UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	CV 19-05019 PSG (KSx)	Date	May 24, 2023
Title	Relevant Group, LLC et al v. Stephan Nourmand et al		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING summary judgment in favor of Defendants.

The Court previously vacated the trial date and requested sua sponte that the parties submit supplemental briefs for the Court to reconsider its prior summary judgment order. *See Supplemental Briefing Order*, Dkt. # 260 ("*Supp. Br. Order*"). Defendants Nourmand & Associates ("N&A"), Stephan "Saeed" Nourmand, and The Sunset Landmark Investment LLC (collectively "Defendants") filed supplemental briefs and supporting documents arguing that the Court should overrule the prior order and grant summary judgment in their favor. *See* Dkts. # 270 ("*Sunset/Nourmand Supp. Br.*"), 273 ("*N&A Supp. Br.*"). Plaintiffs Relevant Group, LLC; 1541 Wilcox Hotel LLC; 6516 Tommie Hotel LLC; and 6421 Selma Wilcox Hotel LLC (collectively "Relevant") filed a supplemental brief and supporting documents in opposition. *See* Dkt. # 281 ("*Relevant Supp. Br.*"). All parties filed responses. *See* Dkts. # 284 ("*N&A Resp. Br.*"), 285 ("*Relevant Resp. Br.*"), 286 ("*Sunset/Nourmand Resp. Br.*"). The Court held a hearing on the matter on May 24, 2023.

Having considered the parties' arguments in their papers and at the hearing, the Court **GRANTS** summary judgment in favor of Defendants. This order closes the case.

I. Factual Background

A. The Parties

In the past ten years, Relevant-affiliated companies have developed several projects in Hollywood, including the hotel development projects at issue in this litigation. *N&A Statement of Undisputed Facts*, Dkt. # 273-23 ("*N&A SUF*"), ¶ 1; *Sunset/Nourmand Statement of Undisputed Facts*, Dkt. # 270-1 ("*Sunset/Nourmand SUF*"), ¶ 3. Those projects include the

Thompson Hotel, Tommie Hotel, Selma Hotel, and Schrader Hotel.[1] *N&A SUF* ¶ 1; *Relevant Statement of Undisputed Facts*, Dkt. # 268-1 ("*Relevant SUF*"), ¶ 11.

Sunset owns the historic Hollywood Athletic Club Building located at 6525 Sunset Blvd, Los Angeles, CA 90028, and Sunset's principal is Stephan "Saeed" Nourmand. *Sunset/Nourmand SUF* ¶ 1. Nourmand also founded N&A, a residential real estate brokerage. *Relevant SUF* ¶ 1; *N&A SUF* ¶ 2. The four Relevant properties at issue in this case are within one block of Sunset's property. *N&A SUF* ¶ 1.

Beginning in 2015, Sunset challenged Relevant's four hotel projects by, in part, opposing them during the entitlements process with the City of Los Angeles and by filing lawsuits against the City in California Superior Court under the California Environmental Quality Act ("CEQA"). *Relevant SUF* ¶ 13. A brief explanation of CEQA is necessary to fully understand the remaining facts of this case.

B. CEQA

i. Overview

"The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) establishes a comprehensive scheme to provide long-term protection to the environment." *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal. 4th 1086, 1092 (2015). "The overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." *Save Our Big Trees v. City of Santa Cruz*, 241 Cal. App. 4th 694, 704 (2015) (citation omitted) (cleaned up). So "[c]onsistent with California's strong environmental policy, whenever the approval of a project is at issue, the statute and regulations have established a three-tiered process to ensure that public agencies inform their decisions with environmental considerations." *San Lorenzo Valley Cmty. Advocs. for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.*, 139 Cal. App. 4th 1356, 1372 (2006) (citation omitted).

[1] Defendants dispute that the Schrader Hotel is a Relevant project or can form the basis of liability in this case. *See, e.g.*, *Sunset/Nourmand Supp. Br.* 5:1–9; *N&A Supp. Br.* 10:6–14; *N&A Response to Relevant's SUF*, Dkt. # 284-1 ("*N&A SDF re Relevant*"), ¶ 14. For purposes of this order, however, the Court will give Relevant the most charitable view of the facts, and even with that gloss, the Court finds that Defendants are entitled to summary judgment.

"The first tier requires an agency to conduct a preliminary review to determine whether CEQA applies to a proposed project." *Save Our Big Trees*, 241 Cal. App. 4th at 704.

"If CEQA applies, the agency must proceed to the second tier of the process by conducting an initial study of the project." *Id.* One purpose of the initial study is "to inform the choice between a negative declaration and an environmental impact report (EIR)." *Id.* at 704–05 (citation omitted). "If there is 'no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,' the agency prepares a negative declaration." *Id.* at 705 (quoting CEQA Guidelines, § 15063(b)(2)). Alternatively, a mitigated negative declaration may be used where "the initial study identifies potentially significant effects on the environment but revisions in the project plans would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur and there is no substantial evidence that the project as revised may have a significant effect on the environment." *Id.* at 705 (citation omitted).

"Finally, if the initial study uncovers 'substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment,' the agency must proceed to the third tier of the review process and prepare a full EIR[.]" *Id.* (quoting CEQA Guidelines, § 15063(b)(1)). Put differently, "[a]n EIR is required whenever substantial evidence in the record supports a fair argument significant impacts or effects may occur." *Keep Our Mountains Quiet v. Cnty. of Santa Clara*, 236 Cal. App. 4th 714, 730 (2015) (citation omitted) (cleaned up).

"In the CEQA context, substantial evidence 'means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.'" *Id.* (quoting CEQA Guidelines, § 15384 (a)). "Significant effect on the environment means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." *Id.* at 729 (quoting CEQA Guidelines, § 15382) (cleaned up). But "[t]here is no 'ironclad definition of what constitutes a significant effect.'" *Id.* (quoting CEQA Guidelines, § 15064 (b)) (cleaned up).

At bottom, "the EIR is the heart of CEQA," and "accomplishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." *San Lorenzo Valley Cmty. Advocs. for Responsible Educ.*, 139 Cal. App. 4th at 1373–74 (citation omitted).

The fair argument standard is "a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." *Sierra Club v. Cnty. of Sonoma*, 6 Cal. App. 4th 1307, 1316–17 (1992).

CEQA also "forbids 'piecemeal' review of the significant environmental impacts of a project." *Banning Ranch Conservancy v. City of Newport Beach*, 211 Cal. App. 4th 1209, 1222 (2012) (citation omitted). Piecemealing is "[t]he process of attempting to avoid a full environmental review by splitting a project into several smaller projects which appear more innocuous than the total planned project." *E. Sacramento Partnerships for a Livable City v. City of Sacramento*, 5 Cal. App. 5th 281, 293 (2016). "The prohibition against piecemeal review is the flip side of the requirement that the whole of a project be reviewed under CEQA." *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170, 1208 (2005).

ii. CEQA Challenges

A third party may bring a challenge under CEQA in state court if standing and exhaustion requirements are met.

A party has standing to seek a writ of mandate in state court based on alleged CEQA violations if she is "a property owner, taxpayer, or elector who establishes a geographical nexus with the site of the challenged project." *Citizens Assn. for Sensible Dev. of Bishop Area v. Cnty. of Inyo*, 172 Cal. App. 3d 151, 158 (1985); *see also San Bernardino Valley Audubon Soc. v. Metro. Water Dist.*, 71 Cal. App. 4th 382, 385–49 (1999). A reviewing court evaluates "efforts to comply with CEQA for prejudicial abuse of discretion," and "[a]n agency abuses its discretion where it fails to proceed in a manner required by law or its determination is not supported by substantial evidence." *Keep Our Mountains Quiet*, 236 Cal. App. 4th at 731. For example, a person challenging a mitigated negative declaration must show that "there is substantial evidence in the record supporting a fair argument that the Project will significantly impact the environment; if there is, it was an abuse of discretion not to require an EIR." *Id.* "Whether a fair argument can be made is to be determined by examining the entire record." *Id.* (citation omitted).

But under CEQA, "only parties who object to the agency's approval of the project either orally or in writing may thereafter file a petition." *Mani Bros. Real Est. Grp. v. City of Los Angeles*, 153 Cal. App. 4th 1385, 1395 (2007); *see also* Cal. Pub. Res. Code § 21177 (a)–(b).

"The exact issue must have been presented to the administrative agency to satisfy the exhaustion requirement." *Mani Bros. Real Est. Grp.*, 153 Cal. App. 4th at 1394 (citation omitted).

A successful challenger may be entitled to attorneys' fees under California's "substantial benefit rule," which "permits the award of fees when a litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuniary nature." *Friends of "B" St. v. City of Hayward*, 106 Cal. App. 3d 988, 994–95 (1980) (citation omitted).

C. The Hotel Projects: Thompson, Tommie, Selma, and Schrader

Sunset challenged the following four projects through CEQA's framework.

i. Thompson/Tommie Project

The Thompson hotel project was challenged throughout the administrative approval process. In February 2015, the City of Los Angeles issued a Notice of Public Hearing for the project, inviting Sunset to attend the hearing and provide comments. *Sunset/Nourmand SUF* ¶ 6. The City published an initial mitigated negative declaration ("MND") in March 2015, and shortly thereafter, a number of N&A employees attended and signed a petition against the project. *Relevant SUF* ¶¶ 18, 29. The City published a revised MND in July 2015, adding several new mitigation measures to address noise impacts. *Id.* ¶ 33. Sunset then filed objections to the project in September 2015, raising, in part, concerns about the hotel's impact on traffic and noise. *Sunset/Nourmand SUF* ¶ 7. Relevant also claims that Defendants engaged in other administrative activity related to the Thompson project. *Relevant SUF* ¶ 34; *N&A SDF re Relevant* ¶ 34; *see also Declaration of Ali Rabbani*, Dkt. # 274, Ex. A ("*Relevant Predicate Act Chart*") (detailing the various acts that makeup the four alleged predicate acts).

The City granted final approval for the project in February 2016, and a month later, Sunset filed a Petition for Writ of Mandamus in state court against the City, challenging the approval under CEQA. *Relevant SUF* ¶¶ 35–36. Relevant claims that while the lawsuit was ongoing, Sunset continued administrative challenges against the project. *See Relevant SUF* ¶ 40; *N&A SDF re Relevant* ¶ 40; *see also Relevant Predicate Act Chart*. The action was set for trial in August 2017, but the parties settled shortly before the start of trial. *Sunset/Nourmand SUF* ¶ 20. Further, the day before trial, the Judge in the case issued a tentative order denying the City's motion to augment the administrative record, which if granted "would [have] support[ed] the City's argument that it disclosed certain design changes in the Project that are not found in

the MND because they were added by the Real Party to the Project after the public comment period closed for the MND." *Declaration of Neil Thakor*, Dkt. # 270, Ex. G ("*Thompson Tentative Ruling*") 1.[2]

The Tommie project faced a similar path. The City produced an MND for the project in December 2016, and in January 2017, Sunset filed objections. *Relevant SUF* ¶¶ 48–49. A month later, Sunset filed an appeal challenging the approval of the project. *Sunset/Nourmand SUF* ¶ 33; *see also Relevant Predicate Act Chart*. In June 2017, after the City approved the project, Sunset filed a Petition for Writ of Mandate in state court challenging the approval. *Sunset/Nourmand SUF* ¶ 35. Two other petitions were also filed against the project. Lauren Farmer filed a petition, citing Sunset's objections and appeals to the City, and she received a favorable remand and injunction from the state court.[3] *Id.* ¶ 41. The parties later settled. *Id.* ¶ 43. Mama Wilcox LLC similarly filed a petition and settled with Tommie. *Id.* ¶¶ 37, 40. Sunset also settled with Tommie. *Relevant SUF* ¶¶ 83–84.

Sunset and Relevant finalized their settlement agreements for the Thompson and Tommie projects in January 2018. *Id.* ¶¶ 83–84; *see generally Declaration of Neil Thakor*, Dkt. # 270, Ex. J ("*Thompson Agreement*"); *Declaration of Neil Thakor*, Dkt. # 270, Ex. K ("*Tommie Agreement*"). The agreements required Relevant to pay Sunset a total of $5.5 million and make several changes to the properties. *See generally Tommie Agreement*; *Thompson Agreement*. The Thompson agreement required, in part, that Relevant reduce the height of the hotel, create a

[2] The Court takes judicial notice of the state court order. *See, e.g.*, *Icon at Panorama, LLC v. Sw. Reg'l Council of Carpenters*, No. 2:19-cv-81-CBM (MRWx), 2019 WL 8198217, at *1 (C.D. Cal. Oct. 4, 2019) (noting that a court may take judicial notice of a court's determination in an underlying CEQA action).

[3] Although Relevant disputes the assertion that Farmer received a favorable result, *Relevant Response to Sunset/Nourmand SUF*, Dkt. # 285-2 ("*Relevant SDF re Sunset/Nourmand*"), ¶ 41, the Court may read the plain language of the state court order, rather than deferring to Relevant's interpretation. *See, e.g.*, *Icon at Panorama, LLC*, 2019 WL 8198217, at *1. And in the order, the court ruled, in part, "that Petitioner has produced substantial evidence of a 'fair argument' that the project may have a 'significant' effect on noise impacts for which no mitigation measures have been proposed," and "that the Project's CEQA analysis of construction and operational noise was defective." *Declaration of Neil Thakor*, Dkt. # 270, Ex. Q ("*Farmer Remand Order*"), 402–07. The court then remanded to the City and issued an injunction. *See id.* 402, 412–25. That, as will be explained further below, is a favorable decision under CEQA.

setback, and implement policies to limit noise levels. *See Thompson Agreement* 2–3. Similarly, the Tommie agreement provided, in part, a setback, noise-reduction measures, and a tieback easement. *See Tommie Agreement* 2–3.

ii. Selma Project

In December 2017, the City published an MND for the Selma Project. *Relevant SUF* ¶ 86. In March 2018, Sunset submitted an objection letter, and in September 2018, it filed an administrative appeal against the project. *Id.* ¶¶ 90, 110. Sunset also sent a letter to the LA County District Attorney's Office, the California Attorney's Office, the California Attorney General, and the U.S. Attorney for the Central District of California, requesting that prosecutors open an investigation into the City's approvals of Relevant projects in Hollywood. *Id.* ¶ 123. The City approved the Selma project in March 2019, and a month later, Sunset filed a Petition for Writ of Mandamus in state court challenging the approval. *Id.* ¶¶ 125–26.

In January 2020, the state court issued an interlocutory order on Sunset's petition. *Sunset/Nourmand SUF* ¶ 48. Although the parties dispute the meaning of the state court order, the Court takes judicial notice of the order and will detail its plain ruling. *See, e.g.*, *Icon at Panorama, LLC*, 2019 WL 8198217, at *1. The state court made the following conclusions:

> Two types of CEQA violations warrant setting aside these land use entitlements. First, the City improperly piecemealed analysis of the Project. The City "internally" piecemealed the Project by piecemealing it into a series of ministerial building permits followed by two discretionary entitlement processes. The City "externally" piecemealed the Project by studying it in isolation from other parts of the integrated complex of hotels, restaurants, bars, and nightclubs that are being developed by Relevant Group, LLC (Relevant Group), Real Party's parent company. Second, the City improperly approved an MND as the record contains substantial evidence to support a fair argument that the Project may cause significant unmitigable impacts to the environment.
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> . . . .
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> [Conclusion] Based upon the foregoing, the court enters an interlocutory writ as to Sunset's petition. Sunset has established a fair argument that the Project may have significant impact on air quality and that the Project's baseline does not comply with CEQA. However, it appears that that [sic] City could remedy these deficiencies.

> Accordingly, the court will remand for further proceedings and for the City to make specific findings to clarify the Project's baseline and resolve the issue of the impact on air quality.

Declaration of Ali Rabbani, Dkt. # 274, Ex. 98 ("*Selma Order*"), 2, 65.

While the court was persuaded by some of Sunset's arguments, it did not accept all of them. For example, after reviewing Sunset's arguments and evidence, including expert opinion evidence on traffic and noise impacts, the court disagreed with Sunset on greenhouse gas emissions impacts, noise impacts, and transportation impacts. *Id.* 12–34. And in the discussion on the internal piecemealing argument, the court noted in a footnote that "Sunset's other arguments directed at the City's dual baseline approach are without merit." *Id.* 56 n.4.

Sunset appealed the order, and the California Court of Appeal dismissed the appeal "as having been taken from a nonappealable order." *Declaration of Ali Rabbani*, Dkt. # 274, Ex. 99 ("*Selma Appeal Order*"), 2. The City has not yet corrected on remand the errors identified by the trial court. *Sunset/Nourmand SUF* ¶ 49.

iii. Schrader Project

In April 2018, the City published an MND for the Schrader project, and in July, Sunset submitted an objection. *Relevant SUF* ¶¶ 101, 105. In August 2018, the City approved the project, and Sunset appealed but later withdrew its challenge. *Sunset/Nourmand SUF* ¶¶ 50, 52, 55. Relevant claims that while it did not have an interest in the project at the time of approval, it did have an ownership interest during the entitlements process because of a purchase agreement and a $1 million nonrefundable down payment. *Relevant Response to N&A SUF*, Dkt. # 285-1 ("*Relevant SDF re N&A*"), ¶ 25. Relevant further claims that Defendants ended their opposition to the project after learning that Relevant had lost interest in the project. *Id.*; *see also Relevant SUF* ¶¶ 112–17.

II. Procedural Background

A. Relevant's Civil RICO Action

On June 10, 2019, Relevant filed a complaint in this Court bringing three related Racketeer Influenced and Corrupt Organizations Act ("RICO") claims under, 18 U.S.C. §§ 1962(c) and (d), against Defendants based on alleged extortion and attempted extortion

relating to Defendants' petitioning activity. *See* Dkt. # 1, 5–22. For relief, Relevant sought, in part, damages "believed to be in excess of $100 million (trebled pursuant to 18 U.S.C. § 1964(c))." *Id.* 22.

Relevant's claims survived two motions to dismiss. The Court granted with leave to amend Defendants' motion to dismiss the RICO claims because Relevant had failed to allege the required enterprise requirement. *See* Dkt. # 39 at 14–16. In the order, the Court also rejected Defendants' argument that the *Noerr-Pennington* doctrine immunized their conduct because Relevant had adequately alleged the doctrine's sham exception under the test announced in *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800 (9th Cir. 1994) ("*USS-POSCO*"). *See id.* at 6–9. The Court then denied Defendants' second motion to dismiss. *See* Dkt. # 114. The Court adhered to its prior ruling that the *Noerr-Pennington* doctrine did not protect Defendants as a matter of law and found that Relevant's amended complaint properly alleged RICO claims. *Id.* at 3–9.

Relevant's claims also survived Defendants' motions for summary judgment. In its order, the Court denied Defendants' motions for summary judgment on the RICO claims, ruling in pertinent part that litigation activity can form the basis of civil RICO liability and that Relevant had presented a triable issue of fact on whether, under *USS-POSCO*, the sham exception to the *Noerr-Pennington* doctrine applied. *See* Dkt. # 167 at 20–31.

B. Case Transfer to Chief Judge Gutierrez

Before trial, the case was transferred from Judge Wright II to Chief Judge Gutierrez pursuant to General Order 21-1. *See* Dkt. # 207.

After issuing an order resolving the parties' pending motions in limine, *see* Dkt. # 246, and preparing the case for trial, the Court decided it was necessary to vacate the trial date and reconsider the prior summary judgment order. *See generally Supp. Br. Order*. The Court's order asked the parties to rebrief the *Noerr-Pennington* doctrine and explain which sham exception test should be applied under the circumstances of this case. *Id.* at 3. The Court also asked the parties to explain how a finding that some or all of Defendants' petitioning activities were not shams would affect RICO liability. *Id.* And finally, the Court asked Relevant to clarify the predicate acts it intended to prove at trial. *Id.*

III. Legal Standard

"A party may move for summary judgment, identifying each claim or defense or the part of each claim or defense on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the moving party's case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be capable of being presented at trial in a form that would be admissible in evidence. *See* Fed. R. Civ. P. 56(c)(2). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

IV. Discussion

This complex case, involving issues of California law, federal law, and First Amendment principles, boils down to a simple conclusion: Relevant should be asking the California Legislature, not this Court, for relief. The "harm" Relevant claims of here is the product of a duly enacted, environmentally focused California statute. Relevant may not now undermine California's policy choices by bringing a civil RICO action to penalize legitimate, or at least not objectively baseless, CEQA activity.

Thus, for the reasons stated below, the Court overrules its prior summary judgment order denying Defendants' motion for summary judgment.

A. Reconsideration of the Prior Summary Judgment Order

Relevant argues that the Court should refrain from overruling the prior summary judgment order because a prior judge's ruling should not be overruled absent exceptional circumstances, "such as where the decision is 'clearly erroneous and its enforcement would work a manifest injustice,' *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001)." *Relevant Supp. Br.* 7:22–26. And here, Relevant argues, the prior ruling should stand because it is "well-reasoned and correct," or at least not "dead wrong." *Id.* 8:6–7.

Generally a judge should not overrule a prior decision of another judge in the same case out of respect for "principles of comity and uniformity which preserve the orderly functioning of the judicial process." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 530 (9th Cir. 2000) (quoting *Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376, 379–80 (9th Cir. 1960)) (cleaned up). But a judge may do so "if there are cogent reasons or exceptional circumstances." *Id.* at 532. Whether it is appropriate to overrule a prior judge's decision is one of "judicial discretion," which is important because a "second judge must conscientiously carry out his judicial function in a case over which he is presiding." *Id.* at 530 (quoting *Castner*, 278 F.2d at 380). In the end, "the judge who enters the final judgment in the case is responsible for the legal sufficiency of the ruling, and is the one that will be reversed on appeal if the ruling is found to be erroneous." *Id.*

Here, the general principles of comity and uniformity must give way because this Judge is firmly convinced that the prior order is erroneous and, if upheld, would endanger core constitutional rights. Indeed, the Ninth Circuit has already spoken on this. *Castner* dealt with the same type of "dilemma" that this Judge now faces: whether a second judge should allow an erroneous decision to stand and proceed to trial, or reverse the order and risk being reversed on appeal because he abused his discretion in overruling a colleague. *See* 278 F.2d at 380. And the court held that a judge does not abuse his discretion in overruling a prior decision where "after examination of the record he is firmly convinced that an error of law has been committed in denying the [motions to dismiss and for summary judgment]." *Id.* It reasoned that a judge is not conscientiously carrying out his judicial function "if he permits what he believes to be a prior erroneous ruling to control the case." *Id.*

The Court will therefore depart from the prior summary judgment order.

B. Civil RICO and *Noerr-Pennington* Immunity

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968, created "criminal offenses involving the activities of organized criminal groups in relation to an enterprise," and a "civil cause of action for 'any person injured in his business or property by reason of a violation' of those prohibitions." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 329 (2016) (citing provisions in 18 U.S.C. §§ 1962(a)–(d), 1964(c)) (cleaned up). The private civil cause of action allows a properly injured person "to sue in federal district court and recover treble damages, costs, and attorney's fees." *Id.* at 331 (citing § 1964(c)).

The elements of a civil RICO claim are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') [and] (5) causing injury to plaintiff's business or property." *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO*, 770 F.3d 834, 837 (9th Cir. 2014) (quoting *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005)). "'Racketeering activity' includes, *inter alia*, 'any act which is indictable' under the Hobbs Act, 18 U.S.C. § 1951, or 'any act or threat involving . . . extortion, . . . which is chargeable under State law.'" *Id.* at 837 (quoting 18 U.S.C. §§ 1961(1)(A), (B)) (cleaned up). "A 'pattern of racketeering activity' requires at least two predicate acts of racketeering activity . . . within a period of ten years." *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008) (citing 18 U.S.C. § 1961(5)).

RICO claims, however, are subject to the *Noerr-Pennington* doctrine. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (applying the *Noerr-Pennington* doctrine to a civil RICO claim); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 643–48 (9th Cir. 2009) (same). "The *Noerr-Pennington* doctrine derives from the First Amendment's guarantee of 'the right of the people . . . to petition the Government for a redress of grievances.'" *Sosa*, 437 F.3d at 929 (quoting U.S. Const. amend. I). The doctrine is a rule of statutory construction that requires courts to construe statutes "so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Id.* at 931; *see also Pyankovska v. Abid*, 65 F.4th 1067, 1076 (9th Cir. 2023). So "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa*, 437 F.3d at 929. "The constitutional right to petition includes the right of access to the courts and therefore most litigation activities . . . are immunized from statutory liability." *United States v. Koziol*, 993 F.3d 1160, 1171 (9th Cir. 2021).

But sham petitions are not protected by the *Noerr-Pennington* doctrine. *See Sosa*, 437 F.3d at 932, 936; *Koziol*, 993 F.3d at 1171. The Ninth Circuit has identified three sham exceptions: (1) "where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful," (2) "where the conduct involves a series of lawsuits 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose," and (3) "if the allegedly unlawful conduct 'consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.'" *Sosa*, 437 F.3d at 938 (quoting *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998)). In this case, only the first two exceptions are implicated and discussed by the parties.

Whether the first or second exception applies depends on the number of shams that are alleged. The first exception applies where a defendant is accused of "bringing a single sham lawsuit (or a small number of such suits)." *Kottle*, 146 F.3d at 1060 (citing *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993) ("*PREI*")); *see also Amarel v. Connell*, 102 F.3d 1494, 1519 (9th Cir. 1996), *as amended* (Jan. 15, 1997) (applying the exception where only two lawsuits were cited). While the second exception applies "where the defendant is accused of bringing a whole series of legal proceedings." *Amarel*, 102 F.3d at 1518–19 (quoting *USS-POSCO*, 31 F.3d at 811).[4]

Here, Relevant claims four predicate acts supporting extortion, attempted extortion, and conspiracy to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and California law, Cal. Pen. Code §§ 518, 524: (1) extortion related to the Thompson Hotel development; (2) extortion related to the Tommie Hotel development; (3) attempted extortion related to the Selma-Wilcox Hotel development; and (4) attempted extortion related to the Schrader Hotel project.[5]

[4] The Court will discuss the two exceptions using shorthand: the first exception will be referred to as the *PREI* exception; the second exception will be referred to as the *USS-POSCO* or "series" exception.

[5] In their previous summary judgment papers, Relevant seemingly conceded that the Schrader Hotel project was not a predicate act, telling the Court that "the Schrader episode, by itself, was not an independent predicate act. It was an overt act in furtherance of [Defendants'] attempt to extort Plaintiffs again[.]" Dkt. # 137 25:13–14. Relevant now fights that concession. *Relevant Resp. Br.* 12:16–28. But as discussed below, even giving Relevant's position the most charitable view, and accepting their position that the Schrader Hotel was a Relevant project and could be counted as a predicate act, the outcome is the same.

Relevant Supp. Br. 4:16–20, 25:19–28.

The main issue in this case is whether Defendants' petitioning activities can create civil RICO liability. Defendants argue that based on their reading of caselaw, litigation activity may never serve as a predicate act for civil RICO. *See, e.g.*, *Sunset/Nourmand Supp. Br.* 15–17. They also claim that even if litigation activity can form the basis of civil RICO, the *Noerr-Pennington* doctrine protects their activity here. *See, e.g.*, *id.* 6–15. Relevant disagrees, arguing that Defendants' per se rule is not supported by caselaw and that a triable issue of fact exists on whether the sham exception to the *Noerr-Pennington* doctrine applies. *See Relevant Resp. Br.* 4–25. Relevant also contends that even if Defendants' conduct is protected under *Noerr-Pennington*, a triable issue of fact remains on whether Defendants committed extortion by using protected means to seek unlawful ends. *See Relevant Supp. Br.* 23–25.

The Court does not see room in the caselaw for Defendants' proposed per se rule but does find that under the *Noerr-Pennington* doctrine, most or all of Defendants' activities are protected. Relevant therefore fails to meet its burden of showing that at least two predicate acts exist, and Defendants are entitled to summary judgment.

i. Litigation Activities as Civil RICO Predicate Acts

The Ninth Circuit has applied the *Noerr-Pennington* doctrine to this very context: civil RICO claims based on predicate acts of extortion under the Hobbs Act and California law. *See Sosa*, 437 F.3d at 929–40. In *Sosa*, the Ninth Circuit analyzed whether DIRECTV was immune from civil RICO liability under *Noerr-Pennington* for sending tens of thousands of prelitigation demand letters to people thought to have illegally accessed the company's satellite television signal. *See id.* at 925–26. The alleged predicate acts included, in part, extortion under the Hobbs Act and California state law, and the Court concluded that "[a]pplying the *Noerr-Pennington* statutory construction presumption, we do not believe the Hobbs Act [or California's extortion statute] imposes liability for threats of litigation where the asserted claims do not rise to the level of a sham." *Id.* at 939–40.

Although that case seems to instruct this Court to analyze Defendants' conduct through the *Noerr-Pennington* doctrine and sham exception, Defendants argue that the Ninth Circuit in *Koziol* suggested that litigation activities in civil RICO cases are granted special protection. *See, e.g.*, *Sunset/Nourmand Supp. Br.* 6–15. *Koziol* involved a defendant who was convicted of attempted extortion under the Hobbs Act for threatening a victim with sham litigation to obtain property to which he knew he had no lawful claim. *See* 993 F.3d at 1164–70. On appeal, the

defendant argued, in part, that his threat of sham litigation could never establish liability under the Hobbs Act, but the court disagreed, holding that "threats of sham litigation, which are made to obtain property to which the defendant knows he has no lawful claim, are 'wrongful' under the Hobbs Act." *Id.* at 1168–70. As part of its analysis, the court distinguished out-of-circuit cases that had rejected civil RICO liability based on litigation activities from situations involving criminal liability under the Hobbs Act. *See id.* at 1172–76.

Koziol emphasized the policy considerations that animated those out-of-circuit cases, including concerns that private parties would collaterally attack litigation adversaries based on litigation activities through a federal statute that provides for treble damages, costs, and attorneys' fees. *See id.* at 1174. For example, the court cited *Kim v. Kimm*, 884 F.3d 98 (2d Cir. 2018), which held that "allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act," *id.* at 104. And *Koziol* explained that *Kim*'s holding was based on the policy concerns that allowing RICO liability for prior litigation activities would "engender wasteful satellite litigation," "erode the principles undergirding the doctrines of res judicata and collateral estoppel," and "chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts" because "pleading[s] and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability." 993 F.3d at 1174 (quoting *Kim*, 884 F.3d at 104); *see also Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016) (explaining that litigation tactics cannot be a predicate act for a civil RICO claim); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) ("[R]ecognizing abusive litigation as a form of extortion would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim."); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994); *I.S. Joseph Co. v. J. Lauritzen A/S*, 751 F.2d 265, 267 (8th Cir. 1984).

But this Court agrees with Relevant that *Koziol*'s discussion of civil RICO does not stand for the implicit holding that litigation activities can never serve as the basis for civil RICO. *See Relevant Resp. Br.* 4–8. The better reading of *Koziol* is that the court merely distinguished civil RICO cases from the case at bar—criminal liability for extortion under the Hobbs Act. *See* 993 F.3d at 1173–76. The civil RICO cases, the court said, "turn on the scope of civil liability under RICO and related policy concerns, but they do not address the issue presented in this case: whether threats of sham litigation can establish criminal liability under the Hobbs Act." *Id.* at 1174.

And if *Koziol* were read to suggest that civil RICO should be granted special treatment based on policy concerns, that reading would be in tension with precedent. In *Sedima, S.P.R.L.*

v. Imrex Co., 473 U.S. 479 (1985), the Supreme Court rejected the idea that the civil and criminal RICO provisions should be construed differently based on policy concerns. *Id.* at 481–500. There, the Court reversed a construction of "[Section] 1964(c) to permit private actions only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury,'" because while there may exist valid concerns about "perceived . . . misuse of civil RICO by private plaintiffs" and "the consequences of an unbridled reading of the statute," the plain text of the statute did not allow for disparate treatment of the civil and criminal provisions. *Id.* at 481. As the Court explained, "[s]ection 1962 renders certain conduct 'unlawful'; § 1963 and § 1964 impose consequences, criminal and civil, for 'violations' of § 1962," and so, "[w]e should not lightly infer that Congress intended the term ["violations"] to have wholly different meanings in neighboring subsections." *Id.* at 489.

Based on that guidance from precedent, it would also make sense not to treat a predicate act differently just because it forms the basis of a civil RICO claim. "Racketeering activity" includes, in part, "'any act which is indictable' under the Hobbs Act." *United Bhd. of Carpenters & Joiners of Am.*, 770 F.3d at 837 (quoting 18 U.S.C. §§ 1961(1)(A), (B)). And *Koziol* rejected "[the] argument that threats of sham litigation are categorically excluded from the term 'wrongful' under the Hobbs Act," 993 F.3d at 1169 n.7, holding instead that threats of sham litigation in some circumstances can be "wrongful," *id.* at 1170. That holding should thus stick in both the criminal and civil context. *See Sedima*, 473 U.S. at 481–500. Further, as *Sosa* explained, policy concerns are adequately addressed by the *Noerr-Pennington* doctrine. The court said that when litigation activity is involved, civil RICO liability based on extortion cannot simply attach—the activity must amount to the level of a sham. *See Sosa*, 437 F.3d at 939–40. The best approach then is for this Court to be guided by precedent not policy. *See Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1175 (9th Cir. 2017) ("[I]t is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute[.]").

This Court recognizes, however, that at least one district court in this circuit has come to a different conclusion. In *Acres Bonusing, Inc. v. Ramsey*, No. 19-cv-05418- WHO, 2022 WL 17170856 (N.D. Cal. Nov. 22, 2022), the court said it was "persuaded by the circuit's reasoning in *United States v. Koziol* as well as other circuits' discussion," and ruled that "[l]itigation activities alone generally cannot serve as predicate acts for civil RICO claims." *Id.* at *10. In its analysis, the court relied heavily on the policy concerns implicated by allowing litigation activities to form the basis of a civil RICO claim and concluded that "[a]lthough the Ninth Circuit ultimately held that threats of sham litigation could constitute extortion under the Hobbs

Act, *Koziol* recognized the arguments and strong policy reasons that counsel caution in civil RICO claims." *Id.* at *10–12.

So while this Court notes that Defendants have made a colorable argument that litigation activities (legitimate or not) cannot form the basis of civil RICO, it does not find the argument to be persuasive. Even still, Defendants prevail through the *Noerr-Pennington* framework.

ii. PREI *and* USS-POSCO *Sham Exceptions*

Relevant does not dispute that Defendants' underlying CEQA-related petitioning activities are presumptively covered by the *Noerr-Pennington* doctrine. Rather, Relevant argues that the sham exception strips Defendants of their protection. *See generally Relevant Supp. Br.*

But before evaluating the merits of Relevant's arguments, the Court must decide whether the *PREI* or *USS-POSCO* sham exception applies. That determination turns on whether the record supports a "series" or "pattern," of sham petitions, *Amarel*, 102 F.3d at 1519, or only a "single" or "small number" of petitions, *Kottle*, 146 F.3d at 1060. The Ninth Circuit has not yet defined the number of legal proceedings sufficient to trigger the *USS-POSCO* "series" exception, but it has provided some guideposts: twenty-nine legal proceedings are enough, but two are not. *See USS-POSCO*, 31 F.3d at 811; *Amarel*, 102 F.3d at 1519. Since then, other courts have tried to find the dividing line between the two exceptions. For example, one court in this circuit has said "that five or six lawsuits [appears to be] on the lower end of what can constitute a pattern or series." *Wonderful Real Est. Dev. LLC v. Laborers Int'l Union of N. Am. Loc. 220*, No. 1:19-cv-00416-LJO- SKO, 2020 WL 91998, at *10 (E.D. Cal. Jan. 8, 2020). Another has said that four is not enough. *See Coca-Cola Co. v. Omni Pac. Co.*, 1998 U.S. Dist. LEXIS 23277, at *24 (N.D. Cal. Dec. 9, 1998). And this Court has declined to apply the "series" exception when four to six proceedings were involved. *See Toyo Tire & Rubber Co. v. CIA Wheel Grp.*, No. SACV 15-246-JLS (DFMx), 2015 WL 4545187, at *3 (C.D. Cal. July 8, 2015) (four proceedings not enough); *Rosen v. Duel*, No. 2:21-cv-08935-FWS-RAO, 2022 WL 18231777, at *9 (C.D. Cal. Nov. 23, 2022) (five or six actions not enough). Courts in other circuits have come to mixed results, with the Third Circuit holding that, in some cases, four petitions are enough, and the Federal Circuit holding that three petitions are not enough. *See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 181 (3d Cir. 2015); *ERBE Elektromedizin GmbH v. Canady Tech. LLC*, 629 F.3d 1278, 1291–92 (Fed. Cir. 2010).

Before deciding whether Relevant has alleged enough proceedings to invoke the *USS-POSCO* "series" exception, the Court must determine how many petitions or legal proceedings

there are here. Relevant claims four predicate acts and concedes, through its own exhibit, that those acts are based on Defendants' petitioning activity related to each of the four hotel projects. *See Relevant Predicate Act Chart*. But Relevant also claims in its briefs that the correct measurement for this analysis should be based on the discrete activity making up the predicate acts, not on the number of predicate acts themselves. *See Relevant Supp. Br.* 2:1–19. If the Court accepts that framework, Relevant claims it can point to "nearly twenty 'proceedings,' making [this case] more akin to [*USS-POSCO*]," *id.* 2:8–9, or at least "seven," if the Court accepts Defendants' theory that some of the petitioning activity was necessary under CEQA's exhaustion requirement, *Relevant Resp. Br.* 18:2–9.

The Court finds on the record that Relevant has alleged only four sham activities—those being the four alleged predicate acts. In its own exhibit, Relevant has grouped the various administrative and CEQA-related activities so that they add up to a single predicate act. *See Relevant Predicate Act Chart* (showing, for example, the heading "Predicate Act 1: Extortion of the Thompson" and then, beneath that, line items of the various alleged petitioning activities supporting that predicate act). It would not make sense to accept Relevant's position that four predicate acts exist but then tease out the activity supporting each predicate act so that Relevant can avail itself of a more favorable sham exception. Relevant could have tried to allege more predicate acts based on each individual petition, but it chose not to, possibly because collective conduct pushing toward a singular purpose against one victim is often characterized as a "single episode" or predicate act. *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992); *cf. U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chicago, Inc.*, 953 F.3d 955, 965 (7th Cir. 2020) (noting that the "series" exception would be inappropriate because the case "involve[d] a *single* legislative proceeding within which Defendants made multiple efforts to influence the Commission's decision regarding one overarching issue: whether to approve [the] application"). Further, because CEQA has an exhaustion requirement, most of Defendants' petitioning activity is part and parcel of its CEQA lawsuits and should be treated as such. *See Mani Bros. Real Est. Grp.*, 153 Cal. App. 4th at 1394 (explaining the exhaustion requirement); *cf. Wonderful Real Est. Dev. LLC*, 2020 WL 91998, at *7–11 (counting each CEQA action as one). And finally, some of the activity Relevant notes as outside CEQA-related conduct, like the letter Sunset sent to prosecutors, may be absolutely protected, without regard to the sham exception. *See Kottle*, 146 F.3d at 1062–63 (noting that an executive department must be sufficiently quasi-judicial, rather than "an essentially political entity," for the judicial sham exception to apply). The Court is thus not persuaded by Relevant's drive-by attempt to "magically transform their four RICO predicate acts," *N&A Resp. Br.* 4:9, into seven or twenty.

Because Relevant alleges only four sham activities, the Court finds that the *USS-POSCO* "series" sham exception does not apply. Although the Ninth Circuit has not laid down a clear rule, the Court finds, as other courts have, that four lawsuits or proceedings are not enough. Four is much closer to two than twenty-nine, and so the *PREI* exception should apply. *Compare Kottle*, 146 F.3d at 1063 (holding that two petitions were not sufficient to invoke the "series" exception because "a handful of legal proceedings does not amount to a 'pattern' of baseless claims"), *with USS-POSCO*, 31 F.3d at 811 (twenty-nine petitions enough).

iii. PREI *Sham Exception*

The *PREI* exception is "a strict two-step analysis." *USS-POSCO*, 31 F.3d at 811. The plaintiff has the burden of proving that the alleged proceeding was (1) objectively baseless, and (2) the defendant's motive in bringing it was unlawful. *PREI*, 508 U.S. at 60–61; *see also Sosa*, 437 F.3d at 938; *Amarel*, 102 F.3d at 1518–19. Objectively baseless means that "no reasonable litigant could realistically expect success on the merits." *PREI*, 508 U.S. at 60. And "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* "[R]equiring *both* objective baselessness and improper motive . . . overprotects baseless petitions so as to ensure citizens may enjoy the right of access to the courts without fear of prosecution." *Sosa*, 437 F.3d at 934.

Objectively baseless is tied to the common law understanding of probable cause to sue. *See PREI*, 508 U.S. at 60–62. As *PREI* explained, probable cause "requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication," and its existence "precludes a finding that [a defendant] has engaged in sham litigation." *Id.* at 62–63 (citation omitted) (cleaned up). Further, at summary judgment, "[w]here . . . there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law." *Id.* at 63; *see also id.* at 66 ("The existence of probable cause eliminated any 'genuine issue as to any material fact,' . . . and summary judgment properly issued." (quoting Fed. R. Civ. P. 56(c)); *cf. Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006–08 (9th Cir. 2008) (affirming a district court's conclusion on a post-verdict JMOL motion that the threatened litigation was not objectively baseless).

PREI also instructed lower courts to be cautious when evaluating probable cause. The Court explained that while a winning suit is conclusively not a sham, a losing suit is not necessarily baseless. "[A] court must resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." *PREI*, 508 U.S. at 60 n.5 (citation omitted). Courts must remember "that

even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* (citation omitted) (cleaned up).

Here, objective baselessness can be decided as a matter of law. The core facts making up the alleged predicate acts are undisputed, and to the extent the Court relies on disputed facts, it views those facts in favor of Relevant. And while Relevant argues that triable issues of fact exist "as to whether the underlying lawsuits were objectively baseless," *Relevant Supp. Br.* 21:10–11, that argument is not aligned with caselaw. *PREI* explained that "[t]he question is not whether the defendant thought the facts to constitute probable cause, but whether the court thinks they do." *Id.* at 63–64 (quoting *Director General of Railroads v. Kastenbaum*, 263 U.S. 25, 28 (1923)) (cleaned up). Other courts also routinely determine probable cause as a matter of law. *See, e.g.*, *Theme Promotions, Inc.*, 546 F.3d at 1006–08; *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 151 (3d Cir. 2017) (concluding that probable cause for the objectively baseless inquiry "is a legal question, not a factual one"); *Evanger's Dog & Cat Food Co, Inc. v. Env't Democracy Project*, CV 21-08489-RSWL-ASx, 2022 WL 180205, at *5 (C.D. Cal. Jan. 20, 2022) (deciding objective baselessness as a matter of law on a motion to dismiss).

The Court's objectively baseless analysis will be guided by two overarching rules. First, Relevant has the burden of showing that Defendants' petitioning activities were objectively baseless. That means Relevant must "disprove the challenged lawsuit's *legal* viability." *PREI*, 508 U.S. at 61. And second, the Court will determine whether the *entire* proceeding, lawsuit, or petition was brought without probable cause. The Court will not, as Relevant asks, take a holistic approach and evaluate whether there was more merit than not in each proceeding. *See, e.g.*, *Relevant Supp. Br.* 21–22. As *PREI* and other courts have stated, the correct inquiry is whether "the *lawsuit*" or "challenged *litigation*," was objectively baseless, meaning there was no "probable cause *to institute legal proceedings*." *Id.* at 60–61 (emphasis added); *see also Limon v. Carpenters Loc. Union 721*, CV 20-9089 DSF (MRWx), 2021 WL 4925444, at *5 (C.D. Cal. Jan. 11, 2021) ("[I]t is not enough for [plaintiff] to show that a single claim is objectively baseless[;] [t]he '*lawsuit* must be objectively baseless.'" (quoting *PREI*, 508 U.S. at 60)); *Meridian Project Sys., Inc. v. Hardin Const. Co., LLC*, 404 F. Supp. 2d 1214, 1221–22 (E.D. Cal. 2005) (same). A stricter approach makes sense considering the overprotective design of the *Noerr-Pennington* doctrine and *PREI* exception. *See Sosa*, 437 F.3d at 934; *PREI*, 508 U.S. at 60 n.5. Indeed, the Ninth Circuit has said it will "not lightly conclude" that litigation is objectively baseless, "as doing so would leave that action without the ordinary protections afforded by the First Amendment, a result we would reach only with great reluctance." *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000).

a. Thompson/Tommie Activity

Relevant has failed to show that the activity underlying the Thompson and Tommie projects were objectively baseless.

The fact that Relevant settled both lawsuits is strong, if not conclusive, evidence that Defendants' proceedings were not objectively baseless. *See, e.g.*, *Theme Promotions, Inc.*, 546 F.3d at 1008 ("The fact that this ongoing litigation settled suggests that the original suit was not objectively baseless."); *New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("[Plaintiff] has settled (for a substantial payment) one of the suits that [defendant] filed in state court, so that one cannot have been a sham[.]"); *Evanger's Dog & Cat Food Co, Inc.*, 2022 WL 180205, at *5 (stating that a settlement suggests that a defendant's claims may have merit); *Toyo Tire & Rubber Co. v. CIA Wheel Grp.*, 2015 WL 4545187, at *3 (collecting cases and concluding the same).

The Court does not find Relevant's response to be persuasive. *See, e.g.*, *Relevant Supp. Br.* 18–19. The fact that Defendants, as CEQA challengers, were entitled to only attorneys' fees, and not compensatory damages, does not impact the strong evidence of merit that the settlement agreements provide. And apart from caselaw saying that settlements indicate merit, the settlement agreements here also provided more than just money. Both agreements required nonmonetary provisions that a CEQA litigant might want, including provisions for noise-reduction measures and a height reduction provision for the Thompson hotel. *See Thompson Agreement* 2–3; *Tommie Agreement* 2–3. The existence of the agreements and their terms therefore suggest that Defendants' suits and petitioning activities had some merit.

But there is more. The day before trial was set to begin in the Thompson suit, the Judge issued a tentative order denying the City's motion to augment the administrative record, which if granted "would [have] support[ed] the City's argument that it disclosed certain design changes in the Project that are not found in the MND because they were added by the Real Party to the Project after the public comment period closed for the MND." *Thompson Tentative Ruling* 1. And in addition to Defendants' Tommie petition, two other petitions were filed against the project, which later settled. *Sunset/Nourmand SUF* ¶¶ 37–43. One of those other petitioners was Lauren Farmer, who cited Sunset's objections and appeals to the City, and received a favorable remand and injunction from state court. *Id.* ¶ 41; *see Farmer Remand Order*. In the order, the state court ruled, in part, "that Petitioner has produced substantial evidence of a 'fair argument' that the project may have a 'significant' effect on noise impacts for which no mitigation measures have been proposed," and "that the Project's CEQA analysis of construction

and operational noise was defective." *Farmer Remand Order* 402–07. The court then remanded to the City and issued an injunction. *See id.* 402, 412–25.

Relevant unpersuasively argues that none of that evidence shows a definitive win for Defendants. Relevant flips the burden to make it so Defendants must prove that they were successful; but it is Relevant that has the burden of showing that Defendants did not just lose but also had no probable cause to bring the suits. And that is a burden Relevant cannot meet here when considering CEQA's design.

The California Legislature created CEQA to provide "a three-tiered process to ensure that public agencies inform their decisions with environmental considerations." *San Lorenzo Valley Cmty. Advocs. for Responsible Educ.*, 139 Cal. App. 4th at 1372 (citation omitted). And the statute sets a low bar for prevailing in court when an agency fails to follow the statute. For example, a person challenging an agency's failure to prepare an EIR needs to show a reviewing court only that "there is substantial evidence in the record supporting a fair argument that the Project will significantly impact the environment." *Keep Our Mountains Quiet*, 236 Cal. App. 4th at 731. If the challenger prevails, the remedy generally includes a mandate for the agency to reconsider its determination in a way that complies with CEQA. *See, e.g.*, *POET, LLC v. State Air Res. Bd.*, 218 Cal. App. 4th 681, 756–58 (2013) (describing judicial remedies under CEQA); *King & Gardiner Farms, LLC v. Cnty. of Kern*, 45 Cal. App. 5th 814, 896 (2020) (same).

Thus, because the CEQA standard is very broad, fact dependent, and a low threshold, and because a successful outcome includes a mandate for the agency to reconsider its determination, it is a difficult task here for Relevant to show that the suits had no reasonable chance of success or legal viability.[6] *See generally Keep Our Mountains Quiet*, 236 Cal. App. 4th at 729–30 (describing the structure of CEQA, including the broad, fact dependent standards for substantial evidence, significant effects, and fair argument). In fact, the tentative order in the Thompson case suggests that Defendants may have prevailed at trial with their argument that the City's approval of the project was defective. And further, the fact that the state court in Farmer found the "fair argument" CEQA standard satisfied and ordered a remand strongly suggests that Defendants' suit had some merit.

So considering the evidence and precedent urging caution in this area, the Court finds that Relevant has failed to show that the activity underlying the Thompson and Tommie predicate acts were objectively baseless.

[6] Relevant does not dispute that Sunset had standing to bring the CEQA suits.

b. Selma Activity

Relevant has also failed to show that the activity underlying the Selma project was objectively baseless.

Unlike the Thompson and Tommie lawsuits, a state court issued a written interlocutory order addressing the merits of Defendants' arguments. After extensive analysis, the court found that Defendants had sufficiently shown that the City committed two CEQA violations: "[f]irst, the City improperly piecemealed analysis of the Project," and "[s]econd, the City improperly approved an MND as the record contains substantial evidence to support a fair argument that the Project may cause significant unmitigable impacts to the environment [*i.e.*, air quality]." *Selma Order* 2. The court thus entered an interlocutory writ remanding to the City "for further proceedings and for the City to make specific findings to clarify the Project's baseline and resolve the issue of the impact on air quality." *Id.* 65.

Relevant boldly argues that the Selma Order was not a win for Defendants. *See, e.g.*, *Relevant Supp. Br.* 3:13–14. The order, however, does appear to be a CEQA win, and even if it was not, Relevant has failed to show that the suit was objectively baseless. The state court found two clear CEQA violations and ordered a remand to resolve the violations—a typical CEQA remedy. And while the court did not order the City to prepare an EIR, instead remanding for the City to "clarify" and "resolve" the issues because "it appeare[d] that that [sic] City could remedy these deficiencies," the court gave Defendants some relief. *Selma Order* 65. The fact that the California Court of Appeal dismissed the appeal does not make the suit baseless. The Court of Appeal dismissed the appeal not on the merits but "as having been taken from a nonappealable order." *Selma Appeal Order* 2. And to this day, the City has not corrected on remand the errors identified by the trial court. *Sunset/Nourmand SUF* ¶ 49. It thus would be odd for this Court to find an ongoing proceeding to be baseless prior to its resolution.

Relevant points heavily to the fact that the state court found many of Defendants' other arguments unpersuasive and in a footnote said that some of Sunset's dual baseline arguments were without merit. *See, e.g.*, *Relevant Supp. Br.* 17; *see also Selma Order* 12–34, 56 n.4. But Relevant's argument fails because the inquiry here is whether there was *some* merit to the suit, which there was, not whether there were more baseless arguments than meritorious ones. Further, the state court dismissed Sunset's arguments after extensively reviewing those arguments and the evidence, including expert opinion evidence on traffic and noise impacts. *Id.* 12–34. Just because Sunset's arguments failed does not mean they were baseless, and the state court's extensive analysis and description of how Sunset produced some expert opinions and

colorable arguments suggests that the arguments were not baseless. Finally, the court's footnote was added to address arguments for one particular discussion section; the court was not saying that all of Sunset's other arguments were meritless or unpersuasive.

Reviewing the record, Relevant has failed to meet its burden of showing that the activities underlying the Selma predicate act were objectively baseless.

c. Schrader Activity

As previously noted, Defendants dispute whether the Schrader project was in fact a Relevant project and whether any activity related to that project can form the basis of a predicate act here. *See, e.g.*, *Sunset/Nourmand Supp. Br.* 5:1–9; *N&A Supp. Br.* 10:6–14; *N&A SDF re Relevant* ¶ 14. But even assuming that Schrader was a Relevant project and accepting Relevant's narrative that Sunset appealed the City's approval of the project but later withdrew the challenge after learning that Relevant had lost interest in the project, Relevant has still failed to meet its burden of showing that Defendants' activities were objectively baseless. Even if Sunset had one improper motive for bringing the lawsuit, Relevant has not presented anything persuasive showing that the CEQA-related activity was objectively baseless.

Relevant has thus failed to meet its burden of showing that the activity underlying the Schrader predicate act was objectively baseless.

d. Conclusion

Because Relevant has failed to show that Defendants' petitioning activity underlying the Tommie, Thompson, Selma, and Schrader projects were shams, the *Noerr-Pennington* doctrine immunizes those activities from liability. As a matter of law, those petitioning activities cannot form civil RICO predicate acts of extortion under the Hobbs Act or California law. And even if the Court were to accept that Defendants' activity relating to the Schrader project amounted to a valid predicate act, Relevant's RICO claim would still fail because at least two predicate acts are required. *See Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d at 972 ("A 'pattern of racketeering activity' requires at least two predicate acts of racketeering activity . . . within a period of ten years." (citing 18 U.S.C. § 1961(5)).

Relevant, however, makes one final argument. It contends that even if the Court finds Defendants' activities to be protected under *Noerr-Pennington*, a triable issue of facts remains on whether Defendants committed extortion or attempted extortion. Relevant cites *Koziol* to

argue that under the Hobbs Act means-ends framework, extortion can be found based on wrongful ends, even if the means were not wrongful. *Relevant Supp. Br.* 3, 24–25.

The Court does not find that argument to be supported by *Koziol* or other caselaw. In *Sosa*, the Ninth Circuit clearly explained that litigation activity must amount to a sham to qualify for liability under the Hobbs Act or California law: "[a]pplying the *Noerr-Pennington* statutory construction presumption, we do not believe the Hobbs Act [or California's extortion statute] imposes liability for threats of litigation where the asserted claims do not rise to the level of a sham." *Sosa*, 437 F.3d at 939–40. And in *Koziol*, the court made a narrow holding relating to sham litigation that is consistent with *Sosa*'s holding. The court in *Koziol* specifically concluded that because the defendant's "ends"—threats of sham litigation to obtain property to which he knew he had no lawful claim—were "wrongful," it did not need to decide whether the "means"—baseless threats of sham litigation using falsified evidence and deceit—were "wrongful." 993 F.3d at 1170. *Koziol*'s holding is bound-up with sham litigation. And the court cited favorably to *Sosa* and even evaluated whether the defendant's activity was protected under the *Noerr-Pennington* doctrine, finding that it was not because the evidence supported both the objective and subjective prongs of the *PREI* test. *See id.* at 1171.

In short, Relevant's argument is essentially a request to sidestep the protections of *Noerr-Pennington*. But that makes little sense and would gut the doctrine's clear goal of broadly protecting First Amendment petitioning activity. *See, e.g.*, *Sosa*, 437 F.3d at 929–42 (describing the importance of the *Noerr-Pennington* doctrine in protecting First Amendment rights); *White*, 227 F.3d at 1231–32 (same). Rather, if Relevant is concerned with the effects CEQA may have on real estate business and development, it should be petitioning the California Legislature to amend or overhaul the statute instead of shoehorning legitimate, or at least not objectively baseless, CEQA activity into civil RICO claims. On these facts, Relevant's claimed "harm"—costs and delays caused by CEQA-related activity—cannot be remedied through civil RICO.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** summary judgment in favor of Defendants. This order closes the case.

IT IS SO ORDERED.