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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FATEMEH SANIEFAR,

Plaintiff,

vs.

RONALD D. MOORE, TANYA E. MOORE, KENNETH RANDOLPH MOORE, MAREJKA SACKS, ELMER LEROY FALK, ZACHERY M. BEST, MOORE LAW FIRM, a California Professional Corporation, MISSION LAW FIRM, a California Professional Corporation, GEOSHUA LEVINSON, RICK D. MOORE, WEST COAST CASP AND ADA SERVICES, a California Corporation, RONNY LORETO, and DOES 1 THROUGH 100, inclusive,

Defendants.

No. 1:17-cv-00823-LJO-BAM

RONALD D. MOORE'S, KENNETH RANDOLPH MOORE'S, MAREJKA SACKS'S, MOORE LAW FIRM, P.C.'S; MISSION LAW FIRM, A.P.C.'S; and TANYA E. MOORE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS RICO COMPLAINT

Date: October 10, 2017
Time: 8:30 a.m.
Courtroom: 4
Honorable Lawrence J. O'Neill

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I. Introduction.

This *second* retaliatory Racketeer Influenced and Corrupt Organizations Act ("RICO") action[1] attacks the legitimate and protected First Amendment petitioning activity of retired attorney Kenneth Randolph Moore ("K. Moore"), attorney Tanya E. Moore ("T. Moore"), paralegal Marejka Sacks ("Sacks"), the Moore Law Firm, P.C. ("MLF"), the Mission Law Firm, A.P.C. ("Mission"), and Ronald D. Moore ("Ronald Moore," and collectively, "The Advocates"), as well as that of their co-defendants who are joining in this motion.

In a nutshell, Plaintiff, Fatemeh Saniefar ("Saniefar"), wants the Court to issue an order preventing The Advocates and co-defendants from ever filing (or assisting in filing) lawsuits seeking to protect the rights of persons with disabilities, and to extract a monetary sum to punish them for ever having done so. (Cmplt. at 29:8-20.) Saniefar is exacting revenge because Ronald Moore dared to file a lawsuit against her seeking full and equal access to her Fresno restaurant under the federal Americans with Disabilities Act ("ADA") and state law claims.[2] Saniefar does not assert that the Prior Litigation was without merit nor can she. The simple fact is that there was no dispute that her restaurant was not accessible to persons with disabilities. As a result of Ronald Moore's lawsuit, she made it accessible, thereby mooting Ronald Moore's ADA claim because he successfully obtained all the relief he sought under the ADA.

Instead, Saniefar complains that The Advocates lied or knew about lies regarding the *extent* of Ronald Moore's disability in that Prior Litigation. (Cmplt., ¶¶ 50, 111.) She also alleges that there was false testimony regarding Ronald Moore's visit to her restaurant, but *nowhere* does she assert that Ronald Moore did not go there as he testified. (Cmplt., ¶¶ 24, 27, 64, 65.) A plain reading of the complaint makes clear that it fails on its face to state a claim that there was any actionable fraud to support a racketeering claim, especially where First Amendment rights are threatened.

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[1] Plaintiff Fatemeh Saniefar and others filed a RICO counterclaim in the underlying action as discussed in more detail below which counterclaim was dismissed.

[2] *Moore v. Zlfreds, Inc., et al.*, E.D. Cal. Case No. 1:14-cv-01067-SKO, referred to by Saniefar (Cmplt. ¶ 24) and The Advocates herein as "the Prior Litigation"; Defendants' Joint Request for Judicial Notice ("RFJN") No. 5

Saniefar bases her claim that Ronald Moore lied *not* about being disabled, but about the extent of his disability, on video surveillance obtained in the Prior Litigation that shows Ronald Moore walking without assistance. (Cmplt., ¶¶ 25, 26, 58, 110.) This surveillance is the sole evidence upon which Saniefar's disability fraud claims rests. But Saniefar paradoxically acknowledges that Ronald Moore never said he could not walk, or even walk without assistance; instead, she admits he testified that *he risks falling* when he does so. (Cmplt., ¶ 56.) *Where is the lie*? Even giving the video surveillance the exaggerated weight Saniefar attaches to it, the Court's inquiry can end here because it in no way contradicts Ronald Moore's testimony.

Further, as discussed below, Saniefar has mischaracterized what her "evidence" revealed. Saniefar's private investigators watched Ronald Moore undetected for over 77 hours spanning over two months, and testified that they *never* saw Ronald Moore in public without his wheelchair. Instead, they saw him in his yard and a neighbor's yard on two days without his wheelchair or cane for a total of *mere minutes out of 77 hours*. Ronald Moore freely acknowledged in the Prior Litigation that he does on rare occasions walk unassisted, but that when he does, he experiences pain in varying degrees depending on the day, and he always risks falling. Again, The Advocates ask, where is the fraud?

And if the video surveillance reveals fraud, it is noteworthy that two different judges in this district viewed that very same video surveillance and concluded that it did not create a disputed fact as to Ronald Moore's disability.[3] Apparently, the fraud implicates quite unlikely suspects.

Notwithstanding the lack of support for her position, Saniefar is indisputably attacking petitioning activity – activity which is protected by the First Amendment under the *Noerr-Pennington* doctrine. That activity, even if it were reprehensible, is to be carefully safeguarded absent an absolute showing that the Prior Litigation was a sham, and that as a result of The Advocates' conduct, the *entire* Prior Litigation was deprived of its legitimacy. Saniefar makes

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(state court complaint filed by Ronald Moore against Saniefar alleging dismissed state claims).

[3] RFJN Nos. 1 (at 7:23-12:2) and 2 (at 6:13-8:13).

no effort to plead this exception to immunity which is fatal to her complaint. Nor can she. The *extent* of Ronald Moore's disability was, at best, a disputed fact, a fact which is the subject of pending state court litigation. Similarly, Saniefar does not dispute that Ronald Moore visited her restaurant, only his claims regarding the barriers to his access he encountered. This latter claim lacks credibility when reviewing the Prior Litigation and Saniefar's stipulation that the conditions Ronald Moore alleged to have encountered indeed existed at that time.[4] And this latter claim was already adjudicated in Saniefar's first RICO counterclaim in the Prior Litigation. There, the district court held that even if Ronald Moore never visited Saniefar's restaurant, such a fact would not deprive the litigation of its legitimacy. As such, this retaliatory RICO claim must be dismissed both because there is no claim stated, and because the conduct complained about, even if true, receives *Noerr-Pennington* immunity.

With regards to the substantive RICO claim itself, The Advocates join in the concurrently filed motions of co-defendants Zachary Best, Rick D. Moore, Ronny Loreto, and Elmer LeRoy Falk who address the fact that no RICO claim is stated. The Advocates further argue that the RICO claim fails to allege open or closed-end continuity given that the only complained of conduct arises out of the single Prior Litigation, and thus the RICO claim fails.

The complaint is admittedly an intriguing read of familial relationships and crafty conspiracies. It appears to have received widespread interest from those who see ADA lawsuits not as an abject failure of businesses across California to comply with the ADA, but as an abuse by disabled persons seeking to vindicate the rights promised to them over 27 years ago when a bi-partisan Congress passed the ADA and President George H. W. Bush signed it into law. Unfortunately for those who would applaud stripping The Advocates of the privilege of righting these wrongs, the complaint fails to deliver because no claim is, or can be, stated.

II. The *Noerr-Pennington* doctrine.

The First Amendment protects an individual's right to petition the government for grievances. Therefore, suits burdening this right are unconstitutional so long as the suit is not

[4] RFJN No. 3 at ¶¶ 4-10.

"sham" litigation. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) ("*Noerr"*); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) ("*Pennington,*" which together with *Noerr*, form the *Noerr-Pennington* doctrine); *Sosa v. DirecTV, Inc.* ("*Sosa*"), 437 F.3d 923, 938 (9th Cir. 2006) (explaining three "sham litigation" exceptions to *Noerr-Pennington* immunity in RICO actions). "Under the *Noerr-Pennington* doctrine, 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. Although initially applied in the anti-trust context, *Noerr-Pennington* immunity extends to RICO suits. *Id.* at 942 (affirming dismissal of RICO suit on ground that the sending of pre-litigation demand letters was conduct immunized from RICO liability under the *Noerr-Pennington* doctrine); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 646-48 (9th Cir. 2009).

Further, "the agents of that litigation--employees and law firms and lawyers--may benefit from the immunity as well." *Id.* at 645. Activity related to petitioning activity also receives immunity. "Consistent with the breathing space principle, we have recognized that, in the litigation context, not only petitions sent directly to the court in the course of litigation, but also conduct incidental to the prosecution of the suit is protected by the *Noerr-Pennington* doctrine." *Sosa*, 437 F.3d at 934 (internal quotations and citation omitted); *see also Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008).

III. Legal standard for motion to dismiss under Rule 12(b)(6) applied to a RICO claim based upon petitioning activity immunized by *Noerr-Pennington*.

A. 12(b)(6) legal standard and proper consideration of extrinsic evidence.

When the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6), "review is limited to the complaint." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to plaintiffs." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Rule 12(b)(6) requires that when evidence extrinsic to the complaint is considered, the motion be converted into a Rule 56 motion for summary judgment.

There are, however, two exceptions to the rule that consideration of extrinsic evidence converts a Rule 12(b)(6) motion to a summary judgment motion. First, a court may consider "material which is properly submitted as part of the complaint" on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (citation omitted). If the documents are not physically attached to the complaint, they may be considered if the documents' "authenticity . . . is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998), *superseded by statute on other grounds as stated in Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681-82 (9th Cir. 2006).

Second, under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of "matters of public record." *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Matters of public record include documents filed with the Court. *See, e.g.*, *Petersen v. Columbia Cas. Co.*, SACV 12-00183 JVS, 2012 U.S. Dist. LEXIS 120033, n. 3 (C.D. Cal. Aug. 21, 2012) ("The existence and contents of the court documents from prior litigation are not subject to reasonable dispute. Thus, the Court takes judicial notice of these documents"); *Aquarius Well Drilling Inc. v. American States Insurance Co*., No. 2:12-cv-00971-MCE-CMK, 2012 U.S. Dist. LEXIS 98547, n. 4 (E.D. Cal. July 16, 2012) (taking judicial notice of a state court complaint in a duty to defend action); *Blue Isle of California, Inc. v. Hartford*, No. CV-01-02405 CAS (MANx), 2002 U.S. Dist. LEXIS 28374, n. 1 (C.D. Cal. Mar. 13, 2002) ("The Court finds that the Underlying Complaint, as well as such additional documents filed in the litigation between Blue Isle and J.N. Zippers as will be discussed below, are appropriate for judicial notice pursuant to Fed.R.Evid. 201").

Although the Court is required to construe all allegations of material fact in the light most favorable to the nonmoving party, *see Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1527 (9th Cir. 1995), conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. *See Anderson v. Clow (In re Stac Elecs. Sec. Litig.),* 89 F.3d 1399, 1403 (9th Cir. 1996).

B. 12(b)(6) motion in the context of a RICO claim based on petitioning activity.

The need for specific, non-conclusory allegations is amplified when evaluating a claim which arises from petitioning activity protected by the First Amendment.

> In order not to chill legitimate lobbying activities, it is important that a plaintiff's complaint contain specific allegations demonstrating that the *Noerr-Pennington* protections do not apply. [] Conclusory allegations are insufficient to strip them of their *Noerr-Pennington* protection. [] Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity.

Boone v. Redevelopment Agency of San Jose, 841 F.2d 886, 894 (9th Cir. 1988) (internal citations omitted) (citing *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1080-81 (9th Cir. 1976) *("Franchise Realty"), cert. denied*, 430 U.S. 940 (1977)).

And where the plaintiff claims that defendants' underlying petitioning activity was a sham, the court should examine "the outcome of the challenged proceedings, the nature of the particular allegations of the legal action claimed to be fraudulent or improper, and whether these claimed misrepresentations or improper conduct would have been significant to the ultimate outcome or continuation of the proceeding." *Coca-Cola Co. v. Omni Pac. Co.*, No. C 98-0784 S1, 1998 U.S. Dist. LEXIS 23277, at *25-26 (N.D. Cal. Dec. 9, 1998).

Another court, upon which the Northern District relied in *Omni*, explained the reason the underlying litigation must be scrutinized carefully:

> To allow antitrust claims based solely on broad and indistinct allegations of misrepresentation and "sham litigation" to reach discovery, regardless of the role the claimed misrepresentations played, or could have played, in the prior proceeding, would predicate the viability of an antitrust complaint on a petitioner's subjective intent, and not the objective merit of its petition, and thus directly contravene the Supreme Court's holding in *PRE.* 113 S. Ct at 1928. Moreover, such discovery would have the effect of encouraging antitrust "strike suits", and effectively chill the First Amendment rights which *Noerr* immunity was intended to protect.

Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp., 874 F. Supp. 543, 549 (E.D.N.Y. 1995).

Where, as here, a plaintiff asserts a RICO claim based upon a prior litigation, the prior litigation should be carefully examined to adduce the viability of the claim in light of the evidence and holdings in that action to safeguard and avoid a chill on First Amendment rights.

IV. The complaint itself makes clear there was no "scheme" to defraud Saniefar or others because Ronald Moore succeeded on his ADA claim and there was no misrepresentation regarding Ronald Moore's disability or visits.

A. Ronald Moore succeeded on his ADA claim.

As discussed above, because this RICO lawsuit is entirely based upon the Prior Litigation and implicates petitioning activity, the Court must turn to the merits of the underlying litigation to determine whether it should be afforded *Noerr-Pennington* immunity or whether the sham litigation exception applies. Therefore, the Prior Litigation will receive significant analysis throughout this motion.

Ronald Moore filed a lawsuit in July 2014 against Saniefar and others (collectively "Defendants"), alleging that Defendants had deprived him full and equal access to their restaurant on account of his disability, in violation of Title III of the Americans with Disabilities Act ("ADA") and parallel California law. (Cmplt., ¶ 24.)

While Saniefar points out that the Prior Litigation concluded when Defendants obtained summary judgment in their favor (Cmplt., ¶ 24), judgment was *not* reached on the merits, but dismissed for lack of jurisdiction on the ADA claim because Defendants had remediated all the conditions about which Ronald Moore had complained as a result of Ronald Moore's lawsuit. (RFJN No. 4.) Saniefar in fact *stipulated* that the conditions about which Ronald Moore had complained about encountering did, in fact, exist at the time of Ronald Moore's visit. (RFJN No. 3 at ¶¶ 4-10.)

Specifically, the court noted that "it is uncontested for purposes of Defendants' Motion that Defendants have voluntarily remedied all alleged barriers." (RFJN No. 4 at 10:16-17.) The court held that because the "claim is moot, the Court lacks subject-matter jurisdiction over Plaintiff's ADA claim. [Citation omitted.] The Court therefore finds that Plaintiff's ADA claim—the First Claim in the Complaint—must be dismissed." (*Id.* at 14:15-20.) The court went

on to decline to exercise supplemental jurisdiction over Ronald Moore's state law claims, and dismissed them *without prejudice*, expressly leaving Ronald Moore free to re-file those claims in state court. (*Id.* at 18:6-8.) And Ronald Moore has, in fact, re-filed the action in state court. (RFJN No. 5.)

In other words, there is no dispute that Defendants removed barriers to Ronald Moore's access at their Restaurant directly in response to the Prior Litigation, or that the conditions Ronald Moore complained about existed. In fact, Saniefar's removal of those barriers is what mooted Ronald Moore's federal claim. There can be no dispute that the underlying litigation was not without merit, at least insofar as the existence of the ADA violations is concerned. Neither can it be claimed that Defendants prevailed in the action on the merits on the ADA claim, or on the pendent state law claims which were dismissed without prejudice and are currently pending. In fact, it is Ronald Moore who achieved victory by compelling Defendants to make their Restaurant accessible to him. While this victory does not impart "prevailing party" status on Ronald Moore for purposes of recovering his attorneys' fees[5], it nonetheless certainly constitutes "success"[6] by any objective measure.

B. The RICO complaint itself acknowledges that Ronald Moore never claimed he could not walk – only that he experienced pain and risked falling if he did – and therefore, there was no scheme to defraud Saniefar.

What the court in the Prior Litigation did not resolve were Defendants' arguments regarding the extent of Ronald Moore's disability. (RFJN No. 6, Facts 1-3.) Instead, Saniefar is attempting to use this RICO action to litigate concocted disputed issues arising from protected petitioning activity. Saniefar alleges:

> Contrary to his sworn testimony, Plaintiff is informed and believes, and thereon alleges, that Defendant Ronald Moore can indeed walk by himself, without the use of a cane, person or object on which to lean. At various times from March to April 2015,

[5] *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 609-10 (2001) (ADA plaintiff who does not achieve judicial imprimatur, even if his lawsuit caused the defendant to remediate its property, does not confer "prevailing party" status on the plaintiff for purposes of recovering his attorneys' fees).

[6] A "favorable or desired outcome." https://www.merriam-webster.com/dictionary/success (Aug. 23, 2017).

> Defendant Ronald Moore has been taped during surveillance walking by himself and without any aid.

(Cmplt., ¶ 26.)

> Contrary to the representations regarding Defendant Ronald Moore's disability made under oath, and the representations of his attorneys and attorneys' agents, video surveillance directly contradicts Defendant Ronald Moore's testimony and the claims made in his various lawsuits.

(Cmplt., ¶ 55.)

Despite the above allegations, the Prior Litigation reflects that Ronald Moore never testified that he was unable to walk; rather, he testified that he was *substantially limited* in his ability to walk because walking causes him pain, and he risks falling when he walks unassisted. (RFJN No. 7 at ¶ 2.) In fact, Saniefar acknowledges this in her Complaint:

> [I]n numerous verified complaints, and in sworn testimony, Defendant Ronald Moore has testified that he is disabled and requires the use of a wheelchair for mobility and that he is *unable to walk without the risk of falling* unless he uses a cane, an object for support, or obtains the assistance of another person.

(Cmplt., ¶ 56 (emphasis added).)

Saniefar goes on to further acknowledge Ronald Moore's testimony regarding how he achieves ambulation at home, even though he does not use a wheelchair there:

> [Ronald Moore] achieves mobility at his home by leaning on walls, using his cane, or obtaining physical support from family members.

(Cmplt., ¶ 57.)

Saniefar's complaint itself demonstrates that there was nothing fraudulent about Ronald Moore's testimony. On the rare occasions Ronald Moore walks, he risks falling – that is not the same as an inability to walk. And it does not call into question Ronald Moore's disability. Any video surveillance of Ronald Moore walking would not contradict his testimony. Saniefar's effort to raise a disputed fact regarding the *extent* of Ronald Moore's disability in a RICO action should be further viewed in the context of the 2008 ADA Amendments wherein Congress, in derogation of two Supreme Court cases, made clear that the focus of actions brought under the

ADA should *not* be on the extent of the plaintiff's disability, but on the defendant's compliance with the Act:

> [I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

ADA Amendments Act of 2008, 110 P.L. 325, 122 Stat. 3553, 3554.

As such, Congress requires broad rules of construction when defining "disability":

> Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
>
> (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
>
> …
>
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

42 U.S.C. § 12102(4) (emphasis added).

Saniefar at best quibbles only with the *extent* of Ronald Moore's disability; but given the express Congressional mandate that such issues should not demand extensive analysis and should be construed broadly, it is hard to conceive how such a dispute could rise to the level of fraud under the ADA, or deprive the litigation of its legitimacy.

The Supreme Court has also clarified that just because an individual could choose at times to walk, he is still disabled. "In the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). In other words, a video showing an individual on occasion walking, but who claims he is substantially limited in his ability to walk, simply cannot be dispositive on the question of his disability.

Even so, Saniefar grossly overstates and misrepresents the video surveillance she relies extensively upon as the sole basis of her allegation that Ronald Moore misrepresented the *extent* of his disability. Paradoxically, that surveillance wholly *supports* Ronald Moore's claims of disability. The private investigators who conducted the surveillance in the Prior Litigation in

fact testified that in the more than 77 hours of surveillance, spanning months, they *never* saw Ronald Moore in public without his wheelchair. (RFJN No. 8 at ¶ 2, Exh. B at 72:10-28; Exh. C at 24:17-20.) Instead, they witnessed him walk a short distance at his home and his neighbor's home for a mere few minutes total. (RFJN 8 at ¶ 3.) Notably, the very same video surveillance referenced in Saniefar's RICO complaint was used in two other actions brought by Ronald Moore, and two different judges in this district concluded, after reviewing the videos, that Ronald Moore was disabled. (RFJN Nos. 1 at 7:23-12:2 and 2 at 6:13-8:13.)

It is the Prior Litigation that forms the basis of the RICO scheme – Saniefar alleges that all The Advocates and co-defendants conspired together to file fraudulent lawsuits to obtain quick settlements from small businesses.

While Saniefar generally alleges that The Advocates and others file other lawsuits containing misrepresentations regarding disability, visits to businesses, and intent to return, no other such lawsuit is identified, let alone the specific parties or fraudulent representations, and thus these phantom lawsuits cannot form the basis of her RICO action.

V. Generalized fraud allegations against The Advocates fail under Rule 9.

Rule 9 of the Federal Rules of Civil Procedure requires that fraud allegations include "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986). Where only vague, and conclusory fraud allegations are made, the complaint must be dismissed. *Desoto v. Condon*, 371 F. App'x 822, 824 (9th Cir. 2010). In addition, when alleging fraud, "[t]he plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Decker v. Glenfed, Inc. (In re Glenfed, Inc. Sec. Litig.)*, 42 F.3d 1541, 1548 (9th Cir. 1994).

Further, allegations of fraud based on information and belief usually do not satisfy the particularity requirements under rule 9(b). *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989). Each allegation in the complaint is based on "information or belief" and the complaint must therefore be dismissed on this basis alone. This is not an instance where the

plaintiff has no knowledge of the wrongdoing; she was a party to the Prior Litigation and has every piece of information necessary to identify the specific misrepresentations but has not done so. Her conclusory allusions to other litigation and other ADA plaintiffs provides absolutely nothing upon which a claim could be stated – the only "fraudulent" litigation referenced is the Prior Litigation, and as discussed below, even then the required specificity is not alleged.

Saniefar makes a wide range of scandalous allegations against The Advocates, most of which are not relevant to her fraud claims. Regardless, they do not come close to meeting Rule 9's requirement. Her factual claims are summarized as follows:

Conspiracy claims:

Saniefar alleges that The Advocates file "false allegations of disability, injury, and standing to collect quick settlements from California businesses." (Cmplt., ¶ 18.) But there is no identification of the lawsuits filed or what the false allegations are, or how they are known to be false. Saniefar goes on to allege that it is cheaper for businesses, especially "mom-and-pop" establishments owned by immigrants, to settle than litigate. (Cmplt., ¶¶ 19-20.) Again, these entities are not identified, and it is a mainstay of litigation that it is always less expensive to settle than litigate, especially where liability is clear. Given that the vast majority of all civil cases filed settle, this argument cannot support any conspiracy claim. And a reasonable inference in the "quick settlements" of ADA lawsuits is that businesses recognize that they have failed to comply with the law and wish to avoid incurring significant fees fighting a losing lawsuit – these are not complicated factual or legal issues.

Saniefar goes on to redundantly allege that the lawsuits "lack merit, are frivolous and vexatious because of false assertions regarding allegations of disabilities, visits to establishments, encounter of [sic] barriers, and intent to return." (Cmplt., ¶ 22.) Again, no lawsuits are identified, and no facts are alleged regarding what the "false assertions" are, to whom they were made, when they were made, or how they were made. Saniefar then complains that "many of the businesses sued" by The Advocates "have not undertaken any improvements to their facilities to become ADA compliant." Not only does she fail to identify a single business sued that did not make changes as a result of a lawsuit initiated by The Advocates, thus

failing again under Rule 9, but whether or not businesses made such changes in no way informs whether the unidentified lawsuits were fraudulent. Moreover, it seems particularly ridiculous and disingenuous for Saniefar to assert that The Advocates try to obtain quick settlements with no remediations when the only evidence before the Court, i.e., the Prior Litigation, demonstrates that The Advocates litigate matters through summary judgment, in fact resulting in Saniefar making her restaurant accessible.

With regards to the Prior Litigation, Saniefar again only alleges that Ronald Moore's "allegations were false." (Cmplt., ¶ 25.) She goes on to provide the example of Ronald Moore's testimony that he is unable to stand or walk without assistance (Cmplt., ¶ 26), but as discussed above, she acknowledges that Ronald Moore in fact testifies that he can walk, but if he does so, he risks falling. (Cmplt., ¶ 56.) She then alleges that Ronald Moore's testimony about his encounter with barriers at her restaurant was disputed by her witnesses. (Cmplt., ¶ 27.) This is at best a disputed fact, not a viable fraud claim. Coupled with her stipulation that the conditions Ronald Moore complained about in fact existed (RFJN No. 3 at ¶¶ 4-10), this "fraud" claim wholly lacks support.

The Criminal Enterprise:

Saniefar implies that there is something inherently wrong with The Advocates having filed "approximately 1,400" disability related litigation in the past eight years involving Ronald Moore and other plaintiffs. (Cmplt., ¶ 30.) But again, she fails to explain how this is evidence of a nefarious intent rather than a wholesale lack of voluntary compliance with the ADA. The remainder of the allegations detail the interrelationship of The Advocates and co-defendants in order to support the RICO claim. However, again, the RICO claim is entirely premised upon a fraud that is not stated and cannot be stated.

The Fraudulent Scheme:

The tale begins with several of The Advocates meeting with the disabled community and offering them a "finder's fee" when they agree to be ADA plaintiffs. (Cmplt., ¶ 39.) Saniefar does not explain what the "finder's fee" is, leaving a reasonable inference (again, assuming any of this is to be believed) that a "finder's fee" could equate to "statutory damages" or other

legitimate compensation for injuries. The lack of Rule 9 specificity leaves The Advocates guessing.

In essence, Saniefar asserts that The Advocates direct other co-defendants (investigators) to go to businesses to document ADA violations, which allegations are then included to "supplement" complaints asserting violations of the ADA. (Cmplt., ¶¶ 40-43.) Saniefar does not appear to dispute that the violations exist, only whether unspecified ADA plaintiffs, in the unspecified litigation, encountered *all* of them. Her use of the term "supplement" at least implies that there is a valid claim initiated by the plaintiffs (what else would there be to supplement?), but that the claim is "supplemented" with additional information obtained from investigators. This "supplementation" could be entirely consistent with the ADA where a disabled plaintiff, who encounters at least one condition that deprives him full and equal access to a business, may bring a suit seeking the removal of all inaccessible conditions that relate to his disability:

> [W]e hold that an ADA plaintiff can establish standing to sue for injunctive relief either by demonstrating deterrence, or by demonstrating injury-in-fact coupled with an intent to return to a noncompliant facility. Second, we hold that an ADA plaintiff who establishes standing as to encountered barriers may also sue for injunctive relief as to unencountered barriers related to his disability.

Chapman v. Pier 1 Imps. (U.S.), Inc., 631 F.3d 939, 944 (9th Cir. 2011).

In order to ascertain what those "unencountered" barriers are, an ADA plaintiff would need another, such as an investigator, to identify them so as to allow him to "supplement" his complaint with that information. Further, the *Chapman* holding eviscerates Saniefar's argument because an ADA claim can be stated without the disabled plaintiff ever visiting the business when he knows about a violation which in turn deters him from going.

The lack of specificity prevents The Advocates from evaluating the alleged fraudulent conduct because not a single lawsuit is identified, nor the specific false claims revealed, or how or why the alleged conduct is fraudulent. Indeed, as discussed above, Saniefar does not dispute that Ronald Moore visited her restaurant and The Advocates are at a loss to figure out what they

have done wrong. Conclusory allegations regarding unknown and unidentified lawsuits are insufficient to meet Rule 9's requirements, and no fraud is revealed in the Prior Litigation.

Defendant-specific allegations:

The remainder of the allegations discuss alleged wrongdoing on the part of each defendant, and include claims of "false verifications" (Cmplt., ¶ 51); "false declarations" (Cmplt., ¶ 52); "false information under sworn testimony" (Cmplt., ¶ 59); the provision of "receipts for evidence to support the false allegations in future-filed ADA complaints" (Cmplt., ¶ 63); "false allegations" (Cmplt., ¶¶ 75-80); "false testimony in depositions and declarations" (Cmplt., ¶ 82); and "false allegations" (Cmplt., ¶¶ 84-87). Other than a reference to an allegedly false statement regarding Ronald Moore's residency in an unrelated litigation to which Saniefar was not even a party (and could have sustained no harm) (Cmplt., ¶ 54), there is no information regarding what the false information was, where it was provided, to whom it was relayed, or any of the details required under Rule 9.

Saniefar relies on repeated generalized statements that there were false allegations regarding the extent of Ronald Moore's disability, visits to businesses, encounter with barriers, and intent to return to businesses. None of the Rule 9 elements is provided. Given that the Prior Litigation is devoid of such falsities, no real fraud claim is stated.

Mail Fraud:

Saniefar alleges that The Advocates and their co-defendants used the mail to "submit receipts, reports, signatures, verifications, declarations, complaints, discovery, correspondence, and other documents containing false information ("Sham Documents") related to the litigation being prosecuted." (Cmplt., ¶ 130.) She asserts that the Sham Documents included "information that was used to falsely establish Defendant Ronald Moore's disability, visits to the facilities being sued, the existence and encounter of [sic] barriers, and intent to return." (Cmplt., ¶ 132.) Although she was obviously a party to the Prior Litigation, and had access to every document allegedly containing such false information (Cmplt., ¶ 136), Saniefar does not identify with any specificity even one document that contained any fraudulent statement, let alone what was untrue, how it is known it was untrue, to whom it was sent, or when it was made.

Wire Fraud:

Saniefar's wire fraud claims fail in the same respect as her mail fraud claims, i.e., they are generalized statements regarding the Sham Documents and false communications without identifying the specific false statements, when they were made, where they were made, and to whom they were made. (Cmplt., ¶¶ 139-151.)

VI. The Advocates are immunized by *Noerr-Pennington*.

A. *Noerr-Pennington* immunity

All of the complained of conduct relates to the filing and prosecution of lawsuits. There is no cognizable argument that the allegations fall outside the protections afforded petitioning activity under the *Noerr-Pennington* doctrine as outlined above. The next inquiry then is whether the "sham litigation" exception to this critical First Amendment safeguard was or could be invoked by Saniefar. If no sham litigation exception applies, The Advocates' alleged conduct is absolutely immunized, and they must be dismissed with prejudice from the action.

The complaint at best references "Sham Documents" and Communications (Cmplt., ¶¶ 131, 142.) It does not address the sham litigation exception. Because the Prior Litigation receives *Noerr-Pennington* immunity, as does any of the vaguely alleged petitioning activity which occurred either before, during, or after the Prior Litigation, Saniefar must have properly pled the sham litigation exception to withstand dismissal. Her failure to do so should result in a dismissal with prejudice and without leave to amend because any amendment would be futile as discussed below. While The Advocates of course have no obligation to preempt any sham litigation argument Saniefar may raise in opposition to this motion to support leave to amend, the importance of immediately ending this direct assault on the First Amendment warrants assuring the Court that no leave to amend, even under the Ninth Circuit's liberal "pro amendment" ethos, should be granted.

In fact, as discussed below, the Ninth Circuit has held that the "pro amendment" ethos does not apply where petitioning activity is implicated.

VII. The "sham litigation" exception is inapplicable because the allegations lack the required specificity; and the complaint does not link The Advocates' conduct to depriving the Prior Litigation, or any litigation, of its legitimacy.

A. The "sham litigation" exception.

Noerr-Pennington immunity is not absolute, and recognizes an exception for conduct that although "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr,* 365 U.S. at 144. As a result, "sham petitions" do not fall within the protection of the doctrine. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1183-84 (9th Cir. 2005). While initial formulations of the sham litigation exception were applied in the antitrust context, the Ninth Circuit has since re-formulated the exception to apply broadly outside the antitrust context. *Sosa*, 437 F.3d at 938. As such, the Ninth Circuit currently recognizes three circumstances in which the sham litigation exception might apply outside the antitrust arena:

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; or

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.

B. The alleged misrepresentations are not identified with the required specificity, there is no link to how they deprived the litigation of its legitimacy, and Saniefar ignores the court's holding in the Prior Litigation that misrepresentations regarding Ronald Moore's visits do not deprive the litigation of its legitimacy.

1. The complaint lacks the required specificity.

The Ninth Circuit subjects allegations of sham litigation via misrepresentations to the court to Rule 9(b)'s heightened pleading standard in order to protect First Amendment rights,

recognizing that "'when a plaintiff seeks damages . . . for conduct which is *prima facie* protected by the First Amendment, the chance that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.'" *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998) (quoting *Franchise Realty,* 542 F.2d at 1083). And this heightened pleading standard "'would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as 'misrepresentations' by the other party.'" *Id.* (quoting *Or. Nat. Res. Council v. Mohla*, 944 F.2d 531, 536 (9th Cir. 1991)). Saniefar's failure to meet Rule 9(b)'s standard is discussed in detail above.

Further, there is a "no amendment" ethos when petitioning activity is the subject of a complaint. The Ninth Circuit has held that a plaintiff's failure to plead the sham litigation exception with specificity warranted dismissal *without leave to amend* given the complained of conduct was protected by the First Amendment:

> From Kottle's complaint, we do not know exactly what representations NWK made, or to whom; with whom NWK conspired; what exactly its 'improper and/or unlawful' methods of advocacy were; or what other testimony the Department may have had that could have influenced its decision to deny Kottle's CON application. Normally, we would be willing to give Kottle the benefit of the doubt, because in reviewing a dismissal for failure to state a claim, we usually ask ourselves whether the plaintiff could prove *any* set of facts that would entitle him to relief. *Franchise Realty,* 542 F.2d at 1082. This case is different, however, because when 'a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.' *Id.* at 1083.

Kottle, 146 F.3d at 1063.

2. The litigation was not deprived of its legitimacy and Saniefar proceeds on a legal theory already rejected in the Prior Litigation.

It is impossible that *any* degree of specificity could establish that anything The Advocates did deprived the Prior Litigation or any litigation complained about of its legitimacy – a requisite element in the third sham litigation exception. To invoke this exception to *Noerr-Pennington* immunity, Saniefar must not only very specifically allege the misrepresentation, she must also establish that The Advocates "so misrepresented the truth [in the underlying

proceeding] that the entire . . . proceeding was deprived of its legitimacy." *Id*. She makes no effort to do so. And in fact, her complaint reveals that there is no disagreement that Ronald Moore is disabled, or that he risks falling when he walks. Nor does she alleged that Ronald Moore did not visit her restaurant. There is no way to interpret anything any defendant did in the Prior Litigation that would deprive it of its legitimacy.

Still, Saniefar challenged Ronald Moore's claims of disability, and found that, at a minimum, he was disabled. (Cmplt., ¶¶ 50, 111.) Her own private investigators also testified that they never saw Ronald Moore ambulating in public without a wheelchair. (RFJN No. 8, Exh. B at 72:10-28; Exh. C at 24:17-20.)

As to the conclusory allegations that Ronald Moore and/or other co-defendants provided false information regarding his visit to Saniefar's restaurant, even if true, they could not deprive The Advocates of immunity. Saniefar misrepresents the nature of standing in a Title III ADA action. Saniefar makes the same allegations the court in the Prior Litigation dismissed. In the Prior Litigation, the court held on her RICO counter-claim that even if there were misrepresentations regarding Ronald Moore's visits to the businesses, those would not deprive the litigation of its legitimacy and could not strip away *Noerr-Pennington* immunity:

> Seeking to avoid unreasonable burdens on ADA plaintiffs, Title III explicitly provides it does not require "a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization . . . does not intend to comply" with the ADA. *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002). Thus, a plaintiff need not visit the place of public accommodation in order to have suffered an injury. *Id.* at 1136–37; *see also Ervine v. Desert View Reg'l Med. Ctr. Holdings*, LLC, 753 F.3d 862, 867 (9th Cir. 2014). Rather, "under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury." *Id.*
>
> Here, to determine ultimately whether the Moores violated the ADA or the Unruh Act, the court need not determine whether Mr. Moore actually visited Zlfred's restaurant. Accordingly, the court could resolve the ADA and Unruh claims in Moore's favor even if his claims of visitation are false, without turning a blind eye to any falsehoods presented to the court.
>
> . . .
>
> Misrepresentations to the court regarding visits to Zlfred's restaurant would not necessarily undermine Moore's ability to prove his claim.

(RFJN No. 9 at 13:8-14:3.)

3. The alleged misrepresentation must be undisputed at the time the sham litigation exception is applied and have been undiscoverable in the prior action.

The legitimacy threshold is best illustrated by examining Ninth Circuit authority wherein the third prong of the sham litigation exception was found to apply to the underlying action, and then comparing those facts to the conduct complained of here.

In an underlying condemnation action, the Ninth Circuit found that the "alleged intentional misrepresentations to the court, and fraud upon the court through the suppression of evidence, that ultimately led to [the plaintiff's] property being valued lower than it should have been," deprived the litigation of its legitimacy. *Kearney,* 582 F.3d at 906. In *Kearny,* the very issue at trial was the fair market value of the plaintiff's property. Material evidence was suppressed despite plaintiff's repeated requests for it. As a result, the jury awarded the plaintiff significantly less than she should have received. The plaintiff successfully moved for a new trial once the evidence was discovered and, based upon the suppressed and withheld evidence which was introduced in the new trial, obtained the higher value for her property. It was only after obtaining this favorable judgment that the plaintiff pursued a RICO action based upon petitioning activity and the third sham litigation exception.

The facts of *Kearny* are instructive. There was absolutely no dispute in the RICO action that evidence was intentionally withheld. This was an objectively identifiable and material misrepresentation – an absolute bright line at the time the RICO action was filed. The court in *Kearny* already *knew* that evidence was withheld, and thus it could meaningfully assess whether the underlying litigation was a sham based upon such conduct.

The Supreme Court has made clear that antitrust lawsuits – certainly analogous to racketeering actions – should not be used to attack First Amendment rights. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) ("The petition right and the adjudication process can be impaired if they are subject to collateral attacks through the antitrust laws, and antitrust liability must be circumscribed to accommodate those interests."). The Ninth Circuit has agreed, holding that a "party should not as a matter of course have the accuracy of

its testimony in a prior judicial proceeding subject to subsequent and collateral attack in the form of an antitrust suit." *Omni Res. Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984).

At its most generous reading, the gravamen of Saniefar's complaint is that Ronald Moore lied 1) about the extent of his disability; and 2) his encounter with inaccessible conditions at Saniefar's restaurant. These were disputed facts in the Prior Litigation (RFJN No. 3 at Facts 1-3 and 6), and were never adjudicated. (RFJN No. 4.) And again, as to the former claim, Saniefar acknowledges that Ronald Moore is disabled, and the latter claim is not material to the Prior Litigation. Still, disputed facts simply cannot provide the basis for asserting the sham litigation exception to *Noerr-Pennington* immunity. If they could, virtually all litigation would be subject to the sham litigation exception, eviscerating the First Amendment protections that are critical to the right to petition the government to seek redress.

Moreover, courts, including the Ninth Circuit, have looked to see whether the misrepresentations could have been addressed and resolved within the litigation itself. This analysis finds favor because that is the very nature of adversarial actions – the ability to discover "the truth." It is part of the human experience, immeasurably emphasized in the pitting of a plaintiff with one view against a defendant sure of another, that "truth" sits firmly in the eye of the beholder. Those variant perspectives should not rise to the level of sham litigation which found its roots in anti-competitive conduct designed to hurt an adversary by the very legal process itself, rather than its outcome. Ronald Moore instituted the Prior Litigation to make Saniefar's restaurant accessible. He succeeded. The "process" vindicated an important civil right – the ability for persons with disabilities to access public accommodations such as Saniefar's restaurant.

It follows then that where courts find that the alleged misrepresentations were capable of vetting, or were not relied upon, *Noerr-Pennington* immunity was extended. *Id.* at 1414 ("Finally, nothing more is alleged than the use of false affidavits in the state suit. That, however, is a charge that can easily be leveled, and it is thus insufficient by itself to overcome *Noerr-Pennington* immunity"); *Omni Res. Cal. Pharmacy Mgmt., LLC v. Redwood & Cas. Ins. Co.*,

No. SACV 09-141 DOC (ANx), 2009 U.S. Dist. LEXIS 126982, at *23-24 (C.D. Cal. July 29, 2009) ("In other words, Plaintiff has not made it clear how Defendants have made misrepresentations to the WCAB that will render those proceeding illegitimate or will make it unlikely that the WCAB can provide adequate relief; if the Defendants' assertions are legally baseless, the WCAB can seemingly adjudicate the pending claims adequately"); *Balt. Scrap Corp. v. David J. Joseph Co*., 81 F. Supp. 2d 602, 620 (D. Md. 2000) ("Neuberger's alleged conduct, although reprehensible, would not strip the defendants of Noerr-Pennington protection. Any actions the defendants may have taken to put the plaintiff 'off the scent' did nothing to deprive the lawsuit of its legitimacy, and are thus protected under Noerr. To establish fraud, BSC must show that Neuberger's alleged knowledge of BSC's strategy prolonged the appeal and caused material harm to BSC. Baltimore Scrap has not established what it would have done differently had Neuberger not contacted Fine").

Saniefar conducted significant discovery in the Prior Litigation to "uncover" the truth about the "extent" of Ronald Moore's disability. (Cmplt., ¶¶ 26, 58 (video surveillance).) In fact, she asserts, albeit incorrectly, that her discovery revealed Ronald Moore's deception. Therefore, the litigation functioned as intended and was not deprived of its legitimacy.

VIII. No RICO claim has been stated against any defendant.

Again, The Advocates join in the motions to dismiss filed concurrently by co-defendants Zachary Best, Elmer LeRoy Falk, Rick D. Moore, and Ronny Loreto who argue that no RICO claim has been stated. If the Court agrees, then no RICO claim has been stated against The Advocates and the complaint must be dismissed.

In addition to the arguments raised by their co-defendants, The Advocates point out the glaringly absent RICO element: Continuity. A violation of § 1962(c) requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima v. Imrex Co.,* 473 U.S. 479, 496 (1985). The "pattern of racketeering" element has been interpreted by the Ninth Circuit to require a showing of "the threat of continuing activity." *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987).

Thus, in order to allege open-ended continuity, a RICO plaintiff must charge a form of predicate misconduct that "by its nature projects into the future with a threat of repetition." *See Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir. 1992); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535-36 (9th Cir. 1992); *Medallion Television Enters., Inc. v. SelecTV of Cal., Inc.* 833 F.2d 1360, 1363-64 (9th Cir. 1988). The only misconduct alleged here relates to the Prior Litigation which, at least as to the ADA claim, has concluded. It simply cannot project into the future.

RICO also recognizes close-ended continuity which a party can demonstrate "by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with longterm criminal conduct." *H. J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 242 (1989). But Saniefar has not, and cannot, meet this requirement either. The acts complained of were confined to a single litigation.

It is true that Saniefar makes general and conclusory allegations that The Advocates filed 260 other lawsuits. (Cmplt., ¶ 31.) But she does not allege what was fraudulent about those lawsuits or how they were part of the pattern of racketeering activity. Of course we reach an interplay with *Noerr-Pennington* immunity here as well since in order to implicate those lawsuits to state a RICO claim, she would have to demonstrate that each of them were objectively baseless or contained such misrepresentations as they denied the actions of their legitimacy. She has pled none of this.

Saniefar simply cannot state a RICO claim.

IX. Conclusion

This RICO claim is an outright attack on petitioning activity. This is not a case where the underlying litigation had undisputed conduct which deprived the litigation of its legitimacy. In fact, when stripped away of all its sensationalism, Saniefar's complaint states not a single material misrepresentation in the Prior Litigation. Saniefar does not dispute that Ronald Moore is disabled, or that he visited her restaurant. She instead argues disputed facts such as the "extent" of Ronald Moore's disability, and the injuries Ronald Moore claimed to suffer from the

inaccessible conditions she admits existed. If these types of disputed facts rise to the level of sham litigation, then no lawsuit is immune to a derivative RICO action.

Ronald Moore did not have a chance to obtain a judicial decision on his disability in the Prior Litigation because the court did not have to reach that issue – Ronald Moore's lawsuit caused Saniefar to make her restaurant fully accessible, thus mooting his ADA claim. But two different judges in this district, reviewing the same "evidence" Saniefar relies upon to dispute Ronald Moore's disability, found that he was disabled and that he therefore had standing under the ADA to obtain the injunctive relief he sought. Saniefar is undoubtedly aware of these decisions, but she persists in her attempt to prevent The Advocates from ever gain pursuing the same type of excellent results they obtained in the Prior Litigation (and those other two actions) – access for all persons with disabilities to public accommodations as the ADA promised 27 years ago.

Notwithstanding the complaint's failure under Rule 9(b), the conduct of The Advocates and each of the co-defendants is protected under *Noerr Pennington*. Saniefar never attempted to allege that the Prior Litigation was a sham, or how any of the alleged conduct deprived "the entire" litigation of its legitimacy. Nor can she.

More is at stake here than the work of The Advocates and other co-defendants. If this RICO lawsuit is given traction, the chilling effect on all persons with disabilities seeking to vindicate their civil rights will be far reaching. It is no secret that the business community harbor a great deal of animus towards persons who bring ADA suits against them, a position the local, state, and national media sadly support with incorrect facts and gratuitous ad hominem attacks. Several commentators have noted this fact and looked for an economic and/or sociological explanation:

> At a basic level, a law and economics analysis of Title III of the Americans with Disabilities Act of 1990 ("ADA") indicates a market failure (i.e., a failure of private businesses to accommodate individuals with disabilities) and seeks to remedy pervasive discrimination of individuals with disabilities.

Kevin J. Coco, Beyond the Price Tag: An Economic Analysis of Title III of the Americans with Disabilities Act, 20 Kan. J.L. & Pub. Pol'y 58, 58 (Fall 2010).

> [N]ondisabled individuals as a whole are likely to place a lower value on the need for disability accommodations of the type mandated by Title III.

Id. at 83.

> [A]ccess laws have been largely unsuccessful…In our background research for this project . . . it was the enforcers of the law – lawyers and plaintiffs who brought access complaints – who were often criticized in media accounts of controversies over access.

Jeb Barnes & Thomas F. Burke, Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access, 46 Law & Soc'y Review 167, 178 (2012).

The market has failed persons with disabilities, and society has devalued the need for access. The Advocates – and indeed the judicial system – can however deliver on the ADA's promise because they are able to view this as a legal right, and prosecute and adjudicate the actions without regard for social sentiment. Saniefar's complaint states nothing more than the work of The Advocates to vindicate the rights of persons with disabilities in an environment hostile to their efforts. This is advocacy, not racketeering, and Saniefar's efforts to interfere with one of the most fundamental and critical First Amendment rights should not be given countenance.

For these reasons, and for the reasons set forth in the motions of the other co-defendants in which The Advocates join, it is respectfully requested that the complaint be dismissed with prejudice.

Dated: September 11, 2017

/s/ Tanya E. Moore
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