23-5169

In the Supreme Court of the United States

MICHAEL MOGAN,

Petitioner

v.

SACKS, RICKETTS AND CASE LLP, Et Al.

Respondents

On Petition for a Writ of Certiorari to the Court of Appeal of the Northern District Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit—in direct conflict with the Seventh Circuit—erroneously fail to recognize that 28 U.S.C. § 636(c) precludes the parties from selecting a particular magistrate judge to preside over their conflict and that, when they do so, the magistrate judge does not obtain jurisdiction over the matter?

2. Whether California's Anti-SLAPP Statute Can Apply In Federal Court Because The Statute Answers The Same Question As The Federal Rules And Is Valid Under The Rules Enabling Act?

3. Whether denial to Petitioner of oral argument by the Magistrate Judge through the entire proceedings including in Petitioner opposing Rule 11 sanctions followed by the Ninth Circuit denying Petitioner's request for oral argument and as a request for special accommodation under the American With Disabilities Act of 1990, As Amended warrants reversal.

4. Whether the Rule 11 motion did not adequately inform Petitioner of the source of authority for the sanctions being considered in violation of the Due Process Clause of the Federal Constitution (U.S. Const., 14th Amend.) and in violation of the Due Process Clause of the Federal Constitution (U.S. Const., 5th Amend.).

PARTIES TO THE PROCEEDING

Michael Mogan, Petitioner here, was appellant and objector below. Respondents Sacks Ricketts and Case LLP, Michele Floyd, Jacqueline Young, Airbnb Inc., Jeff Henry, Dave Willner and Sanan Ebrahini were appellees below.

RELATED PROCEEDINGS

No such proceedings exist.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Mogan prays that a writ of certiorari be granted to review the judgment and orders entered by the Northern District of California.

OPINIONS BELOW

The opinion of the Ninth District Court of Appeals and orders of the Northern District Of California case is attached to this petition as an Appendix.

JURISDICTION

The Ninth District Court Of Appeals opinion is attached. *See* Appendix. This petition is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISION

28 U.S.C. §636; Federal Rules Of Civil Procedure 11; and California Code Of Civil Procedure 425.16.

INTRODUCTION

Michael Mogan ('Petitioner") seeks review of his Appeal Case No. 22-15254 which affirmed the judgment and certain orders by the Ninth Circuit Court Of Appeals. The Ninth Circuit Opinion cited a second appeal 22-15793 and but the two appeals were not consolidated.

Petitioner filed a seven count complaint against Airbnb Inc., Dave Willner, Jeff Henry and Sanaz Ebrahini ("Airbnb Repondents") that included two RICO civil claims specifically 18 U.S.C. 3 1962(c) and 18 U.S.C. §1962(d). Despite well settled precedent that RICO claims are not barred by the litigation privilege (see *Menjivar v. Trophy Props.*, No. C06–03086 SI, 2006 WL 2884396, at *16) the District Court dismissed all Petitioner's claims in granting Airbnb Respondents Rule 12(b)(6) motion and Rule 11 motion under the litigation privilege and the non-RICO claims based on collateral estoppel.

The case was initially assigned to Magistrate Judge Kandis A. Westmore and Petitioner consented to her as a Magistrate judge. Airbnb Respondents then related the case to magistrate Thomas Hixson and Petitioner immediately objected to reassignment but his objections were not ruled upon. The local rules in the Northern District Of California have no such rule governing such a situation as the Seventh Circuit does whether a plaintiff's consent to magistrate jurisdiction remains effective after the case is assigned to another Magistrate Judge thus Judge Thomas Hixson had no jurisdiction over Petitioner's claims.

Sacks Ricketts and Case LLP, Michele Floyd and Jacqueline Young ("SRC Respondents") filed a motion to strike the abuse of process claim against SRC Respondents under California's AntiSLAPP statute and the District Court analyzed such motion under both prongs of the California Code Of Civil Procedure 425.16 statute ("AntiSLAPP statute") and dismissed Petitioner claim with prejudice. Airbnb Respondents filed a motion to declare Petitioner a vexatious litigant and for sanctions and the District Court denied the motion however the District Court failed to apply the same AntiSLAPP statute although it was clear Airbnb Respondents motion fell within the first prong of the AntiSLAPP statute. Thus the District Court arbitrarily applied California's AntiSLAPP statute when filed by SRC Respondents as a moving party but failed to when such a motion was filed by Petitioner.

Airbnb Repondents also filed a motion to dismiss (citing disputed facts from 28 exhibits) and a Rule 11 motion (with 29 exhibits) which the District Court took judicial notice and subsequently granted Airbnb Respondents motion to dismiss and Rule 11 motion. Airbnb Respondents Rule 12(b)(6) motion and Rule 11 motion made no mention of the allegations in the complaint about the unfiled sanctions motion, false document and threatening letter sent to Petitioner nor did they introduce the unfiled sanctions motion as an exhibit as if that meant the allegations in the complaint were not true nor that such unfiled motion did not exist. Instead Airbnb Respondents claimed Petitioner filed a complaint based on a different sanctions motion they

later filed. The Rule 11 motion also had no basis in fact or law and did not discuss why any legal precedent would require Petitioner to amend or withdraw the claims in the complaint yet the Ninth Circuit Court Of Appeals affirmed the decision.

Airbnb Respondents sought to invoke collateral estoppel in their Rule 12(b)(6) motion for two specific facts that (1) Airbnb failed to pay its arbitration fee in an underlying state court case that Mogan, an attorney, brought on behalf of his client, and (2) Airbnb sought to harass, threaten, and extort money from Mogan by moving for sanctions after Mogan filed a motion to lift a stay on the basis of Airbnb's purported untimely arbitration payment which the District Court granted but the underlying civil and arbitration proceedings were not final before January 2021 nor did this address allegations in the complaint for the unfiled sanctions motion.

Despite these disputed facts the Ninth Circuit Court of Appeals sua sponte on appeal revised the facts at issue preclusion and concluded issue preclusion applied because "[b]oth the instant lawsuit and the state-court sanctions proceedings—a "final adjudication"—present the "identical issue(s)" of the timeliness of Airbnb's filing fee payment and the propriety of Mogan's actions in response to communications from the AAA." Op. at 4. Since the Ninth Circuit Court Of Appeals concluded the claims in the complaint were barred by collateral estoppel the Appellate Panel did reach Petitioner's arguments on appeal that the litigation privilege did not bar any of the claims in the complaint.

Petitioner was also not afforded oral argument throughout the entire District Court proceedings

including in opposing the Rule 11 motion. Petitioner also sought oral argument on appeal and as a special accommodation from the Ninth Circuit Court of Appeals and Petitioner was denied oral argument once again.

These questions call urgently for this Court's review and guidance.

STATEMENT OF THE CASE

A. Factual Background

Petitioner filed a complaint on October 29, 2021 that included claims for (1) Abuse Of Process; (2) Intentional Infliction Of Emotional Distress; (3) Intentional Interference With Prospective Economic Relations; (4) Civil Conspiracy; (5) Federal Civil RICO, 18 U.S.C. 3 1962(c); (6) Conspiracy to Engage in a Pattern of Racketeering Activity: 18 U.S.C. §1962(d); (7) Unfair Business Practices Under Business & Professions Code Sections 17200, et seq. Dkt. at 1. The crux of the complaint was based upon threatening letters, an unfiled sanctions motion never filed and fake documents sent to petitioner in a desperate attempt to compel Petitioner into refiling an arbitration claim closed after Respondents failed to pay their arbitration filing fees.

The complaint alleged in part Petitioner as an attorney was involved in arbitration proceedings with his client, where Petitioner timely paid the filing fee, however Respondents Jeff Henry, Dave Willner and Sanaz Ebrahini recklessly did not and arbitration proceedings were closed April 8, 2019. The complaint alleged on June 10, 2019 SRC Respondents served

Petitioner a sanctions motion pursuant to California Code Of Civil Procedure 128.7 seeking $25,047 in fees to vex and annoy Petitioner into refiling an arbitration claim instead of proceeding in state court. The frivolous sanctions motion was never filed. The complaint also alleged in part the June 10, 2019 sanctions motion included an invoice with false information that Airbnb Inc. had paid their $7,500.

The RICO claims in the complaint alleged predicate acts for (1) use of wires to defraud in Violation of 18 U.S.C. §1343 based upon a threatening phone call made by Respondent Young to Petitioner; (2) extortion based upon Respondents threatening Petitioner with the sanctions motion never filed; (3) extortion based upon Respondents sending Petitioner a threatening letter with the unfiled sanctions motion; (4) extortion based upon personal service of the unfiled sanctions motion on Petitioner; (5) extortion based upon service of the unfiled sanctions motion over email; (6) violation of the Hobbs Act pursuant to 18 USC §1951 for Respondents threats in a letter to Petitioner's business and reputation; and (7) violation of the Hobbs Act 18 USC §1951 for service of the unfiled sanctions motion upon Petitioner.

On December 21, 2021 Airbnb Respondents filed a Rule 11 motion with 29 exhibits which motion cited a single statute, Fed. R. Civ. P. 11, not even the RICO statutes were cited. The Rule 11 motion only cited eleven cases which were *Adriana Int'l Corp. v. Theoren*, 913 F.2d 1406 (9th Cir. 1990); *Bletas v. Deluca*, 2011 WL 13130879 (S.D.N.Y. Nov. 15, 2011); *Bus. Guides, Inc. v. Chromatic Commnc'ns Enters.*, 498 U.S. 533 (1991); *Buster v. Greisen*, 104 F.3d 1186,

1190 (9th Cir. 1997), as amended on denial of reh'g (Mar. 26, 1997); *Christian v. Mattel, Inc.*, 286 F.3d 1118 (9th Cir. 2002); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986); *Holgate v. Baldwin*, 425 F.3d 671 (9th Cir. 2005) *In re Keegan Mgmt. Co. Sec. Litig.*, 78 F.3d 431 (9th Cir. 1996); *McCluskey v. Hendricks*, 2021 WL 4815938 (C.D. Cal. June 16, 2021) *McCluskey v. Henry*, 56 Cal. App. 5th 1197 (2020) and *Silberg v. Anderson*, 50 Cal. 3d 205 (1990), as modified (Mar. 12, 1990). The Rule 11 motion did not cite *DKN Holdings LLC v. Faerber*, 61 Cal.4th 813 (Cal. 2015) (cited by the District Court in its motion to dismiss and the Appellate Opinion) and, the litigation privilege nor any legal authority that the complaint was barred because (1) Airbnb paid its filing fee; and (2) they filed a separate sanctions motion for a proper purpose.

B. Procedural History

District Court

Petitioner filed his complaint October 29, 2021. Magistrate Judge Kandis A. Westmore was assigned to the case November 1, 2019 and Petitioner consented to her as Magistrate Judge November 13, 2021. On December 3, 2021 SRC Respondents filed a notice of related case to transfer the case to Judge Thomas Hixson. On December 4, 2021 Petitioner objected to the case being related. On December 10, 2021 Judge Thomas Hixson issued a related case order and did not rule on Petitioner's objections.

On November 24, 2021 Airbnb Respondents filed a motion to dismiss. Dkt. 12. On November 29, 2021 SRC Respondents filed a motion to strike the complaint pursuant to California Code Of Civil Procedure §425.16. Dkt. 16. On December 21, 2021 Airbnb Respondents filed a Rule 11 motion (Dkt. 32) and a separate motion to declare Petitioner a vexatious litigant and for sanctions. Dkt. 41. After briefing concluded the District Court granted the motion to dismiss and AntiSLAPP motion. Dkt. 38. On January 12, 2021 the District Court granted Rule 11 sanctions with leave for Airbnb Respontents to file a fee petition. Dkt. 50 Petitioner filed a Rule 12(b) motion citing California's AntiSlapp statute Cal. Civ. Pro. §425.16 and Petitioner filed a separate opposition to the vexatious litigant motion which the District Court stated were untimely. On January 11 ,2021 Petitioner sought leave to file his opposition to vexatious litigant motion and for sanctions. On January 11, 2021, the District Court stated Petitioner's Rule 12(b) motion was filed late pursuant to Civil Local Rule 7-3(a) which requires oppositions to be filed in 14 days however in such order the District Court stated in part the motion to strike also had no merit. Dkt. 43.

B. Ninth Circuit Court Of Appeals

The Ninth Circuit affirmed the District Court dismissal of Petitioner's claims against Airbnb Respondents and the abuse of process claim against SRC Respondents. The Opinion addressed two combined appeals filed by Petitioner (Case 22-15254

and 22-15793) however the appeals were not consolidated.

REASONS FOR GRANTING THE PETITION

1. Did the Ninth Circuit—in direct conflict with the Seventh Circuit—erroneously fail to recognize that 28 U.S.C. § 636(c) precludes the parties from selecting a particular magistrate judge to preside over their conflict and that, when they do so, the magistrate judge does not obtain jurisdiction over the matter?

The Federal Magistrates Act governs the jurisdiction authority of federal magistrate judges. 28 U.S.C. §§631-39. Section 636(c)(1) authorizes a magistrate judge to "conduct any or all proceedings" in a civil matter, but only if (1) the parties consent and (2) the magistrate judge is "specially designated to exercise such jurisdiction by the district court" that he or she serves. A magistrate judge lacks jurisdiction unless both criteria are met: there must be consent by the parties and the court's special designation. *Roell v. Withrow*, 538 U.S. 580, 582 (2003).

The reason for requiring the court, not the parties, to select the magistrate judge who is to proceed under §636(c) is obvious: to prevent the parties (or a party) from engaging in judge-shopping, which "doubtless disrupts the proper functioning of the judicial system[.]" *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995). "Judge-

shopping clearly constitutes 'conduct which abuses the judicial process." *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998)(quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991)).

The Seventh Circuit in *Hatcher* held that parties *cannot* select their magistrate judge. *Hatcher v. Consol. City of Indianapolis*, 323 F.3d 513, 514 (7th Cir. 2003) *Hatcher*, was a civil-rights lawsuit against government officials. *Id.* The parties specified in their settlement agreement that a particular magistrate judge would resolve an outstanding attorneys' fees issue. *Id.* The plaintiff appealed because the district judge, not the magistrate judge, made the final attorneys' fees award. *Id.* The plaintiff argued that the parties had validly consented to the magistrate judge's jurisdiction, which precluded the district judge from ruling. *Id.* Despite consenting to the magistrate judge, the defendants countered that the form of the parties' consent to the magistrate judge was inadequate under §636(c). *Id.*

The Seventh Circuit provided two reasons for this prohibition. First, "the general rule that one may not choose one's judge in federal court should not have an exception for magistrate judges." Id. at 519. "[N]o one would think of arguing that parties had the right to select a particular district judge," and there is "no distinction between the position of the magistrate judges for this purpose and the position of any other judicial officers exercising power in the federal courts." Id. at 518. The court refused to endorse a scheme that allowed the parties to "shop among a district court's magistrate judges" and "disregard[ ] the assignment procedures otherwise used in that

district court for allocating work to the magistrate judges." Id. at 517-18.

Second, the plain language of § 636(c) does not "provide for the parties' choice of a specific magistrate judge." Id. at 518. It would be inappropriate to construe §636(c) "to allow parties to designate a magistrate judge independently of the district court's procedures for magistrate assignment." Id. "The language in the statute that indicates that the magistrate judge may exercise her power 'when specially designated to exercise such jurisdiction by the district court or courts' is inconsistent with a rule permitting the parties effectively to make that designation." Id. at 519 (quoting 28 U.S.C. § 636(c)(1)).

Thus, under *Hatcher*, parties cannot "pick the magistrate judge who [is] to handle their case." Id. at 518. To do so violates § 636(c) and amounts to improper judge-shopping. This conclusion is legally sound. The plain language of the statute clearly allows only the "district court" to designate the magistrate judge. 28 U.S.C. § 636(c)(1). "This can mean only that it is the court, and not the parties, that has the power to confer general or specific duties upon an individual magistrate judge." Hatcher, 323 F.3d at 518.

The Ninth Circuit claimed Petitioner consented to magistrate jurisdiction but such generalization elevates form over substance as Petitioner consented to a specific magistrate judge then the case was related. It places too much emphasis on the formal referral or designation that triggers the statutory transfer of jurisdiction from one magistrate judge to another. And it ignores Hatcher's concern with the

selection of a particular magistrate judge designated to carry out § 636(c) functions. It goes without saying that any of Respondents have no ability—no power—to actually assign judges to their cases and relating a case to a separate magistrate judge does not enable such power otherwise Congress would have provided such rule. Although Hatcher did not involve a party consenting to one magistrate judge before a related case order, such principle still forbids parties from "pick[ing] the magistrate judge who [is] to handle their case." 323 F.3d at 518. Indeed, in Hatcher, the district judge "was advised of the decision of the parties and seemed to endorse the referral." Id. at 515-16. The Seventh Circuit still vacated the referral because the parties made the particular selection. Id. at 518-19.

Furthermore, Congress has not granted a plenary power to all Magistrate Judges to hold litigants and attorneys in contempt or impose Rule 11 sanctions. To do so would undermine Congress's decision to grant magistrate judges certain powers and withhold others. Furthermore, the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 501(1986) Congress could have included the power to impose Rule 11 sanctions in 2000 when it amended §636. Appellant objected to the case being reassigned to another magistrate judge and later filed a declination to magistrate jurisdiction which the District Court failed to consider.

Thus this Court should grant the writ and hold that Magistrate Judge Hixson lacked jurisdiction to proceed in this case.

2. Whether California's Anti-SLAPP Statute Can Apply In Federal Court Because The Statute Answers The Same Question As The Federal Rules And Is Valid Under The Rules Enabling Act

In diversity cases where the issue is whether a state or federal law should apply, a court may apply "the typical, relatively unguided Erie choice[,]" (*Hanna v. Plumer*, 380 U.S. 460, 471 (1965)) under which "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humans.*, Inc., 518 U.S. 415, 427(1996). However, in situations covered by the Federal Rules, courts will apply the relevant Rule, unless it is either invalid under the Rules Enabling Act (28 U.S.C. §2072) or unconstitutional. *Hanna*, 380 U.S. at 471. AntiSLAPP statutes conflict with Federal Rules 8, 12, and 56 because both the antiSLAPP statutes and the Rules govern pre-trial dismissal of claims. *Klocke v. Watson*, 936 F.3d 240, (5th Cir. 2019); *Carbone v. CNN, Inc.*, 910 F.3d 1345 (11th Cir. 2018); *Abbas v. Foreign Pol'y Grp.*, LLC, 783 F.3d 1328 (D.C. Cir. 2015).

The Supreme Court addressed the issue of controlling Federal Rules in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, where the Court dealt with a state statute "which preclude[d] a suit to recover a 'penalty' from proceeding as a class action," and considered whether that statute conflicted with

FRCP 23, which governs the maintenance of class actions in federal court. *Shady Grove*, 559 U.S. at 397-398(2010) A divided court held Rule 23 was valid and controlled. Id. at 399, 408, 410. In the majority opinion, Justice Scalia addressed "whether Rule 23 answers the question in dispute," which was whether the suit could be maintained as a class action. Id. at 398. The state law "attempt[ed] to answer the same question" as Rule 23 because it, like Rule 23, addressed when a suit could proceed as a class action. Id. at 399. Justice Scalia stated "even if [the state statute] aim[ed] to restrict the remedy a plaintiff can obtain, [it] achieve[d] that end by limiting a plaintiff's power to maintain a class action." Id. at 403. Thus, Rule 23 must apply in federal diversity suits unless it was invalid. Id. at 399.

Justice Scalia's plurality opinion addressed the validity of Rule 23 under the Rules Enabling Act by asking whether the Rule "really regulat[es] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Id. at 407 (quoting *Sibbach v. Wilson & Co.,* 312 U.S. 1, 14 (1941). What matters is not whether or not the rule affects a party's substantive rights, but what the rule regulates: "[i]f it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." *Shady Grove*, 559 U.S. at 407 (quoting *Mississippi Publ'g Corp. v. Murphree,* 326 U.S. 438, 446 (1946)). While each rule did have some effect on the parties' rights, they merely regulated the mechanism for enforcing them. Id. at

407–08. As a result, Rule 23 was valid under the Rules Enabling Act. Id. at 408.

Under *Shady Grove*, there are two steps in determining whether or not defendants in diverse federal litigation can use the protections afforded by state anti-SLAPP statutes. *Shady Grove*, 559 U.S. at 398 (2010). The first step in assessing whether a state statute conflicts with the Federal Rules is to determine whether or not the state law and the Federal Rules "attempt[ ] to answer the same question." Id. at 399. Rules 8, 12, and 56 together answer the same question as anti-SLAPP statutes: when must a court dismiss a claim before it goes to trial? *Carbone*, 910 F.3d at 1350; *Abbas,* 783 F.3d at 1333–34. Rule 8 provides that a complaint must state a plausible claim for relief, (Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–56 (2007)) and if it does not, it must be dismissed under Rule 12(b)(6) for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Rule 56 requires a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Thus, Rule 8 sets the standards for the sufficiency of a claim; Carbone, 910 F.3d at 1350. Rule 12(b)(6) tests the sufficiency of the claim; and Rule 56 seeks to ensure that there are genuine issues to be tried. Mary Kay Kane, Federal Practice And Procedure §2712 (4th ed. 2020). Meanwhile, anti-SLAPP statutes enable defendants to dismiss claims arising from their exercise of First Amendment rights through a special motion to strike, unless the plaintiff can show a probability or likelihood of success on the merits. Cal. Civ. Pro. §425.16(b)(1). These statutes do so with the purpose of quickly dismissing frivolous lawsuits

intended to chill expression. *Metabolife Int'l, Inc. v. Wornick,* 264 F.3d 832, 839 (9th Cir. 2001); Anti-SLAPP statutes answer the same question as the Federal Rules by adding an extra requirement to get to trial. Abbas, 783 F.3d at 1333–34.

The Federal Rules set up the hurdles that a plaintiff must overcome in order to get to trial in federal litigation. Id. at 1334. Rules 8 and 12(b)(6) work to ensure that a plaintiff has adequately plead a claim for relief—hurdle number one. *Carbone v. CNN, Inc.,* 910 F.3d 1345, 1350 (11th Cir. 2018). Rule 56 then ensures that there are genuine issues that may be heard by a trier of fact—hurdle number two. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24 (1986); *Makaeff v. Trump Univ.,* LLC (Makaeff II), 736 F.3d 1180, 1189 (9th Cir. 2013)(Watford, J., dissenting). If these hurdles are satisfied, a plaintiff may proceed to trial. *Abbas,* 783 F.3d at 1334. However, the anti-SLAPP statute sets up an additional hurdle by requiring a plaintiff to demonstrate a probability of success, while still leaving the opportunity to dismiss under Rules 12(b)(6) and 56. *Carbone,* 910 F.3d at 1350–51; Abbas, 783 F.3d at 1333–34; *Makaeff II,* 736 F.3d at 1189 (Watford, J., dissenting). As a result, they answer the same question—when must a court dismiss a claim before trial—because they provide defendants sued for certain claims an extra way to dismiss a lawsuit before trial. *Abbas,* 783 F.3d at 1333–34. As with the rules at issue in Shady Grove, the Federal Rules and anti-SLAPP statutes answer the same question differently. The Anti-SLAPP statute require a showing of a probability of success. Cal. Civ. Pro. §425.16(b)(1). However, Rule 8 specifically "does not impose a probability

requirement at the pleading stage[,]" but rather only requires a showing of a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). In fact, a well-plead complaint may proceed even if it strikes a judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely. *Twombly*, 550 U.S. at 556. Further, while requiring that a plaintiff establish a likelihood of success, California's anti-SLAPP statute stays discovery. C.C.P. §425.16(g). Conversely, while Rule 56 is intended "to isolate and dispose of factually unsupported claims or defenses," (*Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24 (1986)) summary judgment is only warranted when no genuine dispute of material fact exists after an opportunity for discovery. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 250 n.5 (1986) Thus, the anti-SLAPP statute addresses the same question, yet provides a different answer.

The difference in answers is significant. *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015). The Federal Rules must be read together, (*Nasser v. Isthmian Lines*, 331 F.2d 124, 127 (2d Cir. 1964)) and when done, Rules 8, 12, and 56 provide the requirements to be entitled to trial. *Abbas*, 783 F.3d at 1333–34; Carbone, 910 F.3d at 1350. A plaintiff first must state a plausible claim. Fed. R. Civ. P. 8, 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Then, after discovery, a plaintiff must show that there is a genuine dispute of material fact. *Anderson*, 477 U.S. at 250 n.5; *Carbone*, 910 F.3d at 1350. If a plaintiff can meet these two requirements, then he is "entitled to trial." *Abbas*, 783 F.3d at 1334. Anti-SLAPP statutes add an extra requirement.

Abbas, 783 F.3d at 1334. Not only does a plaintiff's claim have to be plausible, it has to be probable that they will succeed, and they must demonstrate that without discovery. Cal. Civ. Pro. §425.16(b)(1),(g). This extra requirement makes it harder for certain plaintiffs to get to trial solely because of the nature of the claim. *Abbas*, 783 F.3d at 1334. In Shady Grove, the statute in question changed the standards for whether or not a certain type of suit could be maintained as a class action. *Shady Grove*, 559 U.S. at 399 (2010). Similarly, anti-SLAPP statutes change the standards that certain plaintiffs must meet in order to be entitled to trial. Carbone, 910 F.3d at 1351. In *Burlington N. R.R. Co. v. Woods*, the state statute "mandate[ed] a test of sufficiency that the Rules reject" by requiring an affirmative penalty on unsuccessful appeals as opposed to the discretionary award for frivolous appeals imposed by the Federal Rules. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987); *Carbone*, 910 F.3d at 1355. Likewise, anti-SLAPP statutes require the courts to apply a stricter standard that the Federal Rules squarely reject. Carbone, 910 F.3d at 1350–51. The Ninth Circuit concluded that because a defendant who brings an unsuccessful motion to strike under the anti-SLAPP statute can still turn to Rules 12(b)(6) and 56, there is no conflict. *Newsham*, 190 F.3d 963, 972 (9th Cir. 1999). However, this argument directly acknowledges that the anti-SLAPP statutes add an extra requirement by saying that even if the claim can make it over that hurdle, it still has to make it over the other two to get to trial. *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015). Rather than showing that they answer separate questions, that

argument only proves anti-SLAPP statutes impose an additional burden on plaintiffs before reaching trial. Id. Further, the types of claims that anti-SLAPP statutes cover fall within the sphere of Rules 8, 12, and 56. The First and Ninth Circuits concluded anti-SLAPP statutes supplement the Federal Rules, and exist in their own separate sphere because anti-SLAPP statutes only pertain to a specific category of cases. *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010); *Newsham*, 190 F.3d at 973. While it is correct that anti-SLAPP statutes provide a supplemental mechanism for protecting defendants against certain types of claims, (*Godin*, 629 F.3d at 88–89; *Newsham*, 190 F.3d at 973) they still exist within the sphere of the Federal Rules. *Abbas*, 783 F.3d at 1334. The Federal Rules cover all actions brought in the federal district courts, with minor exceptions. Fed. R. Civ. P. 1. Thus, they are general rules that apply to every type of claim brought in federal court. Id. Anti-SLAPP statutes cover just a small subset of claims within the large sphere of claims that Federal Rules apply to. Cal. Civ. Pro. §425.16(b)(1). The state statute in Shady Grove similarly imposed additional requirements for certain types of class actions, while FRCP 23 applied to all types of class actions. *Shady*, 397, 400–01 (2010). The Court deemed the state statute's method of following the Federal Rule for some claims but singling out certain ones with extra requirements impermissible. Id. at 400–01. California's Anti-SLAPP statute operates in the same way as to Rules 8, 12, and 56. *Klocke v. Watson*, 936 F.3d 240, 245–46 (5th Cir. 2019); Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1334 (D.C. Cir. 2015). Together, the Federal Rules govern pre-trial dismissal

for every type of claim brought in federal court; however, California's anti-SLAPP statute singles out certain claims and imposes an additional requirement. *Klocke*, 936 F.3d at 245–46; *Carbone v. CNN, Inc.* 910 F.3d 1345, 1354–55 (11th Cir.2018); *Abbas*, 783 F.3d at 1334; Makaeff v. Trump Univ., LLC (Makaeff I), 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring). As a result, their "supplement" to the Federal Rules impermissibly intrudes into the sphere of the Federal Rules.

Congress has taken certain types of claims and placed them outside the sphere of Rules 8, 12, and 56, but has not done so for any of the claims that California's anti-SLAPP statute typically covers. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4(b)(2)(A)(2018); Fed. R. Civ. P. 9(b); see *Carbone*, 910 F.3d at 1353; *Abbas*, 783 F.3d at 1335; *Godin v. Schencks*, 629 F.3d 79, 91 (1st Cir. 2010). However, only Congress may create exceptions to the Federal Rules. *Abbas*, 783 F.3d at 1335; *Shady Grove*, 559 U.S. at 400 (2010). The states cannot. *Abbas*, 783 F.3d at 1335; *Shady Grove*, 559 U.S. at 400. Therefore, California's anti-SLAPP statutes cannot create exceptions for a typical SLAPP claim in federal court. California's Anti-SLAPP statute cannot be read to avoid conflict with the Federal Rules. In Planned Parenthood, the Ninth Circuit purported to read California's anti-SLAPP statute in such a way so as to "prevent the collision" of the antiSLAPP statute with the Federal Rules by reviewing the motion to strike "under different standards depending on the motion's basis." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833 (9th Cir). While a majority of justices in Shady Grove agreed that

courts should "interpre[t] the federal rules to avoid conflict with important state regulatory policies," courts cannot "rewrite the rule." Shady Grove, 559 U.S. at 430–31. The Ninth Circuit's reading of the statute in Planned Parenthood does exactly that. Rather than applying the California anti-SLAPP statute's probability standard, (e.g., C.C.P. §425.16(b)(1)) the court decided that federal courts should apply either the Rule 12(b)(6) or Rule 56 standard depending on the motion's basis, quite literally rewriting the law to not conflict. *Planned Parenthood*, 890 F.3d at 833. In doing so, the court illustrated the conflict between anti-SLAPP statute and the Federal Rules and the fact that they cannot co-exist without directly colliding. Id. The defendants in Abbas similarly attempted to portray the D.C. anti-SLAPP statute's special motion to dismiss as a functional equivalent of the summary judgment standard. *Abbas*, 783 F.3d at 1334. In dismissing this approach, Judge Kavanaugh stated that the main problem with the defendants' theory is that it requires the Court to re-write the special motion to dismiss provision. Id. Put simply, the D.C. Anti-SLAPP Act's likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56. Id. at 1334–35. Anti-SLAPP statutes do not create substantive rights either. Godin and Newsham concluded that anti-SLAPP statutes create substantive rights that cannot be abridged by the Federal Rules. *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010)(quoting Shady Grove, 559 U.S. at 423 (Stevens, J., concurring)). Section 556 was 'so intertwined with a state right or remedy that it functions to define the scope of the state-created

right,' it cannot be displaced by Rule 12(b)(6) or Rule 56. *Newsham.*, 190 F.3d 963, 973(9th Cir. 1999). But see *Klocke v. Watson*, 936 F.3d 240, 247 (5th Cir. 2019); Abbas, 783 F.3d at 1335; *Makaeff v. Trump Univ., LLC* (Makaeff I), 715 F.3d 254, 273 (9th Cir. 2013)(Kozinski, J., concurring). However, a plain reading of the text of any anti-SLAPP statute does not support this proposition. *Makaeff I*, 715 F.3d at 273 (Kozinski, J., concurring). As Judge Kozinski aptly stated: The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. Id. The language of the statute is procedural: Its mainspring is a "special motion to strike;" it contains provisions limiting discovery; it provides for fees for parties who bring a non-meritorious suit or motion; the court's ruling on the potential success of plaintiff's claim is not 'admissible in evidence at any later stage of the case; and an order granting or denying the special motion is immediately appealable. Id. The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation...Id.; C.C.P. §425.16. Rather than creating substantive rights, anti-SLAPP statutes merely provide extra protection to rights that already exist via a mechanism that allows defendants to dismiss certain types of claims quickly. *Klocke*, 936 F.3d at 247; Abbas, 783 F.3d at 1335; Makaeff I, 715 F.3d at 273 (Kozinski, J., concurring). The Federal Constitution, state constitutions, and state laws are the bases of these rights and claims—not anti-SLAPP statutes. *Makaeff I*, 775 F.3d at 273 (discussing substantive rights created under state laws). Thus, state anti-SLAPP statutes, as purely procedural mechanisms

intended to dismiss frivolous claims, do not create substantive rights and cannot supersede the Federal Rules. *Klocke*, 936 F.3d at 247; *Abbas*, 783 F.3d at 1335; *Makaeff I*, 715 F.3d at 273 (Kozinski, J., concurring). Therefore California's anti-SLAPP statute answers the same question as Rules 8, 12, and 56 by governing pre-trial dismissal of certain types of claims. As a result, the Federal Rules should control, unless they are invalid under the Rules Enabling Act. *Shady Grove*, 559 U.S. at 406–10 (plurality opinion); id. at 417–18 (Stevens, J., concurring).

The second question is whether or not Rules 8, 12, and 56 are valid under the Rules Enabling Act. The Court in Shady Grove was divided over the appropriate test for validity under the Rules Enabling Act. *Shady Grove*, 559 U.S. at 406–10 (plurality opinion); id. at 417–32 (Stevens, J., concurring). However, Rules 8, 12, and 56 are valid under the Rules Enabling Act using both Justice Scalia's and Justice Stevens's formulations.

Justice Scalia and the plurality applied the Sibbach rule—which asks whether the "rule really regulates procedure" (*Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941))—to determine validity under the Rules Enabling Act. Shady Grove, 559 U.S. at 407. Judge Kavanaugh, likely correctly, concluded that Sibbach should continue to be the rule because Shady Grove did not actually overturn it. Abbas, 783 F.3d at 1336–37. The question under this test is whether Rules 8, 12, and 56 "really regulate procedure." Sibbach, 312 U.S. at 14; see *Shady Grove*, 559 U.S. at 407; *Abbas*, 783 F.3d at 1336–37. As Judge Kavanaugh noted in Abbas, that question with respect to these three rules is relatively easy because

a majority in Shady Grove expressly stated that pleading standards and rules governing summary judgment are "addressed to procedure." *Abbas*, 783 F.3d at 1337; *Shady Grove*, 559 U.S. at 404. Further, Rules 8, 12, and 56 do not function to curtail a defendant's rights. *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1357(11th Cir. 2018). rather, "they alter only how the claims are processed." *Shady Grove*, 559 U.S. at 408. Together, the Rules simply regulate what must be overcome to advance to trial—they do not create claims or rights. *Carbone*, 910 F.3d at 1357. Accordingly, Rules 8, 12, and 56 "really regulate[ ] procedure" and are valid under the Rules Enabling Act pursuant to the plurality's test. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); *Shady Grove*, 559 U.S. at 407. Rules 8, 12, and 56 are also valid under Justice Stevens's test, which asks whether the state law "is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring).

The state anti-SLAPP statutes do not create substantive rights and merely exist to provide additional protection for rights found in the First Amendment, state constitutions, and state laws. *Makaeff v. Trump Univ., LLC* (Makaeff I), 715 F.3d 254, 273 (9th Cir. 2013)(Kozinski, J., concurring). The statutes do not define the scope of the rights so much as they provide a "protective mechanism" for them. *Klocke*, 936 F.3d at 247; Abbas, 783 F.3d at 1335; *Makaeff I*, 715 F.3d at 273(Kozinski, J., concurring). Similar to the statute in Shady Grove, which applied to claims based on any state's law, (*Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring)), antiSLAPP

statutes also operate to protect defendants based on the type of claim, not the specific state's own law. C.C.P. §425.16. As in Shady Grove, it is difficult to see how anti-SLAPP statutes could be "so intertwined with a state right" if they are not tied to the rights of a specific state but just to certain types of claims. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring); see C.C.P. §425.16. Thus, even under Justice Stevens's test, Rules 8, 12, and 56 are valid under the Rules Enabling Act. Because Rules 8, 12, and 56 are valid under both Justice Scalia's and Justice Stevens's tests, they are valid under the Rules Enabling Act. Consequently, because the Federal Rules are valid and govern pre-trial dismissal in federal court, anti-SLAPP statutes should not be applied in federal diversity cases. Furthermore, the anti-SLAPP statute only permits an award of attorney's fees if the defendant prevails under the specific motion. C.C.P. 425.16(c)(1). As a result, any attorney's fees must also fall with the special motion.

3. **Whether denial to Petitioner of oral argument by the Magistrate Judge through the entire proceedings including in Petitioner opposing Rule 11 sanctions followed by the Ninth Circuit denying Petitioner's request for oral argument and as a request for special accommodation under the American With Disabilities Act of 1990, As Amended warrants reversal.**

The subject of a motion for sanctions is entitled to an opportunity to be heard. *Sakon, Sakon v. Andreo*, 119 F.3d 109, 113(2d Cir. 1997). The District

Court did not hold a single oral argument throughout entire proceedings before Petitioner filed his notice of appeal. Petitioner also requested oral argument in the Ninth Circuit and a request for special accommodation special accommodation so he can appear by telephone if needed which request was denied as well. Although the ADA does not apply to the federal judiciary. However, pursuant to Judicial Conference policy, federal courts provide reasonable accommodations to persons with communications disabilities and the Ninth Circuit failed to. Furthermore such exemption from the ADA does not apply for Magistrate Judges and throughout the entire District Court proceedings no oral arguments were held thus oral arguments on appeal were critical for Petitioner.

The District Court had granted Rule 11 sanctions for reasons not included in the motion then cancelled the February 3, 2022 hearing thus Petitioner was denied an opportunity to be heard. There is no requirement that an evidentiary hearing be held prior to the imposition of sanctions, absent disputed facts or issues of credibility, (Chemiakin v. Yefimov, 932 F.2d 124, 130 (2d Cir. 1991)) however disputed facts existed underlying the District Court's order based on the timeliness of a wire transfer and Airbnb Respondents extortionate behavior. It was also undisputed Airbnb Respondents also misled the state trial court and the Appellate Court's factual findings made clear the AAA confirmed any payment was late. *McCluskey v. Henry*, 56 Cal.App.5th 1197, 1202(Cal. Ct. App. 2020)

4. **Whether the Rule 11 motion did not adequately inform Petitioner of the source of authority for the sanctions being considered in violation of the Due Process Clause of the Federal Constitution (U.S. Const., 14th Amend.) and in violation of the Due Process Clause of the Federal Constitution (U.S. Const., 5th Amend.).**

It is mandated that when Rule 11 sanctions are initiated by the motion of a party, the moving party gives the subject the opportunity to withdraw the potentially offending statements before the sanctions motion is filed. Fed.R.Civ.P. 11(c)(1)(A). Airbnb Respondents admit Petitioner did not receive adequate notice by stating in the Rule 11 motion "[t]he Complaint is also frivolous for the remaining reasons discussed in Airbnb's Motion to Dismiss." The District Court cited the motion to dismiss multiple times and legal authority for collateral estoppel in the order granting fees which specific authority was not included in the Rule 11 motion.

The District Court was required to explain the basis for its selection of an appropriate sanction, in addition to explaining why the conduct at issue violated the rule. *Chia v. Fidelity Invs.,* No. 05-7184, 2006 U.S. App. LEXIS 20296 (D.C. Cir. Aug. 3, 2006)(remanding for the district court to state its grounds for imposing sanctions); *Zuk v. Eastern Pa. Psychiatric Inst. of the Med. College of Pa.,* 103 F.3d 294, 301 (3d Cir. 1996)(remanding for further consideration of appropriate sanction where district court failed to explain basis for its imposition of severe sanctions and failed to consider mitigating factors). The Court failed to explain legal grounds for

concluding each claim in the complaint violated Rule 11.

A District Court "abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Revson v. Cinque & Cinque, P.C.,* 221 F.3d 71, 78(2d Cir. 2000); In re Allen, No. 06-1429, 2007 U.S. App. LEXIS 22445, at *9(10th Cir. Sept. 19, 2007)(sanctions are reviewed under abuse of discretion standard, "[h]owever, any statutory interpretation or other legal analysis which provides the basis for the award is reviewable de novo"). Even with an abuse of discretion standard, "[c]oncerns for the effect on both an attorney's reputation and for the vigor and creativity of advocacy by other members of the bar necessarily require that we exercise less than total deference to the district court in its decision to impose Rule 11 sanctions. *Thompson v. Duke,* 940 F.2d 192, 195 (7th Cir. 1991); *Schlaifer Nance & Co. v. Estate of Warhol,* 194 F.3d 323, 333-34 (2d Cir. 1999)(since power to impose sanctions may mean that trial court may act as "accuser, fact finder and sentencing judge," abuse of discretion standard must be exercised so as "to ensure that any such decision is made with restraint and discretion").

When a "complaint is the primary focus of Rule 11 proceedings, a district court must determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it. *Christian v. Mattel, Inc.,* 286 F.3d 1118, 1127 (9th Cir. 2002). With regard to factual contentions, "sanctions may not be imposed unless a particular allegation is utterly lacking in

support." *O'Brien v. Alexander,* 101 F.3d 1479, 1489 (2d Cir. 1996) Such allegations have to be considered in a group, because, the isolation of fragmentary contentions creates the appearance of an unwarranted contention. *Schlaifer Nance Co.,* 194 F.3d 337. Apostolic Pentecostal Church v. Colbert, 169 F.3d 409, 417 (6th Cir. 1999)(remand because district court did not specifically inquire into whether contentions in garnishee disclosure had evidentiary support). The District Court did not apply this two prong inquiry.

Under the legally frivolous prong, the test is whether a party's conduct is objectively unreasonable, with no showing of bad faith required which involves an assessment of (1) the knowledge that reasonably could have been acquired at the time the pleading was filed; (2) the type of claims and difficulty of acquiring sufficient information; and (3) which party has access to the relevant facts. *Townsend v. Holman Consulting Corp.,* 914 F.2d 1136, 1139-1140 (9th Cir. 1990). To establish a Rule 11(b)(2) violation, it must be patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands. *Shin Park v. Seoul Broad. Sys. Co.,* 2008 U.S. Dist. LEXIS 17277 (S.D.N.Y. Mar. 3, 2008). Thus, the fact that a plaintiff fails to provide a sufficient showing to overcome a demurrer or to survive summary judgment is not, in itself, enough to warrant sanctions. *Segen v. Buchanan Gen. Hosp., Inc.* (W.D.Va.2007) 552 F.Supp.2d 579, 585 The District Court summarily concluded the complaint was frivolous with no legal analysis of the claims nor allegations in the complaint.

The District Court discussed following cases where only one was cited in the Rule 11 motion which was *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997), where the court concluded that the suit was barred by the res judicata and collateral estoppel effects of the prior judgment however Petitioner did not seek to overturn a judgment. *In re Grantham Brothers,* 922 F.2d 1438, 1442 (9th Cir. 1991) cert. denied, 502 U.S. 826 (1991)) involved a Rule 11 award for a complaint that involved an impermissible collateral attack upon a bankruptcy court order approving sale of property. Id. Petitioner's claims did not collaterally attack any court order. *Maciosek v. Blue Cross & Blue Shield United of Wisconsin*, 930 F.2d 536, 542 (7th Cir. 1991) involved an award after Plaintiff's attorneys knew from their involvement in previous cases that two of Plaintiff's four claims had been ruled preempted by ERISA. No legal theory established Petitioner's claims were pre-empted by ERISA or any legal authority. In *Welk v. GMAC Mortg., LLC,* 720 F3d 736, 738-39 (8th Cir. 2013) the Appellate Court affirmed a sanctions award after an attorney brought thirteen separate claims for the plaintiffs, nearly rested on a "show me the note" theory which had been rejected by the courts. Appellant's claims were not barred by any rejected theories. Finally, *Roberts v. Chevron*, 117 F.R.D. 581 (M.D. La. 1987), aff'd, 857 F.2d 1471 (5th Cir. 1988)) involved sanctions for an attempt to have a state court reverse or change a valid federal court judgment. Petitioner did not seek to reverse or change a federal judgment

No authority supporting collateral estoppel was cited in the Rule 11 motion which only briefly mentioned the litigation privilege without any specific authority why the claims against Respondent Airbnb (a non-party to state proceedings) or Jeff Henry, Dave Wilmer and Sanaz Ebrahini should be amended or withdrawn.

The Court abused its discretion overruling Appellant's objections to the Court taking judicial notice of Airbnb Respondents Exhibits filed with the Rule 11 sanctions as Respondents sought judicial notice of publicly and non-publicly available documents for the purpose of contending that statements set forth therein were true facts. *Perretta v. Prometheus Dev. Co.,* No. C-05-02987- WHA, 2006 U.S. Dist. LEXIS 10108, at *7-8 (N.D. Cal. Feb. 24, 2006). The District Court also incorporated by reference disputed facts from the motion to dismiss order in the order granting sanctions in error.

The District Court stated the complaint is baseless because all claims are barred by the preclusive effect of the state court's rulings on the motion to lift the stay and the motion for sanctions however the motion to lift the stay was interlocutory and state Appellate Court found no evidence of a clerical error and confirmed evidence of a late payment which are disputed facts but this was not supported by claims and allegations in the complaint. The complaint was at issue but the Court stated Appellant was admonished for unprofessional conduct when the Appellate Court already concluded Airbnb Respondents misled the state court. *McCluskey v. Henry,* 56 Cal.App.5th 1197, 1202.

Attorney fees were not appropriate as the Court, and not Airbnb Respondents, was the first to address the first sanctions motions in the January 10th 2022 order thus the Court imposed sanctions on its own initiative. Legal authority for issue preclusion was not discussed in the Rule 11 motion but was in the Court's order dismissing the complaint. When a Court imposes sanctions on its own initiative, first, the court must issue a "show cause" order to the party or attorney who is exposed to sanctions. See *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 767(4th Cir. 2003) (vacating sanctions award where court did not issue order to show cause); *Methode Elecs., Inc. v. Adam Techs.,* Inc., 371 F.3d 923, 927 (7th Cir. 2004). Second, the show cause order, like a party's sanctions motion, must describe the specific conduct that appears to violate Rule 11(b). *Thornton v. General Motors Corp.,* 136 F.3d 450, 455 (5th Cir. 1998) A higher standard may also apply because no "safe harbor" applies to sanctions imposed on the court's own initiative, thus particular care must be taken not to impose sanctions in a manner that will deter zealous advocacy. *MHC Inv. Co. v. Racom Corp.,* 323 F.3d 620, see *United Nat'l Ins. Co. v. R&D Latex Corp.,* 242 F.3d 1102, 1118 (9th Cir. 2001)(reversing sua sponte sanctions because conduct "was in neither purpose nor substance 'akin to contempt'"). Even if an a show cause order was issued, where a court sua sponte initiates sanctions proceedings under circumstances where the lawyer has no opportunity to correct or withdraw the challenged submission, a bad faith, rather than objective reasonableness, standard applies. *In re Pennie & Edmonds LLP,* 323 F.3d 86 (2d Cir. 2003). In *In re Pennie & Edmonds LLP,* the court,

relying heavily on the Advisory Committee's notes to the 1993 amendments to Rule 11(b), which, according to the court, contemplated court-initiated sanctions only for conduct akin to contempt of court, reasoned that a heightened standard is warranted to protect zealous advocacy in cases where a lawyer is not afforded the protection of the safe harbor rule and does not have an opportunity to withdraw the offensive submission. Id. at 91.

The 1993 rule also disfavors monetary awards to the proponent of the Rule 11 motion. *Landscape Properties, Inc. v. Whisenhunt,* 127 F.3d 678, 685 (8th Cir. 1997) In addition, courts applying the amended rule have considered whether the conservation of judicial resources counsels against a sanctions proceeding. *Simmons v. Suare*, 4:94CV131, 1995 U.S. Dist. LEXIS 14948, at *11 (W.D.N.C. Sept. 15, 1995). When monetary sanctions are found to be necessary, they "should ordinarily be paid into court as a penalty, only under unusual circumstances, particularly for violations of Rule 11's improper purpose subsection, will monetary sanctions payable to the opposing party be an effective deterrent. 1993 Advisory Committee Notes; *Divane v. Krull Elec. Co.*, 200 F.3d 1020, 1030 (7th Cir. 1999). When a court finds a Rule 11 violation sua sponte and imposes monetary sanctions, those sanctions must be paid to the court and not to the opposing party. Rule 11(c)(2); 1993 Advisory Committee Notes. The District Court sua sponte awarded fees for reasons not in the Rule 11 motion without issuing an order to show cause.

Adequate notice sanctions are being considered is mandated by statute and the due process clause of the federal Constitution (U.S. Const., 14th Amend.).

An award of attorney's fees implicates interests protected by the Due Process Clause of the Fifth Amendment. *Carlucci v. Piper Aircraft Corp.,* 775 F.2d 1440 (11th Cir. 1985). Airbnb Respondents sanctions motion was based solely on the second sanctions motion filed with no mention of the claims in the complaint nor legal authority for "issue preclusion." Airbnb Respondents brief discussion of the litigation privilege was made solely in relation to the second sanctions motion which was irrelevant. The sanctions motion claimed the complaint was brought for an improper purpose and cited one case, *Buster*, 104 F.3d at 1190, and the motion was not based on allegations in the complaint.

Rule 11 and principles of due process require that "the subject of a sanctions motion be informed of: (1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense." *Schlaifer Nance & Co. v. Estate of Warhol,* 194 F.3d 323, 334 (2d Cir.1999). "Indeed, only conduct explicitly referred to in the instrument providing notice is sanctionable." Id. Rule 11 sanctions must be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated and were inappropriate here.Fed.R.Civ.P. 11(c)(2)

The determination of Rule 11 issues is not a res judicata or collateral estoppel bar to litigating the same or related issues in subsequent malicious prosecution or other actions. *Amwest Mortgage Corp. v. Grady,* 925 F.2d 1162, 1164-65 (9th Cir. 1991.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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