

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Docket No. 05-56180

ESMA YOUNIS AND MICHELLE YOUNIS

Appellants,

vs.

CONGREGATION ETZ CHAIM,

Appellee

Appeal From The United States District Court

For the Central District of California

No. CIV 97-5042 CAS (Ex)

Hon. Christina A. Snyder

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION.

Despite its massive Answering Brief, CEC's position still founders on a basic principle: A and B cannot enter into a contract that takes away the rights of C. The Settlement Agreement is a mere contract between A (CEC) and B (the City). It is not law. It has no effect on the rights of C (Younises). It cannot take away C's right to sue A in state court.

The purported authority for the injunction below is the district court's reservation of jurisdiction over matters relating to the Settlement Agreement. The reservation, however, derives its authority *solely* from the Settlement Agreement, *i.e.* from the *consent* of A and B. It too has only the force of their agreement, not the force of law. Just as A and B cannot take away C's rights by contract, a court order based solely on their agreement cannot do so either. The reservation of jurisdiction therefore cannot sustain the injunction below.

Neither can the LRNA judgment. The district court lacked jurisdiction to enjoin the Younis action pursuant to the LRNA judgment. The elements of preclusion are lacking. Both issues were adequately addressed below.

Finally, no basis exists for federal jurisdiction over the Younises' claims. If the injunction stands, Younises will have no access to the courts. The injunction therefore should be reversed.

II. THE DISTRICT COURT'S RESERVATION OF JURISDICTION CANNOT SUSTAIN THE INJUNCTION BELOW.

CEC argues (Answering Brief ("AB") 14-16) that the district court's reservation of jurisdiction over the Settlement Agreement provided sufficient grounds for the injunction. CEC's main authority is Flanagan v. Arnaiz, 143 F. 3d 540, 545 (9th Cir. 1998). There the Court upheld an injunction prohibiting *parties* to a federal settlement agreement, who were *bound* by the agreement and the district court's reservation of jurisdiction over it, from litigating claims for breach of the agreement in state court.

Here, the district court reserved jurisdiction pursuant to the Settlement Agreement, to which Younises are not parties. (ER Tab 2.)¹ The reservation does not bind Younises. Sandpiper Village Condominium Assn. v. Louisiana-Pacific Corp., 428 F. 3d 831, 852 (9th Cir. 2005); Keith v. Volpe, 118 F.3d 1386, 1392 n. 9 (9th Cir. 1997). The reservation derives its authority solely from the Settlement Agreement, *i.e.* from the mere consent of A and B. Local No. 93, Int'l Assn. of Firefighters Etc v. City of Cleveland, 478 U.S. 501, 512 (retention of exclusive jurisdiction), 522 ("it is the agreement of the parties...that creates the obligations embodied in a consent decree"), 106 S.Ct. 3063 (1986) ("Firefighters").

¹ "[A]s set forth in Section XIV of the Settlement Agreement attached hereto, the Court retains jurisdiction" over matters related to the agreement.

The reservation cannot impose any obligations or duties on Younises. Firefighters at 529. It thus cannot obligate them to sue CEC in federal court. It cannot supersede their rights under state law. Keith at 1393-1394. It thus cannot take away their state-law right to sue in superior court. An order entered pursuant to the consent of parties A and B cannot diminish C's rights *at all*. Dunn v. Carey, 808 F.2d 556, 558-560 (7th Cir. 1986).

The district court cannot supersede C's rights under state law unless it finds a conflict with federal law. Keith at 1393. Displacement of C's rights requires "an exercise of federal power, which in turn depends on a *violation* of federal law." Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995) (emphasis in original). Where a federal court decides a case on the merits, it may prevent "even strangers from attempting to upset a final judgment that directs the parties to rectify a violation of federal law." Dunn at 559. Absent an order finding "conflict" with or a violation of federal law, however, the district court has "no power" to enjoin C's state court action. Keith at 1394; Dunn at 559-560.

Here, the district court found no violation of federal law. It found no conflict between federal law and the Younises' right to sue for nuisance in state court. The court decided nothing on the merits. The only authority the district court had was the mere consent of A and B. Firefighters at 522. The court therefore had "no power" to enjoin C's state court action.

In Sandpiper, the Court rejected an argument similar to CEC's. There the dissent, citing Flanagan, argued that a reservation of jurisdiction "provide[d] a sufficient basis for the invocation of the 'necessary in aid of jurisdiction' exception" to the Anti-Injunction Act. Id. at 868. The majority disagreed. A reservation of jurisdiction is necessary for "subject matter jurisdiction" to "entertain [the] motion" for an injunction. Id. at 846, 841. But the reservation, "standing alone, does not allow the district court to enjoin any proceeding it wants to enjoin. The power to halt a state proceeding is circumscribed by the Anti-Injunction Act." Id. at 847.

Under the Anti-Injunction Act and other statutes, courts have consistently held that the district court may not issue an All Writs injunction, based on authority derived from a voluntary settlement agreement, against a nonparty's state court action. Keith, 118 F.3d at 1392-1394 (reversing injunction under Tenth Amendment); Sandpiper, 428 F.3d at 842, 847, 852 (reversing injunction under Anti-Injunction Act); Assn. of Retarded Citizens Etc. v. Thorne, 30 F.3d 367, 370 (2nd Cir. 1994) (reversing injunction under All Writs Act); Dunn, 808 F.2d at 558-559 (affirming denial of injunction under Anti-Injunction Act); see also Application of County Collector of the County of Winnebago, Illinois, 96 F.3d 890, 899-903 (7th Cir. 1996) ("Winnebago") (denying All Writs removal); U.S. v. City of Detroit, 329 F.3d 515, 523 (6th Cir. 2003) (recognizing that contractual

consent decrees cannot support All Writs injunctions against nonparties). Under these decisions neither the Settlement Agreement itself nor the district court's order reserving jurisdiction over it can sustain the injunction below.

III. THE INJUNCTION VIOLATES THE TENTH AMENDMENT.

In their Opening Brief ((“OB”) at 21-29) and above, Younises show that under Keith, the injunction below violates the Tenth Amendment. CEC tries to distinguish Keith on the grounds (AB 40, 42) that the injunction does not take away Younises' *substantive* rights. It “merely” requires them to sue in federal court. Keith, however, holds that an A-B federal settlement agreement cannot take away *any* of C's state-law rights – period. Id. at 1393. Keith does not distinguish between substantive and “merely” procedural rights.

CEC's argument also makes no practical sense. The whole purpose of an injunction against state court proceedings is to permit a uniquely knowledgeable federal judge to apply and interpret the substantive terms of the settlement agreement in determining the parties' rights. See Flanagan, 143 F.3d at 545 (quoted at AB 14). The Settlement Agreement here, however, is *irrelevant* to Younises' rights, which are determined entirely by state law. Keith at 1393-1394. The injunction below merely substitutes a federal judge for a state judge in applying the local zoning ordinance and other state law to the Younis case.

CEC argues (AB 42-43) that in Keith, the injunction deprived Mr. Kudler of a state-law right “unequivocally” adjudicated in his favor. Here, by purported contrast, no court has determined that Younises have a right to enjoin the synagogue use. The injunction, however, takes away Younises’ state-law right to *sue in superior court*. Younises “unequivocally” had that right (see OB 20) until the district court took it away.

In Keith, moreover, Mr. Kudler’s rights remained uncertain. Further proceedings in state court, which would determine Mr. Kudler’s rights, “if any,” were stayed. Id. at 1393 n. 10, 1394. In Keith, as here, the injunction halted an ongoing, unresolved state court action.

CEC’s “unequivocal right” argument implies a different result in Keith if the plaintiffs had sought an injunction earlier. Nothing in Keith, however, suggests that plaintiffs could have obtained an injunction initially but delayed too long in seeking it. Keith’s rationale was that absent a conflict with federal law, the district court could not supersede state-law rights. Id. at 1393. This principle was equally applicable at the beginning and the end of Mr. Kudler’s state court action.

CEC argues (AB 43) that Keith did not address whether the injunction was proper under the Anti-Injunction Act. The Court didn’t reach that issue because it decided the case under the Tenth Amendment. Id. at 1394 n. 11. The Court can do the same here.

CEC argues (AB 44) that Younises “ignore the fundamental substantive federal interests implicated” by the Settlement Agreement, purportedly RLUIPA. Younises ignore them because they don’t exist. The force of the Settlement Agreement – and of all court orders based on it – is solely that of *contract*, not RLUIPA. Firefighters, 478 U.S. at 522; Dunn, 808 F. 2d at 559-560. Keith rejected a similar argument that “important federal policies” underlying the consent decree justified an injunction. Id., 118 F.3d at 1393.

CEC claims (AB 44-45) that nothing in Keith suggests “third party challenges” to the Settlement Agreement can be decided in state court, where “such challenges frustrate the district court’s continuing enforcement jurisdiction.” Keith, however, expressly left determination of Mr. Kudler’s rights to the state courts. Id. at 1393-1394. (See OB 28.)

Further, Keith cited with approval Dunn’s statement that a consent decree “depends on the parties’ authority to give assent.” Keith at 1393. From this premise Dunn reasoned that third parties, “not even colorably bound by the decree,” may challenge that authority in “the forum designated by the state.” Id. at 559-560. Keith thus recognizes that a third-party challenge may proceed in state court.

CEC's attempts to distinguish Keith are meritless. Keith holds that the district court had no power to enjoin the Younises from pursuing their state court action. The injunction below therefore should be reversed.

IV. THE YOUNISES DO NOT NEED OR INTEND TO CHALLENGE THE VALIDITY OF THE SETTLEMENT AGREEMENT.

CEC's mantra (AB 3, 14-16, 24-26, 29-30, 32-33, 41, 43) is that Younises' challenge to the synagogue use is an attack on the "validity and enforceability of the Settlement Agreement itself." CEC claims that in challenging the "*per se* legality" (AB 30) of the use, which the Settlement Agreement purportedly establishes, Younises necessarily ask the state court to "interpret, modify or even annul" the agreement. This purportedly intrudes on the district court's exclusive jurisdiction.

CEC misrepresents what the Settlement Agreement is. As shown above, it is a mere *contract* between A and B that confers *no rights whatsoever* against C. Firefighters, 478 U.S. at 529; Dunn, 808 F.2d at 558, 559-560.

As to Younises (C), the agreement does not establish any "*per se* legality" of the synagogue use. As to C, it establishes nothing. State law alone, not the Settlement Agreement, determines whether the use is lawful. Keith at 1393. C therefore may sue for A's conduct that injures C just as if the Settlement Agreement did not exist. This Court allowed Mr. Kudler to do so in Keith.

CEC responds that the synagogue use is the “very essence” of the Settlement Agreement, which goes to the “very heart” of the district court’s exclusive jurisdiction. To enjoin the use purportedly would “nullify” the agreement and invade the court’s jurisdiction. (AB 29-30.)

The district court’s power to issue an injunction pursuant to its reservation of jurisdiction, however, derives entirely from the A-B *contract*. Firefighters at 521-522; Dunn at 559. A and B cannot enter into a contract that prohibits C from suing A in state court. It doesn’t matter that A and B agree that C’s state court action would destroy the “very essence,” the “very heart,” the Alpha and Omega of their contract. They simply have no power to contract away C’s rights.

Similarly, no court order that derives its authority from the A-B agreement can take away C’s rights either. The order could expressly provide that its very essence, heart, Alpha and Omega depend on the Younises’ not suing in state court. The court would still have only the power A and B can confer by contract – and thus “no power” to enjoin the Younis action. Keith, 118 F.3d at 1393-1394; Dunn, 808 F.2d at 559-560. Younises need not challenge the validity of the Settlement Agreement because it has absolutely no effect on them whatsoever.

The irrelevance of the Settlement Agreement is further evident from the issues raised in Younises’ state court action. Younises allege (ER Tab 4 at 7-9) that CEC is operating a synagogue in an R-1 zone without a CUP, which violates

the LAMC and constitutes a nuisance. The issues thus are whether CEC (1) operates a house of worship; and (2) has a CUP. Neither issue requires the state court to construe, modify or do anything else to the Settlement Agreement.

The district court dismissed the LRNA complaint on the grounds that the agreement is *not* a CUP. (See Dismissal Order, ER Tab 3 at 5.) The state court therefore can decide issue (2) on estoppel grounds without even looking at the Settlement Agreement. 7 B.E. Witkin, California Procedure, “Judgment,” § 284A. (4th ed. 1997).

If CEC (A) had entered into a contract with another neighbor (D) that permitted CEC to operate a synagogue on the Property, Younises would not have to invalidate that agreement to challenge the synagogue use as a nuisance. The negotiated outcome of the A-D agreement, see Thorne, 30 F.3d at 370, would not affect Younises’ rights under state law. Keith at 1393; Dunn at 559. Exactly the same is true of the Settlement Agreement. The Younises can ignore it.

Finally, if the synagogue use were enjoined the Settlement Agreement would still exist *as all it ever was*, i.e. a promise by the City not to enforce the zoning laws against CEC. As such, it would still be very valuable to CEC in protecting CEC and its members from criminal prosecution. (See ER Tab 3 at 6, second paragraph.)

V. THE INJUNCTION VIOLATES THE ANTI-INJUNCTION ACT.

A. The Second and Third Anti-Injunction Exceptions Are Inapplicable.

Under Sandpiper, the second and third Anti-Injunction exceptions are inapplicable here. (OB 33-38.) CEC argues (AB 28-29) with respect to the second exception that unlike the Sandpiper class action, see id., 428 F.3d at 844-846, “the litigation” over the synagogue use and the Settlement Agreement is “not over” because of third-party challenges to the agreement and the use.

The relevant action for purposes of the second exception, however, is CEC’s action against the City, not the third-party challenges. In Sandpiper the relevant case was the class action, not Lester’s or other distributor actions against L-P. Id. at 844. As in the Sandpiper class action, as between CEC and the City nothing remains for the district court to decide. See id. at 846. The relevant litigation thus is over.

In Sandpiper, the dissent reasoned that Lester’s action threatened, among other things, a proliferation of distributor litigation against L-P. The Lester case (along with other factors) thus created a “substantial and serious risk that the district court’s jurisdiction over the class would become ‘nugatory.’” Id., 428 F.3d at 866 and n. 5. Like CEC, the dissent emphasized the effect of third-party litigation on the result created by the settlement agreement.

The majority disagreed. It reasoned that the issue was whether the Lester action “interfered with the district court’s consideration or disposition of the class claims.” Id. at 844. It found no such interference because the class action was over – although more distributor actions were possible. As in Sandpiper, the second exception therefore is inapplicable.

CEC argues (AB 29) that the obligations under the Settlement Agreement are “continuous in nature,” compared to a purported “one time implementation” in Sandpiper. The L-P settlement, however, was long-term and complex. It involved annual reevaluations and elaborate procedures for compensating class members. Id. at 835 n. 1, 846 n. 23. L-P needed an expert to explain it to a jury. Id. at 837.

CEC compares the CEC v. City settlement to a *res* (AB 29), in purported contrast to Sandpiper. A class action, however, is a much more compelling analogy to a *res* than the two-party CEC v. City and its settlement that conferred only personal rights. (ER Tab 1 Section VII.) See Battle v. Liberty National Life Ins. Co., 877 F. 2d 877, 882 (11th 1989) and Section C. below.

In regard to the relitigation exception, CEC (AB 33-34) argues that the Younis case will conflict with the district court’s orders interpreting the Settlement Agreement. As shown above, however, orders interpreting the A-B contract have no effect on C.

Sandpiper, moreover, strictly requires all elements of preclusion, including identity of parties, adequate notice, adequate representation and actual decision of the claims or issues to be precluded. Id., 428 F.3d at 847-848 and n. 24. *None* of these elements is present here. Under Sandpiper, neither Anti-Injunction exception applies. The injunction below therefore should be reversed.

Dunn (see OB 29-31) holds that (if they must do so) Younises may challenge the validity of the City's assent to the Settlement Agreement in state court.² CEC argues (AB 46-47) that in Dunn the state court action did not challenge the "central tenets" of the federal consent decree. Dunn, however, reasoned that as *nonparties* to the decree, plaintiffs were not bound by it and could challenge the government's assent in state court. Id. at 558, 559-560. The plaintiffs were no more bound by "central tenets" than "collateral" provisions.

CEC argues (AB 46) that Dunn did not apply the second Anti-Injunction exception. That is true, but Dunn did apply the third. As the Supreme Court recognized in Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295, 90 S.Ct. 1739 (1970), the second and third exceptions are

² Younises would need to challenge the City's assent to the Settlement Agreement only if the state court erroneously ruled that the agreement affects their rights. That is doubtful. All doubts should be resolved against enjoining state court proceedings. Sandpiper at 842. Younises would not need to address CEC's fraud or breach unless the state court ruled against Younises on the assent issue, which is yet more doubtful.

related concepts. Dunn's holding under the third exception thus applies to the second by analogy. See also Winnebago, 96 F.3d at 901-902.

CEC's third (and allegedly strongest) distinction (AB 46-47) is that the Dunn consent decree did not involve a provision for "exclusive and continuing jurisdiction" in the district court. Dunn does not say whether or not the district court reserved jurisdiction. Dunn's rationale, however, is that the consent decree did not bind the state court plaintiffs. Id. at 558, 559. Plaintiffs would not have been bound by a reservation of jurisdiction either. Sandpiper at 852. A reservation thus would not have changed the outcome in Dunn.

Keith, moreover, did involve an express reservation of jurisdiction. Id., 118 F.3d at 1390. Keith cited with approval the discussion in Dunn (id., 808 F.2d at 559-560) upholding the nonparty plaintiffs' right to proceed in state court. Keith at 1393. The lack of a jurisdictional reservation in Dunn thus didn't matter in Keith and doesn't matter here.

CEC also tries to distinguish Winnebago, where the court applied Dunn in rejecting removal of a state-court challenge to the financing mechanism of a voluntary federal consent decree. CEC claims (AB 47) Winnebago is inapplicable because (1) the court did not consider the second exception and (2) the state court plaintiffs challenged only the financing mechanism "collateral" to the consent decree, not the substance of the decree.

Argument (1) ignores Winnebago's reasoning. The court analogized the All Writs Act ("necessary...in aid of their respective jurisdictions") to the second Anti-Injunction exception ("necessary in aid of its jurisdiction"). It further reasoned that the second and third exceptions are "closely related concepts." Id. at 901-902. The court concluded that although decided under the third Anti-Injunction exception, Dunn "strongly indicate[d]" that relief under the All Writs was improper. Id. Winnebago's holding under the All Writs Act is relevant to the similarly worded second exception.

Argument (2) ignores Winnebago's reliance on Dunn as *independent* grounds for holding federal jurisdiction absent. Winnebago at 899, 900-902. Even if Winnebago had not viewed the financing mechanism as collateral, it still would have rejected All Writs relief under Dunn because the consent decree was contractual. Winnebago's denial of All Writs relief sought pursuant to a contractual settlement agreement implies that the All Writs injunction below is improper.

B. CEC's Authorities are Inapplicable.

Almost all the cases CEC relies on involve injunctions against (1) *parties* to a federal settlement agreement or decree; or (2) nonparties based on a *judgment on the merits*. CEC's cases thus involve injunctions against parties who were *bound*, and whose rights were governed, by the federal settlement or judgment. These

cases are inapplicable here. The Settlement Agreement and the district court's reservation of jurisdiction do not bind Younises. They also are not judgments on the merits.

In Flanagan, the injunction issued against parties to a federal settlement agreement who sought to "evade their own agreement" by litigating a claim for breach of the agreement in state court. Id., 143 F.3d at 545. Sandpiper, 428 F.3d at 847, 852, distinguished Flanagan on this basis. In Alpine Land, 174 F.3d at 1011-1015, the injunction issued against Churchill County, a party to two water-rights decrees based on litigated decisions on the merits.³

U.S. v. ASCAP, 32 F.3d 727 (2nd Cir. 1994) (AB 20), involved a motion by an ASCAP member to vacate the award in an arbitration conducted pursuant to the ASCAP consent decree. The court held the district court's exclusive jurisdiction over the decree encompassed the motion to vacate. Dunn distinguished a similar ASCAP case on the grounds that it involved "members of an organization that was party to a consent decree." Id., 808 F.2d at 558.

Battle, 877 F.2d 877 (AB 20-21), involved an attempt by members of a federal plaintiff class to litigate in state court claims that were settled in the federal class action. Id. at 879-880, 881. See Taylor v. Liberty Nat'l Life Ins. Co., 462

³ See Nevada v. U.S., 463 U.S. 110, 116, 103 S.Ct. 2906 (1983) (Orr Ditch decree based on litigated proceedings before special master); U.S. v. Alpine Land & Res. Co., 697 F. 2d 851, 853 (9th Cir. 1983) (Alpine decree based on litigated judgment).

So. 2d 907, 909-910 (Ala. 1985) (plaintiffs conceded they were bound by class settlement unless notice violated due process).

In re Diet Drugs, 369 F.3d 293, 300-301 (3rd Cir. 2004)(AB 21), involved injunctions enforcing an opt-out agreement against class members bound by the agreement. In U.S. v. District of Columbia, 654 F. 2d 802 (D.C. Cir. 1981) the injunction issued against a party to a federal consent decree, Prince George's County (*id.* at 804), that filed a series of state court actions to block development of a waste treatment facility called for by the decree. See Dunn footnote at 559.

Sable v. General Motors Corporation, 90 F.3d 171, 173 (6th Cir. 1996) involved an injunction against Sable, the representative of a party to one of two closely related settlement agreements that resolved a federal case. The injunction prohibited Sable from pursuing litigation in state court that conflicted with the two decrees, including that of the estate Sable represented.

U.S. v. International Brotherhood of Teamsters, 266 F. 3d 45 (2nd Cir. 2001) involved two IBT members who were banned from union activities as a result of administrative proceedings conducted pursuant to the IBT consent decree. The two formed a new union and petitioned the NLRB for election as the collective bargaining representative of an employee group. The court held that as parties originally subject to the consent decree, the two could be enjoined from pursuing their NLRB petition. *Id.* at 50. None of the above cases applies here because

Younises are not parties to the Settlement Agreement or members an organizational party and thus are not bound by it.

As shown above, where the district court finds a violation of federal law, it may enjoin state court actions by third parties that interfere with the court's ability to remedy the violation. Keith, 118 F.3d at 1393; Dunn, 808 F.2d at 559; Winnebago, 96 F.3d at 901; People Who Care v. Rockford Board of Education, Etc., 961 F.2d 1335, 1337 (7th Cir. 1992) ("PWC"); City of Detroit, 329 F.3d at 523.

In United States v. New York Telephone Co., 434 U.S. 159, 98 S.Ct. 364 (1977) ("NYT"), the district court ruled that probable cause existed to conclude that two telephones were being used in connection with a criminal enterprise. Id. at 162. Based on this ruling, the court ordered the telephone company, a public utility, to install pen registers to identify the numbers called from the suspected phone lines. Id. at 168-169, 174-175. NYT thus was not based on a mere contract. In Doe v. Ceci, 517 F.2d 1203, 1205 (7th Cir. 1975) (AB 21), the injunction against the third-party state judge was based on a *litigated* preliminary injunction.

Yonkers Racing Corp. v. Yonkers, 858 F. 2d 855 (2nd Cir. 1988) (AB 22) involved (1) a decision on the merits that the city had violated federal law, id. at 857-859; and (2) a consent decree designed to remedy the violation. Id. at 863-865. See Winnebago, 96 F. 3d at 900-901 (distinguishing Yonkers).

The Second Circuit later recognized the distinction between an injunction against interference with the remedy for a violation of federal law and an injunction designed to extend to third parties the “negotiated outcome” of a voluntary settlement agreement. Thorne, 30 F. 3d at 370.

CEC cites Washington v. Washington State Etc. Ass’n., 443 U.S. 658, 692 n. 32, 99 S.Ct. 3055 (1979) as purported authority that the City can bind its residents by contract. (AB 34-35 and n. 11.) Washington, however, involved the application of a *litigated judgment on the merits* (on the meaning of the fishing treaties) to nonparties. Id. at 669-674, 692-693.

A case arguably in neither category is In re Baldwin-United Corp., 770 F. 2d 328, 338 (2nd Cir. 1985) (AB 39), where the court affirmed an injunction against impending state court proceedings that threatened to interfere with recently completed and ongoing settlement negotiations. Baldwin was a consolidated multidistrict securities class action by 100,000 securities purchasers against 26 broker-dealers. Eighteen of the defendants settled and negotiations were ongoing with the remaining eight. Id. at 336.

The state of New York, a nonparty to the class action, threatened to file an action in state court on behalf of New York citizens who had bought the securities. Id. at 333. The threatened action thus involved part of the class claims. The Second Circuit upheld an injunction against the threatened litigation.

Sandpiper, 428 F. 3d at 849 n. 26, distinguished Baldwin as not involving the “strict requirements” of the Anti-Injunction Act. The Second Circuit itself limited Baldwin to state court actions that imperil negotiation of a class action settlement. Retirement Systems of Alabama v. J.P. Morgan Chase & Co., 386 F.3d 419, 428 and n. 7 (2nd Cir. 2004).

Baldwin is inapposite because (1) the Anti-Injunction Act applies here; (2) the Younis state court action does not imperil any federal settlement negotiations; and (3) Younises do not assert any claims at issue in CEC v. City.

C. This Case Involves No “In Rem” Jurisdiction.

CEC argues (AB 27-28) that (1) the Younis case involves the “legal limitations on the use of a *res*,” i.e. the Highland Property, and thus purportedly resembles an *in rem* action; and (2) the district court exercised *in rem* (or *in rem*-like) jurisdiction over the Highland Property (see also Injunction Order, ER Tab 10 at 10 n. 9). Neither argument is correct.

The Younis nuisance action is *in personam*, not *in rem*. People v. Frangadakis, 184 Cal. App. 2d 540, 552-553, 7 Cal. Rptr. 776 (1960). The injunction Younises seek against the synagogue use is an *in personam* remedy. People ex rel. Gwinn v. Kothari, 83 Cal. App. 4th 759, 765, 100 Cal. Rptr.2d 29 (2000).

The district court's reserved jurisdiction is not *in rem* for four reasons. First, the court did not reserve jurisdiction over property. It reserved jurisdiction to apply the Settlement Agreement. (See ER Tab 1, Sec. XIV.) The agreement is a *contract* carefully crafted *not* to create *in rem* obligations that run with the land (Dismissal Order, ER Tab 3 at 6) and to create only personal – indeed non-transferable – rights. (ER Tab 1 Sec. VII.)

Second, the district court's reservation of jurisdiction does not bind third parties. Sandpiper at 852. An *in rem* proceeding affects the interests of *all persons* in the property before the court. See Gwinn, 83 Cal. App. 4th at 765. The court's reservation of jurisdiction thus is strictly *in personam*.

Third, before a court can acquire *in rem* jurisdiction, interested parties must receive notice “reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652 (1950). Younises received no such notice. If the district court's reservation of jurisdiction is *in rem*, it violates Due Process and is void.

Fourth, if CEC's argument is correct, the federal court in Keith must have exercised *in rem* jurisdiction over the area along I-105 to the exclusion of the state courts. Keith, however, repeatedly stated that state court was the proper forum for Mr. Kudler's action. Id., 118 F.3d at 1393-1394.

State Engineer v. Southfork Band, Etc., 339 F. 3d 804 (9th Cir. 2003) (AB 27-28), which CEC cites in support of its *in rem* argument, stands for the proposition that a state court's *in rem* judgment *adjudicating* water rights excludes federal jurisdiction over contempt proceedings arising out of that judgment. The Settlement Agreement and contractual reservation of jurisdiction here are not even remotely similar.

VI. THE LRNA JUDGMENT DOES NOT SUPPORT THE INJUNCTION.

A. Younises Did Not Waive Jurisdiction or Absence of Preclusion.

CEC claims (AB 50) Younises waived the jurisdiction and privity issues by not raising them below. Younises raised jurisdiction at oral argument. (ER Tab 9 at 22-23.) Jurisdiction, moreover, is non-waivable. Gibson v. Chrysler Corp., 261 F.3d 927, 948 (9th Cir. 2001).

Younises did not directly argue LRNA preclusion below. That is because CEC did not notice its motion on grounds of LRNA preclusion. (See SER Tab 1 at 1-2.) CEC argued (*id.* at 10) that Younises made the same allegations as those dismissed in LRNA. But CEC's point was that Younises sought to invalidate the Settlement Agreement, not that the LRNA judgment precluded their claims. At oral argument, moreover, the district court raised the key question:

[THE COURT]: And finally, were your clients, Mr. Wright, ever members of LRNA? I think not from the papers, but my question is, are they covered by my prior rulings in the case?

MR. WRIGHT: Your Honor, they are not part of LRNA.

(ER Tab 9 at 5:23-6:3; see also id. at 15:21.)

As the court noted, the pleadings (e.g., SER Tab 2 at 29, 359) showed that Younises were not part of LRNA. CEC made no argument below that Younises and LRNA were in privity.

Waiver is a matter of discretion. See Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691, 693 (9th Cir. 1980). To preclude Younises from arguing that privity and the other elements of preclusion are lacking would be grossly unfair because (a) CEC did not include LRNA preclusion in its notice of motion; (b) the district court adequately addressed the issue; and (c) the pleadings showed the absence of preclusion on their face.

B. The District Court Lacked Jurisdiction.

The notice of appeal in LRNA divested the district court of jurisdiction to enjoin a third-party state court action pursuant to the LRNA judgment. American Town Center v. Hall 83, 912 F. 2d 104, 110-111 (6th Cir. 1990) (“ATC”); Henry v. Farmer City State Bank, 808 F.2d 1228, 1240-1241 (7th Cir. 1986). Pending appeal, CEC had to seek such an injunction in this Court.

CEC argues (AB 52) ATC and Henry did not involve All Writs Act injunctions. The district court in Henry, however, issued the injunction (later reversed) under the All Writs Act. See id., 630 F. Supp. 844, 846. ATC's reliance on Henry suggests an All Writs injunction there too. Moreover, both ATC and Henry applied the Anti-Injunction Act, which limits the All Writs Act. Sandpiper, 428 F.3d at 842. For this reason alone both cases are applicable here.

CEC argues that ATC and Henry did not involve “threats posed by serial challenges to a settlement agreement subject to specifically retained jurisdiction.” (AB 52.). That argument, however, is about the Settlement Agreement. It is irrelevant to jurisdiction to issue an injunction based on the LRNA judgment. The rest of CEC’s comments (AB 52) are also irrelevant.

C. Essential Elements of Preclusion are Lacking.

In Sandpiper, the Court reaffirmed that the relitigation exception depends on strict application of *res judicata* and collateral estoppel. It requires identity of parties, adequate notice and adequate representation. Id. at 847-848.

CEC argues (AB 34-36) that Younises were in privity with the City and LRNA. A conflict of interest, however, precludes privity. Kourtis v. Cameron, 419 F.3d 989, 997 (9th Cir. 2005). If ever a conflict existed, it was between Younises and the City (see OB at 37-38), which bargained away Younises’ interests in entering into the Settlement Agreement. See Douglas Laycock,

“Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties,” 1987 University of Chicago Legal Forum 103, 110-116 (1987) (discussing A-B settlements at the expense of C.) See also PWC, 961 F.2d at 1337, 1339 (instead of buying out teachers’ contract rights, board “ ‘agreed’ ...to eliminate those rights for free”).

CEC argues (AB 35) that Younises are in privity with LRNA, who purportedly (1) are “neighbors in the same position as Younises,” and (2) challenge the Settlement Agreement on the same grounds. The short answer to (1) is that Younises alone live *next door* to the synagogue. Younises allege parking, noise, loss of privacy and damages (ER Tab 4 at 7-9, 10) unique to them. (Id. ¶¶23, 24.)

LRNA also is a very different case from Younis. LRNA challenges the validity of the Settlement Agreement as an *invalid use permit*. (SER Vol. II Tab 2 at 368-372.) The gravamen of LRNA’s complaint, and its challenge to the synagogue use, is that the Settlement Agreement is invalid under city, state and local law. (Id. at 370 ¶ 26, 363-376.)

Younises assume that the Settlement Agreement is a *valid contract*, as the district court held. (See ER Tab 4 at 5:26-27.) Younises do not challenge the validity of the Settlement Agreement in their complaint. In Younises’ view, the mere settlement contract between CEC and the City cannot override the zoning laws as against third parties.

Based on two paragraphs in Younises' complaint and one in LRNA's, CEC argues (AB 35) that the "essence" of both cases is the same. Both allege the synagogue use is unlawful *per se*. As shown above, however, LRNA and Younises challenge the use on different grounds (void use permit vs. irrelevant contract). Unlike LRNA, Younises allege injury as next-door neighbors and seek damages for lost value of their home. (See ER Tab 4 at 9, ¶ 24, 10, ¶ 2 of prayer.)

Even if LRNA's and Younises' positions were identical, privity still would be absent without evidence that LRNA adequately represented Younises' interests. Kourtis, 419 F.3d at 995. It did not. The main objective of the LRNA action is to invalidate the Settlement Agreement. The agreement is irrelevant to the Younises case. LRNA is broadly concerned with zoning governance. (SER Vol. II Tab 2 at 360-361, 371-372.) Younises only want relief from the violation next door.

CEC also ignores Sandpiper's analysis of privity. Sandpiper held that Lester was not in virtual privity with its class-member customers because (1) no familial or legal relationship existed between Lester and the class members; (2) Lester did not control the class members in the prior action; (3) Lester and the class members' interests were similar only in wanting the buildings repaired; and (4) although the injuries in the two actions had "the same root," *i.e.* defective L-P siding, Lester sued for its own injuries. Id. at 848 n. 25.

Here, (1) no legal or familial relationship exists between Younises and LRNA; (2) there is no evidence that Younises controlled LRNA; (3) the parties' interests are similar only in opposing the synagogue use; and (4) Younises sue for unique injuries as next-door neighbors. Under Sandpiper, virtual privity therefore is absent. The LRNA judgment thus does not preclude the Younis case.

VII. THE INJUNCTION DEPRIVES YOUNISES OF A FORUM.

CEC claims (AB 49) Younises failed to raise this argument below.

Younises argued below, however, that an injunction would deprive them of "any forum for their case at all." (Corrected Opposition (Appellants' Supplemental Excerpts of Record, Tab 1 at 3)). They also argued (*id.* at 23) that an injunction would eliminate all challenges to the synagogue use except in the rare instance where the plaintiff could state a federal claim.

CEC argues (AB 49) that Younises concede "jurisdiction," by which CEC apparently means federal jurisdiction over their state nuisance claims. But Younises cannot "concede" or stipulate to jurisdiction. Gibson, 261 F.3d at 948. Further, the only jurisdiction Younises have "conceded" is jurisdiction to entertain CEC's motion for an All Writs injunction, *not* federal subject matter jurisdiction over their action against CEC. Sandpiper, 428 F.3d at 841, 846-847.

CEC argues (AB 50) that federal-question jurisdiction exists because the Younis case purportedly arises under and interferes with the Settlement Agreement

and the synagogue use. Younises' claims, however, arise under state law. See Keith, 118 F.3d at 1393-1394. The Settlement Agreement is irrelevant to their case. (See note 2 above.)

The Supreme Court rejected the "jurisdiction by interference" argument in Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 34, 123 S.Ct. 366 (2002). There the jurisdictional issue was whether a state court action (Henson) for injuries settled in a federal class action (Price) was within the district court's original jurisdiction and thus removable under 28 U.S.C. § 1441.

Defendants argued that the district court in Price retained jurisdiction over the settlement and that Henson "undermined the Price settlement" by pursuing claims settled in Price. Therefore, "in light of the [Price] court's retained jurisdiction [over the settlement], ancillary enforcement jurisdiction was necessary and appropriate." Id., 537 U.S. at 33-34.

The Court rejected the argument. It reasoned that removal was statutory and the governing statute, § 1441, required original federal jurisdiction over Henson. "The All Writs Act, alone or in combination with... ancillary jurisdiction, is not a substitute for that requirement." Id. at 34.⁴ Syngenta thus rejects the theory that

⁴ Syngenta recognized that defendants could have sought an injunction in federal court requiring dismissal of Henson. Id., fn. at 34. Henson, however, had intervened in Price and obtained relief there by settlement.

conflict with a district court's retained jurisdiction over a settlement creates federal-question jurisdiction.

In Winnebago, 96 F.3d at 896-897 and n. 9, the court held that adverse impact on a federal consent decree did not create a federal question. There the intervenor school district argued that although pled under state law, plaintiffs' claims really arose under federal law because "the [state court] actions could potentially interfere with the federal consent decree."

The court rejected the argument on the grounds that plaintiffs had no similar federal claim to pursue and thus could not have filed in federal court. "[A] state law claim does not present a federal question merely because it adversely impacts the terms of a federal consent decree." Id. at 897.

Here too, the question is whether the Younis state court action arises under federal law because it purportedly "undermines" or adversely affects the Settlement Agreement. As Syngenta and Winnebago hold, it does not.

Keith implicitly rejects CEC's argument. The Kudler judgment overturned a major element of the I-105 consent decree. Id. at 1391-1392, 1394. If adverse impact on a federal settlement agreement gives rise to a federal question, then Mr. Kudler's claims arose under federal law. Keith, however, was emphatic that the Kudler action arose under *state* law. Id. at 1393. So does the Younis case.

CEC relies (AB 50) on Yonkers and Sable as authority that the district court has jurisdiction over the Younis action. Yonkers, however, found removal jurisdiction only under the All Writs Act, not § 1441. Id., 858 F.2d at 863-865. Syngenta held that the All Writs Act is not an independent basis of jurisdiction. Id., 537 U.S. at 33-34. Yonkers thus is not authority for federal jurisdiction here.

Sable held (1) a claim pled under state law arose under federal law because it conflicted with voluntary consent decrees, including plaintiff's own; and (2) this effect on the decrees supported All Writs removal. Id., 90 F.3d at 174-175.

Syngenta and Winnebago reject (1) expressly. Keith does so implicitly. Syngenta rejects (2). Sable therefore is not good law. See Neick v. City of Beavercreek, 255 F. Supp. 2d 773, 779 (S.D. Ohio 2003) (noting "questionable validity" of Sable).

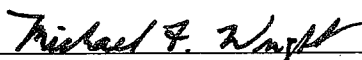
The injunction below closes the one forum that has jurisdiction over the Younis action. This alone is compelling grounds to reverse the injunction.

VIII. CONCLUSION

For the reasons stated above and in the Younises' Opening Brief, the injunction below should be vacated or reversed. For the guidance of the superior court, the Court should include in its decision a determination that the Settlement Agreement has absolutely no effect whatsoever on the Younises' rights against CEC.

Dated: April 2, 2007

CASE, KNOWLSON, JORDAN & WRIGHT



By: Michael F. Wright
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CERTIFICATE OF COMPLIANCE

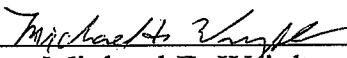
PURSUANT TO CIRCUIT RULE 32-1

U.S. Court of Appeals Docket Number 05-56180

I certify that the attached Appellant's Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,938 words as counted by Microsoft Word 2003.

Dated: April 2, 2007

Case, Knowlson, Jordan & Wright LLP


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CERTIFICATE OF SERVICE

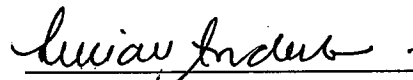
This is to certify that on April 2, 2007, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** in the appeal from the District Court, CV-97-5042 CAS (Ex), was served by United States Mail, First Class, on April 2, 2007, on counsel of record for all parties to the action below in this matter, as follows:

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