IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD NEWMAN, AN INDIVIDUAL; NEWMAN LAW, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND COOPER BLACKSTONE, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants, vs. FULL COLOR GAMES, INC., A NEVADA CORPORATION, Respondent.	**SUPREME COURT CASE NO. 79395** Electronically Filed Aug 27 2020 10:44 a.m. Elizabeth A. Brown Clerk of Supreme Court

On Appeal from a decision in favor of Respondent
entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Mark R. Denton, District Court Judge
District Court Case No. A-17-759862-B

RESPONDENT'S ANSWERING BRIEF

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I.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal. FCGI Full Color Games, Inc. is a Nevada corporation ("FCGI" or "Respondent"). Intellectual Properties Holding, LLC was the sole stock holder holding 100% percent of its common stock and 100% of all voting rights. Intellectual Properties Holding, LLC is wholly owned by David Mahon. FCGI was previously represented by the law firm of Hutchison & Steffen, PLLC. FCGI is now represented by the law firm of Hogan Hulet PLLC. No other law firms are expected to appear on FCGI's behalf in this appeal.

II.

JURISDICTIONAL STATEMENT

FCGI does not dispute that the matters raised by Appellants Richard H. Newman ("Appellant Newman"), Newman Law, LLC, and Cooper Blackstone, LLC (together, "Appellants") in this appeal are properly before this Court jurisdictionally, that the appeal was timely filed, or that the issues presented are appealable despite the case below not having reached a final order or judgment.

III.

STATEMENT OF ISSUES

Whether the district court's denial of Appellant's Special Motion to Dismiss for failure to satisfy prong one of Nevada's anti-SLAPP statute governing special motions to dismiss was proper.

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IV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 11, 2017, the case below was commenced by a group of shareholders of FCGI making claims of wrongful conduct by FCGI's principals David Mahon and Glen Howard. (AA1. 1-34).

On February 4, 2019, David Mahon and Glen Howard filed an Amended Answer, and FCGI filed its Third-Party Complaint naming multiple parties including Appellants. (AA1. 35-249). Appellant is a licensed Nevada attorney and purports to be the sole principal of the other Appellants. (Opening Brief, p. 1).

The version of FCGI's Third-Party Complaint that was on file when the Motion to Dismiss was filed asserted claims against Appellants, including claims under the Sixth Claim for Relief (Violation of 17 U.S.C. 1962(b)); Tenth Claim for Relief (Violation of NRS 207.400); and Twenty-First Claim for Relief (Declaratory Relief re: Shareholders in FCGI). (AA1. 35-249).[1]

On March 14, 2019, Appellants filed their Special Motion to Dismiss Action Pursuant to Nev. Rev. Stat. Ann. 41.650, *et seq*. (the "Motion to Dismiss"). (AA2. 250).

On March 28, 2019, FCGI filed its Opposition to the Motion to Dismiss. (AA2. 303).

On April 20, 2019, Appellants filed their Reply in support of the Motion to Dismiss. (AA2. 429).

[1] The Third-Party Complaint has since been amended as of January 9, 2020 to include additional claims against Appellants: Twenty-Sixth Claim For Relief, (Breach of Fiduciary Duty); Twenty-Seventh Claim For Relief (Professional Negligence); Twenty-Eighth Claim For Relief (Breach of Contract); Twenty-Ninth Claim For Relief (Contractual Breach of the Covenant of Good Fair and Dealing); Thirtieth Claim For Relief (Tortious Breach of the Covenant of Good Faith and Fair Dealing); Thirty-First Claim For Relief (Intentional Misrepresentation); Thirty-Second Claim For Relief (Negligent Misrepresentation); and Thirty-Third Claim For Relief (Fraudulent Concealment). But those additional claims were not the basis for Appellants' Motion to Dismiss before the Court. (R.I. 001-213).

On April 25, 2019, the district court heard oral argument on the Motion to Dismiss. (AA2. 445). Following the hearing, the district court entered its Order on the Motion to Dismiss. (AA2. 443-446). Per the Order, the district court denied the Motion to Dismiss, finding that the communications that Appellants' communications are not applicable under Nevada's anti-SLAPP statute. (AA2. 443-446). The district court further ruled that Appellants would still be allowed to file a motion to dismiss under NRCP 12(b)(5). (AA2. 443-446).

FCGI does not concede the correctness of Appellant's assertions in its Statement of Facts and is entitled to discovery on those assertions in the district court case to the extent the Court deems necessary under analysis of Prong Two as discussed below.

V.

STATEMENT OF FACTS

A. Allegations and Evidence in the Case Below

FCGI's principal, David Mahon, is the creator and sole owner of a new and unique class of cards and casino gaming and is the sole owner of the intellectual property rights of those creations (the "IPR").[2] (AA2. 326).

In March 2010, Mr. Mahon met with Appellant Newman to obtain protection of his intellectual property rights in his creations. (AA2. 327-328). Appellant Newman agreed to provide the legal work to protect Mr. Mahon's IPR through a sweat equity deal in which Appellant Newman and his then law firm, Howard & Howard Attorneys, PLLC ("H2"), would receive 5% of the gross revenues derived from Mr. Mahon's IPR. (AA2. 329).

[2] The IPR includes the new and unique class of cards and casino games and intellectual property rights in Full Color® Cards, Full Color® Games, and the Full Color® Gaming System, including copyrights, trademarks, patents pending, and other forms of intellectual property, along with Multi-Play™ and Bingo, Bingo Poker™. (AA2. 326).

Between April 2010 and October 2014, Appellant Newman provided legal services to Mr. Mahon through H2. (AA2. 329). In October 2014, Appellant Newman abruptly left H2 to form his own firm, and although Mr. Mahon was resistant to transferring the files to Appellant Newman's new firm, he did so after being directed by Appellant Newman and repeatedly assured by Appellant Newman that everything was in perfect order. (AA2. 329).

On August 1, 2015, FGCI formally completed changes to its corporate structure in preparation to become a fully licensed real money casino gaming developer and software distribution company based on FCGI's licensed rights in Mr. Mahon's IPR. (AA2. 330). This required a single unification of all of FCGI's prior net profit agreements, convertible notes, and other investment mechanisms and was carried out through a termination and exchange agreement, which Appellant assisted in drafting. (AA2. 330).

As part of those unification transactions, FCGI converted Appellant Newman's 5% profit interest in Mr. Mahon's IPR into 1 million shares of FCGI through Appellant Cooper Blackstone, LLC, which represented 5% of the issued shares in FGCI. (AA2. 330). Unbeknownst to Mr. Mahon at that time, Appellant Newman had allowed Mr. Mahon's original patent and trademark applications to become abandoned, and Appellant Newman also had a conflict of interest dating back to his employment with H2. (AA2. 329-330).

FCGI subsequently attempted a transaction whereby it would transfer its assets to a company formed in the Isle of Man ("IOM") named Full Color Games, Ltd. ("FCGLTD"). (AA2. 331). This transaction was contemplated for many reasons including the need for additional funding from investors who did not want to invest in an American-based company and that the IOM is online casino friendly and a tax-free business environment. (AA2. 331). Appellants were heavily involved in all aspects of this process. (AA2. 331).

Appellant Newman was outside legal counsel and acted as Chief Legal Officer of FCGLTD, as well as a director and bank signatory. (AA2. 330-31). But Appellant Newman was not an employee of FCGI or FCGLTD. (AA2. 332). Although there was some discussion of key employees becoming employees at some point in the future, no such employment of Appellant Newman was ever consummated. (AA2. 332-336). As such, Appellants' attempt to enforce an employment agreement that they fraudulently drafted on their own as a basis for a "pre-litigation" demand was based on false representations and not substantiated by the evidence.

In August 2016, Mr. Mahon requested a full audit trail of all copyrights, trademarks and patent applications filed, obtained, maintained and by Appellant Newman to obtain investments from major investors. (AA2. 335-36). Appellant Newman failed to produce the information creating a crisis for Mr. Mahon and all interested parties in Mr. Mahon's IPR and began to create a confrontation with Mr. Mahon. (AA2. 336).

Mr. Mahon then became concerned due to erratic behavior by Appellant Newman, which began when Appellant Newman instantly started demanding continuing monthly payments of $10,000 to conduct further work on behalf of FCGLTD. (AA2. 336). Mr. Mahon therefore conducted a full audit of all the work Appellant Newman claimed he had done on behalf of FGCI and FGCLTD over the prior six years. (AA2. 336-37). Mr. Mahon discovered that Appellant Newman had abandoned five patent applications, let two other applications expire, and abandoned and let two trademark applications become suspended. (AA2. 336-337). Mr. Mahon also discovered that Appellant Newman had failed to obtain a single registered copyright on any of the 12 Full Color® Cards applications and failed to even file a copyright on Mr. Mahon's Full Color® Cards 3rd Edition of which 25,000 decks of cards had been printed and distributed into the public domain two years prior. (AA2. 336-37). Due to Appellant Newman's failure to meet his obligations and duties, FGCI

and FCGLTD removed Appellant Newman from every capacity, and Appellants' actions and inactions would ultimately cause FCGI and FCGLTD to become insolvent. (AA2. 336-37; 343-44).

Appellant Newman's response to being removed from FCGI and FCGLTD was to begin to demand money from FCGI and FCGLTD to avoid Appellant Newman from interfering with the application process for FCGLTD with IOM authorities. (AA2. 337-38). Specifically, Appellant Newman demanded $5,000 in payment to release his "attorney lien" on the IPR and concocted a non-existent employment agreement claiming he was entitled to unpaid wages. (AA2. 337-39). Appellant Newman began to disparage Mr. Mahon's name, reputation, honor and character by also raising, for the first-time, supposed concerns he had about Mr. Mahon's conduct and ominously suggested that all claims with Appellant Newman better be resolved. (AA2. 338-39).

FCGLTD informed the United Kingdom Gambling Commission ("UKGC") that Appellant Newman had been removed from the company. (AA2. 340). Appellant Newman also apparently contacted the UKGC, but FCGI, FCGLTD, but Mr. Mahon were not aware of any such contact. (AA2. 340). Thus, none of FCGI's allegations against Appellants arise under Appellant Newman's supposed contacts with the UKGC. (AA2. 340).

Appellant Newman then began renewed settlement discussions with principals for FCGI and FCGLTD except Mr. Mahon who was traveling in India. (AA2. 341). Appellant Newman demanded $50,000.00 plus a full release, and then later upped the amount to $75,000.00 plus a full release. (AA2. 340-41). But Mr. Mahon – who is the sole owner of the IPR, majority shareholder, and sole director of FCGI – never authorized any FCGI principals to have settlement discussions with Appellant Newman on behalf of FCGI. (AA2. 340-43). Appellants only received shares in FCGI based on repeated misrepresentations concerning Appellant Newman's work product

and work efforts. (AA2. 326-44). Thus, no resolution with Appellant Newman was ever reached. (AA2. 326-44). As a result, FCGLTD was not able to complete its applications with the UKGC, and FCGLTD and FCGI became insolvent. (AA2. 344).

Appellants' claim that the UKGC did not have an issue with Appellants' ownership in FCGI and FCGLTD is not supported by the evidence. (AA2. 340). When informed of Appellant Newman's removal from FCGI and the FCGLTD application with the UKGC, the UKGC required the reason for his removal, which was provided to the UKGC. (AA2. 340). Appellant Newman knew that Appellants' continued ownership of 5% of FCGI interest would be a problem for FCGLTD's application with the UKGC, and Appellant Newman attempted to use this to his advantage in negotiations upon his removal. (AA2. 339-40).

Appellants' wrongful conduct does not end there, as FCGI has a basis to believe that Appellant Newman worked with other bad actors and third-party defendants in their conspiracy to destroy FCGI and Mr. Mahon's business. These are allegations set out in Appellants' Third-Party Complaint that was operative at the time of the Motion to Dismiss and set forth in the Second Amended Third-Party Complaint that was filed after the Court ruled on the Motion to Dismiss. (R.I. 001-213).

These allegations deserve discovery. Appellants allege that Appellant Newman was a shareholder of FCGI and was a fiduciary to FCGI as an officer of FCGI and at the highest level of standards as the Chief Legal Officer. (R.I. 001-213). And that Appellant Newman violated non-compete clauses with FCGI and worse, began to usurp FCGI business opportunities by creating competing businesses with other shareholders of FCGI, who were also officers and violating their non-compete in conspiring together. (R.I. 001-213). Thus, FCGI alleges Appellant Newman breached his fiduciary duties to his fellow shareholders. (R.I. 001-213).

. . .

These allegations and claims against the Appellant Newman are deep and wide and far beyond the scope of the anti-SLAPP statute. Appellants' Motion to Dismiss under the anti-SLAPP statute is a Hail Mary in an attempt to cause further financial damage and injury to FCGI in which he has succeeded.

FCGI requires additional discovery into those allegations and claims, and to the extent they impact the ruling under the anti-SLAPP statute, requests that discovery in the case below.

B. Relevant Procedural History

On February 4, 2019, FCGI filed its Amended Answer, Counterclaims, and Third-Party Complaint (the "Third Party Complaint") against Appellants and others. (AA1. 35-249). The Third-Party Complaint makes claims against multiple parties, including Appellants, and generally alleges that the third-party defendants entered into a conspiracy and racketeering activity, among other wrongdoings, to harm FCGI and its investors, which includes specific claims against Appellants under the Sixth Claim for Relief (Violation of 17 U.S.C. 1962(b)); Tenth Claim for Relief (Violation of NRS 207.400; and Twenty-First Claim for Relief (Declaratory Relief re: Shareholders in FCGI). (AA1. 35-249).

Since the Court's ruling on the Motion to Dismiss, on January 9, 2020, FCGI filed its Second Amended Third-Party Complaint to add additional claims, including as against Appellants. See Footnote 1, *supra*, (R.I. 001-213). On January 31, 2020, Appellants filed a Motion to Dismiss the Second Amended Third-Party Complaint (R.I. 214-236). On July 22, 2020, the district court denied Appellants' Motion to Dismiss the Second Amended Third-Party Complaint. (R.I. 237-241).

In addition to the general allegations of Appellants taking part in the racketeering activity, FCGI further alleges that Appellants defrauded FCGI through shoddy and failure to complete legal work that Appellants used to gain an ownership interest in FCGI. (AA1. 203-204). Specifically, Appellant Newman "engaged in a

patent Ponzi scheme that allowed him to get shareholder rights in FCGI and its affiliates." (AA1. 203). "When his failures were discovered and [Appellants] were terminated, [Appellants] made unlawful and wrongful threats in order to wrongfully exert control over FCGI and its affiliates . . . [including] extortionate demands for money on the threat of liening and/or destroying FGCI's and its affiliates' IPR and profits derived therefrom." (AA1. 203). FGCI then sets out specific communications from Appellants to FGCI principals in August 2016, November 2016, February 2017, and March 2017, in which Appellants demanded payment from FGCI in exchange for releases from Appellants. (AA1. 203-204). These allegations require discovery in the case below.

VI.

LEGAL ANALYSIS

A. SUMMARY OF THE ARGUMENT.

Appellants are effectively arguing that a party can commit all sorts of wrongdoing but cannot be liable for those wrongdoings – or even have to face discovery into those alleged wrongdoings – so long as the party has some communications with the opposing party at some point prior to the case commencing, or has some communications with a foreign gaming board without the opposing party's knowledge. That is not the purpose of Nevada's anti-SLAPP statute, and the district court properly rejected Appellants' attempt to use it in such an improper way.

As detailed below, Appellants cannot satisfy Prong One of the anti-SLAPP statute because the communications Appellants argue classify as those protected under the anti-SLAPP statute are in reality not applicable. Thus, Prong Two analysis is not necessary. Nonetheless, FCGI raised sufficient argument, allegations, and evidence in the case below to entitle FCGI to prevent Appellants from meeting their Prong Two burden, or alternatively, FCGI is entitled to discovery even if Prong Two analysis was necessary here, which it is not.

B. STANDARD OF REVIEW.

Like many states, Nevada prohibits strategic lawsuits against public participation or "SLAPP" suits. "A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights." Stubbs v. Strickland, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013). To that end, "[a] person who engages in 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 is immune from any civil action for claims based upon the communication." NRS 41.650.

Nevada provides defendants with a procedural mechanism whereby they may file a special motion to dismiss if they meet the statutory requirements. See NRS 41.660(1); see also Coker v. Sassone, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019). The denial of an anti-SLAPP motion is reviewed de novo. Stark v. Lackey, 136 Nev.Adv.Op. 4, 458 P.3d 342, 345 (2020) (citing Coker, 135 Nev. at 10-11, 432 P.3d at 748-49).

C. NEVADA'S ANTI-SLAPP STATUTE EMPLOYS A TWO-PRONG ANALYSIS.

To prevail on a special anti-SLAPP motion to dismiss, the moving defendant must satisfy two statutory prongs. Under Prong One, the trial court must "[d]etermine 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." NRS 41.660(3)(a).

Prong One contains two sub-components. To start, the communication must fall into one of four categories to be a "good faith communication in furtherance of the . . . right to free speech in direct connection with an issue of public concern." NRS 41.637. Then, as the second sub-part to Prong One, the defendant must establish the

communication was "truthful or is made without knowledge of its falsehood." NRS 41.637(4).

Under Prong Two, if the district court determines that the moving defendant has met the burden under Prong One, the burden shifts to "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

D. APPELLANTS CANNOT MEET THEIR BURDEN UNDER PRONG ONE TO ESTABLISH THAT FCGI'S CLAIMS ARISE UNDER A "GOOD FAITH COMMUNICATION."

Appellants here contends that their purported "pre-litigation" letter and communications with the UKGC fall under NRS 41.637(2) as "[c]ommunication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding matters reasonably of concern to the respective governmental agency." Appellants also contend that the subject communications fall under NRS 41.637(3) as "a communication, whether written or oral, made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law."

Appellants argue that two specific communications from Appellant Newman classify as protected under NRS 41.637(2) and NRS 41.637(3): (i) Appellant Newman's communications with FCGI and FCGLTD after he was removed from those companies but while still a shareholder in which Appellants demanded payment from FCGI in exchange for releases, and (ii) Appellant Newman's supposed communications with the UKGC after he was removed from FCGI. As properly ruled by the district court, Appellants cannot meet their burden to establish either of the two communications fall under the anti-SLAPP statute.

. . .

1. Appellant Newman's communications with FCGI between August 2016 and March 2017 do not fall under NRS 41.637 because they were not communications to the Federal Government or State of Nevada, and because the dispute between FCGI and Appellants was not in litigation when the statements were made.

Appellant Newman's communications with FCGI and FCGLTD after his removal demanding payment do not fall under NRS 41.637(2) or NRS 41.637(3).

NRS 41.637(2) is not applicable because Appellants' extortion demands to FCGI were not made to an officer, legislator or employee of the United States Federal Government or the State of Nevada.

NRS 41.637(3) is not applicable because there was no litigation ongoing relative to the dispute between FCGI and Appellants when the communications were made. In fact, the case below was commenced in August 2017, which was nearly a year after Appellants' first extortion attempt.

Appellants' Special Motion to Dismiss attempted to argue that pre-litigation demand letters fall under NRS 41.637(3). But, as established by FCGI in its Opposition to Appellants' Special Motion to Dismiss, that argument only has potential merit if the demand letters are made during litigation once the matter is actually, as required by NRS 41.637(3), "under consideration by a . . . judicial body." (AA2. 319-320).

Appellants abandoned that argument in their Opening Brief on appeal, and instead claim the district court did not provide any support for its determination that NRS 41.637(3) does not apply to pre-litigation communications. That position is illogical, however, because Appellants have the burden under Prong One. They must come forward with some authority to support their position, but did not and it is because the plain language of NRS 41.637(3) requires that the issue be "under consideration" by a judicial body – not "potentially under consideration" or "pre-under consideration".

Furthermore, the racketeering and other wrongdoing alleged by FCGI's Third-Party Complaint includes conduct by Appellants that is more expansive than these communications. Appellants try to narrow the issue to only these communications, but the Third-Party Complaint is clear that Appellants' conduct pre- and post-dates these communications and includes conduct beyond and apart from attempting to extort FGCI through baseless "settlement" demands.

And finally, Appellant Newman has repeatedly argued that his baseless and extortionate demands for money and a complete release from Mr. Mahon and several of the other third-party plaintiffs was merely good faith communications made prior to or in anticipation of litigation. Yet, Appellant Newman never filed suit against FCGI, Mr. Mahon or anyone else, even though he supposedly believed he had a rights that were being violated. Indeed, Appellant Newman's purported 5% of the value of FCGI's stock is more than all of the other derivative Plaintiffs combined.

The answer is simple. Appellants know that their own actions, including not only malpractice, but intentional torts such as fraud and racketeering and other separate breaches of fiduciary duty, would be fully exposed were they to be involved in the lawsuit. Appellants knew that FCGI and other third-party plaintiffs would raise all of these issues were Appellants to commence an action. Appellants never intended to litigate their purported claims that were the subject of Appellants' frivolous and extortionate demands because they know these "claims" have no merit. Which makes FCGI's point that Appellants were simply trying to extort money from FCGI and Mr. Mahon because Appellants knew they could place FCGI and other in financial ruin by not acceding to the rightful and proper demands to obtain the IPR files and properly obtain Appellant's surrender of their ownership interests in FCGI.

Altogether, Appellants' communications with FCGI between August 2016 and March 2017 in which Appellants seek to extort a payment from FCGI in exchange for Appellants' release of the shares they wrongfully obtained in FGCI do not fall

under NRS 41.637(2) because these communication were not to an officer, employee, or legislator of the United States or Nevada. They likewise do not fall under NRS 41.637(3) because they are not communications made in connection with an issue under consideration by a judicial body since these communications pre-date the litigation.

2. Appellants' communications with UKGC do not fall under NRS 41.637 because FCGI was not aware those communications were even made until after the case below was commenced, and furthermore they were not communications made to the Federal Government or State of Nevada.

As to Appellant Newman's communications with the UKGC (to the extent those communications were actually made), FCGI and Mr. Mahon had no knowledge of them so there is no way the claims against Appellants could be based on or in response to those communications. Moreover, these communications were not made to a "Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity," as required under NRS 41.637(2) since the UKGC is not even based in the United States. Therefore, these communications do not fall under anti-SLAPP protection.

All told, Appellants cannot satisfy the first sub-part of Prong One.

3. Appellants' communications were fraudulent, unlawful, and false.

Appellants also cannot satisfy the second sub-part of Prong One under NRS 61.637, which requires Appellants to establish that Appellant Newman's communications were true or made without knowledge of their falsehood. Courts have held that anti-SLAPP statutes do not protect communications that would otherwise be illegal, such as extortion, fraud, or perjury. See, e.g., Flatley v. Mauro, 46 Cal. Rptr. 3d 606, 139 P.3d 2, 15 (Cal. 2006).

. . .

Appellants cannot meet that standard because Appellant Newman's statements that he was employed by FCGLTD and was entitled to collect wages were untrue and Appellant Newman knew it. Appellant Newman also knew that he had obtained his interest in FCGI through misrepresentations and shoddy legal services, yet he still demanded payment for those "services". These activities are per se violations of 18 U.S.C. § 1346 (frauds by wire), 18 U.S.C. § 1951 (interference with commerce by threats), 18 U.S.C. § 1341 (frauds and swindles based on an unlawful taking of FCGI's and Mahon's property), and NRS 207.400(1)(b) (via NRS 205.380 (false pretence); NRS 205.300 (embezzlement); NRS 205.377 (fraud or deceit in course of enterprise or occupation); and NRS 205.320 (extortion)).

When FCGI discovered that Appellants had not completed the work for which he had been paid $10,000 on July 29, 2016, Newman demanded more money when confronted instead of doing the work. That led FCGI to investigate prior supposed work by Appellants leading to the discovery that Appellants had not done most of the claimed work and had let much of the IPR expire or be abandoned. When FCGI and affiliates terminated the relationship with Appellants as a result, Appellants resorted to extortion instead of accepting their wrongdoings. Appellants even demanded a waiver and release. It is these activities and communications that Appellants claim deserve protection under the anti-SLAPP statute but, in actuality, nothing is less deserving of such protections. Appellant Newman's law license does not protect him from his failures to protect the IPR and his failure to file meritorious motions. Appellants have spent more time filing briefs with this Court than ever spent in protecting the IPR.

Therefore, the district court's ruling was proper, and the Court should reach the same conclusion on appeal. Given Appellants' inability to tie FCGI's claims against Appellants to the allegation in the Third-Party Complaint, Appellant cannot meet its Prong One burden under the anti-SLAPP statute.

E. DUE TO APPELLANTS' INABILITY TO SATISFY PRONG ONE, ANALYSIS OF PRONG TWO IS UNNECESSARRY; BUT, IF IT WERE, APPELLANTS CANNOT MEET THEIR BURDEN, AND, ALTERNATIVELY, THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT FOR DISCOVERY AND A SUBSEQUENT DETERMINATION.

As established above, Appellants cannot satisfy Prong One under NRS 41.660(3)(a). Thus, the analysis can stop there. But if, *arguendo*, Appellants had somehow satisfied Prong One, the analysis would then turn to Prong Two. Under Prong Two, FCGI would have the burden to show with prima facie evidence a probability of prevailing on its claims. See NRS 41.660(3)(b). Even in that scenario, however, FCGI would be entitled to discovery on those issues pursuant to NRS 41.660(4). No such discovery has occurred; in fact, there has been very little discovery in the case below on any issue while motion practice ensues in order to simplify matters, which has already produced settlements and judgments against others to the benefit of the FCGI (and its interested parties) proving there is merit to all of the FCGI's claims.

1. FCGI establishes a prima facie claim on the RICO-based claims

FCGI's Third-Party Complaint sets forth federal and state RICO claims against Appellants. Specifically, FCGI alleges that Appellants withheld FCGI's files, including the IPR, demanding payment in exchange for waivers and releases. (AA.1 142-152). These allegations are substantiated by the exhibits to FCGI's Opposition to Appellants' Motion to Dismiss (AA.2 325-428). The evidence submitted by FCGI more than meets FCGI's burden to make a prima facie showing of RICO-based claims.

The prima facie "evidence standard is a low burden." Rosen v. Tarkanian, 453 P.3d 1220, 1227, 135 Nev.Adv.Op. 59 (2019) (citing Soukup v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 46 Cal.Rptr.3d 638, 139 P.3d 30, 51 (2006)).

"A prima facie case is defined as sufficiency of evidence in order to send the question to the jury." Vancheri v. GNLV Corp., 777 P.2d 366, 368, 105 Nev. 417, 420 (1989).

"Racketeering activity" for purposes of the RICO Act means any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including wire fraud and money laundering. The RICO Act specifically states at 18 U.S.C § 1962(b):

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The RICO Act specifically defines a "pattern of racketeering" at 18 U.S.C: 1961(5):

> 'pattern of racketeering activity' for purposes of the RICO Act means requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

A claim under 18 U.S.C. §1962(b), (c) and (d), require: (1) FCGI must prove that Appellants engaged in a "pattern of racketeering activity"; (2) FCGI must prove that through the pattern of racketeering activity, Appellants acquired or maintained, directly or indirectly, an interest in or control of an enterprise; and (3) FCGI must prove that the Appellant's enterprise engaged in, or had some effect on, interstate or foreign commerce. Nevada's state law racketeering claim is very similar. See NRS 207.400(1)(b).

To establish a pattern of racketeering activity as defined in 18 U.S.C. §1961(1) and succeed on these claims under 18 U.S.C. §1961(5), FCGI must prove each of the following by a preponderance of the evidence: (1) at least "two predicate acts" of racketeering were committed; (2) the predicate acts of racketeering had a relationship

to each other which posed a threat of continued criminal activity; and (3) the predicate acts of racketeering embraced the same or similar purposes, results, participants, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics.

With respect to all allegations common to the Sixth Claim and Tenth Claim in the Third-Party Complaint regarding violations of sections 18 U.S.C. § 1962(b) and NRS 205.400(1)(b), Counter-defendant's "enterprise" includes Appellants and other parties. Here, as set forth above with citations to the record, FCGI has presented sufficient evidence to state a prima facie claim that, in August 2016, Mr. Mahon discovered that Appellant Newman had abandoned five patent applications, let two other applications expire, and abandoned and let two trademark applications become suspended. Mr. Mahon also discovered that Appellant Newman had failed to obtain copyrights on any of the 12 Full Color® Cards applications and failed to even file a copyright on Mr. Mahon's Full Color® Cards 3rd Edition. As a result, Mr. Mahon's IPR had lost a significant portion of federal intellectual property protections and suffered an extraordinary financial loss and was forced to undergo a formal investigation from the United States Securities Investigations as a result of Appellant Newman's fraud, misrepresentation, concealment, breaches and other claims as alleged against him in the case below. Due to Appellant Newman's failure to meet his obligations and duties, FGCI and FCGLTD removed Appellant Newman from every capacity.

FCGI further establishes that Appellant Newman's response to being removed from FCGI and FCGLTD was to begin to demand and extort money from FCGI and FCGLTD to avoid Appellant Newman from interfering with the application process for FCGLTD with IOM authorities. Specifically, Appellant Newman demanded $5,000 in payment to release his "attorney lien" on the IPR and concocted a non-existent employment agreement claiming he was entitled to unpaid wages. Appellant

Newman also raised for the first-time supposed concerns he had about Mr. Mahon's conduct and ominously suggested that all claims with Appellant Newman better be resolved.

Additional evidence establishes that Appellant Newman then demanded $50,000.00 plus a full release, and then $75,000.00 plus a full release. But FCGI and others could not pay this amount because it was not due or payable since Appellants only received shares in FCGI based on repeated misrepresentations concerning Appellant Newman's work product and work efforts. No resolution with Appellant Newman was ever reached, and, as a result, FCGLTD was not able to complete its applications with the UKGC, and FCGLTD and FCGI became insolvent.

Based on these allegations and the evidence that has been submitted in the case below relative to Appellants, which the Court should also consider here, Appellants have engaged in RICO activity and FCGI has stated a prima facie case for these claims. Specifically, FCGI has stated a prima facie claim that Appellants have entered into a scheme to defraud (18 U.S.C. § 1346); fraud by wire (18 U.S.C. § 1343, § 1346); interference with commerce by threats (18 U.S.C. § 1951), and the predicate wrongdoings under NRS 207.400(1)(b) (via NRS 205.380 (false pretense); NRS 205.300 (embezzlement); NRS 205.377 (fraud or deceit in course of enterprise or occupation); and NRS 205.320 (extortion)).

Appellants' Opening Brief does not refute that FCGI has stated a prima facie claim on the RICO-based claims. Appellants instead argue the RICO-based claims are barred by the "litigation privilege". This argument is without merit for multiple reasons.

To start, Appellants appear to base their "litigation privilege" argument on a California statute and California law. The difference between California and Nevada, however, is that California has codified a litigation privilege where any litigation privilege in Nevada is a common law claim. The cases cited by Appellants in support

of their litigation privilege argument are nearly all California cases analyzing California's litigation privilege statute, or federal cases attempting to analyze Nevada's common law litigation privilege under California law. This is a flawed approach. Nevada has sufficient law on this issue, and as discussed next, that law does not support Appellants' argument.

Next, although there is a common law litigation privilege in Nevada, it is generally applied to defamation claims. "[C]ommunications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." Circus Circus Hotels Inc. v. Witherspoon, 657 P.2d 101, 104, 99 Nev. 56, 60 (1983). "The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." Id. at 61. Thus, Nevada's application of the common law litigation privilege is nearly always in the context of a defamation claim. See, e.g., Fink v. Oshins, 49 P.3d 640, 644, 118 Nev. 428 (Nev. 2002); K-Mart Corp. v. Washington, 866 P.2d 274, 282, 109 Nev. 1180 (1993). The analysis in these cases is irrelevant here because FCGI is not asserting claims for defamation against Appellants – the claims are more RICO-based.

Moreover, Appellants argue that their pre-judicial communications – made with no ongoing or contemplated litigation – are covered under the litigation privilege. But Nevada law does not extend the privilege as far as Appellants contend. Nevada's extension of the common law litigation privilege to a "proposed judicial proceeding" is made only in the context of an attorney publishing a defamatory matter concerning another in communications where that communication had some relation to the proceeding. See Bull v. McCuskey, 615 P.2d 957, 961, 96 Nev. 706, 711-12 (Nev. 1980). The purpose for the extension of the privilege to these types of communications "rests upon a public policy of securing to attorneys as officers of the

court the utmost freedom in their efforts to obtain justice for their clients." Id. at 712.

This is not the scenario here, and there is no authority provided by Appellants to extend the litigation privilege to RICO activities or communications in furtherance of RICO activities or other alleged wrongdoing. Nevada law simply does not support Appellants' position that Appellants can commit RICO or other violations but seek immunity for those violations by acting as a party's own attorney, writing a bad-faith demand for money in furtherance of the wrongful activities, and then seeking litigation immunity for that extortion demand. FCGI has certainly provided sufficient evidence to allow further discovery and a trial on those allegations. Appellants' attempt to seek a silver bullet in the form of the litigation privilege misses the mark badly.

Lastly, even if the type of communications at issue here were somehow worthy of a litigation privilege analysis, Appellants' arguments would still fail because there is no evidence Appellants ever intended or even contemplated a judicial proceeding when the communications were made. For the pre-judicial proceeding litigation privilege analysis to even possibly apply, a judicial proceeding must be "contemplated in good faith and under serious consideration." Fink v. Oshins, 49 P.3d 640, 644, 118 Nev. 428 (Nev. 2002) (quoting K-Mart Corporation, 109 Nev. at 1191 n. 7).

Here, Appellants do not and cannot contend that they were "contemplating in good faith" or "seriously considering" litigation based on the extortion demand letters. Proof positive, when FCGI refused Appellants' demands, Appellants let their demands go and did not commence litigation. Appellants' failure to commence an action against FCGI, Mr. Mahon or anyone else, even though they supposedly believed they had a basis for a claim is telling. Appellants know that their actions and inactions, including not only malpractice, but intentional torts such as fraud and racketeering and other separate breaches of fiduciary duty, would be fully exposed

were he to be involved in the lawsuit.

In sum, FCGI satisfies Prong Two because it has provided prima facie evidence to support its claims, which Appellants do not refute. Appellants' argument that FCGI's claims are barred by Nevada's common law litigation privilege falls short because the analysis is not applicable here. But if it were, Appellants have not provided any evidence that it was seriously considering litigation when the communications were made, which is a required showing to apply the litigation privilege to pre-litigation communications. In fact, Appellant Newman, as the single largest shareholder other than the founder of FCGI, was heavily recruited by other shareholders to join their derivative shareholder lawsuit yet Appellant Newman refused to join, proving he had absolutely zero intentions of every filing a lawsuit.

Thus, the litigation privilege is not applicable here.

2. FCGI is entitled to additional discovery for a full and fair Prong Two adjudication

In the unlikely event the Court deems FCGI's evidence does not state a prima facie claim, FCGI requests additional discovery into those claims in the case below. In that scenario, the Court should remand the matter to district court with instructions to address prong two just as it did recently in Stark v. Lackey, 458 P.3d 342, 344, 136 Nev.Adv.Op. 4 (2020) (remanding an anti-SLAPP appeal with instructions to the district court to address prong two of the anti-SLAPP analysis).

VII.

CONCLUSION

The district court properly found that Appellant cannot satisfy prong one of the anti-SLAPP statute because the allegations in FCGI's Third-Party Complaint against Appellant and his cohort of wrongdoers do not qualify for anti-SLAPP protection or protection of the litigation privilege. RICO conduct is not protectable. This was so clear to the district court that the district court saw no need to order discovery under

Prong Two before ruling against Appellants. Therefore, the Court should deny the appeal. Alternatively, if the Court deems further Prong One or Prong Two analysis is necessary, the Court should remand the matter to the district court for discovery and a determination by the district court.

Dated this 27th day of August 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,860 words, which is less than 14,000.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of August 2020.

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CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hulet, Esq., hereby certifies that on the 27th day of August 2020, a true and correct copy of the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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