. ("Black Byrd Productions"), which provided
6 financial support and promotional services for The Blackbyrds. Id. ¶¶ 3-4. On October 1,
7 1973, Perry, along with others, entered into an "Exclusive Artist's Recording Agreement"
8 ("Recording Agreement") and an "Exclusive Songwriter's and Composer's Agreement"
9 ("Songwriter's Agreement") with Black Byrd Productions. Id. ¶ 1. Under the terms of the
10 Songwriter's Agreement, Perry, for good and valuable consideration, assigned and
11 transferred all of his rights, title and interest, including copyrights and renewals and
12 extensions thereof, in any musical composition written, composed or created by him to
13 Black Byrd Productions. Id.

14 Also on October 1, 1973, Black Byrd Productions entered into an exclusive
15 production agreement with Fantasy Record Company (i.e., Fantasy Records), whereby
16 Black Byrd Productions agreed to produce and deliver "commercially satisfactory" master
17 recordings of The Blackbyrds' musical performances. Defs.' RJN, Exh. A ¶ 5. On
18 September 1, 1974, Black Byrd Productions advised Fantasy Records that Perry was an
19 exclusive songwriter for Black Byrd Productions. Id. ¶ 6. On October 6, 1974, Perry
20 confirmed this in writing to Fantasy Records. Id.

21 In a letter dated December 13, 1974, Perry informed Black Byrd Productions by
22 letter that he wished to terminate his contractual relationship with the production company.

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24 ² Defendants request the Court take judicial notice of judicial opinions and other
25 court records. See Defs.' RJN, Exhs. A-I. In ruling on a motion to dismiss, a federal court
26 may take judicial notice of matters of public record, including the existence of proceedings
27 and records issued by other federal courts, state courts, and administrative agencies,
28 without converting the motion into a motion for summary judgment. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); see Bennett v. Medtronic, Inc., 285 F.3d 801, 803 n. 2 (9th Cir. 2002) (noting that a district court "'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'"). Accordingly, Defendants' request for judicial notice is GRANTED.

1 See Defs.’ RJN, Exh. A ¶ 9. In his termination letter, Perry asserted that he was the rightful
2 copyright owner of two musical compositions: “A Hot Day Today” and “Walking in
3 Rhythm” (hereinafter, “the musical compositions”). Id. As a consequence of Perry’s
4 assertion, he was advised that he would no longer receive royalties with respect to the
5 musical compositions until his claim of copyright ownership was resolved. Id. ¶ 10.

6 **B. Prior Actions**

7 Black Byrd Productions and other interested parties commenced suit against Perry in
8 the Eastern District of Virginia in order to settle the question of who is the rightful
9 copyright owner of the musical compositions. In an order dated February 28, 1977, the
10 court found that Black Byrd Productions is the copyright owner of the musical
11 compositions. See Defs.’ RJN, Exh. A. However, the court also found that Perry remained
12 entitled to his portion of songwriter and artist royalties under the Recording Agreement and
13 the Songwriter’s Agreement. Id.

14 On September 1, 1977, Perry and Black Byrd Productions entered into a settlement
15 agreement and release. See Defs.’ RJN, Exh. E. The agreement provided Perry with
16 \$18,400 “as full and final accord and satisfaction of all royalties and other sums due Perry
17 from Black Byrd Productions under both the Recording Agreement and the Songwriter
18 Agreement from the inception thereof to and including December 31, 1976.” Id.

19 In October 1994, Perry attempted to relitigate the Virginia court’s ruling as to
20 ownership of the musical compositions in the Southern District of New York. See Defs.’
21 RJN, Exh. E. The court dismissed Perry’s action on the ground that he had not established
22 ownership or registration of the copyrights at issue, and on the ground that the previous
23 action in Virginia precluded his copyright claim against Black Byrd Productions. Id.

24 In October 1995, this Court presided over an action filed by Perry against Fantasy
25 Records, Paul Zaentz, and the Saul Zaentz Company concerning the musical compositions.
26 See Defs.’ RJN, Exh. C. Among the thirteen claims for relief, Perry claimed conspiracy
27 and legal malice, sedition against the Virginia court, fraud, intentional breach and
28 misrepresentation, defamation, conversion, and copyright fraud. Id. On August 5, 1997,

1 summary judgment was granted in favor of the Defendants. Id. In granting summary
2 judgment, this Court found that: (1) Perry had failed to demonstrate that he owned the
3 copyrights to the musical compositions; (2) the doctrine of res judicata precluded Perry
4 from relitigating the issue of copyright ownership; (3) Perry had failed to demonstrate that
5 the Defendants owed him any royalties; (4) the Virginia court's order pertaining to royalty
6 payments is directed to Black Byrd Productions and not to any Defendant named in the
7 suit; (5) Perry had failed to allege fraud on the court during the Virginia litigation with
8 sufficient particularity to warrant relief pursuant to Federal Rule of Civil Procedure 60(b);
9 and (6) Perry had failed to adequately plead defamation. Id. On appeal, the Ninth Circuit
10 affirmed the Court's summary judgment order. Defs.' RJN, Exh. D.

11 In October 2003, Perry and Perryal Music Publishing Co. commenced suit in this
12 district against Fantasy Records, Paul Zaentz, and the Saul Zaentz Company. See Defs.'
13 RJN, Exh. E. In that action, Plaintiffs' alleged claims for: (1) copyright infringement; (2)
14 copyright ownership of the musical compositions; (3) failure to pay royalties; (4) fraud on
15 the Virginia court committed by the Defendants for failure to pay royalties; (5) contempt of
16 court committed by the Defendants for failure to comply with the settlement and judgment
17 of the Virginia court; and (6) conspiracy to commit fraud on the court and fraudulent
18 inducement to commit copyright fraud. Id. On May 5, 2004, Judge White dismissed the
19 action under the doctrine of res judicata, finding that all of the issues raised in the operative
20 complaint were considered and rejected in Perry's previous lawsuits. Id. On appeal, the
21 Ninth Circuit affirmed Judge White's dismissal order. See Defs.' RJN, Exh. F.

22 **II. DISCUSSION**

23 Defendants move to dismiss the complaint without leave to amend under Rule
24 12(b)(6). Defendants contend that dismissal with prejudice is warranted because the claims
25 alleged in the complaint are barred by the doctrine of res judicata. The Court agrees.

26 A defendant may raise the affirmative defense of res judicata by way of a motion to
27 dismiss under Rule 12(b)(6). See Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984).
28 Federal law controls the question of the preclusive effect of a prior federal action.

1 McQuillion v. Schwarzenegger, 369 F.3d 1091, 1096 (9th Cir. 2004). Res judicata, or
2 claim preclusion, bars any lawsuits on any claims that were raised or could have been
3 raised in a prior action. Providence Health Plan v. McDowell, 361 F.3d 1243, 1249 (9th
4 Cir. 2004). The doctrine of res judicata applies if there is (1) an identity of claims³; (2) a
5 final judgment on the merits; and (3) identity or privity between parties. FTC v. Garvey,
6 383 F.3d 891, 897 (9th Cir. 2004). “The application of this doctrine is central to the
7 purpose for which civil courts have been established, the conclusive resolution of disputes
8 within their jurisdiction. Moreover, a rule precluding parties from the contestation of
9 matters already fully and fairly litigated conserves judicial resources and fosters reliance on
10 judicial action by minimizing the possibility of inconsistent decisions.” Tahoe-Sierra
11 Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1077 (9th
12 Cir. 2003) (quotation marks omitted).

13 Here, although the complaint does not clearly elucidate the claims Plaintiffs assert in
14 this action, it is evident that Plaintiffs seek the same relief that was sought in the two
15 previous lawsuits filed by Perry against Defendants in this district; namely, royalties and
16 damages arising from Defendants’ alleged copyright infringement of the musical
17 compositions. Plaintiffs have previously filed suit in this district against the same
18 Defendants arising out of the same facts. The issues Plaintiffs raise in their complaint have
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23 ³ The Ninth Circuit determines the identity of claims by applying the following
24 criteria:

- 25 (1) whether rights or interest established in the prior judgment would be
26 destroyed or impaired by prosecution of the second action; whether
27 substantially the same evidence is presented in two actions; (3) whether the
28 two suits involve infringement of the same right; and (4) whether the two
suits arise out of the same transactional nucleus of facts.

Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-1202 (9th Cir.1982). The last of
these criteria is the most important. Id.

1 already been litigated.⁴ A final judgment on the merits was entered in favor of Defendants
2 and against Perry by this Court in 1997, and a final judgment on the merits was entered in
3 favor of Defendants and against Plaintiffs by Judge White in 2004. These orders addressed
4 all of the issues Plaintiffs raise in their complaint.⁵ As such, there are no remaining issues
5 before this Court that have not been fully and fairly litigated between the parties.
6 Accordingly, Plaintiffs are barred from litigating the claims alleged in the complaint under
7 the doctrine of res judicata. Therefore, Defendants' motion to dismiss is GRANTED
8 without leave to amend.


9 **III. CONCLUSION**

10 For the reasons stated above, IT IS HEREBY ORDERED THAT:

- 11 1. Defendants' motion to dismiss is GRANTED without leave to amend.
- 12 2. The Clerk shall close the file and terminate all pending matters.

13 IT IS SO ORDERED.

14 Dated: 2/13/2014

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16 SAUNDRA BROWN ARMSTRONG
17 United States District Judge

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24 ⁴ To the extent Plaintiffs' complaint could be construed as alleging claims that were
25 not addressed in previous lawsuits, such claims are nonetheless barred because they could
26 have been litigated in those actions. See *Allen*, 449 U.S. at 94 ("Under res judicata, a final
27 judgment on the merits of an action precludes the parties or their privies from relitigating
28 issues that were or *could have been raised* in that action.") (emphasis added).

⁵ Plaintiffs have filed a motion for leave to file "The Perfected Amended Complaint
with Copyright Confirmation Document." Dkt. 62. However, a review of this document
reveals that Plaintiffs do not seek to assert any claim that is not barred by the doctrine of res
judicata. As such, Plaintiffs' motion is DENIED.