

Case No. 08-7074

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**In the  
United States Court of Appeals  
for the DC Circuit**

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RALPH NADER; PETER MIGUEL CAMEJO; D.B. FANNING;  
C.K. IRELAND; JULIE COYLE; HERMAN BLANKENSHIP;  
LLOYD MARBET; GREGORY KAFOURY,  
*Appellants,*

v.

DEMOCRATIC NATIONAL COMMITTEE; KERRY-EDWARDS 2004 INC.;  
BALLOT PROJECT, INC.; AMERICA COMING TOGETHER; SERVICE  
EMPLOYEES INTERNATIONAL UNION; JOHN KERRY; JACK  
CORRIGAN; TOBY MOFFETT; ELIZABETH HOLTZMAN; ROBERT  
BRANDON; MARK BREWER; REED SMITH, LLP,  
*Appellees.*

**On Appeal from the United States District Court  
for the District of Columbia  
Case No. 07-cv-02136  
Honorable Ricardo M. Urbina Presiding**

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**BRIEF OF APPELLANT**

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December 5, 2008

**CERTIFICATE OF COUNSEL AS TO PARTIES,  
RULINGS AND RELATED CASES**

Pursuant to Circuit Court Rule 28(a)(1), counsel for Plaintiff/Appellants Ralph Nader, Peter Miguel Camejo, Gregory Kafoury, Lloyd Marbet, D.B. Fanning, C.K. Ireland, Julie Coyle and Herman Blankenship certifies the following:

**(A) Parties and Amici.** Ralph Nader, Peter Miguel Camejo, Gregory Kafoury, Lloyd Marbet, D.B. Fanning, C.K. Ireland, Julie Coyle and Herman Blankenship were the Plaintiffs in the District Court and are the Appellants in this Court. The Democratic National Committee, Kerry-Edwards 2004, Inc., The Ballot Project, Inc., America Coming Together, Service Employees International Union, Reed Smith LLP, John Kerry, Jack Corrigan, Toby Moffett, Elizabeth Holtzman, Robert Brandon and Mark Brewer were the Defendants in the District Court and are the Appellees in this Court. There were no *amici curiae* or intervenors in the District Court, and there are none in this Court.

**(B) Rulings Under Review.** The Appellants appeal the decision of the United States District Court for the District of Columbia (Urbina, J.) dated May 27, 2008, in *Nader, et al. v. Democratic National Committee, et al.*, 555 F. Supp. 2d 137 (D.D.C. 2008), which granted the Appellees' motions to dismiss.

**(C) Related Cases.** This case has not previously been before this Court or any other court. Two cases currently pending in the United States District Court for

the District of Columbia are related under D.C. Cir. R. 28(a)(1)(C), because they involve the same plaintiffs and some of the same defendants as the instant case, and because they involve similar issues arising from Defendant-Appellees' nationwide conspiracy to restrain Plaintiff-Appellants' lawful participation in the 2004 General Election, as qualified candidates and voters, by means of twenty-nine groundless and abusive complaints that Defendant-Appellees and their co-Conspirators filed in eighteen state courts and a federal agency within twelve weeks immediately preceding the election, as well as acts of harassment, intimidation and sabotage that were specifically intended to prevent Plaintiff-Appellants from complying with state election laws and to manufacture grounds for Defendant-Appellees' otherwise baseless litigation. The two related cases are *Nader, et al. v. McAuliffe, et al.*, Civ. No. 1:08-cv-0428-RMU (D.D.C.), and *Nader, et al. v. Democratic National Committee, et al.*, Civ. No. 1:08-cv-00589-RMU (D.D.C.).

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## **GLOSSARY OF TERMS**

ACT – Defendant-Appellee America Coming Together

Candidates – Ralph Nader and Peter Miguel Camejo, 2004 Independent Candidates for President and Vice President, respectively

Conspirator or co-Conspirator – Individuals or entities who assisted, materially supported or participated in wrongful and abusive litigation or other unlawful acts to interfere with the Candidates' lawful participation in the 2004 General Election

FEC – Federal Election Commission

SEIU – Service Employees International Union

## **I. JURISDICTIONAL STATEMENT**

Plaintiffs Ralph Nader, Peter Miguel Camejo, D.B. Fanning, C.K. Ireland, Julie Coyle, Herman Blankenship, Gregory Kafoury and Lloyd Marbet appeal from a final judgment entered in the United States District Court for the District of Columbia. The District Court's final judgment dismissed the Plaintiffs' Amended Complaint based upon a May 27, 2008 Memorandum Opinion granting six motions to dismiss filed by Defendants Democratic National Committee, The Ballot Project, Inc., Kerry-Edwards 2004, Inc., Reed Smith, LLP, Service Employees International Union and America Coming Together, on behalf of all Defendants. The District Court had jurisdiction pursuant to 28 U.S.C. § 1441(c) (2007), as an action removed from the Superior Court of the District of Columbia, by consent of all Defendants, on November 27, 2007. Final judgment was entered in the District Court on May 27, 2008. A Notice of Appeal was filed on June 26, 2008. This appeal is timely pursuant to Fed. R. App. 4(a)(1). The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

## **VIII. STATEMENT OF ISSUES**

Whether the District Court erred in dismissing the Amended Complaint by declining to accept allegations of material fact as true, by resolving disputed issues of material fact against the Plaintiffs, and by relying upon case law that has been reversed, where the Amended Complaint raises state law tort claims for abuse of process, malicious prosecution and civil conspiracy, but does not raise federal claims.

## **IX. STATEMENT OF THE CASE**

This appeal arises out of an effort by Appellants Ralph Nader (“Plaintiff Nader”) and Peter Miguel Camejo (“Plaintiff Camejo,” and collectively with Plaintiff Nader, the “Candidates”), who were Independent candidates for President and Vice President, respectively, in the 2004 General Election, and by Appellants D.B. Fanning, C.K. Ireland, Julie Coyle, Herman Blankenship, Gregory Kafoury and Lloyd Marbet (collectively, the “Voters”), who are registered voters in several states who desired to vote for the Nader-Camejo candidacy, to obtain redress for the tortious conduct of Appellees Democratic National Committee, Kerry-Edwards 2004, Inc., The Ballot Project, Inc., America Coming Together (“ACT”), the Service Employees International Union (“SEIU”), Reed Smith, LLP, John Kerry, Jack Corrigan, Toby Moffett, Elizabeth Holtzman, Robert Brandon, Mark Brewer and any other individuals or entities who wrongfully attempted to suppress the Candidate/Voter Plaintiffs’ lawful participation in the 2004 presidential election (collectively, the “Conspirators” or “co-Conspirators”).

In February 2004, DNC Chairman Terry McAuliffe publicly stated on national television that the Democratic Party could not win the 2004 presidential election if voters were permitted the choice of voting for a competing candidate. “We can’t afford to have Ralph Nader in the race,” Mr. McAuliffe declared. Thus, when Plaintiff Nader announced his candidacy, Defendant DNC and its allies

resorted to the courts to accomplish what they believed themselves to be incapable of achieving at the polls. In eighteen state courts, Conspirators challenged the right of Plaintiff Nader and his running mate, Plaintiff Camejo, to run as candidates for public office, filing a total of twenty-four complaints in less than twelve weeks. Conspirators also filed five complaints before the Federal Election Commission (“FEC”). The purpose of these complaints was not to vindicate valid legal claims, however, but to eliminate the Candidates from the race by bankrupting their campaign with the costs of defending against a pattern of baseless and repetitive claims. “We wanted to neutralize [the Candidates’] campaign by forcing [them] to spend money and resources defending these things,” explained Defendant Toby Moffett, who was in charge of recruiting the Conspirators’ lawyers, “but much to our astonishment we’ve actually been more successful than we thought we’d be in stopping [them] from getting on [state ballots] at all.”

In order to manufacture grounds for their otherwise baseless lawsuits, Conspirators coordinated campaigns of harassment, intimidation and sabotage designed to prevent the Candidates from complying with state election laws. In furtherance of this effort, Conspirators disrupted and infiltrated the Candidates’ nomination conventions under false pretenses, causing them to fail; Conspirators systematically sabotaged the Candidates’ nomination petitions, causing them to be invalidated; and Conspirators subpoenaed the Candidates’ petition circulators and

hired private detectives who came to their homes and falsely threatened them with large civil fines, criminal conviction and lengthy prison sentences, causing many of the petition circulators to abandon their efforts to petition on behalf of the Candidates.

At least ninety-five lawyers from fifty-three law firms nationwide initiated or assisted in state court proceedings to challenge the Candidates' nomination petitions. Defendant DNC and its co-Conspirators paid these firms nearly \$1 million, while the firms contributed at least \$2 million more in *pro bono* legal services. A Section 527 organization, Defendant The Ballot Project, was incorporated specifically to coordinate and finance the effort. Despite this massive dedication of funds and resources, the Conspirators ultimately lost the great majority of lawsuits that they filed. Specifically, out of twenty-nine complaints that the Conspirators filed before nineteen tribunals within twelve weeks, twenty-four were dismissed.

Although the Conspirators' complaints generally failed on the merits, their coordinated nationwide effort to drain, distract and bankrupt the Candidates' campaign largely succeeded. The burden of defending proceedings before nineteen tribunals, many of them simultaneous, effectively barred the Candidates from participating in the 2004 presidential election, thus denying the Plaintiff Voters the choice of voting for them, as the Conspirators intended. But the Conspirators'

efforts did not end when the election did. The wrongful and abusive litigation that the Conspirators commenced more than four years ago remains ongoing to the present day.

On July 17, 2007, Defendant Reed Smith, LLP – a law firm retained by Defendants DNC and John Kerry in matters arising during or from the 2004 General Election – initiated attachment proceedings against Plaintiff Nader in the Superior Court of the District of Columbia. Defendant Reed Smith seeks to enforce a judgment directing the Candidates to pay \$81,102.19 in litigation costs allegedly arising from the Conspirators' challenge to the Candidates' Pennsylvania nomination petitions. Defendant Reed Smith procured this judgment by engaging in a number of improprieties, including failing to disclose on the record that it was concurrently representing the chief justice in a state ethics investigation. Upon discovery of such improprieties, Plaintiff Nader filed a motion for relief from the judgment in the Superior Court for the District of Columbia, which remains pending.

While Defendant Reed Smith continued to press its claims to the funds in Plaintiff Nader's personal bank accounts, on July 10, 2008 Pennsylvania Attorney General Tom Corbett filed a Grand Jury Presentment in connection with an ongoing investigation into public corruption. The Presentment alleges that the challenge to the Candidates' Pennsylvania nomination petitions was prepared using



funds and resources misappropriated from the taxpayers of Pennsylvania.

Notwithstanding these allegations, and the filing of numerous counts of criminal conspiracy, theft and conflict of interest against twelve individuals in connection therewith, Defendant Reed Smith continues to press its claims against Plaintiff Nader in the Superior Court for the District of Columbia.

As a result of the Conspirators' ongoing tortious conduct, on October 30, 2007, the Candidate/Voter Plaintiffs commenced this action in the Superior Court for the District of Columbia, alleging state law claims for abuse of process, malicious prosecution and civil conspiracy, as well as federal claims under 42 U.S.C. § 1983. On October 31, 2007, the Candidate/Voter Plaintiffs filed a related action against two Virginia residents in the District Court for the Eastern District of Virginia. On November 27, 2007, the Defendants removed the action to the District Court for the District of Columbia. On January 23, 2008, upon discovery of the Grand Jury investigation into the Conspirators' Pennsylvania challenge, the Candidate/Voter Plaintiffs filed an Amended Complaint in the District Court for the District of Columbia dismissing their federal claims without prejudice, in order to consolidate them, supported by allegations arising from the Pennsylvania Grand Jury investigation, in the District Court for the Eastern District of Virginia. As a result, the case at bar consists exclusively of state law claims.

Rather than remanding the state law claims to the Superior Court for the District of Columbia, the District Court maintained jurisdiction over this action and, on May 27, 2008, dismissed the Amended Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1) and Rule 12(b)(6). In so doing, however, the District Court committed reversible error. First, the District Court declined to accept as true large portions of the material allegations in the Amended Complaint. Second, the District Court resolved disputed issues of material fact against the Candidate/Voter Plaintiffs. Finally, the District Court relied on case law that has been reversed. Had the District Court not made these errors, the Candidate/Voter Plaintiffs could have proceeded with their claims against the Conspirators and the case would not have been dismissed.

## **X. STATEMENT OF FACTS**

### **A. The Parties.**

Plaintiff Ralph Nader is a consumer advocate who ran for President of the United States as an Independent candidate in the 2004 General Election. Am. Comp. ¶¶ 1, 15.<sup>1</sup> Plaintiff Peter Miguel Camejo, now deceased, was Plaintiff Nader's Vice Presidential running mate. *Id.* ¶ 16. Plaintiffs D.B. Fanning and C.K. Ireland are registered voters in Arizona; Plaintiffs Julie Coyle and Herman Blankenship are registered voters in Ohio; and Plaintiffs Gregory Kafoury and Lloyd Marbet are registered voters in Oregon, each of whom wanted to vote for the Candidates in the 2004 General Election but was denied that choice, as a result of the abusive and malicious litigation and unlawful acts set forth in the Amended Complaint. *Id.* ¶¶ 17-22.

Defendant Democratic National Committee ("DNC") is the national head of the Democratic Party. *Id.* ¶ 23. Defendant Kerry-Edwards 2004, Inc. is the principal campaign committee of the Democratic Party candidates for President and Vice President in the 2004 General Election. *Id.* ¶ 24. Defendant The Ballot Project, Inc. is a Section 527 organization incorporated in June 2004 to coordinate and finance litigation against the Candidates and to recruit legal counsel for such litigation. *Id.* ¶¶ 25, 60. Defendant John Kerry is the 2004 Democratic Party

candidate for President. *Id.* ¶¶ 28. Defendant Jack Corrigan is an attorney who worked for Defendants DNC and Kerry-Edwards 2004, Inc. to plan and execute litigation against the Candidates. *Id.* ¶ 29, 57-58. Defendants Toby Moffett and Elizabeth Holtzman are directors of The Ballot Project. *Id.* ¶¶ 30-31. Defendant Robert Brandon is a DNC consultant who housed The Ballot Project in his offices. *Id.* ¶ 32. Defendant Mark Brewer is Vice Chairman of the DNC and Chairman of the Michigan Democratic Party. *Id.* ¶ 33. Defendant SEIU is a labor union and Defendant ACT is a Section 527 organization, which jointly coordinated the effort to prevent the Candidates from gaining ballot access in Oregon by means of sabotage and other unlawful acts. *Id.* ¶¶ 26-27, 67, 69, 166-78. Defendant Reed Smith, LLP is a nationwide law firm retained by Defendants DNC and John Kerry in matters arising during or from the 2004 General Election, which initiated litigation to challenge the Candidates' nomination petitions in Pennsylvania. *Id.* ¶¶ 34, 179-205. The foregoing individuals and entities, together with any other individuals who coordinated, directed, materially supported or participated in the nationwide effort to wrongfully prevent the Candidates from running for public office, are referred to collectively hereinafter as the "Conspirators" or "co-Conspirators". *Id.* ¶¶ 23-44.

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<sup>1</sup> Citations to the Amended Complaint may be found in the attached Joint Appendix

## **B. Factual Background.**

### **1. Conspirators Filed Twenty-Nine Complaints in Less Than Twelve Weeks, Regardless of Probable Cause and Regardless of the Merits of the Cases, in an Effort to Use a Pattern of Baseless and Repetitive Claims as a Means to Bar the Candidates From Running For Public Office During the 2004 General Election.**

Between June and September of 2004, state or local Democratic Parties initiated or materially supported proceedings to challenge the Candidates' right to appear on the 2004 General Election ballot in eighteen states, filing a total of twenty-four complaints in less than twelve weeks. *Id.* ¶¶ 3, 54, 72-226. State Democratic Party chairs and other Conspirators also filed five complaints against the Candidates with the FEC. *Id.* ¶¶ 55, 126, 135, 227. The improper purpose of these complaints was to eliminate the Candidates from the race by bankrupting their campaign with litigation costs. *Id.* ¶¶ 1, 45-47, 51, 53-56. "We wanted to neutralize [the Candidates'] campaign by forcing [them] to spend money and resources defending these things," explained Defendant Toby Moffett in August 2004, when the Conspirators' litigation was ongoing in multiple states, "but much to our astonishment, we've actually been more successful than we thought we'd be in stopping [them] from getting on [state ballots] at all." *Id.* ¶¶ 60, 62. Conspirators thus filed a total of twenty-nine complaints before nineteen tribunals in less than twelve weeks as part of a coordinated nationwide effort to bankrupt the

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beginning at page 6.

Candidates' campaign and prevent them from running for public office during the 2004 General Election.

To achieve this goal, Defendant DNC, under the leadership of former Chairman Terry McAuliffe, worked with Defendants Kerry-Edwards 2004, Inc. and The Ballot Project to develop a wrongful, abusive and baseless litigation strategy against the Candidates. *Id.* ¶¶ 5, 25, 45-63, 98, 118. High-level officials from Defendants DNC and Kerry-Edwards 2004, Inc. directly participated in this effort, even as such Defendants publicly disavowed their involvement, while rank-and-file DNC staff helped prepare the Conspirators' state court complaints. *Id.* ¶¶ 56-60, 64-65, 118, 123, 126, 138. Defendant DNC also directed state party officials (many of whom were DNC officials) to initiate state court proceedings against the Candidates, and Defendant DNC retained several law firms that represented the state parties in such proceedings. *Id.* ¶¶ 56-58. At least ninety-five lawyers from fifty-three law firms nationwide initiated or assisted in these proceedings in eighteen state courts. *Id.* ¶¶ 5, 61, 72-226. Defendants DNC and The Ballot Project, together with their state Democratic Party co-Conspirators, collectively paid these law firms nearly \$1 million, while the firms unlawfully contributed in excess of \$2 million more in *pro bono* legal services. *Id.* ¶ 61.

In furtherance of their coordinated nationwide effort, approximately three dozen Conspirators met at the Four Seasons hotel in Boston on July 26, 2004. Am.

Comp. ¶ 46. Defendant DNC paid for the meeting. *Id.* The Ballot Project co-directors, Defendants Toby Moffett and Elizabeth Holtzman, attended along with Defendant Robert Brandon. *Id.* At the meeting, the Conspirators discussed their strategy “to drain [the Candidates] of resources and force [them] to spend [their] time and money” by suing the Candidates in as many states as possible. *Id.* ¶ 47 (quoting Defendant Toby Moffett). Afterwards, the Conspirators attended the Democratic National Convention, which was also taking place in Boston, where they distributed a detailed action memo outlining their plans, solicited donations and recruited others to join their effort to bankrupt the Candidates’ campaign by filing baseless and repetitive lawsuits in as many states as possible. *Id.* at ¶¶ 49-52.

In order to manufacture grounds for their otherwise baseless state court claims, Conspirators in certain key states coordinated campaigns of harassment, intimidation and sabotage, for the purpose of preventing the Candidates from complying with state election laws. *Id.* ¶ 67. In Oregon, for example, Conspirators infiltrated the Candidates’ nomination conventions under false pretenses, causing the conventions to fall short of the requisite number of verified attendees, and then systematically sabotaged the Candidates’ nomination petitions by crossing names out or otherwise taking measures to invalidate the petitions. *Id.* ¶¶ 69, 166-68, 171-74. In Pennsylvania, Conspirators signed thousands of fake names on the Candidates’ nomination petitions, a tiny number of which went undetected by

petition circulators, and later served as the basis for false claims of “fraud” in the petitions. *Id.* ¶¶ 70, 192-93. In Ohio and Oregon, Conspirators hired private detectives who came to petition circulators’ homes and claimed to be investigating them. *Id.* ¶ 68-69. Petition circulators were also subpoenaed, ordered to attend depositions and falsely threatened with large civil fines, criminal conviction and lengthy prison sentences. *Id.* ¶¶ 68-69, 151, 153-58, 170. All of this activity was intended to harass and intimidate the petition circulators and prevent them from collecting signatures – an effort that succeeded on dozens of occasions. *Id.* ¶ 7.

Such unlawful tactics proved to be decisive to the success of the Conspirators’ state court litigation. *Id.* ¶ 71. Out of eighteen state court challenges to the Candidates’ nomination petitions, only four ultimately succeeded on the merits – in Illinois, Ohio, Oregon and Pennsylvania. *Id.* Every other challenge that was decided on the merits was dismissed, and the Candidates would have been on the ballot in Ohio, Oregon and Pennsylvania, but for the Conspirators’ unlawful interference.<sup>2</sup> *Id.* ¶¶ 67-71. *Id.* The FEC also unanimously dismissed all five of the Conspirators’ complaints without taking action. *Id.* ¶¶ 62, 126, 135, 227. In total,

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<sup>2</sup> The Candidates were forced to withdraw their nomination petitions due to the prohibitive cost of defending the litigation in Arizona. The Ninth Circuit has since held that Arizona’s ballot access law, as applied to the Candidates’ nomination petitions, is unconstitutional. *See Nader v. Brewer*, No. 06-16251 (9th Cir. July 9, 2008). In Oregon, the Conspirators intervened in proceedings to challenge the Candidates’ nomination petitions, but did not file a complaint.



therefore, twenty-four out of twenty-nine complaints that the Conspirators filed before nineteen tribunals within twelve weeks were dismissed.

Many of the Conspirators' state court challenges were objectively baseless on the face of their complaints. In Washington, for example, the Thurston County Superior Court dismissed a complaint that set forth its legal theory in one perfunctory paragraph. *Id.* ¶¶ 208, 211. In West Virginia, the Kanawha County Circuit Court rejected as "extraordinary" the Conspirators' request to invalidate an entire nomination petition signed by 23,000 citizens based upon nothing more than "the testimony of a half-dozen citizens." *Id.* at ¶ 219. In Colorado, the District Court of Denver County summarily dismissed two complaints without issuing a written opinion. *Id.* ¶ 85. The Mississippi State Board of Elections summarily dismissed another complaint at the conclusion of an oral hearing. *Id.* ¶ 129. In Pennsylvania, the Philadelphia Court of Common Pleas dismissed a class action that Conspirators filed against the Candidates' campaign on behalf of petition circulators who claimed to be owed \$200 each for fake signatures that they had collected. *Id.* ¶¶ 179, 193. One complaint in Iowa, two complaints in Maine and two complaints in New Hampshire were also dismissed as groundless. *Id.* ¶¶ 62, 111-20, 135-40.

Although the majority of the Conspirators' complaints failed on the merits, their coordinated nationwide effort to drain, distract and ultimately bankrupt the

Candidates' campaign by filing a pattern of baseless and repetitive claims largely succeeded. *Id.* ¶¶ 66, 228-231. The actions that Conspirators pursued in eighteen state courts and before a federal agency – a total of twenty-nine complaints filed one after another and litigated concurrently during the crush of a presidential election – produced a cumulative burden so onerous that it effectively barred the Candidates from participating in the election, thus denying the Voters and others the choice of voting for them. *Id.* The Conspirators thus accomplished their goals not by securing a favorable outcome from the judicial and administrative processes that they invoked, but by repeatedly invoking such processes, regardless of probable cause, and regardless of the merits of the cases, so as to neutralize their competitors by forcing them to defend multiple proceedings before nineteen different tribunals.<sup>3</sup> *Id.* ¶¶ 1-2, 4, 6-8, 11, 45, 47 53, 62-63, 66.

To the degree that the Conspirators succeeded in harming the Candidates' campaign by abuse of the judicial process itself, as opposed to securing a favorable outcome from that process, such success was consistent with their stated intent before, during and after the election. *Id.* ¶¶ 45, 47-48, 51-53, 62, 63. As DNC Chairman McAuliffe publicly stated on national television in February 2004,

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<sup>3</sup> The Conspirators' pattern of baseless and repetitive claims also directly impacted the outcome of litigation in particular state courts. In Arizona, for example, where the Conspirators filed their first challenge, the Candidates were forced to withdraw their nomination petitions due to the prohibitive cost of defending the litigation. Am. Comp. ¶ 74.

before the Candidates had even announced their candidacy, “We can’t afford to have Ralph Nader in the race.” *Id.* ¶ 2. Chairman McAuliffe reiterated this sentiment privately in a telephone call with Plaintiff Nader on the very day that the Conspirators filed their first state court challenge, during which he offered to support the Candidates’ campaign if they would agree not to campaign in so-called “battleground” states. *Id.* ¶¶ 3. After Plaintiff Nader declined this offer, Chairman McAuliffe repeated his concern publicly during the 2004 Democratic National Convention. *Id.* ¶ 53. In keeping with their ulterior purpose, however, DNC officials and their co-Conspirators denied and fraudulently concealed the coordinated nature of their nationwide effort to bankrupt the Candidates’ campaign. *Am. Comp.* ¶¶ 64-65, 204.

After the election, Defendant Toby Moffett likewise reaffirmed the Conspirators’ intent to use judicial processes to accomplish a collateral purpose that was not within the purview of the law. *Id.* ¶¶ 45, 47, 62-63. “We had a role in the ballot challenges,” Defendant Moffett said in December 2004. “We distracted [the Candidates] and drained [them] of resources. I’d be less than honest if I said it was all about the law. It was about stopping Bush from getting elected.” *Id.* ¶ 63.

**2. The Pennsylvania Challenge, Coordinated By Defendant Reed Smith, LLP, Was Prepared and Financed By Means of an Allegedly Criminal Conspiracy Currently Under Grand Jury Investigation, Which Resulted in the Attachment of Plaintiff Nader's Personal Bank Accounts.**

The Conspirators' Pennsylvania challenge was filed by Defendant Reed Smith, LLP, on behalf of eight nominal plaintiffs. Am. Comp. ¶¶ 179-205. During the litigation, Reed Smith attorneys denied that the Democratic Party had retained or paid their firm, thus concealing their participation in the Conspirators' coordinated nationwide effort. *Id.* ¶¶ 191, 204. FEC records confirm, however, that Defendant DNC retained Defendant Reed Smith for "political consulting" and "legal consulting" during the 2004 General Election, *id.*, and the firm also represented Defendant John Kerry in at least one other matter arising from the 2004 General Election. *Id.* ¶¶ 180, 186-87, 204. When Defendant Reed Smith filed its challenge to the Candidates' Pennsylvania nomination petition, therefore, two of its clients were actively engaged in related lawsuits in state courts across the nation. *Id.* ¶¶ 57-60, 64-65, 118, 123, 126, 138.

The Conspirators prepared their challenge to the Candidates' Pennsylvania nomination petition "with support from approximately 170 Democratic Party operatives" recruited by former Pennsylvania House Minority Leader H. William "Bill" DeWeese and former Pennsylvania House Minority Whip Mike Veon. *Id.* ¶ 181. On July 10, 2008, Mr. Veon, Mr. DeWeese's former chief of staff and ten

other members or employees of the Pennsylvania House Democratic Caucus were charged with multiple counts of criminal conspiracy, theft and conflict of interest in connection with an ongoing Grand Jury investigation into public corruption by Pennsylvania Attorney General Tom Corbett. The Grand Jury Presentment that the Attorney General filed in conjunction with the charges states that they arise from “a concerted pattern of illegal conduct in which millions of dollars of taxpayer funds and resources were misdirected to campaign efforts.” *See Nader v. DNC*, No. 08-cv-00589-RMU, Amended Complaint Filed July 21, 2008, Exhibit A at 1 (D.D.C. 2008) (related action asserting claims under 42 U.S.C. § 1983) (cited hereinafter as “Presentment”).<sup>4</sup> Chief among these campaign efforts was the Conspirators’ challenge to the Candidates’ Pennsylvania nomination petitions. Presentment 54-58; Am. Comp. ¶¶ 179-205.

The 75-page Presentment includes an entire section entitled “Nader Petition Challenge”, which describes how “a veritable army” of state employees dedicated

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<sup>4</sup> Judicial notice of the Grand Jury Presentment is proper pursuant to Federal Rule of Appellate Procedure 10, as “material surfacing after the district court proceeding” that bears directly upon the allegations in the Amended Complaint. 20 MOORE’S FEDERAL PRACTICE 3D § 310.10(5)(e). *See also Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 165 n.3 (D.D.C. 2006) (citing *Covad Communs. Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (treating public records from other courts as judicially noticeable for purposes of a motion to dismiss); *Equal Employment Opportunity Comm’n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (“In determining whether a complaint fails to state a claim, we may consider only the facts alleged in the complaint, any documents

“a staggering number of man-hours” to the challenge – on taxpayer time, using taxpayer resources and at taxpayer expense. Presentment 55-56. Many of the Grand Jury’s findings substantiate the allegations in the Amended Complaint. *Compare* Presentment 54-58 with Am. Comp. ¶¶ 1, 4, 45, 47, 51, 53, 70-71, 179-205. In particular, the Grand Jury found that “[i]t was generally assumed, in Democratic Party circles, that [the Candidates’] appearance on the ballot would be detrimental to Democratic Presidential Candidate John Kerry,” and therefore, “the quest to remove [the Candidates] from the ballot began *before [their] petitions were even filed.*” Presentment 55 (emphasis added). The Grand Jury’s findings thus support the allegation that the Conspirators filed their Pennsylvania challenge regardless of probable cause and regardless of the merits of the case, in furtherance of a coordinated nationwide effort to bankrupt the Candidates’ campaign by filing a pattern of baseless and repetitive claims. Am. Comp. ¶¶ 1, 4, 45, 47, 51, 53, 70-71, 179-205.

The Presentment refers only to an unnamed “law firm” that filed the challenge to the Candidates’ Pennsylvania nomination papers, but the record of the Pennsylvania proceedings, which lists no fewer than 17 Reed Smith attorneys as counsel to the nominal challengers, leaves little doubt that the “law firm” referenced in the Presentment is Reed Smith, LLP. Presentment 55; *see In re:*

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either attached to or incorporated in the complaint and matters of which we may

*Nomination Paper of Nader*, 860 A.2d 1 (Pa. 2004) (listing seventeen Reed Smith attorneys and three others as counsel to the nominal challengers). The Presentment also indicates that the attorneys who prepared the Pennsylvania challenge did so in cooperation with and in reliance upon as many as fifty employees of the Commonwealth of Pennsylvania, who were working at the direction of their supervisors, on taxpayer time, using taxpayer resources and receiving taxpayer-funded compensation for their work. Presentment 54-58. Furthermore, in a preliminary hearing before the Dauphin County, Pennsylvania Court of Common Pleas, state employees who worked on the challenge testified under oath that they visited Reed Smith's Pittsburgh office on several occasions in connection with the challenge, that Reed Smith partner Efrem Grail was coordinating the effort, and that Attorney Grail "definitely knew" that the state employee he met with to exchange materials in connection with the challenge worked for former Minority Whip Veon. *See Serody v. Nader*, No. 07-cv-3385 F, Notice of Supplemental Authority Filed Nov. 3, 2008, Ex. A at 28-31, 46-48 (D.C. Super. 2007) (attachment proceedings initiated by Defendant Reed Smith to collect litigation costs from Plaintiff Nader).<sup>5</sup>

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take judicial notice.")).

<sup>5</sup> The Court may take judicial notice of court records in related proceedings that include evidence surfacing after the conclusion of the District Court proceedings. *See supra* n.3.

Following the conclusion of the Pennsylvania state court proceedings, Defendant Reed Smith submitted a Bill of Costs to the Commonwealth Court of Pennsylvania in the amount of \$81,102.19, claiming that the bill “is true and correct and accurately reflects costs incurred” by its nominal clients in connection with the challenge, and that “Justice requires that this Court award” such costs. Am. Comp. ¶ 191. The Commonwealth Court issued an order approving the bill without opinion. *Id.* ¶ 194. The Candidates appealed, and a divided Pennsylvania Supreme Court affirmed without citing a single case as precedent for its taxation of costs against candidates who defend their nomination papers from a private party challenge. *Id.* ¶¶ 194-95.

Defendant Reed Smith subsequently settled its claims against Plaintiff Camejo for \$20,000. *Id.* ¶ 201. Plaintiff Nader did not settle, and consequently, on July 17, 2007, Defendant Reed Smith initiated attachment proceedings in the Superior Court for the District of Columbia, freezing \$61,638.45 in Plaintiff Nader’s personal bank accounts. *Id.* ¶ 203; *see Serody*, No. 07-cv-3385 F. Thereafter, in September 2007, Plaintiff Nader discovered that, during the proceedings before the Pennsylvania Supreme Court, Defendant Reed Smith had been representing the presiding chief justice as his defense counsel in a state ethics investigation, at the same time that the firm was appearing before the chief justice as the true party in interest seeking to collect litigation costs, without disclosing



such representation on the record (among other improprieties). Am. Comp. ¶¶ 195-96. Accordingly, on November 7, 2007, Plaintiff Nader filed a motion for relief from the judgment in the Superior Court, alleging that Defendant Reed Smith had committed a fraud upon the court and violated his right to due process. *Id.* ¶¶ 195, 198, 203. Plaintiff Nader's motion for relief remains pending, and his personal bank accounts have now been frozen for more than sixteen months pursuant to the Conspirators' effort to enforce the judgment. Am. Comp. ¶ 203.

### **C. Procedural History.**

#### **1. The Candidate/Voter Plaintiffs Filed Suit Against the Conspirators for Abuse of Process, Malicious Prosecution, Civil Conspiracy and Constitutional Violations Under 42 U.S.C. § 1983.**

The action on appeal before this Court was commenced on October 30, 2007, when the Candidates and Voter Plaintiffs filed suit in the Superior Court of the District of Columbia, alleging state law claims for abuse of process, malicious prosecution and civil conspiracy, as well as federal claims under 42 U.S.C. § 1983, against the principal parties that directed the coordinated nationwide effort to suppress the Candidates' and Voters' lawful participation in the 2004 General Election, including as defendants the DNC, The Ballot Project, Kerry-Edwards 2004, Inc., ACT, SEIU, Reed Smith, LLP, John Kerry, Jack Corrigan, Toby Moffett, Elizabeth Holtzman, Robert Brandon and Mark Brewer. Am. Comp. ¶¶ 23-34. On October 31, 2007, the Plaintiffs filed a related action in the District

Court for the Eastern District of Virginia against Virginia residents Terry McAuliffe and Steven Raikin. On November 27, 2007, the defendants removed the instant case from the Superior Court to the District Court for the District of Columbia.

On January 23, 2008, the Candidate/Voter Plaintiffs filed an amended complaint in the District Court for the District of Columbia, dismissing their federal claims without prejudice in order to consolidate them, together with the allegations based on newly discovered evidence disclosed by the Pennsylvania Grand Jury investigation, in the District Court for the Eastern District of Virginia. Without ruling on the Plaintiffs' motion to amend, the District Court for the Eastern District of Virginia transferred the action to the District of Columbia on March 12, 2008. *See Nader v. McAuliffe*, Civ. No. 08-cv-00428-RMU.

Accordingly, the plaintiffs re-filed their federal claims in the District Court for the District of Columbia on April 4, 2008. *See Nader v. DNC*, Civ. No. 08-cv-00589-RMU. The Plaintiffs filed an amended complaint in this action on July 21, 2008, to incorporate allegations based upon the Grand Jury Presentment that Pennsylvania Attorney General Corbett filed on July 10, 2008.

On April 8, 2008, the Candidate/Voter Plaintiffs submitted a Notice of Filing in the District Court for the District of Columbia, so that the Court could consolidate the pending related actions or remand the state law claims in its

discretion. Rather than consolidating the related actions or remanding the state law claims, however, the District Court maintained jurisdiction over the state law claims and adjudicated them separately, in the present action that is before this Court. Thus, on May 27, 2008, the District Court issued a Memorandum Opinion and Order granting six motions to dismiss the state law claims, which Defendants DNC, Kerry-Edwards, 2004, Inc., The Ballot Project, ACT, SEIU and Reed Smith filed on behalf of all defendants under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). That Memorandum Opinion and Order is the subject of this appeal.

## **2. The District Court Opinion**

The District Court granted the Conspirator Defendants' motions to dismiss under Rule 12(b)(1) and Rule 12(b)(6) on the ground that "this court lacks jurisdiction to consider the plaintiffs' malicious prosecution claims that directly attack prior state court judgments, and because the First Amendment bars the remaining claims." Joint Appendix ("JA") 79. Accordingly, the Court dismissed the malicious prosecution claims arising from state court litigation that did not terminate in plaintiffs' favor (i.e., in Arizona, Illinois, Ohio, Oregon and Pennsylvania) for lack of jurisdiction under Rule 12(b)(1), because "favorable termination" in the underlying proceedings is an element of the tort of malicious prosecution. JA 96. The Court reasoned that the Candidate/Voter Plaintiffs could not establish this element without attacking the state court judgments themselves.

*Id.* Therefore, the Court concluded that the *Rooker-Feldman* doctrine barred the Court from considering these claims. *Id.*

The District Court also dismissed the malicious prosecution claims arising from state court litigation that did terminate in the Plaintiff Candidates' favor (i.e., in Arkansas, Colorado, Florida, Iowa, Maine, Michigan, Mississippi, Nevada, New Hampshire, New Mexico, Washington, West Virginia and Wisconsin), as well as the abuse of process claims arising from the nomination petition challenges in all 18 state courts under Rule 12(b)(6). JA 101. The Court reasoned that Candidate/Voter Plaintiffs could not state claims for malicious prosecution and abuse of process based upon the foregoing conduct unless such conduct falls under the "sham" exception to the *Noerr-Pennington* doctrine. JA 101. The Court concluded as a matter of law that such conduct did not fall under the sham exception, and therefore dismissed the remaining claims. JA 101-04. The Court did not address whether the Conspirators' five dismissed FEC complaints constitute an abuse of process or malicious prosecution. In addition, the Court was unable to address whether the Conspirators' ongoing effort to enforce a judgment procured by means of an allegedly criminal conspiracy constitutes an abuse of process or malicious prosecution, because the Pennsylvania Attorney General had not filed the Grand Jury Presentment at the time that the Court issued its opinion. Having dismissed the Candidate/Voter Plaintiffs' abuse of process and malicious

prosecution claims, the Court dismissed the civil conspiracy claim on the ground that civil conspiracy is not an independently actionable tort. JA 108.

The Court also dismissed the claims of the Plaintiff Voters for lack of standing under Rule 12(b)(1). JA 84-85. The Court reasoned that the Voters could not remain in the action “by piggybacking on the [Candidates’] common law claims,” because the only injury that the Plaintiff Voters allege is a deprivation of their constitutional rights. *Id.* The Court recognized that the Plaintiff Voters allege claims against the Conspirators under 42 U.S.C. § 1983 in related actions pending before the Court, but rather than consolidating the related actions or remanding the exclusively state law action to the Superior Court, the District Court retained jurisdiction over the exclusively state law action and dismissed the Plaintiff Voters’ claims for lack of standing. *Id.* In support of this conclusion, which the Court characterized as “self-evident”, the Court relied on case law that has been reversed. JA 85 (citing *Edmondson & Gallagher v. Alban Towers Tenants Ass’n*, 829 F. Supp. 420, 426 (D.D.C. 1993) (dismissing abuse of process and malicious prosecution claims on ground that plaintiff lacked privity with defendants), *rev’d* at 48 F.3d 1260, 1263 (D.C. Cir. 1995) (vacating judgment with directions to remand or dismiss without prejudice so that plaintiff can refile state law claims in Superior Court). For this reason alone, the District Court opinion should be reversed and remanded. *See infra* VI-D.

## **XI. SUMMARY OF ARGUMENT**

The District Court committed reversible error by failing to observe the cardinal principle governing motions to dismiss – that the facts in the Amended Complaint must be taken as true – and by resolving a multitude of disputed issues of fact as a matter of law without affording the Candidate/Voter Plaintiffs an opportunity to prove such facts. As a result of these errors, the Court misconceived the gravamen of the Candidate/Voter Plaintiffs’ claims by concluding that they seek to blame the Conspirators for causing the Candidates to lose the 2004 presidential election, when the Amended Complaint makes no such allegation. Rather, the Amended Complaint alleges that the Conspirators unlawfully suppressed the Candidate/Voter Plaintiffs’ participation in the 2004 presidential election by means of wrongful and abusive litigation, manufacturing of evidence, sabotage, harassment, false threats and other unlawful acts. Because the District Court declined to consider such allegations, however, the Court concluded as a matter of law that the Conspirators had engaged in “genuine” petitioning conduct that is immune from liability under the *Noerr-Pennington* doctrine. This was clear error. The Amended Complaint alleges that the Conspirators filed twenty-nine complaints before nineteen tribunals in less than twelve weeks as part of a coordinated nationwide effort to prevent the Candidates from running for public office during the 2004 General Election by bankrupting their campaign. Thus,

whether the Conspirators engaged in “genuine” petitioning conduct or a “sham” for purposes of the *Noerr-Pennington* doctrine is a question of fact that cannot be resolved upon a motion to dismiss. The Court’s error is made plainer still by a Grand Jury Presentment that the Attorney General of Pennsylvania filed after the District Court issued its decision, in which the Grand Jury concludes that numerous felonies were committed in connection with the challenge that the Conspirators filed to the Candidates’ Pennsylvania nomination petitions. Finally, in dismissing the Candidate/Voter Plaintiffs’ state law tort claims, the District Court misconstrued District of Columbia law and relied heavily upon a District Court decision that this Court reversed in 1995.

## **XII. ARGUMENT**

### **A. The District Court Erred in Dismissing the Amended Complaint Under Rule 12(b)(1) and Rule 12(b)(6).**

#### **1. Standard of Review.**

The District Court dismissed the Amended Complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) and for lack of subject matter jurisdiction under Rule 12(b)(1). The Court reviews the dismissal of a complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) *de novo*. See *Macharia v. United States*, 334 F.3d 61, 64, (D.C. Cir. 2003) (citing *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003)). Because the District Court granted the motions to dismiss, this Court must accept as true all the factual allegations in the Amended Complaint. See *Tri-State Hospital Corp. v. United States*, 341 F.3d 571, 572 n.1 (D.C. Cir. 2003) (citing *Scandinavian Satellite Sys., AS v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002))).

#### **2. The Amended Complaint States Claims for Abuse of Process and Malicious Prosecution.**

Courts in the District of Columbia have long held that a cause of action will lie for “repeated abuse of [court] processes,” in recognition of the principle that “the right to litigate is not the right to become a nuisance.” *Soffos v. Eaton*, 152 F.2d 682, 683 (D.C. Cir. 1945), citing *Melvin v. Pence*, 130 F.2d 423 (D.C. 1942).



In *Soffos*, the “repeated abuse” of court processes consisted of four lawsuits that the defendant allegedly initiated against the plaintiff maliciously and without probable cause. The defendant had filed only two lawsuits, but another party had filed two more, allegedly on the defendant’s behalf, and the plaintiff therefore sued the defendant, seeking “damages for the expense of defending the suits, injury to [plaintiff’s] reputation,” and other damages. *Id.* The Court found that the plaintiff had stated a claim:

The burden of being compelled to defend successive unconscionable suits is not one which would necessarily result in all suits prosecuted to recover for like causes of action. The burden increases in more than arithmetical proportion. ... [S]uccessive suits may even wear a defendant down to the point of capitulation. We see no good reason why the law should tolerate repeated abuse of its processes. To allow redress for such abuse will not seriously hamper the honest assertion of supposed rights. No one is likely to be deterred from litigating an honest claim by fear that some future jury may erroneously decide that he has brought two suits maliciously and without probable cause.

*Id.* In considering whether to recognize a cause of action in *Soffos*, the Court was concerned to strike a balance “between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights.” The Court held, however, that causing four such “unconscionable suits” to be filed was sufficient grounds to sustain a cause of action. *Id.*

In *Soffos* and other early cases, District of Columbia courts did not distinguish between the torts of malicious prosecution and abuse of process. *See, e.g., Davis v. Boyle Bros., Inc.*, 73 A.2d 517 (D.C. 1950) (holding one

“unconscionable suit” sufficient to sustain a cause of action). Now, however, the distinction is well-established: malicious prosecution refers to the wrongful initiation of process, whereas abuse of process refers to the wrongful use of process after it has been properly issued. *See generally* 1 AM. JUR. 2D *Abuse of Process* § 3 (1994). Often, the same set of facts gives rise to a cause of action for both torts. *See Williams v. City Stores Co.*, 192 A.2d 534, 537 (D.C. 1963) (citing *Hall v. Field Enterprises*, 94 A.2d 479, 481 (D.C. 1959)). Thus, in the case at bar, where the Conspirators filed twenty-nine complaints before nineteen tribunals in less than twelve weeks, regardless of probable cause and regardless of the merits of the cases, as part of a coordinated nationwide effort to use a pattern of baseless and repetitive claims to bankrupt their competitors and bar qualified candidates and voters from participating in a federal election, the Amended Complaint states claims for both abuse of process and malicious prosecution. Am. Comp. ¶¶ 1-8.

**a. The Amended Complaint States a Claim for Abuse of Process.**

As the District Court recognized, the Amended Complaint pleads the elements necessary to state a claim for abuse of process. JA 93-94. District of Columbia law defines abuse of process as a “perversion of court processes to accomplish some end which the process was not intended by law to accomplish, or which compels the party against whom it has been used to do some collateral thing which he could not legally and regularly be compelled to do.” *Field Enterprises*,

*Inc.*, 94 A.2d at 481; *see Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Chatterton v. Janousek*, 280 F.2d 719 (D.C. 1960); *Hall v. Hollywood Credit Clothing Company*, 147 A.2d 866 (D.C. 1959). To state a claim for abuse of process, therefore, a plaintiff must allege 1) that the defendant perverted judicial processes to achieve a purpose not contemplated in the regular prosecution of the charge, and 2) that the defendant acted from an ulterior motive. *Hollywood Credit Clothing Company*, 147 A.2d at 868; *Geier v. Jordan*, 107 A.2d 440, 441 (D.C. 1954); *Field Enterprises, Inc.*, 94 A.2d at 480.

The Amended Complaint pleads the first element, that the Conspirators perverted judicial processes to achieve an improper purpose, by alleging that the Conspirators filed twenty-nine complaints before nineteen tribunals in less than twelve weeks “not to vindicate valid claims, but to use the sheer burden of litigation itself as a means to bankrupt and disrupt” their political competitors. Am. Comp. ¶ 62. The Conspirators thus perverted the process for ensuring that candidates comply with state election and federal campaign finance laws by using that process as a means to bar qualified candidates from participating in an election, whether the candidates complied with such laws or not. *Id.* ¶¶ 1, 4, 45, 47, 51, 53, 55, 62-63; *see Morowitz*, 423 A.2d at 198 (“The critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law”); *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992) (“The tort lies where

the legal system ‘has been used to accomplish some end which is without the regular purview of the process’”) (quoting *Morowitz*, 423 A.2d at 198). The Conspirators’ attempt to use a pattern of baseless and repetitive state court and federal agency complaints as a means to bar qualified candidates from participating in a federal election therefore constitutes a perversion of process for an improper purpose. *See id.*; Am. Comp. ¶¶ 1, 4, 45, 47, 51, 53, 55, 62-63.

The Amended Complaint pleads the second element of the tort, that the Conspirators acted with an ulterior motive, by alleging that they intended to use the burden of the judicial process itself, as opposed to the outcome of that process, as a means to compel the Plaintiff Candidates not to run for public office. Am. Comp. ¶¶ 1, 4, 45, 47, 51, 53, 55, 62-63. This motive is “ulterior” because the Conspirators sought, under the guise of state election and federal campaign finance law complaints, “to achieve a result not regularly or legally obtainable.” *Morowitz*, 423 A.2d at 198; *see Bown*, 601 A.2d at 1079. The Conspirators’ sabotage and other unlawful efforts to prevent the Plaintiff Candidates from complying with state election laws demonstrates that the result which the Conspirators sought to achieve – barring qualified candidates from running for public office – was not regularly or legally obtainable. Am. Comp. ¶¶ 6-7, 67-71, 151, 153-58, 166-68, 170-71, 174, 193. The Conspirators’ attempt to fraudulently conceal the coordinated nature of their nationwide effort, and to deny their participation

therein, further underscores their intention to pervert judicial processes. Am. Comp. ¶¶ 64-65, 204. Therefore, the Conspirators' intent to use judicial processes as a means to prevent qualified candidates from running for public office constitutes an ulterior motive. *See Morowitz*, 423 A.2d at 198; *Bown*, 601 A.2d at 1079.

Accordingly, because the Amended Complaint alleges that the Conspirators: 1) perverted judicial processes for an improper purpose; and 2) that they did so with an ulterior motive, the Amended Complaint states a claim for abuse of process.

**b. The Amended Complaint States a Claim for Malicious Prosecution.**

The Amended Complaint also states a claim for malicious prosecution. To state a claim for malicious prosecution under District of Columbia law, a plaintiff must plead four elements: 1) that the defendant initiated process which terminated in the plaintiff's favor; 2) with malice; 3) without probable cause; and 4) that the plaintiff suffered special injury as a result of the original action. *See Morowitz*, 423 A.2d at 198 (citing *Ammerman v. Newman*, 384 A.2d 637 (D.C. 1978)). The Amended Complaint clearly pleads all four of these elements.

The Amended Complaint pleads the first element, that the Conspirators initiated process which terminated in the Plaintiff Candidates' favor, by alleging that the Conspirators filed a total of twenty-four complaints to challenge the

Candidates' nomination petitions in eighteen states, and that courts dismissed the challenges in every state except Arizona (where the Candidates withdrew their nomination petitions due to the prohibitive cost of litigation) Ohio, Oregon and Pennsylvania (where Conspirators manufactured grounds for their complaints by means of sabotage and other unlawful acts) and Illinois. Am. Comp. ¶¶ 6-7, 62, 67-71, 151, 153-58, 166-68, 170-71, 174, 193. The Conspirators also filed five FEC complaints, all five of which the agency dismissed without taking action. Am. Comp. ¶ 71. The Amended Complaint therefore pleads the first element of favorable termination in the underlying proceedings.

The Amended Complaint pleads the second element, that the Conspirators acted with malice, by alleging that the Conspirators filed twenty-nine complaints before nineteen tribunals within twelve weeks "in a deliberate attempt to use the sheer burden of litigation itself as a means to prevent [the Candidates] from running for public office," as part of a coordinated nationwide effort "to deny [the Voters] and others the choice of voting for [the Candidates]," whether or not the Candidates complied with state election laws. Am. Comp. ¶¶ 2, 4, 45, 47, 51, 53, 62-63. The Conspirators therefore evinced a "willful, wanton, reckless or oppressive disregard to the rights of the plaintiff[s]," which is the definition of malice under District of Columbia law. *Ammerman*, 384 A.2d at 641; *see Tyler v. Cent. Charge Serv., Inc.*, 444 A.2d 965, 969 (D.C. 1982). The Conspirators'

systematic efforts to sabotage the Plaintiff Candidates' nomination petitions in key states, and to harass and intimidate their petitioners in order to prevent the Plaintiff Candidates from complying with state election laws, further demonstrates the Conspirators' malicious intent. Am. Comp. ¶¶ 6-7, 67-71, 151, 153-58, 166-68, 170-71, 174, 193. The Amended Complaint therefore pleads the second element of malice.

The Amended Complaint pleads the third element, that the Conspirators lacked probable cause for filing twenty-nine complaints before nineteen tribunals in less than twelve weeks, by alleging that the Conspirators agreed to file such complaints before the Candidates had even announced their candidacy, and thus, "before there was any colorable or potential legal basis for such litigation," Am. Comp. ¶¶ 45, 47, and that the Conspirators filed the complaints "not to vindicate valid legal claims, but rather to bankrupt [the Candidates'] campaign by forcing them to spend their limited resources...*on the defense of unfounded lawsuits.*" *Id.* ¶ 4 (emphasis added). In support of these allegations, the Amended Complaint further alleges that the state court complaints were filed at the direction of Conspirators in Washington, D.C., who had no reason to believe that challenges to the Candidates' nomination petitions were justified in any particular state. *Id.* ¶¶ 45, 47, 53, 57-60, 99, 110, 118, 120, 130, 138, 140-41, 165, 204. These Conspirators nevertheless retained or recruited no fewer than 95 lawyers from 53

law firms to initiate such challenges. *Id.* ¶¶ 60-61, 99, 110, 118, 120, 130, 138, 140-41, 165, 204. Finally, the Conspirators who actually filed the state court complaints did not expect their litigation to succeed on the merits, but rather filed the complaints pursuant to the orders of their Washington, D.C.-based co-Conspirators, who directed them to file the complaints as part of a coordinated nationwide effort to use a pattern of baseless and repetitive claims to bar the Candidates from running for public office. *Id.* ¶¶ 45, 47, 51-53, 56, 62-63, 118. The Conspirators thus filed their complaints without probable cause, because they did not believe that their “action and the means taken in prosecuting it are legally just and proper” *Ammerman*, 384 A.2d at 639-40; see *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus.* 508 U.S. 49, 62-63 (1993) (defining probable cause as “reasonable belief that there is a chance that [a] claim may be held valid upon adjudication”). Further, even if the Conspirators did hold such belief, it would not have been warranted under the “facts and circumstances” set forth in the Amended Complaint, which include numerous unlawful and unethical acts and fraudulent concealment thereof. *Ammerman*, 384 A.2d at 639-40; Am. Comp. ¶¶ 64-65, 67-71, 151, 153-58, 166-71, 174, 193, 195-96, 198, 204. The Amended Complaint therefore pleads the third element, that the Conspirators lacked probable cause for filing their twenty-nine state court and federal agency complaints.



The Amended Complaint pleads the fourth element, that the Conspirators caused “special injury”, on two alternative grounds. First, “being forced to defend multiple proceedings may constitute special injury,” where evidence indicates that “unusual or exceptional procedures were employed,” or that “the proceedings were longer or more onerous” than the usual case. *Tri-State Hospital Supply Corp. v. United States*, 2007 U.S. Dist. Lexis 48609, \*15 (D.D.C. 2007) (special injury is injury that “would not necessarily occur in all suits prosecuted for similar causes of action”) (citation omitted); *see Davis*, 73 A.2d at 520; *Soffos*, 152 F.2d at 685. The Conspirators in the instant case employed numerous unusual or exceptional procedures, including the manufacturing of evidence, sabotage, false threats, misuse of the subpoena process and other unlawful acts intended to prevent the Candidates from complying with state election laws. Am. Comp. ¶¶ 67-71, 151, 153-58, 166-71, 174, 193, 195-96, 198. The proceedings were also more onerous than usual because the Conspirators orchestrated a coordinated nationwide effort to force the Candidates to defend themselves virtually simultaneously before nineteen different tribunals, in a deliberate attempt to use the burden of the judicial process itself, as opposed to the outcome of such process, to bankrupt their competitors. Am. Comp. ¶¶ 45, 47, 51, 53, 61-62; 72-227. Such allegations well exceed the “repeated abuse of [court] processes” held to constitute special injury in the District of Columbia. *Soffos*, 152 F.2d at 683 (holding four separate proceedings

sufficient to establish special injury); *see Davis*, 73 A.2d at 520 (holding “one suit plus...something more than the usual suit brought maliciously and without probable cause” sufficient to establish special injury).

The Amended Complaint pleads the fourth element of special injury on the alternative ground that the Conspirators caused Plaintiff Camejo to pay \$20,000 and initiated attachment proceedings in an effort to seize \$61,638.45 from Plaintiff Nader’s personal bank accounts. *See Mazanderan v. McGranery*, 490 A.2d 180, 182 (D.C. 1984) (special injury includes “such harm as arrest, *seizure of property*, or injury which would not necessarily result in suits to recover for like causes of action”) (emphasis added) (*quoting Ammerman*, 384 A.2d at 641); Am. Comp. ¶¶ 201-03. Defendant Reed Smith, LLP, a law firm retained by Defendants DNC and John Kerry in matters arising during or from the 2004 General Election, seeks to enforce a judgment directing the Candidates to pay \$81,102.19 in litigation costs allegedly incurred in connection with the Conspirators’ challenge to the Plaintiff Candidates’ Pennsylvania nomination petitions. Am. Comp. ¶¶ 181-207. This judgment, directing candidates for public office to pay litigation costs to private parties that sue to remove them from a state ballot, appears to be without precedent in any state or federal court in the nation. *Id.* ¶ 194. Defendant Reed Smith procured this unprecedented judgment by employing the “unusual or exceptional” procedure of undertaking representation of a presiding judge as his defense counsel

in a state ethics investigation, without disclosing such representation on the record, among other improprieties. *Tri-State Hospital Supply Corp.*, 2007 U.S. Dist. Lexis 48609, \*15; Am. Comp. ¶ 195. The Conspirators also employed “unusual or exceptional” procedures in the underlying proceedings by using funds and resources allegedly misappropriated from the taxpayers of Pennsylvania to finance their challenge. *See id.*; Presentment 1, 54-58 (summarizing Grand Jury findings that “a veritable army” of state employees prepared the challenge at taxpayer expense pursuant to “a concerted pattern of illegal conduct in which millions of dollars in taxpayer funds and resources were misdirected to campaign efforts”). The Defendant Conspirators’ ongoing effort to seize a Plaintiff Candidate’s property in an effort to collect litigation costs incurred in connection with an allegedly criminal conspiracy thus constitutes special injury, because it “would not necessarily occur in all suits prosecuted for similar causes of action.” *Mazanderan*, 490 A.2d at 182. The Amended Complaint therefore pleads the fourth element of special injury, because the Conspirators forced the Candidates to defend multiple proceedings, and because the Conspirators seized the Candidates’ property in connection with an allegedly criminal conspiracy.

Accordingly, because the Amended Complaint alleges that the Conspirators:

1) initiated proceedings that terminated in the Candidates’ favor; 2) with malice; 3)

without probable cause; and 4) because those proceedings caused special injury, the Amended Complaint states a claim for malicious prosecution.

**3. The District Court Failed to Apply the Correct Standard of Review Under Rule 12(b)(1) and Rule 12(b)(6).**

The District Court consistently failed to apply the correct standard of review governing the motions to dismiss under Federal Rule of Civil Procedure 12(b)(1) and Rule 12(b)(6), and as a result, the Court misconstrued the factual and legal basis for the Candidate/Voter Plaintiffs' claims, and erroneously dismissed the Amended Complaint in its entirety. The Court's error is evident from the first paragraph of its opinion, which states that the Conspirators are alleged to have "engineered [the Candidates'] defeat" in the 2004 presidential election. JA 78. The Amended Complaint makes no such allegation. Rather, the Amended Complaint alleges that the Conspirators attempted "to prevent [the Candidates] from running for public office" by means of a coordinated nationwide campaign of unfounded and abusive litigation and other unlawful acts. Am. Comp. ¶ 1. The District Court's opinion thus flows from the false premise that the Amended Complaint alleges that the Conspirators caused the Candidates' "poor showing" in the 2004 presidential election, when in fact, the gravamen of the Candidate/ Voter Plaintiffs' claims is that the Conspirators unlawfully attempted to suppress their participation in that election. *Compare* JA 78 *with* Am. Comp. ¶ 1.

**a. The District Court Failed to Accept Allegations in the Amended Complaint as True as Required Under Rule 12(b)(6).**

The District Court repeatedly failed to observe the cardinal principle that the factual allegations in the Amended Complaint must be taken as true for purposes of a motion to dismiss under Rule 12(b)(6). *See Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006); *Macharia*, 334 F.3d at 67. Most significant, the District Court declined to consider any allegation that the Conspirators engaged in sabotage and other unlawful conduct intended to prevent the Candidates from complying with state election laws. JA 99 n.19; Am. Comp. ¶¶ 6-7, 67-71, 151, 153-58, 166-68, 170-71, 174, 193. The Court concluded that it could disregard these allegations because the Amended Complaint does not plead them “in the context of any specific underlying tort other than conspiracy.” JA 99 n.19. This was error. The Amended Complaint clearly alleges that the Conspirators “knew that litigation alone would be insufficient to prevent [the Candidates] from gaining ballot access in certain states,” and that the Conspirators therefore engaged in sabotage and other unlawful acts in order “to manufacture legal grounds for [their] otherwise baseless claims.” Am. Comp. ¶ 67. Further, the Conspirators’ unlawful acts were “decisive to the success” of their litigation, in that the Candidates would have been on the ballot in each of the states where such litigation succeeded, “but for the conspirators’ unlawful interference.” *Id.* ¶¶ 67, 71, 171, 174, 192-93. The

Conspirators' sabotage and other unlawful acts were therefore integral, in both purpose and effect, to their abuse of process and malicious prosecution, and the Court was obligated to accept such allegations as true. *Id.* ¶¶ 6-7, 67-71, 151, 153-58, 166-68, 170-71, 174, 193; *see Trudeau*, 456 F.3d at 193; *Macharia*, 334 F.3d at 67.

The District Court also declined to consider the Candidate/Voter Plaintiffs' allegations that the Conspirators' ulterior motive for filing twenty-nine complaints before nineteen tribunals within twelve weeks was to bankrupt the Candidates' campaign. JA 104 n.15. The Court concluded that it could disregard these allegations "evincing a potentially improper purpose," because such allegations "only constitute evidence of subjective state of mind, not the objective plausibility of the defendants' challenges." *Id.* This too was error. The Amended Complaint alleges that the Conspirators acted with an ulterior motive, namely that they sought to bankrupt the Plaintiff Candidates' campaign by means of a pattern of baseless and repetitive claims, for the purpose of pleading a necessary element of the tort of abuse of process, which is that the Conspirators acted with an ulterior motive. Am. Comp. ¶¶ 45, 47, 51, 53, 62-63; *see Hollywood Credit Clothing Company*, 147 A.2d at 868; *Geier*, 107 A.2d at 441; *Field Enterprises, Inc.*, 94 A.2d at 480. The Court's failure to accept these and other allegations in the Amended Complaint as

true therefore violated the standard of review governing the motions to dismiss.<sup>6</sup>

*See id.*; *see also Trudeau*, 456 F.3d at 193; *Macharia*, 334 F.3d at 67.

**b. The District Court Erroneously Resolved Disputed Issues of Fact as a Matter of Law Without Affording the Candidates and Voters the Opportunity to Prove Such Facts.**

The District Court committed further error by concluding, as a matter of law, that the Conspirators' conduct constitutes "genuine" petitioning activity that is immune from liability under the First Amendment, rather than a "sham" for purposes of the *Noerr-Pennington* doctrine. JA 99-107; *see infra* VI-B. Whether the Conspirators genuinely intended to secure governmental action, however, or merely to inflict harm by filing a pattern of baseless and repetitive claims, is the central question of fact that the Candidate/Voter Plaintiffs must prove in order to prevail, and this question of fact cannot be resolved at the pleading stage. *See Covad Comm'ns Co. v. Bell Atlantic Corp.*, 366 F.3d 666, 676 (D.C. Cir. 2005) ("The district court cannot choose between these competing explanations without first resolving questions of fact not before it on a motion to dismiss"). By resolving

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<sup>6</sup> The District Court also erred by failing to consider whether the Conspirators' five baseless FEC complaints, which were dismissed without agency action, constitute an abuse of process or malicious prosecution. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972) (a pattern of baseless and repetitive administrative claims may constitute an abuse of process not immune under the *Noerr-Pennington* doctrine). The Court noted in its summary of relevant facts that the FEC dismissed all five complaints, but neglected to address the issue in its subsequent analysis of whether such facts support the claims set forth in the Amended Complaint. JA 79.

this disputed issue of material fact against the Candidate/Voter Plaintiffs, therefore, the Court subjected the Amended Complaint to an evidentiary standard not proper upon a motion to dismiss. *See id.* (“a motion to dismiss pursuant to Rule 12(b)(6)...tests the sufficiency of the plaintiff’s allegations, [whereas] a motion for summary judgment pursuant to Rule 56...tests the sufficiency of the non-moving party’s evidence”); *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998) (“the issue presented by a motion to dismiss is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims”) (citation omitted). Such a weighing would not even be proper on a motion for summary judgment if the parties aver conflicting factual motives. *See id.*

The cases on which the District Court primarily relies demonstrate its error. Courts decided these cases not upon motions to dismiss, but only after affording the plaintiffs an opportunity to prove the facts alleged in their complaints, either by means of discovery or after a full trial. *See, e.g.*, JA 99-104 (citing *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993) (judgment entered after discovery); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (judgment entered after trial); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (judgment entered after trial); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)



(“*Noerr*”) (judgment entered after trial); *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 663 F.2d 253 (D.C. Cir. 1981) (judgment entered after trial); *Neumann v. Reinforced Earth Co.*, 594 F. Supp. 139 (D.D.C. 1984) (judgment entered after trial); *U.S. v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981) (judgment entered after trial). Therefore, just as the litigants in the cases on which the District Court relied had the opportunity to prove their allegations, so too the Candidates and Voters are entitled to the opportunity to prove theirs. *See id.*

Even with respect to the claims that the District Court dismissed pursuant to Rule 12(b)(1), the Candidates and Voters are entitled to “a chance to discover the facts necessary to establish jurisdiction.” *Herbert v. Nat’l. Acad. of Scis.*, 974 F.2d 192, 197-98 (D.C. Cir. 1992); *see Edmond v. United States Postal Service General Counsel*, 953 F.2d 1398, 1401 (D.C. Cir. 1992) (Ginsburg, J. concurring) (dismissal under Rule 12(b)(1) is “premature in the absence of any discovery” and “error [that] warrants correction”). Specifically, the District Court dismissed under Rule 12(b)(1) all malicious prosecution claims arising from state court litigation that did not terminate in the Candidates’ favor. JA 96-97. District of Columbia courts recognize an exception to the “favorable termination” element, however, in cases where malicious prosecution claims arise from litigation in which a prior judgment was fraudulently obtained. *See Tyler*, 444 A.2d 965. Dismissal of such claims under Rule 12(b)(1) was therefore improper in the absence of discovery

with respect to allegations in the Amended Complaint that the Conspirators procured their state court judgments by means of such misconduct. Am. Comp. ¶¶ 67-71; *see infra* VI-C. In addition, District of Columbia law provides no basis for concluding that the Plaintiff Voters lack standing to assert their claims, as the Court's reliance upon reversed case law demonstrates. JA 85 (citing *Edmondson & Gallagher*, 829 F. Supp. at 426, *rev'd* 48 F.3d 1260, 1263 (D.C. Cir. 1995); *see infra* VI-D).

**B. The District Court Committed Reversible Error Under Rule 12(b)(6) By Concluding as a Matter of Law that the Defendants Are Immune from Liability Under the *Noerr-Pennington* Doctrine.**

**1. The Conspirators' Conduct Falls Under the "Sham" Exception to the *Noerr-Pennington* Doctrine.**

The District Court erroneously concluded as a matter of law that the *Noerr-Pennington* doctrine immunizes the Defendant Conspirators for all conduct alleged in the Amended Complaint. JA 99-107; *see Noerr*, 365 U.S. 127; *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Under the *Noerr-Pennington* doctrine, a defendant may not be held liable for engaging in activity that is "genuinely aimed at procuring favorable government action." *Profl Real Estate Investors, Inc.*, 508 U.S. at 58 (quoting *Allied Tube & Conduit Corp.*, 486 U.S. at 500 n.4. However, conduct that is "ostensibly directed toward influencing government action," but which in fact is "a mere sham to cover an attempt to

interfere directly” with a competitor enjoys no such immunity. *Noerr*, 365 U.S. at 144. Therefore, where the true nature of a defendant’s conduct is disputed, resolution of the matter “depends upon a question of fact and therefore is not cognizable in support of a motion to dismiss.” *Covad Comm'cns Co.*, 398 F.3d at 676.

Even if it were appropriate for the District Court to determine at the pleading stage whether the Conspirators’ conduct was genuine or a sham, the allegations in the Amended Complaint plainly fall within the sham exception. *See Noerr*, 365 U.S. at 144. The Conspirators filed twenty-nine complaints before nineteen tribunals within twelve weeks, regardless of probable cause and regardless of the merits of the cases, as part of a coordinated nationwide effort to bankrupt the Plaintiff Candidates’ campaign and effectively bar them from running for public office; and in certain key states, where litigation alone would not be sufficient to accomplish their improper purpose, the Conspirators engaged in coordinated acts of sabotage and other systematic efforts to prevent the Plaintiff Candidates from complying with state election laws, in order to manufacture legal grounds for their otherwise baseless litigation. Am. Comp. ¶¶ 67-71. On their face, “these allegations come within the “sham” exception...as adapted to the adjudicatory process.” *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972) (holding that *Noerr-Pennington* immunity does not extend to “a

pattern of baseless, repetitive claims” filed “with or without probable cause, and regardless of the merits of the cases”).

The import of the Court’s holding in *California Motor Transport* is that immunity does not extend to defendants under the *Noerr-Pennington* doctrine simply because they invoke judicial or administrative processes. *See id.* Thus, immunity does not extend to defendants who engage in “overtly corrupt conduct” such as misrepresentations in the adjudicatory process. *Federal Prescription Service, Inc.*, 663 F.2d at 263. Nor does immunity extend to defendants whose actions are “intended not to secure governmental action but to harm the plaintiff by abusing the relevant governmental process.” *Id.* (citations omitted). As this Court has recognized, such “predatory litigation” constitutes a form of sham conduct “about whose existence there is no theoretical or empirical doubt.” *Neumann*, 786 F.2d at 427.

The Supreme Court has established a two part test to determine whether the sham exception applies in the litigation context. *See Profl Real Estate Investors, Inc.*, 508 U.S. at 60-61. To qualify as a sham, a lawsuit must be, first, “objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits.” *Id.* at 60. Second, the baseless lawsuit must be “an attempt to interfere directly with the business relationships of a competitor...“through the use of the process – as opposed to the outcome of that process – as an anticompetitive

weapon.”” *Id.* at 60-61 (quoting *City of Columbia*, 499 U.S. at 380. The predatory litigation alleged in the Amended Complaint satisfies this test.

With respect to the first prong, that the Conspirators’ litigation was objectively baseless, the Amended Complaint alleges that many of their complaints were facially deficient, summarily dismissed, or otherwise held to be groundless. *See supra* IV-B-1. The Amended Complaint also alleges that the Conspirators themselves did not expect success on the merits, *see supra* IV-B-1, which is why they resorted to unlawful tactics such as sabotage to manufacture grounds for their litigation. Am. Comp. ¶¶ 67-71. Notwithstanding such tactics, twenty-four out of twenty-nine total complaints that the Conspirators filed were dismissed. Am. Comp. ¶¶ 72-227. These allegations plainly constitute a set of facts sufficient to allow a factfinder to draw the “difficult line” necessary to conclude that the Conspirators filed “a pattern of baseless, repetitive claims.” *Profl Real Estate Investors, Inc.*, 508 U.S. at 58 (quoting *Cal. Motor Transp. Co.*, 404 U.S. at 513) (quotation marks omitted). Therefore, the Amended Complaint alleges facts sufficient to satisfy the first prong of the sham exception test.

With respect to the second prong, that the Conspirators intended to harm the Candidates directly through the use of the process, as opposed to its outcome, the Amended Complaint alleges that the Conspirators agreed to sue and otherwise obstruct the Plaintiff Candidates in as many states as possible, “in a deliberate

attempt to use the sheer burden of litigation itself as a means to prevent [them] from running for public office.” Am. Comp. ¶ 45. This allegation by itself satisfies the second prong. *Profl Real Estate Investors, Inc.*, 508 U.S. at 60-61 (quoting *City of Columbia*, 499 U.S. at 380). Yet the Amended Complaint alleges numerous facts in support thereof, including statements by the Conspirators which, as the District Court acknowledged, “evinced a potentially improper purpose.” JA 104 n.15. Therefore, the Amended Complaint alleges facts sufficient to satisfy the second prong of the sham exception test. *Profl Real Estate Investors, Inc.*, 508 U.S. at 58 (quoting *Cal. Motor Transp. Co.*, 404 U.S. at 513).

Accordingly, because the Amended Complaint alleges that the Conspirators filed objectively baseless claims, and that they did so in order to use the process itself, as opposed to the outcome of that process, to interfere directly with the Plaintiff Candidates’ campaign, the Conspirators’ conduct falls under the sham exception.

**2. The District Court Erroneously Concluded as a Matter of Law that the Sham Exception Does Not Apply Because the Court Failed to Accept Allegations in the Amended Complaint as True.**

The District Court erroneously concluded as a matter of law that the Conspirators’ conduct was genuine rather than a sham for purposes of the *Noerr-Pennington* doctrine because the Court failed to accept as true significant portions of the allegations set forth in the Amended Complaint. *See supra* VI-A-3-a.

Specifically, the Court declined to consider any allegation that the Conspirators engaged in sabotage and other unlawful acts intended to prevent the candidates from complying with state election laws. *Id.* The Court also declined to consider allegations that the Conspirators intended to use the burden of the judicial process itself, as opposed to the outcome of that process, as a means of interfering directly with the Plaintiff Candidates' campaign. *Id.* As a result of these errors, the Court's application of the two-part test for identifying sham litigation was fatally flawed. *See Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60-61.

In the five states where the Plaintiff Candidates "lost", the District Court concluded that the Amended Complaint fails to establish the first prong of the sham exception, that the underlying litigation was objectively baseless, and thus held that the *Noerr-Pennington* doctrine bars Candidate/Voter Plaintiffs' claims for malicious prosecution arising from proceedings in those five states. JA 101. The Court reasoned that a winning lawsuit is by definition reasonable and therefore not a sham. *Id.* (citing *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 61). In *Professional Real Estate Investors*, however, the Court expressly reserved the question whether the *Noerr-Pennington* doctrine immunizes litigants who obtain a judgment by means of "the forms of illegal and reprehensible practice" identified in *California Motor Transport* and alleged in the Amended Complaint. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 61 n.6 (quoting *Cal. Motor Transp. Co.*, 404

U.S. at 512-13); Am. Comp. ¶ 71. Thus it was error for the Court to conclude as a matter of law that the Candidate/Voter Plaintiffs could not establish that the Conspirators' litigation in the foregoing five states was objectively baseless. *See Prof'l Real Estate Investors, Inc.*, 508 U.S. at 61 n.6., 64 (a trial court "may decide probable cause as a matter of law" only where "there is no dispute over the predicate facts of the underlying legal proceeding"); *Smith v. Tucker*, 304 A.2d 303, 306 (D.C. 1973) (same) (citations omitted). The Court reached this erroneous conclusion, however, because it previously erred by failing to accept as true allegations that the Conspirators engaged in sabotage and other unlawful acts in connection with their wrongful and abusive litigation. *See supra* VI-A-3-a.

In the thirteen states where the Plaintiff Candidates prevailed (and presumably in the District of Columbia and before the FEC), the District Court concluded that the Amended Complaint fails to establish the second prong of the sham exception, that the Conspirators' baseless litigation "concealed an attempt to interfere directly" with the Plaintiff Candidates' campaign through the use of the judicial process itself, rather than the outcome of that process. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60-61. The Court rejected "the argument that partisan motives alone can satisfy" the second prong, as well as the "principle that any motive other than the altruistic motive to see that the law is observed renders a litigant liable," and therefore held that the *Noerr-Pennington* doctrine bars the



Candidate/Voter Plaintiffs' remaining claims. JA 102. However, while the Amended Complaint does allege that the Conspirators intended to benefit their preferred candidate, it neither relies on the Conspirators' partisan motives alone nor their lack of altruism to satisfy the second prong. Am. Comp. ¶¶ 1, 47. Rather, the Amended Complaint alleges that the Conspirators intended to use the sheer burden of litigation itself, as opposed to its outcome, as a means to bankrupt the Candidates' campaign, which is the very definition of an improper motive for purposes of the sham exception. *Id.* ¶¶ 1, 4, 45, 47, 51, 53, 62-63; *see Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60-61 (quoting *Omni Outdoor Advertising, Inc.*, 499 U.S. at 380). Once again, the Court reached an erroneous conclusion because it simply failed to accept allegations in the Amended Complaint as true. JA 104 n.15.

**C. The District Court Committed Reversible Error Under Rule 12(b)(1) by Dismissing the Malicious Prosecution Claims Arising From State Court Litigation That Did Not Terminate in the Candidates' Favor.**

Courts in the District of Columbia recognize an exception to the favorable termination element in malicious prosecution cases where the underlying judgment was obtained by fraud. *See Tyler.*, 444 A.2d 965 (to obtain attachment of the malpractice plaintiff's wages, the malpractice defendant falsely told the court in the prior action that plaintiff had not paid a debt and that a stay of execution existed). The case at bar illustrates the wisdom of that rule. Having filed a challenge to the Plaintiff Candidates' Pennsylvania nomination petitions,

Defendant Reed Smith initiated attachment proceedings against Plaintiff Nader in the Superior Court for the District of Columbia, in an effort to enforce an unprecedented judgment directing the Plaintiff Candidates to pay \$81,102.19 in litigation costs. Defendant Reed Smith procured that judgment by engaging in numerous improprieties, including failing to disclose on the record that the firm was concurrently representing the presiding chief justice as his defense counsel in a state ethics investigation. Am. Comp. ¶ 195. Furthermore, a Grand Jury is currently investigating whether the challenge that Defendant Reed Smith filed was prepared using funds and resources misappropriated from the taxpayers of Pennsylvania. Presentment 54-58. In light of such alleged misconduct, the favorable termination exception rightfully entitles Plaintiff Nader to seek redress for Defendant Reed Smith's malicious prosecution under District of Columbia law. *See Tyler.*, 444 A.2d 965. Therefore, the District Court erred in concluding that it lacked jurisdiction to hear malicious prosecution claims arising from the Pennsylvania proceedings. *See id.*

For the same reason, the District Court erred in concluding that it lacked jurisdiction to hear malicious prosecution claims arising from the other four state court proceedings that did not terminate in the Plaintiff Candidates' favor. The Amended Complaint alleges that such litigation would have terminated in the Plaintiff Candidates' favor, "but for the Conspirators' unlawful interference." Am.

Comp. ¶ 71. The Amended Complaint pleads numerous specific facts in support of this allegation. *Id.* ¶¶ 6-7, 67-71, 151, 153-58, 166-68, 170-71, 174, 193. A question of fact therefore exists with respect to whether the favorable termination exception applies under District of Columbia law to malicious prosecution claim arising from these states. *See Tyler.*, 444 A.2d 965. Because this jurisdictional fact is “inextricably intertwined” with the merits, the District Court committed reversible error by dismissing such claims without affording the Candidate/Voter Plaintiffs an opportunity to prove it. *Herbert*, 974 F.2d at 197; *Edmond* 953 F.2d at 1401 (Ginsburg, J. concurring).

**D. The District Court Committed Reversible Error Under Rule 12(b)(1) by Dismissing the Plaintiff Voters for Lack of Standing.**

The District Court committed clear error by dismissing the Plaintiff Voters’ claims on the ground that they lack standing to assert their state law tort claims due to a “lack of privity” with the Conspirators. JA 85 (citing *Edmondson & Gallagher*, 829 F. Supp. at 426). The Court concluded that it would be “a bold, even reckless extension of the doctrines of justiciability” to recognize the Voters’ standing to assert such claims. *Id.* The single case on which the District Court relied for this proposition, however, was reversed by this Court. *See Edmondson v. Alban Tower Tenants Ass’n*, 48 F.3d 1260, 1263 (D.C. Cir. 1995) (holding that District Court committed abuse of discretion by maintaining supplemental jurisdiction over plaintiff’s state law claims once federal claims had been

dismissed). In *Edmondson*, this Court reversed and remanded with instructions to the District Court either to remand the exclusively state law action to the Superior Court of the District of Columbia, or to dismiss without prejudice, so that the plaintiff could refile the state law claims in state court. *See id.* at 1266. Noting that there was “no trial of the common law claims, and little analysis,” this Court concluded that “we could affirm [the District Court’s] conclusions (if at all) only with very careful new analysis (i.e., expenditure of substantial judicial resources).” *Id.*

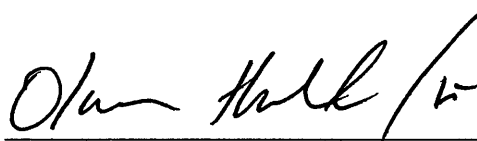
The procedural posture of the case at bar counsels even more heavily in favor of reversal. Unlike in *Edmondson*, the District Court never ruled upon any federal claims in this action. *See supra* IV-C-1. Furthermore, because this Court reversed the single case on which the District Court relied for its conclusion that the Voter Candidates lack sufficient “privity” with the Conspirators for purposes of their state law tort claims, there is no basis in the record upon which the Court could affirm the District Court’s conclusion. *See Edmondson*, 48 F.3d at 1266. Finally, the Court’s clear error in disposing of the Voter Plaintiffs’ claims demonstrates the novel and complex nature of the state law claims raised in this action, which further underscores propriety of reversal. *See id.*; *Shekoyen v. Sibley International*, 409 F.3d 414, 424 (D.C. Cir. 2005) (“In the usual case in which all federal-law claims are dismissed before trial, the balance of factors to be

considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims”) (citation omitted); *Lemmons v. Georgetown University Hospital*, 431 F. Supp. 2d 76, 94 (D.D.C. 2006) (remanding to Superior Court where only claim after disposition of federal claim “raises a novel . . . issue of state law”); *Griffin v. Acacia Life Insurance Co.*, 151 F. Supp. 2d 78, 81 (D.D.C. 2001) (“Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law”).

### **XIII. CONCLUSION**

For the foregoing reasons, the District Court's May 27, 2008 Memorandum Opinion and Final Order should be reversed and the case remanded to the United States District Court for the District of Columbia.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Oliver B. Hall" followed by a stylized flourish or initials.

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## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 13,440 words (including footnotes and endnotes), excluding those parts exempted by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman, size 14 point.



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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Appellant, case number 08-7074, was served via UPS to the parties listed below on December 5, 2008.

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