Case No. 26-2317

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY

Plaintiff-Appellant

v.

STEVE BORISLAV MIKHOV; AMY MORSE; ROGER KIRNOS,

Defendants-Appellees

On Appeal from the United States District Court
for the Central District of California
Case No. 2:25-cv-04550-MWC-PVC
Hon. Michelle Williams Court, United States District Judge

PROPOSED AMICUS BRIEF BY THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF APPELLANT FORD MOTOR COMPANY

[Filed with Motion for Leave]

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1. Identity of the Amicus Curiae

Founded in 1979, the Civil Justice Association of California (CJAC) is dedicated to improving the civil liability system as it affects California businesses, in the legislature, the regulatory arena, and the courts. CJAC's membership base consists of businesses and associations from a broad cross-section of California industries.

An important part of CJAC's work is identifying cases in the appellate courts that may affect those not directly involved in the appeal. Through the filing of amicus curiae briefs such as this one, CJAC seeks to bring the concerns of the business community to the attention of the appellate courts. CJAC hopes that, by providing a broader perspective on the issues being decided, it will assist those courts in arriving at sound decisions in the best interests of all those who may be affected.

CJAC has identified this case as one that warrants filing an amicus curiae brief because what this Court determines about the impact of the *Noerr-Pennington* doctrine on efforts like Ford Motor Company's to hold abusers of the Song-Beverly attorney fee provision accountable will be important in future cases involving other fee-shifting statutes that impact CJAC's membership.

2. Authorship of the Brief

Calvin House, CJAC's counsel, authored the entire brief. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than CJAC and its members contributed money that was intended to fund preparing or submitting the brief.

3. Argument

Ford's complaint alleged that the Knight Law Group was a RICO enterprise that the defendants used to produce inflated billing statements for the purpose of supporting fraudulent fee applications in Song-Beverly cases. The District Court ruled that the conduct was immune from liability under the *Noerr-Pennington* doctrine, thereby depriving Ford of a remedy for the inflated fee awards that it had been defrauded into paying. In doing so, the District Court misapplied the sham exception to the doctrine and immunized conduct that amounted to fraud on the judicial system.

Fee-shifting statutes like the Song-Beverly provision encourage litigation by authorizing successful plaintiffs to recover attorney fees while denying, or severely restricting, such relief to successful defendants. For example, California's whistleblower statute only authorizes a court "to award reasonable attorney's fees to a *plaintiff* who brings a successful action." Cal. Lab. Code § 1102.5(j). The Unruh Civil Rights Act only authorizes an attorney fee award to "any *person denied* the rights provided" by the Act. Cal. Civ. Code § 52(a). Attorney fee awards under the Labor Code Private Attorneys General Act of 2004 ("PAGA") are limited to "[a]ny *employee* who prevails in any action." Cal. Lab. Code § 2699(k)(1). The Fair Employment and Housing Act allows successful employers to recover fees, but only if "the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." Cal. Gov. Code § 12965(c)(6). The standard this Court adopts for the sham-litigation exception will necessarily govern all these contexts, not just Song-Beverly cases.

In the ordinary course, very little scrutiny is given to the hours claimed on fee applications. An opponent to a statutory fee motion is not charged with conducting an independent audit into whether opposing counsel's sworn billing submissions are fabricated. California law expressly permits a fee applicant to establish the hours claimed through counsel's declaration, without even producing contemporaneous time records. (*Steiny & Co., Inc. v. California Electric Supply Co.*, 93 Cal.Rptr.2d 920, 926 (Ct. App. 2000).[1] The abbreviated procedure for determining a fee motion therefore emphasizes the need for defendants to be able to seek recovery of the fees if they later uncover the fraud in the fee application.

Because granting immunity from liability for fraudulent fee applications may have implications for fee awards under other fee-shifting statutes, CJAC urges the Court to make clear that such conduct falls outside the *Noerr-Pennington* doctrine.

[1] Scrutiny on appeal is even more limited, because the trial court's exercise of discretion "will not be disturbed unless the appellate court is convinced that it is clearly wrong." *Ketchum v. Moses*, 17 P.3d 735, 742 (Cal. 2001).

A. This Court's framework for determining whether the sham exception applies *Noerr-Pennington* immunizes unlawful conduct.

Ford's opening brief explains in detail why the Court need not even consider whether the sham exception to *Noerr-Pennington* applies. That is because (1) the RICO statute unambiguously applies to litigation misconduct, and (2) a party's petitioning rights are not burdened by a lawsuit enforcing rules that apply to all litigants. CJAC's brief will concentrate on the sham exception from *Noerr-Pennington* protection, which this Court applies in three circumstances: (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 without regard to the merits and for an unlawful purpose, and (3) if the conduct consists of making intentional misrepresentations to the court, it is a sham if "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Relevant Grp., LLC v. Nourmand*, 116 F.4th 917, 928 (9th Cir. 2024), quoting *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998).

B. Ford adequately alleged that the defendants' intentional misrepresentations of the hours spent on Song-Beverly cases deprived their litigation of legitimacy.

This Court has made clear that RICO claims based on fraudulent litigation conduct fall within the sham exception. In *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638 (9th Cir. 2009), the RICO plaintiff alleged intentional misrepresentations and fraud upon the court through the suppression of evidence in an eminent domain proceeding that led to her property being valued lower than it should have been. That conduct "was precisely the sort the sham exception was created to address." 590 F.3d at 646-647.

The District Court refused to apply the sham exception in this case, because it thought "the entire Lemon Law litigation" constituted the scope of the inquiry, not just the fee applications. On that basis, the District Court concluded that "the sham exception does not apply because Defendants' actions did not so infect the Lemon Law proceedings as to render them illegitimate." And, according to the District Court, it would come to the same conclusion if it just looked at the fee applications. [Dkt. 171, p. 18] If the defendants had not submitted false billing records, their plaintiffs still would have prevailed on the merits of their Song-Beverly claims, and, having done so, the trial courts would have awarded them fees in some amount.

But that narrow view of the "entire proceeding" phrase from *Kottle* rewards exactly the type of conduct that the sham exception has been held to carve out of *Noerr-Pennington* immunity—the use of false statements in litigation to procure something that the litigant would not otherwise be able to obtain. It also fails to take account of two key decisions from this Court.

First, in *Kearney*, the misrepresentations did not change the ultimate result. The municipality would have taken the plaintiff's property even if it had not suppressed evidence that bore upon the value of the property. It just would have had to pay more for it. Nonetheless, the Court applied the sham exception. Likewise, here, if the defendants had not misrepresented the hours on which their fee applications were based, Ford would have paid them less. The same principle supports application of the sham exception in both cases. It is enough that fraudulent conduct was used to secure a benefit that the litigant was not otherwise entitled to.

Second, in *Pyankovska v. Abid*, 65 F.4th 1067 (9th Cir. 2023), the Court reversed summary judgment that had been granted on *Noerr-Pennington* grounds, holding that "filing illegally obtained evidence on a public court docket is conduct not immunized under *Noerr-Pennington*." 65 F.4th at 1071. The decision was based on the first step in this Court's test for determining whether *Noerr-Pennington* shields otherwise unlawful activity—that is, that there was no burden on petitioning activity, a point that Ford explains at length in its opening brief. However, looked at more broadly, the decision also supports the point that the scope of the defense should be determined by looking at the particular conduct at issue.

Fraudulent conduct directed at a court should not be excused just because the plaintiff confronted with a *Noerr-Pennington* defense is unable to show that the fraud affected every aspect of its lawsuit. As this Court said in another context when it overturned a Tax Court decision that was plagued with misconduct by the government's attorneys, "[w]hen we conclude that the integrity of the judicial process has been harmed, however, and the fraud rises to the level of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decisions,' we not only can act, we should." *Dixon v. Comm'r of Internal Rev.*, 316 F.3d 1041, 1046 (9th Cir. 2003). "Such fraud corrupts the adversarial nature of the proceeding, the integrity of witnesses, and the ability of the trial court to judge impartially." 316 F.3d at 1047. When the misconduct harms the integrity of the judicial process, it is not necessary to show prejudice. 316 F.3d at 1046.

That is exactly the sort of misconduct that Ford has identified in the attorney fee applications on which it bases its RICO claim, false statements designed to improperly influence the courts entertaining Song-Beverly attorney fee applications. That conduct corrupts the ability of those courts to judge fairly. The Court should not countenance the use of *Noerr-Pennington* as tool for avoiding the consequences that flow from such conduct. It falls within the sham exception to the *Noerr-Pennington* doctrine.

4. Conclusion

Fee-shifting provisions exist to make representation economically viable for consumers, employees, and civil-rights plaintiffs who could not otherwise afford counsel. Undetected, systemic abuse of that mechanism imposes costs not just on individual defendants but on the fee-shifting model itself. Persistent, provable abuse like what Ford has identified in this case is the kind of harm that invites legislative rollback of fee-shifting provisions, which would hurt legitimate plaintiffs and the attorneys who represent them in good faith

A sham-exception standard calibrated to actually reach this conduct serves the interests of legitimate plaintiffs' counsel and defendants alike and is the more faithful reading of both *Noerr-Pennington* and the fee-shifting statutes' purposes.

The Court should reverse the District Court's judgment for the defendants and remand the case for a trial on the merits.

Dated: August 10, 2026

Respectfully submitted,

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s/ Calvin House
Attorneys for Amicus Curiae
Civil Justice Association of California

5. Certificate of Compliance under Rule 32(g)(1)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because

☒ this brief contains 2,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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s/ Calvin House

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Dated: August 10, 2026