In the
Supreme Court of the State of Nevada

BRIAN MARCUS,

Appellant,

vs.

FULL COLOR GAMES, INC.,

Respondent.

Supreme Court No. 79512

Appeal from the
Eighth Judicial District Court
for Clark County, Nevada

District Court Case No.
A-17-759862-B

APPELLANT'S PETITION FOR *EN BANC* RECONSIDERATION

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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 in order that the judges of this Court may evaluate possible disqualification or recusal.

1. 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.

2. Appellant Marcus has been represented throughout the litigation and appeal by Joseph A. Gutierrez, Stephen G. Clough, and Danielle J. Barraza of MAIER GUTIERREZ & ASSOCIATES.

3. Appellant is represented for purposes of this Petition for Rehearing by Marc J. Randazza and Alex J. Shepard of RANDAZZA LEGAL GROUP, PLLC. No other law firms are expected to appear on Appellant's behalf in this appeal.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ARGUMENT

Pursuant to NRAP 40A, Appellant Brian Marcus hereby files his Petition for *en banc* Reconsideration of this Court's Order Denying Rehearing, dated December 23, 2020.

1.0 Introduction

The first step in the Anti-SLAPP analysis is to identify the defendant's wrongful conduct alleged in the pleadings giving rise to the lawsuit. Though generally a straightforward step, it is an essential step, as only after identifying the conduct of which plaintiff complains can a court determine whether that conduct is protected. At the heart of this Petition is the complete failure of the lower court and the three-member panel of the Supreme Court ("the Panel") to analyze the pleadings, in accordance with the Court's established precedents, to identify the evidence set forth of Marcus' conduct that caused Full Color Games, Inc. ("FCGI") to bring this lawsuit.

Marcus was sued by FCGI after Marcus filed his Declaration ("the Marcus Declaration") in the underlying lawsuit between FCGI and FCGI investors. FCGI, the lower court and the Panel have all stated that the wrongful conduct on which this lawsuit is based is more than just the

filing of the Marcus Declaration. Marcus disagrees. But assuming *arguendo* the suit is not based on the Declaration, ***why then did FCGI sue Marcus***? There is no answer to this question because, apart from the Declaration, the Complaint is ***completely silent*** as to anything Marcus did that would lead FCGI to bring this lawsuit. The Complaint does set forth conclusory allegations of racketeering, but the case law is clear that such conclusory allegations have ***no legal significance*** under the first prong of the SLAPP analysis and do not deprive a defendant of his or her protected status. These conclusory allegations therefore are not and cannot be the conduct on which this lawsuit is based.

For its part, FCGI bafflingly states that it believes there is wrongful conduct, but admits it does not know what that wrongful conduct is. It is asking for discovery so that it may find out why it brought the lawsuit. The Panel, for its part, did not address the issue of identifying conduct on which the suit is based. Instead of identifying wrongful conduct from the pleadings, and analyzing whether that conduct is protected or not, the Panel simply said the Complaint alleges racketeering, and therefore concluded that racketeering claims are not based on protected speech. This is wrong at the outset because racketeering claims are not

categorically exempt from the protections of the Anti-SLAPP statute. It is also wrong because the Panel improperly focuses on the cause of action, instead of the conduct on which the action is based. Given that the Panel did not identify or analyze the conduct on which the lawsuit was based, reconsideration by the full Court is necessary to maintain uniformity of the decisions of this Court.

For his part, Marcus *has* performed this analysis in his briefs, providing evidence and authorities sufficient to carry his burden under the first prong of the Anti-SLAPP analysis. He initially analyzed the Complaint and identified the Declaration as the reason the lawsuit was brought, then showed how that was good-faith protected petitioning activity. When FCGI insisted in its Opposition and Answering Brief that the lawsuit was based on additional evidence, Marcus included this additional evidence in his analysis. When FCGI insisted that the evidence in the ARCC report was part of the record, Marcus included the ARCC Report in his analysis.

Marcus has identified and analyzed ***all of this evidence*** in his briefs, and does so again below. The preponderance of this evidence, indeed the only possible conclusion, is that Marcus was sued based on his

participating in the underlying litigation, which is protected activity. Marcus has also shown that this activity was done in good faith. Marcus has thus met his burden under the first prong of the Anti-SLAPP statute. Contrary to the Panel's finding, ***this evidentiary showing cannot be rebutted simply by pointing to the fact that the Complaint recites a cause of action for racketeering***.

Given the *only* evidence in this case, the Panel's Opinion is also an inexplicable departure from the clear and established precedent of this Court that participation in a legal proceeding is a broadly protected activity. This Opinion will effectively deter witnesses from participating in future judicial proceedings, knowing that the price for such participation will be years of litigation, or as FCGI threatened, litigation "until the end of time." This is *precisely* the result the SLAPP statutes were enacted to prevent. *En banc* reconsideration is therefore requested not only because (1) it is necessary to maintain uniformity with prior decisions of this Court, but also because (2) the chilling effect this Opinion will have on free speech involves a substantial constitutional issue.

2.0 Brief Factual Overview

Petitioner Marcus is a registered patent attorney, practicing at the law firm of Vierra Magen Marcus LLP, a firm he founded in 2001. In his 30+ years of practice, Marcus has never been disciplined by any court, State Bar, or the U.S. Patent Office. AA0824.

Marcus was a minor shareholder in Respondent David Mahon's company, Full Color Games, Inc. ("FCGI"). When FCGI announced it was folding, FCGI for the first time announced that the shareholders had no ownership interest in the assets of FCGI that shareholders paid to develop. Several of the shareholders sued Mahon and FCGI for concealing this fact in the underlying shareholder derivative lawsuit ("the underlying lawsuit"). AA0001-AA0068.

Marcus elected not to join the underlying lawsuit, nor was he initially named as a defendant in FCGI's countersuit. However, at shareholder plaintiffs' request, Marcus submitted a truthful declaration that he was unaware at the time he invested that shareholders would not own the assets of FCGI. Mahon sent Marcus several threatening emails to get Marcus to retract the Marcus Declaration, and the last confirming that Marcus was sued because he did not retract the Marcus Declaration.

AA0883-AA0899. These emails are summarized in Marcus' opening appellate brief (pgs. 11-14), but as a sample:

> Life as you know it is gone caused by the stroke of a single pen when you signed a false, frivolous sworn declaration... 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.

AA0895.

3.0 The Panel Failed to Identify the Complained-of Conduct or Whether that Conduct is Protected

It is axiomatic under the holdings of this Court that the first step of the Anti-SLAPP analysis turns on whether a defendant has shown by a preponderance of the evidence that a lawsuit was brought based on protected conduct. *See, e.g.*, *Abrams v. Sanson*, 458 P.3d 1062, 1065 (2020). Inherent in that determination is the initial step of actually identifying the conduct on which the lawsuit is based. Marcus has now received three Respondent answering briefs and two Court opinions, each asserting that FCGI has set forth evidence of unprotected racketeering conduct of Marcus beyond the filing of the Declaration. However, ***not***

one of those briefs or opinions actually identifies what that unprotected conduct is.

The lower court denied the motion on the grounds that it did not "read the pleading as being necessarily based entirely upon the declaration." AA1073. This finding however does not take the next obligatory step of identifying and analyzing what the pleadings do in fact allege as Marcus' wrongful conduct, as it must in order to determine whether conduct is protected.

The Panel's Opinion does not identify, let alone analyze, *any* evidence of wrongful conduct by Marcus alleged in the pleadings. The Opinion instead denies the Motion because "the third-party complaint also alleges that Marcus participated in a racketeering enterprise." (Opinion, pg. 3). The terse Opinion states no more in this regard, apparently relying on the mere inclusion of a cause of action in racketeering to deny Marcus has shown protected speech on that claim under the first prong.

This is clear error and incompatible with the jurisprudence of this Court. This Court and others have previously made clear that ***it is "the defendant's activity, not the form of the plaintiff's claims for***

relief" that must be analyzed to decide whether or not conduct is protected under the first prong. *Omerza v. Fore Stars, Ltd.*, 455 P.3d 841, 2020 Nev. Unpub. LEXIS 96, *3 (Nev. Jan. 23, 2020) (unpublished); *Navellier v. Sletten*, 29 Cal.4th 82 (Cal. 2002); Appellant's Opening Brief at 21; Appellant's Reply Brief at 4-7. As stated in *Navellier*, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiffs cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." 29 Cal.4th at 92.

The Panel Opinion appears to indicate that Marcus has not shown FCGI's claims are based upon protected activity simply because FCGI says Marcus' conduct is "racketeering." However, the Anti-SLAPP statute "does not exclude any particular claim for relief from its scope because the focus is on the defendant's activity, not the form of plaintiff's claims for relief." *Omerza*, 2020 Nev. Unpub. LEXIS 96 at *3; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*, 136 Cal.App.4th 464, 479 (2006).

Racketeering *sounds* like it involves unprotected activity. But the mere inclusion of a racketeering cause of action does not absolve the

plaintiff from having to set forth ***factual evidence of conduct by the defendant*** believed to support its claim of racketeering. Nor does it excuse the Court from first identifying that conduct and second analyzing that conduct to determine whether it is protected under the Anti-SLAPP analysis. The Panel's neglect in doing this contradicts *Abrams, supra,* and similar holdings, and sets a dangerous new standard under the first prong analysis that will effectively eviscerate the Anti-SLAPP statute. All a plaintiff will need to do is allege "racketeering" and the Court can handwave off the motion. That is not how the Anti-SLAPP statute works. Reconsideration by the full Court is therefore necessary to maintain the uniformity of the decisions of this Court.

4.0 Marcus Met His Burden Under the First Prong by Showing the Conduct Complained of in the Pleadings is Protected.

In accordance with his burden under the first step, Marcus identified all of the evidence presented in all of the pleadings and showed by a preponderance of this evidence that this lawsuit was brought based on Marcus' protected petitioning activity. The totality of the evidence submitted at the district court is identified and analyzed below.

4.1 Evidence of Conduct in the Complaint

It is generally straightforward to identify the acts in a complaint which caused a plaintiff to sue. For example, the defendant published defamatory statements on his/her website about the plaintiff,[1] or the defendant breached an agreement with the plaintiff.[2] Here, determining the acts in the Complaint upon which FCGI premises liability against Marcus is anything but straightforward. In fact, if you remove mention of the Marcus Declaration as a cause of the lawsuit, ***there is not one single sentence in the 200+ pages of the Complaint which sets forth the factual basis for FCGI's claims against Marcus.***

FCGI acknowledges that it has no facts to support its racketeering claim against Marcus (apart from the Declaration), but hopes to find such facts if granted discovery. The best it has right now is the assertion that, on information and belief, Marcus is acting in concert with other defendants accused of racketeering. AA0932. As noted by the District Court, the Complaint does include such general allegations of racketeering against Marcus. However, the general racketeering

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[1] *Patin v. Ton Vinh Lee*, 429 P.3d 1248 (2018).

[2] *Canalysis Nev., LLC v. Desert Testing LLC*, No. 78438 (Nev. Apr. 16, 2020).

allegations against Marcus are no more than a recital of racketeering claim elements, set forth in a conclusory manner. If an Anti-SLAPP motion can be defeated by a plaintiff's general allegations, admittedly made on no more than information and belief, the Anti-SLAPP statute is easily circumvented, simply by vague pleadings.

The courts have accordingly made clear that such conclusory allegations "have no legal significance" under the first prong of the SLAPP analysis and "do not deprive [defendants] of their protected status." *Contreras v. Dowling*, 5 Cal. App. 5th 394, 413-14 (Cal. Ct. App. 2016). In *Omerza*, *supra*, in finding the defendant carried its burden under the first prong against allegations of intentional torts and fraud, this Court stated, "mere allegations of intentional conduct are not enough." 2020 Nev. Unpub. LEXIS 96 at *4 n.4. *See also Sameer v. Benett*, No. F071888, at *14 (Cal. Ct. App. Jan. 11, 2019) (unpublished) (in response to a conclusory allegation of an intentional tort in the complaint, the court stated "[i]n view of the generality of this allegation, which provides no details about what [defendant] did and said [in commission of the intentional tort], we conclude that the alleged activity by [defendant] qualifies as ... protected activity."). The Complaint

therefore does not set forth any evidence of unprotected conduct. To the extent FCGI's position, or the Panel's decision, rests on these general allegations, such reliance is unfounded and contrary to established precedent.

The only factual allegations in the Complaint of actual wrongful conduct of Marcus relates to the filing of the Marcus Declaration. The 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). As shown in Marcus' briefs, the filing of the Marcus Declaration is protected activity, as it is a "[w]ritten or oral statement made in direct connection with an issue under consideration by a ... judicial body." NRS 41.637. Marcus has also shown the good faith of the Marcus Declaration. Marcus provided a second sworn declaration in support of this motion testifying that his statements made in the Marcus Declaration were true or that he had no knowledge of any statement's falsity. AA0824-0832. The sworn statements in the Marcus Declaration,

and in the follow-up declaration, asserted the truthfulness of the statements in the Marcus Declaration and the lack of any knowledge of falsity. This Court has found that a declaration attesting to making statements in good faith, in the absence of controverting evidence, is by itself sufficient to conclusively establish good faith. *See Stark v. Lackey*, 458 P.3d 342, 347 (Nev. 2020).[3]

FCGI argues that the filing of the Marcus Declaration was not the cause of the lawsuit, but merely the trigger for the lawsuit. (Respondent's Answer to Petition for Rehearing, pg. 9). Logically, this argument must fail. If the Marcus Declaration was merely the trigger for the suit, *what then was the cause*? FCGI has no answer for this. If FCGI does not now have an answer as to why it accuses Marcus of racketeering apart from the Declaration, then the Declaration is, by definition, the conduct on which liability is based. If FCGI is asked to provide an answer in this Petition, FCGI is requested to point to the

[3] The *Flatley v. Mauro*, 39 Cal.4th 299 (2006) exception that illegal conduct is not protected does not apply here. Marcus has not conceded the illegality of his conduct, nor has FCGI conclusively shown Marcus' conduct is illegal. *Flatley*, 39 Cal.4th at 316; *Haight Ashbury v. Happen. House*, 184 Cal.App.4th 1539, 1549-50 (Cal. Ct. App. 2010).

reason, supported with factual evidence in the pleadings, as to why it has sued Marcus. It has failed to so to this point.

4.2 Evidence of Conduct in FCGI's Briefs

Upon realizing it had filed a SLAPP lawsuit based on Marcus' Declaration, FCGI backpedaled in its briefs and took the position that the lawsuit was not based on the Marcus Declaration, but instead because of legal assistance that Marcus provided to Mark Munger, a plaintiff in the underlying lawsuit. FCGI states for example in its District Court opposition brief that 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. The opposition brief then elaborates on FCGI's reason for suing Marcus:

> FCGI also believes that Marcus is assisting Munger 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. And further:

> FCGI believes and alleges that Marcus is lending his knowledge and skill to Munger in his efforts to oppose Mahon's and FCGI's efforts to ensure that the Full Color IP remains fully protected by intellectual property laws. FCGI

> believes and has alleged that Marcus is assisting Munger in his improper and illicit attempts to oppose Mahon's efforts to maintain trademark protection for the Full Color mark. Munger, who claims to be submitting filings with the USPTO on his own, has submitted arguments ... that are written in such a matter as to suggest he is receiving assistance from an experienced intellectual property attorney like Marcus.

AA0930. And further, at the Motion hearing before the District Court, FGCI's counsel stated:

> we believe that he [Marcus] may be involved [with Munger] 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].

AA1073.

These statements, which are not admissible evidence, are the only further indications in the record as to why FCGI sued Marcus. However, FCGI again misunderstands the scope of the Nevada Anti-SLAPP statute, as all of the conduct alleged by FCGI in its briefs is protected petitioning activity. Such alleged communications are made in relation to an underlying litigation and are made to a party 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 v. Ton*

Vinh Lee, 429 P.3d 1248, 1251 (2018). *See also Contreras*, *supra*, which held "all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are *per se* protected as petitioning activity by the anti-SLAPP statute." *Id.* at pg. 399. The acts of other defendants are not attributable to Marcus simply because Marcus is alleged to aid and abet the racketeering enterprise by ***giving legal advice***. *Id.* at 409-10. Given the fact that FCGI says that it sued Marcus for "supporting" Munger **as an attorney**, the cases giving broad protection to conduct of attorneys providing advice applies.

FCGI makes one further allegation in its briefs that Marcus obtained confidential information from FCGI, under the guise of acting as counsel for FCGI, for later use against FCGI in the underlying litigation. This is a complete demonstrable lie. But regardless, even such communications would be protected activity. *See, e.g., Bergstein v. Stroock & Stroock & Lavan LLP*, 236 Cal.App.4th 793, 811 (2015) (defendants' actions in tortiously obtaining confidential information "to carry out a litigation attack" was protected activity under the first prong

of the SLAPP analysis, because defendants' acts "centered in defendants' role as counsel.").

Marcus has made these arguments in the lower court and on appeal, but FCGI continues to ignore these arguments. FCGI instead attempts to characterize Marcus' arguments as relying entirely on the filing of the Declaration as the sole grounds for protected activity. That is disingenuous and intentionally (but thus far, effectively) misleading. The alleged protected activity for which Marcus is being sued is participating in the underlying litigation, including for allegedly providing legal advice to plaintiff Munger.

4.3 Evidence of Conduct in the ARCC Report and FCGI's Emails

FCGI has further pointed to the ARCC (Audit, Risk & Compliance Committee) Report, referenced in the Complaint, as providing evidence of conduct by Marcus as to why he was sued. AA0701. The ARCC Report, presumably authored by Mahon, was sent to Marcus shortly after Marcus submitted the Marcus Declaration in the underlying lawsuit. Both the Complaint and FCGI's Appellate Answering brief state that the ARCC Report detailed ***all*** of the non-compliance events of Marcus' conduct that led to him getting sued. AA0701; Appellate Answering brief at pg. 5.

The evidence in the ARCC Report is devastating to FCGI's position, as the only mention of wrongful conduct by Marcus in the ARCC Report is that Marcus executed and submitted the Marcus Declaration in the underlying lawsuit. There is not a single mention or reference to any racketeering activity. The ARCC Report states that "MARCUS' non-compliance actions consist of three different counts of perjury made in [his] sworn Declaration to the District Court of Nevada." (ARCC, ¶49(a)). Because Marcus filed his Declaration, the ARCC Report "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." (ARCC, ¶49(d)).

The remainder of the ARCC report similarly relates solely to the Marcus Declaration. It goes into exhaustive detail of how the Marcus Declaration itself was non-compliant wrongful conduct that created liability of Marcus to FCGI. Again, there is no mention in the ARCC Report of racketeering or any other wrongful conduct of Marcus apart from the Declaration.

The last source of evidence showing the wrongful conduct that led to Marcus being sued are three emails sent by Mahon to Marcus upon

learning of the filed Marcus Declaration. The first two emails threaten to sue Marcus because he filed his Declaration. AA084-AA092. The last email confirms that Marcus was sued because he filed his Declaration. AA094-0899.

The above evidence from the ARCC Report (referenced in the Complaint) and the above emails comes directly from Mahon and FCGI. Paraphrasing, this evidence speaks loudly and unequivocally that, '***we sued Marcus because he filed his Declaration***.' This evidence should have been determinative as to the factual basis of FCGI's claims against Marcus. ***Inexplicably, not only was it not determinative, it was completely ignored***. Had this evidence been considered, the inescapable conclusion is that Marcus was sued because he filed the Marcus Declaration and FCGI premises liability solely upon on this conduct.

4.4 A Preponderance of the Evidence from the Pleadings is that Marcus was Sued on the Protected Conduct of Participating in the Underlying Litigation

The above evidence from the Complaint, FCGI's briefs, the ARCC Report and Mahon's emails comprise the totality of the evidence in this lawsuit. The preponderance of this evidence, in fact the only possible

conclusion to draw, is that FCGI premises liability on Marcus' participation in the underlying litigation. This participation included witness testimony in the form of the Marcus Declaration and Marcus giving advice to a party in the underlying litigation. Marcus has made these arguments before the District Court (AA0945-AA0947) and on appeal to this Court (*e.g.*, Appellant's Opening brief, pgs. 23-30). Even if the Marcus Declaration is disregarded, the remaining evidence is that Marcus was sued because he participated in the underlying litigation by giving advice to a party in the litigation. Other than to argue without support that the lawsuit is not based on the Marcus Declaration, ***FCGI has done nothing to rebut this position***. The conclusory allegations in the Complaint have no legal significance under the first prong of the SLAPP analysis.

Marcus has therefore carried his burden under the first prong of the Anti-SLAPP statute in showing that he has been sued based on protected activity. The Panel's decision, denying protection to litigation-related conduct, is contrary to this Court's prior holdings in *Patin*, *supra*, and the like. The Panel's decision will also have a significant chilling effect on witnesses participating in future judicial proceedings, knowing

that the price for such participation will be years of litigation, or as FCGI threatened, litigation "until the end of time." This is *precisely* the result the SLAPP statutes were enacted to prevent.

5.0 The Causes of Action for Abuse of Process, Inducing a Lawsuit and Perjury Are, By Definition, Based on Protected Petitioning of the Court

In affirming the denial of the SLAPP motion with respect to the 2nd through 4th causes of action for abuse of process, inducing a lawsuit and perjury, the Court deviated from longstanding and unambiguous precedent that these causes of action, ***by their very definition***, satisfy the first prong of the SLAPP analysis. These causes of action are based on the alleged improper filing of a lawsuit, inducing a lawsuit to be filed, and making willfully false statements under oath in a lawsuit, respectively. Each of these causes of action is protected activity because each such claim necessarily depends upon a "[w]ritten or oral statement made in direct connection with an issue under consideration by a ... judicial body." NRS 41.637(3). Appellant's Opening Brief at 7; Appellant's Reply Brief at 24. As such, the conduct for each of the 2nd through 4th causes of action is protected under the first prong of the SLAPP analysis.

This does not mean that Marcus is claiming immediate entitlement to a win – but there is no question that his conduct qualifies under prong one. SLAPP motions on these causes of action are defeated, if at all, under the second prong of the SLAPP analysis. However, it is undeniable that each of these causes of action are directly and by definition based on Marcus' petitioning the court in the underlying lawsuit. As such, each of these causes of action is based upon protected conduct, and Marcus has satisfied the first prong. *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); Appellant's Reply Brief at 24.

The lower court and Panel opinions did not address the 2nd to 4th causes of action. Marcus respectfully requests that the full Court grant this Petition so that it can clarify its basis for reversing established and well-reasoned precedent that these causes of action are necessarily based on conduct in an underlying litigation and inherently satisfy the first prong of the Anti-SLAPP analysis.

6.0 If the Complaint is Based Upon Protected and Unprotected Speech, Causes Based on Protected Speech Should Be Dismissed

As noted above, it is believed that all causes of action against Marcus are based on his protected speech. However, in the event the Complaint is found to include protected and unprotected causes of action, the causes of action based on the protected speech are subject to dismissal by the Anti-SLAPP motion. *Abrams v. Sanson*, 458 P.3d 1062, 1069 (Nev. Mar. 5, 2020); Appellant's Reply Brief at 22-23.

CONCLUSION

Given the failure of the Panel to identify and analyze the conduct of which Plaintiff complains, the Panel's Opinion undermines the provisions of the Nevada Anti-SLAPP statute, and is contrary to this Court's prior opinions in cases such as *Abrams*, *Patin* and others. As such, reconsideration by the full court is necessary to maintain uniformity of decisions of the Court. Moreover, as the Panel's Opinion will have a chilling effect on the broadly protected first amendment right to participate in judicial proceedings, reconsideration by the full court is also necessary because the proceeding involves a substantial constitutional issue.

Dated: January 6, 2021.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza (NV Bar No. 12265)
Alex J. Shepard (NV Bar No. 13582)

Attorneys for Appellant

CERTIFICATION OF ATTORNEY

1. The undersigned has read the foregoing Petition for Rehearing of Appellant Brian Marcus;

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

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

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the type-volume limitations stated in Rule 32(a)(7). Specifically, the brief was written in 14-Point Century Schoolbook font, and the brief is 4,652 words as counted by Microsoft Word.

Dated: January 6, 2021.

/s/ Marc J. Randazza
Marc J. Randazza

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January 2021, a true and correct copy of the foregoing Appellant's Petition for *en banc* Reconsideration was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Respectfully Submitted,

/s/ Heather Ebert
Employee,
Randazza Legal Group, PLLC