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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

5 **FATEMEH SANIEFAR,**

6 **Plaintiff,**

7 **v.**

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

15 **Defendants.**

1:17-cv-00823-LJO-BAM

MEMORANDUM DECISION AND
ORDER DENYING DEFENDANTS’
MOTION TO DISMISS

(ECF No. 42)

16 **I. INTRODUCTION**

17 Plaintiff Fatemeh Saniefar (“Plaintiff” or “Saniefar”) brings this action under the Racketeer
18 Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, against Defendants Ronald D.
19 Moore, Tanya E. Moore, Kenneth Randolph (“Randy”) Moore, Marejka Sacks, Elmer Leroy Falk,
20 Zachary M. Best, Moore Law Firm, Mission Law Firm, Geoshua Levinson, Rick D. Moore, West Coast
21 CASp and ADA Services (“West Coast CASp”), Ronny Loreto, and Does 1 to 100 (collectively,
22 “Defendants”). Now before the Court is Defendants’ joint motion to dismiss the First Amended
23 Complaint (“FAC”) under Federal Rule of Civil Procedure 12(b)(6). This matter is now ripe for review
24 and is suitable for disposition without oral argument. *See* Local Rule 230(g).

1 **II. BACKGROUND**

2 **A. Prior Federal ADA Action**

3 Plaintiff and her late husband owned Zlfred’s, a restaurant located in Fresno, California. In July
4 2014, Ronald Moore filed an action against Plaintiff and others in federal court, alleging violations of
5 the Americans with Disabilities Act (“ADA”) and related state law claims (“Federal ADA Action”)
6 stemming from an alleged visit to Zlfred’s. *Moore v. Saniefar*, No. 1:14-CV-01067-DAD-SKO (E.D.
7 Cal.). Plaintiff filed a counter- and crossclaim against Ronald Moore, Randy Moore, the Moore Law
8 Firm, Geoshua Levinson, and West Coast CASp for RICO violations. (ECF No. 42-3, Request for
9 Judicial Notice (“RJN”), Ex. 1.) The counterclaim was dismissed without prejudice, but also without
10 leave to amend until the Federal ADA Action concluded.¹ *Moore v. Saniefar*, No. 1:14-CV-01067-
11 DAD-SKO, 2016 WL 2764768 (E.D. Cal. May 12, 2016). In March 2017, the court granted summary
12 judgment in favor of Plaintiff Saniefar on the ADA claim. (RJN, Ex. 9.) The court declined to exercise
13 jurisdiction over Ronald Moore’s state law claims, and Ronald Moore filed a complaint in Fresno
14 Superior Court against Plaintiff alleging a violation of the Unruh Act. That action is currently pending.

15 **B. Factual Background²**

16 Plaintiff alleges that Defendants are each part of a criminal enterprise that uses fraudulent ADA
17 actions, predicated on false allegations of disability, injury and standing, to collect quick settlements
18 from California businesses and citizens. Plaintiff alleges that the scheme is accomplished through
19 predicate acts of mail fraud and wire fraud.

20 Defendant Moore Law Firm is operated by Defendants Randy Moore and Tanya Moore, both of
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22 ¹ In so holding, the Court noted that the RICO counterclaim was not viable at that stage because the only damages it sought
23 were in the form of attorney’s fees for the ADA action. Although legal fees are available as RICO damages, the court noted
24 that the “award is subject to one critical limitation: that the legal fees stem from prior legal disputes, and not the RICO
25 lawsuit itself.” *Moore v. Saniefar*, No. 1:14-CV-01067-DAD-SKO, 2016 WL 2764768, at *2 (E.D. Cal. May 12, 2016)
(citing *Menjivar v. Trophy Props. IV DE, LLC*, No. 06-03086, 2006 WL 2884396, at *11-12 (N.D. Cal. Oct. 6, 2006)).

26 ² Unless otherwise indicated, all factual allegations are drawn from the FAC (ECF No. 33).

1 whom are attorneys licensed to practice in the State of California. Defendants Randy and Tanya Moore
2 are married, or were in the past. In about 2009, the Moore Law Firm began suing California businesses
3 and residents under the ADA and related state laws. In total, the Moore Law Firm has filed over 1,400
4 ADA lawsuits since 2009. Defendant Ronald Moore is Defendant Randy Moore's brother, and has
5 served as an ADA plaintiff in over 250 cases brought by the Moore Law Firm in the Eastern District of
6 California. Defendant Marejka Sacks is a paralegal employed by the Moore Law Firm and Mission Law
7 Firm who conducts many of the day to day activities of the firm, including preparing pleadings,
8 engaging in meet-and-confer sessions with opposing counsel, preparing and submitting discovery
9 responses, and so forth. The Complaint identifies Tanya Moore, Randy Moore, and Marejka Sacks as
10 the leaders of the criminal enterprise.

11 Beginning in late 2015 to early 2016, when the Moore Law Firm started to gain regional and
12 national notoriety and was sued by certain ADA plaintiffs for fraud and breach of contract, the assets of
13 the Moore Law Firm were transferred to Defendant Mission Law Firm. Defendant Tanya Moore is the
14 Secretary of the Mission Law Firm, and its employees and operations are largely the same as the Moore
15 Law Firm. The Mission Law Firm is owned by LeRoy Falk, a licensed California attorney. Defendant
16 Zak Best is a California attorney employed by the Mission Law Firm. It is alleged that the Mission Law
17 Firm took over the Federal ADA Action and continued to prosecute it based on the knowingly false
18 representations about Defendant Ronald Moore's disability and the barriers he allegedly faced at
19 Zlfred's. It is further alleged that the Mission Law Firm continues to file ADA lawsuits based on
20 fraudulent claims and misrepresentations, and to benefit financially for the sake of Defendants Falk and
21 Best, among others.

22 Plaintiff alleges that Defendants' ADA cases were based primarily on two known falsities. First,
23 Plaintiff alleges that frequent plaintiff Ronald Moore is not in fact disabled. Although Ronald Moore has
24 averred in ADA lawsuits that he requires the use of a wheelchair for mobility, Plaintiff alleges that video
25 surveillance of Ronald Moore from March 2015 to May 2015 shows him walking, kicking, hopping, and
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1 bending without any support and without a wheelchair. Second, Plaintiff alleges that the Moore Law
2 Firm and Mission Law Firm misrepresented that Ronald Moore and other ADA plaintiffs actually
3 visited the entities that they sued and that they experienced barriers at those locations, which resulted in
4 difficulty, discomfort, and embarrassment. For example, Plaintiff alleges that Moore never visited
5 Zlfred's on April 14, 2014, contrary to Defendants' representation in the complaint in the Federal ADA
6 Action. Plaintiff alleges that these misstatements were used to fabricate ADA plaintiffs' standing.

7 Defendant Ronny Loreto, Defendant Ronald Moore's grandson, is alleged to have visited many
8 of the establishments sued by the Moore Law Firm and Mission Law Firm in lieu of his grandfather for
9 the purpose of making purchases and collecting receipts to aid in the filing of ADA lawsuits on his
10 grandfather's behalf. Plaintiff alleges that Ronny Loreto falsely testified about the facts and
11 circumstances of Ronald Moore's visit to Zlfred's on April 14, 2014, which Plaintiff maintains never
12 occurred. Plaintiff further alleges that Defendant Ronny Loreto falsely represented that he and his
13 grandfather visited nine establishments on a single day, all of which were later sued by Defendants.

14 Geoshua Levinson, Tanya Moore's son, and Rick Moore, Randy Moore's nephew, are also
15 alleged to have been involved in the fraudulent scheme through Defendant Levinson's corporation West
16 Coast CASp. These Defendants are alleged to have conducted investigations of California
17 establishments for the purpose of developing targets for the ADA lawsuits, then using the information
18 collected to develop false allegations about the barriers encountered by ADA plaintiffs, even though
19 Defendants knew that ADA plaintiffs had not visited the establishments and personally encountered
20 such barriers.

21 **C. The Instant Action**

22 Plaintiff filed this action on June 20, 2017. (ECF No. 1.) Defendants filed a motion to dismiss the
23 original complaint on two grounds: (1) the suit was barred by the *Noerr-Pennington* doctrine, and (2)
24 Plaintiff failed to state a claim under RICO. The Court dismissed the complaint with leave to amend,
25 concluding that Plaintiff did not allege fraud with particularity sufficient to fall within the sham

1 litigation exception to *Noerr-Pennington* immunity. (ECF No. 29 (“December 1 Order”).) The Court
2 also concluded, in the alternative, that the RICO claim failed because Plaintiff did not sufficiently allege
3 predicate acts of racketeering with the requisite particularity under Rule 9(b). (*Id.* at 16-18.) The Court
4 declined to address the remainder of Defendants’ arguments regarding the RICO claim. Plaintiff filed
5 the FAC on January 3, 2018. Defendants move to dismiss the RICO claim in the FAC on three grounds:
6 (1) the suit is barred by collateral estoppel; (2) the suit is barred because Defendants are immune from
7 suit under the *Noerr-Pennington* doctrine; and (3) Plaintiff fails to state a claim under RICO. (ECF No.
8 42-1.) Plaintiff opposed the motion. (ECF No. 43.) Defendants submitted a reply. (ECF No. 44.) Federal
9 question jurisdiction exists pursuant to 28 U.S.C. § 1331, and venue is proper in this Court.

10 **III. STANDARD OF DECISION**

11 Dismissal is appropriate under Rule 12(b)(6) of the Federal Rules of Civil Procedure when a
12 plaintiff’s allegations fail “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A
13 dismissal under Rule 12(b)(6) “can be based on the lack of a cognizable legal theory or the absence of
14 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d
15 696, 699 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim, the court
16 generally accepts as true the allegations in the complaint, construes the pleading in the light most
17 favorable to the party opposing the motion, and resolves all doubts in the pleader’s favor. *Lazy Y. Ranch*
18 *LTD. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

19 Federal Rule of Civil Procedure 9(b) requires a party alleging fraud to “state with particularity
20 the circumstances constituting [the] fraud [.]” Fed. R. Civ. P. 9(b). This heightened pleading standard
21 requires the party to do more than simply identify a transaction and allege in a conclusory manner that
22 the transaction was fraudulent. *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)
23 (en banc), *superseded by statute on other grounds*. Rather, the party must set forth in detail “the who,
24 what, when, where, and how” of the alleged fraudulent conduct. *Vess v. Ciba-Geigy Corp. USA*, 317
25 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). The purpose of Rule 9(b) is to protect defendants

1 from factually baseless claims of fraud inasmuch as it is meant to give defendants notice of the claims
2 asserted against them. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). When a
3 party averring fraud fails to meet the heightened pleading standard of Rule 9(b), dismissal of the claim is
4 proper. *See Vess*, 317 F.3d at 1107 (“A motion to dismiss a complaint or claim ‘grounded in fraud’
5 under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss
6 under Rule 12(b)(6) for failure to state a claim.”).

7 **IV. DISCUSSION**

8 **A. Allegations Regarding Ronald Moore’s Personal Encounter With Barriers**

9 Defendants contend that this Court held that “the *sole* bar to Defendants’ *Noerr-Pennington*
10 immunity is Saniefar’s claim that Ronald Moore misrepresented his disability in the [Federal ADA]
11 Action.” (ECF No. 41 at 4.). As an initial matter, the Court did not conclude that the only viable
12 allegation of misstatements that would bar the application of *Noerr-Pennington* immunity was Ronald
13 Moore’s alleged misstatement about his disability. On the contrary, the Court concluded that Plaintiff’s
14 allegations that Ronald Moore falsely averred that he visited the establishments that he sued and faced
15 barriers there were sufficient to fall within the sham litigation exception to *Noerr-Pennington* immunity.

16 If Moore’s standing was fabricated in these ADA actions, so was the
17 courts’ jurisdiction. It is axiomatic that federal courts are courts of limited
18 jurisdiction, and that their powers are defined by Article III of the
19 Constitution. If the courts did not have jurisdiction to hear the ADA cases
20 brought by Defendants, that undermines the legitimacy of the litigation.
21 *See Feld Entm’t Inc. v. Am. Soc’y for the Prevention of Cruelty to*
Animals, 873 F. Supp. 2d 288, 316 n.16 [D.D.C. 2012] (denying motion to
22 dismiss where allegations that attorneys paid plaintiff to fabricate standing
23 were sufficient to support inference that attorneys were participants in
24 RICO enterprise).

25 (December 1 Order at 11.)

26 In their reply brief, apparently recognizing that they had misunderstood the Court’s prior order,
27 Defendants contend the Ninth Circuit declined to “create a bright-line predicate of a ‘personal
28 encounter’ with a barrier to access as a requirement for standing under ADA Title III.” (ECF No. 44 at

1 9-10 (citing *Civil Rights Educ. & Enf't Ctr. v. Hosp. Props. Trust*, 867 F.3d 1093, 1099-1100 (9th Cir.
2 2017).) Therefore, Defendants argue, any misstatements by Ronald Moore about his visits to these
3 establishments were immaterial. However, the *Hospitality Properties Trust* decision does not alter the
4 crux of this Court's reasoning in the December 1 Order. The Ninth Circuit did not conclude in
5 *Hospitality Properties Trust* that personal encounters with barriers are *not* relevant to the district court's
6 analysis of standing. Rather, the Court concluded that the absence of personal encounters did not
7 automatically deprive plaintiffs of standing. Plaintiffs must always demonstrate "(1) an 'injury in fact'
8 suffered by the plaintiff; (2) a causal connection between that injury and the defendant's conduct; and
9 (3) a likelihood that the injury will be 'redressed by a favorable decision.'" *Id.* at 1098 (citations
10 omitted) (describing these three requirements as the "irreducible constitutional minimum of standing"
11 (quotation marks omitted)). In the ADA context, injury can be demonstrated through a personal
12 encounter with barriers. It can also be demonstrated, for example, if plaintiff makes concrete plans to
13 visit an establishment and then discovers that they would be unable to accommodate his disability. *See*
14 *id.* at 1098-1100.

15 Here, Plaintiff alleges that Defendants made fraudulent allegations of Ronald Moore's personal
16 encounters with barriers in an effort to fabricate standing. If those allegations are true, they are certainly
17 material, because if Ronald Moore did not have standing through his personal encounters with barriers
18 he would have had to demonstrate injury and causation in some other way. *Id.* at 1099-100 ("The
19 Named Plaintiffs have alleged in the First Amended Complaint that they intend to visit the relevant
20 hotels, but have been deterred from doing so by the hotels' noncompliance with the ADA Without
21 such averments, they would lack standing"). In the December 1 Order, the Court did not conclude that
22 Ronald Moore needed necessarily to have actually faced barriers to have standing to sue. Rather, the
23 Court determined that making knowingly false allegations about having visited these establishments and
24 encountered barriers would have been material to any determination of standing by the district court, and
25 therefore would have undermined the legitimacy of the litigation. Because the misstatements were

1 material, the alleged false allegations fall within the sham litigation exception to the *Noerr-Pennington*
2 doctrine.

3 **B. Collateral Estoppel**

4 Defendants contend that the Ninth Circuit’s affirmance of a district court order finding that there
5 is no dispute of fact that Ronald Moore is disabled precludes Plaintiff’s argument that Ronald Moore
6 misstated his disability in the Federal ADA Action. *See Moore v. Millennium Acquisitions, LLC*, 708 F.
7 App’x 485 (9th Cir. 2018) (“*Millennium Action*”).

8 Collateral estoppel, or issue preclusion, “prevents a party from relitigating an issue decided in a
9 previous action if four requirements are met: (1) there was a full and fair opportunity to litigate the issue
10 in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result
11 of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the
12 present action was a party or in privity with a party in the previous action.” *Kendall v. VISA U.S.A., Inc.*,
13 518 F.3d 1042, 1050 (9th Cir. 2008).

14 Here, the question is whether Saniefar is in privity with defendants in the *Millennium Action*. In
15 *Taylor v. Sturgell*, 553 U.S. 880 (2008), the Supreme Court embraced a narrow concept of privity. The
16 Court rejected the notion that claim preclusion could attach to similarly situated parties through “virtual
17 representation.” Instead, the Court held that for nonparty preclusion to attach, the parties must be same,
18 unless the nonparty relationship falls within one of the six recognized exceptions:

- 19 1. The nonparty agrees to be bound by a prior judicial determination between other parties;
- 20 2. A substantive legal relationship exists that binds the nonparty;
- 21 3. The nonparty was adequately represented in the prior litigation by someone with the same
22 interests who was a party;
- 23 4. The nonparty assumed control of the prior litigation;
- 24 5. The nonparty is the proxy or agent of a party to the prior litigation;
- 25 6. A special statutory scheme expressly forecloses subsequent litigation by the nonparty.

1 *Id.* at 893-95.³ According to Defendants, Saniefar is in privity with the *Millennium* defendants because:
 2 1) *Millennium* defendants used identical surveillance video obtained by Saniefar in connection with the
 3 Federal ADA Action in the *Millennium* Action; 2) *Millennium* defendants’ counsel represented that the
 4 *Millennium* Action and the Federal ADA Action were “coordinated”; 3) counsel for the *Millennium*
 5 defendants co-represented Saniefar (along with Saniefar’s counsel in this action) in the Federal ADA
 6 Action; and 4) Saniefar’s use of evidence obtained in the *Millennium* Action in the Federal ADA Action.
 7 (ECF No. 42-1 at 4-5.) Defendants also assert that Saniefar’s counsel does not deny her involvement in
 8 the *Millennium* Action as Saniefar’s agent, and that counsel for the *Millennium* defendants has assisted
 9 Plaintiff’s counsel in this action. (*Id.*) Plaintiff denies that the parties were coordinated as described by
 10 Defendants. (ECF No. 43 at 11-12.) However, even accepting Defendants assertions as true, none of
 11 those alleged links is sufficient for the application of nonparty preclusion.

12 In *Sturgell*, plaintiff, an antique airplane enthusiast, filed a lawsuit under the Freedom of
 13 Information Act (“FOIA”) seeking certain documents from the Federal Aviation Administration. *Id.* at
 14 885. Plaintiff’s friend and “close associate” had previously brought an unsuccessful suit under FOIA
 15 seeking the same records and represented by the same attorney. *Id.* The Supreme Court concluded the
 16 judgment against plaintiff’s friend did not bar plaintiff from maintaining his suit, where the men shared
 17 no legal relationship and where plaintiff did not finance or participate in his friend’s lawsuit. *Id.* at 892-

18 _____
 19 ³In their opening brief, Defendants analyze whether *Millennium* defendants and Saniefar were in privity using the framework
 20 set forth in *In re Schimmels*, 127 F.3d 875, 885 (9th Cir. 1997). In *Schimmels*, the Ninth Circuit held that privity should be
 determined on a case-by-case basis by analyzing the following factors:

- 21 [1] participation by the precluded party in the prior proceeding through intervention,
 combined discovery, *amicus* submissions, presence of counsel at hearings, testifying as a
 witness, advising previous parties;
- 22 [2] the extent of congruence between the legal interests and positions of the party to the
 earlier suit and those of the precluded party;
- 23 [3] the quality of representation of the precluded party's interests;
- [4] the burdens relitigation poses on the judicial system; and
- 24 [5] the cost and harassment that relitigation poses to the parties.

25 *Id.* (citations omitted). Although the *Schimmel* factors are relevant to the determination of whether preclusion can attach to a
 nonparty, the narrow exceptions to the rule against nonparty preclusion laid out by the Supreme Court in *Sturgell*, 553 U.S. at
 893-95, are determinative here, and therefore the Court need not address the *Schimmels* factors.

1 93 (“The application of claim and issue preclusion to nonparties thus runs up against the ‘deep-rooted
2 historic tradition that everyone should have his own day in court.’” (internal citations omitted)).

3 Defendants contend that Plaintiff did participate in the *Millennium* Action such that preclusion
4 should attach, arguing that the first, third, and fourth exceptions outlined in *Sturgell* apply here. First,
5 Plaintiff argues that “Saniefar implicitly agreed to be bound by the determination of Ronald Moore’s
6 disability in the *Millennium* action.” (ECF No. 44 at 5.) In support of that argument, Defendants offer an
7 email from *Millennium* defendants counsel indicating that the parties had “coordinated.” As Defendants,
8 concede, this document is hearsay. (ECF No. 44-1.) Therefore, the Court will not consider it in
9 connection with this motion. However, even if Saniefar and *Millennium* defendants did coordinate in the
10 presentation of evidence on Ronald Moore’s disability, that is not evidence that Saniefar agreed to be
11 bound by the outcome of the *Millennium* Action. The first exception, by its very terms, applies to
12 situations where the nonparty has *agreed* to be bound by the determination against the party. The
13 examples offered in *Sturgell* involve situations where the parties openly stipulated to being bound by the
14 outcome, such as a “test case” where the parties agree that the question of the defendant’s liability will
15 be definitively determined. *Id.* at 893-94. There is nothing in the record to suggest that Saniefar ever
16 agreed to be bound by the determinations in the *Millennium* Action. The first exception to the general
17 bar on nonparty preclusion outlined in *Sturgell* does not apply to this case.

18 Second, Defendants argue that Saniefar was adequately represented by the *Millennium*
19 defendants and thus fall within the third exception laid out in *Sturgell*. This exception, however, is
20 narrowly construed. *Id.* at 894 (noting that nonparties may be bound “in certain limited circumstances”
21 where the nonparty was “adequately represented by someone with the same interests who was a party”
22 (quotation marks and citation omitted)). The Court explained that preclusive effects could attach to
23 nonparties in “properly conducted class actions” and suits “brought by trustees, guardians, and other
24 fiduciaries.” *Id.* The Court further indicated that representation is adequate “*only if, at a minimum* (1)
25 The interests of the nonparty and her representative are aligned; and (2) either the party understood
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1 herself to be acting in a representative capacity or the original court took care to protect the interests of
2 the nonparty.” *Id.* (citations omitted) (emphasis added). Defendants argue that “[t]he *Millennium*
3 defendants used video surveillance evidence Saniefar gave to them, and when they used it to contest
4 Ronald Moore’s disability, knew they were acting in a representative capacity on that issue.” *Id.*
5 Plaintiff’s sharing of discovery with the *Millennium* defendants does not in any way suggest that she
6 understood *Millennium* defendants represented her in that action. The Supreme Court determined that
7 adequate representation allowed nonparty preclusion to attach only under much more narrow
8 circumstances. Plaintiff and *Millennium* defendants were not part of the same class, nor were
9 *Millennium* defendants acting as a fiduciary or trustee for her interests. *See Henry E. & Nancy Horton*
10 *Bartels Tr. ex rel. Cornell Univ. v. United States*, 88 Fed. Cl. 105, 114 (2009) (plaintiff trust was not
11 bound by judgment against similarly situated trust despite overlap in trustees and shares interests), *aff’d*
12 *sub nom. Bartels Tr. ex rel. Cornell Univ. ex rel. Bartels v. United States*, 617 F.3d 1357 (Fed. Cir.
13 2010). There is no evidence that the *Millennium* court was acting to protect Plaintiff’s interests in the
14 way it would if she were the member of a class of plaintiffs. The third *Sturgell* exception does not apply
15 to this case.

16 Lastly, Defendants argue that Saniefar assumed control over the issue of Ronald Moore’s
17 disability in the *Millennium* Action. In *Sturgell*, the Court noted that a nonparty can be bound by the
18 judgment of a party if the nonparty “assumed control” over the litigation and had “the opportunity to
19 present proofs and arguments” such that the party has already “had his day in court.” *Id.* at 895.
20 Defendants assert that because the parties acknowledged that they coordinated on the issue of disputing
21 Ronald Moore’s disability, and that Saniefar provided *Millennium* defendants with the sole evidence
22 used to dispute Ronald Moore’s disability, Saniefar assumed control over that issue in the *Millennium*
23 Action and should be barred by issue preclusion from raising it again here. Mere coordinated action
24 between the parties, however, does not imply that Saniefar assumed control over the *Millennium*
25 defendants’ litigation. *See United States v. Bhatia*, 545 F.3d 757, 761 (9th Cir. 2008) (“To invoke
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1 ‘control’ as the basis for privity requires something beyond the cooperation and sharing of witness
2 interviews”); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987)
3 (concluding that it was not sufficient that the nonparty supplied an attorney or was represented by the
4 same law firm, appeared as an amicus curiae, testified as a witness, participated in consolidated pretrial
5 proceedings, undertook some limited presentations to the court, or otherwise participated in a limited
6 way); *Haskell v. Whitaker for Estate of Vesta Ins. Grp., Inc.*, No. CV 09-G-0414-S, 2010 WL 11566502,
7 at *7 (N.D. Ala. Nov. 4, 2010) (“coordinated actions” by defendants in separate suits was not sufficient
8 to allege that one party had “assumed control over the . . . litigation to the degree required under the
9 fourth *Taylor* category” (quotation marks omitted)). There is no evidence that Saniefar had the
10 opportunity to present proofs and arguments on the issue of Ronald Moore’s disability. At most,
11 Defendants suggest that Saniefar provided relevant discovery to defendants in the *Millennium* Action.
12 This is inadequate to demonstrate that Saniefar took control over the issue in that litigation. *See Sturgell*,
13 553 U.S. at 906 (noting that “[a] mere whiff of ‘tactical maneuvering’ will not suffice” and suggesting
14 that a principal-agent relationship is generally required to show that the nonparty is bound by the prior
15 adjudication). There is simply no evidence in the record to suggest that Saniefar has had her day in court
16 on this on the issue of Ronald Moore’s disability, and she is not precluded from arguing it in this case.⁴

17 **C. Noerr-Pennington Immunity**

18 Defendants argue that they are immune from suit because the allegations in the FAC encompass
19 petitioning activity that is protected by the First Amendment of the United States Constitution under the
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21 ⁴ Although Plaintiff is not *precluded* from arguing that Ronald Moore is not disabled within the meaning of the ADA in this
22 case, the Court notes that the district court’s ruling in the *Millennium* Action that Ronald Moore is a disabled person within
23 the meaning of the ADA is persuasive authority. Furthermore, in an unpublished memorandum, the Ninth Circuit affirmed
24 the district court’s finding regarding Moore’s disability, concluding that there was “no material factual dispute that Moore is
25 disabled within the meaning of the ADA.” *Moore v. Millennium Acquisitions, LLC*, 708 F. App’x 485, 486 (9th Cir. 2018);
26 *see also* Ninth Cir. Fed. R. App. P. 36-3(a) (explaining that unpublished dispositions are not precedent). If Plaintiff offers the
same evidence at summary judgment to demonstrate that Ronald Moore is not disabled as did the defendants in the
Millennium Action, the Court would be inclined to reach the same conclusion. *See Nat’l Coal Ass’n v. Hodel*, 675 F. Supp.
1231, 1243 & n.14 (D. Mont. 1987) (although issue preclusion did not attach because prior court’s reasoning was not
necessary to its finding, reasoning was persuasive and adopted), *aff’d sub nom. N. Plains Res. Council v. Lujan*, 874 F.2d 661
(9th Cir. 1989).

1 *Noerr-Pennington* doctrine. In the December 1 Order, the Court considered whether the allegations in
2 the Complaint fell within the “sham litigation” exception to immunity for petitioning activity.
3 (December 1 Order at 7.) Specifically, the Court considered whether Defendants’ conduct in the Federal
4 ADA Action “consist[ed] of making intentional misrepresentations to the court,” such that their
5 “knowing fraud upon, or [their] intentional misrepresentations to, the court deprive the litigation of its
6 legitimacy.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006) (internal citations and quotation
7 marks omitted). Accepting well-pleaded allegations in the original complaint as true, the Court
8 determined that Saniefar alleged that Defendants made knowing, material misrepresentations about
9 Ronald Moore’s disability and the barriers that he allegedly faced. However, the Court concluded that
10 Saniefar did not allege mail fraud or wire fraud with particularity as required by Rule 9(b), and therefore
11 that the activities as alleged did not fall within the sham litigation exception. (*Id.* at 16-17.) Implicitly,
12 the Court also concluded that Plaintiff failed to allege adequately any predicate acts of RICO.

13 In the FAC, Plaintiff alleges mail fraud and wire fraud with greater specificity by detailing when,
14 to whom, and in what manner the fraudulent statements were made. In their moving papers, Defendants
15 do not argue that Plaintiffs fail to plead wire fraud and mail fraud with particularity in the FAC (i.e. that
16 they fail to allege the time, place, or nature of the false statements as required to allege fraud with
17 particularity). *See Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1988).
18 Defendants instead argue that the FAC does not adequately allege that Ronald Moore did in fact
19 misrepresent his disability. They argue that Plaintiff only alleges that Ronald Moore misrepresented the
20 extent of his disability. Defendants therefore contend that the allegations of fraud based on Ronald
21 Moore’s disability are not pleaded with sufficient particularity to fall within the sham litigation
22 exception to the *Noerr-Pennington* immunity doctrine.

23 This argument was rejected by this Court in the December 1 Order, where the Court held that
24 “[t]he Complaint provides ample allegations regarding how and why the statements were false, but
25 insufficient detail regarding the context of the statements themselves.” (December 1 Order at 19.) The
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1 Court went on to note that “[a]lthough Plaintiff has alleged that Defendants made knowing, material
2 misrepresentations to courts in ADA lawsuits that undermined the legitimacy of those cases, Plaintiff
3 has not pleaded the time, place, and manner of those false statements as required to allege fraud with
4 particularity.” (*Id.*) By alleging predicate acts of wire and mail fraud with the particularity required by
5 Rule 9(b), Plaintiff overcame the sole obstacle identified in the December 1 Order to pleading fraudulent
6 litigation activity within the exception to *Noerr-Pennington* immunity. (*See, e.g.*, FAC ¶¶ 148-50, 158-
7 66.) Defendants’ contention that Plaintiff has not met that obligation is inconsistent with the Court’s
8 reasoning in the December 1 Order.

9 **D. RICO Claim**

10 Defendants argue that Plaintiff’s RICO claim fails because it does not allege the existence of an
11 enterprise that is distinct from the individual Defendants, or “RICO persons.”

12 Plaintiff alleges an associated-in-fact enterprise, which is defined as “a group of persons
13 associated together for a common purpose of engaging in a course of conduct.” *United States v.*
14 *Turkette*, 452 U.S. 576, 583 (1981). “To establish the existence of such an enterprise, a plaintiff must
15 provide both evidence of an ongoing organization, formal or informal, and evidence that the various
16 associates function as a continuing unit.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 552 (9th Cir. 2007)
17 (internal quotation marks and citations omitted). RICO defines an enterprise as “any individual,
18 partnership, corporation, association, or other legal entity, and any union or group of individuals
19 associated in fact though not a legal entity.” 18 U.S.C. § 1961(4). “[T]o establish liability under [RICO]
20 one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’
21 that is not simply the same ‘person’ referred to by a different name.” *Cedric Kushner Promotions, Ltd.*
22 *v. King*, 533 U.S. 158, 161 (2001). Because corporations act only through their agents and employees,
23 an enterprise consisting only of a corporation and its employees generally “would fail for lack
24 of distinctiveness.” *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir.
25 2005).

1 However, in *King*, the Court concluded that an individual who was the president and sole
2 shareholder of a corporation could be sued under RICO for conducting the affairs of his corporation,
3 which was identified as the enterprise. As the Supreme Court explained, “[l]inguistically speaking, an
4 employee who conducts the affairs of a corporation through illegal acts comes within the terms of a
5 statute that forbids any ‘person’ unlawfully to conduct an ‘enterprise,’ particularly when the statute
6 explicitly defines ‘person’ to include ‘any individual . . . capable of holding a legal or beneficial interest
7 in property,’ and defines ‘enterprise’ to include a ‘corporation.’” *Id.* at 163 (citations omitted). The
8 Court therefore concluded that “the need for two distinct entities is satisfied . . . when a corporate
9 employee unlawfully conducts the affairs of the corporation of which he is the sole owner – whether he
10 conducts those affairs within the scope, or beyond the scope, of corporate authority.” *Id.* at 166; *see also*
11 *id.* at 163 (“The corporate owner/employee, a natural person, is distinct from the corporation itself, a
12 legally different entity with different rights and responsibilities due to its different legal status. And we
13 can find nothing in the statute that requires more ‘separateness’ than that.”).

14 Defendants contend that Plaintiff fails to allege an enterprise that is legally distinct from the
15 RICO persons. According to Defendants, because the “Moore/Mission law firms are named as RICO
16 Defendants (i.e. RICO persons), but the enterprise is simply these law firms plus its employees and
17 agents,” the distinctness requirement is not met. (ECF No. 42-1 at 22.)

18 Defendants’ argument misconstrues the distinctness requirement. The Ninth Circuit has held that
19 the association of separate corporations, or of individuals and law firms or corporations, for a common
20 purpose of engaging in a course of conduct can constitute an enterprise. *See Odom*, 486 F.3d at 551-53
21 (holding the association of two separate corporations for a common purpose constituted an association-
22 in-fact enterprise); *Living Designs, Inc.*, 431 F.3d at 361-62 (holding that a corporation, law firms
23 retained by the corporation, and individual actors constituted an association-in-fact). The Ninth Circuit
24 has also concluded that a corporate officer “is sufficiently distinct from the corporation for which he
25 works such that a plaintiff can allege the officer as the RICO person and the corporation as the RICO
26

1 enterprise.” *Moran v. Bromma*, 675 F. App’x 641, 645 (9th Cir. 2017) (citing *Cedric Kushner*
2 *Promotions*, 533 U.S. at 163; *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992)).

3 Plaintiff alleges that the Moore Law Firm, Mission Law Firm, and West Coast CASp and various
4 employees (and *non-employees*, such as RICO Defendant Ronald Moore) formed an enterprise that
5 engaged in racketeering activity. The enterprise as alleged in the FAC is an amalgamation of these
6 corporations and individuals – some of whom were employees or officers and some of whom were not.
7 (See FAC ¶ 33.) As the December 1 Order explained, Plaintiff adequately alleges that each of these
8 individuals – either acting through a corporation or individually – participated in the enterprise and
9 engaged in racketeering activity. There is no doubt that an enterprise composed of individual Defendants
10 and several corporations, associated for a common purpose in an enterprise, meets the distinctness
11 requirement under the statute. *Living Designs, Inc.*, 431 F.3d at 361-62. Plaintiff has therefore alleged
12 the existence of an associated-in-fact enterprise distinct from any individual RICO defendant.

13 **V. CONCLUSION AND ORDER**

14 For the reasons stated above, Defendants’ motion to dismiss the FAC (ECF No. 42) is DENIED.

15
16 IT IS SO ORDERED.

17 Dated: **March 13, 2018**

/s/ Lawrence J. O’Neill
UNITED STATES CHIEF DISTRICT JUDGE