No.

IN THE

SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. PAUL V. GALLEGOS,
as District Attorney, etc. et al.,

Plaintiffs and Appellants,

vs.

THE PACIFIC LUMBER COMPANY et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal

First Appellate District

PETITION FOR REVIEW

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No.

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Plaintiff and Appellant

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Defendants and Respondents.

PETITION FOR REVIEW

ISSUES PRESENTED

1. Can the litigation privilege be used as a shield to absolve Pacific Lumber of liability for intentionally falsifying materials during a regulatory proceeding?

2. Does the "petitioning" protected under the *Noerr-Pennington* doctrine extend beyond petitioning and go so far as to provide a blanket prophylactic over the entire administrative record of the regulatory proceeding by which an applicant obtains a permit

through an admittedly false statement?

3. Does a California appellate court commit clear error when it fails to address the preemption arguments raised in the appellate briefing? Specifically, where an irreconcilable conflict exists between the litigation privilege and a coequal, state law – California's Unfair Competition Law – does the appellate court commit clear error when it fails to apply the particular provisions of the Unfair Competition Law?

WHY REVIEW MUST BE GRANTED

An Environmental Impact Report is required for a project "which may have a significant effect on the environment."[1] Yet, the clear errors that the trial court committed and the appellate court affirmed obstruct not only the sanctity of 211,000 acres of Humboldt Forest timberland, but also the very "paths which to lead to the ascertainment of truth," which the United States Supreme Court maintains must remain "as free and unobstructed as possible."[2]

There is clear error, where a party can use the shield of the litigation privilege under Civil Code section 47, subdivision (b), as a weapon against the very truth-seeking process that it is designed to protect. There is clear error, when a party can apply the *Noerr-Pennington* doctrine, which provides a safe harbor from civil liability for "lobbying efforts," as a pretext to perpetrate the ongoing consequences of past fraud. There is also a clear error of statutory construction, where there are two co-equal state laws, and an

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[1] Pub. Resources Code §21151; *see also* §§21100, 21101, 21102, 21150.

[2]*Briscoe v. LaHue* (1983) 460 U.S. 325, 333 (citations omitted).

appellate court does not permit the particular provision to prevail over the general.

The application of the litigation privilege and the *Noerr-Pennington* doctrine to a collateral action under the UCL by a government prosecutor has the practical effect of denying the government prosecution a platform to prosecute unfair competition in cases where the underlying administrative proceedings were corrupt.

In doing so, these clear errors render the appellate decision directly inconsistent with *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921 on the issue of concurrent regulatory authority. Securing uniformity of decision is a stated ground for granting review, per California Rule of court 8.500 (b).

These clear errors also violate the "ecology ethic," as recognized by the Court in *Sierra Club v. Morton* (1972) 405 U.S. 727, 752[3], and later codified by Congress into the citizens' suit provision,[4] which enabled private citizens to bring suit, even where

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[3](1972) 405 U.S. 727, 752.

[4]33 U.S.C. § 1365.

those citizens could demonstrate only injury in fact that was non-economic. The scope of litigant at issue here, however, is much narrower; it concerns only an action by the Attorney General, District Attorney, County Counsel, or City Attorney to bring a collateral action under California's Unfair Competition Law (UCL) against a permit applicant who competed unfairly, and thereby rendered an entire permit approval process fraudulent.

However, the ramifications of these clear errors extend beyond violations of the ecological ethic and undermine the efficient administration of justice. If prosecutors cannot prosecute a collateral action under the UCL, those same prosecutors must monitor every original administrative proceeding for fraud. State governments will be compelled to waste finite economic resources so that prosecutors and other regulatory agents can monitor each and every administrative process in their respective jurisdictions, all because an administrative proceeding is not open to collateral government action under the UCL.

This outcome is inimical to the purposes of California's Environmental Quality Act (CEQA), which states that "[i]t is the intent of the Legislature that all agencies of the state government

which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage."[5] In an era of commercial and industrial expansion in which the environment has been repeatedly violated by those who are oblivious to the ecological well-being of society, the significance of this decision cannot be understated.

These clear errors also carry with them broad, negative procedural ramifications for pleading a Complaint past the point of Demurrer. The particularized provisions of the UCL granting government regulators standing to obtain relief[6] preempt the more general provisions of the litigation privilege. The lobbying efforts protected under the *Noerr-Pennington* doctrine do not cover the entire scope of an administrative proceeding to which those lobbying efforts are but a part. Yet, the trial court shielded the facts of the

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[5] *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal. 3d 247, 254, *quoting* Cal. Pub. Res. Code § 21000(g).

[6] Bus. & Prof. Code, § 17204 *et seq.*

administrative proceedings from the pleadings even though those facts as pled showed clear admissions of fraud.

It is true that the shields to derivative litigation are by necessity absolute. The evils inherent in permitting derivative tort actions based on communications during the trial of a previous action are generally far more destructive than the occasional "unfair" result. Litigants and witnesses must have the utmost freedom of access to the courts, or, as in this case, administrative process. The "paths which to lead to the ascertainment of truth . . . [must remain] . . ."as free and unobstructed as possible."[7]

Yet, the reasons why courts must shield litigants from derivative litigation are the very same reasons why courts must allow an exception to these evidentiary shields when *the path to truth* was muddied beyond the point of recourse. In such an instance, a collateral attack under the UCL is the only form of equitable relief through which the government can stop an ongoing fraud.

In these rare cases, a collateral action by a government prosecutor under the UCL is the only way to free and unfetter that very

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[7]*Briscoe,* 460 U.S. at 333 (citations omitted).

same path to truth. The litigation privilege, which has its roots in the law of libel, must not provide safe harbor to a process that defrauds courts of collateral, truth-seeking litigation. The *Noerr-Pennington* doctrine, which has its roots in the law of antitrust, must not provide a shield for an entire adjudicative proceeding where false statements admittedly occurred, all under the pretext of "lobbying efforts." Justice requires nothing less.

SUMMARY OF ARGUMENT

First, the appellate court committed clear error when it held the people are pleading around the litigation privilege. The opposite is indeed the case. Defendants/Appellees in this case have wielded the litigation privilege not as a shield against derivative liability, as originally intended, and stated in *Silberg* and its progeny,[8] but rather as a sword against the authority of local government, under the UCL, to bring an enforcement action against ongoing fraud.

The appellate court ruling effectively undermines the holding of

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[8] *See Silberg v. Anderson* (1990) 50 Cal. 3d 205; *Rubin v. Green* (1993) 4 Cal. 4th 1187, 1193; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal. 4th 1232, 1241.

People ex rel. Gallegos v. The Pacific Lumber Co. (2008) 158 Cal. App. 4th 950, on the issue of concurrent regulatory jurisdiction. The appellate court held that the District Attorney, was, via privity, a party to the administrative proceeding, and could not challenge the administrative record through a collateral prosecution.[9] Yet, the government is not one, single entity; the District Attorney's collateral prosecution was an enforcement action brought by a separate government regulator with concurrent jurisdiction under Business and Professions Code sections 17200 *et seq.* and 17204. *Gallegos v. The Pacific Lumber Co.* explicitly recognized the concurrent jurisdiction of separate government regulators.

Second, the appellate court erred when it extended the scope of protections provided by the *Noerr-Pennington* doctrine to cover the entire administrative proceeding. The safe harbor protects "petitioning" only. In this case, the protection covers the period from February 25, 1999 to March 1, 1999, when Pacific Lumber petitioned for a greater allowance of annual board feet of timber.

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[9] *People ex rel. Gallegos v. The Pacific Lumber Co.* (2008) 158 Cal. App. 4th 950, 960.

The safe harbor, however, does not cover the prior period, i.e. Pacific Lumber's submission of the first (fraudulent) Jordan Creek report on November 18, 1998, the publication of the final EIR on January 20, 1999, and the subsequent submission of second (corrected) Jordan Creek report on January 22, 1999. The appellate court committed clear error when it failed to consider these facts, as pled, and admitted on Demurrer, facts which fell outside the scope of the *Noerr-Pennington* safe harbor.

Third, the rule of statutory construction that particular provisions prevail over the general requires the Court to recognize a specific exception to California's UCL, as applied in a collateral civil action by a government prosecutor for injunctive relief. In this context, the UCL conflicts with, and thus preempts, the litigation privilege of Civil Code section 47, subdivision (b). These are coequal state laws, and particular applications of the UCL prevail over the litigation privilege, which is a general shield to derivative civil liability. The California Supreme Court's recognition of specific exceptions to the litigation privilege has been guided by the rule of statutory construction that particular provisions will prevail over

general provisions.[10] The appellate court committed clear error when it failed to recognize the exception.

For the above reasons, the Court should overrule the appellate decision and remand the case to the trial court so that the Complaint can proceed past the Demurrer.

JURISDICTION

The First District Court of Appeal filed its opinion on January 10, 2008. The Court filed an Order Modifying the Opinion on February 1, 2008, without change in the judgment. "A reviewing court may modify a decision until the decision is final in that court."[11] A court of Appeal decision is final in that court 30 days after filing.[12] Under court rule 8.264, the decision became final on February 9, 2008. A petition for review must be served and filed within 10 days after the Court of Appeal decision is final,[13] or by February 19, 2008. This Petition for Review was timely filed and the Court has jurisdiction.

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[10] *See Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal. 4th 1232, 1234; Code Civ. Proc., § 1859.

[11] CRC 8.264 (b) (E).

[12] CRC 8.264 (a).

[13] CRC 8.500 (e).

STANDARD OF REVIEW

A Demurrer tests only the legal sufficiency of a pleading.[14] In reviewing a judgment of dismissal pursuant to a Demurrer, the Court must assume the truth of all properly pleaded material allegations of the Complaint.[15]

The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]"[16] However, it is error for a trial court to sustain a Demurrer when the plaintiff has stated a cause of action under any possible legal theory.[17]

STATEMENT OF RELEVANT FACTS

The dispute at issue stems from a 1996 agreement between Pacific Lumber, the State of California and the United States known as the Headwaters Agreement. Pursuant to the Headwaters Agreement, Pacific Lumber agreed to sell the Headwaters Forest, an ancient, old-

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[14] *Committee on Children's Television, Inc. v. General Foods Corporation* (1983) 35 Cal.3d 197, 213-214.

[15] *Silberg v. Anderson* (1990) 50 Cal.3d 205, 210.

[16] *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 21.

[17] *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal. 4th 962, 967, *citing Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.

growth, redwood forest, and other land to the state and federal governments for over $300 million and other consideration.

In return, Pacific Lumber received assurances from those governments that it would be permitted to harvest certain of its remaining timberlands in accordance with, among other things, a sustained yield plan[18] and habitat conservation plan approved by relevant state and federal agencies. In total, Pacific Lumber owns approximately 211,000 acres of timberland in Humboldt County.[19]

To implement the Headwaters Agreement, Congress authorized the appropriation of $250 million in October 1997 to purchase the Headwaters Forest from Pacific Lumber, conditioned upon federal and state agency approval, by March 1, 1999, of plans and permits acceptable to Pacific Lumber. On the state side, the Legislature authorized its $245 million share of money for purchase of the

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[18] A sustained yield plan is one submitted by a landowner to address "long-term issues of sustained timber production, and cumulative effects analysis which includes issues of fish and wildlife and watershed impacts on a large landscape basis." (Cal. Code Regs., tit. 14, § 1091.1, subd. (b).)

[19] Respondents' Brief (RB) at 4.

Headwaters Forest.[20]

On February 24, 2003, the State filed a Complaint against Pacific Lumber alleging violations of California's Unfair Competition Law (UCL)[21] in the manner in which the permit to harvest lumber was obtained. Pacific Lumber demurred, claiming protections under the litigation privilege of Civil Code section 47(b) and the safe harbor for "petitioning" under the *Noerr-Pennington* doctrine.[22]

Before a hearing was held on Pacific Lumber's Demurrer to the original Complaint, the State filed a First Amended Complaint on May 27, 2003. The trial court sustained Pacific Lumber's Demurrer to the First Amended Complaint with leave to amend. The State filed a Second Amended Complaint on May 27, 2004.

In the Second Amended Complaint, the State specifically pled that Pacific Lumber had knowingly submitted false data on a track known as Jordan Creek, which is a watershed adjacent to Bear Creek. The specific false information involved the proximate connection

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[20] *See* Assembly Bill 1986 (Cal. Stats. 1998, ch. 615) ("AB 1986") ¶ 2 (b).

[21] Business and Professions Code §17200 and §17204 *et seq.*

[22] *Presidents Conference v. Noerr Motor Freight, Inc.* (1961) 365 U.S. 127.

between timber harvesting and landslides, and included the following:

> * "[I]n recently completing a similar sediment source analysis for the adjacent Jordan Creek watershed, . . . we discovered harvest and landslide associations that directly and dramatically contradicted those encountered in Bear Creek."
>
> * "[I]n Jordan Creek, 85 percent of the recent landslides had occurred on the older harvested area, and only 15 percent on the recently harvested area.[23]

The People also alleged that Pacific Lumber admitted the information was false. As part of the allegation, the People alleged that Pacific Lumber subsequently issued a second Jordan Creek Report that corrected the false statements contained in the first. The problem, however, was that Pacific Lumber submitted the second, corrected, Jordan Creek Report, conveniently, *after* the appointed state agency, the California Department of Forestry and Fire Protection (CDF) issued the state's final environmental impact report (EIR).

The precise time line is as follows:

November 16, 1998:	The public comment period for the draft EIR closed.

[23] Second Amended Complaint (SAC) at 10.

November 18, 1998:	Pacific Lumber submitted the first Jordan Creek report.
January 20, 1999:	The final EIR was published.
January 22, 1999:	Pacific Lumber submitted the second Jordan Creek report.
February 25, 1999:	CDF adopted findings for the SYP with a long term sustained yield projection known as SYP Alternative 25(a). Under SYP Alternative 25(a), Pacific Lumber could harvest up to 136 million board feet of timber annually.
February 25, 1999 to March 1, 1999:	Pacific Lumber "lobbied" CDF for a greater allowance of annual board feet of timber, amounting up to 176.2 million board feet of timber annually.
March 1, 1999:	CDF adopted a different projection known as Alternative 25. Alternative 25 allowed Pacific Lumber to harvest up to 176.2 million board feet of timber annually.[24]

Pacific Lumber again demurred. The trial court sustained the Demurrer to the Second Amended Complaint, without leave to amend.

The People appealed, together with amicus the City Attorney of San Francisco. Pacific Lumber responded. On January 10, 2008, the First District Court of appeal upheld the decision of the trial court.

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[24] RB at 16.

ARGUMENT

Adequate access to the judicial system is one thing. Illegal access is another. No one disputes that public policy reasons for the litigation privilege and the *Noerr-Pennington* doctrine. The appellate court, however, refused to see that the trial court misapplied the shields to undermine the very same truth seeking process that the policies behind the privilege and the safe harbor purport to protect.

I.

Pacific Lumber Cannot Use the Litigation Privilege as a Shield to Intentionally Falsify Materials.

A. Policies Furthered by Civil Code Section 47(b)

Civil Code Section 47(b) promotes the effectiveness of judicial proceedings by encouraging "open channels of communication and the presentation of evidence" in judicial proceedings.[25] A further purpose of the privilege "is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to

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[25] *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal. App. 3d 961, 970.

investigate and remedy wrongdoing."[26]

Such open communication is "a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings."[27] Since the "external threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice"[28], courts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings.[29]

To effectuate its vital purposes, the litigation privilege is held to be absolute in nature.[30] The *Albertson* court reasoned that the policy of encouraging free access to the courts was so important as to require application of the privilege to torts other than defamation.[31]

The resulting lack of any really effective civil remedy against perjurers

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[26] *Imig v. Ferrar* (1977) 70 Cal. App. 3d 48, 55; *Tiedemann v. Superior Court* (1978) 83 Cal. App. 3d 918, 925.

[27] *Pettitt v. Levy* (1972) 28 Cal. App. 3d 484, 490-491.

[28] *McClatchy*, 189 Cal. App. 3d at 970.

[29] *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 213.

[30] *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381.

[31] *Id.*

is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say."[32] In short, these policies explain why the occasional "heinous conduct must be condoned lest greater mischiefs occur."[33]

B. The California Supreme Court Has Created Exceptions to the Litigation Privilege Where Competing Policies Outweigh the Policies of Section 47(b) and Where Particularized Provisions Prevail Over the General Privilege of Section 47(b).

Although the privilege is absolute in nature, the California Supreme court has created exceptions to the litigation privilege for civil actions for malicious prosecution and for certain types of criminal prosecutions. In *Albertson*, the court extended the privilege to civil actions for malicious prosecution, noting that "[t]he policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of

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[32] *Steiner v. Eikerling* (1986) 181 Cal. App. 3d 639, 643, *citing* and *quoting* PROSSER, LAW OF TORTS (4th ed. 1971) p. 778.

[33] *Pettitt v. Levy* (1974) 28 Cal. App. 3d 484, 492.

favorable termination, lack of probable cause, and malice are satisfied."[34]

In criminal actions, the court has used a rule of statutory construction – "that particular provisions will prevail over general provisions" – as a basis from which to observe that the litigation privilege does not apply to certain crimes.[35] These include: perjury (Pen. Code, § 118 et seq.); subornation of perjury (id., § 127); criminal prosecution under Business and Professions Code section 6128; false report of a criminal offense (Pen. Code, § 148.5); and "attorney solicitation through the use of 'runners' or 'cappers'"[36]
State Bar discipline of attorneys who engage in solicitation and enforcement of the antisolicitation statute is also excepted under the same principle.[37]

C. The Appellate Court Was Misled by an Inaccurate Representation of the Malicious Prosecution Tort in the

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[34]*Albertson*, 46 Cal. 2d at 382.

[35] *Action Apartment Assn., Inc.* 41 Cal. 4th at 1246; *see* Code Civ. Proc., § 1859.

[36] *Action Apartment Assn., Inc.* 41 Cal. 4th at 1246.

[37] *Rubin*, 4 Cal.4th at 1198.

Respondents' Brief.

The malicious institution of a civil proceeding is one recognized example where courts have not applied the litigation privilege. The Respondents' Brief cited *Steiner v. Eikerling*, (1986) 181 Cal.App.3d 639 but misrepresented its holding. Respondents cited the case for the following:

> Steiner v. Eikerling, 181 Cal. App 3d 539, 543 (1986) (holding forged will protected under section 47)[38]

The larger holding is Steiner is that the Complaint was permitted to proceed past Demurrer on a Malicious Prosecution action where the Defendants had initiated the prior legal proceeding.[39] Whether by accident or not, Respondents' narrow representation of the holding in *Steiner* had unjust consequences that require re-examination by this Court.

In *Steiner*, the Court did not allow the Defendants to protect the forged will from a subsequent malicious prosecution action because the Defendants had initiated the prior legal proceeding. The

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[38] RB at 26.

[39] *Steiner*, 181 Cal.App.3d at 644-645.

Defendants forged the will, named themselves as beneficiaries, and filed it for probate.[40] The court upheld the cause of action, concluding that "persons who successfully contest a forged will submitted to probate may maintain an action for malicious institution of civil proceedings against those who offered the forged document with knowledge of its falsity."[41] The court cited with approval a comment to Section 674 of the Restatement Second of Torts which provides in pertinent part, "[t]he person who initiates civil proceedings is the person who sets the machinery of the law in motion, whether he acts in his own name or in that of a third person, or whether the proceedings are brought to enforce a claim of his own or that of a third person"[42] *Steiner* concluded that the Defendants "actually initiated the legal proceedings themselves by presenting the forged document in a petition for probate and that verified petition is what compelled [the plaintiffs] to file the will contest."[43]

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[40] *Id.* at 640-641.

[41] *Id.* at 645.

[42] REST.2D TORTS, § 674, com. a, p. 452.

[43] *Id.* at 644-645.

In sum, Steiner held that ". . . those persons who successfully contest a forged will submitted to probate may maintain an action for malicious institution of civil proceedings against those who offered the forged document with knowledge of its falsity."[44]

The *Steiner* Court did allow a Complaint to proceed past Demurrer where the Defendants who submitted forged documents had initiated the prior legal proceeding. Morever, the prior legal proceeding provided a factual basis for a malicious prosecution claim because the Defendants had submitted a forged document.

D. The Rationale Behind The Malicious Prosecution Exception to the Litigation Privilege Applies Equally to a UCL Enforcement by Law Enforcement Where the Defendant Had Initiated the Prior Legal Proceeding.

The case at bar, like *Steiner*, involves Defendants who initiated the prior legal proceeding. In this case, Pacific Lumber sought a permit to harvest acreage of the Humboldt Forest timberland. As in *Steiner*, the Defendants used fraudulent documents to do so.

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[44] *Steiner*, 181 Cal. App. 3d 639, 645.

Specifically, Defendants submitted false data on the Jordan Creek watershed on November 18, 1998. The Final Environmental Impact Report (EIR) was published on November 20, 1999. After the final EIR was published, Defendants then submitted on January 22, 1999 a second report on Jordan Creek that corrected the false data contained in the first report.[45] Defendants actions alone – submitting a second report to correct false data contained in the first report after the final EIR was published – qualifies as an admission that the content, manner, and timing of the submission of the data contained in the first report was a fraudulent act.

E. Because Pacific Lumber Initiated the Prior Legal Proceeding, Pacific Lumber Cannot Use the Shield of the Litigation Privilege as a Sword to Protect Intentionally Falsified Data From That Prior Proceeding.

Pacific Lumber wields the litigation privilege not as the shield it was originally intended to be but as a sword against a falsified legal proceeding that they initiated. The core policies of section 47 (b) – that individuals should be free from the fear of protracted and costly

[45] RB at 15-16.

lawsuits which otherwise might cause them either to distort their testimony or refuse to testify altogether[46] – do not apply where those same individuals distorted their initial testimony in the prior legal proceeding. In instant case, the distorted testimony involved the submission of patently and admittedly false data on the Jordan Creek watershed before the final Environmental Impact Report was published. To hold otherwise, is to distort the policies behind the privilege itself.

F. The Appellate Ruling Eliminates the Ability of Separate Government Regulators with Concurrent Jurisdiction to Act, as Recognized in *Pacific Lumber v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921, 936.

Pacific Lumber expressly recognized that "there are valid reasons to allow for concurrent jurisdiction among various regulatory agencies," over a timber harvesting plan, one of which, was the Z'berg-Nejedly Forest Practice Act's savings clause.[47] In *Gallegos*, the

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[46] *Pettitt*, 28 Cal. App. 3d at 490-491.

[47] See Pub. Resources Code, § 4511 *et seq*; Pub. Resources Code, § 4514, subd. (c); *Pacific Lumber*, 37 Cal. 4th at 943.

law at issue – CEQA – had a similar savings clause[48], but the appellate court's ruling has the effect of eliminating the ability of a separate government entity to exercise concurrent jurisdiction over a similar timber harvesting plan. The appellate court noted " . . . we disagree the State was not a party to the underlying CEQA proceedings."[49] The appellate court then sought to deny this "single government actor" a second bite at the apple through collateral litigation. Yet, the District Attorney is not the California Department of Forestry.

Per *Pacific Lumber Co.*, the District Attorney has concurrent jurisdiction under Business and Professions Code sections 17200 *et seq*. and 17204. The District Attorney should be able to use the record from an underlying proceeding as an evidentiary basis to proceed past a Demurrer on a collateral Complaint.

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[48] Cal. Pub. Res. Code § 21174.

[49] *Gallegos*, 158 Cal. App. 4th at 960.

II.

The Scope of the Protection for "Petitioning" Under the *Noerr-Pennington* Safe Harbor Does Not Protect All Communications Inside an Administrative Proceeding.

A. The *Noerr-Pennington Doctrine* Protects "Petitioning" Only.

Under the *Noerr-Pennington* doctrine, "[t]hose who petition the government . . . are generally immune from antitrust liability."[50] "This doctrine relies on the constitutional right to petition for redress of grievances to establish that there is no antitrust liability for petitioning any branch of government, even if the motive is anticompetitive."[51] The doctrine relies on principles of comity, "i.e., noninterference on the part of the courts with governmental bodies that may validly cause otherwise anticompetitive effects and with efforts intended to influence such bodies."[52] *Noerr-Pennington* has been extended to preclude civil liability for a Defendant's petitioning before not just

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[50] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993) 508 U.S. 49, 56.

[51] *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1133.

[52] *Blank v. Kirwan* (1985) 39 Cal.3d 311, 321.

courts, but also before administrative and other governmental agencies.[53]

At issue here is the scope of the meaning of the term "petition." The Merriam Webster Dictionary defines "petition" as:

> 1. an earnest request
>
> 2. a: a formal written request made to an official person or organized body (as a court) b: a document embodying such a formal written request
>
> 3. something asked or requested[54]

The United States Supreme Court has also provided a contextual definition of "petition" in the antitrust arena. In the context, the scope of the meaning of "petition" is delimited to that of political activity, such as lobbying. "[T]he Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[55] Considering the government's

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[53] *California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 510-511.

[54] http://www.merriam-webster.com/dictionary/petition

[55] *Presidents Conference v. Noerr Motor Freight, Inc.* (1961) 365 U.S. 127, 136; *accord, Mine Workers v. Pennington* (1965) 381 U.S. 657, 669.

"power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," the Court reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes."[56] Nor did the Court "impute to Congress an intent to invade" the First Amendment right to petition.[57]

Based on the above definitions, *Noerr-Pennington* should shield *only* the portion of Pacific Lumber's administrative proceeding where Pacific Lumber actively lobbied the CDF to adopt a Sustained Yield Plan that permitted 40.2 million board feet more of annual timber harvesting. All communications prior to the petitioning do not fall under the safe harbor because they are not "petitioning." The time line of all relevant communications is again as follows:

November 16, 1998:	The public comment period for the draft EIR closed.
November 18, 1998:	Pacific Lumber submitted the first Jordan Creek report.
January 20, 1999:	The final EIR was published.

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[56] *Noerr*, 365 U.S. at 137.

[57] *Id.* at 138.

January 22, 1999:	Pacific Lumber submitted the second Jordan Creek report.
February 25, 1999:	CDF adopted findings for the SYP with a long term sustained yield projection known as SYP Alternative 25(a). Under SYP Alternative 25(a), Pacific Lumber could harvest up to 136 million board feet of timber annually.
February 25, 1999 to March 1, 1999:	Pacific Lumber "lobbied" CDF for a greater allowance of annual board feet of timber, amounting up to 176.2 million board feet of timber annually.
March 1, 1999:	CDF adopted a different projection known as Alternative 25. Alternative 25 allowed Pacific Lumber to harvest up to 176.2 million board feet of timber annually.[58]

In the table above, only the activities from February 25, 1999 onwards should be covered under the safe harbor of "petitioning" activities. The earlier communications were not petitioning; the submission of the false Jordan creek report followed by the submission of the corrected Jordan creek report were part of the EIR preparation and approval process; the "petitioning" for a higher sustained yield plan occurred after the two Jordan Creek reports were submitted.

[58] RB at 16.

B. Public Policy, as Recognized by the Supreme Court Encourages an Extension of the "Sham" Exception to Include the Ninth Circuit's Definition of "Misrepresentations . . . in the adjudicatory process" as a Type of Sham.

Efforts to petition the government fall outside the protection of the *Noerr-Pennington* doctrine only when they are a "sham."[59] There is a two-part test for determining whether a defendant's petitioning activities fall within its reach: "first, it 'must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits'; second, the litigant's subjective motivation must 'concea[l] an attempt to interfere directly with the business relationships of a competitor … through the use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.' "[60] To meet this test, the defendant's petitioning activities thus "must be a sham both [**30] objectively and subjectively."[61]

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[59] *California Transport,* 404 U.S. 508, 511-516.

[60] *BE&K Constr. Co. v. NLRB* (2002) 536 U.S. 516, 526.

[61] *Id.* at 526.

Yet, a split of authority in the federal courts exists over whether an additional definition of sham should be included. The United States Supreme Court also has concluded that "the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity."[62] Following this line, the Ninth Circuit has expanded the definition of sham to include another of proceeding: "in the context of a judicial proceeding, if the alleged anticompetitive behavior 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."[63]

The time line of Pacific Lumber's submissions clearly deprived the CEQA process of its legitimacy. Pacific Lumber knowingly submitted the first Jordan Creek report. Then, after the EIR was published, Pacific Lumber submitted the second Jordan Creek report. Pacific Lumber knowingly defrauded the legitimacy of the CEQA

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[62] *Allied Tube & Conduit Corp. v. Indian Head* (1988) 486 U.S. 492, 504.

[63] *Kottle v. Northwest Kidney Centers* (9th Cir. 1998) 146 F.3d 1056, 1060.

process.

The context and nature of these activities fall within the policy guidelines of what the United States Supreme Court defines as a sham. In California, it is time, long overdue, to recognize it is such.

III.

The Appellate Court Erred When It Failed to Address the Argument that the Particular Provisions of UCL Authorizing Government Action Preempt the More General Protections of the Litigation Privilege.

As noted, the basis for exceptions to the litigation privileges that the court has recognized stem from the rule of statutory construction that particular provisions prevail over the general. The appellate briefing raised the preemption argument,[64] but the appellate court failed to consider it in its opinion.

The argument is as follows: state preemption of local legislation is established by the California Constitution, article eleven, section seven.[65] Yet, where there are two, co-equal state laws, a rule of

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[64] Appellant's Reply Brief (ARB) at 20-21.

[65] Cal. Const., art. XI, § 7.

statutory construction provides that more particular provision will prevail over the more general provision.[66]

The present conflict is between two, co-equal laws: the UCL, under Business & Professions Code section 17200 *et seq.*, and the litigation privilege of Civil Code section 47 (b). The precise conflict is between a particular section within the Business & Professions Code authorizing certain government entities to seek injunctive relief by– Business & Professions Code section 17204 – and the more generalized litigation privilege.

As recognized by the Court, each instance in which it has found an exception to the litigation privilege that "... would be significantly or wholly inoperable if its enforcement were barred when in conflict with the privilege."[67] The present instance is exactly one such scenario. If the litigation privilege can be applied to all communications in the EIR preparation and approval process, there can be no factual basis for government entities authorized under Business & Professions Code section 17204 to prosecute and enjoin

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[66] *See, e.g., In re James M.* (1973) 9 Cal.3d 517, 522; *see* Code Civ. Proc., § 1859.

[67] *Action Apartment Assn., Inc.* 41 Cal. 4th at 1246.

permits that have been obtained through admittedly fraudulent communications.

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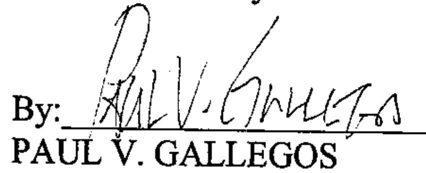
CONCLUSION

For the above reasons, the Court should overrule the appellate decision and remand the case to the trial court so that the Complaint can proceed past the Demurrer.

Dated: February 14, 2008

Respectfully Submitted,

PAUL V. GALLEGOS
District Attorney
Humboldt County

By: 
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CERTIFICATE OF COMPLIANCE

According to the "Word Count" feature in my WordPerfect software, this brief contains approximately 6771 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on February 14, 2008.

PAUL V. GALLEGOS
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By: [signature]
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THE PEOPLE OF THE STATE OF CALIFORNIA

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF HUMBOLDT

I am employed in the County of Humboldt, State of California. I am over the age of eighteen years and not a party to the within action: my business address is 825 5th Street, 4th Floor, Eureka, California 95501.

On February 15th, 2008, I served the following document(s) described as **PETITION FOR REVIEW** on the interested party in this action by placing true copies thereof enclosed in a sealed envelope addressed as follows:

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BY MAIL: I am "readily familiar" with the District Attorney's office practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid in Eureka, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 15th, 2008, at Eureka, California.

Michele A. Shoshani