FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN SONNER, on behalf of herself and all others similarly situated, *Plaintiff-Appellee*, v. PREMIER NUTRITION CORPORATION, FKA Joint Juice, Inc., *Defendant-Appellant.*	No. 21-15526 D.C. No. 3:13-cv-01271-RS OPINION

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Argued and Submitted May 23, 2022
San Francisco, California

Filed September 29, 2022

Before: Carlos F. Lucero,[*] Consuelo M. Callahan, and Bridget S. Bade, Circuit Judges.

Opinion by Judge Bade

[*] The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

SUMMARY[**]

Injunction

The panel affirmed the district court's order denying Premier Nutrition Corporation's request for a permanent injunction against a California state court action under the "relitigation exception" of the Anti-Injunction Act, 28 U.S.C. § 2283.

In *Sonner v. Premier Nutrition Corp. (Sonner I),* 971 F.3d 834 (9th Cir. 2020), the court affirmed the district court's dismissal without leave to amend of Kathleen Sonner's class action complaint. This court held that federal courts sitting in diversity must apply federal equitable principles to claims for equitable restitution brought under California law and that, under such principles, dismissal was appropriate because Sonner could not show that she lacked an adequate remedy at law. After *Sonner I* was issued, Sonner filed a virtually identical complaint in California state court. Premier Nutrition responded by returning to the district court and seeking a permanent injunction against the state court action. The district court denied the injunction.

The panel held that the district court did not abuse its discretion in denying the permanent injunction regardless of *Sonner I*'s preclusive effect. The panel did not determine the preclusive effect of *Sonner I*.

The panel clarified that the dismissal in *Sonner I* was *not* for lack of subject matter jurisdiction. This court affirmed

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the district court's dismissal of Sonner's claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6), but on the basis of federal, rather than state, law. A dismissal under Rule 12(b)(6) requires a judgment on the merits and cannot be decided before the court assumes jurisdiction. What is more, the district court dismissed Sonner's claim with prejudice and without leave to amend. The parties disputed whether a dismissal for failure to plead an inadequate remedy at law was a dismissal "on the merits" and thus precluded relitigation in another forum. The panel did not address this dispute because it held that the district court did not abuse its discretion in denying Premier's motion for a permanent injunction.

The Anti-Injunction Act provides that a federal court generally may not enjoin state court proceedings. Under the All Writs Act and the relitigation exception of the Anti-Injunction Act, a federal district court may enjoin a state-court proceeding to protect or effectuate its judgments. A state court proceeding accordingly may be enjoined under the Anti-Injunction Act's relitigation exception if it is barred by res judicata.

Sonner does not contest that two out of three elements of res judicata are met: there is an identity of claims and parties. What is at issue here is whether this court's affirmance of the dismissal of Sonner's claims was "on the merits" for res judicata purposes. The panel held that it need not resolve whether federal or state law applied here because even if res judicata applied, the panel would hold that the district court did not abuse its discretion in denying the injunction. It will therefore be for the state court to decide whether res judicata bars relitigation of Sonner's claims.

The panel held that there was a strong presumption against enjoining a state court proceeding under the relitigation exception. Premier did not point to any clearly erroneous factual findings in the district court's order, and the panel detected none. Res judicata principles are of high importance, but they can be addressed by the state court, and do not compel resorting to the heavy artillery of a permanent injunction.

COUNSEL

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OPINION

BADE, Circuit Judge:

In *Sonner v. Premier Nutrition Corp.* (*Sonner I*), 971 F.3d 834 (9th Cir. 2020), we affirmed the district court's dismissal, without leave to amend, of Plaintiff-Appellee Kathleen Sonner's class-action complaint. We held that federal courts sitting in diversity must apply federal equitable principles to claims for equitable restitution brought under California law and that, under such principles, dismissal was appropriate because Sonner could not show that she lacked an adequate remedy at law. *Sonner I*, 971 F.3d at 837, 839–44.

Immediately after the *Sonner I* opinion was issued and her federal case was terminated, Sonner filed a virtually identical complaint in California state court. Defendant-Appellant Premier Nutrition responded to Sonner's new complaint by returning to the district court and seeking a permanent injunction against the state court action under the "relitigation exception" of the Anti-Injunction Act, 28 U.S.C. § 2283. The district court denied the injunction, expressing uncertainty about whether our holding in *Sonner I* barred relitigation of Sonner's claims under principles of res judicata, also known as claim preclusion.

We are now asked to determine the preclusive effect of our opinion in *Sonner I*, and to decide whether the district court abused its discretion in denying the permanent injunction. Because the district court did not abuse its discretion in denying the injunction regardless of *Sonner I*'s preclusive effect, we decide only the second of these issues, and we affirm.

I

A

As our opinion in *Sonner I* explains, this case has a long history. 971 F.3d at 837–39. The original complaint was filed in 2013. *Id.* at 837. Sonner and a putative class sought relief under California's Unfair Competition Law ("UCL") and Consumers Legal Remedies Act ("CLRA") for Premier's alleged false advertising of its "Joint Juice" product. *Id.* at 837–38. Premier markets Joint Juice as supporting healthy joints; Sonner alleges it fails to provide the advertised benefits. *Id.* at 837.

In 2017, shortly before trial was scheduled to begin, and after over four years of discovery and extensive motions practice—including the certification of a class and Sonner's prevailing on Premier's motion for summary judgment—Sonner sought leave to file a second amended complaint. *Id.* at 838. Her then-operative complaint requested injunctive relief, restitution, and damages, and demanded a jury trial. *Id.* But Sonner sought leave to file an amended complaint dropping her damages claim so that she could proceed to a bench trial rather than a jury trial. *Id.*

Premier opposed the motion for leave to amend, arguing that amendment would be futile because the proposed second amended complaint, with no damages claim, would be subject to dismissal for failure to allege the lack of an adequate remedy at law. *Id.* During a hearing on the issue, the district court explained that Sonner was taking a "chance" in amending the complaint, warning that, if Premier filed a motion to dismiss, it would be "open season" on the amended complaint in light of the inadequate-remedy-at-law issue. *Id.* Sonner's counsel responded that he understood that his client was "taking that chance." The

district court then warned Sonner "that if it granted the motion and she dropped the damages claim, 'we are never going to hear again anything about a damage claim under the CLRA'" and advised Sonner "not to 'put a lot of money' on a future motion to amend to re-allege the [damages] claim." *Id.* Sonner's counsel responded that he "completely agree[d]" with the district court and that he understood that Sonner would "maybe not be granted [further] leave to amend to put back in" the CLRA damages claim. The district court granted leave to file the second amended complaint.

Sonner filed the second amended complaint and, unsurprisingly, Premier moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), which provides for dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *see Sonner I*, 971 F.3d at 838. Consistent with its admonitions, the district court granted the motion to dismiss, concluding that California law required Sonner to show that her remedy at law was inadequate, and she had not done so. During a hearing on the motion to dismiss, the district court explained that, given its prior warnings, it would not grant leave to amend the complaint to re-allege the damages claim. The district court added that allowing a further amendment to cure the inadequate-remedy-at-law defect would amount to "total prejudice to the court system," "an abuse of the court system," and would be "totally unfair."

On appeal, we affirmed the district court's Rule 12(b)(6) dismissal. *Sonner I*, 971 F.3d at 839, 844. Reviewing the dismissal de novo, we concluded that federal common law, not California law, governed whether dismissal was proper. *Id.* at 839–44. We further held that federal common law required Sonner to establish the lack of an adequate remedy

at law before she could secure equitable restitution in federal court for past harm under the California causes of action alleged in her complaint. *Id.* at 844. In reaching this result, we characterized the choice-of-law issue as a "threshold jurisdictional question" under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Sonner I*, 971 F.3d at 839. But we did not indicate that Sonner's failure to plead an inadequate remedy at law deprived the district court of jurisdiction over her complaint; instead we affirmed that "the district court did not err in dismissing Sonner's claims" under Rule 12(b)(6). *Id.* at 837, 839, 844.

Reviewing the district court's denial of leave to amend to re-allege a damages claim, we concluded that the district court did not abuse its discretion given Sonner's strategic choice to amend the complaint on the eve of trial and the district court's explicit warnings that further leave would not be granted if she dropped her damages claim. *Id.* at 845. Accordingly, we affirmed the district court's Rule 12(b)(6) dismissal of Sonner's complaint, with prejudice. *See id.*

B

One day after the mandate in *Sonner I* issued, Sonner, on behalf of a putative class, filed a complaint asserting the same claims in a California trial court.

Premier then filed a motion for a permanent injunction in the district court under the All Writs Act, 28 U.S.C. § 1651, and the "relitigation exception" to the Anti-Injunction Act, *id.* § 2283, seeking to enjoin Sonner's state-court proceedings on the theory that res judicata barred relitigation of her claims. After full briefing and a hearing, the district court denied the motion.

The district court considered whether to grant an injunction to prevent relitigation of Sonner's claims in state court under res judicata principles. The court observed that there was no dispute about the existence of two of the three elements of res judicata—an identity of claims and privity of parties—because Sonner's state court complaint was virtually identical to her prior complaint and the parties were the same. The court therefore focused on the final element—"whether there was a final judgment on the merits"—and determined that the answer "remain[ed] unclear." The court observed that although it dismissed *Sonner I* under Rule 12(b)(6), our opinion affirming that dismissal may not have been a resolution "on the merits," noting our single use of the phrase "threshold jurisdictional question."

As the district court described it, the parties' dispute over the res judicata effect of *Sonner I* centered on whether the opinion "used the word 'jurisdictional' in its doctrinal sense or as an adjective describing its choice among various jurisdictions' laws." And even though the district court concluded that the *Sonner I* opinion seemed to use "'jurisdictional' only in [the] descriptive sense," the district court nonetheless equivocated and noted that "the decision's legacy may be jurisdictional in nature." The district court ultimately decided that it could not resolve "these open questions" and, in light of "the sensitive nature of interfering with an ongoing state action," denied the injunction.

In doing so, the district court correctly recognized that it "is usually the bailiwick of the *second* court" to determine the preclusive effect of a prior judgment, and that when deciding whether an injunction should issue under the Anti-Injunction Act, "[e]very benefit of the doubt goes toward the state court" determining whether a subsequent action is precluded. Sonner's state court action remains pending in

Alameda County Superior Court and has been stayed pending of the outcome of this appeal.

II

"Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo." *California v. IntelliGender, LLC*, 771 F.3d 1169, 1176 (9th Cir. 2014) (quoting *California v. Randtron*, 284 F.3d 969, 974 (9th Cir. 2002)). "If an injunction falls within the purview of the Anti-Injunction Act, then we review for abuse of discretion the district court's decision whether to grant the injunction." *Id.*

III

To start, and to dispel any confusion, there is no doubt that our dismissal was *not* for lack of subject matter jurisdiction.[1] Instead, we affirmed the district court's dismissal of Sonner's claims for failure to state a claim under Rule 12(b)(6), but on the basis of federal, rather than state, law. *Sonner I*, 971 F.3d at 838–39. Our characterization of the choice-of-law analysis between California and federal law as a "threshold jurisdictional question" does not mean that we transformed Sonner's dismissal for failure to state a claim into one based on lack of subject matter jurisdiction.

[1] Rule 12(b) provides two avenues to dismiss for lack of jurisdiction: Rule 12(b)(1), for dismissal based on lack of subject matter jurisdiction, and Rule 12(b)(2), for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b). Nowhere does Sonner's briefing suggest that subsections 12(b)(1) or (b)(2) should have applied, or that any basis other than Rule 12(b)(6) would have been appropriate for the dismissal of her claims. We also did not state anywhere in *Sonner I* that our decision rested on those subsections. Instead, we referred specifically to Rule 12(b)(6) ("failure to state a claim upon which relief can be granted") and affirmed on that basis. *See Sonner I*, 971 F.3d at 838–39.

As the remainder of *Sonner I* makes clear, the "jurisdictional" question we decided was which forum's laws applied, *not* whether jurisdiction was lacking. *See, e.g.*, *id.* at 837 ("Pursuant to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), and *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L.Ed. 2079 (1945), we hold that federal courts must apply equitable principles derived from federal common law to claims for equitable restitution under [the UCL and CLRA].").

It is also significant that we affirmed the dismissal of Sonner's claims under Rule 12(b)(6), which "requires a judgment on the merits and cannot be decided before the court assumes jurisdiction." *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1035–36 (9th Cir. 1985). Thus, if we had lacked subject matter jurisdiction due to Sonner's failure to show an inadequate remedy at law, it would have been improper for us to affirm on the ground that Sonner had failed to state a claim upon which relief could be granted. If we thought dismissal should have been for lack of subject matter jurisdiction, we would have vacated and remanded with instructions to that effect. *Cf. Wilson v. Horton's Towing*, 906 F.3d 773, 783–84 (9th Cir. 2018) (vacating the district court's with-prejudice dismissal and remanding because the plaintiff could "potentially renew his claims in federal court after the appropriate remedies have been exhausted").

What is more, the district court dismissed Sonner's claims with prejudice[2] and without leave to amend. *See Sonner I*, 971 F.3d at 844–45. We concluded that the district

[2] Sonner concedes that her claims were dismissed with prejudice. *See generally* 971 F.3d 834.

court acted within its discretion in doing so, given that "Sonner strategically chose to amend her complaint on the eve of trial to drop her damages claim" and was warned several times that this strategic choice could result in a dismissal without leave to amend. *Id.* at 845.

Finally, although the parties agree that a dismissal for failure to plead an inadequate remedy at law (and therefore to state an actionable claim for equitable relief in federal court) is not a dismissal for lack of subject matter jurisdiction, they dispute whether such a dismissal is "on the merits" and thus precludes relitigation in another forum. As we explain next, the district court did not abuse its discretion in denying Premier's motion for a permanent injunction, and therefore we do not address this dispute.

IV

The Anti-Injunction Act provides that a federal court generally may not enjoin state court proceedings. 28 U.S.C. § 2283. But under the All Writs Act, *id.* § 1651, and the so-called relitigation exception of the Anti-Injunction Act, a federal district court may enjoin a state-court proceeding when "necessary . . . to protect or effectuate its judgments." *Id.* § 2283; *see Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145–47 (1988); *IntelliGender*, 771 F.3d at 1176. A state court proceeding accordingly may be enjoined under the Anti-Injunction Act's relitigation exception if it is barred by res judicata. *Brother Recs., Inc. v. Jardine*, 432 F.3d 939, 943 (9th Cir. 2005); *Blalock Eddy Ranch v. MCI Telecomms. Corp.*, 982 F.2d 371, 375 (9th Cir. 1992).

Under federal law, res judicata applies when the earlier action "(1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Mpoyo v. Litton*

Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005) (quoting *Sidhu v. Flecto Co.*, 279 F.3d 896, 900 (9th Cir. 2002)). The elements of res judicata are similar under California law: "Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." *DKN Holdings LLC v. Faerber*, 352 P.3d 378, 386 (Cal. 2015).

A

Sonner does not contest that two out of three elements of res judicata are met: there is an identity of claims and parties.[3] Therefore the only question about whether res judicata should apply here is whether our affirmance of the dismissal of Sonner's claims was "on the merits" for res judicata purposes.

Premier urges us to answer this question in the affirmative, arguing that under well-established federal law our affirmance was on the merits. The parties' briefing, however, does not make it clear whether the federal or state definition of "on the merits" applies under these circumstances. Premier states that federal law controls, while acknowledging potential "uncertainty on this choice-of-law question." Sonner does not articulate whether she thinks we should look to federal or state law but seems to have conceded in the district court and on appeal that federal law applies.

[3] The district court concluded that Sonner's claims likely were not barred by collateral estoppel, also known as issue preclusion. Premier does not challenge this ruling on appeal.

"[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Federal common law in turn requires a federal court to apply the law of the state "in which the federal diversity court sits"—here, California. *Id.* at 508–09. Although the parties' briefing and the district court's order suggest otherwise, California courts look to their own law to judge the preclusive effect of a federal court judgment when the federal court sat in diversity. *Burdette v. Carrier Corp.*, 71 Cal. Rptr. 3d 185, 190–91 (Cal. Ct. App. 2008) (recognizing the rule articulated in *Semtek* and applying California res judicata law to determine the effect of a prior judgment in a federal diversity action). Were Sonner's action based on federal question instead of diversity jurisdiction, the answer might well be different. *See Guerrero v. Dep't of Corr. & Rehab.*, 239 Cal. Rptr. 3d 726, 732–35 (Cal. Ct. App. 2018).

But we need not resolve whether federal or state law applies here because even if res judicata applied, we would hold that the district court did not abuse its discretion in denying the injunction. It will therefore be for the state court to resolve this California-law question, and the ultimate question of whether res judicata bars relitigation of Sonner's claim.[4] *See Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011)

[4] We recognize that we could follow the parties' presentation of this issue and apply federal res judicata law, even if the propriety of such application were unclear. *See IntelliGender*, 771 F.3d at 1176 n.6. We think doing so here would be inappropriate because even if res judicata barred Sonner's state action—under federal or California law—the district court would not have abused its discretion. *See, e.g.*, *Merle Norman Cosms., Inc. v. Victa*, 936 F.2d 466, 468 (9th Cir. 1991) (holding that district court "acted entirely within its discretion" when it denied an injunction because the party seeking injunction could raise "defenses of

("Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court . . . .").

B

Even if the district court could have enjoined Sonner's state court action, that would not necessarily imply that it abused its discretion in declining to do so. "[T]he fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." *Chick Kam Choo*, 486 U.S. at 151. Whether to grant an injunction and the scope of such an injunction is assigned to the sound discretion of the district court. *Id.*; *Blalock*, 982 F.2d at 375. Thus, even if we were to conclude that Sonner's claims were dismissed on the merits, it would not necessarily follow that the district court abused its discretion. *See Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1377–79 (9th Cir. 1997).

Importantly, there is a strong presumption against enjoining a state court proceeding under the relitigation exception: "[A]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Smith*, 564 U.S. at 306 (citation omitted). Although we have acknowledged that enjoining state court litigation to protect the principles underlying res judicata can be valid, we have also cautioned that "the use of injunctions against relitigation poses a disturbing problem for our system of justice." *Wood v. Santa Barbara Chamber of Com., Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983).

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res judicata and collateral estoppel in the California courts"); *cf. IntelliGender*, 771 F.3d at 1176 & n.6, 1179–82 (reversing in part the denial of an injunction on the basis of federal res judicata principles).

That is because, as the district court observed, "[d]eciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court." *Smith*, 564 U.S. at 307. Res judicata can be raised as a defense in the second court, so an injunction is not required to uphold res judicata principles. *See Merle Norman Cosms., Inc. v. Victa*, 936 F.2d 466, 468 (9th Cir. 1991) (holding that district court "acted entirely within its discretion" when it denied an injunction because the party seeking injunction could raise "defenses of res judicata and collateral estoppel in the California courts").

Moreover, enjoining a state court judgment "is not justified even where a state court mistakenly rejects the res judicata effect of a prior federal judgment." *Sandpiper Vill. Condo. Ass'n v. Louisiana-Pacific Corp.*, 428 F.3d 831, 850 (9th Cir. 2005). After all, even if a state court action should be barred by res judicata, a "state trial court's erroneous refusal to give preclusive effect to a federal judgment" may be corrected by state appellate courts and ultimately the Supreme Court. *Smith*, 564 U.S. at 307 n.5. This consideration also weighs against issuing an injunction. *Id.*

Given these standards, it is unsurprising that Premier can cite only a single case in which we reversed the denial of an injunction under the relitigation exception, *IntelliGender*, 771 F.3d 1169. *IntelliGender* is distinguishable, however, because in that case the district court rested its decision on "clearly erroneous" factual findings. *Id.* at 1180. Premier does not point to any clearly erroneous factual findings in the district court's order, and we detect none. Further, reversal was justified in *IntelliGender* because failure to enter an injunction would jeopardize a carefully negotiated class-action settlement. *Id.* at 1180–82. Thus, permitting the state action to proceed in that case "would undermine [a]

central guarantee of our legal system and undercut [the Class Action Fairness Act's] purpose of increasing the fairness and consistency of class action settlements." *Id.* at 1181. Apart from the general principles of res judicata, no similarly pressing concerns are present here. Res judicata principles are of high importance, but they can be addressed by the state court, and therefore do not compel resorting to the "heavy artillery" of a permanent injunction. *See Smith*, 564 U.S. at 307 & n.5.

Premier argues that an error in the district court's legal reasoning suggests we should reverse, or at least vacate and remand. *See Brother Recs.*, 432 F.3d at 942 (holding that reliance "on an erroneous legal premise" may warrant reversal (citation omitted)). But the district court carefully grounded its decision on respect for the state court, and the strong presumption against issuing an injunction. This was not an abuse of discretion. *Smith*, 564 U.S. at 307.

V

The district court did not abuse its discretion in denying the injunction. As is generally proper, it will be for the state court to decide whether res judicata applies.

AFFIRMED.