23-6513

# In the Supreme Court of the United States

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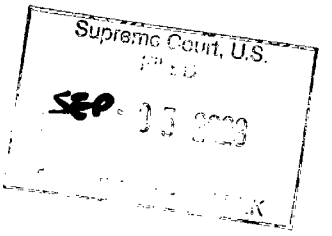
**MICHAEL MOGAN,**

**Petitioner**

**v.**




**SACKS, RICKETTS AND CASE LLP, Et Al.**

**Respondents**

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

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## 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 the Rule 11 motions 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.)

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 Should Have Been Denied Because Airbnb Respondents Did Mot Mitigate Attorney Fees?

5. 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?

6. Whether The Appellate Court Applied The Proper Standard On Appeal In Determining Whether Petitioner's Motion For Recusal Should Have Been Granted?

## PARTIES TO THE PROCEEDING

Michael Mogan, Petitioner here, was Petitioner 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

Supreme Court Case No. 23-5169, Mogan v Sacks Ricketts Case LLP et al.

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## PETITION FOR A WRIT OF CERTIORARI

Michael Mogan ("Petitioner") 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 the date the Petition For Rehearing Was Denied June 8, 2023. 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 and U.S. Const., 5th and 14th Amend.

## INTRODUCTION

Petitioner seeks review of his Appeal Case No. 22-15793 which affirmed the judgment and certain orders by the Ninth Circuit Court Of Appeals.

All 13 appellate courts that sit below the U.S. Supreme Court, and 94 federal judicial districts organized into 12 regional circuits, recognize civil RICO claims are not barred by the litigation privilege. *Menjivar v. Trophy Props.*, No. C06–03086 SI, 2006 WL 2884396, at *16) Despite such precedent, the Court imposed $162,010 in Rule 11 sanctions on Petitioner after Airbnb Inc., Dave Willner, Jeff Henry and Sanaz Ebrahini ("Airbnb Respondents") and the Court held his RICO claims were barred by the litigation privilege. Rule 11 sanctions were granted based upon collateral estoppel despite the fact any underlying civil or arbitration proceedings with Jeff Henry, Dave Willner nor Sanaz Ebrahini did not involve non-party Airbnb nor were such proceedings final until after the Appellate opinion was issued.

The District Court cancelled every single hearing and no oral arguments were held throughout the entire proceedings. The Court only allowed briefing for one of the motions filed by Petitioner, a Rule 59 motion and the District Court repeatedly denied Petitioners motions in a matter of day or days while the Court allowed briefing on Airbnb and SRC Respondents two Rule 12(b) motions, the Rule 11 motion, a frivolous vexatious litigant motion and the two fee petitions filed by SRC Respondents and Airbnb Respondents. The District Court failed to rule on Petitioner's objections to the entries in two separate fee petitions filed by SRC Respondents and

Airbnb Respondents and the District Court also failed to rule on Petitioner's evidentiary objections filed opposing Airbnb Respondents fee petition.

Petitioner requested a special accommodation under the American With Disabilities Act from the Ninth Circuit Court Of Appeals to ensure he would be finally given an opportunity to be heard at the and the Appellate Court cancelled oral arguments violating Petitioner's civil rights. After the Appellate Court affirmed the Rule 11 award based on collateral estoppel despite the fact any underlying civil and arbitration proceedings were not final, Petitioner immediately filed a petition for rehearing against seeking special accommodations and once again and the Petitioner Court summary denied his petition for rehearing. The District Court had even concluded in Airbnb Respondents Rule 12(b)(6) motion, issue preclusion did not bar any of Petitioner's RICO claims thus this was a critical issue.

The Rule 11 motion should have been denied because Petitioner was not given adequate notice sanctions were being considered as mandated by the statute and the due process clause of the federal Constitution. Petitioner was not provided an evidentiary hearing either. The District Court abused its discretion granting sanctions on an erroneous view of the law and clearly erroneous assessment of the evidence. *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78(2d Cir. 2000). The District Court should have imposed Rule 11 sanctions upon filers of the motion and ordered sanctions payable to the Court. Airbnb Respondents also failed in their obligation to mitigate its attorneys' fees. *Pollution Control Indus. of Am. v. Van Gundy,* 21 F.3d 152, 156 (7th Cir. 1994).

Airbnb Respondents and Sacks Ricketts and Case LLP, Michele Floyd and Jacqueline Young's ("SRC Respondents") fee petitions should have been denied because they were not supported by adequate testimony. *Hensley v. Eckerhart,* 461 U.S. 424, 738 n.13 (1983). The District Court abused its discretion failing to consider Petitioners inability to pay any Rule 11 sanctions. *In re Yagman,* 796 F.2d 1165, 1185 (9th Cir.1986). California's AntiSLAPP statute should not apply in Federal Court based upon Supreme Court jurisprudence. The District Court abused its discretion not granting Petitioner's motion for recusal as evidence of apparent and actual bias existed. Finally, Petitioner had not consented to magistrate jurisdiction for the Magistrate Judge who issued Rule 11 sanctions as the case was related after Petitioner consented to a specific Magistrate Judge.

## STATEMENT OF THE CASE

### A. Factual Background

Petitioner filed a complaint 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

After Petitioner filed his complaint, 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. Petitioner filed a second motion for recusal on May 16, 2022 (Dkt. 83) after he discovered new information and the motion was denied the same day. Dkt. 84.

In the order the District Court and not SRC Respondents discussed the unfiled sanctions motion under the first and second prongs of Cal. Civ. Pro. §425.16. On January 10, 2022 the Court ordered SRC Respondents to file a request for attorney fees under Cal. Civ. Proc. 425.16 by February 10, 2022 and they filed the motion a day late February 11, 2022. In a declaration supporting the fee petition, SRC Respondents counsel Mr. Servais stated "I am the supervising attorney on this matter and oversaw all the work being performed by the associate, Natasha Mayat. Based on my review of their time entries and work product I have personal knowledge of the work they performed and the time expended. Based on my professional experience, the fees incurred were reasonable. Mr. Servais stated "[i]n total, I spent 71.3 billable hours overseeing this matter as described in paragraph 4, bringing the successful anti-SLAPP motion. At my customary rate of $450 per hour, my total fees amount to $32,085.00. No declaration was included from Ms. Mayat. On February 11, the District Court ordered SRC to submit detailed time records not included in their fee petition.

On February 12, 2022 SRC Respondents filed a Notice Of Errata with an Amended Declaration from Mr. Servais. Now suddenly almost all the entries claimed the work was done by Mr. Servais and not Natasha Mayat which is the opposite of his testimony in his initial declaration. Between December 14, 2021 and January 10, 2022 SRC Respondents claimed they spent 48.30 hours for fees of $10,879 yet spent only 23

hours for fees of $5,520 between September 11, 2021 and November 29, 2021 when the Anti-SLAPP motion was filed. No declaration nor request for judicial notice was included with the Reply but it took twice as long as the motion. Petitioner filed his opposition to SRC Respondents Anti-SLAPP motion December 13, 2022. SRC Respondents were allowed to file their reply two weeks late January 3, 2022.

Airbnb Respondents fee petition claimed 141.4 hours for $86,745 in fees between November 2nd and November 24th, 2021 and the entries referenced the motion to dismiss and Rule 11 motion but not the vexatious litigant motion filed the same day as the Rule 11 motion. A spreadsheet covering December 1st to December 24, 2021 described 49.70 hours and $34,864 in fees with no mention of the vexatious litigation motion.

Airbnb Respondents did not discuss the complaint with Petitioner before he received an email November 23, 2021 when Airbnb Respondents counsel asked Petitioner if he would accept electronic service. The Rule 11 motion included a short three page argument but 28 exhibits. The vexatious litigant motion included a 25 page motion and twice the exhibits.

Airbnb Respondents fee petition claimed Ms. Kambourelis and Ms. Cardelus spent significant time on this matter but no affidavits were provided from them. Ms. Taylor stated "the fees and costs billed in November and December were "submitted to and

promptly paid by Airbnb" and no testimony said any amount was paid. Airbnb employee John Polito stated in part from November 2021 through present, "I received, reviewed, and tendered full payment promptly upon receipt for all invoices associated with this proceeding. I understand that from January 1 through February 8, 2022, O'Melveny & Myers LLP has incurred an additional $50,864.54 in legal fees related to this matter. Those fees will also be promptly paid upon receipt" and he did not state any amount was paid.

On May 14, 2022 Petitioner learned John Polito had a personal and business relationship with Judge Thomas Hixson ("District Court Judge") and immediately filed a second motion for recusal. Based on information in the public domain, from 1998-2002 the District Court Judge worked as an Associate with the firm of McCutchen, Doyle, Brown & Enersen LLP. From 2002-2014, he worked at Bingham McCutchen LLP (which McCutchen, Doyle, Brown & Enersen, LLP became) as an Associate and then Partner. From 2014-2018, the District Court Judge was a partner at Morgan, Lewis & Bockius LLP before being appointed a Magistrate Judge. Id. Lucy Wang accepted a position as the lead counsel, litigation at Airbnb Inc. in November 2021.She was previously a partner at the same firm as the Magistrate Judge, Morgan, Lewis & Bockius LLP, where she worked with him until 2018 and Lucy Wang worked there until November 2021. During the time the Magistrate Judge was a partner at Morgan, Lewis & Bockius LLP, Lucy Wang worked

as an associate between November 2014 and September 2018 at the firm's San Francisco and Hong Kong office, the same San Francisco office as the Magistrate Judge. Id. Between 2008 and 2014, Lucy Wang worked as an associate at Bingham McCutchen LLP 2008 (Associate Resident in San Francisco; Hong Kong) which is the same firm the Magistrate Judge worked at as a partner from 2002 to 2014. John Polito worked as Associate General Counsel, Global Litigation and Regulatory at Airbnb from June 2021 through the present. From 2014 through June 2021 he worked at Morgan, Lewis & Bockius LLP with the Magistrate Judge and Lucy Wang. Id. John Polito worked as a partner from 2015 to 2021 at Morgan, Lewis & Bockius LLP and as an associate in 2014. John Polito worked as a lawyer at Bingham McCutchen LLP from September 2007 through November 2014 which is the same time the Magistrate Judge worked there.

Petitioner offered testimony the Judge has been biased in favor of counsel for Omelvey and Myers LLP throughout these proceedings because of this relationship with the Magistrate Judge's former employer. Petitioner offered testimony the Magistrate Judge was personally biased against Petitioner. He stated the Court had shown a deep-seated favoritism and antagonism in favor of all the Respondents in this case that would make a fair judgment impossible. Petitioner respectfully contended facts exist that might reasonably call into question the District Court Judge's impartiality. Petitioner requested the

District Court carefully consider all Petitioner's filings in this case in considering whether recusal is proper including the fact Petitioner had not been afforded a hearing or oral argument throughout the entire proceedings. The motion for recusal was denied. The District Court granted $162,160 in Rule 11 sanctions to Airbnb Respondents and $16,399 in fees to SRC Respondents based under California's AntiSLAPP statute. Dkt. 82.

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 (22-15254 and 22-15793) however the appeals were not consolidated. Petitioner had previously filed a writ of certiorari for Case 22-15254 which remains pending.

## 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. Petitioner 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. **To Determine whether the Rule 11 motions 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.)**

A district court's imposition of sanctions under Rule 11 are reviewed for abuse of discretion and the Appellate Opinion does not indicate the Appellate Court performed such a review and in particular for the complex RICO claims in the complaint. *De Dios v.*

*Int'l Realty & Investments,* 641 F.3d 1071, 1076 (9th Cir. 2011)(imposition of sanctions); *United Nat'l Ins. Co. v. R&D Latex Corp.,* 242 F.3d 1102, 1115 (9th Cir. 2001)("[W]e review findings of historical fact under the clearly erroneous standard, the determination that counsel violated the rule under a de novo standard, and the choice of sanction under an abuse of discretion standard."). The decision to take judicial notice and/or incorporate documents by reference is reviewed for an abuse of discretion and these issues raised by Petitioner in his appellate brief was not addressed on appeal either. See *United States v. 14.02 Acres of Land More or Less in Fresno Cty.* 547 F.3d 943, 955 (9th Cir. 2008)(judicial notice); *Davis v. HSBC Bank Nev., N.A.,* 691 F.3d 1152, 1160(9th Cir. 2012) (incorporation by reference).

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). 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. Rule 11(c)(1)(A).* Airbnb Respondents admit Petitioner did not receive adequate notice by stating "[t]he Complaint is also frivolous for the remaining reasons discussed in Airbnb's Motion to Dismiss" in the Rule 11 motion. 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 thus Petitioner's due process rights were violated.

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 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). The Appellate Court did not review Petitioner's arguments on appeal under such standard.

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 discuss this two prong inquiry nor state which allegations were lacking in support.

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. T*ownsend 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). The Court concluded the complaint was frivolous with no discussion of the the claims nor allegations in the complaint.

The District Court discussed multiple cases in the January 2022 Rule 11 order where only one was cited in the Rule 11 motion, *Buster v. Greisen,* 104 F.3d 1186, 1190 (9th Cir. 1997), where a 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 any 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. 1441. Petitioner's claims sought no collateral attack on 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. Petitioner'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's claims 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 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 Petitioner's objections to the Court taking judicial notice of Airbnb Respondents Exhibits filed with the Rule 11 motion 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 had incorporated by reference disputed facts from the motion to dismiss order in the order granting

sanctions which was an abuse of discretion. 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. The complaint was at issue but the Court stated Petitioner 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. The Appellate opinion also did not discuss precedent cited by Petitioner under the Federal Arbitration Act. *McCluskey v. Henry,* 56 Cal.App.5th at 1197. It was undisputed in the record Respondent committed fraud misleading the state court judge then opposed discovery on such issue even in these proceedings.

The District Court denied Petitioner's request for Rule 11 sanctions because it violated Fed. R. Civ. P. 11(c)(2) since he did not bring a separate motion however this is not required. *Goldberg v. Blue Ridge Farms, Inc.,* 2005 U.S. Dist. LEXIS 42907, at *7 (E.D.N.Y. July 26, 2005).

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).

A sanction also cannot exceed the amount the court finds sufficient to deter repetition of the sanctioned conduct, either by the party or attorney sanctioned, or others similarly situated. The 1993 rule 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).

Federal courts in federal law cases use the lodestar method— the reasonable number of hours expended multiplied by the reasonable hourly rate— the result of which is presumed to be reasonable. *Combs v. City of Huntington,* 829 F.3d 388, 393 (5th Cir. 2016). "The party seeking reimbursement of attorneys' fees has the burden of establishing the number of attorney hours expended, and can meet that burden only by presenting evidence that is adequate for the court to determine what hours should be included in the reimbursement." *La. Power & Light Co. v. Kellstrom,* 50 F.3d 319, 324 (5th Cir. 1995). "The court should exclude all time that is excessive, duplicative, or inadequately documented." Jimenez v. Wood Cty., 621 F.3d 372, 379-80 (5th Cir. 2010). Airbnb Respondents bore the burden of establishing by way of satisfactory evidence, in addition to their

own affidavits that the requested hourly rates met this standard. Id.; *Washington v. Philadelphia Cty. Ct., Common,* 89 F.3d 1031, 1035 (3d Cir. 1996). Only one of the three attorneys, Damali Taylor, submitted an affidavits identifying their usual billing rates and time spent and the rates are clearly inflated thus counsel failed to fulfill their duty to the court as no testimony was provided Airbnb ever paid these rates nor were billing sheets provided. District courts also have the discretion to deny a fee request in its entirety when the requested amount is "outrageously excessive." *Brown v. Stackler* , 612 F.2d 1057, 1059 (7th Cir. 1980). The amount of Rule 11 fees was excessive and should have been denied in its entirety.

Moreover, "if the district court determines that the unsuccessful claims...were indeed unrelated to the successful ones, the burden of showing which hours are recoverable for work on the successful claims will of course rest with the fee applicant." *Buffington v. Baltimore County,* 913 F.2d 113, 128 (4th Cir.), reh'g denied (1990). The burden was on Airbnb Respondents to separate work on vexatious litigant motion from Rule 11 motion and motion to dismiss and other unrelated tasks and they failed. Their spreadsheet contained general descriptions of work performed and no evidence of contemporaneous time entries.

The party opposing the fee application must satisfy his obligation to provide specific and reasonably precise objections concerning hours that should be excluded. *American Civil Liberties Un. of*

*Ga. v. Barnes,* 168 F.3d 423, 427 (11th Cir. 1999) Erroneous admission/exclusion of evidence is reviewed under abuse of discretion standard. *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1305-06 (11th Cir. 1999). The complaining party must establish that the error resulted in a "substantial prejudicial effect." Id. Petitioner specifically objected to all the line items including time in Reply papers and the District Court did not review Petitioner's objections in error and his request for an evidentiary hearing or supplemental briefing which caused Petitioner substantial prejudice as almost all fees were awarded.

An attorney's ability to pay is also undoubtedly a legitimate consideration when imposing Rule 11 sanctions. *In re Yagman,* 796 F.2d 1165, 1185 (9th Cir.1986). The offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney and litigant misconduct. *Doering v. Un. Cty. Bd. of Chosen Freeholders,* 857 F.2d 191, 196 (3d Cir. 1988). Because of their deterrent purpose, Rule 11 sanctions are analogous to punitive damages. *Cotner v. Hopkins,* 795 F.2d 900, 903 (10th Cir. 1986) (considering financial status of offender in evaluating effect of fine imposed under Rule 11. Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status.

*Landscape Properties, Inc. v. Whisenhunt,* 127 F.3d 678, 685 (8th Cir. 1997) Petitioner offered evidence he did not have ability to pay the inordinate Rule 11 fees based on his minimal income and assets and inordinate liabilities. His bankruptcy proceeding was pending. Yet no hearing was held to enable Petitioner to respond to any further evidence required from the District Court either.

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 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 Court's order based on the timeliness of a wire transfer and Airbnb Respondents extortionate behavior. The District Court cited disputed facts in the order granting sanctions. Issues

of credibility existed as the District Court questioned Petitioner's credibility referencing disputed facts from interlocutory state orders even after Petitioner offered evidence Airbnb Respondents 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 Should Have Been Denied Because Airbnb Respondents Did Mot Mitigate Attorney Fees?**

The party opposing a pleading or a motion that violates Rule 11 bears an obligation to mitigate its attorneys' fees. *Pollution Control Indus. of Am. v. Van Gundy,* 21 F.3d 152, 156 (7th Cir. 1994)(vacating sanctions against plaintiffs and remanding for appropriate award); *KRW Sales, Inc. v. Kristel Corp., No. 93 C 4377,* 1993 U.S. Dist. LEXIS 17246, at *8 (N.D. Ill. Dec. 3, 1993)(sanctions denied because plaintiff should have mitigated its damages by notifying defendant and attempting to have the problem corrected instead of waiting and filing Rule 11 motion). Airbnb Respondents did not contact Petitioner to discuss any purported deficiencies in the complaint and decided early on they were filing a Rule 11 motion. Since Airbnb Respondents did not make any effort to mitigate fees all fees should have been denied.

**5. 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 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, because the award is dependent on the defendant prevailing under the statutorily proscribed method, the attorney's fees must also rise and fall with the special motion. Since SRC Respondents special motion cannot apply in federal court, neither can the attorney fee provision and all fees should have been denied.

On January 10, 2022 the Court ordered SRC Respondents to file their fee petition within 30 days. They filed the fee petition 31 days later February 11, 2022 thus all fees should have been denied. Federal courts use the lodestar method—the reasonable number of hours expended multiplied by the reasonable hourly rate—the result of which is presumed to be reasonable. *Combs v. City of Huntington,* 829 F.3d 388, 393 (5th Cir. 2016). A fee application must be supported by: (1) adequate testimony (live or by affidavit), covering all the necessary areas, proving at a minimum an attorney's experience, reasonable hourly rate, and billing judgment exercised; and (2) contemporaneous billing time records. *Hensley,* 461 U.S. at 438 n.13. In re Nissan Litig., 2018 U.S. Dist. Lexis 154982, at *12. While editing and revising is permitted, wholesale re-creation of billing entries from documents, calendars, and other extrinsic evidence is insufficient. *Ariz. Dream Act Coal.,* 2018 U.S. Dist. Lexis 207625, at *19–22. Typically, adequate billing records require that each entry identify the date performed, the individual performing the task, and the hourly rate of the individual or charge for the task; describe the general subject matter of the task; and assign an amount of time to perform the task. See generally *Tech Pharmacy,* 2017 U.S. Dist. Lexis 211061, at *15–16. With respect to individual entries, the courts seek information sufficient to allow them to evaluate the reasonableness not only of that entry but also of the overall fee request. See generally *KeyCorp,* 2017 U.S.

Dist. Lexis 21372, at *40. The court should exclude all time that is excessive, duplicative, or inadequately documented." *Jimenez v. Wood Cty.*, 621 F.3d 372, 379-80 (5th Cir. 2010). SRC Respondents sought fees and tasked one lawyer with recreating time records with vague descriptions and excessive hours. They did not maintain contemporaneous time records, instead recreating the records for the amended petition. The descriptions in the entries did not indicate the nature of the subject being reviewed and their entries were unnecessary and excessive as the same descriptions are repeatedly copied especially in the entries for the time claimed for the reply. Natasha Mayat did not provide an affidavit nor did Mr. Servais for contemporaneous entries of his own time. The entire amount should have been denied.

District courts have the discretion to deny a fee request in its entirety when the requested amount is "outrageously excessive" under the circumstances. *Brown v. Stackler* , 612 F.2d 1057, 1059 (7th Cir. 1980) It is the duty of the requesting party to "make a good faith effort to exclude...hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983). To discourage such greed a severe reaction is needful. *Brown v. Stackler,* 612 F.2d 1057, 1059 (7th Cir. 1980). The initial fee request was inflated to an intolerable degree as SRC Respondents claimed double the fees. After the Court gave them the opportunity to cure

deficiencies, they tried to recreate billing records and sought an inordinate amount of time for the reply papers claiming they took twice as long as the motion.

The party opposing the fee application must satisfy his obligation to provide specific and reasonably precise objections concerning hours that should be excluded. *Barnes,* 168 F.3d at 428). Given this requirement, the respondent must pore over the applicant's billing records with auditor- like attention, line-by-line, making specific objections (e.g., duplicative, attributable solely to a failed claim, block billing). Erroneous admission/exclusion of evidence is reviewed under abuse of discretion standard. *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1305-06 (11th Cir. 1999). The complaining party must establish that the error resulted in a "substantial prejudicial effect." Id. Petitioner objected to the time entries and the Court did not review the objections in which caused Petitioner substantial prejudice as fees were awarded based on a spreadsheet and no testimony was introduced who entered the time and when.

**6. Whether The Appellate Court Applied The Proper Standard On Appeal In Determining Whether Petitioner's Motion For Recusal Should Have Been Granted?**

The abuse of discretion standard for judging the appearance of partiality requiring recusal under 28 U.S.C. §455 is an objective one and involves ascertaining whether a reasonable person with

knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. *United States v. Nelson*, 718 F.2d 315, 321(9th Cir. 1983). Erroneous admission/exclusion of evidence is reviewed under abuse of discretion standard. *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1305-06 (11th Cir. 1999). The complaining party must establish that the error resulted in a "substantial prejudicial effect." Id. There is no indication in the Appellate Opinion the Court applied the abuse of discretion standard but instead they summarily concluded there was no basis for recusal despite evidence of apparent and actual bias.

Two statutes govern a Judge's recusal in federal court, 28 U.S.C §§ 144 & 455. The standard under either statute is the same: "[W]hether a reasonable person with knowledge of all of the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Studley,* 783 F.2d 934, 939 (9th Cir. 1986)). "Ordinarily, the alleged bias must stem from an 'extrajudicial source[,]'" and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Id. at 1454 (quoting *Liteky v. United States*, 510 U.S. 540, 554-56 (1994))."[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Id. (quoting *Liteky,* 510 U.S. at

554-56). When presented with an affidavit of prejudice a judge may not pass upon the truth or falsity of the allegations therein, but must accept them as true for the purpose of passing upon the legal sufficiency of the affidavit. *Berger v. United States,* 255 U.S. 22, 41 (1921) The bias contemplated by 28 U.S.C.A. §144 is a personal bias, extrajudicial in origin, that a judge may have against a particular defendant. *Hodgdon v. United States,* 365 F.2d 679, 686 (8th Cir. 1966), cert. denied 385 U.S. 1029.

Airbnb Respondents filed a frivolous vexatious litigant motion which was denied yet it was Petitioner who was warned he may be subject to injunctive relief if he filed another claim against Airbnb Respondents. The District Court did not advise Airbnb Respondents they would be subject to injunctive relief if another frivolous vexatious litigant motion was filed. Petitioner filed an Anti-SLAPP motion opposing the vexatious litigant motion and the Court struck the motion stating it had no merit despite the fact under the second prong of Cal. Civ. Proc. 425.16 a Defendant party has to prove such motion has merit. 10-2372. In contrast, District Court applied the two prongs under Cal. Civ. Proc. 425.16 when considering SRC Respondents AntiSLAPP motion.

The District Court quickly struck Petitioner opposition he filed 21 days after the vexatious litigant motion was filed. When SRC Respondents did not file their reply to the AntiSLAPP motion, the District Court reminded them to file a reply and allowed it to

be filed almost two weeks late. SRC Respondents filed their fee request and reply each a day late and the District Court did not strike these pleadings. Even if

a "judge declines to grant recusal pursuant to section 455(a) & (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to section 144." *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980). The Court did not address this requirement.

Petitioner stated facts exist that call into question the District Court's impartiality. Petitioner discovered the Court had a longstanding personal and business relationship with two executives at Airbnb John Polito and Lucy Wang and this exhibited the appearance of bias. When the District Court concluded SRC Respondents fee petition was inadequate the Court ordered them to amend it and gave an unsolicited extension. When the District Court concluded Petitioner evidence of his income and net assets was deficient in opposition to the Rule 11 fee petition, the Court did not hold an evidentiary hearing nor give Petitioner an opportunity to submit additional evidence. The District Court failed to rule on Petitioner's objections to the SRC and Airbnb Respondents fee petitions nor allow supplemental briefing despite Petitioner request.

Petitioner offered testimony there was evidence on display throughout this case of bias when no hearings were held and inconsistent treatment by Petitioner versus other parties and opposing counsel

which exhibited a deep-seated favoritism and antagonism by the Court that would make any fair judgment impossible by the Court. Petitioner stated the District Court continued to be biased against

Petitioner throughout the proceedings which is evident based on the statements by him in his orders including in the order denying the frivolous vexatious litigant motion and the order granting Rule 11 fees for reasons not described in the Airbnb Respondents Rule 11 motion. The Court did not permit Petitioner to conduct an evidentiary hearing where Petitioner could cross-examine John Polito or anyone offering testimony on fees nor would the Court allow supplemental briefing opposing Respondents fee motions because the Court was personally biased in favor of Defendants and Airbnb executives Polino and Wang. Thus the record indicated the Court demonstrated a deep-seated favoritism and antagonism towards Petitioner that would make a fair judgment impossible for Petitioner. *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997)

## CONCLUSION

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

Date: September 5, 2023

Respectfully submitted,

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