

purely private threats do not constitute a petition to the government...they are not constitutionally protected." *Id.* at 886.

In reaching that conclusion, the Tenth Circuit stated,

While we do not question the application of the right to petition outside of antitrust, it is a bit of a misnomer to refer to it as the *Noerr-Pennington* doctrine...[I]t is more appropriate to refer to immunity as *Noerr-Pennington* immunity only when applied to antitrust claims. In all other contexts, including the present one, such immunity derives from the right to petition.

Id. at 889. The Tenth Circuit went on to hold that threats communicated solely between private parties are not afforded immunity from suit by the right to petition guaranteed by the First Amendment. *Id.* at 891. The court reached that conclusion because in its view, "The plain language of the First Amendment protects only those petitions which are made to 'the government.'" *Id.* at 892. This Court does not believe *Cardtoons* is controlling.

First, as to whether *Noerr-Pennington* applies outside antitrust, many courts, have held that it does. *E.g.*, *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (applying *Noerr-Pennington* to § 1983 claims); *Barnes Found. v. Township of Lower Merion*, 242 F.3d 151, 159 (3^d Cir. 2001); *Santana Prod., Inc. v. Bobrick Washroom Equip., Inc.*, 249 F.Supp.2d 463, 493 (M.D. Pa. 2003); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 831 F.Supp. 1516, 1522 (D. Colo. 1993) (citing cases). In *Oregon Natural Res. Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991) ("*ONRC*"), applying principles of *Noerr-Pennington* immunity outside the context of antitrust, the Ninth Circuit Court of Appeals upheld the dismissal of a counterclaim alleging abuse of administrative and judicial process as well as

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related torts. In doing so, the court noted that "where a claim involves the right to petition governmental bodies under *Noerr-Pennington*...[a] heightened level of protection accorded petitioning activity is necessary to avoid 'a chilling effect on the exercise of this fundamental First Amendment right.'" *Id.* at 533 (citation omitted). In *ONRC*, it is true, an actual lawsuit, not a threatened one, was involved. But that distinction lacks relevance. This Court agrees with the view of the Fifth Circuit in *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983):

Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation.... If litigation is in good faith,¹ a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute. This is the position taken by most of the courts that have considered the question.

See also *Primetime 24 Joint Venture v. Nat'l Broad. Co., Inc.*, 219 F.3d 92, 100 (2d Cir. 2000) (citing cases extending *Noerr-Pennington* to pre-litigation demand letters).

As to whether private party-to-private party communications are entitled to immunity, in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1059 n3 (9th Cir. 1998), the Ninth Circuit noted that the Petition Clause applies to petitions to the government and does not protect lobbying efforts directed at private organizations, but that

¹ Here, the B. Eichorn letter, on its face, dispels any concerns that DIRECTV's contemplated litigation would have been an abuse of the judicial process. Since that is the case, the threatened litigation was not "sham" litigation. *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991) (citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

dictum is not controlling here. Moreover, the Ninth Circuit upheld the dismissal of Kottle's complaint. Furthermore, in *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525 (9th Cir. 1991), the counter-claimant alleged antitrust violations consisting of, or arising out of, *inter alia*, counter-defendants' refusals to consent to counter-claimants' license proposals and threats to file additional copyright suits to intimidate counter-claimants. The court applied *Noerr-Pennington* and First Amendment principles to uphold the district court's grant of summary judgment, noting at one point that "[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of [a] suit...." *Id.* at 1528. See also *Theofel v. Farey-Jones*, 341 F.3d 978, 986-87 (9th Cir. 2003) (citing *Columbia Pictures* for the proposition that conduct "incidental to the prosecution of the suit" is covered by the *Noerr-Pennington* doctrine, but declining to extend *Noerr-Pennington* immunity to a bad faith subpoena).

In *Cardizem CD Antitrust Litigation*, 105 F.Supp.2d 618, 639-40 (E.D. Mich. 2000), the Eastern District of Michigan discussed at length *Columbia Pictures* and other cases such as *Primetime 24 Joint Venture*, which hold that conduct incidental to the prosecution of litigation is immunized by *Noerr-Pennington*. While the cases immunizing pre-litigation activity all arise in the antitrust context, the Court has little difficulty applying the same reasoning to the case at hand because *Noerr-Pennington* is not confined to antitrust, as discussed above. The *Cardizem CD* court explained that conduct is "incidental to" litigation if it could render the underlying prosecution moot. *Id.* at 640. As distinguished from conduct

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"incidental to" litigation, conduct is purely "private" if it "is separate and distinct from prosecution." *Id.* The DIRECTV demand letters at issue in this case are clearly "incidental to" litigation because if a recipient were to comply with the letter, the possibility of prosecution would become moot.

The Court also notes that in several recent unpublished decisions, district courts in Michigan have concluded that similar demand letters from DIRECTV are immunized by the *Noerr-Pennington* doctrine. See *DIRECTV, Inc. v. Milliman*, Case No. 02-74829 (E.D. Mich., Aug. 26, 2003); *DIRECTV, Inc. v. Personette*, Case No. 5:03-CV-66 (W.D. Mich., Oct. 20, 2003); *DIRECTV, Inc. v. Taylor*, Case No. 03-CV-71023-DT (E.D. Mich., Oct. 17, 2003); *DIRECTV, Inc. v. Wyman*, Case No. 03-CV-70889-DT (E.D. Mich., Oct. 17, 2003).

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendants' Motion to Dismiss.² This Order is not intended for publication.

IT IS SO ORDERED.

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² Docket No. 9.