



**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.,

No. S-1-SC-39602

Plaintiffs-Respondents,

v.

THE NEW MEXICAN, INC.,

Defendant-Petitioner.

DEFENDANT-PETITIONER'S BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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Defendant-Petitioner The New Mexican, Inc. (“the *New Mexican*”), pursuant to Rules 12-502(K) and 12-318 NMRA, and the Court’s order dated December 16, 2022, submits the following brief in chief.

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

The *New Mexican* asks this Court, on *de novo* review, to reverse the district court’s dismissal of its counterclaim on the pleadings. The *New Mexican* filed its counterclaim in response to a clearly unconstitutional lawsuit filed by The New Mexico Public Regulation Commission (“PRC”), seeking a prior restraint of the newspaper’s First Amendment right to report on matters of public importance. The *New Mexican*’s counterclaim, which set forth claims for malicious abuse of process and other causes of action, was also filed against three corporations which had intervened to join the PRC’s efforts to seek the unlawful prior restraint. The issue before the Court is whether the district court improperly dismissed the counterclaim on the pleadings, misapplying the pleading standard applicable to actions subject to the *Noerr-Pennington* doctrine. That doctrine, which provides a party with a defense to claims arising out of that party’s petitioning of the government, applies only in certain limited circumstances. The district court misapplied it here, at the pleading stage, in a manner that left the *New Mexican* with no remedy. The *New Mexican* asks this Court to conduct a *de novo* review of

the district court's dismissal of its counterclaim, and, following that review, to reverse the district court and remand to that court for further proceedings.

B. Summary of Relevant Facts, Course of Proceedings and Disposition in Courts Below

The *New Mexican*, exercising its legal right to inspect public records in the possession of government entities, requested records from the PRC pursuant to the New Mexico Inspection of Public Records Act. The PRC provided the *New Mexican* with some of the requested records. Notwithstanding this voluntary production, the PRC then filed suit against the *New Mexican*, seeking injunctive relief barring the newspaper from publishing the records. **[RP 1-49]** The PRC asserted that the documents were governed by an administrative protective order. *Id.* The district court promptly denied the PRC's request for temporary restraining order, relying on decades of U.S. Supreme Court precedent holding that such an order would constitute a prior restraint in violation of the First Amendment.¹ **[RP 193-194]** Public Service Company of New Mexico ("PNM") and BHP Billiton New Mexico Coal, Inc. ("BHP") (together, "Intervenors"), immediately intervened to join the PRC's effort, seeking not only a prior restraint but also damages. **[RP**

¹ At the time of filing, the district judge was The Honorable David K. Thomson.

50, 97, 270]² The *New Mexican*, forced to defend in court its constitutional right to publish, counterclaimed for malicious abuse of process and other causes of action. The *New Mexican*'s counterclaim set forth in detail that the documents at issue were public records, and that, in light of the clear legal authority against prior restraint, the PRC and the Intervenors had brought their claims without probable cause and for improper purposes. **[RP 251, 284]**³

More than four years later, after an unsuccessful effort by Intervenors to remove the case to federal court, the district court⁴ granted Intervenors' motion for judgment on the pleadings, and dismissed each of the *New Mexican*'s claims⁵ set forth in its counterclaim.⁶ **[RP 3393-3400]** The court held that the Intervenors' filings qualified for First Amendment protection for petitioning activity under New Mexico's version of the *Noerr-Pennington* doctrine, as described in *Cordova v.*

² Another entity, Westmoreland Coal Company, also intervened. Westmoreland is no longer a party to this action, as its claims, and the claims made against it, were subsequently discharged via bankruptcy proceedings. **[RP 3125]**

³ Intervenors later argued to the district court that they had not actually filed their complaints, but the district court held otherwise. **[RP 593-594]**

⁴ At the time of dismissal, the district court judge was The Honorable Frances J. Mathew.

⁵ The order dismissed not only the *New Mexican*'s claims for malicious abuse of process, but also an additional 11 causes of action. **[RP 750, 3435, 3437]** The *New Mexican*'s claim under the Unfair Practices Act was previously dismissed. **[RP 745]**

⁶ The operative pleading was the *New Mexican*'s Second Amended Answer and Counterclaim ("the counterclaim"). **[RP 750-792]**

Cline, 2017-NMSC-020, ¶ 24. That doctrine, which in some contexts protects persons who engage in conduct aimed at influencing the government from retaliation, only applies when those persons’ conduct is not a sham. Under *Cordova*, a party’s actions are a sham under *Noerr-Pennington* if 1) the actions are objectively baseless; and 2) the subjective motivation underlying the party’s conduct was improper. *Cordova*, ¶¶ 27-28. The district court concluded that the *New Mexican* had failed to plead, under a heightened pleading standard set forth in *Cordova*, facts showing that Intervenor’s actions were both objectively baseless and brought with improper motivation, thus coming within the sham exception.

[RP 3393-3400] The district court’s decision included no detailed analysis of the *New Mexican*’s specific allegations in the counterclaim; rather, the court accepted Intervenor’s novel argument that because the court had granted Intervenor the right to intervene, it had “necessarily found” that Intervenor had legitimate interests to protect and thus their intervention was not objectively baseless. **[RP 3397]** This holding by the district court plainly misinterpreted the rules of civil procedure governing intervention.

The *New Mexican* appealed the dismissal of its counterclaim. **[RP 3433-3434]** The Court of Appeals, in affirming the district court, did not rely upon the district court’s finding that its prior grant of intervention necessarily meant that the Intervenor’s actions were objectively reasonable. Furthermore, the Court of

Appeals did not address the sufficiency of the pleading of the counterclaim. Instead, the Court affirmed the district court based on the *New Mexican*'s failure to provide argument on one element of the sham exception to *Noerr-Pennington*. Specifically, it held that the *New Mexican* had failed to argue to the district court or to the Court of Appeals that the counterclaim adequately alleged that Intervenor's attempted prior restraint lacked an objectively reasonable basis. Decision, ¶ 6, *New Mexico Public Regulation Commission et al v. The New Mexican, Inc.*, A-1-CA-38898 (N.M. Ct. App. Sept. 7, 2022). The Court of Appeals therefore affirmed the dismissal of all the *New Mexican*'s claims. *Id.* This was in error; the *New Mexican* had, in fact, pled sufficient facts and offered argument on this very issue, in both courts. As a result of the Court of Appeals' decision, the *New Mexican* remained subject to claims by Intervenor⁷ but all of its counterclaims had been dismissed with prejudice.

The *New Mexican* petitioned this Court for a writ of certiorari to review the Court of Appeals' decision. The Court granted the petition and issued the writ.

II. ARGUMENT

The *New Mexican*'s counterclaim should not have been dismissed on the pleadings by the district court. All the *New Mexican* had to do at the pleading

⁷ BHP's claims were dismissed by the district court, but without prejudice. PNM's claims against the *New Mexican* remain. [RP 3427, 3399]

stage – even under a heightened pleading standard – was to set forth sufficient facts that Intervenor’s actions were objectively baseless and subjectively improper, and thus Intervenor’s actions were a sham under *Noerr-Pennington*. As set forth below, the *New Mexican* plainly did so in its counterclaim, and dismissal on the pleadings was improper. Furthermore, the Court of Appeals erred in affirming the dismissal of the counterclaim on the basis that the *New Mexican* had not presented argument on one element on the sham exception; in fact, the *New Mexican* had argued that very issue, both to the district court and the Court of Appeals.

If left undisturbed, the decisions of the lower courts risk imposing a nearly insurmountable pleading burden on future litigants which, like the *New Mexican*, must defend against litigation brought to suppress public debate. The decisions also incentivize litigants to file groundless lawsuits against media organizations knowing that they can use *Cordova*, itself intended by this Court to be a vehicle to protect the First Amendment, to impose significant litigation costs on the media, believing that they will be immunized from liability for filing baseless lawsuits.

A. The District Court Erred in Dismissing the Counterclaim on the Pleadings.

This Court reviews *de novo* the district court’s decision to affirm dismissal of the *New Mexican*’s counterclaim. *Glaser v. LeBus*, 2012-NMSC-012, ¶ 8; *Nash v. Bd. of Cnty. Commissioners of Catron Cnty.*, 2021-NMSC-005, ¶ 20 (“We

review *de novo* a district court’s order granting or denying a motion to dismiss.”). This Court, in assessing the counterclaim *de novo*, assumes all well-pled facts to be true and resolves all doubts in favor of the sufficiency of the pleading. *Id.* Judgments on the pleadings made pursuant to Rule 1-012(C) NMRA are reviewed according to the same standard as motions for failure to state a claim under Rule 1-012(B)(6) NMRA when the district court considers matters contained solely within the pleadings. *Glaser*, ¶ 8; *Dunn v. McFeeley*, 1999-NMCA-084, ¶¶ 10-11, 127 N.M. 513. At the pleading stage, it is not for the district court – or for this Court on *de novo* review – to determine the substantive merits of the counterclaim. Instead, even under a heightened pleading standard, a Court must “accept as true all facts well pleaded and question only whether the plaintiffs might prevail under any state of facts provable under the claim.” *Williams v. Stewart*, 2005-NMCA-061, ¶ 9, 137 N.M. 420; *see also Cordova*, 2017-NMSC-020, ¶¶ 34, 38. Under these standards, and applying the Court’s precedent in *Cordova*, the district court erroneously concluded that the *New Mexican*’s pleading was legally insufficient.

1. The *New Mexican* met the standard for pleading under *Cordova*.

The *New Mexican*’s counterclaim was sufficiently pled. The *New Mexican* set forth 12 causes of action, including malicious abuse of process. [RP 750-792] In seeking dismissal on the pleadings, the Intervenor’s did not assert that any of the *New Mexican*’s causes of action failed to state a claim upon which relief could be

granted, or that the *New Mexican* had otherwise insufficiently stated a basis for recovery. [RP 1922-1931, 3294-3317] Intervenors relied solely on *Noerr-Pennington*. Specifically, the single ground upon which they sought dismissal was that the counterclaim lacked sufficient allegations that Intervenors' court action against the *New Mexican* was a sham, thus depriving Intervenors of *Noerr-Pennington* protection. *Id.* The district court erred in granting dismissal.

a. History of the *Noerr-Pennington* doctrine

The *Noerr-Pennington* doctrine generally provides a limited defense to actions brought against parties based on those parties' exercise of their constitutional rights to freedom of association and to petition the government, including filing lawsuits. *See, e.g., Westlake Services, LLC v. Credit Acceptance Corp.*, 800 Fed. Appx. 505, 507 (9th Cir. 2020); *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, 962 F.3d 1015, 1028 (8th Cir. 2020). As noted by the U.S. Supreme Court in applying the doctrine to an antitrust case:

... it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11, (1972). Although the doctrine had its origins in federal antitrust law, "*Noerr-*

Pennington immunity has been extended to a broader range of cases in which the defendant engaged in activity protected by the First Amendment.” *Gemperline v. Franano*, 2022-Ohio-3727, ¶ 14, 199 N.E.3d 587.

Courts applying *Noerr-Pennington* universally recognize that not all petitioning of the government, including the filing of lawsuits, protects actions that are a sham. “While *Noerr-Pennington* immunity is broad, it is not so broad as to cover all litigation: ‘Sham’ petitions don’t fall within the protection of the doctrine.” *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1183-84 (9th Cir. 2005). The sham exception serves to “weed out” attempts to use *Noerr-Pennington* as a shield where its application would not carry out its First Amendment bases. *See, e.g., Racetrac Petroleum, Inc. v. Prince George’s Cnty.*, 601 F. Supp. 892, 910 (D. Md. 1985), *aff’d*, *Racetrac Petroleum, Inc. v. Prince George’s Cnty.*, 786 F.2d 202 (4th Cir. 1986) (“The [sham] exception protects free speech and the governmental decision-making process by attaching liability to those who would act to muffle the voices of [others] seeking access to government.”).

b. *Cordova v. Cline*

This Court applied *Noerr-Pennington* – and recognized the sham exception – in *Cordova v. Cline*, 2017-NMSC-020. In that case, which involved a malicious prosecution action against members of an unincorporated organization that tried to institute a recall election to remove a member from a school board, this Court stated that “[t]he *Noerr-Pennington* doctrine protections are not absolute ... [t]o be entitled to First Amendment protection under the *Noerr-Pennington* doctrine, the activity must be genuine and not a mere sham.” *Cordova*, ¶ 27.

The Court set forth the following guidelines regarding the sham exception to *Noerr-Pennington*:

To constitute a sham, the petitioning activities must meet a two-part test. First, the petitioning activities “must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” [*Prof’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60]. Only upon a finding that the challenged activities are objectively baseless may the fact-finder proceed to the second element of the test—whether the subjective motivation underlying the challenged conduct was improper. *See id.* at 60-62, 113 S.Ct. 1920. (“Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation.”). In other words, for [a party] to overcome the *Noerr-Pennington* doctrine through the sham exception, he must first establish that [opposing party’s action] was objectively baseless in that it did not have sufficient factual or legal support. Upon such showing, [the party] must then establish that the primary purpose for the [opposing party’s action] was to effectuate an improper objective.

Id., ¶ 28.

The Court went on to state that “[i]n the context of the *Noerr-Pennington* doctrine’s protection of the First Amendment right to petition, courts require a heightened pleading standard for addressing allegations of misuse or abuse of process.” *Id.*, ¶ 29 (citing *Protect Our Mountain Environment, Inc. v. Dist. Ct. In & For Cty. Of Jefferson*, 677 P.2d 1361, 1369 (Colo.1984) (en banc)). Under the heightened standard, where a party seeks damages for conduct protected by the First Amendment, “conclusory allegations” are not sufficient. *Id.*, ¶ 30. A party must plead his claims with sufficient factual and legal specificity to establish that opposing party’s actions were a sham. *Id.*

This heightened standard is far from an insurmountable burden. Courts from other jurisdictions, in applying a heightened pleading standard to complaints in which *Noerr-Pennington* is at issue, have found that such a heightened standard does not justify dismissal at the pleading stage when sufficiently specific facts are alleged. *See, e.g., Scooter Store, Inc. v. SpinLife.com, LLC*, 777 F. Supp. 2d 1102, 1115 (S.D. Ohio 2011) (in the context of the sham exception to *Noerr-Pennington*, “whether a party’s conduct is a genuine attempt to avail itself of the judicial process or is merely a sham is a question of fact that is inappropriate for a motion to dismiss”); *Nabi Biopharm. v. Roxane Labs., Inc.*, 2007 WL 894473, at *4 (S.D. Ohio 2007) (finding that counterclaim alleging that suit was objectively baseless and for an improper purpose adequately stated a claim and should not be

dismissed on *Noerr-Pennington* grounds). Notably, a claimant need not specifically address the *Noerr-Pennington* defense and/or affirmatively plead the sham litigation exception to that defense. *Constr. Cost Data, LLC v. Gordian Group, Inc.*, 2017 WL 2266993, at *5-6 (S.D. Tex. 2017).

In the analogous context of fraud, which also has a heightened pleading standard (Rule 1-009 NMRA), even that elevated standard requires only that “the facts alleged are facts from which fraud will be necessarily implied and the claim asserted should be clear.” *Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 34, 135 N.M. 641; *Kysar v. BP Am. Prod. Co.*, 2012-NMCA-036, ¶ 28 (“our rules merely require pleadings to contain a short and plain statement of the claim or defense, and each pleading averment to be ‘simple, concise and direct,’ *even when pleading with particularity*”) (emphasis added).

c. The *New Mexican*’s pleading

Under these standards, the *New Mexican*’s counterclaim was sufficiently pled. The counterclaim included facts sufficient to set forth claims that Intervenor’s lawsuit was both objectively baseless and brought for a subjectively improper purpose.

1. The *New Mexican* properly pled the objectively baseless element of the sham exception.

In support of its claim that Intervenor's lawsuit was objectively baseless, the *New Mexican* alleged the following in its counterclaim [RP 750-772]:

29. The New Mexican has certain documents which [Intervenors] asked the court to prohibit The New Mexican from publishing, and to order The New Mexican to return those documents and all copies thereof.

34. The complaints, motions, and other papers filed by [Intervenors] sought to impose an unconstitutional prior restraint on the New Mexican.

35. [Intervenors] sought to prohibit The New Mexican from publishing information relating to the restructuring of public utilities, power plants, coal suppliers.

36. [Intervenors] asked the court to impose a blatantly unconstitutional prior restraint on the press, in violation of the free speech and petition clauses of the First Amendment, and the related provisions of the New Mexico Constitution. Any person seeking to obtain a court order preventing the press from publishing has a virtually insurmountable burden under the constitutions of the United

States and of New Mexico. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551-62 (1976). *See also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) – also known as the Pentagon Papers case.

37. At all times the law was well established that The New Mexican and other members of the press had an almost absolute First Amendment right against prior restraints. Prior restraints against the press are almost always unconstitutional, even when prior restraints are sought to protect other constitutional provisions, such as national defense, see the Pentagon Papers case, or the right to a fair trial, see *Nebraska Press Ass'n*.

38. The New Mexican is protected by an almost absolute constitutional immunity against prior restraints. The defendants knew this before they acted against The New Mexican, but they acted anyway.

39. The conduct of all the defendants violates clearly established statutory or constitutional rights which a reasonable person would have known.

40. [Intervenors] have no valid legal or factual basis for the relief which they seek against The New Mexican.

Under *Cordova*, these assertions are more than adequate to survive dismissal on the pleadings on the objective element of the sham exception. The counterclaim, at ¶ 40, specifically states that Intervenor’s “have no valid legal or factual basis for the relief which they seek against The New Mexican.” **[RP 756]** Indeed, it is difficult to imagine, given the facial invalidity of the Intervenor’s request for an unconstitutional prior restraint, what more the *New Mexican* could have alleged to meet the requirement to plead that the claims it was facing were objectively baseless.

Intervenor’s argued in the district court that they had a right to argue that a prior restraint, though constitutionally disfavored, was appropriate in this instance. However, their motions to intervene and their complaints included no facts or argument establishing extraordinary circumstances justifying such relief. And even if they had, this argument would require factual resolution, and could not be resolved on the pleadings. *See, e.g., Scooter Store, Inc., et al., supra.*

Furthermore, the district court, urged by Intervenor’s, took an improper detour in evaluating whether the counterclaim sufficiently alleged that the lawsuit was not objectively reasonable. Specifically in granting the motions to dismiss, the district court improperly relied on the prior judge’s grant of Intervenor’s motion to intervene. The court concluded that because his predecessor had granted Intervenor’s unopposed motions to intervene, the court had “necessarily

found that PNM and BHP had a legitimate interest to protect implicating the *Noerr-Pennington* doctrine.” **[RP 3397]** In so ruling, the court adopted PNM’s argument that the claims in intervention were insulated from attack under *Cordova*’s sham exception. **[RP 3354]**⁸ This conclusion is plainly error.

Permission to intervene under Rule 1-024 NMRA does not constitute a finding, for *Noerr-Pennington* purposes or any other purpose, that the intervenor’s claim is not objectively baseless. Under Rule 1-024, all that a proposed intervenor has to show is that it has a sufficient interest in the outcome of the action to warrant intervention, and that its interests will be jeopardized if intervention is not allowed. *Thriftway Mktg. Corp. v. State*, 1990-NMCA-115, ¶ 2, 111 N.M. 763; *see also New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 17, 126 N.M. 788 (“the requirements for intervention as of right seem to accord with the general requirements for standing”). This Court, in *Solon v. WEK Drilling Co., Inc.*, 1992-NMSC-023, ¶ 5, 113 N.M. 566, established that when a court considers intervention, it may but is not required to pass on the merits of the intervenor’s claims. And nothing indicates that the district court in this case actually made any determination regarding the merits of the complaints in intervention. The court entered the order permitting intervention days after Intervenors moved to

⁸ BHP adopted this same argument before the Court of Appeals. BHP Answer Brief, at 25.

intervene, with no hearing or briefing, and without the *New Mexican* having filed any response in opposition. **[RP 193-194]** Nothing in the court’s order indicates that it considered the legal sufficiency of the proposed complaints in intervention and certainly not the validity of the requests for prior restraint, as to which it had already denied a temporary restraining order. *Id.*

The district court’s ruling, if permitted to stand by this Court, would mean that any time an intervening party has or raises a *Noerr-Pennington* defense, the mere fact that intervention had been permitted would serve to bar an opposing party from asserting the sham exception. This is not the law, and this Court should clarify for district courts that they are free to grant intervention when warranted under the existing standards of Rule 1-024, and that doing so will not reflect any endorsement of the merits of the intervenor’s claims.

2. The *New Mexican* properly pled the subjective element to the sham exception.

As to the subjective element of the “sham” exception of *Cordova* (that Intervenors brought their claim with improper motivation), the counterclaim **[RP 750-772]** alleged:

30. [Intervenors] were “intertwined in a symbiotic relationship” to injure the New Mexican and infringe its constitutional rights.

33. This lawsuit is part of a conspiracy and joint action by ... [Intervenors] to violate and chill the First Amendment rights of the New Mexican.

41. [Intervenors] acted with willful or knowing disregard for The New Mexican's rights, and with deliberate indifference or reckless disregard for those rights.

44. The threats and demands and other actions by [Intervenors] damaged The New Mexican's news reporting. These threats and demands chilled and impaired the newspaper's reporting – its core business – by forcing The New Mexican to deal with the demand letter and subsequent lawsuit, impeding the newspaper's examination and reporting of the actual information in the documents, and diverting time and resources which otherwise would have been spent generating revenue for The New Mexican.

48. [Intervenors] claimed that The New Mexican is prohibited from publishing by the order which the PRC hearing examiner issued on February 21, 2014. This claim was false.

54. PNM falsely stated in its court filings that PNM is not a party to the stock purchase agreement between BHP and Westmoreland.

59. [Intervenors] conspired with the PRC to seek an unconstitutional prior restraint against *The New Mexican*.

61. [Although PNM asserted in its intervention pleadings that certain documents were trade secrets], the documents are not trade secrets.

These allegations sufficiently stated that the subjective element of the sham exception applied. The *New Mexican* specifically alleged that Intervenors acted to injure the *New Mexican* and infringe its constitutional rights, and that the lawsuit itself was part of a conspiracy and joint action by Intervenors to violate the *New Mexican's* constitutional rights.

As noted above, at the pleading stage, it was not for the district court or this Court to address the substantive merits of the counterclaim. Even when applying a heightened pleading standard, a district court and a reviewing court must accept as true all facts well pleaded and question only whether the plaintiffs might prevail under any state of facts provable under the claim. *Williams v. Stewart*, 2005-NMCA-061, ¶ 9, 137 N.M. 420; *see also Cordova*, 2017-NMSC-020, ¶¶ 34, 38. Under this standard, dismissal of the counterclaim was improper.

B. The Court of Appeals Erred in Concluding that the *New Mexican* Did Not Adequately Plead or Argue Both Elements to the Sham Exception to *Cordova v. Cline*.

The Court of Appeals’ affirmance of the district court was in error. The Court of Appeals did not adopt the district court’s assertion that its allowance of the intervention by Intervenors necessarily defeated the objective element of the sham exception. Instead, the Court of Appeals based its decision solely on its conclusion that “the *New Mexican*’s arguments before the district court as well as those contained in its appellate briefing suffer from a fatal structural flaw;” namely, that the *New Mexican* argued “*only* that it had established a subjective illegitimate motive—‘a prior restraint against the news media’” and that even if the Court were to conclude that the *New Mexican* was correct on the subjective element of the sham exception, it had no basis for reversal because “the *New Mexican* has presented no argument as to the objective element—that the complaints in intervention ‘lacked sufficient factual or legal support.’” Decision, at 5-6.⁹

Because this Court has granted the *New Mexican*’s petition for writ of certiorari, and must conduct a *de novo* review of the district court’s dismissal of the counterclaim, this Court need not address whether the Court of Appeals was

⁹ The Court of Appeals did not address whether the *New Mexican*’s counterclaim made adequate allegations concerning the Intervenors’ improper motives in intervening (the subjective element of the *Cordova* sham exception).

correct in determining that the *New Mexican* did not present argument on certain issues. However, if this Court chooses to address this point, it should find that the Court of Appeals was incorrect on this point.

The Court of Appeals overlooked that the *New Mexican* did plead in its counterclaim and did argue, in both courts, that Intervenors' claims were objectively baseless. As to pleadings, the excerpts of the counterclaims cited above show that the *New Mexican* more than adequately alleged the objective baselessness of Intervenors' actions. And, contrary to the Court of Appeals' conclusion, the *New Mexican* also argued in its briefs in the Court of Appeals and the district court that the Intervenors' claims were objectively baseless.

At the Court of Appeals, the *New Mexican* asserted in its brief in chief that Intervenors submitted their complaints-in-intervention "without probable cause," and that the complaint was flatly contrary to U.S. Supreme Court authority regarding prior restraints. Brief in chief to Court of Appeals, 18. The *New Mexican* further asserted that "any reasonable investigation of the law and the known facts would have shown that the complaint could not be granted," and that "PNM was represented by experienced attorneys who should have known that their objective was constitutionally forbidden." *Id.*

The *New Mexican* restated these arguments in its reply brief, noting "PNM and BHP sought relief – a prior restraint against publication – that clearly violates

the First Amendment protections which the United States Supreme Court has extended to the news media. The Supreme Court has noted that the First Amendment’s ‘chief purpose’ is to prevent ‘previous restraint upon publication.’ *Near v. Minnesota*, 283 U.S. 697, 713 (1931). This strong presumption against prior restraints can be overcome only in ‘exceptional cases.’ *Id.* at 716. In fact, ‘the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial.’ *See Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).” Reply brief to Court of Appeals, 8-9. The *New Mexican* further asserted that Intervenor’s lacked probable cause to file suit, and also explained more expansively how Intervenor’s pleadings failed even to address the constitutional infirmities in their effort to obtain injunction relief. *Id.*, 8-12.¹⁰

At the district court, in responding to the motion to dismiss, the *New Mexican* made similar arguments that, combined with the express allegations of the counterclaim, sufficiently met the *Cordova* requirements. [RP 3337-38] (the *New Mexican*’s argument addressing the subjective improper motive in context of evidence supporting claim for abuse of process); [RP 3326] (explaining that

¹⁰ The amicus curiae brief submitted to the Court of Appeals by the Reporters Committee for Freedom of the Press and 24 media organization made these arguments as well. Brief of Amici Curiae, at 7-14.

Intervenors' lawsuits were "contrary to well-established law"); [RP 3327] (describing Intervenors' claims as "frivolous" and "malicious.").

The Court of Appeals erred in determining that the *New Mexican* had not argued the objective element, and this Court should not uphold the district court on this basis.

C. If the Court of Appeals' Decision is Left Undisturbed, Parties Who Face SLAPP Suits Seeking to Squelch Public Debate Will Face Insurmountable Hurdles in Bringing Claims for Malicious Abuse of Process.

As the 25 amici argued to the Court of Appeals, the danger of misapplying *Cordova* to impose an impossible barrier to bringing counterclaims against litigants who bring abusive lawsuits seeking to squelch public debate is that litigants will be authorized to intimidate, harass and threaten news organizations (and citizens), free in the knowledge that those they sue will face an almost insurmountable hurdle to sue back. Consideration of the reasons underlying the *Cordova* pleading rule counsels in favor of a pleading standard reflecting a balance between protecting litigants who exercise their First Amendment rights through litigation and preserving the rights of litigants facing sham lawsuits. That balance is not reached by a pleading rule that requires more than what the *New Mexican* alleged here.

III. RELIEF SOUGHT

The *New Mexican* requests that the Court find that the Second Amended Answer and Counterclaim satisfies the pleading standard of *Cordova*, and remand this case with instructions to the district court to address on the merits the claims dismissed by its judgment on the pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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