**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

NEW MEXICO PUBLIC REGULATION COMMISSION; PUBLIC SERVICE COMPANY OF NEW MEXICO; WESTMORELAND COAL COMPANY; and BHP BILLITON NEW MEXICO COAL, INC.,

Plaintiffs/Counterdefendants-Respondents,

v.

Case No. S-1-SC-39602
Ct. App. No. A-1-CA-38898

THE NEW MEXICAN, INC.,

Defendant/Counterclaimant-Petitioner.

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# BHP BILLITON NEW MEXICO COAL, INC.'S ANSWER BRIEF

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## CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(G), we certify that this Brief complies with the type-volume limitation of Rule 12-318(F)(3). According to Microsoft Office Word, the body of the Answer Brief, as defined by Rule 12-318(F)(1), contains 10,941 words.

DATED this 6th day of March, 2023.

*/s/ Elizabeth A. Martinez*
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## I. INTRODUCTION

The Petition Clause of the First Amendment to the United States Constitution preserves the right "to petition the Government for a redress of grievances." Case authority interpreting this Clause, collectively referred to as the *Noerr-Pennington* doctrine, recognizes that a petition to a court in litigation is protected against retaliatory counterclaims by the First Amendment, so long as the petition is not a sham. The Respondents in this case are being sued for exercising their constitutional right to petition, which contravenes the *Noerr-Pennington* doctrine.

In 2015, the New Mexico Public Regulation Commission ("PRC") was considering issues presented to it by Respondent Public Service Company of New Mexico ("PNM") related to certain contracts (the "Agreements") between Respondent BHP Billiton New Mexico Coal, Inc. ("BBNMC") and Westmoreland Coal Company ("Westmoreland").[1] The PRC wanted to review and consider the Agreements despite the fact that there were confidentiality issues associated with the terms of the Agreements between two entities not party to the PRC proceedings. In order to respect the confidentiality issues while performing its functions, the PRC entered a Protective Order. The Agreements were produced to the PRC in reliance on the Protective Order.

[1] Record Proper citations for the facts referenced in this introduction will be provided in BBNMC's summary of factual and procedural history, *infra*.

A reporter for Petitioner The Santa Fe New Mexican ("SFNM") made an IPRA request to the PRC. In addition to various emails, the confidential Agreements were mistakenly produced in their entirety. After requesting a return of the Agreements and receiving no satisfaction, the PRC sought a temporary restraining order to keep the Agreements confidential. At a preliminary hearing on the TRO, the district court heard arguments from the PRC and SFNM, but expressed concern that interested parties, such as BBNMC, were not yet a part of this litigation. The court declined to enter a TRO at that time but stated that it would take the TRO under advisement until it had the opportunity to hear full arguments from all interested parties at a subsequent hearing, which it scheduled for August 13, 2015.

In response to the court's concern that all interested parties should be heard, BBNMC moved to intervene on August 10, 2015. In its motion, BBNMC sought intervention based on its interest in protecting the Agreements from public disclosure, because publication could jeopardize BBNMC's "business sensitive, trade secret information" and harm BBNMC's "competitive positions and other business relationships." RP1:101. In support of its motion, BBNMC attached affidavits regarding the confidential and trade secret nature of the documents. BBNMC also attached a proposed complaint-in-intervention, as required by Rule 1-024(C) NMRA. PNM and Westmoreland also moved to intervene.

SFNM responded to the motions to intervene by filing a cursory Answer and

Counterclaim, in which it alleged that the PRC, BBNMC, PNM, and Westmoreland sought to violate SFNM's First Amendment right to publish based on the PRC's attempt to retrieve the confidential documents and the companies' motions to intervene in the case. Then, hours before the August 13, 2015 TRO hearing, SFNM published the Agreements to its website, despite the district court's request that the Agreements be kept confidential until it could hear from all interested parties.

The court granted all pending motions to intervene on August 13, 2015. That same morning, BBNMC learned that SFNM had published the Agreements. BBNMC immediately filed a notice of withdrawal of its motion to intervene because the confidentiality ordered by the PRC had been breached. PNM and Westmoreland filed similar notices.

Less than two hours later, the district court held its scheduled hearing on the PRC's Emergency Verified Petition. At the hearing, PNM, BBNMC, and Westmoreland all informed the court that they wished to withdraw from the matter and did not plan to file any complaints-in-intervention because SFNM had posted the confidential Agreements on its website. SFNM responded by arguing that the intervenors could not withdraw because SFNM had filed "counterclaims" against them on the previous day.

BBNMC spent the next four years trying to extricate itself from SFNM's counterclaims, which stemmed from the three days that BBNMC's motion to

intervene had been pending before it was abandoned. Finally, in 2019, after years of being punished for exercising its constitutional right to seek redress from the government, the case was dismissed because SFNM could not establish that BBNMC's protected petition to the government was a sham under the *Noerr-Pennington* doctrine, as interpreted and applied by this Court in *Cordova v. Cline*, 2017-NMSC-020, 396 P.3d 159.

In support of its ruling, the district court found that: (1) Respondents had exercised their First Amendment right to petition the government when they moved to intervene, (2) SFNM could not file retaliatory counterclaims unless it alleged that Respondents' participation in this lawsuit was objectively and subjectively a sham, as required by the *Noerr-Pennington* doctrine and *Cordova*, and (3) SFNM's pleadings failed to satisfy the sham requirements set forth in *Cordova*. RP14:3393-3400. The court of appeals affirmed because SFNM did not brief *Noerr-Pennington/Cordova* with enough specificity to permit appellate review and, thus, "failed to demonstrate any error on the part of the district court." Court of Appeals Decision at 3-4, 6 ("Decision").

This Court should affirm the dismissal of SFNM's counterclaims because SFNM cannot show that BBNMC's constitutionally protected petition to the court—a motion to intervene requested and granted by the district court—was both objectively and subjectively a sham, as required under *Noerr-Pennington/Cordova*.

In the alternative, this Court should affirm because SFNM did not brief the issues with enough specificity to invoke a ruling from the court of appeals.

## II. SUMMARY OF FACTS AND PROCEEDINGS

### A. The Underlying PRC Proceeding.

In 2013, PNM initiated an administrative proceeding with the PRC, Case No. 13-00390 UT, in which it sought to abandon coal-fired generating units at the San Juan Generating Station and obtain authorization for replacement generation resources. *See* RP1:2 ¶7, RP1:7. The PRC Hearing Examiner issued a Protective Order that set forth procedures for the submission of confidential materials in support of PNM's application. RP1:3 ¶¶9-11; RP1:14-27. Pursuant to that Order, parties could designate materials as confidential by marking them as confidential and submitting an affidavit in support. RP1:16-18 ¶¶C.1-C.3. The Protective Order also set forth a procedure for obtaining a confidentiality ruling from the PRC in the event that a party or the PRC wished to use materials that had been marked confidential in a public hearing. RP1:20-26; RP1:23 ¶3.

Prior to the public hearing in Case No. 13-00390 UT, the PRC asked PNM to submit confidential Agreements between BBNMC and Westmoreland relating to the sale of the San Juan Generating Station from BBNMC to Westmoreland. *See* RP1:110-115. The Agreements were submitted to the PRC but were not made

public.[2] Instead, PNM sought permission to use the Agreements at the hearing without publicly disclosing them. RP6:1309-45. As relevant to this appeal, PNM sought to maintain the confidentiality of the following Agreements:

- A Stock Purchase Agreement between BBNMC and Westmoreland, which contained information on pricing and cost structure for the sale of San Juan Coal Company stock, RP6:1311-12;
- Coal Supply Agreements between BBNMC and Westmoreland, which contained information regarding coal pricing, supply, and cost structure relating to the supply of coal, mine reclamation and disposal of coal combustion residuals generated by San Juan, RP6:1312-13.

BBNMC and Westmoreland were not parties to the PRC proceeding and only provided the agreements to PNM pursuant to a confidentiality agreement. *See* RP1:33-35.

**B. The IPRA Request.**

On July 7, 2015, SFNM reporter Steve Terrell sent an IPRA request to the PRC in which he sought "[a]ll communications, including mail, emails and phone records between the Public Service Company of New Mexico and Commissioners, and commissioners' staff between Jan. 1 and the present." RP1:4 ¶15; RP1:43. At

[2] For more detail on the PRC proceedings, please see BBNMC's Court of Appeals Answer Brief.

the time of Mr. Terrell's request, the Agreements were still confidential pursuant to the governing Protective Order.

The PRC responded to the IPRA request by providing Mr. Terrell with a disc of emails on August 3, 2015. RP1:4-5, ¶¶16-17; RP1:45-46. Shortly thereafter, the PRC realized that it had inadvertently produced the Agreements along with the emails. *See id.* On August 5, 2015, after realizing its mistake, the PRC contacted Mr. Terrell to notify him that it had accidentally produced confidential information subject to the Protective Order. RP1:45 ¶7; RP1:49 ("Good Morning Steve: Highly confidential information was inadvertently released to you yesterday. Please contact me at your earliest convenience."). Mr. Terrell responded that he was too busy to review the materials or discuss the issue that day. RP1:48. The PRC followed up with two emails on the morning of August 6, 2015, but Mr. Terrell responded that he was still too busy to review the documents and that he would not return anything until he had spoken with his editors. RP1:47-48.

**C. The PRC Seeks Injunctive Relief.**

Mr. Terrell's lack of cooperation led the PRC to file this action for injunctive relief on the evening of August 6, 2015. In its Emergency Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction and Petition to Enforce Protective Order ("Emergency Verified Petition"), the PRC explained that it had inadvertently released confidential materials and sought a TRO

and injunction to prevent SFNM from publishing the materials. RP1:1-49.

On August 7, 2015, former district court judge David K. Thomson heard preliminary TRO arguments from the PRC and SFNM. *See* RP1:193; 8/7/2015 Tr. The court declined to enter a TRO at that time but stated that it would "take the TRO under advisement" until it had the opportunity to hear full arguments from all interested parties at a subsequent hearing. 8/7/2015 Tr. at 5:36:10-5:36:45; *see also* RP1:193-94 (order denying preliminary TRO request without prejudice). The court noted that SFNM had "something in the nature of a fiduciary duty" to exercise its First Amendment rights responsibly, and encouraged SFNM to observe that duty by keeping the Agreements confidential until the subsequent hearing. 8/7/2015 Tr. at 5:34:22-5:35:26. *See also id.* at 5:05:55-5:05:13 ("Can we come to some agreement that these documents are sequestered until we can get everybody in next week?").

During the hearing, the district court also expressed concern that "all interested parties may not be part of this litigation" and emphasized that it wished to "hear from interested parties" at the next TRO hearing. 8/7/2015 Tr. at 5:00:22-5:00:43. *See also id.* at 5:14:00-5:15:34. In particular, the court wondered why "those individuals that were most closely aligned" with the documents had not yet intervened, and expressed concern that interested parties, such as BBNMC, PNM,

and Westmoreland, were not present to protect their trade secret or other interests. 8/7/2015 Tr. at 5:35:50-5:36:10. *See also id.* at 5:36:10-5:36:45.

On August 10, 2015, the district court entered a written order setting a hearing on the Emergency Verified Petition for the afternoon of August 13, 2015 and requiring interested parties to intervene by August 11, 2015. RP1:95. A few hours later, BBNMC filed an expedited motion to intervene. RP1:97-178. In its motion, BBNMC sought intervention as of right based on its interest in "protect[ing] from public disclosure the unredacted versions of [its] Stock Purchase Transaction Documents and Termination Agreement." *See* RP1:101-105; RP1:101, ¶¶12-13 (stating that publication of the documents could jeopardize BBNMC's "business sensitive, trade secret information" and could harm BBNMC's "competitive positions and other business relationships").[3] BBNMC emphasized that its "interests [we]re in protecting the confidentiality of its trade secrets," and that intervention should be granted because the PRC did not possess knowledge or expertise to protect those interests. RP1:104, ¶21. In the alternative, BBNMC sought permissive intervention. RP1:105-106. In support of its motion, BBNMC attached affidavits regarding the confidential and trade secret nature of the redacted documents. *See* RP1:109-135.

[3] BBNMC explained that its interest focused solely on "the unredacted versions that were inadvertently produced," and that it did not "object to the public disclosure of the redacted versions of the documents." RP1:99, ¶5.

BBNMC also attached a proposed complaint-in-intervention to its motion to intervene, as required by Rule 1-024(C). RP1:137-177. The proposed complaint contained claims for (1) injunctive relief to prevent the disclosure of confidential and trade secret information, RP1:149-152, and (2) violation of the New Mexico Uniform Trade Secrets Act based on SFNM's actual or threatened misappropriation of a trade secret, RP1:152-154. PNM and Westmoreland filed similar motions to intervene based on their own interests in the Agreements. RP1:50-90; RP1:179-92.

On August 12, 2015, before the district court had granted any motion to intervene, SFNM filed an Answer and Counterclaim in which it alleged that the PRC, BBNMC, PNM, and Westmoreland were "trying to infringe and chill The New Mexican's constitutional rights" by participating in this litigation. RP2:251-52.

The following morning brought two new developments that shaped the course of this litigation. First, SFNM published the Agreements on its website. *See* https://www.santafenewmexican.com/stock-purchase-agreement-between-bhp-and-westmoreland/pdf_61eb1836-4150-11e5-bdea-ab77f4561068.html. Second, the district court entered an order granting all pending motions to intervene and stating that the scheduled TRO hearing would continue as planned later that afternoon. RP2:270. Around the same time, BBNMC learned that SFNM had published the Agreements and filed a notice of withdrawal of its motion to intervene.

*See* RP2:274-75. PNM and Westmoreland filed similar notices. RP2:272-73; RP2:276.

Later that day, the district court held its scheduled TRO hearing. At the hearing, PNM, BBNMC, and Westmoreland all informed the court that they wished to withdraw from the matter and did not plan to file any complaints-in-intervention because SFNM had posted the confidential Agreements on its website. 8/13/2015 Tr. at 5:21-7:12; *id.* at 10:2-7 (BBNMC wished to withdraw in light of "The New Mexican's decision to go ahead and publish on its website the documents in which [BBNMC] had an interest and concern, notwithstanding the pendency of this preliminary injunction hearing"). SFNM responded by arguing that the intervenors could not "walk away" because SFNM had filed its premature counterclaims against them on the previous day. 8/13/2015 Tr. at 7:13-8:9. The court did not decide that issue, however. Instead, it ruled that the existing order denying a TRO would remain in effect and that issues regarding the propriety of dismissing the intervenors would be addressed at a later time. *Id.* at 11:7-12:5.

**D. BBNMC Seeks to End Involvement in Litigation.**

BBNMC spent the next four years trying to end its involvement in this lawsuit while defending against SFNM's counterclaims. On August 21, 2015, BBNMC filed a notice of voluntary dismissal of all claims contained in its proposed complaint-in-intervention pursuant to Rule 1-041(A)(1)(a) NMRA. RP2:281-82. SFNM

responded arguing that its Answer precluded voluntary dismissal and that any dismissal of BBNMC's proposed claims would not affect SFNM's counterclaims. RP2:344-53. PNM and Westmoreland filed similar notices of dismissal and also filed motions to dismiss SFNM's counterclaims. *See* RP2:277-80; RP2:401-20; RP2:368-75.

At the December 2, 2015 hearing on the intervenors' notices of dismissal,[4] BBNMC emphasized that it was trying to disentangle itself from this lawsuit because the damage that it had hoped to avoid by intervening—publication of its confidential documents—had already occurred. 12/2/2015 Tr. at 7:5-24; 13:18-19 ("We're trying to get out. We're trying to figure out some way to say we're out[.]"); *id.* at 53:6-7 ("[O]ur client is mostly interested in going away and being left alone."). BBNMC explained that it had never filed its proposed complaint nor sought injunctive relief, and that any counterclaims against it should be treated as nullities given the lack of an initial pleading. *See, e.g.*, *id.* at 7:5-24; 52:25-53:9. The district court noted that this case had become procedurally "convoluted" in the "rush of war" leading up to the TRO hearing because the court had wanted all interested parties to participate in that hearing. *Id.* at 33:10-19. Nevertheless, it denied the intervenors' requests for dismissal and permitted SFNM to continue litigating its counterclaims. Order,

[4] During the December 2, 2015 hearing, the District Court also heard arguments regarding the dismissal of the PRC from this lawsuit and eventually dismissed the PRC. *See* RP3:598-602

RP3:518-530 (finding that BBNMC had "filed" complaint by attaching it to BBNMC's motion to intervene). Thereafter, BBNMC answered SFNM's counterclaims but never pursued any claim in its proposed complaint-in-intervention.

### E. The Intervenors' Motions for Judgment on the Pleadings.

On July 27, 2016, SFNM filed a Second Amended Answer and Counterclaim in which it alleged that the PRC, BBNMC, PNM, and Westmoreland had engaged in a conspiracy to violate SFNM's First Amendment rights by participating in this lawsuit and seeking a prior restraint on publication. *See, e.g.*, RP3:754-56; RP3:762, ¶59; RP3:765, ¶¶71-73. In particular, it claimed that all four counter-defendants, through their involvement in this lawsuit, committed malicious abuse of process ("MAP") and violated SFNM's state and federal constitutional rights. RP3:766-68. SFNM also brought a host of statutory and common-law claims based on the counter-defendants' involvement in this litigation. *See* RP3:766-70. These claims turned on allegations that prior restraints are difficult to obtain and, therefore, any request for a prior restraint should subject counter-defendants to liability. *See, e.g.*, RP3:763 ("Government mistakes and leaks do not . . . create a right to impose restrictions on the press, or to recover the documents.").

BBNMC and PNM then filed the motions for judgment on the pleadings that gave rise to this appeal. In their motions, BBNMC and PNM argued that (1) the First

Amendment, and the related *Noerr-Pennington* doctrine, protected their right to seek intervention in this lawsuit, and (2) SFNM did not allege that their motions to intervene were objectively a sham and did not allege they were subjectively a sham, as required by this Court's interpretation of the *Noerr-Pennington* doctrine in *Cordova v. Cline*.[5] RP13:3294-3307; RP13:3308-17. In its consolidated response, SFNM failed to identify a single allegation that might satisfy the sham exception to the *Noerr-Pennington* doctrine. RP13:3323-31. Instead, it offered a convoluted and incorrect interpretation of *Cordova*, which it has since abandoned, *see* RP13:3324-25 (aligning Respondents with the plaintiff in *Cordova*); argued that any request for a prior restraint is "illegal action," RP13:3326; and suggested that the *Noerr-Pennington* doctrine does not apply to claims against the press, *see* RP13:3326-29. In its reply, BBNMC explained that its motion should be granted because SFNM still had not identified any allegations that satisfied the sham exception to *Noerr-Pennington*. RP14:3370-75.

On November 25, 2019, the district court (Judge Francis J. Mathew) heard arguments on the motions for judgment on the pleadings. On December 4, 2019, it entered an order granting both motions based on SFNM's failure to satisfy the sham exception to the *Noerr-Pennington* doctrine as interpreted and applied in *Cordova.*

[5] Westmoreland filed a similar motion, RP8:1922-1931, but all claims against it were later dismissed because it had filed a federal bankruptcy proceeding. RP12:3007-08; RP13:3125.

RP14:3393-3400. In its Order, the court addressed SFNM's arguments, explained that the First Amendment right to publish does not automatically trump the First Amendment right to petition, and concluded that SFNM's pleadings did not satisfy the heightened pleading standard required by *Noerr-Pennington/Cordova*. *See generally id.* The court entered final judgments on February 18, 2020, and this appeal followed. RP14:3427-30.

### F. The Court of Appeals' Decision.

SFNM focused its appellate briefing on the importance of the First Amendment right to publish and the elements of its counterclaim for MAP. NMCA Brief in Chief ("NMCA BIC") at 9-21. It did not clearly analyze the heightened pleading standard required by *Cordova/Noerr-Pennington*, nor did it identify specific portions of its counterclaims that might satisfy that standard in its NMCA BIC. *See generally id.* at 9-28.

On September 7, 2022, the court of appeals issued a decision affirming the district court's judgment. The court of appeals explained that it had "no basis for reversal" because SFNM had not addressed the objective sham component of *Noerr-Pennington/Cordova* in its briefing. Decision at 3-4, 6.

## III. STANDARD OF REVIEW

Appellate courts review motions for judgment on the pleadings under Rule 1-012(C) NMRA de novo. *Vill. of Angel Fire v. Bd. of Cnty. Comm'rs*, 2010-NMCA-

038, ¶5, 148 N.M. 804. Such motions are typically reviewed under the same standard applicable to motions for failure to state a claim under Rule 1-12(B)(6). *Id.* Accordingly, generally the Court must accept the well-pleaded allegations of SFNM's counterclaim as true and dismiss if SFNM "is not entitled to recover under any theory of the facts alleged." *Delfino v. Griffo*, 2011-NMSC-015, ¶9, 150 N.M. 97.

In cases involving the *Noerr-Pennington* doctrine, however, a heightened pleading standard applies to motions for judgment on the pleadings. The motion should be granted if the non-moving party's pleadings do not establish with legal and factual specificity that the moving party's petition to the government was both (1) "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) intended to "effectuate an improper objective." *Cordova v. Cline*, 2017-NMSC-020, ¶¶28-29, 396 P.3d 159.

In conducting this analysis, the Court is not required to accept as true conclusions of law or unwarranted factual deductions. *See C&H Constr. & Paving, Inc. v. Found. Reserve Ins. Co.*, 1973-NMSC-076, ¶9, 85 N.M. 374 (quotes omitted).

## IV. ARGUMENT

SFNM asks this Court to hold that its conclusory allegations satisfied the sham exception to the *Noerr-Pennington* doctrine, as interpreted and applied in *Cordova v. Cline*. The Court should reject these arguments and affirm the dismissal of

SFNM's counterclaims because SFNM's conclusory pleadings do not establish that BBNMC's participation in this lawsuit was objectively unreasonable or subjectively improper, as required under *Noerr-Pennington* and *Cordova*. In the alternative, this Court should affirm because SFNM did not brief *Noerr-Pennington/Cordova* in enough detail below to fairly invoke a ruling from the court of appeals.

### A. SFNM Has Not Satisfied the Sham Exception to *Noerr-Pennington*.

The lower courts properly dismissed SFNM's counterclaims in this matter because SFNM failed to show that BBNMC's participation in this lawsuit was a sham under the heightened *Cordova/Noerr-Pennington* pleading standard.

#### a. The *Noerr-Pennington* Doctrine and the First Amendment Right to Petition.

The First Amendment right to petition the government for relief is "one of the most precious of liberties safeguarded by the Bill of Rights." *BE&K Constr. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation marks omitted). *See also* U.S. Const. Amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). This right of access to the government "constitutes one of the foundations upon which our republican form of government is premised" because it ensures that citizens can "make their wishes known to governmental officials acting on their behalf." *Protect Our Mountain Env't, Inc. v. Dist. Ct. In & For Jefferson Cty.*, 677 P.2d 1361, 1364 (Colo. 1984) (cited by *Cordova*, 2017-NMSC-020, ¶29). *See also BE&K*, 536 U.S.

at 524-25; *E. RR Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). It "extends to all departments of the Government" and encompasses the right to access courts and advocate a position through litigation. *Cal. Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *Cordova*, 2017-NMSC-020, ¶24.

The *Noerr-Pennington* doctrine protects citizens who exercise the right to petition by "shield[ing] [them] from retaliation provided their conduct is not a sham." *Cordova*, 2017-NMSC-020, ¶24. It emerged in the anti-trust context and initially operated to "exclude[] petitioning activity as a basis for a federal antitrust claim." *Id.* ¶25. *See also, e.g.*, *Noerr*, 365 U.S. at 136 (holding that parties who lobbied the government to obtain anti-competitive legislation did not violate the Sherman Act); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). However, the United States Supreme Court later "imput[ed] a First Amendment analysis to the doctrine" and extended it beyond the anti-trust context. *Cordova*, 2017-NMSC-020, ¶¶25-26. *See also Cal. Motor Transport*, 404 U.S. at 511 (extending *Noerr-Pennington* immunity to petitions to courts, based on First Amendment); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (applying *Noerr-Pennington* immunity to labor relations litigation); *BE&K*, 536 U.S. at 525. In light of these First Amendment principles, state and federal courts have applied *Noerr-Pennington* immunity to a wide variety of legal claims that seek to impose liability based on protected petitions to the government. *Cordova*, 2017-

NMSC-020, ¶26. This makes sense because, as the Fifth Circuit explained in a widely cited passage, "[t]here is simply no reason that a common-law tort [claim] can any more permissibly abridge or chill the constitutional right to petition than can a statutory claim such as antitrust." *Video Int'l Prod., Inc. v. Warner-Amex Cable Comm'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (applying *Noerr-Pennington* to common-law claims and constitutional claims under Section 1983). *See also White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (*Noerr-Pennington* "applies equally in all contexts" (quoted with approval in *Cordova*, 2017-NMSC-020, ¶26)).

While the *Noerr-Pennington* doctrine protects parties who genuinely seek government action, it does not apply to those who file sham petitions. *Cordova*, 2017-NMSC-020, ¶27. This narrow sham exception is limited to situations in which the complaining party can show both that (1) the petition at issue was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and that (2) the subjective motivation underlying the challenged petition was improper. *Id.* ¶28 (citing *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-62 (1993)). Significantly, "'[a] sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result but does so through improper means.'" *Id.* ¶39 (quoting *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991)).

### b. Application of the *Noerr-Pennington* Doctrine in *Cordova*.

In *Cordova*, this Court found that the substantive protections of the *Noerr-Pennington* doctrine required a heightened pleading standard for parties who seek to pierce the shield of *Noerr-Pennington* immunity and impose liability based on a petition to the government. *See* 2017-NMSC-020 at ¶29.

The petitioners in *Cordova*—a citizen's group—initiated proceedings to recall a local school board member. *Id.* ¶¶3-4. The petitioners did not comply with statutory requirements for their petition, however, and they later dismissed the petition without obtaining a decision from the court. *Id.* ¶¶4-5. The school board member, Arsenio Cordova, responded by suing the petitioners for MAP, conspiracy, and prima facie tort based on allegations that the recall petition was "in furtherance of a personal vendetta as opposed to legitimate claims of malfeasance or misfeasance in office." *Id.* ¶6. The petitioners moved to dismiss because Mr. Cordova's claims turned on a protected petition to the government, and the district court granted the motion. *Id.* ¶¶7-8.

On appeal, this Court delved into the *Noerr-Pennington* doctrine and considered whether the doctrine immunized the petitioners against Mr. Cordova's claims. *Id.* ¶¶24-42. The Court began its analysis by recognizing the First Amendment underpinnings of *Noerr-Pennington* and finding that the doctrine would shield the petitioners from liability unless their recall petition was a sham. *Id.* ¶¶24-

28. The Court then determined that the substantive *Noerr-Pennington* protections required a procedural mechanism that would protect petitioners against retaliatory litigation and "avoid a chilling effect on the exercise of th[e] fundamental First Amendment right" to petition. *Id.* ¶29. Accordingly, it adopted a heightened pleading standard and held that litigants—like Mr. Cordova and SFNM—who seek to impose liability based on petitions to the government must "'make a sufficient showing to permit the court to reasonably conclude that the . . . petitioning activities were not immunized from liability under the First Amendment.'" *Id.* ¶¶29-30 (quoting and following *Protect Our Mountain Environment*, 677 P.2d at 1369).

Under this heightened standard, "conclusory allegations are not sufficient to strip a [petitioning party's] activities of *Noerr-Pennington* protection." *Id.* (internal quotes and bracket omitted). Instead, litigants who seek damages based on petitions to the government must "plead [their] claims with sufficient factual and legal specificity to establish that the [petitioning activities] were a sham." *Id.* ¶30. This requires "allegations of the specific activities which demonstrate that the petitioning activity falls within the sham exception." *Id.* ¶38 (internal quotes omitted).

The Court applied this standard to the pleadings before it and held that Mr. Cordova could not pierce the shield of the *Noerr-Pennington* doctrine. With respect to the objective component of the sham exception, the Court found that Mr. Cordova had satisfied the heightened pleading standard by alleging that the recall petition was

supported by backdated affidavits that failed to comply with statutory requirements. *Id.* ¶¶34-35 (no reasonable petitioner could have expected success on the merits in light of the clearly deficient affidavits). However, the Court held that Mr. Cordova's pleadings "lack[ed] the factual specificity necessary to establish an improper subjective motive" and, therefore, did not satisfy the subjective component of the sham exception. *Id.* ¶¶38-39. In particular, the Court found that conclusory allegations regarding petitioners' political motives and desire to embarrass Cordova did not satisfy the subjective component, because such motives—even if true—were not inconsistent with a genuine recall petition seeking "favorable government action." *See id.* ¶¶38-39. In light of this deficient pleading, the Court affirmed the district court's dismissal of Mr. Cordova's complaint under *Noerr-Pennington*. *See id.* ¶41.

**c. SFNM's counterclaims do not satisfy *Cordova*.**

SFNM's counterclaims do not establish that BBNMC's involvement in this lawsuit was objectively unreasonable or subjectively improper and, thus, fail to satisfy the pleading standard required by *Cordova* and *Noerr-Pennington*.

1. SFNM's participation in this lawsuit was objectively reasonable.

SFNM alleges that BBNMC lacked a reasonable basis for intervening in this lawsuit because its proposed complaint-in-intervention sought a "blatantly unconstitutional" prior restraint on publication. *See, e.g.*, RP3:756, ¶¶36-40. These

allegations do not satisfy the objective sham component of *Cordova*, however, because prior restraints may be permitted in order to protect trade secrets.

Although prior restraints are presumptively unconstitutional, they are not forbidden. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 570 (1976) ("This Court has . . . consistently rejected the proposition that a prior restraint can never be employed."). In fact, the U.S. Supreme Court has declined to issue broad rulings regarding freedom of the press and instead has relied on "limited principles that sweep no more broadly than the appropriate context" of the cases before it. *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989).

The context-specific nature of prior-restraint analysis is important. SFNM takes the position that any attempt to enjoin publication of confidential and trade-secret material is facially invalid. *See* BIC at 15. Yet, "[p]reliminary and permanent injunctions are routinely granted in trade secret cases without offending the First Amendment." Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 Hastings L.J. 777, 777 (2007); *Lasen, Inc. v. Tadjikov*, 2020-NMCA-006, ¶30, 456 P.3d 1090 (district court reasonably enjoined former employee from misappropriating materials that had been trade secrets because the materials were the employer's "property"). Moreover, on rare occasions when the party misappropriating trade secrets raises a First Amendment defense, **some lower courts have found it proper to issue prior restraints**. *See DVD Copy*

*Control Assoc., Inc. v. Bunner*, 75 P.3d 1, 11-12, 14 (Cal. 2003) (First Amendment did not bar preliminary injunction to prohibit the publication of trade-secret information because trade secrets implicate property rights); *Public Citizen Health Research Group v. FDA*, 953 F. Supp. 400 (D.D.C. 1996) (granting motion to bar disclosure of company's research data that had been inadvertently disclosed by the FDA in response to a FOIA request); *Principles for Resolving Conflicts*, 58 Hastings L.J. at 777-78 ("There is no consensus in the case law or law review literature about whether . . . preliminary injunctions forbidding disclosure of informational secrets should be considered prior restraints on speech.").

These authorities establish that the claims in BBNMC's proposed complaint-in-intervention were not unreasonable. BBNMC sought an injunction to protect confidential materials that it believed to be trade secrets. RP1:98-99; RP1:149-55; RP1:101, ¶¶12-13; RP1:117-35. The materials had been given to the PRC pursuant to its regulatory authority based on BBNMC's belief that the materials would be held confidential under a Protective Order. RP1:121-23. BBNMC's attempt to recover these materials was consistent with the New Mexico Uniform Trade Secrets Act, which authorizes requests for injunctive relief to prevent the misappropriation of trade secrets. NMSA 1978, §57-3A-3. New Mexico courts have not addressed the intersection between §57-3A-3 of the Trade Secrets Act and the First Amendment. However, given the lack of consensus on this issue, it was not unreasonable for

BBNMC to seek injunctive relief as authorized by the statute and supported by cases such as *DVD Copy Control. Cf. Guest v. Berardinelli*, 2008-NMCA-144, ¶¶19-20, 145 N.M. 186 ("The vitality of our common law system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories[.]" (quotes omitted)). SFNM's conclusory allegations do not establish that this request for injunctive relief in an unsettled area of law had no chance of success and, thus, they do not satisfy the objective sham component of *Cordova*.

The actions of Judge David K. Thomson, the district judge hearing the matter at that time, are telling. The test in *Cordova v. Cline* is whether "no reasonable litigant could realistically expect success on the merits . . ." Judge Thomson had an initial TRO hearing before he requested the attempted interventions. Rather than dismissing the TRO application as frivolous, he sought the intervention of other interested parties so he could be more fully informed. He granted the interventions despite the fact that frivolous interventions should not be allowed. *See, e.g.*, *In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig.*, Nos. 02-MDL-1484, 02-CV-8472, 2008 WL 2594819, at *5 (S.D.N.Y. June 26, 2008) (collecting cases for the proposition that futility is a proper basis for denying a motion to intervene). His actions show that he, an experienced jurist, thought there were serious issues that were worthy of consideration. That conclusion destroys the argument that the motion to intervene was a sham under the objective test.

2. SFNM's participation in this lawsuit was subjectively reasonable.

This Court need not address the subjective sham component of *Cordova/Noerr-Pennington* because SFNM's pleadings fail to satisfy the objective sham requirement. *See Cordova*, 2017-NMSC-020, ¶28. However, even if the Court considers the subjective sham requirement, it should affirm because BBNMC's participation in this lawsuit was subjectively proper.

SFNM alleges that BBNMC must have intervened for the improper purpose of chilling SFNM's First Amendment rights because prior restraints are very difficult to obtain. *See, e.g.*, RP3:756, ¶¶33, 36-40. As explained above, however, prior restraints may be permitted in order to protect trade secrets. Thus, the mere fact that BBNMC sought injunctive relief does not establish that it acted with an improper motive. SFNM did not allege and cannot satisfy the subjective sham requirement of *Cordova* by pleading incorrect conclusions of law and unwarranted factual deductions regarding BBNMC's mental state. *See C&H Constr. & Paving*, 1973-NMSC-076, ¶9 (legal conclusions and unwarranted factual deductions need not be accepted as true in context of Rule 1-012(B)(6) motion).

Moreover, a subjective sham situation "involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through

improper means." *Cordova*, 2017-NMSC-020, ¶39. Thus, in order to satisfy the subjective sham requirement, SFNM's counterclaims must show that BBNMC did not genuinely seek the relief requested in its proposed complaint. SFNM does not—and cannot—do so because the record establishes that BBNMC intervened for a proper purpose. *See, e.g.*, 5A Wright & Miller, Fed. Practice & Proc. Civil 2d §1357 (courts may consider "matters of public record" and "items appearing in the record of the case" in deciding motions under Rule 12(B)(6)); *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1157 (D.N.M. 2013) (citing *Rose v. Utah State* Bar, 471 F. App'x 818, 820 (10th Cir. 2012), for proposition that motion to dismiss is not converted to one for summary judgment when a "court takes judicial notice of its own files and records and facts that are [a] matter of public record"); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (district court properly relied upon a public transcript from a related lawsuit in deciding motion for judgment on the pleadings).

BBNMC moved to intervene on August 10, 2015, at the invitation of the district court, in order to protect its interest in confidential and trade secret documents that had been disclosed to SFNM. *See* 8/7/2015 Tr. at 5:00:22-5:00:43, 5:35:50-5:36:10; RP1:97-178; 12/2/2015 Tr. at 33:11-13 ("The Court: . . . I wanted the interested parties in. And we brought the interested parties in."). BBNMC's proposed complaint-in-intervention sought to protect those interests by obtaining the

return of the documents and/or preventing their publication. RP1:137-174. However, SFNM published the documents at issue on the morning of August 13, 2015, prior to a scheduled TRO hearing and contrary to the district court's request that SFNM exercise its First Amendment rights responsibly. *See* 8/7/2015 Tr. at 5:34:22-5:35:26. After learning of the publication, BBNMC immediately moved to withdraw its motion to intervene and proposed complaint, and informed the district court that it had no interest in continuing to participate in this lawsuit. *See* RP2:274-75 (notice of withdrawal); 8/13/2015 Tr. at 5:21-7:12, 10:2-7. When SFNM opposed this withdrawal, BBNMC moved to dismiss its proposed claims, RP2:281-82, and again informed the district court that it did not intend to pursue any of the claims because SFNM had published its confidential/trade secret documents, 12/2/2015 Tr. 7:5-24, 13:18-19, 53:6-7. Thus, the record establishes that BBNMC intervened for a legitimate purpose—to maintain the confidentiality of its documents—and actively sought to end its participation when its legitimate purpose was foreclosed by SFNM's actions. *Cordova* could never be satisfied under these circumstances.

SFNM does not allege, for example, that BBNMC sought to intervene because of some effort to affect SFNM's reporting of the PRC actions or that it was upset with prior articles and wanted to punish SFNM or that there was some personality conflict between the reporter and an officer of BBNMC. In fact, the conclusory allegations cited by SFNM only contend that the relief sought by BBNMC was not

appropriate. To meet the subjective sham test, SFNM would have to allege that the purpose for the intervention was something other than "procuring favorable government action" regarding the confidentiality of its Agreements. *Cordova*, 2017-NMSC-020, ¶39. SFNM makes no allegation—conclusory or otherwise—that meets the subjective sham test. The fact that BBNMC immediately dropped its effort to intervene when SFNM destroyed the confidentiality by posting the Agreements is further evidence that BBNMC had no "improper" ulterior motive in filing its motion to intervene as requested by the court. It did not, for example, then seek to recover damages or otherwise keep litigation going to the detriment of SFNM.

### B. SFNM's Application of *Cordova/Noerr-Pennington* to the Pleadings Lacks Merit.

In its Brief in Chief ("BIC"), SFNM argues that a handful of allegations in its counterclaims did enough to satisfy *Cordova* and pierce the shield of the *Noerr-Pennington* doctrine. The Court should reject these arguments because *Cordova/Noerr-Pennington* does not permit SFNM to threaten BBNMC's constitutional right to petition based on vague, conclusory, and incorrect allegations.

#### a. SFNM's objective sham arguments are inconsistent with *Cordova/Noerr-Penningon.*

1. SFNM confuses the applicable pleading burdens.

SFNM generally asserts that it satisfied the objective sham component of *Cordova* by alleging that BBNMC's proposed complaint sought a prior restraint on

the press, which is difficult to obtain. BIC at 13-19. As explained above, however, these allegations cannot satisfy *Cordova/Noerr-Pennington*, because they turn on the false legal premise that requests for a prior restraint are facially invalid. *C&H Constr. & Paving*, 1973-NMSC-076, ¶9 (court need not accept legal conclusions as true). In any event, even if the relief sought could not be granted, that does not establish an improper purpose. BBNMC only sought the relief it asked for. It had no other purpose that would make the sought redress a subjective sham.

Nevertheless, SFNM takes the position that its general allegations regarding prior restraints satisfied *Cordova/Noerr-Pennington* because ***BBNMC's*** motion to intervene and proposed complaint supposedly did not include detailed facts or argument to establish "extraordinary circumstances" that would justify a prior restraint. BIC at 15. This argument confuses the pleading burdens relevant to this case. The sham tests do not require that the party seeking redress from the government actually succeed in its effort. Even if they did, BBNMC intervened on short notice at the invitation of the district court. *See* 8/7/2015 Tr. at 5:00:22-5:00:43, 5:14:00-5:15:34, 5:35:50-5:36:45; RP1:95. Its motion to intervene and proposed complaint contained detailed arguments, pleadings, and affidavits explaining that injunctive relief was warranted in order to protect trade secrets contained in the Agreements. *See, e.g.*, RP1:101, ¶13; RP1:104, ¶21; RP1:128-35; RP1:143-46; RP1:149-52; RP1:152-54. These arguments and allegations were adequate to satisfy

any applicable pleading standard, as they put SFNM on notice that BBNMC (1) sought intervention based on its interest in trade secrets, and (2) proposed a request for injunctive relief based on SFNM's violation of the Trade Secrets Act and misappropriation of trade secrets.

BBNMC was not required to pre-emptively brief all potential First Amendment issues in order to demonstrate a good-faith basis for its filings under *Cordova*. To the contrary, it is SFNM—the party seeking damages based on BBNMC's protected petition to the government—that must include detailed pleadings to establish that BBNMC's participation in this lawsuit was a sham. *See generally Cordova*. It has failed to do so, as explained above.

2. Conclusory pleadings do not satisfy *Cordova/Noerr-Pennington.*

SFNM's arguments also lack merit because the conclusory allegations identified in the BIC do not establish with "factual and legal specificity" that BBNMC lacked a reasonable basis for participating in this lawsuit, as required under the objective sham requirement of *Cordova*. 2017-NMSC-020, ¶¶28-30.

SFNM contends that it satisfied *Cordova* by alleging that (1) BBNMC sought to impose a "blatantly unconstitutional prior restraint on the press" by intervening in this lawsuit, BIC at 13, (2) SFNM "had an almost absolute First Amendment right

against prior restraints,"[6] BIC at 14, (3) BBNMC's request for a prior restraint "violate[d] clearly established statutory or constitutional rights which a reasonable person would have known," BIC at 14, and (4) BBNMC had "no valid legal or factual basis for the relief which [it] s[ought]," BIC at 14. But these conclusory allegations make no attempt to identify "specific activities which demonstrate that [BBNMC's] petitioning activity falls within the sham exception," 2017-NMSC-020, ¶38, nor do they resemble the factually and legally specific pleadings that satisfied the objective sham requirement in *Cordova*. *See id.* 2017-NMSC-020, ¶¶31-32, 34-35. To the contrary, the allegations identified by SFNM do not contain a single factual detail specific to BBNMC's conduct or the content of the confidential Agreements, nor do they explain with legal specificity why a prior restraint would not succeed in this case. In the absence of any attempt at specificity, SFNM cannot hold BBNMC liable for exercising its First Amendment right to petition. *See id.* ¶¶29-30 (*Cordova/Noerr-Pennington* "requires more than conclusory allegations").

Significantly, this outcome is consistent with the First Amendment and the *Noerr-Pennington* doctrine. If SFNM's allegations were enough to satisfy *Cordova*, then any media organization could establish an objective sham merely by alleging

[6] The word "almost" in the allegations is telling. Even SFNM recognizes that there are situations that justify a prior restraint. Does the violation of a government issued protective order seeking to maintain the confidentiality of trade secrets fall in that category? That was the issue presented in the motion to intervene. It was an issue presented in good faith.

that prior restraints are presumptively unconstitutional. This would erode the *Noerr-Pennington* doctrine, as it would empower the media to chill petitions to the government by asserting conclusory counterclaims and imposing litigation costs on anyone who makes a reasonable request for a prior restraint.[7] *Cordova* and *Noerr-Pennington* do not contain an exception that would allow the press to stifle the constitutionally protected right to petition in this manner.

3. The district court did not base its decision on BBNMC's successful intervention.

SFNM also argues that the district court's objective sham analysis was flawed because it relied upon Judge Thomson's order granting BBNMC's and PNM's motions to intervene. BIC at 15-18. Yet, a careful reading of the district court's order granting judgment on the pleadings indicates that the court did not base its decision on the successful motions to intervene.

In its order, the district court stated that by granting the motions to intervene, Judge Thomson must have found that BBNMC and PNM had a legitimate right or interest that could only be protected by intervention, which "implicat[ed]" the *Noerr-Pennington* doctrine. RP13:3397. However, the court immediately qualified this

[7] In fact, if BBNMC had known that the three-day pendency of its motion to intervene would lead to over seven years of litigation expenses incurred in defending against SFNM's counterclaims, one must wonder whether it would have sought to protect its interests by participating in this lawsuit or if the threat of the litigation would have chilled its exercise of its constitutional right.

observation by recognizing that "the purpose of PNM and [BBNMC's] applications [for intervention] is irrelevant unless it is determined to be a sham." RP13:3397. The court went on to grant the motions for judgment on the pleadings because SFNM "failed to meet the heightened pleading standard set forth in *Cordova v. Cline*." RP13:3399.

A proper reading of this opinion indicates that, at most, the court correctly recognized that the successful interventions required Judge Thomson to consider the proposed pleadings, *see In re Marcia L.*, 1989-NMCA-110, ¶9, 109 N.M. 420, and determine that BBNMC and PNM had "a claim or defense which properly should be adjudicated in the instant case," *Chino Mines Co. v. Del Curto*, 1992-NMCA-108, ¶17, 114 N.M. 521. Although this "implicated" *Noerr-Pennington*, RP13:3397, it was not determinative in the district court, RP13:3397-99, and the issue was not considered by the court of appeals. Accordingly, there is no reason for this Court to address the matter on certiorari.

If the Court does consider this issue, however, it should find that the successful intervention is relevant to the *Cordova/Noerr-Pennington* analysis. SFNM takes the position that it has satisfied the objective sham component of *Cordova/Noerr-Pennington* by alleging that prior restraints are facially invalid. *See* BIC at 15. If this were true, however, the district court as an experienced judge surely would not have granted a frivolous intervention. Instead, it would have denied the

motions to intervene because BBNMC and PNM could not have any legitimate interest in pursuing facially invalid claims. Judge Thomson did not make any such determination. To the contrary, by granting the motions to intervene, he acknowledged that requests for prior restraints are not facially invalid, and that BBNMC and PNM might have been able to obtain such relief in order to protect the Agreements from public disclosure.

**b. SFNM cannot satisfy the subjective sham pleading requirement.**

SFNM argues that it has satisfied the subjective sham component of *Cordova/Noerr-Pennington* because the district court was required to accept as true the following allegations: (1) this lawsuit was "part of a conspiracy and joint action . . . to violate and chill" SFNM's First Amendment rights, BIC at 17-18; (2) Respondents' conduct chilled SFNM's news reporting by forcing it to "deal with the demand letter and subsequent lawsuit," BIC at 18; (3) Respondents falsely claimed that the PRC hearing examiner's Protective Order prohibited publication of the documents at issue, BIC at 18, and (4) PNM falsely stated that it was not party to the stock purchase agreement and incorrectly asserted that certain documents were trade secrets, BIC at 18-19. SFNM interprets these allegations as establishing that "Intervenors acted to injure [SFNM] and infringe its constitutional rights." BIC at 19.

This Court should reject SFNM's argument and allegations because, as explained above, they turn on a false legal conclusion (that prior restraints are always unconstitutional) and an unwarranted factual deduction (that BBNMC must have intervened for the improper purpose of chilling SFNM's free speech because prior restraints are unconstitutional), which is contradicted by the record. *See C&H Constr. & Paving*, 1973-NMSC-076, ¶9. In fact, the pleadings and the record support the fact that the sole interest of BBNMC in seeking to intervene was to petition the government to enforce the confidentiality promised by the PRC and protect its trade secrets. There was no other ulterior or improper reason. Even if the sought relief was eventually denied, that does not make the request improper.

SFNM's arguments also fail because the allegations it identifies are not specific to BBNMC. For example, the allegation regarding the PRC's demand letter (paragraph 44 of the counterclaim) does not identify conduct by BBNMC that chilled SFNM's First Amendment rights. The allegations regarding PNM's supposedly false representations (paragraphs 54 and 61 of the counterclaim) do not pertain to BBNMC and contain legal conclusions regarding the trade secret status of various documents, which this Court is not required to accept as true. And the allegation that Respondents claimed that the Protective Order prohibited SFNM from publishing (paragraph 48 of the counterclaims) is incorrect as to BBNMC. The record shows that BBNMC primarily sought injunctive relief based on the trade secrets at issue,

RP1:137-55; its proposed allegations regarding the Protective Order sought injunctive relief based on public policy and principles of deference to the PRC, but did not assert that the Protective Order barred publication, RP1:149-51. *See* 5A Wright & Miller, Fed. Practice & Proc. Civil 2d §1357 (court may consider record in deciding motions under Rule 12(B)(6)).

Nor can SFNM use its conclusory allegations of conspiracy in order to hold BBNMC accountable for the alleged conduct of others. The existence of a conspiracy "must be pled either by direct allegations or by allegation of circumstances from which a conclusion of the existence of a conspiracy may be reasonably inferred." *Valles v. Silverman*, 2004-NMCA-019, ¶28, 135 N.M. 91. In this case, SFNM does not identify any allegations to establish that BBNMC conspired with the PRC, Westmoreland, and PNM to violate SFNM's First Amendment rights. In fact, SFNM's only allegations regarding the factual basis for its conspiracy claim pertain to the PRC and PNM, **but do not reference BBNMC**. RP3:754-55, ¶33. This Court should reject the legal conclusion that BBNMC conspired to violate SFNM's rights given the absence of specific allegations and the record evidence establishing that BBNMC intervened at the invitation of the district court. *See, e.g.*, 8/7/2015 Tr. at 5:00:22-5:00:43, 5:35:50-5:36:45; RP1:95.

In sum, SFNM has not alleged—and cannot allege—that BBNMC did not genuinely seek to intervene in this lawsuit in order to protect its trade secrets from

publication. *See Cordova*, 2017-NMSC-020, ¶39. The allegations referenced in the BIC are not specific to BBNMC and do not describe any "specific activities which demonstrate that [BBNMC's] petitioning activity falls within the sham exception." *Id.* ¶38. Instead, they turn on the false assumption that any attempt to intervene in an existing prior-restraint lawsuit—even at the invitation of the district court—is subjectively improper. This does not satisfy *Cordova/Noerr-Pennington*.

### C. This Court Should Reject SFNM's Attempt to Water Down *Cordova*.

Perhaps in recognition of its deficient pleadings, SFNM asserts that *Cordova/Noerr-Pennington* is too hard to satisfy, and asks this Court to water down the heightened pleading standard so that it may continue pursuing its conclusory counterclaims against BBNMC. The Court should reject this request because it is inconsistent with New Mexico law and it is bad public policy.

#### a. There is no legal basis for modifying the *Cordova* standard.

SFNM's main argument is that the *Cordova* pleading standard does not require a heightened degree of factual specificity because (1) Rule 1-009 NMRA does not require factual specificity in fraud cases, and (2) federal courts have denied motions to dismiss in other *Noerr-Pennington* cases. BIC at 11-12. Both arguments lack merit.

With respect to its first point, SFNM argues that *Cordova* does not contemplate a rigorous pleading standard because the "analogous context of fraud"

does not require factually specific pleadings. BIC at 12. Yet, *Cordova* makes clear that its two-part pleading standard is designed to accompany and implement the substantive First Amendment protections of the *Noerr-Pennington* doctrine. 2017-NMSC-020, ¶29. Thus, it requires specific, fact-based allegations in order to create a "breathing space" that "overprotects baseless petitioners, which is necessary for the effective exercise of First Amendment rights." 2017-NMSC-020, ¶40 (internal quotes omitted). The pleading standard for fraud contains no constitutional underpinnings and, therefore, does not require the level of specificity described in *Cordova*. *Compare Cordova*, 2017-NMSC-020, ¶29 (First Amendment necessitates heightened pleading standard in *Noerr-Pennington* cases), *with In re Stein*, 2008-NMSC-013, ¶46, 143 N.M. 462 (fraud pleading standard is designed to put defendant on notice of the fraud claimed against him); *Steadman v. Turner*, 1973-NMCA-033, ¶4, 84 N.M. 738 (fraud claimants need not plead "evidentiary details"); Rule 1-009(B) (improper mental state for fraud may be "averred generally"). There is no basis for SFNM's assertion that this lower pleading standard should be grafted onto *Cordova*.

In support of its second point, SFNM cites *Scooter Store, Inc. v. SpinLife.com, LLC*, 777 F. Supp. 2d 1102 (S.D. Ohio 2011), and *Nabi Biopharm v. Roxane Labs., Inc.*, 2007 WL 894473 (S.D. Ohio 2007), for the proposition that a heightened

*Noerr-Pennington* pleading standard does not support dismissal at the pleading stage. BIC at 11. There are three main problems with this argument.

First, both cases addressed the *Noerr-Pennington* doctrine in its original context of Sherman Act/anti-trust claims, and did not discuss the doctrine's First Amendment implications. *See 777* F. Supp. 2d at 1114; 2007 WL 894473, at *2-*3. Accordingly, they provide little persuasive authority regarding the *Cordova* pleading standard, which is based on a First Amendment analysis. *See, e.g.*, 2017-NMSC-020, ¶29 ("This heightened standard is necessary to avoid a chilling effect on the exercise of this fundamental First Amendment right [to petition] and conclusory allegations are not sufficient to strip a defendant's activities of *Noerr-Pennington* protection." (internal quotes, brackets, ellipses omitted)); *id.* ¶38. Second, *Scooter Store* and *Nabi* analyzed *Noerr-Pennington* under Fed. R. Civ. P. 12(B)(6), which is higher than the pleading standard set forth in Rule 1-012(B)(6) NMRA but distinct from the pleading standard adopted in *Cordova. See* 777 F. Supp. 2d at 1114-1115; 2007 WL 894473, at *3-*4. Thus, they have no bearing on the proper application of the heightened *Cordova* standard.[8] Third, to the extent SFNM cites *Scooter Store* for

[8] Moreover, the detailed allegations at issue in *Nabi* likely would have satisfied even a heightened pleading standard. *See* 2007 WL 894473 at *3-*4. The allegations in *Scooter Store* also may have satisfied a heightened standard, as they established that the plaintiff brought a trademark enforcement lawsuit against a retail business even though the plaintiff's trademarks were "limited to insurance claims processing" and "d[id] not extend to retail sales." 777 F. Supp. 2d at 1114-15.

the proposition that the sham analysis "is a question of fact that is inappropriate for a motion to dismiss," 777 F. Supp. 2d at 1115, that proposition was rejected by *Cordova*. *See generally* 2017-NMSC-020, ¶¶34-42 (adopting heightened pleading standard and affirming the dismissal of claims at the pleading stage).

SFNM also references *Construction Cost Data, LLC v. Gordian Group, Inc.*, 2017 WL 2266993 (S.D. Tex. 2017), for the proposition that its pleadings "need not specifically address the *Noerr-Pennington* defense." BIC at 12. But this non-binding authority has no effect on the *Cordova* pleading standard. In fact, in *Cordova*, this Court did not require that pleadings must "specifically address the *Noerr-Pennington* defense." Instead, the Court explained that pleadings premised on a petition to the government must "include allegations of the specific activities which demonstrate that the petition activity falls within the sham exception," based on the "strictures of the First Amendment as well as the heightened pleading standard we hereby adopt." 2017-NMSC-020, ¶38 (internal quotes omitted). Nothing in *Construction Cost Data* changes this analysis.

More generally, SFNM's arguments lack merit because they overlook the best available authority on the *Cordova* pleading standard: this Court's application of the heightened pleading standard to Mr. Cordova's complaint in paragraphs 31-42 of the *Cordova* opinion. Those paragraphs refute SFNM's request for a watered-down standard and make clear that this Court consciously set a high bar for pleading in

order to over-protect petitioners' First Amendment rights, as required by the *Noerr-Pennington* doctrine. *See* 2017-NMSC-020, ¶¶34-35 (objective sham component satisfied by specific allegations regarding "untimely, backdated" affidavits, which established that it would have been "impossible" for affiants to satisfy statutory requirements for recall petition); *id.* ¶¶36-41 (subjective sham requirement not satisfied by allegations that petitioners were politically motivated and desired to embarrass Mr. Cordova because complaint did not establish that political motivations were "not genuinely aimed at procuring favorable government action at all" (internal quotes omitted)).

Any attempt to lower this standard would undermine the First Amendment rights that *Cordova* seeks to protect. The *Cordova* pleading standard works hand-in-hand with the substantive protections of the *Noerr-Pennington* doctrine in order to ensure that petitioners are not burdened with the threat of liability and the cost of defending against retaliatory litigation. *See* 2017-NMSC-020, ¶¶29-30. The pleading standard accomplishes this goal by (1) requiring factually and legally specific allegations from those who seek to burden the First Amendment right to petition, and (2) facilitating early dismissal of claims that burden the right to petition unless the allegations clearly establish that the petition is a sham. *See id.* If this standard were lowered, parties like SFNM could force petitioners to defend against retaliatory litigation through the summary judgment stage and, perhaps, obtain settlements from

good-faith petitioners based on the threat of liability. SFNM cannot get around these First Amendment concerns by citing Rule 1-009 and referencing distinguishable cases from other jurisdictions.

**b. SFNM's policy arguments do not support modification of the *Cordova* standard.**

SFNM seeks to bolster its legal arguments by asserting that public policy supports a watered-down *Cordova* pleading standard. BIC at 23. In particular, SFNM asserts that if *Cordova* required more specificity than SFNM has alleged, it would incentivize harassing litigation designed to "squelch public debate" and "impose an impossible barrier" to counterclaims by the media. *Id.* These policy arguments are unpersuasive for two reasons.

First, *Cordova* does not impose an "impossible barrier" in the proper case. Instead, it implements the *Noerr-Pennington* doctrine by setting forth a clear framework requiring specific allegations to establish that a protected petition to the government was a sham. SFNM cannot satisfy *Cordova/Noerr-Pennington* here for the simple reason that BBNMC's participation in this lawsuit was not a sham. However, this does not foreclose successful sham allegations in other cases, provided that the petition at issue was objectively unreasonable and subjectively improper. *See, e.g.*, *Cordova*, 2017-NMSC-020, ¶¶34-35 (allegations satisfied objective sham requirement).

Second, SFNM's assertions regarding harassing litigation that "squelch[es] public debate" are not supported by the facts of this case. BBNMC's involvement in this lawsuit—an August 10, 2015 motion to intervene that BBNMC sought to withdraw on August 13, 2015—did not impose any delays or expenses on SFNM, nor did it prevent SFNM from publishing the documents at issue. Moreover, BBNMC has repeatedly stated on the record that it has no desire to pursue any claims against SFNM. *E.g.*, 12/2/2015 Tr. at 7:5-24; 13:18-19 ("We're trying to figure out some way to say we're out[.]"); 11/25/2019 Tr. at 11:30:33-11:30:48 (BBNMC "wants out of this case. It has always wanted out of this case and it doesn't have any intention of pursuing any right that it would have because it was granted intervention.").[9] SFNM ignores the fact that the *Cordova/Noerr-Pennington* doctrine is to protect the right of parties to seek redress of their grievances and protect access to the courts, an important constitutional right.

SFNM has opposed each of BBNMC's attempts to withdraw and has spent the last seven years arguing that BBNMC should be liable in damages because it had the audacity to file a motion to intervene that was requested—and granted—by the district court. If any party has engaged in abusive and harassing litigation, it is

[9] This record undermines SFNM's assertion that it "remain[s] subject to claims" by BBNMC. BIC at 5. *See also* RP14:3427 (final judgment dismissing BBNMC's proposed claims-in-intervention).

SFNM. Public policy does not support SFNM's request for a modified *Cordova* standard under these circumstances.

### D. In the Alternative, This Court Should Affirm Because SFNM Did Not Adequately Brief *Cordova* Below.

In the alternative, this Court should affirm the dismissal of SFNM's counterclaims because SFNM did not fairly invoke a ruling from the court of appeals or district court regarding the application of *Cordova* to this case. "[I]t is well settled that issues raised for the first time on appeal will not be considered by this Court." *Cain v. Powers*, 1983-NMSC-055, ¶5, 100 N.M. 184; Rule 12-321(a) (ruling must be "fairly invoked" below).

SFNM made a strategic decision to avoid any serious analysis of the *Cordova* pleading standard below. In fact, in its NMCA BIC, SFNM did not even reference the heightened pleading standard, nor did it identify any paragraphs of its counterclaims that might satisfy the standard. *See generally* NMCA BIC at 9-28. Instead, SFNM offered general arguments focused on the importance of its First Amendment right to publish and the elements of a claim for MAP under New Mexico law.[10] *Id.* Even after BBNMC and PNM emphasized the *Cordova* pleading standard in their Answer Briefs, SFNM failed to clearly address the issue in its

[10] SFNM's briefing in the district court contained similar arguments and failed to identify allegations that might satisfy the *Cordova* pleading standard. *See generally* RP13:3323-31.

Reply. *See* NMCA Reply at 5-6, 8 (discussing *Cordova* without reference to pleading standard); *id.* at 16-17 (generally stating that the counterclaim "satisfies a heightened pleading standard" and referring to an amicus brief for analysis).

Faced with SFNM's strategic decision to avoid the pleading standard at the heart of this case, the court of appeals properly declined to consider the issue. *See* NMCA Decision at 3-4 (citing *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶70, 309 P.3d 53, for the proposition that parties must "adequately brief all appellate issues" and that appellate courts "will not review unclear arguments, or guess at what a party's arguments might be"); *id.* at 5-6 (affirming because SFNM failed to adequately brief the objective sham component of the *Cordova/Noerr Pennington* analysis). *See also Elane Photography*, 2013-NMSC-040, ¶70 ("To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments."); *Whittington v. State Dep't of Pub Safety*, 2002-NMSC-010, ¶3, 132 N.M. 169 (amici cannot "assume the functions of a party" or raise new issues for the first time). This Court should affirm, and should not allow SFNM to pursue new arguments on certiorari that it chose to avoid below. *See* Rule 12-321.

In its BIC to this Court, SFNM argues that the court of appeals erred because SFNM adequately briefed the objective sham prong of *Noerr-Pennington/Cordova* below. BIC at 20-23. This is not supported by the record.

SFNM asserts that it presented arguments regarding the objective sham requirement on page 18 of the NMCA BIC and pages 8-12 of its NMCA Reply. BIC at 21-22. As this Court made clear in *Elane Photography*, however, an appellant must "adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented." 2013-NMSC-040, ¶70. The portions of briefing identified by SFNM do not satisfy this requirement, as they do not discuss *Cordova*, nor do they identify paragraphs of the counterclaims that might satisfy the applicable pleading standard. Instead, they discuss the elements of MAP, NMCA BIC at 18, and provide authority on prior restraints on publication under the First Amendment, NMCA Reply at 8-12. The court of appeals properly declined to "guess at" how these "unclear arguments" might relate to the *Cordova* pleading standards. *See Elane Photography*, 2013-NMSC-040, ¶70. This Court should affirm on this basis.

SFNM also asserts that the court of appeals erred because excerpts of SFNM's counterclaims cited in the BIC ***to this Court*** supposedly satisfy the objective sham component of the *Cordova* pleading standard. BIC at 21. The problem with this argument is that SFNM did not cite those excerpts in its BIC below. *See generally*

NMCA BIC. The court of appeals is "not obligated to search the record on a party's behalf to locate support for propositions a party advances," *Kilgore v. Fuji Heavy Indus. Ltd.*, 2009-NMCA-078, ¶41, 146 N.M. 698, and it did not err in declining to "comb the record" for portions of the pleadings that SFNM failed to identify in its NMCA BIC, *see Murken v. Solv–Ex Corp.*, 2005-NMCA-137, ¶14, 138 N.M. 653. SFNM may not obtain a do-over on certiorari by hiring new counsel to present new arguments and record citations that were not considered by the court of appeals. *See Adams v. Para-Chem Southern, Inc.*, 1998-NMCA-161, ¶15, 126 N.M. 189 (parties generally are bound by strategic decisions and arguments of their attorneys).

## V. CONCLUSION

SFNM does not have a monopoly on First Amendment freedoms. If it wished to pursue counterclaims based on BBNMC's constitutionally protected petition to the government, it was required to pierce the *Noerr-Pennington* doctrine by satisfying the pleading standard set forth in *Cordova*. It failed to do so. The dismissal of SFNM's counterclaims should be affirmed.

## Statement Regarding Oral Argument

Oral argument is not requested because the issues presented by Petitioner are controlled by established law.

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I HEREBY CERTIFY that the foregoing pleading was filed via "Odyssey File and Serve" on the 6th day of March, 2023, which caused all counsel of record to be served by electronic means. I hereby further certify that a true and correct copy of the foregoing was also served via e-mail this 6th of March, 2023, as follows:

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