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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, PUBLISHED AT 29 F.4th 527 (9th Cir. 2022) (MARCH 17, 2022)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

Plaintiff-Appellant,

v.

KIM EMBRY; NOAM GLICK,

Defendants-Appellees.

No. 20-16971

D.C. No. 2:20-cv-00526-KJM-DB

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted January 12, 2022
San Francisco, California

Before: Ronald M. GOULD, Mark J. BENNETT, and Ryan D. NELSON, Circuit Judges.

OPINION

BENNETT, Circuit Judge:

Plaintiff-Appellant B&G Foods North America, Inc. ("B&G"), a food manufacturer, sued Defendants-Appellees Kim Embry and her attorney, Noam Glick (collectively, "Defendants") under 42 U.S.C. § 1983. B&G alleges that Defendants violated its constitutional rights by threatening to sue and ultimately suing B&G to enforce California's Safe Drinking Water and Toxic Enforcement Act of 1986, better known as Proposition 65 or Prop. 65. The district court dismissed B&G's complaint based on the *Noerr-Pennington* doctrine[1] and denied leave to amend based on futility. B&G challenges those determinations. We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's decision that the *Noerr-Pennington* doctrine bars B&G's complaint, but we reverse the denial of leave to amend and remand to give B&G an opportunity to amend.

I. Facts and Procedural Background[2]

This case arises from Defendants' enforcement of Prop. 65, which, as relevant here, requires businesses to notify customers if their products contain chemicals "known to the state to cause cancer." Cal. Health &

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1 "The *Noerr-Pennington* doctrine, originally derived from the decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965), provides that litigation activity (including pre-litigation cease-and-desist letters) cannot form the basis of liability unless the litigation is a 'sham.'" *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 347 n.1 (9th Cir. 2014) (parallel citations omitted).

2 The facts are based on the allegations in B&G's complaint, which we accept as true and construe in the light most favorable to B&G. *See Ebner v. Fresh, Inc.,* 838 F.3d 958, 962 (9th Cir. 2016).

Safety Code § 25249.6. California's Office of Environmental Health Hazard Assessment ("OEHHA") maintains a list of such chemicals. *See id.* § 25249.8. Acrylamide, the chemical at issue, is on the list based solely on "laboratory studies in which pure acrylamide was given to rats or mice." Studies on humans have shown that acrylamide does not increase the risk of cancer. Indeed, OEHHA conceded in 2007 that acrylamide is not known to cause cancer in humans.

Any "person in the public interest" may bring a Prop. 65 enforcement action upon satisfying certain requirements. Cal. Health & Safety Code § 25249.7 (d). Private enforcers can seek injunctive relief and penalties of up to $2,500 per day per violation. *Id.* § 25249.7(a), (b)(1). A private enforcer receives 25% of any penalty collected, *id.* § 25249.12(d), and may also request reasonable attorneys' fees, Cal. Civ. Proc. Code § 1021.5. The state receives 75% of the penalty collected. Cal. Health & Safety Code § 25249.12(c).

Before bringing a private enforcement action, the person must give sixty days' notice of alleged violation ("NOV") to the Attorney General, other local prosecutors, and the alleged violator. *Id.* § 25249.7(d)(1). After receiving the NOV, the Attorney General must issue a no-merit letter if he believes the action is meritless, but the failure to do so is not an endorsement that the action has merit. *Id.* § 25249.7(e)(1). A no-merit letter doesn't prevent the person from bringing a private enforcement action. If the Attorney General or other prosecutor doesn't begin a prosecution within the sixty days' notice period, the person may commence a private enforcement action. *Id.* § 25249.7(d)(2).

California law offers businesses like B&G at least two exemptions under Prop. 65. First, a business need

not provide a cancer warning if it "can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer." *Id.* § 25249.10(c). This is known as the "No Significant Risk Level" ("NSRL"). For some listed chemicals, like acrylamide, the OEHHA has published a quantitative NSRL. *See* Cal. Code Regs. tit. 27, § 25705. To determine whether exposure from a chemical in a food product exceeds the NSRL, the exposure is calculated based on the "average rate of intake or exposure for average users of the consumer product." *Id.* § 25721(d)(4). Because this scientific assessment is very burdensome and often inconclusive (as enforcers disagree on how average consumption should be calculated), businesses often choose to settle when their products pose no health risks. Second, another exemption applies to products "where chemicals in food are produced by cooking necessary to render the food palatable or to avoid microbiological contamination." *Id.* § 25703(b)(1). But to qualify under this exemption, a business must satisfy a vague standard —that "sound considerations of public health support" an alternative risk level. *Id.* § 25703(b). In sum, because the standards are unclear and burdensome to prove, businesses often choose to settle Prop. 65 cases for certainty and to avoid paying substantial legal fees.

Embry, represented by Glick, has filed or threatened to file dozens of Prop. 65 acrylamide suits against food businesses and retailers. Over the last few years, Defendants have obtained about $1.7 million in penalties and fines from these actions. Consistent with Defendants' past practice, they began a Prop. 65 enforcement action against B&G. Glick, on behalf of Embry, served an NOV on B&G and the Attorney General

(and others). The NOV alleged that B&G was violating Prop. 65 because its "Cookie Cakes" contain acrylamide and B&G provides no cancer warning. The Attorney General did not issue a no-merit letter and did not begin enforcement proceedings. Embry, again represented by Glick, then sued B&G in state court, alleging that B&G's Cookie Cakes contain acrylamide and that B&G's failure to warn customers of that fact violates Prop. 65. Although B&G doesn't add acrylamide to its Cookie Cakes, they contain some amount of acrylamide formed during the baking process.

On the same day Embry sued B&G, B&G sued Defendants. B&G's complaint alleges that the naturally occurring acrylamide found in its Cookie Cakes does not cause cancer. B&G claims Defendants are liable under 42 U.S.C. § 1983 because the NOV and suit against B&G requires B&G to engage in false compelled speech in violation of the First Amendment. B&G seeks, among other things, an injunction barring any threats or lawsuits about acrylamide found in its Cookie Cakes, a declaration that Prop. 65's cancer warning as applied to its Cookie Cakes violates the First Amendment, and damages.

Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that (1) they are not state actors,[3] and (2) the *Noerr*-

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[3] A determination that Defendants are not state actors would be dispositive, as "[l]ike the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 143 L.Ed.2d 130 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S. Ct. 2777, 73 L.Ed.2d 534 (1982)).

Pennington doctrine bars the action. B&G argued in opposition that Defendants are state actors in enforcing Prop. 65. It also argued that the *Noerr-Pennington* doctrine doesn't apply because (1) the doctrine protects First Amendment rights and states have no First Amendment rights, and (2) the sham exception to *Noerr-Pennington* applies because Defendants' Prop. 65 lawsuit is objectively meritless and brought for the wrongful subjective purpose of extorting money from businesses.

The district court granted the motion to dismiss with prejudice. Assuming without deciding that Defendants were state actors, the court determined that *Noerr-Pennington* immunized Defendants from § 1983 liability. The district court rejected B&G's argument that Defendants had no First Amendment petitioning rights protected by *Noerr-Pennington*. It reasoned that while states themselves do not have First Amendment rights, under Ninth Circuit precedent, government actors may receive *Noerr-Pennington* immunity when they petition on behalf of the public. The district court found that Defendants' petitioning activities—sending prelitigation communications and suing—were done to enforce Prop. 65, which was a ballot measure sanctioned by California voters, and thus Defendants were petitioning on behalf of the public and entitled to *Noerr-Pennington* immunity. The district court also rejected B&G's arguments that Defendants' Prop. 65 enforcement action was a sham, because Defendants had been largely successful given the allegation in B&G's complaint that "over the last few years, [Defendants] have extracted nearly $1.7 million in penalties and fines from food companies" in acrylamide suits. After determining that the complaint should be dismissed, the district court denied B&G leave

to amend. The district court reasoned that any amendment would be futile because "[t]he *Noerr-Pennington* doctrine would apply equally to all claims based on Embry's acrylamide litigation against B&G." B&G timely appealed.

II. Standard of Review

We review de novo "a district court's dismissal based on the *Noerr-Pennington* doctrine." *Kearney v. Foley & Lardner, LLP,* 590 F.3d 638, 643 (9th Cir. 2009). In doing so, "[w]e accept as true the well-pleaded factual allegations in the complaint" and construe them in the nonmoving party's favor. *Ebner v. Fresh, Inc.,* 838 F.3d 958, 962 (9th Cir. 2016).

"We review the denial of leave to amend for an abuse of discretion, but we review the question of futility of amendment de novo." *United States v. United Healthcare Ins. Co.,* 848 F.3d 1161, 1172 (9th Cir. 2016) (citations omitted).

III. Discussion

A. The *Noerr-Pennington* Doctrine

"The *Noerr-Pennington* doctrine derives from the Petition Clause of the First Amendment and provides that 'those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct.'" *Kearney,* 590 F.3d at 643-44 (quoting *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 929 (9th Cir. 2006)). "The doctrine immunizes petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies." *Manistee Town Ctr. v. City of Glendale,* 227 F.3d 1090, 1092 (9th Cir. 2000). "[C]onduct incidental

to the prosecution of [a] suit," *Columbia Pictures Indus., Inc. v. Pro. Real Est. Invs., Inc.,* 944 F.2d 1525, 1528 (9th Cir. 1991), like presuit demand letters and discovery communications, is also protected, *see Sosa,* 437 F.3d at 933-38; *Kearney,* 590 F.3d at 646. Though the *Noerr-Pennington* doctrine first arose in the antitrust context, we have extended its application, including to § 1983 claims. *See Manistee,* 227 F.3d at 1092 ("The immunity is no longer limited to the antitrust context; we have held that *Noerr-Pennington* immunity applies to claims under 42 U.S.C. § 1983 that are based on the petitioning of public authorities.").

To determine whether a defendant's conduct, which allegedly violates a statute, is immunized under *Noerr-Pennington,* we apply a three-step analysis to determine: (1) "whether the lawsuit imposes a burden on petitioning rights," (2) "whether the alleged activities constitute protected petitioning activity," and (3) "whether the statute[] at issue may be construed to [avoid] that burden." *Kearney,* 590 F.3d at 644. If the answer at each step is "yes," then a defendant's conduct is immunized under *Noerr-Pennington. See Sosa,* 437 F.3d at 932. But such immunity is not absolute, as "neither the Petition Clause nor the *Noerr-Pennington* doctrine protects sham petitions." *Id.* We decide whether the sham exception applies within step two of the three-part analysis. *See id.* at 938.

1. Step One: whether B&G's § 1983 suit burdens Defendants' petitioning rights

Step one asks "whether the success of [B&G's § 1983] lawsuit would constitute a burden on petitioning rights." *Kearney,* 590 F.3d at 645. In conducting this inquiry, we do not consider any alleged misconduct

tied to the petitioning activities. *Id.* Rather, when the petitioning activity is incidental to the prosecution of a suit, the question is whether plaintiff's lawsuit "places a burden on [defendant's] ability" to prosecute its suit. *Id.* (holding that plaintiff's suit, which challenged defendants' "discovery communications, interactions with expert witnesses and contractors, and statements to the court," would burden defendants' right to prosecute an eminent domain proceeding because it would burden defendants' ability to bring such action).

B&G's lawsuit burdens Defendants' petitioning activities. Indeed, if successful, B&G's suit would completely prevent Defendants from engaging in their petitioning activities—sending prelitigation communications and suing to enforce Prop. 65. *See id.* at 644 (filing a lawsuit is "the very act of petitioning"); *Sosa,* 437 F.3d at 938 ("prelitigation settlement demands" are protected by the Petition Clause).

2. Step Two: whether Defendants' conduct is protected petitioning activity

Our focus at step two is whether Defendants' conduct qualifies as "*protected* petitioning activity." *Sosa,* 437 F.3d at 933 (emphasis added). In making this determination, we must first decide whether the Petition Clause extends to Defendants' conduct. *See id.* at 933-38. If it does, we next decide whether the sham exception to *Noerr-Pennington* applies. *See id.* at 938. Sham petitioning is not protected. "*Noerr-Pennington* immunity is not a shield for petitioning conduct that, although 'ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of

a competitor.'" *Id.* (quoting *Noerr,* 365 U.S. at 144, 81 S. Ct. 523).

We note that the *Noerr-Pennington* doctrine and its sham exception arose in the antitrust context, and so the sham-exception principles discuss whether petitioning is done for an anticompetitive purpose or to interfere with a competitor's business relationships. *See id.* Because these principles may be inapt in non-antitrust contexts in which we have extended the *Noerr-Pennington* doctrine, we do not treat them as rigid requirements in such situations. Rather, we rely on them to create analogous standards suitable to each case's context. *See, e.g., Manistee,* 227 F.3d at 1095 (relying on the antitrust-subjective-sham-inquiry principles, which consider whether a process was used for an "anticompetitive" purpose but determining in a non-antitrust context that the corresponding inquiry is whether defendants caused the harm by "abus[ing] . . . the publicity/lobbying process" without any mention of an "anticompetitive" requirement).

a. Whether the Petition Clause extends to Defendants' conduct

Assuming Defendants are state actors, our precedent compels the conclusion that their activities were protected by the Petition Clause. In *Manistee,* we held that the Petition Clause protected lobbying efforts by government actors—a city and its officials. *Id.* at 1093. We reasoned that applying *Noerr-Pennington* to government actors was "consistent with [the] 'representative democracy' rationale" for the doctrine, as government "petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens." *Id.*

In *Kearney,* we extended *Manistee* to litigation activities by government actors and their attorneys by holding that conduct related to an eminent domain suit, which allegedly violated § 1983, was protected petitioning. 590 F.3d at 644-45. We found that "[t]here is no reason . . . to limit *Manistee*'s holding to lobbying efforts," *id.* at 644, and that the representative democracy rationale applied equally to lawsuits like eminent domain proceedings in which "a governmental entity acts on behalf of the public it represents . . . [in] seek[ing] to take private property and convert it to public use." *Id.* at 645.

Defendants' activities seek to enforce Prop. 65, an initiative adopted by California voters to protect the public from harmful chemicals. *See AFL-CIO v. Deukmejian,* 212 Cal.App.3d 425, 260 Cal. Rptr. 479, 479 (1989). Thus, Defendants' conduct falls squarely within the conduct that we held was protected in *Kearney*—litigation activities brought by government officials to advance public goals. *See Kearney,* 590 F.3d at 644-45. Defendants' conduct is therefore protected by the Petition Clause.

B&G's attempts to distinguish *Kearney* are unconvincing. B&G argues that *Kearney*'s extension of *Manistee* to litigation by government officials is nonbinding dicta because, in *Kearney,* we ultimately found *Noerr-Pennington* inapplicable under the sham exception. But in reaching our ultimate holding in *Kearney,* we applied our three-part test. *See id.* at 644. Thus, before determining whether the sham exception applied, we first determined that defendants' activities amounted to protected petitioning activities. *See id.* at 646. In doing so, we engaged in a detailed analysis that included analyzing our rationale and holding in *Manistee,*

finding that *Manistee* should be extended to litigation activities, and analyzing whether defendants' conduct was protected petitioning. *See id.* at 644-46. Our extension of *Manistee* was therefore not dicta, as whether defendants' conduct was protected petitioning under *Manistee* bore directly on *Noerr-Pennington*'s applicability, and we resolved the issue after considered analysis. *See United States v. McAdory,* 935 F.3d 838, 843 (9th Cir. 2019) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." (alteration in original) (quoting *Cetacean Cmty. v. Bush,* 386 F.3d 1169, 1173 (9th Cir. 2004))).

B&G argues that *Kearney* is relevant only when government officials and their agents file eminent domain proceedings. But nothing in *Kearney* suggests such a limited holding. Indeed, in determining that *Manistee* should be extended to conduct beyond lobbying, we reasoned that *Manistee*'s rationale applied equally to "lawsuits" brought by government actors. *Kearney,* 590 F.3d at 644 ("In a representative democracy, . . . branches of government often 'act on behalf of the people' and 'intercede' to 'advance their constituents' goals, both expressed and perceived.' Such intercession is just as likely to be accomplished through lawsuits—the very act of petitioning—as through lobbying." (citation omitted) (quoting *Manistee,* 227 F.3d at 1093)). And we did not distinguish between eminent domain proceedings and other types of lawsuits. We therefore reject B&G's narrow view of *Kearney*.

Finally, according to B&G, *Kearney* involved "intergovernmental petitioning" by a municipal official to a state court. Thus, it argues that *Kearney* is distinguishable, because here, state officials have petitioned a state court and so there is no protected "intergovernmental petitioning." We are unpersuaded. Nothing in *Kearney* suggests that our holding extending *Noerr-Pennington* immunity to governmental entities and officials depended on whether it was a state or municipal official who had engaged in the petitioning activity. Moreover, why should it matter? "[A] city is a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted to it." *City of Trenton v. New Jersey,* 262 U.S. 182, 185-86, 43 S. Ct. 534, 67 L.Ed. 937 (1923). We see no reason why *Noerr-Pennington* applicability should turn on whether the petitioner is an official of a state or one of its political subdivisions.

In short, under our precedent, Defendants' prelitigation communications and suit to enforce Prop. 65 are protected by the Petition Clause.

b. Whether the sham exception applies

We have identified three circumstances in which the sham exception might apply in the litigation context:

> [F]irst, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose; and third, if the allegedly unlawful

> conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

Sosa, 437 F.3d at 938 (citations and quotation marks omitted).

As an initial matter, we reject Defendants' argument that these exceptions do not apply to the NOV because the NOV should be construed as petitioning directed toward a political entity rather than a judicial body. The NOV is conduct incidental to the prosecution of a suit, as it is a prerequisite to filing a private enforcement action under Prop. 65 and, like a presuit demand letter, essentially threatens litigation against an alleged violator. *See* Cal. Health & Safety Code § 25249.7(d).

B&G argues that all three exceptions apply. But B&G forfeited its argument on the third exception because it failed to raise such argument below. *See Visendi v. Bank of Am., N.A.,* 733 F.3d 863, 869-70 (9th Cir. 2013). We thus address only the first and second exceptions.

Under the first exception, Defendants' "lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L.Ed.2d 611 (1993). "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*. . . ." *Id.* "Only if challenged litigation is objectively meritless

may a court examine the litigant's subjective motivation." *Id.* The subjective element can be satisfied by showing that Defendants "used government processes, as opposed to the outcome of those processes, as a mechanism to injure" B&G. *Empress LLC v. City & County of San Francisco,* 419 F.3d 1052, 1057 (9th Cir. 2005) (citing *Manistee,* 227 F.3d at 1094-95). *Compare Pro. Real Est. Invs.,* 508 U.S. at 60-61, 113 S. Ct. 1920 (explaining that the subjective inquiry in the antitrust context examines "whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon" (cleaned up)) *with Manistee,* 227 F.3d at 1095 (relying on the antitrust-subjective-sham-inquiry principles in determining in a non-antitrust context that the inquiry is whether defendants caused the harm by "abus[ing] . . . the publicity/lobbying process").

B&G has not plausibly alleged that Defendants' suit was objectively baseless. As relevant here, Prop. 65 requires a plaintiff to show that a defendant (1) "knowingly and intentionally expose[d] any individual to a chemical known to the state to cause cancer" and (2) failed to give a "clear and reasonable warning to such individual." Cal. Health & Safety Code § 25249.6. It is undisputed that B&G's Cookie Cakes contain some amount of acrylamide, that acrylamide is on the list of chemicals "known to the state to cause cancer," and that B&G does not provide a warning. Given all this, an objective litigant could have concluded that Defendants' suit was "reasonably calculated to elicit a favorable outcome." *Pro. Real Est. Invs.,* 508 U.S. at 60, 113 S. Ct. 1920. Because B&G has failed to establish

the objective element, we need not reach the subjective element. *See id.*[4]

We now turn to the second sham exception. We agree with the district court that, under our precedent, B&G's complaint fails to plausibly allege the application of the second sham exception. In *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council, AFL-CIO,* 31 F.3d 800 (9th Cir. 1994), we explained that the second sham exception applies "where the defendant is accused of bringing a whole series of legal proceedings" without regard to the merits, *id.* at 811. In such cases, "the question is not whether any one [suit] has merit—some may turn out to, just as a matter of chance—but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* To determine whether the exception applies, we ask: "Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" *Id.*

In *USS-POSCO Industries,* the record showed that "fifteen of the twenty-nine lawsuits" filed by defendants had been successful. *Id.* We reasoned:

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[4] B&G also argues that, as in the labor-relations context, we need not consider the objective element; we need consider only the subjective element. *But see White v. Lee,* 227 F.3d 1214, 1232, 1232 n.16 (9th Cir. 2000) (stating that "[o]bjective baselessness is the *sine qua non* of any claim that a particular lawsuit is not deserving of First Amendment protection" and noting only one exception to this rule, which arises in the labor relations context). We decline to address this argument because B&G forfeited it by failing to raise it below. *See Visendi,* 733 F.3d at 869-70.

"The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.* Thus, based on defendants' success rate alone, we held that plaintiff had failed to show that defendants' conduct fell within the second sham exception. *Id.*

B&G's complaint alleges that "Defendants have filed or threatened to file dozens of cases about acrylamide," and "Defendants have extracted nearly $1.7 million in penalties and fines from food companies." There are no allegations about Defendants' success rate.[5] Thus, the only reasonable inference is that Defendants have been largely successful, which as in *USS-POSCO Industries,* cannot be reconciled with the theory that Defendants were threatening to sue and suing without regard to success. *See id.* The district court therefore properly found the second sham exception inapplicable, given the allegations in the complaint.

In sum, Defendants' conduct is protected petitioning activity. Ninth Circuit precedent holds that government officials engaged in petitioning conduct on behalf of the public, like that present here, are entitled to *Noerr-Pennington* immunity. *See Manistee,* 227 F.3d at 1093; *Kearney,* 590 F.3d at 644-45. And B&G has failed

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[5] B&G's reply brief points to information outside the complaint to support the application of the second sham exception. Because our review is limited to the complaint, we do not consider such outside information in analyzing whether B&G has plausibly alleged the applicability of a sham exception. *See Orellana v. Mayorkas*, 6 F.4th 1034, 1042-43 (9th Cir. 2021).

to show that any of the sham exceptions could apply based on the allegations in the complaint. We thus move to the final part of our three-part analysis.

3. Step Three: whether § 1983 can be construed to avoid burdening Defendants' protected petitioning activity

"[T]he *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa,* 437 F.3d at 931. "Under the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Id.* Thus, we ask at step three whether the statute—here 42 U.S.C. § 1983—can be construed to avoid burdening Defendants' Petition Clause rights. *See id.*; *see also id.* at 932 ("Where . . . the burdened conduct could fairly fall within the scope of the Petition Clause and a plausible construction of the applicable statute is available that avoids the burden, we must give the statute the reading that does not impinge on the right of petition.").

As we recognized in *Sosa,* we determined in *Manistee* that § 1983 cannot burden protected petitioning rights. *Id.* at 932 n.6 (describing *Manistee* as a case in which we "declin[ed] to interpret 42 U.S.C. § 1983 as subjecting governmental entities or officials to liability for activity that would otherwise be with the protection of the *Noerr-Pennington* doctrine"). In *Manistee,* a city and its officials had lobbied a county not to lease space from a shopping center. 227 F.3d at 1091. The shopping center sued the city and its officials, "alleging

that the defendants' lobbying of the County had deprived [the shopping center] of its property (potential lease contracts) without due process of law in violation of 42 U.S.C. § 1983." *Id.* We determined that the lobbying was protected petitioning activity and declined to interpret § 1983 as subjecting the government and its officials to liability for activity protected by *Noerr-Pennington*:

> Nor do we interpret § 1983 to subject government entities or officials to liability for activity that is protected by Noerr-Pennington immunity. . . . The petitioning or lobbying of another governmental entity is insufficient to "subject" . . . a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Id. at 1093 (quoting 42 U.S.C. § 1983). Thus, *Manistee* held that § 1983 cannot burden protected petitioning rights. *Id.*

B&G tries to limit *Manistee*'s holding to lobbying only, as according to B&G, "[l]obbying is not the evil that § 1983 was created to address." But we said nothing in *Manistee* to suggest that *Noerr-Pennington* immunity should be limited to lobbying only. Rather, our statements in *Manistee* show that we believed that the *Noerr-Pennington* doctrine barred § 1983 claims based on any protected petitioning conduct. *See id.* ("[W]e [do not] interpret § 1983 to subject government entities or officials to liability *for activity that is protected by Noerr-Pennington immunity*." (emphasis added)); *id.* ("The *petitioning* or lobbying of another governmental entity is insufficient to 'subject' . . . a person 'to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws.'" (emphasis added) (quoting 42 U.S.C. § 1983)).

B&G also argues that applying *Noerr-Pennington* immunity would undermine one of the foundational purposes of § 1983, which is to protect persons against unconstitutional enforcement actions. To support its argument, B&G discusses several cases in which § 1983 was used to remedy the unconstitutional enforcement of state laws. B&G's argument is flawed, however, because it ignores that its lawsuit does not merely seek to challenge a state law as unconstitutional; it seeks to hold Defendants liable for their petitioning conduct, thereby implicating the *Noerr-Pennington* doctrine.[6] And the cases that B&G discusses fail to advance its argument because none dealt with *Noerr-Pennington* immunity.

In short, even assuming Defendants were state actors, the *Noerr-Pennington* doctrine bars B&G's

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[6] For this reason, the circumstances here are unlike those in our concurrently filed opinion in *California Chamber of Commerce v. Council for Education and Research on Toxics,* No. 21-15745. In *California Chamber,* the plaintiff seeks declaratory and injunctive relief that would apply to only prospective Prop. 65 suits. *See Cal. Chamber of Com. v. Becerra,* 529 F. Supp. 3d 1099, 1113 (E.D. Cal. 2021); First Am. Compl. for Decl. and Inj. Relief at 25-26, No. 2:19-CV-02019-DAD-JDP (E.D. Cal. Mar. 16, 2020), ECF No. 57. In other words, unlike here, the plaintiff in *California Chamber* does not seek to hold Prop. 65 enforcers liable for their past petitioning conduct.

We acknowledge that, as an example, a merits decision in *California Chamber* that Prop. 65 acrylamide litigation involves unconstitutional compelled speech might practically put an end to such litigation. But because such a decision is only hypothetical for now, it does not affect our *Noerr-Pennington* analysis.

§ 1983 action challenging Defendants' protected petitioning conduct.[7]

B. Leave to Amend

"Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Polich v. Burlington N., Inc.,* 942 F.2d 1467, 1472 (9th Cir. 1991). We reverse the district court's denial of leave to amend because it is unclear whether amendment would be futile.

B&G proposes additional allegations that could support the application of the first sham exception, which examines the objective reasonableness of defendant's suit and defendant's subjective motivation. *See Pro. Real Est. Invs.,* 508 U.S. at 60, 113 S. Ct. 1920. For example, B&G says that it could allege that Cookie Cakes "unquestionably qualif[ies] for the NSRL safe harbor," and that Defendants made no effort to investigate their claims and filed without regard to

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[7] We need not and do not decide whether Defendants acted under color of state law under § 1983. Although we have discretion to do so, we believe it unwise given our decision to allow B&G to amend. B&G's amendments could affect the state actor issue. It is also possible that B&G's amendments could still fail to adequately allege application of the sham exception, in which case it would be unnecessary to reach the state actor issue. Also, if the state actor issue needs to be reached, we would benefit from the district court's analysis of the issue in the first instance. We also decline to address B&G's argument that the *Noerr-Pennington* doctrine does not apply to claims for declaratory relief, as B&G forfeited this argument by raising it for the first time in its reply brief. See *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) ("[W]e decline to consider new issues raised for the first time in a reply brief.").

the merits. A reasonable factfinder could infer from these allegations that Defendants' suit was objectively baseless because they knew (or should have known) that B&G was not violating Prop. 65 but filed suit anyway.

The new allegations could also support the subjective element, as they could support the inference that Defendants threatened and filed suit because they wanted to improperly pressure B&G into settling, not because they believed that they could achieve their objective based on the merits. *See Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.,* 745 F.3d 343, 353 (9th Cir. 2014) (holding that allegations that a party hoped to enforce its "rights through the *threat* of litigation rather than through actual litigation" could "satisfy[] the second criterion for the sham exception").

It is also unclear whether B&G could plausibly allege application of the second sham exception, which arises when defendant's "conduct involves a series of lawsuits 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose." *Sosa,* 437 F.3d at 938 (quoting *Kottle v. Nw. Kidney Ctrs.,* 146 F.3d 1056, 1060 (9th Cir. 1998)). B&G points to information in the amicus brief that Embry, while represented by Glick or his co-counsel, has withdrawn 129 of her 260 NOVs concerning acrylamide and has settled only 25 cases. This information, which was omitted from the complaint, could support an inference that Defendants' acrylamide litigation was unsuccessful, as only a fraction of their threatened suits succeeded. Such an inference would undermine the district court's sole basis for finding the second sham exception inapplicable. Moreover, that inference, together with the other new and

existing allegations—for example, that Defendants file without regard to the merits and undertake no efforts to investigate their claims, and businesses like B&G will often settle because Prop. 65 suits are burdensome and very expensive to defend—could support that Defendants' suits were not based on merit but were brought pursuant to a policy of improperly pressuring businesses, like B&G, to settle.

Because it is unclear whether B&G could allege the application of a sham exception to the *Noerr-Pennington* doctrine in an amended complaint, the district court erred in dismissing the complaint without leave to amend.

IV. Conclusion

The district court properly concluded that B&G's § 1983 suit is barred by the *Noerr-Pennington* doctrine, given the allegations in the complaint. But the district court erred in denying leave to amend because it is unclear whether amendment would be futile. We therefore reverse the dismissal of B&G's complaint and remand to allow B&G an opportunity to amend.[8]

The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

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[8] Nothing in this opinion should be construed as precluding B&G from raising on remand its arguments that have been forfeited in this appeal. B&G should be allowed to offer amendments going to such issues.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA GRANTING MOTION TO DISMISS (OCTOBER 7, 2020)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK,

Defendants.

No. 2:20-cv-00526-KJM-DB

Before: Kimberly J. MUELLER, Chief District Judge.

ORDER

Defendants Kim Embry and Noam Glick move to dismiss the complaint brought by plaintiff B&G Foods North America, Inc. (B&G). The motion is fully briefed. *See* Opp'n, ECF No. 23; Reply, ECF No. 24; Supp. Br., ECF No. 31; Supp. Resp., ECF No. 32. The court heard oral argument by video teleconferencing on September 4, 2020. J. Noah Hagey and David Kwasniewski appeared for B&G, and Noam Glick appeared for

defendants.[1] The motion is granted, and the complaint is dismissed with prejudice, as explained below.

I. Background

B&G manufactures Snackwell's Devils' Food Cookie Cakes. Compl. ¶ 13, ECF No. 1. The process of baking the cookies causes the formation in the cookies of acrylamide, a naturally occurring byproduct of all baking. *Id.* ¶¶ 16–18. B&G alleges that Embry, represented by Glick, contends acrylamide causes cancer and has sued many businesses under a California statute that permits private plaintiffs to enforce California Proposition 65, a provision that requires businesses to notify their customers of potential exposures to cancer-causing chemicals. *See* Compl. ¶¶ 1, 2, 7; California Health & Safety Code § 25249.7(d). B&G is among the targets of Embry's complaints. *See* RJN Ex. D, ECF No. 18–7 (showing Embry filed suit in Alameda County Superior Court against B&G immediately prior to filing this suit).[2]

In its complaint, B&G asserts acrylamide does not cause cancer. Compl. ¶¶ 23–26. It therefore claims Proposition 65 violates the First Amendment by compelling it to warn customers that its cookies might give

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[1] Noam Glick appeared as counsel on his own behalf and for Embry.

[2] The court takes judicial notice that this lawsuit was filed and that it rests on the allegations contained in Embry's complaint. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (noting that courts may take judicial notice of court filings and similar matters of public record). In that respect, B&G's request for judicial notice is granted. The remainder of the request is denied as moot.

them cancer. *Id.* ¶¶ 73–80. B&G also contends Proposition 65 is unconstitutionally vague under the Fourteenth Amendment because it does not provide adequate notice to B&G that the level of acrylamide in its products could give rise to liability. *Id.* ¶¶ 82–87. B&G seeks an injunction against threats and lawsuits about acrylamide. *Id.*, Prayer for Relief A. B&G also seeks a declaration that a Proposition 65 warning requirement violates the First Amendment as applied to its cookies. *Id.*, Prayer for Relief B. Embry and Glick move to dismiss under Rule 12(b)(6).

II. Legal Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." A court may dismiss "based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). The court must construe the complaint in the light most favorable to the plaintiff and accept plaintiffs' factual allegations as true. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007).

III. Discussion

Embry and Glick argue the court should dismiss the complaint because (1) they are not state actors; (2) the Anti-Injunction Act bars the action; and (3) the *Noerr-Pennington* doctrine bars the action. At hearing, B&G for the first time raised the argument that *Mitchum v. Foster*, 407 U.S. 225 (1972) held § 1983 to provide an exception to the Anti-Injunction Act. The court permitted defendants to file a supplemental brief,

in which they conceded *Mitchum* precludes the application of the Anti-Injunction Act here; they argued for the first time the court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971). Supp. Br., ECF No. 31. Plaintiff submitted a response addressing this argument. Supp. Resp., ECF No. 32. As discussed below, the court need not address the state action doctrine, the Anti-Injunction Act, *Mitchum* or the *Younger* abstention doctrine because application of the *Noerr-Pennington* doctrine is dispositive.

The *Noerr-Pennington* doctrine was first articulated to provide immunity from antitrust liability for market actors lobbying the government for favorable action. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (union's wage agreements with multiemployer bargaining agreement could not be basis of liability under Sherman Act). The doctrine has since been extended substantially. It derives from the First Amendment's Petition Clause, which guarantees "the right of the people . . . to petition the Government for a redress of grievances," *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2005), and provides immunity against claims based on petitions to any government department. *Id.* Lawsuits are petitions in this respect. *Id.* at 930. To provide "breathing space" to the right to petition, the *Noerr-Pennington* doctrine also immunizes "conduct incidental to the prosecution of the suit," such as demand letters and related prelitigation communications. *Id.* at 935–36. Embry and Glick's Proposition 65 demand letters, prelitigation communications and lawsuits thus qualify as petitions entitled to protection under the *Noerr–Pennington* doctrine.

B&G asserts the *Noerr-Pennington* doctrine does not apply to state actors because states have no First Amendment rights. Opp'n at 18 (citing *Aldrich v. Knab*, 858 F. Supp. 1480, 1491 (W.D. Wash. 1994) (discussing effect of state ownership of broadcast licenses on licensees' First Amendment rights)). This is not the case for the purposes of *Noerr-Pennington* immunity, however. States *qua* states do not have First Amendment rights, but the *Noerr-Pennington* doctrine protects "petitioning" by government actors, provided they are acting in their official capacities on behalf of the public. *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1094 (9th Cir. 2000); *see also Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009). In *Manistee*, for example, the Ninth Circuit held that city officials who lobbied voters, the press and county officials to oppose the county's prospective commercial lease were entitled to the protection of the *Noerr-Pennington* doctrine because they "intercede, lobby, and generate publicity to advance their constituents' goals, both express and perceived." 227 F.3d at 1091. When acting in a representative capacity for constituents, in other words, state actors may receive the immunity.

In *Kearney*, the Ninth Circuit extended immunity to a law firm representing a government entity in an eminent domain proceeding. *Kearney*, 590 F.3d at 644. The *Kearney* court clarified "[t]here is no reason to limit *Manistee*'s holding to lobbying efforts." *Id.* "Such intercession is just as likely to be accomplished through lawsuits—the very act of petitioning—as through lobbying." *Id.* at 644–45 (citation omitted).

The court here assumes without deciding that if Embry and Glick are "state actors" who can be sued

under 42 U.S.C. § 1983, they would be entitled to the protections of the *Noerr-Pennington* doctrine just the same: Proposition 65 was a ballot measure subject to a popular vote, so when private plaintiffs such as Embry enforce Proposition 65, they are engaged in an activity sanctioned by California voters and are acting on behalf of the public. *DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150, 183 (2007) ("Citizens bringing Proposition 65 suits need not plead a private injury and instead are deemed to sue in the public interest." (citation and internal quotation marks omitted)).

B&G argues that Embry and Glick are not protected by the *Noerr-Pennington* doctrine because their acrylamide lawsuits are "sham litigation." Opp'n at 18. It is true the *Noerr-Pennington* doctrine offers no shield to litigation in pursuit of an ulterior and improper motive, such as cases designed to "interfere directly with the business relationships of a competitor." *Prof. Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51 (1993) (internal quotation marks, citation omitted). A series of lawsuits filed without regard to their merits and for an injurious purpose are a sham entitled to no protection. *See Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998). "The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as a part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" *USS-POSCO Industries v. Contra Costa Cty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994).

A plaintiff's successful history in the disputed litigation may rebut claims of a sham. *See, e.g.*, *id.* (litigation not sham because more than half the supposed sham lawsuits had merit). That is the case here. B&G's own allegations show Embry and Glick's litigation is not a sham, at least not completely. B&G claims "over the last few years, [they] have extracted nearly $1.7 million in penalties and fines from food companies" in acrylamide lawsuits. Compl. ¶ 2. The *Noerr-Pennington* doctrine thus bars B&G's complaint, which must be dismissed.

Ordinarily a court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15 (a)(2). The Ninth Circuit has "stressed Rule 15's policy of favoring amendments." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). But "[l]eave need not be granted" if amendment would constitute "an exercise in futility." *Id.* (citations omitted). Amendment would be futile here. The *Noerr-Pennington* doctrine would apply equally to all claims based on Embry's acrylamide litigation against B&G. At hearing, B&G was not able to propose viable amendments. Dismissal is thus granted with prejudice.

IV. Conclusion

For the reasons above, the defendants' motion to dismiss (ECF No. 18) is GRANTED and the complaint is dismissed with prejudice. The clerk is directed to close the case.

IT IS SO ORDERED.

/s/ Kimberly J. Mueller
Chief District Judge

Dated: October 6, 2020

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (APRIL 26, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

Plaintiff-Appellant,

v.

KIM EMBRY; NOAM GLICK,

Defendants-Appellees.

No. 20-16971

D.C. No. 2:20-cv-00526-KJM-DB
Eastern District of California, Sacramento

Before: GOULD, BENNETT, and
R. NELSON, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing en banc. [Dkt. 53].

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

PLAINTIFF B&G FOODS'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (MARCH 6, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK, acting as enforcement representatives under California Proposition 65 on behalf of the State of California,

Defendants.

Case No. 2:20-cv-00526-KJM-DB

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ATTORNEYS FOR PLAINTIFF
B&G FOODS NORTH AMERICA, INC.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff B&G Foods North America, Inc. ("Plaintiff") brings this action for declaratory relief under 42 U.S.C. § 1983 and the First Amendment of the U.S. Constitution against supposed Proposition 65 enforcement representatives of the State of California, and alleges as follows:

PRELIMINARY STATEMENT

1. Everyone—grown-ups, kids, and even blue furry monsters—likes cookies. Plaintiff B&G Foods likes cookies. That's why it sells and distributes devil's food cookie cakes around the country (the "Cookie Cakes"). Like all other cookies, Cookie Cakes are baked and, because of that, Plaintiff faces legal claims by representatives of the State of California asserting that the products somehow cause cancer. Defendants are serial enforcement agents under California's Proposition 65 regime who have threatened to prosecute Plaintiff unless all Cookie Cake labels are changed to include a bold disclaimer that they could kill and "cause cancer" due to the presence of a naturally-occurring substance called acrylamide. Defendants and the State's allegations are false and unconstitutional. Plaintiff accordingly seeks protection from the compelled false speech and requests injunctive and other relief.

2. Defendants have filed or threatened to file dozens of cases about acrylamide against a variety of food businesses and retailers, including Plaintiff. Acrylamide is a naturally occurring substance that arises when foods are cooked. Most scientists, including European and U.S. government scientists agree that acrylamide in food does not cause cancer in humans. Nonetheless, over the last few years, Defendants have extracted nearly $1.7 million in penalties and fines from food companies in frivolous acrylamide suits. Tens of millions more have been obtained by other State enforcers, all of which is done under the supervision, regulation and guidance of the State and its Attorney General's office.

3. Defendant's business model is pernicious and operates through the regulation, encouragement and self-interest of the California government. After testing products, Defendants are enabled by the State to threaten to file suit unless the products' manufacturer (or retailer) pays a massive penalty or agrees to change its label to warn consumers that the product contains substances "known" to cause cancer. The State permits Defendants to file suit against products containing modest trace amounts of substances, even if there is no possible health effect. This includes substances like acrylamide that arise naturally, for example, by baking a cookie. The resulting penalties and fines collected by Defendants and the State do nothing to improve public safety and serve only to enrich lawyers and their accomplices.

4. Defendants have persisted in threatening suit against Plaintiff despite having no evidence that acrylamide or Cookie Cakes poses any health risk. Acrylamide has been present in cooked foods—like

sweet potatoes, nuts, and wooly mammoth—since the discovery of fire. Many of these foods are so healthy that U.S. government agencies encourage people to eat them because they reduce the risk of cancer. The State also has admitted under oath that, despite listing acrylamide as a dangerous chemical, it has no knowledge of that fact. Still, the State continues to allow and encourage its representatives to threaten food companies with unconstitutional speech requirements, lest they not pay a sizable penalty to the enforcer and the State.

5. Plaintiff accordingly seeks protection from this activity, which violates the First Amendment and Section 1983 of the Civil Rights laws.

PARTIES

6. Plaintiff B&G Foods North America, Inc. dates back to 1889, when two immigrant families, the Blochs and Guggenheimers, started a business selling pickles in Manhattan. Today, Plaintiff carries on their legacy by selling a variety of high-quality frozen and shelf-stable foods throughout the country, including Cookie Cakes sold under the SNACKWELLS® brand. Plaintiff is a Delaware corporation with its headquarters in Parsippany, New Jersey.

7. Defendant Kim Embry is a serial Proposition 65 litigant who seeks to act on behalf of the State of California in suing and threatening to sue dozens of businesses based on the alleged presence of acrylamide in their products. She brings these suits in the "interest of the general public" of the State of California. On information and belief, Embry is a citizen of California who directly and indirectly consults with the State

and its representatives to initiate Proposition 65 actions, including against Plaintiff.

8. Defendant Noam Glick is, upon information and belief, a citizen of California and lawyer who seeks to represent the "interest of the general public" of the State of California in bringing Proposition 65 actions.

9. As described below, Defendants are state actors purporting to act on behalf of the government of California.

a. The State is intimately entwined in, encourages, and closely monitors Defendants' Proposition 65 litigation, which it directly and indirectly regulates, controls and guides through the California Attorney General's office.

b. Prior to initiating any private action, bounty hunters like Defendants serve a Notice of Violation on the State through the Attorney General's office, together with evidence supporting the supposed merit of the bounty hunter's allegations. This is so that the State can regulate, monitor and encourage the proposed action. If the State believes the notice lacks merit, it serves a letter on the parties to object to any action. Cal. Health & Safety Code § 25249.7(f). In doing so, the State takes an active role as gatekeeper to permit supposedly meritorious cases to proceed and to reject or contest cases that lack merit.

c. The State also monitors the activity of its Proposition 65 enforcement representatives such as Defendants by, among other things:

requesting pre-approval of any potential settlement or consent judgment, receiving and reviewing notices regarding the progress of acrylamide case litigation, intervening in particular cases, regulating the conduct of representatives, demanding to receive proportional cuts of civil penalties, and retaining the ability to change, alter or amend the regulations governing a particular Proposition 65 chemical and enforcement activity.

d. The Attorney General specifically regulates individual settlement agreements involving Defendants. For example, in 2018, Defendants attempted to settle a Proposition 65 claim against Earthbound Farm, LLC. The Attorney General objected to this settlement, which included $3,000 in civil penalties and a $37,000 attorney fee award, because (1) Defendant Embry received more than 25% of the civil penalties; (2) the settlement "is not likely to result in any benefit to the public," and (3) Defendant Glick's $37,000 fee award was unreasonable. The Attorney General concluded the settlement agreement was "contrary to the law, against public policy, and not enforceable." Attorney General's Mar. 2, 2018, Letter re *Embry v. Earthbound Farm*, Out-of-Court Proposition 65 Settlement. In response to this letter, the parties rescinded the settlement agreement and have not submitted another for review.

e. Defendants' actions are so substantively "entwined" in the State's enforcement regime that their action constitutes state conduct by

the government. Indeed, without the State's imprimatur, support, guidance and regulations, Defendants would not have the ability to threaten and impose upon Plaintiff's constitutional rights. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, (1961) (where restaurant leased premises from a government agency and both parties benefited financially from the arrangement, restaurant's racial discrimination constituted state action).

f. Defendants also are performing a quintessential state function by acting as California's enforcement arm relating to the presence of targeted chemicals in the environment. Moreover, the State is not merely a passive actor in such activity, but has an entire department devoted to regulating, following and encouraging precisely the unconstitutional activity at issue here. *See Lee v. Katz*, 276 F.3d 550, 554-57 (9th Cir. 2002) (private lessee of a public outdoor area owned by the city performed a traditional sovereign function when it sought to regulate free speech activity on the land).

g. Defendants are further engaged in state action because, on information and belief, they conspire with state officials to deprive businesses of their free speech right by enforcing Proposition 65 in violation of the First Amendment to the United States Constitution, in exchange for which state officials receive substantial compensation. *See Dennis v. Sparks*, 449 U.S. 24 (1980) (private person who bribed a judge

to obtain an injunction was engaged in state action).

h. And, last but not least, Defendants are serving as government actors because California has interjected itself into this dispute by virtue of the fact that Proposition 65 is a state statute and Defendants have filed suit in state court. *See Grant v. Johnson*, 15 F.3d 146, 149 (9th Cir. 1994) (existence of state statute and necessary involvement of state judge provided state action necessary to present challenge to Oregon statute allowing appointment of temporary guardian ad litem for person deemed mentally incompetent).

JURISDICTION AND VENUE

10. This Court has federal question subject matter jurisdiction under Title 28, Section 1331 of the United States Code, which confers original jurisdiction on the federal district courts over actions arising under the Constitutions or laws of the United States. Federal courts, including this judicial district, have assumed jurisdiction over similar federal constitutional challenges to the enforcement of Proposition 65. *See, e.g.*, *Nat'l Ass'n of Wheat Growers v. Zeisse*, 309 F. Supp. 3d 842 (E.D. Cal. 2018).

11. Alternatively, should Defendants somehow be deemed non-state actors, then subject matter jurisdiction exists under Title 28, Section 1332 of the United States Code, which confers original jurisdiction on federal district courts over actions between private citizens of different states where the amount in controversy exceeds $75,000.

12. Venue is proper under Title 28, Section 1391 (b)(b)(2) because a substantial part of the events giving rise to Plaintiff's claims occurred in this district.

FACTS

A. Plaintiff's Cookie Cakes Are Good to Eat

13. Plaintiff's Cookie Cakes are reduced fat chocolate cookies with marshmallow and fudge coating. They are sold nationwide and in California and include products sold under the SNACKWELL'S® brand:

14. The interior cookie portion of the Cookie Cakes is baked, just like any other cookie. Otherwise it would be an unpalatable mess of sugar, flour, and chocolate.

15. Plaintiff's Cookie Cakes are free from high fructose corn syrup and partially hydrogenated oils. They do not cause cancer.

B. Baked Products Naturally Create Acrylamide During the Cooking Process

16. Plaintiff does not add acrylamide to its products, which according to the FDA has likely "always been present in cooked foods." Virtually every cookie or bread product on earth that is baked has acrylamide in it.

17. Acrylamide forms during a chemical reaction, known as the Maillard reaction and arises when food is baked, roasted, grilled or fried.

18. To create acrylamide, sugars such as glucose or fructose react with a naturally occurring free amino acid, asparagine.

19. The State recognizes that the substance is widespread in ordinary products like breakfast cereals, roasted coffee, crackers, bread crusts, roasted asparagus, French fries, potato chips, canned sweet potatoes, canned black olives, roasted nuts, and toast.

20. Acrylamide also naturally forms in uncooked foods such as nuts. *See* OEHHA, *Acrylamide Fact Sheet* (Feb. 2019), https://www.p65warnings.ca.gov/sites/default/files/downloads/ factsheets/acrylamide_fact_sheet.pdf.

21. And, acrylamide is created when cooking at home, whether in the oven, on the grill or in the skillet. *See, e.g.*, Letter from Lester M. Crawford, DVM, Ph.D, Deputy Commissioner, FDA, to Joan E. Denton, M.S., Ph.D, Director, OEHHA (July 13, 2003).

C. Acrylamide in Plaintiff's Cookie Cakes Is Safe

22. Plaintiff's Cookie Cakes are not dangerous.

23. They do not cause cancer in people and Defendants have no evidence to the contrary.

24. Nor is the alleged amount of acrylamide in Plaintiff's products harmful to humans.

25. The federal government has studied acrylamide and does not recommend avoiding foods that contain the substance. Many of the foods consumers are encouraged to eat by the FDA, such as nuts, grains and other foods, contain acrylamide.

26. The National Cancer Institute ("NCI"), the federal government's principal agency for cancer research and training, states that "a large number of epidemiologic studies (both case-control and cohort studies) in humans have found no consistent evidence that dietary acrylamide exposure is associated with the risk of any type of cancer." NCI, *Acrylamide and Cancer Risk* (Dec. 5, 2017), https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-factsheet.

27. The American Cancer Society recently has re-confirmed its review of epidemiological studies which "show that dietary acrylamide isn't likely to be related to risk for most common types of cancer." American Cancer Society, *Acrylamide and Cancer Risk* (Feb. 11, 2019), https://www.cancer.org/cancer/cancer-causes/acrylamide.html. The American Cancer Society further states that it has no idea whether acrylamide increases cancer risk, stating that it is "not yet clear if the levels of acrylamide in foods raise cancer risk. . . . " *Id.*

28. In a 2012 systematic review published in the European Journal of Cancer Prevention, researchers found "no consistent or credible evidence that dietary

acrylamide increases the risk of any type of cancer in humans, either overall or among nonsmokers":

> After an extensive examination of the published literature, we found no consistent or credible evidence that dietary acrylamide increases the risk of any type of cancer in humans, either overall or among nonsmokers. In particular, the collective evidence suggests that a high level of dietary acrylamide intake is not a risk factor for breast, endometrial, or ovarian cancers. . . .
>
> In conclusion, epidemiologic studies of dietary acrylamide intake have failed to demonstrate an increased risk of cancer. In fact, the sporadically and slightly increased and decreased risk ratios reported in more than two dozen papers examined in this review strongly suggest the patter one would expect to find for a true null association over the course of a series of trials.

L. Lipworth, et al., *Review of Epidemiologic Studies of Dietary Acrylamide Intake and the Risk of Cancer*, EUROPEAN J. OF CANCER PREVENTION, Vol. 21(4):375-86 (2012); *see also* C. Pelucchi, et al., *Dietary Acrylamide & Cancer Risk: An Updated Meta-Analysis*, INT'L J. OF CANCER, Vol. 136(12):2912–22 (2015) ("This systematic review and meta-analysis of epidemiological studies indicates that dietary acrylamide is not related to the risk of most common cancers."); A. Kotemori, et al., *Dietary Acrylamide Intake and Risk of Breast Cancer: the Japan Public Health Center-Based Prospective Study*, CANCER SCIENCE, Vol. 109(3):843-53 (2018) ("In conclusion, dietary acrylamide intake was not associated with the risk of breast cancer in this population-based

prospective cohort study of Japanese women."); M. McCullough, et al., *Dietary Acrylamide Is Not Associated with Renal Cell Cancer Risk in the CPS-II Nutrition Cohort, Cancer Epidemiology*, BIOMARKERS & PREVENTION, Vol. 28(3):616-619 (2019) ("In conclusion, we found no evidence that greater dietary acrylamide intake was associated with risk of RCC [renal cell carcinoma]."); J. Hogervorst, et al., *Interaction Between Dietary Acrylamide Intake and Genetic Variants for Estrogen Receptor-Positive Breast Cancer Risk*, EUROPEAN J. OF NUTRITION, Vol. 58:1033-1045 (2019) ("This study did not provide evidence for a positive association between acrylamide intake and ER+ [estrogen receptor-positive] breast cancer risk. If anything, acrylamide was associated with a decreased ER+ breast cancer risk.").

29. In fact, studies have shown that certain foods that contain acrylamide likely reduce the risk of cancer in humans. For example, in June 2018, the International Agency for Research on Cancer ("IARC") concluded that there is an "inverse association" between drinking coffee (which contains acrylamide) and certain types of cancer. IARC, *Monographs on the Evaluation of Carcinogenic Risks to Humans, Drinking Coffee, Mate, and Very Hot Beverages*, Vol. 116 at 434 (2018). Likewise, a recent study showed that whole-grain foods may reduce the risk of liver cancer. AMERICAN CANCER SOCIETY, *Study Ties Whole Grains to Lower Risk of Liver Cancer* (Feb. 27, 2019), https://www.cancer.org/latest-news/study-ties-whole-grains-to-lower-risk-of-livercancer.html.

30. The sole basis for California's Proposition 65 warning requirement for acrylamide are laboratory studies in which pure acrylamide was given to rats or

mice. As NCI has explained, however, "toxicology studies have shown that humans and rodents not only absorb acrylamide at different rates, they metabolize it differently as well." NCI, *Acrylamide and Cancer Risk* (Updated Dec. 5, 2017), https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-factsheet. Both the Environmental Protection Agency ("EPA") and IARC did not classify acrylamide as a probable carcinogen based on studies in humans. In its most recent assessment of acrylamide, for example, IARC concluded in 1994 that there was "inadequate evidence in humans for the carcinogenicity of acrylamide." IARC, *Monographs on the Identification of Carcinogenic Risks to Humans, Some Industrial Chemicals*, Vol. 60 at 425 (Feb. 1994), https://monographs.iarc.fr/wp-content/uploads/2018/06/mono60.pdf. Similarly, in its most recent toxicological review of acrylamide in 2010, EPA explained that human studies assessing the carcinogenicity of acrylamide (including studies of both dietary and industrial exposures) "are judged as providing limited or no evidence of carcinogenicity in humans." EPA, *Toxicological Review of Acrylamide*, 167 (March 2010), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0286tr.pdf.

31. In sum, Defendants and the State have no evidence that acrylamide in Cookie Cakes is harmful to anyone. As such, their threat to compel Plaintiff to say otherwise is false and unconstitutional. Yet that is exactly what Defendants and the State hope to do.

D. The State Regulates, Guides, Supports and Benefits from Defendants' Actions

32. The State is responsible for, and benefits from, Defendants' conduct.

33. Under Proposition 65, the State authorizes numerous persons to prosecute the statute on the State's behalf: the Attorney General, a district attorney, a variety of local government officials or a private enforcer, such as Defendants. California Health & Safety Code § 25249.7(c) and (d).

34. The State allows all of these enforcement representatives to seek penalties of up to $2,500 per day for each violation. *Id.* § 25249.7(b).

35. Anyone who brings a case is eligible to recover 25 percent of the penalty, *id.* § 25249.12(d), as well as reasonable attorneys' fees and costs, Cal. Code Civ. Proc. § 1021.5. This creates strong incentives for litigation and a perverse incentive for abusive conduct. *See, e.g., Anthony T. Caso, Bounty Hunters and the Public Interest—A Study of California's Proposition 65*, 13 ENGAGE 30, 31 (Mar. 2012) (describing case in which "law firm created an 'astroturf' environmental group to be a plaintiff in Proposition 65 litigation," which group "consisted of partners from the law firm" and which "sent out hundreds of demand letters charging businesses with failure to provide warnings" and "extort[ing] payments of attorney fees or contributions to the front group").

36. In addition to penalties, the State allows enforcement representatives to seek injunctive relief to require mandatory consumer warnings by food companies in "a court of competent jurisdiction." *Id.* § 25249.7(a).

37. Enforcement representatives rely on the State's Office of Environmental Health Hazard Assess-

ment ("OEHHA") to identify chemicals and concentration levels that are supposedly "known" to cause cancer. Cal. Health & Safety Code §§ 25249.8(a)-(b).

38. Acrylamide currently is listed as a cancer-causing substance by OEHHA and the State encourages enforcement representatives like Defendants to sue food companies for injunctive and monetary relief.

39. If a product such as Cookie Cakes is found to contain acrylamide at the proscribed level, the State's mandatory warning imposed by its representatives require food companies to notify consumers that the affected product contains acrylamide which is "known to the State of California to cause cancer":

> WARNING: Consuming this product can expose you to [Acrylamide], which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov/food.

27 Cal. Code Regs § 25607.2(a)(2).

40. The required warnings on product labels mandated by the State and enforced by prosecutors must be large and obvious, *i.e.*, "must be set off from other surrounding information" and "enclosed in a box." *Id.* § 25607.1(b).

41. The State revises and regulates these requirements from time to time, and consults with its private enforcement representatives in doing so.

42. On information and belief, the State's employees have communicated with Defendants repeatedly over the last several years and encouraged and assisted them in securing monetary penalties from food companies accused of having acrylamide in their products.

E. The Regulation of Acrylamide is Unconstitutionally Vague

43. Proposition 65 purports to give food companies objective information from which to determine whether they must apply cancer warning labels to their products. But that information is completely vague and does no such thing.

44. First, the State exempts a food company from regulation if it "can show that the exposure [to acrylamide] poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer." Cal. Health & Safety Code § 25249.10(c). This threshold is commonly referred to as the "No Significant Risk Level" ("NSRL"). For some listed substances, OEMMA has published a quantitative NSRL, often referred to as a "safe harbor". 27 Cal. Code Regs. § 25705.

45. Proposition 65 lawsuits are pervasive even for chemicals, like acrylamide, that have a "safe harbor" NSRL because the safe harbor is an affirmative defense that is expensive to establish. It does not effectively deter a plaintiff with significant financial incentives from initiating suit in the hopes of collecting a settlement.

46. To determine whether exposure from acrylamide in a food product exceeds the NSRL, the exposure is calculated based on the "average rate of intake or exposure for average users of the consumer product." 27 Code Regs. § 25721(d)(4). Exposure can be determined by looking at the average consumer's consumption of Cookie Cakes over a period of time and then measuring the exposure to acrylamide based on that consumption over such period.

47. In practical terms, the exception is meaningless. Even if a food business engages a full range of experts and consumption scientists for every food product it formulates and sells in the State, the State and enforcers disagree on how average consumption of acrylamide is calculated and applied.

48. Food companies have expended millions of dollars in cases simply to show that the State and an enforcer is wrong about the application of such information in a given case.

49. As a result, businesses like Plaintiff have no means of protecting themselves when selling products in California—because the determination of the applicable NSRL and related safe harbor is very burdensome and because compliance does not prevent a company from being sued—such as in this case.

50. California jurists have recognized how onerous Prop 65 suits can be for anyone doing business in California. "[L]awsuits under Proposition 65 can be filed and prosecuted by any person against any business based on bare allegations of a violation unsupported by any evidence of an actual violation—or even a good faith belief that a defendant is using an unsafe amount of a chemical known by the state to cause cancer." *SmileCare*, 91 Cal. App. 4th at 477 (Vogel, J., dissenting) (emphasis in original). This burden-shifting regime results in "judicial extortion" where many private parties bring Proposition 65 claims (without an appropriate assessment that an exposure exceeds the NSRL) and force the defendant to settle to avoid legal fees and the costs of performing an expensive expert scientific assessment. *Id.* at 477-79.

51. The State makes things worse because businesses have the burden to demonstrate that the exposure at issue does not exceed the NSRL. Nor does demonstrated compliance immunize food businesses from lawsuits in the first instance or from future enforcement efforts. *See DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150, 185 (2007).

52. The one way to obtain certainty is to enter extortive monetary settlements with State representatives like Defendants, even though the business has attempted to comply in good faith and has made a product which poses no health risk.

53. Second, the State exempts from regulation products "where chemicals in food are produced by cooking necessary to render the food palatable or to avoid microbiological contamination. . . . " Cal. Code Regs. § 25703(b)(1).

54. One might expect that such cooking exception would protect companies like Plaintiff, but again that is not the case.

55. To qualify under this "cooking" exception, a business must also show that "sound considerations of public health support an alternative level. . . . " *Id.*

56. Such language is vague on its face and subject to a multitude of differing and unconstitutionally vague interpretations and enforcement actions.

F. The State Has Acknowledged that Acrylamide is Not Harmful

57. Despite encouraging acrylamide prosecution in hundreds of cases, the State readily acknowledges

it has no evidence that the substance actually is harmful or causes cancer.

58. OEHHA added acrylamide to the Proposition 65 list in 1990. The initial Proposition 65 listing was premised on potential exposures to acrylamide in industrial settings. At that time, it was not known that acrylamide was present in cooked foods. Acrylamide was not detected in foods until 2002.

59. OEHHA conceded in 2007 that acrylamide is not actually known to cause cancer in humans. Specifically, Martha Sandy, now the Branch Chief of OEHHA's Reproductive and Cancer Hazard Assessment Branch, was designated as OEHHA's "Person Most Knowledgeable" in an action involving acrylamide. *See* Cal. Code Civ. P. § 2025.230. Ms. Sandy testified that (a) she was not aware of any governmental health organization listing acrylamide as a known human carcinogen, (b) she was not aware of any pharmacodynamic data regarding rats and humans and acrylamide, and (c) OEHHA did not actually "know" that acrylamide was a human carcinogen.

60. OEHHA also has recognized that acrylamide in certain food products—namely, coffee—does not increase human cancer risk. In particular, in June 2019, OEHHA adopted a new regulation that states: "Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer." 27 Cal. Code Regs. § 25704 (effective Oct. 1, 2019). In adopting this regulation, OEHHA explained that "[t]he weight of the evidence from the very large number of studies in the scientific literature does not support an association between the

complex mixture of chemicals that is coffee [including acrylamide] and a significant risk of cancer." OEHHA, *Final Statement of Reasons, Adoption of New Section 25704 Exposures to Listed Chemicals in Coffee Posing No Significant Risk* (June 7, 2019), https://oehha.ca.gov/media/downloads/crnr/fsorcoffee060719.pdf.

61. Under Proposition 65, private plaintiffs are required to provide 60-days' notice to the California Attorney General, the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator before filing suit. Health & Safety Code § 25249.7 (d)(1). The California Attorney General maintains a database of these 60-day notices, available at https://oag.ca.gov/prop65/60-day-notice-search.

62. To date, there have been nearly 600 60-day notices for alleged violations of the Proposition 65 warning requirement with respect to alleged exposures to acrylamide. More than 500 of these 60-day notices relate to acrylamide in food products.

63. These 60-day notices include alleged violations related to potato and potato-based products (more than 90 notices); nut butters, including peanut and almond butter (more than 40 notices); almonds (more than 30 notices); cereals (more than 20 notices); and olives (more than 10 notices).

64. The rate of notices of violation for acrylamide have steadily increased in recent years, from just 32 notices in 2016 to 205 in 2019. Defendants' enforcement efforts are just a small part of the tidal wave of acrylamide litigation targeting innocent food companies.

G. Plaintiff Faces State Action and Lawsuits by Defendants and Others

65. On April 22, 2019, Defendants notified the State and Plaintiff that they intend to require Plaintiff to place a warning label on all Cookie Cakes to tell consumers that the products cause cancer.

66. The State did not object to Defendants' Notice of Violation or seek to curtail or limit it.

67. Defendants' Notice of Violation seeks relief on behalf of the "Public" of California and pursuant to the State's regulations and enforcement guidelines discussed above.

68. On information and belief, the State has communicated with Defendants about this or similar acrylamide cases in the past and has encouraged such lawsuits.

69. The State also has received monetary compensation from Defendants in connection with frivolous acrylamide lawsuits against other food companies, and would receive compensation should Defendants obtain monetary relief from Plaintiff.

70. Plaintiff notified Defendants that the products at issue could not possibly violate Proposition 65.

71. Defendants, however, refused to withdraw their notice unless Plaintiff paid a substantial sum or put a large cancer warning on the products.

CAUSES OF ACTION

First Cause of Action against All Defendants (Violation of the First Amendment to the United States Constitution)

72. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

73. The Free Speech Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. The Fourteenth Amendment of the United States Constitution made this proscription applicable to the States and their political subdivisions. *Id.* Amend. XIV § 1.

74. In addition to providing protections against restrictions on speech, the First Amendment provides protection against the government compelling individuals or entities to engage in speech.

75. Under the First Amendment, laws compelling speech receive strict scrutiny. *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977). Laws regulating commercial speech generally receive at least intermediate scrutiny, *i.e.*, they are prohibited if they do not directly and materially advance the government's interest, or are more extensive than necessary. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). And even laws that require businesses to provide information in connection with commercial transactions are permissible only if the compelled disclosure is of information that is purely factual and uncontroversial, reasonably related to a substantial government purpose, and not unjustified or unduly burdensome. *Nat'l Inst. of Family Life Advocates v. Becerra*,

138 S. Ct. 2361, 2372, 2377; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

76. A Proposition 65 warning, irrespective of the specific language used, conveys that the chemical at issue (here, acrylamide) causes cancer in humans.

77. Contrary to the warning mandated by Proposition 65, there is no reliable scientific evidence that dietary acrylamide in Cookie Cakes increases the risk of cancer in humans. To the contrary, a large number of epidemiological studies suggest that there is no association between exposure to acrylamide from food products and cancer in humans.

78. Nor does California "know" that dietary acrylamide causes cancer. In fact, the California agency responsible for implementing Proposition 65, OEHHA, has admitted that it does *not* know that acrylamide is a human carcinogen.

79. The Proposition 65 warning requirement as applied to acrylamide in Cookie Cakes thus seeks to compel speech that is literally false, misleading, and factually controversial.

80. Because Proposition 65's warning requirement as applied to acrylamide in Cookie Cakes is false, misleading, and factually controversial, it cannot survive any level of constitutional scrutiny. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009) ("[T]he State has no legitimate reason to force retailers to affix false information on their products."). Proposition 65's warning as applied constitutes impermissible compelled speech under the First Amendment and should be enjoined.

Second Cause of Action against All Defendants (Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution)

81. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

82. One of the most basic guarantees of Due Process is that laws "be sufficiently clear so as not to cause persons of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application. . . . " *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting *Connallly v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

83. For this reason, courts have long recognized that laws which are vague are voided by the Due Process Clause, the so-called void-for-vagueness doctrine. This doctrine is premised on the notion that:

> [v]ague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . . . Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the

> unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

84. Thus, where a regulation implicates speech, as here, "heightened vagueness scrutiny applies". *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). In the vagueness context, the requirement that laws be precise is aimed at preventing "chill": rather than risk sanctions, citizens will steer far wider than necessary to avoid engaging in prohibited speech; the First Amendment, however, needs breathing space to survive. Accordingly, "the standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

85. Proposition 65's warning requirement for acrylamide, as applied to Cookie Cakes, is impermissibly vague for two separate and independent reasons. First, because the NSRL is not predetermined, but rather established on a case-by-case basis and only after litigation, it is impossible for business to know whether a warning is required. This is particularly so in the context of acrylamide because the NSRL level is very low and not in any way related to the risk dietary acrylamide poses to humans (namely, none at all).

86. Second, Proposition 65's cooking exception is also impermissibly vague, because it requires a business to show that "sound considerations of public health" merit an alternative risk level, and undefined and undefinable term.

87. Accordingly, Proposition 65's warning requirement for acrylamide violates the Due Process Clause as applied to the Cookie Cakes.

Third Cause of Action against All Defendants
Deprivation of Civil Rights
(42 U.S.C. § 1983)

88. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

89. Defendants are enforcement representatives of the State of California. Their actions are regulated, governed by and ostensibly taken to economically benefit the State.

90. Defendants seek to enforce Proposition 65 against Plaintiff based on the alleged presence of acrylamide in Cookie Cakes.

91. Defendants' threatened enforcement and prosecution violates Plaintiff's rights under the First Amendment to the Constitution, by impermissibly seeking to require Plaintiff to place an objectionable warning on its products that would falsely tell consumers the products cause cancer. Cookie Cakes are enjoyable cookies and do not cause cancer.

92. Defendants' threatened enforcement is made under color of state law for many and reasons highlighted throughout this Complaint: the State is entwined and has a symbiotic relationship with Defendants; Defendants are fulfilling a traditional governmental function; Defendants and the State are engaged in conduct that would rise to a conspiracy.

93. All of those actions involve an intended violation of Plaintiff's First Amendment Rights. Further, a California statute and California court are necessarily involved in this dispute.

94. Plaintiff is entitled to an injunction against further prosecution or threats of prosecution under

Proposition 65 related to the alleged acrylamide in its Cookie Cakes, and to an award of double Plaintiff's damages, including attorneys' fees and costs, as permitted under Section 1983.

Fourth Cause of Action against All Defendants
Declaratory Judgment
(28 U.S.C. § 2201)

95. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

96. There is an actual and imminent controversy between the parties regarding whether the application of Proposition 65's acrylamide warning requirement to the Cookie Cakes violates the First and/or Fourteenth Amendments to the United States Constitution.

97. Plaintiff accordingly requests a declaration that the enforcement of Proposition 65 against the Cookie Cakes is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief against Defendants as follows:

A. For an injunction against further unconstitutional threats and lawsuits against Plaintiff regarding the acrylamide in its Cookie Cakes products.

B. A declaration that the Proposition 65 warning requirement for cancer as applied to Cookie Cakes violates the First Amendment of the United States Constitution.

C. For damages in an amount to be determined according to proof.

D. Plaintiff's attorney's fees and costs.

E. All such other and further relief as the Court may deem just, proper, and equitable.

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: */s/ J. Noah Hagey*
J. Noah Hagey

Attorneys for Plaintiff
B&G Foods North America, Inc.

Dated: March 6, 2020

DEFENDANTS EMBRY AND GLICK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT (MAY 1, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK, acting as enforcement representatives under California Proposition 65 on behalf of the State of California,

Defendants.

Case No. 2:20-CV-00526-KJM-DB

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DEFENDANTS KIM EMBRY AND NOAM GLICK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I. Introduction

Plaintiff seeks to obtain a perceived more favorable forum to litigate its federal constitutional defenses to an earlier-filed state court action under California's Proposition 65. There are a host of reasons that the Court should dismiss the case, including: (1) none of the causes of action apply to the private defendants—for instance, a private citizen cannot violate the First Amendment—and the limited circumstances that would make defendants state actors and therefore susceptible to being sued are nowhere close to being present; (2) the Anti-Injunction Act prohibits this later-filed action, as the Court has already ruled in the very similar case of *California Chamber of Commerce v. Becerra*, 2020 WL 1030980 (E.D. Cal. Mar. 3, 2020); and (3) Plaintiff's claims are improper under the Noerr-Pennington. For these reasons, the Court should dismiss the case and allow Plaintiff to pursue its defenses in state court. If this case were allowed to proceed, it would open the flood gates and result in every Proposition 65 case potentially having a parallel proceeding in federal court.

II. Factual Background

A. Proposition 65 Citizen Suits

The Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65, is a voter-enacted California state statute that protects the public's right to know about the potential threats of cancer, birth defects, or other reproductive harm resulting from exposure to hazardous chemicals. Proposition 65 generally requires businesses to provide a "clear and reasonable warning" on any product that causes an exposure to "a chemical known to the state to cause cancer or reproductive toxicity." Cal. Health & Safety Code § 25249.6. The statute permits any "person" to bring an action "in the public interest" to enforce this requirement. *Id.* § 25249.7(d).

A private party seeking to bring an enforcement action must provide 60 days' notice of the alleged Proposition 65 violation to the alleged violator and to the Attorney General and certain local government prosecutors. *Id.* § 25249.7(d)(1). The notice must include a certificate that "there is a reasonable and meritorious case for the private action" and "[f]actual information sufficient to establish the basis of" that certificate. *Id.* If, after reviewing the notice and certificate of merit, the Attorney General "believes there is no merit to the action, the Attorney General shall serve a letter to the noticing party and alleged violator stating" as much. *Id.* § 25249.7(e)(1)(A).

Assuming more than 60 days passes without public enforcers pursuing the matter, the private enforcer may commence an action. *Id.* § 25249.7(c) and (d). Private enforcers must notify the Attorney General when the action is filed, *id.* § 25249.7(e)(2), and again

when the action "is subject either to settlement or to a judgment," *id.* § 25249.7(f)(1). The settlement of a private enforcement action must occur with court approval after a noticed motion. *Id.* § 25249.7(f)(4). The private enforcer must serve the motion for approval of the settlement on the Attorney General, "who may appear and participate in a [settlement] proceeding without intervening in the case." *Id.* § 25249.7(f)(5).

B. Kim Embry's Citizen Suit Against B&G Foods

Kim Embry is a citizen enforcer of Proposition 65 dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposure from consumer products. Embry has filed dozens of successful private enforcement actions since January 2017, when she began investigating the presence of acrylamide and other Proposition 65 chemicals in consumer products. *See* Request for Judicial Notice in Supp. of Mot. to Dismiss ("RJN"), Ex. A. Other private enforcers have fared equally well, securing product reformulations to reduce exposures to toxic chemicals or warnings regarding those exposures in thousands of consumer products, securing millions of dollars in civil penalties, and, particularly with respect to acrylamide in food cases, securing trial verdicts overcoming First Amendment and other defenses. *See* Statement of Decision on Trial, RJN, Ex. J.

As part of her continued investigation, Embry, on April 22, 2019, served B&G Foods, the Attorney General, and all other required public enforcement agencies with a 60-day notice of violation of Proposition 65 ("Notice"). RJN, Ex. B. The Notice alleged that B&G Foods violated Proposition 65 when it failed to

warn consumers in California that its Snack Well's Devil's Food Fat Free Cookie Cakes ("Cookie Cakes") exposed consumers to acrylamide. *Id.*

Embry did not file suit when the Notice period expired. As is often the case, Embry, through her counsel, sought to exhaust non-litigation remedies (*e.g.*, potential out-of-court settlement) prior to expending substantial time and resources. Instead, Embry and B&G Foods executed a tolling agreement wherein Embry's claims were tolled for "[Embry] and [B&G Foods], and their respective counsel, [ ] to investigate and review [Embry's] allegations before [Embry] filed a lawsuit against [B&G Foods]. RJN, Ex. C. On March 6, 2020, at 10:53 a.m., Embry filed a Proposition 65 complaint against B&G Foods in the Superior Court of California, County of Alameda, Case No. RG20057491 (the "Alameda Action"). RJN, Ex. D. The Alameda Action alleges that B&G Foods failed to sufficiently warn consumers in California about the exposure to acrylamide in Cookie Cakes. *Id.*

C. B&G Foods' Reactionary Declaratory Action

Half a day after Embry filed the Alameda Action, and outside of normal business hours, at 10:07 p.m., B&G Foods filed a reactionary suit in this Court. Complaint, ECF No. 1; RJN at § E, Declaration of Arlene Calles (Calles Decl.) at ¶¶ 2-3. The Complaint names Embry and her counsel, Noam Glick, as defendants. B&G Foods claims that Proposition 65's warning requirement as applied to acrylamide in Cookie Cakes constitutes an unconstitutional speech requirement. *Id.* at ¶¶ 79-80. B&G Foods seeks a "declaration that the enforcement of Proposition 65 against the Cookie

Cakes is unconstitutional," *id.* at ¶ 97, and "an injunction against further prosecution or threats of prosecution under Proposition 65 related to the alleged acrylamide in its Cookie Cakes," *id.* at ¶ 94.

D. Acrylamide

Acrylamide is an odorless chemical found in cigarette smoke, and in certain starchy food products cooked at high temperatures. EPA, Toxicological Review of Acrylamide 266 (Mar. 2010) ("EPA Review") (RJN, Ex. E at 5). Among food products, "[f]rench fries, potato chips, crackers, pretzel-like snacks, cereals, and browned breads tend to have the highest levels of" acrylamide. *Id.*

Decades of research have produced strong evidence that acrylamide causes various cancers in laboratory animals, and that the same mechanisms that result in adverse effects from acrylamide exposures in animals also exist in humans. EPA Review at 166, 173 (RJN, Ex. E at 6, 8, 13, 14, 23).

Based on these and other studies, many scientific and government organizations have identified acrylamide as a probable human carcinogen: the EPA concluded in 2010 that acrylamide is "likely to be carcinogenic to humans," EPA Review at 167 (RJN, Ex. E at 7); the International Agency for Research on Cancer ("IARC") concluded that acrylamide "is probably carcinogenic to humans," IARC, Monographs on the Evaluation of Carcinogenic Risks to Humans: Vol. 60, Some Industrial Chemicals 425 (1994) (RJN, Ex. F at 2); and the National Toxicology Program—an interagency of the FDA, the National Institutes of Health, and the Center for Disease Control and Prevention—concluded that acrylamide "is reasonably anticipated

to be a human carcinogen," National Toxicology Program, Acrylamide, 14th Report on Carcinogens (2016) (RJN, Ex. G at 2).

California's Office of Environmental Health Hazzard Assessment ("OEHHA")—a specialized department within California's Environmental Protection Agency with responsibility for evaluating health risks from chemicals—identified acrylamide as a carcinogen in 1990, based on carcinogenicity findings by the EPA and IARC. *See* OEHHA, Meeting of the Carcinogen Identification Committee, Acrylamide Briefing Binder, Tab 2 (Oct. 17, 2003) (RJN, Ex. H at 4). In 2011, OEHHA identified acrylamide as a chemical known to cause developmental and reproductive toxicity. (RJN, Ex. I)

III. Legal Standard

A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted where the complaint lacks a cognizable legal theory, or alternatively, where it fails to plead essential facts under its legal theory. *Robertson v. Deon Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984), The facts plead must "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). A court may take judicial notice without converting a

motion to dismiss into a motion for summary judgment. *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001).

IV. The Court Should Dismiss the Complaint Because Embry and Glick Are Not "State Actors"

Well-settled law presumes private citizens cannot be "state actors" "acting under color of law" except in narrow circumstances, none of which are applicable here.

A. Embry and Glick Are Presumptively Not "State Actors."

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment makes the Free Speech Clause applicable against the States. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). "The text and original meaning of those Amendments," as well as the Supreme Court's "longstanding precedents" establish that the Free Speech Clause prohibits only "governmental" and not "private abridgement of speech." *Id.* (Emphasis in original). Put simply, the Free Speech Clause applies only against "state actor[s]." *Id.* A due process claim under the Fourteenth Amendment also has a state action requirement. *See, e.g., Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 48, 49-50 (2000).

42 U.S.C. § 1983 permits a cause of action against a person "who, under color of any statute, ordinance, regulation custom or usage . . . causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.

. . . " Thus, in order to invoke Section 1983, the plaintiff must "demonstrate a deprivation of a right secured by the Constitution or laws of the United States, and that the defendant acted under color of state law." *Kirtley v. Rainey*, 326 F. 3d 1088, 1092 (9th Cir. 2003) (emphasis added). Accordingly, "like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 49-50 (*quoting Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)). "Whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly attributable to the government?" *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999).

"When addressing whether a private party acted under color of law," courts "start with the presumption that private conduct does not constitute governmental action." *Sutton*, *supra*, 192 F. 3d at 835. Further, there are only a "few limited circumstances" when a private party may "qualify as a state actor." *Manhattan Cmty. Access Corp.*, *supra*, 139 S. Ct. at 1928. Specifically, a private citizen acts "under color of law" only if: (i) the private citizen "performs a traditional, exclusive public function;" (ii) "the government compels" the private citizen "to take a particular action;" or (iii) "the government acts jointly with the private" citizen. *Id*.

B&G Foods alleges that defendants are "citizen[s] of California," not public officials (Compl. ¶¶ 7-8.) Thus, the Complaint admits defendants are private citizens presumed not to be "state actors."

B. None of The Limited Circumstances Where a Private Citizen Can Act Under "Color of Law" Apply to Embry and Glick.

i. Embry and Glick Do Not Perform Traditional and Exclusive Public Functions.

The Supreme Court "has stressed that very few functions" are "traditionally" and "exclusively" reserved to the States. *Manhattan Cmty. Access Corp.*, *supra*, 139 S. Ct. at 1928. It is "not enough that the function serves the public good or the public interest in some way." *Id.* Rather, the plaintiff must show that the alleged state action is both traditionally and exclusively performed by the government. *Id.* (citing "running elections" and "operating a company town" as examples of traditional and exclusive government functions). This is a demanding standard, and the plaintiff has the burden to meet it. *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs*, 608 F.3d 110, 122 (1st Cir. 2010). The fact that "a private entity performs a function which serves the public does not make its acts state action." *Rendell-Baker v. Kohn*, *supra*, 457 U.S. at 842 (1982).

In *Real Estate Bar Ass'n*, a bar association sued an escrow company under a Massachusetts statute that permitted it, along with private attorneys or prosecutors to bring an action to enforce the State's prohibition of the unauthorized practice of law. 608 F.3d at 122. The closing service then brought a counterclaim against the bar association under Section 1983, claiming that the enforcement statute violated the Dormant Commerce Clause. *Id.* The First Circuit held that the closing

services failed to state a claim because the Bar Association was not a "state actor." *Id*. at 122. The court reasoned that while the State "chose to give bar associations a defined role in bringing court actions to seek a judicial determination" regarding the unauthorized practice of law, "the bringing of a lawsuit to obtain a declaration as to legality—is far from an exclusive function of government." *Id*.

B&G Foods appears to invoke the "traditional and exclusive functions" test by alleging that Embry and Glick perform "a quintessential state function by acting as California's enforcement arm relating to the presence of targeted chemicals in the environment." (Complaint, ¶ 9(f).) However, as the court held in *Real Estate Bar Ass'n*, that a person has standing to bring an enforcement action does not convert the person into a "state actor." This is because filing a lawsuit to enforce public policy is "far from" an "exclusive" function of government. *Real Estate Bar Ass'n*, 608 F.3d at 122. "An action undertaken by a private party does not become state action merely because the action is authorized by state statute." *Id*. (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-66 (1978)); *Roberts v. AT&T Mobility*, 877 F.3d 833, 845 (9th Cir. 2017) ("[P]ermission of a private choice cannot support a finding of state action . . . and private parties [do not] face constitutional litigation whenever they seek to rely on some [statute] governing their interactions with the community surrounding them." (quoting *Lugar*, 457 U.S. at 937, and *Am. Mfrs. Mut. v. Sullivan*, 526 U.S. 40, 53 (1999)).

The fact that filing a lawsuit to enforce Proposition 65 is not an "exclusive" or "traditional" government function is plain from the language of Proposition 65

itself. Under Proposition 65, an action may be brought by "the Attorney General in the name of the People of the State of California, by a district attorney, by a city attorney . . . [or] by a city prosecutor . . . ." Cal. Health and Saf. Code § 25249.7(c). The statute also permits "private action[s]" brought by a "person" acting "in the public interest" but only after the person: 1) provides notices of the Proposition 65 violation to the defendant, the Attorney General and the relevant district attorney or city prosecutor; and 2) with 60 days' notice, "neither the Attorney General, a district attorney, a city attorney, nor a prosecutor has commenced an action and is diligently prosecuting an action against the violation." Cal. Health and Saf. Code § 25249.7(d). In other words, Proposition 65 differentiates between state actions, which are brought by the Attorney General or a prosecutor, and "private actions" which are brought by private citizens after notifying the State, which then declines to take its own action. Moreover, both public and private actions are permitted. Accordingly, by definition, the right to bring a lawsuit under Proposition 65 is not exclusively or traditionally reserved to the State.

B&G Foods mistakenly relies on *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) for its claim that filing a Proposition 65 lawsuit constitutes the exercise of a "traditional" or "exclusive" government function. (Compl. ¶ 9(e)-(f).) In *Lee*, the defendant leased an outdoor space from the City and was sued by the plaintiffs it excluded for violating their free speech rights. Because the defendant was regulating free speech in a public forum, which is a traditional and exclusive public function, the court held the defendant

was acting under color of law. *Id.* at 555-557. In *Burton*, the defendant restaurant leased space from the state. The Court held the defendant could be liable for violating the Equal Protection Clause of the Fourteenth Amendment when it refused to serve African American customers. The court held that the State made itself a party to the discrimination by "electing to place its power, property and prestige behind the admitted discrimination." *Burton*, *supra*, 365 U.S. 715 at 725.

Unlike the defendants in *Lee* and *Burton*, to whom the State delegated complete authority over public property, Proposition 65 plaintiffs (and their attorneys), far from being granted regulatory authority, are merely permitted to seek redress in the courts through litigation, which has never been an exclusive function of the State. Thus, as a matter of law, Embry and Glick cannot be "state actors" under the "traditional and exclusive" functions test.

ii. Embry and Glick Did Not "Act Jointly" With the State.

In order to show there was joint action between a private actor and the State, the plaintiff must show the private actors are "willful participants in joint action with the government or its agents." *Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1211 (9th Cir. 2002). A private party is liable under this theory only if its particular actions are "inextricably intertwined" with those of the government. *Id.* (*quoting Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 503 (9th Cir. 1989); *see also Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989). A "conspiracy" between the

State and a private party to violate another's rights may also satisfy the test. *Brunette*, 294 F.3d at 1211.

In *Nabors Well Servs. Co. v Bradshaw*, 2006 Dist. LEXIS 109849 * 2 (C.D. Cal. Feb 15, 2006), the plaintiff brought a Section 1983 action against a former employee who sued the defendant for various wage and hour violations under California's Private Attorney General Act, Labor Code section 2699 *et seq*. ("PAGA"). The plaintiff alleged that the defendant acted "under color of state law" because he was "helping to enforce compliance with California's labor law." The court granted the defendant's motion to dismiss, holding that the defendant's "private use" of a state sanctioned remedy did not constitute action by the State. *Id*. at * 6-7. The court reasoned that the state was not a "willful participant" in the PAGA action because it "merely acquiesced" and did not "exercise coercive power to further the suit." *Id*. *6. The court further held that the "fact that the State is a passive recipient" of recovery in PAGA actions did "not alter the outcome." *Id*.

Proposition 65 is remarkably similar to PAGA. Like in a PAGA action, the plaintiff must first provide notice to the State and may only bring suit after the State declines to act. *Compare* Labor Code § 2699.3 (a)(1)(A), (a)(2)(A), *with* Health & Saf. Code § 25249.7(d). Further, Proposition 65 emphasizes that the Attorney General's failure to serve a no-merit letter "shall not be construed as an endorsement by the Attorney General of the merit of the action." Cal. Health and Saf. Code § 25249.7(e)(1)(B). The statute does not contemplate that the Attorney General can stop the action from going forward. Even after receiving a no-merit letter, the private enforcer can move ahead with her

enforcement action, albeit at the risk of sanctions if the defendant is ultimately successful. *See id.* § 25249.7(e)(1)(A), (h)(2). Thus, that a Proposition 65 plaintiff must first provide notice to the State cannot constitute joint action with the State. *See Am. Mfrs. Mut. Ins.*, 526 U.S. at 55 (government agency not responsible for private parties' actions where its "participation is limited to requiring insurers to file a form prescribed by the Bureau, processing the request for technical compliance, and then forwarding the matter" to a private entity). As with PAGA, there is not "joint action" between the State and citizens who bring private actions to enforce Proposition 65.

Moreover, like in a PAGA action, if the plaintiff succeeds in recovering penalties in a Proposition 65 action, 75% of the recovery is paid to the State and 25% is paid to the plaintiff. Cal. Health and Saf. Code § 25249.12(c)); Cal. Labor Code 2699(i). As the court held in *Nabors*, the mere "passive" receipt of a recovery by the State does not establish "joint action." Indeed, courts have found state action on the basis of a financial benefit to the state only when private action "confers significant financial benefits indispensable to the government's financial success," such that there is a "symbiotic relationship" between the state and the private actor. *Brunette*, 294 F.3d 1205, 1213 (9th Cir. 2002) (emphasis added; quotation omitted). That is, the government must have "so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity." *Id.* (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). B&G Foods has not, and cannot, allege that civil penalty recoveries in private acrylamide warning enforcement

actions—or even penalties in private enforcement actions overall—are "indispensable" to the state or that the Attorney General is in a "position of interdependence" with any of the private enforcers. *See Vincent v. Trend W. Tech. Corp.*, 828 F.2d 563, 569 (9th Cir. 1987) ("While [the private party] may have been dependent economically on its contract with the Air Force, [it] was most certainly not an indispensable element in the Air Force's financial success.").

In the Complaint, B&G Foods tries to distinguish PAGA and other private attorney general statutes by alleging that the State can "regulate," "monitor" and "object to" Proposition 65 actions and "regulate" settlements. (Compl. ¶¶ 9(b-d).) However, even if the Complaint accurately described the statutory scheme—which it does not—the Attorney General's decision not to "object" to a private enforcement action does not make the State a "joint actor" with the plaintiff. To the contrary, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins.*, *supra*, 526 U.S. at 52; *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 845 (9th Cir. 2017) ("[O]ur cases will not tolerate the imposition of [constitutional] restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.'" (quoting *Am. Mfrs. Mut. Ins.*, 526 U.S. at 54)). Although the Attorney General can preempt a would-be private enforcement action by initiating an action himself before the 60-day period has elapsed, there is nothing in the statute that indicates inaction by the Attorney General could somehow constitute "encouragement" of any action by the plaintiff, let alone a "joint action" with the plaintiff. *See* Cal. Health & Safety Code § 25249.7(d)(2). Further, private

actions and settlements filed over the Attorney General's objection necessarily are not actions taken in concert with a state actor.

Similarly, B&G Foods's allegation that the Attorney General "regulates individual settlements" not only inaccurately portrays the statutory scheme, but also fails to demonstrate state action. A private enforcer must notify the Attorney General upon filing a motion to enter into a settlement agreement with an alleged Proposition 65 violator, and the Attorney General may then "appear and participate in [the settlement] proceeding without intervening in the case." Cal. Health & Safety Code § 25249.7(f)(5). But by objecting to a settlement the Attorney General does not block it from being approved. *See id.* § 25249.7(f)(5). Rather, the statute allows the Attorney General to make his objections to a settlement known to the court, which then decides whether to approve it. Even if the Attorney General had authority to block proposed settlements—which he does not—his use of (or failure to use) that authority would not make him responsible for the resulting settlement or any other part of the private enforcement action. Rather, where the Attorney General objects to a Proposition 65 settlement, the State becomes an adversary to the plaintiff—*i.e.*, the opposite of a "joint actor."

B&G Foods's conclusory allegation that Glick and Embry are "conspiring" with "state officials" is also without merit. Indeed, B&G Foods fails to allege any facts that could constitute a "conspiracy" and its reliance on *Denis v. Sparks*, 449 U.S. 24 (1980) is misplaced. (Compl. ¶ 9(g).) In *Denis*, the court held that a litigant who bribed a judge to influence his decision participated in an official act resulting from a corrupt conspiracy.

Id. at 28. However, as the court reasoned, one does not become a "co-conspirator or joint actor with the judge" simply by "resorting to the courts and being on the winning side of a lawsuit." *Id*. Thus, if anything, *Denis* demonstrates that Embry and Glick are no more "joint actors" with the State than any other litigant and her lawyer who exercise the constitutional right to petition by filing a lawsuit.

iii. Private Enforcers Are Not Compelled to Bring Actions

"The compulsion test considers whether the coercive influence or significant encouragement of the state effectively converts a private action into a government action." *Kirtley*, *supra*, 326 F.3d at 1094 (quotation omitted). Proposition 65 permits but does not require private enforcement actions. Cal. Health & Safety Code § 25249.7(d) ("Actions pursuant to this section may be brought by a person in the public interest. . . . " (emphasis added)).

Proposition 65's civil penalties are not such "significant encouragement" that the choice to initiate a private enforcement action "must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Courts "have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it." *Am. Mfrs. Mut. Ins.*, 526 U.S. at 53; *see also Real Estate Bar Ass'n*, 608 F.3d at 122 ("An action undertaken by a private party does not become state action merely because the action is authorized by state statute.").

Some courts have also applied a "nexus" test to determine whether private action may be considered state action, although the Ninth Circuit has indicated that this test is "largely subsume[d]" within the other state action tests and may not have independent force. *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 n.13 (9th Cir. 2013). Assuming this additional test applies here, for the reasons stated above, the Complaint does not meet it. The nexus test asks whether "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924 (quotation omitted). There is no "close nexus" between private enforcement actions and the State because the State does not command private enforcers to bring enforcement actions or block private actions that it believes are meritless. *Kirtley*, 326 F.3d at 1095 (finding that there was no close nexus between a guardian ad litem and the state, even though the guardian "is appointed by a state actor, is paid by the state, and is subject to regulation by state law"). Further, the statute treats private enforcers differently from government prosecutors: unlike public enforcers, private enforcers are required to provide 60 days' notice before filing an action, Cal. Health & Safety Code § 25249.7(d)(1); they cannot sue if a public enforcer has already sued, *id.* § 25249.7(d)(2); they are subject to sanctions if they bring a frivolous case, *id.* § 25249.7(h)(2); and they must get judicial approval to settle their cases, *id.* § 25249.7(f)(4). Proposition 65 itself thus does not treat private enforcers as an arm of the state.

iv. Allowing Lawsuits Against Citizens Filing Private Actions Would Chill Citizens from Acting in The Public Interest.

Like Proposition 65, numerous statutes permit private actions to enforce public rights without converting the private citizen plaintiffs into state actors. These include the citizen suit provisions of the federal Clean Water Act, 33 U.S.C. § 1365, Endangered Species Act, 16 U.S.C. § 1540(g), and Safe Drinking Water Act, 42 U.S.C. § 300j-8, which permit private parties to seek civil penalties and injunctions against those who violate environmental laws and regulations. California law also permits citizen suits to recover civil penalties, such as under PAGA. Proposition 65's provision for private enforcement actions is merely another example of such a citizen suit statute.

To permit defendants to sue plaintiffs as "state actors" would chill participation by citizens in vindicating the public policies embodied in Proposition 65 and every other similar state and federal statute permitting private enforcement. There is no case, statute, regulation or policy that warrants forcing private citizens considering a private enforcement action to weigh the personal risk and burden of defending lawsuits challenging the Legislature's actions. *See Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 845 (9th Cir. 2017) ("[P]rivate parties [do not] face constitutional litigation whenever they seek to rely on some [statute] governing their interactions with the community surrounding them."). Further, allowing Proposition 65 defendants to bring separate federal actions against private enforcers as if they were the government would create a flood of retaliatory litigation in federal court.

The absurdly broad definition of a "state actor" posited by B&G Foods is embodied in its allegation that Embry and Glick are State actors because "California has interjected itself into this dispute by virtue of the fact that Proposition 65 is a state statute and Defendants have filed in state court." (Compl. ¶ 9(h).) In other words, B&G Foods claims that any time a lawsuit is filed under State law the plaintiff is a "state actor." In support of this preposterous interpretation, B&G Foods mistakenly relies on *Grant v. Johnson*, 15 F.3d 146 (9th Cir. 1994). In *Grant*, a woman sued the judge who appointed her guardian, alleging that the guardianship statute was unconstitutional. *Id.* at 147. The Ninth Circuit reversed a judgment in the woman's favor because there is no Article III "case or controversy" against a judge who has no interest in the outcome of the case. *Id.* at 148. In *dicta*, the court stated that the plaintiff may be able to bring a declaratory judgment action against the petitioner or the guardian herself because, while they were not "state actors" subject to a Section 1983 claim, there might be "state action" due to the order from the judge that could provide a basis for a declaratory judgment action. *Id.* at 149. At most, this *dicta* suggests that in very limited circumstances, which are not applicable here, a private citizen can be involved in a state action. It does not—and cannot—mean that all litigants who file lawsuits in state court under a state law subject themselves to actions in federal court to defend the constitutionality of the state law.

C. Noam Glick Cannot Be a State Actor.

"[I]t is well-established that lawyers in private practice generally do not act under color of law when they represent parties in court proceedings." *Tanasescu*

v. State Bar of Cal., 2012 Westlaw 1401294 *16 (C.D. Cal., March 26, 2012) (*citing Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (dismissing Section 1983 action against attorney in personal injury action against plaintiff). Further, "[i]nvoking state legal procedures does not constitute 'joint participation' or 'conspiracy' with state officials sufficient to satisfy section 1983's state action requirement." *Schucker v. Rockwood*, 846 F.2d 1202 (9th Cir. 1988) (allegations of "conspiracy" between attorneys and judge insufficient to establish that attorney was state actor under Section 1983).

In *Tanasescu*, the plaintiffs brought a 1983 action against their own attorneys and alleged an immigration fraud scheme. 2012 Westlaw 1401294. The court granted the attorneys' motion to dismiss because they are not state actors. Specifically, the attorneys' actions consisted solely of private actions, such as filing a dissolution petition, taking discovery and engaging in other "typical actions of lawyers representing their clients in a civil action." *Id.* at *17.

B&G Foods alleges that Glick is a "lawyer" who brings Proposition 65 actions. (Compl. ¶ 8.) B&G Foods does not and cannot allege that Glick has done anything more than engage in "typical actions of lawyers representing clients in a civil action," like sending statutorily required notice to the Attorney General and filing the Proposition 65 action. Further, B&G Foods's vague allusions to the State's "imprimatur, support" and "guidance" are precisely the type of conclusory and "implausible" allegations the courts in *Tanasescu* and *Schucker* rejected as insufficient to overcome the strong presumption against finding that private attorneys engage in state action.

V. The Court Should Dismiss the Complaint Under the Anti-Injunction Act

The Anti-Injunction Act forbids a federal district court from "grant[ing] an injunction to stay proceedings in a State court except [1] as expressly authorized by Act of Congress, or [2] where necessary in aid of jurisdiction, or [3] to protect or effectuate its judgments." 28 U.S.C. § 2283. The Anti-Injunction Act "is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions." *Negrete v. Allianz Life Ins. Co. of N. Am.,* 523 F.3d 1091, 1100-01 (9th Cir. 2008) (quoting *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 286-87 (1970)).

The limitations expressed in the Anti–Injunction Act "rest[ ] on the fundamental constitutional independence of the States and their courts," *Atl. Coast Line,* 398 U.S. at 287, and reflect "Congress' considered judgment as to how to balance the tensions inherent in such a system," *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140, 146 (1988). Rooted firmly in constitutional principles, the Act is designed to prevent friction between federal and state courts by barring federal intervention in all but the narrowest of circumstances. *See Alton Box Bd. Co. v. Esprit de Corp.,* 682 F.2d 1267, 1271(9th Cir. 1982); *Bennett v. Medtronic,* 285 F.3d 801, 805 (9th Cir. 2002). "Any 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. . . . " *Atl. Coast Line,* 398 U.S. at 297.

A. B&G Foods' Request for Injunctive Relief

Kim Embry is prosecuting a state court Proposition 65 action (the Alameda Action) against B&G Foods concerning the presence of acrylamide in its Cookie Cakes. *See* RJN, Ex. D. In this Court, B&G Foods thereafter filed a Complaint seeking "an injunction against further prosecution or threats of prosecution under Proposition 65 related to the alleged acrylamide in its Cookie Cakes," which, if granted, would have the effect of enjoining the Alameda Action. *See* Complaint at ¶ 94. The Anti-Injunction Act bars this request because none of the exceptions apply. *See* 28 U.S.C. § 2283; *California Chamber of Commerce v. Becerra,* 2020 WL 1030980, at *6-8 (E.D. Cal. Mar. 3, 2020) ("Cal. Chamber") (similar federal action that sought to preempt Proposition 65 state court proceedings dismissed by this Court, in part via the Anti-Injunction Act).

The first exception to the Anti-Injunction Act does not apply because Congress has not expressly authorized federal injunctions against Proposition 65 cases. The second exception does not apply because this is not an *in rem* or similar *in personam* action in which an injunction could be necessary for the Court to preserve its jurisdiction. *See Bennett v. Medtronic,* 285 F.3d 801, 806-07 (9th Cir. 2002); *Gold Coast Search Partners v. Career Partner,* 2019 WL 4305540, at *4 (N.D. Cal. 2019). The third exception does not apply because no judgment has been issued from this Court that could require protection by injunctive relief.

Since none of the statutory exceptions apply, the Anti-Injunction Act bars this Court from granting B&G Foods' requested injunctive relief and requires dismissing the injunction claim. "[I]f the Anti-Injunction

Act bars the court from granting plaintiff's requested remedies, it nevertheless warrants a dismissal of the claims under Rule 12(b)(6)." *Cal. Chamber, supra*, at *7.

B. B&G Foods' Request for Declaratory Relief

"The Anti-Injunction Act also applies to declaratory judgments if those judgments have the same effect as an injunction." *California v. Randtron,* 284 F.3d 969, 975 (9th Cir. 2002); *see also Samuels v. Mackell,* 401 U.S. 66, 72 ("[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.") Here, B&G Foods seeks a "declaration that the enforcement of Proposition 65 against the Cookie Cakes is unconstitutional." *See* Complaint at ¶ 97. The declaratory relief, if granted, would effectively enjoin the Alameda Action because it would decide the issues of B&G Foods' anticipated[1] affirmative constitutional defenses in favor of B&G Foods and prevent Embry's Proposition 65 enforcement action from moving forward.

Since B&G Foods cannot enjoin Embry from enforcing Proposition 65 in the Alameda Action, it also cannot obtain a judgment declaring that her enforcement violates the United States Constitution. *See Cal. Chamber, supra*, at *8. Therefore, B&G Foods' claim for declaratory relief should also be dismissed under the Anti-Injunction Act.

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[1] B&G Foods' responsive pleading in the Alameda Action was originally due on April 8, 2020 but was not filed presumably due to the Covid-19-related court closure.

VI. The Court Should Dismiss the Complaint Under the *Noerr-Pennington* Doctrine

This suit would punish Defendants for petitioning California's executive and judicial branches. The *Noerr-Pennington* doctrine bars Plaintiff from pursuing these ends. The *Noerr-Pennington* doctrine embodies the First Amendment's guarantee of "the right of the people . . . to petition the Government for a redress of grievances." *Noerr-Pennington* generally immunizes from liability "those who petition any department of the government for redress . . . ." *Sosa v. DIRECTV,* 437 F.3d 923, 929 (9th Cir. 2006). While this doctrine arose in the anti-trust context, courts continue to expand and apply the doctrine in other contexts. *Id.* at 929-31; *see Griffin v. Jones*, 170 F. Supp. 3d 956, 970 (W.D. Ky. 2016) ("if a party's actions are protected by the First Amendment, then that party is immune to suit."). Naturally, this broad doctrine applies to petitioning courts through lawsuits. *Id.* at 930, 933-34. (*citing In BE & K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002)). It also extends "litigation-related activities preliminary to the formal filing of the litigation" such as threats to file suit and pre-litigation demands. *Sosa*, 437 F.3d at 937 (collecting cases). Courts routinely apply *Noerr-Pennington* to section 1983 claims.[2]

The lone, narrow exception to the *Noerr-Pennington* doctrine is the "sham" exemption, which excludes immunity for petitioning "conduct that use[s] 'governmental process . . . as an anticompetitive weapon.'"

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[2] *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1054 (9th Cir. 2005); *Swallow v. Torngren*, 789 F. App'x 610, 611 (9th Cir. 2020); *Knology, Inc. v. Insight Commc'ns Co.*, 393 F.3d 656, 658 (6th Cir. 2004).

Kearney, 590 F.3d at 644 (*quoting Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998)). The Court should dismiss[3] Defendant's claims under *Noerr-Pennington*.

A. Proposition 65 Enforcement is Petitioning Activity of Both the Executive and Judicial Branches of Government

Based on the allegations in the Complaint, there should be little dispute here that Plaintiff's claims squarely take aim at Embry and Glick's petitioning activity. Plaintiff alleges that private enforcers, like Embry, and their counsel, like Glick, gather evidence about potential acrylamide exposure in food products through lab testing (Complaint ¶ 3) and submit that evidence along with a Notice of Violation to California through the AG's office (Complaint ¶ 9(b)). Plaintiff further alleges that the AG then plays a gate keeper role, approving or disapproving matters going forward based on the merits of the evidence submitted and, if approved, continues to regulate and monitor the action. Complaint, ¶ 9(b), 9(d). Plaintiff alleges that the AG's discretion and regulation of Prop 65 proceedings includes vetting settlement agreements, reviewing the progress of litigation, intervening in cases, and/or altering the regulations applicable to Prop 65 enforcement. Complaint, ¶ 9(c).

The Complaint further asserts that, under the guidance of California's AG, Defendants and other Prop

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[3] *Noerr-Pennington* is ripe for adjudication at the pleadings stage. *Sosa*, 437 F.3d 923, 929-30; *Kottle*, *supra*, 146 F.3d at 1060 (9th Cir. 1998); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000); *Mazzocco v. Lehavi*, 2015 WL 12672026, at *7 (S.D. Cal. Apr. 13, 2015).

65 enforcers have filed acrylamide cases grossing tens of millions of dollars in settlement payments from food manufacturers like Plaintiff over the last few years. Complaint, ¶ 2. After sending a Notice of Violation, Embry, through her counsel Glick, instituted an action against Plaintiff in state court for acrylamide in Plaintiff's cookie product pursuant to the regime outlined above. RJN, Ex. D. California, through its AG has not curtailed the action and has in fact encouraged it. Complaint, ¶¶ 65-71. According to Plaintiff, California and the enforcers of Prop 65 (as well as their counsel) know acrylamide does not cause cancer and is not a health risk yet they continue to threaten and engage in litigation to enforce Prop 65 as it related to acrylamide in food products. Complaint, ¶ 2, 4, 15, 22-31. This purportedly violates Plaintiff's Constitutional rights and amounts to a state-sponsored conspiracy to rob Plaintiff of its free speech. *See generally* Complaint, ¶ 9(e)-(h).

Thus, the basis for this lawsuit is two types of petitioning: first, via the Notice of Violation and supporting evidence, Embry petitions California's executive branch; and second, Embry, through Glick, petitions California courts to enforce Proposition 65. Courts routinely recognize Notices of Violations, Proposition 65 lawsuits, and similar conduct as petitioning activity. *See e.g. Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 57-67 (2002) (upholding anti-SLAPP[4] dismissal of declaratory and injunctive relief action filed in response to a Notice of Violation because it is

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[4] Courts find anti-SLAPP and *Noerr-Pennington* protections analogous. *E.g. Tichinin v. City of Morgan Hill,* 177 Cal. App. 4th 1049, 1064 (2009).

"activity in furtherance of [defendant's] constitutional rights of speech or petition. . . . "); and *see CKE Restaurants, Inc. v. Moore*, 159 Cal. App. 4th 262, 269 (2008) ("filing of Proposition 65 intent-to-sue notices is a protected activity."); *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1054-57 (9th Cir. 2005) (applying *Noerr-Pennington* in favor of a community activist accused by a real estate developer of assuming power of state zoning commission and violating its constitutional rights).

B. The Sham Exception Does Not Apply

Different sham tests apply to the two types of petitioning conduct the Complaint attacks. *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1061 (9th Cir. 1998) (scope of the sham exception depends on the branch of government involved.). As such, B&G must allege both petitioning the California Attorney General and the enforcement action in court are shams. Further, a "heightened pleading standard" applies. *See Wonderful Real Estate Dev. LLC v. Laborers Int'l Union of N. Am. Local 220*, 2020 WL 91998, at *7 (E.D. Cal. Jan. 8, 2020) (*citing Kottle*, 146 F.3d at 1063). The allegations cannot be conclusory but must address "specific activities which bring the defendant's conduct into one of the exceptions." *Id.* at *10. B&G fails this test.

B&G's allegations regarding Defendants' petitioning of the California Attorney General do not meet the sham exception. Because of the legislative-like role Plaintiff alleges the Attorney General plays,[5] the

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[5] *See* Complaint, ¶ 9 (asserting that the Attorney General is the gatekeeper for Proposition 65 claims, has ex parte communications with Defendants and other enforcers about Proposition 65

stringent legislative petitioning standard applies. *See e.g. Kottle,* 146 F.3d at 1061 (which sham standard applies depends on "whether the executive entity in question more resembled a judicial body, or . . . a political entity."); *Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp.,* 235 F.Supp.3d 1132, 1156-57 (E.D. Cal. 2017) ("executive agenc[ies] charged with enforcing [California laws] . . . [are] more akin to a political process than a judicial one."). Such petitioning is a "sham" only if the defendant allegedly "use[d] the legislative process with no expectation of obtaining legitimate government action." *See Comm. to Protect,* 235 F.Supp.3d at 1156-57.

The Complaint places Defendants outside the legislative sham exception. Those pursuing Proposition 65 acrylamide in food cases have had enormous success over the last several years and the Attorney General has encouraged these lawsuits. Complaint, ¶¶ 2-4, 68. As such, Plaintiff is unable to plead that Defendants did not expect to successfully petition the Attorney General in connection with her efforts to pursue Proposition 65 litigation against Plaintiff and similar companies. Because Plaintiff's claims hinge on the threshold petitioning of the Attorney General, they must be dismissed.

The Complaint equally fails to allege sham judicial petitioning, independently warranting dismissal. There are three grounds for sham judicial petitioning: (1) lawsuits that are objectively baseless and pursued with unlawful motive; (2) a policy of starting legal proceedings without regard to the merits and for an

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enforcement, and can change the regulatory process for carrying out these enforcement actions).

unlawful purpose; and (3) knowing fraud upon or intentional misrepresentations to a court. *Sosa*, 437 F.3d 923, 938.

As to the third ground, Plaintiff does not allege any fraud or intentional misrepresentations by Embry or Glick. The first two grounds are also absent. Plaintiff has not met the heightened pleading standard for alleging that the lawsuits were brought with an unlawful motive and for an unlawful purpose. The most Plaintiff does is make vague, conclusory allegations. *See* Complaint, ¶¶ 2-3, 31.

As to the merits, B&G quibbles with California's legislative and regulatory decisions to make acrylamide in food actionable under Proposition 65, but B&G admits that Proposition 65 acrylamide litigation successfully generates millions of dollars in civil penalty recovery. Complaint, ¶¶ 2-4. Also, Plaintiff alleges that California's Attorney General vets the merits of the Notices of Violation and regulates Defendants' litigation conduct. Complaint, ¶ 9. Indeed, Proposition 65 requires that attorneys serving Notices of Violation submit a certificate of merit to the Attorney General, among others, verifying that the case has merit and that an expert in the field supports this. Health & Safety Code, § 25249.7(d)(1). And if, after reviewing the factual information underlying this certificate of merit, the Attorney General concludes that the action lacks merit, the Attorney General "shall serve a letter to the noticing party and the alleged violator stating the Attorney General believes there is no merit to the action." *Id.* at sub. (e)(1)(A). Still further, California courts must approve the consent judgments reached in Proposition 65 matters which requires the court to assess the

proposed settlement's compliance with the requirements of Proposition 65. *Id.* at sub. (f)(4).

Plaintiff does not allege that prosecution of this or other Proposition 65 matters which (1) require an expert-backed certificate of merit upon submitting the Notice of Violation, (2) are vetted and regulated by the executive branch and (3) then subject to scrutiny and approval by the judicial branch are objectively baseless or brought without regard to the merits. Indeed, Embry, represented by Glick, has successfully resolved (via court-approved settlement) 15 acrylamide in food cases further validating the non-baseless nature of the conduct at issue here. RJN, Ex. A. Other Proposition 65 enforcers have also been successful in acrylamide actions in cases taken to trial. RJN, Ex. J.

Wonderful Real Estate Dev. LLC v. Laborers Int'l Union of N. Am. Local 220, 2020 WL 91998, at *2 (E.D. Cal. Jan. 8, 2020) is instructive. In *Wonderful*, a real estate developer brought claims against a labor union and its associates for purportedly "engag[ing] in a continuing pattern and practice of filing sham litigation and administrative challenges against real estate developers under the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 2100, *et seq*." 2020 WL 91998, *1-2. Specifically, the developer plaintiff alleged that the union defendant's CEQA claims were not based on legitimate, meritorious environmental concerns, but instead an extortion effort aimed to secure lucrative labor contracts for development projects. *Id.* at *2. Under the heightened pleading standard, the court held that the plaintiff failed to plead facts demonstrating baselessness, such as facts "disprov[ing] the challenged lawsuit[s'] legal viability,"

facts showing that "no reasonable litigant could realistically expect to secure favorable relief," or facts that "the pattern of claims [is] baseless as a whole." *Id.* at *7, *10 (*citing Prof'l Real Estate Inv'rs*, 508 U.S. at 61). B&G Foods, as in *Wonderful*, has not pled facts that meet the heightened pleading standard.

VII. Conclusion

For all of the above reasons, Defendants' motion to dismiss should be granted.

Respectfully Submitted,

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Attorneys for Defendants

Dated: May 1, 2020

PLAINTIFF B&G FOODS'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (JUNE 1, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK, acting in the purported public interest of the general public of the State of California,

Defendants.

Case No. 2:20-cv-00526-KJM-DB

Before: Hon. Kimberly MUELLER, Judge

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PLAINTIFF B&G FOODS'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff B&G Foods North America, Inc. ("B&G Foods") respectfully submits this Opposition to Defendants' Motion to Dismiss (Dkt. No. 18).

INTRODUCTION

Plaintiff B&G Foods brought this § 1983 case to protect its constitutional right to free speech. Defendants seek to force B&G Foods to place a false cancer warning on Cookie Cakes that B&G Foods sells around the country. Defendants are self-described prosecutors acting on behalf of the State of California under California's Proposition 65 regime. They seek to compel this false warning, unless B&G Foods pays a handsome extortive fee, due to the alleged presence of acrylamide, a naturally occurring result of baking. But Defendants know there is no evidence that Cookie Cakes pose any cancer risk to anyone.

Over the last few years, under the supervision, regulation, and guidance of the State and its Attorney General's office, Defendants have punished food companies with nearly $1.7 million in regulatory "penalties" and "fines" for failing to include a false cancer warning about acrylamide. Acrylamide naturally forms when food is cooked—including when cookies are baked. Scientists, and leading United States, European, and international health agencies all agree that acrylamide

in food does not cause cancer in humans. Even the State of California has conceded it does not "know" that acrylamide is a carcinogen.

In their Motion to Dismiss, Defendants make no attempt to defend their actions on behalf of the State or their extortive business model, much less the constitutionality of their conduct. Instead, they assert a hodgepodge of defenses, all of which ignore the facts in the Complaint and construe those contested issues against B&G Foods in violation of the tenets of Rule 12(b)(6).

First, Defendants assert that § 1983 does not apply to them because they are not state actors. (Mot. at 4-14.) But as detailed in dozens of allegations in the Complaint, Defendants are in the business of enforcing Proposition 65, a purported public health regulation directed to food labeling, a quintessential traditional government function. (Compl. ¶ 9(f).) In prosecuting their claims, Defendants work hand-in-glove with the State, which oversees every step of the process—from pre-approving their claims prior to filing, to monitoring their litigation activity, to approving the terms of any regulatory fines made by Defendants' targets. (Compl. ¶¶ 9(a)-(d).) The State and Defendants exist in a symbiotic relationship, cemented by the hundreds of thousands of dollars Defendants make for the State each year in exchange for the State's imprimatur on their extortionate business. (Compl. ¶ 9(e).) And the State actively encourages Defendants and others like them to continue to enforce Proposition 65, including through confidential communiques directly to Proposition 65 enforcers and their attorneys, creating a close nexus between the State and Defendants. (Compl. ¶ 9(a)–(h).) Under established law, such conduct constitutes state

action. And for good reason: were it otherwise, states could enforce unconstitutional laws and enact invidious policies simply by delegating these tasks to "private" parties.

Second, Defendants assert that the Complaint is barred by the Anti-Injunction Act, 28 U.S.C. § 2283. (Mot. at 12-15.) Defendants have not proven that B&G Foods could never obtain an injunction under any set of facts. Under *Ex parte Young*, 209 U.S. 123 (1908), a plaintiff may "enjoin future state action by suing a state official for prospective injunctive relief rather than the state itself." *Thomas v. Nakatani*, 309 F.3d 1203, 1208 (9th Cir. 2002). B&G Foods seeks prospective injunctive relief to aid in the enforcement of any judgment rendered in its favor; it is not seeking a preliminary injunction. (Compl. ¶¶ 94, Prayer for Relief A.) This is expressly permitted by the Anti-Injunction Act. 28 U.S.C. § 2283.

Third, Defendants contend that B&G Foods's claims are barred by the *Noerr-Pennington* doctrine. (Mot. at 16-20). This argument is coextensive with their argument that they are not state actors because the *Noerr-Pennington* doctrine does not apply to state actors. Separately, the *Noerr-Pennington* doctrine also does not apply because Defendants' "petitioning activity" is a sham.

Fourth, Defendants argue that allowing this suit to proceed would invite many similar suits and chill the protected activities of Proposition 65 enforcers. (Mot. at 12-13.) But neither Defendants nor any Proposition 65 enforcer has the right to use the statute to extort money from businesses selling products that are perfectly safe. If a ruling in B&G Foods's favor means that businesses are no longer forced to make

ransom payments to Defendants to avoid the unconstitutional enforcement of Proposition 65, that will simply mean justice has been done.

FACTS

On Rule 12(b)(6), the Court must accept the following factual allegations of the Complaint as true.

A. The Accused Cookie Cakes

B&G Foods is a hundred-and-thirty-year-old American brand that makes, sells, and distributes a wide variety of shelf-stable and frozen foods. (Compl. ¶ 6.) Its "Cookie Cakes are reduced fact chocolate cookies with marshmallow and fudge coating, sold under the SNACKWELL'S® brand":

(Compl. ¶ 13.) "The interior cookie portion of the Cookie Cakes is baked, just like any other cookie. Otherwise it would be an unpalatable mess of sugar, flour, and chocolate." (*Id.* ¶ 14.) "The Cookie Cakes are free from high fructose corn syrup and partially hydrogenated oils. They do not cause cancer." (*Id.* ¶ 15.)

B. Naturally Occurring Acrylamide in Baked Goods Is Safe

B&G Foods does not add acrylamide to its Cookie Cakes. (Compl. ¶ 16.) Acrylamide forms when food is baked, roasted, grilled, or fried. (Compl. ¶ 18.) According to the FDA, acrylamide has likely "always been present in cooked foods," including every cookie ever baked in any oven—industrial, home, or EZ-bake. (Compl. ¶ 16.)

Decades of research by scientists around the world have identified no link between naturally occurring acrylamide in food and nay health risk in humans. (Compl. ¶¶ 26-28.) Indeed, many foods containing acrylamide are considered essential parts of a healthy diet and are linked with lower rates of cancer. (Compl. ¶¶ 25, 29.) "The sole basis for California's Proposition 65 warning requirement for acrylamide are laboratory studies in which pure acrylamide was given to rats or mice." (Compl. ¶ 30.) These studies have been questioned, if not outright disregarded by then National Cancer Institute, the Environmental Protection Agency, and the International Agency for Research on Cancer, all of whom have concluded there is no evidence that dietary acrylamide poses any risk of harm to humans. (*Id.*)[1] Even the State itself acknowledged in 2007 that

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[1] Defendants claim the EPA and IARC have determined that acrylamide may be a carcinogen. (Mot. at 3.) But those determinations were limited to chronic ingestion of pure acrylamide either orally or through inhalation, as may occur in certain industrial settings where synthetic acrylamide is used in the production of various polymers. EPA Review at 166; IARC Monograph at 425. And the EPA review specifically concluded that there was no statistically significant link between consumption of foods with acrylamide and any type of cancer. EPA Review at 167.

acrylamide in food is not actually "known" to cause cancer in humans. (Compl. ¶ 59.)

B&G Foods's Cookie Cakes thus do not cause cancer. The small amount of acrylamide they contain occurs naturally and is not harmful to humans. (Compl. ¶¶ 22-24.) Defendants have no evidence to the contrary, nor do they claim they will ever produce such evidence.

C. Defendants Enforce Proposition 65 on Behalf of the State

Defendant Kim Embry is a serial Proposition 65 litigant who, on behalf of the State of California, sues or threatens to sue dozens of businesses every year based on the alleged presence of acrylamide in their products. (Compl. ¶ 6.) Despite lending her name to numerous lawsuits, Defendant Embry has never testified at a deposition, hearing, or trial. (Decl. of David H. Kwasniewski ("Kwasniewski Decl.") ¶ 2.) She has claimed, including in pleadings in this action, that she has no relevant or percipient knowledge regarding her Proposition 65 claims. (Dkt. No. 19 at 8 (Embry's testimony "is wholly irrelevant" and "[s]he would be an unlikely trial witness"); Kwasniewski Decl. ¶ 2 (In her state court lawsuit, Defendant Embry initially refused to appear for deposition on the ground she had no "percipient knowledge")). Defendant Embry does not even herself purchase the products over which she files suit. In this case, for example, the accused Cookie Cakes were purchased at a Ralphs Grocery store even though Embry, who resides in San Francisco, lives at least 200 miles from the nearest Ralphs location.

Defendant Noam Glick is Embry's lawyer and the real driver of their joint Proposition 65 enforcement enterprise. He resides in San Diego (Compl. ¶ 8), where

there are numerous Ralphs locations and presumably purchases the products over which Defendants file suit. He drafts and personally signs the Proposition 65 Notices of Violation and submits them to the Attorney General's office (Dkt. No. 18-5). The lion's share of the $1.7 million collected by Embry from the businesses she has sued has gone to pay Defendant Glick's supposed fees. (Compl. ¶ 2.)

Defendants' Proposition 65 enforcement actions are closely supervised, regulated, and encouraged by the State. Prior to initiating any action, Defendants must "first serve a Notice of Violation on the State through the Attorney General's Office, together with evidence supporting the supposed merit" of their allegations. (Compl. ¶ 9(b).) If the Notice lacks merit, the State serves a letter on the parties objecting to further action, and a private enforcer who proceeds with an action after receiving such a letter may be sanctioned. Cal. Health & Safety Code § 25249.7(f).

The State further monitors Defendants by "requesting pre-approval of any potential settlement or consent judgment, receiving an reviewing notices regarding the progress of acrylamide case litigation, intervening in particular cases, regulating the conduct of representatives, demanding to receive proportional cuts of civil penalties," and routinely promulgating regulations governing the particular mechanisms and methods of Proposition 65 enforcement. (Compl. ¶ 9(c).) The Attorney General specifically regulates the settlement agreements of the Defendants, and recently rejected one because it awarded Defendant Glick nearly $40,000 in fees despite delivering no benefit to the public. (Compl. ¶ 9(d).) The Proposition 65 enforcement actions of Defendants and similar private prosecutors

have netted the State millions of dollars in recent years, and the State has responded by actively encouraging and assisting private Proposition 65 enforcers. (Compl. ¶ 9(e)-(h).)

ARGUMENT

A motion to dismiss for failure to state a claim tests whether a complaint "contain[s] sufficient factual matter to state a claim to relief that is plausible on its face." *Orion Wine Imports, LLC v. Applesmith*, No. 2:18-CV-01721-KJM-DB, 2020 WL 869142 *4 (E.D. Cal. Feb. 21, 2020) (internal quotations and citations omitted). "In making this context-specific evaluation, this court must construe the complaint in the light most favorable to the plaintiff and accept its factual allegations as true." *Id.*

I. B&G FOODS PLAUSIBLY ALLEGES ITS RIGHTS WERE VIOLATED

Defendants do not dispute that B&G Foods has plausibly alleged its constitutional rights are violated by the enforcement of Proposition 65 against the Cookie Cakes. Laws compelling businesses to provide information in connection with commercial transactions are permissible only if the compelled disclosure is purely factual and uncontroversial, reasonably related to a substantial government purpose, and not unjustified or unduly burdensome. *Nat'l Inst. of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372, 2377; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). As alleged in the Complaint, Proposition 65, when enforced against the Cookie Cakes, fails this test because a warning that the Cookie Cakes cause cancer would be literally false: there is no

scientific evidence, and California certainly does not "know," that dietary acrylamide causes cancer. (Compl. ¶¶ 77-78.) Because the First Amendment does not permit the State to compel businesses to say false things about their products, enforcing Proposition 65 against the Cookie Cakes is unconstitutional. (Compl. ¶¶ 79-80.)

II. B&G FOODS PLAUSIBLY ALLEGES DEFENDANTS ARE STATE ACTORS

Defendants argue they are private citizens and thus presumptively not state actors. (Mot. at 4.) They ask the Court to ignore dozens of detailed factual allegations establishing the extensive collaboration between the State and Defendants to enforce a public health and food labeling law, a relationship from which both parties profit handsomely. These allegations are more than sufficient to treat Defendants are state actors.

Courts extend § 1983 liability to private parties who (1) deprive plaintiffs of rights secured by the Constitution or federal statutes and (2) do so while acting under color of state law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 930-31 (1982). This "is a highly factual question," requiring a careful "sifting" of the "facts and circumstances" in order "to ferret out obvious as well as non-obvious State involvement in private conduct." *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1210 (9th Cir. 2002) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). Since the state action requirement was first articulated over a hundred years ago, "[s]everal tests have emerged" by which courts conduct this analysis. *Brunette*, 294 F.3d at 1210. At least five of these tests independently warrant finding that Defendants act under color of

state law: (1) the public function test; (2) the joint action test; and (3) the symbiotic relationship test; (4) the state compulsion test; and (5) the governmental nexus test. Where, as here, the facts plausibly alleged in the complaint would satisfy multiple state action tests, the Court need only find one satisfied to deny a motion to dismiss. *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002). As shown below all are met here.

A. Defendants Perform a Traditional, Exclusive Public Function by Prosecuting Proposition 65 Actions

The allegations in the Complaint easily satisfy the public function test. Under this test, a private party becomes a state actor by engaging in activity that has been "traditionally the exclusive prerogative of the State." *Brunette*, 294 F.3d at 1214. *See also Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002) ("Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to constitutional limitations.") (citation and quotation omitted). Here, as alleged in the Complaint, Defendants act as state officials because they exercise a function that is traditionally and exclusively governmental in nature: enforcing a public health law—one concerning food labeling, no less—on behalf of the public interest. (Compl. ¶¶ 9, 32-42.)

Public health is a quintessential "traditional governmental function." The "structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (quotation and citation omitted); *see also*, *e.g.*, *Hill v. Colo.*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.") (quotation omitted); *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428 (1963) ("the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power"); *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power."); *Jacobson v. Mass.*, 197 U.S. 11, 25 (1905) ("the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("the regulation of health and safety matters is primarily, and historically, a matter of local concern").

Food labeling is likewise a traditional governmental function. *Brazil v. Dole Food Co., Inc.*, 935 F. Supp. 2d 947, 955 (N.D. Cal. 2013) ("[L]aws regulating the proper marketing of food . . . are traditionally within states' historic police powers."); *Florida Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1963) ("States have always possessed a legitimate interest in the protection of their people . . . in the sale of food products at retail markets within their borders." (quotation omitted); *Plumley v. Massachusetts*, *Mass.*, 155 U.S. 461, 472 (1894) ("If there be any subject over which it

would seem the states have plenary control . . . it is the [regulation] of the sale of food products."). This is particularly true in California, which has been regulating food labeling since the 1860s. *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008); *see also Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 959-81 (2004) (recounting California's centuries-long history of food regulation). Numerous agencies have been created to regulate food labeling, including the California Department of Public Health, the California Department of Food and Agriculture, and the Office of Environmental Health Hazard Assessment—the agency responsible for determining which chemicals merit a Proposition 65 warning. *See* https://www.cdfa.ca.gov/AHFSS/Animal_Health/Food_Safety.html (listing all the agencies that regulate food in California), last visited on June 1, 2020. Thus, contrary to Defendants' suggestion promoting "public policy" (Mot. at 6), Proposition 65's enforcement scheme empowers private enforcers to enforce a public health and food-labeling law on the State's behalf.

The history of Proposition 65 likewise shows it was intended to enhance the State's regulation of public health and food labeling. In the original Proposition 65 ballot, the people of California declared that Proposition 65 was necessary "[t]o secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public safety." (Ballot Pamp., Proposed Law, Gen. Elect. (Nov. 4, 1986) p. 53). Before Proposition 65, the enforcement of these laws was the exclusive function of the government, but according to the ballot language "state government agencies have failed to provide [the public] with adequate protection, and . . . these failures have been serious enough to

lead to investigations by federal agencies of the administration of California's toxic protection programs." *See id*. Stated differently, "[C]itizen enforcement was conditioned upon the failure of state and local governments to commence or diligently prosecute an action, after due notice." *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 748 (2001).

Proposition 65's 60-day notice requirement is accordingly structured to facilitate public enforcement, and to make private enforcement an option of last resort. (Compl. ¶¶ 9(b)-(c).)(".) California courts that have analyzed Proposition 65's 60-day notice requirement have concluded that "the framers of the initiative intended that the notice contain sufficient facts to facilitate and encourage the alleged polluter to comply with the law, and to encourage the public attorney charged with enforcement to undertake its duty." *Yeroushalmi*, 106 Cal. App. 4th at 750 (emphasis added). This requirement is paramount, as "[t]he one party who necessarily represents the public interest in any Proposition 65 litigation is the Attorney General." *Consumer Def. Grp v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185, 1206 (2006). If, and only if, public enforcers fail to exercise this *duty*, can private enforcers —or, as the Attorney General has stated in other contexts, "private prosecutor[s]"– step into the State's shoes and bring an enforcement action on the public's behalf. Health & Safety Code § 25249.7(d). (Initial Statement of Reasons, Revision of Chapters 1 and 3, Tit. 11 C.C.R. (2016) ("ISOR").)"), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/prop-65-isor.pdf (last visited June 1, 2020).

Defendants argue that their enforcement of Proposition 65 is merely litigation, which "is far from an

exclusive function of government." (Mot. at 6.) But the cases Defendants cite are not on point.[2] They also misleadingly cite *Nabors Well Servs. Co. v. Bradshaw*, No. CV 05-8334 GAF (CTX), 2006 WL 8432088 *1 (C.D. Cal. Feb. 15, 2006), a case under the Private Attorney General Act ("PAGA"), which held that PAGA enforcement was not state action. Cal. But what they neglect to mention is that since *Nabors* was decided, the California Supreme Court held PAGA claims are "public enforcement action[s]" brought by "a statutorily designated proxy for the [government] agency" and thus cannot be waived by arbitration clauses in employment agreements. *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 389 (2014). Moreover, unlike the PAGA claims in *Nabors*, where plaintiffs sought damages, under Proposition 65, "private prosecutors" (like their public counterparts) seek only *penalties*, and need not suffer any personal harm to bring an enforcement action. For this reason, federal courts have found that private enforcers lack Article III standing, as they are suing on behalf of, and collecting penalties for, the State. *Toxic Injuries Corp. v. Safety Kleen Corp.*, 57 F. Supp. 947, 952-53 (N.D. Cal. 1999).

For the same reasons, Defendants' analogy to *Real Estate Bar Association* falls flat. There, the statute at

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[2] Defendants (Mot. at 12) cite to federal environmental statutes such as the Endangered Species Act, Clean Air Act, and Safe Drinking Water Act and observe that these statutes permit private parties to seek civil penalties and injunctive relief. As these statutes provide express federal rights of action for private enforcers, it is not surprising that no court has ever needed to address whether private plaintiffs under these statutes are state actors under Section 1983. Penalties paid under these statute, moreover, are paid to the government, *not* the private enforcers. [16 U.S.C. § 1540(a)(1); 42 U.S.C. § 7420(b); 42 U.S.C. § 300g-3(b).

issue did "nothing more than grant bar associations . . . standing to bring suit enforcing the unauthorized-practice-of-law statute" and "obtain a declaration as to legality." *Real Estate Bar Ass'n For Mass, Inc. v. Nat. Real Estate Info. Servs.*, 608 F.3d 110, 122 (1st Cir. 2010). Here Proposition 65 deputizes its "private prosecutors" with the authority to both sue in the public interest and to "collect funds for the public treasury." *Consumer Advocacy Group, Inc. v. Kinetsu Enter. of Am.*, 150 Cal. App. 4th 953, 963 (2007). Thus, neither *Nabors* nor *Real Estate Bar* is analogous to this case, where private citizens have been empowered to enforce a public health/food labeling law on behalf of the public interest and to collect penalties for the public treasury, functions that traditionally and exclusively belong to the government.

Nor should the State be permitted to avoid constitutional scrutiny of enforcement of Proposition 65 by delegating that enforcement to private parties. To hold otherwise would enable states to pass any number of unconstitutional laws so long as enforcement was not directly carried out by State officials. For instance, under Defendants' proposed rule, if the State passed a law banning a religious minority from public spaces, but delegated all enforcement to private enforcers, members of the targeted group would have no constitutional recourse. The State cannot delegate its way around the Constitution.

B. Defendants Act Jointly with the Attorney General

Defendants' motion should be denied for the separate and independent reason that the joint action test is also met. A private party also becomes a state

actor by acting jointly with the government. *See Lugar*, 457 U.S. at 931 ("To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.") (citation omitted). The joint action test is satisfied where state officials and private parties act in concert in causing a deprivation of constitutional rights, and "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity." *Brunette*, 294 F.3d at 1210 (citation omitted). Such was the case in *Lugar*, where the Supreme Court held that a creditor who used a state prejudgment attachment statute acted under color of state law because, in attaching the debtor's property with the aid of the court clerk and sheriff, the creditor and state officials engaged in joint activity. *Lugar*, 457 U.S. at 942.

As detailed in the Complaint (at ¶¶ 32-42), this level of joint activity is present because the statutory rights to both commence and resolve private enforcement actions necessarily derive from the Attorney General's ability to enforce the statute. Private enforcers cannot commence an action until at least 60 days after the Attorney General has had the opportunity to review a notice, and then only if the Attorney General has not begun prosecuting the alleged violation himself. Health & Safety Code § 25249.7(d). And private enforcers cannot resolve an action unless they provide a copy of a proposed settlement to the Attorney General, to provide him the chance to review whether the settlement is consistent with the public interest. *Id.* § 25249.7(f). Consequently, private enforcers cannot bring or resolve

actions in the public interest but for the Attorney General acting jointly in fulfilling his statutory duties. (Compl. ¶¶ 9(b)-(d).)

Further, while the allegations in the Complaint suffice to show state action here, in other contexts, the Attorney General has also confirmed the close relationship between the State and private enforcers:

> In 2001, when the Legislature amended Proposition 65, it vested this office with a significant role in reviewing and overseeing private-plaintiff Proposition 65 enforcement. We take that role seriously. We are committed to addressing the challenges in a manner that protects businesses from needless litigation, and insures that the law operates to protect public health and safety as intended by voters.

Letter to Private Enforcers re: 2013 Annual Summary of Proposition 65 Settlements (May 13, 2014), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/ag_letter_prop65_2013rpt.pdf? (last visited June 1, 2020. Indeed, as the Attorney General has stated when advocating for Proposition 65 amendments to increase its oversight, the Attorney General "monitor[s] such litigation from the notice through judgment/settlement stage." (ISOR at 1.)

As alleged in the Complaint, this oversight can lead to the Attorney General objecting to, and effectively ending, Proposition 65 claims or proposed settlements. All claims must be reviewed by the Attorney General and if the Attorney General concludes the claim has no merit, he must serve a letter stating so on the enforcer. (Compl. ¶ 9(b).) While, as Defendants point

out (Mot. at 10), private enforcers can still proceed if they receive a no-merits letter, private enforcers do so at the risk of being sanctioned if there was "no actual or threatened exposure to a listed chemical." Health & Safety Code § 25249.7(h)(2). And in fact, these objections appear to be heeded in most cases as many notices—including many notices issued for acrylamide—never make it past the 60-day stage. For example, in the past year, Defendants withdrew 11 notices just weeks after issuing them. Another enforcer, Christopher Bair, in 2018 withdrew 34 notices for acrylamide in "products used in restaurants." All notices were withdrawn just weeks after having been filed. *See* 60-Day Notice Search, https://oag.ca.gov/prop65/60-day-notice-search.[3]

Likewise, the Attorney General can effectively cancel proposed consent judgments. As alleged in the complaint, the Attorney General previously objected to one of Defendants' proposed consent judgments because of it unreasonably awarded 90% of the settlement proceeds to Defendant Glick while doing nothing to benefit the public. (Compl. ¶ 9(d).)

And in other instances, the Attorney General has teamed up with private enforcers to prosecute Proposition 65 claims. *E.g.,* Consent Judgment, *People ex rel. Lockyer v. PepsiCo, Inc.*, LA Superior Court Case No. BC 351120 (Apr. 14, 2006))) (Attorney General, crediting work of private enforcer, brought Proposition 65 claim for lead in labels on soft drinks, obtaining millions of dollars in penalties and fees), *available at* https://www.oag.ca.gov/system/files/attachments/press_releases/

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[3] These notices can be accessed by typing the name of the Defendants or Christopher Blair, respectively, in the "Plaintiff or Plaintiff's Attorney" field.

06-039_0a.pdf (last visited June 1, 2020); Attorney General Press Release dated Aug. 26, 2005 (announcing Attorney General would be initiating Proposition 65 claims for acrylamide against defendants selected because they had been previously targeted by private enforcers), *available at* https://oag.ca.gov/news/press-releases/attorney-general-lockyer-files-lawsuit-require-consumer-warnings-about-cancer (last visited June 1, 2020).

The "cradle-to-grave" supervision exercised by the Attorney General extends far-beyond "mere approval or acquiescence," as Defendants claim. (Mot. at 10). This distinguishes this case from the cases cited by Defendants, such as *Nabors* (where the Court found there was "no additional involvement or interaction with state officials" beyond the existence of a statute allowing private actions) or *Sullivan* (where, pursuant to an amended statute, the government elected not to intervene in a dispute between insurers and employees). 2006 WL 8432088, at *3 (emphasis in original); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999).

Moreover, in Defendants' case, this coordination exists between the Attorney General and Defendant Glick. As detailed above and in the Complaint (at ¶¶ 8-9), as well as in Defendants' papers (at 2-3), Defendant Glick prepares the Notices of Violation, communicates with the Attorney General, negotiates with his targets, and takes a hefty cut of the resulting proceeds. Defendant Embry simply lends her name to these suits despite having no apparent knowledge of their contents. This makes this case is very different than *Tanasescu v. State Bar*, 2012 WL 1401294 *16 (C.D. Cal. March 26, 2012) or *Schucker v. Rockwood*,

846 F.2d 1202 (9th Cir. 1988), which involved attempts to assert § 1983 claims against attorneys simply for engaging in typical litigation activities. The Complaint alleges a course of conduct by Defendants that more than crosses the line from ordinary civil litigation to outright law enforcement. (Compl. ¶¶ 7-9, 32-42.) These factual allegations satisfy the joint action test, and thus Defendants' motion to dismiss should be denied.

C. Private Enforcers Have a Symbiotic Relationship with the Attorney General

Plaintiffs' motion should be denied for the separate and independent reason that the symbiotic relationship test is also met. Under this rule, private parties also become state actors when they deprive others of constitutional rights while acting in a symbiotic relationship with the government. *Brunette*, 294 F.3d at 1213. Similar to the joint action test, the symbiotic relationship test asks whether the government has "so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity. . . . Often significant financial integration indicates a symbiotic relationship." *Id.* (citations omitted).

The Supreme Court established in the symbiotic relationship test in *Burton v. Wilmington Parking Authority*, where it found a private restaurant located in a public parking garage acted under color of state law when it refused to serve African American customers. 356 U.S. 715, 716 (1961). The Court observed that the relationship between the two entities was symbiotic: the restaurant was located in the parking garage and benefitted from the Parking Authority's tax exemption and maintenance of the premises, and

the Parking Authority received "indispensable" funding from the restaurant that maintained its viability. *Id.* at 719-20. Because the Parking Authority had decided "place its power, property, and prestige behind the admitted discrimination," it constituted state action. *Brunette*, 294 F.3d at 1213 (citing *Burton*, 356 U.S. at 725).

As alleged in the Complaint, the State and private enforcers mutually profit from their prosecution of Proposition 65 claims. (Compl. ¶¶ 9(d), 33-36.) The extend of this profit is demonstrated in the below chart summarizing OEHHA's annual budget:

Year	**OEHHA Budget**	**Prop. 65 Civil Penalties**	**Percentage of Funding**
2017-18	$23.453 Million	$3.702 Million	15.8%
2018-19	$28.615 Million	$4.764 Million	16.6%
2019-20	$28.362 Million	$3.909 Million	13.8%
Cumulative	$80.43 Million	$12.38 Million	15.4%

(Kwasniewski Decl., Ex. 1 (OEHHA Budget Reports).) Plainly, not only would current jobs at OEHHA likely not exist in the absence of up to one-sixth of OEHHA's funding, but OEHHA's implementation of the Proposition 65 would also be seriously impaired. *See* Tit. 11 C.C.R. § 3203(b) ("Recovery of civil penalties (75% of which must be provided to the Office of Environmental

Health Hazard Assessment) serves the purpose and intent of Proposition 65.").

As a result, the relationship between the Attorney General and the private enforcers it supervises is the archetypal symbiotic relationship. *See Adams v. Vandemark*, 855 F.2d 312, 314 (6th Cir. 1988) (defining symbiosis as a "relationship in which each partner does for the other something which the other partner needs but cannot do for itself"). Private enforcers benefit by the state's creation of a "private enforcement scheme" that deputizes them to collect millions in civil penalties and enforcement fees, all under the supervision of the Attorney General and the backing of the Office's "power" and "prestige." And the Attorney General benefits through the prosecution of public health enforcement actions he himself is not capable of prosecuting, which secure injunctive relief and in millions of dollars of penalties each year. Such is the essence of symbiosis.

D. Defendants Act in Close Nexus with the Attorney General

Plaintiffs' motion should be denied for the separate and independent reason that the nexus test is also met. Courts commonly apply the state compulsion test and the governmental nexus test in tandem. *Naoko Ohno v. Uuko Yasuma*, 723 F.3d 984, 995-96 (9th Cir. 2013). Under the state compulsion test, a private party becomes a state actor where the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor's] choice must in law be deemed to be that of the state." *Id.* (citation and quotation omitted). A party is a state actor under the governmental nexus test where "there is a sufficiently close nexus between the State and the

challenged action of the regulated activity so that the action of the latter may be fairly treated as that of the State itself. *Id.* (citation and quotation omitted). Under either formulation, private enforcers act under color of state law.

Courts applying the state compulsion test have found that "intimate involvement" between a private party and the government is sufficient to find state action. *See Tulsa Prof. Collection Servv., Inc. v. Pope*, 485 U.S. 478, 487 (1988) (finding "significant state action" where a probate court triggered a statute of limitations by appointing executor and by accepting notices and affidavits of publication, on grounds that court was "intimately involved in executing the nonclaim statute). Here, the Attorney General, as the "one party who necessarily represents the public interest in any Proposition 65 litigation," makes private enforcement of Proposition 65 possible by fulfilling his statutory duty of reviewing 60-day notices and proposed settlements. While the Defendants observe that the State's provision of a monetary award does not qualify as significant encouragement (Mot. at 9), Proposition 65's civil penalties are not simply "money awards." Rather, they are penalties (not damages) collected by "private prosecutors" (who need not have been harmed) to enforce a public health law on behalf of the public interest. On top of making private enforcement possible and allocating civil penalties to private enforcers, the Attorney General actively encourages private enforcers to enforce Proposition 65. (Compl. ¶¶ 9, 32-42.)

The same reasons described above on the joint action test warrant finding that there is a sufficiently close nexus between the State and private enforcers such that the actions of private enforcers "may be

fairly treated as that of the State itself." The additional points raised in the Defendants' discussion of this test all fail to hold water. For instance, Defendants note the Attorney General cannot block private actions he believes are meritless or block settlements he believes are improper. But the Attorney General is obligated to review Notices of Violation and settlements, private enforcers that proceed after receiving a no-merits letter proceed at the risk of sanctions, Health & Safety Code § 25249.7(h)(2), and the Defendants in this very case, like virtually all other private enforcers, carefully heed the Attorney General's recommendations including by rescinding settlements to which he has objected. (Compl. ¶ 9(d).)

Defendants' contention (at 10) that, in enforcing these procedural safeguards, the Attorney General may become an adverse party to private enforcers, thus falls flat. Proposition 65 was designed to facilitate the State's duty to enforce laws "controlling hazardous chemicals." The procedural safeguards imposed on Defendants were ensure that, when the State delegates this duty to private enforcers, it still retains control over how they exercise it. That control, abundantly detailed in the Complaint (at ¶¶ 9, 32-42), is fatal to Defendants' motion.

III. THE ANTI-INJUNCTION ACT DOES NOT APPLY

Defendants assert the Complaint's prayer for relief should be dismissed because it seeks injunctive relief. (Mot. at 15.) But B&G Foods does not seek an preliminary injunction against a pending case and Defendants fail to show there is any circumstance where one would be sought. "Injunctive relief is a remedy derived from the underlying claims and not an

independent claim in itself." *Huynh v. Northbay Med. Ctr.*, No. 2:17-cv-2039-EFB PS, 2018 WL 4583393 *4 (E.D. Cal. Sept. 25, 2018) (citing *Bridgeman v. United States*, No. 2:10-cv-01457 JAM KJN PS, 2011 WL 221639 *17 (E.D. Cal. Jan. 11, 2011); *Cox Comm'n PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1283 (S.D. Cal. 2002). Courts routinely deny motions to dismiss prayers for injunctive relief as "the court need not determine at this time what remedies should be available to [plaintiff] should she succeed on her claims." *Huynh*, 2018 WL 4583393 *4; *see also Friends of Frederick Seig Grove #94 v. Sonoma Cty. Water Agency*, 124 F. Supp. 2d 1161, 1172 (N.D. Cal. 2000) (finding "no authority" permitting dismissal of the plaintiff's request for relief).

Moreover, the Anti-Injunction Act permits injunctions "to protect or effectuate" the judgments of a District Court. 28 U.S.C. § 2283. B&G Foods's complaint is clear: it seeks a final or permanent injunction at the conclusion of this case against "<u>further</u> unconstitutional threats and lawsuits." (Prayer for Relief A; *see also* Compl. ¶ 94 (requesting injunction against "<u>further</u>" prosecution.). B&G Foods does not seek to enjoin Defendants' pending state court action. The Complaint's request for injunctive relief is limited to prospective judgment enforcement.

<u>All</u> the cases on which Defendants rely are inapposite, as they involved plaintiffs who sought <u>preliminary</u> injunctions to enjoin pending proceedings. (Mot. at 14-15.) B&G Foods has not sought any such injunction here. This Court's decision in *California Chamber of Commerce v. Becerra* is on point. There, the Court recognized that the Anti-Injunction Act does not preclude a party from seeking prospective

injunctive relief from future enforcement actions. No. 2:19-CV02019-KJM-EFB, 2020 WL 1030980 *3 (E.D. Cal. March 3, 2020) (citing *Newby v. Enron Corp.*, 302 F.3d 295, 301 (5th Cir. 2002) ("[F]ederal courts possess power under the All Writs Act to issue narrowly tailored orders enjoining repeatedly vexatious litigants from filing future state court actions without permission from the court."). That is all the relief B&G Foods seeks.

IV. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT APPLY

Defendants contend that the *Noerr-Pennington* doctrine precludes B&G Foods' constitutional claims. (Mot. at 16.) The *Noerr-Pennington* doctrine does not apply because Defendants are state actors and their claims against B&G Foods are a sham.

The *Noerr-Pennington* doctrine provides limited immunity from lawsuits arising from those who "petition the government for a redress of grievances." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 378 (1991). This immunity flows from the First Amendment. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). As such, it does not apply to state actors, because the states themselves have no First Amendment rights. *See Aldrich v. Knab*, 858 F. Supp. 1480, 1491 (W.D. Wash. 1994) ("the state itself does not enjoy First Amendment rights"). The *Noerr-Pennington* doctrine does not apply here because, as shown above, when Defendants serve as private enforcers, they are stepping in the shoes of the Attorney General. *See Envtl. Research Ctr. v. Heartland Prod.*, 29 F. Supp. 3d 1281, 1283 (C.D. Cal. 2014) (explaining that "a private citizen steps into the state's shoes" when filing a Proposition 65 lawsuit).

Further, the *Noerr-Pennington* doctrine does not apply to individuals who assert "sham" claims, as such claims do not merit First Amendment protection. *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090 (9th Cir. 2000); *USS-POSCO*, 31 F.3d at 811. Defendants' argument that they are immune from any claims based on their pursuit of B&G Foods (Mot. at 18) separately and independently fails because Defendants' lawsuit is a sham. A lawsuit is a sham if it is part of a "series of lawsuits . . . brought pursuant to a policy of starting legal proceedings without regard to the merits" and for the purpose of injuring the defendant. *USS-POSCO*, 31 F.3d at 811. Put differently, "[t]he inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for the purposes of harassment?" *Id.*

Defendants' theory requires the Court to ignore the factual allegations in the Complaint, rather than take them as true, as required. "Whether something is a genuine effort to influence government action, or a mere sham is a question of fact." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253-54 (9th Cir. 1982). "As a result, 'courts rarely award *Noerr–Pennington* immunity at the motion to dismiss stage, where the Court must accept as true the non-moving party's well-pleaded allegations' with respect to sham litigation." *In re Outlaw Lab., LP Litig.*, 2019 WL 1205004 *5 (S.D. Cal. Mar. 14, 2019) (denying motion to dismiss because sham litigation was adequately alleged); *Sonus Networks, Inc. v. Inventergy, Inc.*, 2015 WL 4539814 *2 (N.D. Cal. July 27, 2015) (same). So long as plaintiff pleads

"specific allegations of specific activities," the sham litigation exception bars dismissal under the *Noerr–Pennington* doctrine. *Outlaw*, 2019 WL 1205004 *5.

B&G Foods's Complaint more than plausibly alleges Defendants have filed a series of lawsuits based on the false premise that acrylamide in Cookie Cakes or similar foods poses some risk of harm. (Compl. ¶¶ 13-31.) Defendants have filed dozens of lawsuits and collected nearly $1.7 million despite their claims having no legitimate basis in fact. This squarely constitutes sham litigation. "The Ninth Circuit has consistently invoked the sham litigation exception where the defending party was accused of automatically petitioning governing bodies 'without regard to and regardless of the merits of said petitions.'" *Outlaw*, 2019 WL 1205004 *9. Such conduct satisfies both the "objective" and "subjective" components of the *Noerr-Pennington* sham litigation analysis because it is both objectively meritless and bespeaks a subjective intent "to 'use the governmental process—as opposed to the outcome of that process'—as a tool for extortion." *Id.* *9 n. 7.

In *Outlaw,* for example, a defendant in a false labeling lawsuit brought counterclaims alleging that the plaintiff was engaged in a "shakedown" scheme by sending extortionate demand letters and filing meritless suits against California merchants. *Id.* *1-2. Much like Defendants' Proposition 65 demands here, the letters threatened to sue the merchants over their alleged failure to disclose the contents of supplement products, unless the merchants entered into a "settlement" with the putative enforcer. *Id.* *1. The Court denied a motion to dismiss, holding that the sham litigation exception applied based on allegations that the

plaintiff "reflexively and repeatedly mail[ed] demand letters without regard to the individual merit thereof." *Id*. *9. Similarly, in *Sonus Networks,* the Court held that the sham litigation applied where plaintiff alleged that Defendant sent a series of extortionate demand letters threatening to file suit based on objectively meritless allegations. 2015 WL 4539814 *2. Here, B&G Foods' Complaint includes detailed factual allegations establishing that Defendants are engaged in precisely this kind of scheme to harm B&G Foods unless it acquiesces in Defendants' demand for a ransom.

Defendants assert that their lawsuits have been "successful," and attach several consent judgments to their Motion. But that is a factual assertion based on extrinsic evidence inappropriate for consideration on a motion to dismiss. *Clipper Exxpress*, 690 F.2d at 1253–54. Moreover, these consent judgments involve awards of just a few thousand dollars in statutory penalties, when Proposition 65 authorizes penalties up to $2,500 per product per day. Despite collecting only a pittance in penalties, Defendants collected an order of magnitude more in attorney fees. This is not success—this is a shakedown under color of law.

Regardless, Defendants' motion does not—and cannot—refute the total lack of evidence to support their claim that the Cookie Cakes contain harmful levels of acrylamide. Nor, for that matter, do Defendants offer even a scintilla of evidence that any of their other lawsuits, which also involved dietary acrylamide, had any legitimate basis. B&G Foods's complaint plausibly alleges, in considerable detail, that there is a serious reason to doubt the legitimacy of Defendants' claims. The *Noerr-Pennington* doctrine thus has no applicability here.

V. DEFENDANTS' "SPEECH" SHOULD NOT BE PROTECTED

For the reasons above, Defendants' professed "free speech" rights are not implicated here. This is a lawsuit directed against Defendants acting as the State in violation to impose unconstitutional speech requirements on innocent businesses. The First Amendment places no value on false speech, and certainly does not condone Defendants' efforts to compel businesses to place false warnings on their products. *Zauderer*, 471 U.S. at 651. Likewise, Defendants' purported concerns that a ruling in B&G Foods's favor will deter other Proposition 65 private enforcers or lead to more suits in this court is irrelevant. A ruling in B&G Foods's favor will only deter enforcers who violate the Constitution.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: */s/ J. Noah Hagey*
J. Noah Hagey

Attorneys for Plaintiff
B&G Foods North America, Inc.

Dated: June 1, 2020

DEFENDANTS EMBRY AND GLICK'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT (JUNE 15, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK, acting as enforcement representatives under California Proposition 65 on behalf of the State of California,

Defendants.

Case No. 2:20-CV-00526-KJM-DB

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DEFENDANTS KIM EMBRY AND NOAM GLICK'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I. Introduction

Almost one year prior to the start of this action, Kim Embry, through her counsel, Noam Glick, ("Defendants") initiated a Proposition 65 citizen suit against B&G Foods, alleging it failed to warn consumers in California about the presence of acrylamide in its Cookie Cakes. Instead of pursuing constitutional defenses in Embry's state court action, which involves the same set of operative facts and primary rights, B&G Foods filed this retaliatory action seeking to enjoin the state court proceedings. Yet, B&G Foods now contends, contrary to its pleadings, that it only seeks to enjoin Defendants from bringing future Proposition 65 actions regarding Cookie Cakes. Irrespective of whether B&G Foods seeks to enjoin the earlier-filed state court action or prospective litigation, the Complaint should be dismissed without leave to amend for several reasons including: (1) Defendants are not "state actors" subject to claims under 42 U.S.C. § 1983; (2) the Anti-Injunction Act bars the declaratory and injunctive relief sought, and B&G Foods has no Article III standing to enjoin hypothetical, future lawsuits; and (4) *Noerr-Pennington* protects Defendants' petitioning activity.

II. Embry and Glick Cannot Be "State Actors"

B & G Foods does not dispute that private citizens are presumed not to be state actors under *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). *See* Mot. 5:18-20; Opp. 6:19. Instead, it argues that this case fits within one of the limited exceptions to this rule. *See* Mot. 5:20-24. As explained below, this is not true.

A. Embry and Glick Do Not Perform a Traditional and Exclusive Public Function.

The "public functions" exception applies only where a private citizen performs functions that are traditionally and exclusively performed by the State. Just because citizens serve the public does not mean they are state actors. *See* Mot. 6:4-12.

B&G Foods' recitation of the history and structure of Proposition 65 demonstrates incontrovertibly that filing a private enforcement action under Proposition 65 is not a "traditional and exclusive" function of the government. *See* Opp. 8:27-9:23. Indeed, B&G concedes that Proposition 65 permits both public and private enforcement of the statute. *Id.* 9:10-23. Specifically, a private citizen may bring a Proposition 65 action, but only after providing notice to the defendant and the government, and after the government declines to prosecute the violation. Cal. Health & Saf. Code § 25249.7(d). As with similar statutes permitting private enforcement actions, the "purpose" of the notice provision "is to encourage public enforcement, thereby avoiding the need for a private lawsuit altogether." *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 750 (2001) (comparing Proposition 65 notice requirement to

the Clean Water Act). Thus, on its face, Proposition 65 differentiates between state actions, which are brought by the State (California Health & Safety Code § 25249.7(c)), and a "private action" (§ 25249.7(d)(1)), which is brought by private citizens. Because Proposition 65 is drafted to permit enforcement either by the State or by a private citizen, enforcement actions are necessarily not "traditionally" or "exclusively" a government function. B&G Foods ignores this clear dichotomy.

B&G Foods fails to cite a single case that holds a private party becomes a "state actor" by bringing a lawsuit to enforce a statute. Instead, B&G Foods falsely conflates regulating with litigating. *See* Opp. 7:20-8:26. None of the laundry list of cases B&G Foods cites for the obvious proposition that the State regulates food safety has anything whatsoever to do with Section 1983 or what constitutes "state action." The fact that the State enacts health and safety laws does not make anyone who brings litigation to enforce those laws a state actor. The distinction between regulation and litigation is explained in *Nabors Well Servs. Co. v. Bradshaw*, 2006 U.S. Dist. LEXIS 109849 **7-8 (C.D. Cal. 2006), where the court rejected a claim that a plaintiff seeking penalties under PAGA was a state actor. In *Nabors*, the court explained that while "the procedural scheme created by the statute obviously is a product of state action," it is a "fact that litigation is not a traditional government function." *Id.* at **7-8; *see also Real Estate Bar for Mass, Inc. v. Nat. Real Estate Info. Servs.*, 608 F. 3d 110, 122 (1st Cir. 2010) (filing enforcement action is "far from" exclusive government function).

Here, like the employee in *Nabors*, Embry and Glick are litigating to enforce a law. They are not

engaged in any regulation. Further, B&G's attempt to distinguish *Nabors* is unavailing. The 1983 claim in *Nabors* concerned only the PAGA claim, in which the employee sought only (and could only seek) civil penalties. Cal. Labor Code § 2699(f). The fact that the employee also brought different and additional claims for damages was irrelevant to the determination that he was not a "state actor."

Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348 (2014) does not change this result. In *Iskanian*, the California Supreme Court determined that California's prohibition on arbitration does not violate the Federal Arbitration Action. *Id.* at 388-89. *Iskanian* does not concern Section 1983 or whether an employee bringing a PAGA action is a "state actor." Thus, *Iskanian's* description of PAGA claims as "public enforcement action[s]" is unrelated to "state action" under Section 1983 and cannot be interpreted to mean that PAGA plaintiffs are state actors. Indeed, as held in *Nabors* and *Real Estate Bar for Mass. Inc.*, these types of enforcement actions that the state authorizes private citizens to bring for the public's benefit, are not an exclusive government function.

B&G Foods also makes the nonsensical claim it has no recourse to protect its purported constitutional right unless Glick and Embry are deemed to be state actors. Opp. 11:1-7. But B&G Foods can raise the First Amendment as an affirmative defense in Embry's Proposition 65 action in state court. It could also sue an actual public actor—the state Attorney General charged with overseeing Proposition 65 litigation as in *Cal. Chambers*. Plaintiff fails to demonstrate Defendants perform a traditional and exclusive public function.

B. There Is No Joint Action with the State.

The "joint action" test requires "substantial cooperation" between a private citizen and the government. *Brunette v. Humane Soc'y*, 294 F.3d 1205, 1211 (9th Cir. 2002). In contrast, B&G Foods merely alleges that Proposition 65 requires independent actions of the government and private citizens. *See* Opp. 11:21-13:15. Indeed, B&G Foods' claim that the Attorney General's right to object to a Proposition 65 settlement constitutes "substantial cooperation" with the plaintiff misses that the Attorney General's right to object is not "cooperation" but potential adversity. Even if the Attorney General "monitors" Proposition 65 cases as alleged by B&G Foods, that action is not in "cooperation" with Embry's independent prosecution of her Proposition 65 claim.[1]

This case is like *Nabors*, where an employee brought a class action lawsuit against his former employer to recover damages and penalties under the California Labor Code. 2006 U.S. Dist. LEXIS 109849 at **1-2. The basis for the penalties included California's Private Attorney General Act, Labor Code section 2699 *et seq*. ("PAGA"). *Id*. The employer sued for injunctive relief under Section 1983 on the sole basis that imposing penalties under PAGA would be unconstitutional. *Id.* at **4-5. The court granted the employee's motion to dismiss, holding that there was no joint state action because the state did not order the employee to file the case and did not exercise such

[1] The Court need not address whatever cooperation may conceivably result when the Attorney General brings suit based on the work of a private citizen or in addition to a similar citizen suit, because that did not happen here.

"coercive power . . . that the choice [to file it] must in law be deemed to be that of the State." *Id.* at **5-6, quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-5 (1982). Prior to filing her action under Proposition 65, like a plaintiff bringing a PAGA action, Embry provided notice of the violation to the government agency charged with enforcing the statute and could not proceed until the agency declined to file its own action (*e.g.* after the state declined to exercise its statutory right of first refusal). Thus, as in *Nabors*, the Attorney General merely "acquiesced" by declining to file his own enforcement action.

B&G Foods also cites an irrelevant letter from 2014, in which the Attorney General expressed concern about certain types of settlements providing for payments in lieu of penalties. https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/ag_letter_prop65_2013rpt.pdf?. This warning from the Attorney General about payments instead of penalties in Proposition 65 hardly demonstrates "cooperation" with Proposition 65 attorneys, and especially not with Embry and Glick in a case Embry filed 6 years later. B&G Foods' reference to Proposition 65 Notices withdrawn by Embry in past cases similarly cannot possibly demonstrate that she or Glick are acting in "substantial cooperation" with the State in pursuing her pending case.

B&G Foods' reliance on *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1981) is misplaced. In *Lugar*, the court held that in the narrow circumstance where the State allows officials to seize property based on an *ex parte* application for a writ of attachment, the private party seeking the attachment "jointly engages" with the government in the seizure. *Id.* 942. Unlike the attachment process in *Lugar*, which allowed private

parties to involve the government in the deprivation of property on an *ex parte* basis, Proposition 65 requires plaintiffs to bring their own actions and litigate them before a court, without the government's help. Thus, Embry's Proposition 65 lawsuit cannot possibly constitute "joint action" with the state.

C. There Is No Nexus or Symbiotic Relationship.

The government nexus and symbiotic relationship tests ask whether "there is such a close nexus between the State and the challenged action that the seeming private behavior may be fairly treated as that of the State itself." *Kirtley v. Rainey*, 326 F.3d 1088, 1095 (9th Cir. 2003).

While significant financial integration may indicate a symbiotic relationship, "substantial coordination and integration between the private entity and the government are the essence of a symbiotic relationship." *Brunette*, 294 F. 3d at 1213. In *Vincent v. Trend Western Technical Corp.,* 828 F. 2d 563, 569 (9th Cir. 1987), the court held that no symbiotic relationship existed between the Air Force and one of its contractors because there was no "significant financial 'integration'." The court reasoned that while the contractor may have been economically dependent on its contract with the Air Force, the contractor was not an indispensable element in the Air Force's financial success. *Id.*

B&G Foods cannot not possibly contend that Glick and Embry, private citizens who do not work for OEHHA or any of its contractors, are somehow financially dependent on OEHHA. Further, this single lawsuit by Embry, or even all of her lawsuits, could

not possibly impact the OEHHA budget even if B&G Foods could substantiate its improper evidence regarding the purported percentage of OEHHA's budget derived from penalties collected in every Proposition 65 lawsuit filed by every person who files one.[2]

Further, this case is nothing like *Burton v. Wilmington Parking Authority*, 356 U.S. 715, 719 20 (1961), where a restaurant that discriminated against black customers operated out of a building that was owned by the parking authority and whose viability depended on profits of the restaurant.[3]

B&G Foods' argument under the "nexus" test fails for similar reasons. Unlike the executor appointed by the probate court in *Tulsa Prof. Collection Services, Inc. v. Pope*, 485 U.S. 478, 487 (1988), Glick and Embry were not appointed by the State and are not in any way supervised or controlled by it. Further, B&G Foods provides no basis for its claim that it can attribute Glick and Embry's actions to the State based on a conclusory allegation that the Attorney General "encourages private enforcers." Opp. 16:12-14. First, generally encouraging the public to enforce Proposition 65 is not encouraging Glick and Embry. Further, as the court held in *Brunette*, even where a private citizen is invited to participate in a government action, that mere participation is insufficient to constitute the "substantial cooperation" necessary to convert the

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[2] Even that total, according to B&G Foods, is only 15%. (Opposition at 14:24-15:6.)

[3] *Burton* was decided nearly 60 years ago and has been "questioned and criticized in subsequent high court rulings." *Kuba v. Seaworld*, 2009 U.S. Dist. LEXIS 145016 **15-16 (S.D. Cal., decided June 5, 2009).

private party into a state actor. *Brunette,* 294 F.3d at 1211 (9th Cir. 2002).

III. The Anti-Injunction Act Bars Plaintiff's Claims

Although the Complaint seeks to enjoin the earlier-filed Alameda Action, B&G Foods attempts to recast its Complaint as one aimed at only preventing future, hypothetical lawsuits involving the exact same Cookie Cake product. *See* Opp. 17:16-21. B&G Foods' unconvincing attempt to recast its Complaint to address only cases that have not yet been filed or threatened, and not the case actually on file, should be rejected. And, B&G cannot cure this defect by amending the complaint to seek relief from hypothetical future actions, since it lacks Article III standing for such relief.

A. B&G Foods Cannot Avoid the Anti-Injunction Act by Recasting the Relief Sought.

B&G Foods' argument that its Complaint aims only at hypothetical future lawsuits rather than the lawsuit that has already been filed is at odds with a plain reading of the pleadings and their logical effect. *Compare* Opp., pgs. 17-18 *with* Compl., ¶¶ 80, 87, 94, and Prayer for Relief ¶ A. B&G Foods contends it is "entitled to an injunction against <u>further prosecution</u> or threats of prosecution under Proposition 65 related to acrylamide in its Cookie Cakes . . . " Compl. ¶ 94

(emphasis added).[4] The phrase "further prosecution" (*i.e.*, not just a prohibition against future lawsuits or threats of suit, but actual elimination of any ongoing prosecution efforts) demonstrates that B&G Foods desires to stop the ongoing Alameda Action. Additionally, B&G Foods contends that "Proposition 65's warning requirement as applied [to its Cookie Cakes product] constitutes impermissible compelled speech under the First Amendment and should be enjoined." Compl., ¶ 80 (emphasis added). Thus, B&G Foods asks this Court to enjoin enforcement of the very relief Defendants seek in the Alameda Action—Proposition 65 warning language on the Cookie Cake product. See Embry's Proposition 65 Complaint at Prayer for Relief, ¶ 2, RJN, Ex. D.

Like this Court found in the similar *Cal. Chamber* case, B&G Foods' request for injunctive relief is "not merely prospective" and therefore is barred by the Anti-Injunction Act. *See* Order, *Cal. Chamber of Commerce v. Bacerra,* 2020 WL 1030980, at *7 (E.D. Cal. Mar. 3, 2020) (dismissing First Amendment claim and corresponding request for injunctive relief because complaint was unclear as to whether plaintiff sought retroactive or prospective injunctive relief). Given the same issue here, the Court should dismiss Counts I, II, and III pursuant to the Anti-Injunction Act.

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[4] B&G Foods makes a similar request in its prayer for relief. *See* Prayer for Relief, ¶ A ("For an injunction against further unconstitutional threats and lawsuits against Plaintiff regarding the acrylamide in its Cookie Cakes products."

B. The Court Should Not Grant Leave to Amend Since B&G Foods Has No Basis to Sue on a Hypothetical Claim for Prospective Injunctive Relief.

Under its new theory of the case—enjoining hypothetical future lawsuits by Defendants concerning the same subject matter already at issue in the pending Alameda Action but not that case itself—B&G Foods has no injury-in-fact sufficient to create Article III standing. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016) (enumerating Article III standing elements). Nor would such a case be ripe or proper making any amendment to the Complaint futile.

To demonstrate standing for "injunctive relief, which is a prospective remedy, the threat of injury must be 'actual and imminent, not conjectural or hypothetical.'" *Davidson v. Kimberly-Clark Corp.,* 889 F.3d 956, 967 (9th Cir. 2018) (quoting *Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009)). "In other words, the 'threatened injury must be certainly impending to constitute injury in fact' and 'allegations of possible future injury are not sufficient.'" *Id.* (citing *Clapper v. Amnesty Intern. USA,* 568 U.S. 398, 409 (2013)). Past wrongs, though insufficient by themselves to grant standing, are "evidence bearing on whether there is a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983). "Where standing is premised entirely on the threat of repeated injury, a plaintiff must show 'a sufficient likelihood that [s]he will again be wronged in a similar way.'" *Id.* at 111.

District courts may issue injunctions against repetitive litigation. *See Wood v. Santa Barbara Chamber of Commerce, Inc.,* 705 F.2d 1515, 1524 (9th

Cir. 1983). However, injunctions against filing related lawsuits are generally unnecessary, as res judicata and collateral estoppel are usually more than adequate to protect defendants against repetitious litigation. *Id.* Moreover, injunctions against future litigation pose "a disturbing problem for our system of justice" because they can block free access to the courts and deny constitutionally protected rights. *Id.* at 1524-25. Accordingly, "before a district court issues a pre-filing injunction . . . it is incumbent of the court to make 'substantive findings as to the frivolous or harassing nature of the litigant's action.'" *De Long v. Hennessey,* 912 F.2d 1144, 1148 (9th Cir. 1990) (quoting *In re Powell,* 851 F.2d 427, 431 (D.C. Cir. 1988). To determine whether the litigation is frivolous, district courts must "look at 'both the number and content of the filings as indicia' of the frivolousness of the litigant's claims." *Id.* (quoting same).

Here, B&G Foods' entire Complaint is premised on Embry's enforcement and prosecution of a single Proposition 65 claim against it. *See* Compl., ¶¶ 2-5, 65-71, 89-94. B&G Foods has not alleged a "real and immediate threat of repeated injury" necessary to demonstrate Article III standing to seek prospective injunctive relief from another Proposition 65 case. *See Davidson,* 889 F.3d at 966 (quoting *Lyons,* 461 U.S. at 102). Nor would a lawsuit challenging a possible case that has not even been threatened be ripe or an injunction against such a possibility necessary. Embry's action in the state court is still pending. There is no evidence of vexatious litigation here that would warrant B&G Foods' requested injunction.[5] If a judgment or

[5] Generally, district courts only issue pre-filing injunctions against extreme vexatious litigants. *See, e.g., Molski v. Evergreen*

consent judgment against B&G Foods is entered the Alameda Action, Embry (including all other private enforcers) will be barred via *res judicata* from bringing another Proposition 65 case against B&G Foods regarding its Cookie Cakes product.[6] Alternatively, if B&G Foods proves that Embry's claims have no merit (as it vigorously contends), then the matter will be dismissed. Therefore, the Court should not grant leave to amend and should dismiss Counts I, II, and III with prejudice pursuant to the Anti-Injunction Act.

C. The Anti-Injunction Act Also Bars the Claim for Declaratory Relief.

B&G Foods ignores the Anti-Injunction Act's impact on declaratory relief claims. *Compare* Opp., pgs. 17-18 *with* MTD, pgs. 15-16. As this Court notes, "[t]he Anti-Injunction Act also applies to declaratory judgments if those judgments have the same effect as an injunction." *See* Order, *Cal. Chamber,* 2020 WL 1030980, at *8 (quoting *California v. Randtron,* 284 F.3d 969, 975 (9th Cir. 2002). B&G Foods provides no argument or authority to the contrary. Accordingly,

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Dynasty Corp., 500 F.3d 1047, 1060 (9th Cir. 2007) (roughly 400 similar cases); *Wood,* 705 F.2d at 1526 (35 actions filed in 30 jurisdictions); *In re Oliver,* 682 F.2d 443, 444 (3d Cir. 1982) (more than 50 frivolous cases); *In re Green,* 669 F.2d 779, 781 (D.C. Cir. 1981) (between 600 and 700 complaints).

[6] *See Consumer Advocacy Group, Inc. v. ExxonMobil Corp.,* 168 Cal.App.4th 675, 683-88 (2008) (explaining how a Proposition 65 consent judgment entered into by a plaintiff acting in the public interest against a defendant company serves as *res judicata* protection for that company against others acting in the public interest so long as the same "primary rights" are at issue).

the Court should also dismiss the declaratory relief claim (Count IV) based on the Anti-Injunction Act.

IV. Noerr-Pennington Bars This Action

B&G Foods attempts to evade the *Noerr-Pennington* doctrine claiming that it does not apply to state actors and that the Complaint fits within the sham exception. Both contentions are wrong.

B&G Foods first argues *Noerr-Pennington* does not apply to state actors, citing two district court cases that do not even address this doctrine. Opp., 18. The Ninth Circuit disagrees. *Kearney v. Foley & Lardner, LLP* (9th Cir. 2009) 590 F.3d 638, 645 ("We find that a governmental entity or official [as well as their agents like attorneys] may receive *Noerr–Pennington* immunity. . . . "); and *see Committee to Protect our Agricultural Water v. Occidental Oil and Gas Corporation,* 235 F.Supp.3d 1132, 1158 (E.D. Cal. 2017) ("*Noerr–Pennington* can apply to government actors acting in their official capacities.").Courts routinely apply *Noerr-Pennington* to section 1983 claims. *See* MTD, 16, fn. 2 (collecting cases).

Plaintiff's claims regarding the sham exception to *Noerr-Pennington* fall equally flat. Plaintiff does not dispute that this litigation targets Defendants' petitioning activity, nor does it dispute that the petitioning activity involved has both legislative and judicial components. *See* MTD, 18-20 (explaining how Plaintiff's allegations target both legislative and judicial petitioning activities); Opp., 18-20 (addressing *Noerr-Pennington* and failing to refute the existence of both legislative and judicial petitioning). But Plaintiff does not even attempt to address the distinct, "extraordinarily narrow" legislative sham exception and instead

focuses exclusively on whether it sufficiently alleged facts plausibly supporting application of the judicial sham exemption. *Kottle v. Northwest Kidney Centers,* 146 F.3d 1056, 1061 (9th Cir. 1998); and *see* Opp., 18-20 (focusing exclusively on the judicial sham exemption). Thus, B&G Foods implicitly admits that its Complaint fails to state facts sufficient to meet the legislative sham exception.[7]

B&G Foods' arguments regarding the judicial sham exception are unconvincing. B&G ignores the heightened pleading standard that applies. *See* Mot. 18:17-21. B&G also ignores the analysis in *Wonderful Real Estate Dev. LLC v. Laborers Int'l Union of N. Am. Local 220*, 2020 WL 91998 (E.D. Cal. Jan. 8, 2020). As in that case, B&G has not pled facts "disprov[ing] the challenged lawsuit[s'] legal viability," facts showing that "no reasonable litigant could realistically expect to secure favorable relief," or facts that "the pattern of claims [is] baseless as a whole." *Id.* at *7, *10.

Rather, B&G argues that acrylamide in food litigation is objectively (and subjectively) baseless because acrylamide in food poses no harm. Opp., 19 (citing paragraphs 13-31 of the Complaint as the sole factual support for application of the judicial sham exception).

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[7] Sham legislative petitioning only arises where one uses government process, not the outcome of the process, as a means of injuring another. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991). The sham petitioner must have no genuine interest in the government action resulting from his petitioning; his only interest lies in using the process to bring about harm. *Id.*; and *Evans Hotels, LLC v. Unite Here Local 30*, No. 18-CV-2763-WQH-KSC, 2020 WL 1917659, at *12 (S.D. Cal. Jan. 7, 2020) (sham petitioners must be "indifferent to the outcome of their lobbying."). B&G Foods has not made such an allegation.

B&G Foods subtly, but fundamentally, misunderstands what amounts to an objectively baseless claim. B&G addresses whether existing law is warranted by science, but the controlling legal standard asks whether there is probable cause to institute the proceeding, *e.g.* whether the proceeding is "warranted by existing law." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62-65 (1993). In other words, B&G Foods attacks the merits of California's Proposition 65, not the merits of Defendants' Proposition 65 case. And, in answering the proper question for sham litigation, B&G Foods admits Defendants' claims are warranted by existing law. *See e.g.* Complaint, ¶¶ 3-4 ("The State permits Defendants to file suit against products containing modest trace amounts of substances, even if there is no possible health effect. . . . "). If the State permits the very case Defendants have brought in state court, it cannot possibly be legally "baseless." As such, the claims are not objectively baseless.[8]

V. Conclusion

For all of the above reasons, Defendants' motion to dismiss should be granted. Further, because the defects in Plaintiff's complaint cannot be cured by amendment, leave to amend should be denied.

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[8] The fact that Plaintiff admits California permits the underlying state court litigation that it relies on to attempt to show objective/subjective baselessness, distinguishes this case from B&G Foods' primary authority, *In re Outlaw Lab., LP Litig.*, 2019 WL 1205004 *9 (S.D. Cal. Mar. 14, 2019), where demand letters were allegedly sent without any merit or support. Further, contrary to B&G Foods' reliance on that case to claim the factual allegations preclude a motion to dismiss, *Noerr-Pennington* claims are properly decided at the pleadings stage. Mot. 17 n.3.

Respectfully Submitted,

NICHOLAS & TOMASEVIC, LLP

By: */s/ Jake Schulte*
Jake Schulte
Craig M. Nicholas
Shaun Markley

GLICK LAW GROUP, P.C.
Noam Glick

Attorneys for Defendants

Dated: June 15, 2020

HEARING ON MOTION TO DISMISS, TRANSCRIPT (SEPTEMBER 4, 2020)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK, acting in the purported public interest of the State of California,

Defendants.

Sacramento, California
No. 2:20-cv-00526
Friday, September 4, 2020
10:03 a.m.

Before: The Hon. Kimberly MUELLER, Judge

APPEARANCES:

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[Transcript, p. 2]

Sacramento, California, Friday, September 4, 2020, 10:03 AM

THE CLERK: Calling civil case 20-526, B&G Foods North America, Inc. versus Embry, et al. This is on for defendant's motion to dismiss and scheduling conference.

THE COURT: All right. I'll call roll. Appearing for plaintiff Mr.—is it Hagey?

MR. HAGEY: It is. Thank you, your Honor. Good morning.

THE COURT: All right. Good morning, Mr. Hagey.

And is it Mr. Kwasniewski also appearing but observing?

MR. KWASNIEWSKI: Yes, your Honor.

THE COURT: Did I pronounce that correctly?

MR. KWASNIEWSKI: Yes, your Honor.

THE COURT: All right. Good morning to you. And for the defendants, Mr. Glick.

MR. GLICK: Good morning, your Honor.

THE COURT: Good morning.

Here I have just a few questions. Let me find my—I'm toggling between electronic documents here. I have a few questions on the motion, and then we'll talk about scheduling, assuming the case goes forward, which is not prejudging the matter.

On the request for judicial notice, there's no opposition to the request that I take notice of the Alameda Superior Court documents, correct, Mr. Hagey? You're muted.

MR. HAGEY: Unintentionally muted but agreeing with the Court. There's no objection.

THE COURT: All right. And here to clarify, is the injunction requested to prevent enforcement of any judgment contained in—obtained in current state proceedings, Mr. Hagey?

MR. HAGEY: So—thanks, your Honor. So we're not looking to—for a preliminary injunction on the pending state court action. We're not asking your Honor to step on the superior court's toes. When and if there is a final judgment in this case, obviously we have reserved the request for a permanent injunction, but we're not seeking to preliminarily enjoin or to interfere in that state court process.

THE COURT: But does that mean that really what you're seeking is an injunction against hypothetical future actions?

MR. HAGEY: Well, I mean, obviously collateral estoppel or res judicata principles begin to come into play when we're talking about future actions on similar facts or claims that were actually litigated in our case. I think for present purposes, as currently styled, the permanent injunction would be on the current claims and products that are in suit.

THE COURT: So I'm just looking at the Anti-Injunction Act and cases construing it. Just help me understand how the complaint, as currently pled, addresses the observation that the relitigation exception authorizations injunctions only when a former federal adjudication clearly precludes a state court decision.

MR. HAGEY: Let me try to get to the rub of what your Honor's asking. And I have to, I guess, do a little bit of a mea culpa, but I would say that the defense didn't raise this case either. There is a controlling Supreme Court case on issue. This was the late Justice Potter Stewart's decision in *Mitchum v. Foster*. That's 407 U.S. 225 at 242, 243. That's way back in the middle of 1972. That was a 1983 free speech case where the State of Florida, at least the municipality, was seeking to shut down a naughty bookstore, and the estate brought an AIA defense. And Justice Stewart held, your Honor, that the AIA—well, rather Section 1983 is precisely one of those statutes that Congress expressly authorized to be exempt from the Anti-Injunction Act.

And I would be happy to read it into the record. I apologize to the Court for not bringing that to your Honor's attention earlier. We do believe that that resolves the AIA issue full estop. We also believe there are a number of other ways in which this complaint should proceed, notwithstanding the AIA or the other damages claim. We obviously are not asking the Court to enjoin current state court proceedings. We're asking for very sort of modest procedural direction in this case. But we do believe that Justice Stewart got it right. The defendants, having two shots at briefing this issue, should have raised that to your Honor's attention, and certainly for the plaintiff, I apologize in not doing so earlier.

THE COURT: So I'm looking at the—I was referencing implicitly the *Smith* case, *Smith v. Bayer*, a Supreme Court case from 2011, 564 U.S. 299. So that did not in any way modify—it's *Mitchum* you're saying, the *Mitchum* case?

MR. HAGEY: The *Mitchum* case, I don't believe it did, your Honor. And, you know, *Mitchum* had presented harder facts, I believe, for the Court than our case because in Mitchum the 1983 plaintiff, the bookstore, was seeking to enjoin a state court prosecution essentially shutting down its sale of allegedly naughty materials.

We're not asking the Court to do that on a preliminary basis at all. When your Honor reaches a final decision on the merits, if that decision pleases the plaintiff, we would be seeking the natural consequence of that which we also believe is exempted from the application of the AIA because, of course, your Honor is authorized to

protect and effectuate your judgments. And a permanent injunction here would be a fairly limited and directed provision of relief to do so.

THE COURT: All right. Let me just ask Mr. Glick, unless you've previously had a chance to consult *Mitchum*, I would allow some supplemental briefing in response to Mr. Hagey's citation to *Mitchum*, and so I'd give you seven days if you'd like to file up to five pages unless you're prepared to fully respond to *Mitchum* today.

MR. GLICK: No. Because this is the first time counsel has ever raised *Mitchum*. So I didn't hear how many days you said though. You cut out momentarily.

THE COURT: I said seven, but if you needed more, I would—you know, 14, 7 to 14.

MR. GLICK: Sure. If we could have 14 days on that, I would appreciate that, your Honor.

THE COURT: All right. Up to five pages as a surreply.

So is the line that Mr. Hagey is drawing the right line that allows the case to survive the motion, that is, not seeking preliminary injunctive relief, only permanent, if and when the case gets to that stage?

MR. GLICK: I don't think so because the distinction between a preliminary injunction and a permanent injunction is one without a difference when considering the basic underpinnings of the Anti-Injunction Act which is that we have a pending state court case. Amongst the affirmative defenses in that pending state court case raised by the plaintiffs here, the defendants in that case, is the First Amendment. They're asking this Court to

grant a permanent injunction, preliminary or permanent injunction, on the basis that our case in the superior court would entail violating their First Amendment rights.

That defense is certainly available to them in state court, but this, and why I would be surprised if the Mitchum case says what they claim it says, is that what we end up with is two simultaneous cases, two simultaneous places where they argue the same affirmative defense, and I don't see how this Court ends up running afoul of the Anti-Injunction Act—sorry, can avoid running afoul of the basic principles behind the Anti-Injunction Act.

Now in their—notably, in their opposition they claim they are not seeking an injunction as to the Alameda County case. And I would like that to be said clearly on the record that this case shall have no impact on the Alameda County case, but that's certainly not how they pled it in their complaint.

In their complaint they're asking for an injunction as to the quote, unquote, Cookie Cakes that are the subject of the Alameda County lawsuit. Well, in their opposition they say, no, we didn't mean that. We're not seeking an injunction as to the Cookie Cakes case. We're seeking an injunction as to hypothetical future actions.

Well, there are no hypothetical future actions at issue here, and that raises a very serious problem with Article III standing because they don't allege an injury in fact. To have an injury in fact, they have to allege a threat of injury that's actual and imminent, not conjectural or hypothetical.

And so I don't understand the distinction between this preliminary versus permanent injunction. I don't understand how it would save them from the problems with competing lawsuits filed where this federal court would end up being in the position of effectively conflicting with and overriding what is being offered in the state court as in an affirmative defense.

THE COURT: I understand that argument.

Mr. Hagey, brief response. And on the standing question, again assuming for sake of argument, you can respond however you wish. I don't litigate parties' cases for them. But you heard Mr. Glick's request for clarification. But on standing, again assuming for sake of argument alone that I grant the motion, are there facts that could be included in an amended complaint showing imminence, successive state suit not connected to this one or to otherwise address the standing challenge?

MR. HAGEY: We could, your Honor. But I think standing is squarely addressed by the juris prudence under 1983 where damages and nominal damages even are clearly awardable, and we've asserted those here on the face of the pleading and have done so and cited that to your Honor in our opposition.

But I would just note that in terms of your question about *Smith v. Bayer*, it actually does not even mention *Mitchum*. So I believe that when Mr. Glick has an opportunity to respond, he'll see what we saw in the *Mitchum* decision which says that for these reasons we conclude that under the criteria established in our previous decision

construing the anti-injunction statute, Section 1983 is an act of Congress that falls within the expressly authorized exception of that law.

And before that Justice Stewart, you know, I think waxes a little bit eloquent about Section 1983 and its importance in our federal scheme where he says, quote, the very purpose of Section 1983 was to interpose the federal courts between the states and the people as the guardians of the people's federal rights to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial. And that's citing ex parte *Virginia*. And that citation on that quote, your Honor, is pages 242 and 243 from the Supreme Court's decision.

THE COURT: All right. I'll read the case now. So on the standing question?

MR. HAGEY: On the standing question, I think we've—so I answer it in three ways. Number one is I think we've got direct and immediate harm occurring right now that we're asking for a permanent injunction on once we prevail in this case. It's not a distinction without a difference.

We're not asking your Honor to tell the state court to stop its proceeding in its tracks. We're asking for what happens oftentimes where you have a federal case and a state case, and they proceed in parallel. And when there's a decision or judgment in one, that may or may not affect the other depending on what the judgment provides.

Number two, we've asked for damages.

And number three, the threat of imminent harm, we actually could add something to an amended complaint. I would hesitate to go through an amended complaint process unless it's necessary, your Honor.

But in fact, Mr. Glick and his law associates at the law firm Nichols, Craig Nichols, have sent a notice of violation to B&G Foods just a couple of weeks ago for our client's Delicious and Tasty New York Flatbread which they now want to impose an additional or another unconstitutional compelled speech that consumers should be advised that that too contains cancerous chemicals.

So we would probably—if pressed to, if this were really the standard the Court was concerned about in terms of standing and imminent harm, we could certainly add that new confluence of events into our pleading. I respectfully would suggest that it's not necessary.

Unlike the standing arguments that you heard in the *CalChamber* case, this particular action squarely addresses the point. This is a food producer who makes great food, and it's being told to tell consumers that Cookie Cakes and, I guess, flatbread cause cancer, and there is no way that the defendants are going to be able to pass constitutional muster and demonstrate, which is going to be their burden to beat the *NIFLA* or the *Zauderer* test under the First Amendment scrutiny. There's just no way.

So yes, we are facing imminent harm. We do believe our client has been injured and is going to be injured in the future, and I think the pleading, as

presently drafted, does that. Whether we can amend to add some other stuff, dare ask a lawyer to do that.

THE COURT: All right. One final question, and then Mr. Glick can respond. And then I'd take any wrap-up argument. If I'm not asking you questions, it's because I don't have one after having reviewed what's before me.

So again, for sake of argument, Mr. Hagey, if the Court dismissed injunctive and declaratory relief prayers, would plaintiff proceed on damages alone? I'm assuming—and Mr. Glick can correct me if I'm wrong—that defendants aren't contending the Anti-Injunction Act bars a claim for damages. But first, Mr. Hagey.

MR. HAGEY: That's correct, your Honor. We would indeed proceed on a damages claim, but I dare say, you know, potentially that may be a decision that your Honor would reach after a merits hearing to determine what to do with our request for permanent injunction. We think doing so at this stage would—at this pleading stage would be somewhat premature. And I appreciate your Honor's question and just reserve any response should my friend across the aisle say something interesting in rebuttal.

THE COURT: All right. Mr. Glick, response to my question and then anything else you want to say in response to what you've heard from Mr. Hagey. Then I would turn to Mr. Hagey for brief wrap-up. Then you would have the final word just so it's clear.

MR. GLICK: Thank you. As regards to what he just said and as regards to your question about damages, I'm not sure what damages they're even seeking in this case. It's unclear to me. There isn't a line item in the prayer for relief for damages, but what are the damages that they could even allege if they try to amend the complaint to make it all about damages? That is unclear to me.

There's no provision in Prop 65 for damages to the defendants, and I'm not aware how they could claim damages here in this case. So that seems like it is simply setting up another motion to dismiss if they were to amend in that regard. I guess I think that addresses the question that your Honor raised.

THE COURT: All right. Anything else in response to what you last heard from Mr. Hagey?

MR. GLICK: No, your Honor.

THE COURT: All right. So if you think there's something not fully covered by the discussion we've just had or the briefing, without repeating what's in the briefing, anything further, Mr. Hagey?

MR. HAGEY: No, your Honor. I appreciate the Court's indulgence.

THE COURT: All right. Mr. Glick?

MR. GLICK: No, your Honor. Other than to tell the Court that we struggled with the order of the arguments in our briefing and certainly considered bringing the Anti-Injunction Act as the primary argument, but we believe all three arguments are equally fatal to this complaint and would urge the Court to go back and read, especially the *Noerr*-

Pennington, which is effectively undisputed in their opposition brief. So I know you don't want me to rehash those arguments, but I just wanted to highlight that.

THE COURT: Yeah. I know the *Noerr-Pennington* is out there.

All right. The motion will be submitted once I see Mr. Glick's supplemental briefing on the *Mitchum* case.

On scheduling, I've reviewed the joint status report. Mr. Hagey mentioned the *CalChamber* case. I see the cases as related but certainly not as to be consolidated. Do the parties agree with that, Mr. Hagey?

MR. HAGEY: We do, your Honor.

THE COURT: And Mr. Glick?

MR. GLICK: Yes, your Honor.

THE COURT: And I guess I'll have to remind myself. Is there a different magistrate judge on the *CalChamber* case? Because if so, what I would do is relate the cases, meaning the magistrate judge who would handle discovery at least would be the same. So I'll clean that up if it needs to be cleaned up.

Anything to say on that, Mr. Glick?

MR. GLICK: No, your Honor. I'm not sure who the magistrate judge is in that *CalChamber* case.

THE COURT: All right.

All right. And then I see your disputes on the timing of discovery. And it's not unusual for a

defendant to want to wait for the Court to ultimately resolve pending motions and for the case to be joined, as it were.

This Court tends to think the spirit of the most recent round of federal rules that have been mentioned particularly with regard to initial disclosures encourages proceeding regardless. I can understand there could be a question about the parameters of the case.

I'm prepared to tie initial disclosures to my order on this motion but not ultimately resolution because I do think I can resolve this motion fairly quickly once I see Mr. Glick's filing. And so I would say initial disclosures 14 days after my order on the pending motion.

You want to register an objection to that, Mr. Glick?

MR. GLICK: That's fine, your Honor.

THE COURT: All right.

All right. And then I will otherwise adjust—I don't know that there's a big difference then, actually, if I look at what B&G is proposing in terms of specific dates and Mr. Glick's time frame. Actually, B&G doesn't think there's much time needed for fact discovery.

MR. HAGEY: We would—your Honor, if I may, I think that's right. I think the fundamental case management tension between the parties is, as you noted, defendants often like to have a lot more time in their case schedule. The plaintiffs, if they're interested in their case, want to see it move expeditiously.

We frankly believe this is a case that is not going to require voluminous discovery. It's fairly targeted. It's a specific—it's a specific product. Either the defendants have evidence in their possession to satisfy the constitutional scrutiny or they don't. And we're happy for there to be some period of time for discovery around that on sort of a—you know, lay witness or percipient basis, and some time for some expert disclosure.

But these are issues that Mr. Glick and his client around acrylamide have been litigating for four years. They should—you know, they send out these notices all the time. I think the defendant here has 432 notices of violations sent out to various food companies and perhaps other businesses, retailers and whatnot.

THE COURT: All right. So I understand the general landscape. Let me clarify with Mr. Glick. Are you saying you want all the expert discovery to proceed fairly early and be done before fact discovery cutoff? Do I have that right?

MR. GLICK: I don't think so, your Honor.

THE COURT: All right.

MR. GLICK: Frankly, it's hard for me to offer an opinion on how discovery should be conducted without the Court's order setting forth the scope of the case. So whether or not discovery can be completed quickly and in what order, I would hope that we can revisit that, and perhaps if the Court would like to set another case management conference for after a ruling, to the extent that it's necessary, to the extent there's anything left of the case, we'll certainly meet and confer with opposing

counsel and try to reach agreement on that. But right now it's just too nebulous for us to be able to propose a specific calendar and sequence.

THE COURT: Here's what I'm going to do. We are a congested court. I'm going to—I have a standard schedule that I default to, and so without reading you the dates, I'm going to include that, taking account of the ISC—I mean, the initial disclosures dates I've just given you. I'll include that in my order.

Once you see my order on the motion, you may meet and confer, and if you stipulate to a different schedule, I'll accept that. I think that's the most efficient. It will be more generous than what B&G is requesting, probably not as generous as Mr. Glick is requesting, so a bit Solomonic.

But I do—taking into account what's realistic in this court, I will set through dispositive motion cutoff. I'm not setting trial dates at this point because we were just continuing so many dispositive motion dates. So if we get past that hurdle, if the case gets that far, then we would set trial dates. And I will not send you to settlement at this point.

All right. I have what I need. So the matter is submitted.

MR. HAGEY: Thank you, your Honor.

THE COURT: Very briefly.

MR. HAGEY: One short question. Does the Court intuit that the parties should not exchange any other form of written or other discovery? As the Court can probably appreciate, normally that practice

can commence once there's been the 16 and Rule 26 conferences and meetings.

THE COURT: Wait until you see my order on the motion.

MR. HAGEY: Okay. Thank you, your Honor.

THE COURT: All right.

MR. GLICK: Thank you, your Honor.

THE COURT: That good enough for you, Mr. Glick?

MR. GLICK: Yes, it is.

THE COURT: All right. Very good. You may now sign off.

MR. HAGEY: Thank you very much.

(The proceedings adjourned at 10:53 a.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kacy Parker Barajas

KACY PARKER BARAJAS
CSR No. 10915, RMR, CRR, CRC

APPELLANT B&G FOODS'S OPENING BRIEF (FEBRUARY 16, 2021)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

Plaintiff/Appellant,

v.

KIM EMBRY and NOAM GLICK,

Defendants/Appellees.

Case No. 20-16971

On Appeal from the United States District Court for the Eastern District of California, Case No. 2:20-cv-0526-KJM-DB, the Honorable Kimberly Mueller

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APPELLANT'S OPENING BRIEF

CORPORATE DISCLOSURE STATEMENT

Plaintiff/Appellant B&G Foods North America, Inc., certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:

1. B&G Foods, Inc. (a publicly traded company), and

2. B&G Foods North America, Inc.

* * *

Plaintiff/Appellant B&G Foods North America, Inc. respectfully submits this Opening Brief in support of its appeal from the district court's order of dismissal and final judgement below.

INTRODUCTION

The lower court's application of *Noerr-Pennington* immunity to dismiss this First Amendment case at the pleading stage must be overturned: The ruling contradicts decades of law, bars claims against the state arising from threatened enforcement litigation, and guts the civil-rights protections afforded by the First Amendment and Section 1983.

Appellant B&G Foods filed this case to remedy California's use of private bounty hunters to force the publication of false cancer "warnings" on packages of *Snackwell's Devil's Food Cookie Cake* products sold in California. Appellees-Defendants are serial Proposition 65 state enforcers who routinely threaten food businesses with mandatory injunctions and penalties to coerce them to quickly enter generous settlements.[1] Over the last few years, Appellees have amassed millions of dollars in such payments at the expense of food businesses. They are able to do so because of the mandatory injunction they wield against any food business whose product contains dietary acrylamide, a chemical that naturally arises whenever foods are cooked. If a business refuses to pay, it is threatened with state action to compel a false, self-disparaging label on all products sold in the State: "WARNING: This product can expose you to acrylamide, which is known to the State of California to cause cancer."

Appellees' actions are unconstitutional because they cannot possibly satisfy this Court's longstanding First Amendment jurisprudence protecting individuals and businesses from controversial or false compelled speech. *See, e.g.*, *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (enjoining

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[1] California's notorious Proposition 65 has long been criticized as subject to "abuse[]" by "unscrupulous lawyers driven by profit rather than public health," who serially file " frivolous 'shake-down' lawsuits." Press Release of the Governor of the State of California (May 7, 2013), https://www.ca.gov/archive/gov39/2013/05/07/news18026/index.html. For this reason, Proposition 65 has been called "legalized blackmail." *See, e.g.*, https://www.foodnavigator-usa.com/Article/2018/09/01/Amended-Prop-65-regulations-likely-to-prompt-a-significant-uptick-in-litigation-predict-attorneys. The statute is found at Cal. Health & Safety Code § 25249.5 *et seq*.

enforcement of San Francisco ordinance compelling health warning on sugary beverages); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (affirming injunction against enforcement of California law compelling age labeling on certain video games); *CTIA-Wireless Ass'n v. City & Cty. of San Francisco*, 494 F. App'x 752 (9th Cir. 2012) (affirming injunction against enforcement of San Francisco ordinance compelling warnings about radiofrequency energy emissions from cell phones).

Dietary acrylamide has been around since humankind first used fire to heat food. Decades of research from the U.S. Food and Drug Administration, the National Cancer Institute, the American Cancer Society, and other scientific bodies have determined that acrylamide is safe and occurs naturally in virtually all heated foods, including cookies, breads, crackers, popcorn, French fries, and roasted coffee. It also forms organically in almonds, potatoes, grains, dates, soybeans, and dozens of other fruits, nuts and vegetables.

Acrylamide nonetheless was improvidently included on a list of suspect chemicals in California, even though no agency has ever concluded that acrylamide is a known human carcinogen. Appellees use the chemical's widespread presence to threaten and file dozens of baseless suits, including their action against B&G Foods. Of course, Cookie Cakes do not cause cancer, and California's attempt to use state actors to compel businesses to say otherwise is unconstitutional and should stop.

B&G Foods brought this action under the First Amendment and Section 1983. Appellees moved to dismiss the Complaint under Rule 12(b)(6), arguing in part that the action somehow violated their *Noerr-*

Pennington rights to petition the state courts, no matter how unconstitutional their objectives and misuse of state power. The district court granted the motion without leave to amend, finding that while Appellees were assumptively "state actors," their violation of B&G Foods's First Amendment free speech rights was itself "petitioning activity" immunized under the First Amendment.

As should be evident, the district court's ruling would create an entirely new class of state immunity for constitutional violations and should be reversed on at least three grounds.

First, no court in this Circuit or any other has ever endorsed the broad theory now advanced by the district court: that a state actor enforcing an unconstitutional law or regulation may be immune from liability under the U.S. Constitution and Section 1983. If upheld, the ruling would undermine all civil-rights remedies in this Circuit – free speech, discrimination, gun rights, *et cetera* – and interpose a judicially-erected barrier between citizens' constitutional protections and a misguided state actor.

Stretching the *Noerr-Pennington* doctrine in this manner is both impractical and unprincipled and would overturn decades of precedent repeatedly upholding the right of victims of improper state action to seek redress in federal court under Section 1983. *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162, 32 L. Ed. 2d 705 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action

be executive, legislative, or judicial." (internal quotation and citation omitted)); *Miofsky v. Super. Ct.*, 703 F.2d 332, 335 (9th Cir. 1983) ("[D]istrict courts have subject matter jurisdiction over suits brought under § 1983 even when the state action allegedly violating plaintiff's federally protected rights takes the form of state court proceedings."); *Anderson v. Nemetz*, 474 F.2d 814, 816 (9th Cir. 1973) (reversing dismissal of § 1983 claim seeking declaratory and injunctive relief against further prosecution under state vagrancy law).

Second, even if the doctrine could be extended to state actors in a case such as this, the district court erred in making summary factual findings and drawing inferences which contradict the Complaint and prejudice the plaintiff at the pleading stage. In specific, the court improperly concluded, notwithstanding the Complaint's dozens of contrary allegations, that Appellees had not engaged in "sham litigation."

Last, the district court clearly abused its discretion in denying leave to amend where B&G Foods could have alleged a variety of facts to overcome Appellees' supposed *Noerr-Pennington* immunity.

The Court should reverse the lower court's judgment of dismissal and permit B&G Foods to proceed with its case.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's Order dismissing the case with prejudice, and awarding final judgment to Defendants/Appellees.

QUESTIONS PRESENTED

1. Whether the district court erred by applying the *Noerr-Pennington* doctrine to immunize state actors from violating B&G Foods's First Amendment rights.

2. Whether the district court erred in misconstruing the "sham litigation" exception to *Noerr-Pennington* and/or by making factual findings at the pleading stage contrary to the Complaint's well-pleaded allegations that Appellees' misconduct deprived Appellees of *Noerr-Pennington* protection (assuming such doctrine is even available).

3. Whether the district court abused its discretion by denying B&G Foods leave to amend its Complaint to add additional facts showing that Appellees were engaged in "sham litigation" and thus not entitled to *Noerr-Pennington* immunity (assuming such doctrine is even available).

4. Whether, based on the detailed allegations in the Complaint, Appellees are state actors for the purposes of Section 1983.

STATEMENT OF THE CASE

This appeal arises from the district court's dismissal, without leave to amend, of B&G Foods's March 6, 2020 Complaint asserting four causes of action: (1) violation of the First Amendment, (2) violation of the Due Process Clause of the Fourteenth Amendment, (3) deprivation of civil rights under 42 U.S.C. § 1983, and (3) entitlement to declaratory relief under 28 U.S.C. § 2201. (4-ER-602-606.)

On May 1, 2020, Appellees moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on three grounds: that Appellees were not state actors, that the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, barred B&G Foods's claims for injunctive relief, and that Appellees were immune from suit under the *Noerr-Pennington* doctrine. (3-ER-429.)

On June 1, 2020, B&G Foods filed its Opposition to the Motion. (2-ER-114.) B&G Foods's Opposition also appended the Declaration of David Kwasniewski, which enclosed detailed records of the monies generated for the State by private enforcers like Appellees. (2-ER-113.)

On September 4, 2020, the district court held a hearing. The argument focused on Appellees' now-abandoned defense under the AIA. B&G Foods explained to the court that such defense was precluded by the Supreme Court's decision in *Mitchum v. Foster*, 407 U.S. 225 (1972), which ruled that § 1983 claims are statutorily exempt from the AIA. (2-ER-53-57.) The district court requested supplemental briefing on this issue. (2-ER-53-54.) In passing, the district court also inquired about any possible amendments to the Complaint. (2-ER-58-59.) Counsel supplied several potential allegations that B&G Foods was prepared to add to its Complaint if necessary. (*Id.*)

The parties thereafter submitted supplemental briefs agreeing that *Mitchum* foreclosed the applicability of the AIA to Complaint's § 1983 claim. (Pltf's Supp. Brief, 2-ER-14; Defs' Supp. Brief, 2-ER-26.) Neither at the hearing nor in the supplemental briefing did either side discuss the merits of the Complaint's state-action allegations or the *Noerr-Pennington* doctrine. Indeed, the district court's only mention of

Noerr-Pennington at the hearing was "I know the *Noerr-Pennington* is out there." (2-ER-61.)

On October 7, 2020, the district court granted Appellees' motion on *Noerr-Pennington* grounds, dismissed the complaint with prejudice, and entered final judgment against B&G Foods. (1-ER-6.) The district court did not address the AIA or the state action doctrine. Instead, it assumed that Appellees were state actors and found that even in that capacity, they were completely immune from suit under the *Noerr-Pennington* doctrine because they were "engaged in an activity sanctioned by California voters and [were] acting on behalf of the public." (1-ER-5.) The district court also ruled that the "sham litigation" exception to the *Noerr-Pennington* doctrine did not apply because Appellees' prior lawsuits had yielded monetary settlements. (1-ER-6.)

The court's order denied leave to amend, reasoning that "[a]t hearing, B&G was not able to propose viable amendments." (1-ER-6.) The Hearing Transcript, however, shows that no question was ever raised regarding *Noerr-Pennington* immunity and, as noted above, B&G Foods expressly preserved several grounds for possible amendment. (2-ER-58-59.)

On October 7, 2020, B&G Foods timely filed its Notice of Appeal. (4-ER-607.)

STATEMENT OF FACTS

The facts relevant to this Appeal are set forth in B&G Foods's Complaint, which is accepted as true with all reasonable inferences drawn "in favor of the plaintiff." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1012 (9th Cir. 2018) (reversing district court

for improperly interposing a "fact-driven defense" to dismiss a complaint).

A. The Products at Issue

B&G Foods is a 130-year-old American food business which makes a wide variety of products, including Snackwell's Devil's Food Cookie Cakes (the "Cookie Cakes"):

(4-ER-590, 593 ¶¶ 6, 13.)

B&G Foods prepares and bakes its Cookie Cakes like any other store-bought or homemade cookie, and does not use high-fructose corn syrup or partially hydrogenated oils. (4-ER-593-594 ¶ 15.) No acrylamide is added to the product. (4-ER-594 ¶ 16.) Any acrylamide that may be present in the product arises naturally from the baking process, which, like any cookie, is necessary to turn the cookie ingredients into an edible product. (4-ER-594 ¶ 16-21.)

B. Appellees' Statutory "Notice of Violation" to B&G Foods

On April 22, 2019, Appellees, on behalf of the State, served a statutory Notice of Violation upon B&G

Foods, commonly referred to as an "NOV." The NOV charged that B&G Foods's Cookie Cakes contained a level of acrylamide that was "dangerous" and violated California's Proposition 65. (3-ER-354.)

The NOV was presented by Appellees "acting in the interest of the general public" (3-ER-354) and alleges that Appellees shared the results of their acrylamide analysis with the California Attorney General for his review. (3-ER-358.)

The NOV stated that B&G Foods would be subject to penalties, attorneys' fees, costs, and a mandatory injunction unless the following warning was placed on all Cookie Cake packages sold in California:

> WARNING: This product can expose you to [Acrylamide], which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

(3-ER-357.)

If B&G Foods refused to place this warning on its products, penalties would be assessed on behalf of the State in amounts of up to $2,500 per day, per violation. (3-ER-357.)

Copies of the NOV were served on the Attorney General of the State of California, as well as the District Attorneys for the counties of Alameda, Calaveras, Contra Costa, Lassen, Monterey, Napa, Riverside, Santa Barbara, Santa Clara, Santa Cruz, San Diego, San Francisco, San Joaquin, San Luis Obispo, Sonoma, Tulare, Ventura, and Yolo.

C. Acrylamide Is a Natural Compound Created When Foods are Heated

The NOV's allegation that Cookie Cakes contain dangerous levels of acrylamide that cause cancer is not true. (4-ER-593.)

Acrylamide is a compound found in virtually all foods and forms naturally whenever food is baked, roasted, grilled, or fried. (4-ER-594.) According to the FDA, acrylamide likely has "always been present in cooked foods," including cookies, cakes, breads, brownies, pastries, crackers, breakfast cereals, French fries, potato chips, tortilla chips, roasted sweet potatoes, coffee, and tea; as well as in various uncooked foods, such as almonds, dates, soybeans, black olives, dried plums, dried pears, and peanuts. (4-ER-594.)

Acrylamide in food has never been shown to be harmful in people. (4-ER-594-597.) Many domestic and international scientific bodies, including the National Cancer Institute, the American Cancer Society, the Environmental Protection Agency, and the International Agency for Research on Cancer, recognize that acrylamide in food does not pose a risk to people. (4-ER-594-597, 600 ¶ 57.) Indeed, the State itself has recognized it lacks any evidence that acrylamide in food actually causes cancer. *Id.*

As detailed in the Complaint, decades of research by scientists around the world have concluded there is no association between acrylamide in food and any health risk in humans. The National Cancer Institute, the federal government's principal agency for cancer research and training, states that "a large number of epidemiologic studies (both case-control and cohort studies) in humans have found no consistent evidence

that dietary acrylamide exposure is associated with the risk of any type of cancer." (4-ER-594-595 ¶ 26.) The American Cancer Society recently re-confirmed its review of epidemiological studies that "show that dietary acrylamide isn't likely to be related to risk for most common types of cancer." (4-ER-595 ¶ 27.) A 2012 meta-analysis conducted by the European Journal of Cancer Prevention likewise concluded there is "no consistent or credible evidence that dietary acrylamide increases the risk of any type of cancer in humans." (4-ER-595-596.) Meta-analyses by the publications International Journal of Cancer, Cancer Science, Biomarkers & Prevention, and the European Journal of Nutrition likewise reached the same conclusion – there is no evidence acrylamide in food causes cancer. (*Id.*)

In fact, studies have shown the opposite – foods high in acrylamide are associated with lower rates of cancer. For example, the International Agency for Research on Cancer has concluded that drinking coffee reduces the risk of certain types of cancer. (4-ER-596 ¶ 29.) And the American Cancer Society has concluded that consuming foods made of whole grains may reduce the risk of liver cancer. (*Id.*)

"The sole basis for California's Proposition 65 warning requirement for acrylamide are laboratory studies in which pure acrylamide was given to rats or mice." (4-ER-596-597 ¶ 30.) These studies have been questioned, if not outright disregarded, by the National Cancer Institute, the Environmental Protection Agency, and the International Agency for Research on Cancer, all of whom have concluded there is no evidence that dietary acrylamide poses any risk of harm to humans. (*Id.*) Even the State itself acknowledged in

2007 that acrylamide in food is not actually "known" to cause cancer in humans. (4-ER-600-601 ¶ 59.)

D. Appellees Are "State Actors"

Appellees' threatened NOV and ensuing State Court lawsuit are essential enforcement actions of a state actor. Prior to initiating any private action, enforcers like Appellees serve a Notice of Violation on the State through the Attorney General's office, together with evidence supporting the supposed merit of the bounty hunter's allegations. This is so that the State can regulate, monitor, and encourage the proposed action. (4-ER-591 ¶ 9b.) If the State believes the notice lacks merit, it serves a letter on the parties to object to any action. Cal. Health & Safety Code § 25249.7(f).

After a notice is filed, the State continues to monitor the activity of its Proposition 65 enforcers "by, among other things: requesting pre-approval of any potential settlement or consent judgment, receiving and reviewing notices regarding the progress of acrylamide case litigation, intervening in particular cases, regulating the conduct of representatives, demanding to receive proportional cuts of civil penalties, and retaining the ability to change, alter or amend the regulations governing a particular Proposition 65 chemical and enforcement activity." (4-ER-591 ¶ 9c.) Defendants in particular have been subject to close scrutiny by the Attorney General. (4-ER-591 ¶¶ 9c-9d.) For instance, in 2018, the Attorney General found invalid a settlement in which Defendants attempted to recoup a $37,000 fee award but just a $3,000 penalty. (4-ER-591 ¶ 9c.) The Attorney General found this settlement would do nothing to benefit the public and

was an illegal overpayment to Appellee Glick. (4-ER-591 ¶ 9d.)

Appellees thus are part of the Attorney General's outsourcing of its enforcement function "in the public's interest" (4-ER-590 ¶¶ 7-8); they bring significant financial benefits to the State (4-ER-591, 596 ¶¶ 9(d), 35); they are supervised by, overseen by, and coordinated with the State's attorney general's office (4-ER-591-592, 597-598 ¶¶ 9, 32-42); and they serve a traditional public function of enforcing a public health and food-labeling regulation (*Id.*)

Appellee Kim Embry is a serial Proposition 65 litigant. (4-ER-589-590.) She has sued dozens of businesses every year as an enforcement arm of the State of California. (4-ER-590 ¶ 7.) Her lawsuits seek to impose statutory penalties (of which she receives 25%) on food companies who, like B&G Foods, refuse to place false acrylamide-related cancer warnings on their products. (*Id.*)

Despite filing numerous such lawsuits, including against B&G Foods, Appellee Embry admits she has no relevant or percipient knowledge regarding her Proposition 65 demands or the underlying merits of those claims. (2-ER-122.) She does not purchase the products at issue and does very little other than use the threat of drawn-out, meritless litigation to secure payments from food businesses operating in California. (*Id.*) For example, the accused Cookie Cakes in this case were purchased at a Ralphs Grocery store even though Embry, who resides in San Francisco, lives at least 200 miles from the nearest Ralphs location. (2-ER-122-123.)

Appellee Noam Glick is Embry's lawyer and the real driver of their joint Proposition 65 enforcement enterprise. He resides in San Diego (4-ER-590 ¶ 8), where there are numerous Ralphs locations, and purchases the products over which Appellees file suit. He drafts and personally signs the Proposition 65 Notices of Violation and submits them to the Attorney General's office (Dkt. No. 18-5). The lion's share of the $1.7 million collected by Embry from the businesses she has sued has gone to pay Appellee Glick's supposed fees. (4-ER-589 ¶ 2.)

E. Proposition 65 Is Routinely Abused by State Actors

Proposition 65 and its implementing regulations provide food companies with no objective information from which to determine whether they must apply cancer warning labels to their products, further enabling Appellees' campaign of sham litigation.

To begin, the State exempts a food company from Proposition 65 only if it "can show that the exposure [to acrylamide] poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer." Cal. Health & Safety Code § 25249.10(c). This threshold is commonly referred to as the "No Significant Risk Level" ("NSRL"). 27 Cal. Code Regs. § 25705.

This so-called "safe harbor" is anything but, as the burden of proving that an NSRL exists – or, if one has been previously satisfied, that the product does not exceed it – lies entirely on the defendant and entails costly expert analysis. (4-ER-598-599 ¶¶ 43-47.) By contrast, all a plaintiff need plead to bring a Proposition 65 claim is that the product contains any

amount of a listed chemical. *Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th at 477 (2001) (Vogel, J., dissenting) ("[L]awsuits under Proposition 65 can be filed and prosecuted by any person against any business based on bare allegations of a violation unsupported by any evidence of an actual violation – or even a good faith belief that a defendant is using an unsafe amount of a chemical known by the state to cause cancer.") The burden-shifting framework of Proposition 65 results in "judicial extortion" where many private parties bring claims without any assessment that an exposure exceeds the NSRL, forcing the defendant to settle and avoid legal fees and the costs of performing an expensive expert scientific assessment. (4-ER-599-600 ¶ 50.)

The State also exempts from regulation products "where chemicals in food are produced by cooking necessary to render the food palatable or to avoid microbial contamination." Cal. Code Regs. § 25703 (b)(1). Like the NSRL, the burden of proving that the cooking exemption applies lies entirely on a defendant, which again must produce costly expert analysis showing that "sound considerations of public health support an alternative [safe harbor] level." *Id.* The regulations provide no further elaboration of what is required to make this showing, rendering it an impossibly vague standard for a defense.

F. Appellees File Their Lawsuit and B&G Foods Files This Action

On March 6, 2020, after providing notice to the State of their planned lawsuit, Appellees followed through and initiated a lawsuit to force B&G Foods to

place false cancer warnings on its products. (2-ER-166.)

Later the same day, B&G Foods filed this action seeking relief from Appellees' efforts to coerce it to place false speech warnings on its products in violation of the First Amendment. (4-ER-588.)

STANDARD OF REVIEW

This Court "review[s] the district court's grant of a motion to dismiss de novo." *Chamber of Commerce v. City of Seattle*, 916 F.3d 749, 779 (9th Cir. 2018). "A court's denial of leave to amend is reviewed for an abuse of discretion." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016).

ARGUMENT

The district court's decision must be reversed because it misapplies and dramatically expands the *Noerr-Pennington* doctrine beyond all recognition. If allowed to stand, the decision would overturn decades of civil-rights and First Amendment jurisprudence, and make it virtually impossible for businesses and individuals to seek redress from unconstitutional state action. Nor is there any other basis for affirming the district court's decision. Appellees conceded below that their Anti-Injunction Act argument was based on a misapplication of law long ago rejected by the Supreme Court. (*See* 1-ER-4 ("[Defendants] conceded *Mitchum* [*v. Foster*, 407 U.S. 225 (1972)] precludes the application of the Anti-Injunction Act here").) As for state action, B&G Foods's Complaint contains numerous and compelling facts showing that Appellees are inextricably intertwined with the State and serve as its

agents – allegations which must be treated as true on this record.

I. The *Noerr-Pennington* Doctrine Does Not Immunize State Actors from Section 1983 Liability for Unconstitutional Enforcement Activity

In dismissing B&G Foods's Complaint, the district court distorted the *Noerr-Pennington* doctrine beyond all recognition, holding that it shields even unconstitutional state enforcement activity from liability under Section 1983. (1-ER-4-5.) This cannot be the law. Decades of settled jurisprudence permits aggrieved citizens to hold state actors accountable in federal court for Constitutional deprivations, including for precisely the kind of unlawful compelled speech at issue in this case. The lower court's ruling would upend all of that – and privilege the notional petitioning interest of state prosecutors and their agents above the citizens whose rights are being violated.

A. Section 1983 Provides a Comprehensive Remedy Against State Actors Engaged in Unconstitutional Enforcement Actions

Congress enacted 42 U.S.C. § 1983 to protect individual civil rights against unlawful prosecution by state and local officials. Section 1983 was passed as Section 1 of the Civil Rights Act or Ku Klux Klan Act of 1871. Ch. 22, § 1, 17 Stat. 13, 13. Section 1 of the Act was designed to empower the federal government to punish vigilante "justice" wielded by Klansmen and their state-actor confederates portending to act under color of state or local law. *See id.* § 1, 17 Stat. at 13; *see generally* Susan H. Bitensky, *Section 1983: Agent*

of Peace or Vehicle of Violence Against Children?, 54 Okla. L. Rev. 333, 341-47 (2001). In other words, the entire thrust of the legislation was to address the misuse of *state* authority to deprive citizens of their civil rights. *Id.*

Congress recognized that states and those acting in concert with the state may, from time to time, infringe upon federal civil rights. Erwin Chemerinsky, *Federal Jurisdiction* 504-05 (6th ed. 2012) ("Section 1983 . . . empowered the federal government, and most especially the federal courts, with the authority necessary to prevent and redress violations of federal rights."). Legislators were concerned that "state instrumentalities could not protect those rights" and that "state officers might, in fact, be antipathetic to the vindication of those rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). For that reason, Congress "opened the federal courts to private citizens, offering a uniquely federal remedy" – one that was "to be broadly construed" – against "incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum*, 407 U.S. at 239; *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978).

Accordingly, a foundational goal of § 1983 was to protect private persons against unconstitutional state laws or prosecutorial activity, and it was modeled in this respect on Section 2 of the Civil Rights Act of 1866. Cong. Globe, 42d Cong., 1st Sess. app. 68 (1871) (statement of Rep. Shellabarger). The 1866 Act, in turn, was expressly passed to "secure [federal] rights" against the "laws in slaveholding States," such as statutes prohibiting Black people from acting as ministers or possessing firearms. Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull). Section

1983's innovation was that it created a private right of action in federal court to remedy state misconduct – and that it expressly authorized monetary and injunctive relief as remedies. *Mitchum*, 407 U.S. at 242.

B. Section 1983 Has Routinely Been Applied by Federal Courts to Protect Businesses from Unlawful Litigation By State Actors

In keeping with its purpose, § 1983 routinely has been used to remedy unconstitutional enforcement of state laws including, as here, infringement of businesses' First Amendment Rights. Justice Stewart Potter's 1972 decision in *Mitchum v. Foster* is paradigmatic. The case was brought by a Florida bookstore seeking relief in federal court under § 1983 and the First Amendment against a local prosecutor's state lawsuit to prevent the store from selling supposedly "indecent" material. 407 U.S. at 227. The district court enjoined the prosecutor's enforcement, but the court of appeals reversed, holding that federal courts were limited by Congress' adoption of the Anti-Injunction Act, 28 U.S.C. § 2283.

In a 7-0 decision, the Court reversed the court of appeals and squarely found that federal courts are obligated under § 1983 to provide a remedy against state prosecutions impinging on Constitutional rights, including the First Amendment:

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . federal injunctive relief against a state court proceeding can . . . be essential

> to prevent great, immediate, and irreparable loss of a person's constitutional rights.

Id. at 242; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 528, 547 (1993) (upholding private church's application under § 1983 to prevent state enforcement of an ordinance targeting religious practices).

Justice Stewart's decision in *Mitchum* stands the test of time. Court after court in this Circuit and others have upheld federal courts' solemn obligation under § 1983 to provide a venue for individuals and businesses confronted with unconstitutional state actor enforcement – whether arising from racial discrimination, impingement of religious liberties, compelled speech, or other deprivations.

In *Am. Beverage Ass'n*, 916 F.3d at 749, this Court enjoined San Francisco's effort to mandate the inclusion of health warnings on advertisements for certain sugar-sweetened beverages. The soda industry brought a First Amendment challenge "to prevent implementation of the Ordinance" which, like Proposition 65 here, would have subjected noncompliant beverage manufacturers to threatened litigation and penalties. *Id.* at 754. The district court rejected plaintiffs' application, but this Court reversed, holding that the First Amendment extended to enjoin a municipality from enforcing such law: "The required warnings therefore offend Plaintiffs' First Amendment rights by chilling protected speech." *Id.* at 756.

In *Video Software Dealers Ass'n*, 556 F.3d at 950, this Court upheld an injunction prohibiting enforcement of a California law that "require[d] that the front side of the package of a 'violent video game' be labeled

with a four square-inch label that reads '18.'" *Id.* at 965-66. The labeling requirement was unconstitutional, this Court held, "because it does not require the disclosure of purely factual information; but compels the carrying of the State's controversial opinion." *Id.* at 953.

In *CTIA-Wireless Ass'n*, 494 F. App'x at 752, this Court summarily upheld an injunction prohibiting enforcement of a San Francisco ordinance that required cell-phone sellers to provide consumers with a "fact sheet" on the supposed dangers of radiofrequency energy exposure. *Id.* at 753. The Court held that the ordinance ran afoul of the First Amendment because the fact sheet was not "both 'purely factual and uncontroversial.'" *Id.* at 754.

Courts from outside this Circuit likewise have recognized business' right to use Section 1983 to challenge unlawful compelled speech. *See, e.g.*, *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (upholding Section 1983 claims against state enforcement of warnings on milk packages).

None of these decisions affirming citizens' right to sue state enforcers under § 1983 could be correct if the *Noerr-Pennington* doctrine somehow immunized state actors from liability as long as they enforced these unconstitutional laws using state courts.

C. The *Noerr-Pennington* Doctrine Serves as a Limited Privilege, Centered on Antitrust Issues

As shown above, the lower court's sweeping reliance on *Noerr-Pennington* upends decades of settled law under § 1983 regarding citizens' right to petition

federal courts for relief from unconstitutional state enforcement. The decision also fundamentally misapplies the doctrine.

Noerr-Pennington is, at its core, an antitrust doctrine intended to protect private competitors from "restraint of trade" liability under the Sherman Act where they engage in joint efforts to lobby the government for legislative or regulatory reform. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

In the decades since *Noerr* and *Pennington*, courts have lightly expanded the doctrine's reach but not in ways applicable here. First, the doctrine has been applied in limited circumstances outside the antitrust context, as a "generic rule of statutory construction," under which courts "construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006).

Second, the doctrine encompasses certain petitioning of the judicial branch by private citizens filing lawsuits: "The right of access to the courts is . . . one aspect of the right of petition." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Courts also have protected conduct "incidental to the prosecution of the suit," including pre-suit demand letters, as long as the "underlying litigation [falls] within the protection of the Petition Clause." *Sosa*, 437 F.3d at 934-36. Such cases, however, do not involve state actors or those seeking to enforce unconstitutional laws or regulations.

Finally, this Court has interpreted the *Noerr-Pennington* doctrine as potentially extending "in at least some limited cases [to] governmental entities" as well. *Walker v. City of Lakewood*, 272 F.3d 1114, 1130 n.5 (9th Cir. 2001); *see also Manistee Town Center v. City of* Glendale, 227 F.3d 1090, 1092-93 (9th Cir. 2000) (city entitled immunity for "lobbying and public relations efforts" aimed at another municipality); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644-45 (9th Cir. 2009) (municipality and its counsel shielded from liability in eminent-domain proceedings).

As discussed in the next section, the reasoning in those cases is not altogether straightforward. But no matter how read, nothing in the decisions supports extending *Noerr-Pennington* to insulate state actors engaged in unconstitutional enforcement efforts regarding a traditional public function, like enforcing a supposed public-health law. In fact, until the district court's decision, no court had ever applied the doctrine to immunize unconstitutional state action, whether in the form of threatened compelled speech or the filing of state court litigation.

D. *Noerr-Pennington* Does Not Grant State Actors Immunity for Using Litigation to Violate Constitutional Rights

The district court assumed that Defendants were state actors and, relying on *Manistee* and *Kearney*, held that they nevertheless enjoyed *Noerr-Pennington* immunity from suit because they were "petitioning" the courts "in their official capacities on behalf of the public." (1-ER-4-5.) But the *Noerr-Pennington* doctrine does not protect state actors enforcing state laws against private parties in state courts. Neither

Manistee's nor *Kearney*'s "limited" extension to government actors supports the district court's decision here. *Cf. Walker*, 272 F.3d at 1130 n.5. And, even if this Court were to find stray dicta in those cases that could extend their holdings, it should expressly exclude cases in which state actors violate the constitutional rights of others under color of state law – the heartland of § 1983.

1. *Manistee* Does Not Support the District Court's Decision

The district court miscites *Manistee* as extending *Noerr-Pennington* immunity to allow state law-enforcement officials to misuse state-court proceedings (or the threat of such proceedings) to jeopardize a citizen's constitutional rights. *Cf. Manistee*, 227 F.3d at 1092-93 (immunizing only intergovernmental lobbying).

In *Manistee*, this Court reasoned that government officials sometimes speak on their constituents' behalf – they "intercede, lobby, and generate publicity to advance their constituents' goals." *Id.* It thus held that the government defendants there vicariously enjoyed *Noerr-Pennington* immunity derived from their constituents' First Amendment rights.[2] *Id.* It cited three cases to support its rule, *id.* at 1094, all of which involved municipalities engaged in intergovernmental petitioning outside the judicial arena:

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[2] There is reason to believe this rationale is unsound: The Supreme Court generally treats rights as personal and non-assignable. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (holding that one person may not invoke another's Fourth Amendment right to be free from unreasonable search).

In *Miracle Mile Assocs. v. City of Rochester*, the City of Rochester had been held immune from liability for petitioning state and federal agencies opposing the expansion of a shopping center. 617 F.2d 18, 20 (2d Cir. 1980).

- In *Fischer Sand & Aggregate Co. v. City of Lakeville*, City of Lakeville officials had been held immune from liability for petitioning state and local agencies opposing the opening of a gravel mine. 874 F.Supp. 957, 959-60 (D. Minn. 1994).
- And, in *County of Suffolk v. Long Island Lighting Co.*, the County of Suffolk had been held immune from liability for petitioning the U.S. Nuclear Regulatory Commission opposing the opening of a nuclear power plant. 710 F.Supp. 1387, 1390 (E.D.N.Y. 1989).

Subsequent cases are similar. For example, the Seventh Circuit held in *New West, L.P. v. City of Joliet* that "[a]s far as the national government is concerned, a municipality has a right to speak and petition for redress of grievances, so the *Noerr-Pennington* doctrine applies fully to municipal activities." 491 F.3d 717, 722 (7th Cir. 2007) (emphasis added).

Such municipal petitioning – where officials are "lobbying other government officials on behalf of their constituents" – is a far cry from "government-initiated litigation" against private parties. *Cf. Kearney*, 590 F.3d at 644-45. Lobbying is not the evil that § 1983 was created to address. *See Mitchum*, 407 U.S. at 239; *Monell*, 436 U.S. at 700-01. State officials depriving individuals of their civil rights with the assistance or acquiescence of state courts, however, is precisely the

evil § 1983 was created to curtail: "[S]tate courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U.S. at 240.

Manistee's reasoning makes clear this Court did not intend that *Noerr-Pennington* immunity would extend beyond lobbying to law-enforcement proceedings in state courts. This Court held there that "[t]he petitioning or lobbying of another governmental entity is insufficient to 'subject' or 'cause to be subjected' a person 'to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'" 227 F.3d at 1093 (quoting § 1983). Whether or not that is true, it is certainly true that state regulatory enforcement can subject a person to the deprivation of constitutional rights. That is precisely why both this Court and the Supreme Court routinely enjoin enforcement of unconstitutional state laws and regulations. *See, e.g.*, *Lukumi Babalu*, 508 U.S. at 528, 547; *Mitchum*, 407 U.S. at 227; *Am. Beverage Ass'n*, 916 F.3d at 749; *Video Software Dealers Ass'n*, 556 F.3d at 950; *CTIA-Wireless Ass'n*, 494 F. App'x at 752.

Thus, neither *Manistee*'s rule nor its reasoning supports extending *Noerr-Pennington* to Defendants' conduct here.

2. *Kearney* Does Not Support the District Court's Decision

The district court also relies on dicta from this Court's decision in *Kearney* implying that a governmental entity enjoys vicarious immunity whenever it "acts on behalf of the public it represents." (1-ER-4-5

(citing *Kearney*, 590 F.3d at 644-45).) The case does not stand for such a sweeping proposition.

First, the *Kearney* Court rejected immunity, finding that the defendant-municipality had engaged in sham litigation tactics in pursuing eminent-domain proceedings. *Id.* at 646-48. Accordingly, its suggestion "[t]here is no reason to limit *Manistee*'s holding to lobbying efforts" was unnecessary to its conclusion that plaintiff's claim should proceed. *Cf. id.* at 644.

Kearney also involved municipal officials and their agents, not state actors threatening or filing state court litigation to foist unconstitutional speech upon food companies. *Id.* at 641. *Kearney*'s bottom line that "a governmental entity or official may receive *Noerr-Pennington* immunity for the petitioning involved in an eminent domain proceeding" does not bear upon whether state law-enforcement actors enjoy *Noerr-Pennington* immunity for misusing state courts to abuse citizens' constitutional rights. *Cf. Kearney*, 590 F.3d at 644. Further, the underlying state lawsuit against B&G Foods is not a municipal eminent-domain proceeding; it is a state enforcement action directly impinging upon First Amendment rights. State officials or their agents petitioning in state court are categorically different because they are petitioning the very government of which they are a part. Conflating that type of petitioning with the intergovernmental petitioning in *Manistee* and *Kearney* is error: As the Fifth Circuit recognized, "it is impossible for the government to petition itself within the meaning of the first amendment." *Video Int'l*, 858 F.2d at 1086.

The district court's application of *Kearney* is incorrect for other reasons as well. It implies that states have blanket immunity in all enforcement

actions (whether in state court or otherwise) because they are nominally acting on behalf of the public. (1-ER-4-5.) If that were the case, § 1983 would be surplusage and there would be no need for prosecutorial immunity or any number of other abstention doctrines. Nonetheless, the district court relied on a tortured reading of *Kearney's* dicta to vitiate a bedrock civil-rights protection. No other case has ever done so and this Court should not allow it to remain the first.

II. The District Court Erred by Making Factual Findings Contrary to the Complaint's Detailed "Sham Litigation" Allegations

Noerr-Pennington does not extend where the plaintiff has engaged in acts tantamount to "sham litigation" or a fraud on the court. The Supreme Court long has held that such abuses require close factual scrutiny before ever applying the doctrine to shield liability. *See, e.g.*, *Noerr*, 365 U.S. at 144; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982) (evidence that defendants filed tariff protests "automatically and without regard to merit" was sufficient to create triable issue of fact).

Whether the sham exception applies "is a question of fact," and on a motion to dismiss, allegations that the underlying litigation was a sham "must be assumed true." *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 352 (9th Cir. 2014).[3] Here,

[3] At the motion to dismiss stage, courts also must "accept a plaintiff's allegations as true and construe them in the light most favorable to the plaintiff." *Schueneman v. Arena Pharm., Inc.*, 840 F.3d 698, 704 (9th Cir. 2016) (reversing district court's dismissal based on inferences drawn against the plaintiff).

however, the district court did the opposite and ignored the Complaint's dozens of allegations regarding Appellees' abusive activity. (*See* Order at 5 (making factual finding and inference that because Appellees had obtained settlements, their conduct must "not [be] a sham, at least not completely").) For this reason as well, the judgement should be reversed and remanded.

A. Sham Litigation Tactics Are Not Protected by *Noerr-Pennington*

In *Noerr*, the Supreme Court explained that when "a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere with the business relationships of a competitor, . . . the application of the Sherman Act would be justified." 365 U.S. at 144. As *Noerr-Pennington* immunity has been expanded outside the antitrust context, so too the sham exception has been expanded to address more than just competitive injuries. The *sine qua non* of the modern sham exception is "some abuse of process." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982). "Neither the Petition Clause nor the *Noerr-Pennington* doctrine protects sham petitions, and statutes need not be construed to permit them." *Sosa*, 437 F.3d at 932.

Whether the sham exception to the *Noerr-Pennington* doctrine applies "is a question of fact," and on a motion to dismiss, allegations that the underlying litigation was a sham "must be assumed true." *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 352 (9th Cir. 2014); *Kearney*, 590 F.3d at

646. Thus, in *Kearney*, this Court accepted as true allegations that the defendant had made "intentional misrepresentations to the court, and [perpetrated] fraud upon the court through the suppression of evidence." *Id.* at 646-47. In contrast, the district court had required additional "support" for such allegations, which this Court held was error. *Id.* As in any other litigation, a plaintiff claiming that the underlying litigation is a sham need only allege "enough facts to . . . nudge[] their claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).[4]

The scope of the sham exception depends on the type of government entity being petitioned. *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998). It is at its broadest where, as here, the petition is addressed to the judicial branch. *Id.* at 1060-61. "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Cal. Motor Transp.*, 404 U.S. at 513.

In the context of litigation, this Court recognizes three types of sham exception: Litigation for unlawful or unconstitutional purposes, routine filing of meritless litigation, and fraud upon the court. *Kottle*, 146 F.3d

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[4] This Court has at times suggested that allegations of a sham require a "heightened pleading standard," but it has since clarified that "heightened pleading standards should only be applied when required by the Federal Rules." *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1063 (9th Cir. 1998); *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1055 (9th Cir. 2005). In any event, *Kottle* was decided before *Twombly*, when the operative pleading standard was "whether the plaintiff could prove *any* set of facts that would entitle him to relief." 146 F.3d at 1063 (emphasis in original).

at 1060; *Freeman v. Lasky, Haas & Cohler*, 410 F.3d at 1184. Each exception is further described below.

1. Test #1: Does the Activity Involve Illegal and/or Unconstitutional Objectives?

The first test applies when a complaint concerns only one or a few lawsuits. Usually, in such cases, the test has an objective and a subjective component: The plaintiff must allege "both that the legal claim is objectively baseless and that the suit was brought for an [abusive] purpose." *Sosa*, 437 F.3d at 938; *Kottle*, 146 F.3d at 1060; *see also Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 492 (9th Cir. 2010) ("In the antitrust context, lawsuits that are both objectively baseless and subjectively intended to abuse process constitute 'sham petitioning' and are therefore stripped of First Amendment protection." (emphasis added)).

But in some contexts, such as labor relations, the plaintiff need satisfy only the subjective prong and allege that "a lawsuit has an illegal objective." *Small*, 611 F.3d at 492; *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000). This Court has explained that this broader version of the exception applies in the labor context because "[t]he employer's right of expression has to be balanced against the equal rights of the employees to associate freely." *White*, 227 F.3d at 1237 (quotation marks omitted) (emphasis added). When such balancing is required, if a plaintiff alleges that the underlying lawsuit was filed with an illegal objective like retaliating against an employee, the case comes within the sham exception and survives a motion to dismiss. *Id.* at 1236-37; *Bill Johnson's Restaurants,*

Inc. v. N.L.R.B., 461 U.S. 731, 744 (1983); *Small*, 611 F.3d at 492.

2. Test #2: Does the Activity Involve Routine Filing of Meritless Cases?

The second sham-litigation test applies when a complaint concerns a "series of lawsuits." *Kottle*, 146 F.3d at 1060. In such cases, the question is not whether any one of the underlying suits has merit – "some may turn out to, just as a matter of chance" – but whether the underlying suits are brought "pursuant to a policy of starting legal proceedings without regard to the merits" and for an abusive or "unlawful" purpose. *Id.* (quotation marks omitted); *Sosa*, 437 F.3d at 938. If so, the underlying lawsuits are a sham and the plaintiff's claim may proceed.

3. Test #3: Is the Activity Effectively a Fraud on the Court?

Finally, allegations of fraud upon a tribunal can bring a case within the sham-litigation exception because supplying courts with fraudulent information "threatens [their] fair and impartial functioning" and thus "does not deserve immunity." *Clipper Exxpress*, 690 F.2d at 1261; *Kottle*, 146 F.3d at 1060; *see Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 616 (6th Cir. 2009) ("an allegedly false statement is not immunized by the Petition Clause"). Thus, "a party's knowing fraud upon, or its intentional misrepresentations to, the court" can "deprive the litigation of its legitimacy" and turn the litigation into a sham. *Kottle*, 146 F.3d at 1060 (quotation marks omitted).

Here, B&G Foods presented allegations satisfying each of these tests, particularly at the pleading stage for purposes of Rule 12(b)(6).

B. The District Court Ignored B&G Foods' Detailed Allegations of Appellees' Sham Litigation Conduct

The Complaint contains detailed allegations of Appellees' frequent and notable misuse of Proposition 65 to coerce significant financial payments to themselves (and the State). The lower court ignored those facts and drew opposite inferences instead. For the reasons above and below, this requires reversal.

1. Appellees' Litigation Has an Illegal Objective

As in the labor-relations context, Appellees' rights under the Petition Clause must be balanced against B&G Foods's equal or greater right against false compelled speech. *See Barnette*, 319 U.S. at 642; *supra*, Part II.A.1. Thus, B&G Foods need only allege that Appellees have the "subjective intent to use legal process to achieve the evil prohibited by [§ 1983]." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1079 n.6 (9th Cir. 2004).

B&G Foods more than sufficiently alleged that Appellees "seek[] to compel speech that is literally false, misleading, and factually controversial." (Compl. ¶ 79; *see also id.* ¶ 65 ("Defendants notified the State and Plaintiff that they intend to require Plaintiff to place a warning label on all Cookie Cakes to tell consumers that the products cause cancer." (emphasis added))). Such violation of the First Amendment *is* the evil prohibited by § 1983: "Section 1983 opened the

federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Thus, Appellees' litigation is a sham under the first type of sham exception.

2. Appellees Have Filed a Series of Lawsuits Without Regard to the Merits

Appellees threatened suit against (and have now sued) B&G Foods without regard to the merits. They know, because B&G Foods informed them, that "the products at issue could not possibly violate Proposition 65." (4-ER-602 ¶ 70.) They know, because B&G Foods informed them, that California's most knowledgeable acrylamide regulator "conceded in 2007 that acrylamide is not actually known to cause cancer in humans." (4-ER-600-601 ¶ 59.) They know, because B&G Foods informed them, that the acrylamide in B&G Foods's products meets the "No Significant Risk Level" safe-harbor threshold. (4-ER-598-599, 4-ER-599-600 ¶¶ 44, 50.) Nevertheless, they "persisted in threatening suit against Plaintiff despite having no evidence that acrylamide or Cookie Cakes poses any health risk." (4-ER-590 ¶ 4.)

Knowing all this, they filed suit anyway because they are "serial enforcement agents under California's Proposition 65 regime," who get paid to bring these actions in the form of 25% of the penalties they collect plus their supposed fees. (4-ER-589-590 ¶¶ 1, 7.) They have filed or threatened to file "dozens of cases about acrylamide against a variety of food businesses and retailers, including Plaintiff." (4-ER-589-590 ¶¶ 2, 7.) As this Court has recognized, "having to defend a whole

series of such proceedings can inflict a crushing burden on a business." *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994). The only way to avoid such a burden is to "enter extortive monetary settlements with State representatives like Defendants, even though [B&G Foods has] attempted to comply in good faith and has made a product which poses no health risk." (4-ER-600 ¶ 52.)

One California jurist characterized this scheme – accurately – as "judicial extortion." *SmileCare* (Vogel, J., dissenting). Defendants' bevy of acrylamide lawsuits shows that they "did not have the requisite legitimate intent to influence government that is necessary to invoke the first amendment protections of *Noerr*." *Clipper Exxpress*, 690 F.2d at 1255 n.22. Instead, their intent is to shake down innocent food companies and coerce quick settlements. (4-ER-589-590, 597, 599-600 ¶¶ 1-4, 7, 35, 47-52.) Alternatively, their intent is to actually compel B&G Foods and their other victims to engage in false speech. *See supra* Part II.B.1. Either way, they have the abusive intent or unlawful purpose required to allege that their raft of lawsuits was in fact a sham. *See Kottle*, 146 F.3d at 1060.

3. Appellees' Litigation is a Fraud Upon the Court

The heart of Defendants' allegations is that acrylamide causes cancer in human beings. They assert: "Decades of research have produced strong evidence that acrylamide causes various cancers in laboratory animals, and that the same mechanisms that result in adverse effects from acrylamide exposures in animals also exist in humans. . . . Based on these and other

studies, many scientific and government organizations have identified acrylamide as a probable human carcinogen[.]" (2-ER-122.) This assertion is false. (4-ER-594 ¶¶ 22-23 ("Plaintiff's Cookie Cakes are not dangerous. They do not cause cancer in people and Defendants have no evidence to the contrary.").) What is more, Defendants know that their assertion is false, because B&G Foods told them so before they filed suit and provided them with ample evidence, including the testimony of OEHHA's most knowledgeable acrylamide regulator and OEHHA's decision that acrylamide in coffee did not increase human cancer risk. (4-ER-600-602 ¶¶ 59-60, 70.) Defendants' intentional misrepresentations "go to the central issue of the [underlying] litigation" and therefore deprives it of its legitimacy. *Kearney*, 590 F.3d at 647 n.2. Thus, their litigation is a sham and they are not entitled to *Noerr-Pennington* immunity.

4. The District Court's Ruling Ignored B&G Foods's Allegations

The Court summarily rejected B&G Foods's allegations of sham litigation, ruling that Appellees' conduct "is not a sham, at least not completely" because some defendants in other cases were successfully extorted to avoid years of litigation and the threat of compelled (false) speech:

> A plaintiff's successful history in the disputed litigation may rebut claims of a sham . . . B&G's own allegations show Embry and Glick's litigation is not a sham, at least not completely. B&G claims 'over the last few years [they] have extracted nearly $1.7 million in penalties and fines from food

> companies' in acrylamide lawsuits. The *Noerr-Pennington* doctrine thus bars B&G's complaint, which must be dismissed.

(Order at 5 (citing USS-POSCO Industries v. Contra Costa Cty. Bldg. & Const. Trades Council., AFL-CIO, 31 F.3d 800, 811 (9th Cir. 1994)).)

The ruling effectively ignores all of the Complaint's detailed allegations that (i) Appellees knowingly bring their false acrylamide lawsuits in order to extort large cash payments for themselves and the State (4-ER-589-590 ¶¶ 2-3), (ii) Appellees know nothing about the accused products, nothing about natural acrylamide or how it might interact with the human body (4-ER-590, 594-595 ¶¶ 4, 22-31), and (iii) nothing about whether B&G Foods's products could ever somehow cause cancer (id. at ¶¶ 22-31.) The Complaint further details how Appellees and the State reap millions of dollars from food companies every year simply by threatening them with sham claims that will cost more to defend than actually litigate. (4-ER-598-600 ¶¶ 42-50.) As a result, the vast majority of businesses elect to pay enforcers like Appellees even where there is no evidence the product poses any risk of harm, because of the uncertainty and expense of litigation. (4-ER-600 ¶¶ 51-52.)

The district court did not address any of these allegations, much less treat them as true or draw reasonable inferences in B&G Foods's favor. Instead, the court did the opposite – drawing inferences against the plaintiff that because some businesses had paid Appellees money, those claims must have had merit. That is an impermissible inference on a motion to dismiss because the alternative inference – that those

businesses settled for less than the cost of defense – is equally plausible, if not more so.

More fundamentally, the district court's reasoning is fatally flawed because it ignores that this Court has outlined several paths to show that underlying litigation is a sham, of which only one – the variant of the first test used when the plaintiff does not have competing First Amendment rights – requires that the underlying suit be objectively meritless. *See supra* Part II.A.1. Here, because Appellees' supposed First Amendment rights must be "balanced against" B&G Foods's right against compelled speech, B&G Foods need only allege under the first test that Appellees' suit had an unconstitutional objective. *White*, 227 F.3d at 1236-37; *Small*, 611 F.3d at 492. It has done so. *See supra* Part II.B.1. Under the second test, B&G Foods need not show that all of Appellees' suits are objectively meritless, but only that Appellees bring their series of lawsuits without regard to the merits. *See supra* Part II.A.2. It has done so. *See supra* Part II.B.2. And under the third test, the merit of the underlying suit or suits is not a factor at all. *See supra* Part II.A.3. B&G Foods has met the required showing under that test as well. *See supra* Part II.B.3.

Accordingly, Appellees' state litigation against B&G Foods is a sham and is "not protected by the Petition Clause of the First Amendment," *Small*, 611 F.3d at 493. The district court should not have dismissed the Complaint.

III. The District Court Abused Its Discretion by Denying Leave to Amend

B&G Foods requested, but was never given, an opportunity to amend or supplement its allegations,

whether in response to the Court's *Noerr-Pennington* concerns or otherwise. (2-ER-58 (B&G Foods could "certainly add" additional facts to support its claims).) Accordingly, even if dismissal was not in error, the district court should have granted B&G Foods's requests for leave to amend, which were made in its opposition papers and at the hearing. Because no amendment of the Complaint was ever provided, the district court abused its discretion and its decision should be remanded to permit amendment.

A. The Federal Rules Mandate that Leave to Amend is Freely Given

A court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). This Court has "stressed Rule 15's policy of favoring amendments." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation marks omitted). Even if a party fails to ask for it, a district court should grant leave to amend, unless "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1103 (9th Cir. 2018) (quotation marks omitted).[5]

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[5] *See, e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 692 (9th Cir. 2001) ("dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment"); *McMullen v. Fluor Corp.*, 81 F. App'x 197, 198 (9th Cir. 2003) (Where there have been no prior amendments to the complaint, and where the sole basis for denying leave to amend is futility, the district court has only "limited discretion" to dismiss with prejudice); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend should be given unless plaintiff's actions

These principles apply with even greater force to the sham-litigation exception, whose applicability is a deeply fact-intensive question. *Rock River Commc'ns*, 745 F.3d at 352; *California Motor Transp.*, 404 U.S. at 515.

B. B&G Foods Presented Numerous Grounds for Amendment

The district court denied leave to amend based on the following analysis:

> Amendment would be futile here. The *Noerr-Pennington* doctrine would apply equally to all claims based on Embry's acrylamide litigation against B&G. At hearing, B&G was not able to propose viable amendments. Dismissal is thus granted with prejudice.

(1-ER-6.) This conclusion contradicts the Complaint on multiple levels, as well as counsel's arguments at the hearing.

To begin, the district court incorrectly states that B&G Foods could not plead any additional facts in an amended complaint. However, B&G Foods *did* propose amendments when asked at the hearing, including additional factual allegations that Plaintiffs' claims

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are inhabited by "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment"); *Broudo v. Dura Pham.*, 339 F.3d 933, 941 (9th Cir. 2003) ("Where the plaintiff offers to provide 'additional evidence' that would add 'necessary details' to an amended complaint and such offer is made in good faith, leave to amend should be granted.").

are a sham and not immunized by *Noerr-Pennington*, including that:

- B&G Foods's products unquestionably qualify for the NSRL safe harbor, and so Defendants' lawsuits are objectively baseless (2-ER-59);
- Defendants failed to perform any kind of assessment that exposure from B&G Foods's products would exceed the NSRL, and so Defendants filed suit without regard to the merits (2-ER-58-59);
- Defendants generally do not prevail in court but obtain quick settlements for less than the cost of defense, with a pittance in statutory penalties but hefty attorney's fees (2-ER-137); and
- Defendants intended to file successive, meritless claims against B&G Foods in further violation of its First Amendment rights. (2-ER-58.)

In addition, B&G Foods could buttress its complaint with additional facts showing that Appellees file their claims without regard to the merits, that they undertake no efforts to investigate their claims, and that no court has determined that Appellees' claims have any merit following a fully contested hearing or trial.

Given that B&G Foods could make non-futile amendments to the complaint, the district court's dismissal with prejudice is error. The district court did not consider any of the other *Foman* factors, nor would any support denial of leave to amend. Appellees would suffer no prejudice, as the case remains in its infancy.

B&G Foods was not dilatory nor did it act in bad faith – it was never given leave to amend its complaint prior to the district court's dismissal. This is a separate and independent basis for reversal.

IV. The District Court's Decision Correctly Assumed that Appellees are "State Actors"

The district court assumed that Appellees are state actors, effectively endorsing the Complaint's well-pleaded allegations on the subject. (1-ER-4-6.) This assumption was inexorable in light of the extensive factual allegations of the Complaint.

The state-actor doctrine extends Section 1983 liability to private parties such as Appellees who (i) attempt to deprive plaintiffs of rights secured by the Constitution or federal statutes, while (ii) acting under color of state law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 930-31 (1982). This "is a highly factual question," requiring a careful "sifting" of the "facts and circumstances" in order "to ferret out obvious as well as non-obvious State involvement in private conduct." *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1210 (9th Cir. 2002) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). Since the state action requirement was first articulated over a hundred years ago, "[s]everal tests have emerged" by which courts conduct this analysis. *Brunette*, 294 F.3d at 1210.

The Complaint plausibly alleges that all five of these tests independently warrant finding that Appellees act under color of state law: (1) the public function test; (2) the joint action test; (3) the symbiotic relationship test; (4) the state compulsion test; and (5) the governmental nexus test. The Court need only find one

satisfied to deny a motion to dismiss. *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002). Here, all five are met.

A. Appellees Perform a Public Function

The first way in which Appellees are easily deemed public actors is under "public function" test. "Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to constitutional limitations." *Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002) (citation and quotation marks omitted). Appellees exercise a function that is traditionally and exclusively governmental in nature: enforcing a public health law – one concerning food labeling, no less – on behalf of the public interest. (4-ER-591, 597-598 ¶¶ 9, 32-42.) *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (the "structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons") (quotation marks and citation omitted) *Hill v. Colo.*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.") (quotation marks omitted); *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428 (1963) ("the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power"); *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power.").

Food labeling is likewise a traditional governmental function. *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1963) ("States have always possessed a legitimate interest in the protection of their people . . . in the sale of food products at retail markets within their borders." (quotation marks omitted)); *Plumley v. Mass.*, 155 U.S. 461, 472 (1894) ("If there be any subject over which it would seem the states have plenary control . . . it is the [regulation] of the sale of food products."). This is particularly true in California, which has been regulating food labeling since the 1860s. *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008); *see also Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 959-81 (2004) (recounting California's centuries-long history of food regulation).

And the history of Proposition 65 shows it was intended to enhance the State's regulation of public health. Ballot Pamp., Proposed Law, Gen. Elect. (Nov. 4, 1986), p. 53 (declaring Proposition 65 was necessary "[t]o secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public safety") Stated differently, "citizen enforcement was conditioned upon the failure of state and local governments to commence or diligently prosecute an action, after due notice." *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 748 (2001).

B. Appellees Acted "Jointly" with the State

A second way in which Appellees are state actors is their "joint action" with California's Attorney General's office. The joint action test is satisfied where "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged

activity." *Brunette*, 294 F.3d at 1210 (citation omitted). Such was the case in *Lugar*, where a creditor who used a state prejudgment attachment statute acted under color of state law by using the judicial system to attach a debtor's property. *Lugar*, 457 U.S. at 942.

As detailed in the Complaint (4-ER-597-598 ¶¶ 32-42), this level of joint activity is present because the statutory rights to both commence and resolve private enforcement actions derive from the Attorney General's enforcement authority. Private enforcers cannot commence an action until at least 60 days after the Attorney General has had the opportunity to review a notice, and then only if the Attorney General has not begun prosecuting the alleged violation himself. Health & Safety Code § 25249.7(d). Private enforcers cannot resolve an action unless they provide a copy of a proposed settlement to the Attorney General, to provide him the chance to review whether the settlement is consistent with the public interest. *Id.* § 25249.7(f). Private enforcers thus cannot bring any action in the public interest unless Attorney General acts jointly with them to approve their claim. (4-ER-591 ¶¶ 9(b)-(d).)Indeed, as the Attorney General has stated when advocating for Proposition 65 amendments to increase its oversight, the Attorney General "monitor[s] such litigation from the notice through judgment/settlement stage." (Initial Statement of Reasons, Revision of Chapters 1 and 3, Tit. 11 C.C.R. (2016) at 1, available at https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/prop-65-isor.pdf.)

As alleged in the Complaint, this cradle-to-the-grave oversight can lead to the Attorney General ending Proposition 65 claims or proposed settlements. All claims must be reviewed by the Attorney General and

if the Attorney General concludes the claim has no merit, he must serve a letter stating so on the enforcer. (4-ER-591 ¶ 9(b).) While private enforcers can still proceed if they receive a no-merits letter, private enforcers do so at the risk of being sanctioned if there was "no actual or threatened exposure to a listed chemical." Cal. Health & Safety Code § 25249.7(h)(2). And in fact, these objections appear to be heeded in most cases as many notices – including many notices issued for acrylamide – never make it past the 60-day stage. For example, in 2020, Appellees withdrew 11 notices just weeks after issuing them – because they are acting jointly with, and under the supervision of, the State.

C. Appellees Have a "Symbiotic Relationship" with the State

The third way in which Appellees are state actors is that they enjoy a "symbiotic relationship" with the State. Symbiosis occurs when the government has "so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity" such as when there is "significant financial integration." *Brunette*, 294 F.3d at 1213 (citations omitted).

The Supreme Court first established the symbiotic relationship test in *Burton v. Wilmington Parking Authority*, where it found a private restaurant located in a public parking garage acted under color of state law when it refused to serve African American customers. 365 U.S. 715, 716 (1961). The restaurant was located in the parking garage and benefitted from the Parking Authority's tax exemption and maintenance of the premises, and the Parking Authority received "indispensable" funding from the restaurant that

maintained its viability. *Id.* at 719-20. Because the Parking Authority had decided "place its power, property, and prestige behind the admitted discrimination," it constituted state action. *Brunette*, 294 F.3d at 1213 (citing *Burton*, 356 U.S. at 725).

As alleged in the Complaint, the State and private enforcers profit from the prosecution of Proposition 65 claims and derive benefits from the alleged benefits to public health. (4-ER-591-592, 597 ¶¶ 9(d), 33-36.) In fact, the State routinely satisfies almost one-sixth of its annual Proposition 65 budget from enforcement actions like the one at issue here:

Year	**OEHHA Budget**	**Prop. 65 Civil Penalties**	**Percentage of Funding**
2017-18	$23.453 Million	$3.702 Million	15.8%
2018-19	$28.615 Million	$4.764 Million	16.6%
2019-20	$28.362 Million	$3.909 Million	13.8%
Total	**$80.43 Million**	**$12.38 Million**	**15.4%**

(2-ER-113.)

Private enforcers benefit by the state's creation of a "private enforcement scheme" that deputizes them to collect millions in civil penalties and enforcement fees, all under the supervision of the Attorney General and the backing of the Office's "power" and "prestige." And the Attorney General benefits through the prosecution of public health enforcement actions he himself

is not capable of prosecuting, which secure injunctive relief and in millions of dollars of penalties each year. Such is the essence of symbiosis. *Adams v. Vandemark*, 855 F.2d 312, 314 (6th Cir. 1988) (symbiosis is a "relationship in which each partner does for the other something which the other partner needs but cannot do for itself.").

D. Appellees Hold Massive Coercive Power Sufficient to Meet the State "Compulsion Test"

The fourth way in which Appellees are state actors is the State's encouragement of their "enforcement" efforts. A private party becomes a state actor where the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor's] choice must in law be deemed to be that of the state." *Naoko Ohno v. Uuko Yasuma*, 723 F.3d 984, 995-96 (9th Cir. 2013) (citation and quotation marks omitted).

Here, the Attorney General, as the "one party who necessarily represents the public interest in any Proposition 65 litigation," makes private enforcement of Proposition 65 possible by fulfilling his statutory duty of reviewing 60-day notices and proposed settlements. On top of making private enforcement possible and allocating civil penalties to private enforcers, the Complaint details how the Attorney General actively encourages private enforcers to enforce Proposition 65. (4-ER-591-592, 597-598 ¶¶ 9, 32-42.)

E. Appellees Have a "Close Nexus" with the State

Finally, there is a sufficiently close nexus between Appellees and the State, such that their actions may be fairly treated as that of the State itself. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Such nexus exists when there is "public entwinement in the management and control of" ostensibly private actors. *Id.* at 297 (interscholastic athletic association comprised of many public schools was a state actor); *see also Thomas S. v. Morrow*, 781 F.2d 367, 377-78 (4th Cir. 1986) (state-appointed guardian was state actor where guardian had custody of ward and obtained significant aid from state officials).

Appellees' enforcement of Proposition 65 is thus closely entwined with the State, which encourages their lawsuits, monitors their settlements, and receives a cut of all the monies they receive. They do not function as independent, private parties but rather as an adjunct of the State, meant to supplement the State's enforcement efforts.

CONCLUSION

For each reason above, the district court's judgment dismissing the case should be reversed and B&G Foods's claims permitted to proceed to discovery.

Respectfully Submitted,

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Dated: February 16, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 12,124 words.

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: */s/ J. Noah Hagey*
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Attorneys for Plaintiff/Appellant
B&G Foods North America, Inc.

Dated: February 16, 2021

BRIEF OF AMICUS CURIAE CONSUMER BRANDS ASSOCIATION URGING REVERSAL (MARCH 1, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

Plaintiff/Appellant,

v.

KIM EMBRY AND NOAM GLICK,

Defendants/Appellees.

No. 20-16971

Appeal from Judgment of the United States District Court for the Eastern District of California District Court Case No. 2:20-cv-00526-KJM-DB (Honorable Kimberly J. Mueller, Chief District Judge, Presiding)

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BRIEF OF AMICUS CURIAE CONSUMER BRANDS ASSOCIATION URGING REVERSAL

CORPORATE DISCLOSURE STATEMENT

Consumer Brands Association ("CBA") is a nongovernmental corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

INTEREST OF AMICUS CURIAE

With consent of all parties, *amicus curiae* Consumer Brands Association ("CBA") respectfully submits this brief urging reversal of the District Court order of dismissal and judgment addressed herein.[1]

CBA champions the industry whose products Americans depend on every day. From household and personal care to food and beverage products, the consumer-packaged goods industry plays a vital role in powering the U.S. economy, contributing $2 trillion to U.S. gross domestic product and supporting more than 20 million American jobs.

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[1] Counsel for the parties have not authored this brief in whole or in part. No one other than *amicus* and its members contributed money that was intended to fund preparing or submitting this brief.

CBA is a trade association that represents the world's leading consumer-packaged goods companies, as well as local and neighborhood businesses. The consumer-packaged goods industry plays a unique role as the single largest U.S. manufacturing employment sector, delivering products vital to the well-being of people's lives every day.

CBA has extensive experience with Proposition 65 and its impacts on consumer-packaged goods companies, many of which have been the subject of the highest profile Proposition 65 cases. Proposition 65 enforcement actions, such as those seeking to compel a false cancer warning on a food product, negatively impact CBA members and their products and create consumer confusion by encouraging unwarranted, false, and misleading warnings on wholesome foods. CBA has a strong interest in protecting consumers' rights to accurate information about the foods they purchase and eat.

For these reasons, CBA and its members have a direct interest in the subject matter of this appeal.

INTRODUCTION

This case is about false compelled speech in violation of the First Amendment. The First Amendment, as applied to the States through the Fourteenth Amendment, generally prohibits States from compelling speech to the same extent it prohibits States from restricting speech. Laws that require businesses to provide information in connection with commercial transactions are permissible only if the compelled disclosure provides information that is purely factual and uncontroversial, is reasonably related to a sub-

stantial government purpose, and is neither unjustified nor unduly burdensome. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372, 2377 (2018); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

California's Proposition 65 requires businesses to warn consumers about exposures to chemicals that are designated as being "known to the State to cause cancer." Cal. Health & Safety Code § 25249.6 *et seq*. This includes acrylamide—a naturally occurring chemical formed in the ordinary cooking processes for thousands of food and beverage products ranging from coffee to whole grain cereals to grilled asparagus to peanut butter. While no domestic or international health agency has ever concluded that acrylamide is a "known" human carcinogen—and epidemiological and toxicological evidence shows no association between dietary acrylamide consumption and cancer in humans-—Proposition 65 nevertheless requires that businesses that manufacture or sell food products containing this near-ubiquitous chemical convey the message that consuming their products increases consumers' cancer risk.

Businesses that refuse face a phalanx of private attorneys general: individuals and organizations who have suffered no harm to themselves, and who need not even purchase the products, but who have been deputized by the state statute to enforce its onerous commands. The incentives for private prosecution are overwhelming: (1) a 25 percent bounty on the staggering civil penalties available—up to $2,500 per unit sold; (2) recovery of attorney's fees under California's broad private attorney general statute; and (3) a burden of proof that requires these bounty hunters only to demonstrate the mere presence of acrylamide in a

product at any level in order to shift the burden to defendants, in expert-intensive litigation, to prove that the level is below an indeterminate standard at which a warning is required.

Businesses that manufacture for sale or sell food products in California are thus faced with a Hobson's choice: slap a false and stigmatizing warning[2] on their products or defend their products in state court to avoid being "slapped with an injunction and costly civil penalties." *See Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 344, 362 (2004). The threat of litigation these businesses face every day is far from theoretical, with private enforcers serving more than 450 notices of violation of Proposition 65 for alleged exposures to acrylamide in food products in 2020 alone. And no wonder there are so many lawsuits, since Proposition 65 allocates a "bounty" of 25 percent of the civil penalties to the private plaintiff. Cal. Health & Safety Code § 25249.12(d).[3] Indeed, numerous courts and commentators have recognized the widescale

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[2] A cancer warning on a food product is likely to dissuade the public from using the product and may also instill fear in the public given that such a warning necessarily "play[s] on the average consumer's well-founded fear of cancer." *Cf. FTC v. Pharmtech Research, Inc.*, 576 F.Supp. 294, 301 (D.D.C. 1983) (food supplement advertisement was misleading and "played on the average consumer's well-founded fear of cancer").

[3] The law's "provisions provide[] a powerful monetary incentive to file claims alleging California businesses have failed to provide appropriate warnings–whether or not those claims had any merit." Anthony T. Caso, The Federalist Society, *Bounty Hunters and the Public Interest-A Study of California Proposition 65* (March 22, 2012), https://fedsoc.org/commentary/publications/bounty-hunters-and-the-public-interest-a-study-of-california-proposition-65.

abuse of Proposition 65. *See, e.g., Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th 454, 477 (2001) (Vogel, J., dissenting).[4] Because of the law's unique burden shifting mechanism, businesses faced with the threat of costly litigation to prove a defense to Proposition 65's warning requirement often are forced to acquiesce and provide a warning, regardless of whether the businesses know the warning is affirmatively false or misleading—an outcome that delegitimizes warnings for chemicals that actually do cause cancer and fosters consumer apathy towards government warnings generally.

In this case, Appellant B&G Foods North America, Inc. ("B&G Foods") filed an action in the District Court seeking relief for the constitutional harm resulting from the enforcement of the Proposition 65 warning requirement for acrylamide. That requirement can only be enforced if it is consistent with the First Amendment. *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F.Supp.3d 1247 (E.D. Cal. 2020), *appeal docketed*, No. 20-16758 (9th Cir. Sept. 11, 2020). The District Court,

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[4] *See also* Alliance for Natural Health, Proposition 65: Evaluating Effectiveness and a Call for Reform, at 7 (2015),_https://www.anh-usa.org/wp-content/uploads/2015/09/Prop-65.pdf; Geoffrey Mohan, You See The Warnings Everywhere. But Does Prop 65 Really Protect You?, L.A. Times, July 23, 2020, https://www.latimes.com/business/story/2020-07-23/prop-65-product-warnings; Editorial, Warning: Too Many Warnings Signs are Bad for Your Health, L.A. Times, Sept. 30, 2017, https://www.latimes.com/opinion/editorials/la-ed-proposition-65-warning-coffee-20170930-story.html (noting "Starbucks, Whole Foods and about 80 other places in California that sell coffee" are exposed under Proposition 65 even though "research increasingly" indicates coffee does not cause cancer).

however, erroneously dismissed B&G Foods' constitutional claims based on the *Noerr-Pennington* doctrine.

CBA files this *amicus* brief because companies that make and sell food products containing acrylamide in California must be able to file lawsuits in federal court to protect their freedom of speech and vindicate their First Amendment rights. Companies need access to the federal courts to combat the evils of false compelled speech. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights–to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.") (citation and internal quotation marks omitted).

As discussed below, what is at stake in this case is whether the doors of the federal courthouse are open to protect the First Amendment rights of businesses subject to Proposition 65 enforcement actions seeking to compel false speech, and the rights of consumers to not be subject to false cancer warnings on their foods. The District Court's order of dismissal and judgment should be reversed because (1) Appellees' petition rights cannot supersede the First Amendment rights of B&G Foods to petition the government and be free from false compelled speech; (2) the District Court's finding that the sham litigation exception did not apply ignored the well-pleaded facts in the complaint; and (3) the *Noerr-Pennington* doctrine does not apply to declaratory relief claims.

BACKGROUND

I. Proposition 65's Private Enforcement Scheme

Proposition 65 prohibits businesses with ten or more employees from knowingly and intentionally exposing Californians to chemicals "known to the state to cause cancer or reproductive toxicity" without providing required warnings, unless an affirmative defense applies. Cal. Health & Safety Code § 25249.6. The statute imposes penalties of up to $2,500 *per day* for *each* failure to provide an adequate warning (*i.e.*, each instance a product is sold without an adequate warning). *Id.* §§ 25249.7(b)(1), (d). The statute also provides that any person who "threatens to violate" the warning requirement may be "enjoined in any court of competent jurisdiction." *Id.* § 25249.7(a).

The Attorney General, any district attorney, and certain city attorneys may bring an enforcement action under California Health & Safety Code § 25249.7 (c). In addition, any person may bring a private enforcement action on behalf of the public. *Id.* §§ 25249.7(c)-(d). Proposition 65 empowers these private enforcers to step into the shoes of the State and prosecute claims "in the public interest," if they first issue a valid 60-day notice and no public enforcer files a lawsuit in the intervening 60 days.[5] Cal. Health & Safety Code § 25249.7(d). These private enforcers, who have suffered no harm to themselves and need not even purchase the product, are eligible to recover 25 percent of the penalty (*id.* § 25249.12(d)), as well

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[5] The Attorney General of California has alternatively referred to private enforcers of Proposition 65 as "private prosecutor[s]." 2 ER 129:19-20.

as their reasonable attorneys' fees and costs (Cal. Code Civ. Proc. § 1021.5).

On top of these financial incentives, Proposition 65 is especially attractive for private enforcers because of the statute's unique burden shifting mechanism. To assert a Proposition 65 action, a private enforcer need only show that an exposure to a listed chemical occurred at any level. While Proposition 65 provides a "No Significant Risk Level" ("NSRL") affirmative defense that applies where an exposure "poses no significant risk assuming lifetime exposure at the level in question," the statute forces defendants to bear the burden of proving that alleged exposures do not exceed this level. Cal. Health & Safety Code § 25249.10(c); *see also DiPirro v. Bondo Corp.,* 153 Cal. App. 4th 150, 185, 187 (2007). The NSRL, moreover, is not a concentration limit, but rather is a daily exposure-based limit based on lifetime exposure at the level in question of the chemical. Thus, a business must demonstrate that this exemption applies to a particular product (in which the chemical level can vary from unit to unit) and the amount eaten by average consumers on a daily basis. *See, e.g., Envtl. Law Found. v. Beech-Nut Nutrition Corp.,* 235 Cal. App. 4th 307, 327-28 (2015). Proving this negative is a costly and time-consuming endeavor, typically requiring expert testimony and evidence. *See id.* at 313-14 (safe harbor defense litigated at trial). Under Proposition 65, therefore, contrary to centuries of Anglo-American law, a business is essentially presumed guilty unless it proves itself innocent.

II. Proposition 65's Impacts On Businesses

California judges have recognized the onerous nature of Proposition 65's private enforcement scheme. "[L]awsuits under Proposition 65 can be filed and prosecuted by any person against any business based on bare allegations of a violation unsupported by any evidence of an actual violation—or even a good faith belief that a defendant is using an unsafe amount of a chemical known by the state to cause cancer or reproductive toxicity." *Consumer Cause, Inc.*, 91 Cal. App. 4th at 477 (Vogel, J., dissenting) (emphases in original); *see also Consumer Def. Grp. v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1217 (2006) ("bringing Proposition 65 litigation is so absurdly easy").

As a result, in practice, businesses faced with the threat of costly litigation to prove a defense to the warning requirement often are forced to acquiesce and provide a warning, regardless of whether the warning is false or misleading. *See Consumer Def. Grp.*, 137 Cal. App. 4th at 1216 (private enforcement actions are "intended to frighten all but the most hardy of targets (certainly any small, ma and pa business) into a quick[] settlement") (footnote omitted); *SmileCare*, 91 Cal. App. 4th at 477-78 (Vogel, J., dissenting) (noting that Proposition 65's burden-shifting scheme results in "judicial extortion"). Courts have cautioned that this "over-warning" reduces the legitimacy of those warnings that are actually required.[6] While the state agency responsible for administering Proposition 65, the Office of

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[6] *See Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652, 660-61 (1991) (upholding OEHHA regulation exempting "naturally occurring" chemicals from Proposition 65 because it reduces "unnecessary warnings, which could distract the public from other important warnings on consumer products") (quoting

Environmental Health Hazard Assessment ("OEHHA") acknowledges that businesses accused of violating Proposition 65 bear the burden and costs of proving their innocence, it discourages businesses from providing unmeritorious warnings because of the negative effects of "over-warning."[7]

Statistics from the California Attorney General, who oversees private enforcers of the statute, show that concerns about the abuse of Proposition 65's private enforcement scheme are well-founded. Under Proposition 65, private parties are required to provide 60 days' notice—to the Attorney General, the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator—before initiating an enforcement action. *See* Cal. Health & Safety Code § 25249.7 (d)(1). The Attorney General maintains a publicly-available database of these 60-day notices. Office of the Attorney General, *60-Day Notice Search*, https://

OEHHA); *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 70 (2008) (over-warning "invite[s] mass consumer disregard and ultimate contempt for the warning process"); *Thompson v. Cty. of Alameda*, 27 Cal. 3d 741, 754-55 (1980) (recognizing that excessive warnings "produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public."); *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 392 (7th Cir. 2010) (concluding that over-warning "can dilute the effectiveness of valid warnings").

7 *See* OEHHA, *Businesses and Proposition 65*, https://oehha.ca.gov/proposition-65/businesses-and-proposition-65 ("Although a business has the burden of proving a warning is not required, a business is discouraged from providing a warning that is not necessary and instead should consider consulting a qualified professional if it believes an exposure to a listed chemical may not require a Proposition 65 warning.").

oag.ca.gov/prop65/60-day-notice-search ("AG Notice Database").

According to the AG Notice Database, private enforcers served 13,916 notices of violation between 2015 and 2020, equivalent to more than 2,000 notices per year, or approximately nine notices per weekday. AG Notice Database.[8] The number of 60-day notices filed in the last three years, moreover, exceeds the five-year average, as private enforcers filed 2,368, 2,409, and 3,514 notices in 2018, 2019, and 2020 respectively. *Id.* Last year's uptick in enforcement resulted not only in a record number of total notices served but also established a new high-water mark for one of private enforcers' favorite chemicals: acrylamide.

III. Enforcement of Proposition 65 For Acrylamide

OEHHA automatically added acrylamide to the Proposition 65 list of carcinogens in 1990 based on the U.S. EPA's determination that acrylamide was a "probable" human carcinogen and the International Agency for Research on Cancer's ("IARC") classification of acrylamide as "possibly carcinogenic to humans." *See* 4 ER 597:24-27; 4 ER 601:23 (IARC has since re-classified acrylamide as "probably carcinogenic to humans.")[9] Both the EPA and IARC classifications of acrylamide are based on studies in laboratory animals in which

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[8] The AG Notice Database contains a search function that allows users to filter notices based on date issued, plaintiff or plaintiff's attorney, defendant, chemical at issue, and product type.

[9] IARC, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Volume 60: Some Industrial Chemicals* (1994), https://publications.iarc.fr/Book-And-Report-Series/Iarc-Monographs-On-The-Identification-Of-Carcinogenic-Hazards-To-Humans/Some-Industrial-Chemicals-1994.

nearly pure acrylamide was administered to rats and mice. 4 ER 597:19-20. Both agencies, however, have concluded that epidemiological studies (*i.e.*, human studies) provide limited or no evidence of carcinogenicity in humans, and neither agency has ever classified acrylamide as a "known" human carcinogen. 4 ER 597:24-27.

Despite requiring that businesses warn consumers that acrylamide is a chemical "known to the state to cause cancer," the State has admitted under oath that it in fact does not know whether acrylamide actually causes cancer in humans. 4 ER 591:8-9. OEHHA has since recognized that acrylamide in certain food products —namely, coffee—does not pose a risk of cancer in humans. In June 2019, OEHHA adopted a new regulation that states: "Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the process of roasting coffee beans or brewing coffee do not pose a significant risk of cancer." Cal. Code Regs. tit. 27, § 25704. OEHHA explained that "[t]he weight of the evidence from the very large number of studies in the scientific literature does not support an association between the complex mixture of chemicals that is coffee [including acrylamide] and a significant risk of cancer." 4 ER 602:11-12.

Since the discovery of acrylamide in foods, over a dozen private enforcers—at times joined by the Attorney General, *see* 2 ER 133:5-15—have pursued Proposition 65 enforcement actions for alleged failures to warn about acrylamide in food. Although acrylamide has been on the Proposition 65 list for 30 years, however, the number of pre-litigation notices has grown exponentially over recent years. In 2015, private enforcers

filed just three notices, a number that increased to 32 notices in 2016. *See* AG Notice Database. Private enforcers served acrylamide notices in record numbers for each of the next three years, serving 144, 147, and 205 notices in 2017, 2018, and 2019. *Id.* In 2020, private enforcers shattered the record set the previous year, serving 453 notices for alleged exposures to acrylamide in food products. *Id.*

Appellees have played and continue to play an integral role in the explosion of acrylamide enforcement actions. Since first emerging as a private enforcer of Proposition 65 for acrylamide in February 2017, Ms. Embry has served more than 260 notices of violation for alleged exposures to the chemical, an average of more than 60 notices per year. *Id.* For all of these notices, either the Glick Law Group, or its co-counsel in this action, Nicholas & Tomasevic LLP, has represented Ms. Embry. *Id.* All of these notices have caused businesses operating in California to necessarily incur legal fees and expert costs, but according to the AG Notice Database, Ms. Embry has withdrawn 129 of these notices, just under half of the notices she has served for the chemical. *Id.* She has filed complaints based on 73 of the 260-plus notices she has served for acrylamide. *Id.* Ms. Embry's scattershot "serve and see" approach, however, has proven lucrative for her and her attorneys, with Ms. Embry having entered into 25 cost-of-defense or nuisance settlements for alleged exposures to acrylamide, for a total of $46,750 in in civil penalties paid to Ms. Embry[10] and $1,291,000 in fees paid to her attorneys. *See id.*

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10 Embry's 25 settlements for alleged exposures to acrylamide netted a total of $187,000 in civil penalties. Per Proposition 65's

ARGUMENT

I. The District Court's Ruling Improperly Granted Greater Protection to Appellees' Right to Petition Than to B&G Foods' Free Speech Rights

In dismissing B&G Foods' complaint based on the *Noerr-Pennington* doctrine, the District Court improperly elevated Appellees' right to petition over B&G Foods' rights to petition and to free speech. Longstanding First Amendment jurisprudence establishes that the rights to petition and to freedom of speech are "cut from the same cloth." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). In *McDonald v. Smith*, the Supreme Court held that the Petition Clause does not provide absolute immunity to a defendant in a libel action who allegedly expressed libelous and damaging falsehoods in letters to the President regarding a potential candidate for U.S. Attorney. The Court reasoned that the Petition Clause does not have "special First Amendment status" (*id.* at 485) and further explained the relationship between the First Amendment rights as follows:

> The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the

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implementing regulations, 75% of these penalties ($140,250) were paid to OEHHA.

> President than other First Amendment expressions.

McDonald, 472 U.S. at 485 (citations omitted). In this manner, the Supreme Court has made clear that one First Amendment right does not have priority over the other.

The District Court's decision conflicts with the principle set forth by the Supreme Court in *McDonald* and—without any relevant authority, analysis, or precedent—it dramatically extends the *Noerr-Pennington* doctrine. The two cases cited by the District Court do not involve the plaintiff's First Amendment speech rights, and thus neither supports this unwarranted extension. *See Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1091 (9th Cir. 2000) (plaintiff-appellant alleged that defendant's petitioning activity deprived it of its property (potential lease contracts) without due process of law); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 641 (9th Cir. 2009) (plaintiff-appellant alleged that defendants' petitioning activity deprived her of the value of her property due to their failure to disclose a test report in the valuation trial). CBA has found no published decision that has foreclosed a plaintiff's First Amendment speech claim on the basis of the *Noerr-Pennington* doctrine, and there is no justification in this case for extending the doctrine in this manner.

Indeed, if anything, this case presents a situation that merits an express limitation on the *Noerr-Pennington* doctrine. Section 1983 was created to provide a federal forum for vindication of federal constitutional rights that are infringed under color of state law. *Mitchum*, 407 U.S. at 242. That procedure has particular utility and necessity when such rights are

not respected by state officials or in state courts and when state officials behave in a manner, whether by action or by omission, that effectively deputizes non-governmental actors. Proposition 65 expressly permits the full force of the state's enforcement powers, including the threat of statutory civil penalties in potentially bankrupting amounts ($2,500 per unit sold), to be wielded by private individuals like Ms. Embry. Cal. Health & Safety Code §§ 25249.7(b)(1), (d). Proposition 65 incentivizes such deputies by promising them 25 percent of the civil penalties assessed, and another state law all but guarantees their attorneys' fees will be paid by the defendant company. *See* Cal. Code Civ. Proc. § 1021.5. It is no surprise that thousands of such actions are initiated every year.

These actions impose a serious burden on the free speech rights of businesses. As Justice Breyer observed in the context of California's now reformed false advertising law, which until 2004 deputized private attorneys general to sue businesses over false advertising claims:

> The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement

> agencies focused upon more purely economic harm.

Nike v. Kasky, 539 U.S. 654, 679-80 (2003) (Breyer, J., dissenting) (citation omitted). In such a situation, Justice Breyer predicted, if the Supreme Court were to reach the merits of the case, "it would hold that heightened scrutiny applies; that, under the circumstances here, California's delegation of enforcement authority to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it." *Id.* at 681.

The *Noerr-Pennington* doctrine, grounded in the First Amendment right to petition, should not prevent federal courts from vindicating the First Amendment right to free speech.

Indeed, the federal forum is essential here. Proposition 65 enforcement actions can only be brought in state court, and cannot be removed to federal court, because the plaintiffs—individuals or organizations who have not suffered any harm to themselves and are acting instead as private attorneys general—lack Article III standing. *Toxic Injuries Corp. v. Safety-Kleen Corp.*, 57 F.Supp.2d 947, 953-57 (C.D. Cal. 1999). The burdens of the statutory scheme all but prevent First Amendment defenses from being adjudicated, and in the rare instance when they are litigated, the state courts have been unreceptive. Defendant companies raise their First Amendment rights against compelled false speech as an affirmative defense in almost every Proposition 65 enforcement action. But the expense of litigation, the unique burden-shifting of Proposition 65, and its threat of civil penalties prompt settlements in the vast majority of cases. Indeed, in the more than 30 years since Proposition 65's enactment, there have

been only two cases, out of thousands filed, in which defendants have litigated their First Amendment defenses. In the first of these, the state court denied a summary judgment motion without prejudice to the First Amendment issue being raised at trial, but the case settled before trial. *People v. Frito-Lay, Inc. et al.* (Los Angeles Cnty. Sup. Ct., No. BC 338956). In the second, the state court rejected the First Amendment case after trial, only to later grant judgment in favor of the defendants once the state agency (OEHHA) adopted a special regulation declaring that the product at issue (coffee) does not require a warning for acrylamide. *Council for Educ. & Research on Toxics v. Starbucks et al.* (Los Angeles Cnty. Sup. Ct., No. BC 435759). The issue therefore almost entirely evades review in the state courts, and in the rare instance when it has been presented, it has failed.

Furthermore, prudential considerations can pose a serious impediment to attempts to bring the First Amendment issue to federal courts in affirmative suits that are not brought under Section 1983. *See Cal. Chamber of Commerce v. Becerra*, No. 2:19-CV-02019, 2020 WL 1030980 at *2-3 (E.D. Cal. Mar. 3, 2020) (granting defendants' motion to dismiss on abstention grounds, where plaintiff sought declaratory and injunctive relief regarding enforcement of Proposition 65's warning requirement for exposures to dietary acrylamide, without asserting a Section 1983 claim).

As a result, in this case, it is essential that this Court protect the venerable right provided by Section 1983—to seek to vindicate federal constitutional rights in federal court. As this Court has found, "In general, 'First Amendment rights are not immunized from regulation when they are used as an integral part of

conduct which violates a valid statute.'" *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006) (quoting *Cal. Motor Trans. Co. v. Trucking Unlimited,* 404 U.S. 508, 514 (1972). *A fortiori*, the First Amendment right to petition cannot be immunized from regulation when, as alleged by B&G Foods, it is used as an integral part of conduct which violates Section 1983 based on deprivation of the First Amendment constitutional right to free speech.

There can be no doubt that the *Noerr-Pennington* doctrine plays an important role in safeguarding the right of citizens to petition their government by protecting them from liability for doing so. But where the citizens' petitioning is based on an unusual state statute (Proposition 65) that deputizes private individuals and organizations as private attorneys general and empowers and incentivizes them to use the state court litigation process to chill and indeed infringe the free speech rights of other citizens, this Court should respect the longstanding policies embedded in Section 1983 and not limit its reach by expanding the *Noerr-Pennington* doctrine to bar the federal courthouse door to those targeted by this conduct who seek to assert their own, legitimate petition rights and to vindicate their free speech rights under the First Amendment.

II. The District Court Erred, As A Matter of Law, In Finding That Appellees' State Court Case Was Not Sham Litigation

Consistent with the need for careful analysis of the First Amendment interests at stake on either side, and *McDonald*'s prohibition on prioritizing one right over another, the *Noerr-Pennington* doctrine itself

recognizes that the right to petition is limited to bona fide petitioning activity that is not a sham.

The question of whether Appellees' state litigation is sham litigation is quintessentially a question of fact that is not properly decided at the pleading stage. The District Court erred in concluding that Appellees' "litigation is not a sham, at least not completely." 1 ER 6:11-12. As discussed below and in Appellant's Opening Brief, the allegations in B&G Foods' complaint, taken as true, support the conclusion that Appellees' state court case is sham litigation. *See* AOB at 32.

In *California Motor Transport Co. v. Trucking Unlimited*, a group of in-state highway carriers sued a group of interstate carriers for antitrust violations, alleging that the interstate carriers conspired to institute state and federal proceedings "with or without probable cause, and regardless of the merits of the cases" to defeat applications by the in-state carriers to acquire operating rights. 404 U.S. at 512 (internal quotation marks omitted). The Court found that the specific conduct alleged in the complaint fell under the "sham" exception because it "effectively barr[ed] respondents from access to the agencies and courts." *Id.* at 513. In reversing the order granting a motion to dismiss, the Court relied upon the allegations in the complaint, which elaborated on the sham theory. *Id.* at 511. The Court explained that "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." *Id.* at 513.

Here, the District Court failed to "take the allegations of the complaint at face value." *See id.* at 515. In finding that the sham litigation exception did not

apply, the District Court relied on a summary judgment case where the *evidence* in the record showed that more than half of the cases brought had been successful. *See* 1 ER 6:9-11 (citing *USS-POSCO Indus. v. Contra Costa Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994)). Appellees do not have a track record of successful Proposition 65 acrylamide litigation. Instead, as detailed in its Opening Brief, B&G Foods has unambiguously alleged a pattern of "repetitive lawsuits carrying the hallmark of insubstantial claims." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973). Its allegations also amount to a contention that Appellees "used government processes, as opposed to the outcome of those processes, as a mechanism to injure" B&G Foods. *Empress LLC v. City & County of San Francisco*, 419 F. 3d 1052, 1057 (9th Cir. 2005). These allegations include:

- Appellees are "serial enforcement agents under California's Proposition 65 regime" (4 ER 590 ¶ 1; *see* 4 ER 591 ¶ 7);
- Appellees "have filed or threatened to file dozens of cases about acrylamide against a variety of food businesses and retailers" (4 ER 590 ¶ 2);
- "The State also has admitted under oath that, despite listing acrylamide as a dangerous chemical, it has no knowledge of that fact" (4 ER 591 ¶ 4; 4 ER 601 ¶ 59);
- Acrylamide in foods, including B&G Foods' cookies, does not cause cancer in humans (4 ER 595-8 ¶¶ 22-31);
- Businesses "enter extortive monetary settlements" "even though the business has

> attempted to comply in good faith and has made a product which poses no health risk" (4 ER 601 ¶ 52).

The District Court erred in failing to "take . . . at face value" these extensive allegations of a "pattern of baseless, repetitive claims."[11] *See Cal. Motor Transp. Co.,* 404 U.S. at 513, 515; *see also Kearney*, 590 F.3d at 647-48 (vacating dismissal order and remanding because district court erred in holding that the sham litigation exception did not apply to plaintiff's allegations). Properly credited at the pleadings stage, these allegations foreclose dismissal under the sham litigation exception to the *Noerr-Pennington* doctrine and require this Court to reverse.[12]

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[11] In Appellants' Opening Brief, B&G Foods also sets forth additional allegations that it could include in an amended complaint to further establish the sham litigation exception. *See* AOB at 46.

[12] We anticipate that Appellees will raise the issue of whether they are state actors. State action is a complex issue of first impression, and it is unnecessary for this Court to reach the issue in this appeal from a motion to dismiss. The issue should be decided on a developed factual record, not at the pleadings stage. Here, B&G Foods has adequately pled that Appellees are state actors. 4 ER 592-93 ¶¶ 9a-9h. The District Court properly relied on those well-pled allegations in its dismissal order. 1 ER 5:17-18.

III. The District Court Erred as a Matter of Law in Dismissing B&G Foods' Request for Prospective Declaratory Relief Because It Does Not Seek to Impose Liability on Appellees and Therefore Falls Outside the Scope of *Noerr-Pennington*

Although the District Court's dismissal of all claims should be reversed on the grounds discussed above, it is especially appropriate for this Court to reverse the decision below with respect to B&G Foods' claim for prospective declaratory relief. The *Noerr-Pennington* doctrine stands for the proposition that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa* 437 F.3d at 929 (emphasis added). As this Court has recognized, *Noerr-Pennington* accordingly "provides only a defense to liability," not a complete bar on suits related to petitioning conduct. *Nunag-Tanedo v. East Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013). Claims that do not seek to impose liability on opposing parties, such as claims for prospective declaratory relief, accordingly fall outside the scope of *Noerr-Pennington*. *See Cisco Sys., Inc. v. Beccela's Etc., LLC*, 403 F.Supp.3d 813, 825 (N.D. Cal. 2019) (refusing to apply *Noerr-Pennington* to party's declaratory relief claim because the doctrine "immunizes a party from liability and not from an entire claim") (citation omitted). As a result, the District Court stretched *Noerr-Pennington* too far in finding that the doctrine barred B&G Foods' request for a declaration that state-compelled cancer warnings on its products are unconstitutional.

In *Sosa*, this Court established a three-step inquiry for identifying violations of the *Noerr-Pennington*

doctrine. 437 F.3d at 930. First, the court must "identif[y] the burden that the threat of an adverse [ruling] imposes on [a party's] petitioning rights." *Id.* Second, the court "examine[s] the precise petitioning activity at issue, to determine whether the burden on that activity implicated the protection of the Petition Clause." *Id.* Third, the court "analyze[s] the [statute at issue] to see whether it could be construed so as to preclude such a burden on the protected petitioning activity." *Id.*

The District Court's dismissal of B&G Foods' declaratory relief claim runs afoul of *Sosa*'s first step: Appellees faced no legal burden from an adverse ruling on this claim, and any practical burden they faced as a result of having to participate in litigation falls outside the protections of the Petition Clause. Courts have made clear in applying the *Noerr-Pennington* doctrine that it is the threat of statutory or common law liability that constitutes the relevant burden on petitioning rights. *See, e.g., BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002) (applying *Noerr-Pennington* principles to claims asserting liability under National Labor Relations Act); *Cal. Motor Transp. Co.*, 404 U.S. at 509-10 (applying *Noerr-Pennington* doctrine to claim seeking treble damages under section 4 of the Clayton Act); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006-07 (9th Cir. 2008) (applying *Noerr-Pennington* doctrine to dismiss a state law tortious interference claim); *Sosa*, 437 F.3d at 932-33 (applying *Noerr-Pennington* doctrine to claim seeking treble damages under RICO).

Indeed, in *Nunag-Tanedo*, this Court distinguished *Noerr-Pennington* immunity from immunity under California's anti-SLAPP statute, finding that the

former is much narrower in scope: "[U]nlike California's anti-SLAPP statute, which is 'in the nature of immunity from suit,' [citations omitted], the *Noerr-Pennington* doctrine provides only a defense to liability, implied into various federal statutes to protect the right of petitioning." *Id.* (citing *Sosa*, 437 F.3d at 929, 931). This Court accordingly ruled that the *Noerr-Pennington* doctrine provides "immunity from liability, not from trial," a ruling which brought the Ninth Circuit into accord with its sister circuits. *Nunag-Tanedo*, 711 F.3d at 1140; *accord Hinshaw v. Smith*, 436 F.3d 997, 1003 (8th Cir. 2006) (same); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 295 (5th Cir. 2000) (same); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 328-30 (3d Cir. 1999) (same). As the Third Circuit explained, "Without diminishing the importance of the First Amendment right to petition that is protected by the *Noerr-Pennington* doctrine, . . . a right not to be burdened with a trial is simply not an aspect of this protection." *We, Inc.*, 174 F.3d at 330; *accord Nunag-Tanedo*, 711 F.3d at 1141 (citing *We, Inc.*).

Although this Court has not yet squarely addressed this issue, multiple district courts in the Ninth Circuit have held that *Noerr-Pennington* does not apply to claims for prospective declaratory relief, on the grounds that such claims do not seek to impose liability on the opposing party. For example, in *Cisco Systems, Inc. v. Beccela's Etc., LLC*, Cisco filed an action for trademark and copyright infringement, and defendants subsequently filed a counterclaim seeking a declaration of non-infringement. 403 F.Supp.3d at 820-22. Cisco argued that *Noerr-Pennington* barred defendants' declaratory relief claim because it was based on Cisco's litigation activity (namely, Cisco's filing of the lawsuit). The

Northern District of California rejected this argument, reasoning that "Defendants' declaratory judgment claim is not seeking to hold Cisco liable for its protected activity of filing its complaint. Instead, the claim seeks a declaration that Defendants are not liable for infringement under the Lanham Act." *Id.* at 824-25 (emphasis in original). Accordingly, because "Defendants [did] not seek remedies (be it damages or otherwise) from Cisco on this claim," the Court found that the declaratory relief claim fell "outside the ambit of *Noerr-Pennington*." *Id.* at 825.

The District of Alaska applied the same reasoning in refusing to apply *Noerr-Pennington* immunity to the declaratory relief claim at issue in *Shell Gulf of Mexico, Inc., v. Center for Biological Diversity, Inc.*, No. 3:12-cv-0048-RRB, 2012 WL 12865419 (D. Alaska June 26, 2012). There, Shell filed an action for declaratory judgment against several environmental groups, seeking a declaration that the Bureau of Safety and Environmental Enforcement's ("BSEE") approval of Shell's oil spill response plans complied with the Administrative Procedure Act, notwithstanding the environmental groups' comments to BSEE arguing the contrary. *Id.* at *1-2. The Court rejected defendants' argument that *Noerr-Pennington* barred Shell's declaratory relief claim, explaining that the declaration sought by Shell "[did] not seek to impose any kind of liability on" defendants. *Id.* at *10.[13] The Court

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[13] *Shell Gulf* was appealed to this Court, but this Court did not address the district court's refusal to extend *Noerr-Pennington* immunity to plaintiff's claim for declaratory relief. *See Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632 (9th Cir. 2014). Instead, this Court dismissed Shell's declaratory relief action on standing grounds. *Id.* at 638.

further observed that Ninth Circuit precedent restricts application of the *Noerr-Pennington* doctrine to "immunizing a party from liability and not from an entire claim." *Id.* at n.109 (citing *Theme Promotions*, 546 F.3d at 1006-07). The Court thus refused to apply *Noerr-Pennington* to Shell's declaratory relief claim, reasoning that "[t]he gravamen of this action is not the curbing of the [defendants'] right to challenge [the oil spill response plan], but the validation of the approval." *Id.* at *10.[14]

Likewise, the Central District of California applied the same reasoning in *Monster Beverage Corp. v. Herrera*, No. CV13-00786-VAP, 2013 WL 4573959, at *10 (C.D. Cal. Aug. 22, 2013). That court distinguished the situation in *Sosa v. DirecTV*, where the plaintiffs claimed that DirecTV's demand letters violated RICO

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[14] Other than the instant action, CBA is aware of just one instance in which a district court in the Ninth Circuit applied the *Noerr-Pennington* doctrine to bar a declaratory relief claim, *Westlands Water District Distribution District v. Natural Resources Defense Council, Inc.*, 276 F.Supp.2d 1046 (E.D. Cal. 2003). There, a water district sought a declaration that a proposed contract with the United States complied with federal law, after an environmental group first sent a public letter to the Department of Interior arguing that the proposed contract was legally deficient. The district court found that the water district's declaratory relief claim was barred by *Noerr-Pennington* because it "may force a citizen who petitions the government to incur the expense of defending his position in court." *Id.* at 1054. *Westlands*, however, was decided before this Court's decision in *Nunag-Tanedo*, which observed that "the courts have never recognized that immunity *from suit* was necessary to prevent an unacceptable chill of . . . First Amendments rights." 711 F.3d at 1141 (emphasis in original; alterations omitted). Furthermore, both the *Cisco* and *Shell Gulf* Courts called into question the precedential value of *Westlands*. *See Shell Gulf*, 2012 WL 12865419, at *10; *Cisco Sys.*, 403 F.Supp.3d at 825.

and did not seek a declaration as to "whether plaintiffs could be held liable under the Federal Communications Act, which is the legal issue DirectTV [sic] raised in its letters." *Id.* The lawsuit by Monster Beverage Corp., in contrast, was brought "to litigate the legal issues raised in Herrera's demand letter." *Id. Noerr-Pennington* was therefore inapplicable.[15]

Here, the District Court broadly found that the *Noerr-Pennington* doctrine "bars B&G's complaint" as a whole, including B&G Foods' claim for declaratory relief. *See* 1 ER 6:14. The District Court, however, never addressed—either in its order or oral argument[16]—the applicability of the *Noerr-Pennington* doctrine to B&G Foods' claim for declaratory relief, and indeed, it is unclear whether the District Court considered this issue. Regardless, B&G Foods' request for a relief under the Declaratory Judgment Act for a "declaration that the enforcement of Proposition 65 against the Cookie Cakes is unconstitutional," 4 ER 607:10-12, does not seek to, and cannot, impose liability on Appellees. Under established precedent from this Court dictating that *Noerr-Pennington* provides only

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[15] This reasoning echoes that of the California Supreme Court in interpreting the state's Anti-SLAPP statute to not apply to a state court lawsuit for declaratory relief that followed a federal court lawsuit. *See City of Cotati v. Cashman*, 29 Cal. 4th 69 (2002). There the court held that the second lawsuit did not arise from the first lawsuit but instead arose from the same "actual controversy," such that the second lawsuit was not aimed at the petition or speech rights of the plaintiffs in the first lawsuit. *Id.* at 80.

[16] The District Court's only mention of the *Noerr-Pennington* argument at oral argument was a statement made in passing: "Yeah, I know the *Noerr-Pennington* is out there." *See* 2 ER 63:21-22.

"immunity from liability, not from trial," *Nunag-Tanedo*, 711 F.3d at 1140, it therefore follows that B&G Foods' claim for declaratory relief falls "outside the ambit of *Noerr-Pennington*." *See Cisco*, 403 F.Supp. 3d at 825; *see also id.* (*Noerr-Pennington* "immunizes a party from liability and not from an entire claim") (citing *Shell Gulf*, 2012 WL 12865419, at *10 & n.109).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Appellant's Opening Brief, CBA respectfully requests that the Court reverse the District Court's order of dismissal and judgment in this case.

Respectfully,

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By: */s/ Trenton H. Norris*
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Attorneys for Amicus Curiae Consumer Brands Association

Dated: March 1, 2021

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 20-16971

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Brief of *Amicus Curiae* Consumer Brands Association Urging Reversal is proportionally spaced, in a typeface of 14 points or more and contains 6,276 words, exclusive of those materials not required to be counted under Rule 32(a)(7)(B)(iii), according to the word count function of the Microsoft Word software program.

/s/ Trenton H. Norris
Trenton H. Norris

Dated: March 1, 2021

APPELLEES EMBRY AND GLICK'S ANSWERING BRIEF (JUNE 25, 2021)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

Plaintiff/Appellant,

v.

KIM EMBRY and NOAM GLICK,

Defendants/Appellees.

Case No. 20-16971

On Appeal from the United States District Court for the Eastern District of California, Case No. 2:20-cv-0526-KJM-DB, the Honorable Kimberly Mueller

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APPELLEES' ANSWERING BRIEF

INTRODUCTION

The parties have very different views of the importance and validity of the actions to enforce California's Proposition 65 that resulted in this lawsuit – as well as the importance and implications of this case. Defendant-Appellee Kim Embry has brought citizen suits to enforce Proposition 65's health and safety requirements through her attorney, Defendant-Appellee Noam Glick. Plaintiff-Appellant B&G Foods seeks to prevent such enforcement actions by claiming they violate its constitutional rights. Rather than bring these claims as a defense to the underlying Proposition 65 action in state court, however, B&G Foods brought an entirely new lawsuit in federal court against both Ms. Embry as the citizen enforcer and Mr. Glick as her attorney. Whatever can be said about the propriety or merits of this federal lawsuit, there can be no question that it is entirely unnecessary – B&G Foods can raise the constitutional issues as defenses in the state court proceeding.

In any event, the lawsuit cannot survive for two separate reasons. First, state action is required for the claims at issue in this case. There are only narrow circumstances that can overcome the presumption that private citizens are not "state actors." None of the exceptions apply where, as here, a private citizen simply makes her own choice to bring suit to enforce State

law when the Attorney General has declined to bring his own action. Although the district court relied on a different rationale for dismissal (never reaching the "state actor" issue), this Court may affirm the dismissal based on the lack of state action. The Court should do so. Leaving the door open to federal constitutional lawsuits on the basis of citizen enforcement actions would chill private actions to enforce important state and federal statutes. Nor is there any need to bring a separate constitutional lawsuit. Any defense can and should be raised in the enforcement action itself.

Only if there is state action does the Court need to address what has become known as the *Noerr-Pennington* doctrine, which protects the First Amendment's right to petition for a redress of grievances. The district court correctly found that this lawsuit implicated petitioning activity protected by the doctrine. B&G Foods' argument that there is an exception for sham litigation fails on both the law and the facts. At bottom, B&G Foods' suit punishes Ms. Embry and Mr. Glick for petitioning California's executive and judicial branches. The *Noerr-Pennington* doctrine bars B&G Foods from pursuing this action.

ISSUES PRESENTED

1. Whether the state action doctrine protects private citizens who are presumptively not state actors from being sued because they enforce a state law.

2. Whether the district court properly dismissed the complaint under the *Noerr-Pennington* doctrine, thereby protecting core petitioning activity.

3. Whether the district court properly dismissed the complaint without leave to amend given the lack of additional facts that could change the analysis.

STATEMENT OF THE CASE

I. Proposition 65 and the State Court Lawsuit

This case arose out of California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code § 25249.6 *et seq.*, known as "Proposition 65." Proposition 65 is a voter-enacted initiative that protects the public's right to know about potential exposures to hazardous chemicals. Proposition 65 generally requires businesses to provide "clear and reasonable warning[s]" on products that expose consumers to "chemical[s] known to the state to cause cancer or reproductive toxicity." Cal. Health & Safety Code § 25249.6. The initiative permits any "person" to bring an action "in the public interest" to enforce this requirement. *Id.* § 25249.7(d).

Defendant-Appellee Kim Embry is one such citizen enforcer of Proposition 65. 2-ER-169, ¶ 6; 5-ER-591 ¶ 7. Ms. Embry has filed many successful private enforcement actions since January 2017, when she began investigating the presence in consumer products of acrylamide and other chemicals covered by Proposition 65. 2-ER-299-354 (sampling of orders granting Ms. Embry's motions to approve Consent Judgments regarding acrylamide in food products).

A citizen enforcer seeking to bring a Proposition 65 action must provide 60 days' notice of the alleged violation to the alleged violator and to the California Attorney General and certain local government prosecutors. Cal. Health & Safety Code § 25249.7(d)(1). The

notice must include a certificate that "there is a reasonable and meritorious case for the private action" and "[f]actual information sufficient to establish the basis of" that certificate. *Id.* Assuming more than 60 days pass without public enforcers pursuing the matter, the private enforcer may commence an action. *Id.* § 25249.7(c) and (d).

As part of her continued investigation into acrylamide in food, Ms. Embry, through her counsel, Defendant-Appellee Noam Glick, on April 22, 2019, served Plaintiff-Appellant B&G Foods and all other required public enforcement agencies with a 60-day Notice of Violation of Proposition 65. 3-ER-356-365. The Notice alleged that B&G Foods violated Proposition 65 by failing to warn consumers in California of the health hazards associated with exposures to acrylamide found in its Snack Well's Devil's Food Fat Free Cookie Cakes. *Id.*

On March 6, 2020, Ms. Embry, through her counsel, Mr. Glick, filed a complaint against B&G Foods in the Superior Court of California, County of Alameda, for the violation of Proposition 65 asserted in the Notice. 2-ER-168-172.

II. Procedural History

On the same day that Ms. Embry filed her state court action, B&G Foods filed the underlying federal action against Ms. Embry and Mr. Glick in the Eastern District of California. 4-ER-589-607. The Complaint brings claims under the First and Fourteenth Amendments. 4-ER-603-607.

On May 1, 2020, Ms. Embry and Mr. Glick moved to dismiss B&G Foods' complaint pursuant to Federal

Rule of Civil Procedure 12(b)(6), including on the following grounds: (1) absence of state action given that Ms. Embry and Mr. Glick are private citizens; and (2) immunity under the *Noerr-Pennington* doctrine. 3-ER-431-458.

On October 7, 2020, the district court granted Appellees' motion, ruling that B&G Foods' claims were aimed at petitioning activity protected under the *Noerr-Pennington* doctrine. 1-ER-2-6. The district court did not address the state action doctrine. 1-ER-4:10. Rather, the district court "assum[ed] without deciding that if Embry and Glick are 'state actors' who can be sued under 42 U.S.C. § 1983, they would be entitled to the protections of the *Noerr-Pennington* doctrine just the same." 1-ER-5:17-19. The district court also ruled that B&G Foods' allegations regarding Appellees' past success in acrylamide-in-food litigation proved the "sham litigation" exception to the *Noerr-Pennington* doctrine did not apply. 1-ER-5:25-6:14. Lastly, the district court dismissed the complaint with prejudice, holding that amendment would be futile because "[t]he *Noerr-Pennington* doctrine would apply equally to all claims based on Embry's acrylamide litigation against B&G." 1-ER-6:19-20.

On October 8, 2020, B&G Foods filed a Notice of Appeal. 2-ER-9.

III. Acrylamide

According to the U.S. Environmental Protection Agency, acrylamide is an odorless chemical found in cigarette smoke, and in certain starchy food products cooked at high temperatures. 2-ER-257. Among food products, "[f]rench fries, potato chips, crackers, pretzel-like snacks, cereals, and browned breads tend to have

the highest levels of" acrylamide. *Id.* Decades of research has produced strong evidence that acrylamide causes various cancers in laboratory animals, and that the same mechanisms that result in adverse effects from acrylamide exposures in animals also exist in humans. 2-ER-258, 276-278.

Scientific and government organizations have identified acrylamide as a probable human carcinogen: EPA concluded in 2010 that acrylamide is "likely to be carcinogenic to humans" (2-ER-259); and the National Toxicity Program – an interagency of the Food and Drug Administration, the National Institutes of Health, and the Center for Disease Control and Prevention – concluded that acrylamide "is reasonably anticipated to be a human carcinogen" (2-ER-241).

California's Office of Environmental Health Hazard Assessment ("OEHHA") identified acrylamide as a carcinogen in 1990, based on carcinogenicity findings by the EPA and the International Agency for Research on Cancer. 2-ER-238.[1] In 2011, OEHHA identified acrylamide as a chemical known to cause developmental and reproductive toxicity. 2-ER-232.

IV. The Related *Cal. Chamber* Case

On March 30, 2021, the Eastern District of California enjoined the filing of new lawsuits to enforce Proposition 65's warning requirement for cancer as

[1] OEHHA is the lead agency designated by the Governor to implement and enforce Proposition 65. Cal. Health & Safety Code § 25249.12(a); Cal. Code Regs. tit. 27, § 25102 (o). As part of its mission, OEHHA publishes a list of chemicals and updates the list, at least annually, to include any chemicals known to the State of California to cause cancer or reproductive toxicity. Cal. Health & Safety Code § 25249.8(a).

applied to acrylamide in food and beverage products. *See California Chamber of Commerce v. Becerra*, 2021 WL 1193829, No. 2:19-cv-02019-KJM-EFB (E.D. Cal. Mar. 30, 2021) ("*Cal. Chamber*").[2] The district court found that the California Chamber of Commerce is "likely to succeed on the merits of its First Amendment claims" because it "is likely to show the acrylamide warning required by Proposition 65 is controversial and not purely factual." *Cal. Chamber*, 2021 WL 1193829 at *12, *16. The injunction provided that "no person may file or prosecute a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products." *Id.* at *18.

This Court has since stayed the *Cal. Chamber* injunction pending appeal. *California Chamber of Commerce v. Bonta*, Case No. 21-15745, Dkt. 16 (Order of May 27, 2021).

SUMMARY OF ARGUMENT

Appellees are not "state actors." Well-settled law presumes private citizens – like Ms. Embry and Mr. Glick – are not state actors. The five unusual circum-

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[2] The same judge who dismissed B&G Foods' case also issued the injunction (and denial of summary judgment) in *Cal. Chamber*, finding the *Noerr-Pennington* doctrine was unavailable to Intervenor-Defendant Council for Education and Research on Toxics ("CERT") in that case because – unlike B&G Foods – the Chamber was not actively litigating against CERT in state court. *See Cal. Chamber,* 2021 WL 1193829 at *9 ("This court's decision in *B&G Foods North America, Inc. v. Embry* is a rare example of exactly such a case [where the *Noerr-Pennington* doctrine offers a defense to requests for equitable relief].").

stances that would create an exception to the presumption on which B&G Foods relies to attempt to overcome the presumption really boil down to three: (1) the private citizen engages in a traditional and exclusive public function, (2) there is joint action of the government and private citizen, or (3) the government compels the private citizen to act.

None of these three exceptions is present. Litigation to enforce a state law is not an exclusive function of the State. To the contrary, private litigants often bring enforcement actions. Indeed, Proposition 65 specifically and separately provides for both lawsuits brought by a public prosecutor and lawsuits brought by private citizens. Because both public and private actions are permitted, Proposition 65 does not support the view that litigation is an exclusive public function. Nor do the State and the private enforcer act jointly. Instead, each acts separately and makes its own decisions. Further, the State does not coerce the private enforcer to act; Proposition 65 merely permits a private party to bring an enforcement action – there is no such requirement. Beyond the reasons the three exceptions do not apply, there is another reason that Mr. Glick is not subject to suit: Lawyers in private practice are simply not state actors.

Were citizen enforcers state actors subject to suit, every time a potential plaintiff considered bringing a suit under any of the myriad state and federal statutes permitting private enforcement, the plaintiff would have to take into account the possibility of a retaliatory constitutional lawsuit. This would chill citizen enforcement actions to vindicating public policy. The proper place to raise the constitutional issues is as a defense to the enforcement lawsuit.

Were there state action, this Court should still affirm the district court's judgment and dismiss B&G Foods' claims under the *Noerr-Pennington* doctrine. This Court has already held that state actors may invoke the doctrine. The district court properly found that Ms. Embry's Proposition 65 suit against B&G Foods, including the prelitigation communications authored by her counsel, Mr. Glick, qualified for protection under the *Noerr-Pennington* doctrine. The district court also properly found the sham exception to the *Noerr-Pennington* doctrine did not apply. In response, B&G Foods raises new arguments on appeal and misstates the contours of the sham exception. Most importantly, B&G Foods' own allegations show the litigation is not a sham because it has resulted in more than $1.5 million in penalties.

Finally, the district court properly denied B&G Foods leave to amend. There is nothing B&G could add to its complaint to bolster its arguments.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss *de novo*, and a denial of leave to amend for an abuse of discretion. *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1141 (9th Cir. 2015). The Court may affirm the dismissal based on any ground supported by the record, "even if the district court did not reach the issue or relied on different grounds or reasoning." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

ARGUMENT

I. APPELLEES ARE NOT STATE ACTORS

A. Ms. Embry and Mr. Glick are Presumptively Not State Actors

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment makes the Free Speech Clause applicable against the States. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). "The text and original meaning of those Amendments," as well as the Supreme Court's "longstanding precedents," establish that the Free Speech Clause prohibits only "governmental" and not "private abridgement of speech." *Id.* (emphases in original). Simply put, the Free Speech Clause applies only against a "state actor." *Id*. A due process claim under the Fourteenth Amendment also has a state action requirement. *See, e.g., Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 48, 49-50 (2000).

42 U.S.C. § 1983 permits a cause of action against a person "who, under color of any statute, ordinance, regulation custom or usage . . . causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws. . . . " To invoke § 1983, the "plaintiff must demonstrate a deprivation of a right secured by the Constitution or laws of the United States, and that the defendant acted under color of state law." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003); *accord Sullivan*, 526 U.S at 49-50. Accordingly, "like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes

from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Sullivan*, 526 U.S. at 50 (*quoting Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). That is, "whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly attributable to the government?" *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (internal quotation marks omitted).

In "addressing whether a private party acted under color of law," courts "start with the presumption that private conduct does not constitute governmental action." *Sutton*, 192 F.3d at 835. Further, there are only a "few limited circumstances" when "a private entity can qualify as a state actor." *Halleck*, 139 S. Ct. at 1928. Specifically, a private citizen is a state actor if: (1) the private citizen "performs a traditional, exclusive public function"; (2) "the government acts jointly with the private" citizen; or (3) "the government compels" the private citizen "to take a particular action." *Id*.

B&G Foods alleges Ms. Embry and Mr. Glick are "citizen[s] of California," not public officials. 4-ER-591, ¶¶ 7-8. Thus, the Complaint admits what is true: Appellees are private citizens presumed not to be state actors.

B. None of the Limited Circumstances Where a Private Citizen Can be a State Actor are Applicable

1. Ms. Embry and Mr. Glick Do Not Perform Traditional and Exclusive Public Functions

The Supreme Court "has stressed that very few functions" are "traditionally" and "exclusively" reserved to the government. *Halleck*, 139 S. Ct. at 1929 (internal quotation marks omitted). "[I]t is not enough that the function serves the public good or the public interest in some way." *Id.* at 1928-29. Rather, the plaintiff must show the alleged state action is both traditionally and exclusively performed by the government. *Id.* at 1929 (citing "running elections" and "operating a company town" as examples of traditional and exclusive government functions). This is a demanding standard, and the burden rests on the plaintiff to demonstrate it. *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs*, 608 F.3d 110, 122. (1st Cir. 2010). "That a private entity performs a function which serves the public does not make its acts state action." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

The Supreme Court has held that even "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981). The Court reasoned in part that "a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.* at 322. So, too, do lawyers prosecuting Proposition 65 cases on behalf of private plaintiffs.

Similarly, in *Real Estate Bar Ass'n*, a bar association sued an escrow company under a Massachusetts statute that permitted the association, along with private attorneys and prosecutors, to bring an action to enforce the State's prohibition of the unauthorized practice of law. *See Real Estate Bar Ass'n*, 608 F.3d at 122. The closing service then brought a counterclaim against the bar association under § 1983, claiming that the enforcement statute violated the Dormant Commerce Clause. *Id.* at 117. The First Circuit held that the closing service failed to state a claim because the bar association was not a "state actor." *Id.* at 122-23. The court reasoned that while the State "chose to give bar associations a defined role in bringing court actions to seek a judicial determination" regarding the unauthorized practice of law, "the bringing of a lawsuit to obtain a declaration as to legality – is far from an exclusive function of government." *Id.* at 122.

B&G Foods does not grapple with this case law. *See* Opening Br. at 48-50. Based on these cases, filing a lawsuit to enforce Proposition 65 is not an exclusive government function. Under Proposition 65, an action may be brought in two very different ways. First, the government may bring an action by "the Attorney General in the name of the People of the State of California, by a district attorney, by a city attorney . . . [or] by a city prosecutor. . . . " Cal. Health & Safety Code § 25249.7(c). Second, Proposition 65 also permits "private action[s]" brought by a "person" acting "in the public interest" but only after the person: (1) provides notice of the Proposition 65 violation to the defendant, the Attorney General and the relevant district attorney or city prosecutor; and (2) waits 60 days and "neither the Attorney General, a

district attorney, a city attorney, nor a prosecutor has commenced an action and is diligently prosecuting an action against the violation." *Id.* §§ 25249.7(d). As with similar statutes permitting private enforcement actions, the "purpose of the notice provision is to encourage public enforcement, thereby avoiding the need for a private lawsuit altogether." *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 750 (2001) (comparing Proposition 65 notice requirement to the Clean Water Act).

In sum, Proposition 65 differentiates between state actions, which are brought by a public prosecutor, and "private actions" which are brought by private citizens after notifying the State, which then declines to take its own action. That is, both public and private actions are permitted. Accordingly, by definition, the right to bring a lawsuit under Proposition 65 is not exclusively reserved to the State.

B&G Foods nonetheless relies on the traditional nature of public health and food labeling as public functions. Opening Brief at 48-49. But that the State is empowered to enact health and safety laws (and even to bring public prosecutions under those laws) does not make any private citizen who brings litigation to enforce those laws a state actor. Filing a private enforcement action does not transform a private citizen into a state actor. *Real Estate Bar Ass'n*, 608 F.3d at 122.

The situation here does not rise to the level of cases that have found state action based on the exercise of a traditional and exclusive government function. For instance, B&G Foods relies on *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002). Opening Br. at 48. There, the defendant leased an outdoor space from the city and

was sued by the plaintiffs it excluded for violating their free speech rights. *Id.* at 552-53. Because the defendant was regulating free speech in a public forum, which is a traditional and exclusive public function, this Court held the defendant was acting under color of law. *Id.* at 555-57.

Unlike the defendant in *Lee*, which had control over public property, Proposition 65 citizen plaintiffs (and their attorneys) are merely permitted to seek redress in the courts through litigation, which has never been an exclusive function of the State. This scenario comes nowhere close to meeting the traditional and exclusive public function test.

2. Ms. Embry and Mr. Glick Did Not Act Jointly with the State, are Not in a Symbiotic Relationship with the State, and Do Not Have a Close Nexus with the State

To show there was joint action between private actors and the State, the plaintiff must show the private actors are "willful participants in joint action with the government or its agents." *Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1210 (9th Cir. 2002). A private party is liable under this theory "only if its particular actions are inextricably intertwined with those of the government." *Id.* at 1211 (internal quotation marks omitted).

As the Court has explained, "derivative of the joint action test" is "the 'symbiotic relationship' test." *Brunette*, 294 F.3d at 1210. That test "asks whether the government has so far insinuated itself into a position of interdependence with a private entity that the private entity must be recognized as a joint participant

in the challenged activity." *Id.* As *Brunette* further explained, "substantial coordination and integration between the private entity and the government are the essence of a symbiotic relationship." *Id.* at 1213. Although B&G Foods addresses the two tests separately (Opening Br. at 50-53), they are so close as to merit being addressed together. Indeed, B&G Foods actually quotes the symbiotic relationship test in the portion of its brief on joint action. Opening Br. at 50 (quoting *Brunette*, 294 F.3d at 1210).

B&G Foods also relies on the "close nexus" test. Opening Br. at 54-55. Under that test, "a private party acts under color of state law if there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 n.13 (9th Cir. 2013) (internal quotation marks omitted). Again, this test is covered by the joint action test – and the traditional and exclusive function test. *See id.* Indeed, B&G Foods argues with respect to the close nexus test that "Appellees' enforcement of Proposition 65 is thus closely entwined with the State." Opening Br. at 55. This is already covered by the joint action test's focus on the extent to which actions are "inextricably intertwined" and the symbiotic relationship's focus on "interdependence." *Brunette*, 294 F.3d at 1210, 1211.

Proposition 65 does not entail joint action, a symbiotic relationship, or a close nexus. Quite the contrary: Proposition 65 requires <u>independent</u> actions of the government and private citizens. A potential plaintiff must first provide notice to the State and may only bring suit after the State declines to act. Cal.

Health & Safety Code § 25249.7(d). Although Proposition 65 permits the Attorney General to inform the potential plaintiff that the Attorney General does not believe the case has merit, the statute does not contemplate that the Attorney General can stop the action from going forward. *Id.* § 25249.7(e)(1)(A). Even after receiving a no-merit letter, the private enforcer can move ahead with her enforcement action, which is necessarily not an action taken in concert with the State. The plaintiff risks sanctions if the defendant is ultimately successful, but that is true regardless of the views of the Attorney General and is a decision for the state court. *Id.* § 25249.7(h)(2). Further, Proposition 65 emphasizes that the Attorney General's failure to serve a no-merit letter "shall not be construed as an endorsement by the Attorney General of the merit of the action." Cal. Health & Safety Code § 25249.7(e)(1)(B).

That a Proposition 65 plaintiff must first provide notice to the State does not constitute joint action, a symbiotic relationship, or a close nexus with the State. *See Sullivan*, 526 U.S. at 55 (government agency not responsible for private parties' actions where its "participation is limited to requiring insurers to file a form prescribed by the Bureau," processing a request, forwarding the matter to a private entity, and providing information to the parties). A private party is not a state actor where the government's involvement is limited to providing "mere approval or acquiescence," "subtle encouragement," or "permission of a private choice." *Id.* at 52-54.

B&G Foods also relies on the Attorney General's general oversight ability and option to review settlements. Opening Br. at 51. But "[a]ction taken by private

entities with the mere approval or acquiescence of the State is not state action." *Sullivan*, 526 U.S. at 52. Rather, "our cases will not tolerate the imposition of [constitutional] restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement." *Id.* at 54 (internal quotation marks omitted); *accord Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 845 (9th Cir. 2017).

Nothing in Proposition 65 indicates that inaction during monitoring by the Attorney General could somehow constitute "encouragement" of any action by the plaintiff. As to settlement, a private enforcer must notify the Attorney General upon filing a motion to enter into a settlement agreement with an alleged Proposition 65 violator, and the Attorney General may then "appear and participate in [the settlement] proceeding without intervening in the case." Cal. Health & Safety Code § 25249.7(f)(5). But Proposition 65 leaves it to the state court to approve or reject a settlement regardless of any position the Attorney General takes. *See Id.* § 25249.7(f)(4). Even if the Attorney General had authority to block proposed settlements – which he does not – his use of (or failure to use) that authority would not make him responsible for the resulting settlement or any other part of the private enforcement action. Rather, where the Attorney General objects to a Proposition 65 settlement, the State becomes an adversary to the plaintiff – *i.e.*, the opposite of what is required to prove state action.

B&G Foods further relies on the financial considerations under Proposition 65. Opening Br. at 52-53. If the plaintiff succeeds in recovering penalties in a Proposition 65 suit, 75% of the recovery is paid to the State and 25% is paid to the citizen enforcer. Cal.

Health & Safety Code § 25249.12(c). But there is state action on the basis of a financial benefit to the state only when private action "confers significant financial benefits indispensable to the government's financial success." *Brunette*, 294 F.3d at 1213 (emphasis added; internal quotation marks omitted); *see also Vincent v. Trend W. Tech. Corp.*, 828 F.2d 563, 569 (9th Cir. 1987) ("While [the private party] may have been dependent economically on its contract with the Air Force, [it] was most certainly not an indispensable element in the Air Force's financial success.").

B&G Foods relies on *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). But in that case the restaurant that discriminated against black customers operated out of a building that was owned by the parking authority, whose viability depended on profits of the restaurant. *Id.* at 719-20; *see also Vincent*, 828 F.2d at 569 (restaurant "provided the state agency with the income it needed to maintain financial self-sufficiency").

B&G Foods has not, and cannot, allege that civil penalty recoveries in private acrylamide warning enforcement actions – or even penalties in private enforcement actions overall – are "indispensable" to the State.

Nor does B&G Foods explain how it is possibly the case that the Attorney General, by failing to prosecute a Proposition 65 action and then perhaps monitoring matters through settlement, lends "power and prestige" to private enforcers such that there is state action. *See* Opening Br. at 53.

The bottom line is that where "the [private party's] actions were its own; they were not "state actions"

directed by or jointly conceived, facilitated or performed by the [State]." *Brunette*, 294 F.3d at 1213. That is precisely the case here.

3. Private Enforcers are Not Compelled to Bring Actions

"The compulsion test considers whether the coercive influence or significant encouragement of the state effectively converts a private action into a government action." *Kirtley*, 326 F.3d at 1094 (internal quotation marks omitted). Proposition 65 permits but does not require private enforcement actions. Cal. Health & Safety Code § 25249.7(d) ("Actions pursuant to this section may be brought by a person in the public interest. . . . ") (emphasis added).

B&G Foods argues that the Attorney General's review of Proposition 65 notices and settlements "makes private enforcement of Proposition 65 possible." Opening Br. at 54. Even if true, it is a far cry from permitting an action to coercing one.

Nor do Proposition 65's civil penalties or the role of the Attorney General constitute "significant encouragement" such that the option to initiate a private enforcement action "must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Courts "have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it." *Sullivan*, 526 U.S. at 53. That the Attorney General may approve or acquiesce to private action, again, "is not state action." *Id.* at 52.

4. Mr. Glick Is Not a State Actor

There is an additional reason that Mr. Glick is not subject to suit: It is well-established that lawyers in private practice are not state actors. *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (holding that the lawyer for the defendant, who obtained the plaintiff's default, was properly dismissed under Rule 12(b)(6), because he was a lawyer in private practice and, thus, not acting under color of state law); *Briley v. State of California*, 564 F.2d 849, 955 (9th Cir. 1977) ("We have repeatedly held that a privately-retained attorney does not act under color of state law for purposes of actions brought under the Civil Rights Act.").

C. Permitting Lawsuits Against Private Citizens Filing Enforcement Actions Would Chill Enforcers from Acting in the Public Interest and Serve No Purpose

Like Proposition 65, numerous statutes permit private actions to enforce public rights without converting the private plaintiffs into state actors. These include the citizen suit provisions of the federal Clean Water Act, 33 U.S.C. § 1365; Endangered Species Act, 16 U.S.C. § 1540(g); and Safe Drinking Water Act, 42 U.S.C. § 300j-8, all of which permit private parties to seek civil penalties and injunctions against those who violate environmental laws and regulations. California law also permits citizen suits to recover civil penalties, such as under PAGA. *See* Cal. Lab. Code § 2699(i). Proposition 65's provision for private enforcement actions is merely another example of such a citizen suit statute.

To permit defendants, such as B&G Foods, to sue plaintiffs as "state actors" would chill participation by citizens in vindicating the public policies embodied in Proposition 65 and similar state and federal statutes permitting private enforcement. There is no case, statute, regulation, or policy that warrants forcing private citizens considering a private enforcement action to weigh the personal risk and burden of defending lawsuits challenging legislative actions. *See Roberts*, 877 F.3d at 845 ("[P]rivate parties [do not] face constitutional litigation whenever they seek to rely on some [statute] governing their interactions with the community surrounding them.") (internal quotation marks omitted). Further, allowing defendants in Proposition 65 and other citizen suits to bring separate federal actions against private enforcers, as if they were the government, has the potential to create a flood of retaliatory suits in federal court.

On the other side of the ledger, B&G Foods retains the ability to protect its purported constitutional right without suing Appellees. B&G Foods can raise whatever defenses it wants in Ms. Embry's Proposition 65 action in state court. B&G Foods could also sue an actual public actor – the state Attorney General charged with overseeing Proposition 65 litigation as in *Cal. Chamber*. What B&G Foods cannot do is the one thing it did: Bring a lawsuit against private citizens who are not state actors.

II. The *Noerr-Pennington* Doctrine Immunizes the Core Petitioning Activities at Issue

A. The Noerr-Pennington Doctrine

The *Noerr-Pennington* doctrine stems from the First Amendment's guarantee of the right to petition the government to redress grievances. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). To safeguard this fundamental right, the *Noerr-Pennington* doctrine generally immunizes from statutory liability activities that constitute "petitioning activity." *Empress LLC v. City & Cty. of San Francisco,* 419 F.3d 1052, 1056 (9th Cir. 2005).

Although the doctrine originally arose in the anti-trust context, it now applies "equally in all contexts" (except for labor law) relating to acts that constitute "petitioning." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000).

Moreover, this Court has twice squarely held that state actors may invoke the *Noerr-Pennington* doctrine. The first case addressed "a question of first impression in this circuit: does Noerr-Pennington apply to petitioning by government actors, here a municipality and its officials?" *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000). In the context of lobbying activity, the Court found "the principle that led the Supreme Court to adopt the immunity principle in *Noerr* is equally applicable to the petitioning by the Glendale city officials." *Id.*

The second case was just as definitive and more expansive. When a litigant attempted to limit *Manistee* to lobbying by government officials, the Court stated: "There is no reason, however, to limit *Manistee*'s holding

to lobbying efforts." *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644 (9th Cir. 2009). Rather, government "intercession is just as likely to be accomplished through lawsuits—the very act of petitioning—as through lobbying." *Id.* Accordingly, the Court found that *Noerr-Pennington* immunity applied to an eminent domain lawsuit brought by a private law firm for a governmental entity. *Id.* at 645.

B&G engages in all sorts of gymnastics to attempt to avoid the plain holdings of *Manistee* and especially *Kearney*. Opening Br. at 26-32. None of these maneuvers can suffice to avoid the straightforward language in the two cases.

B&G Foods also attempts to circumvent *Manistee* and *Kearney* by pointing to general principles underlying § 1983, treatises, and prior cases. Opening Br. at 20-24. But B&G Foods nowhere acknowledges the fundamental principal that Ninth Circuit panels "are bound by a prior three-judge panel's published opinions." *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015). The only possible intervening authority after *Manistee* and *Kearney* that B&G Foods cites are three Ninth Circuit cases addressing compelled speech. *See* Opening Br. at 23-24. But none of these cases so much as mentions the *Noerr-Pennington* doctrine. Further, all of the cases involved a challenge to an enacted ordinance or statute, and B&G Foods does not explain how that constitutes petitioning activity for *Noerr-Pennington* purposes; none of the cases involved litigation as the basis for the suit; and one case is unpublished. These cases certainly cannot interfere with the binding holdings of *Manistee* and *Kearney*.

Finally, were the Court to hold that Appellees are not state actors as discussed in Part I, there is no

dispute that the *Noerr-Pennington* doctrine applies – although the Court would not need to reach the issue because the case would be dismissed for lack of state action.

B. Proposition 65 Enforcement Is Petitioning Activity

B&G Foods appears to concede that the activity that led to this lawsuit is petitioning activity. *See* Opening Br. at 26. There is no argument to the contrary. This Court has held that "in the litigation context, not only petitions sent directly to the court in the course of litigation, but also conduct incidental to the prosecution of the suit is protected by the *Noerr-Pennington* doctrine." *Sosa*, 437 F.3d at 934. Indeed, "extending *Noerr-Pennington* immunity to litigation-related activities preliminary to the formal filing of the litigation is consistent with the law of the majority of other circuits that have considered the issue." *Id.* at 937.

This lawsuit is based on two types of petitioning activity: (1) the Notice of Violation and supporting evidence through which Ms. Embry petitioned California's executive branch; and (2) the state court lawsuit, in which Ms. Embry, through her counsel Mr. Glick, petitioned California courts to enforce Proposition 65. *E.g.*, 4-ER-592, ¶ 9(b), 4-ER-593, ¶ 9(h), 4-ER-603, ¶¶ 65-67. Under *Sosa*, there can be no question that this core petitioning activity falls within the protection of the *Noerr-Pennington* doctrine. *See also, Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67 (2002) (upholding anti-SLAPP because lawsuit "is one arising from Consumer Cause's activity in furtherance of its constitutional rights of speech or

petition—viz., the filing of Proposition 65 intent-to-sue notices").

C. The Sham Exception Does Not Apply

Noerr-Pennington immunity is not absolute. When the petitioning process is used to injure the plaintiff rather than to obtain relief, the sham exception applies, and a defendant may be liable for the injury. *Empress*, 419 F.3d at 1057.

Different sham tests apply to the two types of petitioning conduct the Complaint attacks. *See Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998) ("the scope of the sham exception depends on the type of governmental entity involved"). As such, B&G Foods must show that both petitioning the California Attorney General and the enforcement action in court are shams.

There is a split within the Ninth Circuit as to whether a heightened pleading standard applies. *Compare id.* at 1063 *with Empress*, 419 F.3d at 1055-56. At least, however, "[c]ourts may properly be more critical in reviewing complaints which invoke the sham exception to the *Noerr-Pennington* doctrine since the conduct is presumptively protected by the first amendment." *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 389 (9th Cir. 1983)

1. The Executive Sham Exception

B&G Foods' allegations related to Appellees' petitioning of the California Attorney General do not meet the sham exception. The scope of the scam exception in this context depends on "whether the executive entity in question more resembled a judicial

body, or more resembled a political entity." *Kottle*, 146 F.3d at 1061. B&G Foods' allegations about the Attorney General's role show that he exercises political discretion. 4-ER-592-593, ¶ 9(b)-(d) (asserting that the Attorney General is the "gatekeeper" for Proposition 65 claims, can change the regulatory process for carrying out these enforcement actions, and can object to settlements). For this reason, the sham exception is narrower with respect to petitioning the Attorney General than with respect to the lawsuit. *Kottle*, 146 F.3d at 1062.

B&G Foods recognizes that the scope of the sham exception depends on what entity is the subject of petitioning activity. Opening Br. at 35. But B&G Foods does not even attempt to address the distinct executive sham exception and instead focuses exclusively on the judicial sham exception. Opening Br. at 32-43. That is because B&G Foods has not pled facts sufficient to overcome the executive sham exception. To the contrary, the complaint pleads that citizen enforcers pursuing Proposition 65 acrylamide in food cases have had enormous success over the last several years and the Attorney General has permitted these lawsuits to continue. 4-ER-590-591, ¶¶ 2-4. Thus, B&G Foods is unable to plead that Ms. Embry did not expect to petition the Attorney General successfully in connection with her efforts to pursue Proposition 65 litigation and obtain relief against B&G Foods and similar companies.

2. The Judicial Sham Exception

B&G Foods fares no better with the sham exception it does address. There are three grounds for sham judicial petitioning. "First, if the alleged anticompetitive

behavior consists of bringing a single sham lawsuit (or a small number of such suits), the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships." *Kottle*, 146 F.3d at 1060. Put another way, the burden is to show that "the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful." *Sosa,* 437 F.3d at 938. Second, if the issue is "the filing of a series of lawsuits," the question is "whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring" the defendant or other unlawful purpose. *Kottle*, 146 F.3d at 1060; *accord Sosa*, 437 F.3d at 938. Third, "intentional misrepresentations to the court" can constitute a sham when "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Kottle*, 146 F.3d at 1060 (internal quotation marks omitted); *accord Sosa,* 437 F.3d at 938.

a. Appellees' Litigation Is Neither Objectively Baseless Nor Brought with an Improper Motive

As to the first test, a lawsuit is objectively baseless where "no reasonable litigant could realistically expect success on the merits." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). Only if the objective baselessness element is satisfied, do courts determine whether the defendant had an improper subjective motivation. *Id.* "[R]equiring both objective baselessness and an improper motive" is important because it "overprotects baseless petitions so as to ensure citizens may enjoy the right of access

to the courts without fear of prosecution." *Sosa*, 437 F.3d at 934.

B&G Foods attempts to justify avoiding the required showing of objective baselessness and skips straight to subjective motivation. Opening Br. at 36-38. At the outset, this argument has been forfeited as it was not made below. *See* 2-ER-138-140. Rather, B&G Foods expressly argued below only that the "conduct satisfies both the 'objective' and 'subjective' components of the *Noerr-Pennington* sham litigation analysis." 2-ER-139:16-17. Accordingly, the argument that no objective baselessness showing is required has been forfeited. *See, e.g.*, *Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 870 (9th Cir. 2013) ("we decline to consider Plaintiffs' 'local controversy' argument because Plaintiffs failed to raise it to the district court"). In any event, this Court has expressly limited dispensing with objective baselessness to the context of labor law. *White*, 227 F.3d at 1236-37.

B&G Foods musters no argument that the litigation is objectively baseless. Opening Br. at 38. Nor could it given that the standard is simply whether the plaintiff has a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Pro. Real Est. Invs.*, 508 U.S at 62. Put another way, the question is whether that claim "was arguably warranted by existing law." *Id.* at 65 (internal quotation marks omitted). Among other things, there is no allegation that the Attorney General found there was no merit. *See* Cal. Health & Safety Code § 25249.7(e). Given the lack of a showing on objective baselessness, this Court need not even proceed to the subjective motivation prong.

Regardless, on that prong, B&G Foods makes the misguided argument that the state court lawsuit would violate the First Amendment's prohibition on compelled speech. Opening Br. at 38. But that has nothing to do with Appellees' subjective motivation. B&G Foods points to nothing that alleges Appellees' motivation was to violate the First Amendment. That the effect of the lawsuit would, in B&G Foods' view, violate the prohibition on compelled speech is irrelevant.

b. Appellees Have Not Filed a Series of Lawsuits Without Regard to the Merits or for an Unlawful Purpose

As to the second sham exception, B&G Foods argues that acrylamide-in-food cases brought under Proposition 65 lack merit because dietary acrylamide poses no harm. Opening Br. at 38-39. But B&G Foods admits Ms. Embry's claims were permissible under the law. 4-ER-590, ¶ 3 ("The State permits Defendants to file suit against products containing modest trace amounts of substances, even if there is no possible health effect."); 4-ER-603, ¶ 66 ("The State did not object to Defendants' Notice of Violation or seek to curtail or limit it.").[3]

In any event, the relevant question is: "Were the legal filings made, not out of a genuine interest in redressing grievances, but as a part of a pattern or practice of successive filings undertaken essentially

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[3] B&G Foods' complaint and the conduct at issue therein was filed before the decision and injunction issued in *California Chamber of Commerce v. Becerra,* 2021 WL 1193829, Case No. 2:19-cv-02019-KJM-EFB (E.D. Cal. Mar. 30, 2021), which enjoined the filing of new acrylamide in food lawsuits (and has now been stayed).

for purposes of harassment?" *USS-POSCO Industries v. Contra Costa Cty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994). A successful history in the disputed cases defeats the sham exception. *See id.*

B&G Foods admits that Proposition 65 acrylamide litigation successfully generates millions of dollars in civil penalty recovery. 4-ER-590, ¶ 2. In particular, "over the last few years, Defendants have extracted nearly $1.7 million in penalties and fines from food companies." *Id.* Further, "[t]ens of millions more have been obtained by other State enforcers." *Id.* Moreover, prior to filing suit, Proposition 65 requires a certificate of merit verifying that the case has merit and that an expert supports it. Cal. Health & Safety Code § 25249.7(d)(1). If the case settles, California courts must approve the consent judgments reached in Proposition 65 cases. *Id.* at § 25249.7(f)(4). Ms. Embry, represented by Mr. Glick, has successfully resolved (via court-approved settlements) 15 acrylamide-in-food cases. 3-ER-299-354. B&G Foods points to only one instance in which the Attorney General objected to a settlement. 4-ER-592, ¶ 9(d). By any measure, this is a successful track record. *See USS-POSCO Industries*, 31 F.3d at 811. B&G Foods has no explanation for how Appellees brought cases without regard to the merits and for an unlawful purpose given the Court-approved settlements. *See Kottle*, 146 F.3d at 1060; *Sosa*, 437 F.3d at 938.

c. Appellees' Litigation Is Not Fraudulent

With respect to the third sham exception, B&G Foods disputes the harm from dietary acrylamide and argues that Appellees' view constitutes an intentional

misrepresentation. Opening Br. at 40-41. But B&G Foods did not make this argument below. *See* 2-ER-138-140. The argument has therefore been forfeited.

In any event, a difference of opinion about the science does not amount to fraud or an intentional misrepresentation. Litigation can only be deemed a sham if "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Kottle*, 146 F.3d at 1060 (internal quotation marks omitted). Ms. Embry's enforcement actions regarding unsafe levels of acrylamide are based on *California's designation* of acrylamide as a chemical known to cause cancer and reproductive harm. *See* 2-ER-169, ¶¶ 3-4. Given this predicate, Ms. Embry's enforcement actions do not constitute fraud or intentional misrepresentations.

III. The District Court Properly Granted the Motion to Dismiss Without Leave to Amend

B&G Foods also argues that it should have been granted leave to amend its complaint. Opening Br. at 44-47. A "district court does not err in denying leave to amend where amendment would be futile." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) (internal quotation marks omitted). The district court did not abuse its discretion in denying B&G Foods leave to amend its complaint.

First, with respect to the state action requirement, there are no additional facts that could further B&G Foods' arguments. Proposition 65's scheme is what shows Ms. Embry and Mr. Glick are not state actors and nothing B&G Foods can plead can change the initiative. Because that issue is dispositive, the Court need go no further.

Second, even if the Court addresses the *Noerr-Pennington* doctrine, there is no cause to find the district court abused its discretion in denying leave to amend. Although B&G Foods claims it proposed specific amendments, that is not supported by the record cites. *See* Opening Br. at 46. Moreover, the additional facts are simply more of the same. B&G Foods does not explain how they would go beyond the present allegations to change the analysis of the sham exception.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the district court.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Appellees state they are aware of *Cal. Chamber of Commerce v. Becerra,* Case No. 21-15745, pending before this Court, which raises the same or closely related issues including whether Proposition 65's mandated health hazard warning for acrylamide is an unconstitutional compelled speech requirement.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionally double-spaced 14-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 8,230 words up to and including the signature lines that follow this brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 25, 2021.

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Dated: June 25, 2021

APPELLANT B&G FOODS'S REPLY BRIEF (AUGUST 17, 2021)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

Plaintiff/Appellant,

v.

KIM EMBRY and NOAM GLICK,

Defendants/Appellees.

Case No. 20-16971

On Appeal from the United States District Court for the Eastern District of California, Case No. 2:20-cv-0526-KJM-DB, the Honorable Kimberly Mueller

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APPELLANT'S REPLY BRIEF

Plaintiff/Appellant B&G Foods North America, Inc. respectfully submits this Reply Brief in support of its appeal.

INTRODUCTION

In their Answering Brief, Defendants make little effort to defend the District Court's misapplication of *Noerr-Pennington* and instead, seek affirmance on the ground that they are not state actors and cannot be liable under Section 1983. This factual argument, which the lower court never ruled on, ignores the allegations in the pleading and misapprehends the law. Defendants do not dispute that it would violate the First Amendment for the state to force Plaintiff to put false labels on its products. The state cannot circumvent this constitutional protection by deputizing uninjured "private" enforcers, who are subject to control by the state, to file suit on behalf of the state, to enforce a criminal statute and seek penalties that go to the state. Under any of the tests this Court uses to assess whether someone is a state actor, Defendants qualify. (Opening Brief ("OB") at 47-55.)

The four arguments Defendants advance as to why they are not state actors lack merit.

First, Defendants contend that "[f]iling a private enforcement action" is not a traditional public function. (Answering Brief ("AB") at 15.) But many state-action cases involve "private enforcement actions," such as a "private" corporation punishing plaintiffs for violating

the corporation's speech restrictions in *Lee v. Katz*, 276 F.3d 550, 552 (9th Cir. 2002). Defendants fail to confront that restricting speech, labeling food, and requiring warnings on products are all traditional and exclusive government functions. (OB at 48-49.) Defendants also argue that their enforcement "does not rise to the level" of factual scenarios found to constitute state action. (AB at 15.) But in addition to being incorrect, this argument ignores the "fact-intensive nature of the inquiry," *Katz*, 276 F.3d at 554, and that the facts alleged in the pleading must be taken as true.

Second, Defendants claim that they do not meet the "joint action," "close nexus," and "symbiotic relationship" tests because the State merely approves or acquiesces in private enforcement. (AB at 19.) This factual argument (which also conflates three separate legal tests) also requires ignoring the contrary allegations in the Complaint, *viz.*, that the State closely monitors and supervises Proposition 65 private enforcement from inception to resolution, may stop claims from being filed or settlements from being executed, actively encourages and supports private enforcement, and that nearly a sixth of the State's Office of Environmental Health Hazard Assessment's budget derives from the proceeds of "private" enforcement.

Third, Defendants contend they are not state actors because they are not "compelled" to file Proposition 65 cases by the State. (AB at 21.) This misstates the "state compulsion" test, which asks only whether the State lends "significant encouragement" to private actors. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

This is yet another highly factual argument that is contradicted by the allegations in the Complaint.

Fourth, Defendants assert that Defendant Glick cannot be a state actor because he is a "lawyer[] in private practice." (AB at 22.) But attorneys, in private practice or otherwise, may be state actors if they act jointly with state officials to violate constitutional rights. *Kimes v. Stone*, 84 F.3d 1121, 1129 (9th Cir. 1996). That is precisely what B&G Foods has alleged here.

Defendants' two-page defense of the reason the district court granted their motion to dismiss also lacks merit. (AB at 25-26) Their cursory analysis of *Noerr-Pennington* ignores the arguments in Plaintiff's Opening Brief, and does not address that their theory would upend decades of settled § 1983 precedent and extend *Noerr-Pennington* immunity far beyond what this Court, or any court, has ever authorized. (OB at 27-32.)

Like most of their brief, Defendants' contention that their claims fall outside the sham litigation exception to the *Noerr-Pennington* doctrine (AB at 28–35) fails to address the allegations in the Complaint. Plaintiff alleges that Defendants serially file unconstitutional lawsuits, an allegation that was recent confirmed by the district court's decision in *California Chamber of Commerce v. Becerra*, — F.Supp.3d —, 2021 WL 1193829, No. 2:19-cv-02019-KJM-EFB (E.D. Cal. Mar. 30, 2021) ("*CalChamber*"). Defendants likewise ignore B&G Foods's allegations that their lawsuits only result in settlements because the Proposition 65 statutory scheme makes it prohibitively expensive to defend against their sham claims. Thus, it was separately erroneous to dismiss the Complaint without leave to amend because Defendants engaged in sham litigation.

ARGUMENT

I. The Facts Alleged Below Establish that Defendants are State Actors

Defendants' argument that they are not state actors would enable states to engage in unconstitutional activities unchecked and seeks to resolve a fact-bound inquiry that was never examined below by construing the Complaint against Plaintiffs.

Resolving the "highly factual question" of whether Defendants are state actors is inappropriate at the pleading stage, especially without the benefit of a district court opinion. *See Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1210 (9th Cir. 2002) (determining whether there is state action requires a careful "sifting" of the "facts and circumstances"). Defendants improperly conflate the five distinct tests for state action—traditional public function, joint action, symbiotic relationship, compulsion, and close nexus—all of which are plausibly alleged in B&G Foods's Complaint. Indeed, Defendants largely ignore the extensive allegations in B&G Foods's Complaint, instead of taking them to be true.

For the reasons below, B&G Foods's Complaint more than adequately alleges that Defendants are state actors.

A. Defendants Perform a Traditional Public Function

Defendants ignore B&G Foods's allegations that their state-court lawsuit seeks to perform a quintessential public function: enforce a public health law that requires putting a warning label on food. This has

been a traditional province of the State since at least the 19th century. (OB at 48-49.)

Instead, Defendants assert that they are not state actors because they are only engaged in "private enforcement." (AB at 15.) But many state-actor cases involve "private enforcement." The question is whether this enforcement has been the historical domain of the state. (OB at 48.) Defendants make little effort to explain how seeking penalties for failing to put a warning label on a product does not fall squarely within the traditional police powers exclusively exercised by the states, and the cases they rely on only underscore this point.

Defendants' reliance on *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019), is misplaced. (AB at 12.) That case involved a Section 1983 claim brought against a company that operated a public access cable television channel. As the Supreme Court succinctly put it: "The relevant function in this case is operation of public access channels on a cable system. That function has not traditionally and exclusively been performed by government." *Id.* at 1929. Food labeling regulation, by contrast, has been the subject of state regulation for hundreds of years.

Defendants also rely on *Polk County v. Dodson*, 454 U.S. 312 (1981) (AB at 13), in which the Supreme Court held that a public defender did not engage in state action when she withdrew from her representation of an indigent defendant because he wanted to file a frivolous appeal. *Id.* at 314. The Supreme Court's decision in that case was grounded on the fact that a public defender, while employed by the State, was at all times completely independent and adverse to the State, as the Sixth Amendment requires. *Id.* at 320-

22 ("[I]t is the function of the public defender to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments on behalf of defendants. All of these are adversarial functions.").

To the extent *Polk County* has any bearing on the "public function" test, it does not support Defendants' position in this case. B&G Foods's Complaint contains detailed allegations—which must be taken as true at the pleading stage that Defendants work jointly, in a close nexus, and/or symbiotically with the State. (4-ER-591-592, 597-598.) Indeed, Defendants call their litigation "enforcement," seek penalties rather than damages, and are supervised by California's top law enforcement officer—the Attorney General. (*Id.*) These are not the hallmarks of an adversarial relationship with the State.

Defendants also cite *Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Servs.*, 608 F.3d 110, 122 (1st Cir. 2010). (AB at 13.) That case involved a Massachusetts statute that granted bar associations standing "to seek a judicial determination whether the challenged actions constitute the unauthorized practice of law." *Id.* at 122. The First Circuit found there was no state action because the statute granted no other powers to bar associations: "[A bar association] could not itself determine whether its interpretation was correct, nor could it enforce its interpretation." *Id.* Here, by contrast, Proposition 65 deputizes "private prosecutors" like Defendants with the authority to sue in the "public interest," seek injunctive relief, and "collect funds for the public treasury." *Consumer Advocacy Grp., Inc. v. Kinetsu Enter. of Am.*, 150 Cal. App. 4th 953, 963

(2007). These are quintessential aspects of State law enforcement and go far beyond the declaratory relief authorized by the statute in *Real Estate Bar Association*.

Alternatively, Defendants suggest that the structure of Proposition 65 "differentiates" lawsuits filed by the state and private enforcers. (AB at 15.) Defendants' cursory analysis misunderstands the purpose of Proposition 65, which was to encourage public enforcement. Proposition 65 was originally described to voters as necessary for the "strict enforcement of the laws" regarding "hazardous chemicals." Ballot Pamp., Proposed Law, Gen. Elect. (Nov. 4, 1986) at 53. While enforcement of these laws was traditionally the exclusive function of the State, according to the ballot language, private enforcers were necessary because "state government agencies have failed to provide [the public] with adequate protection. . . . " *Id.* Only when public enforcers fail to exercise this duty can private enforcers step into the State's shoes and bring an enforcement action on the public's behalf.[1]

Additionally, Defendants in their lawsuits seek civil penalties and injunctions—not damages. Indeed, Proposition 65 private enforcers need not have suffered any injury at all, and for this reason federal courts

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[1] Defendants misapprehend the California Court of Appeals' decision in *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 750 (2001), which they cite for the proposition that public and private enforcement of Proposition 65 are different. As the court made clear, "[C]itizen enforcement was conditioned upon the failure of state and local governments to commence or diligently prosecute an action, after due notice." *Id.* at 748. In other words, private enforcement was not simply an alternative enforcement mechanism, but rather a means of encouraging the State to enforce the law—because it is the State's prerogative to do so.

have found that private enforcers lack Article III standing, as they are suing on behalf of, and collecting penalties for, the State. *Toxic Injuries Corp. v. Safety Kleen Corp.*, 57 F.Supp.2d 947, 952-53 (N.D. Cal. 1999) (finding that a Proposition 65 private enforcer "does not assert its own rights."). These are further hallmarks of state action.

Defendants' efforts to distinguish *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002), thus fall flat. Defendants contend they "merely . . . seek redress in the courts through litigation," while the defendant in *Lee* was exerting control over publicly owned property. (AB at 16.) Yet for the reasons above, private enforcers are not merely filing private lawsuits. They are stepping into the shoes of the State when the State fails to act, seeking penalties and injunctive relief, and all for the sake of policing the labels of countless foods and other consumer products. This is a traditional and exclusive State function.

B. Defendants Act "Jointly" with the State

The "joint action" test "examines whether private actors are willful participants in joint action with the government or its agents." *Brunette*, 294 F.3d at 1210. Defendants assert they do not act jointly with the State because they merely provide advance notice of their claim, and thereafter the Attorney General has no authority to prevent them from filing suit. (AB at 17-18.) This argument again ignores B&G Foods's detailed allegations to the contrary, which is not permissible at the pleading stage.

Nor is Defendants' description of the State's supervision and control over their lawsuits accurate. As explained in B&G Foods's Complaint (4-ER-591-

592, 597-598), the Attorney General can elect to prosecute the claim itself, in which case the private enforcer has no authority to bring the claim. Cal. Health & Safety Code. Section 25249.7(d). The Attorney General may issue a no-merit letter to a claim it believes lacks merit, and private enforcers risk sanctions if they proceed.

Cal. Health & Safety Code Section 25249.7(h)(2). Private enforcers likewise cannot resolve an action without first providing a copy of a proposed settlement to the Attorney General for its review. *Id.* Section 25249.7(f). The Attorney General has stated that Proposition 65 vested it "with a significant role in reviewing and overseeing private-plaintiff [] enforcement" and that it "monitors" all Proposition 65 litigation "from the notice through judgment/settlement." (2-ER-132.) This active supervision and monitoring goes well beyond "mere approval or acquiescence," as Defendants characterize it, and is squarely in the realm of "willful participation."

Defendants note that the Attorney General's objections to claims or settlements does not legally bar private enforcers from proceeding anyway. (AB at 18.) Defendants ignore B&G Foods's allegations that these objections are closely heeded by private enforcers (4-ER-591). Indeed, Defendants do not deny that *they* routinely withdraw claims or settlements in the face of the Attorney General's objections. (OB at 15, 50.)

Defendants cite *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), for the proposition that a State's "approval or acquiescence" in private action does not make it state action. (AB at 19.) In that case, Pennsylvania amended its worker's compensation law to permit insurers or employers to

withhold payment for medical treatment pending an independent review to determine whether the treatment is reasonable and necessary. *Id.* at 43. Under the amended law, the State played no role in determining whether payments would issue—that decision rested entirely with insurers or employers and the independent review boards they created. This case is far different: the Attorney General does not merely permit private enforcement, it actively reviews each private enforcement action, lodges objections to claims or settlements, and takes a cut of any proceeds.[2]

Defendants also contend that the Attorney General's objections to claims or settlements places him in an adversarial relationship with private enforcers. (AB at 19-20.) To the contrary, the Attorney General's ability to provide private enforcers with "administrative direction" is emblematic of joint action. *See Polk County*, 454 U.S. at 321 (finding public defenders were not state actors because they were "not amenable to administrative direction in the same sense as other employees of the State"). As alleged in the Complaint, Defendants and the State are joint actors.

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[2] *Roberts v. AT&T Mobility LLC*, 877 F.3d 833 (9th Cir. 2017) likewise does not support Defendants' position. That case concerned a claim that AT&T's enforcement of arbitration clauses in its mobile phone contracts violated the First Amendment's petition clause. As in *American Manufacturers*, this Court found no state action because the government had nothing to do with the dispute.

C. Defendants Have a "Symbiotic Relationship" with the State

The touchstone of the "symbiotic relationship" test is "significant financial integration." *Brunette*, 294 F.3d at 1213. Although Defendants acknowledge that 75% of the penalties they recover are paid to the State, they simply assert, without explanation, that the money generated by private enforcement is not "indispensable" and therefore no symbiotic relationship exists. (AB at 20.) Defendants' argument ignores B&G Foods's detailed allegations regarding the substantial monies private enforcers generate for the State—nearly one-sixth of OEHHA's budget. (2-ER-113; 4-ER-591-592, 597-598.) Even if it were the test (and it is not), the question of whether private enforcement is "indispensable" to the State is plainly a factual matter inappropriate for resolution at the pleading stage.

Defendants are wrong about the law. Contrary to their assertion, "significant financial integration" does not require the financial benefits conferred be "indispensable to the government's financial success" (AB at 20); indispensability is a sufficient but not necessary condition. *Brunette* 294 F.3d at 1213 ("For example, if a private entity . . . confers significant financial benefits indispensable to the government's financial success, then a symbiotic relationship may exist. A symbiotic relationship may also arise by virtue of the government's exercise of plenary control over the private party's actions." (internal citations and quotation marks omitted)).

Vincent v. Trend W. Technical Corp., 828 F.2d 563 (1987), cited by Defendants (AB at 20) is not to the contrary. That case held the allegedly wrongful termination of an employee of a government contractor

was not state action because the defendant was a "standard government contractor" and the government "did not profit from [the] alleged unconstitutional conduct." *Id.* at 569. Here, by contrast, B&G Foods has alleged that the State profits from Defendants' unconstitutional conduct, over which the State exercises significant control. This is symbiosis.

D. Defendants Meet the "State Compulsion" Test

The "state compulsion" test is satisfied if there is "significant encouragement" by the State of private actors. *Naoko Ohno v. Uuko Yasuma*, 723 F.3d 984, 995-96 (9th Cir. 2013); *see also Tulsa Prof. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.").

Defendants assert that the mere availability of a remedy does not create state action. (AB at 22.) But this again ignores B&G Foods's allegations that Proposition 65 private enforcers do far more than simply seek a "remedy"—they "collect funds for the public treasury" and impose penalties and injunctions on supposed violators, all with the substantial encouragement and assistance of the State discussed above and in the Opening Brief at 54. This is a separate and independent basis for finding state action here.

E. Defendants Have a "Close Nexus" with the State

A "close nexus" exists where there is "public entwinement in the management and control of" private

actors. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Defendants do not offer any specific argument or explanation for why a close nexus does not exist here. As detailed in the Opening Brief at 55, there is substantial entwinement in the management and control of Proposition 65 private enforcers, from the commencement of the actions to their conclusion. This is yet another separate and independent basis for finding state action here. At the very least, this is yet another highly factual question which cannot be resolved at the pleading stage

F. Both Defendants are State Actors

B&G Foods's Complaint contains detailed allegations that Defendants work in concert as representatives of the State in their Proposition 65 enforcement. (4-ER-591-592, 597-598.) Defendants assert that Appellee Glick cannot be a state actor because he is a lawyer "in private practice." (AB at 22.) Neither of the cases Defendants cite support this sweeping proposition; rather, they merely require that Section 1983 claims against attorneys be based on more than purely conclusory allegations of coordination with state officials. *See Simmons v. Sacramento Cty. Super. Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) ("[C]onclusory allegations that the lawyer was conspiring with state officers to deprive [Plaintiff] of due process are insufficient."); *Briley v. California*, 564 F.2d 849, 856 (9th Cir. 1977) (affirming dismissal of Section 1983 claims against attorneys who "were not State officers, and [who] did not act in conspiracy with a State officer" (citing *Haldane v. Chagnon*, 345 F.2d 601, 604 (9th Cir. 1965))).

Where, as here, the Complaint contains allegations of joint action of an attorney and state officials, that is

sufficient to state a claim. *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996) (plaintiff stated a Section 1983 claim against his former attorney with specific allegations that his attorney acted to deprive him of property in conjunction with a judge). As noted above, the Complaint contains detailed allegations that the Defendants acted jointly with the State to deprive B&G Foods of its First Amendment rights. This is sufficient to establish that Appellee Glick is a state actor.

G. Proposition 65 Is a Unique Regulation of Constitutionally Protected Activity

Defendants also postulate that if B&G Foods is permitted to proceed with its claim, private enforcement of the Clean Water Act, Endangered Species Act, and Safe Drinking Water Act would somehow be curtailed. (AB at 23.) Yet unlike Proposition 65, none of these statutes necessarily implicates constitutional rights.

There is no constitutional right to pollute or contaminate water or destroy the habitats of endangered species. There is, however, a constitutional right to speak truthfully, *see e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557 (1980), and a right against compelled speech, *See E.g.*, *Am. Beverage Ass'n*, 916 F.3d at 749. "Private" enforcement of Proposition 65 necessarily implicates those speech rights by compelling warning labels to be placed on certain products, and providing for heavy penalties against those who refuse to so label their products. Proposition 65 is thus a unique attempt to avoid the State's constitutional responsibilities by placing enforcement in the hands of a "private" party. "Private enforcers" are thus in the same position as the leaseholder in Lee

because they are restricting speech in an unconstitutional manner, while remaining under government control. *See* 276 F.3d at 556–57.

II. The *Noerr-Pennington* Doctrine Does Not Apply Here

The district court erred in finding that B&G Foods's Section 1983 claim is barred by the *Noerr-Pennington* doctrine, a holding which Defendants do not even attempt to defend. The district court compounded this error by also ignoring B&G Foods's allegations that Defendants' litigation is a sham because Defendants' claims are meritless and filed for the improper purpose of extorting money from businesses that have done nothing wrong.

A. The *Noerr-Pennington* Doctrine Does Not Immunize Defendants from B&G Foods's Section 1983 Claim

Defendants do not defend the district court's *Noerr-Pennington* ruling, instead simply asserting, without analysis, that it is consistent with Ninth Circuit precedent. (AB at 25-26.) Not so. As detailed in B&G Foods's Opening Brief at 20–31, the district court's decision is inconsistent with decades of Section 1983 precedent and misreads the Ninth Circuit's *Noerr-Pennington* cases. Indeed, this Circuit has never held that state actors are immune from suit if they seek to enforce unconstitutional state laws through state courts. This Court should not allow the district court's unprecedented decision stand.

B. The District Court's Decision Is Inconsistent with Decades of Section 1983 Precedent

Defendants ignore the decades of decisional law cited in B&G Foods's (OB at 20-24) affirming the principle that Section 1983 provides a remedy for unconstitutional state-court lawsuits. *E.g.*, *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("[T]he very purpose of § 1983 was to interpose the federal courts between the States and the people" including when the relief sought was "injunctive relief against a state court proceeding. . . . "); *Miofsky v. Super. Ct.*, 703 F.2d 332, 335 (9th Cir. 1983) (affirming federal court subject matter jurisdiction over Section 1983 lawsuits "even when the state action allegedly violating plaintiff's federally protected rights takes the form of state court proceedings"); *Anderson v. Nemetz*, 474 F.2d 814, 816 (9th Cir. 1973) (reversing dismissal of Section 1983 claim seeking to enjoin enforcement of state vagrancy laws). None of these decisions could be correct if, as Defendants urge, the *Noerr-Pennington* doctrine somehow immunized state actors from liability so long as they enforce unconstitutional laws using the state courts.

As B&G Foods' s explained in its Opening Brief at 23-24, this Court has recently and repeatedly reaffirmed federal courts' obligation under Section 1983 to provide a venue for individuals and businesses confronted with unconstitutional state actor enforcement. *E.g.*, *Am. Beverage Ass'n*, 916 F.3d at 749 (affirming injunction against enforcement of ordinance requiring warnings on certain sugar-sweetened beverages); *Video Software Dealers Ass'n*, 556 F.3d at 950 (affirming injunction against law requiring warnings on certain video games); *CTIA-Wireless Ass'n*, 494 F. App'x at 752 (affirming injunction against ordinance

requiring warnings on certain wireless devices). Defendants assert that these cases involved challenges to statutes or ordinances, rather than lawsuits. (AB at 26.) Yet Defendants do not discuss any of the decisions cited in the Opening Brief recognizing that Section 1983 claims are properly brought in response to unconstitutional state-court lawsuits. *Mitchum*, 407 U.S. at 242; *Miofsky*, 703 F.2d at 335; *Anderson*, 474 F.2d at 816. Nor do Defendants explain how Section 1983 can redress unconstitutional laws before they are enforced, but not afterwards if that enforcement is achieved via state-court litigation.

Under the logic of the district court's opinion, a state could enact any manner of unconstitutional laws so long as enforcement was limited to citizen suits in state court. This is not a purely imaginary possibility. To cite just one recent example, Texas enacted a statute imposing wide-ranging restrictions on abortion access that will be enforced through citizen lawsuits only in order to avoid constitutional scrutiny. Sabrina Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, N.Y. Times A1 (July 9, 2021), *available at* https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html. Indeed, states deputizing private parties to enforce unconstitutional laws is the evil meant to be eliminated by Section 1983, which was enacted in 1871 as part of the Ku Klux Klan Act. The district court's decision would thus render one of the core components of Section 1983 a dead letter. *Mitchum*, 407 U.S. at 242 ("[F]ederal injunctive relief against a state court proceeding can . . . be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.").

C. This Court's *Noerr-Pennington* Decisions Do Not support the District Court's Decision

As explained in B&G Foods's Opening Brief at 27–32, and ignored by Defendants, neither *Manistee Town Center v. City of Glendale*, 227 F.3d 1090 (9th Cir. 2000), nor *Kearney v. Foley & Lardner, LLP* 590 F.3d 638 (9th Cir. 2009) support the district court's holding in this case. *Manistee* involved intergovernmental lobbying, not a state actor filing a lawsuit in state court. The Court there found lobbying deserved *Noerr-Pennington* protection because government officials "advanc[ing] their constituents' goals" is "vital to the functioning of a modern representative democracy." *Manistee*, 227 F.3d at 1093. *Kearney's* holding was grounded in a similar logic. And *Kearney*'s limited holding, that "a governmental entity or official may receive *Noerr-Pennington* immunity for the petitioning involved in an eminent domain proceeding," was grounded on the same principles: "[A] governmental entity acts on behalf of the public it represents when it seeks to take private property and convert it to public use." 590 F.3d at 645. The cases cited by *Manistee* and *Kearney*, as well as subsequent cases from other Circuits, likewise hew to the principle that *Noerr-Pennington* immunity attaches to state actors when they engage in intergovernmental petitioning on behalf of their constituents. (OB at 28-29.) Defendants cite to no case extending *Noerr-Pennington* immunity to lawsuits brought by state actors to enforce state laws, because there is none.

Defendants instead simply assert that *Manistee* and *Kearney* are precedential decisions that must be followed. But this case presents fundamentally different

facts to which the holdings of *Manistee* and *Kearney* do not apply. Nor does it logically follow from *Manistee* or *Kearney* that all state actors are entitled to *Noerr-Pennington* immunity for any lawsuit that they file, no matter how unconstitutional the objective. If the *Noerr-Pennington* doctrine were truly so expansive, there would be no need for prosecutorial immunity or any number of other abstention doctrines. The district court's tortured reading of the Ninth Circuit's *Noerr-Pennington* cases cannot stand.

D. The *Noerr-Pennington* Doctrine Does Not Apply to Claims for Declaratory Relief

The *Noerr-Pennington* doctrine "provides only a defense to liability." *Nunag-Tanedo v. East Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013). As Amicus explains, several courts in this Circuit have concluded that the *Noerr-Pennington Doctrine* does not apply to claims for declaratory relief, since those claims do not seek to impose liability on the opposing party. (Amicus Br. at 29-32.) Defendants make no effort to explain how the district court's dismissal of B&G Foods's claim for declaratory relief is consistent with these decisions. This is a separate and independent basis for reversal.

E. The District Court Erred by Ignoring B&G Foods's Sham Litigation Allegations and Making Improper Factual Determinations

Even if the *Noerr-Pennington* doctrine applied, B&G Foods plausibly alleged that Defendants' lawsuit is a sham—allegations which have since been affirmed by the district court's subsequent decision in *CalChamber*. Litigation is a "sham" for purposes of

the *Noerr-Pennington* doctrine if (1) it is brought for an illegal purpose, (2) it is part of a series of lawsuits filed without regard to the merits, or (3) it is a fraud on the Court. (OB at 38-40.) The well-pleaded allegations of the Complaint establish that Defendants knowingly file false and unconstitutional acrylamide suits in order to extort money for themselves and the state. The district court ignored these allegations and instead drew inferences in Defendants' favor at the pleading stage. This is a separate and independent basis for reversal.

1. Defendants' Enforcement of Proposition 65 Has an Illegal Objective

When litigation is objectively baseless and brought for an abusive purpose, it is a sham. *Sosa*, 437 F.3d 923, 938 (9th Cir. 2006); *see also Small v. Operative Plasters' Local 200*, 611 F.3d 483, 493 (9th Cir. 2010) (holding that state court lawsuits with an illegal objective are not protected by the Petition Clause). Where the underlying litigation targets expressive activity, courts focus on the subjective component of this test. *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000). Here, B&G Foods alleged that Defendants filed their state court lawsuit to compel false and misleading speech, in violation of the First Amendment. (OB at 38.) As the district court in *CalChamber* explained, there is no sound scientific basis for placing a cancer warning on food containing acrylamide:

> [D]ozens of epidemiological studies have failed to tie human cancer to a diet of food containing acrylamide. Nor have public health authorities advised people to eliminate acrylamide from their diets. . . . California has

> also decided that coffee, one of the most common sources of acrylamide, actually reduces the risk of some cancers.

2021 WL 1193829 at *14. The State's required acrylamide warning language, which "states without qualification that the acrylamide in the particular food identified is 'known to cause cancer,'" was thus "controversial and not purely factual" because it is "incorrect, and it implies misleadingly that the science about the risks of food-borne acrylamide is settled." *Id.* at *15-16. The lack of any basis in fact for the warning Defendants seek to compel B&G Foods to place on its Cookie Cakes renders Defendants' litigation objectively baseless.

Defendants do not challenge the district court's holding in *CalChamber* or explain why their efforts to force B&G Foods to place a false cancer warning on its products are constitutionally permissible. Instead, they note only that the Attorney General did not warn them that their claims had no merit prior to filing suit. But *B&G Foods* warned them and they filed suit anyway, demonstrating their subjective intent to pursue an illegal objective. (OB at 38-39.) Defendants' litigation was thus also brought with an abusive intent, which is a separate and independent basis for finding it to be a sham, especially considering that the litigation seeks to compel B&G Foods to engage in false speech.[3]

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[3] Defendants assert that B&G Foods did not raise below the question of whether their lawsuit was sham based solely on its abusive intent. (AB at 31.) But B&G Foods did argue before the district court that Defendants' lawsuit was a sham due to their "subjective intent to use the governmental process—as opposed to the outcome of that process—as a tool for extortion." (2-ER-

2. Defendants' Other Sham Lawsuits Were Not "Successful"

Defendants are "serial enforcement agents under California's Proposition 65 regime" (4-ER-589) who, as Amicus notes, have withdrawn nearly half of the Proposition 65 notices they submitted for acrylamide and settled less than 10% of them. (Amicus Br. at 16.) At the very least, these facts support the inference that Defendants routinely file Proposition 65 claims without regard to the merits.

The district court drew the opposite inference, finding that the small percentage of cases Defendants settled meant that their extortive scheme was a success, an inference Defendants reiterate in their Brief. (AB at 33-34.) Drawing an inference against the plaintiff is clear error at the pleading stage. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972) (at pleading stage, district court must "take the allegations of the complaint at face value"). Nor is it the sensible inference to make here in light of the facts. As B&G Foods alleges, the Proposition 65

137.) "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 997 n.5 (9th Cir. 2007) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)) (internal quotation marks omitted). Additionally, "where an issue is purely legal, and the other party would not be prejudiced, we can consider an issue not raised below." *Id.* at 997 n.5 (citing *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). Since the district court decided Defendants were not engaged in sham litigation, it is appropriate for this Court to evaluate that holding through the appropriate legal framework.

statutory scheme makes it all but impossible for businesses to defend against these claims for less than the cost of settlement. (4-ER-589-90, 597, 599-600); *see also Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th 454, 478 (Vogel, J., dissenting) (characterizing Proposition 65 as "a form of judicial extortion"). Defendants do not reckon with B&G Foods's allegations, or explain why the settlement payments they have extracted from businesses should be viewed as anything other than "judicial extortion." This is a separate and independent basis for reversal and remand for appropriate fact-finding by the district court.

3. Defendants' Litigation is a Fraud Upon the Court

Defendants would force B&G Foods to warn consumers that its Cookie Cakes cause cancer when there is no basis for believing such a warning to be true. Countless governmental and scientific bodies have confirmed that there is no basis for believing acrylamide in food causes cancer. Defendants attempt to spin their untenable position as a "difference of opinion about the science," but offer no scientific or other evidence linking acrylamide in food to any risk of harm. (AB at 34.)

Alternatively, Defendants claim they were relying on the State's listing of acrylamide to justify the hundreds of Proposition 65 notices they filed. (*Id.*) But B&G Foods told them before they filed their suit that California's most knowledgeable acrylamide regulator "conceded in 2007 that acrylamide is not actually known to cause cancer in humans" (4-ER-600-01) and that even under

California's existing regulations, B&G Foods's Cookie Cakes do not exceed the "No Significant Risk Level" threshold for which a Proposition 65 warning is required. (4-ER-598-99.) Defendants filed anyway, knowing full well that the allegations in the Complaint were untrue. That is fraud, and it is a separate and independent basis for reversal and remand for appropriate fact-finding by the district court.[4]

4. The District Court Ignored B&G Foods's Allegations

In granting Defendants' motion to dismiss, the district court failed to "accept as true all facts alleged in the Complaint and draw all reasonable inferences in favor of the plaintiff." *In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016). As detailed in B&G Foods's Opening Brief at 42, the Complaint contained extensive allegations that Defendants' lawsuits lack merit, are brought to extort money rather than protect the public, and that they collect money from some businesses only because the statutory scheme makes the cost of defending such lawsuits prohibitive. Rather than take these allegations "at face value," *Cal. Motor Transp.*, 404 U.S. at 516, the district ignored them and instead drew inferences against B&G Foods, including that because other parties had settled with Defendants, their claims must have some merit. For the reasons above, this inference is not just improper—it is entirely inconsistent with the facts. Defendants likewise ignore

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[4] Defendants assert B&G Foods did not raise this issue below. As noted above at 42, B&G Foods asserted before the district court that Defendants' lawsuit was a sham and had no basis in law or fact. The Court can, and should, evaluate each test for determining whether Defendants engage in sham litigation.

these allegations and urge the Court to ignore B&G Foods's Complaint. This is contrary to law. The district court's decision, untethered from the allegations in the Complaint, must be overturned.

III. The District Court Abused Its Discretion by Denying Leave to Amend

Defendants do not deny that B&G Foods requested leave to amend, presented potential amendments, and yet was still denied even one opportunity to amend the Complaint. Under this Court's precedents, this was error and warrants reversal. (OB at 44-45 (collecting cases).)

Defendants assert that B&G Foods's proffered amendments would not have changed the *Noerr-Pennington* analysis. Not so. B&G Foods could have amended the Complaint to include additional facts regarding, among other things, that the Cookie Cakes qualify for the NSRL safe harbor; that Defendants conduct no NSRL assessment before filing suit; and that Defendants do not prevail in court but rather accept quick settlements for a pittance in statutory penalties but hefty attorney's fees (so hefty they have repeatedly been declared illegal by the Attorney General), to name but a few. (OB at 46.) Such allegations bear directly on whether Defendants are engaged in sham litigation, and the district court erred by refusing to permit B&G Foods even one opportunity to amend and add these allegations.

CONCLUSION

For each reason above, the district court's judgment dismissing the case should be reversed and B&G Foods's claims permitted to proceed to discovery.

Respectfully Submitted,

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By: */s/ J. Noah Hagey*
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B&G Foods North America, Inc.

Dated: August 17, 2021

REPLY TO STATEMENT OF RELATED CASES

Defendants assert that *Cal. Chamber of Commerce v. Bonta*, No. 21-15745, is related to this case. B&G Foods disagrees. That case concerns whether a private Proposition 65 enforcer may appeal an injunction issued against the government that enjoins future enforcement of Proposition 65 as to acrylamide in foods. The *Noerr-Pennington* doctrine is not at issue and the cases are not related within the meaning of the Ninth Circuit rules.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,380 words.

Respectfully Submitted,

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Dated: August 17, 2021

AUDIO AND VIDEO OF ORAL ARGUMENT IN THE NINTH CIRCUIT (JANUARY 12, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

v.

KIM EMBRY

No. 20-16971

Case Panel: Gould, Bennett, Nelson

Hearing Location: San Francisco, CA

https://www.ca9.uscourts.gov/media/audio/?20220112/20-16971/ (Audio)

https://www.ca9.uscourts.gov/media/video/?20220112/20-16971/ (Video)

APPELLANT B&G FOODS'S PETITION FOR REHEARING EN BANC (MARCH 31, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B&G FOODS NORTH AMERICA, INC.,

Plaintiff/Appellant,

v.

KIM EMBRY and NOAM GLICK,

Defendants/Appellees.

Case No. 20-16971

On Appeal from the United States District Court for the Eastern District of California, Case No. 2:20-cv-0526-KJM-DB, the Honorable Kimberly Mueller

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PETITION FOR REHEARING EN BANC

STATEMENT OF REASONS FOR EN BANC REVIEW

The attached Panel Opinion involves a question of exceptional importance and conflicts with other Courts of Appeals that have addressed the same issue:

1. Whether the judge-made *Noerr-Pennington* doctrine may be used to immunize state actors from violating citizens' constitutional rights.

By answering this question in the affirmative, the Panel Opinion favored the state's purported First Amendment interests, which are not constitutionally protected, over its citizens' constitutional rights. This decision is inconsistent with Supreme Court precedent, conflicts with the law in other Circuits, and elevates a judge-made immunity over rights guaranteed by the Constitution and enforced under 42 U.S.C. § 1983.

Taking the Panel Opinion's holding to its logical conclusion, state and local governments are free to deputize bounty hunters to infringe constitutionally protected rights, and the aggrieved parties will have no legal remedy, all in the name of a state's fictitious First Amendment rights to petition the courts. However, "*Noerr–Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns Corp.,* 858 F.2d 1075, 1086 (5th Cir. 1988); *see also* Mark G. Yudof, *When Government Speaks: Politics, Law, and Government Expression*

in America 45 (1983) ("[I]t is inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community.") Accordingly, this Court should grant Appellant's petition for rehearing *en banc*, correct the Panel's decision, and overturn the lower court's application of *Noerr-Pennington* immunity to dismiss Appellant's First Amendment case.

STATEMENT OF THE CASE

Plaintiff-Appellant B&G Foods North America, Inc. ("B&G Foods" or "Appellant") filed this case to remedy California's use of private bounty hunters to force B&G Foods to publish false cancer "warnings" on packages of *SnackWell's Devil's Food Cookie Cake* products sold in California. This product contains dietary acrylamide, a chemical that naturally arises from cooking food, which has never caused cancer in a human.

Defendants-Appellees Kim Embry and Noam Glick ("Appellees") are serial Proposition 65 state enforcers who routinely threaten food businesses with mandatory injunctions and penalties to coerce payments to themselves.[1] If a business refuses to pay, Appellees

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[1] California's Proposition 65 authorizes private individuals to bring state actions to enforce California's warning label requirements. The law has long been criticized as subject to "abuse[]" by "unscrupulous lawyers driven by profit rather than public health," who serially file " frivolous 'shake-down' lawsuits." Press Release of the Governor of the State of California (May 7, 2013), https://www.ca.gov/archive/gov39/2013/05/07/news18026/index.html. For this reason, Proposition 65 has been called "legalized blackmail." *See, e.g.*, Elaine Watson, *Amended Prop 65 Regulations Likely to Prompt a Significant Uptick in Litigation, Predict Attorneys,* https://www.foodnavigatorusa.com/Article/2018/09/01/Amended-

sue to compel a false and disparaging label on all products sold in the State: "WARNING: This product can expose you to acrylamide, which is known to the State of California to cause cancer," even though acrylamide is a compound found in countless foods and has never been shown to be harmful in people. (OB at 12-14.)

Appellees' actions are unconstitutional because they infringe on B&G Foods's First Amendment right to be free from controversial or false compelled speech. (*Id.* at 2 (collecting cases).) Appellees do not argue otherwise, and the Panel Opinion assumed that the enforcement action at issue was a constitutional violation actionable under § 1983.[2] But instead of redressing this violation, the Panel Opinion expanded the limited holding in *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009), which found that "a governmental entity or official may receive *Noerr-Pennington* immunity for the petitioning involved in an eminent domain proceeding," and held that state actors who use the courts to violate a plaintiff's constitutional rights are immune from liability. It thus concluded that Appellant's suit was properly dismissed.

Prop-65-regulations-likely-to-prompt-a-significant-uptick-in-litigation-predict-attorneys. The statute is found at Cal. Health & Safety Code § 25249.5 *et* seq.

[2] On the same day that the Panel Opinion was issued, this Court decided *California Chamber of Commerce v. Council for Education & Research on Toxics*, which affirmed the district court's finding "that the Prop. 65 acrylamide warning did not pass constitutional muster." 2022 WL 804104, *7 (9th Cir. 2022). Accordingly, Appellees' actions underlying this suit are unconstitutional under binding Ninth Circuit precedent.

ARGUMENT

The Panel Opinion should be reversed because it misapplied and dramatically expanded the *Noerr-Pennington* doctrine, making it virtually impossible for businesses and individuals to seek redress from unconstitutional state action. Decades of settled jurisprudence permit aggrieved citizens to hold state actors accountable in federal court for constitutional deprivations, including for precisely the kind of unlawful compelled speech at issue in this case. The Panel's ruling would upend all of that—and privilege the notional, and not constitutionally protected, petitioning interest of state prosecutors and their agents above the citizens whose rights are being violated. This result stretches *Noerr-Pennington* beyond recognition and, contrary to Supreme Court precedent, undermines the purpose of § 1983 lawsuits, would permit states to infringe on their citizens' constitutional rights without consequence, and is contrary to the law in other circuits. Accordingly, the Panel Opinion should be reconsidered and reversed.

I. The Slow Erosion of Civil Rights Due to a Fictional State's Right to Petition

Noerr-Pennington began as a judge-made antitrust doctrine intended to protect private competitors from "restraint of trade" liability under the Sherman Act where they engage in joint efforts to lobby the government for legislative or regulatory reform. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). In the decades since *Noerr* and *Pennington*, courts have expanded the doctrine's reach to a "generic rule of

statutory construction," under which courts "construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006). Courts also have broadened the doctrine to encompass certain petitioning of the judicial branch by private citizens filing lawsuits, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and to conduct "incidental to the prosecution of the suit," including pre-suit demand letters, as long as the "underlying litigation [falls] within the protection of the Petition Clause," *Sosa*, 437 F.3d at 934-36. *Noerr-Pennington* is grounded in the immunized party's First Amendment rights under the Petition Clause, although this proposition has come under fire. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 403-04 (2011) (Scalia, *J.*, concurring) ("I find the proposition that a lawsuit is constitutionally protected 'Petition' quite doubtful. . . . There is abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of the government, not the courts.").

In 2000, this Court decided *Manistee Town Center v. City of Glendale*, in which it reasoned that government officials sometimes speak on their constituents' behalf —they "intercede, lobby, and generate publicity to advance their constituents' goals." 227 F.3d 1090, 1092-93 (9th Cir. 2000). This Court thus held that the government defendants there vicariously enjoyed *Noerr-Pennington* immunity derived from their constituents' First Amendment rights. *Id.*

This Court went a step further a few years later in *Kearney*, 590 F.3d at 64445. The *Kearney* Court held that "a governmental entity or official may receive

Noerr-Pennington immunity for the petitioning involved in an eminent domain proceeding." *Id.* at 645.[3] It further explained that "[t]here is no reason . . . to limit *Manistee*'s holding to lobbying efforts" and that "an eminent domain proceeding is consistent with the principles laid out in *Manistee*: a governmental entity acts on behalf of the public it represents when it seeks to take private property and convert it to public use." *Id.* at 644-45. With *Kearney*, *Noerr-Pennington* was expanded from a judge-made antitrust doctrine into a way for the government to immunize itself when taking its citizens' property.

II. The Panel Opinion Erred in Holding That a State's Right to Petition Per Se Outweighs Its Citizens' Constitutional Rights

Relying on *Manistee* and *Kearney*, the Panel Opinion explained that *Noerr-Pennington* applies to all § 1983 claims, no matter the unconstitutional violation underlying such claims. This holding is unsupported by the law and creates a devastating precedent, effectively gutting civil-rights protections for citizens within this Circuit and nationwide.

At the outset of its analysis, the Panel Opinion set forth the following test, which has historically been used when considering the *Noerr-Pennington* doctrine:

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[3] In *Kearney*, the Court ultimately concluded that *Noerr-Pennington* immunity *did not apply* because the defendant-municipality's conduct fell within the narrow sham-litigation exception. *Id.* at 646-48.

> To determine whether a defendant's conduct, which allegedly violates a statute, is immunized under *Noerr-Pennington*, we apply a three-step analysis to determine: (1) "whether the lawsuit imposes a burden on petitioning rights," (2) "whether the alleged activities constitute protected petitioning activity," and (3) "whether the statute[] at issue may be construed to [avoid] that burden."

B&G Foods N. Am. v. Embry, 2022 WL 804287, at *4 (9th Cir. 2022) (quoting *Kearney*, 590 F.3d at 644). On the second step—whether the Appellees' lawsuit on behalf of the state is a protected petitioning activity—the Panel Opinion explained that this Court's "precedent compels the conclusion that their activities were protected by the Petition Clause." *Id.* at*5. Because Appellees were engaged in "litigation activities brought by government officials to advance public goals," they were protected by the First Amendment's Petition Clause. *Id.* at *5-6. This holding is incorrect for at least three independent reasons.

A. The State Does Not Enjoy First Amendment Protections That Outweigh Their Citizens' Civil Rights

States and their agents do not have a protectable interest under the Petition Clause, much less one that per se outweighs its citizens' constitutional rights. A governmental unit "created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor & City Council of Balt.,* 289 U.S. 36, 40 (1933). It is "inconceivable that governments should assert

First Amendment rights antagonistic to the interests of the larger community," and doing so in this context especially "would be standing the world on its head." *See* Mark G. Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* 44-45 (1983); *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 139 (1973) (Stewart, *J.*, concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."); *Herr v. Pequea Township*, 274 F.3d 109, 129-30 (3d Cir. 2001) (Garth, *J.*, dissenting) ("*Noerr-Pennington* immunity applies to *private parties—not governmental entities*—seeking redress from the government," otherwise "a governmental entity's. . . . 1st Amendment right to petition always trumps an individual citizen's [constitutional rights, to, among other things,] be free from arbitrary and capricious government activity"), *abrogated by United Artists Theatre Cir., Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). The

Panel Opinion held that "§ 1983 cannot burden protected petitioning rights." *B&G Foods N. Am.*, 2022 WL 804287, at *9. That holding should not be allowed to stand.

To the extent that the Panel Opinion's holding is premised on the limited precedent in this Circuit finding that the government enjoys constitutional protections conferred on it vicariously through its citizens, that too should be reversed. Constitutional rights are personal and non-assignable. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (holding that one person may not invoke another's Fourth Amendment right to be free from unreasonable search).

B. Even If the State Does Have an Interest Under the Petition Clause, Private Enforcement Actions Are Not Protected

Even if the government had some First Amendment right in lobbying its own courts, the Panel Opinion extended that interest too far by applying it to private enforcement actions. In *Manistee*, this Court found that municipalities that lobby other government officials on behalf of their constituents are entitled to First Amendment protections. 227 F.3d at 1092. But such lobbying activities are not analogous to state actors who initiate litigation against private parties. Lobbying is not the evil that § 1983 was created to address. *See Mitchum v. Foster*, 407 U.S. 225, 239 (1972); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978). State officials depriving individuals of their civil rights with the assistance or acquiescence of state courts, however, is precisely the evil § 1983 was created to curtail: "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U.S. at 240.

Like this Court's holding in *Manistee*, the Second and Seventh Circuits have held that municipal government actors are protected by *Noerr-Pennington* when they are petitioning the state or federal government on behalf of their constituents. *See Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 20-21 (2d Cir.1980) (city's petition to state and federal agencies opposing expansion of a regional shopping center were immunized under *Noerr-Pennington* without a discussion of the public versus private dichotomy); *New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) (holding

that *Noerr-Pennington* applies to municipality's efforts to lobby federal government without discussion of the public versus private dichotomy). But they have not extended this protection to a government's decision to petition to the Courts to attack private citizens. This Court should decline to go down this perilous path.

C. The Panel Opinion's Holding Will Have a Devastating Effect on Citizens' Civil Rights and Is Directly Contrary to the Purpose of § 1983

Applying the judge-made *Noerr-Pennington* doctrine to state action vitiates Congress's purpose in passing 42 U.S.C. § 1983 and years of Supreme Court precedent vindicating citizens' civil rights to challenge unlawful prosecutions. Congress enacted § 1983 as Section 1 of the Civil Rights Act or Ku Klux Klan Act of 1871, and designed it to empower the federal government to punish vigilante "justice" wielded by Klansmen and their state-actor confederates portending to act under color of state or local law. *See* Ch. 22, § 1, 17 Stat. 13, 13; *see generally* Susan H. Bitensky, *Section 1983: Agent of Peace or Vehicle of Violence Against Children?*, 54 Okla. L. Rev. 333, 341-47 (2001). The entire thrust of the legislation was to address the misuse of private actors wielding state authority to deprive citizens of their civil rights. *Id.*

Congress recognized that states and those acting in concert with the state may, from time to time, infringe upon federal civil rights. Erwin Chemerinsky, *Federal Jurisdiction* 504-05 (6th ed. 2012) ("Section 1983 . . . empowered the federal government, and most especially the federal courts, with the authority necessary to prevent and redress violations of federal rights.").

Legislators were concerned that "state instrumentalities could not protect those rights" and that "state officers might, in fact, be antipathetic to the vindication of those rights." *Mitchum*, 407 U.S. at 242. For that reason, Congress "opened the federal courts to private citizens, offering a uniquely federal remedy"—one that was "to be broadly construed"—against "incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 239; *see Monell*, 436 U.S. at 700-01.

Section 1983's innovation was that it created a private right of action in federal court to remedy state misconduct—and that it expressly authorized monetary and injunctive relief as remedies. *Mitchum*, 407 U.S. at 242. And as explained by the Supreme Court in *Mitchum*, and as this Court has reaffirmed, § 1983 provides a private right of action "even when the state action allegedly violating plaintiff's federally protected rights takes the form of state court proceedings." *Miofsky v. Superior Ct. of State of Cal.*, 703 F.2d 332, 335 (9th Cir. 1983) (citing *Mitchum*, 407 U.S. at 226-30; *see also Goldie's Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 469 (9th Cir. 1984) (district court had jurisdiction over § 1983 claim challenging allegedly unconstitutional state court eviction proceedings); *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 890 (9th Cir. 2011) (reversing district court's dismissal of § 1983 claim challenging state court mandamus proceedings filed to compel municipality to enforce unconstitutional ordinance). *Mitchum*, *Miofsky*, and their progeny are rendered academic by the Panel Opinion because any § 1983 claim challenging a state court proceeding will be nullified pursuant to *Noerr-Pennington*. While *Mitchum* and *Miofsky* require district courts to entertain

§ 1983 claims challenging unconstitutional state court proceedings, the Panel Opinion compels district courts to then dismiss those same § 1983 claims. The Panel Opinion's holding thus undermines the purpose of and protections offered by § 1983.

The Panel Opinion also has no limit when taken to its logical conclusion, and it will serve to effectively eliminate many citizens' constitutionally protected rights. The Panel Opinion found that enforcement actions under Prop 65 "advance public goals," and thus were protected petitioning activity. But every government action can be construed as advancing public goals and thus trigger the state's purported petition rights under the Panel Opinion's holding. Accordingly, state and local government will have free reign to enact unconstitutional laws and bring in enforcement actions of the same with complete immunity from being haled into court, all in the name of "advancing the public good." This cannot be the law.

States have increasingly created laws like Proposition 65, which delegate enforcement to citizens. Under the Panel Opinion's precedent, a defendant subjected to such suit would be unable to challenge its constitutionality, as any would-be citizen enforcer would be shielded by *Noerr-Pennington*. And the defendants would similarly be unable to prevail on pre-enforcement attack on the law. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021) ("As our cases explain, the chilling effect associated with a potentially unconstitutional law being on the books is insufficient to justify federal intervention in a pre-enforcement suit.") (internal quotation marks omitted). Accordingly, a defendant would be left with no recourse to challenge

an unconstitutional state action, no matter how unlawful. These are not abstract concerns.[4]

In sum, this is an issue of exceptional importance, as the Panel Opinion will provide state and local governments a novel way to infringe on their citizens' constitutional rights with impunity. The Court should grant this petition to correct this dangerous precedent.

III. The Panel's Decision Is Inconsistent with Other Circuits' Opinions Regarding the Applicability of the *Noerr-Pennington* Doctrine as to § 1983 Claims

This Court should further reconsider this case en banc because other Courts of Appeal are divided on the issue of whether *Noerr-Pennington* immunizes state actors against § 1983 claims. *See Latta v. Otter*, 779 F.3d 902, 904 (9th Cir. 2015) ("Such a clear circuit split on such an exceptionally important issue demands en banc review.").

On the one hand, the Fifth Circuit has held that "*Noerr-Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment." *Video Int'l Prod., Inc.,* 858 F.2d at 1086. In that case, the City of Dallas sought

Noerr-Pennington immunity where it unlawfully enforced zoning laws against plaintiff. Explaining that the "point of the *Noerr-Pennington* doctrine is to protect private parties when they petition the

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[4] *California's Governor Pledges to Model an Assault Weapons Ban on Texas Abortion Law*, AP (Dec. 12, 2021), https://www.npr.org/2021/12/12/1063489922/california-governor-gavin-newsom-assault-weapons-ban-texas-abortion-law.

government for laws or interpretations of its existing laws," the Court found that the doctrine offered the city no protection and thus proceeded to the merits of the plaintiff's claims. *Id.* at 1083.

On the other hand, the Third Circuit in *Mariana v. Fisher* held that the Attorney General of Pennsylvania, along with other state actors, were protected by *Noerr-Pennington* after instituting a lawsuit against tobacco companies on behalf of the commonwealth. 338 F.3d 189, 200 (3d Cir. 2003). But neither *Mariana* nor any of the cases it cites addressed the nature of government speech, a state's "right" to petition, or the extent that such a right is "protected" by the First Amendment.[5] On this score, as well as for the reasons set forth above, en banc review is necessary.

CONCLUSION

For the foregoing reasons, this Circuit should grant Appellant's petition for rehearing en banc, reverse the Panel Opinion and the lower court ruling, and find that *Noerr-Pennington* immunity does not apply to Appellees or any other state actor that violates its citizens constitutionally protected civil rights.

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[5] As noted, the Second and Seventh Circuits have held that municipalities have an interest under the Petition Clause to lobby state and federal governments, but neither discussed the public versus private dichotomy. *See Miracle Mile Assocs.*, 617 F.2d 18; *New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007).

Respectfully Submitted,

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Dated: March 31, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35(b) and Ninth Circuit Rule 40-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 3,478 words.

Respectfully Submitted,

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