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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 Brigitte Browning (ECF No. 29); 2) the Special Motion to Strike filed by UNITE HERE Local 30 and Brigitte 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).

1       **I. BACKGROUND**

2               **A. Procedural History**

3               On December 7, 2018, Plaintiffs Evans Hotels, LLC (“Evans Hotels”), BH  
4 Partnership LP (“BH”), and EHSW, LLC (“EHSW”), initiated this action by filing a  
5 Complaint against Defendants UNITE HERE Local 30 (“Local 30”), Brigette Browning,  
6 San Diego County Building and Construction Trades Council, AFL-CIO (“Building  
7 Trades”), and Tom Lemmon. (ECF No. 1). Plaintiffs amended the Complaint on March 7,  
8 2019. (ECF No. 19).

9               Plaintiffs bring the following claims in the Amended Complaint: 1) unlawful  
10 secondary boycott in violation of section 303 of the Labor Management Relations Act  
11 (“LMRA”), 29 U.S.C. § 187(a), against Local 30 and Building Trades; 2) attempted  
12 monopolization and conspiracy to monopolize in violation of section 2 of the Sherman Act  
13 against all Defendants; 3) violation of 18 U.S.C. § 1962(e) and conspiring to violate §§  
14 1962(a), (b), and (c) under the Racketeer Influenced and Corrupt Organizations Act  
15 (“RICO”) against all Defendants; and 4) state law interference with contract and attempted  
16 extortion claims against all Defendants. Plaintiffs seek damages, punitive and treble  
17 damages, injunctive relief, attorneys’ fees, costs, and prejudgment interest.

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

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

1 Objections to Local 30 and Browning’s Request for Judicial Notice in support of their  
2 Motion to Dismiss. (ECF No. 36). On June 7, 2019, Local 30 and Browning filed Replies  
3 in support of their Motion to Strike (ECF No. 40), Motion to Dismiss (ECF No. 41), and  
4 Request for Judicial Notice in support of their Motion to Dismiss (ECF No. 42). Building  
5 Trades and Lemmon filed Replies in support of their Motion to Dismiss (ECF No. 43) and  
6 Motion to Strike (ECF No. 44).<sup>1</sup>

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

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

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

14 **B. Allegations in the Amended Complaint**

15 Plaintiff Evans Hotels is a limited liability company that operates three hotels in San  
16 Diego, including the Bahia Resort Hotel (the “Bahia”). Members of the Evans family own  
17 and control Plaintiffs Evans Hotels, ESHW, and BH. BH is the owner of the Bahia. The  
18 Bahia is located on Mission Bay Park, owned by the City of San Diego (the “City”). In the  
19 1950’s, BH and the City entered into a long-term commercial lease agreement for the Bahia  
20 to rent the Mission Bay Park land from the City. Evans Hotels seeks to redevelop and  
21 expand the Bahia. In order to redevelop or expand the Bahia, an amendment to BH’s lease  
22 is required, subject to the Mission Bay Park Master Plan Update (“MBPMPU”), the City’s  
23 comprehensive land use plan for Mission Bay Park.

24 The Bahia does not have a unionized workforce. Plaintiffs allege that in early 2018,  
25 Defendants began to carry out a “playbook” of tactics designed to coerce Plaintiffs to  
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28 <sup>1</sup> The Court will refer to the motions as “Defendants’ motions” because Defendants join each other’s motions.

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

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

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

26 On June 30, 2018, Defendant Browning sent Defendant Lemmon, the business  
27 manager of Defendant Building Trades, to meet with Evans. Building Trades consists of  
28 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

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

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

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

19 [I]f SeaWorld continued its partnership with Evans Hotels, SeaWorld would  
20 face severe opposition from the unions and other union allies in connection  
21 with its plan to open new attractions every year. Defendants not only would  
22 interfere with SeaWorld’s ability to get approval for a master plan amendment  
23 at City Council and the Coastal Commission (the usual greenmail), but would  
24 also drum up negative publicity against SeaWorld designed to undermine  
25 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.

26 (*Id.* ¶ 110). Sea World abandoned its joint venture with Evans Hotels on September 19,  
27 2018. “[A] SeaWorld executive confirmed to David Cherashore, Executive Board Member  
28

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

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

## 15 **II. MOTIONS TO DISMISS**

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

### 19 **A. Legal Standard**

20 Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for “failure  
21 to state a claim upon which relief can be granted.” In order to state a claim for relief, a  
22 pleading “must contain . . . a short and plain statement of the claim showing that the pleader  
23 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) “is proper only  
24 where there is no cognizable legal theory or an absence of sufficient facts alleged to support  
25 a cognizable legal theory.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035,  
26 1041 (9th Cir. 2010) (quotation omitted).

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

1 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
2 “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
3 court to draw the reasonable inference that the defendant is liable for the misconduct  
4 alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted). “[A] plaintiff’s obligation to provide  
5 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and  
6 a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S.  
7 at 555 (quoting Fed. R. Civ. P. 8(a)). A court is not “required to accept as true allegations  
8 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”  
9 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum, for a  
10 complaint to survive a motion to dismiss, the non-conclusory factual content, and  
11 reasonable inferences from that content, must be plausibly suggestive of a claim entitling  
12 the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)  
13 (quotation omitted).

#### 14 **B. Discussion**

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

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

24 “[T]he *Noerr-Pennington* doctrine requires that, to the extent possible, [courts]  
25 construe federal statutes so as to avoid burdens on activity arguably falling within the scope  
26 of the Petition Clause of the First Amendment.” *Sosa v. DIRECTTV, Inc.*, 437 F.3d 923,  
27 942 (9th Cir. 2006). “Under the *Noerr-Pennington* doctrine, those who petition any  
28 department of the government for redress are generally immune from statutory liability for



1 their petitioning conduct.” *Id.* at 929 (citing *Empress LLC v. City & Cty. of S.F.*, 419 F.3d  
2 1052, 1056 (9th Cir. 2005)). Petitioning activity is immune from statutory liability  
3 “notwithstanding the fact that the[ ] activity might otherwise be proscribed by the statute  
4 involved.” *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000).

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

14 Today, “the *Noerr-Pennington* doctrine stands for a generic rule of statutory  
15 construction, applicable to any statutory interpretation that could implicate the rights  
16 protected by the Petition Clause.” *Sosa*, 437 F.3d at 931. “Under the *Noerr-Pennington*  
17 rule of statutory construction, we must construe federal statutes so as to avoid burdening  
18 conduct that implicates the protections afforded by the Petition Clause unless the statute  
19 clearly provides otherwise.” *Id.* The *Noerr-Pennington* doctrine has been extended beyond  
20 the statutory context to apply to state common law torts based on activity that implicates  
21 the Petition Clause. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007-  
22 08 (9th Cir. 2008). The protection afforded by the *Noerr-Pennington* doctrine is not  
23 absolute. Where petitioning activity is “a mere sham to cover what actually is nothing more  
24 than an attempt to interfere directly with the business relationships of a competitor,”  
25 immunity does not apply. *Noerr*, 365 U.S. at 144.

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

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

7 The plaintiff has the burden to state factual allegations that show the defendant's  
8 conduct falls outside the protection of *Noerr-Pennington*. See *Boone v. Redevelopment*  
9 *Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) ("In order not to chill legitimate  
10 lobbying activities, it is important that a plaintiff's complaint contain specific allegations  
11 demonstrating that the *Noerr-Pennington* protections do not apply."); *Sosa*, 437 F.3d at  
12 942 (affirming order dismissing plaintiff's claims without leave to amend for failure to  
13 state a claim under Rule 12(b)(6) where the plaintiff alleged activity "arguably falling  
14 within the scope of the Petition Clause of the First Amendment").

15 "[I]n order to state a claim for relief . . . a complaint must include allegations of the  
16 specific activities" the defendant engaged in that deprive the defendant's conduct of *Noerr-*  
17 *Pennington* protection. *Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd.*, 542  
18 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1997). "[T]he danger that the  
19 mere pendency of the action will chill the exercise of First Amendment rights requires  
20 more specific allegations than would otherwise be required." *Id.* at 1088. "Where a claim  
21 involves the right to petition governmental bodies under *Noerr-Pennington*, [ ] we apply a  
22 heightened pleading standard." See *Or. Natural Res. Council v. Mohla*, 944 F.2d 531, 533  
23 (9th Cir. 1991). "Conclusory allegations are not sufficient to strip a defendant's activities  
24 of *Noerr-Pennington* protection." *Id.* (citation omitted).

### 25 1. Step One – Burden on Petitioning Activity

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

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

## 21 **2. Step Two – Petition Clause Protection**

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

28 ///

1 a. Petitioning Activity

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

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

18 Petitioning activity includes “petitions directed at any branch of government,  
19 including the executive, legislative, judicial and administrative agencies.” *Manistee Town*  
20 *Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000). To give “adequate breathing  
21 space to the right of petition,” *Sosa*, 437 F.3d at 934, *Noerr-Pennington* also protects  
22 conduct that is “incidental to a valid effort to influence governmental action.” *Allied Tube*  
23 *& Conduit Corp. v. Indian Head*, 486 U.S. 492, 499 (1988). “[C]ommunications between  
24 private parties are sufficiently within the protection of the Petition Clause to trigger the  
25 *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity.”  
26 *Sosa*, 437 F.3d at 935.

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

1 (ECF No. 19 ¶ 92). Plaintiffs allege that Defendant Lemmon threatened Evans that “if  
2 [Evans] did not give in to Ms. Browning, his project would be doomed as the union would  
3 hold it up by any and all means—stating ‘we know how to do it, we do it all the time.’”  
4 (*Id.*). Plaintiffs allege Defendant Lemmon threatened that there was “still time to put [the  
5 pin] back in” the “grenade” and that Defendant Browning said the unions “would stop at  
6 nothing to prevent the Bahia from going forward.” (*Id.* ¶ 122). Plaintiffs allege that  
7 Defendants threatened, through Sea World’s environmental consultant, Allison Rolfe, that  
8 if SeaWorld continued its partnership with Evans Hotels . . . Defendants . . .  
9 would interfere with SeaWorld’s ability to get approval for a master plan  
10 amendment at City Council and the Coastal Commission . . . [and] drum up  
11 negative publicity against SeaWorld designed to undermine SeaWorld’s  
reputation and public image.

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

16 Threats to file a lawsuit fall within the scope of the Petition Clause. *See Rock River*  
17 *Communcs., Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 351 (9th Cir. 2014) (sending  
18 cease and desist letters and making threats to litigate against plaintiff’s business partner are  
19 immune unless the threatened lawsuit is a sham). The alleged threats to lobby the City  
20 Council, file CEQA lawsuits, petition the Coastal Commission, and engage in a negative  
21 publicity campaign are “the type[s] of activit[ies] that typically arise[] only in the context  
22 of contemplated petitioning activity.” *Sosa*, 437 F.3d at 936. Plaintiffs allege that  
23 Defendants are threatening to engage in petitioning activity. *See USS-POSCO Indus. v.*  
24 *Contra Costa Cty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 810 (9th Cir. 1994) (filing  
25 a series of lawsuits is petitioning conduct); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d  
26 1056, 1061-62 (9th Cir. 1998) (petitioning an administrative agency falls within the scope  
27 of *Noerr-Pennington*); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 88 (9th Cir.  
28 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. Sham Exception

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  
28

1 assuming—and alleging in a conclusory fashion—” that any petitioning against Sea World  
2 would be a sham. (ECF No. 29-1 at 25).

3 The test courts apply to determine whether the sham exception applies differs  
4 depending on the type of governmental entity involved in the petitioning activity. *Kottle*,  
5 146 F.3d at 1060. Where the branch of government is a court of law, the plaintiff must  
6 demonstrate one of three circumstances: 1) where the plaintiff alleges a single action  
7 constitutes sham petitioning, the plaintiff must demonstrate the lawsuit was both  
8 “objectively baseless in the sense that no reasonable litigant could realistically expect  
9 success on the merits” and a concealed “attempt to interfere with the directly with the  
10 business relationships of a competitor,” *Prof'l Real Estate Investors, Inc. v. Columbia*  
11 *Pictures Indus.*, 508 U.S. 49, 60-61 (1993) (quotation omitted); 2) where the defendant is  
12 alleged to have brought a series of legal proceedings, the plaintiff must demonstrate that  
13 the lawsuits were brought “pursuant to a policy of starting legal proceedings without regard  
14 to the merits and for the purposes of injuring a market rival,” i.e., “for purposes of  
15 harassment,” *USS-POSCO Indus.*, 31 F.3d at 811; or 3) where the alleged anticompetitive  
16 behavior consists of making intentional misrepresentations to the court, the plaintiff must  
17 demonstrate the “party’s knowing fraud upon, or its intentional misrepresentation to, the  
18 court deprive the litigation of its legitimacy.” *Kottle*, 146 F.3d at 1060 (quoting *Liberty*  
19 *Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993)).

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

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



1 expansion; 3) a “sham CEQA suit” related to the Cisterra development (ECF No. 19 ¶ 57);  
2 4) an appeal of the Port of San Diego’s determination to exclude the Sunroad restaurant  
3 from coastal development permit requirements; 5) an appeal to the Coastal Commission of  
4 permit approval for the Hotel Del Coronado; 6) a CEQA complaint related to the Hotel Del  
5 Coronado; and 7) an appeal of the City Council’s water easement determination for the San  
6 Diego Marriott Marquis & Marina on CEQA grounds. Plaintiffs allege that Defendants  
7 abandoned these challenges, and in some cases provided support for the developments,  
8 once the developers agreed to sign favorable union agreements. Plaintiffs allege that  
9 Defendants communicated through Allison Rolfe that Defendants would “interfere with  
10 SeaWorld’s ability to get approval for a master plan amendment at . . . the Coastal  
11 Commission . . .” unless Sea World terminated its agreement with Evans Hotels. (*Id.* ¶  
12 110).

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

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

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

9 *ii. Lobbying Sham Exception*

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

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

22 When the branch of government is the legislature, “the sham exception is  
23 extraordinarily narrow.” *Kottle*, 146 F.3d at 1061. It is “pointless” to ask whether a  
24 lobbying effort was objectively baseless, because there are few, if any, objective standards  
25 in the political realm of legislation against which to measure the defendant’s conduct. *Id.*  
26 “Misrepresentations are a fact of life in politics.” *Id.* at 1062 (citation omitted). “[T]he  
27 political arena has a higher tolerance for outright lies than the judicial arena does.” *Id.* at  
28 1061. The scope of the lobbying sham exception is “limited to situations where the

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

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

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

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

22 Plaintiffs allege Defendants 1) sent a letter to the Mayor and City Councilmembers  
23 expressing concern “regarding the lack of transparency and access to information  
24 pertaining to environmental review of the proposed Lease Amendment” (ECF No. 19 ¶  
25 80); 2) sent a letter to the Mayor and City Council arguing that the proposed elimination  
26 of Gleason Road as part of the Bahia redevelopment is inconsistent with the MBPMPU; 3)  
27 “created and sponsored a website, ‘nomissionbaylandgrab.org’ and a related Facebook  
28 page to disseminate the false message that the Bahia redevelopment violates the

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

15 The Court cannot infer from these allegations that Defendants were “not seeking  
16 official action by a governmental body”—that is, that Defendants were not seeking City  
17 Council action to stop or delay the Bahia redevelopment. *Franchise Realty Interstate Corp.*  
18 542 F.2d at 1081 (quotation omitted). Plaintiffs’ allegations that Defendants participated  
19 in the lobbying process for the purpose of coercing Plaintiffs’ to sign a card check neutrality  
20 agreement and PLA are conclusory. The Court cannot infer from the facts alleged that  
21 Defendants were indifferent to the outcome of their lobbying.<sup>3</sup> *Omni Outdoor Adver.*, 499  
22 U.S. at 380.

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23  
24  
25 <sup>2</sup> Defendants request the Court take judicial notice of fifteen documents related to Defendants’ lobbying  
26 efforts. (ECF No. 29-2). Judicial notice of the requested documents is unnecessary for this Order.  
27 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”).

28 <sup>3</sup> 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

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

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

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

21 *iii. Bribery*

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

24  
25  
26  
27 (attempts to influence public officials are protected by *Noerr-Pennington* even though the attempts "may  
28 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).

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

3 Courts treat illegal acts, such as fraud and bribery, “as analogous to the sham  
4 petitioning activity.” *Clipperxxpress v. Rocky Mountain Motor Tariff Bureau*, 674 F.2d  
5 1252, 1266 n. 23 (9th Cir. 1982), *overruled in part on other grounds by Mayle v. Felix*,  
6 545 U.S. 644 (2005). Plaintiffs allege that the City Council President told Evans that “the  
7 unions had given her ‘hundreds of thousands of dollars to win this thing’ and that they (Ms.  
8 Browning and Mr. Lemmon) would be upset if the Bahia was to get docketed before the  
9 new City Councilmembers took office.” (ECF No. 19 ¶ 40). Plaintiffs allege that Lemmon  
10 stated he “own[s] five city councilmembers.” (*Id.* ¶ 47 n. 2). Plaintiffs allege that Browning  
11 “‘pressured’ Councilmember I by conditioning future funding and political support for  
12 Councilmember I on a quid pro quo agreement to oppose the Bahia unless Evans Hotels  
13 agreed to sign a card check neutrality agreement.” (*Id.* ¶ 87).

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

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

24 c. Step Three – Construing Laws

25 At step three of the *Noerr-Pennington* analysis, the court determines whether the  
26 laws the plaintiff is suing under may be construed to preclude the burden on petitioning  
27 activity. *Sosa*, 437 F.3d at 930. (citation omitted). Under the *Noerr-Pennington* doctrine,  
28

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.  
28

1 Plaintiffs' fourth through seventh claims are for violations of RICO based on  
2 extortion, attempted extortion, and conspiracy under 18 U.S.C. § 1951 and sections 518,  
3 522, and 524 of the California Penal Code. In *Sosa*, the court examined these provisions  
4 and held that a RICO suit predicated on section 1951 and the California state extortion  
5 statutes cannot lie where the conduct alleged to violate the statutes is protected petitioning  
6 activity. 437 F.3d at 939. The court held that, although on its face section 1951

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

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

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



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

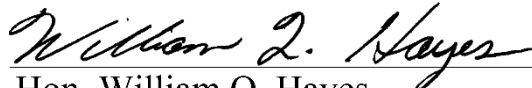
4 In sum, Plaintiffs have not met their burden to allege specific activities that show  
5 Defendants engaged in conduct not protected by the *Noerr-Pennington* doctrine. Plaintiffs’  
6 lawsuit will burden Defendants’ petitioning activity. Plaintiffs do not allege facts from  
7 which the Court can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

12 **III. CONCLUSION**

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

15 IT IS FURTHER ORDERED that Defendants’ Motion to Dismiss (ECF No. 31) and  
16 Motions to Strike (ECF Nos. 30, 32) are denied as moot. No later than thirty days from the  
17 date this Order is filed, Plaintiffs may request leave to amend pursuant to Local Civil Rules  
18 7.1 and 15.1(c). If no motion is filed, the Clerk of Court shall close the case.

19 Dated: January 7, 2020

20   
21 Hon. William Q. Hayes  
22 United States District Court  
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