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,

Plaintiffs,

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-WQH-KSC

ORDER

HAYES, Judge:

The matters before the Court are 1) the Motion to Dismiss Amended Complaint filed by Defendants UNITE HERE Local 30 and Brigette Browning (ECF No. 29); 2) the Special Motion to Strike filed by UNITE HERE Local 30 and Brigette Browning (ECF No. 30); 3) the Motion to Dismiss Amended Complaint filed by Defendants San Diego County Building and Construction Trades Council, AFL-CIO, and Tom Lemmon (ECF No. 31); and 4) the Special Motion to Strike filed by San Diego County Building and Construction Trades Council, AFL-CIO, and Tom Lemmon (ECF No. 32).

I. BACKGROUND

A. Procedural History

On December 7, 2018, Plaintiffs Evans Hotels, LLC ("Evans Hotels"), BH Partnership LP ("BH"), and EHSW, LLC ("EHSW"), initiated this action by filing a Complaint against Defendants UNITE HERE Local 30 ("Local 30"), Brigette Browning, San Diego County Building and Construction Trades Council, AFL-CIO ("Building Trades"), and Tom Lemmon. (ECF No. 1). Plaintiffs amended the Complaint on March 7, 2019. (ECF No. 19).

Plaintiffs bring the following claims in the Amended Complaint: 1) unlawful secondary boycott in violation of section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187(a), against Local 30 and Building Trades; 2) attempted monopolization and conspiracy to monopolize in violation of section 2 of the Sherman Act against all Defendants; 3) violation of 18 U.S.C. § 1962(e) and conspiring to violate §§ 1962(a), (b), and (c) under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against all Defendants; and 4) state law interference with contract and attempted extortion claims against all Defendants. Plaintiffs seek damages, punitive and treble damages, injunctive relief, attorneys' fees, costs, and prejudgment interest.

On March 15, 2019, Defendants Local 30 and Browning filed a Motion to Dismiss Plaintiffs' Amended Complaint (ECF No. 29) and a Special Motion to Strike (ECF No. 30). Each motion was accompanied by a Request for Judicial Notice. (ECF Nos. 29-2; 30-2). On March 15, 2019, Defendants Building Trades and Lemmon filed a Motion to Dismiss Plaintiffs' Amended Complaint (ECF No. 31) and a Special Motion to Strike (ECF No. 32), joining Local 30 and Browning's Special Motion to Strike. Local 30 and Browning joined the Motion to Dismiss filed by Building Trades and Lemmon. (ECF No. 29 at 2). Building Trades and Lemmon joined the Motion to Dismiss filed by Local 30 and Browning. (ECF No. 31 at 3).

On May 17, 2019, Plaintiffs filed Responses in opposition to Defendants' Motions to Dismiss (ECF Nos. 35, 38) and Motions to Strike (ECF No. 37). Plaintiffs also filed

Objections to Local 30 and Browning's Request for Judicial Notice in support of their Motion to Dismiss. (ECF No. 36). On June 7, 2019, Local 30 and Browning filed Replies in support of their Motion to Strike (ECF No. 40), Motion to Dismiss (ECF No. 41), and Request for Judicial Notice in support of their Motion to Dismiss (ECF No. 42). Building Trades and Lemmon filed Replies in support of their Motion to Dismiss (ECF No. 43) and Motion to Strike (ECF No. 44).[1]

On September 3, 2019, Plaintiffs filed a Notice of Supplemental Authority in support of their Responses to Defendants' Motions to Dismiss. (ECF No. 53).

On October 2, 2019, the Court heard oral argument on all pending motions.

On October 29, 2019, Plaintiffs filed a second Notice of Supplemental Authority in support of their Responses to Defendants' Motions to Dismiss. (ECF No. 58). On November 1, 2019, Defendants filed a Response to Plaintiffs' Notice of Supplemental Authority. (ECF No. 59).

B. Allegations in the Amended Complaint

Plaintiff Evans Hotels is a limited liability company that operates three hotels in San Diego, including the Bahia Resort Hotel (the "Bahia"). Members of the Evans family own and control Plaintiffs Evans Hotels, ESHW, and BH. BH is the owner of the Bahia. The Bahia is located on Mission Bay Park, owned by the City of San Diego (the "City"). In the 1950's, BH and the City entered into a long-term commercial lease agreement for the Bahia to rent the Mission Bay Park land from the City. Evans Hotels seeks to redevelop and expand the Bahia. In order to redevelop or expand the Bahia, an amendment to BH's lease is required, subject to the Mission Bay Park Master Plan Update ("MBPMPU"), the City's comprehensive land use plan for Mission Bay Park.

The Bahia does not have a unionized workforce. Plaintiffs allege that in early 2018, Defendants began to carry out a "playbook" of tactics designed to coerce Plaintiffs to

[1] The Court will refer to the motions as "Defendants' motions" because Defendants join each other's motions.

unionize. (*See* ECF No. 19 ¶¶ 24, 26, 39). Defendants seek to "unlawfully extort[]" Plaintiffs into signing a card check neutrality agreement and a project labor agreement ("PLA"). (*Id.* ¶ 26). The card check neutrality agreement would require Plaintiffs to remain neutral, not communicate with their employees regarding the pros and cons of unionization, and waive their right to bargain to impasse. In exchange, the union would agree not to strike, boycott, or picket Plaintiffs' hotels. The PLA would require Plaintiffs' general contractor to allow only union subcontractors to bid on or perform construction work on a project.

BH representatives met with City officials in January 2018 to negotiate the lease amendment. In early February 2018, Defendant Local 30, a labor union that represents service workers in San Diego, sent letters to the Mayor and City Council expressing concern about the "lack of transparency and access to information pertaining to environmental review of the proposed Lease Amendment . . . and claiming that the Bahia's plan for expansion, which proposed to eliminate Gleason Road, was inconsistent with the MB[P]MPU and would require an amendment to the MB[P]MPU to move forward with the lease amendment." (*Id.* ¶¶ 80-81).

Defendant Browning, the president of Local 30, "met individually with City Councilmembers and demanded that they revoke or change their positions regarding the proposed Bahia lease amendment unless Evans Hotels agreed to meet with Ms. Browning." (*Id.* ¶ 83). On February 16, 2018, a Councilmember told Bill Evans that the Bahia needed to sign a card check neutrality agreement if Evans wanted the Councilmember to support the proposed lease amendment. The Councilmember told Evans that "Browning 'pressured' [her] by conditioning future funding and political support . . . on a quid pro quo agreement to oppose the Bahia unless Evans Hotels agreed to sign a card check neutrality agreement." (*Id.* ¶ 87).

On June 30, 2018, Defendant Browning sent Defendant Lemmon, the business manager of Defendant Building Trades, to meet with Evans. Building Trades consists of affiliated construction and trade unions in San Diego. Lemmon told Evans that "Evans

1 Hotels needed to sign a card check neutrality agreement with Ms. Browning and Local 30."
2 (*Id.* ¶ 92). "When Mr. Evans made it clear that Evans Hotels would not voluntarily sign a
3 card check neutrality agreement, the discussion quickly shifted to greenmail and other
4 union tactics." (*Id.*). Lemmon "admitted" that the unions were engaging in "greenmail" but
5 stated that the union would "cover its tracks if Evans Hotels agreed to the neutrality
6 agreement by requiring a couple of 'small mitigation measures.'" (*Id.*). Lemmon "made it
7 clear . . . that Local 30 and its allies . . . intended to use CEQA and other environmental
8 challenges to hold the Bahia redevelopment project hostage." (*Id.*). Lemmon threatened "if
9 [Evans] did not give in to Ms. Browning, his project would be doomed as the union would
10 hold it up by any and all means . . . ." (*Id.*).

11 Plaintiffs "refused to acquiesce to Defendants' threats and demands." (*Id.* ¶¶ 110,
12 91). In October 2018, Plaintiffs learned that the proposed lease amendment had not been
13 calendared on the City Council's agenda, despite requests from Plaintiffs. Thereafter, on
14 October 19, 2018, Lemmon sent a text message to Browning and Robert Gleason, the CEO
15 of Evans Hotels, telling Browning to "send [Gleason] [the] card check language in advance
16 . . . . I got the feeling he's gonna need it." Lemmon texted Browning and Gleason that he
17 would "like to see all construction and future maintenance be done by union signatory
18 contractors." (*Id.* ¶ 98).

19 In November 2018, City Council President Myrtle Cole told Evans the City Council
20 refused to schedule the hearing on the proposed lease amendment because "the unions had
21 given her 'hundreds of thousands of dollars to win [the upcoming election]' and that they
22 (Ms. Browning and Mr. Lemmon) would be upset if the Bahia was able to get docketed
23 before the new City Councilmembers took office." (*Id.* ¶ 120).

24 On November 27, 2018, Evans Hotel CEO Gleason met with Browning, Lemmon,
25 and the political director for Building Trades. Lemmon told Gleason that "the union is a
26 business and its objective is to sign up members via a signed PLA and card check neutrality
27 agreement." (*Id.* ¶ 122). Gleason asked why Evans Hotels should sign a card check
28 neutrality agreement and PLA, and Browning responded, "[S]o that you can go forward

with your project." (*Id.*). Lemmon and Browning stated that "they had the vote on the new City Council President 'all locked up' and future City Councils would be even worse." (*Id.*). Lemmon told Gleason that the union's conduct was like a "grenade with the pin on the table" and "threatened that although the 'pin' had been taken out of the grenade, there was still time to put it back in." (*Id.*). Browning "cit[ed] her sham environmental suit with the Cisterra development and the affordable accommodation challenge she pulled out of 'thin air' to oppose the Sunroad development" and "assured Evans Hotels that they would stop at nothing to prevent the Bahia from going forward." (*Id.*).

While Defendants "successfully carr[ied] out Part 1 of their playbook and delay[ed] a vote on the Bahia lease amendment, Defendants further turned up the volume by implementing Part 2." (*Id.* ¶ 99). "At the same time that Defendants were drumming up environmental opposition, strong-arming City Council officials to impose unlawful conditions and delay hearings, and posting false messages on its website, they also turned up the heat by going after Evans Hotels' business partners, specifically Sea World LLC" ("Sea World"). (*Id.*).

In January 2018, Evans Hotels and Sea World entered a formal joint venture agreement to develop, own, and operate a Sea World hotel. Throughout June and July 2018, Sea World's environmental consultant, Allison Rolfe, relayed to Sea World:

> [I]f SeaWorld continued its partnership with Evans Hotels, SeaWorld would face severe opposition from the unions and other union allies in connection with its plan to open new attractions every year. Defendants not only would interfere with SeaWorld's ability to get approval for a master plan amendment at City Council and the Coastal Commission (the usual greenmail), but would also drum up negative publicity against SeaWorld designed to undermine SeaWorld's reputation and public image. The message to SeaWorld was clear: either terminate your deal with Evans Hotels or face years of delay in getting future attractions approved and immeasurable damage to your image, reputation, and business in San Diego.

(*Id.* ¶ 110). Sea World abandoned its joint venture with Evans Hotels on September 19, 2018. "[A] SeaWorld executive confirmed to David Cherashore, Executive Board Member

of Evans Hotels, that the reason why the Board of Directors terminated the Joint Venture with Evans Hotels was because the unions threatened to target SeaWorld . . . .” (*Id.* ¶ 119).

Defendants’ actions opposing the Bahia lease amendment, threatening to file environmental challenges, and conditioning political support on City Council votes are part of a pattern Defendants engage in “to use unlawful measures to unionize all labor in the construction and operation of hospitality properties in San Diego.” (*Id.* ¶ 4). Defendants have been using “extortion, bribery, and secondary pressure” to ensure that “no new development in the hospitality industry can move forward without agreeing to a PLA with the Building Trades and a card check neutrality agreement with Local 30.” (*Id.* ¶¶ 39, 48). Over the past ten years, Defendants “targeted” ten non-union developments. (*Id.* at 26; ¶ 50). Defendants use their “playbook” of tactics including “opposing projects on numerous, yet dubious grounds; filing voluminous objections to projects (also on dubious grounds); and pursuing sham lawsuits that are immediately abandoned once Defendants obtain PLAs and card check neutrality agreements.” (*Id.* ¶¶ 55-56).

II. MOTIONS TO DISMISS

Defendants move to dismiss Plaintiffs’ Amended Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for “failure to state a claim upon which relief can be granted.” In order to state a claim for relief, a pleading “must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) “is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (quotation omitted).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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 (citation omitted). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. P. 8(a)). A court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotation omitted).

B. Discussion

Defendants contend that the facts alleged in the Amended Complaint fail to state a claim under the LMRA, the Sherman Act, RICO, or California state law. Defendants contend that Plaintiffs' claims are based on petitioning activity, which is immune from liability under the *Noerr-Pennington* doctrine.

Plaintiffs contend that the *Noerr-Pennington* doctrine does not bar the claims alleged in the Amended Complaint, because the claims are based on Defendants' non-petitioning threats, rather than protected petitioning activity. Plaintiffs contend that even if Defendants' alleged conduct constitutes petitioning activity, the activity falls within the "sham exception" to *Noerr-Pennington* immunity. (ECF No. 35 at 31).

"[T]he *Noerr-Pennington* doctrine requires that, to the extent possible, [courts] construe federal statutes so as to avoid burdens on activity arguably falling within the scope of the Petition Clause of the First Amendment." *Sosa v. DIRECTTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006). "Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for

their petitioning conduct." *Id.* at 929 (citing *Empress LLC v. City & Cty. of S.F.*, 419 F.3d 1052, 1056 (9th Cir. 2005)). Petitioning activity is immune from statutory liability "notwithstanding the fact that the[ ] activity might otherwise be proscribed by the statute involved." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000).

The *Noerr-Pennington* doctrine arises from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). These cases established that the Petition Clause of the First Amendment of the United States Constitution insulates petitioning conduct from liability under the Sherman Act, regardless of the petitioner's anticompetitive purpose or intent. *See Noerr*, 365 U.S. at 138; *Pennington*, 381 U.S. at 669-72. "While the *Noerr-Pennington* doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore . . . applies equally in all contexts." *White*, 227 F.3d at 1231 (citations omitted).

Today, "the *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa*, 437 F.3d at 931. "Under the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Id.* The *Noerr-Pennington* doctrine has been extended beyond the statutory context to apply to state common law torts based on activity that implicates the Petition Clause. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007-08 (9th Cir. 2008). The protection afforded by the *Noerr-Pennington* doctrine is not absolute. Where petitioning activity is "a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business relationships of a competitor," immunity does not apply. *Noerr*, 365 U.S. at 144.

In determining whether the *Noerr-Pennington* doctrine immunizes a defendant's conduct from liability, the court applies a three-step test. *Sosa*, 437 F.3d at 930 (citing *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 530-37 (2002)). First, the court determines

whether the plaintiff's lawsuit burdens the defendant's petitioning activities. *Sosa*, 437 F.3d at 930, 932 (citations omitted). Second, "examin[ing] the precise petitioning activity at issue, [the court] determine[s] whether the burden on that activity implicate[s] the protection of the Petition Clause." *Id.* at 930 (citation omitted). Third, the court determines whether the laws the plaintiff is suing under may be construed to preclude the burden on petitioning activity. *Id.* (citation omitted).

The plaintiff has the burden to state factual allegations that show the defendant's conduct falls outside the protection of *Noerr-Pennington*. *See Boone v. Redevelopment Agency 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."); *Sosa*, 437 F.3d at 942 (affirming order dismissing plaintiff's claims without leave to amend for failure to state a claim under Rule 12(b)(6) where the plaintiff alleged activity "arguably falling within the scope of the Petition Clause of the First Amendment").

"[I]n order to state a claim for relief . . . a complaint must include allegations of the specific activities" the defendant engaged in that deprive the defendant's conduct of *Noerr-Pennington* protection. *Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd.*, 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1997). "[T]he danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Id.* at 1088. "Where a claim involves the right to petition governmental bodies under *Noerr-Pennington*, [ ] we apply a heightened pleading standard." *See Or. Natural Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). "Conclusory allegations are not sufficient to strip a defendant's activities of *Noerr-Pennington* protection." *Id.* (citation omitted).

1. Step One – Burden on Petitioning Activity

At step one of the *Noerr-Pennington* inquiry, the court determines whether the plaintiff's lawsuit burdens the defendant's petitioning activities. *Sosa*, 437 F.3d at 930, 932 (citations omitted). In this case, Plaintiffs' lawsuit seeks to impose liability under the

LMRA, the Sherman Act, RICO, and California state extortion and interference with contract law. Plaintiffs base their claims on factual allegations involving the following activities by Defendants: 1) sending letters and lobbying City Councilmembers to oppose the Bahia lease amendment; 2) posting on a website and Facebook page that the proposed Bahia redevelopment violates the MBPMPU; 3) threatening to continue to oppose the Bahia redevelopment, including by filing CEQA challenges, if Plaintiffs refuse to sign a card check neutrality agreement and PLA; and 4) threatening Sea World that Defendants will oppose future Sea World projects at the Coastal Commission and City Council and engage in a negative publicity campaign against Sea World if Sea World continued its partnership with Evans Hotels. A successful suit by Plaintiffs in this case would burden each of Defendants' alleged activities, including Defendants' ability to petition the City Council, file lawsuits, and create web content aimed at influencing public opinion. A successful lawsuit by Plaintiffs would further burden Defendants' ability to resolve issues short of the often expensive and time-consuming process of lobbying, litigating, and campaigning. If liability may be imposed for making demands prior to directly petitioning a governmental body, parties would be deterred from attempting to resolve problems on their own before seeking government relief. *See Sosa*, 437 F.3d at 932-33 (holding that a successful RICO suit would burden the defendant's ability to send pre-suit demand letters and settle claims short of filing a lawsuit). The Court finds that Plaintiffs' lawsuit will burden Defendants' petitioning activity.

2. Step Two – Petition Clause Protection

At step two of the *Noerr-Pennington* inquiry, the court determines whether the burden on the defendant's petitioning activity "implicate[s] the protection of the Petition Clause." *Sosa*, 437 F.3d at 930. To decide whether the Petition Clause is implicated, the court "first determine[s] whether the activities of [the defendant] are of the type that the *Noerr-Pennington* doctrine seeks to protect and then discuss[es] whether any exceptions to the *Noerr-Pennington* protections apply." *Boone*, 841 F.2d at 894.

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a. Petitioning Activity

Plaintiffs contend that Defendants engaged in non-petitioning conduct that does not implicate the Petition Clause. Plaintiffs contend that Defendants made "direct threats" to Plaintiffs and Sea World that "are not sufficiently related to petitioning activity" to warrant *Noerr-Pennington* protection. (ECF No. 35 at 31-32). Plaintiffs contend that Defendants' threat to oppose the Bahia lease amendment unless Plaintiffs sign a PLA and card check neutrality agreement is not protected petitioning activity. Plaintiffs contend that Defendants' threats to oppose Sea World projects and "drum up negative publicity" against Sea World if Sea World continued to work with Plaintiffs is not protected petitioning activity. (*See* ECF No. 19 ¶ 110).

Defendants contend that Plaintiffs' allegations are based on Defendants' protected petitioning activity. Defendants contend that their opposition to the Bahia lease amendment, including sending letters to City Council and directly petitioning City Councilmembers, is protected lobbying activity. Defendants contend that threatening to continue to oppose the Bahia lease amendment is protected petitioning activity. Defendants contend that threatening to petition the Coastal Commission and City Council and to engage in a negative publicity campaign against Sea World is protected petitioning activity.

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). To give "adequate breathing space to the right of petition," *Sosa*, 437 F.3d at 934, *Noerr-Pennington* also protects conduct that is "incidental to a valid effort to influence governmental action." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 499 (1988). "[C]ommunications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity." *Sosa*, 437 F.3d at 935.

Plaintiffs allege in the Amended Complaint that Defendant Lemmon threatened "to use CEQA and other environmental challenges to hold the Bahia redevelopment hostage."

(ECF No. 19 ¶ 92). Plaintiffs allege that Defendant Lemmon threatened Evans that "if [Evans] did not give in to Ms. Browning, his project would be doomed as 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.*). Plaintiffs allege Defendant Lemmon threatened that there was "still time to put [the pin] back in" the "grenade" and that Defendant Browning said the unions "would stop at nothing to prevent the Bahia from going forward." (*Id.* ¶ 122). Plaintiffs allege that Defendants threatened, through Sea World's environmental consultant, Allison Rolfe, that

> if SeaWorld continued its partnership with Evans Hotels . . . Defendants . . . would interfere with SeaWorld's ability to get approval for a master plan amendment at City Council and the Coastal Commission . . . [and] drum up negative publicity against SeaWorld designed to undermine SeaWorld's reputation and public image.

(*Id.* ¶ 110). Plaintiffs allege that Rolfe "related [that] . . . Defendants would target . . . SeaWorld" (*id.* ¶ 122) and that "[o]n information and belief, Ms. Rolfe was sent by Defendants to communicate the message that . . . [Defendants] would come after SeaWorld . . ." (*id.* ¶ 108).

Threats to file a lawsuit fall within the scope of the Petition Clause. *See Rock River Communcs., Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 351 (9th Cir. 2014) (sending cease and desist letters and making threats to litigate against plaintiff's business partner are immune unless the threatened lawsuit is a sham). The alleged threats to lobby the City Council, file CEQA lawsuits, petition the Coastal Commission, and engage in a negative publicity campaign are "the type[s] of activit[ies] that typically arise[] only in the context of contemplated petitioning activity." *Sosa*, 437 F.3d at 936. Plaintiffs allege that Defendants are threatening to engage in petitioning activity. *See USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 810 (9th Cir. 1994) (filing a series of lawsuits is petitioning conduct); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1061-62 (9th Cir. 1998) (petitioning an administrative agency falls within the scope of *Noerr-Pennington*); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 88 (9th Cir. 1982) (lobbying the legislature is petitioning); *Boone*, 841 F.2d at 895 (a negative publicity

1 campaign is protected by *Noerr-Pennington* unless it is a sham, not genuinely intended to
2 influence government action). Threats to file a lawsuit, to lobby, file CEQA challenges,
3 and engage in a negative publicity campaign are incidental to petitioning activity and fall
4 within the scope of the Petition Clause.
5 In regard to Plaintiffs' allegations that Defendant Lemmon threatened Evans that
6 "his project would be doomed as the union would hold it up by any and all means," that
7 there was "still time to put [the pin] back in" the "grenade," and that Defendant Browning
8 said the unions "would stop at nothing to prevent the Bahia from going forward," (ECF
9 No. 19 ¶¶ 92, 122), each alleged threat was made in the context of petitioning activity. The
10 alleged threat that the Bahia would be "doomed" was made in the context of Defendant
11 Lemmon discussing the union's lawyers sending letters to the City Council and filing
12 CEQA challenges. The alleged "grenade" comment was made in the context of Defendants
13 discussing lobbying the City Council. Defendant Browning's statement that Defendants
14 "would stop at nothing" was made in the context of Defendants discussing past lawsuits.
15 The Court cannot infer, from the facts alleged, that Defendants' "threats" to Plaintiffs fall
16 outside the scope of the Petition Clause. *See Affordable Hous. Dev. Corp. v. City of Fresno*,
17 CIV F 97-5498 DWW SMS, 2001 U.S. Dist. LEXIS 26378, at *64 (E.D. Cal. Nov. 9, 2001)
18 (holding the defendant's threat that the plaintiff "might have some problems down the road
19 if [defendant] did not get his way" was a threat of a "political nature" protected by the
20 *Noerr-Pennington* doctrine). The Court cannot infer that these alleged threats would
21 constitute actional conduct under the LMRA, Sherman Act, RICO, or California state law.
22 *See Kottle*, 146 F.3d at 1064 (holding that the plaintiff's "vague allegations of
23 misrepresentations are [] insufficient to overcome *Noerr-Pennington* protection").
24 The same conclusion applies to Plaintiffs' allegations that Sea World's
25 environmental consultant, Allison Rolfe, "related [that] . . . Defendants would target . . .
26 Sea World," (ECF No. 19 ¶ 122), and that "[o]n information and belief, Ms. Rolfe was sent
27 by Defendants to communicate the message that . . . [Defendants] would come after Sea
28 World . . ." (*id.* ¶ 108). Assuming that Defendants made the exact statements alleged—

1 rather than Rolfe's interpretation of Defendants' statements—the Court cannot infer that
2 Defendants threatened any actionable conduct outside the protection of *Noerr-Pennington*.
3 The alleged statements were made along with "threats" to lobby the City Council, petition
4 the Coastal Commission, and drum up negative publicity. Viewing the alleged threats,
5 communicated by Rolfe, in the light most favorable to Plaintiffs, Plaintiffs' allegations fall
6 short of the "specific activities" Plaintiff must allege that do not constitute petitioning
7 conduct or conduct incidental to petitioning activity. *Franchise Realty Interstate Corp.*,
8 542 F.2d at 1082. Defendants' conduct as alleged in the Amended Complaint is protected
9 by the *Noerr-Pennington* doctrine unless it falls within the sham exception.

10 b. <u>Sham Exception</u>

11 At step two of the *Noerr-Pennington* analysis, the court determines whether the
12 plaintiff has stated facts that show the defendant's petitioning activity is a sham to cover
13 "an attempt to interfere directly with the business relationships of a competitor." *Noerr*,
14 365 U.S. at 144; *Boone*, 841 F.2d at 894; *Mohla*, 944 F.2d 534.

15 *i. Serial Petition Sham Exception*

16 Plaintiffs contend that Defendants' efforts to delay or block non-union
17 developments—by lobbying, posting website content, writing letters, filing lawsuits, and
18 initiating environmental challenges—show a pattern of "sham activity" under the serial
19 petitioning sham exception. (ECF No. 35 at 34-35). Plaintiffs contend that Defendants'
20 threat to engage in serial petitioning against Sea World falls within the sham exception to
21 the *Noerr-Pennington* doctrine. Plaintiffs contend that "Defendants can have no
22 objectively reasonable grounds for opposing SeaWorld developments before they are even
23 proposed." (ECF No. 35 at 38).

24 Defendants contend that the Court may only consider actions brought against
25 Plaintiffs, not actions brought against unrelated entities, in determining whether a series of
26 petitions falls within the sham exception. Defendants further contend that their past
27 petitions had merit. Defendants contend that Plaintiffs fail to "state a claim by merely
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assuming—and alleging in a conclusory fashion—" that any petitioning against Sea World would be a sham. (ECF No. 29-1 at 25).

The test courts apply to determine whether the sham exception applies differs depending on the type of governmental entity involved in the petitioning activity. *Kottle*, 146 F.3d at 1060. Where the branch of government is a court of law, the plaintiff must demonstrate one of three circumstances: 1) where the plaintiff alleges a single action constitutes sham petitioning, the plaintiff must demonstrate the lawsuit was both "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and a concealed "attempt to interfere with the directly with the business relationships of a competitor," *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993) (quotation omitted); 2) where the defendant is alleged to have brought a series of legal proceedings, the plaintiff must demonstrate that the lawsuits were brought "pursuant to a policy of starting legal proceedings without regard to the merits and for the purposes of injuring a market rival," i.e., "for purposes of harassment," *USS-POSCO Indus.*, 31 F.3d at 811; or 3) where the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, the plaintiff must demonstrate the "'party's knowing fraud upon, or its intentional misrepresentation to, the court deprive the litigation of its legitimacy.'" *Kottle*, 146 F.3d at 1060 (quoting *Liberty Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993)).

The serial petition sham exception applies only to petitions to a court or adjudicatory administrative agency and conduct incidental to filing a petition. It does not apply to lobbying. *Kottle*, 146 F.3d at 1061. Where a plaintiff alleges a series of sham lawsuits against entities other than the plaintiff, the lawsuits "are relevant only to the extent that they demonstrate that [the defendant] was improperly motivated in filing its lawsuit against [the plaintiff]." *Mohla*, 944 F.2d at 534.

Plaintiffs allege that, over the past ten years, Defendants filed 1) a petition for writ of mandate alleging that the financing plan for the proposed San Diego Convention Center expansion was illegal; 2) a CEQA lawsuit regarding the San Diego Convention Center

expansion; 3) a "sham CEQA suit" related to the Cisterra development (ECF No. 19 ¶ 57); 4) an appeal of the Port of San Diego's determination to exclude the Sunroad restaurant from coastal development permit requirements; 5) an appeal to the Coastal Commission of permit approval for the Hotel Del Coronado; 6) a CEQA complaint related to the Hotel Del Coronado; and 7) an appeal of the City Council's water easement determination for the San Diego Marriott Marquis & Marina on CEQA grounds. Plaintiffs allege that Defendants abandoned these challenges, and in some cases provided support for the developments, once the developers agreed to sign favorable union agreements. Plaintiffs allege that Defendants communicated through Allison Rolfe that Defendants would "interfere with SeaWorld's ability to get approval for a master plan amendment at . . . the Coastal Commission . . ." unless Sea World terminated its agreement with Evans Hotels. (*Id.* ¶ 110).

Under the serial petition test, Plaintiffs fail to allege facts from which the Court can infer that Defendants' past filings against other San Diego developments demonstrate that Defendants were improperly motivated in filing any lawsuit against Plaintiffs. *Mohla*, 944 F.2d at 534. In this case, Defendants have not filed any lawsuit against Plaintiffs. Moreover, the Court cannot conclude that Defendants filed the allegedly sham past lawsuits, or threatened to file future lawsuits, to "injure a market rival." *USS-POSCO Indus.*, 31 F.3d at 811. Unions and hotel developers are not market rivals. *See* ECF No. 19 ¶ 122 ("[T]he union is a business and its objective is to sign up members . . . ."). The serial petition sham exception does not apply.

Even if the Court examines Defendants' alleged threat to "interfere with SeaWorld's ability to get approval for a master plan amendment at . . . the Coastal Commission . . . ," (ECF No. 19 ¶ 110), under the "objectively baseless" standard for single petitions, as Plaintiffs request, Plaintiffs fail to state facts from which the Court can infer Defendants' threat was a sham. Plaintiffs request the Court conclude that *any* future Coastal Commission petition filed by Defendants against Sea World would be objectively baseless, without stating "specific allegations" that show the petitions would be meritless. *See Theme*

Promotions, Inc., 546 F.3d at 1007 (explaining that a pre-suit demand letter is a sham if the threatened litigation is objectively baseless). Defendants' subjective motivations are irrelevant unless Defendants could not "realistically expect success on the merits" of a petition. *See White*, 227 F.3d at 1232 (holding that "a court may not even consider the defendant's allegedly illegal objective unless it first determines that his lawsuit was objectively baseless). Plaintiffs have not met their burden to state facts that show Defendants' alleged threat against Sea World to petition the Coastal Commission in the future falls within the sham exception to the *Noerr-Pennington* doctrine.

ii. Lobbying Sham Exception

Plaintiffs contend they have "sufficiently alleged that Defendants' lobbying efforts were not genuinely intended to block the Bahia redevelopment, but rather intended to secure a card check neutrality agreement and a PLA." (ECF No. 35 at 35). Plaintiffs contend that "Defendants admit that if Evans accedes to Defendants' demands for a PLA and card check neutrality agreement, they will—as they have with other developers—drop their opposition and support the development." (*Id.* at 36). Plaintiffs contend that Defendants' lobbying is objectively baseless, because the MBPMPU does not require that Gleason Road be retained. Plaintiffs contend that Defendants' threats to lobby against Sea World and engage in a negative publicity campaign are a sham to coerce Plaintiffs to agree to Defendants' demands.

Defendants contend that their lobbying is "effectively beyond the sham exception," even if the Court applies the "objectively baseless" standard. (ECF No. 29-1 at 22-23).

When the branch of government is the legislature, "the sham exception is extraordinarily narrow." *Kottle*, 146 F.3d at 1061. It is "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 the defendant's conduct. *Id.* "Misrepresentations are a fact of life in politics." *Id.* at 1062 (citation omitted). "[T]he political arena has a higher tolerance for outright lies than the judicial arena does." *Id.* at 1061. The scope of the lobbying sham exception is "limited to situations where the

defendant is not seeking official action by a governmental body, so that the activities complained of are nothing more than an attempt to interfere with the business relationships of a competitor." *Franchise Realty Interstate Corp.*, 542 F.2d at 1081 (quotation omitted).

Lobbying falls within the sham exception "when persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 380 (1991) (emphasis in original). "A 'sham' situation involves a defendant whose activities 'are not genuinely aimed at procuring favorable governmental action' at all, not one 'who genuinely seeks to achieve his governmental result, but does so through improper means.'" *Id.* (quoting *Indian Head*, 486 U.S. at 500 n. 4, 508 n. 10) (emphasis omitted). In *Omni Outdoor Advertising*, for example, the Court determined the sham exception to the *Noerr-Pennington* doctrine did not apply to a billboard company lobbying the city council to enact zoning ordinances that would restrict the construction of new billboards, thus shutting out the company's competitors. 499 U.S. at 368, 382. The Court found:

> Although [defendant] indisputably sought to disrupt [plaintiff's] business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances.

Id. at 381 (emphasis in original). Lobbying is not a sham unless the anticompetitive result "is sought to be achieved only by the lobbying process itself, and not by the governmental action the lobbying seeks." *Id.*

Plaintiffs allege Defendants 1) sent a letter to the Mayor and City Councilmembers expressing concern "regarding the lack of transparency and access to information pertaining to environmental review of the proposed Lease Amendment" (ECF No. 19 ¶ 80); 2) sent a letter to the Mayor and City Council arguing that the proposed elimination of Gleason Road as part of the Bahia redevelopment is inconsistent with the MBPMPU; 3) "created and sponsored a website, 'nomissionbaylandgrab.org' and a related Facebook page to disseminate the false message that the Bahia redevelopment violates the

MB[P]MPU" (*id.* ¶¶ 82; 93); 4) met with City Councilmembers to demand that they revoke or change their position regarding the Bahia lease amendment unless Evans Hotels agreed to meet with Defendant Browning and sign a card check neutrality agreement and/or PLA; and 5) demanded the Mayor and City Council delay and not docket the vote on the proposed lease amendment.[2] Plaintiffs allege that Defendants made "threats" to Sea World, through Allison Rolfe, that Defendants would oppose Sea World's future projects at the City Council and engage in a negative publicity campaign. Plaintiffs allege that Defendants' "message to SeaWorld" was that if Sea World did not terminate the agreement with Evans Hotels, the unions would make sure Sea World faced years of delay in opening new attractions. (*Id.* ¶ 110). Plaintiffs allege that Allison Rolfe related that "if Evans Hotels agreed to a deal with Ms. Browning . . . the environmental opposition would resolve itself at the Bahia and Defendants would not target Sea World." (*Id.* ¶ 109). Plaintiffs allege that Defendant Browning encouraged Evans to sign a card check neutrality agreement and PLA "so that you can go forward with your project." (*Id.* ¶ 122).

The Court cannot infer from these allegations that Defendants were "not seeking official action by a governmental body"—that is, that Defendants were not seeking City Council action to stop or delay the Bahia redevelopment. *Franchise Realty Interstate Corp.* 542 F.2d at 1081 (quotation omitted). Plaintiffs' allegations that Defendants participated in the lobbying process for the purpose of coercing Plaintiffs' to sign a card check neutrality agreement and PLA are conclusory. The Court cannot infer from the facts alleged that Defendants were indifferent to the outcome of their lobbying.[3] *Omni Outdoor Adver.*, 499 U.S. at 380.

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[2] Defendants request the Court take judicial notice of fifteen documents related to Defendants' lobbying efforts. (ECF No. 29-2). Judicial notice of the requested documents is unnecessary for this Order. Defendants' request for judicial notice is denied. *See Asvesta v. Petroustas*, 580 F.3d 1000, 1010 n. 12 (9th Cir. 2009) (denying request for judicial notice where judicial notice would be "unnecessary").

[3] Even if Defendants' interpretation of the MBPMPU was incorrect or false, the "extraordinarily narrow" lobbying sham exception would still not apply. *Kottle*, 146 F.3d at 1061; *see Boone*, 841 F.2d at 894

For these same reasons, Plaintiffs fail to allege facts that show Defendants' alleged threat to engage in a future negative publicity campaign against Sea World would not genuinely be aimed at procuring favorable government action. *Manistee Town Ctr.*, 227 F.3d at 1094. The Court cannot infer that lobbying the City Council to deny future Sea World development would not be aimed at securing denial of the development. The Court cannot infer from Plaintiffs' allegations that future lobbying or publicity campaigns fall within the sham exception to the *Noerr-Pennington* doctrine. *See Plumbers v. Pipefitters Local 32 v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990) (the court may not presume from a threat to picket a jobsite that the picketing would be done in an unlawful manner); *see also Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (explaining that "enjoining or preventing First Amendment activities before demonstrators have acted illegally . . . is presumptively a First Amendment violation").

Moreover, even if Plaintiffs stated facts sufficient to allege Defendants used the lobbying process without regard for favorable government action, Plaintiffs do not state facts sufficient for the Court to infer that Defendants' conduct was an "attempt to interfere with the business relationships of a competitor," because hotel operators and developers and labor unions are not competitors. *Franchise Realty Interstate Corp.*, 542 F.2d at 1081 (quotation omitted).

Plaintiffs have not met their heightened burden to allege facts sufficient to show that Defendants' lobbying and related conduct was a sham.

iii. Bribery

Plaintiffs contend that Defendants bribed City Councilmembers, an illegal act not protected by the *Noerr-Pennington* doctrine. (ECF No. 35 at 38).

(attempts to influence public officials are protected by *Noerr-Pennington* even though the attempts "may occasionally result in deception of the public, manufacture of bogus sources of relevance, [and] distortion of public sources of information") (quotation omitted) (alteration in original).

Defendants contend that Plaintiffs have not pled facts that state a claim for bribery. (ECF No. 41 at 13).

Courts treat illegal acts, such as fraud and bribery, "as analogous to the sham petitioning activity." *Clipperxxpress v. Rocky Mountain Motor Tariff Bureau*, 674 F.2d 1252, 1266 n. 23 (9th Cir. 1982), *overruled in part on other grounds by Mayle v. Felix*, 545 U.S. 644 (2005). Plaintiffs allege that the City Council President told Evans that "the unions had given her 'hundreds of thousands of dollars to win this thing' and that they (Ms. Browning and Mr. Lemmon) would be upset if the Bahia was to get docketed before the new City Councilmembers took office." (ECF No. 19 ¶ 40). Plaintiffs allege that Lemmon stated he "own[s] five city councilmembers." (*Id.* ¶ 47 n. 2). Plaintiffs allege that Browning "'pressured' Councilmember I by conditioning future funding and political support for Councilmember I on a quid pro quo agreement to oppose the Bahia unless Evans Hotels agreed to sign a card check neutrality agreement." (*Id.* ¶ 87).

Plaintiffs' allegations are conclusory and insufficient to state a bribery claim. "Payments to public officials in the form of . . . campaign contributions, is a legal and well-accepted part of our political process." *Boone*, 841 F.2d at 895; *see id.* ("We do not condone the giving or acceptance of campaign contributions as inducements to support the donor's interests in the legislative process. We merely hold that this conduct was not intended to be covered by the Sherman Act." (quoting *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 231 (7th Cir. 1975))). The Court cannot infer from Plaintiffs' allegations that Defendants' monetary support for any City Councilmember constitutes bribery.

Plaintiffs have not met their burden to state facts that show Defendants' petitioning conduct falls within the sham exception to the *Noerr-Pennington* doctrine.

c. Step Three – Construing Laws

At step three of the *Noerr-Pennington* analysis, the court determines whether the laws the plaintiff is suing under may be construed to preclude the burden on petitioning activity. *Sosa*, 437 F.3d at 930. (citation omitted). Under the *Noerr-Pennington* doctrine,

1 petitioning activity is immune from liability "unless the statute unavoidable so requires."
2 *Id.* at 940.
3 Plaintiffs' first cause of action is for unlawful secondary boycott in violation of
4 LMRA section 303, which provides that "[i]t shall be unlawful . . . for any labor
5 organization to engage in any activity or conduct defined as an unfair labor practice in
6 section 158(b)(4) of this title." 29 U.S.C. § 187(a). Section 158(b)(4) of the National Labor
7 Relations Act ("NLRA") states that "[i]t shall be an unfair labor practice for a labor
8 organization or its agents to threaten, coerce, or restrain any person engaged in commerce
9 or in an industry affecting commerce, where in either case an object thereof is . . . forcing
10 or requiring any person . . . to cease doing business with any other person." 29 U.S.C. §
11 158(b)(4)(ii). There is nothing in either the LMRA or NLRA that "unavoidably" requires
12 the statutes to be read to include as an unfair labor practice threats to engage in protected
13 petitioning activity. *Sosa*, 437 F.3d at 940. Section 303 of the LMRA and 158(b)(4) of the
14 NLRA are "susceptible to a construction that avoids the serious constitutional question of
15 Petition Clause immunity." *Id.* at 939.
16 Plaintiffs' second and third claims are for attempted monopolization and conspiracy
17 to monopolize in violation of section 2 of the Sherman Act. Section 2 of the Sherman Act
18 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine
19 or conspire with any other person or persons, to monopolize any part of the trade or
20 commerce among the several States . . . shall be deemed guilty of a felony." 15 U.S.C. § 2.
21 The Ninth Circuit has already held that "[j]oint efforts to influence public officials do not
22 violate the antitrust laws even though intended to eliminate competition. Such conduct is
23 not illegal, either standing alone or as part of a broader scheme itself violative of the
24 Sherman Act." *Pennington*, 381 U.S. at 670; *see also Noerr*, 365 U.S. 127 (Sherman Act
25 violation may not be predicated on attempt to influence passage of laws). Accordingly, the
26 Court construes the Sherman Act to preclude liability based on protected petitioning
27 activity.
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Plaintiffs' fourth through seventh claims are for violations of RICO based on extortion, attempted extortion, and conspiracy under 18 U.S.C. § 1951 and sections 518, 522, and 524 of the California Penal Code. In *Sosa*, the court examined these provisions and held that a RICO suit predicated on section 1951 and the California state extortion statutes cannot lie where the conduct alleged to violate the statutes is protected petitioning activity. 437 F.3d at 939. The court held that, although on its face section 1951

> could be read broadly to reach the class of suits at issue here, it need not be so read . . . . Applying the *Noerr-Pennington* statutory construction presumption, we do not believe the Hobbs Act imposes liability for threats of litigation where the asserted claims do not rise to the level of a sham. California's extortion statute . . . is equally susceptible to our narrow reading.

(*Id.* at 939-40). Accordingly, Plaintiffs' RICO claims predicated on federal and California extortion statutes may be construed not to apply to protected petitioning activity.

Plaintiffs' eighth and ninth claims are for interference with contract and attempted extortion under California state law. The Ninth Circuit has held that defendants are not liable for common law claims, like statutory claims, where liability is based on protected petitioning conduct. *See Theme Promotions, Inc.*, 546 F.3d at 1007-08 (holding that "the *Noerr-Pennington* doctrine applies to [plaintiff's] state law tortious interference with prospective economic advantage claims" and "bars [plaintiff's] intentional interference claims"). "'There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.'" *Id.* at 1007 (citing *Video Int'l Prod., Inc. v. Warner-Amex Cable Commuc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988)). Plaintiffs' state law interference with contract claim and attempted extortion claim cannot be based on Defendants' protected activity. *See Theme Promotions, Inc.*, 546 F.3d at 1007 ("[B]ecause *Noerr-Pennington* protects federal constitutional rights, it applies in all contexts, even where a state law doctrine advances a similar goal.").

The Court finds that the laws under which Plaintiffs' allege violations may be read or construed to preclude liability based on protected petitioning conduct under the *Noerr-Pennington* doctrine.

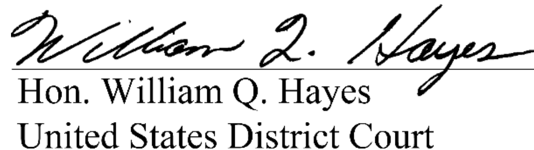
In sum, Plaintiffs have not met their burden to allege specific activities that show Defendants engaged in conduct not protected by the *Noerr-Pennington* doctrine. Plaintiffs' lawsuit will burden Defendants' petitioning activity. Plaintiffs do not allege facts from which the Court can infer that Defendants engaged in non-petitioning activity. Plaintiffs do not allege facts from which the Court can infer that Defendants' petitioning conduct was a sham. Each of the laws Plaintiffs bring claims under may be construed to exclude protected petitioning activity from liability. Accordingly, Defendants' Motion to Dismiss based on the *Noerr-Pennington* doctrine is granted.

III. CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (ECF No. 29) is granted. Plaintiffs' Amended Complaint is dismissed without prejudice.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (ECF No. 31) and Motions to Strike (ECF Nos. 30, 32) are denied as moot. No later than thirty days from the date this Order is filed, Plaintiffs may request leave to amend pursuant to Local Civil Rules 7.1 and 15.1(c). If no motion is filed, the Clerk of Court shall close the case.

Dated: January 7, 2020



Hon. William Q. Hayes
United States District Court