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.

PUBLIC SERVICE COMPANY OF NEW MEXICO'S ANSWER BRIEF

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

As required by Rule 12-318(G) NMRA, we certify that this brief complies with the type-volume limitation of Rule 12-318(F)(3) NMRA. According to Microsoft Office Word 365, the body of this brief, as defined by Rule 12-318(F)(1) NMRA, contains 8,435 words.

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Pursuant to Rule 12-318(B) NMRA, Appellee Public Service Company of New Mexico ("PNM") files this Answer Brief response to the Brief in Chief ("BIC") filed by Appellant The Santa Fe New Mexican ("SFNM"), and requests this Court to quash the writ of certiorari issued in this case, and alternatively to affirm the district court's December 4, 2019 Order [RP 3393] dismissing the SFNM's Counterclaim with Prejudice.

I. SUMMARY OF PROCEEDINGS

Appellee Public Service Company of New Mexico ("PNM") submits this summary of the proceedings to ensure the Court has an accurate statement of the material necessary to consider the issues on appeal and to help it avoid extraneous matters. *See* Rule 13-318(A)(3) and (B) NMRA.

A. Introduction.

Most of the pertinent facts involve the sequence and timing of court filings in the week after the New Mexico Public Regulation Commission ("PRC") started this litigation. This appeal arises from judgment on the pleadings entered five years later in favor of PNM and BHP Billiton New Mexico Coal, Inc. ("BHP").

This case began after the PRC mistakenly produced confidential documents to SFNM in response to an Inspection of Public Records Act ("IPRA") request. The confidential documents were exempt from IPRA production because they had been filed under protective order in a regulatory matter before the PRC.

PNM had submitted the confidential documents to the PRC. When the PRC realized its mistaken production, it notified PNM of its error and then the PRC continued to work to remedy the problem it had created—ultimately filing this suit as the sole plaintiff seeking a Temporary Restraining Order and related relief to recover the documents.

Less than a day after suit was filed, the district court held an emergency TRO hearing at which the court inquired whether other parties such as PNM would participate, orally denied the PRC's requested TRO without prejudice, set very short deadlines for filing motions to intervene and other papers to be considered, and set a follow-up hearing for the following week.

PNM and others filed motions to intervene prior to the court's set deadline. Before the court ruled on the motions for intervention, the SFNM filed an "Answer and Counterclaim" asserting claims against the PRC *and* the prospective intervenors. The morning before the follow-up hearing, the SFNM published the confidential documents on its website.

Publication mooted the intervenors' purpose for litigating, and they sought to withdraw from the litigation without filing their complaints-in-intervention. The SFNM objected to their withdrawals and the court ultimately refused the withdrawals.

The district court ultimately found the SFNM's claims against the intervenors to be entirely based on their motions to intervene, and therefore a violation of the intervenors' First Amendment right to petition as articulated in the *Noerr-Pennington* doctrine. Accordingly, the district court dismissed the SFNM's claims.

B. The complaint, motions to intervene, answer and counterclaim, and publication.

On August 6, 2015, the PRC filed this litigation to retrieve confidential documents it accidentally produced to the SFNM in a response to its IPRA request. [RP 1-90]. The PRC's petition included a request for TRO, and the district court held an emergency TRO hearing the next day. [*See generally* 8/7/2015 Tr.].

Only counsel for the PRC and the SFNM appeared at the emergency TRO hearing. [RP 193; 8/7/2015 Tr.]. At its start the district court noted it did not believe all interested parties were participating. [8/7/2015 Tr. 4:59:46 to 5:01:50]. The district court surmised, and counsel for both the PRC and the SFNM agreed that PNM and other parties would desire to participate in the proceedings [8/7/2015 Tr. 5:02:56 to 5:04:20], and the district court set a hearing for the following week "to give the interested parties enough time to brief what they need to brief." [8/7/2015 Tr. 5:38:03 to 5:38:16]. A few days later, on August 11, the court entered its order denying the PRC's requested TRO without prejudice, and recited its basis for the denial [RP 193-194].

In the meantime, on August 10, the district court entered its order giving notice of the follow-up hearing (set for August 13), ordered all motions to intervene be filed by noon on August 11, and "any paper to be considered" be filed by August 12 at noon. [RP 95-96]. In its notice the court also requested "briefing from the New Mexico Attorney General's ("AG") Office, regarding issues involving the Inspection of Public Records raised in the Petition." [RP 95-96].

Shortly after the TRO hearing concluded on August 7, PNM filed its motion to intervene [RP 50-90], followed by two other parties' motions on Monday, August 10.[1] [RP 97-174, 179-192]. Attached to PNM's motion was its proposed Complaint-in-Intervention. That proposed complaint was unsigned and its certificate of service had a blank for its service date which was also unsigned. [RP 63]. Five days later, on August 12, in order to comply with the district court's deadline for filing items to be considered at the upcoming hearing [RP 96], PNM filed an Application for

[1] Co-Appellee BHP, was one of these intervenors. The other, Westmoreland Coal Company, filed bankruptcy in October 2017 [RP 3007-08] and stopped participating in the litigation. Westmoreland eventually received a discharge in bankruptcy in 2019. [RP 3125-3291]. The PRC ultimately resolved its dispute with the SFNM in October 2015. [RP 462, 518].

Preliminary Injunction.[2] [RP 195-227]. At that time, the district court had not yet ruled on any of the motions to intervene. [*Compare* RP 195 *with* RP 270].

Late in the morning of August 12, the AG's Office filed a brief on the IPRA issues raised in the PRC's petition as requested by the court. [RP 264-69; RP 95-96]. In its brief, the AG's Office noted that simply because IPRA did not have a mechanism for a public agency to recover inadvertently produced records that "does not necessarily mean that the public agency or third party lacks any legal recourse. A party may request judicial intervention under other legal theories to prevent the distribution or use of documents in which the party claims some proprietary interest, such as a trade secret." [RP 268].

On the afternoon of August 12—before any ruling on the motions to intervene—the SFNM filed an "Answer and Counterclaim" against the PRC and all intervenors. It contained only general denials of all allegations in the PRC's petition and the proposed complaints-in-intervention, and a vague one-paragraph counterclaim that "the plaintiffs" were infringing on the SFNM's constitutional rights. [RP 251-53].

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[2] PNM filed its Application for Preliminary Injunction before the court granted intervention. The SFNM never responded to the Application and the court never heard it.

The follow-up hearing—at which any motions to intervene and "other papers to be considered" were to be heard—was set for the late afternoon of August 13. [RP 95-96]. That morning the court granted intervenors' motions to intervene [RP 270-71], and the SFNM published the confidential documents on its website. [8/13/2015 Tr. 7:1-4].

C. Order granting intervention and attempts to withdraw by the intervenors.

On the morning of August 13, the district court entered its "Order Approving Intervenors" in which it granted the three pending motions to intervene. [RP 270-71]. The order said nothing about whether the proposed complaints-in-intervention were deemed filed.

The SFNM's nearly simultaneous publication of the confidential documents mooted the intervenors' interest in litigating for them, thus the intervenors began preparing and filing withdrawals of their motions to intervene. [8/13/2015 Tr. 4:24-5:2, 6:11-6:18; RP 272-73, 274-75, 276]. Unfortunately, the district court's file-and-serve system did not deliver the order granting intervention until later that day, and so two intervenors attempted to withdraw their motions to intervene without realizing their motions had been granted. [8/13/2015 Tr. 5:24-6:13; RP 272-73, 274-75]. PNM received the order granting intervention before it filed its withdrawal, and so PNM instead filed a Notice of Withdrawal as Intervenor, in which it specifically

noted that it had not filed its proposed (and still unsigned) complaint-in-intervention. [RP 275-76].

At the follow-up hearing, instead of arguing the TRO as originally scheduled, the parties discussed the intervenors withdrawing from the litigation [8/13/2015 Tr. 5:24-7:12, 9:16-18, 10:6-7], and their as yet unfiled complaints-in-intervention. [8/13/2015 Tr. 7:11-12, 9:20-22, 10:7-10]. The SFNM asserted that its Answer and Counterclaim [RP 251-53] applied to the intervenors because the motions to intervene had the proposed/draft complaints-in-intervention attached to them as exhibits. [8/13/2015 Tr. 7:8:2-4, 9:19-21]. The intervenors argued that this was procedurally defective because the complaints-in-intervention had not been filed and therefore the Answer and Counterclaim was premature against the intervenors. [8/13/2015 Tr. 8:21-9:2, 9:20-22, 10:7-10]. No decision on the effect of the SFNM's Answer and Counterclaim (which was filed *before* the district court allowed intervention) or the effect of the intervenors' withdrawals was made at that follow-up hearing.

After the hearing, the intervenors filed notices of dismissal. [RP 277-78, 279-80, 281-82]. In response, the SFNM filed its First Amended Answer and

Counterclaim[3] in which it expanded its claims [RP 284-333], and also filed a written response to the notices of withdrawal and dismissal in which it opposed the intervenors exiting the case. [RP 344-353]. The SFNM argued the intervenors' attempts to withdraw were nullities because they were filed after its Answer and Counterclaim, and that the intervenors could not dismiss their proposed complaints-in-intervention because the SFNM had already answered the proposed/draft complaints and filed counterclaims (despite being before intervention was granted). [RP 345-46]. PNM filed a reply arguing that the rules of civil procedure required a proposed complaint-in-intervention be attached to a motion to intervene, and that caselaw required a separate filing of the complaint-in-intervention if the district court granted intervention. [RP 354-56].

PNM and BHP also filed motions to dismiss in which they argued, among other things, that the complaints-in-intervention had not been signed or separately filed, and thus the complaints-in-intervention were not active [RP 370, 403-05], and in any event had been voluntarily dismissed because the SFNM's original Answer and Counterclaim was prematurely filed, and the notices of dismissal had been filed the SFNM's filing of an actually-responsive pleading. [RP 371-72].

[3] On July 27, 2016, the SFNM filed a Second Amended Answer and Counterclaim which added headings to its petition but made no substantive changes to the first amended Answer and Counterclaim. [RP 750-72].

The SFNM argued to keep all parties in the case, filing a response in which it argued (without authority) that attaching a proposed complaint-in-intervention to a motion to intervene constituted the filing of the complaints-in-intervention. [RP 430-32].

The court ultimately entered its order, ruling that the notices of dismissal were ineffective and that the intervenors were bound in the case, but it indicated a willingness to consider language to certify the issue for an interlocutory appeal. [RP 518-30]. The intervenors submitted applications for certification and attached proposed forms of order. [RP 571-80, 583-88] The SFNM emailed the district court its own proposed form of order with markedly different language, which the district court modified slightly and entered without hearing.[4] [RP 593-94]. PNM filed its application for interlocutory appeal [RP 603-73], which the New Mexico Court of Appeals ("NMCOA") denied. [RP 674-75].

D. The SFNM's claims, and application of the *Noerr Pennington* Doctrine.

The SFNM's Second Amended Answer and Counterclaim generally denied the claims in the complaints-in-intervention [RP 753 ¶ 27], and alleged that PRC and the intervenors had engaged in a conspiracy to violate the SFNM's First Amendment rights by participating in this lawsuit and seeking a prior restraint on publication.

[4] The SFNM's submission of a competing form of order, and the court's entry of it skirted the requirements of Rule 1-058(C) NMRA.

[RP 754-56, 759, 762, 765-74]. The SFNM asserted that the PRC and intervenors committed malicious abuse of process [RP 766], civil conspiracy [RP 769], *prima facie* tort [RP 770], and violated its First and Fourteenth Amendment Rights [RP 767], due process rights [RP 767], 42 U.S.C. §§ 1983 and 1985 [RP 767-68], the New Mexico constitution [RP 768], the Inspection of Public Records Act [RP 769], the New Mexico Open Meetings Act [RP 769], the quorum and majority vote laws [RP 770], the Trade Secrets Act [RP 770], and the Unfair Practices Act [RP 770].

Each of the SFNM's claims focused on the PRC's filing of its complaint and the intervenors' motions to intervene (and the proposed complaints-in-intervention attached to those motions). The intervenors ultimately filed motions for judgment on the pleadings based on the *Noerr-Pennington* doctrine as adopted by the New Mexico Supreme Court in *Cordova v. Cline,* 2017-NMSC-020. [RP 1922-31, 3294-3307, 3308-17].

In their briefs, the intervenors argued that none of the SFNM's allegations in its counterclaim demonstrated it had met the heightened pleading standard adopted in *Cordova*. [RP 1924-28, 3300, 3310-14]. In response, the SFNM never explained how its allegations demonstrated that the intervenors' pleadings were shams or were objectively unreasonable, which the intervenors pointed-to in their reply briefs. [RP 3357-61, 3373-75].

The district court heard the motions for judgment on the pleadings on November 25, 2019 [*see generally* 11/25/2019 Tr.], and granted the motions on December 4, 2019. In its order, the district court recognized that the SFNM conceded that its claims arose out of the motions to intervene. [RP 3395; *see also* 11/25/2020 Tr. 10:49:35 to 10:49:41]. The district court also noted that the SFNM had failed to plead facts showing the intervenors' actions were both objectively baseless and for an improper purpose, and thus the SFNM could not establish the sham exception in the *Noerr-Pennington* doctrine as adopted in *Cordova*. [RP 3393-3400]. While the court observed that its order allowing intervention "necessarily found that PNM and BHP had a legitimate interest to protect" [RP 3397], its dismissal did not turn on that, but instead focused on the SFNM's failure to meet the heightened pleadings standard established in *Cordova* [RP 3399]. Furthermore, the court observed that although the SFNM had alleged that its rights as a member of the press were "almost" absolute, jurisprudence established that constitutional rights such as freedom of the press were all "relative" and that "none are absolute." [RP 3395].

The SFNM moved for reconsideration of that order [RP 3401-02], to which PNM and BHP responded [RP 3411-14, 3415-17]. The SFNM failed to file a reply, never requested a hearing on that motion, and later abandoned that motion at subsequent hearing on presentment of the form of judgment. [*See* 2/17/2020 Tr. 1:26:40 to 1:29:20]. While the SFNM's briefing states that PNM still has active

claims against it that it will still need to defend against (BIC at p. 5), PNM has committed to the district court that it intends to dismiss any claims it has if it prevails in the SFNM's appeal. [RP 3393; RP 3407][5].

E. Confidentiality of the accidentally produced documents.

The documents the PRC accidently provided to the SFNM were confidential. The documents consisted of Stock Purchase Agreements and several Coal Agreements that pertained to supply, sale, pricing, and reclamation services. [RP 196-99]. However, the issue of confidentiality of those documents is irrelevant to the issues on appeal because they have not been—and indeed could not be—decided by the district court. Much of the SFNM's arguments to the district court and court of appeals challenged the confidentiality of the documents, but the SFNM's BIC to this Court has abandoned this topic. Nevertheless, to ensure the Court has an accurate understanding of the PRC proceedings that led to the confidential documents filed there, why they were confidential, and why they continued to be treated as confidential when this litigation began, PNM states as follows:

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[5] PNM has consistently taken the position that it never filed its Complaint-in-Intervention and its withdrawal from this litigation was proper. PNM sought interlocutory appeal with the NMCOA on that issue [RP 603-73]. Nonetheless, the district court's ruling [RP 518-30] suggests that PNM's proposed Complaint-in-Intervention was properly filed, and the SFNM correctly filed its answer and counterclaim. Therefore, law of the case would suggest that PNM has live claims pending against the SFNM.

The confidential documents arose out of a utility proceeding filed by PNM with the PRC in 2013 in which PNM was requesting to abandon part of the San Juan Generating Station and issuance of certificates of public convenience and necessity to replace the retired capacity of certain generation resources. [RP 2]. The PRC regulates electric utilities and has exclusive jurisdiction for matters such as those raised in that 2013 petition. [RP 2]. In the exercise of that jurisdiction, the PRC operates pursuant to state statute, and holds administrative proceedings for which it has promulgated rules, regulations and procedures. [*See generally* RP 2-4].

In conformity with those procedures, a hearing officer was designated by the PRC to handle the 2013 petition, who then entered a protective order. [RP 3]. The PRC's protective order created a procedure which allowed a party to identify as "confidential" whatever proprietary information or documents it needed to submit as part of those proceedings, and then file that information with the PRC under protection of the protective order. [RP 3]. Under the protective order, a "confidential" designation is neither absolute nor a ruling on actual confidentiality—instead the protective order provided mechanisms to allow others participating in the proceeding to challenge claims of confidentiality. [RP 3-4]. Those challenges could lead to determinations of confidentiality. [*Id.*]. This confidentiality process is utilized by the PRC to meet certain exceptions contemplated by the various public records laws. [RP 3].

In reliance on the protective order, PNM submitted confidential documents to the PRC. [RP 4]. Despite dozens of other parties participating in the proceedings concerning the 2013 petition, none of them challenged the protective order or the designation of confidentiality. [RP 4]. While it could have participated in the proceedings, the SFNM did not [RP 38-42 (listing the service matrix for the 2013 PRC proceeding)], and therefore it did not challenge the confidentiality of the documents in those PRC proceedings.

On June 24, 2015, the PRC entered an order stating that if PNM desired to rely on the confidential documents at final hearing on the 2013 proceedings, it would need to file the documents publicly. [RP 1274 ¶ D; 8/7/2015 Tr. 5:26:30-5:27:45]. PNM immediately moved for reconsideration of the hearing officer's order. [RP 1279-1289]. About a month later, with the motion for reconsideration still pending, the PRC inadvertently released the documents to the SFNM. [RP 4]. However, the documents were still protected by the protective order, were still PNM's confidential information, and still considered by PRC to be confidential. [RP 4-5].

II. STANDARD OF REVIEW

The district court's grant of a motion for judgment on the pleadings is reviewed *de novo* on appeal. *Vill. of Angel Fire v. Bd. of Cty. Comm'rs of Colfax Cty.*, 2010-NMCA-038, ¶ 5, 148 N.M. 804, 242 P.3d 371. On review, this Court accepts as true "all facts well pleaded" and will accord the same standard of review

"as motions for failure to state a claim under Rule 1-012(B)(6) NMRA." *Id.* A party resisting dismissal pursuant to the *Noerr-Pennington* doctrine must also satisfy the heightened pleading standard and demonstrate that the moving party's petitioning activity is a "sham." *Cordova v. Cline*, 2017-NMSC-020, ¶27, 396 P.3d 159. Accordingly, the non-moving party must show that the petitioning activity was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" with "sufficient factual or legal support," and must also show that the moving party's "subjective motivation underlying the [petitioning activity] was improper." *Id.* at ¶ 28. Under the heightened standard, "conclusory allegations are not sufficient to strip a defendant's activities of *Noerr-Pennington* protection." *Id.* at ¶ 29 (quotations and alterations omitted).

III. ARGUMENT

The SFNM has been perpetuating this litigation since August 2015. PNM's involvement in this case began against the backdrop of the district court's belief at the first hearing on August 7, 2015, that not all of the interested parties were present, and that other parties should have the opportunity to intervene. [8/7/2015 Tr. 4:59:46 to 5:04:20, 5:35:00 to 5:36:30]. Following that hearing, PNM sought intervention in the PRC's case so that it could be part of the proceedings that would determine the fate of the inadvertently released documents.

The SFNM's August 12, 2015, Answer and Counterclaim against the three intervenors was premature, and the district court did not grant intervention until the following day. The Answer and Counterclaim was also submitted before the complaints-in-intervention were filed (and the intervenors contend they were never filed).

A prospective intervenor is not a party before an order is entered and a complaint-in-intervention filed. *Lebeck, State ex rel., v. Chavez*, 1941-NMSC-016, ¶ 19, 45 N.M. 161, 113 P.2d 179. The SFNM's Answer and Counterclaim was a nullity. *Id.* ¶ *23* (holding movant intervenor's affidavit to disqualify judge untimely because it preceding an order granting intervention).

With the answer and counterclaim a nullity, the district court was incorrect when it ruled that the intervenors could not voluntarily withdraw from the matter by abandoning their complaints or withdrawing their motions. Additionally, the SFNM could not correct this procedural error by amending its Answer and Counterclaims because PNM never filed its complaint. The district court rejected this argument [RP 518-64] and PNM briefed this issue to the NMCOA seeking interlocutory review [RP 603-73] which the NMCOA denied [RP 674-75]. *See State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("Under the 'right for any reason' doctrine, 'we may affirm the district court's order on grounds not relied upon

by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below.'").

A. The *Noerr-Pennington* doctrine and the holding in *Cordova v. Cline,* 2017-NMSC-020.

The SFNM conceded to the district court that its claims against PNM arose out of its motion to intervene in this case [RP 3395-96; *see also* 11/25/2020 Tr. 10:49:35 to 10:49:41], and it does not argue otherwise on appeal (*see generally* BIC). Put another way, the SFNM made counterclaims against PNM in retaliation for PNM seeking intervention, and the basis for those counterclaims all stem from PNM's petitioning activity to the district court.

The *Noerr-Pennington* doctrine protects the First Amendment right to petition the government. It shields a party from retaliation because of petitioning activity, provided the petitioning activity is not a sham. *Cordova v. Cline,* 2017-NMSC-020, ¶ 24, 396 P.3d 159. In *Cordova*, this Court held that the *Noerr-Pennington* doctrine entitles a petitioner in a court action to immunity when the petitioner exercises their right to petition. 2017-NMSC-020, ¶ 1 ("We also conclude that the petitioners are entitled to immunity under the *Noerr-Pennington* doctrine when they exercise their right to petition[.]"). In that case, the petitioners initiated a petition to recall Aresnio Cordova from his office as a local school board member. *Id.* At the hearing on the recall petition, the petitioners dismissed their recall petition. *Id.* ¶ 5. Cordova then filed suit against the petitioners alleging malicious abuse of process, civil

conspiracy, and *prima facie* tort. *Id.* ¶ 6. In response, the petitioners filed motions to dismiss, arguing that Cordova's complaint was in "retaliation for their petitioning activity and thus violated their right to petition under the First Amendment[.]" *Id.* ¶ 7.

In affirming the dismissal of Cordova's retaliatory complaint, this Court noted that under the *Noerr-Pennington* doctrine, "those who engage in conduct aimed at influencing the government, including litigation, are shielded from retaliation provided their conduct is not a sham." *Id.* ¶ 24; *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (extending *Noerr-Pennington* protections to "the right to petition ... all departments of the [g]overnment" including administrative agencies and courts). This Court recognized that the doctrine's protections "are not absolute," and observed that to be entitled to the First Amendment protection for the right to petition, "the activity must be genuine and not a mere sham." *Id.* ¶ 27. Sham petitions lack "a genuine, legitimate purpose of procuring favorable governmental action[.]" *Id.* ¶¶ 27, 39 (citing to *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991), with approval and noting that 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.").

In analyzing whether a petitioning activity constitutes a "sham," the two-part test articulated in *Professional Real Estate Investors., Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49, 60-62 (1993) is applicable. *See Cordova,* 2017-NMSC-020 ¶ 28. Under the test, a court first must determine if the petitioning activity is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* ¶ 28. If the petitioning activity is objectively baseless, the court may advance to the second part of the test. *Id.* ("Only upon a finding that the challenged activities are objectively baseless may the fact-finder proceed to the second element of the test[.]") (citing *Prof'l Real Est. Inv'rs, Inc.*, 508 U.S. at 60-62). Under the second part of the test, the factfinder examines "whether the subjective motivation underlying the challenged conduct was improper." *Id.* Importantly, the doctrine's "protection of the First Amendment right to petition" requires a "heightened pleading standard for addressing allegations of misuse or abuse of process." *Id.* ¶ 29. The "heightened standard" is "necessary to avoid a chilling effect on the exercise of this fundamental First Amendment right" and "conclusory allegations" are "not sufficient to strip a defendant's activities of *Noerr-Pennington* protection." *Id.* (internal quotations and citations omitted).

B. This Court should affirm because there is no showing that PNM's petitioning activity was "objectively baseless" under the first prong of the sham exception to the *Noerr-Pennington* doctrine.

This Court should affirm the district court's and the Court of Appeals' decisions for numerous reasons. The SFNM did not adequately plead (or argue) that PNM's Motion to Intervene was objectively baseless, the district court necessarily found that PNM had a legitimate interest to protect when it permitted intervention (thus implicating the *Noerr-Pennington* doctrine), and as a matter of law, PNM's Motion to Intervene was not "objectively baseless."

1. As a matter of law, PNM's Motion to Intervene was not "objectively baseless."

As an initial matter, the SFNM appears to suggest that dismissal of its counterclaims was inappropriate pursuant to PNM's motion for judgment on pleadings. Specifically, the SFNM cites to *Scooter Store, Inc. v. SpinLife.com, LLC*, 777 F. Supp. 2d 1102 (S.D. Ohio 2011), and argues that the heightened pleading standard required for a non-moving party to show the sham exception "does not justify dismissal at the pleading stage when sufficiently specific facts are alleged." BIC at p. 11. Although the SFNM provides no further argument on this point, to the extent that it suggests that a party may not obtain relief under the *Noerr-Pennington* doctrine pursuant to a motion to dismiss or motion for judgment on the pleadings, the SFNM is mistaken.

The *Scooter Store* court's holding was focused on whether a party's conduct was "a genuine attempt to avail itself of the judicial process or [was] merely a sham[.]" *Scooter Store, Inc,* 777 F. Supp. 2d at 1115 (S.D. Ohio 2011). Put another

way, the court was analyzing application of the second prong, not the first. *See Ashley Furniture Indus., Inc. v. Am. Signature, Inc.*, 2015 WL 12999664, at *4 (S.D. Ohio Mar. 12, 2015) (discussing the *Scooter Store* holding and suggesting that "whether protest was genuinely intended to influence the government is a question of fact" which pertains to "the subjective *intent* prong of the sham exception," but "whether a lawsuit is objectively baseless may be decided as a question of law.") (emphasis in original).

Under the first prong, a court must review whether the subject petitioning activity was "objectively baseless," and a court should examine whether "no reasonable litigant could realistically expect success on the merits." *Id.* at ¶ 28. This question was appropriately addressed pursuant to PNM's motion for judgment on the pleadings. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 927, 942 (9th Cir. 2006) (analyzing and applying the *Noerr-Pennington* doctrine and affirming dismissal of district court's ruling following a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim); *Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 532, 535-36 (9th Cir. 1991) (affirming the district court's granting of a motion to dismiss pursuant to the *Noerr-Pennington* doctrine and concluding that the non-moving party "failed to plead with particularity that [the moving party's] suit to enjoin… was a sham."). Contrary to the SFNM's suggestion, it was not error for the

district court to consider the SFNM's counterclaims under the heightened threshold pursuant to PNM's motion for judgment on the pleadings.

PNM argued in its motion for judgment on the pleadings that the SFNM's claims were premised on PNM's Motion to Intervene in this case. [RP 3295-96]. PNM also argued that it met the requirements to intervene under Rule 1-024 NMRA [RP 52-56], and it asked the court for "leave to intervene" [RP 56]. In accordance with Rule 1-024 NMRA, PNM submitted its motion "accompanied by a pleading setting forth the claim or defense for which intervention is sought." PNM's accompanying *draft* Complaint-In-Intervention argued that the SFNM was in violation of New Mexico's Uniform Trade Secrets Act (NMSA 1978, § 57-3A-1 to -7).

Put simply, PNM's petitioning activity (its Motion to Intervene) established that it met the requisite requirements to intervene as a matter of law [RP 50-56], and the district court agreed and permitted PNM to intervene. The SFNM provides no analysis or argument on PNM's Motion to Intervene, and it never objected to PNM's motion. Rather, the SFNM filed its Answer and Counterclaim on August 12, 2015. [RP 251].

PNM's draft Complaint-In-Intervention [RP 57-63] (which was attached to its Motion to Intervene as required by Rule 1-024 NMRA but which was never filed in this case) cannot be deemed "objectively baseless" as a matter of law. PNM argued

that the SFNM was in violation of New Mexico's Uniform Trade Secrets Act (NMSA 1978, § 57-3A-1 to -7), which defines a "trade secret" as information that "derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use" and which is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." NMSA 1978, § 57-3A-2(D) (1989). The Act specifically contemplates that a party may seek injunctive relief for "[a]ctual *or threatened* misappropriation." Section 57-3A-3(A) (emphasis added). The Act defines a "misappropriation" as both the "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means" and also as the "disclosure or use of a trade secret of another without express or implied consent" by a person who "knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake." Section 57-3A-2(B). Finally, the Act states that in some circumstances, "affirmative acts to protect a trade secret may be compelled by a court order" (Section 57-3A-3(C)), and that "a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders… and ordering any person involved in litigation not to disclose an alleged trade secret without prior approval" (Section 57-3A-6).

The Uniform Trade Secret Act provides a party with a cause of action to seek a court's assistance to protect an asserted trade secret, and it specifically contemplates that a court may impose injunctive relief for both actual and threatened misappropriation. [*See also* RP 268 (briefing by AG's Office, stating that the absence "of a mechanism for a public agency to claw back already-disclosed records… does not necessarily mean that the public agency or third party lacks any legal recourse" and that "[a] party may request judicial intervention under other legal theories to prevent the distribution or use of documents in which the party claims some proprietary interest, such as a trade secret.")]. And importantly, other courts have also allowed injunctive relief to protect trade secrets. *See DVD Copy Control Assn., Inc. v. Bunner*, 75 P.3d 1 (2003), *as modified* (Oct. 15, 2003) (examining California's Uniform Trade Secrets Act and recognizing that the law "clearly contemplates the use of injunctive relief as a remedy for trade secret misappropriation" and enjoining publication of trade secret information); *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 953 F. Supp. 400, 401-02, 404-05 (D.D.C. 1996) (entering a protective order at an intervening company's request which prohibited public disclosure of materials inadvertently produced to another party by the Food and Drug Administration pursuant to a Freedom of Information Act request).

In its order granting PNM's motion for judgement on the pleadings, the district court correctly observed that the *Noerr-Pennington* framework protects the right of a litigant to "bring a viable lawsuit regardless of the underlying motivation[.]" [RP 3396-97 (quoting *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills,* 701 F. Supp. 2d 568, 597 (S.D.N.Y. 2010))]. There is no requirement that a litigant ultimately prevail on the merits of their claim in order to establish that the claim was reasonable. *See Protect Our Mountain Env't, Inc. v. Dist. Ct. In & For Jefferson Cnty.*, 677 P.2d 1361, 1369 (Colo. 1984) (holding that a moving party's complaint was not "without a reasonable basis in fact or law" and could not "be characterized as a sham merely because [its underlying claim] was ultimately unsuccessful or because [its] legal activity caused some delay in the resolution of the case."); *Nader v. The Democratic Nat. Comm.*, 555 F. Supp. 2d 137, n.14 (D.D.C. 2008), *aff'd on other grounds sub nom. Nader v. Democratic Nat. Comm.*, 567 F.3d 692 (D.C. Cir. 2009) (recognizing that an "unsuccessful lawsuit is not presumed unreasonable or without foundation until a court has determined whether the state of the law at the time of the suit was uncertain or not."); *see also Mosley v. Titus*, 762 F. Supp. 2d 1298, 1329, 1330 (D.N.M. 2010) (holding in the context of malicious abuse of process that a New Mexico litigant has the right to pursue "a potentially unsuccessful theory" which is a "freedom that New Mexico courts have emphasized as important" and it would be "inconsistent with the attorneys' professional duty to

zealously advocate for their clients to hold [an attorney] liable for malicious abuse of process, when he had a reasonable belief based on the facts and law known to him that he could enforce the rights of his clients through the courts."). Here, the parties never had the opportunity to litigate the merits because the SFNM published the confidential materials on its website just hours before the August 13, 2015 hearing, and PNM moved to withdraw its motion to intervene at that hearing. [8/13/2015 TR. 7:1-4, 10-12].

In *Cordova,* the recall petitioner's petition was "objectively baseless" because the "affidavits in support of the recall petition failed to meet the statutory requirements of the Recall Act because they were untimely, backdated, and contained attestations of events occurring after the affidavits were signed and after the recall petition was filed with the district court." 2017-NMSC-020, ¶ 35. Under the circumstances, "no reasonable litigant could realistically expect success on the merits." *Id.* Conversely, PNM's effort to intervene in the PRC's case cannot be deemed as "objectively baseless" or a situation where no litigant could expect success, and this is not a case where a party failed to meet statutory requirements or filed an action after a statute of limitation had run. Rather, New Mexico's Uniform Trade Secret Act specifically allows parties to seek judicial assistance in the face of threatened misappropriation of trade secrets, other courts have recognized the right of litigants to prevent disclosure of trade secrets, and even the AG's Office suggested

that PNM could seek judicial intervention under legal theories to prevent the distribution of trade secrets. Under the standard of a motion for judgment on the pleadings, the district court could properly determine whether PNM's petition activity was objectively baseless "as a question of law." *Ashley Furniture Indus., Inc.*, 2015 WL 12999664, at *4. Against this backdrop of law and fact, PNM's petitioning was objectively reasonable.

2. The district court necessarily found that PNM had a legitimate interest to protect, implicating the Noerr-Pennington doctrine.

On August 13, 2015, just before the hearing on the merits of the PRC's Emergency Petition, the district court entered its order granting PNM's motion to intervene. As the district court noted in its order granting judgment on the pleadings, "by allowing intervention, [the district court] was required to find that the right or interest [PNM] sought to protect could not otherwise be protected except by intervention." [RP 3397]. The court explained that "[b]y its Order allowing intervention, the Court necessarily found that PNM and BHP had a legitimate interest to protect implicating the *Noerr-Pennington* doctrine." [*Id.*]

Intervention is at the heart of the issue for the Court to consider. First, the district court's order granting the motions to intervene was necessarily a determination that the intervenors' claims were viable and *not* objectively baseless. Second, the intervenors never filed their Complaints-in-Intervention, and thus were never actually parties in the case. Third, the SFNM's counterclaim was filed before

intervention was granted—thus the SFNM's original counterclaim was entirely premised on the filing of motions to intervene.

Procedurally, there are three steps before a prospective intervenor becomes a party to a case. First, a prospective intervenor must file a motion to intervene which sets forth the grounds for intervention and attach to it the proposed complaint-in-intervention to the motion. Rule 1-024(C) NMRA. The rule specifies the motion is to be served on parties to the action pursuant to Rule 1-005 NMRA.

Second and third, the court must enter an order granting the motion and the movant must file and serve the complaint-in-intervention. The mere filing a motion to intervene is insufficient to transform the movant intervenor into a party—the district court must first enter an order granting intervention, and second the complaint-in-intervention must be filed. *See Lebeck*, 1941-NMSC-016, ¶ 19 (stating "two things essential to making one a party by intervention must occur[:] There must be a petition setting forth the grounds relied upon and this must be followed by the filing of a complaint *when and if the court allows* the intervention.") (emphasis added).

A prospective intervenor is *not* a party while awaiting those second and third steps. Until the order granting intervention is entered and the complaint-in-

intervention is filed with the court,[6] any actions taken by or against the proposed intervenor are simply inappropriate and untimely. *Id.* ¶ 23 (holding movant intervenor's affidavit to disqualify judge untimely because it preceding an order granting intervention).

As routine as this process may seem, the entry of an order granting intervention is not just a ministerial act of the court. Regardless of the basis for an intervenor-movant's motion—that is, intervention by right or permissive intervention (compare Rule 1-024(A) NMRA with Rule 1-024(B) NMRA)—the court has the discretion to grant or deny intervention. *See Solon v. WEK Drilling Co. Inc.*, 1992-NMSC-023, ¶ 5, 113 N.M. 566, 829 P.2d 645 (noting that a district court considering a motion to intervene under Rule 24 has discretion under both subsections (A) and (B) of the rule).

In most cases exercising that discretion means that a court may, but is not required to, scrutinize the complaint-in-intervention for a cause of action. *Id.* Nevertheless scrutiny is expected, because denial of intervention means "it is more likely that there is no avenue in which the individual is entitled to complain." *Chino Mines Co. v. Del Curto*, 1992-NMCA-108, ¶¶ 9, 13, 17, 114 N.M. 521, 842 P.2d 738 (determining that denial of motion to intervene was not an abuse of discretion

[6] This would also require an attorney to sign the complaint-in-intervention, and then to file and serve the signed complaint.

because applicant had not "presented sufficient evidence to establish a claim or defense which properly should be adjudicated").

In addition, in certain cases—such as this case—a district court is required to delve into the matter. This true when the State is already a party to the proceeding, and is thus presumed to be adequately representing the interests at issue in the lawsuit. *Id.* ¶ 11. In this situation a proposed interpleader must make more than a minimal showing of the basis for intervention, it must demonstrate it complies with the requirements for participating in the lawsuit and that the state's representation is inadequate. *Id.* ¶ 13.

When it invited the intervenors to participate and then granted the motions to intervene, the district court necessarily determined that the prospective intervenors had established claims which properly needed to be adjudicated. *Id.* ¶ 17 (analyzing a denied intervenor's appeal and stating "[t]he district court is invested with broad discretion in deciding whether Applicant presented sufficient evidence to establish … a claim or defense which properly should be adjudicated in the instant cases."); [*see also* 8/7/2015 Tr. at 5:00:22-5:00:43, 5:35:50-5:36:10; 12/2/2015 Tr. at 33:11-13 ("[COURT:] I wanted the interested parties in. And we brought the interested parties in.")].

The district court's order allowing intervention means that PNM's participation cannot now be found to be "objectively baseless" as it would be

inherently contradictory for a district court to find good cause to allow intervention, but then subsequently conclude that the complaint-in-intervention was "objectively baseless." *See New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 17, 126 N.M. 788, 975 P.2d 841 (recognizing that the "requirements for intervention as of right seem to accord with the general requirements for standing"); *Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 13, 369 P.3d 1046 (stating that standing requires a showing of "injury in fact, causation, and *redressability* to invoke the court's authority to decide the merits of a case.") (emphasis added). As a result, the district court had already concluded that PNM's intervention was not objectively baseless, satisfying the objective component required by the Noerr-Pennington doctrine.

3. The SFNM did not demonstrate that it had adequately pled its claims against PNM, and its conclusory pleadings do not satisfy the heightened pleading standard under Cordova.

Cordova recognized that the *Noerr-Pennington* doctrine's protection of the First Amendment right to petition requires "a heightened pleading standard for addressing allegations of misuse or abuse of process" which requires claims to be pled with "sufficient factual and legal specificity." 2017-NMSC-020, ¶¶ 29-30. The heightened standard is "necessary to avoid a chilling effect on the exercise of this fundamental First Amendment right," and "conclusory" allegations are not sufficient

"to strip a defendant's activities of *Noerr-Pennington* protection." *Id.* (internal quotations and citations omitted).

PNM argued in its motion for judgment on the pleadings that *Cordova* required a heightened pleading standard, and the SFNM's counterclaims did not meet that standard and did not demonstrate with factual specificity the existence of a sham. [RP 3299-3300]. In response, the SFNM did not argue that it had met the heightened pleading standard and it did not argue that it had in fact pled that its Second Amended Answer and Counterclaim alleged that the PNM's motion to intervene was a sham or objectively baseless. [*See generally* RP 3323-31][7]. Accordingly, the district court concluded that the SFNM had failed to meet the heightened pleading standard set forth in *Cordova* to bring its claims within the narrow exception of the *Noerr-Pennington* doctrine. [RP 3399]. Notably, the SFNM's Second Amended Answer and Counterclaim was its third attempt at bringing its counterclaims, and it did not ask the district court for further opportunity to amend its counterclaims again in response to PNM's motion for judgment on the

[7] In its brief, the SFNM alleges that it made "arguments that, combined with the express allegations of the counterclaim, sufficiently met the *Cordova* requirements." BIC at p. 22. However, a review of the SFNM's citations to its response to PNM's motion for judgment on the pleadings shows that the SFNM simply failed to explain how its Second Amended Answer and Counterclaim provided either sufficient factual or legal specificity to satisfy the heightened pleading requirement.

pleadings. Likewise, the SFNM made no attempt in its Brief in Chief to the Court of Appeals to show that its Counterclaims met the heightened pleading requirement.[8]

In its brief to this Court, the SFNM does not argue that PNM's Motion for Intervention or its draft Complaint-in-Intervention were objectively baseless as a matter of law, rather it merely argues that it pled the objectively baseless element of the sham exception. *See* BIC at pp. 12-13. As explained above, this was insufficient and the district court was permitted to review the merits of PNM's Motion to Intervene and proposed Complaint-in-Intervention as a matter of law when reviewing a motion for judgment on the pleadings. Nonetheless, a review of the select excerpts that the SFNM has now chosen to analyze on appeal underscores that it failed to meet the heightened pleading standard. *Id.* First, the SFNM focuses on PNM's proposed Complaint-in-Intervention, which it never filed. However, to the extent that PNM's proposed pleading was relevant to the SFNM's claims, at most, the SFNM alleged generally (and not within the heightened pleading standard) that PNM had an improper motive because PNM sought a prior restraint, which is difficult to obtain. *Id.* These averments facially fail to establish that PNM's relief

[8] The SFNM states that it did make such arguments. *See* BIC at p. 21 (citing to its BIC to the NMCOA at p. 18, and stating that it argued that the intervenors' complaints were contrary to U.S. Supreme Court authority). However, the SFNM's briefing was conclusory at best, and it never explained how its counterclaim met the heightened pleading standard to show that PNM's petitioning was "objectively baseless."

was objectively baseless. Rather, they merely claim that a prior restraint is difficult to obtain. [*See* RP 756 at ¶¶ 35-40 (stating that burden for prior restraints is "*virtually* insurmountable," that the "press had an *almost* absolute First Amendment right," and the SFNM has "an *almost* absolute constitutional immunity") (emphasis added)]. These conclusory allegations are a far cry from the heightened pleading standard required, and they acknowledge that there are instances when prior restraints have merit.

C. The SFNM did not meet its burden under the heightened pleading standard of showing a subjectively improper motive.

On appeal to this Court, the SFNM for the first time cites to several averments in its Second Amended Answer and Counterclaim, and argues that its allegations "sufficiently stated that the subjective element of the sham exception applied." BIC 17-19. However, review of the averments the SFNM has selected demonstrate that they are all conclusory, and do not claim that PNM's purpose was to harm the SFNM. Put another way, although the SFNM claims that PNM's petition "damaged" the SFNM's reporting, and "impaired" its reporting and "imped[ed]" its review of the subject documents, the SFNM does not allege that PNM's "subjective motivation underlying the challenged conduct was improper." *Cordova,* 2017-NMSC-020, ¶ 28.

PNM's motivation was to protect disclosure of the subject documents. SFNM cannot allege that PNM did not genuinely seek the relief that it sought in its Motion

to Intervene given that PNM sought to withdraw from this case as soon as the SFNM published the documents. *See Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 534 (9th Cir. 1991) (concluding that although the petitioning party's effort to enjoin logging activities was ultimately defeated on summary judgment, *Noerr-Pennington* protection was nonetheless "appropriate so long as the [petitioning party] was genuinely seeking government action"); *Coastal States Marketing v. Hunt,* 694 F.2d 1358, 1372 (5th Cir. 1983) ("A litigant should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit."). PNM had no wish to pursue litigation when protection of the confidentiality of the documents became moot, and therefore, PNM was genuinely seeking government action.

D. The NMCOA's decision was proper, and there are no "insurmountable hurdles" in bringing claims for abuse of process.

The SFNM makes the cursory argument that misapplying *Cordova* will result in "an impossible barrier" for litigants to make counterclaims in response to abusive lawsuits that seek to "squelch public debate" and "intimidate, harass and threaten news organizations (and citizens)." BIC at p. 23. There is no merit to this claim and the NMCOA's decision was decided correctly.

As discussed in *Cordova*, the *Noerr-Pennington* doctrine and New Mexico's Anti-SLAPP statute work together. *Cordova*, 2017-NMSC-020, ¶ 24 ("While the Anti-SLAPP statute provides the procedural protections Petitioners require,

the *Noerr-Pennington* doctrine is the mechanism that offers Petitioners the substantive First Amendment protections they seek."). "SLAPP suits are filed solely for delay[,] distraction ... and to [impose] litigation costs on activists exercising their constitutional right to petition as guaranteed by the First Amendment." *Id.* at ¶ 18 (internal quotations omitted). Importantly, a party who faces a 'strategic lawsuit against public participation' would have no trouble pleading counterclaims that pierce the *Noerr-Pennington* doctrine and establish the sham exception because, by definition, such a suit would be objectively baseless and filed for an improper purpose. The SFNM provides no substantive argument on how the holding of this case would result in lack of access to the courts, or an erosion of protection from sham litigation.

IV. CONCLUSION

The events that give rise to the basis for this suit occurred over a short period of time after the PRC inadvertently released the confidential materials. Given the statutory framework of New Mexico's Uniform Trade Secrets Act, the interests at stake, and the short time available for PNM to act, PNM had a reasonable basis for filing its Motion to Intervene. The district court also believed PNM had an interest in the case, and it specifically allowed a short time for PNM and the other companies to submit motions seeking permission to intervene in the case before the district court would address the fate of the confidential materials. The SFNM's brief in

opposition to PNM's motion for judgment on the pleadings makes no argument that it met the heightened pleading standard required by *Cordova*. Under the circumstances, the SFNM's claims against PNM are barred by the *Noerr-Pennington* doctrine and PNM's First Amendment right to petition.

PNM requests this Court to quash the writ of certiorari issued in this case, and alternatively to affirm the district court's dismissal of the SFNM's Counterclaim with prejudice and for whatever other relief this Court deems fair and just.

Respectfully submitted,

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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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