No. 18-89

In The
Supreme Court of the United States

AMERICULTURE, INC., *et al.*,

Petitioners,

v.

LOS LOBOS RENEWABLE POWER, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

SHAWN PATRICK REGAN
Counsel of Record
PETER S. PARTEE, SR.
ROBERT A. RICH
JENNIFER L. BLOOM
HUNTON ANDREWS KURTH LLP
200 Park Avenue
New York, NY 10166
(212) 309-1000
sregan@hunton.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the collateral order doctrine provides a basis for appellate jurisdiction to consider the two other questions presented here, given Petitioners' failure to file a timely petition for interlocutory appeal under 28 U.S.C. § 1292(b) as certified by the district court.

2. Whether federal courts are required to expedite procedurally their consideration of any motion to dismiss claims implicating New Mexico's "anti-SLAPP" statute, N.M. Stat. Ann. § 38-2-9.1.

3. Whether a dependent provision of the same state statute, requiring award of attorneys' fees to a defendant prevailing on such an expedited motion, is binding on a federal court.

RULE 29.6 STATEMENT

Lightning Dock Geothermal HI-01, LLC[1] is a wholly-owned subsidiary of Cyrq Energy. There is no publicly traded company owning 10% or more of its stock.

Los Lobos Renewable Power, LLC[2] is a cancelled limited liability company. There is no publicly traded company owning 10% or more of its stock.

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[1] The Petition misidentified Lightning Dock Geothermal HI-01, LLC as a corporation.

[2] The Petition misidentified Los Lobos Renewable Power, LLC as a corporation.

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BRIEF IN OPPOSITION

Petitioners request that this Court grant certiorari to decide two questions: (i) whether a provision of a New Mexico state statute requiring expedited consideration of certain motions to dismiss is binding on a federal court; and (ii) whether a dependent provision of the statute requiring award of attorneys' fees to a defendant prevailing on such an expedited motion is binding on a federal court. Petitioners assert that this case "presents the Court with an opportunity to consider" these two specific provisions "without having to

decide the applicability in federal court of every feature of state anti-SLAPP laws," Pet. at 33 (emphasis removed), and that "[p]roviding much-needed guidance to the lower courts will enable those courts to address disputes about other anti-SLAPP provisions informed by, and with the benefit of, this Court's views about the questions presented in this petition[,]" id. 33-34.

Granting this petition would be improvident for several reasons.

First, the underlying appeal and this petition are bound up within a thorny, if not dubious, ground of appellate jurisdiction. Because Petitioners "failed to timely petition [the Tenth Circuit] for permission to appeal once the district court certified the Erie question for interlocutory review" under 28 U.S.C. § 1292(b), the only basis for appellate jurisdiction is the collateral order doctrine. Pet. App. 33a, n.2; id. 7a-16a. While the court of appeals found the issues appealable under the collateral order doctrine, the petition here does not fit within the limited categories of "collateral orders" with respect to which the Court has sanctioned appeals in recent decades. See Pet. App. 29a-30a (Baldock, J., dissenting from finding of jurisdiction). At minimum, this procedural posture would complicate any consideration of the petition and raise a substantial likelihood that (i) adjudication of the petition would create confusion regarding this Court's views of the collateral order doctrine and/or (ii) the questions presented by Petitioners might not even be reached.

Second, it is not possible for the Court to grant "effectual relief" to Petitioners. Church of Scientology of California v. United States, 506 U.S. 9, 12 (1992). During the pendency of this suit, each of the Respondents filed petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). By virtue of their jointly administered bankruptcy cases, the plan and the bankruptcy court's order confirming the plan, any claim by Petitioners for attorneys' fees against Lightning Dock has been fully discharged, and Los Lobos, a holding company with no assets, has been dissolved. The Court should deny certiorari where the requested decision cannot provide effectual relief to the party and make some difference in the outcome.

Third, the probing determination by both lower courts that these provisions of the New Mexico statute are procedural and inapplicable in federal court, advises against this Court's review. See Sup. Ct. R. 10. For good reason, this Court typically does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949) (citations omitted). Indeed, the Tenth Circuit's determination was not only based on its own careful consideration of the statutory language, it was reinforced by an intervening decision of the New Mexico Supreme Court—which was the subject of supplemental briefing before the Tenth Circuit—holding that the New Mexico statute provides only "procedural protections," Pet. App. 20a (emphasis removed), and making clear that one "must look outside the statute

for substantive defenses. . . ." Id. 21a (discussing Cordova v. Cline, 396 P.3d 159 (N.M. 2017)). The New Mexico statute "is not designed to influence the outcome of an alleged SLAPP suit but only the timing of that outcome . . . [and] simply does not define the scope of any state substantive right or remedy. . . ." Id. 27a.

Finally, to the extent questions regarding the application of certain provisions of one or more state anti-SLAPP statutes ultimately might be worthy of the Court's consideration, there will be abundant opportunities to do so, as the petition recognizes. "The proliferation of anti-SLAPP statutes is one of the most significant statutory developments affecting speech and public debate in recent decades. And as anti-SLAPP statutes have multiplied, so have cases about them." Pet. 31 (citing Travelers Cas. Ins. Co. of Am. v. Hirsh, 831 F.3d 1179, 1182 (9th Cir. 2016) (Kozinski, J., concurring) (reporting that anti-SLAPP "cases have more than tripled over the last ten years")). Thus, granting certiorari to address the questions presented in the petition would be particularly improvident.

For these reasons, and those set forth in greater detail below, the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

The United States Bureau of Land Management leased 2,500 acres of geothermal mineral rights in

Hidalgo County, New Mexico to Respondent Lightning Dock Geothermal HI-01, LLC ("LDG"), a Delaware limited liability company, for the development of a geothermal power generating project. Pet. App. 2a. As part of this project, LDG also developed a geothermal well field on the acreage. Id.

Petitioner AmeriCulture, Inc. ("AmeriCulture"), a New Mexico corporation under the direction of Petitioner Damon Seawright, a New Mexico resident, later purchased a surface estate of approximately fifteen acres, overlying LDG's mineral lease, to develop and operate a commercial fish farm. Id. 2a-3a.

In 1995, as AmeriCulture began operations, it entered into a Joint Facility Operating Agreement ("JFOA") with a predecessor-in-interest to LDG, which permitted AmeriCulture to utilize some of the land's geothermal resources without interfering or competing with LDG's development of its federal lease. Pet. 13; Pet. App. 3a. Los Lobos Renewable Power, LLC ("Los Lobos"), also a Delaware limited liability company, was the sole member of LDG and a third-party beneficiary of the JFOA. Pet. App. 3a.

The JFOA granted AmeriCulture the right to "drill and develop" geothermal resources under AmeriCulture's land up to a depth of 1,000 feet, so long as AmeriCulture's activity was intended for uses other than electric generation, like supplying heated water to AmeriCulture's fish-farming facilities. Pet. at 13 (citing C.A. App. 140).

B. Procedural History

1. The District Court Finds the Statute Does Not Apply in Federal Court Under Erie.

On June 26, 2015, Respondents filed the instant civil suit in the United States District Court for the District of New Mexico, alleging that Petitioners breached the JFOA. Pet. App. 35a. Respondents alleged, inter alia, that Petitioners impermissibly objected to Respondents' permit applications filed with the New Mexico Office of the State Engineer and the New Mexico Oil Conservation Division, "for the sole purpose of [gaining] a competitive advantage for [Petitioners'] own intended production of Geothermal Power in violation of the JFOA." Pet. App. 3a-4a.

Petitioners filed a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12, asserting that the Complaint failed to state adequately the facts necessary to establish federal court subject matter jurisdiction based on diversity of the parties and that the claims asserted under the New Mexico Unfair Practices Act should be dismissed for failure to state a claim. Id. 42a. In response, Respondents filed an Amended Complaint that clarified the basis for diversity jurisdiction and omitted the claim brought under the New Mexico Unfair Practices Act. Id. Petitioners conceded that the bases for their first motion to dismiss had been "cured" by the Amended Complaint. Id. 43a.

On August 18, 2015, Petitioners filed a Special Motion to Dismiss, arguing that that they were "entitled to summary dismissal of the Complaint under New

Mexico's Anti-SLAPP statute." Id. 35a; id. 43a. As the legal basis for their motion, Petitioners asserted "New Mexico's Anti-SLAPP statute is a substantive state law designed to protect the [Petitioners] from having to litigate meritless claims aimed at chilling First Amendment expression." Id. 4a. Petitioners 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." Id. The district court was not persuaded and, in a considered opinion, denied Petitioners' motion, finding that "New Mexico's Anti-SLAPP statute is a procedural provision that does not apply in the courts of the United States." Id. (citation omitted); see also id. 40a-51a.

2. Petitioners' Failure to File an Interlocutory Appeal Under 28 U.S.C. § 1292(b).

Following decision by the district court, Petitioners sought amendment of the Memorandum Opinion and Order to permit an interlocutory appeal, which request the district court granted. Id. 5a.

Petitioners did not file a petition for permission to appeal as required by § 1292(b)'s plain language. Pet. App. 5a. Instead, three days after the district court certified its ruling for interlocutory appeal under section 1292(b), Petitioners filed a notice of appeal. Id. Accordingly, the Tenth Circuit addressed two questions on appeal: (i) whether it could exercise jurisdiction over the appeal pursuant to the collateral order doctrine; and

(ii) whether the New Mexico anti-SLAPP statute applies in the federal diversity action. Id.

3. The Issue of Appellate Jurisdiction Under the Collateral Order Doctrine.

A two-judge majority of the Tenth Circuit found it could assert jurisdiction over Petitioners' appeal under the collateral order doctrine. Pet. App. 7a-16a (Op. of Tymkovich, C.J., joined by Briscoe, J.).

Judge Baldock dissented as to jurisdiction, Pet. App. 29a-33a, concluding that the majority's determination of jurisdiction "finds little support in Supreme Court jurisprudence." Id. 29a. Judge Baldock observed that this 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.'" Pet. App. 29a (quoting Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 113 (2009) (internal quotation marks omitted)). He wrote that "[p]rior cases mark the line between rulings within the class and those outside," and that "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." Id. 29a-30a (citing Will v. Hallock, 546 U.S. 345, 350-53 (2006) (quotation marks omitted)).

Judge Baldock further explained that "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." Id. 30a (citing 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)).

He emphasized that "[a]s the Court's opinion ultimately concludes, the New Mexico anti-SLAPP statute in no sense constitutes a grant of immunity to Defendants, ... the present appeal unquestionably falls outside the line the Supreme Court has marked for categories of collaterally appealable orders." Id.

4. The Tenth Circuit Unanimously Finds the New Mexico Statute Is Entirely Procedural and Holds It Does Not Apply in Federal Court.

With a two-judge majority of the court of appeals finding jurisdiction under the collateral order doctrine, the three-judge panel turned to "whether the district court must apply the New Mexico anti-SLAPP statute in this federal diversity action for the enforcement of state-created rights." Id. 16a.

1. Describing this task, as the well-known Erie analysis after Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the court explained that 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.'" Id. 16a (citing Berger v. State Farm Mut. Auto. Ins. Co., 291 F.2d 666, 668 (10th Cir. 1961) (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945))). The court explained that "[t]his 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." Id. 17a (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)). And "[s]tate 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." Id. (quoting Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 416–17 (2010) (Stevens, J., concurring in the judgment)).

The unanimous court observed that although "distinguishing between procedural and substantive law is not always a simple task," id. 17a, "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'" because "[t]he 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." Id. 18a.

2. The court fully reviewed the statutory provisions at issue, N.M. Stat. Ann. § 38-2-9.2, which sets forth the findings and purpose of the state statute, and § 38-2-9.1, which is entitled "[s]pecial motion to dismiss unwarranted or specious lawsuits; procedures; sanctions . . ." and provides:

> 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.

Id. 6a-7a.

3. The court found that "Subsection A is unquestionably the most important of the three subsections" in that "[i]t 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." Id. 19a. The court notably found "Subsections B and C are dependent subsections, entirely meaningless absent subsection A." Id. (emphasis added). "[A] dispositive pretrial motion filed pursuant to the anti-SLAPP statute is 'special'" but "only" in 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. 19a (quoting § 38-2-9.1(A)). 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" the statute. Id.

4. The court found further support for its reading in the New Mexico Supreme Court's recent decision, Cordova v. Cline, 396 P.3d 159 (N.M. 2017). Pet App. 19a.

In Cordova, a plaintiff had filed a malicious abuse of process claim against members of a citizens'

association following their efforts to remove him from the school board. Id. Several members responded by filing a "special" motion to dismiss pursuant to the statute. Id. 19a-20a. On appeal after the trial court granted the members' motion to dismiss, the New Mexico Supreme Court held the association members were "'entitled to the procedural protections of the New Mexico [anti-SLAPP] statute.'" Id. 20a (quoting Cordova, 396 P.3d at 162). The Tenth Circuit highlighted that "to resolve the case on the merits, the court relied on a substantive immunity defense entirely separate from the anti-SLAPP statute" and asked whether the members were "'entitled to the substantive protections provided by the Noerr-Pennington doctrine.'" Id. (citing Cordova, at 166) (emphases removed).

The Tenth Circuit stated that "[t]he 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. (emphases removed). And "[a]fter 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." Id.

C. The Bankruptcy Proceedings

During the pendency of this suit, Respondents LDG and Los Lobos each filed petitions for relief under Chapter 11 of the Bankruptcy Code in the United

States Bankruptcy Court for the District of New Mexico, commencing their jointly administered bankruptcy cases (together, the "Chapter 11 Cases").

The bankruptcy court entered an order (the "Confirmation Order") confirming Respondents' joint chapter 11 plan (the "Plan") on September 8, 2017. In re Lightning Dock Geothermal HI-01, LLC, et al., Case No. 17-10567-t11 (Bankr. D.N.M. Sept. 8, 2017) D.E. 393 (order confirming chapter 11 plan).[3]

The Plan went effective December 8, 2017 (the "Effective Date"). See id. Case No. 17-10567-t11 (Bankr. D.N.M. Dec. 8, 2017) D.E. 404 (notice of Effective Date).

Petitioners originally filed a proof of claim against LDG on June 9, 2017, but then inexplicably withdrew that proof of claim on June 14, 2017. See id., Case No. 17-10567-t11 (Bankr. D.N.M. Jun. 14, 2017) D.E. 289 (withdrawal of claim).

In accordance with 11 U.S.C. § 1141(d), the Plan provides that, except as otherwise set forth therein, all claims against LDG, of any nature, based on events occurring prior to the Effective Date, are deemed satisfied, discharged and released in full, and all of LDG's liability with respect thereto shall be deemed extinguished. Appendix at App. 94-95 (Plan, § 8.1).

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[3] The Confirmation Order and Plan, without exhibits, are attached as an Appendix to this Brief. The Court may consider such extrinsic facts outside the record of the case from which the Petition arises. See Mills v. Green, 159 U.S. 651, 653 (1895).

The Plan also provided for Respondents "to dissolve Los Lobos," a Delaware limited liability company that held no assets other than its membership interests in LDG, "without the necessity for any other or further actions to be taken by or on behalf of the [Respondents]." See Appendix at App. 67 (Plan, § 4.6); see also Confirmation Order, ¶ 5 (Respondents and all other appropriate parties are authorized to take all actions necessary to implement the Plan, including "as necessary to effect . . . the dissolution of Los Lobos.").

Petitioners did not file a claim against Los Lobos and, in any event, the Plan provides that general creditors of Los Lobos are not entitled to any distribution given that Los Lobos had no assets. See Appendix at App. 54-62 (Plan, § 3.1(e)).

In accordance with the Plan and Confirmation Order, on January 17, 2018, Los Lobos was dissolved by the filing of a certificate of cancellation with the Delaware Secretary of State. See Delaware Secretary of State File Number 4439790.[4]

[4] The Court may take judicial notice of the certificate of cancellation. United States v. Mitchell, No. CV14-9771, 2016 WL 857301, at *2 (C.D. Cal. Mar. 4, 2016) ("The Court takes judicial notice of the State of Delaware Certificate of Cancellation filed with the State of Delaware Secretary of State Division of Corporations"), aff'd sub nom. United States ex rel. Yagman v. Mitchell, 711 F. App'x 422 (9th Cir. 2018).

REASONS FOR DENYING THE PETITION

I. THE COLLATERAL ORDER DOCTRINE JURISDICTIONAL ISSUES BOUND UP WITHIN THE CASE MAKE THIS AN IMPROVIDENT VEHICLE TO DECIDE THE QUESTIONS PRESENTED.

The Court should deny the petition for a writ of certiorari because the issues presented are bound up within a thorny, if not dubious, ground of appellate jurisdiction. Petitioners "failed to timely petition [the Tenth Circuit] for permission to appeal once the district court certified the Erie question for interlocutory review" under 28 U.S.C. § 1292(b). Pet. App. 33a, n.2; id. 7a-16a. Instead, Petitioners filed only a notice of appeal. Id. 8a. It is well established that a notice of appeal does not suffice as a timely petition for permission to appeal. See id.

Thus, the only basis for appellate jurisdiction is the collateral order doctrine. Id. 33a, n.2; id. 7a-16a. While the court of appeals found the issues appealable under the collateral order doctrine, the petition here does not fit into the limited categories of orders with respect to which the Court has sanctioned appeals in recent decades. See id. 29a-30a (Baldock, J., dissenting from finding of jurisdiction).

This Court has admonished "that the class of collaterally appealable orders must remain narrow and selective in its membership." Mohawk Indus., 558 U.S. at 113 (quotation omitted). The collateral order doctrine issues embedded in this case make it a flawed

vehicle for addressing the remaining issues. At minimum, this procedural posture would complicate any consideration of the petition. Adjudication of the petition under such circumstances also is substantially likely to create confusion regarding this Court's views of the collateral order doctrine. See, e.g., Pet. App. 30a (observing that this is "a civil case between private parties" and "[a]s the Court's opinion ultimately concludes, the New Mexico anti-SLAPP statute in no sense constitutes a grant of immunity to Defendants"). In fact, the questions presented by Petitioners might not even be reached.

II. ADJUDICATION OF THE PETITION WILL NOT PROVIDE RELIEF TO PETITIONERS.

A. Petitioners' Claim Against LDG for Attorneys' Fees or Costs Has Been Discharged Under the Plan.

Petitioners' claim against LDG for attorneys' fees and costs under New Mexico's anti-SLAPP statute has been discharged under the Plan.

The Plan provides, in accordance with 11 U.S.C. § 1141(d), that, except as otherwise provided in the Plan, all claims against LDG of any nature, based on events occurring prior to the Effective Date, are deemed satisfied, discharged and released in full, and all of LDG's liability with respect thereto is deemed extinguished. Appendix at App. 94-95 (Plan, § 8.1). Only holders of claims against LDG deemed "allowed" pursuant to 11 U.S.C. § 502 are entitled to receive

distributions under the Plan. Petitioners have no "allowed" claims in the Chapter 11 Cases. In fact, although Petitioners filed a proof of claim against LDG, they opted to withdraw it days later rather than seek allowance on the merits. In re Lightning Dock Geothermal HI-01, LLC, et al., Case No. 17-10567-t11 (Bankr. D.N.M. Jun. 14, 2017) D.E. 289 (withdrawal of claim). Any claim they might have had for attorneys' fees or costs against LDG is now discharged under the Plan.

That Petitioners cannot obtain effectual relief against LDG compels denying the Petition as to LDG. Cf. Church of Scientology, 506 U.S. at 12 ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed.") (quoting Mills, 159 U.S. at 653); Porter Bridge Loan Co. v. Northrop, 566 F. App'x 753, 755 (10th Cir. 2014) ("After this appeal was filed, Dr. Northrop received a discharge in bankruptcy. Accordingly, this court is prevented from granting him any effective relief because the bankruptcy discharge operates to release him from his debts. . . . Therefore, his appeal is moot and will be dismissed.") (citation omitted); Stachowiak v. Comm'r, 93 F. App'x 809 (6th Cir. 2004) (dismissing appeal based on discharge in bankruptcy and abatement of tax liability).

B. Petitioners Cannot Obtain Relief Against Los Lobos.

The Plan also provides for Respondents "to dissolve Los Lobos for all purposes without the necessity for any other or further actions to be taken by or on behalf of the [Respondents]." See Appendix at App. 67 (Plan, § 4.6); see also id. App. 8 (Confirmation Order, ¶ 5) (Respondents and all other appropriate parties are authorized to take all actions necessary to implement the Plan, including as "necessary to effect . . . the dissolution of Los Lobos."). The Plan further provides that general creditors of Los Lobos are not entitled to any distribution, given that Los Lobos was a limited liability holding company that had no assets other than its membership interests in LDG. Appendix at App. 61 (Plan, § 3.1(e)). In any event, Petitioners did not ever file any claim against Los Lobos.

In accordance with the Plan and Confirmation Order, on January 17, 2018, Los Lobos was dissolved by the filing of a certificate of cancellation with the Delaware Secretary of State. Delaware Secretary of State File Number 4439790.

Under Delaware law, no claim may be brought against a dissolved limited liability company. See Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 138 (Del. Ch. 2004) (reasoning that, under common law, "no claim may be brought against a dissolved entity" absent statutory authority and, under section 18-803(b) of the Delaware Limited Liability Company Act, suit may be brought by or

against a limited liability company only until the certificate of cancellation is filed.) Accord Gilbert v. Doehler-Jarvis, Inc., No. 01-3831, 2004 WL 2848545, at *1 (6th Cir. Aug. 9, 2004) ("[D]efendants' liquidation moots the plaintiffs' claim for recovery of damages. . . . [and] prevents this court from entering 'effectual relief' for the plaintiffs in the event they prevailed on appeal."); John v. Gallagher, 993 F.2d 1549 (7th Cir. 1993) (dismissing appeal on ground corporation was dissolved during appeal); United States v. William S. Gray & Co., 59 F. Supp. 665, 667 (S.D.N.Y. 1945) (granting summary judgment for dissolved defendant on mootness ground).

While there are certain exceptions to the rule that dissolution bars a claim for recovery of damages, none is applicable here. For example, there is no successor to the dissolved entity that took over the dissolved entity's business. See, e.g., William S. Gray & Co., 59 F. Supp. at 667. Nor does applicable corporate law permit claims to be brought against the entity. See, e.g., Durso v. Cappy's Food Emporium, Ltd., No. CV 05-3498, 2006 WL 3725546, at *2 (E.D.N.Y. Dec. 14, 2006) (reviewing laws applicable to a New York corporation).

That Petitioners also cannot obtain effectual relief against Los Lobos compels denying the Petition.

III. THAT THE TWO LOWER COURTS HERE REACHED CONSISTENT FINDINGS—AND THE COURT OF APPEALS' READING IS REINFORCED BY THE HOLDING OF THE NEW MEXICO SUPREME COURT—WEIGHS AGAINST REVIEW OF THIS PETITION.

The consistent, fact-intensive, specific determination by both lower courts, that these provisions of the New Mexico statute are procedural and inapplicable in federal court, advises against this Court's review. See Sup. Ct. R. 10; cf. Graver Tank & Mfg. Co., 336 U.S. at 275 (the Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). Indeed, the Tenth Circuit's determination was informed not only by its own careful consideration of the statutory language but here was reinforced by an intervening decision of the New Mexico Supreme Court—which was the subject of supplemental briefing before the Tenth Circuit—holding that the New Mexico statute provides only "procedural protections," Pet. App. 20a (emphasis removed), and making clear that one "must look outside the statute for substantive defenses. . . ." Id. (discussing Cordova, 396 P.3d 159). As such, the New Mexico statute "is not designed to influence the outcome of an alleged SLAPP suit but only the timing of that outcome . . . [and] simply does not define the scope of any state substantive right or remedy. . . . [T]he statute is procedural in all its aspects." Id. 27a; accord id. 25a, n.6 (explaining that the legislative history in the New Mexico House shows the original bill sought to

grant substantive immunity from suit, but the enacted law removed all references to immunity, which "reinforces our plain reading of the New Mexico anti-SLAPP statute as a purely procedural device."). There is no reason to disturb these consistent, and correct, findings.

IV. THE COURT IS SURE TO BE PRESENTED WITH ABUNDANT, AND BETTER, OPPORTUNITIES TO ADDRESS THE ISSUES.

To the extent questions regarding the application of certain state anti-SLAPP statutes may be worthy of the Court's consideration at an appropriate time, there will be—as the petition recognizes—abundant opportunities to address the questions presented here. "The proliferation of anti-SLAPP statutes is one of the most significant statutory developments affecting speech and public debate in recent decades. And as anti-SLAPP statutes have multiplied, so have cases about them." Pet. 31 (citing Travelers Cas. Ins. Co. of Am., 831 F.3d at 1182 (Kozinski, J., concurring) (reporting that anti-SLAPP "cases have more than tripled over the last ten years")).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SHAWN PATRICK REGAN
Counsel of Record
PETER S. PARTEE, SR.
ROBERT A. RICH
JENNIFER L. BLOOM
HUNTON ANDREWS KURTH LLP
200 Park Avenue
New York, NY 10166
(212) 309-1000
sregan@hunton.com

Counsel for Respondents

October 26, 2018