



by Dan Fligsten

Big Doctrine

**The U.S. Supreme Court may ultimately decide how far
Noerr-Pennington applies outside the antitrust context**

THE *NOERR-PENNINGTON* DOCTRINE provides immunity from antitrust laws to those who petition the government through lobbying,¹ the initiation of a lawsuit, or the submission of forms required for the approval of governmental action.² The doctrine has also been expanded to other causes of action. Courts within the Ninth Circuit, for example, have held that the *Noerr-Pennington* doctrine is not limited to antitrust and applies to all civil causes of action.³ California state courts have also taken an expansive view of *Noerr-Pennington* and have routinely applied it to areas outside antitrust.⁴

Some have pushed for even greater expansion of *Noerr-Pennington* immunity and have recently attempted to persuade judges that the doctrine is not only a rule of liability but also a rule of evidence that can shield statements that concern petitioning from even being considered by a jury. However, the recent case of *AMCORD v. Hernandez* suggests that even courts that take an expansive view of *Noerr-Pennington* may be willing to push the doctrine only so far and no farther.⁵

The *Noerr-Pennington* doctrine originated in 1961 with the U.S. Supreme Court's decision in *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*⁶ In that case, a trucking company sued 24 railroad companies under Sections

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2 and 3 of the Sherman Antitrust Act for conducting a public relations campaign designed to influence legislation detrimental to the trucking industry and “create an atmosphere of distaste for the truckers among the general public.”⁷ While the campaign of the railroad companies was intended to restrain the trade of truckers and to monopolize the market, the Supreme Court concluded that no violation of the Sherman Act had occurred. The Court’s basis for this conclusion was that the Sherman Act could not be read to infringe upon the “right to petition” guaranteed by the First Amendment:

To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.⁸

Four years later, in *United Mine Workers v. Pennington*, the Supreme Court reaffirmed this holding, stating that “Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”⁹ The first court to officially identify that, with *Noerr* and *Pennington*, the Court had established an antitrust “doctrine” was the U.S. District Court for the Northern District of California in *Trucking Unlimited v. California Motor Transport Company*.¹⁰ According to the Northern District:

The *Noerr* and *Pennington* cases establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be, to destroy their competitors.¹¹

While the Supreme Court in *Trucking Unlimited* ultimately concluded that the allegations before it were of unprotected conduct, the court did not disturb the district court’s articulation of the *Noerr-Pennington* doctrine.¹²

Thus, at the time of the Supreme Court’s decision in *Trucking Unlimited*, there was little disagreement as to the meaning and scope of the *Noerr-Pennington* doctrine,

which simply provided that a party cannot incur antitrust liability for attempting to influence the government, even if the purpose is anticompetitive.

Expansion of *Noerr-Pennington*

However, courts would soon differ in their application of the *Noerr-Pennington* doctrine, particularly regarding whether it serves as a shield to liability only in the antitrust context, or whether it is also applicable to other causes of action.¹³ The first case to expand *Noerr-Pennington* beyond antitrust was *Sierra Club v. Butz*.¹⁴ In *Sierra Club*, the Northern District of California considered whether the *Sierra Club* was subject to state law tort liability for interference with advantageous relationship for filing a complaint against the defendant and by asserting administrative appeals.¹⁵ The District Court held that liability was precluded under the *Noerr-Pennington* doctrine despite the fact that the claim at issue was a state law tort rather than a Sherman Act violation:

This court agrees that when a suit based on interference with advantageous relationship is brought against a party whose “interference” consisted of petitioning a governmental body to alter its previous policy a privilege is created by the guarantee of the First Amendment. This court, however, does not believe that privilege should depend upon malice. For the reasons given by the Supreme Court in [*Noerr*]...this court is persuaded that all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.¹⁶

The *Sierra Club* holding marks the decoupling of *Noerr-Pennington* doctrine from the Sherman Act. The District Court justified this departure by interpreting *Noerr-Pennington* as being rooted solely in the First Amendment’s right to petition rather than being a doctrine designed to accommodate the Sherman Act to the protections of the First Amendment.

A number of courts eventually followed the lead of the Northern District. For example, in 1981, West Virginia’s Supreme Court of Appeals in *Webb v. Fury* used *Noerr-Pennington* to dismiss a coal mining company’s libel action against environmental groups, in part for communications made to regulatory agencies.¹⁷ Citing *Sierra Club*, the *Webb* court stated that the “clear import of the *Noerr-Pennington* doctrine is to immunize from legal action persons who attempt to

induce the passage or enforcement of law or to solicit governmental action even though the result of such activities may indirectly cause injury to others.”¹⁸

Thus, the *Webb* court accepted that *Noerr-Pennington* applies outside the antitrust context. Moreover, the *Webb* court’s description of *Noerr-Pennington* immunity was particularly broad and suggested that any “attempt to induce the passage or enforcement of law or solicit government action” would be immunized, irrespective of whether the petitioner was affirmatively lying to the government for his or her own purposes. On this latter point, however, the West Virginia court quickly reversed itself in *Harris v. Adkins*, stating:

We agree with the reasoning in *McDonald*, which contained no dissent, and we can find no persuasive reason why our Constitution should provide greater protection than the First Amendment as to the right to petition. Accordingly, we hold that the right to petition the government found in Section 16 of Article III of the West Virginia Constitution is comparable to that found in the First Amendment to the United States Constitution. It does not provide an absolute privilege for intentional and reckless falsehoods, but the right is protected by the actual malice standard of *New York Times Co. v. Sullivan*.¹⁹

Ultimately, then, the *Harris* court recognized that *Webb* had gone too far in its expansive interpretation of the *Noerr-Pennington* doctrine. The Supreme Court in *McDonald* had decided that First Amendment rights are on parity and that the “right to petition” is afforded no more protection than, say, the right to free speech (which may undoubtedly be curtailed in certain circumstances). Nevertheless, the *Harris* court did not challenge *Webb*’s extension of *Noerr-Pennington* beyond the antitrust context.

Rejected Applications outside Antitrust

Not all courts have been inclined to follow *Sierra Club* and many have refused to apply *Noerr-Pennington* beyond antitrust cases. The Tenth Circuit in *Cardtoons, L.C. v. Major League Baseball Players Association* explained:

While we do not question the application of the right to petition outside of antitrust, it is a bit of a misnomer to refer to it as the *Noerr-Pennington* doctrine; a doctrine which was based on two rationales. In our view, it is more appropriate to refer to immunity as *Noerr-Pennington* immunity only when applied to antitrust claims. In all other contexts, including the present one, such immunity derives

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- The *Noerr-Pennington* doctrine was originally developed in the context of the:
 - Clayton Antitrust Act.
 - Sherman Antitrust Act.
 - Federal Trade Commission Act 1914.
 - None of the above.
- In *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, the U.S. Supreme Court considered the following First Amendment rights:
 - Free exercise of religion.
 - Right of petition.
 - Free speech.
 - Free press.
- A party may be held liable under the Sherman Act for lobbying the government in an attempt to decrease competition.

True.
False.
- The first court to recognize that a doctrine had been created with *Noerr* and *United Mine Workers v. Pennington* was:
 - The U.S. Supreme Court in *BE&K Constr. v. NLRB*.
 - The Northern District of California in *Trucking Unlimited v. California Motor Transport Company*.
 - The Second Appellate District of California in *Hernandez v. AMCORD, Inc.*
 - The Sixth Appellate District of California in *People ex. rel Gallegos v. Pacific Lumber Company*.
- It is well settled that *Noerr-Pennington* doctrine applies outside the antitrust context.

True.
False.
- In *Noerr*, the U.S. Supreme Court held that a violation of the Sherman Act had occurred because the railroad companies' public relations campaign against truckers was fundamentally anticompetitive.

True.
False.
- At the time of *Trucking Unlimited*, there was a jurisdiction split concerning whether the *Noerr-Pennington* doctrine applied outside the antitrust context.

True.
False.
- The first case to expand *Noerr-Pennington* beyond the antitrust context was:
 - Sierra Club v. Butz*.
 - Webb v. Fury*.
 - Cardtoons, L.C. v. Major League Baseball Players Association*.
 - Sliding Door Company v. KLS Doors*.
- Only in the last five years have courts begun to apply *Noerr-Pennington* beyond the antitrust context.

True.
False.
- In *Webb v. Fury*, the West Virginia Supreme Court suggested that *Noerr-Pennington* immunizes all petitioning, irrespective of whether it is alleged that the petitioner affirmatively lied to the government.

True.
False.
- The *Noerr-Pennington* doctrine provides greater protection to the right to petition than to other First Amendment rights.

True.
False.
- In *Cardtoons, L.C. v. Major League Baseball Players Association*, the Tenth Circuit stated that *Noerr-Pennington* immunity is only applicable in the antitrust context.

True.
False.
- In *Cardtoons*, the Tenth Circuit stated that *Noerr* was based on a construction of the Sherman Act and that it was not a First Amendment decision.

True.
False.
- No recent cases in jurisdictions outside of the Tenth Circuit have followed the *Cardtoons* court's view on *Noerr-Pennington* outside antitrust.

True.
False.
- In *Sliding Door*, the Central District followed *Cardtoons* and rejected the application of *Noerr-Pennington* outside the antitrust context.

True.
False.
- In *BE&K Constr. Company*, Justice Stephen Breyer, in his concurrence, referred to *Noerr-Pennington* as "antitrust precedent."

True.
False.
- California state courts generally hold that *Noerr-Pennington* immunity applies outside the antitrust context.

True.
False.
- In *People ex rel. Gallegos v. Pacific Lumber Company*, the appellate court looked toward this Supreme Court decision to determine that *Noerr-Pennington* applies outside the antitrust context:
 - Noerr*.
 - Pennington*.
 - California Transport*.
 - BE&K Constr. Co.*
- California courts generally hold that the *Noerr-Pennington* doctrine is a rule of evidence.

True.
False.
- In *Hernandez v. AMCORD, Inc.*, the court followed *Cardtoons* and ruled that the *Noerr-Pennington* doctrine is inapplicable outside antitrust.

True.
False.

MCLE Answer Sheet #232 BIG DOCTRINE



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from the right to petition. This distinction is not completely academic. Antitrust cases that grant *Noerr-Pennington* immunity do so based upon both the Sherman Act and the right to petition. These precedents, founded in part upon a construction of the Sherman Act, are not completely interchangeable with cases based solely upon the right to petition.²⁰

The *Cardtoons* court continued:

If we were to refer to immunity based solely on the right to petition as *Noerr-Pennington* immunity, it would be very tempting to apply *Coastal States* in the present case. To do so, however, would be inappropriate. First, *Coastal States* rejected the right to petition as a basis for *Noerr*. “*Noerr* was based on a construction of the Sherman Act. It was not a first amendment decision.”...Second, and even more instructive, the Fifth Circuit specifically noted that its use of the term “petitioning immunity” went beyond the guarantees of the petition clause. “We reject the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly.”²¹

This passage cuts to the heart of the controversy surrounding *Noerr-Pennington*. Is the doctrine based in the First Amendment right to petition, or is it based on the Sherman Act? If it is based on the right to petition, it should logically apply to other causes of action and not be limited to antitrust. On the other hand, if it is rooted in the Sherman Act or at least in antitrust legislation, its application to other causes of action would not necessarily be appropriate.

On this question, the Tenth Circuit takes the latter view. “Petitioning immunity” applies only in the antitrust context. Outside of antitrust, the First Amendment right to petition is afforded protection under the First Amendment, but that right is qualified, as are freedom of speech and freedom of the press.

The *Cardtoons* decision provides a common-sense rationale for *Noerr-Pennington* immunity in the antitrust context and a reason why such immunity need not be extended automatically outside of antitrust. Because all political activity usually represents an attempt by the “petitioner” to augment the power of his or her organization, any petitioning by a competitor would be anticompetitive, by its very nature, giving rise immediately to a colorable Sherman Act violation. For this reason, the *Noerr-Pennington* doctrine sensibly sought to reconcile the Sherman Act with the First Amendment and, in so doing, provided virtually unlimited immunity to petitioning in the Sherman Act context. However,

in the non-antitrust context, the danger to the First Amendment is not present and, logically, causes of action not involving antitrust should not be afforded any more protection than are given to other First Amendment rights.

Other courts reject the notion that *Noerr-Pennington* can be used to provide immunity to non-antitrust petitioning. Recently, in *Shirokov v. Dunlap, Grubb & Weaver PLLC*,²² the District Court of Massachusetts refused to extend *Noerr-Pennington* immunity to the plaintiffs’ allegation that the defendant had fraudulently obtained a copyright:

The *Noerr-Pennington* doctrine, as originally formulated by the Supreme Court, rests on two separate grounds. First, it relies on a statutory interpretation of the Sherman Act that limits the scope of the Act so as to not reach activity associated with the political process....Second, it rests on the First Amendment right of citizens to petition the government....Because the instant dispute is not regulated by the Sherman Act, this Court is reluctant to apply the *Noerr-Pennington* doctrine. A number of courts have acknowledged the incongruity of applying the *Noerr-Pennington* doctrine outside of the antitrust context where immunity is cognizable only on First Amendment grounds.²³

The *Shirokov* court thus agreed with the *Cardtoons* court that the *Noerr-Pennington* doctrine is particular to antitrust and that it is not merely an expression of the First Amendment’s right to petition.

A Broader View

Still, many jurisdictions, including the Ninth Circuit and California state courts, have generally accepted that the *Noerr-Pennington* doctrine applies outside of the antitrust context. Within the Ninth Circuit, this view was recently reaffirmed in *Sliding Door Company v. KLS Doors*.²⁴ In that case, the plaintiff had sued defendant for patent infringement.²⁵ The defendant counterclaimed against the plaintiff for Lanham Act violations, in part, because the plaintiff had distributed communications to one of the defendant’s customers that said that the defendant was engaging in patent infringement.²⁶ While this case did not involve an antitrust issue, the Central District ruled that the defendant’s counterclaim was barred by the *Noerr-Pennington* doctrine:

Plaintiff contends that the email sent to customers here falls under the *Noerr-Pennington* doctrine and is, therefore, protected under the First Amendment right to petition. Communications “are sufficiently within the protection of

the Petition Clause to trigger the *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity.”...The communication at issue here is related to the petition activity of filing the suit since it was an email sent to purchasers or potential purchasers notifying them that Plaintiff had sued Defendants for patent infringement and that it would also pursue its intellectual property rights as to “those who purchase any infringing product.” In addition, the email was sent on February 6, 2013, shortly after the lawsuit was filed. While the communication can be construed to contain advertising or promotion as discussed above, the Ninth Circuit has noted that “in nearly every instance in which *Noerr-Pennington* has been applied, including *Noerr* itself, the petitioning conduct at issue was carried out to further the petitioning party’s commercial interests.”...Therefore, Defendants’ claims for false advertising under the Lanham Act arise from communication related to the litigation and are barred by the *Noerr-Pennington* doctrine.²⁷

In other words, the fact that the communication in question informed the defendant’s customer of pending patent infringement litigation precluded Lanham Act liability under the *Noerr-Pennington* doctrine. In the district court’s view, these communications were immunized by the First Amendment’s right to petition.

The holding in *Sliding Door* is based largely upon the Ninth Circuit’s decision in *Sosa v. DIRECTV, Inc.*²⁸ In *Sosa*, DirectTV, a satellite television company, had previously sued several companies that had been selling “smart cards” to end users, allowing them to illegally access DirectTV’s programming.²⁹ During discovery, DirectTV uncovered these companies’ customer lists, including the purchasers of the smart cards, and sent them letters informing them that they were required to forfeit this equipment and pay DirectTV an unspecified sum of money.³⁰ The customers reacted by filing a lawsuit against DirectTV alleging extortion and unfair business practices.³¹ However, the Ninth Circuit ruled that DirectTV was protected under *Noerr-Pennington* doctrine.

The Ninth Circuit suggested that its conclusion was compelled by Supreme Court precedent, particularly by *BE&K Constr. Co. v. NLRB*.³² In the view of the Ninth Circuit, the *BE&K* court recognized that *Noerr-Pennington* was an antitrust doctrine but indicated that the immunity afforded to antitrust laws in response to petitioning should also apply to labor laws.³³ In his con-

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currence, Justice Stephen Breyer disagreed that the outcome in *BE&K* was supported by *Noerr-Pennington* principles:

For another thing, I do not believe that this Court's antitrust precedent determines the outcome here.... That precedent finds all but sham lawsuits exempt from the reach of the *antitrust laws*.... It does not hold employers enjoy a similar exemption from the reach of the labor laws. And it should not do so, for antitrust law and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes.³⁴

Despite this disagreement, the proposition relied upon by the district court in *Sliding Door*—that *Noerr-Pennington* immunity extends beyond the antitrust context—has been followed by numerous courts within the Ninth Circuit.³⁵

California state courts also generally follow the Ninth Circuit's approach to *Noerr-Pennington*. In *Vargas v. City of Salinas*, citizens who favored a ballot measure sued the city of Salinas for publishing articles that described the negative effect that the ballot measure would have on municipal services.³⁶ The plaintiffs' lawsuit was dismissed as a SLAPP action, and this ruling was affirmed by the California Supreme Court.³⁷ Following the decision, both parties filed

motions for attorney's fees. The plaintiffs argued that "SLAPP suits against government defendants should not be subject to a mandatory award of attorney fees unless they fit the sham exception to the *Noerr-Pennington* doctrine." While the Sixth Appellate District disagreed with the plaintiffs' contention, it explicitly stated that *Noerr-Pennington* applies outside the antitrust context. The *Noerr-Pennington* doctrine "has since been extended to virtually all civil liability for legitimate petitioning activity."³⁸

For this proposition, the Sixth Appellate District cited the First Appellate decision *People ex rel. Gallegos v. Pacific Lumber Company*, which also determined that *Noerr-Pennington* applies outside of antitrust.³⁹ However, the *Gallegos* court's determination was based upon an interesting reading of *California Transport v. Trucking Unlimited*.⁴⁰ *California Transport* involved a Clayton antitrust claim rather than a Sherman antitrust claim. Apparently, the *Gallegos* court believed that because *California Transport* applied the *Noerr-Pennington* doctrine to the Clayton Act, this rule must also apply to all civil liability. This is not self-evident. The Clayton Act, like the Sherman Act, is an antitrust law. In any event, the proposition that *Noerr-Pennington* extends to virtually all civil liability for legitimate petitioning

activity is not stated in *California Transport*. Nevertheless it suffices to say that California courts generally agree that the *Noerr-Pennington* doctrine may be applied outside the antitrust context.

Excluding Relevant Evidence

One recent case—*Hernandez v. AMCORD, Inc.*—suggests that California state courts are unwilling to apply *Noerr-Pennington* to exclude evidence.⁴¹ In *Hernandez*, the Second Appellate District considered whether the trial court properly excluded evidence of the defendant-manufacturer's lobbying activities under the *Noerr-Pennington* doctrine. The court ruled that the evidence was improperly excluded. The court held that the *Noerr-Pennington* doctrine is not a rule of evidence. Relying on *Pennington*, the court observed that it would be within the province of a trial court to admit evidence of efforts to influence public officials, if the court deemed the evidence probative and not unduly prejudicial. Such an admission could be made under the established judicial rule of evidence that testimony of prior or subsequent transactions may be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. As the *Hernandez* court held, "[W]hile a corporation's petitioning of government officials may not itself form the basis of liability, evidence of such petitioning activity may be admissible if otherwise relevant to show the purpose and character of other actions of the corporation."⁴² *Hernandez* cites with approval decisions limiting the doctrine to instances in which the cause of action is "based on the act of lobbying or filing a lawsuit."⁴³ Even in that setting, *Noerr-Pennington* is applicable only as a bar to liability, not as a bar to evidence.

The issue of whether *Noerr-Pennington* applies outside of the antitrust context remains open to debate. While cases such as *BE&K Constr. Company v. NLRB* have touched upon the issue,⁴⁴ the U.S. Supreme Court has yet to squarely decide it. Evidence of this lack of clarity is the current divergence in interpretations among and within the circuits and state courts. However, *Hernandez* suggests that even courts that are willing to take an expansive view of *Noerr-Pennington* have their limits. ■

¹ Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 71 (1993).

² California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

³ Sliding Door Co. v. KLS Doors, 2013 U.S. Dist. LEXIS 71304 (C.D. Cal. May 1, 2013).

⁴ See *Hernandez v. AMCORD, Inc.*, 215 Cal. App. 4th 659 (2013); *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331, 1343 (2011) (citing *People ex rel. Gallegos v. Pacific Lumber Co.*, 158 Cal. App. 4th 950, 965 (2008)).



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⁵ See, e.g., Hernandez, 215 Cal. App. 4th 659.

⁶ Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

⁷ Id. at 129.

⁸ Id. at 137-8.

⁹ United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).

¹⁰ Trucking Unlimited v. California Motor Transp. Co., 1967 U.S. Dist. LEXIS 11536, at *11 (N.D. Cal. 1967).
¹¹ Id.

¹² California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 512 (1972).

¹³ Robert A. Zauzmer, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1256 (1985).

¹⁴ Id.

¹⁵ Sierra Club v. Butz, 349 F. Supp. 934, 936-7 (N.D. Cal. 1972).

¹⁶ Id. at 938.

¹⁷ Webb v. Fury, 167 W. Va. 434, 446 (W. Va. 1981), overruled by Harris v. Adkins, 189 W. Va. 465 (W. Va. 1993).

¹⁸ Id. at 448.

¹⁹ Harris v. Adkins, 189 W. Va. 465, 476 (W. Va. 1993). See also McDonald v. Smith, 472 U.S. 479 (1985); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

²⁰ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F. 3d 885 (10th Cir. Okla. 2000).

²¹ Id. at 890-1. (citing Coastal States Mktg., Inc. v. Hunt, 694 F. 2d 1358, 1364-66 (1983)).

²² *Shirokov v. Dunlap, Grubb & Weaver PLLC*, 2012 U.S. Dist. LEXIS 42787, at *59 (D. Mass. Mar. 1, 2012).

²³ Id. (citing *Cardtoons*, 208 F. 3d at 891); see also *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

²⁴ *Sliding Door Co. v. KLS Doors*, 2013 U.S. Dist. LEXIS 71304 (C.D. Cal. May 1, 2013).

²⁵ Id. at *2.

²⁶ Id. at *3-4.

²⁷ *Sliding Door Co.*, 2013 U.S. Dist. LEXIS 71304, at *18-19 (quoting *Sosa v. DirectTV, Inc.*, 437 F. 3d 923, 935, 935 n.8 (9th Cir. 2006)).

²⁸ Id.; *Sosa v. DIRECTV, Inc.*, 437 F. 3d 923 (9th Cir. 2006).

²⁹ *Sosa*, 437 F. 3d at 926.

³⁰ Id.

³¹ Id.

³² Id. at 931; see also *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002).

³³ *BE&K Constr. Co.*, 536 U.S. at 525.

³⁴ Id. at 541 (Breyer, J., concurring) (citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993); *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)).

³⁵ See, e.g., *Nunag-Tanedo v. East Baton Rouge Parish Sch. Bd.*, 711 F. 3d 1136, 1139 (9th Cir. Cal. 2013); *Rupert v. Bond*, 2013 U.S. Dist. LEXIS 132972, at *25 (N.D. Cal. 2013).

³⁶ *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331, 1337 (2011).

³⁷ Id.

³⁸ Id. at 1343 (citing *People ex rel. Gallegos v. Pacific Lumber Co.*, 158 Cal. App. 4th 950 (2008)).

³⁹ *Gallegos*, 158 Cal. App. 4th at 964.

⁴⁰ Id. (citing *California Transp. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972)).

⁴¹ *Hernandez v. AMCORD, Inc.*, 215 Cal. App. 4th 659 (2013).

⁴² Id. at 679 (citing *United Mine Workers v. Pennington*, 381 U.S. 657, n.3 (1965)).

⁴³ Id. at 680 (citing *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1500-01 (D. Kan. 1990)).

⁴⁴ *BE&K Const. Co. v. NLRB*, 536 U.S. 516 (2002).

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