IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN MARCUS, AN INDIVIDUAL, Appellant, vs. FULL COLOR GAMES, INC., A NEVADA CORPORATION, Respondent.	**SUPREME COURT CASE NO. 79512**

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

RESPONDENT'S ANSWERING BRIEF

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I.

NRAP 26.1 DISCLOSURE

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

II.

JURISDICTIONAL STATEMENT

FCGI does not dispute that the matters raised by Appellant Brian Marcus ("Appellant") in this appeal are properly before this Court jurisdictionally, that the appeal was timely filed, or that the issues presented are appealable despite the case below not having reached a final order or judgment.

III.

STATEMENT OF ISSUES

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

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IV.

STATEMENT OF THE CASE

Although Appellant's Statement of the Case accurately sets forth Appellant's third-party claims against FCGI in the case below, Appellant incorrectly asserts that Appellant "chose not to get involved in the underlying shareholder litigation" (Appellant's Brief, p. 6) and that FCGI "retaliated against" FCGI by naming him as a third-party defendant in the case below (Appellant's Brief, p. 7). FCGI disputes these assertions and has not had the opportunity to conduct discovery on these issues yet in the case below. As such, FCGI does not concede the correctness of Appellant's assertions in its Statement of Facts and is entitled to discovery on those assertions in the district court case.

V.

STATEMENT OF FACTS

A. Allegations in the Case Below

Pursuant to NRAP 28(b), FCGI is not required to set forth a comprehensive Statement of Facts but may set forth matters where FCGI "is dissatisfied" with Appellant's Statement of Facts.

FCGI is "dissatisfied" with Appellant's Statement of Facts because FCGI has not been able to conduct discovery in the case below as its claims. Many of the "facts" in Appellant's Statement of Facts are based on Appellant's declaration that was filed with the district court. (See Appellant's Opening Brief, pp. 7). FCGI disputes those facts – or at least should not be held to have conceded to their accuracy for the purposes of this appeal – because no discovery has been completed on those facts. Furthermore, most of the "facts" in Appellant's Statement of Facts are not relevant to the Court's analysis on appeal under the anti-SLAPP statute. Appellant's Opening Brief is anything but brief and is clear on its face that Appellant is intent on improperly litigating the district court case here in this appeal rather that stay focused

on the narrow focus of the subject of the appeal. FCGI objects to Appellant's approach.

As to the issues in the Opening Brief that *are* relevant to this Appeal, FCGI does not dispute that Appellant is a licensed attorney with knowledge of intellectual property, and that, as a result, FCGI provided Appellant extraordinary details about specific intellectual property that formed the basis of investors in FCGI. (Vol. V: AA930). FCGI also does not dispute that Appellant was an investor in FCGI via a convertible note. (Vol. V: AA0929).

As to issues that have not yet been subject to discovery in the case below, FCGI alleges that principals of FCGI believed Appellant would use his skills as an intellectual property attorney to protect FCGI, but instead has acted against that intellectual property to the detriment of FCGI and its investors and interested parties, and that Appellant's actions, in concert with his racketeering partners, drove FCGI into ruin in a sophisticated attempt to extort its principal, David Mahon, of his sole ownership in his intellectual property (Full Color IP) and deprive all of his licensors (including FCGI) from their rights to their proportional future revenue from the subject limited License Agreement. (Vol. V: AA0930; Vol. IV: AA0616-617). To that end, FCGI alleges that Appellant obtained confidential and privileged information about FCGI and other third-party plaintiffs, and wrongfully used that information to further and assist in a conspiracy, racketeering, and extortion scheme against FCGI and FCGI's stake holders, rather than protecting them. (Vol. V: AA0931; Vol. IV: AA0700-701).

B. Relevant Procedural History

On February 4, 2019, FCGI filed its Amended Answer, Counterclaims, and Third-Party Complaint (the "Third Party Complaint") against FCGI. (Vol. IV: AA0569). The Third-Party Complaint makes claims against multiple parties, including FCGI, and generally alleges that the third-party defendants entered into a

conspiracy and racketeering activity, among other wrongdoings, to harm FCGI and its investors. (Vol. IV: AA0616-0783).

Appellant makes the incorrect assertion in his Brief that there "is no mention of any other alleged conduct specifically committed by [Appellant] in the remaining 200+ pages of the Third-Party Complaint." (Appellant's Brief, p. 15). In reality, there are multiple allegations as to Appellant that have nothing to do with the (false) assertions in Appellant's subject declaration that were made known to the Appellant and explicitly mentioned in the Third-Party Complaint. (Vol. IV: AA0701). There was a 305-page Audit, Risk, and Compliance Committee report ("ARCC Report of Brian Marcus") that was provided to Appellant and is referenced in the Third Party Complaint; specifically, the ARCC Report of Brian Marcus was sent directly to Appellant on January 10, 2018 in advance of filing any counterclaims or third-party claims in hopes to mitigate the matters rather than litigate them. (Vol. IV: AA071). The Third-Party Complaint references the ARCC Report of Brian Marcus instead of making or attaching all 305 pages of additional allegations in to keep the already 200+ page Third-Party Complaint from being any longer. (See generally Vol. IV: AA0569).

The Third-Party Complaint is pled with substantial specificity such that Appellant's representation that every allegation against Appellant in the Third-Party Complaint is "based solely and entirely" on Appellant's declaration significantly misstates the record and seeks to keep the true allegations of the case from the Court's consideration. (Appellant's Brief, p. 14).

Without covering every detail in the lengthy Third-Party Complaint, FCGI's make the following general allegations as to Appellant:

- Appellant is a "self-certified accredited investor" who is "beyond skilled in the relevant art of copyrighting, trademark and patent law with regards to intellectual property" (Vol. IV: AA0700-701).

- Appellant invested into convertible notes of FCGI (Vol. IV: AA0701).
- Appellant's statement in his declaration that he did not know FCGI only had a revocable license as to the subject intellectual property is a false statement (Vol. IV: AA0701).
- Appellant invested not just once in FCGI, but three separate times (Vol. IV: AA701).
- Appellant is acting in concert with other third-party defendants to tortiously interfere with FCGI's rights (Vol. IV: AA0701).
- The ARCC Report of Brian Marcus detailed all of the non-compliance events resulting from Appellant's conduct, which was sent to the Appellant in advance of filing any litigation giving the Appellant ample opportunity mitigate instead of litigate these matters (Vol. IV: AA0701).
- Appellant was notified of wrongdoings in the ARCC Report of Brian Marcus but never responded (Vol. IV: AA0701).
- Appellant worked and conspired with other third-party defendants to "organize, manage, direct, supervise, or finance a criminal syndicate" starting around October 2015 and continuing to the present, which main purpose was to force FCGI's main principal to relinquish his corporate positions and surrender his majority interest in FCGI and take and harm intellectual property that benefitted FCGI and its other investors (Vol. IV: AA0750).

Based on these example and other allegations, FCGI makes claims against Appellant (and may other co-parties) for Violation of 18 U.S.C. § 1962(b) (Fifth Claim for Relief) (Vol. IV: AA0730); Racketeering under NRS 207.400(d) (Eighth Claim for Relief) (Vol. IV: AA0750); for Securities Fraud & Perjury (Eleventh Claim for Relief) (Vol. IV: AA0756); Inducing Lawsuit Pursuant to NRS 199.320 (Twelfth Claim for Relief) (Vol. IV: AA0759); Abuse of Process (Thirteenth Claim for Relief)

(Vol. IV: AA0760); and Declaratory Relief as to FCGI's shareholders including Appellant (Twenty-First Claim for Relief) (Vol. IV: AA0773).

On May 15, 2019, Appellant filed its Special Motion to Dismiss Third-Party Complaint Pursuant to NRS 41.660. AA0791-0925. FCGI timely opposed the motion (AA926-936), and Appellant filed its reply (Vol. V: AA0937-0953).

On June 27, 2019, Appellant's motion came on for hearing before the district court. The district court requested confirmation, and Appellant's counsel confirmed, that the motion was brought solely under Nevada's anti-SLAPP statute. (Vol. VI: AA1064). Appellant's counsel argued that the only allegations against Appellant in the Third-Party Complaint are six paragraphs. (Vol. VI: AA1065). The district court disagreed and noted there are multiple claims for relief against Appellant, which Appellant's counsel did concede. (Vol. VI: AA1066). Appellant's counsel then stated – "There's claims for relief, but none of them are specifically dealing with what Mr. Marcus allegedly did." (Vol. VI: AA1066). The district court responded – "But this is not a motion to dismiss for failure to state a claim." (Vol. VI: AA1066).

In FCGI's argument, counsel for FCGI made clear that FCGI is not seeking liability against Appellant for a specific submission of a declaration to the Court, and that reference to the declaration in the Third-Party Complaint was to provide background to the claims against FCGI. (Vol. VI: AA1070). Counsel for FCGI then stated – "We don't have all the facts and discovery we need for – to know exactly how involved Marcus was, but we do have some that we believe he was involved in what Munger was doing." (Vol. VI: AA1070). FCGI's counsel added – "we believe that he may be involved in that because he's got some attorney ghostwriting for him. It's either Mr. Newman or Mr. Marcus and we think that, again, that shows that he's supporting -- he is supporting all of the racketeering allegations we made against Munger and the other Defendants. He is involved with them. He's conspiring with them and that's why we believe he should be maintained [in the action] not because

of the specific declaration he submitted to this Court." (Vol. VI: AA1072).

Toward the end of the hearing, the district court declared, "as I read the pleading, it's not entirely based upon the declaration. The declaration is alleged to have – to exist, but I don't read the pleading as being necessarily based entirely upon the declaration." (Vol. VI: AA1073). Appellant's counsel responded, "There's no other allegation against Mr. Marcus specifically." (Vol. VI: AA1073). The district court responded that there are "allegations against him collectively with the other third-party defendants." (Vol. VI: AA1073).

The district court ultimately stated that the motion was denied without prejudice to Appellant being able to file a motion under NRCP 12(b)(5). (Vol. VI: AA1074); Vol. V: AA0954-957). But "from the standpoint of an Anti-SLAPP motion, I just don't find it has any merit." (Vol. VI: AA1074).

VI.

LEGAL ANALYSIS

A. SUMMARY OF THE ARGUMENT.

Appellant is effectively arguing that a party can commit all sorts of wrongdoing but cannot be liable for those wrongdoings – or even have to face discovery into those alleged wrongdoings – so long as the party makes a sworn statement in the subject case. That is not the purpose of Nevada's anti-SLAPP statute, and the district court properly rejected Appellant's attempt to use it in such an improper way.

Instead of focusing on the key issue – whether FCGI's claims and allegation against Appellant in the Third Party Complaint arise under prong one of Nevada's anti-SLAPP statute – Appellant's Opening Brief attempts to litigate the entire case on appeal before FCGI has even had a chance at discovery. The Court should reject that approach. First of all, as detailed below, Appellant cannot satisfy prong one of the anti-SLAPP statute. Secondly, FCGI raised sufficient argument, allegations, and

evidence in the case below to entitle FCGI to discovery on its claims even if prong two were invoked here, which it is not.

The proper procedural move for Appellant would have been to file a motion to dismiss under NRCP 12(b)(5). That is why the district court essentially invited Appellant to file such a motion instead of an anti-SLAPP motion to dismiss. But Appellant filed this appeal instead even though Appellant's Opening Brief is essentially a motion to dismiss under NRCP 12(b)(5). This case needs to be remanded for Appellant to file a motion to dismiss under NRCP 12(b)(5) and thereafter discovery on FCGI's allegations.

B. STANDARD OF REVIEW.

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

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

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

To prevail on a special anti-SLAPP motion to dismiss, the moving defendant must satisfy two statutory prongs. Under prong one, the trial court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a).

Prong one contains two sub-components. To start, the communication must fall into one of the following four categories to be a "good faith communication in furtherance of the . . . right to free speech in direct connection with an issue of public concern." NRS 41.637. Appellant here contends that his sworn statement in the case below falls under NRS 41.637(3) as "a communication, whether written or oral, made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law." Then, as the second sub-part to prong one, the defendant must establish the communication was "truthful or is made without knowledge of its falsehood." NRS 41.637(4).

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

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

The district court properly found that Appellant did not meet his burden to satisfy prong one of the anti-SLAPP statute under NRS 41.660(3)(a) because FCGI's claims against Appellant in the Third-Party Complaint do not arise under Appellant's

declaration. The Third-Party Complaint's reference to Appellant's sworn statement is merely a background allegation as a point of evidence of FCGI's allegation of Appellant's extensive wrongful conduct as alleged throughout the Third-Party Complaint and FCGI's perjury.

As correctly recognized by the district court, FCGI's Third-Party Complaint makes multiple claims against Appellant as being a member of a group of bad actors who have committed the bad actions alleged in the Third-Party Complaint. Appellant's declaration is not the basis of those allegations. In particular, FCGI's Third-Party Complaint has alleged many specific acts that the co-conspirators and racketeers, including Appellant, have committed in order to harm FCGI and those invested in FCGI. FCGI has reason to believe, and has alleged, that Appellant was involved in this conspiracy and other wrongful conduct. As a matter of procedure, FCGI is entitled to complete discovery to determine the extent of Appellant's involvement with the other bad actors alleged by FCGI. Appellant has ignored this reality and instead hyper-focuses and wholly-relies on the baseless argument that FCGI's claims against him arise solely under his (false) declaration. The only full and fair process for FCGI to move forward on its allegations is via discovery, which has not yet occurred in the case below.

Faced with that reality, Appellant attempts to distract the Court from the many allegations and claims against Appellant in the Third-Party Complaint to focus only on the six paragraphs in the Third-Party Complaint that specifically reference Appellant by name. But if Appellant wishes to challenge the entirety of FCGI's allegations against him in the Third-Party Complaint – or even seek a more definite statement – that needs to be done at the district court level. That is why the district court expressly left that procedural door open for Appellant in its order denying Appellant's anti-SLAPP motion to dismiss. But Appellant instead filed this unnecessary appeal.

Moreover, the second sub-part of prong one requires the statement to be "truthful or made without knowledge of its falsehood." NRS 41.637(4). Courts have held that anti-SLAPP statutes do not protect communications that would otherwise be illegal, such as extortion, fraud, or perjury. See, e.g., Flatley v. Mauro, 46 Cal. Rptr. 3d 606, 139 P.3d 2, 15 (Cal. 2006). Here, FCGI asserts that Appellant's declaration was perjurious. The district court did not address the second sub-part of prong one, however, because it found that FCGI's allegations and claims do not arise under Appellant's statements made in the subject declaration. But if the second sub-part of prong one is part of this Court's analysis, Respondent is also entitled to discovery on that issue, which the Court should remand and order if it deems necessary to move this far in the analysis.

Simply put, Appellant does not satisfy prong one under NRS 41.660(3)(a). FCGI is not seeking damages based on an allegation of perjury based on Appellant's declaration. FCGI has instead alleged in good faith that Appellant is one of the claimed co-conspirators and racketeers. FCGI requires, and is entitled-to, discovery to determine the specific details of Appellant's involvement with the other bad actors. Appellant's actual remedy is to seek dismissal under NRCP 12(b)(5) by attempting to show that FCGI cannot prove a set of facts against FCGI under which Appellant would be entitled to relief. See Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008); Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993).

Therefore, the district court's ruling was proper, and the Court should reach the same conclusion on appeal. Given Appellant's inability to tie FCGI's claims against Appellant to the allegation in the Third-Party Complaint that Appellant submitted a false declaration to the district court, Appellant cannot rely on the anti-SLAPP statute.

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E. DUE TO APPELLANT'S INABILITY TO SATISFY PRONG ONE, ANALYSIS OF PRONG TWO IS UNNECESSARRY; BUT, IF IT WERE, THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT FOR DISCOVERY AND A SUBSEQUENT DETERMINATION.

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

Because Appellant cannot satisfy prong one, and because FCGI is entitled to discovery before any prong two analysis would be appropriate, FCGI will not ask the Court to use its precious resources reviewing briefing on a full prong two analysis on each of FCGI's claims against Appellant in the Third-Party Complaint. Instead, if prong two analysis is deemed necessary, the Court should remand the matter to district court with instructions to address prong two just as it did recently in Stark, 136 Nev.Adv.Op. 4, 458 P.3d at 347. To make a prong two analysis here, FCGI would be entitled to discovery on the relevant issues.

VII.

CONCLUSION

The district court properly found that Appellant cannot satisfy prong one of the anti-SLAPP statute because the allegations in FCGI's Third-Party Complaint against Appellant and his cohort of wrongdoers do not arise from Appellant's subject

declaration. This was so clear to the district court that the district court saw no need to order discovery into whether Appellant's declaration was perjurious (the second sub-part of prong one) or whether FCGI could meet its burden under prong two. Therefore, the Court should deny the appeal. Alternatively, if the Court deems further prong one or prong two analysis is necessary, the Court should remand the matter to the district court for discovery and a determination by the district court.

Dated this 6th day of August 2020.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,496 words, which is less than 14,000.

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

Dated this 6th day of August 2020.

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CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hulet, Esq., hereby certifies that on the 6th day of August 2020, a true and correct copy of the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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