IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN MARCUS, an individual, Appellant, vs. FULL COLOR GAMES, INC., A NEVADA CORPORATION, Respondent.	Case No. 79512

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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

APPELLANT'S OPENING BRIEF

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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. Appellant Brian Marcus is an individual residing in the State of California, and there is no parent corporation or publicly held company that owns 10% or more of his stock. Appellant Marcus has been represented throughout the litigation and appeal by Joseph A. Gutierrez, Esq., Stephen G. Clough, Esq., and Danielle J. Barraza, Esq. of MAIER GUTIERREZ & ASSOCIATES. No other law firms are expected to appear on Appellant's behalf in this appeal.

JURISDICTIONAL STATEMENT

On February 4, 2019, Mahon filed the Third Party Complaint against Marcus, alleging claims of: 1) intentional recruitment of racketeering; 2) securities fraud and perjury; 3) inducing a lawsuit; and 4) abuse of process. AA0569.[1] All of these claims are based on the Marcus Declaration filed in the shareholder derivative lawsuit. AA0149-151.

On May 15, 2019, Marcus filed an anti-SLAPP motion to dismiss under N.R.S. 41.660, seeking dismissal of Mahon's Third Party Complaint against Marcus as a meritless lawsuit based on protected speech. AA0791-927. Mahon filed his

[1] "AA" refers to Appellant's Appendix.

Opposition to the Anti-SLAPP Motion on June 14, 2019. AA0926-936. On June 21, 2019, Marcus filed his Reply in Support of the anti-SLAPP Motion. AA0937-953.

On June 27, 2019, the district court heard oral argument on the anti-SLAPP Motion, at the end of which the district court orally announced that it would issue an order denying the Motion. AA1074. On July 29, 2019, the district court issued its written order [AA0954], without comment as to the reasons for denial, with notice of entry of the order filed that same day. AA0958. On August 26, 2019, Marcus filed his Notice of Appeal. AA0965.

ROUTING STATEMENT

This appeal should be presumptively retained by the Supreme Court pursuant to NRS 41.670(4), which states: "If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court." Since the adoption of NRS 41. 670(4), the Court of Appeals has been created and rules adopted to regulate the assignment of cases. This case should be retained by the Supreme Court pursuant to NRAP 17(a)(12) as it addresses an issue of statewide public importance. There is little law on Nevada's anti-SLAPP statute and the trial courts are in need of guidance so that the statute's purpose of protecting the free speech of citizens unable to afford to defend against abusive lawsuits can be achieved.

INTRODUCTION

David Mahon, through his now defunct company Full Color Games, Inc. ("FCGI") has brought this third party lawsuit against Brian Marcus, an investor in FGCI who simply submitted a declaration [AA0149-151] in support of the underlying shareholder derivative lawsuit [AA0001-68] brought by FCGI shareholders against Mahon for his concealing the ownership rights in FCGI assets.

Marcus was never a party to the shareholder derivative lawsuit and he did nothing more than submit truthful testimony through a three page declaration based on his own personal knowledge. In response to Marcus providing his declaration, Mahon sent emails to Marcus threatening criminal prosecution and insisting that he will tie Marcus up in litigation "until the end of time," and cost him "a million dollars," in legal fees unless Marcus withdrew his declaration. AA0894-899.

When Marcus did not comply, Mahon initiated this action against Marcus, at the same time he initiated a barrage of third party claims against other innocent shareholders in an effort to censor their involvement as witnesses in the derivative lawsuit. AA0569. In the 200+ page Third Party Complaint, the sole grounds for suing Marcus are set forth in a single sentence, "Marcus' sworn declaration has provided a supporting role to the racketeering activities" of others sued by Mahon. AA0701. Mahon also took the malicious step of contacting each attorney in Marcus' law firm, stating that racketeering charges have been brought against Marcus, and

informing the attorneys of Marcus' firm that actions will be taken to have Marcus disbarred. AA0901-902.

Mahon's actions in bringing the lawsuit, with the threat of endless litigation in an attempt to intimidate Marcus into silence and stifle constitutionally-protected speech, is precisely the type of bullying behavior targeted by Nevada's Anti-SLAPP statute, N.R.S. 41.635 et seq. The anti-SLAPP statute § N.R.S. 41.637 provides a means to file a special motion for a quick and inexpensive dismissal from lawsuits initiated based on "[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." Mahon's claims against Marcus fall squarely and indisputably within the protections afforded by this section.

Realizing the weakness in his position, Mahon has created new allegations that Marcus, an attorney, has allegedly committed racketeering crimes by virtue of his assisting a plaintiff with regard to issues in the derivative lawsuit. AA0928. Mahon did not raise this issue in the Third Party Complaint, and as such it cannot be argued as a grounds for avoiding dismissal. Nevertheless, Mahon's new position misunderstands the type of speech that is protected by Nevada's anti-SLAPP statutes. This Court has made clear that the Nevada anti-SLAPP statutes protect speech that relates to substantive issues in a litigation that are made to someone having an interest in that litigation. Under this standard, all of Marcus' alleged

communications fall within the protections of the Nevada anti-SLAPP statutes.

Mahon has also not set out *any* facts required to plead his racketeering claim against Marcus, let alone the plain, concise and definite statement of facts held by this Court to be required in pleading racketeering claims. Mahon has not provided any factual evidence as to what criminal activities Marcus committed. Nor has he provided any factual evidence as to when, where and how those alleged criminal acts occurred. Without such a showing, Mahon's Third Party Complaint is deficient as a matter of law, and Mahon will not be able to show he is likely to succeed in his racketeering claim against Marcus.

Given that the Third Party Complaint does not assert any factual evidence of wrongdoing by Marcus, and given that all communications alluded to by Mahon in the Third Party Complaint fall within the protection of Nevada's anti-SLAPP statutes, Marcus requests that the lawsuit be dismissed. Anti-SLAPP motions have been granted by this Court in cases that were much less clear than here. That is, such motions have been granted where the plaintiff did not expressly state on the record he was bringing the suit for malicious purposes, and where the communications on which the suit were based did not fall so clearly within the definition of protected speech. If Mahon is true to his word, Mahon will keep Marcus in the litigation "until the end of time," and cost him "a million dollars." Permitting this case to go forward would not only be counter to the plain terms of the anti-SLAPP statute and the First

Amendment, it would incentivize precisely the type of litigation that the anti-SLAPP statute is meant to discourage.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court erroneously decided Appellant Marcus' Special Motion to Dismiss which was filed pursuant to NRS 41.660.

STATEMENT OF THE CASE

The underlying case originated as a shareholder derivative action brought by shareholders of FCGI [AA0001-68]. David Mahon is one of the defendants in the underlying shareholder derivative action. *Id.* Although Appellant Marcus is also a shareholder of FCGI, he chose not to get involved in the underlying shareholder litigation, thus he is not a plaintiff in that action. *Id.;* AA0324.

In November 2017, at plaintiff Mark Munger's request, Marcus provided a declaration in the shareholder derivative lawsuit. AA0149-151. The November 2017 Marcus Declaration (along with the declarations of several other shareholders) was included as an exhibit in support of Plaintiffs' opposition to Defendants' motion for summary judgment, filed on November 27, 2017. AA0069-323.[2]

[2] The same November 2017 Marcus Declaration was also included as "Exhibit 7" to Plaintiffs' opposition to Defendants' motion to dismiss filed on April 23, 2018. Because it is the same declaration that was previously attached as an exhibit to Plaintiffs' brief filed on November 27, 2017, Appellant Marcus did believe it was necessary to also include the 389-page brief filed on April 23, 2018 in the Appellant's Appendix.

On February 1, 2019, defendant Mahon (through the defunct FCGI) retaliated against Marcus by naming Marcus as a third-party defendant in the underlying action. AA0359. The amended third-party complaint was filed on February 4, 2019 AA0569. In the amended third-party complaint, Marcus is accused of 1) intentional recruitment of racketeering [AA0750]; 2) securities fraud and perjury [AA0756]; 3) inducing a lawsuit [AA0759]; and 4) abuse of process [AA0760]. All of these claims are based on the Marcus Declaration filed in the shareholder derivative lawsuit.

Recognizing Mahon's lawsuit as a strategic attempt to intimidate and punish Marcus for providing a truthful declaration in the underlying action, Marcus filed his Special Motion to Dismiss under NRS 41.660. AA0791. Marcus contends that his statements were protected communications under the statute (prong 1); and that Mahon (through FCGI) cannot not show a probability of prevailing on the merits of his claims (prong 2).

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

Appellant Brian Marcus has been a practicing patent attorney for over 30 years. In that time, he has never been disciplined by any court, State Bar or the U.S. Patent Office. AA0824. As a patent attorney, Marcus has worked extensively in patent, copyright and trademark acquisition and licensing, and has authored published papers on intellectual property. Marcus founded the law firm of Vierra

Magen Marcus LLP in 2001, and remains a practicing partner of the firm.

In March of 2015, Mahon sought investors in FCGI, to fund his development of assets, intellectual property (IP) and online gaming platform relating to a new card deck and casino games using that deck. AA0824.

On March 21, 2015, Glen Howard came to Marcus' home to present the investment in FCGI and to see if Marcus was interested. *Id.* During the March 21, 2015 meeting, Howard stated he and Mahon were raising capital to fund the development of assets and IP related to a new card deck which could be used in various casino games. *Id*. Howard did not mention that the company Marcus would be investing in would not own those assets or IP. *Id*. After that meeting, Howard sent an email confirming his presentation. AA0834.

Marcus did invest in FCGI and is a shareholder of FCGI, as admitted to by Mahon in his January 11, 2018 email to Marcus:

> As of this date January 11, 2018, you, Brian Marcus ("MARCUS") are a shareholder of FCGI pursuant to Certificate of Shares number CS-52, CS-61 and CS-84 that were obtained when you converted your security interests in your Convertible Note Purchase Agreement ("C-NOTE") into common stock of FCGI on or about April 11, 2016.

AA0884. Marcus met Mahon on only one occasion, on November 30, 2015, when Mahon came to San Francisco to meet with some investors and explain the progress of the company. AA0825.

Unbeknownst to the investors, Mahon set up FCGI such that investors would pay to develop and market assets of FCGI, but then have no ownership of those assets or the IP covering those assets. This is the basis for the underlying shareholder derivative lawsuit against Mahon and Howard. AA0797.

Marcus and the other investors signed a Convertible Note Purchase Agreement setting forth the details under which the investors would invest in FCGI ("the Purchase Agreement"). AA0864-879. The Purchase Agreement included an Exhibit C, a Security Agreement, which states in sections 1.1 and 1.2 that FCGI's obligations under the Purchase Agreement will be secured by FCGI's grant of a security interest in certain "Collateral" defined in "that certain License Agreement by and between the Company and Intellectual Properties Holdings, LLC" (the "License Agreement"). AA0873. Beyond this vague reference, the Purchase Agreement provides no information as to the content of the License Agreement.

Mahon insists that the vague reference to the existence of an alleged License Agreement in Exhibit C to the Purchase Agreement satisfied his obligation to sufficiently inform investors that they merely held a revocable license in FCGI assets and IP. This position is belied by the security interest set out in Ex. C to the Purchase Agreement [AA0873] as discussed above. This position is also contradicted by the express terms of the Purchase Agreement. Section 6.10 of the Purchase Agreement states:

> **6.10 Entire Agreement.** This Agreement and the Exhibits hereto constitute ***the full and entire understanding and agreement between the parties*** with regard to the subjects hereof and ***no party shall be liable or bound to any other party in any manner*** by any representations, warranties, covenants and agreements ***except as specifically set forth herein***. (Emphasis added).

AA0869. The License Agreement was not part of the Purchase Agreement, and the terms of the License Agreement are not "specifically set forth" in the Purchase Agreement. As such, the investors (including Appellant Marcus) should not have had to seek out the License Agreement to understand that it allegedly materially affected their rights under the Purchase Agreement.

In June of 2017, in an email from Howard, FCGI investors were informed that FCGI was out of money and was defunct. AA0851-52. Alleging termination of the License Agreement, Mahon then took the assets and IP the FCGI investors paid to develop, opened a new company with those assets and IP, and left the FCGI investors (including appellant Marcus) with nothing. AA0797.

These actions are the basis for the underlying shareholder derivative lawsuit against Mahon and Howard. AA0001-68; AA0324-358. When asked by Munger to join the underlying derivative lawsuit, Marcus declined. AA0826. Marcus has a busy law practice, and has three young children at home (his daughter having severe disabilities). *Id*. While feeling strongly that Mahon's deception was illegal and the

shareholder plaintiffs would ultimately prevail, Marcus decided his time and emotional energy were much better spent at home and at work. *Id*.

In November 2017, at Munger's request, Marcus provided a declaration in the shareholder derivative lawsuit [attached in Marcus' anti-SLAPP motion at AA0820-822]. The 3-page declaration sets forth how Marcus came to be involved with FGCI, and details how at the time Mahon was seeking his investment, Marcus did not know the company he was investing in did not own the assets or IP. AA0821. The November 2017 Marcus Declaration was filed in the underlying derivative action along with the declarations of several other shareholders in support of Plaintiffs' opposition to Defendants' motion for summary judgment. *See* AA0149-151.

As stated in the November 2017 Marcus Declaration, it was not until June of 2017 that Marcus first learned that the definition of investors' rights in the FCGI assets and IP was allegedly set forth in the License Agreement. AA0821. Prior to June of 2017, Marcus had never asked for, nor received, a copy of the License Agreement. *Id.* Prior to June of 2017, Marcus did not know of the contents of the License Agreement and was unaware that the investors did not own the assets/IP they were investing in to develop. *Id.* In his anti-SLAPP motion to dismiss, Marcus provided an affidavit confirming that his statements in his November 2017 Declaration are truthful. AA0824-832.

After Marcus provided his 2017 Marcus Declaration for filing in the shareholder derivative lawsuit, Mahon (through FCGI) sent Marcus three emails threatening various actions unless Marcus withdrew his 2017 Marcus Declaration. AA0883-AA0899.

The first of these emails, dated January 11, 2018, indicates that the 2017 Marcus Declaration created "strict liability" which could result in action against Marcus unless Marcus agreed to a full release of Mahon. AA0885. The second of these emails, on January 18, 2018, indicated that Marcus would be brought for disciplinary proceedings and/or disbarment from the State Bar of California and the United States Patent Office unless Marcus agreed to a full release of Mahon. AA0888-890.

The last email, sent last month on April 23, 2019, states in part:

> we will give you one last chance to humble yourself, admit the error of your ways and move on and let us continue to believe you are an innocent victim of the racketeers, or rebuke the Defendants again and remove all doubt that you are not a victim, but in fact, a victimizer and with that, will be shown no mercy
>
> ...
>
> There have been over 90 Motions, Orders and Decisions filed in the Court so far. The docket is bleeding with entries and Motion practice is creating hearings virtually every week on average now with 22 different parties due to service being effectuated in the counter-claims. Several million dollars in legal fees and expenses have been expended... The cases are now ramping up to have over

> 14 different law firms involved that are will now start to make their appearances and you (yours) will be one of them responsible for responding to every element of it.
>
> Life as you know it is gone caused by the stroke of a single pen when you signed a false, frivolous sworn declaration and let your racketeering partners use it to further their extortion attempts against the Defendants and now you will face the consequences of your willful decision
>
> ...
>
> you are a licensed USPTO attorney and as a result, are of a much higher target value because we can use your credentials to destroy your credibility and wipe you out in the end...we are willing to spend another million dollars to prove it and the lawsuit ensures you will too...Make no mistake about it now, absent a full and final settlement, relief against you will be pursued until the END OF TIME in order to hold you accountable for your perjury, racketeering activities and your breaches of contracts… Make no mistake about it, this is HIGHLY COMPLEX LITIGATION and you WILL spend the next 10-12 years of your life in Court fighting the charges if you wish to pursue your losses in one Court of Appeals after another until there are none left and then, years upon years paying off the debts you are left as a result of it.

AA0894-899.

Subsequently, on May 1, 2019, Mahon through FCGI sent an email to all of the attorneys in Marcus' law firm. AA0901. The email subject was "Notice of Racketeering Charges et al. against Brian Marcus." *Id.* The body of the email stated:

> Due to the egregious and unethical nature of Mr. Marcus' actions, a formal grievance and complaint will further be filed against Mr. Marcus with the California State Bar and the United States Patent and Trademark Office OED

> seeking to have disciplinary action taken against Mr. Marcus including but not limited to the request of being disbarred based on the ARCC Report."

Id. This email has no legitimate value to Mahon's law suit against Marcus. It was sent solely to punish Marcus for his truthful testimony.

II. PROCEDURAL BACKGROUND

On February 4, 2019, based solely and entirely on the Marcus Declaration, Mahon filed the Third Party Complaint against Marcus, naming Marcus as a third party defendant in the derivative lawsuit. AA0569. All of Mahon's claims against Marcus are based on the allegedly "perjurious" statements Marcus made in the Marcus Declaration that was submitted in the shareholder derivative litigation. Although the Third-Party Complaint is 215 pages, Mahon devotes a mere 6 paragraphs (barely spanning a whole page) to general allegations concerning Marcus, set forth in full below:

XXI. MARCUS SUPPORTS BASTIAN CASINO GAMING RACKETEERING ENTERPRISES & PERJURES HIMSELF IN SWORN DECLARATION

> 422. Marcus is a licensed attorney by the State Bar of California and before the USPTO. Marcus is further a self-certified accredited investor. Marcus is beyond skilled in the relevant art of copyright, trademark and patent law with regards to intellectual property and the licensing of it. Marcus invested into the CNOTES of FCGI, three different times on April 3, 2015, June 12, 2015 and again on November 9, 2015.

423. On November 23, 2017, Marcus makes three perjurious statements in a sworn Declaration before this Court in ¶7 and ¶9, specifically, "…I had no knowledge that the company I was investing in merely had a revocable license and did not own, the intellectual property or assets I was investing to develop and market" furthered with "The first I learned of the existence of the license agreement, defining the ownership of the assets I invested to develop and market, was on June 29, 2017.

424. Marcus' sworn declaration has provided a supporting role to the racketeering activities of Munger, Bastian and the rest of the Bastian Casino Gaming Enterprise and continues to tortiously interfere with the Counter-claimants' rights.

425. Between November 23, 2017 and January 10, 2018, the ARCC Report of Brian Marcus dated January 10, 2018 was produced, certified and approved by the Board of Directors of FCGI detailing all of the non-compliance events resulting from Brian Marcus' as alleged herein and in the ARCC Report.

426. On January 12, 2018, Marcus was notified on his wrong doings and sent a Notice of Non-Compliance Events, and thereafter provided with access to the full 305 page ARCC Report. Marcus never responded after that.

427. Marcus' sworn Declarations claims in the derivative lawsuit echo all of the other Plaintiff's false and frivolous claims.

AA0700-701. Each of these 6 paragraphs focuses solely on the 2017 Marcus Declaration as the reason Marcus is being sued. The only mention of alleged criminal activity is the single sentence of paragraph 424, which states that "Marcus' sworn declaration has provided a supporting role to the racketeering activities" of others. AA0701. There is no mention of any other alleged conduct specifically committed by Marcus in the remaining 200+ pages of the Third Party Complaint.

Accordingly, because all of the statements in the 2017 Marcus Declaration were true and made in good faith in connection to an issue of public concern (specifically, in connection with an issue under consideration by a judicial body), Appellant Marcus filed his Special Motion to Dismiss Pursuant to NRS 41.660 (anti-SLAPP) on May 15, 2019. AA0791.

In Mahon's Opposition to the Motion to Dismiss filed on June 14, 2019, Mahon alleged (for the first time) that the racketeering and other claims against Marcus are based in part on Marcus having provided undescribed and unspecific "assistance" to plaintiffs in the derivative lawsuit. Mahon states:

> [d]espite the declaration itself garnering some protection under Anti-SLAPP statutes, [Marcus'] voluntary participation in the lawsuit, despite attempting to appear neutral, demonstrates that he has tied himself to and forms part of the basis for FCGI's believe that he is not simply an innocent bystander." AA0927.

Mahon continues:

> FCGI also believes that Marcus is assisting Munger [a plaintiff in the derivative lawsuit] as a ghostwriter in filing all of the legal briefs in the Notice of Opposition in his continued efforts to tie up the Full Color IP in litigation both in this action and before the United States Patent and Trademark Officer ("USPTO")." AA0928.

No actual evidence was provided in Mahon's anti-SLAPP briefing to support his speculation that Marcus is "assisting" any of the plaintiffs in the derivative lawsuit – because none exists.

On June 21, 2019, Marcus filed his Reply in support of the anti-SLAPP motion to dismiss. AA0937.

On June 27, 2019, the district court heard oral argument on the anti-SLAPP Motion, at the end of which the district court orally announced that it would issue an order denying the motion because "I just don't find that it has merit." AA1074. The district court did not include a specific analysis of the anti-SLAPP prongs. On July 29, 2019, the district court issued its written order. AA0954-957. The district court made no findings under the first prong of the Nevada Anti-SLAPP statutes, nor any findings under the second prong. *Id.*

SUMMARY OF ARGUMENT

The district court erred, as a matter of law, in denying the anti-SLAPP Motion, because all of Mahon's claims against Marcus are "based upon [Marcus'] 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," N.R.S. 41.660(3)(a), and Mahon did not and cannot make a *prima facie* showing that he is likely to succeed on any of his claims.

First, Marcus showed that actions complained of by Mahon fall squarely within the protections of the Nevada anti-SLAPP statutes. The Marcus Declaration is within the express definition of protected speech under N.R.S. 41.637: "'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' means any ... 3. [w]ritten or oral statement made in direct connection with an issue under consideration by a ... judicial body."

Mahon also alleges that his claims are based not just on the Marcus Declaration, but also because Marcus somehow criminally "assisted" Munger in providing legal advice to Munger in the derivative lawsuit. This argument must fail, because the Third Party Complaint itself only mentions the 2017 Marcus Declaration as a basis for the lawsuit against Marcus. Mahon first alleged conversations between Marcus and Munger in his Opposition to the anti-SLAPP Motion. Mahon's speculation set forth in his Opposition does not form part of the pleadings. In any event, even considering Marcus's alleged conversations with Munger, all such communications are still protected speech under Nevada's Anti-SLAPP statutes because such communications "relate to the substantive issues in the [derivative] litigation and (2) [are] directed to persons having some interest in the litigation." *Patin v. Lee*, 134 Nev. Adv. Op. 87 (Nov. 15, 2018) (*en banc*).

Second, Marcus showed that his communications were all made in good faith. With regard to the statements made in the 2017 Marcus Declaration, Marcus provided sworn testimony that those statements were truthful, and also pointed to the declarations of at least five other shareholders who each made statements to the

same effect as Marcus that they did not know they would not own the FCGI assets and IP. AA0824-832 (citing to AA0907-925).

In his Opposition Brief and in the Amended Third Party Complaint, Mahon argues that, given his expertise in intellectual property, Marcus *should* have known there was a license agreement relating to ownership of FCGI intellectual property, and *should* have known to ask for it. AA0928. Marcus disagrees, but in any event, Mahon's arguments here miss the mark. The good faith of Marcus' statements does not turn on whether he *should* have known to ask for the license agreement, but rather whether he *did ask for and receive* the License Agreement. In the Motion to Dismiss, Marcus testified that he did not receive the License Agreement, and Mahon did not dispute this. AA0827. As Marcus never saw the License Agreement, and as Marcus did not otherwise learn he would not own the assets or intellectual property of FCGI, Marcus' statements in his declaration are completely truthful.

Third, Mahon has not and cannot make a *prima facie* showing that he has a probability of succeeding on his claims, which goes to the second prong of the anti-SLAPP analysis. Mahon has not provided any factual evidence of criminal activity by Marcus to make out a claim for racketeering. This Court has held that civil racketeering claims must be pled not merely with specificity, but with "the same degree of specificity [as] is called for in a criminal indictment or information." *Hale v. Burkhardt*, 104 Nev. 632, 637-38, 764 P.2d 866, 869-70 (Nev. 1988). The

complaint must provide adequate information as to "when, where [and] how" the alleged criminal acts occurred. *Id*. at 637. Moreover, all communications on which Mahon bases his claims in the Third Party Complaint are constitutionally-protected speech under the litigation privilege. *Rusheen v. Cohen*, 37 Cal. 4th 1048 (2006).

Based on the above, the anti-SLAPP statute requires dismissal of this action.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A strategic lawsuit against public participation (SLAPP) is a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." *See John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009) (superseded by statute as stated in *Delucchi v. Songer*, 133 Nev. 290, 296, 396 P.3d 826, 831 (2017)). An anti-SLAPP motion to dismiss is treated as a motion for summary judgment. *See Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013). NRS 41.660 sets forth a two-pronged analysis for determining whether a Special Motion to Dismiss under Nevada's anti-SLAPP statute should be granted.

First, the defendant seeking dismissal must show, by a preponderance of the evidence, that the plaintiff's 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), *see also Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d 1220, 1223 (2019); *John v. Douglas County Sch.*

Dist., 125 Nev. 746, 754, 219 P.3d 1276, 1282 (2009). NRS 41.637 establishes four categories of communications protected by the statute. The relevant category here is a "[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," as long as the statement is "truthful or is made without knowledge of its falsehood." NRS 41.637(3).

The provisions of the anti-SLAPP statutes "shall be construed broadly" to safeguard "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Nygard, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d 210, 218 (Cal. Ct. App. 2008). The first step of the inquiry addresses whether the moving party has made a threshold showing that the challenged cause of action is one arising from a protected activity – that is, an activity in furtherance of the person's right of petition or free speech.

Once the defendant shows good faith protected speech under the first prong, the burden shifts to the plaintiff under the second prong, who must make a sufficient prima facie evidentiary showing that he has a probability of prevailing on his claim(s). NRS § 41.660(3)(b).

On appeal, the Supreme Court conducts a *de novo* review of the decision on the anti-SLAPP motion to dismiss. *See Coker v. Sassone*, 135 Nev. Adv. Op. 2, 432 P.3d 746, 749 (2019). In *Coker*, the Supreme Court adopted California's standard

of review for a denial of an anti-SLAPP motion:

> We review de novo the grant or denial of an anti-SLAPP motion. We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.

Id. at 749 (2019) (citing to *Park v. Bd. of Trustees of California State Univ.*, 2 Cal. 5th 1057, 1067, 393 P.3d 905, 911 (2017) (citations omitted)). *See also* Nev. Rev. Stat. § 41.665(2) ("the Legislature intends that in determining whether the plaintiff 'has demonstrated with prima facie evidence a probability of prevailing on the claim,' the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015").

Whether under state anti-SLAPP statutes or NRCP 56, courts should dispose of meritless cases implicating protected speech early. "[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." *Good Government Group, Inc. v. Superior Court of Los Angeles County*, 22 Cal.3d 672, 685, 586 P.2d 572, 578 (Cal. 1978) *citing Dombrowski v. Pfister*, 380 U.S. 479, 486-487 (1965).

II. THE ALLEGED CONDUCT FORMING THE BASIS OF THE THIRD PARTY COMPLAINT

In the 200+ page Third Party Complaint, the only actual conduct alleged by Mahon as the grounds for the lawsuit against Marcus is set forth in a single sentence in paragraph 424:

> 424. Marcus' sworn declaration has provided a supporting role to the racketeering activities of Munger, Bastian and the rest of the Bastian Casino Gaming Enterprise and continues to tortiously interfere with the Counter-claimants' rights. AA0701.

Thus, Mahon's claims against Marcus are based on the supporting role that "Marcus' sworn declaration" has provided to the racketeering activities of others. This is the entirety of Marcus' conduct, in the whole of the Third Party Complaint, that supposedly gives rise to the racketeering and other allegations made against Marcus.

Marcus sets forth below why a lawsuit based on Marcus' sworn 2017 Declaration should be dismissed as a SLAPP lawsuit. Further, Mahon expressly admits, on the record, that a lawsuit based on Marcus' sworn 2017 Declaration should be dismissed as a SLAPP lawsuit. Mahon's Opposition to the Anti-SLAPP Motion, filed on June 14, 2019, states:

> ***Despite the declaration itself garnering some protection under Anti-SLAPP statutes***, his voluntary participation in the lawsuit, despite attempting to appear neutral, demonstrates that he has tied himself to and forms part of the basis for FCGI's believe that he is not simply an innocent bystander. (Emphasis added). AA0927.

The reference to "some protection" is odd, as speech either is protected or it is not, but Mahon clearly and unequivocally admits here that the 2017 Marcus Declaration has protection under the Anti-SLAPP statutes. Thus, Mahon admitted, on the record, that Marcus has carried his burden under the first step of the Anti-SLAPP test to show that the 2017 Marcus Declaration is protected speech, and more importantly, Mahon admitted that Marcus has carried his burden in showing the statements in the 2017 Marcus Declaration were made in good faith.

In an attempt to salvage his lawsuit, Mahon further alleged in the Opposition to the Anti-SLAPP Motion that the suit is not just based on the 2017 Marcus Declaration, but is also based on "his voluntary participation in the lawsuit." AA0927. Mahon stated that Marcus' participation in the lawsuit "demonstrates that he has tied himself to and forms part of the basis for FCGI's believe *[sic]* that he is not simply an innocent bystander." AA0927.

Marcus disagrees that the grounds for the lawsuit are anything other than the submission of his 2017 Marcus Declaration in the derivative lawsuit – and the actual Third Party Complaint supports Marcus' position. Mahon told Marcus outright in emails that Mahon was going to sue Marcus because Marcus submitted the 2017 Marcus Declaration. AA0884-899.

Given that the Third Party Complaint alleges the 2017 Marcus Declaration as the sole basis for the lawsuit against Marcus, Mahon cannot expand on that in his

Opposition to the anti-SLAPP Motion. *Schneider v. Calif. Dep't. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("[t]he Court cannot consider new facts not alleged in the complaint, but asserted in plaintiff's opposition papers, in ruling on a motion to dismiss."). *See also*, *Korhonen v. Sentinel Ins., Ltd.*, 2:13-cv-00565-RCJ-NJK, at *7 (D. Nev. Mar. 24, 2014) ("[p]laintiffs attempt to salvage this defective claim by pleading additional facts, not contained in the [first amended complaint], in their opposition to the instant motion... A deficient pleading, however, cannot be cured by new allegations raised in a plaintiff's opposition to a motion to dismiss..."); *Conroy v. Regents of University of California*, 45 Cal.4th 1244, 1254 (2009) (defendants "had the burden on summary judgment of negating only those 'theories of liability as alleged in the complaint' and were not obliged to 'refute liability on some theoretical possibility not included in the pleadings,' simply because such a claim was raised in plaintiff's declaration in opposition to the motion for summary judgment." (citations omitted)); *Qureshi v. Countrywide Home Loans, Inc.*, 2010 WL 841669Z (N.D. Cal 2010) ("[t]he Court also notes that Plaintiff's opposition attempts to expand the scope of his appraisal fraud claim by relying on allegations not contained in the amended complaint. The Court cannot consider such new facts not alleged in the complaint, but asserted in plaintiff's opposition papers, in ruling on a motion to dismiss.").

Accordingly, any alleged participation in the derivative lawsuit by Marcus, through discussions with Munger or otherwise, is irrelevant because such conduct is not alleged in the Third Party Complaint. The only conduct set forth in the Third Party Complaint as a basis for the causes of action is Marcus having submitted the 2017 Marcus Declaration. Marcus does not need to refute liability on any other grounds. Nevertheless, in the analysis below, Marcus discusses why both his Declaration and his alleged "participation in the lawsuit" are protected activities and that Mahon has not and cannot show a likelihood of prevailing in a lawsuit based on these activities.

III. DISMISSAL IS WARRANTED BECAUSE MARCUS' COMMUNICATIONS INVOLVED GOOD FAITH COMMUNICATIONS MADE IN CONNECTION WITH AN ISSUE UNDER CONSIDERATION BY A JUDICIAL BODY

NRS 41.637 provides four categories of protected conduct which allow this special dismissal process. As relevant here, the statute protects 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," as long as the statement is "truthful or is made without knowledge of its falsehood." NRS 41.637(3). For a statement to be considered in "direct connection" with an issue under consideration by a judicial body, the statement must 1) relate to the substantive issues in the litigation; and 2) be directed to persons having some

interest in the litigation. *Patin v. Ton Vinh Lee*, 134 Nev. Adv. Op. 87, 429 P.3d 1248, 1251 (2018). *See also, In re Episcopal Church Cases*, 45 Cal.4th 467, 477-78 (Cal. 2009) ("In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected speech or petitioning activity.").

Marcus' burden under this step is easily satisfied, as there is no disputing that the 2017 Marcus Declaration is a written statement made in direct connection with the derivative lawsuit before the Nevada District Court. The November 2017 Marcus Declaration obviously relates to the substantive issues in the derivative litigation, as it involves Marcus' knowledge and experience as an investor and shareholder in Full Color Games, Inc. AA0820-822. *See, e.g. LHF Prods., Inc. v. Kabala*, No. 216CV02028JADNJK, 2018 WL 4053324, at *3 (D. Nev. Aug. 24, 2018), in which the Court held that "demand letters, settlement negotiations ***and declarations*** are clearly made in direct connection with a complaint, which is 'under consideration by a judicial body' so as to carry defendant's burden under the first step of the Anti-SLAPP analysis (emphasis added).

Further, the Marcus Declaration was submitted as an exhibit in support of the plaintiff shareholder's opposition to Mahon's motion for summary judgment in the underlying derivative action. AA0149-151. Thus, because the opposition brief was

in response to Mahon's brief, the Marcus Declaration attached to the opposition brief was directed at persons having interest in the litigation. *Id.*

As noted, Mahon added in his Opposition to the Anti-SLAPP Motion that Marcus committed racketeering and other causes of action based on his "participation in the lawsuit." Mahon alleges that Marcus has communicated with Mark Munger, a plaintiff in the derivative lawsuit, to assist Munger with intellectual property issues raised in the derivative lawsuit. AA0927. However, any such alleged communications "relate to the substantive issues" in the shareholder derivative lawsuit, *i.e.*, who in fact owns the FCGI intellectual property, Mahon or the shareholders. These alleged communications are also "directed to persons having some interest in the litigation," *i.e.*, Munger, who is a plaintiff and clearly has some interest in the shareholder derivative lawsuit. Under these circumstances, this Court has held that such communications fall within the purview of protected speech that is immune from suit under the Nevada Anti-SLAPP statutes. *Patin v. Ton Vinh Lee*, 134 Nev. Adv. Op. 87, 429 P.3d 1248, 1251 (2018).

Courts have routinely held that providing assistance or advice in anticipation of litigation or other official proceeding is considered a protected activity for the purposes of the anti-SLAPP statutes. *See, e.g.*, *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (plaintiff brought action for fraudulent conversion of its trademarks and sued attorney Kamran who worked with defendants to register

the trademarks to defendants. In dismissing the suit against Kamran as a SLAPP lawsuit, the Court stated, "[b]ut for the trademark application, Mindys would have no reason to sue Kamran. Because Mindys' claims arose from Kamran's act of applying to register the trademarks in [defendants'] name, they are properly subject to an Anti-SLAPP motion."); *Contreras v. Dowling*, 5 Cal.App.5th 394 (2016) ("[A]ll communicative acts performed by attorneys as part of the representation of a client in a judicial proceeding or other petitioning contacts are *per se* protected as petitioning activity by the anti-SLAPP statute" (citations omitted)); *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564 (1999) ("Even [defendant's] counseling of tenant ... was in anticipation of litigation, and courts considering the question have concluded that 'just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege, ... such statements are equally entitled to the benefits of section 425.16 [the California Anti-SLAPP statutes]'"(citations omitted)); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993 (2001) (Defendants were sued in part for a complaint made to the Securities and Exchange Commission alleging violations by plaintiff. In granting defendants' anti-SLAPP motion to dismiss, the court stated, "[w]e have little difficulty concluding that the filing of the complaint [with the SEC] qualified at least as a statement before an

official proceeding... [T]he purpose of the complaint was to solicit an SEC investigation.").

Mahon alleges that Marcus committed racketeering and other actionable offenses, each of which is based on the Marcus Declaration, and his assisting Munger with regard to the FCGI intellectual property at issue in the shareholder derivative lawsuit. All of these alleged acts by Marcus are protected communications under the Nevada anti-SLAPP statutes as explained above.

The Nevada anti-SLAPP statutes further require that protected speech be made in good faith. Nev. Rev. Stat. § 41.660(3)(a). The moving party "must establish only 'by a preponderance of the evidence' that the statements were true or made without knowledge of its falsehood. NRS 41.660(3)(a)."

In the sworn 2017 Marcus Declaration, Marcus states he did not know at the time he invested in FCGI that FCGI would not own the assets of FCGI. AA0821. Marcus submitted another sworn affidavit, the "May 2019 Marcus Declaration," in support of his Motion to Dismiss confirming his belief in the truthfulness of his statements in the 2017 Marcus Declaration. AA0824-832. As set forth in both the sworn 2017 Marcus Declaration and the sworn May 2019 Marcus Declaration, all of the statements made in the 2017 Marcus Declaration are true, and if not true, Marcus was not aware of any falsehoods within any of the statements, and Marcus will attest to them again under oath before this Court if necessary.

The sworn statements in both the 2017 and 2019 Marcus Declarations as to the truthfulness of the statements in the 2017 Marcus Declaration are sufficient to show those statements were made in good faith. *Omerza v. Fore Stars, Ltd.*, No. 76273, at *7 (Nev. Jan. 23, 2020) ("[a]ppellants met their burden of showing by a preponderance of the evidence that their communications were truthful or made without knowledge of their falsehood (*i.e.*, that they were 'good faith' communications) through the sworn declarations attached to their special motion to dismiss, which is sufficient to satisfy the good-faith component of the step-one inquiry under NRS 41.660(3)(a)."). *See also LHF Prods., Inc.* at *3 (D. Nev. Aug. 24, 2018) (because defendants provided declarations "that declare that the communications were truthful or made without knowledge of their falsehood, I find that [defendant] has made the requisite showing that its communications are protected" under the first step of the Anti-SLAPP analysis); *Delucchi v. Songer*, 396 P.3d 826 (Nev. 2017) (The Court found that "Songer also made an initial showing that the Songer Report was true or made without knowledge of its falsehood, using as evidence Songer's declaration before the district court which stated: '[t]he information contained in [his] reports was truthful to the best of [his] knowledge, and [he] made no statements [he] knew to be false.").

Next, Marcus submitted the sworn declarations of five other investors in support of the motion to dismiss: G. Bradford Solso; David Eckels; Teresa Moore;

Larry Moore; and Eric Kagan. AA0907-925. Each of these investors also submitted declarations in the derivative lawsuit indicating that they also did not know that the company they were investing in would not own the assets they were investing in to develop. AA0156-163; AA0262-275. These sworn affidavits of the other investors support the good faith of Marcus' statements in his 2017 Marcus Declaration, as it shows Marcus was just one of several investors who were duped by Mahon and honestly did not know they would not own the assets of the company they were investing in. Marcus reasonably believes there are a great many other investors who similarly had no idea that Mahon had set it up so that the investors would not own the assets they were investing in to develop.

The simple truth is Mahon hid the ownership of the FCGI assets and he succeeded in his ruse. The investors, including Marcus, believed they would own the assets of the company they were investing in. If Mahon was dealing fairly with investors per his fiduciary duty, he would have told investors outright that the company they were investing in would not own the assets. Instead, Mahon set up an unnecessary treasure hunt, one the investors did not know they were on, in order for them to discover the true ownership of FCGI assets. All of this shows it is not only reasonable, but likely that Marcus did not know he would not own the assets of FCGI, and the statements to this effect in the Marcus Declaration are true.

Mahon also argues in his Opposition to the Motion to Dismiss that Marcus should have known of the License Agreement and its contents because of his expertise in IP law. AA0928. Marcus disagrees with this premise. Section 6.10 of the FCGI Convertible Note Purchase Agreement states:

> **6.10 Entire Agreement.** This Agreement and the Exhibits hereto constitute ***the full and entire understanding and agreement between the parties*** with regard to the subjects hereof and no party ***shall be liable or bound to any other party in any manner*** by any representations, warranties, covenants and agreements ***except as specifically set forth herein***. (Emphasis added).

AA0869. Thus, the Purchase Agreement is express that no party will be bound, ***in any manner***, by any agreement that is outside the four corners of the Purchase Agreement. The License Agreement was not part of the Purchase Agreement, and the terms of the License Agreement are not "specifically set forth" in the Purchase Agreement. One reading section 6.10 would not look beyond the Purchase Agreement for other "covenants and agreements" that materially affected the ownership of FCGI assets.

Moreover, even if Mahon is granted his claims that Marcus could have, or should have, asked for and reviewed the License Agreement, this is still not evidence that Marcus lied in the 2017 Marcus Declaration. Mahon needs to show, by specific admissible evidence that Marcus knew he lied when he stated in the 2017 Marcus Declaration that he did not know he would not own the FCGI assets. Merely

presenting conjecture that Marcus could have or should have asked to see some license agreement does not come close to showing Marcus lied. In fact, Mahon's allegation that Marcus should have gotten the License Agreement, but did not, is evidence supporting the truthfulness of the 2017 Marcus Declaration, not its falsity.

The fact is, if Marcus knew at the time he was considering investing in FCGI that there was a License Agreement which fundamentally affected his ownership interest in the FCGI assets and IP, it stands to reason that Marcus, experienced in IP license agreements as noted, would have asked to see the License Agreement in making his decision. The simple, undisputed facts are that Marcus was not provided, nor told of, the License Agreement, and was unaware that the investors did not own the FCGI assets/IP. Marcus' statements to this effect in his 2017 Marcus Declaration are completely truthful.

Mahon also alleges communications between Marcus and Munger as a grounds for the racketeering claims. As shown above, those statements are protected speech under the Nevada Anti-SLAPP statutes.

Given the above, Marcus has shown by a preponderance of the evidence under the first prong of the anti-SLAPP statute that the statements in the 2017 Marcus Declaration were made in direct connection with an issue under consideration by a judicial body, and that the statements were truthful or made without knowledge of their falsehood.

IV. MAHON CANNOT SHOW A PROBABILITY OF PREVAILING ON HIS CLAIMS AGAINST MARCUS

Having shown that Marcus' complained of communications are good faith protected speech under the first prong of the Nevada Anti-SLAPP statutes, the burden now shifts to Mahon to demonstrate with *prima facie* evidence a probability of succeeding on each of his racketeering and other claims. *Rosen*, 453 P3d at 1223. In order to avoid dismissal under the second prong of the Nevada Anti-SLAPP statutes, Mahon must demonstrate both: (1) that the Third Party Complaint is legally sufficient to state a cause of action, and (2) that the cause of action is supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment. *Rusheen*, 37 Cal. 4th at 1056. The showing of facts required of plaintiff under this standard is higher than would be required to avoid a motion to dismiss. *Omerza*, No. 76273, at *9 (Nev. Jan. 23, 2020). Mahon has not and cannot show that his Third Party Complaint is legally sufficient. Similarly, Mahon has not and cannot show facts supporting his cause of action. As such, Mahon cannot carry his burden under the second prong of the anti-SLAPP test.

1. Mahon Has Not Made a *Prima Facie* Case of Racketeering (First Cause of Action)

Mahon's claims against Marcus based on racketeering must fail on at least two independent grounds. First, Mahon has not come close to even pleading the

requisite factual evidence or specificity for a cause of action based on racketeering. Second, all of Marcus' actions giving rise to Mahon's claims of racketeering are protected under the litigation privilege.

a. Mahon has Failed To Plead the Requisite Elements of a Racketeering Cause of Action Against Marcus

In the Eighth Cause of Action [AA0750], Mahon claims Marcus violates N.R.S. 207.400(d), which requires among other things, proof of "racketeering activity." N.R.S. 207.390 defines "racketeering activity as:

> engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering.

To plead a racketeering claim, under Nevada law, a plaintiff must demonstrate (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff's business or property. *See, Century Sur. Co. v. Prince*, 265 F. Supp. 3d 1182, 1190 (D. Nev. 2017). "Failure to allege any one of these elements with the required specificity would defeat the entire criminal charge." *Hale v. Burkhardt*, 764 P. 2d 866, 870 (Nev. 1998).

In *Hale v. Burkhardt, supra*, this Court held that civil racketeering claims must be pled not merely with specificity, but with the specificity required of a criminal indictment:

> Because the present civil RICO action, despite its fundamentally civil nature, (1) involves pleading the commission of racketeering-related crimes and (2) permits the levy of serious punitive consequences, the same degree of specificity is called for ***as in a criminal indictment*** or information. A civil RICO pleading must, in that portion of the pleading which describes the criminal acts that the defendant is charged to have committed, contain ***a sufficiently "plain, concise and definite" statement of the essential facts*** such that it would provide a person of ordinary understanding with notice of the charges. (Emphasis added).

Hale, 764 P. 2d at 869-70 (emphasis added). This standard requires a complaint to provide adequate information as to "when, where [and] how" the alleged criminal acts occurred. *Id*. at 869. Given that the complaint in Hale was devoid of a plain, concise and definite statement of facts essential to the racketeering claim, including when, where and how the alleged criminal acts occurred, the Court had "no difficulty in coming to the conclusion that, in this area of pleading, Hale has failed to state a claim upon which RICO relief can be granted." *Id*. at 870.

Nevada courts routinely dismiss racketeering claims where the complaint fails to set forth the requisite elements in a plain, concise and definite statement of the essential facts, including when, where and how the alleged criminal acts occurred. *See, Cummings v. Charter Hospital*, 896 P.2d 1137 (Nev. 1995) (plaintiffs' civil

racketeering charges dismissed because, "[t]he complaint does not state, in any detail, the circumstances surrounding the allegations, nor does it specify with particularity what conduct is complained of and when and where the conduct occurred."); *BGC Patners, Inc. v. Avision Young (Canada), Inc.*, Case No. 2:15-cv-00531-RFB-GWF (D. Nev. June 19, 2018) (Plaintiff plead the existence of two predicate acts, but "[t]he Court finds that Plaintiff's allegations do not amount to 'definite' statements of the particular facts of the predicate 'crimes'... The fact that none of the allegations of particular predicate crimes include any indication of 'when' they occurred is sufficient to merit dismissal."); *Toromanova v. Wells Fargo Bank, N.A.*, 12-cv-00328-GMN-CWH at *9 (D. Nev. 25 June 2012) (despite the complaint setting forth some factual allegations as to how defendants deprived plaintiff of property rights, plaintiff's civil racketeering charges dismissed, because "[t]hese allegations do not rise to the level of specificity required under Nevada law. More facts are necessary to put a reasonable person on notice of the charges.").

In pleading racketeering against Marcus, alleged criminal acts of others cannot be attributed to Marcus. Mahon must set forth a definite statement of facts in the Third Party Complaint establishing each element of racketeering as to Marcus independently of others. *Rivercard, LLC v. Post Oak Prods., Inc.*, D. Nev. 2013 (2013 WL 1908315) ("Plaintiff's RICO claims group defendant Patriquin with other defendants and fail to identify "when where and how" defendant Patriquin engaged

in racketeering activity."). Moreover, Mahon must establish that his alleged injury "flows from [Marcus'] violation of a predicate Nevada RICO act, [and that Marcus'] violation of the predicate act directly and proximately caused [Mahon] injury." *Toromanova,* 12-cv-00328-GMN-CWH at *9 (D. Nev. 25 June 2012).

Courts have expressly held that racketeering claims are subject to being stricken under anti-SLAPP statutes, when the racketeering claims are brought based on protected speech and plaintiff was unable to show a likelihood of success on the merits. *See, e.g., Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.,* 136 Cal.App.4th 464 (2006). *Trice v. JP Morgan Chase Bank*, No. 215CV01614APGNJK, 2015 WL 10743195, at *1 (D. Nev. Nov. 18, 2015), *aff'd sub nom. Trice v. JP Morgan Chase Bank, N.A.*, 672 F. App'x 679 (9th Cir. 2016).

Mahon also accuses Marcus of racketeering in his Opposition to the anti-SLAPP Motion because of "his voluntary participation in the lawsuit." AA0927. *Trice v. JP Morgan Chase Bank, supra,* is on point. In that case, the court dismissed racketeering charges brought by plaintiff against a defendant law firm which argued the case against the plaintiff in an underlying lawsuit (the "second lawsuit"). In dismissing the case under Nevada's anti-SLAPP statute, the court stated:

> Trice asserts a RICO claim against the defendants ... based solely on their "participation" in the second lawsuit as the bank's lawyers. Trice fails to explain how this constitutes acts forming a pattern of racketeering. ***Nor could she.*** The lawyers were representing their client in litigation filed by Trice; ***that can hardly be considered racketeering***

> ***activity***. Trice seems to base her claims on communications the lawyers had with her and the court in connection with that lawsuit. Trice is simply retaliating against lawyers representing their client, in violation of Nevada's anti-SLAPP statute. Nev. Rev. Stat. §41.635 *et seq*. The lawyers are immune from civil liability for claims based upon the communications in connection with that lawsuit. *Id.* at §§41.637(3), 41.650. (Emphasis added).

The present case differs only in that Marcus is not a lawyer in the derivative lawsuit. However, the rationale applies in that Marcus is being sued for racketeering based solely on communications he had with the court and a plaintiff in the derivative lawsuit. *See also*, *Viriyapanthu v. Suriel*, No. G048981, 2014 WL 3510171, at *2 (Cal. Ct. App. July 16, 2014) (unpublished) (analogous fact pattern where defendant in underlying suit countersued 20 cross-defendants for claims including racketeering. The countersuit was dismissed under anti-SLAPP statute as to cross-defendant who did nothing more than participate in underlying lawsuit).

Thus, even accepting Mahon's allegations as true, he has not come close to making out a claim for racketeering. It is informative that there is no mention of "Marcus" anywhere in the Eighth Claim for Relief aside from naming Marcus as a defendant to that cause of action in the heading. AA0750-753. Mahon has not set out *any* facts, let alone a "plain, concise and definite statement of the essential facts," sufficient to plead his racketeering claim against Marcus. There are no details as to anything Marcus has allegedly done outside of executing a declaration in an isolated

court case and having discussions with a plaintiff in that isolated court case. Mahon has not shown how such alleged acts are criminal, nor has he provided any factual evidence as to when those alleged criminal acts occurred, where those alleged criminal acts occurred, and how those alleged criminal acts occurred. Without such a showing, Mahon's complaint is deficient as a matter of law, and Mahon will not be able to show he is likely to succeed in his racketeering claim against Marcus.

b. The Litigation Privilege Bars all of Mahon's Claims Against Marcus

Mahon will also not be able to show a likelihood of success in proving his racketeering cause of action against Marcus under the second step of the anti-SLAPP analysis, because Marcus is immune from suit under the litigation privilege. The litigation privilege, when applicable as here, is broadly construed as an absolute bar to lawsuits based on statements made in contemplation of or during litigation. The litigation privilege is used as part of the SLAPP analysis, specifically under the second step to show a party will not be able to prevail on his claims based on the underlying protected speech.

Nevada courts have recognized "the long-standing common law rule that communications 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 the controversy." *Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002) (quoting *Circus*

Circus Hotels, Inc. v. Witherspoon, 657 P.2d 101, 104 (Nev. 1983). "The scope of the absolute privilege is quite broad," and "courts should apply the absolute privilege liberally, resolving any doubt in favor of its relevancy or permanency." *Id.* at 644. Moreover, the privilege applies not only to communications made during actual judicial proceedings, but also to "communications preliminary to a proposed judicial proceeding." *Id.* at 644. *See also, Bull v. McCuskey*, 96 Nev. 706, 712 (Nev 1980) ("an attorney at law is absolutely privileged ... in communications preliminary to proposed judicial proceeding ... if it has some relation to the proceeding"); *Richards v. Conklin*, 94 Nev. 84, 85 (1978) (litigation privilege applies to anticipated litigation). Moreover, "the privilege applies to communications made by either an attorney or a non-attorney that are related to ongoing litigation or future litigation contemplated in good faith." *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (2014).

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 for making false and malicious statements." *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60 (1983). *See also, Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15 (Cal.App. 4th 1997) (the reason behind the litigation privilege is to give "litigants and witnesses 'the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.' In other words, the litigation privilege is intended to encourage parties to feel free to

exercise their fundamental right of resort to the courts for assistance in the resolution of their disputes, without being chilled from exercising this right by the fear that they may subsequently be sued in a derivative tort action arising out of something said or done in the context of the litigation."). "When applicable, an absolute privilege bars *any* civil litigation based on the underlying communication." *Bullivant Houser Bailey PC v. Eight Judicial Dist. Court of State*, 128 Nev. 885 (Nev. 2012).

Nevada and California courts have expressly held that the litigation privilege specifically applies to bar claims based on racketeering. *See Bailey v. City Attorney's Office of N. Las Vegas*, Case No.: 2:13-cv-343-JAD-CWH, at *6 (D. Nev. Jul. 23, 2015) (fn. 35). *See also, Trice v. JP Morgan Chase Bank*, No. 215CV01614APGNJK, 2015 WL 10743195, at *1 (D. Nev. Nov. 18, 2015), *aff'd sub nom. Trice v. JP Morgan Chase Bank, N.A.*, 672 F. App'x 679 (9th Cir. 2016); *Viriyapanthu v. Suriel*, No. G048981, 2014 WL 3510171, at *2 (Cal. Ct. App. July 16, 2014) (unpublished).

Moreover, the courts have expressly held that the litigation privilege may be used under the anti-SLAPP statutes to show the plaintiff will be unable to carry its burden under the second prong. *Briggs*, 969 P.2d 564 (Cal 1999) ("'just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege, ... such statements are equally entitled to the benefits of section 425.16 [the California Anti-

SLAPP statutes]'" (citation omitted)); *Rusheen*, 37 Cal. 4th at 1057-58 (plaintiff unable to show likelihood of prevailing under the second prong of the Anti-SLAPP analysis because the claim was barred by the litigation privilege.); *Flatley v. Mauro*, 46 Cal.Rptr.3d 606, 624 (2006) ("[t]he litigation privilege is also relevant to the second step in the anti-SLAPP analysis.").

It is undeniable that the November 2017 Marcus Declaration submitted in support of a summary judgment opposition is covered by the litigation privilege. The November 2017 Marcus Declaration was filed in the underlying shareholder lawsuit and relates directly to the subject matter of the underlying controversy, *i.e.*, whether Mahon fraudulently concealed ownership of the assets and IP the investors paid to develop. AA0149-151. Moreover, any alleged discussions between Marcus and Munger with regard to ownership of the FCGI intellectual property are also protected by the litigation privilege as such alleged discussions would be communications made during judicial proceedings in relation to a matter pertinent to the subject of the controversy, *i.e.*, who owns the FCGI intellectual property, Mahon or the shareholders.

Based on the above, Mahon has not and cannot even meet the pleading standard for his claim of racketeering against Marcus, let alone actually submit *prima facie* evidence demonstrating a probability of prevailing on this claim. Mahon's racketeering claim should therefore be dismissed.

2. Mahon Has Not Made a *Prima Facie* Case of Securities Fraud and Perjury (Second Cause of Action)

As for the "securities fraud and perjury" cause of action, Mahon cannot show, by *prima facie* evidence or otherwise, that Marcus committed securities fraud or perjury. At the outset, Mahon's eleventh claim for relief is based on a purported violation of NRS 90.570[3], which is inapplicable because that statute deals with statements made "in connection with the offer to sell, sale, offer to purchase or purchase of a security." Mahon has made no allegations, factual or otherwise, as to any acts of Marcus that constitute fraud "in connection with the offer to sell, sale, offer to purchase or purchase of a security." Mahon alleges that the securities fraud and perjury under this count amount to racketeering. As such, Mahon is required to plead the allegation with a plain, concise and definite statement of facts essential to the racketeering claim of securities fraud, including when, where and how Marcus committed alleged criminal acts. *Hale*, 764 P. 2d at 869-70. *See also*, *State v. Hancock*, 114 Nev. 161, 164 (Nev. 1998) (securities fraud and racketeering indictment was dismissed because it failed to include "(1) each and every element

[3] NRS 90.570 specifically states that "In connection with the offer to sell, sale, offer to purchase or purchase of a security, a person shall not, directly or indirectly: 1) employ any device, scheme or artifice to defraud; 2) make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading in the light of the circumstances under which they are made; or 3) engage in an act, practice or course of business which operates or would operate as a fraud or deceit upon a person.

of the crime charged and (2) the facts showing how the defendant allegedly committed each element of the crime charged.").

The only acts alluded to by Mahon in his Complaint against Marcus are the execution of his declaration and alleged discussions with Munger. Mahon has not shown how either of these acts amount to fraud "in connection with the offer to sell, sale, offer to purchase or purchase of a security." And he cannot, at least because the acts alluded to by Mahon occurred after the underlying derivative lawsuit commenced and long after Marcus purchased the FCGI securities.

Further, this cause of action must fail because there is no civil cause of action for perjury. It is a criminal action, brought upon credible evidence and good cause by a prosecutor, and shown beyond a reasonable doubt. *Jordan v. State Dept. of Motor Vehicles*, 121 Nev. 44, 68 (2005), *abrogated on other grounds*, *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 (Nev. 2008) ("Jordan's independent claims for... perjury damages must fail" in part because "no independent civil conspiracy to commit perjury cause of action exists."); *Pollock v. University of Southern California*, 112 Cal.App.4th 1416, 1429 (Cal. Ct. App. 2003) ("[t]here is no civil cause of action for 'perjury.'... Perjury is a criminal wrong." (citations omitted)); *Westerfield v. Gomez*, CV 16-5957 DSF (SS), at *12 (C.D. Cal. Apr. 12, 2017) ("Perjury is a criminal offense, and a private plaintiff may not raise criminal claims in a civil lawsuit."). Mahon would do away with the distinctions between

civil claims and criminal charges, as well as all of the heightened procedural safeguards for criminal charges, and have this Court find perjury in a civil litigation.

In criminal proceedings, the prosecution has the burden to prove a defendant's guilt beyond a reasonable doubt in order to obtain a conviction. If the defense attorney can raise this reasonable doubt by showing that the evidence suggests the defendant did not deliberately lie under oath, then the case may be thrown out. A person who makes a false statement under oath is not guilty of perjury in Nevada if he believed the statement to be true, as there is a required element of willfulness which needs to be established. *Licata v. State*, 99 Nev. 331, 333, 661 P.2d 1306, 1307 (1983). Mahon has made no such showing.

Even if perjury allegations were allowed to continue, all statements in Marcus Declaration are true, or are believed to be true. Marcus reasonably believed that FCGI owned the assets and IP that the investors were paying to develop and market as set forth above. AA0824. Mahon can provide no objective evidence otherwise.

Additionally, the litigation privilege immunizes Marcus against this cause of action based in fraud. As noted above, "[w]hen applicable, an absolute privilege bars *any* civil litigation based on the underlying communication." *Bullivant Houser Bailey PC v. Eight Judicial Dist. Court of State*, 128 Nev. 885, 381 P.3d 597 (2012).

Mahon has not and cannot even meet the pleading standard for his claim of securities fraud and perjury against Marcus, let alone actually submit *prima facie* evidence demonstrating a probability of prevailing on this claim.

3. Mahon Has Not Made a *Prima Facie* Case of Inducing a Lawsuit (Third Cause of Action)

As for whether Marcus "induced a lawsuit" pursuant to NRS 199.320, that is a criminal misdemeanor, and not a civil claim that Mahon can bring. As stated in *Raphaelson v. Ashtonwood Stud Associates, L.P.*, 2:08-cv-1070-KJD-RJJ at *4 (D. Nev. Jul. 31, 2009), "[p]laintiff also refers to N.R.S. 199.320, which assigns criminal liability to the intentional misuse of lawsuits to distress or harass a defendant, inferring that the Nevada legislature intended for there to be a civil remedy arising out of false civil suits. The statute, however, assigns no civil liability and does not imply that a tort for wrongful use of civil proceedings exists."

Even if such a civil cause of action did exist, Mahon has not pled any facts in his Complaint as to how Marcus induced the bringing of a lawsuit against Mahon.

Based on the above, Mahon cannot even meet the pleading standard for his claim of inducing a lawsuit against Marcus, let alone actually submit *prima facie* evidence demonstrating a probability of prevailing on this claim. Mahon's inducing a lawsuit claim should therefore be dismissed.

4. Mahon Has Not Made a *Prima Facie* Case of Abuse of Process (Fourth Cause of Action)

Mahon also has not and cannot establish evidence to support any abuse of process claim. Abuse of process requires "1) an ulterior purpose by the [party abusing the process] other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." *Land Baron Inv. v. Bonnie Springs Family LP*, 131 Nev. Adv. Op. 69, 356 P.3d 511, 519 (2015). Thus, the claimant must provide facts, rather than conjecture, showing that the party intended to use the legal process to further an ulterior purpose. *LaMantia v. Redisi,* 118 Nev. 27, 31 (1993) (holding that where the party presented only conjecture and no evidence that the opposing party actually intended to improperly use the legal process for a purpose other than to resolve the legal dispute, there was no abuse of process).

Marcus' mere act of providing a truthful declaration in the underlying derivative litigation does not constitute a "willful act" that would "not be proper in the regular conduct of the proceeding." Normal acts like submitting a declaration have nothing to do with an abuse of process. *See Land Baron Inv.*, 356 P.3d at 520 (2015) ("We agree with the majority rule that filing a complaint does not constitute abuse of process. The tort requires a "willful act" that would not be 'proper in the regular conduct of the proceeding.'"). Even if the ulterior purpose could be

established – which it cannot – it is perfectly normal for parties to include signed declarations from witnesses in dispositive briefings, so there is no improper use of the legal process to complain about.

Based on the above, Mahon cannot even meet the pleading standard for his claim of abuse of process against Marcus, let alone actually submit *prima facie* evidence demonstrating a probability of prevailing on this claim. Mahon's abuse of process claim should therefore be dismissed.

V. MARCUS REQUESTS MANDATORY SANCTIONS UNDER NEVADA'S ANTI-SLAPP DOCTRINE

Mahon's suit was brought to harass and intimidate Marcus. This is confirmed through Mahon's emails to Marcus in 2018 and 2019, which became more and more threatening over time. AA0884-902. It cannot be more obvious that the claims were only brought against Marcus to intimidate him to retract his truthful 2017 Marcus Declaration, which is exactly what the anti-SLAPP legislation was meant to prevent.

CONCLUSION

In the end, it was no big deal for Mahon to sue Marcus. He was suing a host of shareholders for racketeering. Why not add one more? Marcus had made him mad by filing the 2017 Marcus Declaration, and Marcus needed to be "humbled." The problem is, it was a big deal to Marcus. It embroiled him in Mahon's scorched earth litigation practice, and has drained Marcus of significant time, energy and

resources. If Mahon is true to his word, Mahon will keep Marcus in the litigation "until the end of time," and cost him "a million dollars." This is *precisely* the conduct the Nevada Anti-SLAPP statute was enacted to prevent. Permitting this case to go forward would not only fly in the face of the plain terms of the anti-SLAPP statute and the First Amendment, it would incentivize the type of litigation that the anti-SLAPP statute is meant to discourage.

For the foregoing reasons, this Court should grant Marcus' Special anti-SLAPP Motion to Dismiss following *de novo* review, and award sanctions to Appellant Marcus pursuant to NRS 41.670(1)(a)-(b).

DATED this 18th day of February 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this opening 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 Rules of Appellate Procedure, and in particular NRAP 28(e) which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because it does not exceed 14,000 words. 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. I further certify that this brief complies with the type-

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volume limitations of NRAP 32(a)(7) because it contains 12,215 words. 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 18th day of February 2020.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of February 2020, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: APPELLANT'S OPENING BRIEF and VOLUMES I-V of the JOINT APPENDIX shall be made in accordance with the Master Service List as follows:

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