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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITIZENS FOR FREE SPEECH, LLC;
MICHAEL SHAW,

Plaintiffs,

v.

COUNTY OF ALAMEDA; EAST COUNTY BOARD OF ZONING ADJUSTMENTS; and
FRANK J. IMHOFF, SCOTT BEYER, and MATTHEW B. FORD, all in their official capacities as members of the East County Board of Zoning Adjustments,

Defendants.

Case No. 4:18-cv-00834-SBA

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: April 11, 2018
Time: 1:00 P.M.
Courtroom: TBD
Hon. Saundra Brown Armstrong

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Plaintiffs Citizens for Free Speech and Michael Shaw respectfully submit this Reply to Defendants' Opposition to Motion for Preliminary Injunction (Opp.).

BACKGROUND

The essential facts of this case are undisputed. This action arises from Defendant County of Alameda's (County's) attempt to conduct an administrative adjudication to abate certain signs built and maintained by Plaintiffs that display speech protected by the First Amendment. Complaint for Civil Rights Violation and Injunctive Relief; Declaratory Relief; and Damages, Dkt. 1, ¶¶ 8-24. The operative facts giving rise to the County's abatement action are identical to those that gave rise to previous litigation between the same parties in this Court, from 2014 to 2017 (the Litigated Case). The Litigated Case resulted in a valid, final judgment in which Plaintiffs were the prevailing parties. Dkt. 1, ¶ 19.

The final Judgment in the Litigated Case is now res judicata as to any and all claims arising between the same parties based on the same body of facts, regardless of whether those claims were actually litigated. The Litigated Case is also subject to Federal Rule of Civil Procedure 13(a), which provides that the County's failure to raise a compulsory counterclaim in that case bars such claim from being asserted by the County against Plaintiffs in any subsequent forum. Plaintiffs now ask for a preliminary injunction to bar the County from applying its sign ordinance to abate Plaintiffs' signs, since the County could have, but did not, file a compulsory counterclaim in the Litigated Case alleging that Plaintiffs' signs violated the ordinance.

In its Opposition, the County agrees that the 2014 Litigated Case should have a preclusive effect on the present dispute, but advances a strangely inverted understanding of claim preclusion. The County argues that the Litigated Case bars Plaintiffs' present motion for a preliminary injunction, although the claims Citizens now advance *could not have been litigated in the earlier case* because they did not accrue until after the final judgment in that case. Conversely, the County maintains that its own wasteful and duplicative effort to abate Plaintiffs' signs should not be precluded, although that claim very easily *could have been raised* in the Litigated Case.

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The County apparently chose not to raise its compulsory counterclaim in the Litigated Case as a deliberate litigation strategy, in the conviction that long-established principles of res judicata and the Federal Rules of Civil Procedure should not require the County to enforce its regulations in federal court. Opp. at 8-10. In effect, the County seeks to invoke what amounts to a governmental exception to the procedural rules that bind other litigants, simply because the County prefers to extend litigation and waste judicial resources in a forum of its own choosing, rather than resolving matters efficiently and economically, once and for all, when it had the opportunity before this Court. The Court should not carve out such an exception.

The County does not dispute, and therefore concedes, that the issuance of an injunction in this case is not barred by the Anti-Injunction Act, 28 U.S.C. § 2283. Dkt. 22 at 11.

ARGUMENT

I. Plaintiffs Are Not Barred From Asserting Claim Preclusion and Rule 13(a) As Grounds for This Injunction.

At various points throughout its Opposition, the County asserts that Plaintiffs are barred from seeking the present injunction by claim preclusion or issue preclusion. Each of these assertions reflects a mistaken understanding of the facts of this case or of preclusion law, and will be addressed together here for convenience.

A. Plaintiffs do not ask this court for the same injunction that was sought in the Litigated Case.

The County's Opposition repeatedly mischaracterizes the preliminary injunction Plaintiffs seek as the same (or even the "very same") injunction that was requested in the Litigated Case. Opp. at 1, 6, 7, 8. That is not true. The gravamen of the complaint in the Litigated Case was that provisions of the County's Sign Code were unconstitutional.[1] That was the basis for the injunctive relief sought and granted in that case. Prior Dkt. 11-1, at 3-12. The present motion for a preliminary injunction is based on the fact that the County seeks to adjudicate a

[1] *Citizens for Free Speech, LLC et al. v. County of Alameda*, Case No. C14-02513, Dkt 1, ¶¶ 15-33. Plaintiffs will hereafter adopt Defendants' practice of referring to documents filed in the Litigated Case as "Prior Dkt. ###."

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claim against Plaintiffs that is foreclosed by claim preclusion and Rule 13(a). Dkt. 22 at 13-18. Although both this case and the Litigated Case involve requests for the Court to enjoin the County from enforcing its Code against Plaintiffs, the facts giving rise to the requests for relief differ, as described above. More important, the facts giving rise to the present motion did not even exist at the time of the request for injunctive relief in the Litigated Case. The mere fact that injunctive relief was sought then, and is again sought now, is not in itself grounds for claim or issue preclusion when the claims for relief arise from different operative facts. *Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994) ("[T]he critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts." Cf. *Villacres v. ABM Indus. Inc*., 189 Cal. App. 4th 562, 576 (2010) ("The fact that different forms of relief are sought in the two lawsuits is irrelevant" to claim preclusion).

B. The fact that Plaintiffs clearly foresaw that the County would pursue its current campaign of duplicative and wasteful litigation does not imply that they are barred from raising claim preclusion to enjoin it.

Defendants point out that Plaintiffs repeatedly warned this Court that, unless enjoined, the County would engage in a campaign of wasteful and duplicative litigation on the issues that should have been resolved in the Litigated Case. Opp. at 7. The County's actions that gave rise to the present Complaint are a prime example of what Plaintiffs clearly foresaw. Yet the County now argues that somehow, *because* Plaintiffs foresaw the County's present enforcement action, they should be barred from opposing it as foreclosed by the entry of a final judgment in the Litigated Case. (Id.) The County cites to no authority for its novel theory of "preclusion by foresight," and Plaintiffs are aware of none. This Court should not be the first to adopt it.

C. Plaintiffs were not required to raise the preclusive effect of the final judgment in the Litigated Case before that judgment was entered.

Equally strangely, the County asserts that Plaintiffs should be precluded from invoking Rule 13(a) to bar the County's duplicative enforcement action, because they "never argued [in the Litigated Case] that the expected enforcement proceeding would be barred by the simple fact

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of the judgment or the County's failure to file a counterclaim under Rule 13(a)." (Opp. at 7:11-12.) Similarly, the County again complains that Plaintiffs "could have, but failed to, assert this theory in the prior action." Opp. at 9. But the long-standing doctrine of res judicata and the Federal Rules of Civil Procedure are not secrets. Moreover, there is no requirement at law, and the County cites none, that a potential party to a future action must raise the possibility of a claim or defense before it comes into existence.

A fundamental requirement for claim preclusion is a valid, final judgment in a litigated case or administrative proceeding. See *Tahoe–Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir.2003). The County was not precluded from raising its present claims against Plaintiffs at any point prior to entry of the final judgment in the Litigated Case. After that entry of judgment, res judicata and Rule 13(a) precluded the County from raising those claims in any future proceeding. If the County was not aware that the entry of judgment would have that effect, it was not Plaintiffs' obligation to so inform it.

D. Neither the Present Complaint Nor This Motion Are Barred by Claim or Issue Preclusion.

The County argues at length that both the Complaint in this case and the present Motion for Preliminary Injunction are barred by claim and issue preclusion. (Opp. at 11-13.) The County is mistaken.

Because both the Complaint in this case and the complaint in the Litigated Case allege violations of the First Amendment, the County treats those causes of action as identical. They are not. In the Litigated Case, Plaintiffs alleged that the content of the County's Code violated their First Amendment rights, both facially and as applied. Prior Dkt. 1, ¶¶ 15-36. The Complaint in the present case alleges that

> "Requiring Plaintiffs to either acquiesce in the removal of the signs, or engage in an administrative proceeding which can result in the forcible removal of Plaintiff's signs without the approval of a judicial officer, subjects Plaintiffs to the deprivation of free speech rights secured by the First Amendment to the United States Constitution."

Dkt. 1, ¶ 26. This claim is completely distinct from any allegation concerning the

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constitutionality of the County's regulations, per se. Moreover, it is not a claim that was, or could have been, raised in the Litigated Case, because it did not accrue until the County served its 2017 "Declaration of Public Nuisance – Notice to Abate" and "Notice of Administrative Hearing on Abatement of Nuisance." Dkt. 1, ¶¶ 12-13. These notices were dated more than 6 months after entry of the final judgment in the Litigated Case. See Dkt. 1, ¶ 19. Because the First Amendment cause of action in the present case alleges a fundamentally different type of injury than was alleged in the Litigated Case, and arises from facts that did not even exist until after the entry of judgment in the Litigated Case, it is impossible that res judicata could apply to bar this cause of action. Moreover, the County admits that Plaintiffs' Due Process cause of action is not and cannot be barred. (Opp. at 25-27.) Thus, the County's contention that the Complaint in this case is barred by claim preclusion is meritless.

The County's assertion that the present Motion is barred by issue preclusion is similarly absurd. A fundamental requirement for issue preclusion is that the issue was actually litigated in a previous action. Plaintiffs' present Motion for Preliminary injunction, like the underlying Complaint, is based on facts that did not come into existence until after the completion of the Litigated Case. Although the County could easily have litigated its present claim against Plaintiffs in the Litigated Case, it is literally impossible that a motion for an injunction to set aside an administrative hearing could have been actually litigated and resolved months or years before that hearing was scheduled. Issue preclusion can have no application to Plaintiffs' motion.

II. Rule 13(a) Plainly Applies To the Facts of This case.

A. The County effectively concedes that the facts of this case fall within the scope of Rule 13(a).

The language of Rule 13(a) is clear: "A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." Fed. Rules Civ. Pro. 13(a). The County's Opposition does not dispute, and therefore concedes, that

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the claim it is now pursuing against Plaintiffs existed at the time the Litigated Case was filed. The County does not dispute, and therefore concedes, that it did not file a counterclaim in the Litigated Case raising its claim against Plaintiffs. The County does not dispute, and therefore concedes, that its present claim against Plaintiffs arises from the same body of facts as Plaintiffs' claims in the Litigated Case, and the County does not allege that filing the counterclaim required by Rule 13(a) would have required adding any other party to the Litigated Case. In short, the County effectively concedes that it failed to comply with the requirements of Rule 13(a), but merely disputes whether that failure is grounds for issuance of the present injunction.

B. Rule 13a may properly be applied to bar subsequent claims filed before state administrative tribunals.

The County argues that the preclusive effect of Rule 13(a) applies only "when a party files suit in federal court that states a claim that should have been asserted in an earlier federal suit." Opp. at 8. No authority is cited for this proposition, which is entirely fictional. In arguing that its actions should not be subject to the ordinary operation of Rule 13(a), the County notes that "Plaintiffs fail to cite a single case . . . holding that Rule 13(a) can preclude a subsequent state or local *administrative* proceeding." Opp. at 8 (emphasis in original). However, it is equally true that the Opposition fails to cite a single case or other authority holding to the contrary. Federal courts have the undoubted authority to enjoin state administrative proceedings when those proceedings would conflict with federal law. *Bud Antle, Inc., v. Barbosa*, 45 F.3d 1261 (1994) (enjoining hearing before the California Agricultural Labor Relations Board); *American Motors Sales Corp. v. Runke*, 708 F. 2d 202 (6th Circuit, 1983) (enjoining hearing before the Kentucky Department of Transportation). The County advances no reason why there should be an exception to this general authority for injunctions of administrative adjudications that would facilitate a violation of the Federal Rules.

The County further asserts that administrative adjudications are not subject to claim preclusion at all, since adjudicating Plaintiff's liability for violating the Code in such a forum does not constitute a "claim." Opp. at 8. As authority for this proposition, the County cites *City of Oakland v. PERS*, 95 Cal.App. 4th 29 (2002), a case that dealt with whether Code Civ. Pro. §

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338 (d), which provides a three-year statute of limitations applicable to civil actions based on mistake, applied to an administrative reclassification proceeding. The court concluded that "no statute of limitations bars an administrative claim for reclassification." But this holding in no way suggests that adjudications before administrative tribunals do not constitute "claims" in the context of claim preclusion. The Supreme Court has repeatedly found that the outcomes of such administrative adjudications have claim-preclusive effect with respect to subsequent court actions. See *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) ("'[W]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.'") (quoting *University of Tenn. v. Elliott*, 478 U.S. 788, 797–798 (1986) (quoting *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422 (1966)). Thus, for purposes of preclusion, a "claim" is a "claim," regardless of whether it is brought before a court of law, or before an administrative tribunal.

C. The County's desire to have Plaintiffs' liability adjudicated before a hand-picked tribunal of County appointees instead of by this Court is not sufficient grounds to carve out a special exception to preclusion law.

According to the County's Opposition, applying ordinary, long-accepted rules of claim preclusion to the County in this case would have "untenable," even disastrous, consequences. But what the County considers "untenable" is the prospect of having to litigate an enforcement action in federal court, instead of before an administrative tribunal of hand-picked County appointees. Opp. at 9. To make the point more plainly, complying with normal principles of claim preclusion in a case like this would "deny the County its choice of forum," thus "frustrat[ing] the administrative process." Id. Yet the County points to no statute, rule, doctrine, or case that elevates the County's interest in enforcing its regulations before a tribunal of its own chosen appointees above the interests served by maintaining the integrity of res judicata and Rule 13(a).

The closest authority the County could cite is a 42-year-old District Court opinion from Delaware, in which plaintiffs sought to enjoin the Federal Trade Commission from commencing

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an enforcement action in any forum other than Delaware, on the grounds that, under Rule 13(a), such an enforcement action could only be brought as a compulsory counterclaim to the then-ongoing Delaware litigation. *A. O. Smith v. Federal Trade Commission*, 417 F. Supp. 1068, 1088 (D. Delaware, 1976). The court denied the injunction and allowed the Commission to transfer the action to the District Court for the District of Columbia, which was the Congressionally designated enforcement forum for the regulatory program at issue. This special exception to Rule 13(a) was warranted because consolidating enforcement actions in the District of Columbia court was an element of

> "a special Congressionally designed enforcement scheme which provides the district courts with jurisdiction over suits by the Commission to enforce its orders. 15 U.S.C. § 49. This is especially important because application of [Rule 13(a)] in the instant context would serve to completely eviscerate the Congressionally-mandated enforcement mechanism."

(Id.) Clearly, the weighty national issues justifying a special exception to the compulsory counterclaim rule in *A.O. Smith* cannot reasonably be compared to the County's simple preference to enforce its sign regulations before an adjudicatory tribunal of its own picking.

D. Applying Rule 13(a) in this case would not conflict with the Rules Enabling Act.

The County asserts that the "sweeping impact" of requiring Defendants to comply with Rule 13(a) would contravene the Rules Enabling Act, 28 U.S.C. § 2072(b). (Opp. at 9:10-12.) This Act states that the federal rules "shall not abridge, enlarge or modify any substantive right." (Id.) Here, the substantive right that the County asserts is its supposed right not to be required to "conduct nuisance abatement in federal court." Opp. at 9. However, being allowed to litigate in one's preferred forum is not a substantive right; it is a procedural one. No substantive remedy available to the County would be foreclosed by requiring it to litigate its nuisance abatement claim as a compulsory counterclaim in the Litigated Case, rather than waiting and commencing a new, duplicative action before an administrative tribunal. Thus, complying with Rule 13(a) would have had no impact on the County's substantive right to abate nuisances within its jurisdiction, and would not have implicated the Rules Enabling Act in any way.

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III. Like Rule 13(a), the More General Doctrine Of Res Judicata Fully Applies To This Case.

A. Res judicata applies to all parties in the previous action

The County asserts that the res judicata "has little application" in this case, beyond the operation of Rule 13(a). Opp. at 10. Because the County was the defendant in the Litigated Case, it is true that the most reasonable way for it to assert any claims it had against Plaintiffs would have been via a counterclaim. However, the fact that the County's failure to file such a claim violates Rule 13(a) does not mean that the County is not also barred from asserting its claims now by the broader doctrine of res judicata.

"Claim preclusion, formerly known at common law as res judicata, teaches that a final judgment on the merits of an action precludes *the parties* from re-litigating not only the adjudicated claim, but also any theories or issues that were actually decided, or could have been decided, in that action." *Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1100 (10th Cir. 2007) (emphasis added). Thus, regardless of how the County might have raised its claim that Plaintiffs' signs violated the Code and should be abated, it chose not to avail itself of the opportunity, and is barred from doing so now by res judicata, independently of its violation of Rule 13(a).

B. Res judicata applies to adjudicative administrative tribunals

The County maintains that res judicata is inapplicable to bar adjudicative proceedings by an administrative agency. Opp. at 10, 11. While this may have been a tenable proposition 70 years ago, it is no longer so, and the County advances no authorities that support it. *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982) does not hold, as the County claims, that a valid final judgment does not, as a general principle, bar a subsequent administrative adjudication. In *Hall*, an intervenor in an ongoing agency proceeding moved to dismiss further proceedings as precluded by a recent Supreme Court opinion. The Fifth Circuit responded that the intervenor "misreads and construes too broadly" the opinion in question (691 F.2d at 1189). "The thrust of Arkla's motion to dismiss," the court continued, "is based upon its erroneous and overbroad reading of the Supreme Court's decision ... and accordingly, it is without merit." (Id. at 1189-

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1190.) Nothing in *Hall* suggests that, if the Supreme Court had in fact ruled on the matter pending before the agency, the normal operation of claim preclusion would not have barred further proceedings.

Indeed, the County ultimately admits that claim preclusion *would* bar the Board's administrative adjudication if the County had been the plaintiff in the Litigated case, instead of the defendant. Opp. at 11. So in fact, the County is once again merely objecting to being required to raise its claims against Plaintiffs before this Court, during the pendency of the Litigated Case, rather than being allowed to pursue a wasteful and duplicative subsequent action in its preferred forum, before a panel of its own appointees.

IV. The All Writs Act Confirms This Court's Jurisdiction To Issue an Injunction.

The All Writs Act, 28 U.S.C. § 1651, expressly authorizes federal courts to enjoin state proceedings when, as in the present case, a local government attempts to evade the preclusive effect of a prior federal judgment. For this reason, Plaintiffs seek injunctive relief pursuant to the All Writs Act, in addition to relying on standard principles of res judicata and Rule 13(a). Dkt. 1 at 8. The County concedes that "district courts have authority under the Act to enjoin proceedings barred by prior litigation." Opp. at 11. However, the County cites to an unpublished 2012 order denying a preliminary injunction under California's Uniform Fraudulent Transfer Act (CUFTA) on the grounds that the plaintiff in that case "has not pled a CUFTA claim." Opp. at 23-24. That ruling is wholly irrelevant to Plaintiffs' prayer for relief pursuant to the All Writs Act in the present case, since all the elements required to establish the preclusive effect of this Court's previous judgment have been fully pled.

V. Plaintiffs Do Not Need To Exhaust Administrative Remedies Before Seeking To Enjoin the County's Duplicative Administrative Adjudication.

The County argues that "a majority of the Courts of Appeals" have held that litigants in Plaintiffs' position are required to exhaust administrative remedies by presenting their objections to an agency's jurisdiction to the agency itself, rather than seeking to enjoin those proceedings as precluded by prior litigation. Opp. at 14. Notably, that "majority" does not include the Ninth Circuit, which has no such rule. In this Circuit, litigants may seek and obtain prospective

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injunctive relief to avoid being forced into an administrative adjudication of matters over which the agency lacks jurisdiction, without first presenting its objections to the agency itself.

VI. Plaintiffs Are Entitled to a Preliminary Injunction

The preliminary injunction should issue upon a showing of either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) serious questions going to the merits and a balance of hardships tipping sharply in favor of the party requesting relief. *Brown v. California Dept. of Transp.,* 321 F.3d 1217, 1221 (9th Cir. 2003) (citing *A & M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 (9th Cir. 2001). Here, Plaintiffs have easily met both of these disjunctive requirements.

A. Probable success on the merits and possible irreparable injury.

All that is required for Plaintiffs to succeed on the merits is for this Court to apply standard, long-established principles of res judicata and Federal Rule of Civil Procedure 13(a).

"To establish irreparable injury in the First Amendment context, [Plaintiffs] need only 'demonstrat[e] the existence of a colorable First Amendment claim.'" *Brown*, 321 F.3d at 1225 (quoting *Sammartano v. First Judicial Court*, 303 F.3d 959, 973 (9th Cir. 2002)). Here, the chilling effect of the County's threat to remove or destroy Plaintiff's protected speech easily meets that threshold.

B. Public interest and Balance of Hardships

The protection of free speech from official threats of restraint is of extraordinary public importance. The threat of abatement Plaintiffs face is intensified by the fact that it comes in willful disregard of the preclusive effect of the Litigated Case. In contrast, the only "hardship" the County has alleged is being forced to comply with standard principles of claim preclusion and the Federal Rules of Civil Procedure. The County apparently believes that, for purposes of injunctive relief, "the public interest" is synonymous with "the County's interest" – defined in this case as allowing the County to have its preferred choice of forums. There is no issue here of not "allowing [the County] to enforce its zoning code." Opp. at 15 (citing *Ventura County Christian High Sch. V. City of San Buenaventura*, 233 F.Supp. 1241, 1254 (C.D. Cal. 2002)).

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Rather, the public interest lies in ensuring that the County enforces its Code in compliance with the law – including complying with the same procedural rules as all other litigants, even if that means being denied its preferred forum.

CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiff's motion for a preliminary injunction.

DATED: MARCH 28, 2018

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By ___/s/ *Timothy V. Kassouni*_____

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