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 REPLY BRIEF

Respectfully submitted,

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Defendant-Petitioner The New Mexican, Inc. ("the *New Mexican*"), submits this reply to the answer briefs of Public Service Company of New Mexico ("PNM") and BHP Billiton New Mexico Coal, Inc. ("BHP") (together, "Intervenors").[1]

INTRODUCTION

Intervenors hope to persuade the Court that they were little more than bystanders in this case, brought into it unwillingly and then unfairly prevented from extricating themselves. In fact, the sole issue before the Court arises directly from Intervenors' decision to join in an effort to seek an unconstitutional prior restraint of the *New Mexican*'s First Amendment right to publish matters of public concern, an effort that was immediately rejected by the district court. The *New Mexican* was entitled to counterclaim against Intervenors, and there is only one issue for this Court to decide: did the *New Mexican* adequately plead its counterclaim? The district court erred by holding that it did not, and that error was based on Intervenors' groundless argument that the district court's grant of intervention necessarily required a finding that Intervenors' proposed complaint in intervention was not objectively baseless. The Court should make clear that the

[1] This Reply responds to both answer briefs. *See* Rule 12-318(C).

district court's interpretation of Rule 1-024 was in error, and that the district court erred in dismissing the counterclaim on the pleadings.

ARGUMENT

A. The relevant facts are not in dispute, but Intervenors improperly characterize those facts and focus on irrelevant issues.

The facts relevant to this appeal are straightforward, notwithstanding Intervenors' efforts to complicate them. Although PNM devotes 14 pages of its answer brief to a recitation of the facts and case history, and BHP offers over 10 pages of its own, the material facts can be summarized much more briefly. As set forth in the brief in chief **[BIC 2-4]**, the facts are plain.

The New Mexico Public Regulation Commission ("PRC") filed suit against the *New Mexican*, seeking emergency injunctive relief barring the newspaper from publishing certain records. Intervenors immediately joined the PRC's effort, intervening to seek not just a prior restraint but also damages. The district court promptly denied the requested relief because such an order would constitute an unlawful prior restraint in violation of the First Amendment. The *New Mexican*, forced to defend its constitutional right to publish, counterclaimed for malicious abuse of process and other causes of action, asserting that Intervenors had brought their claims without probable cause and for the improper purpose of chilling exercise of the newspaper's First Amendment rights. Subsequently, the district

court granted Intervenors' motion for judgment on the counterclaim on the pleadings, and dismissed each of the *New Mexican*'s claims, based on New Mexico's version of the *Noerr-Pennington* doctrine, as described in *Cordova v. Cline*, 2017-NMSC-020, ¶ 24. Although that doctrine does not apply when a petitioner's conduct is a sham (meaning that its actions are objectively baseless and its subjective motivation in its conduct was improper), the district court accepted Intervenors' argument that because it had permitted Intervenors to intervene, it had "necessarily found" that Intervenors had legitimate interests to protect and thus their intervention was not objectively baseless.

Both Intervenors offer a version of the facts apparently designed to minimize their own responsibility for voluntarily joining the effort to seek the unconstitutional prior restraint. For example, both Intervenors focus heavily on events occurring ***after*** their intervention and ***after*** the *New Mexican* filed its counterclaim, specifically Intervenors' alleged efforts to withdraw or dismiss their claims against the *New Mexican*. **[BHP AB 11-13; PNM AB 6-9]** Because the only issue before the Court is the sufficiency of the counterclaim, these events are not relevant. The district judge at the time, David K. Thomson, considered whether Intervenors could voluntarily withdraw their court filing under Rule 1-041 NMRA and held they could not. **[3 RP 528]** Intervenors assert that Judge Thomson's ruling was "incorrect" **[PNM AB 16]**, but fail to show how their

arguments on this point are relevant, or are properly before the Court given that Intervenors did not cross-appeal the issue and it is not one on which this Court granted certiorari.

The Intervenors' focus on this argument appears to be a strategy to persuade the Court that they are victims in this litigation, and that they sought from early on to be allowed to "go away." This theme misleads the Court as to the history below. First, Judge Thomson obviously did not require Intervenors to become parties and join the PRC's efforts in seeking a prior restraint. Judge Thomson understandably suggested that parties other than the *New Mexican* and the PRC might have an interest in the proceedings; as BHP states in its brief in chief, Judge Thomson was interested in permitting other parties to be heard "so he could be more fully informed." **[BHP AB 25]** He certainly did not mandate that Intervenors assert claims against the *New Mexican*, or require Intervenors to seek the very type of prior restraint he had denied the PRC.

Second, Intervenors remained in this case of their own volition. After filing filed pleadings stating claims against the *New Mexican*, they did not attempt to withdraw them until after the district court had denied the PRC's request for temporary restraining order without prejudice, a clear indication that the court was not likely to grant the relief they sought. **[1 RP 193-94, 274-76, 279-83]** And when Intervenors sought to dismiss their claims, they did so only "without

prejudice," meaning that they would have been free to refile those claims in state or federal court.[2] **[2 RP 279-83]** Intervenors omit, in their lengthy fact discussion, that the *New Mexican* did not oppose a dismissal with prejudice, and Intervenors could have done so at any time. **[2 RP 346]** The PRC, in fact, agreed as part of a settlement to dismiss its claims with prejudice and not to seek any further prior restraints, and thus has been out since February 17, 2016. **[3 RP 598-602]** BHP continued to prosecute its claims against the *New Mexican* until February 18, 2020, when the claims were dismissed without prejudice **[14 RP 3427-28]**, and PNM's claims have never been dismissed, despite its stated but nonbinding assertion that it would do so.

The record shows that Intervenors' early efforts to obtain dismissal without prejudice were never an effort to exit the case, but instead a strategic plan to defeat the counterclaim by arguing that the it was not properly filed because it was pled in response to complaints-in-intervention that were never filed. Once that effort failed, Intervenors refused to dismiss their claims with prejudice. Intervenors' irrelevant and misleading arguments that they have been kept in this case against their will should thus be disregarded.[3]

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[2] Intervenors did, in fact, later try to remove this matter to federal court. **[12 RP 3009-90]**

[3] The Court should similarly disregard other facts set forth by Intervenors that are not material to the issue before it. For example, PNM's extensive discussion of the PRC's utility regulation

B. The *New Mexican* met the standard for pleading under *Cordova v. Cline*, and Intervenors have not demonstrated otherwise.

The *New Mexican*'s counterclaim was sufficiently pled. The *New Mexican* was only required to plead facts that Intervenors' claims were a sham in that they were objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and that Intervenors' subjective motivation underlying the challenged conduct was improper. *Cordova*, ¶ 28.

Both Intervenors wrongly focus their briefing on presenting facts that they think would support their *Noerr-Pennington* defense at trial. In other words, they try to win the case on the merits at the pleading stage, attempting to demonstrate that they had a basis for submitting their claims and that their subjective motivation was proper. This, of course, was not the district court's focus in resolving the motion to dismiss, nor can it be this Court's focus on *de novo* review. The only issue is whether the *New Mexican*'s counterclaim was adequately pled.

The Court thus need not consider Intervenors' extended characterizations of the bases for their actions. Courts addressing the sham exception at the motion to

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duties and process for designating records **[PNM AB 12-14]** is not relevant. Likewise, the Court need not consider extraneous allegations such as 1) BHP's charge that a "lack of cooperation" by Steve Terrell, a *New Mexican* reporter, led to the PRC's decision to sue the *New Mexican* one day after realizing it had improperly released records to him, **[BHP AB 7]** or 2) whether the *New Mexican* and Judge Thomson "skirted the requirements of Rule 1-058(C) NMRA" in submitting and entering an order denying Intervenors' efforts at voluntary dismissal. **[PNM AB 9]**.

dismiss stage have uniformly recognized as much, and declined to consider factual arguments as to whether the sham exception was actually satisfied, as opposed to appropriately pled. *See, e.g., ThermoLife Int'l LLC v. NeoGenis Labs Inc.*, 2020 WL 6395442, at *6 (D. Ariz. Nov. 2, 2020) (disregarding factual assertions by party-asserting *Noerr-Pennington* defense at motion to dismiss stage, noting that at that stage, court was not required to accept what party asserted as its "real reason" for taking action); *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1083 (C.D. Cal. April 22, 2010) (even under a heightened pleading standard, "[a]t the motion to dismiss stage in the litigation, the Court need not conclude whether the plaintiff's conduct was a sham. It must decide only whether Plaintiff has properly pleaded that the conduct was a sham").

This accords with the requirement that at the motion to dismiss stage, a Court must accept "all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Delfino v. Griffo,* 2011-NMSC-015, ¶ 9, 150 N.M. 97. This Court stated explicitly in *Cordova* that this rule applies even when applying a heightened pleading standard. *Cordova,* ¶ 29. Other facts are not relevant at this stage.

It is for this reason that dismissal on the pleadings is inappropriate when the sham exception is asserted. Whether a party's conduct was a sham is a question of fact, and thus inappropriate for resolution at the motion to dismiss stage. *In re*

JUUL Labs, Inc., Mktg., Sales Practices, & Products Liab. Litig., 497 F. Supp. 3d 552, 614 (N.D. Cal. Oct. 23, 2020) (sham exception to *Noerr-Pennington* is generally a question of fact not appropriate for resolution on a motion to dismiss). Although Intervenors try to distinguish the cases cited by *the New Mexican* on this point as being "antitrust cases" or not invoking First Amendment issues, it cannot be disputed that regardless of the context in which a *Noerr-Pennington* defense is raised and the sham exception asserted in response, dismissal on the pleadings – even under a heightened pleading standard – is rarely appropriate. *See, e.g.*, *Wonderful Real Estate Dev. LLC v. Laborers Int'l Union of N. Am. Local 220*, 2020 WL 91998, at *7 (E.D. Cal. Jan. 8, 2020) (even under heightened pleading standard, "courts rarely award *Noerr-Pennington* immunity at the motion to dismiss stage"); *Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*, 2010 WL 4392547, at *6 (S.D. Cal. Oct. 28, 2010) ("[p]roblematically, Plaintiff's motion is framed as motion for judgment on the pleadings. Given the intense factual findings required to assess the *Noerr–Pennington* doctrine and its exceptions, the Court does not find it appropriate to resolve the privilege at this stage").[4]

[4] *See also D. H. Pace Co., Inc. v. Aaron Overhead Door Atlanta LLC*, 2018 WL 11346526, at *2 (N.D. Ga. May 7, 2018).

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

The *New Mexican*'s brief in chief highlighted for the Court each allegation in the counterclaim in support of its claim that Intervenors' pleadings were objectively baseless. **[BIC 13-17]** Under *Cordova*'s heightened pleading standard, the *New Mexican* was required to plead with sufficient factual and legal specificity that objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Cordova*, ¶¶ 28, 30. The *New Mexican* did just that in its counterclaim.

Those facts included specific allegations that Intervenors' pleadings sought to impose an unconstitutional prior restraint on the *New Mexican*; that such restraints face a virtually insurmountable burden under the constitutions of the United States and of New Mexico; that the law was well-established in this area; and that Intervenors had no valid legal or factual basis for the relief which they sought against the *New Mexican*. **[BIC 13-17]**

Under *Cordova*, these assertions were sufficient to survive dismissal on the pleadings on the objective element of the sham exception. The counterclaim specifically stated that Intervenors "have no valid legal or factual basis for the relief which they seek against The New Mexican" **[3 RP 756]**, which mirrors the pleading requirement in *Cordova*, and which was based on specific factual and

legal allegations. Although Intervenors allege briefly that the counterclaim lacked sufficient specificity **[BHP AB 32; PNM AB 34]**, these arguments fail. The *New Mexican* specifically alleged that Intervenors' pleadings had an insufficient factual and legal basis. The counterclaim specifically identified the Intervenors' filings and described why they were baseless. Using the starting point that Intervenors were requesting a prior restraint, with a heavy presumption against constitutionality, it is not clear what more the *New Mexican* could have alleged to meet the requirement to plead that Intervenors' claims were baseless.

This is true even under the heightened pleading standard set forth in *Cordova*. The *New Mexican*, contrary to Intervenors' characterization of its brief, does not ask this Court to modify or "water down" the pleading standard. **[BHP AB 38]** The *New Mexican* discussed the *Cordova* standard at length in its brief in chief, and did not argue that it should be changed or that it does not apply to this case. To the contrary, as set forth above, application of the *Cordova* standard supports reversal of the district court.[5]

[5] Intervenors take exception with the *New Mexican*'s analogy of heightened pleading standard in *Cordova* to the heightened standard for fraud claims in Rule 1-009, arguing that Rule 1-009 "has no constitutional underpinnings" and therefore requires less than *Cordova* does. **[BHP AB 39]** At least one court has equated the heightened standard in *Noerr-Pennington* cases with that of federal Rule 9. *Saniefar v. Moore*, 2017 WL 5972747, at *9 (E.D. Cal. Dec. 1, 2017), citing *Meridian Project Systems, Inc. v. Hardin Construction Co., LLC*, 404 F. Supp. 2d 1214, 1221 (E.D. Cal. 2005).

Intervenors' continued insistence that Judge Thomson's grant of their requests to intervene constitutes a finding that their pleadings had an objective basis is simply an incorrect assertion of law, and the subsequent district court judge erred in so relying.[6] As addressed in the brief in chief, 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. It is not required to show that its claims are legally cognizable; there are other mechanisms, like Rules 1-012 and 1-056 NMRA, for a court to address the viability of a claim. Plaintiffs neither rebut the case law offered by the *New Mexican* on this point nor offer any case in which a court, in addressing *Noerr-Pennington*, found that permission to intervene constituted a finding that the subsequent intervention pleadings were not objectively baseless.

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[6] Perhaps recognizing the weakness of this argument, BHP equivocates on this point. It first asserts that the district court did not actually rely on this basis in granting the motion to dismiss, but then goes on to adopt the argument, asserting that the grant of intervention was a proper consideration, as "an experienced judge surely would not have granted a frivolous intervention" and "would have denied motions to intervene because BBNMC and PNM could not have any legitimate interest in pursuing facially invalid claims." **[BHP AB 33-35]**

Though Intervenors quote hearing transcripts at length, they offer nothing that shows that Judge Thomson, in granting the intervention, considered the *Noerr-Pennington* implications or even had any idea that those issues would become part of the case. The record shows only that Judge Thomson recognized that Intervenors might have interests worth considering in the case, and permitted them to file pleadings to raise them. Notably, the motions to intervene were granted before any opposition was or could be filed, and so there could not have been any consideration of the merits of the intervention pleadings. Intervenors thus cannot argue that the district court actually decided this issue. *See Fernandez v. Farmers Ins. Co. of Arizona*, 1993-NMSC-035, ¶ 15, 115 N.M. 622 ("cases are not authority for propositions not considered"). The district court's ruling, if permitted to stand, 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.[7]

The Court should also reject Intervenors' focus on their supposed right to seek prior restraint to protect trade secrets. **[BHP AB 22-25; PNM AB 22-24]**

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[7] Although BHP offers a tortured reading of the district court's decision in arguing that the district court did not base its decision on the successful motions to intervene **[BHP AB 33]** (PNM does not join in this argument), the plain language of the district court's decision demonstrates otherwise. The district court specifically held that "By its Order allowing intervention, the Court necessarily found that PNM and BHP had a legitimate interest to protect implicating the *Noerr-Pennington* doctrine." **[14 RP 3397]**

First, as noted above, the Court is required to consider only the content of the counterclaim on this issue, and not what Intervenors might prove later in the case. Second, even if the Court were to consider this argument, Intervenors are wrong on the law; specifically, their assertion that a court can restrain publication of trade secrets by a newspaper in the course of exercising its First Amendment right to cover matters of public interest, is incorrect.

Intervenors cite two cases in support of their contention that they had a legitimate basis for seeking a prior restraint in this case. Those cases are of no help to Intervenors, because they plainly do not provide a basis for a court to bar a newspaper from publishing public records, related to a matter of public interest, obtained legally in response to the newspaper's public records request. For example, in *DVD Copy Control Ass'n., Inc. v. Bunner*, 75 P.3d 1, 18 (Cal. Sup. Ct. Aug. 25, 2003) an injunction was upheld, but only because the court believed that the respondent knew or had reason to know that the trade secrets at issue were obtained illegally and because the court found that the information at issue did not implicate any issue of public concern. Significantly, the court in *Bunner* noted that the facts before it differed from those in *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994), a case closer factually to the present case, in which Justice Blackmun stayed enforcement of an injunction as an impermissible prior restraint against a broadcaster where there was no evidence that CBS had acquired proprietary

information by improper means and where the matter reported on was a matter of public concern. *Bunner*, 75 P.3d at 18.

The second case cited by Intervenors, *Public Citizen Health Research Group v. FDA*, 953 F. Supp. 400 (D.D.C Oct. 17, 1996) is likewise of no help because in that case the judge apparently believed (erroneously) that the "temporary" nature of its protective order relieved it of any obligation to apply the "exacting First Amendment scrutiny" required for a "classic prior restraint." *Id.*, at 404-05. Here, Intervenors did not seek a temporary protective order; they sought a permanent injunction against publication, the very type of "classic prior restraint" that is not available to protect even national secrets. *See New York Times v. U.S.*, 403 U.S. 713 (1971) (the "Pentagon Papers" case).

Even the secondary source upon which BHP relies heavily, Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 Hastings L.J. 777 (2007), notes that the heavy presumption against the constitutionality of prior restraint of the media applies to trade secret cases. *Id.*, 811-12; *see also Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 221 (6th Cir. 1996) (addressing "issue of whether the bedrock First Amendment principle that the press shall not be subjected to prior restraints can be set aside when a federal court perceives a threat to the secrecy of material placed under seal by

stipulation of the parties," Sixth Circuit held that it could not, and order blocking publication was error).[8]

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 brief in chief details the relevant allegations in the counterclaim, including that Intervenors acted to violate and chill the First Amendment rights of the *New Mexican*, that they did so willful or knowing disregard for the *New Mexican*'s rights, and made false statements in filings. As alleged by the *New Mexican* in the counterclaim, it was "protected by an almost absolute constitutional immunity against prior restraints … [Intervenors] knew this before they acted against The New Mexican but they acted anyway." **[3 RP 756]**

Intervenors do not show that the *New Mexican*'s allegations were insufficient on this element. BHP argues that the allegations "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

[8] Furthermore, Intervenors' arguments, if adopted, would require this Court to find that the records in question actually were trade secrets, even though this was a contested issue below. *See* Counterclaim, at ¶ 61 ("… the information in the documents does not meet the statutory definition of trade secret …"). **[3 RP 762]**

chilling SFNM's free speech because prior restraints are unconstitutional)," and further asserts that the allegations are not specific to BHP. **[BHP AB 36]** PNM, briefly, asserts that the *New Mexican*'s allegations were "conclusory" and faults the *New Mexican* for not specifically asserting that PNM's "subjective motivation underlying the challenged conduct was improper," even though that language comes from *Cordova* and PNM had not at that time asserted a *Cordova/Noerr-Pennington* defense. **[PNM AB 34]** Rather than focus on the *New Mexican*'s allegations, Intervenors concentrate their arguments on this point on what they assert their actual motivations to have been. **[BHP AB 36-38; PNM AB 34-35]**

These arguments fail. First, as discussed above, Intervenors' self-serving description of their own motivations is not relevant at the motion to dismiss stage. And the *New Mexican* sufficiently asserted facts on this prong. Under *Cordova*, the *New Mexican* was only required to plead, with sufficient factual and legal specificity, that the primary purpose for the Intervenors' filing was to effectuate an improper objective. *Cordova*, ¶¶ 28, 30. The *New Mexican* did just that. It described the court filings in detail, alleged the Intervenors' purpose, and specifically alleged that the purpose was improper (to chill the newspaper's right to publish).

Although Intervenors assert that, in regard to the facts cited by the *New Mexican* on the subjective element, "they are all conclusory," **[PNM AB 34]**, this

assertion mischaracterizes the actual allegations in the counterclaim and misstates what *Cordova* requires. *Cordova*, even under its heightened pleading standard, requires only that a complaint "include allegations of the specific activities" that underlie the assertion of the sham exception. *Id.*, ¶ 38. It was not possible for the *New Mexican*, at the initial pleading stage, to know every fact related to Intervenor's motive or state of mind, and *Cordova* does not demand that. It requires only a description of the specific actions taken by Intervenors, and an allegation, arising from those facts, that Intervenors' "subjective motivation underlying the challenged conduct was improper." *Id.*, ¶ 28. Of course, any assertion of another party's subjective intent necessarily includes a conclusory statement. This is why, in the context of pleading fraud, Rule 1-009(B) NMRA requires only that the circumstances constituting fraud or mistake shall be stated with particularity, while "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."

Neither lower court actually addressed whether the *New Mexican*'s counterclaim sufficiently pled this element. Other than a brief and unclear discussion of "conspiracy" in the context of *Noerr-Pennington,* nothing in the district court's order shows that it examined the actual allegations of the counterclaim to determine whether they adequately set forth this element, and the Court of Appeals did not address the issue at all. At any rate, on *de novo* appeal,

this Court must undertake its own analysis of the counterclaim, and should find that the allegations were sufficient.

C. 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.*

As discussed in the brief in chief, 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 correct in determining that the *New Mexican* did not present argument on certain issues. PNM does not argue otherwise in its answer brief, but BHP asserts that this Court should affirm the Court of Appeals because the *New Mexican* did not "fairly invoke a ruling from the court of appeals or district court regarding the application of *Cordova* to this case." **[BHP 45-48]**

This argument fails. Even if this Court chooses to address this issue – and it should not – the *New Mexican* demonstrated in its brief in chief how it presented the issues to the lower courts. The Court of Appeals erred in finding otherwise, and BHP does not overcome the *New Mexican*'s specific citations to its briefing below demonstrating how it addressed this issue.

WHEREFORE, the *New Mexican* requests that the Court grant the relief requested in the brief in chief.

Respectfully submitted,

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RULE 12-318(G) NMRA STATEMENT OF COMPLIANCE

The body of the Reply uses a proportionally-spaced typeface (Times New Roman), contains 4390 words, as counted by Microsoft Word, Version 2303 (Build 16130.20306 Click-to-Run), and thus complies with the limitations of Rule 12-318(F)(3) NMRA.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2023, a true and correct copy of the foregoing was served electronically to the following counsel of record:

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