

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	
SILVANO VIAL and MARISA VIAL,)	Bankruptcy Case
)	No. 96-31748DM
Debtors.)	Chapter 7
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SILVANO VIAL, an individual;)	Adversary Proceeding
MARISA ARMANINO-VIAL, an)	No. 98-3456DM
individual,)	
)	
Plaintiffs,)	
v.)	
COLDWELL BANKER, INC., a)	
California corporation;)	
JIM McCAHON, an individual;)	
and DOES 1 through 100, inclusive,)	
Defendants.)	
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MEMORANDUM DECISION

I. INTRODUCTION

A hearing was held on September 1, 2000 on the motion for summary judgment filed by Coldwell Banker, Inc. ("Coldwell Banker") and Jim McCahon ("McCahon" and, collectively with Coldwell Banker, "defendants"). Joseph W. Carcione, Jr., Esq. and Gary W. Dolinski Esq. appeared for plaintiffs Silvano Vial and Marisa Armanino-Vial

1 ("Debtors"). Victoria B. Naidorf, Esq. appeared for defendants.
2 issue is whether this present adversary proceeding for
3 misrepresentation and emotional distress related claims by Debtors
4 against defendants is barred as *res judicata* by this court's earli
5 fee award to defendants entered over Debtors' objection on grounds
6 misrepresentation. For the reasons set forth below, the court
7 concludes that this action is barred by the doctrine of *res judica*
8 and grants defendants' motion for summary judgment.

9 II. FACTS¹

10 A. The Prior "Suit"

11 Debtors filed for relief under Chapter 13 of the Bankruptcy C
12 on April 25, 1996. The case was converted to Chapter 11 on July 2
13 1996, with Debtors acting as debtors in possession. On January 14
14 1997, Debtors entered into an "Exclusive Listing Agreement" whereb
15 defendants would receive a 6% commission upon the sale of Debtors'
16 residence at 84 Euclid Avenue, Atherton, California (the "Residenc
17 the list price was \$1.695 million. This court approved the
18 appointment of defendants as Debtors' real estate broker on Februa
19 18, 1997, but prohibited defendants from representing any buyer in
20 sale. Debtors accepted an offer naming "Jim Baskin or nominee" as
21 buyer for \$1.6 million on March 24, 1997, and this court approved
22 sale on April 28, 1997 to Baskin's nominees, Mr. and Mrs. Phelps.
23 Debtors claim they showed the Residence to Mr. Baskin on behalf of
24 Phelps prior to signing the listing agreement.

25 On May 8, 1997, Debtors sought to disqualify defendants as th
26 agents on grounds of misrepresentation by filing a "Declaration of

27 _____
28 ¹ The following discussion constitutes the court's findings of
fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 Maria and Silvano Vial to Disqualify Coldwell Banker as Agent to [
2 Sale of Vial Property at 84 Euclid Ave. Athercon CA." Following a
3 status conference on the same date, this court entered a supplement
4 order on May 15, 1997, ordering that the brokerage commission
5 otherwise due upon closing be withheld and placed in an interest
6 bearing "Commission Account," pending a future hearing set for Jun
7 26, 1997 under Bankruptcy Code § 330².

8 On May 29, 1997, pursuant to the May 15, 1997 order, defendan
9 filed a Motion for an Order To Enforce Court Approved Payment of R
10 Estate Commission and Order Distribution of Escrow Funds to Coldwe
11 Banker. On July 21, 1997, Debtors filed an opposition and sought
12 disqualify defendants as their broker on grounds that (1) defendan
13 effectively represented the buyers in the transaction in violation
14 this court's order of February 18, 1997, (2) defendants dissuaded
15 other buyers by misleading them as to the location and status of t
16 Residence, (3) defendants misrepresented the buyers' identity and
17 intent to purchase the Residence as a "spec home,"(4) defendants
18 breached an oral agreement to exclude commissions on a sale to a p
19 potential purchaser, and (5) defendants breached their fiduciary d
20 by failing to disclose their pre-existing relationship with the
21 buyers. A section 330 hearing was held on July 25, 1997, and this
22 court approved the commission of \$96,000 plus accrued interest,
23 holding that (1) defendants did not make misrepresentations to
24 Debtors, (2) there was insufficient evidence that defendants

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26

27 ² Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
and all rule references are to the Federal Rules of Bankruptcy
Procedure.

1 discouraged other buyers, and (3) Debtors failed to prove an agree
2 to exclude prior potential purchasers.

3 B. The Present Suit

4 On April 28, 1998, Debtors filed suit in the Superior Court,
5 State of California, County of San Mateo against defendants for br
6 of fiduciary duty, intentional misrepresentation, negligent
7 misrepresentation, fraudulent concealment, false promise, intentio
8 infliction of emotional distress, negligent infliction of emotiona
9 distress, and loss of consortium. Debtors claim these causes of ac
10 arose in connection with the sale of the Residence because (1)
11 defendants did not act exclusively for Debtors but instead also
12 represented the buyers under the transaction; (2) defendants
13 discouraged other potential buyers; (3) defendants did not disclos
14 the identity of Mr. Baskin's nominees, Mr. and Mrs. Phelps; (4)
15 defendants concealed that Baskin was a real estate developer; (5)
16 defendants breached an oral agreement not to seek a commission if
17 Residence were sold to a prior potential buyer; and (6) defendants
18 breached a promise to exercise diligence in obtaining the best
19 possible price.

20 On December 2, 1998, defendants removed the state court
21 proceeding to this court as an adversary proceeding.³ Defendants
22 filed a motion for summary judgment on June 28, 2000, claiming tha
23 this suit is barred as res judicata. On July 17, 2000, Debtors fi
24 a motion for leave to amend their complaint. A hearing was held o
25 September 1, 2000, at which time the court notified the parties of
26

27 ³On August 31, 1999, the underlying bankruptcy case was
28 dismissed, but this court (with the consent of the parties) retain
jurisdiction to conclude this adversary proceeding.

1 recent decision, Osherow v. Earnst & Young LLP (In re Intelogic Tr
2 Inc.), 200 F.3d 82 (5th Cir. 2000), and gave them opportunity to
3 submit letter briefs concerning the case by September 15, 2000, wh
4 they did.

5 The court would grant Debtors leave to amend their complaint
6 if the motion for summary judgment is denied; thus, the following
7 analysis will assume that Debtors' complaint is so amended.

8 III. DISCUSSION

9 Generally, once a claim is presented for adjudication and a v:
10 and final judgment is rendered on the merits, the litigants and th
11 privies are thereafter barred from re-litigating the same claim,
12 including matters which could and should have been litigated in th
13 first suit. See, e.g., Allen v. McCurry, 449 U.S. 90, 94, 101 S.C
14 411, 414 (1980) ("[u]nder res judicata, a final judgment on the me
15 of an action precludes the parties or their privies from relitigat
16 issues that were or could have been raised in that action");
17 Commissioner v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719 (1948
18 ("when a court of competent jurisdiction has entered a final judgm
19 on the merits of a cause of action, the parties to the suit and th
20 privies are thereafter bound 'not only as to every matter which wa
21 offered and received to sustain or defeat the claim or demand, but
22 to any other admissible matter which might have been offered for t
23 purpose'"), quoting Cromwell v. County of Sac., 94 U.S. 351, 352
24 (1876).

25 Here, in the prior section 330 hearing during Debtors' Chapte:
26 case, Debtors raised claims of misrepresentation and breach of ora
27 contract in connection with defendants' conduct in their capacity
28 sales agent and broker for the sale of the Residence. This court,

1 having proper jurisdiction under 28 U.S.C. § 1334, made a valid and
2 final ruling on Debtors' claims. Debtors' instant suit seeks relief
3 against the same defendants and arises out of the same transaction
4 namely, the sale of the Residence. The only real issue is whether
5 Debtors' instant claims could and should have been raised in the prior
6 section 330 hearing.

7 A. The Prior Section 330 Hearing Was a Proper and Effective
8 Forum for Asserting Debtors' Claims.

9 Debtors claim that the prior section 330 hearing was an improper
10 forum for raising the claims sought here because it was a contested
11 matter under Rule 9014 where, unlike adversary proceedings,
12 counterclaims cannot be raised. Hence, Debtors argue that the matters
13 raised here are not ones that "could and should have been litigated
14 the first suit." Debtors' argument is unpersuasive.

15 To be an effective forum for res judicata purposes, the forum
16 must have provided the claimant with "a [full and] fair opportunity
17 procedurally, substantively and evidentially to pursue his claim" in
18 the prior suit. Blonder-Tongue Labs v. University of Ill. Foundat
19 402 U.S. 313, 333 (1971), quoting Eisel v. Columbia Packing Co., 1
20 F. Supp. 298, 301 (D.Mass. 1960). In the highly analogous Osherow
21 case, the court held that a debtor's failure to object⁴ to its
22 accountants' fees for bankruptcy-related services in a section 330
23 hearing barred the debtor from subsequently asserting in an adversary
24 proceeding a malpractice claim arising from the same services. See

26 ⁴ The debtor in Osherow apparently decided not to object at the
27 fee hearing because (1) it did not want the bankruptcy court to be
28 aware of problems with the reorganization plan and (2) it wanted to
use its concerns to negotiate a reduced fee. See Osherow, 200 F.3
384-85.

1 Osherow, 200 F.3d at 384-91. The court found that a fee hearing
2 provided an "effective forum for [the debtor] to present its
3 [malpractice] claims" against its accountants and management
4 consultants. Id. at 390. In concluding that section 330 hearings
5 provide adequate opportunity to raise and litigate such claims, the
6 court noted that (1) Rule 3007 converts an objection to a claim in
7 an adversary proceeding if the objection is joined with a demand for
8 relief under Rule 7001, (2) Rule 9014 permits the bankruptcy court
9 any stage in a contested matter to direct that one or more rules in
10 Part VII of the Rules (which incorporate several portions of the
11 Federal Rules of Civil Procedure) apply, and (3) the bankruptcy court
12 has power to stay a fee hearing and permit time for discovery and
13 development. See id.

14 Debtors argue that Osherow should be distinguished and limited
15 its particular facts, citing the following paragraph of the decision:

16 The particular facts of this case direct our decision: the
17 [debtor]'s general awareness of the background facts
18 underlying the present claims before the fee hearing, the
19 [debtor]'s having realized the real possibility of a link
20 between its flawed numbers and [its accountant]'s services,
21 the [debtor]'s deliberate choice not to voice its concerns
22 regarding the quality of services at the fee hearing, and
23 the bankruptcy court's order awarding fees to [debtor's
24 accountants].

25 Id. at 391 (footnote omitted).

26 Debtors omit an important footnote to this passage:
27 We do not suggest that the absence of such factors would
28 preclude giving res judicata effect to a prior court
judgment awarding recovery for personal professional
service; we speak here only to the context of a bankruptcy
court contested matter order, where in our view some level
of actual or constructive awareness on the part of the
party sought to be so barred by the order properly carries
a greater significance than it might in other contexts.

Id. at 391 n.6.

1 Debtors claim that, unlike the debtors in Osherow, they did not
2 make a deliberate choice not to voice objections at the fee hearing.
3 As noted by the omitted footnote, however, the deliberate choice not
4 to object at the fee hearing was not the sine qua non of the Osherow
5 decision. Read properly, the self-imposed limitation of the Osherow
6 opinion is a confinement to a bankruptcy court contested matter where
7 the party to be barred had actual or constructive awareness of the
8 grounds for an objection. Specifically, the Osherow debtor's actual
9 or constructive knowledge of the grounds for an objection brought the
10 matter into the category claims that it "should and could have raised
11 at the hearing. Similarly, Debtors were on sufficient notice to raise
12 an objection, as evidenced by a declaration filed May 8, 1997, where
13 they declared, among other things:

14 On the day of signing of escrow..., we find out that the buyer
15 was not the buyer we had been led to believe, but was in fact the
16 same person who had been shown the same property "prior" to the
17 listing agreement. We had been told misrepresenting facts all along;
18 we were lied about [¶]...who the buyer was [¶]...[and] what the
19 intention of the purchase of the property was[.]
20 ...[McCahon] misrepresented to induce [sic] our assent and omitted
21 material facts. He knew that if true facts were known they would
22 have altered the transaction in question...[and] we would have
23 behaved differently. ...[T]here was misrepresentation: concealment,
24 conflict of interest, concealment of important material facts and
25 relevant information, [and] undue influence...."

26 Declaration of Maria and Silvano Vial to Disqualify Coldwell Banker
27 Agent to Sale of Vial Property at 84 Euclid Ave. Atherton CA. p. 2

28 B. The Applicable Definition of "Claim" Is the Transactional
Definition.

Debtors argue that they assert a different claim here than the
claim asserted in the prior hearing. Debtors argue that the "primary
rights" definition of "claim" should be applied instead of the
transactional definition, citing International Evangelical Church

1 the Soldiers of the Cross of Christ v. Church of the Soldiers of t
2 Cross of Christ, 54 F.3d 587, 591 (9th Cir. 1995). Under that
3 definition, Debtors argue, their claims for infliction of emotiona
4 distress, loss of consortium, and other claims constitute a violat
5 of a different primary right. Debtors are mistaken; the standard
6 applicable here is the transactional definition and Debtors' insta
7 claims constitute the same claims asserted in the prior hearing
8 because they both arise from the same transaction **nn** the sale of t
9 Residence and defendants' alleged conduct as their broker.

10 Courts have differed in defining what constitutes a "claim" fo
11 res judicata purposes. California courts have adopted the so-call
12 "primary rights" definition, holding that a claim consists of all
13 effects and consequences of a violation of a single primary right,
14 having regard primarily to the harm suffered by the claimant. See
15 Branson v. Sun-diamond Growers, 24 Cal.App.4th 327, 341 n. 6, 29
16 Cal.Rptr.2d 314, 321 n. 6 (Cal.Ct.App. 1994); Takahashi v. Board
17 Trustees of Livingston Union School District, 783 F.2d 848, 851 (9
18 Cir. 1986) (applying California res judicata law to find that prio
19 California state court proceeding barred instant federal civil rig
20 action); Argarwal v. Johnson, 25 Cal.3d 932, 955, 160 Cal.Rptr. 14
21 155 (Cal. 1979). Other courts and the Second Restatement of Judgm
22 have adopted the transactional definition, holding that a claim
23 consists of all legal rights arising from a single transaction or
24 occurrence, having regard to whether (1) the facts are related in
25 time, place, origin, or motivation, (2) the facts form a convenien
26 trial unit, and (3) treatment of the facts as a unit conforms to t
27 parties' expectations or business understandings or usage. See
28 Restatement of Judgments 2d (A.L.I. 1982) § 24; Container Transpor

1 Internat'l, Inc. v. U.S., 468 F.2d 926, 928-29 (Ct. Cl. 1972); Mil
2 v. U.S., 438 F. Supp. 514, 521-22 (E.D. Pa. 1977); Rush v. City of
3 Maple Heights, 167 Ohio St. 221, 235, 147 N.E.2d 599, 607 (Ohio 19

4 The Supreme Court has held that federal courts must apply federa
5 res judicata law in defining the preclusive effect of prior federa
6 question federal court decisions. See Blonder-Tongue Labs, 402 U.
7 at 324 n. 12; Heiser v. Woodruff, 327 U.S. 726, 733, 66 S.Ct. 853,
8 (1946); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 290-91,
9 S.Ct. 252, 259 (1906); 18 Charles Alan Wright, Arthur R. Miller &
10 Edward H. Cooper, Federal Practice and Procedure § 4466, pp. 617-1
11 (2d ed. 1996). Such a rule is sound because, as noted by the Supr
12 Court, it prevents the dilution of federal adjudicative power over
13 federal questions:

14 [A] right claimed under the Federal Constitution, finally
15 adjudicated in the federal courts, can never be taken away
16 or impaired by state decisions. ...Any other conclusion
17 strikes down the very foundation of the doctrine of res
18 judicata, and permits the state court to deprive a party of
19 the benefit of its most important principles, and is a
20 virtual abandonment of the final power of the Federal
21 courts to protect all who come before them relying upon
22 rights guaranteed by the Federal Constitution and
23 established by the judgments of the Federal courts.

24 Deposit Bank v. Frankfort, 191 U.S. 499, 517-20, 24 S.Ct. 154, 160
25 (1903).⁵

26 When defining the preclusive effect of prior federal question
27 rulings, federal courts have adopted some form of a transactional
28 definition of "claim." See, e.g., American Standard, Inc. v. Cran
Co., 60 F.R.D. 35, 41 (S.D.N.Y. 1973) ("all claims which [one] cou
reasonably foresee could arise out of the same transaction"); Lamb

27 ⁵Although the rights asserted here are not constitutional, the
28 quoted passage is nevertheless representative of all rights under
federal law, viz. Bankruptcy Code §330.

1 v. Conrad, 536 F.2d 1183, 1186 (7th Cir. 1976) (claims which "pert
2 to the same disputed facts and arise out of the same operative
3 facts"); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 4
4 (3d Cir. 1950) (*res judicata* invoked where "acts complained of and
5 demand for recovery are the same...[and t]he only thing that is
6 different is the theory of recovery"), cert. denied, 341 U.S. 921;
7 Coggins v. Carpenter, 468 F.Supp 270, 280 (E.D.Pa. 1979) (the same
8 "liability creating conduct"). Indeed, federal courts have used
9 transactional definitions when defining the preclusive effect of a
10 prior bankruptcy ruling. See, e.g., In re A. Musto Co. v. Satran,
11 F. Supp. 1172, 1176 (D. Mass. 1979) ("whether the facts underlying
12 claims are identical"); Osherow, 200 F.3d at 386 ("we apply the
13 transactional test of the Restatement (Second) of Judgments").
14 Accordingly, the applicable standard here is the transactional
15 definition of "claim." Debtors' reference to the International
16 Evangelical Church case is misplaced because the prior suit in
17 International Evangelical Church was a California state court
18 proceeding, not a federal question federal court proceeding. See
19 International Evangelical Church, 54 F.3d at 588.

20 C. Debtors' Proposed Amendments to Their Complaint Do Not
21 Raise a New Claim.

22 Debtors claim that their proposed amendments to their complaint
23 defeat application of the res judicata doctrine. Specifically, they
24 propose to add (1) a factual allegation that they did not learn of
25 McCahon's preexisting business relationship with the purchasers until
26 after this court's July 25, 1997 ruling that defendants are entitled
27 to their commission, and (2) a new cause of action for fraudulent
28 inducement of contract. Again, Debtors' arguments are unpersuasive.

1 Federal courts have held that the mere addition of facts and/
2 new theories of recovery will not create a new claim for res judic
3 purposes. See, e.g., Ley v. Boron Oil Co., 454 F. Supp. 448, 450
4 (W.D. Pa. 1978) ("plaintiff is not entitled to another day in cour
5 he merely proposes a different theory of recovery based upon the s
6 'liability creating conduct' of the defendant which gave rise to t
7 first action"); Williamson v. Columbia Gas & Electric Corp., 186 F
8 464, 470 (3d Cir. 1950), cert. denied, 341 U.S. 921, 71 S.Ct. 743;
9 Cemer v. Marathon Oil Co., 583 F.2d 830, 832 (6th Cir. 1978); Seam
10 v. Bell Telephone Co. of Pa., 576 F. Supp. 1458, 1460 (W.D. Pa. 19
11 Coggins, 468 F. Supp at 280 ("merely adding some facts, naming
12 additional defendants or proposing a different theory of recovery
13 not convert one cause of action into a second cause of action if b
14 actions involve the same liability-creating conduct"); Walworth Co
15 United Steelworkers of America, 443 F. Supp. 349, 351 (W.D. Pa. 19
16 Denckla v. Maes, 313 F. Supp. 515, 522-23 (E.D. Pa. 1970).

17 The fact remains that Debtors' present suit seeks recovery fr
18 the same defendants over the same transaction--the sale of the
19 Residence. By now alleging fraudulent inducement of contract, wha
20 Debtors only change here is the theory of recovery. Debtors'
21 fraudulent inducement claim rests on substantially the same facts
22 alleged in the prior section 330 hearing, namely, that defendants
23 misrepresented the identity of the buyers, (2) did not act exclusi
24 for Debtors but effectively represented the buyers, and (3) failed
25 disclose a prior relationship with the buyers.

26 D. The Equitable Doctrine of Clean Hands Is Not Applicable.

27 Debtors argue that defendants "do not have the requisite 'cle
28 hands' for equitable relief by the res judicata doctrine."

1 Supplemental Opposition to Motion of Coldwell Banker Defendants Fo
2 Summary Judgment, p. 4:19-20. Debtors mischaracterize the res
3 judicata doctrine as an equitable doctrine instead of a legal one;
4 doctrine is not designed to do equity between parties, but rather
5 preserve judicial resources, promote finality and closure, and
6 encourage reliance on adjudication by preventing inconsistent resu
7 See Federated Department Stores v. Moitie, 452 U.S. 394, 401, 101
8 S.Ct. 2424, 2429 (1981) ("[t]he doctrine of res judicata serves vi
9 public interests beyond any individual judge's ad hoc determinatio
10 the equities in a particular case"); Heiser v. Woodruff, 327 U.S.
11 733 ("we are aware of no principle of law or equity which sanction
12 the rejection by a federal court of the salutary principle of res
13 judicata, which is founded upon the generally recognized public po
14 that there must be some end to litigation and that when one appear
15 court to present his case, is fully heard, and the contested issue
16 decided against him, he may not later renew the litigation in anot
17 court").

18 E. Debtors Fail to Establish Fraud on the Court.

19 Debtors argue that the doctrine of res judicata is inapplicab
20 since the prior result at the section 330 hearing was procured thr
21 fraud on the court by defendants' failure to disclose the full ext
22 of the business relationship between McCahon and Mr. Baskin. Debt
23 argument is flawed.

24 Federal courts have long possessed an inherent authority to
25 vacate judgments obtained through fraud upon the court. See Chamb
26 v. NASCO, Inc., 501 U.S. 32, 44, 111 S.Ct. 2123, 2132 (1991) ("the
27 inherent power [to punish for contempts] also allows a federal cou
28 to vacate its own judgment upon proof that a fraud has been

1 perpetrated upon the court"), citing Hazel-Atlas Glass Company v.
2 Hartford Empire Company, 322 U.S. 238, 245, 64 S.Ct. 997, 1001 (19
3 which was overruled on other grounds in Standard Oil of Cal. v. Un
4 States, 329 U.S. 17, 18, 97 S.Ct. 31, 31 (1976) (without leave of
5 appellate court, district court may hear Federal Rule of Civil
6 Procedure 60(b) motions on cases reviewed on appeal).

7 Here, Debtors informed this court of a pre-existing business
8 relationship between McCahon and Baskin during oral argument both
9 the May 8, 1997 status conference and at the July 25, 1997 section
10 hearing. Accordingly, this court's July 25, 1997 order approving
11 defendants' commission was not tainted by defendants' failure to
12 disclose a prior relationship, and the order was hence not procure
13 fraud on the court. Although the failure to disclose may have
14 violated the disclosure requirements of Rule 2014, that issue is n
15 before the court here.

16 In support of their argument, Debtors cite Gumport v. China
17 International Trust and Investment Corporation (In re Intermagneti
18 America, Inc.), 926 F.2d 912 (9th Cir. 1991). Gumport is factually
19 distinguishable from the case at bar.

20 In Gumport, the bankruptcy court approved the sale of the Chap
21 11 debtor's inventory and leases to a third party purchaser "subje
22 to the representations and warranties set forth in the...'Declarat
23 of [the debtor's CEO]'...." Id. at 914. Unbeknown to the bankrupt
24 court, the debtor's CEO secretly jointly owned and controlled the
25 third party purchaser, and had secretly negotiated with China
26 International Trust and Investment Corporation ("CITIC") to sell t
27 debtor's property at a substantially higher price. Id. The Chapt
28 11 trustee filed a complaint against CITIC after discovering its

1 involvement. The district court dismissed the claims, finding the
2 be barred under the doctrine of res judicata by the bankruptcy cou
3 earlier sale approval order. The Ninth Circuit Court of Appeals
4 reversed, concluding as follows:

5 The district court erred in determining that the
6 bankruptcy court's...order mandated dismissal of the
7 [t]rustee's complaint on res judicata grounds. The
8 bankruptcy court's order was conditioned on the veracity of
9 the declaration of [debtor's CEO]...[who] was an officer of
10 the court at the time he made the admittedly false
11 declaration[.]...[U]nder the circumstances the [t]rustee
12 should be permitted to maintain its independent action to
13 set aside the bankruptcy court's order for fraud upon the
14 court.... We therefore vacate the district court's summary
15 judgment and remand...for further proceedings consistent
16 with this [o]pinion.

17 Id. at 918.

18 Here, unlike Gumport, this court's earlier fee award order wa:
19 not expressly conditioned on any affirmative representations of
20 defendants, nor was the order issued in ignorance of the facts upo
21 which fraud on the court is alleged (i.e., the prior relationship
22 between McCahon and Baskin). Specifically, although the bankruptc
23 court in Gumport was unaware of the CEO's affiliation with the thi
24 party purchaser and its prior secret negotiation with CITIC, this
25 court was aware that McCahon and Baskin had a pre-existing
26 relationship at the time it issued the fee award order. According
27 Gumport is factually distinguishable and does not control the outc
28 here.

29 IV. CONCLUSION

30 For the above reasons, Debtors' present action is barred unde:
31 the doctrine of res judicata by this court's earlier fee award ord
32 Defendants' motion for summary judgment is accordingly granted.
33 Counsel for defendants should submit a form of order granting the

1 motion for summary judgment and denying plaintiffs' motion to amend
2 their complaint, together with a form of judgment in their favor.

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Dated: November 7, 2000

Dennis Montali
United States Bankruptcy Judge