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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 BRIAN MARCUS, AN INDIVIDUAL,

4
5 Appellant,

6 vs.

7 FULL COLOR GAMES, INC., A
8 NEVADA CORPORATION,

9 Respondent.

**SUPREME COURT CASE NO.
79512**

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

14 **RESPONDENT'S ANSWER TO PETITION FOR EN BANC**
15 **RECONSIDERATION**

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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.

INTRODUCTION

This is the fourth time Brian Marcus (“Marcus”) has made the same arguments rejected by the district court once and this Court twice. Marcus’ Petition for En Banc Reconsideration (the “Petition”) seeks to challenge the Court’s Order of Affirmance (the “Order”) upholding the Court’s denial of Marcus’ Petition for Rehearing. To successfully reconsider the Court’s affirmance of its earlier ruling, Marcus must establish that the Court has failed to “secure or maintain uniformity of decisions” or has made rulings against a “public policy issue”. NRAP 40A(a). This high standard is why en banc reconsideration “is not favored” and is available only under “limited circumstances”. Id.

Marcus fails to meet his burden. Marcus’ first failing argument is that the district court and this Court did not “analyze the pleadings, in accordance with the Court’s established precedents, to identify the evidence set forth of Marcus’ conduct” that caused FCGI to make claims against Marcus. Petition at 1.

1
2 In actuality, the Court properly analyzed FCGI's allegations and claims against
3 Marcus (and his co-wrongdoers) and made rulings consistent with the Court's
4 precedent. See Order, on file herein. Specifically, the Court correctly ruled that
5 FCGI's wide-ranging claims against Marcus and his cohorts are based on Marcus'
6 alleged participation in a racketeering enterprise along with a claim for declaratory
7 relief seeking to divest Marcus of his shares in FCGI (among other claims), and are
8 not based on Marcus' submission of a declaration in the action. See id. Marcus is
9 attempting to use the fact that he submitted a declaration in the same case as a silver
10 bullet against his wrongful conduct. There is no precedent providing that so long as
11 a person gives a declaration in a case, that person may not be added as a defendant
12 later in the same case.

13 Marcus also argues that the Court's earlier rulings in this action will "deter
14 witnesses from participating in future judicial proceedings." Petition at 4. The Court
15 should be assured that any ruling in this case – under the facts of this case – will not
16 deter any witness from participating in judicial proceedings. The anti-SLAPP statute
17 was intended to protect against retaliation for participation in public matters. But
18 prior public participation is not a shield against allegations of other wrongful acts,
19 such as FCGI's allegations and claims against Marcus here.

20 All told, Marcus' flawed contention is that a person can commit wrongdoing
21 but cannot face discovery and liability for that wrongdoing if that party has already
22 made a sworn statement in the subject case. The district court and this Court have
23 three times properly rejected Marcus' misplaced attempt to utilize the anti-SLAPP
24 statute as a global shield from any allegations of wrongdoing. For these reasons,
25 Marcus cannot satisfy his burden under NRAP 40A.

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III.

FACTUAL OVERVIEW

Marcus is a licensed attorney with knowledge of intellectual property; as a result, FCGI provided Marcus extraordinary details about specific intellectual property that formed the basis of investors in FCGI. Vol. V: AA930. Marcus was an investor in FCGI via a convertible note. Vol. V: AA0929. FCGI alleges that principals of FCGI believed Marcus would use his skills as an intellectual property attorney to protect FCGI, but instead Marcus has acted against that intellectual property to the detriment of FCGI and its investors, and that Marcus' actions, in concert with his racketeering cohorts, 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 Marcus 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 protect them. Vol. V: AA0931; Vol. IV: AA0700-701.

IV.

ARGUMENT

A. LEGAL STANDARD FOR ANTI-SLAPP MOTION TO DISMISS.

To prevail on a special anti-SLAPP motion to dismiss, the moving defendant must satisfy two statutory prongs. Under prong one, the claims must arise under a protected communication, and the court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a

1 good faith communication in furtherance of the right to petition or the right to free
2 speech in direct connection with an issue of public concern.” NRS 41.660(3)(a); NRS
3 41.650. If the moving party fails to meet his burden under the first prong, “the inquiry
4 ends . . . the case advances.” Coker v. Sassone, 135 Nev. 8, 12, 432 P.3d 746, 749
5 (2019).
6

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

11 **B. THE COURT HAS TWICE CORRECTLY RULED UNDER PRONG**
12 **ONE THAT FCGI’S CAUSES OF ACTION ARE NOT BASED ON ANY**
13 **COMMUNICATIONS THAT MAY BE PROTECTED UNDER THE**
14 **ANTI-SLAPP STATUTE.**

15 On October 20, 2020, the Court entered its Order in affirming the district
16 court’s ruling that Marcus cannot satisfy his burden under prong one of the anti-
17 SLAPP statute because FCGI’s causes of action are not based on any protected
18 conduct. See Order, on file herein. The Court also correctly declined to consider
19 Marcus’s argument that the district court was required to look at the “gravamen” of
20 FCGI’s claims because he raised this argument for the first time in his appellate reply
21 brief. See id. On December 23, 2020, the Court entered its Order Denying Rehearing
22 in response to Marcus’ Petition for Rehearing. See Order Denying, on file herein.

23 **C. FCGI’S CAUSES OF ACTION AGAINST MARCUS ARE NOT**
24 **BASED ON PROTECTED COMMUNICATIONS.**

25 Section 3.0 of Marcus’ Petition argues that the Court “failed to identify the
26 complained-of conduct or whether that conduct is protected.” To start, Section 3.0 of
27 the Petition does not identify any failure by the Court to follow existing precedent.
28 Instead, Marcus argues standards that do not exist. Based on Marcus’ argument in his
Petition, he is asserting the following non-existent standards: (1) abrogation of NRCF

1 8(a)'s notice pleading standard and instead arguing NRCP 9(b)'s particularity
2 pleading applies in anti-SLAPP matters (Petition at 7); and (2) requiring the non-
3 moving party under prong one of the anti-SLAPP analysis to come forth with
4 "evidence" of wrongful conduct by the moving party (Petition at 6-7). Marcus' entire
5 argument relies and falls on these non-existent standards. The Petition should be
6 denied on this basis alone.

7
8 Marcus argues that FCGI has not "set forth *evidence* of unprotected
9 racketeering conduct of Marcus". Petition at 6 (emphasis added). As noted, there is
10 no requirement under prong one of the anti-SLAPP statute for the non-moving party
11 to "set forth evidence". That analysis only occurs if prong two is triggered. And prong
12 two was not triggered here because the Court properly ruled that Marcus cannot meet
13 his initial burden to prove that the claims against him are based on his submission of
14 a declaration. Hence, the only consideration by the Court is whether the claims
15 against the moving party arise under protected activity. See NRS 41.660(3)(a); NRS
16 41.650; see also Omerza v. Fore Stars, Ltd., 455 P.3d 841, 2020 Nev. Unpub. LEXIS
17 96, *3 (Nev. Jan. 23, 2020) (unpublished); Navellier v. Sletten, 29 Cal.4th 82 (Cal.
18 2002). Marcus failed to meet his prong one burden.

19 Marcus then argues the Court's rulings in favor of FCGI are not proper since
20 "the mere inclusion of a racketeering cause of action does not absolve the plaintiff
21 from having to set forth *factual evidence* of conduct by the defendant believed to
22 support its claim of racketeering." Petition at 8-9 (emphasis added). Here again
23 Marcus incorrectly argues FCGI was required to "set forth factual evidence" under
24 prong one of the anti-SLAPP analysis. As correctly ruled by the district court and this
25 Court, FCGI's allegations and claims against Marcus are robust and are not the result
26 of Marcus' submission of a declaration in the case below.

27 The subject Third Party Complaint ("Complaint") is clear as to what FCGI is
28 alleging and claiming against Marcus. In total, FCGI makes the following claims

1 against Marcus and co-wrongdoers: Violation of 18 U.S.C. § 1962(b) (Fifth Claim
2 for Relief) (Vol. IV: AA0730); Racketeering under NRS 207.400(d) (Eighth Claim
3 for Relief) (Vol. IV: AA0750); for Securities Fraud & Perjury (Eleventh Claim for
4 Relief) (Vol. IV: AA0756); Inducing Lawsuit Pursuant to NRS 199.320 (Twelfth
5 Claim for Relief) (Vol. IV: AA0759); Abuse of Process (Thirteenth Claim for Relief)
6 (Vol. IV: AA0760); and Declaratory Relief as to FCGI's shareholders including
7 Marcus (Twenty-First Claim for Relief) (Vol. IV: AA0773).
8

9 Based on these claims, the Court correctly determined that Marcus is a
10 defendant in this action because he is alleged to have engaged in wrongdoing that
11 began before submitting his declaration in this case below – not because he submitted
12 a declaration. FCGI was not required to submit evidence of all of Marcus'
13 wrongdoing because the district court and this Court properly ruled that Marcus did
14 not satisfy his prong one burden under the anti-SLAPP statute.

15 The Court's Order does not – as argued by Marcus – abrogate existing
16 precedent by allowing a party to simply allege "racketeering" to allow courts to
17 "handwave" off an anti-SLAPP motion to dismiss. Petition at 9. While there may be
18 a scenario where a claim based on protected activity couched as a racketeering claim
19 may give rise to anti-SLAPP protections, that is not the case here where there are
20 multiple claims and allegations against Marcus and his co-wrongdoers that began
21 years before Marcus ever submitted a declaration in the case below. This reality
22 places Marcus on the same grounds as his co-defendants (and any other defendant in
23 any other case); so, the action must proceed through discovery and then adjudication
24 based on the evidence. Marcus does not get a free pass from that process simply
25 because he gave a declaration in the case below before being named as a party.

26 **D. MARCUS DID NOT MEET HIS PRONG ONE BURDEN.**

27 Section 4 of Marcus' Petition argues that Marcus met his burden under prong
28 one of the anti-SLAPP analysis. Marcus keys in on one paragraph of the Complaint

1 that mentions the false statements in Marcus' declaration (Vol. IV: AA701) – and
2 then argues every claim against him in the Complaint arises under that single
3 paragraph. Based on that faulty argument, Marcus maintains he satisfied prong one
4 of the anti-SLAPP analysis.
5

6 Actually, as set forth in the preceding section, there are multiple allegations as
7 to Marcus that have nothing to do with Marcus' subject declaration that were made
8 known to Marcus and explicitly mentioned in the Complaint. Vol. IV: AA0701.
9 There was also a 305-page Audit, Risk, and Compliance Committee report ("ARCC
10 Report of Brian Marcus") that was provided to Marcus and is referenced in the
11 Complaint; specifically, the ARCC Report of Brian Marcus was sent directly to
12 Marcus on January 10, 2018 in advance of filing any counterclaims or third-party
13 claims in hopes to mitigate the matters rather than litigate them. Vol. IV: AA071. The
14 Complaint references the ARCC Report of Brian Marcus instead of making or
15 attaching all 305 pages of additional allegations in to keep the already 200+ page
16 Complaint from being any longer. See generally Vol. IV: AA0569. The Complaint
17 refutes Marcus' argument that every allegation against him in the Complaint is
18 "based solely and entirely" on Appellant's declaration. Appellant's Brief at 14.

19 Without covering every detail in the lengthy Complaint, FCGI makes the
20 following general allegations as to Marcus:

- 21 ■ Marcus is a "self-certified accredited investor" who is "beyond skilled
22 in the relevant art of copyrighting, trademark and patent law with
23 regards to intellectual property" (Vol. IV: AA0700-701).
- 24 ■ Marcus invested into convertible notes of FCGI (Vol. IV: AA0701).
- 25 ■ Marcus' statement in his declaration that he did not know FCGI only
26 had a revocable license as to the subject intellectual property is a false
27 statement (Vol. IV: AA0701).
- 28 ■ Marcus invested not just once in FCGI, but three separate times (Vol.

1 IV: AA701).

- 2
- 3 ■ Marcus is acting in concert with other third-party defendants to
- 4 tortiously interfere with FCGI's rights (Vol. IV: AA0701).
- 5 ■ The ARCC Report of Brian Marcus detailed all of the non-compliance
- 6 events resulting from Marcus' conduct, which was sent to Marcus in
- 7 advance of filing any litigation giving the Marcus ample opportunity
- 8 mitigate instead of litigate these matters (Vol. IV: AA0701).
- 9 ■ Marcus was notified of wrongdoings in the ARCC Report of Brian
- 10 Marcus but never responded (Vol. IV: AA0701).
- 11 ■ Marcus worked and conspired with other third-party defendants to
- 12 "organize, manage, direct, supervise, or finance a criminal syndicate"
- 13 starting around October 2015 and continuing to the present, which main
- 14 purpose was to force FCGI's main principal to relinquish his corporate
- 15 positions and surrender his majority interest in FCGI and take and harm
- 16 intellectual property that benefitted FCGI and its other investors (Vol.
- 17 IV: AA0750).

18 These are the allegations upon which the district court and this Court have

19 rejected Marcus' prong one arguments. Seeking to invent a new standard, Marcus

20 argues that if an "Anti-SLAPP motion can be defeated by a plaintiff's general

21 allegations . . . the Anti-SLAPP statute is easily circumvented, simply by vague

22 pleadings." Petition at 11. But there is no heightened pleading requirement under the

23 anti-SLAPP statute or the Nevada Rules of Civil Procedure for such claims. For this

24 reason, the district court and this Court have properly ruled three times that FCGI's

25 allegations are sufficient and Marcus did not meet his prong one burden under FCGI's

26 claims and allegations.

27 Marcus cites Contreras v. Dowling, 5 Cal. App. 5th 394, 413-14 (Cal. Ct. App.

28 2016) for the proposition that conclusory allegations "have no legal significance"

1 under the anti-SLAPP statute. But that pronouncement is limited to the facts of that
2 case. Marcus does not inform the Court that the claims in Contreras involved claims
3 against an attorney where there were no allegations that the defendant attorney did
4 “anything outside the scope of normal, routine legal services.” 5 Cal. App. 5th at 413.
5 There, the failure to allege wrongful conduct by the defendant attorney was not
6 enough to support claims against the defendant attorney for conspiracy and aiding
7 and abetting. Id. Conversely, here, there is an abundance of allegations of
8 wrongdoing against Marcus far and beyond his “routine legal services” (including
9 making frivolous and ill-intentioned filings with the USPTO) or submission of a
10 declaration in the action.

11 Similarly, Marcus’ reliance on Omerza, *supra*, is misplaced. While Omerza
12 does declare that “mere allegations of intentional conduct” are not enough to preclude
13 a moving party from satisfying prong one of the anti-SLAPP statute, Marcus still had
14 the burden to establish that FCGI’s claims are based on Marcus’ submission of a
15 declaration in the action rather than his other wrongful conduct. As discussed
16 repeatedly herein, and as previously agreed by this Court, Marcus cannot meet that
17 burden because FCGI asserts multiple claims and allegations as to Marcus and his
18 co-wrongdoers that do not arise under Marcus’ submission of a declaration. There is
19 no precedent stating that a person may not be named in an action if that same person
20 previously submitted a declaration in the same action.

21 Marcus also argues that FCGI cannot establish the reason for its claims against
22 Marcus other than Marcus’ submission of his declaration. Petition at 13. In reality,
23 FCGI’s list of allegations and claims of wrongdoing against Marcus and his cohorts
24 is long and wide, as set forth above. That the allegations against Marcus are lumped
25 in with other co-wrongdoers does not negate the mountain of allegations against
26 Marcus. As also discussed above, Marcus’ claim that FCGI was required to “point to
27 the reason, supported with factual evidence in the pleadings” is not the standard under
28

1 prong one of the anti-SLAPP statute or NRCP 8. Petition at 13-14. Marcus' argument
2 of a non-existent heightened pleading standard in anti-SLAPP matters – or a standard
3 where the non-moving party is required to come forth with evidence under prong one
4 – is not supported by any precedent or law.
5

6 Marcus then launches into an attack on the supposed “evidence of conduct” in
7 FCGI's briefing. Petition 14-16. Marcus claims that FCGI's allegations are not
8 specific enough as to Marcus. But when FCGI provides specifics, including a specific
9 reference to a report referenced in the Third-Party Complaint that details the non-
10 compliance issues caused by Marcus' conduct, Marcus argues those specifics are not
11 sufficient or are deficient. Marcus cannot have it both ways.¹ Prong one analysis is
12 not the place to argue the evidence. These arguments should be made at the district
13 court level on a motion to dismiss, motion for summary judgment, or trial. Marcus
14 cannot identify how the Court erred in reviewing the substantial allegations against
15 Marcus and his cohorts and determining that the claims do not arise under Marcus
16 declaration. Thus, this argument falls short.

17 Paradoxically, Marcus cites to portions of FCGI's briefings in the case below
18 as “evidence of conduct in FCGI's briefs” but then maintains that such statements
19 “are not admissible evidence.” Petition at 14-15. Next, Marcus cherry-picks from
20 FCGI's opposition brief in the case below to make it appear FCGI is only pursuing
21 Marcus for actions that Marcus argues is protected. In actuality, FCGI's opposition
22 brief is clear that the claims against Marcus are because FCGI has “significant
23 information that demonstrates Marcus' direct involvement in the conspiracy and
24

25 ¹ Marcus' citation to the ARCC Report, see Petition at 17, and naked assertions of
26 what the ARCC Report supposedly states, is entirely improper and that portion of
27 the Petition should be disregarded. The ARCC Report is not part of the appellate
28 record. And there is an entire paragraph on Petition at 17 where Marcus characterizes
the content of the ARCC Report without citation to any record.

1 racketeering allegations . . . directed against other investors who have joined the
2 lawsuit . . . and has been since April 2017.” Vol. V: AA927.

3
4 Here are more specifics from the briefing:

5 As further explained below, since April, 2017, Marcus has had multiple
6 conversations with FCGI, its principals and officers garnering
7 confidential and proprietary information from under the guise of
8 feigning interest in continuing investment in the Full Color IP through
9 Full Color Games Group, Inc. (“FCGG”). Instead of investing, Marcus
10 appears to have been gathering information [to] support Munger and
11 the others to work against them. What makes Marcus’ actions all the
12 more heinous, are the facts that Marcus is a self-admitted expert in
13 domestic and international intellectual property law, intellectual
14 property licensing, venture capital funding of intellectual property and
15 above all, owns a law firm whose specialty is engaging in the due
16 diligence process upon behalf of clients to formally determine the full
17 investment value of disruptive copyrights, trademarks and patents (such
18 as Mahon’s inventions in the Full Color IP) making it seem odd that
19 Marcus would not know or understand the licensing structure that
20 Mahon had employed with FCGI. FCGI also believes that Marcus is
21 assisting Munger as a ghostwriter in filing all of the legal briefs in the
22 Notice of Opposition in his continued efforts to tie up the Full Color IP
23 in litigation both in this action and before the United States Patent and
24 Trademark Officer (“USPTO”). Vol. 5: AA0928.

25 Moreover, FCGI’s counsel told the district court at oral argument that there is
26 evidence of Marcus’ wrongdoing sufficient to make claims against Marcus along
27 with his cohorts and conduct discovery on those claims. Here is what counsel stated
28 at the hearing:

29 We have made it clear that we’re not seeking liability against Marcus for
30 a specific submission of a declaration to this Court. That’s not what we’re
31 seeking liability for in this case. We did allege it, as background to that.
32 But the things that we believe have been good-faith alleged against
33 Marcus is that he was in support of all the actions that Munger has been
34 alleged to have completed before he even submitted that declaration. Vol.

1 VI: AA1070.

2
3 [O]ur allegations are based on things that we believe he did before he
4 even submitted this declaration [and] he is supporting all of the
5 racketeering allegations we made against [Marcus's cohorts]. Vol. VI:
6 AA1072.

7 Based on this argument in the case below, it is inaccurate for Marcus to argue
8 that FCGI's claims are based on his act of submitting a declaration in the case below.
9 A wrongdoer is not protected by the anti-SLAPP statute simply because the
10 wrongdoing may have occurred as part of – or concurrent with – an ongoing lawsuit.
11 There is no authority or precedent for Marcus' argument.²

12 **E. THE CLAIMS FOR ABUSE OF PROCESS, INDUCING A LAWSUIT
13 AND PERJURY ARE NOT PROTECTED CONDUCT.**

14 Marcus asserts that FCGI's claims for abuse of process, inducing a lawsuit,
15 and perjury "by their definition, satisfy the first prong of the SLAPP analysis." See
16 Petition at 21. This argument is made without citation to the record or analysis of
17 these claims.

18 Even a cursory review of these claims refutes Marcus' argument. The perjury
19 claim, which was a claim for "Securities Fraud & Perjury – Violation of Nevada
20 Racketeering Statute (N.R.S. § 90.570)" and named twelve total individuals
21 including Marcus, has been voluntarily dismissed in the case below for reasons

22 ² Marcus misrelies on Patin v. Ton Vinh Lee, 429 P.3d 1248, 1251 (2018); Contreras
23 v. Dowling, 5 Cal. App. 5th 394, 413-14 (Cal. Ct. App. 2016); and Bergstein v.
24 Stroock & Stroock & Lavan LLP, 236 Cal.App.4th 793, 811 (2015). Those cases do
25 not stand for the proposition that the anti-SLAPP statute protects an attorney who is
26 not representing a client and self-servingly uses his position as an attorney to make
27 wrongful and frivolous public filings to tie up the intellectual property of a company
28 in which he is working with others to harm. This is what is alleged here by FCGI.
Again, contrary to Marcus' position, the anti-SLAPP statute is not a silver bullet to
protect from wrongdoing.

1 unrelated to the anti-SLAPP statute. Vol. V: AA0756-759. Nonetheless, this claim
2 did not reference Marcus' declaration.
3

4 Marcus also characterizes FCGI's inducing a lawsuit claim as arising under
5 Marcus' declaration. In reality, FCGI's full claim is: "Inducing lawsuit pursuant to
6 N.R.S. § 199.320," which arises under Nevada's RICO statute and names twelve total
7 defendants including Marcus. Vol. V: AA0760. FCGI alleges that these twelve
8 defendants together "instigated, incited and encouraged each other to bring a false
9 lawsuit . . . to carry out their extortion" of FCGI and its principal, David Mahon, and
10 that these twelve defendants have succeeded in preventing FCGI from reaching
11 revenue. VOL V: AA0759-0760. This claim does not mention Marcus' declaration.

12 Marcus also characterizes FCGI's claim for abuse of process as arising under
13 Marcus's declaration. In fact, FCGI's "Abuse of Process" claim is against twelve
14 total defendants including Marcus. Vol. V: AA0760. FCGI alleges: "The defendants
15 named in that claim have made it unequivocally clear that their purpose was to extort
16 MAHON and the Counter-claimants out of their property rights in forcing him to step
17 down as the CEO and sole Director of FCGI, give 100% of his stock to the Counter-
18 Defendants, turn over all of his trade secrets and be forced into indentured servitude
19 or face a tortuous litigation if Mahon did not comply." Vol. V: AA00761. There is
20 no mention of Marcus' declaration.

21 This review of FCGI's claims refutes Marcus' assertion that "it is undeniable
22 that each of these causes of action are directly and by definition based on [Marcus']
23 petition the court in the underlying shareholder lawsuit," and that the "Opinion of the
24 Court did not address these causes of action." Petition at 22. That is not accurate. In
25 its Order, the Court correctly recognized that these claims do not arise under Marcus'
26 declaration because "FCGI's third-party complaint also alleges claims based on
27 actions other than Marcus submitting his signed declaration." Order at 2. "For
28 example, the third-party complaint also alleges that Marcus participated in a

1 racketeering enterprise with other shareholders.” Order at 2-3.

2 **F. THE COMPLAINT IS NOT BASED ON PROTECTED SPEECH.**

3 The Court’s rulings have been clear that FCGI’s claims against Marcus do not
4 arise under prong one of the anti-SLAPP statute. Section 6.0 of Marcus’ Petition
5 argues that if there is a mix of protected and unprotected speech, the causes of action
6 based on the protected speech should be dismissed. That is not applicable here
7 because there is no mix of protected and unprotected conduct. But if there were,
8 Marcus is barred from making the “gravamen” approach argument. The Court has
9 already ruled that Marcus may not raise this argument since Marcus raised it for the
10 first time in his reply brief. See Order at 2, n. 2.

11
12 **V.**

13 **CONCLUSION**

14 Marcus’ argument boils down to the flawed position that the anti-SLAPP
15 statute bars any claims against a person who submitted a declaration in a case before
16 being named as a party in that case. But that is not the result intended by the anti-
17 SLAPP statute. The anti-SLAPP statute was intended to protect against retaliation for
18 participation in public matters. Prior public participation is not a shield against
19 allegations of other wrongful acts.

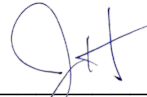
20 The district court and this Court correctly rejected that approach because the
21 face of FCGI’s pleadings is clear that the claims against Marcus are not retaliatory
22 for the declaration – they are actually based on Marcus’ wrongful acts that he
23 committed with others ultimately harming FCGI and its principal, David Mahon,
24 most of which was before Marcus submitted his declaration.

25 Marcus raised no plausible argument in his Petition that the Court failed to
26 “secure or maintain uniformity of decisions” or has made rulings against a “public
27 policy issue”. NRAP 40A(a). The Court’s Order correctly ruled that Marcus did not
28

1 satisfy prong one of the anti-SLAPP statute because FCGI asserts multiple claims
2 against Marcus that are not retaliatory for Marcus's providing a declaration in the
3 case below. Therefore, the Court should deny the Petition and affirm its Order and
4 the order of the district court.
5

6 Dated this 18th day of February 2021.

7 HOGAN HULET PLLC

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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)(4)-(6) and (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 4,482 words as counted by Microsoft Word.

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 18th day of February 2021.

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CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hulet, Esq., hereby certifies that on the 18th day of February 2021, 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 upon all counsel of record using the Nevada Supreme Court's electronic filing system.



JEFFREY HULET, ESQ.