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IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD H NEWMAN, AN INDIVIDUAL; NEWMAN LAW, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND COOPER BLACKSTONE, LLC, A NEVADA LIMITED LIABILITY COMPANY *Appellant,* vs. FULL COLOR GAMES, INC., A NEVADA CORPORATION *Appellee.*	SUPREME COURT NO.: 79395

APPELLANTS REPLY BRIEF

APPEAL FROM THE DISTRICT COURT
FOR CLARK COUNTY, NEVADA, CASE NO.: A-17-759862-B

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INTRODUCTION

On August 11, 2017, shareholders of Full Color Games, Inc. ("FCGI") filed suit in district court with various claims for fraud and embezzlement against FCGI's CEO, David Mahon, and its President, Glen Howard. (AA1. 1-34)

On February 4, 2019 Defendants David Mahon and Glen Howard, filed an Amended Answer to the shareholder complaint with counterclaims and a Third-Party Complaint on behalf of Full Color Games, Inc. alleging "RICO claims" for racketeering under the Federal RICO statute, 18 U.S.C. 1962(b); acts of extortion in violation of the Hobbs Act and through fraud in violations of 18 U.S.C. § 1346, frauds by wire; 18 U.S.C. § 1951, interference with commerce by threats or violence; 18 U.S.C. § 1341, frauds and swindles and violations under Nevada RICO, NRS 207.400, against Appellants. (AA1 202-206 and 220-221).

These claims were made in the Third-Party Complaint against Appellants based on a predicate act of sending a prelitigation demand letter and attempting to settle a legitimate dispute in good faith.

In its Third-Party Complaint, Appellees refer to the "extortionate threats" as including "communications by Newman" identified as follows:

> "(1) On August 27, 2016 at 4:04pm PST, in a document entitled "**Settlement Agreement.pdf**";
>
> (2) On November 17, 2016 at 5:50pm PST after Newman's phone

call with Linham and Howard memorialized in the emailed document entitled "**2016_11_17_Rich_Newman_Settlement_Proposal.docx**";

(3) On February 21, 2017, Newman emailed document titled "**Mutual Termination and Release-2-21-2017.docx**""

(AA1. 203-204)

Appellee further alleged as a basis for its claims against Appellants in the Third-Party Complaint that Appellants "with its extortionate demands, held FCGI and its affiliates property rights and corporate stock ransom in order to prevent the FCGI and its affiliates from being able to obtain a UKGC casino gaming license and prevent them from obtaining revenue streams through interstate and foreign commerce." (AA1. 204)

No "extortionate demands" were specified in the Third Party Complaint other than Appellant Richard Newman's proposed settlement agreement and prelitigation demand letter, a copy of which is found in Exhibit 3 of Appellant's Special Motion to Dismiss. (AA2. 297-298)

Appellants filed a Special Motion to Dismiss the RICO claims as being based on privileged and protected communications, namely, the prelitigation demand letter sent by Appellant Richard H Newman to Appellee and communication Richard H Newman had with the United Kingdom Gambling Commission

("UKCG") in response to the UKGC's request for information from Appellant Richard H Newman, since communication with the UKGC was also mentioned as a cause for the RICO claims. (AA1. 150 and 205; AA2. 250-302)

Appellants filed this appeal because the trial court did not make the findings required by NRS 41.660(3) with regard to all Appellants, failed to consider the communication with the UKGC and categorically denied that the Nevada Anti-SLAPP statute applies to an attorney's prelitigation demand letter, despite the Appellant's demand letter being a good faith communication protectable under NRS 41.637(3), or at the very least, not proven otherwise. (AA2. 448-451).

Appellants have also filed this Appeal because an aggrieved party should not made to defend against RICO based claims of extortion and racketeering merely because they send a pre-litigation demand letter to seek redress of a legitimate dispute.

1.0 Appellee Concedes the Factual Basis Predicating Appellant's Communication of the Pre-litigation Attorney Demand Letter to Appellee

In its Answer Appellee concedes that Appellant Richard Newman and Appellee David Mahon began working together in 2010 on a business venture intended to commercialize live wagering games. (AA2. 255-256) Appellee concedes that on August 1, 2015, Appellant Richard Newman became the second

largest shareholder of FCGI pursuant to a Share Issuance Agreement of the same date. Appellee concedes that Appellant Richard Newman agreed to become a director and Chief Legal Officer for Full Color Games, Limited ("FCGLTD"), a related entity formed pursuant to the laws of the Isle of Man. (AA2. 256-257). Appellee concedes that there was a dispute between Appellant Richard Newman and David Mahon, CEO of both FCGI and FCGLTD, over monthly compensation relating to working for FCGLTD. (AA2. 336).

After Appellant Richard Newman confronted FCGI's CEO about his financial improprieties and failure to deliver on promises to compensate Appellant for his additional time and effort spent on the business, Appellee contrived a reason to oust Appellant Richard Newman from the business he helped to build for over six years before. Appellee's CEO David Mahon was fully aware of everything Appellant did on behalf of the business, and also knows that Appellant lacks access to his former FCGI and FCGLTD email accounts and other evidence as a result of being locked out by David Mahon, and since the parties worked closely together many discussions, particularly those of sensitive nature, were oral and accurate records reflecting the view of both parties were not kept.

Despite conceding Appellant Richard Newman's facts supporting him having played a significant role in the business over six years, Appellee argues that Appellant Richard Newman's communication of a pre-litigation demand letter

seeking redress for being wrongly ousted from that business was so devoid of a good faith basis that the pre-litigation demand letter should not be deemed protectable under Nevada's anti-SLAPP statute from Appellee's retaliatory RICO claims.

The District Court should have dismissed these RICO claims based on the Appellant's attorney demand letter being protectable under Nevada's anti-SLAPP statue but categorically denied protection the pre-litigation demand letter and failed to even consider whether Appellants had met their burden of establishing by a preponderance of the evidence that the attorney's pre-litigation demand letter was a good faith communication that was either truthful or made without knowledge of its falsehood.

2.0 Appellee Has Since Asserted Contract-Based Claims in its Second Amended Third Party Complaint Which Rely on the Same Factual Basis Predicating Appellant's Communication of the Pre-litigation Attorney Demand Letter to Appellee

Appellee's Second Amended Third Party Complaint filed January 9, 2020 contains new contract-based claims against Appellants, such as breach of contract, breach of fiduciary duty and contractual breach of covenant of good faith and fair dealing, among other claims, all of which are predicated on the existence of the same business relationship which formed the basis for Appellant Richard Newman

seeking redress in the pre-litigation demand letter. (See footnote 1 of Appellee's Answer and R.I. 001-213)

While Appellee argues on one hand that Appellant Richard Newman's demand letter was not sent in good faith because Appellant Richard Newman had no possible contractual based claims against Appellee, on the other hand Appellee has asserted contract-based claims against Appellants arising from the same factual basis relating to Appellant Richard Newman's former involvement in the business. There is a clear fundamental incongruity of asserting contract-based claims against Appellant while simultaneously asserting that Appellant's demand letter to resolve a dispute of contractual claims is so devoid of factual basis as to constitute a RICO violation.

While the District Court should have dismissed the RICO claims based on the Appellant's attorney demand letter being protectable under Nevada's anti-SLAPP statue,

Appellee's concessions support Appellants having met their burden of establishing by a preponderance of the evidence that the attorney's pre-litigation demand letter was a good faith communication that was either truthful or made without knowledge of its falsehood.

3.0 Appellee Has Not Contested Appellants' Argument that the District Court Erred by not examining whether Appellant's Communication was a good faith communication

In denying Appellants' Anti-SLAPP motion, the Court summarily found that Nevada's Anti-SLAPP Statute was "inapplicable to the communication sent by Richard Newman to [Appellee]" despite the lack of any further analysis of the issues and communication in question.

The District Court did not consider analyze whether the demand letter was within the categories of the Anti-SLAPP Statute, whether the demand letter was sent in good faith or give any consideration to Appellant Richard H Newman's communication with the UKGC, despite the RICO claims against Appellants' being predicated on the demand letter. The Court's order stated that "the Court found that Nev. Rev. Stat. Ann. 41.660, et seq. was inapplicable to the communication sent by Richard Newman" without anything more. (AA2. 446)

Appellants contend that they satisfied their burden to establish, by a preponderance of the evidence, that the prelitigation demand letter was a good faith communication that was either truthful or made without knowledge of its falsehood. Yet the District Court provided no explanation of how Appellants submission of information in the motion along with a copy of the demand letter was insufficient to meet Appellants' burden, and no explanation of how, if at all, Appellee's

evidence rebutted Appellants' evidentiary showing. In fact, the court made no determinations at all other than to summarily decide that Nevada's Anti-SLAPP statute is inapplicable to an attorney's prelitigation demand letters.

Appellee's Answer does not contest Appellants' arguments that the District Court erred and that the District Court should have considered whether the communication was in good faith.

LEGAL ARGUMENT

4.0 Appellants have satisfied the First Prong by having made a Threshold Showing that Appellants Communication Constitutes Protected Activity Under Nevada's Anti-SLAPP Statute

With regard to the first element, the court must "decide[] whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *See Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002); *John*, 219 P.3d at 1282 ("Nevada's anti-SLAPP statute filters unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits *arising from their right to free speech under both the Nevada and Federal Constitutions*."). "'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [the Anti-SLAPP Statute].'" *See Navellier*, 29 Cal. 4th at 88.

In making its evaluation, the court must be mindful that "[t]he anti-SLAPP statute's definitional focus is not the form of the [SLAPP] plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning." *See id.*, at 92. *See also, Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 918 (2004) ("plaintiffs cannot successfully argue that their complaint does not arise from DIRECTV's constitutionally protected right to petition for redress of grievances" as "[t]he entire lawsuit is premised on DIRECTV's demand letter, sent in advance of, or to avoid, litigation to vindicate its right not to have its programming pirated.").

An Anti-SLAPP movant does not carry a heavy burden in satisfying the first prong of an Anti-SLAPP motion. He does not need to "establish [that his] actions are constitutionally protected under the First Amendment as a matter of law." *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 305 (2001). Rather,

> a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens.

Chavez v. Mendoza, 94 Cal. App. 4th 1083, 1089 (2001). That discussion is reserved for the second prong of the analysis. *See Wallace v. McCubbin*, 196 Cal. App. 4th 1169, 1195 (2011).

Communications sent in good faith to resolve a legitimate dispute comes within the scope of *Nevada Revised Statute § 41.637(3)* – a provision which is materially identical *California Code Civil Procedure § 425.16(e)(2).*[1]

Appellant Richard Newman sent a demand letter in advance of the existing litigation to seek redress for harm caused by the wrongful ouster and failure to pay as agreed, and to make an attempt to settle the dispute directly with Appellee's CEO. (AA2. 297-298). While Appellee argues that there were no contractual obligations so a good faith basis for the demand letter did not exist, the history of the parties which is conceded by Appellee and Appellee's own assertions of

[1] Specifically, section 425.16(e)(2) of the California statute states that "[a]s used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: …(2) *any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law*." See Cal. Code Civ Proc § 425.16(e)(2). This is identical to section 41.637(3) of the Nevada statute, which states that a "'[g]ood faith communication in furtherance of the right to petition" means *any*: … *[w]ritten or oral* statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law…" See Nev. Rev. Stat. Ann. § 41.637(3).

contract-based claims against Appellants in its Second Amended Third Party Complaint against Appellants undermine Appellee's arguments.

Appellant Richard Newman sent communications pertaining to settlement responsive to the parties mutual interest in settling the dispute. Appellee references a settlement proposal sent on November 17, 2016 after Appellant Richard Newman's discussion with Martin Linham (Appellee's chief financial officer) and Glen Howard (Appellee's President), and a Mutual Termination and Release sent February 21, 2017. (AA1. 203-204).

All the issues complained of by Appellee in its Answer are typical reasons parties seek to settle rather than to litigate. For example, Appellee essentially claims its business suffered as a result of the failure of the parties to reach a settlement. This fact does not constitute extortion, but rather, points out the business necessity of settling disputes with a business resolution. As shown by the demand letter, Appellant Richard Newman was seeking $5000 to settle his claim. When it became clear that Appellee desired Appellant Richard Newman's shares in FCGI, the settlement offer naturally increased commensurate with the terms of settlement now including a transfer of shares which Appellant rightfully owned. Under the Appellee's theory of extortion, almost every business negotiation would have a potential to constitute extortion if it involves a bargained-for exchange of value.

Appellee claims to have no knowledge of Appellant Richard Newman having been contacted by the UKGC with regard to FCGLTD, but even if believed, Appellee still used communication with the UKGC by Appellant Richard Neman as a basis for Appellee's damages from Appellants alleged RICO violations, which is clearly protected communication under the Anti-SLAPP Statute. The Third-Party Complaint states that Appellants "with its extortionate demands, held FCGI and its affiliates property rights and corporate stock ransom in order to prevent the FCGI and its affiliates from being able to obtain a UKGC casino gaming license and prevent them from obtaining revenue streams through interstate and foreign commerce." (AA1. 204). When the alleged damage in a lawsuit is caused by protected activity, the lawsuit should be dismissed as a SLAPP lawsuit. *See, e.g., Peregrine Funding v. Sheppard Mullin Richter & Hampton*, 133 Cal.App.4th 658, 671, 35 Cal. Rptr. 3d 31 (2005).

Appellants have shown by at least a preponderance of the evidence that the communications underlying lawsuit, namely, the attorney demand letter, was a good faith communications within the scope of *Nevada Revised Statute § 41.637(3)* and conduct in furtherance of the exercise of the constitutional right of petition. Racketeering claims in particular have been dismissed as SLAPP lawsuits when based on such protected speech. *See, e.g., Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*, 136 Cal.App.4th 464, 479 (2006).

5.0 Ongoing Litigation is Not Required for Communication to be Protectable Under Nevada's Anti-SLAPP Statute

Appellee's Answer argues that NRS 41.637(3) is not applicable because there was no litigation ongoing between the parties when the communications were made. However, Appellee fails to provide support for such an argument and the evidence strongly suggests that the communication in question does not need to be made during litigation to be protected under NRS 41.637(3).

Nevada Courts have not held the existence of an ongoing litigation to be a prerequisite before communication becomes protected under NRS 41.637(3). Neither Nevada nor California Courts have decided a case based on the fact that the anti-SLAPP statute was inapplicable to communication that was made without a concurrent related litigation. If NRS 41.637(3) was intended to be interpreted as requiring litigation to exist at the same time as the communication, then such an interpretation has not been expressed in a Nevada Courts. In fact, the decisions in Nevada strongly suggest that ongoing litigation is not a prerequisite to determining whether communication is protectable under NRS. 41.637(3).

For example, in *Patin v. Lee*, 134 Nev. Adv. Op. 87, the Nevada Court found the analysis of the California court in *Neville v. Chudacoff,* 160 Cal.App.4th 1255, 73 Cal.Rptr.3d 383, 391-92 (2008) to be instructive and adopted the standard set

forth in the *Neville* case. In *Neville*, the communication at issue was an attorney's letter sent to customers regarding a fired employee having breached a confidentiality agreement **prior to** the company's bringing suit against that employee. As described in *Patin,* the *Neville* court concluded that the attorney's letter to the company's customers was protected under both California's Anti-SLAPP statute and litigation privilege because "the letter related directly to the company's forthcoming claims against the fired employee and was directed to the company's customers, who the company reasonably believed would have an interest in the forthcoming litigation." *Patin v. Lee*, 429 P.3d 1248, 1251 (Nev. 2018).

The court in *Neville* found the attorney's letter to be protected communication even though it had clearly been made prior to any litigation, and the Nevada Court indicated it was persuaded by the *Neville* court's reasoning. In adopting the *Neville* court's standard for what qualifies for protection under NRS 41.637(3), the Nevada Court in *Patin* could have stated that ongoing litigation at the time was a prerequisite for a communication to be protectable under NRS 41.637(3) but it chose not to. Nothing in *Patin* states or suggests that NRS 41.637(3) should be interpreted to require that litigation be ongoing at the time the communication was made for purposes of obtaining anti-SLAPP protection or that any particular party must be the plaintiff in subsequent litigation.

The facts involved in this appeal show that Appellee engaged Appellant Newman in settlement discussions for many months, and thus the forthcoming litigation was suspended, and thereafter, FCGI was alleged to be dissolved. (AA2. 258, and 300-302) However, litigation has since ensued, and the attorney demand letter sent by Appellant Newman was, at the time it was sent, and is obviously now in light of the ongoing litigation, in direct connection with an issue under consideration by a judicial body. The demand letter relates to the substantive issues in the present litigation, which now includes contract-based claims arising from the same factual basis and relationship between Appellant Richard Newman and Appellee as claims made in the pre-litigation demand letter. Appellant's demand letter related to claims of redress relating to the same role and involvement in FCGI and FCGLTD. Appellant's demand letter was directed to persons having some interest in the litigation, namely, David Mahon, who was both FCGI and FCGLTD's CEO, and copied other FCGLTD directors.

Thus, the communication at issue, Appellant's demand letter, should rightfully receive anti-SLAPP protection against Appellee's RICO claims, all of which are based merely on Appellant having sent the demand letter for redress of a legitimate dispute in the first place.

6.0 The Gravamen of Appellee's RICO claims against Appellants is Protected Activity Under Nevada's Anti-SLAPP Statute

A claim rests on protected activity if the "principal thrust or gravamen" of the claim is the protected activity. *Ramona Unified School Dist. v. Tsiknas*, 135 Cal.App.4th 510, 519-520 (2005); *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 403 P.3d 1280, 1285 (2017) ("we must look to the gravamen or 'substantial point or essence' of each claim rather than its form."). As set forth in *Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal.App.4th 1264, 99 Cal.Rptr. 3d 805 (2009), the courts "assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim.' (*Martinez v. Metabolife Internat., Inc.*, 113 Cal.App.4th 181, 189, 6 Cal.Rptr.3d 494, 500 (2003))" *Hylton*, 177 Cal.App.4th at 1271.

As much as FCGI attempts to distance itself from its own statements in the Third Party Complaint, paragraph 520 quoted above speaks for itself. (AA1. 203-205) There, FCGI is undeniably asserting the demand letter and settlement communication as the allegedly wrongful conduct that damaged FCGI. When the alleged damage in a lawsuit is caused by protected activity, the lawsuit should be dismissed as a SLAPP lawsuit. *See, e.g., Peregrine Funding v. Sheppard Mullin Richter & Hampton*, 133 Cal.App.4th 658, 671, 35 Cal. Rptr. 3d 31 (2005).

The gravamen of all of the allegations of RICO violations in the Third Party Complaint are all based on the prelitigation demand letter and settlement communications, which are protected communications under Nevada's Anti-SLAPP statute. No other factual basis is provided. No discovery is needed on this issue because this communication is the only basis alleged for the RICO violations.

"[I]n ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim *and what actions by defendant supply those elements and consequently form the basis for liability*." *Park v. Bd. of Trs. of the Cal. State Univ.*, 2 Cal.5th 1057, 1063, 393 P.3d 905 (2017) (emphasis added); *see also, Chodos v. Cole*, 210 Cal.App.4th 692, 719, 148 Cal. Rptr. 3d 451, 470 (2012) ("[t]he principal thrust or gravamen test is to be broadly interpreted.") (internal quotations omitted).

Nevertheless, Appellee now argues that Appellant's wrongful conduct does not end with such settlement communications, 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."

In short, Appellee acknowledges that it lacks the evidence to support its claims. Appellee acknowledges that all it has is the pre-litigation demand letter and settlement communications and so now asserts that it has unsupported "basis to believe" allegations that Appellant is conspiring with others against Appellee and David Mahon. Appellee subsequently claims however, that if they are granted

discovery, they may be able to uncover racketeering acts that are not protected speech, thus defeating the anti-SLAPP motion. But that is not how lawsuits are brought, nor how anti-SLAPP motions are defeated. Plaintiff must have some knowledge of unprotected wrongful acts of the defendant, that are plead with specificity, *at the time the complaint is filed*. Here, respondents acknowledge they do not have that.

7.0 Appellee is not entitled to Discovery

In its Answering Brief, Appellee repeatedly says it is entitled to discovery in order to adequately plead its claim, but cites no support for its position. Presumably, this is a tacit acknowledgement that it lacks evidence to support its RICO claims against Appellants. The case law is in fact uniform that in any procedural situation, where a plaintiff files a claim with nothing more than legal conclusions, the plaintiff is not entitled to discovery to prove or correct its pleading. *See, Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (the rules of civil procedure do "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."); *Choy v. Ameristar Casinos, Inc*., 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) (discovery denied in summary judgment context, because "the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must

instead present specific facts demonstrating the existence of a genuine factual issue supporting his claims.").

These concepts have been applied to deny plaintiffs discovery in an attempt to avoid a SLAPP motion to dismiss. *Khai v. Cnty. of L.A.*, No. 16-56574 (9th Cir. Mar. 27, 2018) ("[t]he district court did not abuse its discretion in denying Khai's request for discovery prior to granting the anti-SLAPP motion."). The reasoning was explained in *Makaeff v. Trump University, LLC*, 715 F.3d 254 (9th Cir. 2013): "[t]he anti-SLAPP statute is designed, first and foremost, to reduce the time and expense certain defendants spend in court upon being sued... It accomplishes this by requiring plaintiff to show that there's a 'reasonable probability' he'll prevail on his claim before subjecting the defendant to the cost, delay and vexation of discovery." *Makaeff*, 715 F.3d at 274-75.

Here, Appellee concedes it is unaware of any conduct other than the prelitigation demand letter and settlement communication which are protected communications, but merely has an unspecified "basis to believe" wrongful conduct exists. While FCGI seeks discovery in the hope of finding something on which the suit can be based, "this argument amounts to a request for this Court's permission to conduct a fishing expedition, and it is unavailing." *Korhonen v. Sentinel Ins., Ltd.*, 2:13-cv-00565-RCJ-NJK, at *7 (D. Nev. Mar. 24, 2014). Having failed to plead

any specific factual evidence which may be used to rebut Appellants' showing under the first prong, Appellee's request for discovery should be denied.

8.0 Appellee Cannot Establish a Probability of Prevailing Under the Second Prong of the Anti-SLAPP Statute

"Once he meets his initial burden, the burden shifts to the plaintiff who must show that his claim has merit." *See John*, 219 P.3d at 1284. Under this second prong of the analysis, "the burden of production shifts to the plaintiff to show that there is a genuine issue of material fact." *See John*, 219 P.3d at 1284.

Appellants have shown why its communication satisfies the first prong in its Opening Brief and in this Reply, yet Appellee has not met its burden under the second prong in its Answer. Appellee has offered *absolutely no facts or evidence* to show a probability of succeeding on his RICO based claims. Instead, Appellee asks for discovery in the hope of finding some evidence. Appellee cannot rest on a "basis to believe" some wrongful conduct occurred, it must have some knowledge of facts showing that it will probably succeed in proving its claims. These facts must be pleaded with specificity, *at the time the complaint is filed*. Appellee has failed to do so and furthermore it acknowledges that it does not have any facts to support its claims.

9.0 Appellee Failed to Submit any Admissible Evidence to Establish a Probability of Prevailing on the RICO-based Claims

Here, Appellee cannot establish a probability of prevailing on any of its claims as a matter of law, as Appellants' communication is cloaked with absolute immunity under the "litigation privilege."

While Appellee argues in its Answer that Nevada law differs from California law, Appellee offers no support for the contention that Appellant's settlement communications would not be privileged in Nevada. Moreover, the Ninth Circuit has concluded that "[w]here Nevada law is lacking [on issues relating to the litigation privilege], its courts have looked to the law of other jurisdictions, particularly California, for guidance." *See Crockett*, 583 F.3d at 1237.

Appellee thus failed to provide any admissible evidence in support of its RICO-based claims. In fact, Appellee's RICO-based claims will necessarily fail regardless of any proof that Appellee submitted in support of such claims.

Pursuant to the litigation privilege – which is a common law rule in Nevada[2] and is codified by statute at Civil Code §47(b) in California – "publications made in the

[2] "Nevada recognizes 'the long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged….'" *See Crockett & Myers v. Napier*, 583 F.3d 1232, 1236 (9th Cir., 2009) (quoting *Fink v. Oshins*, 118 Nev. 428, 434 (2002)). As the case under California law, "[t]he privilege applies not only to communications made during

course of a judicial proceeding are absolutely privileged." *See Albertson v. Raboff*, 46 Cal. 2d 375, 379 (1956); *see also Fink v. Oshins*, 118 Nev. 428, 434 (2002). "For well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from tort liability by the [litigation] privilege…." *See Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993). Relevant here, "[t]he privilege has been broadly construed to apply to **demand letters** and **prelitigation communications** by an attorney." *See Knoell v. Petrovich*, 76 Cal. App. 4th 164, 169 (1999) (citing *Rubin v. Green*, 4 Cal. 4th 1187, 1193-94 (1993)).

"Underlying the recognition of this privilege is the important public policy of affording the utmost freedom of access to the courts." *See Kachig v. Boothe*, 22 Cal. App. 3d 626, 641 (1971); *Fink*, 118 Nev. at 432 ("The policy behind the absolute privilege, as it applies to attorneys participating in judicial proceedings, is to grant them 'as officers of the court the utmost freedom in their efforts to obtain justice for their clients.'"). Based thereon, "the absolute privilege provides unconditional immunity, even for statements made with 'personal ill will'" because "[i]n a true absolute privilege situation, liability is totally foreclosed without regard to the fault or mental state of the defendant." *See Fink*, 118 Nev. at 433 n.7. "To hold otherwise would be inconsistent with the general public purpose of the privilege to encourage

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actual judicial proceedings, but also to 'communications preliminary to a proposed judicial proceeding.'" *See id*. (quoting *Fink*, 118 Nev. at 434).

the utmost freedom of access to the courts and quasi-judicial bodies." *See Jacob B. v. County of Shasta*, 40 Cal. 4th 948, 959 (2007).[3]

Even if the communication at issue were admissible, Appellant's communication constitutes letters, emails, discussions and proposed settlement agreements which are directed towards resolving a dispute. These communications are routine in the context of settlement negotiations. Appellee should have been made to come forward with evidence sufficient to demonstrate the merit of its claims that these communications constitute extortion and racketeering.

The bottom line is that Appellants should not be sued for extortion and racketeering for sending a prelitigation demand to Plaintiff's CEO based on a good faith claim seeking redress for its damages. Indeed, the very premise of Appellee's lawsuit defies logic, that is, Appellee should not be permitted to harm Appellants and then force Appellants to defend against extortion and racketeering claims when Appellants seek redress for such harm and attempt to settle a dispute.

[3] The breadth of the privilege is itself a testament to the significance of objective which the privilege intends to achieve. "As Prosser notes, 'Absolute immunity has been confined to a very few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives.'" *See Abraham v. Lancaster Cmty. Hosp*., 217 Cal. App. 3d 796, 812 (1990) (quoting Prosser & Keeton, Torts (5th ed. 1984) § 114, p. 816.).

CONCLUSION

The objective of the Anti-SLAPP statute is to "eliminate meritless litigation at an early stage" [*Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1113 (1996)], and accomplishes this goal by "provid[ing] an economical and expeditious remedy to SLAPP suits." *See Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 647 (1996). SLAPP suits are brought to chill various forms of protected First Amendment petitioning activity, including activities associated with the filing of a lawsuit. *See Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, 99 Cal. App. 4th 1179, 1188 (2002) ("It is well established that filing a lawsuit is an exercise of a party's constitutional right of petition."); *CKE Restaurants, Inc. v. Moore*, 159 Cal. App. 4th 262, 269 (2008) (holding that "[i]t is established that the filing of Proposition 65 intent-to-sue notices is a protected activity.").

Appellants are being sued for racketeering and extortion for sending a prelitigation demand to Appellee based on a good faith claim seeking redress for its damages. Based at least on the foregoing, this is protected activity and Appellants met its threshold burden under Nevada's Anti-SLAPP statute. Appellee should be made to establish a probability of prevailing on any of its RICO-based claims.

The Court should thus reverse the district court's denial of Appellants' Special Motion to Dismiss and remand with instructions to decide the motion on the second prong with the record currently before it.

NEWMAN LAW, LLC

/s/ Richard H Newman

Richard H Newman (NV Bar No. 8943)
Attorneys for Third-Party Defendants/Appellants Richard Newman, Newman Law, LLC and Cooper Blackstone, LLC

RULE 28.2 CERTIFICATION

1. The undersigned has read the following Reply brief of Appellants, Richard H Newman, Newman Law, LLC and Cooper Blackstone, LLC;

2. To the best of the undersigned's knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. The following brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6) because it was written in 14-Point Times New Roman, and the type-volume limitations stated in Rule 32(a)(7). Specifically, the brief is 6268 words as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this foregoing document was electronically filed on this 12th day of October 2020, and (i) served via the Nevada Supreme Court's Eflex electronic filing system to:

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Respectfully Submitted,

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