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

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 ERRATA TO REPLY BRIEF

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Appellant Brian Marcus respectfully submits this errata to the Reply Brief filed on September 4, 2020, correcting the Table of Contents, which contained inadvertent automatically-populated errors. Attached, as **Exhibit 1** is the corrected Reply Brief.

DATED this 8th day of September 2020.

MAIER GUTIERREZ & ASSOCIATES

/s/ Danielle J. Barraza
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CERTIFICATE OF SERVICE

I certify that on the 8th day of September 2020, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: APPELLANT'S ERRATA TO REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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EXHIBIT 1

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APPELLANT'S AMENDED REPLY BRIEF

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INTRODUCTION

David Mahon, through his now defunct company Full Color Games, Inc. ("FCGI"), filed this lawsuit against Marcus as retaliation after Marcus submitted a 3-page truthful declaration in the underlying shareholder lawsuit against Mahon and FCGI. There is no need to speculate on this point, as Mahon's emails to Marcus state that this is precisely what Mahon would do because Marcus submitted his Declaration. Mahon states for example, "[l]ife as you know it is gone caused by the stroke of a single pen when you signed a false, frivolous sworn declaration... and now you will face the consequences of your willful decision." (AA0895).

Consistent with his email threats, the only specific conduct of Marcus mentioned in the Third Party Complaint as a basis for the suit is that Marcus filed the Declaration. The Third Party Complaint sets forth: "Marcus' sworn declaration has provided a supporting role to the racketeering activities of [other Counter-defendants]." And "Marcus' sworn declaration ... continues to tortiously interfere with the Counter-claimants' rights." (AA0701). As much as FCGI attempts to disavow its own complaint, it speaks for itself. The Marcus Declaration is clearly the underlying cause of the lawsuit against Marcus.

In denying the motion, the District Court noted that there were other, general allegations in the Third Party Complaint unrelated to the Marcus Declaration. But that should not have been the end of the analysis, as *all* of FCGI's allegations are

based on Marcus having submitted his Declaration, or more generally, on Marcus' alleged involvement in the shareholder lawsuit. Mahon openly asserts that the shareholder lawsuit itself is nothing more than an illegal racketeering activity to wrongfully take his company, intellectual property, and assets. (AA0517). In its briefs, FCGI also admits that Marcus was sued because of Marcus' participation in the shareholder lawsuit. (AA0929). Consistent with these admissions, all of FCGI's general allegations, claims of racketeering and other litigation-misconduct offenses against Marcus are based on Marcus allegedly acting to deprive Mahon of his company and assets *through involvement in the shareholder litigation*. There is no other alleged wrongful conduct set forth anywhere in the 200+ pages of the Third Party Complaint.

To be clear, none of Mahon's allegations are true. Marcus is not a party in the shareholder litigation and remains a disinterested third party to that result. But what is relevant under the first prong is that Marcus' Declaration, or more generally his alleged "involvement" with the shareholder lawsuit, is the conduct giving rise to the lawsuit. Under this Court's precedent, such conduct is constitutionally protected petitioning activity. *Patin v. Ton Vinh Lee*, 134 Nev. 722, 726, 429 P.3d 1248, 1251 (2018). As such, Marcus met his burden under the first anti-SLAPP prong.

FCGI argues that it sued Marcus based on his wrongful unprotected conduct; it just does not have any idea what that conduct is. It is thus asking for discovery in

the hope of finding some good faith reason for bringing an action against Marcus. But that is not how lawsuits are brought, nor how anti-SLAPP motions are defeated. A plaintiff must have sufficient knowledge of wrongful and unprotected conduct by the defendant, and plead that at the time the complaint is filed. The rules of civil procedure do "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In summary, this Court should reverse the District Court's denial of the anti-SLAPP motion because all activities complained of by FCGI are "good faith communications 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). Moreover, as FCGI has not and cannot make a *prima facie* showing that it is likely to succeed on any of its claims, this Court should grant the special motion to dismiss and direct the District Court to award attorney fees and other appropriate damages.

LEGAL ARGUMENT

I. MARCUS WAS SUED FOR EXECUTING A DECLARATION IN THE UNDERLYING SHAREHOLDER LAWSUIT

FCGI sued Marcus because Marcus executed a truthful declaration in the shareholder lawsuit. FCGI argues that the Third Party Complaint is not based on the Marcus Declaration. But the Third Party Complaint sets forth in paragraph 424:

> Marcus' sworn declaration has provided a supporting role to the racketeering activities of [other Counter-defendants].

And also:

> Marcus' sworn declaration ... continues to tortiously interfere with the Counter-claimants' rights.

(AA0701). The plain meaning of these statements is that the Marcus Declaration is the underlying cause of the lawsuit by FCGI against Marcus.

A. The Gravamen of the Lawsuit is Protected Activity Under the Nevada Anti-SLAPP Statute

A claim rests on protected activity if the "principal thrust or gravamen" of the claim is the protected activity. *Ramona Unified School Dist. v. Tsiknas*, 135 Cal.App.4th 510, 519-520 (2005); *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 403 P.3d 1280, 1285 (2017) ("we must look to the gravamen or 'substantial point or essence' of each claim rather than its form."). "Gravamen" is defined as:

> "1. the essence or most serious part of a complaint or accusation."[1]

[1] Oxford Languages Online Dictionary, https://www.google.com/search?q=gravamen+definition&rlz=1C1CHBF_enUS903US903&oq=grav&aqs=chrome.0.69i59j69i57j0l2j46j0l2j46.4021j1j15&sourceid=chrome&ie=UTF-8.

As set forth in *Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal.App.4th 1264, 99 Cal.Rptr. 3d 805 (2009), the courts "assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim.' (*Martinez v. Metabolife Internat., Inc.*, 113 Cal.App.4th 181, 189, 6 Cal.Rptr.3d 494, 500 (2003))" *Hylton*, 177 Cal.App.4th at 1271.

As much as FCGI attempts to distance itself from its own statements in the Third Party Complaint, paragraph 424 quoted above speaks for itself. There, FCGI is undeniably asserting the Marcus Declaration as the allegedly wrongful conduct that damaged FCGI. This is confirmed in Mahon's emails to Marcus: "Did you really think you could sign a sworn declaration in a Court of law and let other people use it to create harm and injury to the Defendants." (AA0895). When the alleged damage in a lawsuit is caused by protected activity, the lawsuit should be dismissed as a SLAPP lawsuit. *See, e.g., Peregrine Funding v. Sheppard Mullin Richter & Hampton*, 133 Cal.App.4th 658, 671, 35 Cal. Rptr. 3d 31 (2005).

Nevertheless, FCGI argues that the Third Party Complaint sets forth allegations that are not based on the Marcus Declaration. The District Court apparently agreed. It is true that there are general allegations against Third Party Defendants, which include Marcus. These general allegations including Marcus are conclusory and applied to the whole class of Third Party Defendants.

But as to the gravamen of these general allegations, each one of them, to the extent they apply to Marcus, traces back to the Marcus Declaration as the underlying wrongful and injury-producing alleged conduct. If the references to the Marcus Declaration are removed, there is literally *not one sentence* in the 200+ pages of the Third Party Complaint that points to actual conduct (wrongful or otherwise) that is specifically attributed to Marcus. Mahon admits that Marcus was not part of the alleged racketeering enterprise *until Marcus filed his Declaration*. (AA0894). In Mahon's eyes, Marcus' filing of the Declaration itself showed he was part of the conspiracy and racketeering enterprise to "wrest ownership of the Full Color IP from those who properly own it" via the shareholder litigation. (AA0929). It was that act, and nothing more, that caused Mahon to add Marcus to this lawsuit as a Third Party Defendant, and it is the gravamen of the suit against Marcus. "[I]n ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim *and what actions by defendant supply those elements and consequently form the basis for liability*." *Park v. Bd. of Trs. of the Cal. State Univ.*, 2 Cal.5th 1057, 1063, 393 P.3d 905 (2017) (emphasis added); *see also, Chodos v. Cole*, 210 Cal.App.4th 692, 719, 148 Cal. Rptr. 3d 451, 470 (2012) ("[t]he principal thrust or gravamen test is to be broadly interpreted.") (internal quotations omitted).

In all, FCGI asserts four claims against Marcus: 1) racketeering, 2) securities fraud and perjury, 3) inducing a lawsuit, and 4) abuse of process, and includes

general allegations as to each. However, regardless of the form of the claim, the gravamen for each is the same: Marcus' Declaration. FCGI provides no other basis. *Peregrine Funding*, 133 Cal.App.4th at 671 ("a court considering a special motion to strike must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed."); *Martinez v. Metabolife Internat., Inc.*, 113 Cal.App.4th 181, 187 (Cal. Ct. App. 2003) ("[o]ur Supreme Court has recognized that ... a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a 'garden variety breach of contract [or] fraud claim' when in fact the liability claim is based on protected speech or conduct.") (citation omitted).

Navellier v. Sletten, 29 Cal.4th 82, 52 P.3d 703 (2002) is also on point. There, defendant Sletten was sued for breach of contract and fraud for reneging on a signed release of claims by filing a counterclaim lawsuit against plaintiff. In the anti-SLAPP motion to dismiss, the Court ruled that while the claims were couched in terms of contract breach and fraud, the gravamen and underlying cause of the plaintiff's suit was in fact defendant's petitioning the court by filing of the counterclaim lawsuit. The Court stated that the defendant was "being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and [defendant's] alleged action taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls squarely

within the ambit of the anti-SLAPP statute's 'arising from' prong." *Id.* at p. 90. Just as in *Navellier*, while the present claims are couched in terms of racketeering and litigation misconduct, the real underlying cause is Marcus' petitioning of the court through the filing of his declaration. FCGI would not have filed its racketeering and other claims but for Marcus having submitted his protected Declaration.

The Third Party Complaint does in fact have detailed allegations setting forth specific conduct as to some parties, just not Marcus. For example, the main claim for relief for racketeering lists 27 defendants, including Marcus, in the header of that claim:

EIGHTH CLAIM FOR RELIEF (Intentional Recruitment of Racketeering)

VIOLATION OF NEVADA RACKETEERING STATUTE (N.R.S. § 207.400(d))

(As to Counter-defendants Munger, M&A, Valcros, Linham, Brock Sr., Brock Jr., Solso, Eckles, Bastian, Playtech, DTG, DHL, Island Luck, Multislot, L Moore, T Moore, Castaldo, Marcus, Brazer, Spin, Young, Mishra, DHWT, Millennium Trust, Moore Trust and the Brazer Trust)

(AA0750). In paragraphs 566 – 576 that follow in support of the racketeering claim, FCGI sets out detailed allegations with specific conduct *as to 26 of the 27 named defendants*. The one party not specifically named? Marcus. Marcus is not named and no specific allegations are set forth against Marcus anywhere in the paragraphs describing FCGI's racketeering claims. (AA0750-AA0753). The same is true of

the remaining claims against Marcus for: 2) securities fraud and perjury (AA0756), 3) inducing a lawsuit (AA0759), and 4) abuse of process (AA0760).

Based on the above, the gravamen underlying *all* of FCGI's allegations against Marcus is the Marcus Declaration. No discovery is needed on this issue, as Mahon's own threatening emails to Marcus admit that the reason FCGI was suing Marcus was because of the Marcus Declaration. After the Marcus Declaration was filed, Mahon sent Marcus three emails, each alleging that the Marcus Declaration was perjurious, and that Mahon was going to sue Marcus because of it. Of note, Mahon has not objected to the authenticity of these emails.

The following are just a few admissions from the last email, sent on April 23, 2019, after filing of the Third Party Complaint.

> You were not a cause of the failure of FCGI ... You were not an original target in the racketeering case, but your sworn declaration *changed all that* and by statute, *your actions make you a supporting member of the racketeering enterprise* giving the Defendants and all authorities having jurisdiction the legal standing necessary to prosecute you and more importantly the case law precedents to prevail.

AA0894. Here, Mahon admits that (1) Marcus did not contribute to FCGI's failure, and (2) Mahon had no reason to sue Marcus until Marcus' "sworn declaration changed all that." It was the filing of the Declaration itself, as opposed to other

wrongful conduct, that made Marcus "a member of the racketeering enterprise." Mahon continues:

> 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.
>
> . . .
>
> Did you really think you could sign a sworn declaration in a Court of law and let other people use it to create harm and injury to the Defendants and truly believe you'd face absolutely no consequences to it?
>
> . . .
>
> The Summons makes clear now that the demand for you to *withdraw your false sworn statements or face litigation* was not a hollow threat. *It is a promise made good* and a barometric pressure reading of what's next if you wish to continue asserting your sworn declaration and support of the criminal racketeering enterprise *you are now a part of*.

AA0895. Here, Mahon admits that without the Marcus Declaration, there would be no lawsuit against Marcus, and that the litigation was Mahon making good on its promise to sue Marcus because Marcus would not withdraw his Declaration. Mahon further admits that Marcus was not part of the racketeering enterprise, *until he executed the Marcus Declaration*.

These emails leave no question that FCGI sued Marcus based on the Marcus Declaration, as a bullying tactic to punish Marcus for his constitutionally-protected speech. It would appear that sometime after the filing of the Third Party Complaint, Mahon learned that he could not sue Marcus based on the Marcus Declaration. This forced Mahon to backtrack and fabricate unsupported theories of Marcus' conspiracy and racketeering activities. However, Mahon's reasons for this suit are clear, and these emails cannot be ignored.

B. <u>The Answering Brief Misquotes the Complaint</u>

In the face of all this, FCGI makes the disingenuous claim repeatedly in the Answering Brief that the Marcus Declaration had nothing to do with the lawsuit. The Answering Brief states that there are several allegations of actual wrongful conduct against Marcus in the Third Party Complaint apart from the Marcus Declaration. However, FCGI misquotes from the Third Party Complaint and misleads the Court.

For example, the Answering Brief cites an excerpt allegedly presented in the Third Party Complaint: "Appellant is acting in concert with other third-party defendants to tortiously interfere with FCGI's rights (Vol. IV: AA0701)." Answering Brief, pg. 5. However, a correct quote of this allegation, taken directly from the Third Party Complaint at AA0701, is: "*Marcus' sworn declaration* ...

continues to tortiously interfere with the Counter-claimants' rights." (Emphasis added). Thus, this allegation is in fact tied to the Marcus Declaration.

The last excerpt mentioned in the Answering Brief, supposedly taken from the Third Party Complaint, states: "Appellant worked and conspired with other third-party defendants to 'organize, manage, direct, supervise, or finance a criminal syndicate'... (AA0750)." Answering Brief, pg. 5. However, this allegation *is not made against Marcus* in the Third Party Complaint. This general allegation is expressly made against the Counter-Defendants (*i.e.*, plaintiffs in the shareholder lawsuit that have been countersued by FCGI), and Counter-Defendants alone. (AA0750). Marcus is not a plaintiff in the underlying lawsuit and is not a Counter-Defendant.

Thus, while the Answering Brief argues that the Third Party Complaint is full of allegations of wrongful conduct of Marcus apart from the Declaration, the Answering Brief does not set forth a single example of such alleged wrongful conduct that is actually in the Third Party Complaint.

II. MARCUS' ALLEGED CONDUCT IS PROTECTED SPEECH UNDER NEVADA'S ANTI-SLAPP STATUTE

In the Answering Brief, FCGI states its case is based on more than the Marcus Declaration, and therefore concludes that "Appellant *cannot rely on the anti-SLAPP statute*." (Answering Brief, pg. 11, emphasis added). This is a misstatement of the

law on the scope of protected speech under the Anti-SLAPP statute. Statements are protected under anti-SLAPP statute NRS 41.637(3) when they have a "direct connection with an issue under consideration by a ... judicial body." The Nevada Supreme Court, sitting *en banc*, interpreted this to mean a statement or conduct is protected so long as 1) it relates to the substantive issues in a litigation; and 2) it is directed to persons having some interest in the litigation. *Patin*, 429 P.3d at 1251. This covers more than just the Marcus Declaration.

A. The Gravamen of All Allegations in the Third Party Complaint is Generally Marcus' Alleged Involvement in the Shareholder Litigation

Marcus shows above that the gravamen of all allegations and claims herein against Marcus was the Marcus Declaration. However, the gravamen may alternatively or additionally be stated more generally – that all allegations and claims herein are based on Marcus' involvement in the shareholder litigation.

Mahon has made no attempt to hide the fact that he views the underlying shareholder litigation itself as constituting a racketeering activity to wrongly deprive him of his position, company, IP and other assets. To him, the shareholder lawsuit is synonymous with racketeering activity. Mahon states for example:

> The Counter-Defendants and Third-Party Defendants conspired to extort Mahon out of his Full Color IP, other intellectual property rights and stock ownership property and FCGI and its affiliates relevant revenue and licensing rights thereto by acting on their threats ***to engage***

> ***in tortuous litigation*** for the sole intent of depriving MAHON and the Counter-claimants of their property rights and revenue streams ***by filing a baseless, meritless, frivolous and wrongful lawsuit***.

AA0517 (emphasis added). Therefore, when Mahon makes general allegations in the Third Party Complaint that Marcus is part of a racketeering enterprise to take his assets, he is not alleging that Marcus broke into his safe and stole his property. He is alleging that Marcus is conspiring with others to steal his property *through the shareholder litigation*. This is the basis for his claims against Marcus.

Mahon admits as much in his District Court opposition brief, where he states that Marcus' "voluntary participation in the lawsuit, despite attempting to appear neutral" makes him part of the racketeering enterprise, and "not simply an innocent bystander." (AA0927). The opposition brief then elaborates on Mahon's reasons for suing Marcus:

> FCGI also believes that Marcus [an attorney] is assisting Munger [party to shareholder 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.

FCGI thus argues that its lawsuit is not based on the Marcus Declaration, it is instead based on Marcus' involvement in the shareholder lawsuit. Accordingly, the

gravamen of its allegations and claims of racketeering and other offenses against Marcus can be described as Marcus' alleged involvement in the shareholder litigation, by his Declaration and/or by his assisting a party in the shareholder litigation. There is no other wrongful conduct of Marcus mentioned anywhere in the whole of the Third Party Complaint or FCGI's briefs. It was this asserted involvement in the shareholder lawsuit which led Mahon to believe Marcus was part of the racketeering enterprise and caused Mahon to add Marcus to this lawsuit as a Third Party Defendant. This Court should adopt Marcus' position that the gravamen of this lawsuit is the Marcus Declaration, and/or adopt FCGI's position that the gravamen of this lawsuit is Marcus' alleged "involvement" in the shareholder litigation. The result is the same either way under the first prong.

Nor does it alter this result that the FCGI has couched its claims in terms of racketeering, perjury, inducing a lawsuit and abuse of process. "[A] court considering a special motion to strike must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed." *Peregrine Funding, infra,* 133 Cal.App.4th at 671. For example, in *Navellier*, *infra,* 29 Cal.4th at 90, the Court looked beyond the form of the claim (breach of contract and fraud) to find that the real gravamen of the claim was that defendant filed a counterclaim lawsuit. Just as in *Navellier*, while the form of the present claim is racketeering, the gravamen of all of FCGI's racketeering allegations is that Marcus

got involved in the shareholder litigation. As to the remaining claims for perjury, inducing a lawsuit and abuse of process, these claims are, *by definition*, also based on Marcus' alleged involvement in the shareholder litigation.

To be clear, none of Mahon's allegations in these claims are true. But what is relevant under the first prong is that *all* of the allegations against Marcus, contained in the Third Party Complaint or briefs, are based on the Marcus Declaration or more generally on Marcus' alleged involvement in the shareholder litigation.

B. Litigation-Related Activities Are Broadly Construed Under the Nevada Anti-SLAPP Statute

FCGI's position, that its claims are not based on the Marcus Declaration but rather his deeper involvement in the shareholder litigation, shows that FCGI continues to misunderstand the scope of the Nevada anti-SLAPP protections. FCGI's bringing suit on this basis is *still* protected under the anti-SLAPP statute. Statements are protected under anti-SLAPP statute NRS 41.637(3) when they have a "direct connection with an issue under consideration by a ... judicial body." FCGI alleges that Marcus is providing legal assistance to a party in the shareholder litigation. Such alleged communications are made in relation to an underlying litigation and are made to someone having an interest in that litigation. This Court has expressly found that such communications are protected as a constitutional right

of petition under the first prong in *Patin*, 429 P.3d at 1251. Marcus raised this point in his Opening Brief, but FCGI mischaracterizes Marcus' position in the Answering Brief as relying entirely on the Marcus Declaration.

Courts have adopted "a fairly expansive view of what constitute litigation-related activities within the scope of [the anti-SLAPP statute]." *Kashian v. Harriman*, 98 Cal.App.4th 892, 908, 120 Cal. Rptr. 2d 576 (2002). Under this expansive view, courts have routinely held that providing assistance or advice in a 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) (suit based on attorney's assistance in alleged fraudulent filing of trademark applications "properly subject to an Anti-SLAPP motion."); *Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court of State ex rel. Cty. Of Clark*, 128 Nev. 885, 381 P.3d 597, *2 (2012) (unpublished) ("Nevada follows the long-standing rule" that attorney communications and conduct in relation to litigation are "absolutely privileged" and protected under the first prong of the anti-SLAPP statute) (quoting *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983)); and other cases cited in Marcus' Opening Brief at pgs. 28-30.

FCGI alleges that Marcus joined the conspiracy when his Declaration was filed in the shareholder litigation. (AA0894). But even if it alleged that Marcus

joined earlier, before the litigation started, the same protections apply when providing assistance or advice preparing for or in anticipation of litigation or other official proceeding. *See, e.g., Comstock v. Aber*, 212 Cal.App.4th 931, 943 (2012) ("communications that are preparatory to or in anticipation of commencing official proceedings come within the protection of the anti-SLAPP statute."); *Bullivant Houser Bailey PC*, 381 P.3d at *****3 (lawsuit based on "communications preliminary to a proposed judicial proceeding" protected and subject to dismissal as SLAPP).

It is also noteworthy that Marcus' alleged involvement in the shareholder lawsuit is protected by the anti-SLAPP statute even though FCGI accuses Marcus of engaging in this conduct for unlawful purposes. *Birkner v. Lam*, 156 Cal.App.4th 275, 285 (2007) ("conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is alleged to have been unlawful or unethical."); *Omerza v. Fore Stars, Ltd.*, 455 P.3d 841, *1 (Nev. 2020) (unpublished) ("[t]he district court erred in concluding that the anti-SLAPP statutes afford appellants no protection because the complaint alleges intentional torts.").

C. The District Court Did Not Consider Communications Beyond The Marcus Declaration

In denying the motion, the District Court noted that there were general allegations in the Third Party Complaint unrelated to the Marcus Declaration.

Whether or not that is correct, that should not have been the end of the analysis. The District Court should have looked to the gravamen of these general allegations, and determined whether they were based on protected speech. As set forth above, the gravamen of all allegations against Marcus in the Third Party Complaint are the Marcus Declaration, or more generally, Marcus' alleged involvement in the shareholder litigation. All such communications are protected speech under the first prong.

The allegations relating to Marcus acting as IP counsel to Mahon bear further discussion, as they are a good example of Mahon's casual relationship with the truth. When Mahon learned that Marcus executed his Declaration (arguably of little consequence as it was one of five such Declarations filed at a preliminary stage in the shareholder litigation), Mahon sent Marcus three threatening emails, a 300+ page ARCC Report, and he sued him. However, according to Mahon's story, the filing of the Declaration also revealed Marcus' deeper deceit in falsely representing him and stealing his irreplaceable trade secrets and other IP. How did Mahon respond to this much more egregious deceit and theft? With nothing. The alleged deceitful representation is not mentioned anywhere in his threatening emails, nowhere in the ARCC Report and nowhere in the Third Party Complaint.

That this allegation is an outright lie is factually shown from the dates in Mahon's Opposition Brief. Mahon there alleges that the earliest discussion of

Marcus providing IP legal services was in April, 2017, in relation to Mahon's new company, Full Color Games Group (AA0928). Mahon thus contradicts himself when he elsewhere alleges that, two years earlier, in 2015, Marcus agreed to provide IP legal services to FCGI as a condition to Marcus' last investment. (AA0930). Marcus never acted as IP counsel to FCGI, or any other Mahon entity, and never received any confidential information. In any event, as noted above, such alleged communications relate to Marcus' supposed attempt to steal intellectual property *through litigation* and are thus protected. As also noted, the allegations of fraud and deceit do not remove the protections from the communications. *Omerza*, 455 P.3d at fn. 4.[2]

III. THE ARCC REPORT

In an effort to save its claims, the Answering Brief points to the ARCC Report referenced in the Third Party Complaint, and argues that the ARCC Report details all of Marcus' wrongful conduct on which the lawsuit is based. However, upon review of the entire 300+ pages of the ARCC Report, ***there is not one single mention of wrongful conduct by Marcus apart from his having executed the Marcus Declaration in the shareholder lawsuit***. The ARCC Report, presumably authored

[2] Moreover, FCGI did not mention this in the Third Party Complaint, and it cannot expand the allegations from the Third Party Complaint via its Opposition Briefs. *Schneider v. Calif. Dep't. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) and other cases cited in Appellant's Opening Brief, pg. 25.

by Mahon, was sent to Marcus shortly after Marcus submitted the Marcus Declaration in the shareholder lawsuit. Mahon summarizes the finding of the ARCC Report in paragraph 42: "MARCUS' non-compliance actions consist of [multiple] counts of perjury made in is *[sic]* sworn Declaration to the District Court of Nevada, Case A-17-758962-B ("LAWSUIT"). The ARCC Report continues:

> 49. ARCC REPORT OF BRIAN MARCUS RECOMMENDS CIVIL AND CRIMINAL CHARGES BE FILED
>
> a. The Audit, Risk and Compliance Committee ("ARCC") has determined that MARCUS has engaged in 4 separate counts of perjury in ¶7 (2), ¶9, and ¶13 of his declarations in the LAWSUIT. In addition to the 4 counts of perjury, MARCUS has made many other false, dishonest statements in the same declaration to the Court that may not rise to perjury but they are egregious as misleading, dishonest and misrepresenting the truth in order to support the LAWSUIT and wrongfully impugn the character, reputation and integrity of FCGI ... that create additional "non-compliance events".
>
> b. As a result, the ARCC of FCGI has determined that MARCUS is no longer suitable to be a shareholder of FCGI…
>
> c. The ARCC further recommends to FCGI's BOD that it immediately file civil and criminal charges against MARCUS for a maximum of 16 years in prison and $20,000 based on how egregious MARCUS' claims are and to prevent MARCUS from

> creating permanent damage to the name, likeness, brand and reputation of MAHON, HOWARD, FCGI and FCG-IP's ability to obtain real money gaming licenses in and around the world.

ARCC Report, pgs. 25-28. The entirety of the remainder of the ARCC report similarly relates solely to the Marcus Declaration and how it created liability of Marcus to FCGI.

The Answering Brief states that the ARCC Report "detailed *all* of the non-compliance events resulting from Appellant's conduct." (Answering Brief, pg. 5, emphasis added). If FCGI in fact believed Marcus was part of a racketeering conspiracy and falsely represented FCGI to steal its intellectual property, it stands to reason that the ARCC Report would at least mention this conduct. It does not. The ARCC Report states only that Marcus should be sued because he filed his declaration in the shareholder lawsuit and nothing more.

It is unclear why FCGI would point to a report, alleged to be part of the Third Party Complaint, that so obviously supports Marcus' position and not its own. Perhaps it believed that its strategy of burying adverse parties in paper alone would be successful. However, upon closer inspection, these volumes of paper amount to no more than smoke and mirrors; just another 300+ pages confirming that FCGI sued Marcus because Marcus executed his Declaration in the shareholder lawsuit.

IV. MARCUS HAS CARRIED HIS BURDEN UNDER THE FIRST PRONG EVEN IF THE COMPLAINT IS BASED IN PART ON UNPROTECTED SPEECH

Marcus has shown that the entire Third Party Complaint is based on protected speech. However, even assuming arguendo that some of the Third Party Complaint is based on unprotected speech, ***Marcus has still carried his burden under the first prong if the suit is even partially based on protected speech.*** "Where the defendant shows that the gravamen of a cause of action is based on nonincidental protected activity as well as nonprotected activity, it has satisfied the first prong of the SLAPP analysis." *Haight Ashbury v. Happen. House,* 184 Cal.App.4th 1539, 1551, fn. 7 (Cal. Ct. App. 2010); *Abrams v. Sanson*, 136 Nev., Advance Opinion 9, at *13 (Nev. Mar. 5, 2020). As stated by the Court in *Club Members for an Honest Elec. v. Sierra Club*, 45 Cal.4th 309 (Cal. 2008), "[t]he 'principal thrust or gravamen' test serves the Legislative intent that section 425.16 be broadly interpreted. Thus, a plaintiff could not deprive a defendant of anti-SLAPP protection by bringing a complaint based upon both protected and unprotected conduct." *Club Members*, 45 Cal.4th at 319.

As noted above, the Third Party Complaint expressly states "Marcus' sworn declaration has provided a supporting role to the racketeering activities of [other Counter-defendants]. And "Marcus' sworn declaration ... continues to tortiously interfere with the Counter-claimants' rights." (AA0701). Thus, the Third Party

Complaint is at least partially based on the protected filing of the Marcus Declaration. As shown, the lawsuit is also based more generally on Marcus' alleged participation in the lawsuit. Thus, even if the lawsuit against Marcus was based on other, unprotected speech (which it is not), Marcus still would have carried his burden under the first prong of the anti-SLAPP analysis.

V. SUMMARY

In summary, Marcus has shown by at least a preponderance of the evidence that the communications underlying lawsuit, whether based on the Marcus Declaration alone or Marcus' alleged involvement with the shareholder litigation, were conduct in furtherance of the exercise of the constitutional right of petition. Racketeering claims in particular have been dismissed as SLAPP lawsuits when based on such protected speech. *See, e.g., Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*, 136 Cal.App.4th 464, 479 (2006).

Likewise, the remaining claims for perjury, inducing a lawsuit and abuse of process are inherently based on Marcus' protected activity to petition the courts, and are also subject to dismissal under the anti-SLAPP statute. *See, e.g., Booker v. Rountree*, 155 Cal.App.4th 1366, 1370 (2007) ("it is hard to imagine" a lawsuit based on misconduct in an underlying litigation that does not fall under the protections of the anti-SLAPP statute). As such, Marcus has met his burden under

the first prong of the SLAPP analysis. Of note, FCGI has offered *absolutely no evidence* in its Answering Brief to dispute this.

Moreover, Marcus has shown by at least a preponderance of the evidence that his communications were made in good faith, and without knowledge of their falsity. The sworn statements in both the Marcus Declaration, and in the follow-up declaration filed in support of this motion (AA0824-32), asserted the truthfulness of the statements in the Marcus Declaration. These assertions are sufficient to show those statements were made in good faith. *Omerza*, 455 P.3d at *1 ("sworn declarations ... [are] sufficient to satisfy the good-faith component of the step-one inquiry under NRS 41.660(3)(a)."). As confirmed in *Stark v. Lackey*, 136 Nev., Adv.Op. 4 (Nev. Feb. 27, 2020), "even under the preponderance standard, an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record." *Stark*, 136 Nev., Adv.Op. at *10.

FCGI has presented no evidence to contradict the truthfulness of the Marcus Declaration. FCGI asserts instead in its Answering Brief that Anti-SLAPP protection does not apply to statements that "would otherwise be illegal, such as extortion, fraud or perjury," and cites to *Flatley v. Mauro*, 39 Cal.4th 299, 46 Cal.Rptr.3d 606, 139 P.3d 2 (2006). (Answering Brief, pgs. 10-11). However,

Flatley does not apply here. The *Flatley* Court made clear that its holding was limited to "the specific and extreme circumstances of this case," in which "the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence." *Flatley*, 39 Cal.4th at 316. *See also, Haight Ashbury*, 184 Cal.App.4th at 1549-50. That is not the case here and *Flatley* does not apply.

VI. FCGI IS NOT ENTITLED TO DISCOVERY

FCGI acknowledges that it lacks the evidence to support its claims. FCGI acknowledges that all it has is the known fact of Marcus executing his declaration (which is protected speech) and unsupported allegations that Marcus is conspiring with others in the shareholder suit (which is also protected speech). It argues, in effect, that it sued Marcus based on his wrongful unprotected conduct; it just does not have any idea what that conduct is. FCGI claims however, that if they are granted discovery, they may be able to uncover racketeering acts that are not protected speech, thus defeating the anti-SLAPP motion. But that is not how lawsuits are brought, nor how anti-SLAPP motions are defeated. Plaintiff must have some knowledge of unprotected wrongful acts of the defendant, that are plead with specificity, *at the time the complaint is filed*. Here, respondents acknowledge they do not have that.

In its Answering Brief, FCGI repeatedly says it is entitled to discovery in order to adequately plead its claim, but cites no support for its position. The case law is

in fact uniform that in any procedural situation, where a plaintiff files a claim with nothing more than legal conclusions, the plaintiff is not entitled to discovery to prove or correct its pleading. *See, Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (the rules of civil procedure do "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."); *Choy v. Ameristar Casinos, Inc*., 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) (discovery denied in summary judgment context, because "the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting his claims.").

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

Here, FCGI concedes it is unaware of any conduct of Marcus other than his protected communications. While FCGI seeks discovery in the hope of finding something on which the suit can be based, "this argument amounts to a request for this Court's permission to conduct a fishing expedition, and it is unavailing." *Korhonen v. Sentinel Ins., Ltd.*, 2:13-cv-00565-RCJ-NJK, at *7 (D. Nev. Mar. 24, 2014). Having failed to plead any specific factual evidence which may be used to rebut Marcus's showing under the first prong, FCGI's request for discovery should be denied.

VII. FCGI HAS NOT CARRIED ITS BURDEN UNDER THE SECOND PRONG OF THE ANTI-SLAPP ANALYSIS

Having showed the complained of communications are good faith protected speech under the first prong of the Nevada Anti-SLAPP statutes, the burden shifts to FCGI to demonstrate with *prima facie* evidence a probability of succeeding on each of his racketeering and other claims. *Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d 1220, 1223 (2019). Marcus has showed in detail why FCGI has not come close to meeting its burden under the second prong in its Opening Brief. In its Answering Brief, FCGI has offered *absolutely no facts or evidence* to show a probability of succeeding on his racketeering or other claims. It merely asks for discovery in the hope of finding some. FCGI must have some knowledge of facts showing that it will probably succeed in proving its claims. These facts must be

pleaded with specificity, *at the time the complaint is filed*. Here, FCGI acknowledges it does not have that.

CONCLUSION

Marcus has carried his burden under the first prong of the SLAPP analysis in showing that the causes of action against Marcus are based on the Marcus Declaration and/or other protected speech made in good faith. For its part, FCGI has offered no factual evidence to rebut this showing. FCGI has also failed to offer any evidence showing a probability of success in its claims. As such, this Court should grant the special motion to dismiss and direct the District Court to award attorney fees and other appropriate damages.

DATED this 8th day of September 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this reply 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 7,000 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-volume limitations of NRAP 32(a)(7) because it contains 6,897 words.

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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 8th day of September 2020.

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CERTIFICATE OF SERVICE

I certify that on the 8th day of September 2020, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: APPELLANT'S AMENDED REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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