APPENDIX

APPENDIX A: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, MARCH 12, 2018

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LOS LOBOS RENEWABLE POWER, LLC and LIGHTNING DOCK GEOTHERMAL, HI-01, LLC,

Plaintiffs-Appellees,

No. 16-2046

v.

AMERICULTURE, INC., and DAMON SEAWRIGHT,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 1:15-CV-00547-MV-LAM)

Before**: TYMKOVICH**, Chief Judge, **BALDOCK**, and **BRISCOE**, Circuit Judges.

Appendix A

This appeal considers the applicability of a New Mexico statute to diversity actions in federal court. In this action, AmeriCulture filed a special motion to dismiss the suit under New Mexico's anti-SLAPP statute, a provision designed to expedite judicial consideration of so-called "strategic lawsuits against public participation." The district court, however, refused to consider that motion, holding the statute authorizing it inapplicable in federal court.

For the reasons set forth here, we agree. Judge Baldock first gives the factual background, on which the panel agrees. Chief Judge Tymkovich's opinion, which Judge Briscoe joins, explains why we have jurisdiction to hear this appeal under the collateral order doctrine. The opinion of Judge Baldock explains our unanimous holding on the merits of this appeal. Finally, Judge Baldock dissents to our jurisdictional holding.

BACKGROUND

BALDOCK, Circuit Judge

The United States Bureau of Land Management leased 2,500 acres of geothermal mineral rights in Hidalgo County, New Mexico to Plaintiff Lightning Dock Geothermal HI-01, LLC (LDG), a Delaware company. Consistent therewith, LDG developed and presently owns a geothermal power generating project in Hidalgo County. LDG also developed a geothermal well field on the subject tract as part of its project. Defendant AmeriCulture, a New Mexico corporation under the direction of Defendant Damon Seawright, a New Mexico resident, later purchased a surface estate of approximately fifteen acres overlying LDG's mineral lease—ostensibly to develop and operate a tilapia fish

farm. Because AmeriCulture wished to utilize LDG's geothermal resources for its farm, AmeriCulture and LDG (more accurately its predecessor) entered into a Joint Facility Operating Agreement (JFOA). The purpose of the JFOA, at least from LDG's perspective, was to allow AmeriCulture to utilize some of the land's geothermal resources without interfering or competing with LDG's development of its federal lease. We are told that Plaintiff Los Lobos Renewable Power LLC (LLRP), also a Delaware company, is the sole member of LDG and a third-party beneficiary of the JFOA.

The parties eventually began to quarrel over their contractual rights and obligations. Invoking federal diversity jurisdiction under 28 U.S.C. § 1332, Plaintiffs LDG and LLRP sued Defendants Americulture and Seawright in federal court for alleged infractions of New Mexico state law.[1] Of particular importance here are the factual allegations contained in paragraphs 44D and 44E and the legal conclusions contained in paragraph 77 of Plaintiffs' first amended complaint. The former two paragraphs allege Defendants "impermissibly" objected to permit applications Plaintiffs made before the New Mexico Office of the State Engineer and the New Mexico Oil Conservation Division. Paragraph 77 then concludes:

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[1] Plaintiffs' first amended complaint alleges breach of contract, breach of covenants of good faith and fair dealing, prima facie tort, tortious interference with business relations, and negligent misrepresentation. Plaintiffs seek damages, indemnification, a declaratory judgment, specific enforcement of the JFOA, and injunctive relief against Defendants.

> Defendants Seawright and Americulture have both intentionally and negligently made material misrepresentations concerning the Plaintiffs and the Project to numerous state agencies and other public bodies for the sole purpose of delaying and subverting the Project solely for the purpose of giving Defendants a competitive advantage for the Defendants own intended production of Geothermal Power in violation of the JFOA.

Defendants responded to these allegations and conclusions by filing a "special motion to dismiss" pursuant to the New Mexico anti-SLAPP statute, a state legislative enactment aimed at thwarting "strategic lawsuits against public participation." N.M. Stat. Ann. §§ 38-2-9.1 & 38-2-9.2. As the factual basis for their motion, Defendants told the district court the permits which Plaintiffs sought and to which Defendants objected "pertained to activities conducted on lands other than the 15-acre fee estate covered by the JFOA." As the legal basis for their motion, Defendants asserted "New Mexico's Anti-SLAPP statute is a substantive state law designed to protect the Defendants from having to litigate meritless claims aimed at chilling First Amendment expression." Defendants described their rights under the state statute as "in the nature of immunity because New Mexico lawmakers also want to protect speakers from the trial itself rather than merely from liability." The district court was not persuaded and denied Defendants' "special" motion because "New Mexico's Anti-SLAPP statute is a procedural provision that does not apply in the courts of the United States." *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 2016 WL 8254920, at *2 (D.N.M. 2016) (unpublished).

Recognizing the interlocutory nature of the district court's decision, Defendants subsequently moved the court to amend its order to certify its decision for immediate appeal pursuant to 28 U.S.C. § 1292(b). The court did so. *Los Lobos Renewable Power, LLC v. Americulture.*, 2016 WL 8261743, at *2–3 (D.N.M. 2016) (unpublished). But for whatever reason, Defendants failed to timely petition us for permission to appeal as required by § 1292(b)'s plain language. Instead, three days after the district court certified its ruling for appeal, Defendants filed their notice of appeal.

Given the respective positions of the panel members, this appeal requires us to resolve two issues:

1. Whether we may exercise jurisdiction over this appeal pursuant to the collateral order doctrine.
2. Whether the New Mexico anti-SLAPP statute applies in this federal diversity action.

We answer the first query yes, the second query no, and affirm the decision of the district court.

* * *

Because the language of the New Mexico anti-SLAPP statute predominates this appeal, we set forth its relevant provisions prior to both our jurisdictional and merits analyses. The statute consists of two parts, N.M. Stat. Ann. §§ 38-2-9.1 & 38-2-9.2. Because placing § 38-2-9.1 in proper context is imperative to its construction, we commence with § 38-2-9.2, entitled "[f]indings and purpose":

> The legislature declares that it is the public policy of New Mexico to protect the rights of citizens to participate in quasi-judicial proceedings before local and state governmental

> tribunals. Baseless civil lawsuits seeking or claiming millions of dollars have been filed against persons for exercising their right to petition and to participate in quasi-judicial proceedings before governmental tribunals. Such lawsuits [1] can be an abuse of the legal process and [2] can impose an undue financial burden on those having to respond to and defend such lawsuits and [3] may chill and punish participation in public affairs and the institutions of democratic government. These lawsuits should be subject to prompt dismissal or judgment to prevent the abuse of legal process and avoid the burden imposed by such baseless lawsuits.

Id. § 38-2-9.2.

Consistent with the "[f]indings and purpose" of the New Mexico anti-SLAPP statute, § 38-2-9.1 is entitled "[s]pecial motions to dismiss unwarranted or specious lawsuits; procedures; sanctions; . . . ." Subsections A, B, and C of § 38- 2-9.1 provide:

> A. Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.

> B. If the rights afforded by this section are raised as an affirmative defense and if a court grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment filed within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action. If the court finds that a special motion to dismiss or motion for summary judgment is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to the party prevailing on the motion.
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> C. Any party shall have the right to an expedited appeal from a trial court order on the special motions described in Subsection B of this section or from a trial court's failure to rule on the motion on an expedited basis.

Id. § 38-2-9.1.A–C.[2]

APPELLATE JURISDICTION

TYMKOVICH, Chief Judge, with Judge Briscoe joining, on the issue of appellate jurisdiction.

As a preliminary matter, Plaintiffs contend the court does not have appellate jurisdiction.

After the district court refused to consider Defendants' special motion, the court certified for interlocutory review the question of whether New

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[2] Subsections D, E, and F of N.M. Stat. Ann. § 38-2-9.1 have no bearing on the outcome of this appeal.

Mexico's anti-SLAPP statute applies to federal diversity cases. See 28 U.S.C. § 1292(b). That order opened a ten-day period within which Defendants could petition this court for permission to appeal. See id.; Fed. R. App. P. 5(a)(1). But Defendants failed to petition this court, and instead only filed a notice of appeal. Plaintiffs thus contend we lack jurisdiction.

As a prerequisite to jurisdiction under these circumstances, we generally require a timely petition for permission to appeal. *Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1175 (10th Cir. 2005). We have specifically rejected the notion that a party's notice of appeal may serve as such a petition. *See id.*; *Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470, 472 (10th Cir. 1976) (collecting cases from other jurisdictions). Thus, the district court's certification does not grant us authority to decide this appeal.

That leaves the collateral order doctrine. This court's jurisdiction is generally limited to "all final decisions" of the district courts. 28 U.S.C. § 1291. As the Supreme Court held in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), however, the federal courts of appeals have jurisdiction to review some orders not considered final in the traditional sense. *See id.* at 546–47. This "collateral order doctrine," as it has come to be called, "accommodates a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action.'" *Will v. Hallock*, 546 U.S. 345, 349 (2006) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996)). These rulings are said to be "too important to be denied review and too independent of the cause itself" to

justify waiting out the rest of the adjudication. *Cohen*, 337 U.S. at 546.

A party asserting jurisdiction under the collateral order doctrine must show that the district court's order: (1) "conclusively determine[d] the disputed question," (2) "resolve[d] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The Supreme Court has described these conditions as "stringent," *Will*, 546 U.S. at 349 (quoting *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)), to protect against "overpower[ing] the substantial finality interests" the limit on our jurisdiction aims to further. *Id.* at 350. We therefore must apply it with an eye towards preserving judicial economy and avoiding "the harassment and cost of a succession of separate appeals from the various rulings" in a single case. *Id.* at 350.

Importantly, we "decide appealability for categories of orders rather than individual orders." *Johnson v. Jones*, 515 U.S. 304, 315 (1995). Thus, our task is not to look at the "individual case [and] engage in ad hoc balancing to decide issues of appealability." *Id.* Instead, we must undertake a more general consideration of "the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one and the danger of denying justice by delay on the other.'" *Id.* (citation omitted). The latter end of that scale has often tipped in favor of constitutionally based immunities. See *Will*, 546 U.S. at 350. Yet these "examples" do not exclude other applications. *Id.* Indeed, the Supreme Court has also protected private parties from delay as

well, even in civil actions. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950); *Cohen*, 337 U.S. 541.

With that in mind, we consider whether the district court's decision to not apply the New Mexico anti-SLAPP statute in federal court warrants interlocutory review under the collateral order doctrine. We address each of the three *Cohen* conditions below.

1. Condition One: Conclusively Determined

Neither party disputes that the district court conclusively determined the *Erie* issue in its order denying Defendants' special motion to dismiss. An order is "conclusive" if it is not subject to later review or revision by the district court. *Cf. Coopers*, 437 U.S. at 469; *Utah ex rel. Dep't of Health v. Kennecott Corp.*, 14 F.3d 1489, 1492 (10th Cir. 1994). In its order, the district court held that New Mexico's anti-SLAPP statute does not apply in federal court. That determination is final in the relevant sense. Defendants have thus satisfied the first condition of the collateral order doctrine.

2. Condition Two: Separate from the Merits

Whether New Mexico's anti-SLAPP statute applies in federal court is a discrete legal question completely separate from the underlying merits. An issue is completely separate from the merits if it is "significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits." *Johnson*, 515 U.S. at 314. The Supreme Court has indicated that the collateral order doctrine's second condition is more likely to be satisfied "where purely legal matters are at issue." *Id.* at 316.

Plaintiffs claim the district court's application of the anti-SLAPP statute necessarily required considering and evaluating the merits of this action. We disagree.

It is one thing for a court to consider a New Mexico anti-SLAPP motion, apply the New Mexico anti-SLAPP statute, and deny the motion under the statute. *Cf., e.g.*, *Schwern v. Plunkett*, 845 F.3d 1241, 1243–45 (9th Cir. 2017) (Oregon law); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 170–81 (5th Cir. 2009) (Louisiana law). It is an entirely different matter for the court to refuse to apply the anti-SLAPP statute at all. In the first scenario, the court must determine whether the special motion to dismiss is frivolous or available on its own terms, as well as whether or not to grant it. *See* N.M. Stat. § 38-2-9.1A-B. These determinations necessarily turn on the merits of the lawsuit. *See Ernst v. Carrigan*, 814 F.3d 116, 118–19 (2d Cir. 2016).

But the latter scenario presents a more abstract question of federal law that has nothing to do with the particular facts in this case. Indeed, whether federal courts can apply the New Mexico anti-SLAPP statute depends on considerations entirely external to the dispute between Plaintiffs and Defendants. Several other circuits have already recognized this crucial distinction. *See Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1357 (11th Cir. 2014) ("[T]he district court's order regarding the applicability of [Georgia's anti-SLAPP statute] in federal court meets the second *Cohen* prong because it is entirely separate from the merits of the case."); *Godin v. Schencks*, 629 F.3d 79, 84 (1st Cir. 2010) ("[T]he issue of whether a defendant can utilize [Maine's anti-SLAPP statute] in federal court is distinct from the merits of [the] action."); *cf.*

Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 149 (2d Cir. 2013) (explaining that a ruling denying a motion for being "predicated on a source of law that did not apply to the suit" was "completely separate from the merits").

This is precisely the type of issue the collateral order doctrine's second condition contemplates. *See, e.g.*, *Cohen*, 337 U.S. at 545–46. Defendants have therefore met *Cohen*'s second condition.

3. Condition Three: Effectively Unreviewable a on Appeal from Final Judgment

Lastly, we conclude the district court's order would be effectively unreviewable on appeal from final judgment.

"A major characteristic of the denial or granting of a claim appealable under *Cohen*'s 'collateral order' doctrine is that 'unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all.'" *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (alteration in original) (quoting *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.)).

Plaintiffs argue the rights enshrined in New Mexico's anti-SLAPP statute could be protected after final judgment because they do not shield defendants from the burden of standing trial. But that is not the issue. True, the Supreme Court has placed orders denying certain species of immunity among the categories warranting interlocutory review. *Will*, 546 U.S. at 350. But an order need not deny an asserted immunity to satisfy *Cohen*'s test. *See Eisen*, 417 U.S. 156; *Swift*, 339 U.S. 684; *Cohen*, 337 U.S. 541; *cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106–

09 (2009) (conducting *Cohen*'s three-pronged analysis despite no claim of immunity).

Moreover, *similar* to a protection from standing trial, the New Mexico statute seeks to reduce the ordinary time and expense of litigation. *See* N.M. Stat. Ann. § 38-2-9.1A (making special motions available "to prevent the unnecessary expense of litigation"). It will not absolve liability that would otherwise lie. *Cf.*, *e.g.*, *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013) (addressing a California anti-SLAPP statute that shifted substantive burdens and altered substantive standards). Instead, it creates a right to expeditious trial and appellate process.

This means that were we to wait for this case to conclude in the court below by ordinary process, the statute's sole aim would already be lost. Defendants would have already incurred the ordinary time and expense of litigation that the statute potentially grants them a right to avoid. Indeed, we can reverse the rulings of a subordinate court, but we cannot order away proceedings and legal fees that have already passed into history. Nor can we remand the case with instructions to "do it again, but faster this time."

Defendants' characterization of the statute as conferring an immunity from trial carries some significance as well. While we ultimately conclude in this case that the statute is better read as not conferring immunity, Defendants' contention in the district court and on appeal is far from fanciful. Even so, on questions of first impression, we usually decline to credit a party's claim to immunity, opting to conduct our own analysis instead. *See Gen. Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1181–82 (10th Cir. 2016). But this court has often—far too many

times to count—taken interlocutory appeals based on asserted immunities only to deem those immunities inapplicable. *See, e.g.*, *Morris v. Noe*, 672 F.3d 1185 (10th Cir. 2012). Our cases thus draw an unsatisfying distinction between appeals concerning the *scope* of certain immunities on the one hand, and appeals concerning the *existence* of immunities that we have yet to recognize on the other. The better course may be to credit plausible assertions of novel state-law immunities—like this one—on matters of first impression in the *Erie* context. If, as here, we then determine that the asserted immunity is unavailable on the merits, it would end the matter for both purposes.

We also think it instructive that *Cohen* itself presented markedly similar facts. In that case, the Supreme Court considered whether a federal court sitting in diversity had to apply a New Jersey statute requiring plaintiff shareholders to post a security before prosecuting certain derivative actions. *See Cohen*, 337 U.S. at 544–45. The Court explained that the district court's decision to not apply the security law would "not be merged in final judgment." *Id.* at 546. Instead, the point of the security provision was to ensure *at the outset of litigation* that feeshifting rules would be enforceable later on as a sanction. *See id.* at 545. It was thus a prerequisite to the cause of action itself. This protected corporations from harassing litigation brought by minor shareholders who could escape the consequences of their abuse of process.

In a similar way, the New Mexico anti-SLAPP statute aims to nip harassing litigation in the bud, thus protecting potential victims from the effort and expense of carrying on a frivolous lawsuit. We could

not secure this statute's protections after final judgment on the merits because—just as in *Cohen*—burdensome legal process has already been brought to bear at that point. *See Royalty Network*, 756 F.3d at 1357.

The dissent points out that federal district courts have tools at their disposal to accomplish the same ends. And indeed they do. But the collateral order doctrine does not ask whether trial courts *might*—in their discretion—guarantee the deprived right by other means. It asks whether courts of appeals have sufficient remedial power to reverse the effects of an erroneous order after litigation has run its course on the trial level. True, the Supreme Court has said that other "source[s] of recompense" weigh against satisfaction of *Cohen*'s third prong. *Digital Equipment*, 511 U.S. at 882. But a right to reduce the time and expense of litigation is poorly suited to satisfaction through *more* litigation. Because any remedy we—or any other court—can provide will at best end and at worst *prolong* litigation, alternate remedies prove inadequate here.

Nor does *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), hold otherwise. In that case, the Supreme Court held an order disclosing privileged attorney-client communication ineligible for interlocutory review. *See id.* at 109. In so doing, the Court reasoned that reversal and remand after final judgment could negate any error of the district court in handling this evidence. *See id.* As for any interest in candor between counsel and client, the court thought it minimally infringed and still within the attorney's power to protect. *See id.* at 109–12. It did not say that any possible alternate means of vindication would

defeat collateral order jurisdiction. Such a holding would have rendered the doctrine a nullity given the availability of interlocutory review by certification or a writ of mandamus. *Cf. id.* at 110–12. Whatever the merits of discarding *Cohen*, *see id.* at 114–19 (Thomas, J., concurring in part and concurring in the judgment), the Court did not take that path in *Mohawk*, and we may not blaze it here.

Several other circuits agree with our course. *See Royalty Network*, 756 F.3d 1351 (11th Cir.); *Godin*, 629 F.3d 79 (1st Cir.); *Liberty Synergistics*, 718 F.3d 138 (2d Cir.). The dissent, by contrast, stands alone.

Accordingly, this appeal meets *Cohen*'s third requirement.

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Because Defendants have satisfied all three conditions of the collateral order doctrine, we have jurisdiction to decide this appeal on the merits.

ANALYSIS

BALDOCK, Circuit Judge, for a unanimous panel on the merits.

Having concluded that we may exercise jurisdiction over Defendants' appeal, our next task is to determine whether the district court must apply the New Mexico anti-SLAPP statute in this federal diversity action for the enforcement of state-created rights. In undertaking this task, known as an *Erie* analysis after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the "overriding consideration" is "whether . . . the *outcome* would be 'substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in state court.'" *Berger v. State Farm Mut. Auto. Ins. Co.*, 291 F.2d 666, 668 (10th Cir. 1961) (emphasis added)

(quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)). This means that in a federal diversity action, the district court applies state substantive law—those rights and remedies that bear upon the outcome of the suit—and federal procedural law—the processes or modes for enforcing those substantive rights and remedies. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). State laws that solely address procedure and do not "function as a part of the State's definition of substantive rights and remedies" are inapplicable in federal diversity actions. *See Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416–17 (2010) (Stevens, J., concurring in the judgment).[3]

Of course, distinguishing between procedural and substantive law is not always a simple task. "Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is *sometimes* a challenging endeavor." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (emphasis added). "A state procedural rule, though undeniably procedural in the ordinary sense of the term, may exist to influence substantive outcomes, and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Shady Grove,* 559 U.S. at 419–20 (Stevens, J., concurring in the judgment) (internal citation and quotation marks omitted). Where the line between procedure and substance is unclear, the Supreme Court has set forth a multi-faceted analysis designed to prevent both

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[3] Justice Stevens' concurrence in *Shady Grove* provides the controlling analysis in the Tenth Circuit. *See James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1217 (10th Cir. 2011).

forum shopping and the inequitable administration of the laws. *See generally* Erwin Chemerinsky, *Federal Jurisdiction* § 5.3, at 351-365 (7th ed. 2016). Fortunately, we need not rely on any complex *Erie* analysis here because, assuming one is able to read, drawing the line between procedure and substance in this case is hardly a "challenging endeavor." The plain language of the New Mexico anti-SLAPP statute reveals the law is nothing more than a *procedural* mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights. Section 38-2-9.2, which sets forth the anti-SLAPP statute's purpose, says the statute addresses *only* "[b]aseless civil lawsuits" arising out of a defendant's participation in proceedings before a quasi-judicial governmental body. These are lawsuits designed to "abuse . . . the legal process," "impose an undue financial burden on those having to respond," and "chill and punish participation in public affairs."[4] Consistent therewith, the title to § 38-2-9.1 says the anti-SLAPP statute addresses "unwarranted or specious lawsuits; procedures; sanctions." The New Mexico Supreme Court has told us that "[f]or the purpose of determining the legislative intent we may look to the title, and ordinarily it may be considered as a part of the act if necessary to its construction." *Tri-State Generation and Transmission Assoc. Inc. v.*

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[4] Notably, the anti-SLAPP statute recognizes that not *every* lawsuit arising out of a defendants participation in proceedings before a quasi-judicial governmental body is baseless. N.M. Stat. Ann. § 38-2-9.1.B (providing for a sanction of fees and costs where a movant files an unwarranted motion pursuant to the anti-SLAPP statute).

D'Antonio, 289 P.3d 1232, 1238 (N.M. 2012) (internal quotation marks omitted).

Also critical to a sound construction of the New Mexico anti-SLAPP statute are the first three subsections of § 38-2-9.1. Subsection A is unquestionably the most important of the three subsections. It mandates the expedited procedures applicable to the type of frivolous or retaliatory lawsuits at which § 38-2-9.2 tells us the statute is aimed. Subsections B and C are dependent subsections, entirely meaningless absent subsection A. Both the title of § 38-2-9.1 and the body of subsection A state that a dispositive pretrial motion filed pursuant to the anti- SLAPP statute is "special." According to the plain terms of subsection A, the only reason such motion is "special" is that it "shall be considered by the court on a priority or expedited basis to ensure early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation." *Id*. § 38-2-9.1.A. Most importantly for our purpose, subsection A sets forth no rule(s) of substantive law. Rather, it tells the trial court to hurry up and decide dispositive pretrial motions in lawsuits that a movant claims fit the description of "baseless" provided in § 38-2-9.2, *i.e.*, frivolous lawsuits—and that's it. All subsection A demands is expedited procedures designed to promptly identify and dispose of such lawsuits.

The New Mexico Supreme Court's recent decision in *Cordova v. Cline*, 396 P.3d 159 (N.M. 2017), supports our reading of the anti-SLAPP statute to a tee. In that case, plaintiff filed a malicious abuse of process claim against members of a citizens' association following their efforts to remove him from the school board. Six

of those members responded by filing a "special" motion to dismiss pursuant to N.M. Stat. Ann. § 38-2-9.1.A. The trial court granted the members' motion to dismiss and plaintiff appealed, ultimately to the New Mexico Supreme Court. The state supreme court held the association members were "entitled to the *procedural* protections of the New Mexico [anti-SLAPP] statute." *Cordova*, 396 P.3d at 162 (emphasis added). But to resolve the case on the merits, the court relied on a substantive immunity defense *entirely separate* from the anti-SLAPP statute. The court identified the relevant inquiry as whether the members were "entitled to the *substantive* protections provided by the *Noerr-Pennington* doctrine."[5] *Id*. at 166 (emphasis added). The court could not have made itself any clearer: "While the Anti-SLAPP statute provides the *procedural* protections [the members] require, the *Noerr-Pennington* doctrine is the mechanism that offers [the members] the *substantive* First Amendment protections they seek." *Id*. 166–67 (emphasis added). The court ended its analysis by holding the association members were "entitled to immunity under the *Noerr-Pennington* doctrine." *Id*. at 162.

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[5] The *Noerr-Pennington* doctrine provides a qualified immunity from liability under antitrust laws for political activities associated with attempts to influence legislation having an anticompetitive effect. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Both federal and state courts have extended the doctrine to confer immunity for a range of conduct aimed at influencing the Government. *See*, *e.g.*, *Cordova*, 396 P.3d at 167.

After *Cordova*, one cannot reasonably read the language of the New Mexico anti-SLAPP statute as providing a defendant with a substantive defense to SLAPP liability. To be sure, the statute seeks to spare those who exercise their free speech rights before a quasi-judicial governmental body from unwarranted and harassing litigation that threatens to chill the exercise of such rights. As *Cordova* plainly tells us, however, the statute as written pursues this policy through purely *procedural* means. The New Mexico anti-SLAPP statute sets forth a unique "judicial process for enforcing rights and duties recognized by substantive law," that is, substantive law located *entirely* outside the four corners of the anti-SLAPP statute. *Sibbach*, 312 U.S. at 14; *see also Cuba v. Pylant*, 814 F.3d 701, 719 (5th Cir. 2016) (Graves, J., dissenting) (construing a Texas anti-SLAPP statute broader than § 38-2-9.1 as "clearly a procedural mechanism for speedy dismissal of a meritless lawsuit" that infringes on a defendant's free speech rights). *Cordova* undoubtedly stands for a proposition consistent with the anti-SLAPP statute's language, namely, that a movant under the New Mexico anti-SLAPP statute must look outside the statute for substantive defenses designed to defeat a SLAPP lawsuit on its merits.

A defendant's reliance on § 38-2-9.1 may very well hasten a SLAPP suit's outcome. This is precisely what the New Mexico statute is designed to do. Unlike many other states' anti-SLAPP statutes that shift substantive burdens of proof or alter substantive standards, or both, under no circumstance will the New Mexico anti-SLAPP statute have *any* bearing on the suit's merits determination. *See*, *e.g.*, *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013)

(addressing a California anti-SLAPP statute that shifted substantive burdens and altered substantive standards). The New Mexico statute does not alter the rules of decision by which a court will adjudicate the merits of the complaint. The statute "alter[s] only how the claims are processed." *Shady Grove*, 559 U.S. at 407 (plurality opinion). If a defendant in an action described in the opening words of § 38-2-9.1.A has violated the underlying substantive law as alleged in the complaint, *nothing* in the New Mexico anti-SLAPP statute exempts or shields the defendant from liability. The *only* means by which a defendant may avoid liability is to raise a substantive defense entirely separate from the anti-SLAPP statute.

Subsections B and C of § 38-2-9.1 reinforce our plain reading of subsection A because, like subsection A, neither subsection states any rule of substantive law. Subsection B, which the title of § 38-2-9.1 plainly tells us is a "sanctions" provision, consists of two sentences. The second sentence protects a responding party's interests by stating that if a special motion filed pursuant to the anti-SLAPP statute is "frivolous or solely intended to cause unnecessary delay," the trial court shall award fees and costs to the party responding to the motion. N.M. Stat. Ann. § 38-2-9.1.B. We have never encountered a substantive fee-shifting provision—that is, one designed primarily to compensate for services rendered—worded as such. Clearly, subsection B's second sentence is a procedural provision primarily designed to punish and deter a defendant from improperly invoking § 38-2-9.1. *See Farmer v. Banco Popular*, 791 F.3d 1246, 1256 (10th Cir. 2015) (explaining that procedural fee shifting involves a court's authority to sanction for an abuse of the legal process or bad faith conduct in litigation).

Given the context in which § 38-2-9.2 places § 38-2-9.1, why should the Court construe subsection B's first sentence which awards fees and costs to a successful movant any differently? To be sure, the subsection's first sentence does not expressly refer to frivolous or retaliatory lawsuits. But why should it? Section 38-2-9.2 plainly tells us the New Mexico anti-SLAPP statute is aimed at a particular type of frivolous or retaliatory lawsuit. Therefore, construing the entirety of subsection B as a procedural fee-shifting device makes perfect sense. Save the second sentence of subsection B, which is aimed at a type of frivolous motion, the entire statute is aimed at a type of "baseless" lawsuit. As § 38-2-9.1's title plainly suggests, Subsection B's first sentence provides for the imposition of fees and costs as a *sanction* primarily designed not to compensate for legal services but to vindicate First Amendment rights threatened by a kind of "unwarranted or specious" litigation.

All this leaves only subsection C for our consideration. Subsection C provides for an "expedited appeal" from a trial court's ruling, or failure to rule, on a "special" motion. In *Cordova*, the New Mexico Supreme Court held § 38-2-9.1.C allows a party to bring an interlocutory appeal in state court from a decision on a special motion filed pursuant to the New Mexico anti-SLAPP statute. *Cordova*, 396 P.3d at 165. After the trial court granted the association members' special motion, two of those members had counterclaims still pending. Thus, the appeal was interlocutory in nature. The supreme court, sensibly enough, reasoned that "[b]oth the plain language and the purpose of the anti-SLAPP statute underscore a clear legislative intent to provide an interlocutory appeal." *Id*. The purpose of the statute, according to

the court, is to protect those who exercise their right to petition from the financial burden of having to defend against "retaliatory" lawsuits. *Id*. And the statute's plain language reinforces this purpose:

> Importantly, the plain language of Subsection A explicitly provides that the expedited process must allow for the *early consideration* of the issues raised by the motion and to prevent the unnecessary expense of litigation. Therefore *the plain language of Subsections A, B, and C of the Anti-SLAPP statute describes an expedited process that is necessarily interlocutory in nature*.

Id. at 164 (second emphasis added) (internal citation and quotation marks omitted). Nowhere in *Cordova* did the New Mexico Supreme Court suggest the "expedited process" mandated by subsection A of § 38-2-9.1 constitutes a substantive defense to a SLAPP suit. Relying exclusively on "the plain language and the purpose" of the statute, the court decided the New Mexico legislature's *desire for expedited procedures* to thwart retaliatory lawsuits that abused the judicial process and threatened to chill free speech *alone* justified an interlocutory appeal. *Id*. at 165.

Undeterred by the New Mexico anti-SLAPP statute's plain language and the New Mexico Supreme Court's interpretation of it in *Cordova*, Defendants tell us "the statute clearly expresses the intent of New Mexico's legislature to provide individuals immunity from suit" or "a right not to stand trial." Defs' Br. at 12. The statute expresses nothing of the sort. Civil immunity, whether absolute or qualified, is properly defined as an exemption from liability. *See Black's Law Dictionary* 817 (9th ed. 2009); *see also Antoine v. Byers*

& Anderson, Inc. 508 U.S. 429, 432 (1993) (explaining that the proponent of a claim to immunity bears the burden of justifying an "exemption from liability."). Of course, an exemption from liability necessarily encompasses a right not to stand trial that may be effectively lost if a court fails to resolve the question of immunity at the earliest opportunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (explaining that Supreme Court precedent "recognized an entitlement not to stand trial or face the other burdens of litigation, *conditioned on* the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." (emphasis added)). But *only* where the law exempts one from liability can one claim a substantive right not to stand trial in the sense of civil immunity.[6]

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[6] We note here that the *original* version of New Mexico House Bill 241—a Bill the State of New Mexico never enacted into law—clearly sought to grant an immunity from SLAPP suits, albeit a limited or qualified one. H.B. 241, 45th Leg., 1st Sess. (N.M. 2001) (reproduced as Appendix A in Frederick M. Rowe and Leo M. Romero, *Resolving Land-Use Disputes by Intimidation: SLAPP Suits in New Mexico*, 32 N.M. L. Rev. 217, 240–41 (2002)). Among other clear indicators within the original Bill, § 2.A plainly provided that a defendant was immune from liability in an action arising out of the defendant's objectively reasonable or good faith exercise of free speech before a governmental body. The original version of H.B. 241 unequivocally illustrates that the New Mexico legislature understands quite well how to draft a law providing a class of individuals with a limited immunity from suit. But the revised version of H.B. 241, which ended up as N.M. Stat. Ann. §§ 38-2-9.1 & 38-2-9.2, removed *all* references to immunity. This history undoubtedly reinforces our plain reading of the New Mexico anti-SLAPP statute as a purely procedural device.

As the astute reader recognizes by now, the New Mexico anti-SLAPP statute does not exempt a party subject to an alleged SLAPP suit from liability. Because absolutely nothing in the language of the anti-SLAPP statute exempts from liability under any circumstance one who has violated the law while petitioning a governmental body, the statute cannot constitute a grant of immunity. The "right not to stand trial" is not, as Defendants suggest, a substantive defense in the form of immunity itself. Such right is an entitlement *dependent* upon an exemption from liability, an exemption that under a plain reading of the New Mexico anti-SLAPP statute does not appear therein.[7]

In this case, the line between procedure and substance is clear. A plain reading of the New Mexico

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[7] Defendants' faulty reasoning finds its genesis (not surprisingly) in the Ninth Circuit's decision in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). There, the court in passing described a defendant's rights under the California anti- SLAPP statute as "in the nature of immunity: They protect the defendant from the burdens of trial, not merely from the ultimate judgments of liability." *Id.* at 1025; *see also NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742 (5th Cir. 2014) (blindly following *Batzel*'s dicta and, absent critical analysis, construing Texas' anti-SLAPP statute as a grant of immunity). But right or wrong, the Ninth Circuit's construction of a California statute very different from its New Mexico counterpart is none of our business. Our concern is with the proper interpretation of a much narrower statute, one that, as we have seen, does not protect a defendant "from the ultimate judgments of liability." *See Metabollic Research, Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012) ("[D]eeper inspection has persuaded us that, while all of the [anti-SLAPP] statutes have common elements, there are significant differences as well, so that each state's statutory scheme must be evaluated separately.").

anti-SLAPP statute reveals the statute is not designed to influence the *outcome* of an alleged SLAPP suit but only the *timing* of that outcome. The statute simply does not define the scope of any state substantive right or remedy. As we have learned, the statute is procedural in all its aspects. The statute's purpose is the prompt termination of certain lawsuits the New Mexico legislature deemed to be both unduly burdensome and a threat to First Amendment rights. To this end, the statute provides a movant the "right" to have a trial court promptly review the merits of the case (and, if necessary, the "right" to have an appellate court do so as well), so as to limit any harm engendered by the "baseless" lawsuit defined in N.M. Stat. Ann. § 38-2-9.2. But rest assured, if the merits of the case justify liability, a defendant will be held liable notwithstanding the anti-SLAPP statute, *unless* the defendant presents a successful defense wholly unrelated to the anti-SLAPP statute. *See Cordova*, 396 P.3d at 166–67 (applying the *Noerr-Pennington* doctrine to relieve defendants of substantive liability in a SLAPP suit). A defendant's reliance on § 38-2-9.1 will not alter the suit's outcome because it does not provide a defendant the right to avoid liability apart from a separate determination of the suit's underlying merits. The proper course is to recognize the New Mexico anti-SLAPP statute as a procedural mechanism for vindicating existing rights and nothing more.[8]

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[8] The *Erie* analysis called for in more nuanced cases, if properly undertaken, makes no difference to a correct resolution of this case. First, whether the New Mexico anti-SLAPP statute can logically operate alongside the Federal Rules of Civil Procedure without conflict is very much debatable. Rules 11 (sanctions),

Accordingly, the decision of the district court denying application of the New Mexico anti-SLAPP statute in this federal diversity action is AFFIRMED. Defendants' motion to certify a question of state law is DENIED.

12(b) (motions to dismiss), 12(c) (motions for judgment on the pleadings), 16(a) (expedited proceedings), and 56 (motions for summary judgment) seem to cover all the bases, leaving little room for § 38-2-9.1 to operate in federal court. But even assuming for the sake of brevity that the anti- SLAPP statute can exist alongside the Federal Rules, the twin aims of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws"—do *not* render the state statute substantive for *Erie* purposes. *Hanna v. Plummer*, 380 U.S. 460, 468 (1965). Anyone who believes that a federal district court is ill-equipped to deal swiftly and harshly with the sort of lawsuits described in N.M. Stat. Ann. § 38-2-9.2 absent application of § 38-2-9.1 is seriously mistaken. Those litigants and lawyers who seek to circumvent application of the New Mexico anti-SLAPP statute by filing a baseless SLAPP lawsuit in federal district court are in for a rude awakening.

BALDOCK, Circuit Judge, dissenting as to jurisdiction.

The Court initially holds that we may exercise jurisdiction over Defendants' appeal pursuant to the collateral order doctrine, a doctrine identified with *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The Court's holding, in my view, finds little support in Supreme Court jurisprudence. The Supreme Court has admonished us recently "that the class of collaterally appealable orders [*i.e.*, those falling within the collateral order doctrine] must remain narrow and selective in its membership." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (internal quotation marks omitted). Further, the Supreme Court has told us its "[p]rior cases *mark the line* between rulings within the class and those outside." *Will v. Hallock*, 546 U.S. 345, 350 (2006) (emphasis added). For reasons the Court explained in *Will*, the only *categories of orders* on the immediately appealable side of the line are as follows: (1) the denial of a state actor's absolute immunity defense, (2) the denial of a state actor's qualified immunity defense, (3) the denial of a state's Eleventh Amendment immunity defense, and (4) the denial of a criminal defendant's double jeopardy

defense.[1] *Id.* at 350–53. Notably, over the past forty years, the Supreme Court has not sanctioned an appeal pursuant to the collateral order doctrine in a civil case between two private parties, notwithstanding the importance of the interest at stake. *See, e.g.*, *Mohawk Indus.*, 558 U.S. at 109 (acknowledging the sanctity of the attorney-client privilege but holding a district court's order adverse to the privilege was not immediately appealable under the collateral order doctrine). As the Court's opinion ultimately concludes, the New Mexico anti-SLAPP statute in no sense constitutes a grant of immunity to Defendants. Thus, the present appeal unquestionably falls outside the line the Supreme Court has marked for categories of collaterally appealable orders. Under the third *Cohen* inquiry, *i.e.,* whether a claim would be effectively unreviewable absent application of the collateral order doctrine, "[t]he justification for immediate appeal must

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[1] The Court correctly points out that in applying the collateral order doctrine we decide appealability for categories of orders rather than individual orders. Interestingly, the Supreme Court has never identified the category of appealable order under which its decision in *Cohen* falls. In *Cohen*, the state statute at issue in a stockholder's derivative action made the plaintiffs, if unsuccessful, liable for all expenses, including fees, of the defense and required security for their payment as a condition for prosecuting the action. The Supreme Court concluded that upon final judgment, it would "be too late effectively to review the present order and the rights conferred by the statute, if applicable." *Cohen*, 337 U.S. at 546. This appeal is readily distinguishable from *Cohen*. As my dissent shall well illustrate, the procedures provided for in the New Mexico anti-SLAPP statute are adequately vindicable in federal court by means other than application of the collateral order doctrine.

. . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus.*, 558 U.S. at 107. This is because "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Id.* at 106. While the importance of the First Amendment rights asserted in an alleged SLAPP suit cannot be gainsaid, Supreme Court precedent plainly identifies the pertinent question as whether these rights may be "adequately vindicable" by means other than application of the collateral order doctrine. *Id.* at 107. "[T]he decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of high order." *Id.* (internal quotation marks omitted).

So what is this Court's "sufficiently strong" justification for ignoring the final judgment rule and exercising jurisdiction over this appeal pursuant to the collateral order doctrine? Or stated otherwise, what is "the danger of denying justice" by delaying an appeal until final judgment? *Johnson v. Jones*, 515 U.S. 304, 315 (1995). The Court tells us that if we ignore the New Mexico anti-SLAPP statute's policy of protecting individuals from SLAPP lawsuits until final judgment, then "the statute's sole aim would already be lost" because Defendants "would have already incurred the ordinary time and expense of litigation that the statute potentially grants it a right to avoid." Court's Op. at 13. This Court could not be more wrong. An immediate appeal in this case is unnecessary to protect Defendants from what they say is a frivolous lawsuit designed to chill their exercise of First Amendment rights. The Supreme Court has recognized that a party

claiming an adversary is pursuing litigation for an improper purpose "*need not rely on a court of appeals for protection*." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 882–83 (1994) (emphasis added). To suggest otherwise is an affront to the federal district court and its ability to manage its own docket. As a former federal district judge, "Woe!" I say to litigants and lawyers who seek to circumvent application of a state anti-SLAPP statute by filing baseless SLAPP lawsuits in federal district court—lawsuits that in the words of the New Mexico legislature, "chill and punish participation in public affairs," "impose an undue financial burden," and "abuse . . . the legal process." N.M. Stat. Ann. § 38-2-9.2. Rest assured, federal district courts are willing and able to dispose of these unsavory suits in a just manner. This is particularly so where defendants are more than willing to point out the true nature of these suits by moving for judgment as a matter of law and for sanctions in the form of fees and costs—just as they would in New Mexico state court under the anti-SLAPP suit!

Federal district courts have a long and storied history of safeguarding constitutional rights and a bevy of procedural tools in their arsenal to combat abuses of the judicial process that threaten the exercise of those rights. For example, the Federal Rules of Civil Procedure provide for expedited proceedings in federal court. *See* Fed. R. Civ. P. 16(a). These same rules, together with various statutes and the district court's inherent authority, permit the imposition of fees and costs as a sanction on those responsible for filing SLAPP lawsuits. *See, e.g.*, Fed. R. Civ. P. 11. *Experience* suggests federal courts will not hesitate to utilize one or more of these tools to punish and deter

unwarranted litigation of any sort, and many litigants and lawyers can grudgingly testify to the same.

If the first amended complaint's allegations challenging Defendants' speech-related activities are as frivolous as Defendants insist, then they do not need to rely in the first instance on the court of appeals for protection.[2] *And this means—wholly consistent with Supreme Court precedent—that the collateral order doctrine has no application here.* Accordingly, I respectfully but strongly dissent from the Court's holding that we have jurisdiction over this appeal pursuant to the collateral order doctrine.

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[2] Another factor working against Defendants is that at one point they had the district court's blessing to request our discretionary review. The Supreme Court has noted that "litigants confronted with a particularly injurious or novel . . . ruling have several potential avenues of review apart from collateral order appeal." *Mohawk Indus.*, 558 U.S. at 110. This case well illustrates the availability of one discretionary review mechanism. Here, the district court, cognizant of the suit's nature, certified its ruling that the New Mexico anti-SLAPP statute did not apply in federal court for an immediate appeal under 28 U.S.C. § 1292(b). Little doubt exists in my mind that other district courts faced with lawsuits that may imperil First Amendment rights would similarly certify their non-final rulings for immediate appeal. For whatever reason, however, Defendants failed to timely petition us for permission to appeal once the district court certified the *Erie* question for interlocutory review. *See* 28 U.S.C. § 1292(b). Defendants'—or perhaps more accurately defense counsel's—apparent nonfeasance not only has caused this Court to expend valuable time addressing the *Cohen* issue but also surely has caused all parties to incur unnecessary fees and expenses. How ironic that Defendants claim their adversaries are running up unnecessary fees and expenses while doing so themselves!

APPENDIX B: OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO AMENDING OPINION AND ORDER OF FEBRUARY 17, 2016 AND CERTIFYING INTERLOCUTORY APPEAL, MARCH 22, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LOS LOBOS RENEWABLE POWER, LLC, and LIGHTNING DOCK GEOTHERMAL HI-01, LLC, Plaintiffs, v. AMERICULTURE, INC., and DAMON SEAWRIGHT, Defendants.	No. 15-0547-MV-LAM

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants' Motion to Amend Memorandum Opinion and Order [Doc. 34]. Plaintiffs timely responded [Doc. 36] and Defendants replied [Doc. 37]. The Court, having considered the Motion, briefs, relevant law, and being otherwise fully informed, finds that Defendants' Motion to Amend Memorandum Opinion and Order [Doc. 34] is well-taken and therefore will be **GRANTED**.

Appendix B

BACKGROUND

The facts material to the Court's disposition are easily recited. On June 26, 2015, Plaintiffs filed the instant civil action in this Court, seeking relief for, *inter alia*, Defendants' purported breaches of contract. *See generally* Doc. 1. Approximately two months later, on August 18, 2015, Defendants filed a Special Motion to Dismiss [Doc. 14], arguing that that they were "entitled to summary dismissal of the Complaint under New Mexico's Anti-SLAPP statute." Doc. 14 at 1. In its Memorandum Opinion and Order filed on February 17, 2016, the Court denied Defendants' Motion because it found that "New Mexico's Anti-SLAPP statute is a procedural provision that does not apply in the courts of the United States." Doc. 32 at 4. Five days later, Defendants filed the Motion at bar, requesting that the Court amend its Memorandum Opinion and Order to permit an interlocutory appeal. *See* Doc. 34 at 1. Although the Court believes that no such amendment is necessary because Defendants may appeal under the collateral order doctrine, the Court will nonetheless authorize an interlocutory appeal in the event that the United States Court of Appeals for the Tenth Circuit disagrees with the Court's collateral order analysis.

DISCUSSION

I. Collateral Order Doctrine

As an initial matter, the Court finds that Defendants may appeal the Court's Memorandum Opinion and Order pursuant to the collateral order doctrine. This doctrine provides that an order may be appealed immediately, notwithstanding the absence of a final judgment, if that order "(1) conclusively determined the disputed question, (2) resolved an

important issue completely separate from the merits of the case, and (3) is effectively unreviewable on appeal from a final judgment." *Arbogast v. Kansas Dep't of Labor*, 789 F.3d 1174, 1179-80 (10th Cir. 2015) (internal quotation marks omitted). Each of these three requirements is met here. First, the Memorandum Opinion and Order conclusively determined that New Mexico's Anti-SLAPP statute is a state procedural mechanism inapplicable in federal court. *See, e.g.*, Doc. 32 at 4 ("The Court will deny Defendants' Special Motion because New Mexico's Anti-SLAPP statute is a procedural provision that does not apply in the courts of the United States."). Second, this issue is entirely separate from the merits of the case, which centers on a contract dispute and its attendant tort claims. *Cf. Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1267 (10th Cir. 2013) (noting, in the context of qualified immunity appeals, that "[t]o be 'completely separate' from the merits, however, the [] issue raised on appeal must be an 'abstract legal question'") (emphasis original).

Third and finally, the Court's holding would otherwise be unreviewable on appeal; moreover, delaying review of the applicability of New Mexico's Anti-SLAPP statute would risk interfering with ***both*** the express public policy of New Mexico ***and*** the federalist interests protected by *Erie* and its progeny. See *Miller v. Basic Research, LLC*, 750 F.3d 1173, 1177 (10th Cir. 2014) ("The 'decisive consideration' in determining whether an order is effectively unreviewable is 'whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order'") (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009)). That is, the Court views the right to

avoid trial conferred on certain defendants by New Mexico's Anti-SLAPP statute as analogous to the protection afforded by qualified immunity, which itself forms the heart of the collateral order doctrine. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866-67 (1994) (noting that the denial of "an immunity rooted in an explicit constitutional or statutory provision or 'compelling public policy rationale'" has "been held to be immediately appealable"). Accordingly, the Court finds that the collateral order doctrine permits an interlocutory appeal of the Court's Memorandum Opinion and Order.

The Court is confirmed in this conclusion by the fact that several circuits have found that district court denials of motions to dismiss based on Anti-SLAPP statutes qualify for immediate appeal under the collateral order doctrine. *See, e.g.*, *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013) ("Applying this rule, we hold that the denial of a motion to strike made pursuant to California's anti-SLAPP statute remains among the class of orders for which an immediate appeal is available."); *Liberty Synergistics, Inc. v. Microflo Ltd.*, 718 F.3d 138, 143 (2d Cir. 2013) ("With respect to the first question, we hold that the District Court's denial of the defendants' motion to dismiss under California's anti-SLAPP rule constitutes an immediately appealable collateral order."); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 752 (5th Cir. 2014) ("Thus, we hold that this Court has jurisdiction to interlocutorily consider the denial of a [Texas Citizen's Participation Act] anti-SLAPP motion to dismiss."). Thus, the Court finds that its Memorandum Opinion and Order [Doc. 32] may be appealed immediately pursuant to the collateral order doctrine.

II. Federal Rule of Appellate Procedure 5(a) and 28 U.S.C. § 1292(b)

Although 28 U.S.C. § 1291 generally requires that litigants appeal only "final decisions of the district courts," § 1292(b) provides that if a district judge "shall be of the opinion that [an interlocutory] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [she] shall so state in writing in such order." 28 U.S.C. § 1292(b). Thereafter, the "Court of Appeals which would have jurisdiction of an appeal of such action may [], in its discretion, permit an appeal to be taken from such order." *Id.* Moreover, Federal Rule of Appellate Procedure 5(a)(3) provides that "[i]f a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order" to satisfy this requirement. Fed. R. App. P. 5(a)(3).

Here, the Court finds that its Memorandum Opinion and Order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In the Court's view, the applicability of state Anti-SLAPP statutes in diversity cases is an important question of law about which the circuits are divided and on which the Tenth Circuit should be afforded an opportunity to rule. *See* Doc. 32 at 6 (explaining that "there is no Tenth Circuit precedent addressing this aspect of New Mexico's Anti-SLAPP statute" and that "[i]n surveying

the legal landscape, this Court observes disagreement among the courts of appeals"). Moreover, given the nature of Anti-SLAPP statutes, the decision as to whether they apply in diversity cases may, ultimately, prove dispositive in those cases, such that an "appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Further, the question of which rule of decision obtains in diversity cases is one that should be applied uniformly and, therefore, merits appellate review. Accordingly, the Court believes it prudent to afford the Tenth Circuit an opportunity to resolve this question definitively.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Amend Memorandum Opinion and Order [Doc. 34] is **GRANTED. IT IS THEREFORE ORDERED THAT** the Court's Memorandum Opinion and Order [Doc. 32] is **AMENDED** to state that Defendants are given permission to appeal immediately the Memorandum Opinion and Order [Doc. 32] for the reasons described above. **IT IS FURTHER ORDERED THAT** litigation in this Court shall be **STAYED** pending guidance from the United States Court of Appeals for the Tenth Circuit.

Dated this 22nd day of March, 2016.

/s/

MARTHA VÁSQUEZ
United States District Judge

APPENDIX C: OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DENYING SPECIAL MOTION TO DISMISS, FEBRUARY 17, 2016,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LOS LOBOS RENEWABLE POWER, LLC, and LIGHTNING DOCK GEOTHERMAL HI-01, LLC, Plaintiffs, v. AMERICULTURE, INC., and DAMON SEAWRIGHT, Defendants.	No. 15-0547-MV-LAM

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants' First Motion to Dismiss [Doc. 13] and Defendants' Special Motion to Dismiss [Doc. 14]. Plaintiffs timely responded [Docs. 16-17] and Defendants replied [Docs. 25, 28]. The Court having considered the Motions, briefs, relevant law, and being otherwise fully informed, finds that Defendants' First Motion to Dismiss [Doc. 13] is MOOT and that Defendants' Special Motion to Dismiss [Doc. 14] is not well-taken and therefore will be **DENIED**.

Appendix C

BACKGROUND

This case arises out of the fractious relationship between two neighbors in Hidalgo County, New Mexico. Plaintiffs are the beneficiaries of a lease from the Bureau of Land Management ("BLM"), pursuant to which they have developed a "geothermal power generating project located within Hidalgo County, New Mexico." Doc. 23 ¶ 9. Evidently, Plaintiffs have "drilled five deep wells" on the leased property for the purpose of generating geothermal power. *Id.* ¶ 10. Defendant AmeriCulture, Inc., "is a corporation organized and existing under the laws of the State of New Mexico ('AmeriCulture') and its principal place of business is in Hidalgo County, New Mexico, on a tract of land that is adjacent to the Plaintiffs' geothermal electric power generating facility." Doc. 17 at 1-2. Defendant Damon Seawright is, "upon information and/or belief, the Chief Operating Officer of AmeriCulture, an offer and director and the principal shareholder of AmeriCulture." *Id.* at 2. Defendants operate a commercial fish farm devoted to raising tilapia. *See id.*

Apparently, Defendants' fish farm draws heated water from the same geothermal source as Plaintiffs' electricity generation facility, although at a temperature somewhat lower than that preferred for electricity generation; Plaintiffs deep wells are directed at securing minimum water temperatures of 250 degrees Fahrenheit, while Defendants' tilapia prefer a comparatively tepid 235 degrees Fahrenheit. *See id.* at 2. In order to harmonize the management of their shared geothermal resource, the Parties entered into the Joint Facility Operating Agreement ("JFOA"). *See* Doc. 23 ¶¶ 4, 14-21. Plaintiffs believe that Defendants breached this agreement in a variety of ways and, accordingly, brought suit in this Court. *See generally* Doc. 1. Defendants now move to dismiss the suit. *See generally* Docs. 13-14.

DISCUSSION

I. Defendants' First Motion to Dismiss [Doc. 13]

In this Motion, Defendants argue that Plaintiffs' Complaint [Doc. 1] fails to establish subject matter jurisdiction in this Court because the Complaint does not state a basis for the diversity of the Parties and that "Defendants are also entitled to dismissal of Plaintiffs' Count VII for" alleged violations of the New Mexico Unfair Practices Act for failure to state a claim. Doc. 13 at 1, 5, 10. *See also* Doc. 1 ¶¶ 79-83. In response, Plaintiffs submitted an Amended Complaint that clarified the basis for diversity jurisdiction in this Court and omitted the seventh count of the original Complaint. In the Court's view, this resolves all of the issues presented in Defendants' First Motion to Dismiss, such that the Motion is now moot.

To their credit, Defendants themselves concede that while "Defendants' First Motion to Dismiss was based upon Plaintiffs' failure to plead facts necessary to demonstrate diversity jurisdiction, and that under New Mexico law Plaintiffs' Count VII Unfair Practices Act claim failed to state a claim for relief" these deficiencies have been "cured by Plaintiffs' filing of their First Amended Complaint [Doc. 23], which also excluded the Unfair Practices Act claim." Doc. 28 at 1. Accordingly, "the relief requested in Defendants' First Motion to Dismiss is moot." *Id.* As explained above, the Court concurs with this analysis.

II. Defendants' Special Motion to Dismiss [Doc. 14]

In their Special Motion to Dismiss, Defendants argue that they are "entitled to summary dismissal of the Complaint under New Mexico's Anti-SLAPP statute (NMSA 1978, § 38-2-9.1), and a statutory award of attorneys [sic]." Doc. 14 at 1. The Court will deny Defendants' Special Motion because New Mexico's Anti-SLAPP statute is a procedural provision that does not apply in the courts of the United States.

a. *Relevant Law in Diversity Cases*

Under the doctrine established by *Erie R. Co. v. Tompkins* and its progeny, in cases where federal jurisdiction is predicated on diversity, the district courts of the United States apply substantive state law, but federal procedural rules. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-79 (1938). *See also, e.g.*, *Cuprite Mine Partners LLC v. Anderson*, 809 F.3d 548, 554 (9th Cir. 2015) ("Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural rules."); *Weiser-Brown*

Operating Co. v. St. Paul Surplus Lines Ins. Co., 801 F.3d 512, 517 (5th Cir. 2015). However, as Justice Reed noted in his partial concurrence to the opinion rendered in *Erie*, the "line between procedural and substantive law is hazy." Erie, 304 U.S. at 92. Since then, the courts of the United States have grappled with the parameters of this boundary. *See, e.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744 (1980) ("The question whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship jurisdiction has troubled this Court for many years."); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 416 (1996) ("Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor.").

Helpfully, the United States Supreme Court recently reiterated the "test for either the constitutionality or the statutory validity of a Federal Rule of Procedure" when confronted with conflicting state provisions. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010). As stated by the Court, the "test is not whether the rule affects a litigant's substantive rights; most procedural rules do." *Id.* at 407. Rather, what "matters is what the rule itself regulates: [i]f it governs only the manner and the means by which the litigants rights are enforced, it is valid; if it alters the rules of decision by which [the] court will adjudicate [those] rights, it is not." *Id.*

Stated otherwise, a "federal court exercising diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure answer[s] the same question as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act." *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (emphasis original, internal quotation marks omitted). *See also In re Cty. of Orange*, 784 F.3d 520, 527 (9th Cir. 2015) ("When confronted with an Erie question, we first ask whether a Federal Rule of Civil Procedure or a federal law governs. If so, we will apply that rule—even in the face of a countervailing state rule—as long as it is constitutional and within the scope of the Rules Enabling Act.") (citations omitted); *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, (11th Cir. 2014) ("A federal rule applies in the face of a conflicting state rule, however, only if the federal rule comports with the Rules Enabling Act and the Constitution.") (citations omitted); *Nat'l Liab. & Fire Ins. Co. v. R &R Marine, Inc.*, 756 F.3d 825, 835 (5th Cir. 2014) ("If a direct collision [between a federal rule and state law] exists, we must apply the Federal Rule as long as it does not violate either the Constitution or the Rules Enabling Act."). Importantly, the Supreme Court itself noted that "[a]pplying that test, we have rejected every statutory challenge to a Federal Rule that has come before us." *Shady Grove*, 559 U.S. at 407. For the reasons described below, this Court will not venture where the Supreme Court has not.

b. *Precedent Regarding Anti-SLAPP Statutes in Diversity Cases*

Defendants concede that there is no Tenth Circuit precedent addressing this aspect of New Mexico's Anti-SLAPP statute. *See* Doc. 14 at 4 ("While no federal Court [sic] has on-point reviewed New Mexico's Anti-SLAPP statute…"). Accordingly, this Court must look to persuasive, rather than binding, decisions in resolving the matter before it. In surveying the legal landscape, this Court observes disagreement among the courts of appeals. The Court will examine these decisions and adopt the apposite reasoning that it finds most persuasive in the instant case.

The First Circuit has held that Maine's Anti-SLAPP statute applies in federal courts hearing diversity cases. *See Godin v. Schencks*, 629 F.3d 79, 86-87 (1st Cir. 2010) ("Rules 12 (particularly Rule 12(b)(6)) and 56 do not control" motions under the Anti-SLAPP provision and "the dual purposes of *Erie* are best served by enforcement of Section 556 in federal court."). The Court of Appeals for the Ninth Circuit has adopted a similar position with respect to California's Anti-SLAPP statute. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999) ("We conclude that these provisions [of the Anti-SLAPP statute] and Rules 8, 12, and 56 can exist side by side ... each controlling its own intended sphere of coverage without conflict.") (omission original, internal quotation marks omitted). However, then-Chief Judge Kozinski has since urged the Ninth Circuit to abandon its decision in *Newsham*, reasoning that "[f]ederal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied

in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof." *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring).

By contrast, the United States Court of Appeals for the District of Columbia Circuit recently held that "a federal court exercising diversity jurisdiction may [not] apply the D.C. Anti–SLAPP Act's special motion to dismiss provision." *Abbas*, 783 F.3d at 1333. In so holding, the court reasoned that, "[f]or the category of cases that it covers, the D.C. Anti–SLAPP Act establishes the circumstances under which a court must dismiss a plaintiff's claim before trial." *Id.* However, "Federal Rules of Civil Procedure 12 and 56 'answer the same question' about the circumstances under which a court must dismiss a case before trial" and, moreover, "those Federal Rules answer that question differently." *Id.* at 1333-34. Accordingly, the panel concluded that "Federal Rules 12 and 56 answer the same question as the D.C. Anti–SLAPP Act, and those Federal Rules are valid under the Rules Enabling Act" such that a "federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti–SLAPP Act's special motion to dismiss provision." *Id.* at 1337.

Appendix C

The United States District Court for the Northern District of Illinois, in an exceptionally lucid and cogent opinion reached the same conclusion with respect to Washington's Anti-SLAPP statute. *See Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1042 (N.D. Ill. 2013) ("Applying that analysis to the facts of this case, the Court finds that [the Anti-SLAPP statute] cannot be applied by a federal court sitting in diversity because it is in direct conflict with Federal Rules of Civil Procedure 12 and 56."). The Court explained that the Anti-SLAPP statute at issue "allows a court resolve a 'special motion to strike' and dismiss a plaintiff's claim on a preliminary basis in a different manner than it would otherwise resolve a preliminary motion attacking the merits of a case under Rules 12 or 56." *Id.* at 1041. Applying the *Shady Grove* framework, the court carefully explained that "by placing a higher procedural burden on the plaintiff than is required to survive a motion for summary judgment under Rule 56, Section 525 conflicts with Rule 12(d) and Rule 56 by restricting a plaintiff's procedural right to maintain [an action] established by the federal rules and therefore cannot be applied by a federal court sitting in diversity." *Id.* at 1048 (internal quotation marks omitted). In part, the court justified this conclusion by drawing from the Advisory Committee about the 1946 amendments to Rule 12, which, in the court's view, make clear that "Rules 12 and 56 were intended to provide the exclusive means for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint." *Id.* at 1048. Hence, the federal rules "answer the same question that is in dispute in this case and, pursuant to Shady Grove and Burlington Northern, cannot be applied by a federal court sitting in diversity." *Id.*

c. *The Instant Case*

The Court is persuaded by this latter line of reasoning and therefore concludes that New Mexico's Anti-SLAPP statute is inapplicable in this diversity case. The statute provides, in pertinent part, that "[a]ny action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state is subject to a special motion to dismiss." N.M.S.A. § 38-2-9.1(A). However, "[n]othing in this section limits or prohibits the exercise of a right or remedy of a party granted pursuant to another constitutional, statutory, common law or administrative provision, including civil actions for defamation or malicious abuse of process." *Id.* at § 38-2-9.1(E). Straightforward application of the two-prong *Shady Grove* analysis makes patent that the Federal Rules of Civil Procedure, not New Mexico's anti-SLAPP statute, govern the instant case.

With respect to the first element of the *Shady Grove* framework, there can be no genuine dispute that the "Federal Rule of Civil Procedure answer the same question as" New Mexico's Anti-SLAPP statute. *Abbas*, 783 F.3d at 1334 (internal quotation marks omitted). Indeed, the three methods of disposing of SLAPP cases provided for in NMSA § 38-2-9.1(A), the motion to dismiss, the motion for judgment on the pleadings, and the motion for summary judgment, are described in Federal Rules of Civil Procedure 12(b), 12(c), and 56, respectively. *See* NMSA § 38-2-9.1(A) ("…is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment…"). Thus, the situation presented by New Mexico's Anti-SLAPP statute resonates strongly with the view of Rules 12 and 56 as "an integrated program for determining whether to grant pre-trial judgment in cases in federal court." *Abbas*, 783 F.3d at 1334 (internal quotation marks omitted). *See also Intercon*, 969 F. Supp. 2d at 1048 (explaining that Rules 12 and 56 "were intended to provide the exclusive means for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint."). Consequently, this Court, for the same reasons, holds that the Federal Rules of Civil Procedure "answer the same question as" New Mexico's Anti-SLAPP statute.

Similarly, there can be no serious argument that "the Federal Rule does not violate the Rules Enabling Act." *Abbas*, 783 F.3d at 1333 (citing *Shady Grove*, 559 U.S. at 398-99). The Court need not now recite the lengthy analysis provided in *Abbas* or *Intercon*; instead, it is sufficient to note that "the Supreme Court has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act" and that the decisions discussed above found that Rules 12 and 56 are "valid under the Rules Enabling Act." *Id.* at 1336-37. *See also Intercon*, 969 F. Supp. 2d at 1051 ("This Court agrees with [the United States District Court for the District of Columbia] that Rules 12(d) and 56 'fall squarely within the proper scope of the Rules Enabling Act.'"). The Court adopts this analysis and finds that Rules 12 and 56 are valid under the Rules Enabling Act.

CONCLUSION

For the foregoing reasons, Defendants' First Motion to Dismiss [Doc. 13] is **MOOT** and Defendants' Special Motion to Dismiss [Doc. 14] is not well-taken and therefore is **DENIED**.

Dated this 17th day of February, 2016.

/s/

MARTHA VÁSQUEZ
United States District Judge

APPENDIX D:
STATUTES AND RULES INVOLVED

Selected State Anti-SLAPP Statutes

New Mexico

N.M. Stat. Ann. § 38-2-9.1. Special motion to dismiss unwarranted or specious lawsuits; procedures; sanctions; severability

A. Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.

B. If the rights afforded by this section are raised as an affirmative defense and if a court grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment filed within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action. If the court finds that a special motion to dismiss or motion for summary judgment is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to the party prevailing on the motion.

C. Any party shall have the right to an expedited appeal from a trial court order on the special motions described in Subsection B of this section or from a trial court's failure to rule on the motion on an expedited basis.

D. As used in this section, a "public meeting in a quasi-judicial proceeding" means and includes any meeting established and held by a state or local governmental entity, including without limitations, meetings or presentations before state, city, town or village councils, planning commissions, review boards or commissions.

E. Nothing in this section limits or prohibits the exercise of a right or remedy of a party granted pursuant to another constitutional, statutory, common law or administrative provision, including civil actions for defamation or malicious abuse of process.

F. If any provision of this section or the application of any provision of this section to a person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

§ 38-2-9.2. Findings and purpose

The legislature declares that it is the public policy of New Mexico to protect the rights of its citizens to participate in quasi-judicial proceedings before local and state governmental tribunals. Baseless civil lawsuits seeking or claiming millions of dollars have been filed against persons for exercising their right to petition and to participate in quasi- judicial proceedings before governmental tribunals. Such

lawsuits can be an abuse of the legal process and can impose an undue financial burden on those having to respond to and defend such lawsuits and may chill and punish participation in public affairs and the institutions of democratic government. These lawsuits should be subject to prompt dismissal or judgment to prevent the abuse of the legal process and avoid the burden imposed by such baseless lawsuits.

Appendix D

California

Cal. Civ. Proc. Code § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by

that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue

under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "crosscomplainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly

upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Appendix D

District of Columbia

§ 16-5501. Definitions.

For the purposes of this chapter, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

§ 16-5502. Special motion to dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c) (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

Appendix D

§ 16-5503. Special motion to quash.

(a) A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

§ 16-5504. Fees and Costs.

(a) The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

(b) The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

§ 16-5505. Exemptions.

This chapter shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is:

(1) A representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services; and

(2) The intended audience is an actual or potential buyer or customer.

D.C. Code §§ 16-5501-05.

Appendix D

Louisiana

La. Code Civ. Proc. Ann. art. 971

A. (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.

(2) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability of success on the claim, that determination shall be admissible in evidence at any later stage of the proceeding.

B. In any action subject to Paragraph A of this Article, a prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs.

C. (1) The special motion may be filed within ninety days of service of the petition, or in the court's discretion, at any later time upon terms the court deems proper.

(2) If the plaintiff voluntarily dismisses the action prior to the running of the delays for filing an answer, the defendant shall retain the right to file a special motion to strike within the delays provided by Subparagraph (1) of this Paragraph, and the motion shall be heard pursuant to the provisions of this Article.

(3) The motion shall be noticed for hearing not more than thirty days after service unless the docket conditions of the court require a later hearing.

D. All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this Article. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. Notwithstanding the provisions of this Paragraph, the court, on noticed motion and for good cause shown, may order that specified discovery be conducted.

E. This Article shall not apply to any enforcement action brought on behalf of the state of Louisiana by the attorney general, district attorney, or city attorney acting as a public prosecutor.

F. As used in this Article, the following terms shall have the meanings ascribed to them below, unless the context clearly indicates otherwise:

(1) "Act in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue" includes but is not limited to:

(a) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.

(b) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official body authorized by law.

(c) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(2) "Petition" includes either a petition or a reconventional demand.

(3) "Plaintiff" includes either a plaintiff or petitioner in a principal action or a plaintiff or petitioner in reconvention.

(4) "Defendant" includes either a defendant or respondent in a principal action or a defendant or respondent in reconvention.

La. Code Civ. Proc. Ann. art. 971

Appendix D

Maine

Maine Rev. Stat. tit. 14 § 556

When a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss. The special motion may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require. The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The Attorney General on the Attorney General's behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed may intervene to defend or otherwise support the moving party on the special motion.

All discovery proceedings are stayed upon the filing of the special motion under this section, except that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery remains in effect until notice of entry of the order ruling on the special motion.

The special motion to dismiss may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms the court determines proper.

If the court grants a special motion to dismiss, the court may award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. This section does not affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, "a party's exercise of its right of petition" means any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Me. Rev. Stat. tit. 14 § 556.

Appendix D

Nevada

Nev. Rev. Stat. Ann. § 41.660. Attorney General or chief legal officer of political subdivision may defend or provide support to person sued for engaging in right to petition or free speech in direct connection with an issue of public concern; special counsel; filing special motion to dismiss; stay of discovery; adjudication upon merits

1. If an action is brought against a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern:

(a) The person against whom the action is brought may file a special motion to dismiss; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) Determine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;

(b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim;

(c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

(1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or

(2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;

(d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);

(e) Except as otherwise provided in subsection 4, stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

(f) Rule on the motion within 20 judicial days after the motion is served upon the plaintiff.

4. Upon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information.

5. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

6. The court shall modify any deadlines pursuant to this section or any other deadlines relating to a complaint filed pursuant to this section if such modification would serve the interests of justice.

7. As used in this section:

(a) "Complaint" means any action brought against a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, including, without limitation, a counterclaim or cross-claim.

(b) "Plaintiff" means any person asserting a claim, including, without limitation, a counterclaim or cross-claim.

Appendix D

Nev. Rev. Stat. Ann. § 41.665. Legislative findings and declaration regarding plaintiff's burden of proof under NRS 41.660

The Legislature finds and declares that:

1. NRS 41.660 provides certain protections to a person against whom an action is brought, if the action is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.

2. When a plaintiff must demonstrate a probability of success of prevailing on a claim pursuant to NRS 41.660, the Legislature intends that in determining whether the plaintiff "has demonstrated with prima facie evidence a probability of prevailing on the claim" the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015.

Nev. Rev. Stat. Ann. § 41.670. Award of reasonable costs, attorney's fees and monetary relief under certain circumstances; separate action for damages; sanctions for frivolous or vexatious special motion to dismiss; interlocutory appeal

1. If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

> (a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal

officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.

(b) The court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to $10,000 to the person against whom the action was brought.

(c) The person against whom the action is brought may bring a separate action to recover:

(1) Compensatory damages;

(2) Punitive damages; and

(3) Attorney's fees and costs of bringing the separate action.

2. If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party reasonable costs and attorney's fees incurred in responding to the motion.

3. In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:

(a) An amount of up to $10,000; and

(b) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.

Nev. Rev. Stat. Ann. §§ 41.660-70.

Appendix D

The Rules of Decision Act

The Rules of Decision Act provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

The Rules Enabling Act

The Rules Enabling Act provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 U.S.C. § 2072.

Appendix D

Federal Rule of Civil Procedure 12

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United

States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.