Case No. 23-55018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE AMY SHERLOCK, on her own behalf and on behalf of her minor Children, T.S. and S.S.,
Petitioners-Appellant,

And

ANDREW FLORES, an individual,
Plaintiff,

v.

GINA M. AUSTIN, an individual; et al.,
Defendants-Appellees.

On Appeal from the United States District Court for
the Southern District of California
No. 20-CV-00656-JO-DEB
The Honorable Jinsook Ohta, United States District Court Judge

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Dated: May 5, 2023

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I. INTRODUCTION

Appellee-Respondents Michael Weinstein, Scott H. Toothacre, Elyssa Kulas, Rachel M. Prendergast, and Ferris & Britton's (Collectively "Appellee") were in involved in the representation of Larry Geraci and Rebecca Berry in *Geraci v. Cotton*, Case No.: 37-2017-00010073-CU-BC-CTL in San Diego Superior Court ("state court action"). Plaintiff-Appellant and Plaintiff-Appellant counsel, Andrew Flores[1], specially appeared and represented the opposing party, Cotton, in various proceedings in the state court action and over time became personally invested in the outcome of that state court action. ER-46,47, 49. In retaliation for the loss of the state court action, Plaintiff-Appellant In Re Amy Sherlock, on her own behalf and on behalf of her minor children, T.S. and S.S. (collectively "Appellant"), via the services of Andrew Flores, brought this suit in District Court against the Appellee for their litigation acts in the state court action i.e. "filing and/or maintaining a lawsuit" to overturn the state court action. ER-37, 42-44, 49, 55, 62.

[1] Flores, who is an attorney, represented himself and Sherlock in the underlying district court proceedings, and also is the attorney of record on this appeal. Although Appellant's Opening Brief indicates that Flores is an appellant, he is not a proper party to this appeal because the Notice of Appeal only designates "Amy Joe Sherlock" as the Appellant. Fed. R. App. P. 3(c)(1)(A); *Tarabochia v. Adkins*, 766 F.3d 1115, 1118 n.1 (9th Cir. 2014); *Torres v. Oakland Scavenger Co.*, 487 U.S. 314, 317 (1988).

Appellant and Mr. Flores, by this appeal, requests that this court overturn the well-reasoned opinion granting the Appellee's Motion to Dismiss with prejudice that the court below reached after significant briefing and oral argument. Appellate Opening Brief ("AOB") p.7. Appellant also seeks to overturn the district court's dismissal of the entire matter due to Appellant's failure to prosecute the matter and refusal to comply with the district court's order to file an amended complaint. *Id.* As to Appellee, Appellant's first amended complaint alleged a claim for violation of civil rights under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and 42 U.S.C. § 1986, and a claim for declaratory relief, requesting the District Court to make various determination concerning the underlying state court actions. Appellee oved to dismiss the Firast Amended Complaint arguing, among other things, that the action against them was barred by the Noerr-Pennington doctrine and that Appellant lacked standing to bring the district court suit. At the hearing of said motion to dismiss, on March 23, 2022, the district court granted Appellee's motion to dismiss with prejudice upon Noerr-Pennington immunity and standing.[2] ER-102-123. Although, the District Court did not expressly rule on these issues, this Court may affirm the dismissal

[2] Appellee also moved to dismiss the First Amended Complaint on the basis that it: (1) failed to allege a viable § 1983, § 1985 and § 1986 claim (ii) failed to alleged facts sufficient to state a cognizable claim for declaratory relief (iii) Appellee's complained of conduct is protected under the California Anti-SLAPP statute. (District Court ("D.C.") ECF No. 21).

on any ground that is supported by the record. Wood v. City of San Diego, 678 F.3d 1075, 1086 (9th Cir. 2012).

In the lower court's ruling on Appellee's motion to dismiss, the district court ruled that Appellee's complained of conduct was protected by the *Noerr-Pennington* doctrine as all complained of conduct was protected petitioning activity. ER-114. Additionally, the district court held that that the Appellant did not allege facts to support standing to bring the suit, thus the district court lacked subject matter jurisdiction. ER-115, 119. Consequently, the Court dismissed the first amended complaint, with prejudice, as to the Appellee due to the *Noerr-Pennington* Doctrine and dismissed, without prejudice, the entire complaint as to all defendants due to a lack of standing. ER-114, 119. The Appellant was ordered to file a second amended complaint by Wednesday May 11, 2022. ER-119-120. The Appellant and Appellant's counsel, Andrew Flores, agreed to file the second amended complaint by May 11, 2022. *Id.*

The Appellant did not file a second amended complaint by May 11, 2022 as ordered by the District Court. ER-127-129. After an inadequate and improper explanation regarding Appellant's refusal to follow the district court's order by Appellant, on December 9, 2022, the District Court dismissed the entire matter for failure to prosecute and comply with the court's orders. ER-124-126; 130-132.

Thus, this appeal is the latest in a long line of attempts by Appellant and Appellant's counsel to use the federal courts to circumvent the proper state court appeals process.

II. JURISDICTIONAL STATEMENT

Pursuant to Ninth Circuit Rule 28-2.2, Appellee submits the following statement of jurisdiction:

A. The District Court did not have subject matter jurisdiction over this action against Appellee because the Appellant lacked Article III standing to bring the action. (U.S. Const. Art. III, § 2; Rucho v. Common Cause, 139 S. Ct. 2484, 2493-2492 (2019).

B. The District Court entered final judgment on all claims for relief in the underlying action on December 9, 2022. (ER 130-132). The judgment is final under Federal Rule of Civil Procedure 41(b) and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

C. Appellant appeals from the District Court's judgment, entered December 9, 2022. (ER 130-132, 143, D.C. ECF No. 52). The Notice of Appeal was filed on January 5, 2023 (ER 133), and is timely pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a).

III. ISSUES PRESENTED

1. Whether Appellee's complained of petitioning activities in filing and/or maintaining a lawsuit fall within the protections of the *Noerr-Pennington* immunity where the claims against them are soley predicated on their petitioning activity?

2. Whether the district court had the authority to the dismiss the action based upon Appellant's unreasonable undue delay of the action and refusal to prosecute due to Appellant's refusal to comply with the district court's order and file an amended complaint?

3. Whether the appeal should be dismissed because Appellant, who was not a party to the two underlying state court actions, but nevertheless filed this federal court action challenging rulings in those cases, lacks Article III standing.

4. Whether Appellant waived her right to appeal the order dismissing Appellee, with prejudice, when she failed to challenge the District Court's ruling in her Opening Brief on appeal.

5. Whether Appellant is precluded from seeking review of the District Court's March 23, 2022, interlocutory order dismissing Appellee with prejudice because said order did not merge with the final judgment, which dismissed the action for failure to prosecute.

IV. STATEMENT OF THE CASE

This action arises out of an unsuccessful underlying agreement for the purchase and sale of real property between Cotton and Co-Defendant Larry Geraci (hereinafter "Geraci"), which resulted in the state court action. Specifically, on March 21, 2017, Geraci, through the legal representation of the Appellees, filed a complaint against Darryl Cotton ("Cotton") in San Diego Superior Court, the state court action, alleging, among other things, that Cotton breached their contract; Cotton cross-complained for, among other things, breach of contract and fraud. ER-37-38; 1-FBSER (Ferris & Britton Supplemental Excerpts of Record)-48-51, 108-144. Appellant's counsel, Andrew Flores, filed a motion to intervene in the state court action, but it was denied. ER-46.

Following a jury trial in the state court action, judgment was entered in favor of Geraci and against Cotton on both the complaint and the cross-complaint. 1-FBSER-72-107. Cotton attempted to appeal the state court decision, but his appeal was dismissed for procedural failures. 1-FBSER-145-204.

Unhappy with the adverse ruling in the state court action, Cotton and Appellant and Appellant counsel Andrew Flores, filed their respective lawsuits in federal court. ER-52, 54; 1-FBSER-145-204. On May 13, 2020, Cotton filed a First Amended Complaint in his federal

suit, which refers to the initial Complaint and events in this matter. Cotton Federal Suit ER-35-37; 1-FBSER-52-71.

Plaintiff's First Amended Complaint added a fourth cause of action against the Appellee, Appellant asserted claims for Violation of Federal Civil Rights pursuant to 42 U.S.C. §§ 1983, 1985, & 1986 and declaratory relief. ER-58-64; WohlfeilSER-92-175. Despite Appellant amending their Complaint, Appellant's allegations still only claim that Appellee represented Geraci in the underlying state court action and carried out petitioning activities. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127. In fact, Appellee Rachel Prendergast is not even mentioned once in the First Amended Complaint. ER-19-101; WohlfeilSER-92-175. Appellee Elyssa Kulas is only mentioned as being a defendant in this suit and as a part of the Appellee law firm Ferris & Britton APC. ER-26; WohlfeilSER-92-175. As such, as Appellant admits in their first amended complaint, all Appellee alleged conduct arises from their lawful litigation activities i.e. "filing and/or maintaining a lawsuit". ER-54; 61; WohlfeilSER-92-175.

Appellant admits that they initiated this matter to re-litigate the existence of the same November 2, 2016 contract that was subject of the state court action and re-litigate the state court action. ER-23; 54; 58-59; WohlfeilSER-127. Appellants also seek to have the federal courts improperly intervene and act as an appellate court for the state

court's judgments and ruling. ER-64; WohlfeilSER-137; 2-FBSER-213.

On July 20, 2020, Appellee filed their motion to dismiss the Appellant's First Amended Complaint. 1-FBSER-7-39. On March 23, 2022, the lower court held that Appellant's claims against Appellee were barred by the Noerr-Pennington Doctrine and thus dismissed the causes of action, with prejudice, against Appellee. ER-114; WohlfeilSER-2-3. The lower court also held that Appellant had not plead facts to support Appellant's standing to bring the suit and dismissed the matter without prejudice to allow Appellant to plead facts supporting standing by filing a second amended complaint by May 11, 2022. ER-115; 119-120. Appellant refused to do so. ER-124-126.

Appellant's explanation for refusing to file a second amended complaint is that "multiple federal judges including this Court had already failed to find the subject state court judgments are void and he believed they were telegraphing their intent that the state courts should find the state court judgments void in order to not embarrass the state court judges." ER-125. Consequently, the lower court held that Appellant had unreasonably delayed the filing of an amended complaint after the First Amended Complaint was dismissed on March 23, 2022. ER-130-132. The lower court also noted that, despite being granted forty-nine days after the dismissal for the amendment, Appellant failed to meet the lower court's deadlines. ER-131.

To this day, over a year after the lower court's order to amend the complaint, Appellant still has not complied with the lower court's order nor requested an extension of time to do so. ER-131. Based on these facts, the lower court found that the public's interest in speedy litigation and the lower court's need to manage its docket weigh in favor of dismissal. ER-131. The Court also found that prejudice to Defendants, including Appellee, can be presumed from the length of this delay. ER-131. Consequently, on December 9, 2022, the lower court ordered the case dismissed in its entirety for Appellant's failure to prosecute. ER-132.

Appellant's continued improper use of the federal system as an appellate court should be halted. Therefore, Appellee respectfully request this Court deny Appellant's appeal in its entirety.

V. SUMMARY OF ARGUMENT

This Court should affirm the District Court's March 23, 2022 Order dismissing the First Amended Complaint.

A. Appellant is Precluded from Seeking Review of March 23, 2022 Order

Appellant is precluded from seeking review of the March 23, 2022 Order dismissing Appelee. Interlocutory orders "are not appealable after a dismissal for failure to prosecute." *Al-Torki v.*

Kaempen, 78 F.3d 1381, 1386 (9th Cir. 2016); see also *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016). The March 23, 2022 Order, which (i) dismissed Judge Wohlfeil with prejudice, (ii) dismissed the F&B Defendants with prejudice, and (iii) dismissed the First Amended Complaint as to all other Defendants with leave to amend, is an interlocutory order issued prior to the December 9, 2022 Order and Judgment dismissing the entire action for failure to prosecute. Therefore, Appellant cannot seek review of the March 23, 2022 interlocutory order dismissing Appellee.

B. Appellant Lacks Standing to Bring this Appeal

The appeal should be dismissed because, as in the District Court, Appellant lacks Article III standing. The District Court addressed the issue of standing at the hearing on March 23, 2022, and dismissed the action as to the remaining Defendants without prejudice on the basis that Plaintiffs lacked standing. Although provided an opportunity to cure the standing defect, Plaintiffs neglected to remedy said defect. Therefore, as Appellant lacked standing in the District Court, she also lacks standing to bring this appeal.

C. Appellee's Petitioning Activity is Protected Speech

Noerr-Pennington immunizes persons, such as Appellees, from liability for injuries allegedly caused by their activities and participation in the judicial processes. Although Appellant's claim that

their Appellee's petitioning activities are excluded from protection due to the sham pleading exception, prior case law and Appellant's own pleadings dictate that this doctrine applies to the Appellee's petitioning activities. Under *Freeman*, in order to show a lawsuit was a "sham" for antitrust purposes, Appellant must show that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the Plaintiff's business relationships. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir.2005). However, as a matter of law, victory "is by definition a reasonable effort at petitioning for redress and therefore not a sham." See *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 n.5 (1993).

As Appellant's own allegations reveal that Appellees' actions were not objectively baseless, Appellant failed to satisfy even the broader, two-part test for alleging sham petitioning. 1-FBSER-72-107. Moreover, as evidence that the insured made misrepresentations to the court, Appellant attempts to claim that the Appellee made legal arguments in court or pleadings that Appellant believes to be incorrect. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127. This type of litigation speech is precisely the type of litigation activity protected by the various litigation privileges, including the *Noerr-Pennington* doctrine. Accordingly, the district court did not err in granting Appellee's motion to dismiss without prejudice.

D. The District Court Did Not Abuse Its Discretion

A dismissal under Federal Rule of Civil Procedure 41(b) for failure of a plaintiff to comply with an order of the court, whether on a defendant's motion or the court's own, is a matter resting "firmly within the discretion of the District Court judge." *Mindek v. Rigatti*, 964 F.2d 1369, 1372 (3d Cir. 1992). Rule 41(b) also permits dismissal upon a failure to prosecute. A motion to dismiss, pursuant to Federal Rule of Civil Procedure 41(b), will be reversed on appeal only when there is a manifest abuse of discretion demonstrated. *Id.* at 1373, 1374; see also T*hompson v. Housing Authority of the City of Los Angeles*, 782 F.2d 829 (9th Cir. 1986), cert. denied, 479 U.S. 829 (1986).

In this case, there was no abuse of discretion committed by the district court. As it is clear from Appellant' s opening brief and the record, Appellant failed to comply with the court's March 23, 2022 Order which directed Appellant to file an amended pleading within forty-nine days i.e. by May 11, 2023. ER-119;124-126;130-132. As Appellant did not comply with the order, their case was properly dismissed under the plain language of Rule 41(b) and application of the Ninth Circuit Court's espoused factors. ER-131-133. In fact, even after failing to amend within the time set by the district court, Appellant did not avail themselves of other potential procedures available, such as seeking to file out of time. ER-131-133. Dismissal for lack of

prosecution in light of the failure to amend also would be within the court's Rule 41(b) discretion.

VI. STANDARD OF REVIEW

Ruling on Motions to Dismiss based upon a failure to state a claim and for lack of subject matter jurisdiction are reviewed De Novo by the Court of Appeals. *Ashe v. Saul*, 983 F.3d 1104, 1106 (9th Cir. 2020); *Lam v. United States*, 979 F.3d 665, 670 (9th Cir. 2020). In regard to an appeal of a motion to dismiss, normally this Court accepts as true all of the Appellant's factual allegations, but where the claim involves the right to petition under *Noerr-Pennington*, this Court applies a heightened pleading standard and the Appellant must "satisfy more than the usual 12(b)(6) standard[.]" *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991).

The court of appeals reviews a district court's decision to dismiss an action for failure to file an amended complaint in a timely manner for abuse of discretion. *Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Cir.1987).

VII. ARGUMENT

A. Appellant is Precluded From Seeking Review of the District Court's March 23, 2022 Order Dismissing Appellee with Prejudice.

Appellant's Notice of Appeal states that she is appealing the District Court's December 9, 2022 Judgment, which dismissed the case for failure to prosecute. ER-133. However, to the extent Appellant seeks review of the dismissal of Appellee, this appeal would necessarily challenge the March 23, 2022 Order, which dismissed Appellee with prejudice. However, this order is not reviewable because (i) it is an interlocutory order which is not appealable from the final judgment because the case was dismissed for failure to prosecute and (ii) Appellant has waived any challenge to the order dismissing Appellee.

Federal circuit courts have jurisdiction over appeals from 'final decisions' of district courts." *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 723 (9th Cir. 2017). "[A]bsent an 'express determination that there is no just reason for delay and ... an express direction for the entry of judgment[,]'" an order dismissing fewer than all parties and claims, is "not a final, appealable order." *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 (9th Cir. 2004) (quoting Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291); see also *M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1089 (9th Cir. 2012) ("An order that adjudicates fewer than all claims of all parties is not final").

It therefore follows, that generally, "[a]n appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984).

However, there are exceptions to this general rule. One exception to this rule are orders dismissing a case for failure to prosecute under Federal Rule of Civil Procedure 41(b). *Ash v. Cvetkov*, 739 F.2d 493, 498 (9th Cir. 1984); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 2016). Interlocutory, non-final orders "are not appealable after a dismissal for failure to prosecute." *Al–Torki*, 78 F.3d at 1386; see also *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016).

"[I]mportant policy considerations underlie [the] application of this exception." *Erickson v. PNC Mortg.*, 585 F. App'x 467 (9th Cir. 2014).

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291. To review the district court's refusal ... is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Ash, 739 F.2d at 497 (quoting *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1240 (9th Cir. 1979); see also *Sere v. Bd. of Trustees of Univ. of*

Illinois, 852 F.2d 285, 288 (7th Cir. 1988) (adherence to the general rule that rulings on interlocutory orders are merged within a subsequent final judgment is inapplicable if it "would reward a party for dilatory and bad faith tactics"). Therefore, "[t]here is no good reason to allow plaintiff to revive his case in the appellate court after letting it die in the trial court." *Al-Torki*, 78 F.3d at 1386.

On March 23, 2022, the District Court issued an order (i) dismissing Judge Wohlfeil with prejudice, (ii) dismissing the F&B Defendants with prejudice, and (iii) dismissing the First Amended Complaint as to all other defendants with leave to amend. WohlfeilSER 2-3. The March 23, 2022 Order, which encompassed rulings dismissing the action with prejudice as to some Defendants, and dismissing it without prejudice with leave to amend as to other Defendants, constitutes an interlocutory, non-final order. Therefore, the exception to the general rule described above applies and the March 23, 2022 Order does not merge into the final judgment issued on December 9, 2022, dismissing the entire case for failure to prosecute. Consequently, Appellant is prohibited from seeking appellate review of the March 23, 2022 Order, which dismissed Appellee from this action.

B. The Appeal Should Be Dismissed Because Appellant Lacks Article III Standing In the District Court and This Court

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); see also *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). A plaintiff must establish that they have standing in order to satisfy the case-or-controversy requirement. *Clapper*, 568 U.S. at 408. Article III standing consists of three elements: (1) the appellant must have suffered an "injury in fact;" (2) a causal connection between the injury and the conduct at issue; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must clearly allege facts demonstrating that he or she is a proper party to invoke the court's authority to resolve the dispute. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). In other words, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

In order to satisfy the "injury in fact" element, Appellant "must assert a grievance that is both 'concrete and particularized.'" *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 908 (9th Cir. 2011). For the causal connection element to be satisfied "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e]

result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. Evaluating redressability, the third element, turns on whether the court has the authority to right or prevent the alleged injury. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

Further, although standing issues are often addressed early in litigation, the case-or-controversy requirement persists throughout all stages of a case, such that standing "'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.' (Citation omitted)." *Perry v. Newsom*, 18 F.4th 622, 631 (9th Cir. 2021). In fact, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. (Citation omitted)." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). In those instances when the lower federal court lacked jurisdiction, the appellate court has jurisdiction on appeal, not of the merits but for purposes of correcting the lower court's error in entertaining the suit. *Id.*

Just as Appellant lacked Article III standing in the District Court, she lacks standing in this appeal. Although Appellee was dismissed with prejudice based on the Noerr-Pennington immunity, they did raise

the issue of standing in the District Court. Moreover, on March 23, 2022, the District Court addressed the standing issue as to the other Defendants who had not appeared in the action. The District Court found that Plaintiffs lacked standing because they had failed to adequately plead "injury in fact." ER-119. As a result, the District Court dismissed the First Amended Complaint without prejudice as to the remaining Defendants, giving Appellant an opportunity to amend the complaint to establish standing. ER- 114-120, 127.

However, as reflected in the December 9, 2022 Order dismissing the entire action, Appellant never filed an amended pleading attempting to cure the fatal standing deficiencies. ER- 130-132. Thus, the standing defects identified by the District Court are still in effect and require the dismissal of this appeal.

C. The District Court Correctly Applied the Noerr-Pennington Doctrine in Granting Appellee's Motion to Dismiss On the Grounds that Appellee is Immune from Liability Pursuant to Noerr-Pennington

1. Appellees are Entitled to Noerr-Pennington Protection

This Court reviews the district court's grant of appellees' motion to dismiss de novo. *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). Normally this Court accepts as true all of the Appellant's factual allegations, but where the claim involves the

right to petition under *Noerr-Pennington*, this Court applies a heightened pleading standard and the plaintiff must "satisfy more than the usual 12(b)(6) standard[.]" *Id.*

Appellant's complaint was premised entirely on its attempt to hold Appellees liable for their advocacy in filing and maintaining an action in the state court action. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127. A line of United States Supreme Court opinions, however, holds that activity within the ambit of the right to petition the government is privileged under the First Amendment. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585 (1965). These cases form what is commonly referred to as the "Noerr-Pennington doctrine." "The Noerr-Pennington doctrine shields individuals from, inter alia, liability for engaging in litigation." *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1047 (9th Cir. 2015) (emphasis in original, internal citations omitted); *accord Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1044 (9th Cir. 2009). To safeguard this fundamental right, the *Noerr-Pennington* doctrine immunizes from statutory liability activities that constitute "petitioning activity." *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005). While the doctrine originally arose in the antitrust context, it now applies "equally in all contexts" relating to acts that

constitute "petitioning." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000).

Noerr-Pennington immunity applies to claims under civil rights statutes (*see, e.g.*, 42 U.S.C. § 1983) that are based on the petitioning of public authorities, such as the courts. *Boulware v. Nevada Dep't of Human Resources*, 960 F.2d 793, 800 (9th Cir. 1992); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 930 (9th Cir. 2006) (holding that the Supreme Court has held that the Noerr-Pennington principles "apply with full force in other statutory contexts" outside antitrust); *see Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984). Moreover, the right to petition, and hence the *Noerr-Pennington* doctrine, applies to the judicial branch, and immunity extends to the "use of the channels and procedures of state and federal courts to advocate causes." *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644 (9th Cir. 2009). The Ninth Circuit has made clear, however, that this immunity only extends to activities that "may fairly be described as *petitions*, not to litigation conduct generally." *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) (emphasis in original).

Petitioning activity before courts include the filing of "[a] complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something." *Id.* To find liability for these acts would clearly burden

Appellee's right to petition. As a result, the *Noerr-Pennington* doctrine applies with full force.

On its face, Appellant's complaint alleges that Appellees filed and served a complaint and a lis Pendens, filed demurrers, entered into a stipulation, filed an answer, orally argued motions at court hearings, filed oppositions to motions, and filing and/or maintaining various legal matters, thus satisfying the requirements for Noerr-Pennington immunity. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127.

First, and as noted above, the filing of a complaint clearly falls within protected petitioning activity. *See Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). Second, and relatedly, the arguments that Appellees made in the complaint also constitutes protected petitioning activity. *See Huh v. Bank of Am., N.A.*, No. CV1504669TJHAJWX, 2015 WL 12828172, at *2 (C.D. Cal. Dec. 15, 2015) (stating that "[c]omplaints and pleading documents making legal arguments and defenses are considered petitions.") (citing *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). Noerr-Pennington immunity applies to Appellees' alleged petitioning related to the state court action, as well as to their alleged actions in filing and maintaining the state court action. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127.

"Although the Noerr-Pennington doctrine initially arose in the antitrust field, other circuits have expanded it to protect first

amendment petitioning of the government from claims brought under federal and state laws, including § 1983 and common-law tortious interference with contractual relations." *Video lnt'l Prod., Inc. v. Warner-Amex Cable Communications. Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), cert. denied, 491 U.S. 906, 109 S. Ct. 3189 (1989). This Circuit is among those who recognize that "the Noerr-Pennington doctrine is not merely a narrow interpretation of the Sherman Act in order to avoid a statutory clash with First Amendment 'values."' *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1059 (9th Cir. 1998). cert. denied, 119 S. Ct. 1031 (1999). Accordingly, "the First Amendment rationale of the Noerr-Pennington doctrine extends beyond antitrust actions to civil rights actions as well." *Boulware v. State of Nev. Dep't of Human Resources*, 960 F.2d 793, 800 (9th Cir. 1992) (citing *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984)). The district court therefore correctly held that activity protected by Noerr-Pennington cannot form the basis of section 1983 or section 1985 liability.

As a matter of public policy, any result other than affirming the district court's dismissal of Appellant's complaint against Appellee would chill the exercise of freedom of speech and petition. "These First Amendment activities are at the heart of our representative form of government, and are subject to broad protection. To permit lawsuits of this kind to go forward would strike a devastating blow to citizens'

willingness to express their views publicly or lobby their government." *Gibson v. City of Alexandria*, 855 F. Supp. 133, 136 (E.D. Va. 1994).

Ultimately, Appellant's complaint alleged only that Appellee petitioned the courts to protect Mr. Geraci's rights. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127. "Thus, nothing more is alleged than that [Appellee] intentionally exercised their right to petition the government, and this is precisely that with which this court cannot interfere." *Sierra Club v. Butz*, 349 F. Supp. 934, 939 (N.D. Cal. 1972). Attempting to hold Appellee liable for acting in their capacity as an attorney and filing complaints with legal arguments—even those with which Plaintiff disagrees—would burden Appellee's petitioning rights. *See Williams v. Jones & Jones Mgmt. Grp., Inc.*, No. CV 14-2179-MMM JEM, 2015 WL 349443, at *9 (C.D. Cal. Jan. 23, 2015) (finding that the plaintiff's attempt to invalidate a state court's judgment because the defendant attorneys "allegedly filed papers in state court that misrepresented the basis of Plaintiffs' state court complaint" were barred under the *Noerr-Pennington* doctrine since this argument challenges "defensive petitioning activity" by the attorneys, which is protected).

2. The District Court Correctly Held that the Appellant Failed to Adequately Allege Sham Petitioning

The sham exception is applicable only where a party does not genuinely seek a favorable action from the government; but instead the party uses the governmental process itself "as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) ("Omni"). In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), the Court explained:

> The "sham" exception to Noerr encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are not genuinely aimed a procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means.
>
> *Id.* at 380, 111 S.Ct. 1344 (citations and quotation marks omitted).

To prove that the "sham" exception applies, Appellant must show that (1) the lawsuit was both "objectively baseless" and a "concealed attempt to interfere with the plaintiff's business relationships," or (2) if the defendant has allegedly brought a series of lawsuits, whether those lawsuits were brought "without regard to the merits and for the purpose of injuring a market rival," or (3) if the defendant has allegedly made intentional misrepresentations to the court, whether the party's "knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998).

As the District Court held, none of these above scenarios apply. ER-114. Appellant's main gripe stems from his disagreement with the legal arguments that Appellant made in their pleadings, at hearing, or in their choice of client. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127. But disagreement with legal arguments made by the opposing party does not mean that the lawsuit was (1) "objectively baseless," (2) "brought without regard to merits of the case," or (3) an "intentional misrepresentation to the court." At every turn, Appellant only explains why they believe Appellee's arguments were *wrong*. ER-37-39; 41-44; 47; 49; 54; WohlfeilSER-110-112, 114-117, 120-122, 127. But apart from his strong disagreement with Appellee's legal arguments, Plaintiff's claims amount to nothing else. Attempting to hold Appellee liable for acting in their capacity as legal counsel in litigation and filing complaints with

legal arguments—even those with which Appellant disagrees—would burden Appellee's petitioning rights. *See Williams v. Jones & Jones Mgmt. Grp., Inc.*, No. CV 14-2179-MMM JEM, 2015 WL 349443, at *9 (C.D. Cal. Jan. 23, 2015) (finding that the plaintiff's attempt to invalidate a state court's judgment because the defendant attorneys "allegedly filed papers in state court that misrepresented the basis of Plaintiffs' state court complaint" were barred under the *Noerr-Pennington* doctrine since this argument challenges "defensive petitioning activity" by the attorneys, which is protected).

D. The District Court Did Not Abuse it Discretion in Dismissing the Entire Action

District courts may dismiss actions, sua sponte, under inherent powers, and under the statutory authority provided them through Rule 41(b). The district court's power to dismiss in this case, following Petitioners' failure to amend was based on these two precepts.

District courts have the inherent power to enter a sua sponte order of dismissal. *Link v. Wabach RR*, 370 U.S. 626, 629-631 (1962) (stating "The authority of a court to dismiss sua sponte … has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs."). *Hewlett v. Davis*, 844 F.2d 109 (3rd Cir. 1988); *Smith v. C.I.R.*, 926 F.2d 1470 (6th Cir. 1991); *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

In addition to the court's inherent powers, it may also dismiss cases pursuant to Rule 41(b), which states in pertinent part: (b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule - except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 - operates as an adjudication on the merits. See also *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 108 (1st Cir. 1998) ("court has broad authority to dismiss a case for failure to obey orders" and "[o]ne source of such authority is Fed. R. Civ. P. 41(b)").

Commentary addressing Rule 41(b) clarifies that, under the precept, while a defendant may move for dismissal for want of prosecution, a district court may, in the exercise of its own inherent power to keep its dockets clear, dismiss a matter on its own motion for want of prosecution. 5 Moore's Federal Practice §41.11 (1993) (footnotes omitted) (citing *Link*, 370 U.S. 626; *Hewlett*, 844 F.2d 109.) An involuntary dismissal under Rule 41(b) amounts to an adjudication on the merits and is with prejudice to the bringing of a new action. Wright & Miller, 9 Federal Practice and Procedure: Civil § 2369 (3d ed. 2014). It is apparent that allowing such a dismissal is "intended as a safeguard against delay in litigation and harassment of a defendant." *Id.* at § 2370.

The Ninth Circuit addressed Rule 41(b) in *Eldridge*, supra, 832 F.2d at 1136, where the plaintiffs failed to amend within the time permitted. The Ninth Circuit stated the court will not overturn a district court's Rule 41(b) dismissal absent a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (quoting *Schmidt v. Herrmann*, 614 F.2d 1221, 1224 (9th Cir.1980)). The relevant factors include "(1) the public's interest in expeditious resolution of litigation; (2) the trial court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions." *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988). In *Eldridge*, the Ninth Circuit found the district court abused its discretion where it refused an incarcerated plaintiff's timely request for an extension of time in which to file an amended complaint. *Eldridge*, 832 F.2d at 1138 (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)).

Yourish v. California Amplifier, 191 F.3d 983, 985-986 (9th Cir. 1999) is another case in which the Ninth Circuit addressed Rule 41(b) dismissals in light of a failure to amend. In *Yourish*, the Ninth Circuit affirmed a district court's dismissal order stating the "district court did not abuse its discretion in dismissing Plaintiffs' case for failing to amend in a timely fashion." *Id.* at 992. The Ninth Circuit specifically noted the factors relating to an interest in expeditious resolution, the court's need to manage its docket, and the risk of prejudice to the

defendant, all strongly weighed in favor of dismissal. *Id.* at 990-991. While the Ninth Circuit recognized dismissal by the district court was harsh, the Ninth Circuit stated it did not have a "definite and firm conviction," that a clear error had been committed in weighing the factors. *Id.*

In *WMX Technologies*, supra, 104 F.3d at 1136, the Ninth Circuit raised the issue of jurisdiction, sua sponte, and cited a previous decision in which the Ninth Circuit had stated, "Unless a plaintiff files in writing a notice of intent not to file an amended complaint, such dismissal order is not an appealable final decision." *WMX Technologies, Inc.*, 104 F.3d at 1135-1136 (quoting *Lopez*, 95 F.3d at 22). In *WMX Technologies*, the court stated:

> We now specifically rule that a plaintiff, who has been given leave to amend, may not file a notice of appeal simply because he does not choose to file an amended complaint. A further district court determination must be obtained. To the extent that any of our cases may suggest a different rule, we now overrule them.

In this case, Appellant argues that a dismissal of the underlying action was not proper because the Appellant had an unsupported belief that the district court did not rule correctly in regard to Appellee's Motion to Dismiss as Appellant argued that the Sham exception to the Noerr-Pennington doctrine should apply and the District Court should have reversed itself, therefore Appellant was not required to comply

with the district court's order. ER-124-126; AOB p. 9. This defies logic, Appellant cannot ignore court orders just because it disagrees with the ruling, if allowed this would destroy the order established by the courts. Appellant had many procedures available to them of which they did not avail themselves. ER-130-132. Despite failure to amend, the case remained pending for almost nine months before being dismissed. ER-119; 130-132 Appellant did not request an extension of time, as was the case in *Eldridge*, nor did Petitioners seek leave to file an amended pleading out of time. ER-130-132.

Appellant appears to also call in question the district court's inherent authority relating to managing its docket. In *Mindek v. Rigatti*, 964 F.2d 1369 (3d Cir. 1992), the Third Circuit affirmed a dismissal, with prejudice, based on a party's failure to comply with court orders in line with its previous decision in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984). In *Mindek*, the Third Circuit recognized that the decision to dismiss constitutes an exercise of the judge's discretion and "must be given great deference by this Court - a court which has had no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted." *Id.*, 964 F.2d at 1373. The Third Circuit stated:

> To tolerate the delays caused by the Mindeks, or to equivocate over lesser sanctions, would make a mockery of the very objectives of the 'civil justice expense and delay reduction plans' which the district courts have developed and implemented pursuant to the Civil Justice

Reform Act of 1990. 28 U.S.C. 472 et. seq. Congress enacted the Civil Justice Reform Act of 1990 after having found that unnecessary costs and delays in the federal judicial system had seriously decreased access to the courts … The district court plans … are designed to proscribe delay and to reduce expense by encouraging early judicial intervention and efficient judicial management of litigation.

Moreover, the Third Circuit, in *Mindek*, quoted from a decision of the United States Supreme Court, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1975), wherein the Supreme Court stated:

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.
>
> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order …. But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League, 427 U.S. at 642-643; see also *Costello v. United States*, 365 U.S. 265 (1961). The district court here was within its discretion to dismiss the case in light of the district courts' inherent authority and authority pursuant to Rule 41(b). Appellant raises no conflict or compelling issue to tackle the inherent authorities and

discretionary acts of the district courts. Moreover, "A dismissal for lack of prosecution must be supported by a showing of unreasonable delay," which "creates a presumption of injury to the defense." *Id.* at 1423 (citations omitted). Appellant failed to take any action for almost nine months, a clearly unreasonably delay. ER-130-132.

The district court properly weighed the "essential factors" described by this Court in *Henderson v. Duncan*, 779 F.2d 1421, 1423-24 (9th Cir. 1986). The district court found, after a well-reasoned analysis, that said factors heavily weighed in favor of dismissal. ER-130-132. Furthermore, the district court also properly noted that Appellant's nearly nine-month delay was an unreasonable delay supporting dismissal. *Id.* Appellant, to this day, over a year later, has not sought an extension of time to file an amended complaint or complied with the district court's March 23, 2022 order. Furthermore, as pointed out by the district court, by not requesting an extension the district court had no other alternative sanction and Appellant has demonstrated a complete lack of desire to prosecute the matter. *Id.* Thus, the District Court's dismissal of the matter was appropriate.

VIII. CONCLUSION

For the foregoing reasons, the judgement of the district court should be affirmed and permit the district court to close the matter. Appellant is precluded as a matter of law from seeking review of the District Court's March 23, 2022 Order dismissing Appellee with

prejudice because it is an interlocutory order, which is not appealable after a dismissal for failure to prosecute. Further, Appellant lacks Article III standing to bring this appeal. Lastly, to the extent that the March 23, 2022 Order is reviewable, the dismissal of Appellee with prejudice should be affirmed because their actions are protected by Noerr-Pennington immunity.

Respectfully submitted,

Dated: May 5, 2023 KJAR, McKENNA & STOCKALPER

By: __/s/ Gregory B. Emdee_____
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Gregory B. Emdee
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) No. 23-55018

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

◉ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

○ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature /s/ Gregory B. Emdee **Date** May 5, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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I am the attorney or self-represented party.

This brief contains 7,616 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
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- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Gregory B. Emdee **Date** May 5, 2023
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

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I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Defendant Appellee Brief, Index to Excerpts of Record, Excerpt of Records Vol. 1 and Vol. 2

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