UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

B&G Foods North America, Inc., Plaintiff, v. Kim Embry and Environmental Health Advocates, Inc., Defendants.	No. 2:20-cv-00526-KJM-DB ORDER

Plaintiff B&G Foods North America, Inc. (B&G) brings this action under 42 U.S.C. § 1983 against defendants Kim Embry and Environmental Health Advocates, Inc. (EHA). B&G alleges defendants violated its First Amendment rights by bringing private enforcement actions under California chemical disclosure rules commonly known as "Proposition 65." Defendants contend B&G's complaint is barred by *Noerr-Pennington* immunity and in the alternative urge there is no state action. In response, B&G argues defendants' Proposition 65 lawsuits are a sham and are not entitled to protection under *Noerr-Pennington*, and it claims private enforcement actions under Proposition 65 are state action. Finding B&G plausibly pleads defendants' Proposition 65 actions are shams and state action, the court **denies** defendants' motion to dismiss.

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Defendants also move for sanctions under Federal Rule of Civil Procedure 11. They claim B&G's factual allegations contradict the exhibits to its complaint and run afoul of this court's previous orders. In response, B&G contends defendants' Rule 11 motion itself violates Rule 11 and accordingly requests sanctions. As explained below, the court **denies** these motions.

I. BACKGROUND

B&G sold and distributed devil's food cookie cakes and chocolate crème sandwich cookies across the United States. Second Am. Compl. (SAC) ¶ 7, ECF No. 57. These cakes and cookies contained acrylamide, a naturally occurring byproduct of all baking. *Id.* ¶ 9. Since 1990, California has included acrylamide on its list of "known" carcinogens regulated by Proposition 65, although acrylamide was not detected in food until 2002. *Id.* ¶ 10.

Proposition 65 imposes certain warning requirements on foods and drinks that contain chemicals on this list, *see* Cal. Health & Safety Code §§ 25249.6, 25249.8(a), and it permits private litigants to enforce those warning requirements after sending the alleged violator a "Notice of Violation," *see id.* § 25249.7(d)(1). This notice must also be provided to the California Attorney General and local prosecutors 60 days before filing suit. *Id.* The notice must further state the private enforcer "consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical." *Id.* If the Attorney General's Office does not believe the action has merit, then it shall notify the parties of that determination, although that determination does not preclude the private enforcer from proceeding with a lawsuit. *Id.* § 25249.7(e)(1)(A). If, in the alternative, the Attorney General commences a public action, then the private party may not pursue the claim. *Id.* § 25249.7(d)(2). Only if the 60-day period ends without public enforcement may the private party file the lawsuit. *Id.* § 25249.7(c), (d). If the private party does bring an action, it must notify the Attorney General when the action is filed, and again when the action concludes in settlement or a judgment. *Id.* § 25249.7(e)(2), (f)(1). A court must approve any settlement agreement, and the Attorney General may appear and participate in the settlement proceedings without intervening. *Id.* § 25249.7(f)(4), (f)(5). Lastly, the Attorney General must

maintain records of private Proposition 65 enforcement actions, including reporting forms for proposed settlement agreements. *Id.* § 25249.7(g).

Defendants sent Notices of Violation to B&G about its cakes and cookies, intending to require B&G to place a warning label on them. SAC ¶¶ 11, 62–66. Defendants later filed lawsuits in state court to enforce Proposition 65. *Id.* ¶¶ 68–69. B&G alleges those lawsuits rest on fraudulent allegations and are intended as "shake down actions." *Id.* ¶¶ 19–21 (internal quotation marks omitted). B&G further alleges those lawsuits threaten it with "unconstitutional speech requirements." *Id.* ¶ 29. B&G seeks injunctive relief against further acrylamide lawsuits and a declaration that Proposition 65 is unconstitutional as applied to the cakes and cookies. *Id.*, Prayer for Relief A–B. It also seeks damages. *Id.*, Prayer for Relief C.

This court dismissed B&G's previous complaint without leave to amend as barred by the *Noerr-Pennington* doctrine, assuming without deciding that private enforcers are state actors. *See* Prior Order (Oct. 7, 2020), ECF No. 33; *B&G Foods N. Am., Inc. v. Embry*, No. 20-0526, 2020 WL 5944330 (E.D. Cal. Oct. 7, 2020). The Ninth Circuit affirmed the dismissal but reversed and remanded to give B&G an opportunity to amend its complaint. *See B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 212 (Oct. 3, 2022).

Concurrently, while this case has unfolded, the California Chamber of Commerce pursued similar claims and relief in this court. *See Cal. Chamber of Com. v. Becerra*, 529 F. Supp. 3d 1099, 1110–11 (E.D. Cal. 2021), *aff'd*, 29 F.4th 468 (9th Cir. 2022), *cert. denied*, ___ S. Ct. ___, 2023 WL 2959385 (Apr. 17, 2023). The Chamber of Commerce urged the court to find the Proposition 65 warning requirement violates the First Amendment as applied to acrylamide in all food and beverage products. *See id.* at 1110. On a motion for preliminary injunction, the court enjoined new actions to enforce Proposition 65's warning requirements in that context. *Id.* at 1123. Following the preliminary injunction, defendants requested a stay of their litigation against B&G. SAC ¶ 26.

After the Ninth Circuit's remand in this case, B&G filed an amended complaint. First Am. Compl. (FAC), ECF No. 45. This court again dismissed the complaint as barred by the *Noerr-Pennington* doctrine, finding insufficient allegations to permit an inference defendants'

lawsuits are a sham. *See* Prior Order (Nov. 3, 2022), ECF No. 56; *B&G Foods N. Am., Inc. v. Embry*, ___ F. Supp. 3d ___, 2022 WL 16702141 (E.D. Cal. Nov. 3, 2022). The court granted leave to amend, explaining it appeared B&G could add factual allegations to plausibly plead defendants' Proposition 65 litigation is a sham, for example by alleging defendants committed fraud when purporting to comply with the Proposition 65 process. *See* Prior Order (Nov. 3, 2022) at 16.

B&G has now filed a second amended complaint. *See generally* SAC. It has added at least four new categories of allegations to plead defendants' Proposition 65 litigation is a sham. First, it alleges defendants chose a laboratory to test samples based on the lab's unreliable methods, which in fact produced false results, then destroyed those samples so they could not be retested. *Id.* ¶¶ 75–85. Second, it alleges defendants made false statements in their certificates of merit, including by falsely stating they had consulted with experts. *Id.* ¶¶ 86–102. Third, it alleges defendants did not conduct the required pre-lawsuit investigation, including investigating whether an affirmative defense would block the action. *Id.* ¶¶ 103–23. Fourth, it alleges defendants knowingly made false or misleading statements in their state court complaint. *Id.* ¶¶ 124–45.

Defendants now move to dismiss B&G's second amended complaint on the same grounds as before. *See* Mot. Dismiss, ECF No. 66. They argue the complaint still does not plausibly plead that the Proposition 65 litigation is a sham, nor that defendants are engaged in state action. *Id.* At the same time, defendants move for sanctions under Rule 11. *See* Mot. Sanctions, ECF No. 68. B&G opposes both motions and also moves for sanctions. *See* Opp'n to Mot. Dismiss, ECF No. 69; Opp'n to Mot. Sanctions, ECF No. 71. Defendants have replied. *See* Reply on Dismissal, ECF No. 75; Reply on Sanctions, ECF No. 76. The court held oral argument on the motions on March 10, 2023. David Kwasniewski and Matthew Borden represented B&G, and Noam Glick appeared for defendants. The court submitted the motion.[1] Hr'g Mins. (Mar. 10, 2023), ECF No. 79.

[1] After the hearing and the motions were submitted, the parties filed an unauthorized "statement" and reply. *See* Statement, ECF No. 80; Reply, ECF No. 81. Parties must seek the

II. MOTION TO DISMISS

A. Legal Standard and Introduction

A party may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a motion to dismiss, the court assumes all factual allegations are true, construing "them in the light most favorable to the nonmoving party." *Steinle v. City & County of San Francisco*, 919 F.3d 1154, 1160 (9th Cir. 2019) (mark and citation omitted). The motion may be granted if the complaint's factual allegations do not support a "cognizable legal theory." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). To survive a motion to dismiss, a complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But formulaic recitations of elements are inadequate. *Id.* "Sufficient factual matter" must state a claim to relief that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

As the court explained previously, the Ninth Circuit's decisions conflict regarding whether a plaintiff faces a heightened pleading standard to overcome *Noerr-Pennington* immunity. *See* Prior Order (Nov. 3, 2022) at 3–5[2] (citing, among other cases, *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 646–47 (9th Cir. 2009)). As before, the court applies a heightened pleading standard to *Noerr-Pennington* sham exceptions based on fraud under Rule 9(b) and otherwise applies the Rule 8(a) standard. *See id.*; Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *Kearney*, 590 F.3d at 647 (explaining "required specifics would include such things as exactly what representations defendant made, or to whom; with whom defendant conspired; and what exactly its improper and/or unlawful methods of advocacy were" (internal quotation marks and brackets omitted)).

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court's leave before filing supplemental briefing. Because the parties did not do so, the court has not considered these documents.

[2] Pagination refers to the original document, not page numbers applied by the CM/ECF system.

This court has twice assumed without deciding that if defendants are state actors who can be sued under 42 U.S.C. § 1983, they would be entitled to the protections of the *Noerr-Pennington* doctrine. *See* Prior Order (Oct. 7, 2020) at 4; Prior Order (Nov. 3, 2022) at 6. The Ninth Circuit made the same assumption when resolving the appeal of this court's first order. *See* 29 F.4th at 536 ("Assuming Defendants are state actors, our precedent compels the conclusion that their activities were protected by the Petition Clause."). For that reason, the court begins with the same threshold question here as before: has B&G pled enough to permit a reasonable inference defendants' Proposition 65 litigation is a sham and thus exempted from *Noerr-Pennington* immunity? The court concludes B&G now has, as explained below, then addresses whether defendants are state actors.

B. Whether Defendants' Litigation Is a Sham

"Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). This protection arises from the First Amendment's Petition Clause, *see id.*, and it includes litigation in a state's courts, *see Kottle*, 146 F.3d at 1059. The Petition Clause does not, however, shield a lawsuit if it is "a mere sham." *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961); *see Prof'l Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51, 56 (1993). A person cannot claim the protections of the Petition Clause when a lawsuit is "not genuinely aimed at procuring favorable government action," but rather seeks a result "*through improper means*." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 485 U.S. 492, 500 n.4, 508 n.10 (1988)) (emphasis in original).

The Ninth Circuit has "identified three circumstances in which the sham exception might apply in the litigation context." *B&G Foods*, 29 F.4th at 537. First, a lawsuit is a sham when it is objectively baseless and brought for an unlawful purpose. *See Sosa*, 437 F.3d at 938. Second, a series of lawsuits can be a sham, even if some cases in the series have merit, when brought "pursuant to a policy of starting legal proceedings without regard to the merits and for an

unlawful purpose." *B&G Foods*, 29 F.4th at 537 (quoting *Sosa*, 437 F.3d at 938). Third, litigation predicated on "intentional misrepresentations to the court" is a sham if that "knowing fraud . . . deprive[s] the litigation of its legitimacy." *Kottle*, 146 F.3d at 1060 (quoting *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993)).

This court has previously explained why those three circumstances must not be treated as rigid and independent categories. Prior Order at 7–8. The court also has described why the inquiry must focus on whether the alleged harm was caused by an outcome of legitimate process or an abuse of the process itself. *Id.*; *see also Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1095 (9th Cir. 2000). As explained below, assuming the complaint's allegations are true, as the court must at this early stage, the court can infer B&G could prove the underlying litigation was a sham because it was predicated on misrepresentations. Three sets of allegations support this conclusion.

First, B&G claims defendants "intentionally and willfully destroyed the only products they tested to support their claims," which prevents B&G from assessing the test's accuracy. SAC ¶ 75. It alleges defendants chose "an out-of-state laboratory that uses non-standard testing procedures (including the destruction of all samples immediately after testing)," and as a result, the laboratory's "improper or unreliable testing methodologies . . . produce skewed results showing unusually high levels of acrylamide are present in foods." *Id.* ¶ 76. Those results, which form the basis of defendants' lawsuits, are plausibly fraudulent in part because "B&G Foods' own testing showed that the acrylamide levels in the Cookies were . . . below the [No Significant Risk Level (NSRL)]," the threshold below which Proposition 65 warnings do not apply. *Id.* Moreover, when B&G contacted the lab plaintiffs used about retesting the cakes and cookies, it responded "it had destroyed the samples at Ms. Embry's instruction," just after she filed her lawsuit. *Id.* ¶ 80. When B&G discussed this issue with Ms. Embry, she said "it was her practice to spoliate the product samples in every Proposition 65 case she brought." *Id.* ¶ 82. Specific allegations about a defendant's efforts to suppress crucial evidence can allow a court to infer an otherwise protected petition was a sham. *See Kearney*, 590 F.3d at 647. Although defendants provide a reasonable explanation for the destruction of these samples, *see* Mot. Dismiss at 5–6,

the court does not resolve this factual dispute here, nor can it substitute B&G's allegations with defendants' explanations; it must take B&G's allegations as true and draw reasonable inferences in its favor.

Second, B&G alleges defendants' certificates of merit, which private enforcers are required to serve on an alleged violator and the Attorney General, falsely claimed they had consulted with experts before filing their private enforcement actions. *Id.* ¶¶ 86–88, 96–97. B&G avers "EHA admitted that it had not obtained a written statement or interviewed any person about its claims, and that no person—including any expert—had prepared a report pertaining to its claims." *Id.* ¶ 97. If defendants did not consult with an expert before filing, but claimed they had, then the lawsuits are a sham because they are predicated on intentional misrepresentations. *See Kottle*, 146 F.3d at 1060 (quoting *Liberty Lake*, 12 F.3d at 158).

Third, the allegations about the certificates of merit are bolstered by B&G's allegations that defendants did not conduct the required pre-lawsuit investigation. *See, e.g.*, SAC ¶ 103. As relevant here, B&G alleges "Ms. Embry did not do any research into how often people eat Cookie Cakes or similar products," *id.* ¶ 110, and EHA admitted it never had documents about the frequency with which consumers eat cakes, cookies or similar products, *id.* ¶ 111. B&G also claims defendants' expert did not consider the rate of consumption, which would be necessary to determine whether the cakes and cookies required a Proposition 65 warning. *Id.* ¶¶ 113–15. These allegations could show, as B&G says, that defendants did not investigate "an obvious affirmative defense," as required, *id.* ¶ 116, which would be a further misrepresentation.

As the court has previously emphasized, litigation is unlikely to be protected petitioning activity when the plaintiff has abused the process in pursuit of an improper goal. *See* Prior Order (Nov. 3, 2022) at 7–8, 14–15. Here, in light of the allegations reviewed above, B&G also puts forward allegations of abuse of legal process. B&G pleads defendants "are not interested in the merits of their cases, because their goal is to impose litigation costs . . . [and] coerce" action, while generating fees from settlements. SAC ¶ 160. B&G alleges less than ten percent of Ms. Embry's and about twenty percent of EHA's cases result in a favorable resolution. *Id.* ¶¶ 171, 177. This court previously concluded these numbers alone could not show the litigation is a sham

and that "[m]ore facts would be needed to tip the scale from possible to plausible." Prior Order (Nov. 3, 2022) at 12. B&G now has included the necessary facts. In addition to the new allegations discussed above, B&G alleges two instances of the Attorney General objecting to defendants' prior proposed settlement agreements. *See* SAC ¶¶ 182–84. First, the Attorney General objected to one of defendants' prior proposed Proposition 65 settlement agreements because it was contrary to law and against public policy; defendant "appears to have abandoned this litigation" after receiving the letter. *Id.* ¶ 182. Second, the Attorney General objected to a proposed settlement agreement based on the distribution of penalties and fees, concluding the agreement was "not likely to result in any benefit to the public." *Id.* ¶ 183. In response, the parties "rescinded the settlement agreement" and did not submit another for review. *Id.* ¶ 184. B&G also alleges "the products at issue in [defendants' other cases] contained levels of acrylamide below the NSRL." *Id.* ¶ 173.

These allegations tip the scale and plausibly plead defendants engaged in sham litigation. In short, B&G alleges defendants use an unreliable, out-of-state laboratory to produce inaccurate NSRL results; destroy the product samples so they cannot be retested; refuse to conduct the required pre-lawsuit investigation; and use fraudulent test results in Notices of Violation and lawsuits with the aim of collecting fees rather than ending violations of Proposition 65, all without a legitimate basis. *See, e.g.*, *id.* ¶¶ 164–67. These allegations plausibly support B&G's claims that defendants are not entitled to the protection of the *Noerr-Pennington* doctrine because their underlying lawsuits do not seek vindication in the courts, but rather abuse legal process for private gain.

In their motion to dismiss, defendants raise a litany of arguments for why these allegations fall short. *See* Mot. Dismiss at 5–8, 11–12. Defendants' arguments share a common flaw. They contend the complaint's allegations are contradicted and disproven by extrinsic evidence or otherwise should not be taken at face value. However, in deciding a motion to dismiss for failure to state a claim, it is hornbook law that a court not only assumes all factual allegations are true; it also construes those allegations "in the light most favorable to the nonmoving party." *Steinle*, 919 F.3d at 1160. Defendants would have this court do the opposite.

For example, defendants argue B&G's exhibits undermine its allegation that Ms. Embry disposed of the samples. Mot. Dismiss at 5 (citing SAC ¶ 80). Although the exhibit does not show Ms. Embry instructed the lab to destroy the samples, its contents do not contradict or undermine the complaint's allegations. *Compare* SAC ¶ 80 *with* Kwasniewski Decl. Ex. J, ECF No. 57-10. On this record, the court cannot draw an adverse inference against B&G. Similarly, defendants claim the destruction of evidence is in fact "a regular disposal practice of perishable product samples," and that the test results, not the particular products tested, are the evidence. Mot. Dismiss at 5. Neither argument is persuasive at this stage. The first argument is contradicted by B&G's allegation that destruction of samples after testing is "non-standard," and the second is contradicted by the allegation that B&G could not "ever uncover[] how Defendants tested the products or [determine] if the testing was accurate or reliable." SAC ¶ 76. Defendants' contentions do not eviscerate B&G's allegations.

For similar reasons, defendants cannot obtain a dismissal under Rule 12(b)(6) by now rationalizing their interrogatory responses from the underlying litigation, which B&G offers as an illustration of its allegation that defendants' certificates of merit were false. Mot. Dismiss at 7; *see* SAC ¶ 97; Ex. F, Pl. Resp. to Form Interr., ECF No. 57-6. The court cannot reduce B&G's allegations to only the information verified by the complaint's exhibits. Nor is it clear at this early stage whether defendants' rationalizations are persuasive on their own terms. *See* Opp'n to Mot. Dismiss at 10 (advancing plausible competing interpretation of interrogatory response).

As a final example, defendants cannot prevail by claiming B&G's allegations about inadequate pre-lawsuit investigations are contradicted by the Notices of Violation. Mot. Dismiss at 11 (citing Exs. C, D, Req. for Judicial Notice).[3] The court takes judicial notice of the Notices

[3] Defendants request the court take judicial notice of a series of documents comprised of official public records and court filings in other matters. *See* Req. for Judicial Notice, ECF No. 66-2. The request is unopposed. A court may "take judicial notice of adjudicative facts 'not subject to reasonable dispute.'" *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994) (quoting Fed. R. Evid. 201(b)). "Adjudicative facts are simply the facts of the particular case." Advisory Notes to Fed. R. Evid. 201. Where, as here, a party requests judicial notice of a series of documents, two problems arise. One issue is some documents might not be a proper source for the facts included, and another is the significant volume of information often presents irrelevant facts, which are by their nature not adjudicative. *See Fed. Energy Regul. Comm'n v. Vitol Inc.*,

of Violation, *see* Ex. C, Req. for Judicial Notice, ECF No. 66-2; Ex. D, Req. for Judicial Notice, ECF No. 66-2, as they are relevant, public documents and not subject to reasonable dispute. However, the documents do not support defendants' position for two reasons. First, as B&G argues in its opposition, *see* Opp'n to Mot. Dismiss at 11, the expert's report does not state whether defendants investigated the rate of consumption. It thus does not undermine B&G's allegations that defendants did not conduct a reasonable pre-lawsuit investigation because they did not consider whether actual consumption of the cakes and cookies would exceed the NSRL. *See* SAC ¶¶ 105–11, 113–15. Second, the two Notices of Violation cited by defendants are amended violation notices; defendants used a different laboratory for those notices and served them after filing the lawsuits. *See* Exs. C, D, Req. for Judicial Notice. In light of defendants' other allegations, the inclusion of an expert report using a different expert and different laboratory supports an inference the defendants did not conduct the *pre*-lawsuit investigation required under Proposition 65. *See* Opp'n to Mot. Dismiss at 9.

Defendants' many other arguments are unpersuasive for the same basic reason: at this stage, the court assumes the complaint's allegations are true and draws reasonable inferences in B&G's favor; it does not investigate whether evidence from outside the complaint contradicts B&G's claims or whether its allegations cannot be taken at face value.

In sum, the court finds B&G has plausibly pled defendants' Proposition 65 litigation is a sham. *Noerr-Pennington* immunity therefore does not apply to defendants' conduct at this stage, and the court turns to whether B&G plausibly pleads defendants' private enforcement lawsuits are state action.

C. Whether Defendants' Litigation Is State Action

B&G claims defendants violated its First Amendment rights and seeks relief under section 1983. "Although most rights secured by the Constitution are protected only against infringements by the government, in certain circumstances, a litigant may seek damages under

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2021 WL 6004339, at *1 (E.D. Cal. Dec. 20, 2021). The court therefore considers specific facts, when those facts are relevant and not subject to reasonable dispute, and takes judicial notice of them and relies on them.

42 U.S.C. § 1983 from a private party based on a violation of a constitutional right." *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1209 (9th Cir. 2002) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). "Section 1983 liability extends to a private party where the private party engaged in state action under color of law and thereby deprived a plaintiff of some right, privilege, or immunity protected by the Constitution or the laws of the United States." *Id.* (citing *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc)).

As a result, a threshold question here is whether defendants' Proposition 65 litigation is state action. Courts typically use four tests to identify state action, satisfaction of any one of which would be sufficient: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (quoting *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835–36 (9th Cir. 1999)). Each test asks a common question: "is the alleged infringement of federal rights fairly attributable to the government?" *Sutton*, 192 F.3d at 835 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)) (brackets omitted). "What is fairly attributable as state action is a matter of normative judgment, and the criteria lack rigid simplicity or clarity. No one fact can function as a necessary condition across the board nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Kirtley*, 326 F.3d at 1092 (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001)) (cleaned up). In short, this is a "fact-intensive" inquiry. *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002). The plaintiff bears the ultimate burden of showing state action. *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978)).

To summarize, B&G's theory of state action relies at its core on its allegations that Proposition 65 deputizes private enforcers as "bounty hunters" to enforce the state's police powers, SAC ¶ 234(b), that the state regulates, monitors and encourages defendants' lawsuits, *id.* ¶¶ 234(c)–(f), and that the state dedicates an entire department to work with private enforcers, helps private enforcers pursue litigation and receives monetary compensation from them in return, *id.* ¶¶ 234(j)–37. In short, B&G alleges defendants' lawsuits are attributable to the state because

they could not bring Proposition 65 lawsuits without the state's accommodation and assistance. *See generally id.* ¶ 234. B&G urges the court to find it has sufficiently pled that defendants' conduct qualifies as state action under all four tests, *see* Opp'n to Mot. Dismiss at 17–20, and defendants insist their conduct is not state action under any test, *see* Mot. Dismiss at 15–20; Reply on Dismissal at 8–10. Although the question makes for a close call, assuming the allegations in B&G's complaint are true, the court can "draw the reasonable inference" defendants acted under color of law; that conclusion is "more than [a] mere possibility" at this early stage. *Iqbal*, 556 U.S. at 678.

Applying the four commonly cited legal tests for state action can be a challenging exercise. The reasoning behind those tests can be difficult to generalize beyond the circumstances of their creation. At this early stage of the case, two of the four tests operate together to permit the reasonable inference under *Iqbal* that defendants' Proposition 65 enforcement actions are "fairly attributable to the government." *Sutton*, 192 F.3d at 835 (quoting *Rendell-Baker*, 457 U.S. at 838).

First, consider the public function test. It "treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013) (collecting cases). The function must be "both traditionally and exclusively governmental." *Lee*, 276 F.3d at 555 (citing *Rendell-Baker*, 457 U.S. at 842). The Supreme Court has identified certain functions traditionally exclusively reserved to the state, such as the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection[4] and in some circumstances the operation of a municipal

[4] At first glance, peremptory challenges in jury selection might not appear to be state action—to be a traditional and exclusive governmental function—because they are the province of attorneys often representing private interests in litigation. However, as the Supreme Court has explained:

> Just as a government employee was deemed a private actor because of his purpose and functions in *Dodson*, so here a private entity becomes a government actor for the limited purpose of using peremptories during jury selection. The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of

park. *See United Auto Workers, Loc. No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (cataloging cases). Like the powers identified in this varied list, the function B&G traces out is a longstanding, core power of the government: protecting the public from dangers to the public's health and safety. Private enforcers exercise delegated enforcement power "relating to the presence of targeted chemicals in the environment." SAC ¶ 234(i). They sue "in the public interest," not in their own interest. Cal. Health & Safety Code § 25249.7(d). They do not need to purchase the offending product or consume it. *Id.*

In this way, Proposition 65 contrasts with the legal tools that might at first glance seem to be privately available analogs—that is, legal tools similar to Proposition 65 enforcement actions that could demonstrate defendants have wielded a power that is not traditionally exclusive to the government. The legal tools within this class remedy a wrong to a particular plaintiff, such as product liability actions, negligence claims, the pursuit of an implied warranty or even an action for declaratory judgment. They are examples of classic "cases" and "controversies" that underly the Supreme Court's conclusion that when the Constitution's authors wrote about the "judicial power" in Article III, they were thinking of disputes in which one person has suffered or will imminently suffer some "concrete" harm and asks a court to redress that injury with a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (citation and quotation marks omitted).

> invoking constitutional protections against discrimination by reason of race . . . . [W]hen private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation. Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627–28 (1991).

The parties point to nothing in Proposition 65 to suggest it compensates individuals for injuries they suffer. Private enforcers cannot recover damages, for example. Nor have defendants cited any other legal tools that allow private persons to protect the greater public, as Proposition 65 does, which likewise would be necessary to undergird the conclusion that defendants are not exercising a power that has been traditionally reserved exclusively to the government. This is not to say there are no such examples; there may very well be.[5] But defendants bear the burden to explain the basis of their motion, and they have not. *See, e.g.*, *Bryant v. Apotex, Inc.*, No. 12-01377, 2013 WL 394705, at *5 (E.D. Cal. Jan. 30, 2013) ("It is the burden of the party bringing a motion to dismiss for failure to state a claim to demonstrate that the requirements of Rule 8(a)(2) have not been met." (quoting *Gallardo v. DiCarlo*, 203 F. Supp. 2d 1160, 1165 (C.D. Cal. 2002))).

Second, under the joint action test, the court considers "whether 'the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity.'" *Kirtley*, 326 F.3d at 1093 (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995)). "This occurs when the state knowingly accepts the benefits derived from unconstitutional behavior." *Id.* "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982). Here, drawing reasonable inferences in B&G's favor, the complaint alleges California has implicitly blessed defendants' strategy of shakedown litigation and gone beyond mere approval of it: the state has acceded to defendants governmental power that a private person would not ordinarily possess, *see* SAC ¶ 234(a)–(d), the state communicates with defendants and receives compensation as a result of defendants' enforcement efforts, *see id.* ¶¶ 234(j)–37, and the state

[5] Defendants cite several statutes that permit private enforcement in the context of protecting the public interest later in their motion. *See* Mot. Dismiss at 20 (citing the Clean Water Act, 33 U.S.C. § 1365; the Endangered Species Act, 16 U.S.C. § 1540(g); the Safe Drinking Water Act, 42 U.S.C. § 300j-8; and California's Private Attorneys General Act, Cal. Lab. Code § 2699(i)). However, they raise these statutes only when discussing a policy argument. They do not draw the connection to the public function test, nor discuss whether private enforcers of those statutes are state actors for the purposes of section 1983.

keeps tabs on those enforcement efforts and can speak up when the private enforcer goes too far, but it has not done so in this case, *see id.* ¶¶ 234(c)–(f). Moreover, as discussed above, defendants could not bring the contested lawsuits without the state's participation, including the state's role in selecting which chemicals require warnings and reviewing Notices of Violation and settlement agreements.

For these reasons, this case is unlike others in which courts have held private lawsuits are not state action simply because they were brought in the public interest. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) ("[Courts] have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it."); *The Real Est. Bar Ass'n for Mass., Inc. v. Nat'l Real Est. Info. Servs.*, 608 F.3d 110, 122 (1st Cir. 2010) (holding private enforcement action for unauthorized practice of law is not state action). B&G alleges the state has delegated its authority to private litigants, accommodates their filing of those lawsuits, reviews the merits of their claims, encourages them to pursue action and takes a cut of the award.[6]

Perhaps the closest analog the court has identified to this case is the set of lawsuits alleging California Private Attorneys General Act (PAGA) actions infringe on constitutional rights. Under PAGA, employee-plaintiffs who have suffered labor code violations may sue their employer for violations suffered by themselves and other current and former employees on behalf of California's Labor and Workforce Development Agency. *See* Cal. Lab. Code. § 2698 *et seq.* In that context, courts have found PAGA plaintiffs are not state actors because state officials are not involved in PAGA litigation; all the state did was create PAGA in the first place. *See, e.g.*, *Nabor Well Servs. Co. v. Bradshaw*, No. 05-8334, 2006 WL 8432088, *3 (C.D. Cal. Feb. 15,

[6] The court notes it seems unlikely California could have knowingly benefitted from defendants' unconstitutional sham litigation if it was unaware of the sham, which would undermine an attempted showing of joint action. In fact, the Supreme Court has held that "private misuse of a state statute does not describe conduct that can be attributed to the State." *Lugar*, 457 U.S. at 941. However, at this early stage, given B&G's allegations about substantial cooperation and communication between defendants and the state, the court draws the reasonable inference the state is aware of defendants' sham litigation.

2006); *Pineda v. Sun Valley Packing L.P.*, No. 20-0169, 2022 WL 1308141, at *4 (E.D. Cal. May 2, 2022). In contrast to these cases, and as discussed in depth above, B&G alleges more than passive regulation and monitoring; it alleges communication and encouragement of defendants' shakedown litigation. B&G's allegations of California's active role in defendants' litigation thus factually distinguishes *Nabor Well* and *Pineda*. *See, e.g.*, SAC ¶ 234(j) ("[T]he State is not merely a passive actor in such activity, but has an entire department devoted to regulating, following, and encouraging" private Proposition 65 enforcement actions.).

To be clear, the court does not take sides in the parties' substantive disagreement regarding the nature and structure of Proposition 65's enforcement mechanisms. The ultimate inquiry is "fact-intensive." *Lee*, 276 F.3d at 554. And it is far from clear B&G could ultimately prove California has condoned the alleged shakedown. However, the question at this stage is whether B&G has pled its claim so as to survive dismissal. And the court cannot dismiss B&G's complaint simply because "actual proof of [the alleged] facts is improbable." *Twombly*, 550 U.S. at 556.

Defendants emphasize B&G's allegations do not establish every element of a particular state-action test. *See* Mot. Dismiss at 15–20; Reply on Dismissal at 8–10. But B&G's allegations need not prove its claims or delineate the proof it will offer at trial. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002). It need only offer "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In any event, the four "tests" courts typically use to identify state action do not describe rigid and independent categories:

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding

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> state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Brentwood Acad., 531 U.S. at 295–96. B&G plausibly pleads state action by tracing the outlines of defendants' exercise of a traditionally exclusive public function and joint action with California. Accordingly, the court **denies** defendants' motion to dismiss.

III. MOTION FOR SANCTIONS

"[T]he central purpose of Rule 11 is to deter baseless filings in district court and . . . streamline the administration and procedure of the federal courts." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Imposing sanctions under Rule 11 is reserved for the "rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Operating Eng'rs Pension Tr. v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988). In short, "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution." *Id.* at 1345.

"Where, as here, the complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually 'baseless' from an objective perspective, and (2) if the attorney has conducted a 'reasonable and competent inquiry' before signing and filing it." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (quoting *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997)). The filing of a motion under Rule 11 is also subject to sanctions if the motion itself violates the rule, and "[a] party defending a Rule 11 motion need not comply with the separate document and safe harbor provisions when counter-requesting sanctions." *Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 (9th Cir. 2001). "If, judged by an objective standard, a reasonable basis for the position exists in both law and in fact at the time that the position is adopted, then sanctions should not be imposed." *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986).

Defendants claim B&G's complaint violates two of Rule 11's four prohibitions. First, they claim the complaint's factual allegations do not have evidentiary support and would not have

evidentiary support after a reasonable opportunity for discovery. *See* Mot. Sanctions at 6–9; Fed. R. Civ. P. 11(b)(3). Second, they argue B&G's claims and defenses are not warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law. *See* Mot. Sanctions at 9–12; Fed. R. Civ. P. 11(b)(2). B&G opposes both arguments and urges the court to find defendants' Rule 11 motion for sanctions itself violates Rule 11. *See generally* Opp'n to Mot. Sanctions.

The court finds the parties' respective requests for sanctions unpersuasive. First, defendants' motion relies on countervailing evidence and discrepancies between the operative complaint and its exhibits to claim the complaint's allegations are false, but it does not present evidence showing the allegations are in fact demonstrably false. For example, defendants point to the discrepancy between the allegation EHA did not obtain an expert report and the form interrogatory response objecting to premature disclosure of experts. Mot. Sanctions at 6. But, as discussed above, a complaint's allegations do not need to be supported by exhibits at this stage, and the court cannot draw an adverse inference from the fact an allegation is not proved by a directly corresponding exhibit. Similarly, defendants point to evidence the laboratory had a policy to destroy samples, but this evidence does not disprove that defendants instructed the lab to destroy the samples. *Compare* SAC ¶ 80 *with* Kwasniewski Decl., Ex. J *and* RJN, Ex. M at 4:4–6. Defendants' other examples fit this pattern, and none show the allegations are false. Without evidence showing the allegations are false, the court cannot conclude the complaint is factually baseless.

Second, defendants argue B&G's allegations defy the relevant legal standards. *See* Mot. Sanctions at 9–12. This characterization does not match the record before the court. As explained above, the court finds B&G's new allegations permit a plausible inference B&G could ultimately show defendants' Proposition 65 litigation is a sham. As a result, some of those allegations are relevant to the applicable legal standards. Although some arguments in the complaint are at odds with this court's previous orders, *see* Mot. Sanctions at 10–11, those arguments are not in contempt. For example, defendants point to B&G's argument that defendants' lawsuits are a sham because they knew the cakes and cookies do not cause cancer.

See id. B&G's argument is inconsistent with this court's previous legal conclusion that potentially viable affirmative defenses do not render an allegation baseless. *See* Prior Order (Nov. 3, 2022) at 9. But not all ultimately meritless arguments are frivolous. *See Arrowhead Cap. Fin., Ltd. v. Picturepro, LLC*, 2023 WL 109722, at *2 (9th Cir. Jan. 5, 2023). Defendants do not show the complaint advances arguments that are frivolous or could not be supported by good-faith requests to extend the law. Defendants' motion for sanctions is **denied**.

For its part, B&G urges the court to find defendants' sanctions motion itself violates Rule 11. Opp'n to Mot. Sanctions at 8. Although the court denies defendants' motion, a reasonable attorney could believe defendants might prevail on their motion for sanctions, in light of this court's prior order granting limited leave to amend with a Rule 11 admonition. *See* Prior Order (Nov. 3, 2022) at 16. The defense motion has "a sound basis in law and in fact" because it pointed to discrepancies between the second amended complaint, its exhibits and extrinsic evidence, and also because the objective baselessness standard is at odds with the complaint's allegations. *Golden Eagle*, 801 F.2d at 1538.

B&G also claims defendants' motion for sanctions was filed for an improper purpose. Opp'n to Mot. Sanctions at 18. B&G states it "repeatedly asked Defendants to provide substantiation for the disputed facts that Defendants seek to resolve . . . but Defendants refused to provide it." *Id.* On this basis, B&G concludes defendants are motivated by an improper purpose. However, B&G has not shown defendants were obligated to provide substantiation, beyond that attached to the motion for sanctions. Defendants' refusal to supply additional information to B&G on its own is not sufficient to show improper purpose. On this record, and in light of the court's prior Rule 11 admonition, *see* Prior Order (Nov. 3, 2022) at 16, the court cannot conclude the motion was filed for an improper purpose. B&G's cross-request for sanctions is **denied**.

IV. CONCLUSION

In sum, as explained above, the court **denies** defendants' motion to dismiss and motion for sanctions and **denies** B&G's cross-request for sanctions.

The court previously noted it would revisit pretrial scheduling after the resolution of these motions. *See* Min. Order (Feb. 23, 2023), ECF No. 74. The court thus **sets** the Status (Pretrial

Scheduling) Conference for June 29, 2023, at 2:30 PM, with the filing of a joint status report due fourteen days prior.

This order resolves ECF Nos. 66, 68, 71.

IT IS SO ORDERED.

DATED: May 31, 2023.

CHIEF UNITED STATES DISTRICT JUDGE