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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

LHF Productions, Inc.,

Plaintiff

v.

Brian Kabala, et al.,

Defendants

Case No.: 2:16-cv-02028-JAD-NJK

**Order Dismissing All Claims  
and Closing Case**

[ECF Nos. 120, 136, 174, 175, 178]

9 Two years ago, LHF Productions, Inc. filed this action for copyright infringement against  
10 several unidentified doe defendants,<sup>1</sup> alleging that they had used BitTorrent software to illegally  
11 download the film *London Has Fallen*.<sup>2</sup> LHF eventually identified those defendants and  
12 systematically dismissed all claims against them after settling with or failing to serve them;<sup>3</sup>  
13 Brian Kabala was one of those defendants. Kabala then counterclaimed against LHF for a  
14 declaration of non-infringement and for abuse of process.<sup>4</sup>

15 After a round of dismissal-motion briefing, I found that LHF had failed to demonstrate a  
16 basis to dismiss Kabala's declaratory-judgment counterclaim, but I dismissed Kabala's abuse-of-  
17 process counterclaim with leave to amend it.<sup>5</sup> Kabala amended his counterclaim (re-alleging  
18 both claims), and LHF moved to dismiss once again.<sup>6</sup> But before I could resolve that dismissal  
19 motion, LHF filed a separate special motion to dismiss under Nevada's anti-SLAPP statute, NRS  
20 § 41.660.<sup>7</sup> After considering the parties' arguments for each motion, I find that LHF has shown

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22 <sup>1</sup> ECF No. 1.

23 <sup>2</sup> *Id.*

24 <sup>3</sup> ECF Nos. 10, 14, 39, 43, 69, 72, 79, 83.

25 <sup>4</sup> ECF No. 22.

26 <sup>5</sup> ECF No. 90 at 14–15.

27 <sup>6</sup> ECF No. 120.

28 <sup>7</sup> ECF No. 136.

1 that Kabala’s counterclaims should be dismissed as a matter of law. So, I dismiss both  
2 counterclaims and close this case.

### 3 Discussion

#### 4 A. Kabala’s request for declaratory relief is dismissed.

5 Under the Declaratory Judgment Act, a potential defendant may sue preemptively for  
6 declaratory relief if the claim that would be asserted against him arises under federal law.<sup>8</sup>  
7 Because courts may not render advisory opinions based on hypothetical facts,<sup>9</sup> there must be an  
8 actual controversy between the parties before a federal court may exercise jurisdiction. For an  
9 actual controversy to exist in a declaratory-judgment action, there must be a “substantial  
10 controversy, between parties having adverse legal interests, of sufficient immediacy and reality  
11 to warrant the issuance of a declaratory judgment.”<sup>10</sup> An adverse legal interest requires a dispute  
12 about a legal right—for example, an underlying legal cause of action that the declaratory  
13 defendant could have brought or threatened to bring.<sup>11</sup> This requirement persists through all  
14 stages of litigation, not just when the complaint is filed.<sup>12</sup>

15 In order to prevail on his declaratory-judgment counterclaim, Kabala must prove that he  
16 has a “real and reasonable apprehension” of future suit that gives rise to an actual controversy  
17 between himself and LHF.<sup>13</sup> But LHF doesn’t have any claims pending in this case; it  
18 voluntarily dismissed all of its claims against all defendants, including Kabala,<sup>14</sup> and it now

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19 <sup>8</sup> *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983); *Nationwide Mut.*  
20 *Ins. Co. v. Liberatore*, 408 F.3d 1158, 1162 (9th Cir. 2005).

21 <sup>9</sup> *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

22 <sup>10</sup> *Id.* at 942 (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

23 <sup>11</sup> *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

24 <sup>12</sup> *Aetna*, 300 U.S. at 241.

25 <sup>13</sup> *Societe*, 655 F.2d at 944.

26 <sup>14</sup> See ECF Nos. 87 (dismissing claims against Ante Soda); ECF No. 90 (court severing and  
27 dismissing claims against Donald Plain and John Koehly); 72 (dismissing claims against Brian  
28 Kabala); 43 (dismissing claims against Maria Gonzalez and Daniel O’Connell); 39 (dismissing  
claims against Matthew Stewart); 24 (dismissing claims against David Poor and Aaron  
Takahashi); 10 (dismissing claims against Agustin Bertolin).

1 requests that the dismissal of its claims against Kabala be *with prejudice*.<sup>15</sup> Kabala requests a  
2 declaration of non-infringement to preclude LHF from refiling claims against him. In light of  
3 LHF’s voluntary-dismissal-with-prejudice motion, that concern is moot. So, I dismiss Kabala’s  
4 declaratory-judgment claim.

5 **C. Kabala’s abuse-of-process claim is dismissed.**

6 SLAPP (Strategic Lawsuits Against Public Participation) lawsuits abuse the judicial  
7 process by chilling, intimidating, and punishing individuals for their involvement in public  
8 affairs.<sup>16</sup> To curb these oppressive lawsuits, Nevada’s legislature adopted anti-SLAPP laws that  
9 immunize protected speakers from suit. Codified at NRS 41.660 et seq., Nevada’s anti-SLAPP  
10 statutes permit a defendant to bring a special motion to dismiss an action “brought against a  
11 person in furtherance of the right . . . to free speech in direct connection with an issue of public  
12 concern.”<sup>17</sup> This procedural mechanism “filters unmeritorious claims in an effort to protect  
13 citizens from costly retaliatory lawsuits arising from their right to free speech under both the  
14 Nevada and Federal Constitutions.”<sup>18</sup>

15 The Nevada Supreme Court clarified the parties’ burdens when litigating a special motion  
16 under Nevada’s anti-SLAPP statute in *Delucchi v. Songer*.<sup>19</sup> The moving party must first  
17 establish by a preponderance of the evidence that the claim challenges a “good faith  
18 communication in furtherance of the right . . . to free speech in direct connection with an issue of  
19 public concern.”<sup>20</sup> The defendant’s conduct is a good-faith communication if it falls within one  
20 of the four categories enumerated in NRS 41.637 and “is truthful or is made without knowledge  
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22 <sup>15</sup> ECF No. 174.

23 <sup>16</sup> *John v. Douglas Cty. Sch. Dist.*, 219 P.3d 1276, 1281 (Nev. 2009); *Moreira-Brown v. Las*  
24 *Vegas Review-Journal, Inc.*, 2017 WL 4158604, at \*5 (D. Nev. Sept. 18, 2017).

25 <sup>17</sup> NEV. REV. STAT. § 41.660(1)(a).

26 <sup>18</sup> *John*, 219 P.3d at 1282.

27 <sup>19</sup> *Delucchi v. Songer*, 396 P.3d 826 (Nev. 2017).

28 <sup>20</sup> *Moreira-Brown*, 2017 WL 4158604, at \*5 (quoting NEV. REV. STAT. § 41.660(3)(a)).

1 of its falsehood.”<sup>21</sup> The burden then shifts to the plaintiff to establish “by clear and convincing  
2 evidence a probability of prevailing on the claim.”<sup>22</sup> If the district court determines that the  
3 plaintiff has shown by clear and convincing evidence a likelihood of succeeding on the merits,  
4 the plaintiff may proceed with its claim.<sup>23</sup> But if the court grants the special motion to dismiss,  
5 “the dismissal operates as an adjudication upon the merits.”<sup>24</sup>

6 ***1. Kabala’s abuse-of-process claim challenges a protected communication.***

7 LHF argues that its complaint and pre-filing correspondence (including demand letters)  
8 with Kabala are protected speech because they fall under one of the anti-SLAPP statute’s four  
9 enumerated categories: a “[w]ritten or oral statement made in direct connection with an issue  
10 under consideration by a legislative, executive[,] or judicial body, or any other official  
11 proceeding authorized by law.”<sup>25</sup> LHF supports this argument with citations to several  
12 California cases that interpret California’s anti-SLAPP statute—which is similar to Nevada’s<sup>26</sup>—  
13 to protect complaints, declarations, demand letters, settlement negotiations, and other  
14 communicative acts.<sup>27</sup> Kabala encourages me to disregard LHF’s California citations,<sup>28</sup> but the  
15 Nevada Supreme Court has repeatedly recognized the similarity between these anti-SLAPP

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19 <sup>21</sup> *Delucchi*, 396 P.3d at 833 (quoting NEV. REV. STAT. § 41.637).

20 <sup>22</sup> *Id.* at 831.

21 <sup>23</sup> *Id.*

22 <sup>24</sup> NEV. REV. STAT. § 41.660(5).

23 <sup>25</sup> ECF No. 136 at 5; NEV. REV. STAT. § 41.637(3).

24 <sup>26</sup> Compare CAL. CIV. PROC. CODE § 425.16(e)(2) with NEV. REV. STAT. § 41.637(3); see also  
25 *Shapiro v. Welt*, 389 P.3d 262, 268 (Nev. 2017) (“Because this court has recognized that  
26 California’s and Nevada’s anti-SLAPP ‘statutes are similar in purpose and language,’ we look to  
California law for guidance on this issue.”) (internal citation omitted).

27 <sup>27</sup> ECF No. 136 at 6–8.

28 <sup>28</sup> ECF No. 140 at 6 n.2

1 statutes and looked to California for guidance in this area.<sup>29</sup> So, I give those California cases  
2 considerable weight.

3 Kabala adds that LHF's assertion of statutory protection is one made "barely in passing,"  
4 that LHF fails to "suggest which of its communications fit" within NRS 41.637(3), and that "the  
5 underlying communications undertaken in [a] judicial proceeding" are not covered by this  
6 statute.<sup>30</sup> To hold otherwise, Kabala urges, "would encourage countless litigants to file Anti-  
7 SLAPP motions," which is "clearly not the intention of the Nevada legislature."<sup>31</sup> Kabala adds  
8 that "recent Nevada Supreme Court holdings suggest that LHF misapprehends the plain language  
9 of that statute," but supports this contention with three federal district court cases and a single  
10 Nevada Supreme Court case with a conclusory parenthetical that reads: "reversing grant of anti-  
11 SLAPP motion where communication at issue was not a protected communication."<sup>32</sup>

12 Plus, the parenthetical is wrong. The Court did not reverse the lower court's grant of an  
13 anti-SLAPP motion because the communication wasn't protected; it reversed because, although  
14 the movant "made the required initial showing" that the communication at issue was protected,  
15 the non-movant "presented sufficient evidence to defeat [the movant's] special motion under the  
16 [pre-amendment] summary judgment standard."<sup>33</sup> So the Court remanded the case because there  
17 was a "genuine issue for trial regarding whether the [communication at issue] was" protected.<sup>34</sup>

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19 <sup>29</sup> See, e.g., *Shapiro*, 389 P.3d at 268; *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276, 1281  
(Nev. 2009) *superseded by statute in Delucchi*, 396 P.3d 826; *Delucchi*, 396 P.3d at 832.

20 <sup>30</sup> ECF No. 140 at 5. Kabala's minimization of LHF's assertion as one made "barely in passing"  
21 is disingenuous. LHF supports its assertion with three pages of detailed analysis with persuasive  
22 authority from California courts interpreting a similar anti-SLAPP provision. See ECF No. 136  
at 5–8.

23 <sup>31</sup> *Id.* at 6.

24 <sup>32</sup> *Id.* (citing to *Chocolate Magic Las Vegas LLC v. Ford*, case no. 2:17-cv-00690-APG-NJK,  
25 2018 WL 475418 (D. Nev. Jan. 17, 2018); *Moreira-Brown v. Las Vegas Review Journal, Inc.*,  
26 case no. 2:16-cv-0220-JAD-VCF, 2017 WL 4158604 (D. Nev. Sept. 18, 2017); *Delucchi v.*  
*Songer*, 396 P.3d 826, (Nev. 2017); *Drussel v. Elko Cnty. Sch. Dist.*, 2013 WL 3353531 (D. Nev.  
July 2, 2013)).

27 <sup>33</sup> *Delucchi*, 396 P.3d at 833–34.

28 <sup>34</sup> *Id.* at 834.

1 The federal district court cases are equally unavailing. In *Chocolate Magic*, Judge  
2 Gordon addressed whether a communication was one made “in direct connection with an issue of  
3 public interest in a place open to the public or in a public forum.”<sup>35</sup> The parties didn’t argue—so  
4 he didn’t address—whether it was a “[w]ritten or oral statement made in direct connection with  
5 an issue under consideration by a legislative, executive[,] or judicial body, or any other official  
6 proceeding authorized by law.”<sup>36</sup> In *Moreira-Brown*, I held that an article reporting on a case  
7 against a lawyer who was accused of rape was “a written statement in direct connection with an  
8 issue under consideration by a judicial body.”<sup>37</sup> I did not consider whether a complaint and pre-  
9 filing correspondence were also protected by Nevada’s anti-SLAPP laws—I certainly didn’t  
10 foreclose their protection. And the *Drussel* court didn’t even address whether a specific  
11 communication was protected; it merely allowed the non-movant “to conduct limited discovery”  
12 to oppose the anti-SLAPP motion.<sup>38</sup>

13 A “good faith communication in furtherance of the right to petition or the right to free  
14 speech in direct connection with an issue of public concern” includes any “[w]ritten or oral  
15 statement made in direct connection with an issue under consideration by a legislative, executive,  
16 or judicial body . . . .”<sup>39</sup> The statute has no temporal requirement that only communications that  
17 come after the filing of a complaint are protected, and demand letters, settlement negotiations,  
18 and declarations are clearly “made in direct connection” with a complaint, which is “under  
19 consideration by a . . . judicial body.” LHF’s California authority also supports this notion.<sup>40</sup>

20 <sup>35</sup> *Chocolate Magic*, 2018 WL 475418, at \*2–3 (referring to one of the four definitions of a  
21 “good faith communication in furtherance of the right to petition or the right to free speech in  
22 direct connection with an issue of public concern”).

23 <sup>36</sup> *Id.*; NEV. REV. STAT. § 41.637(3).

24 <sup>37</sup> *Moreira-Brown*, 2017 WL 4158604, at \*6–8.

25 <sup>38</sup> *Drussel*, 2013 WL 3353531, at \*5.

26 <sup>39</sup> NEV. REV. STAT. § 41.637.

27 <sup>40</sup> See ECF No. 136 at 6–7 (citing *Crossroads Inv’rs, L.P. v. Fed. Nat’l Mortg. Ass’n*, 222 Cal.  
28 Rptr. 3d 1, 24 (2017) (“Settlement discussions made in connection with litigation are protected  
activity under the anti-SLAPP statute.”); *GeneThera, Inc. v. Troy & Gould Prof’l Corp.* 90 Cal.  
Rptr. 3d 218, 222–23 (2009) (“[A]n attorney’s communication with opposing counsel on behalf  
of a client regarding pending litigation directly implicates the right to petition and thus is subject

1 And because LHF offers two signed declarations—one from its counsel and another from a  
2 witness—that declare that the communications were truthful or made without knowledge of their  
3 falsehood, I find that LHF has made the requisite showing that its communications are protected.

4 **2. Kabala has not shown a probability of success on his abuse-of-process claim by**  
5 **clear and convincing evidence.**

6 LHF has satisfied its burden of showing that the communications at issue are protected  
7 under Nevada’s anti-SLAPP laws, so the burden shifts to Kabala to show by clear and  
8 convincing evidence a probability of success on his abuse-of-process claim. The two elements  
9 that Kabala must show are: (1) an ulterior purpose behind the issuance of process; and (2) a  
10 willful act in the use of process not proper in the regular conduct of the proceeding.<sup>41</sup> Kabala  
11 has not shown either.

12 **a. Kabala does not establish by clear and convincing evidence that LHF**  
13 **has an ulterior motive.**

14 Kabala argues that his burden is met if he presents prima facie evidence that his claims  
15 have “minimal merit.”<sup>42</sup> He supports this standard with an unpublished opinion from a Nevada  
16 state trial court and a handful of Ninth Circuit cases that predate the 2013 amendments to  
17 Nevada’s anti-SLAPP statute.<sup>43</sup> But Nevada’s Supreme Court recognized that the 2013  
18 amendments to Nevada’s anti-SLAPP law require the non-movant to show, by clear and  
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22 to a special motion to strike.”); *see also Sosa v. DirectTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006)  
23 (“Second, many states, including California, protect prelitigation communications under  
24 statutorily granted litigation privileges. [citations]. Such laws highlight the intimate relationship  
25 between presuit settlement demands and the actual litigation process.”)).

26 <sup>41</sup> *Nevada Credit Rating Bureau, Inc. v. Williams*, 503 P.2d 9, 12 (1972); *Bull v. McCuskey*, 615  
27 P.2d 957, 960 (1980); *Abbot v. United Venture Capital, Inc.*, 718 F. Supp. 828, 834–35 (D. Nev.  
28 1989).

<sup>42</sup> ECF No. 140 at 9.

<sup>43</sup> I was unable to find the state-trial-court opinion on WestLaw, and my own Google search was  
just as fruitless.

1 convincing evidence, a probability of success on the merits.<sup>44</sup> So, I apply the clear-and-  
2 convincing-evidence standard.

3         The Nevada Supreme Court has held that filing a complaint in order to coerce a nuisance  
4 settlement can constitute an ulterior purpose to satisfy the first element of an abuse-of-process  
5 claim if the plaintiff knows that he has no basis for the claim.<sup>45</sup> “In *Bull* [*v. McKuskey*], the  
6 Nevada Supreme Court upheld a jury award for abuse of process where the respondent’s  
7 attorney, knowing he had no basis for his claim, brought suit against a physician for medical  
8 malpractice with the ulterior purpose of coercing a nuisance claim settlement.”<sup>46</sup>

9         Though Kabala’s allegations may satisfy the low standard required to defeat a 12(b)(6)  
10 motion, they miss the higher standard of “clear and convincing” evidence to defeat this special  
11 motion. When faced with a special motion to dismiss—not merely a 12(b)(6) motion—the non-  
12 movant must present evidence; allegations alone are insufficient. Though a track record of filing  
13 complaints against hundreds of defendants and dismissing the lion’s share of them (as LHF has  
14 done) can be considered suspect, filing legitimate lawsuits with the hope of resolving them by  
15 settlement is not an improper use of the legal process.

16         There is no evidence that shows clearly and convincingly that LHF had no basis for its  
17 initial claims against Kabala. By Kabala’s own admission (and as my experience with  
18 BitTorrent cases has shown), LHF identifies specific defendants by connecting them to IP  
19 addresses that are (or have been) involved with torrenting its movies. The fact that LHF has not  
20 yet taken a claim to trial does not diminish the legitimacy of its motives, particularly when the  
21 vast majority of civil lawsuits never make it to trial.<sup>47</sup>

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23 <sup>44</sup> *Delucchi*, 396 P.3d at 827.

24 <sup>45</sup> *Bull*, 615 P.2d at 960.

25 <sup>46</sup> *Posadas v. City of Reno*, 851 P.2d 438, 445 (Nev. 1993) (citing *Bull*, 615 P.2d at 959–60).

26 <sup>47</sup> See John Barkai, et al., *A Profile of Settlement*, COURT REVIEW: THE JOURNAL OF THE  
27 AMERICAN JUDGES ASSOCIATION, Vol. 42, Iss. 3-4 (December 2006) available at  
28 <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1024&context=ajacourtreview>  
 (“[P]erhaps up to 97% of cases are resolved by means other than by trial.”).



1                   ***b. Kabala does not establish by clear and convincing evidence that LHF***  
2                   ***has committed an improper willful act.***

3                   The filing of a complaint, in and of itself, is generally not enough to support the second,  
4 willful-act element of an abuse-of-process claim.<sup>48</sup> The alleged improper act must be so lacking  
5 in justification that it loses its legitimate function as a reasonably justifiable litigation  
6 procedure.<sup>49</sup>

7                   The bulk of Kabala's abuse-of-process claim relies on his allegation that LHF threatens  
8 to file suit for the sole purpose of coercing settlements. Even if this is true, it's not an improper  
9 act for abuse-of-process purposes if there is a legal basis to support the claim. And Kabala has  
10 not shown that LHF had no justifiable basis for commencing this case against him. Because  
11 Kabala cannot show by clear and convincing evidence a probability of success on his abuse-of-  
12 process claim, I grant LHF's special motion to dismiss it. I do not reach LHF's litigation-  
13 privilege defense.

14                   **Conclusion**

15                   Accordingly, IT IS HEREBY ORDERED that LHF's motion to dismiss Kabala's  
16 counterclaims **[ECF No. 120] is GRANTED in part**, and LHF's special motion under NRS  
17 41.660 to dismiss Kabala's abuse-of-process counterclaim **[ECF No. 136] is GRANTED**. Both  
18 of Kabala's counterclaims are **DISMISSED with prejudice**. Counsel for LHF may file a  
19 separate application for fees and costs under NRS 41.670 that complies with Local Rule 54-14,  
20 and I will rule on it in the ordinary course.

21                   IT IS FURTHER ORDERED that LHF's motion to voluntarily dismiss with prejudice its  
22 claims against Kabala **[ECF No. 174] is GRANTED**.

23                   IT IS FURTHER ORDERED that all other pending motions **[ECF Nos. 175, 178] are**  
24 **DENIED as moot**.

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27 <sup>48</sup> *Abbott*, 718 F. Supp. at 834 (citing *Laxalt v. McClatchy*, 622 F. Supp. 737, 752 (D. Nev.  
1985); *Ging v. Showtime Entertainment, Inc.*, 570 F. Supp. 1080, 1083 (D. Nev. 1983)).

28 <sup>49</sup> *Momot v. Mastro*, 2010 WL 2696635, at \*4 (D. Nev. July 6, 2010).

1           The **Clerk of Court** is directed to **ENTER JUDGMENT accordingly and CLOSE**  
2 **THIS CASE.**

3           Dated: August 23, 2018



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6 U.S. District Judge Jennifer A. Dorsey

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