

No. 20-952

---

**In The  
Supreme Court of the United States**

---

**CONSTRUCTION COST CATA, L.L.C.;  
THE JOB ORDER CONTRACT GROUP, L.L.C.;  
MANAGED JOC SOLUTIONS, L.L.C.,**  
*Petitioners,*

v.

**THE GORDIAN GROUP, INC.;  
R.S. MEANS COMPANY, LLC,**  
*Respondents.*

---

**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

---

**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

---

**Jeffrey A. Cohen  
Counsel of Record  
FLASTER/GREENBERG, P.C.  
1835 Market Street, Suite 1050  
Philadelphia, Pennsylvania 19103  
(215) 279-9393  
jeffrey.cohen@flastergreenberg.com**

***Counsel for Respondents***

***Dated: March 1, 2021***

---

## QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the *Noerr-Pennington* doctrine protects petitioning activity that a jury finds to be not objectively baseless even when the underlying legal claim that constitutes the petitioning activity is not proven by a preponderance of evidence at trial.
2. Whether the *Noerr-Pennington* doctrine acted as a complete defense to CCD's business tort claims because the Jury unanimously found that Gordian's pre-litigation correspondence was not objectively baseless.
3. Whether CCD properly preserved these issues in the courts below.

## **CORPORATE DISCLOSURE STATEMENT**

The Gordian Group, Inc. and R.S. Means Company, LLC are subsidiaries of Fortive Corporation, and Fortive Corporation owns more than 10% of the stock of The Gordian Group, Inc. and R.S. Means Company, LLC.

## TABLE OF CONTENTS

	<b>Page</b>
QUESTIONS PRESENTED .....	i
CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	v
INTRODUCTION .....	1
STATEMENT OF THE CASE .....	3
A.    Job Order Contracting and Gordian’s Pre-Litigation Correspondence .....	3
B.    The District Court Action and Pre- Trial Motions .....	4
C.    The Trial and Jury Charge Conference .....	4
D.    The Defense Verdict for Gordian and CCD’s Post-Trial Motions.....	5
E.    The Court of Appeals Affirmed Gordian’s Defense Verdict on Appeal and Denied CCD’s Petition for Panel Re-Hearing.....	8
ARGUMENT.....	10
A.    The <i>Noerr</i> -Pennington Doctrine Protects Petitioning Activity that a Jury Finds to Be Not Objectively Baseless Even When the Underlying Legal Claim that Constitutes the Petitioning Activity Is Not Proven by a Preponderance of Evidence at Trial .....	10

B.	The <i>Noerr</i> -Pennington Doctrine Was Properly Applied to CCD's Business Tort Claims, And the Jury Findings Were Logically Consistent.....	16
CONCLUSION .....		20

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Acoustic Sys. v. Wenger Corp.</i> , 207 F.3d 287 (5th Cir. 2000) .....	12
<i>Bryant v. Military Dep't</i> , 597 F.3d 678 (5th Cir. 2010) .....	12
<i>Cal. Motor Transp. Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972) .....	10
<i>Coastal States Mktg, Inc. v. Hunt</i> , 694 F.2d 1358 (5th Cir. 1983) .....	17, 18
<i>Columbia v. Omni Outdoor Advertising, Inc.</i> , 499 U.S. 365 (1991) .....	13, 14
<i>E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961) .....	<i>passim</i>
<i>Garrison v. La.</i> , 379 U.S. 64 (1964) .....	15
<i>Gertz v. Welch</i> , 418 U.S. 323 (1974) .....	15
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) .....	15
<i>Profl Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.</i> , 508 U.S. 49 (1993) .....	<i>passim</i>

*United Mine Workers of Am. v. Pennington*,  
381 U.S. 657 (1965) ..... *passim*

*Video International Production, Inc. v.*  
*Warner–Amex Cable Communications, Inc.*,  
858 F.2d 1075 (5th Cir. 1988) ..... 17

*Whitehead v. Food Max of Miss., Inc.*,  
163 F.3d 265 (5th Cir. 1998) ..... 9

## **CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend. I ..... *passim*

U.S. CONST. amend. XIV ..... 15

## **RULES**

Fed. R. Civ. P. 48 ..... 8

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents The Gordian Group, Inc. and R.S. Means Company, LLC (collectively “Gordian”) respectfully request that the Supreme Court of the United States deny the petition for writ of certiorari (“Petition”) of Petitioners, Construction Cost Data, L.L.C., The Job Order Contract Group, L.L.C., and Managed J.O.C. Solutions, L.L.C. (collectively “CCD”) to review the judgments of the United States District Court and the United States Court of Appeals for the Fifth Circuit.

### INTRODUCTION

CCD seeks to overturn decades of First Amendment and *Noerr-Pennington* jurisprudence, including the precedent already established by this Honorable Court, and instead create a new legal test that would vitiate the objective prong of the *Noerr-Pennington* doctrine. The District Court and the Court of Appeals both unequivocally held that the *Noerr-Pennington* doctrine provided Gordian a complete defense to CCD’s affirmative claims when the Jury found that Gordian’s pre-litigation correspondence was not objectively baseless.

The *Noerr-Pennington* doctrine is an affirmative defense to business tort claims, so long as the defendant can show one of two things: (1) that its petitioning activity was not objectively baseless; or (2) that the subjective intent was not to merely interfere with the plaintiff. Crucially, since Gordian’s pre-litigation correspondence met the first prong of the *Noerr-Pennington* standard when the



Jury found it not to be objectively baseless, the analysis ends, and Gordian's subjective intent is immaterial. In *Prof'l Real Estate Inv'rs., Inc. v. Columbia Pictures Indus., Inc.*, this Court already examined this exact question and rejected a purely subjective definition of a "sham" lawsuit and instead articulated the two-part test that was applied in this case. 508 U.S. 49, 57 (1993).

CCD's argument that Gordian made a "false statement" is misleading and is actually the very petitioning activity that *Noerr-Pennington* was designed to protect. Gordian accused CCD of copyright infringement, but at trial, the Jury found that Gordian did not carry its burden on this claim by a preponderance of the evidence. In other words, CCD seeks to upend decades of *Noerr-Pennington* petitioning jurisprudence to create a new test in which a party asserting a legal claim against a competitor that does not ultimately succeed in establishing that claim by a preponderance of evidence at trial has made a "false statement" that cannot be protected by *Noerr-Pennington*. In essence, the original petitioning activity would become unprotectable regardless of objective or subjective intent. This *ex post facto* addendum to the *Noerr-Pennington* doctrine would vitiate the objective prong of the doctrine and frustrate the very purpose of *Noerr-Pennington* petitioning activity. This Court specifically crafted the *Noerr-Pennington* defense with an objective and subjective prong to prevent a reductive application of the doctrine based on the ultimate success of the underlying legal claim.

CCD's Petition does not seek to resolve an "unwarranted expansion of *Noerr-Pennington*," but

instead, seeks to create a new legal test and overturn decades of *Noerr-Pennington* jurisprudence. These issues have already been resolved by this Court, and CCD's Petition should be denied.

## STATEMENT OF THE CASE

### A. Job Order Contracting and Gordian's Pre-Litigation Correspondence

Gordian operates in the job order contracting ("JOC") industry, and JOC is a system of procuring construction through an umbrella-type contract that allows a client, a user of job order contracting, to do many jobs having only bid the contract once. App.2-3. A key component of JOC is the unit price book, which contains the labor, materials, and equipment costs that a contractor may need to provide during the course of a contract. App.3. Gordian invests substantial resources in developing its unit price book, the "Construction Task Catalog," including devoting over 20,000 man hours of research per year to build its annual data set and update it. App.3. The Construction Task Catalog is comprised of thousands of pages and hundreds of thousands of line items and associated construction costs, and forms the pricing basis for each JOC construction contract that is advertised, solicited and awarded by Gordian's JOC procurement customers. ROA.32716.

In 2015, Gordian became aware of CCD's "Construction Cost Catalogue" unit price book. App.3. Gordian reviewed its contents and found that its own proprietary construction cost data was contained in the Construction Cost Catalogue. As a result, Gordian sent cease-and-desist letters alleging

copyright and trademark infringement (pre-litigation correspondence) to CCD and third-party vendors using the Construction Cost Catalogue. App.3. In addition, it was unfathomable to Gordian how two people (CCD) could develop a data set needed to run a JOC program in a mere three or four months when the Gordian Entities devote over 20,000 man hours of research per year to revise and update the Construction Task Catalog. ROA.5702:11 – 5703:7.

### **B. The District Court Action and Pre-Trial Motions**

CCD filed a lawsuit against Gordian in state court alleging tortious interference with contract, antitrust violations, and business disparagement. App.3. Gordian removed the case to federal court and filed counterclaims for copyright infringement, trademark infringement, and unfair competition. App.3.

The parties filed cross motions for summary judgment. App.4. The District court found that “Construction Task Catalog” is a generic trademark and granted summary judgment in favor of CCD on Gordian’s trademark infringement claim, but the District Court denied summary judgment as to the copyright claim, finding there were genuine issues of material fact for trial. App.5.

### **C. The Trial and Jury Charge Conference**

While the record shows seven days of trial related activities, the evidentiary phase of the trial lasted for four days in front of twelve jurors. App.27.

On day 5, District Judge Ellison devoted the entire day to a lengthy jury charge conference with both parties. App.64. During the conference, Judge Ellison advised both sides that this was the last opportunity for argument about jury instructions, which ultimately consisted of over 50 pages of instructions. App.64, 74-129. The instructions on Question 12 for the *Noerr-Pennington* affirmative defense were taken from the ABA's Model Jury Instructions for antitrust cases, which CCD had specifically endorsed as the appropriate instructions for their monopoly claims. App.64. Even though Judge Ellison admonished both sides that the charge conference on Friday, January 18, 2019, was the final chance to advance objections or argument regarding the jury instructions, CCD emailed the Court and Gordian's counsel a new draft of proposed instructions days later and just fifteen hours before the jury was set to be charged and while Gordian's counsel was in transit to Houston. App.64. As a result, Judge Ellison refused to entertain the new, belated instructions, especially since CCD's counsel had clearly waited until the last minute to prepare the proposed jury instructions despite the fact that the case was over three years old. App.64.

#### **D. The Defense Verdict for Gordian and CCD's Post-Trial Motions**

The Jury unanimously found in the first subpart of Question 12 that Gordian's pre-litigation correspondence was not "objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits." App.91-94. The Jury Charge instructed, "If you find that [Gordian's] threatened suit was not objectively baseless, then

you do not need to consider whether [Gordian's] lawsuit was an attempt to harass or interfere with the business relationships of the Plaintiffs." App.92. The Jury struck a line through the specific section responsive to the second subpart of Question 12 asking: "If the activity of [Gordian] was objectively baseless, was the subjective intent merely to interfere with [CCD]?"; thereby, indicating that they understood the instruction. App.94. Since the Jury did not find that the "sham exception" to *Noerr-Pennington* immunity applied, Gordian prevailed on its affirmative defense to CCD's claims, and final judgment was entered for Gordian on CCD's claims. App.67.

The Jury heard the following evidence at trial to substantiate that Gordian's pre-litigation correspondence was not objectively baseless: (1) Ben Stack, one of the two members of CCD, used data that he took from the U.S. Army Corps of Engineers ("ACOE") to create the Construction Cost Catalogue, and at that time, the ACOE got its data from Gordian (ROA.5842:23 – 5843:15); (2) CCD and third-party vendors exchanged correspondence in which they were concerned that the line items of data and task descriptions were identical or uncomfortably similar to Gordian's data (ROA.5855:25 – 5856:11, 5861:1-4, 6729); (3) Stack emailed Mark Powell, the other member of CCD, and told him that he believed the Construction Cost Catalogue was "poisoned" with Gordian's data, and he was "absolutely crushed" that this could have happened (ROA.6741); and (4) Gordian analyzed the data and found evidence of glaring similarities between the Construction Cost Catalogue and their own data set (ROA.6370:12 – 6371:14).

On January 28, 2019, CCD filed a Rule 49 Motion for Continued Jury Deliberations or for a New Trial. App.6. On February 5, 2019, the District Judge held oral argument on the motion and explained in great detail how CCD had lost their case because the Jury was convinced by the overwhelming evidence that Gordian had proven their *Noerr-Pennington* affirmative defense:

But the biggest issue of all is on *Noerr-Pennington*. That was the central issue in the case. We knew that from well before we went to trial. And I have to say if the jury had come back with findings for plaintiff on every damages question, I believe I would have – I know I would have entered judgment *non obstante veredicto*, because I thought the *Noerr-Pennington* defense clearly applied. I thought defendants won on that issue by a considerable margin. So, I really – to me the jury’s verdict makes sense.

ROA.34908:5-13.

On February 6, 2019, the Court entered judgment in favor of Gordian on all of CCD’s claims because the *Noerr-Pennington* doctrine was an affirmative defense to all of CCD’s business tort claims. App.67. The District Court also issued a lengthy memorandum and opinion denying CCD’s Rule 49 Motion and finding that *Noerr-Pennington* was properly applied, and the Jury’s unanimous finding in Question 12 did not conflict with its other findings. App.25-65. The District Court stated: “The

Court finds [CCD's] argument inconsistent with the nature of an affirmative defense. There is nothing irreconcilable about finding the elements of, for example, business disparagement, and also finding that the elements of an affirmative defense were met." App. 52.

On March 6, 2019, CCD then filed a Rule 59 Motion for a New Trial, and the District Court denied it on June 24, 2019, largely citing to the reasons set forth in its opinion from the Rule 49 Order. App.68-70.

**E. The Court of Appeals Affirmed Gordian's Defense Verdict on Appeal and Denied CCD's Petition for Panel Re-Hearing**

CCD thereafter filed an appeal to the Court of Appeals for the Fifth Circuit and argued: (1) the District Court violated Rule 48 because there was not a unanimous verdict and CCD was deprived of an opportunity to poll the Jury; (2) the Jury's findings were irreconcilable; (3) the District Court improperly excluded evidence at trial; and (4) the District Court erred in finding *Noerr-Pennington* immunity was applicable. App.2.

The Court of Appeals found that CCD's challenges to the District Court's judgment were without merit and affirmed the decision below. App.2. Regarding the applicability of *Noerr-Pennington* and the allegation that Gordian made "false statements," the Court of Appeals opined:

CCD argues that, nevertheless, the cease-and-desist letters were 'false, or at best,

misleading’ because the jury unanimously found no copyright infringement and the district court found no trademark infringement. But, these findings do not establish that Gordian lied or made misrepresentations in the cease-and-desist letters; rather, they show that Gordian did not prove the elements of trademark and copyright infringement. The same is true of the jury’s favorable findings as to CCD’s affirmative claims. Those findings showed that CCD established the elements of its affirmative claims, and not that Gordian lied or made misrepresentations in its letters.

App.19-20.

CCD filed a petition for panel rehearing with the Court of Appeals, which the Court of Appeals denied. App.72. The Court of Appeals found that CCD did not raise the issue on appeal concerning false statements in Question 8 and *Noerr-Pennington* until oral argument. “[T]he issue was not raised on appeal until oral argument . . . we do not generally consider points raised for the first time at oral argument.” *Id.* (citing *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 270 (5th Cir. 1998)).



## ARGUMENT

**A. The *Noerr-Pennington* Doctrine Protects Petitioning Activity that a Jury Finds to Be Not Objectively Baseless Even When the Underlying Legal Claim that Constitutes the Petitioning Activity Is Not Proven by a Preponderance of Evidence at Trial**

The *Noerr-Pennington* doctrine emerged from two Supreme Court cases and was originally intended to protect a party's First Amendment right to petition the government for a redress of grievances in the context of antitrust liability. See *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (holding the right to petition is protected by the First Amendment and the Sherman Act does not apply to railroad companies' solicitation activities of government action for the passage and enforcement of laws); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (holding that concerted efforts to influence public officials do not violate the antitrust laws even when intended to eliminate competition). The *Noerr-Pennington* doctrine immunizes a party's petitioning activity from liability (including petitioning the courts) even if the activity eliminates competition, unless the activity is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr Motor Freight, Inc.*, 365 U.S. at 144; see also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (holding that the right to petition the government extends to petitioning the courts).

In *Profl Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, this Court outlined the two-part test of what constitutes “sham” litigation:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and [a claim] premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals ‘an attempt to interfere *directly* with the business relationships of a competitor,’ [internal citation omitted], through the ‘use [of] the governmental *process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon,’ [internal citation omitted]. This two-tiered process requires the plaintiff to disprove the challenged lawsuit’s *legal* viability before the court will entertain evidence of the suit’s *economic* viability.

508 U.S. 49, 60-61 (1993) (emphasis in original).

Crucially, and contrary to CCD’s representation<sup>1</sup> in its Petition, CCD had the burden of proving that Gordian’s petitioning activity was objectively baseless. *See Bryant v. Military Dep’t*, 597 F.3d 678, 690 (5th Cir. 2010) (“The plaintiff bears the burden to disprove the challenged lawsuit’s legal viability before subjective intent can be considered. . . . This test looks at objective merit at the outset, not whether the claim ultimately prevailed.”) (citing *Profl Real Estate Inv’rs, Inc.*, 508 U.S. at 60-61). CCD did not carry its burden of proof, and the Jury unanimously held that Gordian’s petitioning activity was not objectively baseless. App.92.

CCD contends that because Gordian did not prove copyright infringement at trial by a preponderance of evidence, its allegations of copyright infringement contained in the pre-litigation correspondence constituted “false statements” that cannot be protected by the First Amendment and the *Noerr-Pennington* doctrine. In sum, CCD asks this Court to vitiate the objective prong of the doctrine and impose a new *ex post facto* element in which a party is only protected under the doctrine if it succeeds in proving at trial the underlying claim alleged in its pre-litigation

---

<sup>1</sup> CCD cites *Acoustic Sys. v. Wenger Corp.* for the proposition that the defendant carries the burden of proving that the challenged lawsuit was not objectively baseless. 207 F.3d 287, 296 (5th Cir. 2000). That case does not contain this proposition and instead provides that *Noerr-Pennington* is only an affirmative defense and does not afford a party a right to not stand trial.

petitioning activity (e.g., a cease-and-desist letter). Otherwise, in CCD's view, the allegation of unlawful conduct in the pre-litigation correspondence would end up being a "false" accusation post-trial because it had not been proven. CCD's suggestion has already been considered and rejected by this Court.

In *Professional Real Estate Investors*, Columbia Pictures Industries, Inc. ("Columbia") sued Professional Real Estate Investors, Inc. ("Professional Real Estate") for copyright infringement, and Professional Real Estate counterclaimed for violations of the Sherman Act. 508 U.S. at 52. The parties filed cross-motions for summary judgment, and the district court entered summary judgment in favor of Professional Real Estate on Columbia's copyright claim. *Id.* at 53. Following an appeal, on remand, Columbia was granted summary judgment on Professional Real Estate's Sherman Act claims because the copyright infringement claim was not objectively baseless and did not constitute a sham. *Id.* Professional Real Estate asked the Supreme Court to ignore the objective component and focus on Columbia's subjective intent in bringing its copyright infringement claim alone. *Id.* at 55. The Supreme Court rejected Professional Real Estate's proposed "sham" definition and instead created the two-part test that remains the law today:

Our most recent applications of *Noerr* immunity further demonstrate that neither *Noerr* immunity nor its sham exception turns on subjective intent alone . . . . In *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991), we []

held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria. We dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's 'purposes were to delay [the plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate . . . administrative and legislative fora.' *Id.* at 381 (internal quotation marks omitted).

\* \* \* \*

In sum, fidelity to precedent compels us to reject a purely subjective definition of 'sham.' The sham exception so construed would undermine, if not vitiate, *Noerr*. And despite whatever 'superficial certainty' it might provide, a subjective standard would utterly fail to supply 'real intelligible guidance.'

*Id.* at 59-60 (internal quotations omitted).

The Court of Appeals in this matter relied on *Professional Real Estate Investors* for the proposition that *Noerr-Pennington* was correctly applied because Gordian's claim had "objective merit," and Gordian's inability to prove the elements of copyright infringement at trial by a preponderance of the evidence does not mean that "Gordian lied or made misrepresentations in the cease-and-desist letters." App.16-17, 20. The Court of Appeals further opined: "The Court in *Professional Real Estate Investors*

considered such a possibility and held that a party's subjective expectation, intent, and/or motivation regarding its infringement claim were not relevant if there was proof of the 'objective legal reasonableness of the litigation.'" App.17.

CCD also relies on *Sullivan*, *Garrison*, and *Gertz* in support, but these cases are irrelevant red herrings that involve the outer bounds of First and Fourteenth Amendment protections with respect to defamatory statements made with actual malice about public or private individuals. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (examining extent of First and Fourteenth Amendment protections for freedom of speech and freedom of the press with respect to libelous words printed about public officials); *Garrison v. La.*, 379 U.S. 64 (1964) (examining whether criminal libel statute should conform to the same restrictions as civil libel statutes with respect to protections for freedom of speech under the First Amendment); *Gertz v. Welch*, 418 U.S. 323 (1974) (examining whether the First Amendment allows a newspaper to publish defamatory statements about an individual who is not a public figure). *Sullivan* and *Gertz* discussed First Amendment protections afforded to defamatory statements made in the press, and *Gertz* analyzed the First Amendment's protections for criminal versus civil statutes. These cases do not discuss, examine, or apply the *Noerr-Pennington* doctrine.

Unlike those cases, the actual act of petitioning at issue here cannot be considered "true" or "false" depending on the claim's success or failure in court. Since Gordian's pre-litigation correspondence which accused CCD of copyright infringement was

found to be not objectively baseless, it cannot be considered “defamatory” or a “false statement.” Otherwise, the act of petitioning the courts would no longer be protected, and instead, only successful petitioning would be covered by *Noerr-Pennington*. This is the drastic limitation of the doctrine that the Supreme Court declined to adopt in *Professional Real Estate Investors*.

Accordingly, this Court has already considered and rejected CCD’s position that *Noerr-Pennington* should only focus on the subjective element for the sham exception. Because the Jury unanimously found that Gordian’s petitioning activity was not objectively baseless, the *Noerr-Pennington* doctrine was properly applied, and judgment was entered for Gordian on CCD’s affirmative claims and affirmed by the Fifth Circuit.

**B. The *Noerr-Pennington* Doctrine Was Properly Applied to CCD’s Business Tort Claims, And the Jury Findings Were Logically Consistent**

The *Noerr-Pennington* doctrine protects petitioning the courts and is a defense against business tort claims; accordingly, when the Jury found that Gordian’s pre-litigation correspondence was not objectively baseless, it provided a complete defense to CCD’s affirmative claims. “Although the *Noerr-Pennington* doctrine initially arose in the antitrust field, [it now also] protect[s] first amendment petitioning of the government from claims brought under federal and state laws . . . [including, but not limited to] common law tortious interference with contractual relations.”

*Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988). As CCD admitted in its Petition, the federal circuit courts are in agreement that the *Noerr-Pennington* doctrine extends to petitioning the courts and defending against business tort claims under state law. See CCD's Petition at 26-27.

The Fifth Circuit has expressly held that the *Noerr-Pennington* doctrine extends to threats to litigate, such as cease-and-desist letters, even though such actions do not involve petitioning the government. See *Coastal States Mktg, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983). In *Coastal States*, the Fifth Circuit reasoned:

Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute. This is the position taken by most of the courts that have considered the question.

*Id.*

Moreover, the immunity extends to pre-litigation correspondence against a competitor's customers, so long as the conduct is reasonably attendant upon effective litigation in good faith, or if



those customers can also be potentially liable. *Id.* at 1367-68 & n. 30 (finding that *Noerr-Pennington* immunity extends to threats against a competitors' customers which are in good faith and reasonably attendant upon effective litigation but does not extend to bad faith efforts).

It is indisputable that the Jury unanimously found that Gordian was entitled to immunity under the *Noerr-Pennington* doctrine in Question 12. Question 12 was two-pronged with the second prong being premised upon the first. App.94. The first prong of Question 12 asked: "Was [Gordian's] pre-litigation correspondence 'objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits?'" *Id.* All 12 jurors answered, "No," finding that the copyright infringement claim was not objectively baseless. *Id.* Tellingly, the Jury affirmatively drew an actual line through the answer space for the second prong of the Question 12 blank, as per the instructions providing that it did not have to proceed to the second prong if it did not find the threatened litigation was objectively baseless. App.92, 94. Thus, the Jury left no doubt it understood that it was unanimously finding that the Gordian Entities' pre-litigation correspondence was not objectively baseless.

CCD argues that the Jury finding in favor of Gordian's affirmative defense is logically inconsistent with the Jury also finding that CCD had proven its affirmative business tort claims in Questions 1-8, but there is nothing logically inconsistent about it. As the District Court stated: "The Court finds [CCD's] argument inconsistent with the nature of an affirmative defense. There is

nothing irreconcilable about finding the elements of, for example, business disparagement, and also finding that the elements of an affirmative defense were met.” App. 52. The Court of Appeals echoed this line of reasoning:

CCD argues that, nevertheless, the cease-and-desist letters were ‘false, or at best, misleading’ because the jury unanimously found no copyright infringement and the district court found no trademark infringement. But, these findings do not establish that Gordian lied or made misrepresentations in the cease-and-desist letters; rather, they show that Gordian did not prove the elements of trademark and copyright infringement. The same is true of the jury’s favorable findings as to CCD’s affirmative claims. Those findings showed that CCD established the elements of its affirmative claims, and not that Gordian lied or made misrepresentations in its letters.

App.19-20. Additionally, the Jury merely answered the questions in the order that they were provided in the Jury charge, and thus, after finding in favor of CCD’s affirmative claims in Questions 1-8, when the Jury got to Question 12, they found in favor of Gordian on the *Noerr-Pennington* affirmative defense.

In sum, the Jury’s fact findings were logically consistent and provided a complete defense verdict for Gordian. The District Court and Court of Appeals examined this exact issue, and both courts

held that the *Noerr-Pennington* doctrine was properly applied to this matter, and CCD's challenges to the application of the doctrine were without merit.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jeffrey A. Cohen  
*Counsel of Record*  
FLASTER/GREENBERG, P.C.  
1835 Market Street, Suite 1050  
Philadelphia, Pennsylvania 19103  
(215) 279-9393  
jeffrey.cohen@flastergreenberg.com

*Counsel for Respondents*