No. _____

In the
Supreme Court of the United States

EVANS HOTELS, LLC, ET AL.,
Petitioners,

v.

UNITE HERE! LOCAL 30, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), prohibits unions from targeting neutral parties, often referred to as secondary employers, to cease doing business with other persons. In this action where two unions used and threatened to use lobbying and litigation to financially harm secondary employers, the questions presented are:

1. Did the Ninth Circuit err in holding that the First Amendment and the *Noerr-Pennington* doctrine protect the unions' actions despite those actions violating Section 8(b)(4), a holding that is contrary to decisions of the Second, Third, Eleventh, and D.C. Circuits?

2. The *Noerr-Pennington* doctrine does not protect serial sham petitioning where a party asserts a series of challenges without regard for their merits and for an improper purpose. The Ninth Circuit held that the unions' long history of using environmental, land-use, and zoning laws to block developments until developers agreed to labor agreements is not serial sham petitioning. Did the Ninth Circuit err in this holding, which conflicts with decisions of the Fourth, Second, and Seventh Circuits?

3. Should this Court reject the holdings of the Ninth and First Circuits and instead agree with the Second, Fifth, Eleventh, and D.C. Circuits that, under *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the procedures authorized by state anti-SLAPP statutes do not apply in federal courts?

PARTIES TO THE PROCEEDING

Petitioner Evans Hotels, LLC is a California limited liability company; petitioner BH Partnership LP is a California limited partnership; and petitioner EHSW, LLC is a Delaware limited liability company. Petitioners were the plaintiffs in the district court and the appellants/cross-appellees in the court of appeals.

Respondents are: Unite Here! Local 30; Brigette Browning, an individual; San Diego County Building and Construction Trades Council, AFL-CIO; Tom Lemmon, an individual; and Does 1-10. Respondents were the defendants in the district court and the appellees/cross-appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations. No publicly held corporation owns 10 percent or more of their stock.

RELATED PROCEEDINGS

Evans Hotels, LLC, et al. v. Unite Here! Local 30, et al., Nos. 23-55692 & 23-55728, United States Court of Appeals for the Ninth Circuit. Opinion entered on January 2, 2025; petitions for rehearing denied on February 11, 2025.

Evans Hotels, LLC, et al. v. Unite Here! Local 30, No. 3:18-cv-02763, United States District Court for the Southern District of California. Order granting defendants' motion to dismiss the third amended complaint and denying plaintiffs' motion for leave to file a surreply as moot entered on July 6, 2023.

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Evans Hotels, LLC, BH Partnership LP, and EHSW, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-11a) is not published in the *Federal Reporter* but is available at 2025 WL 17120. The orders of the district court (Pet. App. 12a-54a, 55a-71a) are not published in the *Federal Supplement* but are available at 2023 WL 4998062 and 2022 WL 3924283.

JURISDICTION

The Ninth Circuit issued a memorandum disposition on January 2, 2025, and denied petitioners' and respondents' timely petitions for rehearing on February 11, 2025. Pet. App. 72a-73a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. Pet. App. 74a-89a.

INTRODUCTION

Unable to maintain membership numbers through traditional organizing campaigns,[1] many unions challenge non-union employers' projects on environmental, land-use, and zoning grounds. Solely to delay these projects, the unions file lawsuits and otherwise obstruct government proceedings by claiming these projects violate such laws and regulations. Eventually, the costs of delay force employers to capitulate. Unions then drop their objections if the employer agrees to their demands for labor agreements that make it easier to unionize workers.[2] Often unions then support the very projects they previously opposed.

Here, petitioners Evans Hotels, LLC, BH Partnership LP, and EHSW, LLC (collectively, "Evans") stood up to two unions that have worked in tandem for more than a decade to extort concessions from hotel developers in San Diego, California. Respondents Unite Here! Local 30 and San Diego County Building and Construction Trades Council, AFL-CIO ("Building

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[1] Union membership has fallen steadily for decades. In 1945, more than a third of non-agricultural workers were union members. Gerald Mayer, Cong. Rsch. Serv., RL32553, *Union Membership Trends in the United States* CRS-12 (Aug. 31, 2004). In 1983, union membership was at 20.1 percent. News Release, Bureau of Lab. Stat., U.S. Dep't of Labor, Union Members – 2012, at 1 (Jan. 23, 2013), https://www.bls.gov/news.release/archives/union2_01232013.pdf. By 2012, the rate of union membership had plummeted to 11.3 percent as a whole and within the private sector stood at 6.6 percent. *Id.*

[2] Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Env't L.J. 21, 62-63, 66 (2018).

Trades"), led respectively by respondents Brigette Browning and Tom Lemmon,[3] grind projects to a halt by publicly challenging the projects on environmental, land-use, and zoning law grounds in lobbying and litigation. Meanwhile, they privately shake down the developers, promising to withdraw their challenges if the developers sign agreements that make it easier for the Unions to unionize hotel workers and that require hotel developers to use only unionized construction contractors and subcontractors. And when developers like Evans do not capitulate, the Unions employ other underhanded means. In this case, the Unions threatened Evans' business partner with financial ruin until it abandoned a joint venture with Evans, resulting in $100 million dollars in damages. There is no dispute that such tactics violate the National Labor Relation Act's prohibition on secondary boycotts, 29 U.S.C. § 158(b)(4)(i), (ii)(A)-(B).

Despite detailed allegations of the Unions' violations of the secondary boycott laws and their use of sham lobbying and litigation against numerous hotel developers, the district court dismissed Evans' action under Federal Rule of Civil Procedure 12(b)(6). The Ninth Circuit affirmed in part and reversed in part. Its ruling conflicts with opinions of this Court and of other circuit courts of appeals on three separate questions of law.

First, because the Unions' abusive tactics involve actual and threatened lobbying and litigation, the Ninth Circuit held their actions were protected by the

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[3] For clarity, all respondents will collectively be referred to as "the Unions."

First Amendment and the *Noerr-Pennington* doctrine.[4] At least four other circuits have reached the opposite conclusion. *Kentov v. Sheet Metal Workers' Int'l Ass'n Loc. 15*, 418 F.3d 1259, 1265 (11th Cir. 2005); *Metro. Reg'l Council of Phila. & Vicinity v. NLRB*, 50 F. App'x 88, 92 (3d Cir. 2002); *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 951-54 (D.C. Cir. 1999); *NLRB v. Loc. Union No. 3*, 477 F.2d 260, 266 (2d Cir. 1973). Those cases follow this Court's precedent that the statutory prohibition against the "evil" of secondary boycotts does not violate the First Amendment. *Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951); *see also Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982).

Second, the Ninth Circuit refused to hold that the Unions' pattern of opposing every hotel project without regard for its merit but to cause delay and harass developers constituted sham petitioning under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The Ninth Circuit's holding that

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[4] The *Noerr-Pennington* doctrine provides immunity for private entities' attempts to influence the passage or enforcement of laws. It is based on *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). Originally applied in antitrust cases, it has been applied in other actions. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-14, 934 (1982) (*Noerr-Pennington* protects participants in boycott from civil liability); *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 535 (9th Cir. 2022) (*Noerr-Pennington* applied in 42 U.S.C. § 1983 action); *see also CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1283 (10th Cir. 2020) ("In this circuit, this immunity extends beyond antitrust situations[,b]ut we refer to it as Petition Clause immunity, reserving the name, *Noerr-Pennington*, for antitrust cases.").

Evans failed to plead that it was literally barred from access to government tribunals and that Evans could not rely on the Unions' actions toward other hotel developers in establishing the pattern of sham petitioning conflicts with decisions of the Second, Fourth, and Seventh Circuits. *Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27*, 728 F.3d 354, 366-67 (4th Cir. 2013); *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 810 n.36 (2d Cir. 1983); *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 471-72 (7th Cir. 1982).

Third, the Ninth Circuit held that the Unions were entitled to seek attorney's fees on some state law claims that they moved to strike under California's anti-SLAPP statute, California Code of Civil Procedure Section 425.16.[5] The Ninth Circuit's ruling adds to a long-standing circuit split over whether state anti-SLAPP statutes apply to state law claims in federal courts. The Ninth Circuit is in the minority, joined only by the First Circuit, in holding that these

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[5] SLAPP stands for strategic lawsuit against public participation. As of January 2025, thirty-five states and the District of Columbia have enacted anti-SLAPP statutes. Reps. Comm. for Freedom of the Press, *Anti-SLAPP Legal Guide*, https://www.rcfp.org/anti-slapp-legal-guide/ (last visited May 8, 2025). Since then, Idaho and Montana have enacted anti-SLAPP statutes. Kyle Pfannenstiel, *Idaho Joins States with Anti-SLAPP Laws, Aimed at Combatting Frivolous Lawsuits*, Idaho Cap. Sun (Mar. 10, 2025), https://idahocapitalsun.com/briefs/idaho-joins-states-with-anti-slapp-laws-aimed-at-combatting-frivolous-lawsuits/; Zeke Lloyd, *Montana Joins Growing List of States with Codified Protection Against Frivolous Lawsuits*, Mont. Free Press (May 3, 2025), https://montanafreepress.org/2025/05/03/montana-joins-growing-list-of-states-with-codified-protection-against-frivolous-lawsuits/.

laws apply in federal courts. In contrast, the Second, Fifth, Eleventh, and D.C. Circuits have all held that anti-SLAPP statutes answer the same questions as Federal Rules of Civil Procedure 12(b)(6) and 56, and thus, under *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), state anti-SLAPP laws have no place in federal courts. *La Liberte v. Reid*, 966 F.3d 79, 86-88 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240, 244-49 (5th Cir. 2019); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349-57 (11th Cir. 2018); *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015).

Each of these three questions involve holdings that "conflict with the decision of another United States court of appeals on the same important matter" (Sup. Ct. R. 10(a)) and/or "decided an important federal question in a way that conflicts with relevant decisions of this Court" (Sup. Ct. R. 10(c)). This case offers the opportunity to resolve these conflicts. Accordingly, Evans respectfully requests that this Court grant certiorari and reverse the Ninth Circuit.

STATEMENT OF THE CASE

In San Diego, California, the Unions have exploited developers' need to obtain approval for development and renovation from local government bodies to extract labor concessions they cannot obtain through traditional organizing.[6]

Unable to convince hotel workers to support unionization, Unite Here! bullies developers to force

[6] Unless otherwise specified, these facts are set forth in detail in petitioners' Third Amended Complaint. C.A. E.R. 587-694.

them to execute card check neutrality agreements. These agreements bypass employers' and workers' rights to have a secret ballot election overseen by the National Labor Relations Board ("NLRB"), 29 U.S.C. § 159(c)(1)(B), and force employers to give up their statutory and First Amendment rights to oppose unionization of their workforces, 29 U.S.C. § 158(c); *Thomas v. Collins*, 323 U.S. 516, 537 (1945).[7] These agreements make it much easier to obtain union recognition than traditional secret ballot elections.[8]

Meanwhile, Building Trades force developers to agree to Project Labor Agreements ("PLAs"). Under a PLA, a developer agrees to work only with a contractor that employs union workers and to mandate that the contractor hire only subcontractors that employ union workers. This deprives workers of their right to decide whether they want to be unionized and freezes non-union contractors, subcontractors, and workers out of the opportunity to work on large-scale hotel developments.

Over the decade before Evans filed this action, the Unions bullied at least ten San Diego hotel developers into capitulating to their demands for card check neutrality agreements and/or PLAs. Major hotel develop-

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[7] *See generally* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589 (2008).

[8] Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 51-52 (2001) (study showing that, between 1983 and 1998, unions won 78.2 percent of surveyed campaigns involving card check neutrality agreements but only 45.6 percent of campaigns subject to NLRB-overseen elections).

ments must go through an approval process with various government entities like the City Council, the Port of San Diego, and the Coastal Commission. The Unions have taken advantage of that process by challenging every major hotel development over the past decade on frivolous environmental, land-use, and zoning grounds at every stage. When initial challenges fail, the Unions appeal or find new avenues for challenging the projects.

In their actions against San Diego hotel developers, the Unions have levied hundreds of objections in roughly twenty administrative challenges, five writ petitions, and multiple appeals without ever obtaining the substantive relief they sought. The few times their objections were not rejected entirely, the Unions at best secured minor victories based on technicalities. Instead, their goal is to inflict cost and delay on developers and coerce them to agree to card check neutrality agreements and/or PLAs. If developers agree to their demands, the Unions drop their challenges without obtaining the relief they sought and then often support the same projects that they had previously opposed.

This action arose because Evans refused to be bullied. Evans Hotels is a family business that operates three San Diego-area hotels, including the Bahia Resort Hotel ("Bahia"), which is owned by BH Partnership. The Bahia operates under a long-term lease with the City of San Diego ("City"). Any significant redevelopment of the Bahia requires a lease amendment that complies with the 1994 Mission Bay Park Master Plan Update.

In 2018, Evans sought approval from the City for amendments to the Bahia lease so it could renovate the existing hotel and add rooms. In response, the Unions began a publicity campaign and lobbied against the project, asserting the proposed plan violated local land-use requirements.[9] The Unions followed that with demands to members of the City Council that they advise Evans that it would have to agree to the Unions' demands before it could obtain approval of the Bahia redevelopment, which the members did.

Such a condition is illegal, as the City Attorney advised the City Council. Despite that, the City would not place the lease amendment on its agenda.

The Unions then told Evans that it must agree to a card check neutrality agreement and force its future contractors to agree to PLAs. Respondent Browning said the Unions would "stop at nothing" to prevent the Bahia project from going forward and bragged about their legal challenges against other developers, admitting they created objections out of "thin air." Respondent Lemmon told Evans that, unless it agreed to the Unions' demands, the Bahia redevelopment was "doomed" and bragged that Unions knew how to block projects because they "do it all the time." Lemmon warned Evans it faced a "grenade with the pin out on the table," adding that, although the pin had been taken out, there was still time to put it back in.

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[9] In a separate proceeding, the San Diego County Superior Court later held that this land-use argument against the project was baseless "[e]conomic blackmail." Statement of Decision at 35-36, 40, *San Diegans for Open Gov't v. City of San Diego*, No. 37-2018-00055910 (Cal. Super. Ct. Feb. 7, 2023), 2023 WL 4135913.

Evans also was informed by the City Council President that she would not docket the lease amendment for a vote because the Unions had given her "hundreds of thousands of dollars" in campaign contributions. And the then-Mayor told Evans that he had previously agreed in secret to give the Unions "veto power" over non-union projects they opposed—a power they had exercised to prevent the Bahia lease amendment from being docketed.

To further ratchet up the pressure on Evans, the Unions threatened SeaWorld, which had entered into a joint venture agreement with petitioner EHSW to develop a branded SeaWorld hotel.[10] Through an intermediary, the Unions threatened to "drum up negative publicity" about SeaWorld and oppose all of its future attractions when they needed City Council and California Coastal Commission approval unless SeaWorld severed ties with Evans. Faced with the prospect of the Unions targeting SeaWorld's core business plan to increase sales by opening new attractions, SeaWorld abandoned its joint venture with Evans. Evans estimates that its damages from the termination exceed $100 million.

Refusing to be bullied, Evans sued the Unions in the Southern District of California on December 7, 2018. Evans alleged that the Unions had engaged in two unlawful secondary boycotts in violation of Section 8(b)(4)(ii)(A) and (B) of the National Labor Relations Act and attempted monopolization and conspiracy to monopolize in violation of the Sherman Act, 15 U.S.C. § 2. Evans alleged the Unions violated Section 8(b)(4)(ii) by: (1) threatening SeaWorld so it cancelled

[10] EHSW is owned by members of the Evans family.

its joint venture deal with EHSW; and (2) threatening to block the Bahia redevelopment unless Evans Hotels entered into agreements that prevented its contractors from employing non-union subcontractors and non-union workers. Evans also alleged that the Unions violated antitrust laws by preventing Evans and other hotel operators from contracting with non-union hotel workers and attempting to exclude non-union contractors, subcontractors, and construction workers from the market.

After various proceedings, Evans filed a Third Amended Complaint. The Unions moved to dismiss it, raising the same arguments against the secondary boycott claims that two judges had previously rejected. C.A. E.R. 705, 776-778. Despite the prior rulings, the latest judge dismissed all claims with prejudice based on *Noerr-Pennington* without explaining the departure from the earlier judges' rulings. Pet. App. 12a-54a.

The judge refused to award attorney's fees that the Unions sought under California's anti-SLAPP statute. Pet. App. 66a-70a.

Evans appealed the dismissal of its claims, and the Unions cross-appealed the denial of their attorney's fees claim. The Ninth Circuit panel—consisting of Judges Fletcher, De Alba, and Callahan—affirmed in part and reversed in part. The panel's memorandum disposition held that the *Noerr-Pennington* doctrine applied to the secondary boycott claims and that Evans had not sufficiently alleged "serial sham," *i.e.*, that the Unions' long history of blocking hotel development projects demonstrated a series of sham petitions for an improper purpose. Pet. App. 4a-6a. Judge

Callahan dissented in part, holding that petitioners had pled respondents' conduct as to the Bahia redevelopment fell within the serial sham exception to the *Noerr-Pennington* doctrine. *Id.* at 10a-11a.

The Ninth Circuit did allow the secondary boycott claim based on the threats toward SeaWorld to proceed. Although *Noerr-Pennington* applied to the threats to oppose future attractions, those threats were "objectively baseless as the Unions neither knew which attractions SeaWorld intended to build nor did they intend to follow through on their threat." Pet. App. 5a.

The Ninth Circuit also reversed and remanded for further proceedings to determine if respondents were entitled to attorney's fees in connection with their anti-SLAPP motion. Pet. App. 7a-9a.

Evans filed a petition for rehearing en banc. The Unions filed a petition for panel rehearing and rehearing en banc. Both were denied, though Judge Callahan voted to grant Evans' petition for rehearing en banc. Pet. App. 72a-73a.

After the mandate issued, the district court awarded respondents $221,748.10 in attorney's fees and costs under the anti-SLAPP statute. D. Ct. Doc. 186 (Apr. 28, 2025).

REASONS TO GRANT THE PETITION

I. Creating a Conflict with the Opinions of Four Other Circuits, the Ninth Circuit Wrongly Held That the First Amendment Protects Threats That Violate Section 8(b)(4)'s Prohibition on Secondary Boycotts.

Section 8(b)(4) prohibits unions' use of secondary boycotts—that is, actions designed to force a third party to "cease doing business with any other person." *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 632-34 (1967) (citation omitted); 29 U.S.C. § 158(b)(4). Section 8(b)(4)(i) states unions may not "induce or encourage" employees to engage in secondary strikes, while Section 8(b)(4)(ii) forbids a union from threatening, coercing, or restraining another person to force that person to cease doing business with an employer or other person or to force the employer to enter into certain prohibited agreements. 29 U.S.C. § 158(b)(4)(i), (ii)(A)-(B). Petitioners alleged respondents violated Section 8(b)(4)(ii) by: (1) threatening SeaWorld so it cancelled its joint venture with Evans; and (2) threatening Evans so it would require its contractors to enter into PLAs with respondents Building Trades.[11] The Ninth Circuit held that the *Noerr-Pennington*

[11] In the Unions' threats against SeaWorld, SeaWorld is the secondary employer being threatened or coerced to refuse to do business with Evans, the primary employer. In trying to force Evans to agree to a PLA governing what type of workers can work on the Bahia redevelopment, the contractors and subcontractors are the primary employers of those workers. The Unions are threatening Evans, a secondary employer in that situation, to force it to refuse to do business with non-union contractors and subcontractors.

doctrine, which is rooted in the First Amendment's right to petition the government, applies to petitioners' secondary boycott claims.[12] Pet. App. 3a.

This directly conflicts with decisions of four other circuits that have held secondary activity prohibited by Section 8(b)(4) is not protected by the First Amendment. *See, e.g.*, *Kentov v. Sheet Metal Workers' Int'l Ass'n Loc. 15*, 418 F.3d 1259, 1265 (11th Cir. 2005) (citing *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.* ("*Allied*"), 456 U.S. 212 (1982) in holding First Amendment did not apply to mock funeral procession that violated Section 8(b)(4)(ii)(B)); *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 951-54 (D.C. Cir. 1999) (First Amendment not implicated where union agents violated secondary boycott provisions by distributing handbills calculated to reach neutral employees and speaking with employees who subsequently refused to enter job site and perform services); *NLRB v. Loc. Union No. 3*, 477 F.2d 260, 264, 266 (2d Cir. 1973) (union business manager's statements that in his personal opinion members of electrical union should refuse to take deliveries from employer involved in dispute with another union was unlawful secondary activity not protected by the First Amendment); *see also Metro. Reg'l Council of Phila. & Vicinity v. NLRB*, 50 F. App'x 88, 91-92 (3d Cir. 2002) (citing *Allied* in holding First Amendment did not protect excessively loud

[12] The Ninth Circuit allowed the claim for secondary boycott based on the Unions' threats to SeaWorld to proceed on the basis that the threats fell within the exception to *Noerr-Pennington* for sham petitioning. Pet. App. 5a. While the Ninth Circuit is correct in that holding, it should have never reached that issue because *Noerr-Pennington* does not apply to secondary boycott activity in violation of Section 8(b)(4).

broadcasts union directed at housing complex residents, aimed at coercing the complexes to stop doing business with non-union contractors in violation of Section 8(b)(4)(ii)(B)).

These cases all follow *International Brotherhood of Electrical Workers v. NLRB* ("*IBEW*"), 341 U.S. 694 (1951). It held that Section 8(b)(4)'s restrictions pose no conflict with the First Amendment. In that case, a union violated Section 8(b)(4)(i) by inducing and encouraging employees of the neutral employers to strike to force a general contractor to cease doing business with the primary employer. *Id.* at 697-98, 705. This Court rejected the union's claim that its conduct was protected by the First Amendment because the statutory words "'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Id.* at 701-02. To the contrary, "[t]he prohibition of inducement or encouragement of secondary pressure by [Section] 8(b)(4)[ ] carries no unconstitutional abridgement of free speech."[13] *Id.* at 705 & n.9.

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[13] In cases involving picketing after *IBEW*, this Court has held that union conduct directed at secondary parties is not subject to First Amendment protections. *Allied*, 456 U.S. at 214, 226 (refusal by longshoremen to handle cargoes arriving from or destined for the Soviet Union in protest of its invasion of Afghanistan was not protected by First Amendment); *NLRB v. Retail Store Emps. Union, Loc. 1001*, 447 U.S. 607, 609, 611-16 (1980) (picketing of title companies that did business with title insurance provider engaged in dispute with union violated secondary boycott provisions and plurality found was unprotected by the First Amendment); *id.* at 616 (plurality opinion) ("As applied to picketing that predictably encourages consumers to boycott a secondary business, [Section 8(b)(4)] imposes no impermissible

The Ninth Circuit held *IBEW* did not apply because it "addressed Section 8(b)(4)(i) rather than Section 8(b)(4)(ii)." Pet. App. 3a. But the Eleventh and Third Circuits have applied *IBEW* to claims under Section 8(b)(4)(ii). *Kentov*, 418 F.3d at 1265; *Metro. Reg'l Council*, 50 F. App'x at 92.

Nor is there any textual basis to treat Section 8(b)(4)(ii) differently from Section 8(b)(4)(i). Both sections are part of the same sentence. Both prohibit secondary boycotts: the "evil condemned by Congress in [Section] 8(b)(4)." *IBEW*, 341 U.S. at 705. The former prevents "inducing or encouraging" strikes to enforce secondary boycotts, and the latter prevents narrower conduct: threats and coercion to enforce secondary boycotts. There is no reason that the First Amendment would protect actions that "threaten, coerce, or restrain" secondary employers, yet would not protect speech that merely "induce[s] or encourage[s]" third parties to engage in secondary boycotts. To the contrary, this Court has held that "conduct designed not to communicate but to coerce merits still less consideration under the First Amendment" than conduct that induces or encourages secondary activity. *Allied*, 456 U.S. at 226.

The Ninth Circuit also held that *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), forecloses the argument that the First Amendment does

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restrictions upon constitutionally protected speech."); *id.* at 618, 619 (Stevens, J., concurring in part and concurring in the result) ("I agree with the plurality that this content-based restriction is permissible . . . . [T]he statute is consistent with the First Amendment.").

not apply to secondary boycott violations of Section 8(b)(4)(ii). Pet. App. 3a. But *DeBartolo* never decided that issue. It applied the doctrine of constitutional avoidance and declined to decide the First Amendment question. 485 U.S. at 575. Instead, it held that peacefully passing out leaflets could be interpreted to fall outside the scope of Section 8(b)(4)(ii) because "[t]here is no suggestion that the leaflets had any coercive effect on customers of the mall." *Id.* at 578.

Here, there is no way to interpret as non-coercive the Unions' threats: (1) to ruin SeaWorld financially unless it stopped doing business with Evans; and (2) to harm Evans financially by blocking the Bahia redevelopment unless it agreed to retain contractors who would employ only union members and union subcontractors—and do no business with non-union subcontractors and employees. Because those threats violate Section 8(b)(4)(ii), the First Amendment does not protect them. As *Warshawsky* and *Kentov* held, the union actions in those cases were prohibited by Section 8(b)(4), so *DeBartolo* did not foreclose the secondary boycott claims. *Warshawsky*, 182 F.3d at 952-53 (encouraging neutral employees to boycott is unlike the wholly legal conduct in *DeBartolo*); *Kentov*, 418 F.3d at 1264-66 (rejecting argument that *DeBartolo* applied because unions' actions were more coercive than peaceful handbilling). By holding, under *DeBartolo*, that *Noerr-Pennington* applies to the Unions' threats against Evans and SeaWorld, the Ninth Circuit created a further circuit split.

Thus, in applying the First Amendment and the *Noerr-Pennington* doctrine to the Unions' secondary threats, the Ninth Circuit's ruling creates circuit

splits with the Second, Third, Eleventh, and D.C. Circuits, and departs from *IBEW*. Review should be granted under Supreme Court Rule 10(a) and (c) to resolve these conflicts.

II. In a Ruling That Conflicts with Decisions of the Second, Fourth, and Seventh Circuits, the Ninth Circuit Incorrectly Held That the "Serial Sham" Exception to the *Noerr-Pennington* Doctrine Does Not Apply to Petitioners' Claims.

Even if *Noerr-Pennington* applies here, it only safeguards parties' First Amendment right to petition the government by protecting *genuine* efforts to obtain government action, even if the action has anticompetitive effects. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). However, *Noerr-Pennington* does not protect sham petitioning. *Id.*

"*[I]n whatever forum*, private action that is not genuinely aimed at procuring favorable governmental action is a mere sham that cannot be deemed a valid effort to influence government action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988) (emphasis added). Such sham petitioning is a pattern of using administrative and judicial proceedings to harass others. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-13 (1972). This Court has explained that this "'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon" and "involves a defendant whose activities are 'not genu-

inely aimed at procuring favorable government action' at all." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) (quoting *Allied Tube & Conduit*, 486 U.S. at 500 n.4).

Evans alleged that the Unions' actions fell within this "serial sham" exception. It identified at least ten other San Diego hotel developers whose projects were blocked and delayed when the Unions' asserted environmental, land-use, and zoning objections and lawsuits without regard for their merits and purely to delay approval of the projects until the developers capitulated to the Unions' demands for card check neutrality agreements and PLAs. Once developers capitulated, the Unions abandoned their environmental, land-use, and zoning claims. Often, they did an about-face and supported the very projects they had just opposed.

Over the dissent of Judge Callahan, the Ninth Circuit held these allegations did not sufficiently allege the sham exception because: (1) relying on language in *Cal. Motor*, Evans did not allege that it was "effectively bar[red] . . . from meaningful access to adjudicatory tribunals"; and (2) Evans could not rely on the Unions' actions toward other developers. Pet. App. 4a-5a. Both holdings conflict with decisions of other circuits.

The "access" language derives from this Court's statement in *Cal. Motor* that the petitioners in that case "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." 404 U.S. at 512. The Fourth and Second Circuits have held that this Court did not require allegations that the sham petitioning created

a literal barrier to tribunals, but simply required abusive tactics. *Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27*, 728 F.3d 354, 366 (4th Cir. 2013) (*Cal. Motor*'s "'access-barring' language cannot mean that litigation must reach such a crescendo as to literally incapacitate the legal system and prevent another litigant from receiving their day in court"); *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 810 n.36 (2d Cir. 1983) (explaining that access barring in *Cal. Motor* is "one example of the illegal results that might flow from abuse of the administrative process" but "reject[ing] the suggestion . . . that the applicability of the sham exception turns on whether a competitor is barred from access to administrative agencies or the courts"). "Instead, legal challenges need only 'harass and deter [litigants] in their use of administrative and judicial proceedings . . . .'" *Waugh Chapel*, 728 F.3d at 366 (quoting *Cal. Motor*, 404 U.S. at 511) (brackets in original).[14] As this Court stated in *City of Columbia*, the sham exception applies when "delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks." 499 U.S. at 381-82.

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[14] Two previous Ninth Circuit opinions also rejected the argument that "access barring [is] a prerequisite to application of the sham exception." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1257-60 (9th Cir. 1982) ("to invoke the sham exception, some abuse of process, although not necessarily access barring, must be alleged"); *see also Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 841 n.14 (9th Cir. 1980) (declining to interpret Ninth Circuit and Supreme Court precedent to require "a showing that the plaintiff has been barred from meaningful use of the agency or tribunal" in serial sham cases).

As for the Ninth Circuit's holding that Evans could not rely on conduct toward other developers, Judge Posner in the Seventh Circuit held squarely to the contrary. In *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), the plaintiff alleged that the defendant had engaged in a campaign of anticompetitive behavior that included "threatening groundless patent-infringement suits to deter would-be competitors" and "prosecuting three 'baseless and groundless lawsuits in bad faith, not for the legitimate purpose of adjudicating a legal controversy, but . . . to eliminate competition,'" *Id.* at 468. "[T]hree improper lawsuits are alleged, and it can make no difference that they were not all against Grip-Pak."[15] *Id.* at 472.

Grip-Pak is consistent with *Cal. Motor* and another earlier decision of this Court, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). *Cal. Motor* involved the allegation by one group of highway carriers that another group of highway carriers made sham administrative challenges to block applications by members of the first group to acquire, transfer, and register operating rights. 404 U.S. at 509. In *Otter Tail*, the government sufficiently showed that a power

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[15] In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("*PRE*"), this Court appeared to disapprove of *Grip-Pak* for holding it was proper to inquire into the defendant's motivations absent evidence the case was objectively baseless or frivolous. 508 U.S. 49, 65 (1993). However, in *PRE*, petitioners alleged that only a single lawsuit was sham. *Id.* at 53-54; *see also id.* at 72 n.8 (Stevens, J., concurring in the judgment) (explaining that *Grip-Pak*'s consideration of motivation was "neither surprising nor relevant" to *PRE*, a single sham case, but is a valid consideration in sham petitioning cases based on "abuse of judicial process").

company used sham litigation against twelve different towns to block municipal power systems and monopolize the retail distribution of electric power. 410 U.S. at 370-72, 379-80. Both cases therefore involved sham petitioning against multiple parties. Contrary to the Ninth Circuit's ruling, the sham exception does not require all of the actions to be directed against the same party.

Because the Ninth Circuit's ruling creates these circuit splits, review should be granted under Supreme Court Rule 10(a).

III. In a Ruling That Conflicts with Four Other Circuits, the Ninth Circuit Wrongly Applied California's Anti-SLAPP Statute to a Case Pending in a Federal Court.

The Ninth Circuit held that the Unions could seek attorney's fees under California's anti-SLAPP statute, California Code of Civil Procedure Section 425.16. Pet. App. 7a-9a. The Ninth Circuit's ruling, thus, adds to a deep and long-standing circuit split, with the Second, Fifth, Eleventh, and D.C. Circuits holding state anti-SLAPP laws do not apply in federal court and the Ninth and First Circuits holding they do apply. *Compare La Liberte v. Reid*, 966 F.3d 79, 86-88 (2d Cir. 2020) (refusing to apply California's anti-SLAPP statute), *Klocke v. Watson*, 936 F.3d 240, 244-49 (5th Cir. 2019) (refusing to apply Texas's anti-SLAPP statute), *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349-57 (11th Cir. 2018) (refusing to apply Georgia's anti-SLAPP statute), *and Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015), *with United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73

(9th Cir. 1999), *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-35 (9th Cir. 2018), *and Franchini v. Inv.'s Bus. Daily, Inc.*, 981 F.3d 1, 6-8 (1st Cir. 2020).

Numerous cases have acknowledged that the circuits are split over whether anti-SLAPP statutes apply in federal courts. *See, e.g.*, *La Liberte*, 966 F.3d at 86 ("Our sister circuits split on whether federal courts may entertain the various state iterations of the anti-SLAPP special motion."); *Abbas*, 783 F.3d at 1335-36 (citing decisions of other circuits applying anti-SLAPP statutes, but finding them "not persuasive"); *see also Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1183 (9th Cir. 2016) (Kozinski, J., concurring) (discussing D.C. Circuit's ruling in *Abbas*: "Now we've got a circuit split, and we're standing on the wrong side.").

The divide arises from this Court's opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). There, this Court held that if a state law and Federal Rule of Civil Procedure "answer the same question," the Federal Rule applies and the state law cannot apply. *Id.* at 398-99. Since it was decided, courts rejecting anti-SLAPP laws have held they cannot apply in federal courts because they answer the same questions as Federal Rules of Civil Procedure 12 and 56.

For instance, in *Abbas*, then-Judge Kavanaugh explained that "[f]or the category of cases that it covers," an anti-SLAPP statute requiring a plaintiff to establish a probability of success "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial—namely, when the court concludes

that the plaintiff does not have a likelihood of success on the merits." 783 F.3d at 1333. "But Federal Rules of Civil Procedure 12 and 56 'answer the same question' about the circumstances under which a court must dismiss a case before trial." *Id.* at 1333-34.

Under Rule 12(b)(6), "a plaintiff can overcome a motion to dismiss by simply alleging facts sufficient to state a claim that is plausible on its face." *Abbas*, 783 F.3d at 1334 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A well-pleaded complaint 'may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable.'" *Id.* (quoting *Twombly*, 550 U.S. at 556). Similarly, Rule 56 permits summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). Neither rule requires the non-moving party to establish a probability of prevailing. *Id.* Consequently, under *Shady Grove*, the anti-SLAPP statutes cannot be applied in federal courts because they require a showing of probability of success. *Id.*

Then-Judge Kavanaugh also held that, because the anti-SLAPP statute did not apply, the defendants could not recover attorney's fees for claims dismissed on a Rule 12(b)(6) motion. *Abbas*, 783 F.3d at 1337 n.5.

The Second Circuit in *La Liberte* performed a similar analysis in finding California's anti-SLAPP statute cannot apply in federal court under *Shady Grove*. Like then-Judge Kavanaugh in *Abbas*, the Second Circuit held that California's anti-SLAPP statute's probability of success requirement contravenes Rule

12(b)(6) and Rule 56 by imposing its probability requirement. *La Liberte*, 966 F.3d at 87. *La Liberte* also held that the defendant could not obtain attorney's fees "under the anti-SLAPP statute based on the district court's separate Rule 12(b)(6) dismissal." *Id.* at 88.

Eschewing the approach taken by these other circuits, the Ninth Circuit has applied an entirely different standard to decide anti-SLAPP motions. In decisions that pre-date or do not address *Shady Grove*, the Ninth Circuit applies a piecemeal approach to anti-SLAPP statutes: procedures authorized by those statutes apply in federal courts unless they conflict directly with Federal Rules of Civil Procedure. *Compare Newsham*, 190 F.3d at 970-73 (holding anti-SLAPP statute applied to dismissal of counterclaims), *and Planned Parenthood Fed'n of Am.*, 890 F.3d at 833-35 (holding that federal courts should apply Rule 12(b)(6) standards if anti-SLAPP motion challenges legal sufficiency of claim but should apply Rule 56 standards if anti-SLAPP motion challenges factual sufficiency of claim), *with Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 839, 846-47 (9th Cir. 2001) (automatic stay of discovery under anti-SLAPP statute conflicted with federal rules), *and Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (granting anti-SLAPP motion without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment). The result is that some elements of anti-SLAPP statutes apply in federal court, while others do not. And the only significant Ninth Circuit opinion to address the anti-SLAPP statute under *Shady Grove* held it was not "'clearly irreconcilable'

with circuit law" so it did not override the Ninth Circuit's earlier rulings. *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1141 (9th Cir. 2022).[16] More recently, the First Circuit agreed with the Ninth Circuit in holding anti-SLAPP statutes apply in federal courts. *Franchini*, 981 F.3d at 6-8 (holding the appellate court had jurisdiction to hear an interlocutory appeal of a denial of a motion to dismiss under Maine's anti-SLAPP law).

This Court therefore should grant review pursuant to Supreme Court Rule 10(c) to resolve the conflict over the applicability of state anti-SLAPP statutes in federal courts.

[16] The Ninth Circuit appeared poised to revisit its position on anti-SLAPP statutes by ordering rehearing en banc in *Martinez v. ZoomInfo Technologies, Inc.*, 82 F.4th 785 (9th Cir. 2023), *reh'g granted, vacated*, 90 F.4th 1042 (9th Cir. 2024). Before the en banc case was decided, however, the appeal was dismissed by stipulated agreement. *Martinez v. Zoominfo Techs., Inc.*, 122 F.4th 739, 740 (9th Cir. 2024).

CONCLUSION

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

Respectfully submitted,

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May 12, 2025

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 2 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EVANS HOTELS, LLC, a California limited liability company; et al., Plaintiffs-Appellants, v. UNITE HERE! LOCAL 30; et al., Defendants-Appellees.	No. 23-55692 D.C. No. 3:18-cv-02763-RSH-AHG MEMORANDUM*

EVANS HOTELS, LLC, a California limited liability company; et al., Plaintiffs-Appellees, v. UNITE HERE! LOCAL 30; et al., Defendants-Appellants.	No. 23-55728 D.C. No. 3:18-cv-02763-RSH-AHG

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court for the Southern District of California
Robert Steven Huie, District Judge, Presiding

Argued and Submitted November 7, 2024
Pasadena, California

Before: W. FLETCHER, CALLAHAN, and DE ALBA, Circuit Judges.
Partial Dissent by Judge CALLAHAN.

Evans Hotels, LLC; BH Partnership LP; and EHSW, LLC (collectively "Evans") appeal from the district court's order dismissing with prejudice Evans' third amended complaint against Unite Here! Local 30; Brigette Browning; San Diego County Building and Construction Trades Council, AFL-CIO (the "Trades Council"); and Tom Lemmon (collectively the "Unions") and from the district court's order denying its motion for leave to file a fourth amended complaint.

The Unions cross-appeal from the district court's order denying their motion for attorneys' fees and costs under Cal. Civ. Proc. Code § 425.16. We have jurisdiction under 28 U.S.C. § 1291. We reverse the dismissal of Evans' claim for secondary boycott in violation of 29 U.S.C. § 158(b)(4)(ii)(B), and affirm the dismissal of Evans' remaining claims with prejudice. We affirm the order denying Evans' motion for leave to file a fourth amended complaint. We reverse the order denying the Unions' motion for attorneys' fees under Cal. Civ. Proc. Code § 425.16, and remand for the district court to determine whether the Unions achieved any practical benefit in bringing the motion.

***Noerr-Pennington* Doctrine**

The *Noerr-Pennington* doctrine shields the Unions from statutory liability for their efforts to oppose the lease amendment before the Mayor of San Diego and the San Diego City Council. *See Relevant Grp., LLC v. Nourmand*, 116 F.4th 917, 927 (9th Cir. 2024). The doctrine also shields the Unions from liability for their threats to raise administrative and legal challenges to the Bahia redevelopment. *See United States v. Koziol*, 993 F.3d 1160, 1171 (9th Cir. 2021).

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568 at 575-576 (1988), forecloses Evans' contention that claims for secondary boycott in violation of Section 8(b)(4)(ii) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4)(ii), do not implicate the First Amendment or *Noerr-Pennington* doctrine. Evans' reliance on *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, 341 U.S. 694 (1951) is misplaced as that case addressed Section 8(b)(4)(i) rather than Section 8(b)(4)(ii).

Evans fails to plead facts sufficient to show the sham exception applies to the Unions' lobbying before the Mayor and City Council. "[P]etitioning may be considered a 'sham' only where the petitioner uses 'the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.'" *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1095 (9th Cir. 2000) (quoting *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991)). In addition, the petitioning must "lack objective reasonableness," *Prof. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993) (*PREI*),

which means that the petitioner cannot reasonably expect to secure favorable government action. Here, the Unions successfully petitioned the Mayor and City Council to decline approving the Bahia lease amendment. Because Evans has failed to allege that this harm was caused by legislative process, rather than the outcome of the process, the Unions' lobbying activity does not fall within the sham exception. *See id.*

Evans similarly fails to plead facts sufficient to show the sham exception applies to the Unions' threats to raise administrative and legal challenges to the Bahia redevelopment. At best, Evans alleges that one argument the Unions threatened to raise may not have prevailed. Evans does not show the remaining arguments the Unions threatened to raise in opposition to the project were baseless, nor that the threatened litigation was "so baseless that no reasonable litigant could realistically expect to secure favorable relief." *See PREI*, 508 U.S. at 62.

Evans does not plead facts showing the serial sham exception applies to the Unions' conduct. *See USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). Evans alleges the Unions raised administrative challenges to, or filed lawsuits seeking to block, eight different development projects between 2007 and 2018. Evans was not a party to any of those proceedings. These allegations are not sufficient to plausibly show the prior challenges "effectively 'bar[red]'" it or any other developer "from meaningful access to adjudicatory tribunals and so . . . usurp[ed] the decision-making process," as necessary to establish the exception. *See PREI*, 508 U.S. at 58 (quoting *Cal.*

Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 515 (1972)).

Evans does plead facts sufficient to show the sham exception applies to the Unions' threats to raise administrative challenges to Sea World's future attractions to pressure SeaWorld to cease doing business with Evans. Construing the allegations in the light most favorable to Evans, the Unions sought to use the governmental process, rather than the outcome of that process, to coerce SeaWorld. *See Koziol*, 993 F.3d at 1171-72. Further, the threat was objectively baseless as the Unions neither knew which attractions SeaWorld intended to build nor did they intend to follow through on their threat. Therefore, they could not have reasonably expected to secure favorable government action.

Claims for Secondary Boycott in Violation of the NLRA

Evans states a claim against the Unions for secondary boycott in violation of 29 U.S.C. § 158(b)(4)(ii)(B). Evans alleges the Unions threatened to oppose SeaWorld's future park attractions, with the "object thereof" to force SeaWorld to cease doing business with Evans. 29 U.S.C. § 158(b)(4)(ii).[1]

Evans does not state a claim for secondary boycott in violation of 29 U.S.C. § 158(b)(4)(ii)(A). For the reasons discussed, the *Noerr-Pennington* doctrine

[1] Because Evans states a claim based on the Unions' threats to oppose SeaWorld's future park attractions, we need not decide whether Evans independently stated a claim for relief based on the Unions' other alleged threats to SeaWorld.

protects the Trades Council from statutory liability for the conduct alleged in support of the claim.

Sherman Act Claims

Evans does not state a claim for attempted monopolization, or conspiracy to monopolize, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. To monopolize a relevant market or have a dangerous probability of success, *see Optronic Tech., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 481 (9th Cir. 2021), the defendant generally must compete in the relevant market. *See Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers*, 795 F.3d 1124, 1131 (9th Cir. 2015).

Evans defines the relevant market as the "the market for luxury destination resorts in the cities of San Diego and Coronado . . . ." Evans does not plead facts showing the Unions compete in that market. The Unions do not operate luxury resorts nor provide the services offered by luxury resorts. Evans' contention that the Unions "dictate entry and expansion" in the luxury resort market is immaterial. *See Name.Space*, 795 F.3d at 1131.

Evans' reliance on *Connell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616 (1975), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), is also misplaced. Neither case stands for the proposition that a labor organization may violate Section 2 of the Sherman Act where it does not compete in, or at least conspire with someone who competes in, the relevant market. *See Connell*, 421 U.S. at 637; *Pennington*, 381 U.S. at 665-66.

Motion for Leave to File Fourth Amended Complaint

The district court did not abuse its discretion in denying Evans leave to file a fourth amended complaint. *See Gonzalez v. Planned Parenthood*, 759 F.3d 1112, 1116 (9th Cir. 2014). The record supports the district court's determination that Evans unduly delayed in seeking to add a new Sherman Act claim. *See Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020). The record also supports the district court's determination that the amendment would prejudice the Unions, who would incur additional expense "through the time and expense of continued litigation on a new theory." *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989) (quoting *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 971 (6th Cir. 1973)).

Cross-Appeal

The district court erred in ruling the Unions were not entitled to fees and costs under Cal. Civ. Proc. Code § 425.16(c) solely because the Unions' anti-SLAPP motion was no longer pending when the Unions filed their fee motion. Under California law, "when a plaintiff dismisses his or her complaint while the defendant's special motion to strike is pending, courts . . . retain jurisdiction" to award fees and costs. *Ross v. Seyfarth Shaw LLP*, 314 Cal. Rptr. 3d 549, 557 (Cal. Ct. App. 2023). While Evans did not dismiss its claims while the Unions' anti-SLAPP motion was pending, the circumstances were analogous. After the court dismissed Evans' state law claims with leave to amend, Evans abandoned them by failing to assert them in its third amended complaint. *See Graham-*

Sult v. Clainos, 756 F.3d 724, 753 (9th Cir. 2014). Evans' reliance on *Verizon Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081 (9th Cir. 2004) is misplaced, as the *Verizon* court did not address whether a defendant may obtain fees and costs under Section 425.16(c) when it seeks to strike an amended complaint.

Where a plaintiff abandons its claims after the defendant files an anti-SLAPP motion, the defendant is entitled to fees and costs if it would have prevailed on the merits of its motion. *See Moore v. Liu*, 81 Cal. Rptr. 2d 807, 812 (Cal. Ct. App. 1999). Where, as here, a plaintiff pleads a "'mixed cause of action'—that is, a cause of action that rests on allegations of multiple acts," courts evaluate "each act or set of acts supplying a basis for relief, of which there may be several in a single pleaded cause of action—to determine whether the acts are protected . . . ." *Bonni v. St. Joseph Health Sys.*, 491 P.3d 1058, 1066 (Cal. 2021).

Here, the Unions would have partially prevailed on their anti-SLAPP motion. Section 425.16 protects the Unions' alleged threats to raise administrative and legal challenges to the Bahia redevelopment. *See* Cal. Civ. Proc. Code § 425.16(e)(2). Therefore, the Unions would have prevailed in striking these allegations from the state law claims.[2] However, the Unions would not have prevailed in striking their alleged threats to organize SeaWorld's employees, and to raise administrative challenges to SeaWorld's future park attractions. The Unions do not contend Section

[2] Evans does not contend its state law claims had merit, and therefore, fails to meet its burden under the second step of the anti-SLAPP analysis.

425.16 protects the former threat, and Section 425.16 does not protect the latter threat. *See People ex rel. Fire Ins. Exch. v. Anapol*, 150 Cal. Rptr. 3d 224, 236 (Cal. Ct. App. 2012).

A defendant who partially prevails on an anti-SLAPP motion is generally the prevailing party, unless there is a determination that that party achieved no practical benefit from bringing the motion. *Mann v. Quality Old Time Serv. Inc.*, 42 Cal. Rptr. 3d 607, 614 (Cal. Ct. App. 2006). "The determination . . . lies within the broad discretion of a trial court." *Id.* We remand for the district court to make the determination in the first instance.[3]

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[4]

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[3] Because we remand for the district court to determine whether the Unions would have achieved any practical benefit, we do not consider whether the Unions would have prevailed in seeking to strike the remaining allegations supporting the state law claims. The district court should make this determination on remand.

[4] Evans' motion for judicial notice, Docket No. 21, is denied as unnecessary to the disposition.

CALLAHAN, Circuit Judge, dissenting in part:

I concur in memorandum disposition with the exception that I would not affirm the dismissal of Evans' NLRA § 8(b)(4)(ii)(A) claim based on the Unions' alleged threats to file legal challenges to the Bahia redevelopment project. In my view, the Unions do not enjoy *Noerr-Pennington* immunity for those threats because the operative complaint adequately alleges that the Unions made the threats "pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring [others]." *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994).

The memorandum disposition concludes that Evans was required to allege an additional element to trigger application of the serial sham petitioning exception: that the Unions' legal proceedings "effectively barred" Evans or others "from meaningful access to adjudicatory tribunals." Mem. Dispo. at 4 (cleaned up). I respectfully disagree. When a party files a series of lawsuits without regard to the merits and "not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment," it has engaged in serial sham petitioning, and its conduct is not protected. *USS-POSCO*, 31 F.3d at 811; *see id. at* 804, 810-11 (clarifying when the serial sham petitioning exception applies and concluding that plaintiffs' allegations that defendant unions filed legal proceedings "to cause such delay and expense that future project owners would only hire unionized contractors and subcontractors" would have been "sufficient" but for the unions' record of success in those proceedings).

Accordingly, I would vacate the dismissal of Evans' NLRA § 8(b)(4)(ii)(A) claim and remand for further consideration whether Evans' allegations are sufficient to state a claim.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EVANS HOTELS, LLC, a California limited liability company; BH PARTNERSHIP LP, a California limited partnership; EHSW, LLC, a Delaware limited liability company, Plaintiff, v. UNITE HERE! LOCAL 30; BRIGETTE BROWNING, an individual; SAN DIEGO COUNTY BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO; TOM LEMMON, an individual; and DOES 1-10, Defendants.	Case No.: 18-CV-2763-RSH-AHG **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT AND DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SURREPLY AS MOOT** **[ECF Nos. 143, 155]**

Pending is a motion to dismiss the operative Third Amended Complaint and a request for judicial notice of two documents, filed by Defendants Tom Lemmon, Brigette Browning, San Diego County Building and Construction Trades Council, AFL-CIO (the "Trades Council"), and UNITE HERE Local 30 ("Local 30").

ECF No. 143. The motion has been fully briefed (*see* ECF Nos. 144–45), and Plaintiffs Evans Hotels, LLC ("Evans Hotels"), BH Partnership, LP ("BH"), and EHSW, LLC ("EHSW") have submitted their objections to Defendants' request for judicial notice (ECF No. 144-1). Also before the Court is Defendants' Notice of Supplemental Authority, which provides a January 20, 2023 order in *Relevant Group, LLC v. Nourmand*, No. CV 19-05019 PSG (KSx) (C.D. Cal.). ECF No. 151. The Court finds the matter suitable for disposition without oral argument. *See* Civ. L.R. 7.1(d).

For the reasons discussed below, the Court grants Defendants' motion to dismiss (ECF No. 143), and denies as moot Defendants' request for judicial notice (ECF No. 143-3) and Plaintiffs' motion for leave to file a surreply (ECF No. 155).

I. BACKGROUND

A. Procedural History

The Court incorporates the detailed procedural background from its prior Orders. *See* ECF Nos. 93, 113, 140. As relevant here, Plaintiffs filed their initial Complaint on December 7, 2018, bringing nine claims: (1) unlawful secondary boycott in violation of section 303 of the Labor-Management Relations Act ("LMRA"), (2) attempted monopolization in violation of section 2 of the Sherman Act, (3) conspiracy to monopolize in violation of section 2 of the Sherman Act, (4) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), (5) violation of RICO by conspiring to violate 18 U.S.C. § 1962(c), (6) violation of RICO by conspiring to violate 18 U.S.C. § 1962(a), (7) violation of RICO by conspiring to violate 18 U.S.C. § 1962(b), (8) interference with prospective

economic advantage, and (9) attempted extortion. ECF No. 1. In February 2019, Defendants filed motions to dismiss and anti-SLAPP motions. ECF Nos. 15–18.

On March 7, 2019, Plaintiffs filed a First Amended Complaint, containing the same nine claims. ECF No. 19. The Court ruled that the filing of an amended complaint mooted the motions that were pending as to the initial complaint. ECF No. 24. On April 15, 2019, Defendants again filed motions to dismiss as well as motions to strike. ECF Nos. 29–32.

On January 7, 2020, the Court dismissed all of Plaintiffs' claims (hereinafter, the "2020 Order"), ruling that Plaintiffs had failed to plead facts establishing that Defendants' conduct was not protected under the *Noerr–Pennington* doctrine. ECF No. 60. The Court denied the anti-SLAPP motions as moot and provided that Plaintiffs could request leave to amend. *Id.* at 25. Plaintiffs requested and were granted leave to amend. *See* ECF No. 75.

On April 21, 2020, Plaintiffs filed their Second Amended Complaint ("SAC"). ECF No. 76. The SAC added a new state claim for unfair competition, and withdrew two RICO conspiracy claims, for a total of eight claims. *Id.*

On August 26, 2021, the Court dismissed without prejudice all claims in the SAC, except Plaintiff's first claim for unlawful secondary boycott (hereinafter, the "2021 Order"). ECF No. 93 at 61. The Court also afforded Plaintiffs one final opportunity to amend their complaint. *Id.* Before Plaintiffs did so, Defendants moved for reconsideration of the 2021 Order. ECF No. 100. The Court denied the motion, noting that upon

consideration of the SAC and Defendants' arguments, the Court was "not persuaded that [the 2021 Order] was incorrect." ECF No. 113 at 11. Further, the Court directed that "Plaintiffs must file their Third Amended Complaint within ten (10) days of this order" and "[a]bsent a motion demonstrating good cause, that complaint must not contain any new claims for relief." *Id.* at 113.

Plaintiffs timely filed the Third Amended Complaint ("TAC") on February 7, 2022.[1] ECF No. 114. The TAC contains only three claims, none of which are new: (1) unlawful secondary boycott in violation of section 303 of the LMRA, and (2)–(3) attempted monopolization and conspiracy to monopolize in violation of section 2 of the Sherman Act. *See id.*

B. Allegations in TAC

The TAC is largely similar to the SAC, the main difference being the addition of allegations concerning Plaintiffs' antitrust claims. *See* ECF No. 144 at 14; ECF No. 143-2. The Court therefore incorporates Plaintiffs' factual allegations as set forth in the 2021 Order, ECF No. 93, and summarizes the relevant portions below. For purposes of the Court's analysis of Defendants' instant motion to dismiss, Plaintiffs' factual allegations are accepted "as true." *See Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1050 (9th Cir. 2019) (citing *Karam v. City of Burbank*, 352 F.3d 1188, 1192 (9th Cir. 2003)).

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[1] The TAC remains the operative pleading after the Court denied Plaintiffs' request to file a fourth amended complaint. *See* ECF No. 140.

Plaintiffs operate three hotels in the San Diego, California area, including the Bahia Resort Hotel (the "Bahia") in Mission Bay Park which does not have a unionized workforce.[2] TAC ¶¶ 10, 13–15. Defendants are two labor unions and two of their current or former leaders. *Id.* ¶¶ 17–21. According to Plaintiffs, Defendants have developed a "playbook" (hereinafter, the "Playbook") of anticompetitive, exclusionary conduct to unionize all labor in the construction and operation of large-scale hospitality properties in greater San Diego. *Id.* ¶¶ 6–7, 47. This Playbook consists of two parts. First, Defendants attack non-union projects on sham environmental grounds and land use issues. *Id.* ¶¶ 48–49. Second, while pursuing these challenges, Defendants threaten public officials as well as third parties in business with targeted owners or developers of the non-union projects. *Id.* ¶¶ 55–57. Defendants have used their Playbook over the last decade to delay the development of non-union projects or stop them entirely. *Id.* ¶ 68.

The instant action arises from Defendants' alleged use of their Playbook against Plaintiffs, beginning in 2018. Defendants sought to block a redevelopment project for the Bahia (hereinafter, the "Bahia Project") until Plaintiffs signed a card check neutrality agreement ("CCNA") and a Project Labor Agreement ("PLA"). Under the CCNA, an employer pledges to remain neutral to Local 30's organizing campaigns, not to communicate with its employees regarding the ramifications of unionization, and to recognize a

[2] Plaintiff BH owns the Bahia and is a party to the Bahia's lease with the City of San Diego. TAC ¶ 15. Members of the Evans Hotels family own and control both Plaintiffs BH and EHSW. *Id.* ¶ 15–16.

union if Local 30 collects signed authorization cards from a majority of employees sought to be unionized.[3] *Id.* ¶¶ 7, 31–32. The PLA requires employers to work only with a unionized general contractor which, in turn, would subcontract work only to unionized entities or individuals.[4] *Id.* ¶¶ 7, 43.

1. *Part 1 of Defendants' Playbook*

Per the first "part" of the Playbook, Defendants lobbied City Councilmembers against approving an amendment to the Bahia's lease agreement with the City of San Diego (the "City"). *See id.* ¶¶ 11, 48–54, 178–99. Since the 1950s, the Bahia has operated under long-term leases from the City for the land. *Id.* ¶ 10. In 1994, the City adopted the Mission Bay Park Master Plan Update ("MBMPU"), a comprehensive land-use plan for the entirety of Mission Bay Park. *Id.* Consequently, any significant redevelopment of the Bahia requires a lease amendment from the City that is compliant with the MBMPU. *Id.* ¶¶ 10–11.

On February 28, 2018, Defendants' attorney sent a letter to the Mayor and City Councilmembers "to

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[3] After the union is recognized, the CCNA requires the employer to provide Local 30, on a monthly basis, a complete list of employees, including their job classifications and contact information. TAC ¶ 32. The CCNA also allows Local 30 to engage in organizing efforts, such as union-sponsored speeches during work hours, on the premises. *Id.* Finally, the employer waives its right to bargain the terms and conditions of employment to impasse, instead agreeing to submit disputed terms and conditions to arbitration. *Id.*

[4] Plaintiffs allege that PLAs dramatically increase the costs of construction on real estate development project by reducing the number of qualified bidders and weakening the developer's bargaining power. TAC ¶ 45.

express concern regarding the lack of transparency and access to information pertaining to environmental review of the proposed Lease Amendment for the Bahia Resort Hotel Renovation Project." *Id.* ¶ 180. Defendants' attorney sent a second letter on May 11, 2018, contending that the proposed Bahia Project was not compliant with the MBMPU because it would eliminate Gleason Road. *Id.* ¶ 181. Defendants also created a website, "nomissionbaylandgrab.org," and a related Facebook page to disseminate this claim. *Id.* ¶ 182. Defendants further met and/or communicated individually with a majority of the City Council to secure its opposition to the lease amendment. *Id.* ¶ 183.

Plaintiffs first learned of Defendants' actions in February or March of 2018 after William Evans, cofounder of Evans Hotels, spoke with an unnamed City Councilmember about the Bahia Project. *Id.* ¶ 184. Although this Councilmember initially expressed support for the project, she later withdrew her support and indicated that she would have to oppose the project unless Plaintiffs agreed to a CCNA with Defendants. *Id.* ¶¶ 187, 190. Plaintiffs believe Defendants pressured the Councilmember by conditioning future funding and political support on opposition to the Bahia Project, unless Plaintiffs signed a CCNA, and that Defendants have contacted at least four other Councilmembers. *Id.* ¶¶ 187, 190

On June 30, 2018, Defendant Lemmon met with Evans about signing a CCNA. *Id.* ¶¶ 191–92. When Evans refused to do so voluntarily, Lemmon acknowledged that Defendants' attorney had sent letters to the Mayor and City Council. *Id.* ¶ 192. Lemmon then threatened to use environmental challenges, including under the California Environmental Quality Act

("CEQA"), to hold up the Bahia Project. *Id.* Lemmon closed by promising that the Bahia Project would be "doomed" if Plaintiffs did not capitulate to Defendants because "[they] know how to do it, [they] do it all the time." *Id.*

On September 11, 2018, Defendants posted links on its Facebook pages to a website that it funded and created called "No Mission Bay Land Grab at Bahia Point by UNITE HERE Local 30," which pertained to the Bahia Project and whether it violated a purported requirement to retain Gleason Road. *Id.* ¶ 193.

In October 2018, Plaintiffs learned that the Bahia lease agreement was not placed on the agenda for a mid-October City Council Committee meeting, even though only three matters had been calendared. *Id.* ¶¶ 195–97. That same month, a representative of Plaintiffs spoke with a staff member of another Councilmember, who allegedly refused to calendar the lease agreement because of a close, personal friendship with Defendant Browning. *Id.* ¶ 196.

On October 19, 2018, Lemmon and Browning texted Plaintiffs' CEO, Robert Gleason. *Id.* ¶ 199. In this text exchange, Lemmon told Browning to "send Robert [Gleason] [her] card check language in advance . . . . [because Lemmon has] got the feeling he's gonna need it." *Id.* Lemmon added that he would "like to see all construction and future maintenance done by Union signatory contractors." *Id.*

Plaintiffs' problems persisted following City Council elections in November 2018. *See id.* ¶¶ 222–23. The City Council President allegedly indicated that she would not docket the Bahia lease amendment because the unions had given her "hundreds of thousands of

dollars to win this thing," and Defendants would be upset if the project were docketed before the new City Councilmembers took office. *Id.* ¶ 222. Plaintiffs then sought help from the Mayor, without success. *See id.* ¶ 223. According to Plaintiffs, the Mayor had entered into a "secret agreement" in mid-2017, giving Defendants veto power over any non-union projects they opposed, and had agreed not to docket the Bahia lease amendment. *Id.* ¶¶ 3, 81, 223.

On November 27, 2018, Defendants met with Gleason and Evans. *Id.* ¶ 224. When asked why Plaintiffs should agree to the card check neutrality agreement and PLA, Browning responded, "[S]o that you can go forward with your project," adding that Defendants would "stop at nothing" to prevent the Bahia project from going forward. *Id.* ¶ 224. Browning and Lemmon stated that they had the new City Council President's vote "all locked up," and indicated that Plaintiffs would fare no better under future City Councils. *Id.* Lemmon likened Defendants' conduct to a "grenade with the pin out on the table," adding that, although the pin had been taken out, there was still time to put it back in. *Id.*

2. *Part 2 of Defendants' Playbook*

Per the second part of Defendants' alleged playbook, Defendants threatened Sea World LLC ("SeaWorld") that they would oppose SeaWorld's plan to build new attractions, unless it terminated its business relationship with Plaintiffs. *Id.* ¶¶ 200–21. In 2015, Plaintiffs and SeaWorld signed a letter of intent and a Preliminary Project Agreement regarding a potential hotel adjacent to SeaWorld's park in San Diego (the "Joint Venture"). *Id.* ¶ 201.

According to Plaintiffs, Defendants knew that it was important to SeaWorld to build new attractions in its park. *Id.* ¶ 204. SeaWorld requires approval from the California Coastal Commission (the "Coastal Commission") for such attractions and has struggled to obtain approval with previous projects in the past. *Id.* Consequently, SeaWorld worked with an environmental consultant, Allison Rolfe, to facilitate its dealings with the Coastal Commission and environmental groups. *Id.* ¶ 205. Rolfe is allegedly a "very close friend" of Browning and acts as an "intermediary" between Defendants and their targets, including Plaintiffs. *See id.* ¶¶ 206, 209.

In June or July 2018, Defendants communicated to SeaWorld, through Rolfe, that it would face severe opposition from unions and their allies against SeaWorld's new attractions if it continued its partnership with Plaintiffs. *Id.* ¶ 211. Specifically, Defendants threatened to interfere with SeaWorld's ability to obtain approval for its plans from the City Council and California Coastal Commission, and to "drum up negative publicity" on subjects like animal cruelty. *Id.* In mid-July, SeaWorld's CEO called Evans, stating he understood that Plaintiffs had "a big problem" with Defendants and informing Evans that SeaWorld could not afford to be involved with anyone that would delay its ability to obtain approval of its plans and/or adversely impact its business. *Id.* ¶ 213.

After months of discussing the issues SeaWorld would face if Plaintiffs did not agree to a deal with Defendants, SeaWorld abandoned the Joint Venture. *Id.* ¶¶ 215–18. Plaintiffs allege that a SeaWorld executive later confirmed that the reason it terminated

the Joint Venture was because the unions threatened to target SeaWorld. *Id.* ¶ 221.

II. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a 12(b)(6) motion, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). The Court "disregard[s] '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)). "After eliminating such unsupported legal conclusions, we identify 'well-pleaded factual allegations,' which we assume to be true, 'and then determine whether they plausibly give rise to an entitlement to relief.'" *Id.* A claim has facial plausibility when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

III. THE *NOERR–PENNINGTON* DOCTRINE

The Court begins by addressing whether the *Noerr–Pennington* doctrine bars Plaintiffs' claims.[5]

[5] The Court has twice addressed the applicability of the *Noerr–Pennington* doctrine to Plaintiffs' allegations, not including on Defendants' motion for reconsideration. *See* ECF No. 60 at 15; ECF No. 93 at 12. To the extent Defendants urges the Court to reconcile any differing outcomes of its previous holdings, the Court declines. *See* ECF No. 143-1 at 5–6. The Court's

ECF No. 143-1 at 5. *See Harbor Performance Enhancement Ctr., LLC v. City of Los Angeles Harbor Dep't*, No. CV203251, 2021 WL 1676281, at *12 (C.D. Cal. Mar. 24, 2021) (addressing the applicability of *Noerr–Pennington* before determining whether plaintiffs have stated a claim), *aff'd*, No. 21-55416, 2022 WL 1239055 (9th Cir. Apr. 27, 2022); *see also White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) ("The *Noerr–Pennington* doctrine ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved.").

As discussed in the Court's prior Orders, "[t]he *Noerr–Pennington* doctrine derives from the First Amendment's guarantee of 'the right of the people . . . to petition the Government for a redress of grievances.'"[6] *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (quoting U.S. Const. amend. I). Under this doctrine, "those who petition any department of the government for redress are generally immune

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2020 Order and 2021 Order addressed two different versions of the Complaint—both of which have since been superseded by amendment. The Court reapplies the law to the facts, as pleaded in the TAC.

[6] The doctrine developed from two Supreme Court cases—*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)—which held "that the First Amendment Petition Clause immunizes acts of petitioning the legislature from antitrust liability." *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006 (9th Cir. 2008). "The doctrine has since been applied to actions petitioning each of the three branches of government, and has been expanded beyond its original antitrust context." *Id.*

from statutory liability for their petitioning conduct." *Id.* "[T]he *Noerr–Pennington* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government." *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1059 (9th Cir. 1998).[7] *See Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 956 (S.D. Cal. 1996) (concluding that *Noerr–Pennington* immunity "bars any claim, federal or state, common law or statutory, that has as its gravamen constitutionally-protected petitioning activity").

To determine whether a defendant's conduct is immunized, courts apply a three-part test: (1) "whether the lawsuit imposes a burden on petitioning rights," (2) "whether the alleged activities constitute protected petitioning activity," and (3) "whether the statute[ ] at issue may be construed to [avoid] that burden." *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 535 (9th Cir. 2022) (quoting *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644 (9th Cir. 2009)). "If the answer at each step is 'yes,' then a defendant's conduct is immunized under *Noerr–Pennington*." *Id.*

However, this immunity is not absolute. *See Kearney*, 590 F.3d at 644. "Sham petitioning is not protected. *Noerr–Pennington* immunity is not a shield for petitioning conduct that, although ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *B&G Foods*, 29

[7] However, the doctrine "does not protect lobbying efforts directed at private organizations." *Kottle*, 146 F.3d at 1059.

F.4th at 536 (internal citations and quotations omitted). Whether the sham exception applies is determined within "step two" of *Noerr–Pennington*'s three-part analysis. *Id.* at 535.

In claims involving the right to petition governmental bodies under *Noerr–Pennington*, a heightened pleading standard is applied, requiring a plaintiff to "satisfy more than the usual 12(b)(6) standard." *Or. Natural Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). Under this heightened standard, "the complaint will be dismissed unless it includes allegations of specific activities which bring the defendant's conduct into one of the *Noerr–Pennington* exceptions." *Meridian Project Sys., Inc. v. Hardin Const. Co.*, LLC, 404 F. Supp. 2d 1214, 1221 (E.D. Cal. 2005) (internal quotation marks omitted). *See Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) ("In order not to chill legitimate lobbying activities, it is important that a plaintiff's complaint contain specific allegations demonstrating that the *Noerr–Pennington* protections do not apply."). "Conclusory allegations are not sufficient to strip a defendant's activities of *Noerr–Pennington* protection." *Mohla*, 944 F.2d at 533.

A. Step One: Burden on Petitioning Activity

Step one asks whether the success of Plaintiffs' instant lawsuit would constitute a burden on Defendants' petitioning rights. *See Kearney*, 590 F.3d at 645. In conducting this inquiry, the Court does not consider any alleged misconduct tied to the petitioning activities. *B&G Foods*, 29 F.4th at 535. *See Kearney*, 590 F.3d at 645 ("[T]he question at this stage is not

whether the conduct at issue is fraudulent and abusive . . . .").

Here, Plaintiffs seek to impose liability under the LMRA and Sherman Act based on the following activities by Defendants: (1) sending letters to City Councilmembers and the Mayor in February and May 2018 opposing the Bahia Project (TAC ¶¶ 180–81); (2) lobbying City Councilmembers to oppose the proposed Bahia lease amendment and delay the hearing until new Councilmembers took office (*id.* ¶¶ 187, 189, 222–23); (3) creating a website and posting links to that website on a Facebook page that stated the proposed Bahia Project violates the MBMPU (*id.* ¶¶ 182, 193); (4) threatening to continue opposing the Bahia Project, including by filing legal challenges under CEQA, if Plaintiffs refused to sign a CCNA and PLA (*id.* ¶¶ 192, 265); and (5) threatening SeaWorld with opposition to future attractions, by interfering with its ability to get approval from the City Council and the California Coastal Commission and with negative publicity campaigns, if SeaWorld continued its business relationship with Plaintiffs (*id.* ¶¶ 204–11).

Although Plaintiffs argue that the *Noerr–Pennington* doctrine does not apply to "[m]uch of Defendants' petitioning," Plaintiffs do not dispute that the instant action would burden Defendants' petitioning activity. *See* ECF No. 144 at 39. Indeed, a successful suit by Plaintiffs would burden these alleged activities, including Defendants' ability to lobby elected government officials, file lawsuits, and create web content, or launch publicity campaigns aimed at influencing public opinion. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 510 (1988) (noting that "concerted efforts to influence those governments

through direct lobbying, publicity campaigns, and other traditional avenues of political expression" are means of petitioning); *Kearney*, 590 F.3d at 644 (stating that lawsuits are "the very act of petitioning"); *Sosa*, 437 F.3d at 938 (finding that "prelitigation settlement demands" are protected by the Petition Clause).

Accordingly, the Court concludes that Plaintiffs' lawsuit would burden Defendants' petitioning activity.

B. Step Two: Protected Petitioning Activity

At step two of the *Noerr–Pennington* analysis, the Court must determine whether Defendants' conduct qualifies as "*protected* petitioning activity." *See B&G Foods*, 29 F.4th at 535 (emphasis in original). In making this determination, the Court must first decide whether the Petition Clause extends to Defendants' alleged conduct. *See id.* If it does, the Court must next consider whether the sham exception applies. *See id.*

1. *Whether the Petition Clause Extends to Defendants' Conduct*

Protected petitioning activity includes "petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies." *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). "A complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something, can be described as

petitions . . . ." *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). But the *Noerr–Pennington* doctrine is not strictly limited to petitions. To preserve the breathing space required for the effective exercise of the rights the Petition Clause protects, conduct "incidental to" petitioning may also be immunized. *Kearney*, 590 F.3d at 646. *See Sosa*, 437 F.3d at 934 ("[T]o exercise its petitioning rights meaningfully, a party may not be subjected to liability for conduct intimately related to its petitioning activities.").

Here, all categories of Defendants' alleged conduct above qualify as either petitioning activity or conduct incidental to such activity. Sending letters to City Councilmembers to express concern about or oppose the Bahia Project, TAC ¶¶ 180–81, falls squarely under the scope of Petition Clause. *See Empress LLC v. City & Cnty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) (holding that, where sham exception did not apply, writing a letter requesting that city officials make a zoning determination was protected petitioning activity); *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984) (finding that activity of property owners who urged county officials not to close what they believed was a public road "falls within the first amendment's protection of the right to petition the government for redress of grievances"). *See also Christian Gospel Church, Inc. v. City & Cnty. of San Francisco*, 896 F.2d 1221, 1226 (9th Cir. 1990) (neighbors who opposed zoning permit application by church "by circulating a petition, testifying before the Planning Commission and writing letters to the editor" were "fully protected by the first amendment"), *superseded on other grounds by* 42 U.S.C. § 2000e.

Likewise, Defendants' lobbying of City Councilmembers is petitioning activity. *See Kottle*, 146 F.3d at 1062 ("[L]obbying is the sine qua non of democracy."); *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800, 810 (9th Cir. 1994) (stating that *Noerr–Pennington* protection "extends to the lobbying of government officials"); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 88 (9th Cir. 1982) (holding that "concerted lobbying efforts" of officials was petitioning and exempted by *Noerr–Pennington*). Even if, as Plaintiffs allege, Defendants secretly met with or contacted the City Councilmembers to oppose the Bahia Project, that conduct would be protected. *See Boone*, 841 F.2d at 894–95 (holding that private meetings between government officials and individuals seeking to lobby the government is a form of advocacy protected under *Noerr–Pennington*).[8]

Further, Defendants' creation and dissemination of online content to influence public opinion regarding the Bahia Project "amounted to petitioning" the City Council and its Councilmembers. *See Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1193 (9th Cir. 2006) (finding that making and distributing flyers encouraging the public to oppose a

[8] To the extent Plaintiffs allege that Defendants "condition[ed] future funding and political support" for Councilmembers on the Councilmembers' opposition to the Bahia Project, that conduct is incidental to Defendants' lobbying efforts. *See* ECF No. 114 ¶¶ 187–90; *Boone*, 841 F.2d at 895 ("[A]llegations concerning campaign contributions do not convert into a Sherman Act violation conduct which *Noerr* held was not covered by the Act.") (quoting *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 231 (7th Cir. 1975)).

construction project, among other things, "amounted to petitioning the city council"). Although Plaintiffs allege that the website Defendants funded and created "contain[ed] false and misleading information" regarding whether the Bahia Project would violate the MBMPU, TAC ¶ 193, the Supreme Court has noted that misrepresentations are "condoned in the political arena." *See Trucking Unlimited*, 404 U.S. at 513; *see also Kottle*, 146 F.3d at 1062 ("Misrepresentations are a fact of life in politics . . . ."); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity.").

Finally, the Petition Clause also extends to Defendants' contemplated future petitioning activity. *See Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 351 (9th Cir. 2014) (holding that prelitigation material and threats of litigation are immune under *Noerr–Pennington*, unless the threatened lawsuit is a sham); *Sosa*, 437 F.3d at 937 (noting same). In the TAC, Plaintiffs allege that Defendants threatened to "use CEQA and other challenges to hold the Bahia redevelopment project hostage." TAC ¶ 192. At a June 30, 2018 meeting, Defendant Lemmon allegedly told Evans that, if Plaintiffs did not accede to Defendant Browning's demands, the Bahia Project "would be doomed" because "the union would hold it up by any and all means—stating 'we know how to do it, we do it all the time.'" *Id.* At a November 27, 2018 meeting, Defendants Lemmon and Browning allegedly stated that Evans should agree to a PLA and CCNA so that he could

move forward with the Bahia Project and pursue other opportunities in San Diego. *Id.* ¶ 224. Defendants allegedly stated that they had the vote of the presumptive incoming City Council President "all locked up" and future City Councils would be even worse for Plaintiffs. *Id.* Defendant Lemmon then allegedly likened the unions' conduct to a "grenade with the pin out on the table," and threatened that, although the "pin" had been taken out, there was still time to put it back in. *Id.* According to Plaintiffs, Defendant Browning stated that Defendants "would stop at nothing" to stop the Bahia Project and "made clear that the alternative for [Plaintiffs] would not be pretty," citing prior litigation she had brought to oppose other development projects. *Id.*

In addition, Defendants allegedly threatened, through SeaWorld's consultant Rolfe, that SeaWorld would face "severe opposition from the unions and union allies in connection with its plan to open new attractions every year" if SeaWorld continued its partnership with Plaintiffs:

> Defendants not only would interfere with SeaWorld's ability to get approval for a master plan amendment at the City Council and the Coastal Commission (the usual greenmail), but also would drum up negative publicity against SeaWorld designed to undermine SeaWorld's business by damaging its reputation and public image.

Id. ¶ 211.

Defendants' alleged threats to bring CEQA and environmental challenges in the courts, lobby the City Council, petition the Coastal Commission, and engage

in a negative publicity campaign to delay or stop the Bahia Project are threats to engage in petitioning activity and therefore immunized under *Noerr–Pennington*. *See Noerr*, 365 U.S. at 533 (negative publicity campaign was immunized); *Kottle*, 146 F.3d at 1061–62 (petitioning administrative agency fell within the scope of *Noerr–Pennington*); *USS-POSCO*, 31 F.3d at 810 (filing a series of lawsuits was petitioning conduct).

Moreover, Defendants' other alleged threats made were "incidental" to their petitioning activity. *See Sosa*, 437 F.3d at 934. Defendant Lemmon's June 30, 2018 threat that the Bahia Project would be "doomed" or held up "by any and all means" was allegedly made while he was discussing Defendants' efforts to lobby elected officials and file lawsuits to prevent the Project.[9] *See* TAC ¶¶ 191–92. Defendant Lemmon's November 27, 2018 threat warning Plaintiffs of the metaphorical "grenade" was allegedly made while he was discussing "the issue of numerous environmental challenges" to the Bahia Project and lobbying City Councilmembers. *See id.* ¶ 224. Defendant Browning's November 27, 2018 threat to oppose the Bahia Project was allegedly made while she was "[c]iting" other lawsuits she had brought to oppose other development projects. *See id.*

Similarly, Defendants' alleged threats to SeaWorld, communicated through Rolfe, were made in

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[9] Plaintiffs allege that given Defendants' past conduct, they understood Defendants' threats to mean picketing of Plaintiffs and their clients. *See* TAC ¶¶ 192, 224, 298. This characterization of Defendants' statements is, however, unsupported by any specific factual allegations.

the context of discussing Defendants' future lobbying of the City Council and the Coastal Commission to oppose SeaWorld's future attractions. *See id.* ¶ 211. According to Plaintiffs' allegations, Defendants threatened SeaWorld that it "would face severe opposition from the unions and union allies *in connection with its plans to open new attractions every year*"—attractions that would require "both City Council approval and Coastal Commission approval." *See id.* ¶¶ 204, 211 (emphasis added). In context, Defendants' alleged threats to "interfere with SeaWorld's ability to get approval" and "drum up negative publicity against SeaWorld" thus constitute petitioning activity or conduct incidental to such activity.

Although Plaintiffs add that the threatened negative publicity "attacks would be unrelated to SeaWorld's future attractions," but rather "subjects like animal cruelty," Plaintiffs do not allege that these threats were ever made outside the discussions about Defendants' contemplated petitioning. *See id.* ¶ 211. To the extent any allegations regarding Defendants' threats to SeaWorld are vague or ambiguous, Plaintiffs bear the burden of stating sufficient factual allegations which "demonstrate[e] that *Noerr–Pennington* protections do not apply." *See Boone*, 841 F.2d at 894 ("Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity."). *See also Kottle*, 146 F.3d at 1064 (concluding that "vague allegations of misrepresentation" cannot overcome *Noerr–Pennington* protection); *Franchise Realty Interstate Corp. v. San Francisco Loc. Joint Exec. Bd. of Culinary Workers*, 542

F.2d 1076, 1082 (9th Cir. 1976) (stating that, where plaintiff is seeking relief for conduct that is "prima facie protected by the First Amendment," "a complaint must include allegations of the specific activities"). The Court concludes that the Petition Clause also extends to Defendants' threats against SeaWorld, and Plaintiffs have not sufficiently alleged facts establishing that *Noerr–Pennington* does not apply. *See id.*

In opposing Defendants' motion to dismiss, Plaintiffs argue that *Noerr–Pennington* does not apply to Defendants' unlawful secondary boycotts against SeaWorld or "petitioning that was illegal," such as Defendants' secret meetings with City Councilmembers or undisclosed lobbying.[10] ECF No. 144 at 38–39. *See*

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[10] Relying on *National Labor Relations Board v. International Association of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Loc. 229, AFL-CIO*, 941 F.3d 902 (9th Cir. 2019) ("*Iron Workers*"), Plaintiffs argue that the First Amendment does not apply to unlawful secondary boycotts. ECF No. 144 at 15. However, *Iron Workers* does not address the relevant provision of the statute at issue here (29 U.S.C. § 158(b)(4)(ii)), *Noerr–Pennington*, or the First Amendment right to petition. Rather, the Ninth Circuit in *Iron Workers* discussed the constitutionality of 29 U.S.C. § 158(b)(4)(i), stating that the "First Amendment is not at all implicated when activities prohibited by Section 8(b)(4)(i) are proscribed." *Iron Workers*, 941 F.3d at 9055 (internal quotation marks omitted).

To the extent Plaintiffs are requesting that the Court determine whether Defendants actions were unlawful (i.e., that Defendants threatened or coerced Plaintiffs and SeaWorld) before applying *Noerr–Pennington*, "[t]his is backwards." *Harbor Performance Enhancement Ctr.*, 2021 WL 1676281, at *12. "Courts apply *Noerr–Pennington* to 'construe statutes so as to avoid burdens on activity arguably falling within the scope of the Petition Clause of the First Amendment.'" *Id.* (citing *Sosa*, 437 F.3d at 942). First deciding whether Defendants' action violate the

TAC ¶¶ 2, 8, 58–62, 65, 258. However, this argument essentially "collapses the question of petitioning conduct with that of the sham exception's application."[11]

LMRA or NLRA "would put the cart before the horse and risk interpreting the statute so broadly that it interferes with the [Defendants'] petitioning rights." *Id.* (citing *White*, 227 F.3d at 1231).

[11] Notably, courts have held that conduct like that alleged in the TAC qualifies as protected petitioning activity or as conduct incidental to such activity. *See Allied Tube*, 486 U.S. at 499–500 ("A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods."); *Boone*, 841 F.2d at 895 (finding that "allegations of misrepresentations, payments to public officials, and 'secret backroom dealings'" that did not occur in a judicial or quasi-judicial setting was immunized under *Noerr–Pennington*); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1364 (5th Cir. 1983) ("The mere fact that a boycott forms a part of the petitioning conduct does not vitiate the immunity of such conduct."). "Furthermore, there is no 'conspiracy' exception to the *Noerr–Pennington* doctrine that applies when government officials conspire with a private party to employ government action as a means of depriving other parties of their federal constitutional or statutory rights." *Empress LLC*, 419 F.3d at 1057 (explaining that "[i]n such circumstances, a remedy lies only against the conspiring government officials, not against private citizens"); *see Omni*, 499 U.S. at 383 (concluding that "a 'conspiracy' exception to *Noerr* must be rejected").

In addition, Plaintiffs' allegations of "extortion" and "bribery" are conclusory. *See* TAC ¶¶ 64, 187, 222. Although bribery may be treated "as analogous to sham petitioning activity," *Clipper Exxpress*, 690 F.2d at 1256 n.23, Plaintiffs fail to specify "who, when, how much, or for what purpose." *See Boone*, 841 F.2d at 895. "More important, even if these allegations had been made with the requisite specificity, the alleged activities are facially valid. . . . Payments to public officials, in the form of . . . campaign contributions, is a legal and well-accepted part of our political process." *Id.*

See Kearney, 590 F.3d at 646; *Sosa*, 437 F.3d at 938 ("Finding that the protections of the Petition Clause extend to [the conduct at issue] . . . does not mean that such [conduct is] . . . absolutely protected from liability.").

Accordingly, the Court finds that the misconduct Plaintiffs alleges is protected petitioning conduct or conduct incidental to such conduct and turns to whether the sham exception applies.

2. *Whether the Sham Exception Applies*

As stated above, sham petitioning is not protected. "*Noerr–Pennington* immunity is not a shield for petitioning conduct that, although 'ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.'" *B&G Foods*, 29 F.4th at 536 (quoting *Sosa*, 437 F.3d at 938). The exception extends to threats of sham petitioning. *See United States v. Koziol*, 993 F.3d 1160, 1171 (9th Cir. 2021) (stating that *Noerr–Pennington* does not protect "threats of sham litigation").

The scope of the sham exception depends on the type of governmental entity involved. *Kottle*, 146 F.3d at 1060 (citing *California Motor Transp.*, 404 U.S. at 513). "If it is the legislature, the sham exception is extraordinarily narrow. But if it is the judicial branch, this circuit recognizes three categories of anticompetitive behavior that can amount to a sham and, therefore, outside the protection of the *Noerr–Pennington* doctrine." *Id. See Boone*, 841 F.2d at 895–96 (stating that "illegal or fraudulent lobbying activities that would normally be immunized by *Noerr–Pennington*

lose their protection if they occur in a judicial or quasi-judicial setting"). The inquiry is complicated where the executive branch is involved because that branch is "radically diverse." *Kottle*, 146 F.3d at 1061 (discussing that the sham exception standard for some executive entities should be the same as for judicial bodies, but for others that would be "far too broad"). "[E]xecutive entities are treated like judicial entities only to the extent that their actions are guided by enforceable standards subject to review." *Id.* at 1062.

a. Sham litigation

In the litigation context, the Ninth Circuit has identified three sham exceptions:

> first, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose; and third, if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

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

Here, the Parties dispute whether the second exception applies to Defendants' alleged past or

threatened litigation.[12] *See* ECF No. 144 at 43; ECF No 145 at 5–6. Where a series of legal proceedings is brought, "the question is not whether any one of them has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *USS-POSCO*, 31 F.3d at 811. "The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" *Id.*

There is no exact number of legal proceedings sufficient to trigger the second sham exception. The Ninth Circuit has held that 29 proceedings were enough, but two lawsuits were not. *See USS-POSCO*, 31 F.3d at 811; *Amarel v. Connell*, 102 F.3d 1494, 1519 (9th Cir. 1996), *as amended* (Jan. 15, 1997). If a defendant prevails in more than half of its lawsuits, it is unlikely that the lawsuits are meritless. *See USS-POSCO*, 31 F.3d at 811 ("The fact that more than half of all the actions . . . turn[ed] out to have merit cannot be reconciled with the charge that the [defendants] were filing lawsuits and other actions willy-nilly without regard to success.").

In opposing Defendants' motion to dismiss, Plaintiffs contend that "Defendants have initiated and threatened to initiate sham environmental and land use challenges against new construction or redevelop-

[12] Because Plaintiffs do not discuss the other two exceptions, the Court does not address their application here.

ment projects in the Relevant Market[13] to force developers to agree to a [CCNA] and/or a PLA." ECF No. 144 at 45. In addition to Defendants' threatened CEQA and other environmental challenges against the Bahia Project, Plaintiffs allege that, over the span of more than a decade, Defendants have:

(1) filed a petition for writ of mandate regarding the proposed San Diego Convention Center expansion and appealed the judgment when the action was dismissed;

(2) filed a separate CEQA lawsuit regarding the proposed San Diego Convention Center expansion;

(3) filed a petition for writ of mandate regarding the "Cisterra Development" and appealed the judgment when the petition was denied;

(4) filed two appeals to the Coastal Commission regarding the approval of a coastal development permit for the "Lane Field Development";

(5) presented written objections to the Wetlands Advisory Board and the Planning Commission regarding the "Town and Country Development";

(6) filed a petition for writ of mandate regarding the "Fat City Project";

(7) filed a CEQA lawsuit regarding the "Sunroad Project";

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[13] Plaintiffs define the Relevant Market as "the market for luxury destination resorts in the Cities of San Diego and Coronado." TAC ¶ 236.

(8) filed an appeal to the Coastal Commission regarding the approval of coastal development permits for the Hotel Del Coronado and filed a separate CEQA lawsuit in San Diego Superior Court;

(9) filed a petition for writ of mandate regarding the San Diego Marriott Marquis & Marina hotel; and

(10) threatened to interfere with SeaWorld's ability to get approval for future attractions from the Coastal Commission.

TAC ¶¶ 69–175, 211.[14] Plaintiffs allege that Defendants eventually abandoned most of these challenges and, in some instances, provided support for the projects after the developers agreed to sign favorable union agreements. *See id.*

Setting aside the issue of whether some of these entities, such as the Coastal Commission, qualify as a "judicial or quasi-judicial setting" for the purposes

[14] This list excludes three projects that did not involve litigation or pre-litigation demands. The Seaport Village project involved several developers, including one who was in a partnership with Plaintiffs, bidding for a Port of San Diego project. TAC ¶¶ 136–43. The Legacy International Center was a hotel development project pending City Council approval, which Defendants opposed until they allegedly learned they could not unionize the workers. *Id.* ¶¶ 161–165. The San Diego State University Mission Valley project is a development project that has allegedly been stalled "[e]ven though Defendants have secured an agreement that Local 30 would represent the hotel workers and a portion of the stadium workers and that the construction project would use as much union labor as practical." *Id.* ¶¶ 166–69.

here,[15] the Court cannot infer from the facts alleged that Defendants' past filings against other San Diego developments demonstrate that Defendants were "improperly motivated" in initiating any legal proceeding against Plaintiffs—i.e., filed without regard to the merits. *See Mohla*, 944 F.2d at 534. Notably, none of these legal proceedings involved Plaintiffs or their related entities.[16] And of the seven lawsuits

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[15] The serial sham litigation exception does not apply outside the context of a "judicial or quasi-judicial setting." *See Boone*, 841 F.2d at 896–97. Courts must consider "the totality of the circumstances" when determining whether an entity operates "in a sufficiently non-political way to warrant application of the judicial sham exception, including whether the entity "conducts public hearings, accepts written and oral arguments, permits representation by counsel, . . . allows affected persons to question witnesses. . . . issue[s] written findings after its hearing[,] . . . [and issues] decision[s] [that are] appealable." *Kottle*, 146 F.3d at 1062. Here, the TAC offers conclusory allegations that the Coastal Commission, Port of San Diego, Wetlands Advisory Board, Planning Commission, Centre City Development, the City, or local city councils made "adjudicative decision[s]." *See, e.g.*, TAC ¶¶ 97, 100, 113–14, 120, 128, 143, 145. Although Plaintiffs allege that some of these entities conducted public hearings and issued written decisions, it is unclear on the record here whether these hearings involve written and oral arguments, permit representation by counsel, or allow questioning of witnesses. *See Kottle*, 146 F.3d at 1062. Significantly, Plaintiffs fail to allege that these entities are governed by enforceable standards subject to review. *See id.* Such allegations are therefore insufficient to support the inference that these entities more closely resemble a judicial rather than a legislative body for the purposes of the sham exception.

[16] The TAC does not allege that Defendants have filed any lawsuit, let alone a series of lawsuits, against Plaintiffs. As the Ninth Circuit explained, "the filing of a whole series of lawsuits and other legal actions without regard to merits has far more

identified above, five settled or were at least partially successful. *See Theme Promotions*, 546 F.3d at 1008 ("The fact that this ongoing litigation settled suggests that the original suit was not objectively baseless."); *USS-POSCO*, 31 F.3d at 811 (holding that a series of lawsuits did not trigger the sham exception where over half "turn out to have merit").

Nor can the Court conclude, based on the facts alleged, that Defendants filed the alleged sham lawsuits or threatened future litigation "for the purpose of injuring a *market rival*." *See USS-POSCO*, 31 F.3d at 811 (emphasis added). Plaintiffs are hotel owners and developers, and Defendants are unions and union leaders. Although Plaintiffs allege that Defendants "can exclude competitors and/or competition," Plaintiffs never allege that Defendants and Plaintiffs are competitors. *See* TAC ¶¶ 172, 244.

Accordingly, the Court concludes that Plaintiffs have not met their burden of alleging specific facts showing that the serial sham litigation exception applies.

b. Sham lobbying

In the lobbying context, the sham exception applies where "persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) ("*Omni*"). In other words, a sham situation "involves a

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serious implications than filing a single action" because "[l]itigation is invariably costly, distracting and time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business." *USS-POSCO*, 31 F.3d at 811.

defendant whose activities are not genuinely aimed at procuring favorable government action at all," rather than one who seeks a governmental result "but does so through improper means." *Id.* at 380 (internal quotation marks and citations omitted). Further, the abuse of the governmental process must "directly" have an anticompetitive effect. *Manistee Town Ctr.*, 227 F.3d at 1090.

Where, as here, the alleged lobbying takes place in a non-judicial setting, the sham exception is "extraordinarily narrow."[17] *See Kottle*, 146 F.3d at 1061. Intent alone is insufficient to trigger this sham exception. *See Omni*, 499 U.S. at 380 ("That a private party's political motives are selfish is irrelevant: '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.'"). Indeed, the Supreme Court has consistently held that "evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate

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[17] As previously discussed, *supra* note 14, Plaintiffs fail to sufficiently allege that Coastal Commission, Port of San Diego, Wetlands Advisory Board, Planning Commission, Centre City Development, the City, or local city councils are judicial or quasi-judicial bodies. Further, the Court concludes that the City Council—which was allegedly subject to much of Defendants' lobbying conduct—is a legislative body. *See* City of San Diego Charter, art. III § 11 ("All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State."); *see also Boone*, 841 F.2d at 896 ("[E]ven though proceedings before the [city's redevelopment] agency have some of the trappings normally associated with adjudicatory procedures, all final decisions are made by the [city] council, a distinctly legislative body.").

activity into a sham." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) ("*PREI*"); *see id.* ("[N]either *Noerr* immunity nor its sham exception turns on subjective intent alone.").

Here, Plaintiffs allege that Defendants: (1) sent a letter to the Mayor and City Councilmembers on February 28, 2018 that expressed concern "regarding the lack of transparency and access to information pertaining to environmental review" of the Bahia Project, TAC ¶ 180; (2) sent a letter to the Mayor and City Councilmembers on May 11, 2018 arguing that the Bahia Project's elimination of Gleason Road was inconsistent with the MBMPU, *id.* ¶ 181; (3) created and sponsored a website, "nomissionbaylandgrab.org," and a related Facebook page to "disseminate the false message that the Bahia redevelopment violates the MBMPU," *id.* ¶ 182; (4) met with City Councilmembers to demand that they revoke or change their position regarding the Bahia Project unless Plaintiffs agreed to sign a CCNA and/or PLA, *id.* ¶ 183; (5) demanded that the Mayor and City Council delay and not docket the vote on the proposed lease amendment for the Bahia Project, *id.* ¶¶ 196–98; and (6) threatened SeaWorld through Rolfe that Defendants would interfere with its ability to get future attractions approved by City County and the Coastal Commission as well as engage in a negative publicity campaign, *id.* ¶ 211.[18]

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[18] Plaintiffs also argue that the Court should analyze the Defendants' various lobbying efforts under the serial sham petition exception. ECF No. 144 at 43. The Court declines. As both the 2020 and 2021 Orders made clear, the serial sham petition exception applies only to petitions to a court or adjudicatory

In opposing Defendants' motion to dismiss, Plaintiffs argue that Defendants "have no interest in procuring the environmental or land use relief for which they lobby or in blocking the projects entirely; rather, if Plaintiffs agree to a [CCNA] and a PLA, then Defendants will drop their challenges and support the projects." ECF No. 144 at 41. Plaintiffs allege in the TAC:

> Defendants do not actually want to block the projects entirely; they merely want to block the projects until the developer agrees to a card check neutrality agreement and PLA. Once those agreements are obtained, Defendants abandon their challenges with, at most, negligible mitigation measures that create the facade of good faith settlement negotiations and then actively support the same projects that they once opposed.
>
> That Defendants so freely abandon their challenges to a project proves their sole motivation in asserting those claims is to obtain unrelated labor concessions. . . . The only justification for this pattern of conduct is that those CEQA and land use claims are mere vehicles for Defendants to accomplish their true objective – obtaining [CCNAs] and PLAs with developers.

TAC ¶¶ 266–67.

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administrative agency and conduct incidental to filing a petition. *See* ECF No. 60 at 16; ECF No. 93 at 24. It does not apply to lobbying. *See Kottle*, 146 F.3d at 1061 ("[T]he second and third variants of the litigation sham exception do not make sense in the legislative realm.").

As an initial matter, the Court cannot infer from these allegations that Defendants were "not seeking official action by a government body." *See Franchise Realty*, 542 F.2d at 1081. *See also Omni*, 499 U.S. at 380 ("A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all . . . .") (internal quotation marks omitted). In fact, Plaintiffs' allegations in other places in the TAC indicate that Defendants actively sought to delay or stop the Bahia Project. *See, e.g.*, TAC ¶¶ 198, 200, 224, 248. Plaintiffs also acknowledge that Defendants were "careful not to discredit the environmental opposition" to the Bahia Project. *See id.* ¶ 224.

Significantly, that Defendants had an ulterior motive for lobbying does not vitiate *Noerr–Pennington* protection. *See Omni*, 499 U.S. at 380 (stating that "a concerted effort to influence public officials" is immunized "regardless of intent or purpose"). Nor is Defendants' lobbying a sham because Plaintiffs allege that Defendants' opposition to the Bahia Project lacked merit. Plaintiffs allege that the two letters sent by Defendants' counsel in 2018 and the creation of the website and related Facebook page were spurious because Defendants "knew or had reason to know that the retention of Gleason Road was not a part of the MBMPU." *See id.* ¶¶ 182, 193. Plaintiffs explain that, while the words "Retain Gleason Road" appear on an unapproved, amended graphic that was prepared after approvals for the Bahia Project were articulated, this requirement was not in the administrative record. *Id.* ¶ 182. Further, the Coastal Commission, the City's Planning Department, and two advisory boards confirmed that the Bahia's proposed lease

amendment did not require an amendment of the MBMPU. *See id.* But whether the 2018 letters, website, and related Facebook page had any objective basis is not dispositive. *See Kottle*, 146 F.3d at 1061 (stating that "it would seem quite pointless to ask whether [a] lobbying effort was 'objectively baseless'" because "there are few, if any, [objective standards] in the political realm of legislation, against which to measure [a] defendant's conduct"). The same is true to the extent Plaintiffs allege that the content of these letters and webpages was misleading, or that Defendants otherwise acted in an unethical manner. *See Noerr*, 365 U.S. at 140, 145 (stating that attempts to influence public officials may occasionally result in "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information" but "that deception, reprehensible as it is can be of no consequence so far as the Sherman Act is concerned"); *Boone*, 841 F.2d at 894 (stating that "[w]hile we do not condone misrepresentations, we trust that [governmental bodies], acting in the political sphere, can accommodate false statements and reveal their falsity") (internal quotation marks omitted). *See also Allied Tube,* 486 U.S. at 499–500 ("A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods.").

Further, Plaintiffs do not allege that the process of sending letters, creating online content directed at the general public, and lobbying elected officials itself imposed any cost on Plaintiffs or effected any delay in realizing the Bahia Project. *See Omni*, 499 U.S. at 381. "Any lobbyist or applicant, in addition to getting

himself heard, seeks by procedural and other means to get his opponent ignored." *Id.* at 382 (further stating that"[p]olicing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act"). For example, Plaintiffs do not allege that Defendants' conduct directly imposed any procedural, administrative, or regulatory burden on Plaintiffs or automatically stayed the Bahia Project. *See Manistee Town Ctr.*, 227 F.3d at 1090 (emphasizing that the abuse of the governmental process must "directly" have an anticompetitive effect). Rather, any delay that Defendants allegedly sought resulted from persuading government officials to consider their objections. *See Omni*, 499 U.S. at 381 (holding that a billboard company's successful lobbying of a city to enact a zoning ordinance that hampered its competitor's ability to compete did not fall within the sham exception because it was not the process of lobbying, but the result of the effort, that interfered with its competitor's business). The TAC fails to allege that Defendants used the governmental processes, "as opposed to the *outcome* of those processes, as a mechanism to injure [Plaintiffs]." *Empress LLC*, 419 F.3d at 1057 (emphasis added). As such, "no matter what [Defendants'] motives were," their petitioning activity is immunized under *Noerr–Pennington*. *See id.*

Similarly, the Court cannot infer that Defendants' alleged threats against SeaWorld regarding future lobbying of the City Council and the Coastal Commission or negative publicity campaigns incidental to such petitioning activity would be a sham. *See United Ass'n of Journeymen & Apprentices of Plumbing &*

Pipefitting Indus. of U.S. & Canada, Loc. 32, AFL-CIO v. N.L.R.B., 912 F.2d 1108, 1110 (9th Cir. 1990) (stating that a court may not presume "a union's threat to picket the job [would be] a threat to picket contrary to the law, when picketing at the job could be done in a lawful manner"). *See also Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) ("[E]njoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation."). As previously discussed, Plaintiffs allege that Defendants threatened to interfere with SeaWorld's ability to get new attractions approved by the City Council and Coastal Commission. *See* TAC ¶ 211. Even if Defendants threatened to oppose all of SeaWorld's proposed future attractions for the purpose of exerting pressure on Plaintiffs to sign a PLA or CCNA, as Plaintiffs allege, this intent alone "cannot transform otherwise legitimate activity into a sham." *See PREI*, 508 U.S. at 59. The TAC must include "allegations of the specific activities" which would "bring [Defendants'] conduct into one of the exceptions to the *Noerr–Pennington* protection." *See Mohla*, 944 F.2d at 533. Plaintiffs fail to indicate that Defendants' threatened conduct would use the process of lobbying City Council and the Coastal Commission or the process of engaging in negative publicity campaigns incidental to that lobbying—as opposed to the outcome of such activities—as an anticompetitive weapon.[19] *See Omni*, 499 U.S. at 380.

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[19] Nor do Plaintiffs "allege any *independent* conduct apart from [Defendants' future] lobbying efforts" or conduct incidental

Given that the sham exception is "extraordinarily narrow" in the context pleaded here, the Court concludes that Plaintiffs have not met the heightened pleading standard required. *See Kottle*, 146 F.3d at 1061, 1065. Accordingly, the Court concludes that Plaintiffs have failed to show that any of the sham exceptions could apply based on the allegations and turns to the final part of the *Noerr–Pennington* analysis.

C. Step Three: Statutory Construction

At step three, the Court asks whether the LMRA or Sherman Act can be construed to avoid burdening Defendants' protected petitioning rights.[20] *See B&G Foods*, 29 F.4th at 540. Under the *Noerr–Pennington* rule of statutory construction, courts "must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Sosa*, 437 F.3d at 931).

Plaintiffs' first claim alleges that Defendants violated section 303 of the LMRA, which makes it unlawful for a union to "engage in any activity or conduct defined as an unfair labor practice" in section 8(b)(4)

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to such lobbying, that would make *Noerr–Pennington* protection unavailable. *See Harbor Performance Enhancement Ctr.*, 2021 WL 1676281, at *13 (finding that plaintiffs failed to include specific allegations that union defendants' conduct falls outside *Noerr–Pennington* protection and therefore dismissing plaintiffs' NLRA and Sherman Act claims) (emphasis in original).

[20] Neither Plaintiffs nor Defendants appear to dispute that the LMRA, NLRA, and Sherman Act may be construed to preclude liability based on petitioning conduct protected under *Noerr–Pennington*.

of the National Labor Relations Act ("NLRA"). TAC ¶¶ 277–302. *See* 29 U.S.C. § 187. Section 8(b)(4)(ii), which is the provision at issue here, in turn makes it an unfair labor practice for a labor organization to "threaten, coerce, or restrain any person engaged in commerce" with the object of "forcing or requiring any employer . . . to enter into any agreement prohibited by subsection (e)"[21] or "forcing or requiring any person . . . to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(A)–(B). There is nothing in either the LMRA or NLRA that "unavoidably" requires the statutes to be read to include, as an unfair labor practice, threats to engage in protected petitioning activity. *See Sosa*, 437 F.3d at 940; *Harbor Performance Enhancement Ctr., LLC v. City of Los Angeles Harbor Dep't*, No. 21-55416, 2022 WL 1239055, at *2 (9th Cir. Apr. 27, 2022) ("The third prong [of the *Noerr–Pennington* analysis] is satisfied because Section 8(b)(4)(ii) of the NLRA . . . may be construed to exclude the union defendants' petitioning conduct."). *See also, e.g.*, *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 526 (2002) (applying *Noerr–Pennington* in the NLRA context); *Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 863 F.3d 1178, 1189 (9th Cir. 2017) (holding that *Noerr–Pennington* immunized a lawsuit brought under LMRA); *USS-POSCO*, 31 F.3d at 811 (holding that unions' lobbying efforts were

[21] Subsection (e) states, in relevant part, that "[i]t shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . . ." 29 U.S.C. § 158(e).

immunized from LMRA liability under *Noerr–Pennington*). Section 303 of the LMRA and Section 8(b)(4) of the NLRA are "susceptible of a construction that avoids the serious constitutional question of Petition Clause immunity." *See Sosa*, 437 F.3d at 939.

Plaintiffs' remaining two claims are for attempted monopolization and conspiracy to monopolize in violation of section 2 of the Sherman Act. Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. The Supreme Court in *Pennington* held: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Pennington*, 381 U.S. at 670; *see also Noerr*, 365 U.S. at 135 (holding that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws"). Section 2 of the Sherman Act is likewise susceptible of a construction that avoids the question of Petition Clause immunity here.

Accordingly, the Court concludes that the *Noerr–Pennington* doctrine immunizes Defendants' conduct in the context of Plaintiffs' claims. *See* TAC ¶¶ 286–87, 297–98, 305, 313.

IV. LEAVE TO AMEND

As the Court has previously observed, this case has been pending at the pleadings stage for over four years. Plaintiffs have had ample opportunity to

sufficiently plead their claims in the instant action. The 2021 Order stated that it was providing Plaintiffs with "one final opportunity to amend their complaint." ECF No. 93 at 61. Given the Court's prior Orders and the analysis above, the Court concludes that further amendment of the complaint, already in its fourth iteration, would be futile. *See Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.1989) ("The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint."). *See also Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986) (refusing to allow plaintiff to file a fourth amended complaint where "[t]he factual bases of the claims were known to [plaintiff] long before"). Nor have Plaintiffs proffered any proposed amendments that would suggest otherwise. The Court therefore grants Defendants' motion to dismiss the TAC with prejudice. *See Californians for Renewable Energy v. California Pub. Utilities Comm'n*, 922 F.3d 929, 935 (9th Cir. 2019) ("The 'district court does not err in denying leave to amend where the amendment would be futile, or where the amended complaint would be subject to dismissal.'") (quoting *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991)).

V. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Defendants' Motion to Dismiss Plaintiffs' TAC. ECF No. 143. Further, the Court **DENIES** Defendants' request for judicial notice (ECF No. 143-3)[22]

[22] The Court did not rely on the documents attached in ruling on Defendants' instant motion to dismiss.

and Plaintiff's motion for leave to file a surreply as moot. ECF No. 143-3. The action is **DISMISSED** with prejudice, and the Clerk of Court is **DIRECTED** to close the case.

IT IS SO ORDERED.

Dated: July 6, 2023

s/
Hon. Robert S. Huie
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EVANS HOTELS, LLC, a California limited liability company; BH PARTNERSHIP LP, a California limited partnership; EHSW, LLC, a Delaware limited liability company, Plaintiff, v. UNITE HERE! LOCAL 30; BRIGETTE BROWNING, an individual; SAN DIEGO COUNTY BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO; TOM LEMMON, an individual; and DOES 1-10, Defendants.	Case No.: 18-CV-2763-RSH-AHG **ORDER (1) DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT; (2) DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS; (3) GRANTING JOINT MOTION FOR ORDER ON BRIEFING OF MOTION TO DISMISS; AND (4) DENYING JOINT MOTION FOR STATUS CONFERENCE** **[ECF Nos. 118, 125, 126, 137]**

Pending before the Court are four motions: (1) Plaintiffs' Motion for Leave to File a Fourth Amended Complaint (ECF No. 118); (2) Defendants'

Motion for Attorneys' Fees and Costs Pursuant to California Code of Civil Procedure § 425.16 (ECF No. 125); (3) the Parties' Joint Motion for an Order on Briefing a Motion to Dismiss (ECF No. 126); and (4) a Joint Motion to Set a Status Conference (ECF No. 137). For the reasons discussed below, the Court denies Plaintiffs' motion (ECF No. 118), denies Defendants' motion (ECF No. 125), grants the parties' Joint Motion on Briefing (ECF No. 126), and denies the Joint Motion for a Status Conference (ECF No. 137).

I. Background

The Court previously provided a detailed factual and procedural background in its Order of August 26, 2021. ECF No. 93. For purposes of the pending motions, the relevant procedural history below pertains to Plaintiffs' filing of successive complaints, Defendants' motions to dismiss or to strike those complaints, and the Court's rulings.

On December 7, 2018, Plaintiffs filed their initial Complaint in this matter, alleging nine claims: (1) unlawful secondary boycott in violation of section 303 of the Labor-Management Relations Act ("LMRA"), (2) attempted monopolization in violation of section 2 of the Sherman Act, (3) conspiracy to monopolize in violation of section 2 of the Sherman Act, (4) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), (5) violation of RICO by conspiring to violate 18 U.S.C. § 1962(c), (6) violation of RICO by conspiring to violate 18 U.S.C. § 1962(d), (7) violation of RICO by conspiring to violate 18 U.S.C. § 1962(b), (8) interference with prospective economic advantage, and (9) attempted extortion. ECF No. 1. In February

2019, Defendants filed motions to dismiss and anti-SLAPP motions. ECF Nos. 15-18.

On March 7, 2019, Plaintiffs filed a First Amended Complaint, containing the same nine claims. ECF No. 19. The Court ruled that the filing of an amended complaint mooted the motions that were pending as to the initial complaint. ECF No. 24. On April 15, 2019, Defendants again filed motions to dismiss as well as motions to strike. ECF Nos. 29-32.

On January 7, 2020, the Court dismissed all of Plaintiffs' claims, ruling that Plaintiffs had failed to plead facts establishing that Defendants' conduct was not protected under the *Noerr-Pennington* doctrine. ECF No. 60. The Court denied the anti-SLAPP motions as moot, and provided that Plaintiffs could request leave to amend. *Id.* at 25. Plaintiffs requested and were granted leave to amend. ECF No. 75.

On April 21, 2020, Plaintiffs filed their Second Amended Complaint ("SAC"). ECF No. 76. The SAC added a new state claim for unfair competition, and withdrew two RICO conspiracy claims, for a total of eight claims (of which three were state claims). *Id.* Defendants again filed motions to dismiss, as well as an anti-SLAPP motion directed to the state claims. ECF Nos. 79-81.

On August 26, 2021, the Court dismissed all claims in the SAC, except Plaintiffs' first claim for unlawful secondary boycott in violation of section 303 of the LMRA. ECF No. 93. The dismissal was without prejudice. *Id.* at 61. Having dismissed all the state claims, the Court denied as moot Defendants' anti-SLAPP motion. *Id.* at 60-61. The Court also denied without prejudice Defendants' request for fees and

costs made in connection with the anti-SLAPP motion. *Id.* at 60.

Defendants thereafter moved for reconsideration of the Court's order, which the Court denied on January 28, 2022. ECF No. 113. In denying the motion for reconsideration, the Court directed that "Plaintiffs must file their Third Amended Complaint within ten (10) days of this order" and "[a]bsent a motion demonstrating good cause, that complaint must not contain any new claims for relief." *Id.* at 113.

On February 7, 2022, within the ten-day window, Plaintiffs filed a Third Amended Complaint ("TAC"). ECF No. 114. The TAC contained three federal claims, none of which were new: (1) unlawful secondary boycott, (2) attempted monopolization in violation of section 2 of the Sherman Act, and (3) conspiracy to monopolize in violation of section 2 of the Sherman Act.

On February 14, 2022, the parties filed a joint motion seeking to extend the deadline for Defendants to respond to the TAC. ECF No. 115. In that motion, the Parties indicated that "Plaintiffs intended to seek leave of the Court to assert a new antitrust claim arising under section 1 of the Sherman Act based on the existing nucleus of facts." *Id.* at 3. On February 15, 2022, the Court granted the motion in part, directing Plaintiffs to file their motion for leave to amend within ten days. The order advised that "a strong showing must be made for why any claims can survive as well as why they were not brought within the past three years of this case's pendency." ECF No. 116 at 4.

On February 25, 2022, Plaintiffs timely filed their Motion for Leave to File a Fourth Amended

Complaint ("FAC") that is pending before this Court. ECF No. 118. The proposed FAC adds two claims under section 1 of the Sherman Act, for a total of five claims. ECF No. 118-3. Neither the TAC nor the FAC contains state claims. Plaintiffs' motion has been fully briefed. ECF Nos. 118, 119, 121, 122, 123.

On April 5, 2022, Defendants filed their pending motion for attorneys' fees and costs pursuant to California's anti-SLAPP statute; this motion has likewise been fully briefed. ECF Nos. 125, 127, 128.

Also on April 5, 2022, the Parties filed their joint motion for an order on briefing a motion to dismiss. ECF No. 126. That motion proposes expanded page limits for briefing on a motion to dismiss that is yet to be filed by Defendants, but that will seek dismissal either of the TAC (if the Court denies leave to file a FAC) or of the FAC (if the Court grants leave to file).

After the case was transferred to the undersigned on June 24, 2022 (ECF No. 135), the Parties on August 2, 2022 filed their joint motion for a status conference. ECF No. 137. The joint motion recited the procedural history of the case and requested a status conference because "there are motions pending before the Court that will drive how the litigation proceeds going forward." *Id.* at 6.

II. Plaintiffs' Motion for Leave to Amend

Plaintiffs' motion, filed more than 38 months after the initial complaint, seeks leave to file a Fourth Amended Complaint that for the first time includes two claims under section 1 of the Sherman Act. Instructed by the Court to make a showing of why these claims could not have been brought earlier, Plaintiffs' explanation is that "they have been developing an

additional theory of liability, having hired additional counsel specialized in antitrust and retained experts." ECF No. 118-1 at 5. Based on undue delay, prejudice, and the fact that the complaint has been amended more than once previously, the Court exercises its discretion to deny Plaintiffs' request.

A. Legal Standard

On a motion for leave to amend a pleading, a court should "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Court considers five factors in determining whether a motion for leave to amend is appropriate: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Among these factors, "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Undue delay, while less significant than prejudice, is also relevant. *See Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("Although delay is not a dispositive factor in the amendment analysis, it is relevant."); *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) ("Undue delay is a valid reason for denying leave to amend."); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) ("[D]elay, by itself, is insufficient to justify denial of leave to amend.").

A Court's "discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.1989).

Furthermore, "a district court does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to develop his contention originally." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (citing *Allen v. City of Beverly Hills*, 911 F.2d 367, 375 (9th Cir. 1990)). *See also Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir.1986) (refusing to allow plaintiff to file a fourth amended complaint where "[t]he factual bases of the claims were known to [plaintiff] long before" and that "permitting amendment would impose a prejudicial burden on the [defendant]").

B. Analysis

Plaintiffs' motion for leave to file their proposed FAC was filed over 38 months after they filed their initial complaint. Before Plaintiffs filed their motion, the Court advised them of the need to make a showing of why their new claims could not have been brought earlier in the case. ECF No. 116 at 4. Plaintiffs responded that they "have been developing an additional theory of liability, having hired additional counsel specialized in antitrust and retained experts." ECF No. 118-1 at 11.[1] Plaintiffs do not contend that the new claims are based on newly discovered facts; instead, they state that "the factual predicate for the proposed Section 1 claims is substantially similar" to

[1] Plaintiffs have three law firms representing them at present. At the time of their initial complaint, they had one multinational law firm representing them. ECF No. 1. At the time of their SAC, that law firm was joined by a second multinational firm that continues to be counsel of record. ECF No. 76.

that of their other claims. *Id.* at 7. Plaintiffs provide no reason that they could not have developed these theories, or hired the relevant attorneys or experts, earlier or at the outset of the case. Plaintiffs also cite, as reasons for delay, a host of reasons including judicial reassignments, the time that the Court has taken to rule on the Parties' motions, and the COVID-19 pandemic. ECF No. 118-1 at 7, 14; ECF No. 121 at 4. But none of these factors has anything to do with why Plaintiffs could not have brought their proposed new claims earlier.[2] The Court finds that Plaintiffs have no legitimate reason for their delay, and that such delay was undue and unreasonable.[3] *See Amerisource-*

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[2] Plaintiffs also claim that they held off on filing their new claims to await the outcome of Defendants' motion for reconsideration on the Court's August 26, 2021 Order dismissing all but the first claim in Plaintiffs' SAC. Plaintiffs contend that otherwise they would have filed those claims in September 2021 (33 months after the initial complaint). ECF No. 118-1 at 14. The Court is skeptical of this contention, which is unsupported by any declaration. Plaintiffs' motion states that they "have been developing an additional theory of liability, having hired additional counsel specialized in antitrust," ECF No. 118-1 at 11. Counsel from the third law firm that currently represents Plaintiffs, and that appears to specialize in antitrust and competition law, first entered appearances in October 2021. ECF Nos. 101, 102, 103.

[3] Plaintiffs argue that this Court, in dismissing without prejudice all but one of the claims in the SAC, also authorized Plaintiffs to bring any new claims as they deemed appropriate, and that they "relied on" that ruling. ECF No. 118-1 at 15. Not so. The Court's August 26, 2021 Order provided that Plaintiffs "MAY FILE an amended complaint addressing the above-identified deficiencies within fourteen (14) days of the electronic docketing of this Order." ECF No. 93 at 61. In giving Plaintiffs the chance to amend for the specific purpose of "addressing the

Bergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 953 (9th Cir. 2006) (finding delay was unreasonable where plaintiff "never provided a satisfactory explanation" for a 15-month delay between discovery of a possible litigation theory and request for leave to amend).[4]

Plaintiffs' principal argument is that, whatever the cause of the delay may be, Defendants will suffer no prejudice from having to defend new claims in the FAC because (1) the new claims are based on substantially the same facts as the old claims; (2) Defendants have not filed an answer yet; and (3) discovery has not yet begun. ECF No. 118-1 at 13-14. But here, the prejudice to Defendants is straightforward: For over three-and-a-half years, Defendants have been, and still are, litigating the pleadings. *See Synopsys, Inc. v. Libr. Techs., Inc.*, No. 20-CV-07014-CRB, 2022 WL 2356819, at *2 (N.D. Cal. June 30, 2022) (finding that party will be "substantially prejudiced" by an amendment that was brought nearly two years after complaint was filed, even though discovery had not yet begun, in light of "the many motions and hearings"

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above-identified deficiencies," the Court was not inviting new and different claims.

[4] The only case that Plaintiffs have identified as addressing a delay of this length is *Cejas v. Paramo*, No. 14-CV-1923-WQH-WVG, 2018 WL 1637997 (S.D. Cal. Apr. 4, 2018), which involved a 42-month delay between the initial complaint and the proposed First Amended Complaint. The plaintiff was a prisoner who explained that he had been on "lock down 'for months.'" *Id.* at *1. The court noted that "[t]o call this undue delay would be an understatement." *Id.* However, given the absence of other factors weighing against amendment, the court granted leave to file a First Amended Complaint. *Id.* at 2. Notably, the motion was unopposed. *Id.* at 1.

that had taken place) (citing *Ascon Properties*, 866 F.2d at 1161). This includes six motions to dismiss, five motions to strike, their pending motion for fees based on the motion to strike, and the motion to dismiss that they are reportedly preparing to file to either the TAC or the FAC, depending on the Court's ruling. As a result of these efforts—even though the initial Complaint was superseded by Plaintiffs, the First Amended Complaint was dismissed in its entirety, and the SAC was dismissed in its entirety except for a single claim—Plaintiffs' proposed FAC is roughly as long as it has ever been and includes two new claims which have not previously been litigated. If these claims had been included in the initial complaint, they would be that much closer to getting a final resolution of the legal issues raised by the pleadings, and proceeding to discovery and trial. As the Parties will know, that litigation is not only time-consuming but costly, as reflected in Defendants' pending motion for attorneys' fees. ECF No. 125. *See Ascon Properties*, 866 F.2d at 1161 (holding that pre-discovery amendment would prejudice defendant "through the time and expense of continued litigation on a new theory, with the possibility of additional discovery"); *Foster Poultry Farms v. Alkar-Rapidpak-MP Equip., Inc.*, 2013 WL 398664, at *6 (E.D. Cal. Jan. 31, 2013) (finding that two-year delay in bringing new claims caused prejudice because "requiring Defendant to respond to Plaintiff's untimely allegations would generate unnecessary expenditures by the parties and the Court").

The Court finds that Plaintiffs' new claims will result in significant added complexity, expense, and delay. This is illustrated by the fact that it took

Plaintiffs several years, plus a fourth, antitrust-focused law firm and the engagement of antitrust experts, to be in a position to plead these claims. This is also illustrated by the Declaration of Chetan Sanghvi, Ph.D., that Plaintiffs filed in connection with their Reply Brief. ECF No. 121-2. Dr. Sanghvi's 29-page declaration advises that his work is "in its preliminary stages," but he offers "provisional conclusions" that the FAC appropriately pleads relevant antitrust markets and participants (including with regard to the labor market definition that is new to the FAC, and that will likely require additional factual investigation and legal analysis by Defendants). *Id.* at 3-4. In the course of discovery, Defendants will no doubt engage experts of their own if they have not already done so; nonetheless, even at the pleading stage, Plaintiffs' proposed new claims will impose a substantial burden on Defendants.[5]

With regard to whether "the plaintiff has previously amended the complaint," *Johnson*, 356 F.3d at 1077, the Plaintiffs have done so here. Defendants contend that they would have included the new section 1 claims in their TAC but did not want to violate the Court's Order of January 28, 2022. ECF 113. Accepting that representation, they nonetheless previously filed a First Amended Complaint (as of right) and a Second Amended Complaint (with leave of Court). This factor, like that of undue delay and prejudice, also weighs against granting leave to amend. *See Ascon Properties*, 866 F.3d at 1160 (holding that a

[5] The Court declines to address the merits of Dr. Sanghvi's lengthy declaration and, for purposes of Plaintiffs' motion to amend, sustains Defendants' objection to it. ECF No. 122.

district court has broad discretion to deny leave to amend where plaintiff has previously amended the complaint).

Finally, the Court declines to analyze whether the proposed claims would be futile. The Court exercises its discretion to deny leave to amend in light of the 38-month unexcused delay, the prejudice to Defendants, and the fact of Plaintiffs' three prior amendments. *See Eminence Capital*, 316 F.3d at 1052 (holding that a strong showing of the factors support denial of leave to amend).

III. Defendants' Motion for Attorneys' Fees and Costs

Defendants move for an award of attorneys' fees and costs pursuant to California Code of Civil Procedure § 425.16(c)(1) on the grounds that they are the "prevailing defendant[s] on a special motion to strike." ECF No. 125. However, this Court previously determined, at the time of denying Defendants' motion to strike as moot, that Defendants were not "prevailing parties" and that an award of fees was not warranted. ECF No. 93 (Order dated Aug. 26, 2021) at 60. Accordingly, Defendants' Motion is denied.

In its August 26, 2021 Order granting in part Defendants' motion to dismiss with leave to amend, and denying as moot Defendants' special motion to strike under California's anti-SLAPP statute, the Court ruled that Defendants were not "prevailing parties" are were not entitled to recover their fees. *Id.* at 61. Specifically, the Court held:

> [F]ees are not warranted here. In contrast to Defendants' cases, *see* [*Resolute Forest Prod.,*

Inc. v. Greenpeace Int'l, 302 F. Supp. 3d 1005, 1026 (N.D. Cal. 2017)] (separately addressing anti-SLAPP motion on the merits); [*Robinson v. Alameda Cty.*, 875 F. Supp. 2d 1029, 1050 (N.D. Cal. 2012)] (dismissing defamation claim with prejudice); [*Bhambra v. True*, No. C 09-4685 CRB, 2010 WL 1758895, *2 (N.D. Cal. Apr. 30, 2010)] (granting attorneys' fees on anti-SLAPP motion where "this Court has already dismissed [the plaintiff's] complaint with prejudice"), the Court has dismissed Plaintiffs' claims without prejudice and without addressing the Anti-SLAPP Motion on the merits. *See generally supra*. Consequently, Defendants are not "prevailing parties" for purposes of Section 425.16(c)(1)—or entitled to attorneys' fees—at this time. *See, e.g.*, *Garcia v. Allstate Ins.*, No. 1:12-cv-00609-AWI-SKO, 2012 WL 4210113, at *14 (E.D. Cal. Sept. 18) ("Since Defendants' anti-SLAPP motion is being considered in federal court, and since the Ninth Circuit requires that Plaintiffs be given an opportunity to amend their complaint … , granting of Defendant's motion is considered a 'technical' victory that does not warrant an award of attorney's fees to Defendant as the prevailing party.") (citing *Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004); *Brown v. Elecs. Acts, Inc.*, 722 F. Supp. 2d 1148, 1156-57 (C.D. Cal. 2010)), *report and recommendation adopted*, 2012 WL 4982145 (E.D. Cal. Oct. 17, 2012); *Martin v. Inland Empire Utilities Agency*, 198 Cal. App. 4th 611, 633 (2011) ("[B]ecause the court's order granting defendants' anti-SLAPP motion with leave to amend

> was the functional equivalent of a denial, defendants were not 'prevailing parties' entitled to attorney fees").

Id. at 60. Although Defendants moved for reconsideration of the Order, they did not challenge this aspect of the Order. *See* ECF No. 100.

Even though there has been no further anti-SLAPP litigation since their motion was denied, Defendants argue that they have now become "prevailing parties"—and therefore have become entitled to their attorneys' fees—because Plaintiffs chose not to re-plead the state claims that the Court dismissed with leave to amend. ECF No. 125-1 at 4-5.

Defendants' request for fees has already been denied. The Court explained that it was denying the request because "the Court has dismissed Plaintiffs' claims without prejudice and without addressing the Anti-SLAPP Motion on the merits." ECF No. 93 at 60. None of this has changed. The anti-SLAPP motion has not been renewed or addressed on the merits. The Court's denial of the request for fees was "without prejudice," meaning that if Defendants filed a new anti-SLAPP motion against claims brought by Plaintiffs, in the event Defendants prevailed they could again request their fees. The Court's ruling did not invite Defendants to bring a new motion for fees in the event Plaintiffs chose not to pursue their state claims.

Among the cases cited in the Court's Order denying Defendants' fee request was the Ninth Circuit's decision in *Verizon Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081 (9th Cir. 2004). In that case, the district court deferred ruling on the

defendant's anti-SLAPP motion, pending the plaintiff's filing of an amended complaint. *Id.* at 1090-91. The Ninth Circuit found no error and disagreed with the defendant's argument that the district court's approach amounted to giving the plaintiff a "free shot at a SLAPP suit before amending the complaint." *Id.* at 1091. The Ninth Circuit explained that "the purpose of the anti-SLAPP statute, the early dismissal of meritless claims, would still be served if plaintiff eliminated the offending claims from their original complaint," and "[i]f the offending claims remain in the first amended complaint, the anti-SLAPP remedies remain available to defendants." *Id.* The clear implication is that absent any offending claims, the anti-SLAPP remedies would not be available. *See Ramachandran v. City of Los Altos*, 359 F. Supp. 3d 801, 820 (N.D. Cal. 2019) ("[T]he Court denies the anti-SLAPP motion and request for fees without prejudice at this time. Defendants may renew their motion if [plaintiff] includes amended state law claims in his second amended complaint."). The present case is distinguishable from ones in which a plaintiff dismissed or announced an intent to withdraw claims while an anti-SLAPP motion was pending. *See, e.g.*, *Plevin v. City and Cty. of San Francisco*, No. 11-cv-2359, 2013 WL 2153660, at *6 (N.D. Cal. May 16, 2013) (awarding fees where the court "denied Defendants' anti-SLAPP motion to strike as moot in light of Plaintiffs' representation that they did not intend to assert their state law claims in their Amended Complaint").

At the time this Court denied Defendants' anti-SLAPP motion as moot and granted Plaintiffs leave to amend, it ruled that Defendants were not "prevailing

parties" and were not entitled to fees. Without a new anti-SLAPP motion, this remains the case.

IV. Joint Motion for Briefing on Motion to Dismiss

The Parties jointly moved for leave to file oversized briefs in connection with Defendants' to-be-filed motion to dismiss. ECF No. 126. Given the length of the TAC, the complexity of the claims, and the length of prior applicable Court orders, the Court finds good cause for granting the request.

V. Joint Motion for Status Conference

Finally, the parties jointly moved for a status conference, on the grounds that "[t]here are several motions pending before the Court, and the outcome of those motions will likely drive further proceedings." ECF No. 137 at 3. The Court interprets the joint motion as a diplomatic reminder to the newly assigned district judge that there are motions pending in the case. Having addressed those motions, the Court does not see any reason for a status conference at this time. To the extent that there are other reasons warranting a status conference, the Parties are invited to identify those issues and renew their motion.

VI. Conclusion

For the foregoing reasons, the Court hereby **DENIES** Plaintiffs' Motion for Leave to File a Fourth Amended Complaint (ECF No. 118) and Defendants' Motion for Attorneys' Fees and Costs (ECF No. 125). The Court **GRANTS** parties' Joint Motion for Order

on Briefing of Motion to Dismiss (ECF No. 126) and **ORDERS** that:

(1) Defendants file a single, joint memorandum in support of their motion to dismiss the TAC of not more than 40 pages;

(2) Plaintiffs file a single memorandum in opposition to Defendants' motion to dismiss the TAC of not more than 40 pages; and

(3) Defendants file a single, joint reply memorandum in support of their motion to dismiss the TAC of not more than 15 pages.

Finally, the Parties' Joint Motion for Order Setting Status Conference (ECF No. 137) is **DENIED** as moot.

IT IS SO ORDERED.

Dated: August 30, 2022

s/
Hon. Robert S. Huie
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 11 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EVANS HOTELS, LLC, a California limited liability company; et al., Plaintiffs-Appellants, v. UNITE HERE! LOCAL 30; et al., Defendants-Appellees.	No. 23-55692 D.C. No. 3:18-cv-02763-RSH-AHG Southern District of California, San Diego ORDER

EVANS HOTELS, LLC, a California limited liability company; et al., Plaintiffs-Appellees, v. UNITE HERE! LOCAL 30; et al., Defendants-Appellants.	No. 23-55728 D.C. No. 3:18-cv-02763-RSH-AHG Southern District of California, San Diego

Before: W. FLETCHER, CALLAHAN, and DE ALBA, Circuit Judges.

The motion for leave to file an amicus curiae brief, Docket No. 72, is GRANTED.

The panel has voted to deny Appellees' petition for rehearing, Docket No. 71.

Judge Callahan has voted to grant Appellants' petition for rehearing en banc, Docket No. 70. Judge de Alba has voted to deny the petition, and Judge Fletcher so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

Appellants' petition for rehearing en banc is DENIED. Appellees' petition for rehearing is DENIED.

APPENDIX E

1. 29 U.S.C. § 158 provides:

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the

appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair

the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or

approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an

employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an

industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the

provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them

to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or

[1] So in original. Probably should be "unenforceable".

manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing

in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

2. California Civil Procedure Code § 425.16 provides:

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 11130, 11130.3, 54960, or 54960.1 of the Government Code, or pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title 1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to Section 7923.115, 11130.5, or 54960.5 of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, Insurance Commissioner, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an

issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall,

promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.