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EFILED 06/21/24 10:04 AM CASE NO. 24C869 Joseph P. Day, Clerk

IN THE EIGHTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

THE CONGRESS GROUP, INC., SECOND AVENUE NASHVILLE PROPERTY, LLC, CENTRUM REALTY AND DEVELOPMENT, AND CRD 2ND AVENUE OWNER, LLC,	§	
Plaintiffs,	§	
v.	§	Case No.: 24C869
STEVEN SNYDER, H. ANDREW DECKER, AND R. GREGORY BREETZ,	§	
Defendants.	§	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS AND TENN. CODE ANN. § 20-17-104(a) PETITION TO DISMISS THE PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO THE TENNESSEE PUBLIC PARTICIPATION ACT

I. INTRODUCTION

This is a Strategic Lawsuit Against Public Participation—better known as a "SLAPP suit"[1]—filed by wealthy real estate developers against the leading critics of two of the Developers' proposed developments in Nashville. As the Tennessee Court of Appeals has explained, "[t]he paradigm SLAPP suit is 'one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.'" *Nandigam Neurology, PLC*, 639 S.W.3d at 658

[1] *See Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 657 (Tenn. Ct. App. 2021) ("The term 'SLAPP' stands for 'strategic lawsuits against public participation,' meaning lawsuits which might be viewed as 'discouraging the exercise of constitutional rights, often intended to silence speech in opposition to monied interests rather than to vindicate a plaintiff's right.'" (citing Todd Hambidge, et al., *Speak Up. Tennessee's New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights*, 55 TENN. B.J. 14, 15 (Sept. 2019))), *no app. filed.*

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(cleaned up). This case is that "paradigm SLAPP suit." *Id.*

Though obfuscated by the excessive emphasis littered throughout the Developers' Amended Complaint, this case is simple. The defendants are three Nashville residents and concerned citizens. The Concerned Citizens had understandable concerns about the Developers' proposed developments on two sites in their immediate neighborhood, one of which was to be built across the street from the Concerned Citizens' condominium building, and the other of which was to be built a block away. The Developers specifically sought to build three 26-story, 32-story, and 18-story buildings vastly in excess of the height limitations contemplated by the Downtown Code. Amended Compl. at ¶ 15. The Concerned Citizens' complaints about those proposed developments were thus stated clearly: they "will allow building heights over the currently permissible limit, will negatively affect their property values, interfere with their use and enjoyment of their property, and destroy the character of the Rutledge Hill Neighborhood."[2]

Based on these concerns, the Concerned Citizens sought a determination of their legal rights regarding the Developers' proposed developments. Upon initial review, Davidson County Chancellor Anne Martin explained that she was "not unsympathetic to" the Concerned Citizens' concerns.[3] Chancellor Martin also agreed that "[i]t is difficult to understand what standards the Planning Commission and its staff are applying in approving these projects given how out of skew they are with the existing neighborhoods and the standards set out in" the Downtown Code.[4] Thus, although Chancellor Martin initially adjudicated the Parties' dispute favorably to the Developers, she added further

[2] **Ex. 1**, Final Order, Davidson Cnty. Chancery Court Case Nos. 22-1014-IV & 23-0159-III(IV) (Mar. 10, 2023) at 14.
[3] **Ex. 2**, Memo and Order, Davidson Cnty. Chancery Court Case Nos. 21-1077-II and 22-0017-II (May 2, 2022) at 21.
[4] *Id.*

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that she:

> [I]ssues this decision with some hesitation and shares the view of Commissioner Jeff Haynes, who commented at the 2nd and Peabody Project hearing as follows:
>
> > I think unless we pause on our bonus sites, our infrastructure as a city is not going to keep up in the core of our downtown. And if we do this project and then we continue down the Lafayette district, we're going to create an infrastructure problem. And I think as a city, especially in the core of our downtown, we've got to pause on triple the density of the bonus heights.[5]

After the Concerned Citizens appealed, their first attempt to secure a conclusive determination of their rights was stymied when the Developers strategically mooted the Concerned Citizens' appeal by obtaining a change in the zoning of the underlying properties while appeal was pending.[6] Thus, Chancellor Martin set aside her order, and the first round of litigation between the Parties did not terminate on the merits.[7] Because the Concerned Citizens' appeal was mooted "as a result of the developers," the Court of Appeals also assessed *the Developers* the costs of the Concerned Citizens' appeal.[8]

Though the Concerned Citizens did not ultimately secure the ruling they preferred, their second attempt to secure a determination of their rights was successful. That is because the "purpose of a declaratory judgment action is not to award affirmative relief, but '*to resolve a dispute, afford relief from uncertainty with respect to rights, status, and*

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[5] *Id.* at 22.
[6] **Ex. 3**, Order, *Snyder v. Metropolitan Nashville Planning Commission, et al.*, M2022-00722-COA-R3-CV (Apr. 27, 2023) ("the case was rendered moot by the actions of appellees Second Avenue Nashville Property, LLC, Centrum Realty and Development, and CRD 2nd Avenue Owner, LLC, in seeking and obtaining a change in the zoning as to the properties in dispute in this litigation. Because this case was rendered moot by their actions, thus necessitating the appellants' motion to voluntarily dismiss, costs are taxed against these appellees.")
[7] *Id.* ("In a March 29, 2023 order, the trial court granted the appellants' motion and set aside its prior final order, finding the case to be moot as a result of the developers, Centrum Realty and Development, CRD 2nd Avenue Owner, LLC, and Second Avenue Nashville Property, LLC, pursuing and obtaining new zoning for the properties that were subject to dispute.").
[8] *Id.*

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other legal relations.'" *Blackwell v. Haslam*, No. M2011-00588-COA-R3-CV, 2012 WL 113655, at *7 (Tenn. Ct. App. Jan. 11, 2012) (emphasis in original) (quoting *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005)). Thus, during the second round of litigation between the Parties, the Concerned Citizens succeeded in obtaining the relief from uncertainty they sought. The Developers were not required to do anything during that litigation, either. *Cf. Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008) ("'Declaratory judgments' are so named because they proclaim the rights of the litigants without ordering execution or performance.").

Angry that the Concerned Citizens applied to the judiciary to determine their rights, the Developers have now retaliated by suing the Concerned Citizens for over $200 million dollars. *See* Amended Compl. "Seldom is so ambitious a case filed on so slight a basis." *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 87 F.4th 315, 318 (6th Cir. 2023).

Here, all of the Developers' claims fail quickly on a host of grounds:

First, the Developers' abuse of process claims are time-barred by the one-year statute of limitations that governs them. Unlike malicious prosecution claims, "the accrual of a cause of action for abuse of process need not await the termination of an action in the claimant's favor." *Blalock v. Preston L. Grp., P.C.*, No. M2011-00351-COA-R3-CV, 2012 WL 4503187, at *7 (Tenn. Ct. App. Sept. 28, 2012). Instead, "a cause of action for abuse of process accrues from the termination of the acts complained of" and "**does not await completion of the case in which the wrongful use of process occurred[.]**" *Id.* (emphasis added).

Here, the Developers' Amended Complaint pleads that the relevant "acts complained of" are the Concerned Citizens' lawsuits. *See, e.g.*, Amended Complaint at 10,

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§ III (asserting that "Defendants Set Their Plan in Motion, Begin Filing (and Losing) Frivolous Lawsuits on a Serial Basis"); *id.* at ¶ 86 (complaining about "unjustified lawsuits"); *id.* (complaining about "Defendants' resulting lawsuits"); *id.* at ¶ 102 ("Defendants nevertheless filed another lawsuit in the Chancery Court."); *id.* at ¶ 107 (alleging that the Concerned Citizens "filed serial lawsuits"). The lawsuits at issue, however, were filed on October 28, 2021,[9] January 5, 2022,[10] July 25, 2022,[11] and February 3, 2023,[12] respectively. Thus, the Developers' abuse of process claims are time-barred, because this lawsuit was not filed until April 5, 2024.[13]

Second, the Developers' abuse of process claims fail on their merits because the Developers have not alleged an essential ingredient of an abuse of process claim: that the Concerned Citizens misused a court's power. "The gist of the tort of abuse of process is the misuse of **the court's** power." *Warwick v. Warwick*, No. E2011-01969-COA-R3-CV, 2012 WL 5960850, at *10 (Tenn. Ct. App. Nov. 29, 2012) (emphasis added) (cleaned up); *see also Montpelier v. Moncier*, No. E2016-00246-COA-R3-CV, 2017 WL 2378301, at *8 (Tenn. Ct. App. June 1, 2017) ("'[w]ithin the context of tortious abuse of process, process refers to times when the authority of the court is used.' . . . Here, we find no such improper use of the court's authority.") (internal citations omitted). Thus,

> A claim for abuse of process "normally rests on some writ, order, or command of the court in the course of a judicial proceeding." *Blalock*, 2012 WL 4503187, at *4 (quoting *Merritt–Chapman & Scott Corp. v. Elgin Coal,* Inc., 385 F. Supp. 17, 21 (E.D. Tenn. 1972)). "Such a claim, therefore, refers to times when the authority of the court is used for some improper purpose. *Id.* (citing *Rentea*, 2008 WL 1850911 at *4). The *Blalock* court noted that "[m]any kinds of process can lend themselves to misuse, including

[9] **Ex. 4**, Pet. for Writ of Certiorari, Davidson Cnty. Chancery Ct. Case No. 21-1077-II (Oct. 28, 2021).
[10] **Ex. 5**, Pet. for Writ of Certiorari, Davidson Cnty. Chancery Ct. Case No. 22-0017-II (Jan. 5, 2022).
[11] **Ex. 6**, Verified Compl. for Declaratory Judg., Davidson Cnty. Chancery Ct. Case No. 22-1014-IV (Jul. 25, 2022).
[12] **Ex. 7**, Compl. for Declaratory Judg., Davidson Cnty. Chancery Ct. Case 23-0159-IV (Feb. 3, 2023).
[13] Doc. 1, Compl. (Apr. 5, 2024).

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> attachment, execution, garnishment, sequestration proceedings, arrest of the person and criminal prosecution." Prosser and Keeton on Torts (5th ed. 1984), Ch. 21, *Abuse of Process* § 121." *Id.* at *4. "The gist of the tort of abuse of process is the misuse of the court's power." 1 Am. Jur. 2d § 5 (1994).

Id. at *6.

Here, the Developers have not even *alleged* a misuse of "the court's" power, whether by "attachment, execution, garnishment, sequestration proceedings, arrest of the person and criminal prosecution" or otherwise. *Id.* Indeed, the Developers boast that they "never even answered Defendants' complaint(s)." *See* Amended Compl. at ¶ 83.

Instead, the Developers' abuse of process claim is based on the mere "existence of the [Concerned Citizens'] Petitions" seeking declaratory relief. *Id.* at ¶ 40. The Concerned Citizens' Petitions had nothing to do with "*the court's* power" or "authority[,]" though. *Montpelier*, 2017 WL 2378301, at *6–8 (emphasis added). Thus, the Developers' abuse of process claims fail as a matter of law. *Cf. Amodio v. Ocwen Loan Servicing, LLC*, No. 3:18-CV-00811, 2018 WL 6727106, at *7 (M.D. Tenn. Dec. 21, 2018) ("The court does not find that the facts as alleged demonstrate a perversion of the tools of litigation.").

Third, the Developers cannot satisfy even the first element of a malicious prosecution claim: lack of probable cause to initiate the declaratory judgment action. "[I]n order to sustain an action for malicious prosecution, the plaintiff must show that the defendant **initiated** the prior lawsuit without probable cause." *Smith v. Kwik Fuel Ctr.*, No. E2005-00741-COA-R3CV, 2006 WL 770469, at *7 (Tenn. Ct. App. Mar. 27, 2006) (emphasis added). Thus, "[t]he relevant time for the existence of probable cause is 'at the time prosecution was initiated.'" *Leland v. Louisville Ladder Grp. LLC*, No. M2006-02109-COA-R3-CV, 2007 WL 4440923, at *4 (Tenn. Ct. App. Dec. 5, 2007) (cleaned up).

Given this context, the dispositive question is whether the Concerned Citizens'

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position in the relevant declaratory judgment action was "remotely susceptible" to being accepted. *Buffalo Wild Wings, Inc. v. BW-3 of Akron, Inc.*, 763 F. App'x 558, 565 (6th Cir. 2019). Here, the Developers' own complaint concedes that it was and acknowledges that outside observers perceived it that way. *See* Amended Compl. at ¶ 39 (alleging that "as a result of the pending litigation regarding the Developments, [the Developers] were unable to obtain financing" because "[n]o lender is going to front the necessary tens of millions of dollars for a project that is, at least on paper, susceptible to judicial cancellation."). This concession dooms the Developers' case. The Developers' malicious prosecution claims are time-barred and suffer from other fatal defects, too.

Fourth, the Developers' claim for Intentional Interference With Prospective Business Relationships seeks redress for the Concerned Citizens' alleged misuse of legal process. *See* Amended Compl. at ¶ 144 ("Through their illegal litigation tactics, Defendants intended to and did prevent the Congress Developers from obtaining that loan."); *id.* at ¶ 145 ("Defendants knowingly, intentionally, and improperly used those lawsuits to prevent the Congress Developers from obtaining a loan to finance the Second and Peabody Development"). But "[i]n Tennessee[,] there are **two** tort actions which may be brought to obtain redress for the alleged misuse of legal process by another: malicious prosecution and abuse of process." *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 555 (Tenn. 1999) (emphasis added); *see also Cordova v. Martin*, 677 S.W.3d 654, 659 (Tenn. Ct. App. 2023), *appeal denied* (Oct. 11, 2023) ("Malicious prosecution is one of **two** torts in Tennessee 'that may be brought to obtain redress for the alleged misuse of legal process by another.'") (quoting *Donaldson v. Donaldson*, 557 S.W.2d 60, 62 (Tenn. 1977)) (emphasis added). Intentional Interference With Prospective Business Relationships is not one of them.

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The Developers' claim for Intentional Interference With Prospective Business Relationships—which asserts that the Concerned Citizens used "illegal litigation tactics" to further ulterior motives—is thus nothing more than a reformulated version of their abuse of process claim. The gravamen rule also requires this Court to treat it that way. *See Rubbermaid-Maryville, Inc. v. Barber & McMurry, Inc.*, No. 03A01-9309-CV-00327, 1994 WL 45315, at *2 (Tenn. Ct. App. Feb. 15, 1994) (noting "the rule that, regardless of the allegations of the complaint, the Court looks to the factual basis for the cause of action to determine the complaint's gravamen"); *Gunter v. Lab'y Corp. of Am.*, 121 S.W.3d 636, 638 (Tenn. 2003) ("The determination of the gravamen of the complaint is a question of law which may be appropriately addressed in a motion to dismiss under Rule 12.02(6) of the Tennessee Rules of Civil Procedure."). As a result, the claim is time-barred for the reasons already identified above.

For these reasons and the many others detailed below, the Developers' Amended Complaint fails—in its entirety—to state a claim upon which relief can be granted. Further, even if it did not, all of the Developers' claims would have to be dismissed under the Tennessee Public Participation Act. Thus, the Defendants' Motion and Tennessee Public Participation Act Petition to dismiss the Plaintiffs' Amended Complaint should be **GRANTED**. Afterward, the Concerned Citizens should be awarded their reasonable attorney's fees, costs, and expenses. *See* Tenn. Code Ann. § 20-17-107(a)(1). Additionally, "to deter repetition of" the Developers' misconduct here, the Developers should be sanctioned. *See* Tenn. Code Ann. § 20-17-107(a)(2).

II. LEGAL STANDARDS

A. THE CONCERNED CITIZENS' MOTION TO DISMISS.

"A motion to dismiss a complaint for failure to state a claim pursuant to Rule

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12.02(6) of the Tennessee Rules of Civil Procedure asserts that the allegations in the complaint, accepted as true, fail to establish a cause of action for which relief can be granted." *Conley v. State*, 141 S.W.3d 591, 594 (Tenn. 2004). Generally, a motion to dismiss is resolved by examining the pleadings alone. *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn. 2010) (citing *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994)). This Court, however, may also consider "items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned . . . without converting the motion into one for summary judgment."[14] *W. Exp., Inc. v. Brentwood Servs., Inc.*, No. M2008-02227-COA-R3-CV, 2009 WL 3448747, at *3 (Tenn. Ct. App. Oct. 26, 2009) (quoting *Indiana State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. Feb. 19, 2009) (in turn quoting WRIGHT & MILLER, FED. PRAC. & PROC., CIV. § 1357, at 376 (3d ed. 2004), *app. denied* (Tenn. Aug. 24, 2009))), *no app. filed*. Thereafter, when—as here—a plaintiff "can prove no set of facts in support of the claim that would entitle the plaintiff to relief[,]" a defendant's motion to dismiss for failure to state a claim must be granted. *See Crews v. Buckman Lab'ys Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

B. THE TENNESSEE PUBLIC PARTICIPATION ACT.

The Tennessee Public Participation Act ("TPPA")—which Tennessee enacted in 2019 to deter, expediently resolve, and punish SLAPP-suits like this one—provides that "[i]f a legal action is filed in response to a party's exercise of the right of free speech, right

[14] "Tennessee law allows for judicial notice (TRE 201) of public records." *Indiana State Dist. Council of Laborers v. Brukardt,* No. M2007-02271- COA-R3-CV, 2009 WL 426237, at *9 (Tenn. Ct. App. Feb. 19, 2009) (citing Cohen, Shepard, and Paine, Tennessee Law of Evidence § 2.01[4][c] (5th ed.2005)). "Court records fall within the general rubric of facts readily and accurately determined." *State v. Nunley*, 22 S.W.3d 282, 288 (Tenn. Crim. App. 1999).

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to petition, or right of association, that party may petition the court to dismiss the legal action" subject to the specialized provisions of Tennessee Code Annotated §§ 20-17-104 and 20-17-105. *See* Tenn. Code Ann. § 20-17-104(a). The TPPA "provide[s] an additional substantive remedy to protect the constitutional rights of parties" that "supplement[s] any remedies which are otherwise available . . . under the Tennessee Rules of Civil Procedure." Tenn. Code Ann. § 20-17-109. As such, nothing in the Act "[a]ffects, limits, or precludes the right of any party to assert any defense, remedy, immunity, or privilege otherwise authorized by law[.]" *See* Tenn. Code Ann. § 20-17-108(4).

In enacting the TPPA, the Tennessee General Assembly forcefully established that:

> The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury. This chapter is consistent with and necessary to implement the rights protected by the Constitution of Tennessee, Article I, §§ 19 and 23, as well as by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent.

Tenn. Code Ann. § 20-17-102.

Substantively, the TPPA also provides, among other things, that:

1. When a party has been sued in response to the party's exercise of the right of free speech or the right to petition, he or she "may petition the court to dismiss the legal action" pursuant to Tennessee Code Annotated § 20-17-104(a);

2. "All discovery in the legal action is stayed" automatically by statute "until the entry of an order ruling on the petition" pursuant to § 20-17-104(d); and

3. "The court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals." *See* Tenn. Code Ann. § 20-17-106.

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A TPPA petition to dismiss "may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper." *See* Tenn. Code Ann. § 20-17-104(b). Under the TPPA, "[t]he petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association." *See* Tenn. Code Ann. § 20-17-105(a). Thereafter, the Court "shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action." *See* Tenn. Code Ann. § 20-17-105(b). Separately, "[n]otwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action." *See* Tenn. Code Ann. § 20-17-105(c). "If the court dismisses a legal action pursuant to a petition filed under this chapter, the legal action or the challenged claim is dismissed with prejudice." *See* Tenn. Code Ann. § 20-17-105(e).

III. FACTS

A. FACTS RELEVANT TO MOTION TO DISMISS.

1. Abuse of Process Claim

The Concerned Citizens initiated litigation against the Developers on October 28, 2021,[15] January 5, 2022,[16] July 25, 2022,[17] and February 3, 2023,[18] respectively. The Developers' abuse of process claim is based on the mere "existence of the [Concerned Citizens'] Petitions" seeking judicial relief. *See* Amended Compl. at ¶ 40. Thus, the

[15] **Ex. 4,** Pet. for Writ of Certiorari, Davidson Cnty. Chancery Ct. Case No. 21-1077-II (Oct. 28, 2021).
[16] **Ex. 5,** Pet. for Writ of Certiorari, Davidson Cnty. Chancery Ct. Case No. 22-0017-II (Jan. 5, 2022).
[17] **Ex. 6**, Verified Compl. for Declaratory Judg., Davidson Cnty. Chancery Ct. Case No. 22-1014-IV (Jul. 25, 2022).
[18] **Ex. 7**, Compl. for Declaratory Judg., Davidson Cnty. Chancery Ct. Case No. 23-0159-IV (Feb. 3, 2023).

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Developers assert that the Concerned Citizens' lawsuits themselves constituted an abuse of the legal process. *See* Amended Complaint at 10, § III (asserting that "Defendants Set Their Plan in Motion, Begin Filing (and Losing) Frivolous Lawsuits on a Serial Basis"); *id.* at ¶ 86 (complaining about "unjustified lawsuits"); *id.* (complaining about "Defendants' resulting lawsuits"); *id.* at ¶ 102 ("Defendants nevertheless filed another lawsuit in the Chancery Court."); *id.* at ¶ 107 (alleging that the Concerned Citizens "filed serial lawsuits"); *id.* at ¶ 119 (same).

The Developers do *not* assert any misuse of a court's power during the preceding litigation. *See generally* Amended Compl. Thus, the Developers do not allege that the Concerned Citizens misused a writ, order, or command of the court—for instance, an attachment, execution, garnishment, or sequestration proceedings—or abused discovery tools during the earlier proceedings. *Id.* To the contrary, the Developers boast that, during the preceding litigation, they "never even" had to "answer[] Defendants' complaint(s)." Amended Compl. at ¶ 83.

2. Malicious Prosecution Claim

The first round of litigation between the Parties concluded on April 27, 2023, by order of the Court of Appeals in Case No. M2022-00722-COA-R3-CV. **Ex. 3**, Order, *Snyder v. Metropolitan Nashville Planning Commission, et al.*, M2022-00722-COA-R3-CV (Apr. 27, 2023). The Court of Appeals' April 27, 2023 Order followed the Davidson County Chancery Court's unappealed March 29, 2023 Order, which "set aside its prior final order, finding the case to be moot as a result of the developers, Centrum Realty and Development, CRD 2nd Avenue Owner, LLC, and Second Avenue Nashville Property, LLC, pursuing and obtaining new zoning for the properties that were subject to dispute." *Id.* The Court of Appeals thus determined that "the case was rendered moot by the actions

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of appellees Second Avenue Nashville Property, LLC, Centrum Realty and Development, and CRD 2nd Avenue Owner, LLC, in seeking and obtaining a change in the zoning as to the properties in dispute in this litigation." *Id.* Further, "[b]ecause th[e] case was rendered moot by [the Developers'] actions, thus necessitating the appellants' motion to voluntarily dismiss, costs [were] taxed against [the Developers]." *Id.* The Concerned Citizens' appeal was not deemed frivolous. *See id.*

The second round of litigation between the Parties arose from a consolidated declaratory judgment action. The Davidson County Chancery Court entered its final order in the consolidated cases on March 10, 2023. *See* **Ex. 1**, Final Order, Davidson Cnty. Chancery Court Case Nos. 22-1014-IV & 23-0159-III(IV) (Mar. 10, 2023). Although the Davidson County Chancery Court did not rule in favor of the Concerned Citizens on the merits, it did find that the Concerned Citizens had "standing to pursue their claims." *Id.* at 14. In particular, the Davidson County Chancery Court determined:

> An action for declaratory judgment "is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action of county, city or other municipal legislative authority enacting or amending zoning legislation." *Fallin v. Knox Cty. Bd. Of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). Further, **Plaintiffs reside in close proximity to the Properties and have sufficiently alleged they will suffer harm from the Developments that is unique to them and not shared by the general public. Plaintiffs have alleged that the approval of the SP Applications, which will allow building heights over the currently permissible limit, will negatively affect their property values, interfere with their use and enjoyment of their property, and destroy the character of the Rutledge Hill Neighborhood.** The motion to dismiss for lack of standing and a private right of action is respectfully denied.

Id. (emphasis added).

The Concerned Citizens then appealed the Chancery Court's March 10, 2023 final order. The Court of Appeals adjudicated the Concerned Citizens' appeal in *Snyder v.*

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Second Ave. Nashville Prop., LLC, No. M2023-00498-COA-R3-CV, 2023 WL 7153694 (Tenn. Ct. App. Oct. 31, 2023). The Developers did not cross appeal. Thus, the Chancery Court's standing determination—as set forth in its March 10, 2023 order—was the final order as to the Concerned Citizens' standing.

The Concerned Citizens won the first issue presented in their appeal. *See id.* at *3–4 ("The Developers offer at most a conclusory defense of the trial court's ruling on the VPRA issue without providing any legal authority. Metro, alternatively, concedes that the trial court erred with regard to its analysis of the VPRA issue. . . . While the Developers here may have gained vested property rights upon the adoption of the ordinances, those vested rights themselves have no bearing on the Plaintiffs' ability to bring this lawsuit or to argue that the ordinances themselves violate the law."). As to the balance of the appeal: the Concerned Citizens' dispute with the Developers presented "a question of law, not fact." *Id.* at *4 ("Arguing for the invalidity of the SP zoning on this basis squarely presents this court with a question of law, not fact."). The Concerned Citizens did not convince the Court of Appeals to accept their preferred legal position. *Id.* at *4–7. They did, however, obtain a declaration of their rights that resolved the Parties' controversy. *Id.*

Thus, the Concerned Citizens' declaratory judgment action was not rejected—by *any* court—on the basis that any Concerned Citizen had failed to "'allege facts which show he has a real, as contrasted with a theoretical, interest in the question to be decided and that he is seeking to vindicate an existing right under presently existing facts.'" *Grant v. Anderson*, No. M2016-01867-COA-R3-CV, 2018 WL 2324359, at *5 (Tenn. Ct. App. May 22, 2018) (quoting *Burkett v. Ashley*, 535 S.W.2d 332, 333 (Tenn. 1976)). The Developers do not allege that any court order, stay, or other restriction precluded the Developers from moving forward with their proposed development while the Concerned Citizens' litigation

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was pending, either. *See generally* Amended Compl.

3. Intentional Interference With Prospective Business Relationships Claim.

The Congress Developers alone have sued for "Intentional Interference With Prospective Business Relationship[s]." *See* Amended Compl. at 39. The Congress Developers' claim for Intentional Interference With Prospective Business Relationships seeks redress for the alleged misuse of legal process. *See* Amended Compl. at ¶ 144 ("Through their illegal litigation tactics, Defendants intended to and did prevent the Congress Developers from obtaining that loan."); *id.* at ¶ 145 ("Defendants knowingly, intentionally, and improperly used those lawsuits to prevent the Congress Developers from obtaining a loan to finance the Second and Peabody Development"). The Congress Developers specifically assert that the Concerned Citizens used "illegal litigation tactics" to further ulterior motives. *Id.* at ¶¶ 142, 144.

When the Concerned Citizens commenced litigation against the Congress Developers, the Congress Developers had not obtained financing for the development at issue in this litigation. Instead, they were merely "in the process of obtaining financing" by "analyzing a variety of lending institutions and the loan terms offered by the same[.]" *Id.* at ¶ 142. But "[n]o lender is going to front the necessary tens of millions of dollars for a project that is, at least on paper, susceptible to judicial cancellation." Amended Compl. at ¶ 39. Thus, because, "on paper," the project was "susceptible to judicial cancellation," *id.*, the Developers assert that the Concerned Citizens "knowingly, intentionally, and improperly used those lawsuits to prevent the Congress Developers from obtaining a loan to finance the Second and Peabody Development[.]" *Id.* at ¶ 145.

The Congress Developers do not allege that the Concerned Citizens had any contact with any potential loan provider during this time. *See generally* Amended Compl. Nor

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do the Congress Developers allege that the Concerned Citizens encouraged any loan provider not to do business with the Congress Developers or otherwise interfered with any loan provider's independent determination not to loan the Congress Developers money. *Id.* The Developers do not allege that the Concerned Citizens directed any illicit action toward any lender, either. *Id.*

B. FACTS RELEVANT TO TENNESSEE PUBLIC PARTICIPATION ACT PETITION.

In a final order concerning the Concerned Citizens' standing that the Developers did not appeal, the Davidson County Chancery Court determined that:

> Plaintiffs reside in close proximity to the Properties and have sufficiently alleged they will suffer harm from the Developments that is unique to them and not shared by the general public. Plaintiffs have alleged that the approval of the SP Applications, which will allow building heights over the currently permissible limit, will negatively affect their property values, interfere with their use and enjoyment of their property, and destroy the character of the Rutledge Hill Neighborhood.

Ex. 1, Final Order, Davidson Cnty. Chancery Court Case Nos. 22-1014-IV & 23-0159-III(IV) (Mar. 10, 2023), at 14.

Based on these facts, the Concerned Citizens' declaratory judgment action was filed by multiple well-respected members of the bar in good standing and signed by those attorneys in accordance with Rule 11.[19] At no point in the preceding litigation did the Developers assert any violation of Rule 11.[20]

The Concerned Citizens had a bona fide legal dispute with the Developers and the Metropolitan Government of Nashville and Davidson County, the circumstances of which were detailed at length by the Court of Appeals in *Snyder*, 2023 WL 7153694, at *3–7. The legal dispute involved was complicated enough that the Concerned Citizens' opposing

[19] **Ex. 8**, Berry Decl., ¶¶ 2, 17, 33; **Ex. 9**, Bowen Decl., ¶¶ 2, 3, 7, 8.
[20] **Ex. 8**, Berry Decl., ¶ 34; **Ex. 9**, Bowen Decl., ¶ 9.

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parties disagreed about—and the trial court erred in adjudicating—central issues in it. *See id.* at *3–4 ("The Developers offer at most a conclusory defense of the trial court's ruling on the VPRA issue without providing any legal authority. Metro, alternatively, concedes that the trial court erred with regard to its analysis of the VPRA issue. . . . While the Developers here may have gained vested property rights upon the adoption of the ordinances, those vested rights themselves have no bearing on the Plaintiffs' ability to bring this lawsuit or to argue that the ordinances themselves violate the law.").

The Concerned Citizens sought in good faith the advice of competent counsel regarding their legal dispute and disclosed the material facts relevant to it.[21] Based on the facts involved, the Concerned Citizens' counsel concluded that the Concerned Citizens had a reasonable chance of success.[22] Thus, based on their advice to the Concerned Citizens, the Concerned Citizens' counsel commenced litigation on the Concerned Citizens' behalf.[23] The Concerned Citizens' counsel also made all strategic decisions in the litigation.[24]

Every factual statement that the Concerned Citizens made in the preceding litigation was true.[25] Further, every such statement was signed by well-respected attorneys who had affirmative obligations to make truthful statements.[26] No Rule 11 motion was ever filed in any of the preceding litigation.[27] Neither appellate decision issued in the Parties' preceding litigation determined that the Concerned Citizens' appeals

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[21] **Ex. 8**, Berry Decl., ¶¶ 11–18, 28–31; **Ex. 9**, Bowen Decl., ¶¶ 4–5.
[22] **Ex. 8**, Berry Decl., ¶¶ 30–33; **Ex. 9**, Bowen Decl., ¶ 15.
[23] **Ex. 8**, Berry Decl., ¶¶ 30–33; **Ex. 9**, Bowen Decl., ¶ 15.
[24] **Ex. 8**, Berry Decl., ¶ 32; **Ex. 9**, Bowen Decl., ¶ 6.
[25] **Ex. 8**, Berry Decl., ¶¶ 31, 33; **Ex. 9**, Bowen Decl., ¶ 10.
[26] **Ex. 8**, Berry Decl., ¶ 13; **Ex. 9**, Bowen Decl., ¶¶ 11–12.
[27] **Ex. 8**, Berry Decl., ¶ 34; **Ex. 9**, Bowen Decl., ¶¶ 9, 13.

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were frivolous, either.[28] Nor did any opposing party in either appeal even assert that the Concerned Citizens' appeals were frivolous.[29]

It is true that the Parties had one meeting—at the Developers' request—to discuss a potential settlement during the preceding litigation, which the Developers requested "as early as possible."[30] Notwithstanding their breach here, in advance of those settlement discussions, the Developers agreed that the discussions would be protected by both "Rule 408 and confidentiality" restrictions.[31] Furthermore, **the Developers told the Concerned Citizens' counsel that the "[p]roposal will be monetary[,]"**[32] which the Concerned Citizens' counsel then communicated to them:

From: Doug Berry <Doug.Berry@millermartin.com>
Sent: Monday, February 14, 2022 8:24 AM
To: Steven Snyder; Andrew Decker; R Gregory Breetz
Subject: Fwd: Message from LARRY PAPEL (6156645353)
Attachments: VoiceMessage.wav

I just returned this call. Papel confirmed what he says in the message. He also says we don't want Arthur there, because he's a hothead. Any agreement will have to be reduced to writing anyway and all parties would have to bind themselves, successors, assigns etc. He says no redesign will be proposed. Settlement proposal will be monetary. If you guys want to proceed, let me know if you want attorneys to be present. I'm agreeable to having this be clients only.

Sent from my iPhone

Begin forwarded message:

Douglas Berry

d (615) 744-8620
f (615) 744-8635
Suite 1010 | 401 Commerce Street | Nashville, TN 37219

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CONFIDENTIALITY NOTICE
The information contained in this e-mail message is legally privileged and confidential, and is intended only for the use of the addressee. If you are not the intended recipient, please be aware that any dissemination, distribution or copy of this e-mail is prohibited. If you have received this e-mail in error, please immediately notify us by reply e-mail and delete this message and any attachments. Thank you.

[33]

[28] **Ex. 8**, Berry Decl., ¶ 35; **Ex. 9**, Bowen Decl., ¶ 14.
[29] **Collective Ex. 10** (Appellees' Briefs in Tennessee Court of Appeals Case Nos. M2023-00498-COA-R3-CV and M2022-00722-COA-R3-CV.); *see also* **Ex. 8**, Berry Decl., ¶ 35; **Ex. 9**, Bowen Decl., ¶ 14.
[30] **Ex. 8**, Berry Decl, at Ex. B, pp. 3–4. ("Dean is willing to sit down with your clients to discuss settlement proposals. . . . [I]t makes sense to initiate any settlement discussions as early as possible.").
[31] **Ex. 8**, Berry Decl., ¶ 24; *see also id.* at Ex. B, p. 6 ("Confirmed on Rule 408 and confidentiality.")
[32] **Ex. 8**, Berry Decl., ¶ 22; *see also id.* at Ex. C, p. 1.
[33] **Ex. 8**, Berry Decl., at Ex. C, p. 1.

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The Developers did not present any proposal—financial or otherwise—to potentially settle the matter during the one meeting with the Concerned Citizens or at any time afterward, and they did not respond to any proposal made by the Concerned Citizens at the one meeting held at the Developers' request.[34] Thus—particularly when considered alongside the fact that the Developers have based this lawsuit in substantial part on the Concerned Citizens discussing a "monetary" proposal during the one meeting held at the Developers' request—it appears clear that the Developers' invitation to discuss settlement was simply an attempt to set up this lawsuit.

IV. ARGUMENT

A. THE DEVELOPERS' COMPLAINT FAILS TO STATE A COGNIZABLE CLAIM FOR RELIEF.

The Developers have asserted three categories of claims:

1. Abuse of Process claims;
2. Malicious prosecution claims; and
3. An Intentional Interference With Prospective Business Relationships claim.

As detailed below, all three claims must be dismissed for failure to state a claim upon which relief can be granted.

1. The Developers' abuse of process claims fail.

The Developers' abuse of process claims fail for failure to state a claim on two grounds: (a) they are time-barred; and (b) the Developers have failed to allege any abuse of judicial power. Thus, the Developers' abuse of process claims should be dismissed.

a. The Developers' abuse of process claims are time-barred.

"[A]buse of process and malicious prosecution are subject to different accrual

[34] **Ex. 8**, Berry Decl., ¶ 25.

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rules[.]" *Cordova*, 677 S.W.3d at 660. Thus, "'[u]nlike an action for malicious prosecution where a legal termination of the prosecution complained of is essential, in an action for abuse of process it is not necessary, ordinarily, to establish that the action in which the process issued has terminated unsuccessfully.'" *Id.* (quoting *Blalock*, 2012 WL 4503187, at *7 (in turn quoting *Hyde Const. Co. v. Koehring Co.*, 321 F. Supp. 1193, 1207 (S.D. Miss. 1969))). "'For this reason, a cause of action for abuse of process has been generally held to accrue, and the statute of limitations to commence to run, from the termination of the acts which constitute the abuse complained of, and **not from the completion of the action which the process issued.**'" *Id.* (cleaned up).

The significance of this distinction is that a litigant's decision "to continue" litigating a matter that a plaintiff contends is an abuse of process does not toll the statute of limitations through appeal. The Court of Appeals considered and rejected exactly that claim in *Blalock v. Preston L. Grp., P.C.*, 2012 WL 4503187, at *7. There, the Court of Appeals explained:

> Dr. Blalock argues that his complaint for abuse of process is timely, even under the one year statute of limitations, because the general rule is that the statute begins to run against a claim of abuse of process "from the termination of the acts which constitute the abuse complained of." 1 AM.JUR.2D, *Abuse of Process*, § 27 (1994). He reasons that it is an abuse of process for Preston to continue to prosecute Landlord's claim for money he has already paid, and that the abuse has not terminated, for it continues so long as Landlord's suit against him remains unresolved. He has not offered any authority that specifically endorses this suggested interpretation of the general rule.
>
> To the contrary, it is generally held that while a cause of action for abuse of process accrues from the termination of the acts complained of, it does not await completion of the case in which the wrongful use of process occurred[.]

Id.

Here, the Developers' Amended Complaint pleads that the relevant "acts

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complained of" are the Concerned Citizens' lawsuits. *See, e.g.*, Amended Complaint at 10, § III (asserting that "Defendants Set Their Plan in Motion, Begin Filing (and Losing) Frivolous Lawsuits on a Serial Basis"); *id.* at ¶ 86 (complaining about "unjustified lawsuits"); *id.* (complaining about "Defendants' resulting lawsuits"); *id.* at ¶ 102 ("Defendants nevertheless filed another lawsuit in the Chancery Court."); *id.* at ¶ 107 (alleging that the Concerned Citizens "filed serial lawsuits"); *id.* at ¶ 119 (same). But those lawsuits were filed on October 28, 2021,[35] January 5, 2022,[36] July 25, 2022,[37] and February 3, 2023,[38] respectively, and this lawsuit was not filed until April 5, 2024.[39] Thus, this lawsuit is time-barred, and the Developers' apparent misunderstanding that the Concerned Citizens' act of "continu[ing] to appeal" tolled the relevant statute of limitations is fatal to their abuse of process claims. *See id.* at ¶¶ 107, 119.

b. The Developers have failed to allege any abuse of judicial power.

"The gist of the tort of abuse of process is the misuse of **the court's** power." *Warwick*, 2012 WL 5960850, at *10 (emphasis added). As such, some misuse "involv[ing] the authority of the court" is required. *Id.* at *11 ("failing to disclose assets during the marital property division is not abuse of process because it does not involve the authority of the court. We therefore conclude that the complaint fails to state a cause of action for abuse of process."). This essential requirement has been emphasized by Tennessee's appellate courts over, and over, and over again. *See, e.g., Montpelier*, 2017 WL 2378301, at *5 ("Abuse of process 'only deals with perversions of the tools of litigation

[35] **Ex. 4,** Pet. for Writ of Certiorari, Davidson Cnty. Chancery Ct. Case No. 21-1077-II (Oct. 28, 2021).
[36] **Ex. 5,** Pet. for Writ of Certiorari, Davidson Cnty. Chancery Ct. Case No. 22-0017-II (Jan. 5, 2022).
[37] **Ex. 6**, Verified Compl. for Declaratory Judg., Davidson Cnty. Chancery Ct. Case No. 22-1014-IV (Jul. 25, 2022).
[38] **Ex. 7,** Compl. for Declaratory Judg., Davidson Cnty. Chancery Ct. Case No. 23-0159-IV (Feb. 3, 2023).
[39] Doc. 1, Compl. (Apr. 5, 2024).

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occurring after a lawsuit has commenced.'"); *Blalock*, 2012 WL 4503187, at *4 ("a claim for abuse of process 'normally rests on some writ, order, or command of the court in the course of a judicial proceeding.' . . . Such a claim, therefore, refers to times when the authority of the court is used for some improper purpose.") (citing *Rentea v. Rose*, No. M2006-02076-COA-R3-CV, 2008 WL 1850911, at *4 (Tenn. Ct. App. Apr. 25, 2008)); *Maize v. Friendship Cmty. Church, Inc.*, No. E2019-00183-COA-R3-CV, 2020 WL 6130918, at *3–4 (Tenn. Ct. App. Oct. 19, 2020).

Given the clarity of Tennessee law on the point, federal courts that have applied Tennessee's abuse of process law have had no difficulty understanding it. *See, e.g., Amodio*, 2018 WL 6727106, at *6–7 ("Tennessee courts have made clear that the tort of abuse of process is grounded in misuse of judicial power. . . . The court does not find that the facts as alleged demonstrate a perversion of the tools of litigation."). Further, "'[b]ecause of its potential chilling effect on the right of access to the courts, the tort of abuse of process is disfavored and must be narrowly or strictly construed to insure the individual a fair opportunity to present the claim.'" *Id.* at *5 (quoting 1 Am. Jur. 2d Abuse of Process § 1).

Here, the Developers' abuse of process claims are not based "on some writ, order, or command of the court in the course of a judicial proceeding," such as an "attachment, execution, garnishment, sequestration proceedings, [or] arrest of the person and criminal prosecution." *Montpelier*, 2017 WL 2378301 at *8 (cleaned up). Nor are they premised on the misuse of judicial discovery tools, such as the "use of discovery subpoenas, depositions, and interrogatories." *Givens v. Mullikin ex rel. Est. of McElwaney*, 75 S.W.3d 383, 402 (Tenn. 2002). To the contrary, the Developers boast that—during the Concerned Citizens' litigation—they "never even" had to "answer[] Defendants'

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complaint(s)." Amended Compl. at ¶ 83.

Instead, the Developers' abuse of process claims are based on the mere "existence of the [Concerned Citizens'] Petitions" seeking judicial relief. *See id.* at ¶ 40. The Concerned Citizens' Petitions were not an exercise of "*the court's* power" or "authority[,]" though. *Montpelier*, 2017 WL 2378301, at *6–8 (emphasis added). Thus, on its face, the Developers' abuse of process claims fail, because they have failed to allege any "perversion of the tools of litigation." *Amodio*, 2018 WL 6727106, at *7 ("The court does not find that the facts as alleged demonstrate a perversion of the tools of litigation."); *see also Warwick*, 2012 WL 5960850, at *11 ("failing to disclose assets during the marital property division is not abuse of process because it does not involve the authority of the court. We therefore conclude that the complaint fails to state a cause of action for abuse of process.").

2. <u>The Developers' malicious prosecution claims fail.</u>

The Developers' malicious prosecution claims fail to state a claim upon which relief can be granted for a host of reasons as well. In particular:

a. the Developers' malicious prosecution claims that are based on the first round of preceding litigation fail because that litigation did not terminate on the merits;

b. the Developers' malicious prosecution claims that are based on the second round of preceding litigation fail as to probable cause; and

c. the Developers' malicious prosecution claims are time-barred.

a. <u>The Developers' malicious prosecution claims that are based on the first round of preceding litigation fail because that litigation did not terminate on the merits.</u>

"To state a claim for malicious prosecution, a plaintiff must show that the defendant (1) instituted a proceeding against him 'without probable cause,' (2) 'with

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malice,' and (3) that the proceeding 'terminated in the plaintiff's favor.'" *Mynatt v. Nat'l Treasury Emps. Union, Chapter 39*, 669 S.W.3d 741, 746 (Tenn. 2023). "With respect to the last of these requirements, a judgment that terminates a lawsuit in favor of one of the parties **must address the merits of the suit rather than terminating the suit on procedural or technical grounds**." *Himmelfarb v. Allain*, 380 S.W.3d 35, 38 (Tenn. 2012) (emphasis added).

Here, the first round of litigation against the Developers terminated "on procedural or technical grounds," rather than on the merits. *Id.* In particular, after the Developers rezoned the property at issue while the Concerned Citizens' appeal was pending, the trial court's earlier merits ruling was set aside on mootness grounds, and the resulting appeal was dismissed voluntarily as moot. The Court of Appeals' order details this chronology, explaining:

> In a March 29, 2023 order, the trial court granted the appellants' motion and set aside its prior final order, **finding the case to be moot** as a result of the developers, Centrum Realty and Development, CRD 2nd Avenue Owner, LLC, and Second Avenue Nashville Property, LLC, pursuing and obtaining new zoning for the properties that were subject to dispute.
>
> In this court, no opposition to the appellants' motion for voluntary dismissal has been filed by any of the appellees including the Metropolitan Nashville Planning Commission, Centrum Realty and Development, CRD 2nd Avenue Owner, LLC, or Second Avenue Nashville Property, LLC.
>
> Having reviewed the motion and supplemental record, we grant the appellants' voluntary dismissal motion. As the trial court found in its order, the case was rendered moot by the actions of appellees Second Avenue Nashville Property, LLC, Centrum Realty and Development, and CRD 2nd Avenue Owner, LLC, in seeking and obtaining a change in the zoning as to the properties in dispute in this litigation. Because **this case was rendered moot by their actions**, thus necessitating the appellants' motion to voluntarily dismiss, costs are taxed against these appellees.

Ex. 3, Order, *Snyder v. Metropolitan Nashville Planning Commission, et al.*, M2022-00722-COA-R3-CV (Apr. 27, 2023) (emphases added).

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A decision to dismiss a case on mootness grounds definitionally does not "address the merits[.]" *Himmelfarb*, 380 S.W.3d at 38. Instead, "'[m]ootness ... is a justiciability doctrine that implicates [a] court's subject matter jurisdiction[.]'" *Dominy v. Davidson Cnty. Election Comm'n*, No. M2022-00427-COA-R3-CV, 2023 WL 3729863, at *4 (Tenn. Ct. App. May 31, 2023). Thus, "to address the merits of an issue notwithstanding its ostensible mootness[,]" "exceptional circumstances" are required, *City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013), none of which was asserted here. *See* **Ex. 3**, Order, *Snyder v. Metropolitan Nashville Planning Commission, et al.*, M2022-00722-COA-R3-CV (Apr. 27, 2023).

For these reasons, to the extent the Developers' malicious prosecution claims are based on the litigation that concluded with the Court of Appeals' dismissal in Case No. M2022-00722-COA-R3-CV, those claims fail for lack of a final termination on the merits.

b. The Developers' malicious prosecution claims that are based on the second round of preceding litigation fail as to probable cause.

As to the second round of litigation, the Developers cannot satisfy even the first element of a malicious prosecution claim: lack of probable cause. "[I]n order to sustain an action for malicious prosecution, the plaintiff must show that the defendant **initiated** the prior lawsuit without probable cause." *Smith*, 2006 WL 770469, at *7 (emphasis added). As such, "[t]he relevant time for the existence of probable cause is 'at the time prosecution was initiated.'" *Leland*, 2007 WL 4440923, at *4 (cleaned up). Nor does a litigant's ultimate victory affect this inquiry. *See Roberts v. Fed. Exp. Corp.*, 842 S.W.2d 246, 249 (Tenn. 1992) ("Termination of the prior proceeding in Plaintiff's favor has no bearing on whether probable cause existed at the time prosecution was initiated[.]").

There are also obvious problems with initiating a malicious prosecution claim

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based on a declaratory judgment action like the one the Concerned Citizens filed. Most prominently: the "purpose of a declaratory judgment action is not to award affirmative relief, but '*to resolve a dispute, afford relief from uncertainty with respect to rights, status, and other legal relations.*'" *Blackwell*, 2012 WL 113655, at *7 (emphasis in original) (quoting *Cannon Cnty. Bd. of Educ.*, 178 S.W.3d at 730). As a result, declaratory judgment actions have "gained popularity as a proactive means of preventing injury to the legal interests and rights of a litigant." *Colonial Pipeline Co.*, 263 S.W.3d at 836. Declaratory judgment actions accordingly permit parties "to settle important questions of law before the controversy has reached a more critical stage." *Id.* at 837 (citing 26 C.J.S. *Declaratory Judgments* § 3 (2001)). For these reasons, to obtain a declaratory judgment, a plaintiff need only "'allege facts which show he has a real, as contrasted with a theoretical, interest in the question to be decided and that he is seeking to vindicate an existing right under presently existing facts.'" *Grant*, 2018 WL 2324359, at *5 (quoting *Burkett*, 535 S.W.2d at 333). For nearly a century, the Tennessee Supreme Court has also made clear that it "is committed to a liberal [interpretation] of the Declaratory Judgments Act so as to make it of real service to the people and to the profession." *Hodges v. Hamblen Cnty.*, 277 S.W. 901, 902 (Tenn. 1925).

With this context in mind, the Concerned Citizens raise and preserve the claim that Tennessee law categorically forbids litigants from basing malicious prosecution claims on earlier declaratory judgment actions, at least when—as here—litigants established their standing and succeeded in obtaining a declaration of their rights. Enforcing such limitations is necessary to avoid the "'risk of chilling access to the courts and unnecessarily expanding liability.'" *Mynatt*, 669 S.W.3d at 749 (quoting *Hewitt v. Rice*, 154 P.3d 408, 416 (Colo. 2007)); *cf. Long v. Parry*, No. 2:12-CV-81, 2016 WL 814861, at

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*25 (D. Vt. Feb. 29, 2016), *aff'd,* 679 F. App'x 60 (2d Cir. 2017) ("The parties' disagreement over their rights to the disputed funds, however, does not prevent this Court from ruling on Dr. Long's claim for malicious prosecution as a matter of law. To the contrary, the very fact that the parties were engaged in such a dispute, coupled with the purpose of a declaratory judgment action, establishes that Parry had an objectively reasonable basis for filing suit.").

Because there does not appear to be dispositive Tennessee caselaw resolving this issue, though, the Concerned Citizens address persuasive standards instead. Under other jurisdictions' approach, whether a declaratory judgment action can give rise to later malicious prosecution liability turns on whether a litigant's position in the declaratory judgment action was "remotely susceptible" to being accepted. *See Buffalo Wild Wings, Inc.*, 763 F. App'x at 565. Here, the Concerned Citizens satisfy this standard.

The Concerned Citizens' position was "remotely susceptible" to being accepted. *See id.* Indeed, the Developers' own complaint concedes that sophisticated outside observers perceived it that way. *See* Amended Compl. at ¶ 39 (alleging that "as a result of the pending litigation regarding the Developments, [the Developers] were unable to obtain financing" because "[n]o lender is going to front the necessary tens of millions of dollars for a project that is, at least on paper, susceptible to judicial cancellation.").

This concession ends the matter. Here, the Developers do not claim that any court order, stay, or other restriction precluded them from moving forward with their proposed development while the Concerned Citizens' litigation was pending. *See generally id.* Instead, the apparent obstacle was that the Developers could not obtain financing because—based on the perceived merits of the Concerned Citizens' claim—the Developers' project was, "at least on paper, susceptible to judicial cancellation." *Id.* As such, the

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Developers' malicious prosecution claims fail on probable cause grounds.

c. The Developers' malicious prosecution claims are time-barred.

The Developers' malicious prosecution claims are time-barred, too. "A cause of action for malicious prosecution accrues when a malicious suit is finally terminated in the defendant's favor." *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992). This limitations period is "not tolled by the period for appeal." *Selker v. Savory*, No. W[redacted]-00823-COA-R3-CV, 2002 WL 1905312, at *3 (Tenn. Ct. App. Aug. 13, 2002). Thus, the Developers' malicious prosecutions claims are time-barred, because the Chancery Court's final order in the preceding declaratory judgment action was entered on March 10, 2023,[40] and this suit was not filed until April 5, 2024.

The Concerned Citizens acknowledge that a later Court of Appeals panel "decline[d] to follow the holding in *Selker*." *Cordova*, 677 S.W.3d at 659, n.3. But *Cordova* conflicts with Tennessee Supreme Court precedent, so *Selker* controls.

To begin, *Cordova* neglects the Tennessee Supreme Court's instruction that "the appeal-tolling doctrine has been consistently rejected" in this state. *Story v. Bunstine*, 538 S.W.3d 455, 466 (Tenn. 2017) (collecting cases). Tennessee Supreme Court precedent also instructs, separately, that termination of the "suit"—not the suit and any appeal that results from it—is what matters. *See Christian*, 833 S.W.2d at 73. Indeed, *Christian* specified that the malicious prosecution claim there accrued upon termination in the trial court even though further proceedings against other parties continued. *See id.* ("Plaintiffs Harold and Sue Christian did not participate in the RICO action after the February 16, 1988 filing of the amended complaint. . . . We find that any cause of action

[40] **Ex. 1**, Final Order, Davidson Cnty. Chancery Court Case Nos. 22-1014-IV & 23-0159-III(IV) (Mar. 10, 2023).

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Plaintiffs may have had for malicious prosecution accrued upon the February 16, 1988 filing of Defendants' amended complaint. Therefore, we affirm dismissal of Plaintiffs' April 4, 1990 suit as being filed outside the statute of limitation."). Thus, the Court of Appeals' ruling in *Selker* controls, because it is supported by—rather than contrary to—controlling Tennessee Supreme Court precedent.

Selker's one-year-from-termination-at-the-trial-court rule is also the better one, for several reasons.

First, *Cordova*'s contrary rule—that malicious prosecution claims accrue when "appellate remedies [are] exhausted[,]" *Cordova*, 677 S.W.3d at 659—would give rise to shifting statutes of limitations and promote stale claims. The appellate process is a deliberate one, and it can take years to unfold. The appellate process also cannot even begin until trial-level proceedings conclude, which leaves maliciously-sued litigants who are dismissed early in multi-party cases waiting even longer before they can seek redress. *Cf. Christian*, 833 S.W.2d at 73. Thus, allowing and requiring litigants to wait—for several years, in many cases—to file malicious prosecution claims when the central question is whether a plaintiff had probable cause when suit was "initiated" makes little sense.

Second, similar tort claims are not treated this way. As noted, the Tennessee Supreme Court has been clear that "the appeal-tolling doctrine has been consistently rejected" here. *Story*, 538 S.W.3d at 466. Thus, there is no appeal-tolling rule for injuries based on trial-level malpractice, even though injuries resulting from trial-level malpractice may later be reversed on appeal. *Id.* Similarly, Tennessee Rule of Civil Procedure 60.02(1) & (2) claims must be filed "one year after the judgment" with no tolling period for appeals, either.

Thus, the accrual rule for initiating malicious prosecutions claim should be the

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same: "one year after the discovery of the injury and its cause," with no tolling for later appeals. *Cherry v. Williams*, 36 S.W.3d 78, 87 (Tenn. Ct. App. 2000). The principal justification for that rule is the same as other tort claims: "A defendant should not have to wait years before knowing whether he will be sued, when the plaintiff already knows the facts supporting his legal claim." *Gibson v. Trant*, 58 S.W.3d 103, 117 (Tenn. 2001).

Third, treating attorney malpractice accrual times and malicious prosecution accrual times differently would give rise to mischief. When a represented client is sued for malicious prosecution, the client will often be able to look to their attorney for indemnity. If malicious prosecution claims are tolled pending appeal but legal malpractice claims are not, though, then based on the accrual rule for malpractice claims, a client's malpractice claim will nearly always be time-barred by the time the client is sued for malicious prosecution. *Story*, 538 S.W.3d at 466. That is not a good outcome for clients. It is not a good outcome for most malicious prosecution *plaintiffs*, either, who will often be left without a path to an actual recovery if *Cordova*'s accrual rule applies.

Fourth, if and when a litigant maliciously prosecutes an appeal, there is an independent (and exclusive) remedy available to redress the resulting damage: Tenn. Code Ann. § 27-1-122, Tennessee's frivolous appeal statute. *See id.* ("When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal."). Significantly, Tenn. Code Ann. § 27-1-122 permits *broader* liability than malicious prosecution claims do. For example, lack of probable cause for an appeal triggers liability even without an ulterior motive. *See id.* (damages may be awarded

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"[w]hen it appears to any reviewing court that the appeal . . . was frivolous"). An ulterior motive alone may also trigger damages "[w]hen it appears to any reviewing court that the appeal from any court of record was . . . taken solely for delay." *Id.* Advice of counsel does not immunize litigants from liability under Tenn. Code Ann. § 27-1-122, either. *See id.*

Thus, there also is no practical reason why malicious prosecution claims should be tolled pending appeal. If a lawsuit is maliciously prosecuted through appeal, then Tenn. Code Ann. § 27-1-122 confers an immediate—and broader—remedy that may be raised within the appeal itself. This remedy is also an exclusive one; as the Court of Appeals has held, whether to award "damages for a frivolous appeal lies **solely** within [an appellate court's] discretion." *See Dominion Real Est., LLC v. Wise Grp., Inc.*, No. M2023-00242-COA-R3-CV, 2024 WL 1885430, at *2 (Tenn. Ct. App. Apr. 30, 2024) (emphasis added); *see also Chiozza v. Chiozza*, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009) ("The decision to award damages for the filing of a frivolous appeal rests solely in the discretion of this Court."). Further, entrusting that discretion to appellate courts alone—rather than enabling private litigants to discourage appeals through the threat of tort liability—is necessary to promote the judiciary's recognized interest in "not [] discourag[ing] legitimate appeals[.]" *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977).

For all of these reasons, the Developers' malicious prosecution claims should be dismissed as time-barred. The Developers' malicious prosecution claims based on the first round of litigation would also be time-barred regardless of which accrual rule applies. *See* **Ex. 3**, Order, *Snyder v. Metropolitan Nashville Planning Commission, et al.*, M2022-00722-COA-R3-CV (Apr. 27, 2023) (noting that the trial court proceedings in Davidson County Chancery Court Case No. 21-1077-II ended with "a March 29, 2023 order" that was not later appealed).

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3. The Congress Developers' Intentional Interference With Prospective Business Relationships claim fails.

The Congress Developers alone have sued the Concerned Citizens for "Intentional Interference With Prospective Business Relationship[s]." *See* Amended Compl. at 39. But there are two fatal defects associated with the claim: (a) the gravamen of the Congress Developers' Intentional Interference With Prospective Business Relationships claim is an abuse of process claim; and (b) the Congress Developers' Intentional Interference With Prospective Business Relationships claim fails in its own right.

a. The gravamen of the Congress Developers' Intentional Interference With Prospective Business Relationships claim is an abuse of process claim.

"In Tennessee there are **two** tort actions which may be brought to obtain redress for the alleged misuse of legal process by another: malicious prosecution and abuse of process." *Bell ex rel. Snyder*, 986 S.W.2d at 555 (emphasis added). Myriad appellate decisions emphasize that limitation. *See, e.g., id.; Cordova*, 677 S.W.3d at 659 ("Malicious prosecution is one of **two** torts in Tennessee 'that may be brought to obtain redress for the alleged misuse of legal process by another.'") (emphasis added); *Donaldson*, 557 S.W.2d at 62 ("There are **two** tort actions that may be brought to obtain redress for the alleged misuse of legal process by another: abuse of process and malicious prosecution.") (emphasis added); *Brown v. Bushnell*, No. M2017-01124-COA-R3-CV, 2018 WL 2447049, at *2 (Tenn. Ct. App. May 31, 2018) ("In Tennessee, there are **two** tort actions that may be brought to obtain redress for alleged misuse of the legal process: malicious prosecution and abuse of process.") (emphasis added); *Simmons v. Harris*, No. M2000-00227-COA-R3-CV, 2000 WL 1586451, at *3 (Tenn. Ct. App. Oct. 25, 2000) ("In Tennessee **two** tort claims may be brought to obtain redress for the alleged

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misuse of process by another: malicious prosecution and abuse of process.") (emphasis added).

Here, the Congress Developers' claim for Intentional Interference With Prospective Business Relationships seeks redress for the alleged misuse of legal process. Amended Compl. at ¶ 144 ("Through their illegal litigation tactics, Defendants intended to and did prevent the Congress Developers from obtaining that loan."); *id.* at ¶ 145 ("Defendants knowingly, intentionally, and improperly used those lawsuits to prevent the Congress Developers from obtaining a loan to finance the Second and Peabody Development"). Thus, unless every Tennessee appellate decision addressing the matter for the past half century has been mistaken that Tennessee law only recognizes "two" tort claims for alleged misuse of legal process, *see supra* at 32–33, then something is amiss.

The explanation here is that the Congress Developers' claim for Intentional Interference With Prospective Business Relationships is nothing more than a reformulated version of the Developers' abuse of process claim. The gravamen rule also requires this Court to treat it that way. *See Rubbermaid-Maryville, Inc.*, 1994 WL 45315, at *2 (noting "the rule that, regardless of the allegations of the complaint, the Court looks to the factual basis for the cause of action to determine the complaint's gravamen"); *cf. Deposit Recovery Corp. v. Santini*, 765 S.W.2d 764, 770 (Tenn. Ct. App. 1988) ("It is obvious that the gravamen of the counterclaim is the alleged institution and prosecution of a groundless civil suit, which is commonly denominated 'malicious prosecution'."). Here, as in other cases, the gravamen of the Developers' claim is "dispositive" of it, too. *Cf. Nichols v. Metro. Nashville Airport Auth.*, No. M2020-00593-COA-R3-CV, 2021 WL 1426992, at *2 (Tenn. Ct. App. Apr. 15, 2021) ("the dispositive issue in this case is whether

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the gravamen of Plaintiff's claim is a civil rights claim for excessive use of force or 'simple negligence.'")

The gravamen of a plaintiff's claim is a question of law. *See Gunter*, 121 S.W.3d at 638 ("The determination of the gravamen of the complaint is a question of law which may be appropriately addressed in a motion to dismiss under Rule 12.02(6) of the Tennessee Rules of Civil Procedure."). The gravamen rule—including the statute of limitations that governs a claim—also applies on a per-claim basis. *See Benz-Elliott v. Barrett Enterprises, LP*, 456 S.W.3d 140, 149 (Tenn. 2015) ("We agree with the Court of Appeals that, in choosing the applicable statute of limitations, courts must ascertain the gravamen of each claim, not the gravamen of the complaint in its entirety."); *Reddoch v. Stooksbury*, No. 03A01-9308-CH-00283, 1994 WL 45317, at *1 (Tenn. Ct. App. Feb. 15, 1994) ("In determining what statute of limitations is applicable, the Court looks to the factual basis for the cause of action to determine the complaint's gravamen.") (citing *Swauger v. Haury & Smith Contractors, Inc.*, 512 S.W.2d 261 (Tenn. 1974); *Williams v. Thompson*, 443 S.W.2d 447 (Tenn. 1969)).

Here, the Congress Developers' Intentional Interference With Prospective Business Relationships claim asserts that the Concerned Citizens used "illegal litigation tactics" to further ulterior motives. *See* Amended Compl. at ¶¶ 142, 144. Thus, the gravamen of the claim is an abuse of process claim. As such, it must be dismissed for the reasons already identified above. Further, to the extent this Court concludes that the gravamen of the Congress Developers' Intentional Interference With Prospective Business Relationships claim is a malicious prosecution claim (the only other option available here), the claim would fail for the separate reasons set forth above, too.

b. <u>The Congress Developers' Intentional Interference With Prospective</u>

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Business Relationships claim fails in its own right.

Even if the gravamen of the Congress Developers' Intentional Interference With Prospective Business Relationships claim were disregarded, the claim fails on its own terms. As detailed below, a careful reading of the Plaintiffs' Amended Complaint confirms that the Congress Developers cannot prove multiple essential elements of the tort, including: (1) "the defendant's intent to cause the breach or termination of [a] business relationship;" (2) the Concerned Citizens' knowledge of the Congress Developers' existing business relationship with lenders; (3) causally connected damages; or (4) "improper" interference. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002).

The Congress Developers' theory of Intentional Interference With Prospective Business Relationships liability unfolds in three parts. *First*, the Congress Developers allege that they "were in the process of obtaining financing for the Second and Peabody Development" when the Concerned Citizens commenced litigation against them. *See* Amended Compl. at ¶ 142. *Second*, the Congress Developers allege that the Concerned Citizens "knew lending institutions would not finance the Second and Peabody Development while it was the subject of Defendants' multiple lawsuits." *See id.* at ¶ 144. *Third*, based on the above allegations, the Congress Developers conclude that the Concerned Citizens "knowingly, intentionally, and improperly used those lawsuits to prevent the Congress Developers from obtaining a loan to finance the Second and Peabody Development[.]" *See id.* at ¶ 145. The Congress Developers thus insist that the Concerned Citizens are responsible for paying them the difference in "5-year commercial loan interest rates" between September 2021 and now. *See id.* at ¶ 146.

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The first problem with this simplistic theory of liability is that, even as pleaded, the Concerned Citizens did not "cause" (much less intend to cause) either "the breach or termination of [a] business relationship" or the damages that the Congress Developers claim to have suffered. *Trau-Med of Am., Inc.*, 71 S.W.3d at 701. The Congress Developers do not assert that they had financing lined up when the Concerned Citizens commenced litigation; to the contrary, the Congress Developers acknowledge that they were merely "in the process of obtaining financing" by "analyzing a variety of lending institutions and the loan terms offered by the same[.]" Amended Compl. at ¶ 142. Afterward, though, based on loan companies' apparent conclusion that the Concerned Citizens' litigation *could be meritorious*, loan companies apparently determined—on their own—that loaning money to the Congress Developers would be *too risky*. *Id.* at ¶ 39 ("No lender is going to front the necessary tens of millions of dollars for a project that is, at least on paper, susceptible to judicial cancellation.").

The second problem with the Congress Developers' theory of liability is that they have not alleged that the Concerned Citizens knew of any specific business relationship between the Congress Developers and lending institutions. *See id.* at ¶¶ 141–47. The *Trau-Med* court emphasized that a defendant's "mere awareness of plaintiff's business dealings in general" is insufficient to trigger liability, though; rather, a defendant must have "knowledge" of a plaintiff's business relationships with "specific third parties" or an "identifiable class of third persons." *Trau-Med of Am., Inc.*, 71 S.W.3d at 701. With respect to intentional interference claims in general, the Restatement (Second) of Torts § 766 at Comment i explains further that:

> To be subject to liability, . . . the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract. Although the actor's conduct is in fact the

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> cause of another's failure to perform a contract, the actor does not induce or otherwise intentionally cause that failure if he has no knowledge of the contract.

Id.

The same "knowledge" requirement was adopted by the Tennessee Supreme Court with respect to intentional interference with prospective business relationships claims. *Trau-Med of Am., Inc.*, 71 S.W.3d at 701. As one court construing the Restatement's knowledge requirement in the context of a tortious interference with prospective business relationship put it under similar circumstances:

> Once again, plaintiffs falter because they have offered no evidence indicating that any of the defendants had actual awareness of plaintiffs' business relationships. . . or that they intentionally sought to interfere with those relationships. Plaintiffs assert that "Defendants knew or should have known the Plaintiffs had customers who enjoyed KBS content and employed wrongful means to interfere with that relationship." (Pls.' Mem. at 25). A generalized allegation of this nature will not pass muster; plaintiffs must show that defendants had *actual knowledge* of the *specific* business relationships with which they allegedly interfered. Courts have repeatedly rejected general claims of this nature because the party claiming interference could not make such a showing. *See, e.g., Boehner v. Heise,* 734 F.Supp.2d 389, 406–07 (S.D.N.Y. 2010) (granting summary judgment to defendant, a ginseng trade organization, in part because plaintiff, a ginseng wholesaler, could not show that the defendant knew that a particular supplier had sold ginseng to plaintiff in the past or intended to do so in the future); *Sedona Corp. v. Ladenburg Thalmann & Co., Inc.,* No. 03–Civ. 3120, 2009 WL 1492196, at *9 (S.D.N.Y. May 27, 2009) (dismissing claim because, while plaintiff "refers to Defendants' knowledge of [plaintiffs] business model *generally,* at no point does [it] actually allege that Defendants knew about the *specific* business relationships [at issue]") (emphasis added); *800America, Inc. v. Control Commerce, Inc.,* 202 F.Supp.2d 288, 289–90 (S.D.N.Y. 2002) (holding similarly). Because the record is bereft of evidence indicating that defendants had knowledge of plaintiffs' business relationships with Yoon, Park, or Hahn (or, indeed, with any other specific customer), the Court grants summary judgment to defendants on plaintiffs' claim for tortious interference with prospective business relations.

Yong Ki Hong v. KBS Am., Inc., 951 F. Supp. 2d 402, 423-24 (E.D.N.Y. 2013) (emphases in original).

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The third problem with the Congress Developers' theory of liability is that they cannot prove either "termination of [a] business relationship" nor causally connected damages. *Trau-Med of Am., Inc.*, 71 S.W.3d at 701. For liability to attach, a defendant "must have directed its actions in some way toward the third party." *Zimmerman v. Philip Morris Inc.*, 78 F. Supp. 2d 1191, 1193 (D. Kan. 1999); *see also* Restatement (Second) of Torts § 766B (1979) ("Inducement not to enter into a contract is normally of a third party, not the plaintiff."). Further, "[l]oss of prospective contractual relation must be proved with reasonable certainty." *Id.*; *cf. Peoples Mortg. Co. v. Fed. Nat. Mortg. Ass'n*, 856 F. Supp. 910, 932 (E.D. Pa. 1994) ("Peoples must also establish that there is a reasonable likelihood that the transaction would have been completed but for Fannie Mae's interference.").

These requirements preclude liability here. "[P]rivate parties operating for profit maintain considerable discretion to refuse to enter into or continue a business relationship." *Patterson v. Methodist Healthcare-Memphis Hosps.*, No. W2008-02614-COA-R3-CV, 2010 WL 363314, at *11 (Tenn. Ct. App. Feb. 2, 2010). Thus, absent allegations that the Concerned Citizens directed some illicit action *toward a lender* who acted on it, the Concerned Citizens cannot be liable for any lender's independent determination that making a loan to the Congress Developers in connection with its development was too risky.

There are no such allegations here. The Congress Developers do not allege that the Concerned Citizens had any contact with any potential loan provider at the time they filed suit. *See generally* Amended Compl. Nor do the Congress Developers allege that the Concerned Citizens encouraged any loan provider not to do business with the Congress Developers or otherwise interfered with any loan provider's independent determination

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not to loan the Congress Developers money. *Id.* Indeed, the Congress Developers have not alleged that the Concerned Citizens even knew of any specific lending institution that was considering whether to loan money to the Congress Developers. *See id.* at ¶¶ 141–47.

It is true that the Congress Developers allege in conclusory terms that the Concerned Citizens "prevent[ed]" the Congress Developers from obtaining a loan. *See id.* at ¶ 145. However, the rest of the Developers' Amended Complaint makes clear that, in fact, loan companies simply *chose not to do business with* the Congress Developers in connection with their proposed developments based on the loan companies' assessment of the potential merits of the Concerned Citizens' litigation. *See id.* at ¶ 39 ("No lender is going to front the necessary tens of millions of dollars for a project that is, at least on paper, susceptible to judicial cancellation."). Under these circumstances, the Congress Developers' conclusory allegation need not be accepted. *See, e.g., Lane v. Becker*, 334 S.W.3d 756, 763 (Tenn. Ct. App. 2010) ("Conclusory allegations unsupported by material facts will not be sufficient to state such a claim."); *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 40 (Tenn. Ct. App. 2006) ("Although we are required to construe the factual allegations in Plaintiffs' favor, and therefore accept the allegations of fact as true, we are not required to give the same deference to conclusory allegations."); *King v. State*, No. M2018-00572-COA-R3-CV, 2018 WL 5995701, at *5 (Tenn. Ct. App. Nov. 15, 2018) (same).

The fourth problem with the Congress Developers' theory of liability is that the Congress Developers fail to establish "improper" interference as a matter of law. *Cf. Trau-Med of Am., Inc.*, 71 S.W.3d at 701, n.5 ("It is clear that a determination of whether a defendant acted 'improperly' or possessed an 'improper' motive is dependent on the particular facts and circumstances of a given case[.]"). It is true that "unfounded

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litigation" may qualify as improper when it is "illegal or independently tortious[.]" *Id.* But "[i]n Tennessee[,] there are two tort actions which may be brought to obtain redress for the alleged misuse of legal process by another: malicious prosecution and abuse of process[,]" *see Bell ex rel. Snyder*, 986 S.W.2d at 555, and here, the Congress Developers have failed to state a claim for either one. *See supra* at 19–31.

Moreover, a bona fide effort to secure a declaration of one's rights can *never* be "improper." As already noted:

> [I]t is important to recognize that the general purpose of a declaratory judgment action is not to award affirmative relief, but "*to resolve a dispute, afford relief from uncertainty with respect to rights, status, and other legal relations.*" *Wade*, 178 S.W.3d at 730 (emphasis added). In this context, the fact that the party seeking declaratory relief is not entitled to a favorable judgment—that he, she, or it will not prevail on the issue in controversy—does not mean that the parties are not entitled to the "relief from uncertainty that a declaratory judgment affords." *Id.* at 730.

Blackwell, 2012 WL 113655, at *7 (emphasis in original).

With this context in mind, "[t]he fact that the party seeking declaratory relief is not entitled to the judgment sought (that it is on the losing side of the controversy) does not mean that the parties are not entitled to the relief from uncertainty that a declaratory judgment affords." *Cannon Cnty. Bd. of Educ.*, 178 S.W.3d at 730. "Thus, a party seeking a declaratory judgment is not required to allege facts in its complaint demonstrating that it is entitled to a favorable decision." *Id.*

Here, the Concerned Citizens established that they would suffer actual injuries from the Developers' proposed development. As the Davidson County Chancery Court determined in a ruling that was not later contested:

> Plaintiffs reside in close proximity to the Properties and have sufficiently alleged they will suffer harm from the Developments that is unique to them and not shared by the general public. Plaintiffs have alleged that the approval of the SP Applications, which will allow building heights over the

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> currently permissible limit, will negatively affect their property values, interfere with their use and enjoyment of their property, and destroy the character of the Rutledge Hill Neighborhood.

Ex. 1, Final Order, Davidson Cnty. Chancery Court Case Nos. 22-1014-IV & 23-0159-III(IV) (Mar. 10, 2023) at 14.

Given this context, the Concerned Citizens' declaratory judgment action was not improper. As long as a plaintiff "allege[s] facts which show he has a real, as contrasted with a theoretical, interest in the question to be decided and that he is seeking to vindicate an existing right under presently existing facts[,]" *see Grant*, 2018 WL 2324359, at *5 (citing *Burkett*, 535 S.W.2d at 333), a request for declaratory relief cannot be "unfounded" for purposes of an intentional interference with prospective business relationship claim. *Trau-Med of Am., Inc.*, 71 S.W.3d at 701, n.5. A contrary result would "conflict[] with the public policy of assuring good-faith litigants access to the courts." *Nichols v. Merrill Lynch, Pierce, Fenner & Smith*, 706 F. Supp. 1309, 1353 (M.D. Tenn. 1989); *cf.* Tenn. Const. art. I, § 17 ("all courts shall be open"); *Hodges*, 277 S.W. at 902 (the Tennessee Supreme Court "is committed to a liberal [interpretation] of the Declaratory Judgments Act so as to make it of real service to the people and to the profession").

Here, although the Concerned Citizens ended up on the losing side of the Parties' controversy, they established their injuries (*see* **Ex. 1** at 14) and were thus "entitled to the 'relief from uncertainty that a declaratory judgment affords.'" *Blackwell*, 2012 WL 113655, at *8 (citing *Wade*, 178 S.W.3d at 730). As a result, under the circumstances presented here, seeking from the judiciary relief to which the Concerned Citizens were "entitled" definitionally was not "improper." *See supra* at 40–41. Thus, the Congress Developers' Intentional Interference With Prospective Business Relationships claim fails to state a claim upon which relief can be granted for that reason, too.

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B. THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UNDER THE TENNESSEE PUBLIC PARTICIPATION ACT.

The Tennessee Public Participation Act (TPPA) governs all of the Developers' claims in this case. Further, as detailed below, the TPPA mandates that the Developers' claims be dismissed with prejudice. The Developers should also be ordered to pay the Concerned Citizens' attorney's fees and costs, and this Court should assess severe sanctions against the Developers to deter repetition of their abusive conduct.

1. The Tennessee Public Participation Act applies to this action, which has been filed in response to the Concerned Citizens' right to petition.

The Tennessee Public Participation Act—Tennessee's still-relatively-new anti-SLAPP statute—provides that "[i]f a legal action is filed in response to a party's exercise of the right of free speech, **right to petition**, or right of association, that party may petition the court to dismiss the legal action" subject to the TPPA's specialized provisions. *See* Tenn. Code Ann. § 20-17-104(a) (emphasis added).[41] As to the right to petition, Tenn. Code Ann. § 20-17-103(4) provides that:

> "Exercise of the right to petition" means a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and:
>
> > (A) Is intended to encourage consideration or review of an issue **by a . . . state . . . judicial . . . body**; or
> >
> > (B) Is intended to enlist public participation in an effort to effect consideration of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body[.]

Id. (emphasis added).

[41] The petition "may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper." Tenn. Code Ann. § 20-17-104(b). Thus, having been filed within sixty (60) days of service, *see* Defs.' Notice of Filing (Jun. 21, 2024) at Ex. 1, the Defendants' TPPA petition to dismiss this action is timely filed. *See id.*

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This definition is broad. *See Doe v. Roe*, 638 S.W.3d 614, 623 (Tenn. Ct. App. 2021) ("based on our plain reading of the TPPA, the right to petition merely requires there to be a communication that is either intended to elicit consideration or review by a governmental body or intended to 'enlist public participation' to effectuate such consideration."). Tennessee Code Annotated § 20-17-103(4)'s explicit recognition that a communication to a state judicial body is a "petition" within the meaning of the TPPA also conforms with longstanding U.S. Supreme Court jurisprudence instructing that lawsuits are petitions. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.") (citing *Sure–Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896–897, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984) ("the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government[.]"); *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 525, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ("the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.")).

Thus, lawsuits are "petitioning activity[.]" *Cartwright v. Thomason Hendrix, P.C.*, No. W2022-01627-COA-R3-CV, 2024 WL 1618895, at *12 (Tenn. Ct. App. Apr. 15, 2024); *see also Garner v. Thomason, Hendrix, Harvey, Johnson & Mitchell, PLLC*, 2024 WL 1618897, at *7 (Tenn. Ct. App. Apr. 15, 2024) (finding, even where the plaintiff in the SLAPP lawsuit was not a party to the underlying litigation, that "there can be no reasonable conclusion from reading the . . . complaint other than that it was filed in

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response to, or at least, relates to, the filing of . . . [l]awsuits" because the plaintiffs "allege that they were damaged by . . . the filing of petitions against them"). That proposition is also clear enough that, in anti-SLAPP cases, the point generally is not even disputed. *See, e.g., Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 734–35, 74 P.3d 737, 741 (2003) ("the point is not disputed. Jarrow concedes that, by its terms, [the anti-SLAPP statute] potentially may apply to every malicious prosecution action, because every such action arises from an underlying lawsuit, or petition to the judicial branch.").

With this body of precedent in mind, the TPPA applies here. The Concerned Citizens have been sued in response to their exercise of the right of petition. *See* Amended Compl. at ¶ 1 ("This dispute arises out of one thing: Defendants' . . . lawsuits against Plaintiffs."). In particular, the Concerned Citizens have been sued for initiating earlier lawsuits against the Developers, *id.*: petitions to the judicial branch that were "intended to encourage consideration or review of an issue by a . . . state . . . judicial . . . body[.]" Tenn. Code Ann. § 20-17-103(4)(A). Indeed, this case is "[t]he paradigm SLAPP suit[.]" *Nandigam Neurology, PLC*, 639 S.W.3d at 658 ("[t]he paradigm SLAPP suit is 'one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.'") (cleaned up). Tennessee's judiciary has had no difficulty identifying developer SLAPP-suits like this one as "evil[,]" either. *See Residents Against Indus. Landfill Expansion, Inc. (RAILE) v. Diversified Sys., Inc.*, No. 03A01-9703-CV-00102, 1998 WL 18201, at *3, n.6 (Tenn. Ct. App. Jan. 21, 1998).

For these reasons, having established that the Tennessee Public Participation Act applies to the Developers' claims, the burden shifts to the Developers to "establish[] a prima facie case for each essential element of the claim in the legal action." Tenn. Code

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Ann. § 20-17-105(b).

2. Valid defenses preclude the Developers' claims.

"Notwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action." *See* Tenn. Code Ann. § 20-17-105(c). Here, several valid defenses preclude liability.

i. The Developers have failed to state a claim on which relief can be granted.

The Tennessee Public Participation Act "is intended to provide an additional substantive remedy to protect the constitutional rights of parties and to supplement any remedies which are otherwise available to those parties . . . under the Tennessee Rules of Civil Procedure." Tenn. Code Ann. § 20-17-109. "[U]nder the Tennessee Rules of Civil Procedure," *see id.*, defendants may raise a plaintiff's "failure to state a claim upon which relief can be granted" as a defense to liability. *See* Tenn. R. Civ. P. 12.02(6). Thus, in support of their TPPA petition, the Concerned Citizens incorporate their valid 12.02(6) defenses as set forth above.

ii. The Concerned Citizens relied on the advice of counsel.

The Concerned Citizens' dispute with the Developers presented "a question of law, not fact." *Snyder*, 2023 WL 7153694, at *4 ("Arguing for the invalidity of the SP zoning on this basis squarely presents this court with a question of law, not fact."). Further, the Concerned Citizens' declaratory judgment action was filed by multiple well-respected members of the bar in good standing and signed by those attorneys in accordance with Rule 11.[42] *See* Tenn. R. Civ. P. 11.01(a) ("Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name"); Tenn.

[42] **Ex. 8**, Berry Decl., ¶¶ 2, 17, 33; **Ex. 9**, Bowen Decl., ¶¶ 2, 3, 7, 8.

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R. Civ. P. 11.02(3) ("By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]"). At no point in the preceding litigation did the Developers assert any violation of Rule 11, either.[43]

These facts alone—not to mention the attached declarations of the Concerned Citizens' attorneys in the preceding litigation, *see* **Ex. 8** Berry Decl.; **Ex. 9**, Bowen Decl.—preclude liability. "[T]hat a prior lawsuit or judicial proceeding was instituted without probable cause" is an essential element of a malicious prosecution claim. *Preston v. Blalock*, No. M2014-01739-COA-R3-CV, 2015 WL 3455384, at *4 (Tenn. Ct. App. May 29, 2015). "Probable cause exists where the party that instituted the underlying proceedings had a reasonable belief in the existence of facts supporting his or her claim and a reasonable belief that those facts made out a legally valid claim." *Id.*

"The defendant in a malicious prosecution lawsuit may establish the existence of probable cause by demonstrating that he or she relied on the advice of counsel in initiating the underlying proceedings."[44] *Id.* at *5 (citing *Sullivan v. Young*, 678 S.W.2d 906, 911 (Tenn. Ct. App. 1984); *Cooper v. Flemming*, 84 S.W. 801, 802 (Tenn. 1904) ("stating that

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[43] **Ex. 8**, Berry Decl., ¶ 34; **Ex. 9**, Bowen Decl., ¶ 9.

[44] "The defense [of advice of counsel] may serve to rebut the scienter element of a . . . civil charge requiring a wilful or intentional violation of the law." *DiLiddo v. Oxford St. Realty, Inc.*, 450 Mass. 66, 79–80, 876 N.E.2d 421, 431 (2007) (collecting cases). Thus, the advice of counsel is relevant to—even if not dispositive of—a claim of intentional interference as well. *See, e.g., Sysdyne Corp. v. Rousslang*, 860 N.W.2d 347, 353 (Minn. 2015) ("whether a defendant was justified in interfering with a contract based on the advice of outside counsel hinges on the reasonableness of the defendant's inquiry").

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the purpose of the advice of counsel defense is to 'establish the existence of probable cause'")).

> To establish probable cause through reliance on the advice of counsel, the defendant must prove three elements: (1) that the attorney's advice was sought in good faith, (2) that the defendant disclosed all material facts relating to the case in his possession and all facts that could have been ascertained by reasonable diligence, and (3) that the case was commenced pursuant to the attorney's advice.

Id. (citing *Abernethy v. Brandt*, 120 S.W.3d 310, 314 (Tenn. Ct. App. 2002) (in turn citing *Cooper*, 84 S.W. at 802).

These elements are easily met here. The Concerned Citizens established their standing to prosecute a bona fide legal dispute with the Developers, the circumstances of which are detailed at length by the Court of Appeals in *Snyder*, 2023 WL 7153694, at *3–7. The Parties' legal dispute was also complicated enough that the Concerned Citizens' opposing parties disagreed about—and the trial court erred when adjudicating—central legal issues in it. *See id.* at *3–4 ("The Developers offer at most a conclusory defense of the trial court's ruling on the VPRA issue without providing any legal authority. Metro, alternatively, concedes that the trial court erred with regard to its analysis of the VPRA issue. . . . While the Developers here may have gained vested property rights upon the adoption of the ordinances, those vested rights themselves have no bearing on the Plaintiffs' ability to bring this lawsuit or to argue that the ordinances themselves violate the law.").

The Concerned Citizens sought the advice of competent counsel before initiating their legal dispute and disclosed to their counsel the facts relevant to it.[45] Based on the facts involved, the Concerned Citizens' counsel concluded that the Concerned Citizens

[45] **Ex. 8**, Berry Decl., ¶¶ 11–18, 28–31; **Ex. 9**, Bowen Decl., ¶¶ 4–5.

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had a reasonable chance of success.[46] *Cf. Abernethy*, 120 S.W.3d at 313 ("the advice of counsel must be based upon 'ample evidence at the time [of filing suit] for the [attorney] to conclude that [the client] had a reasonable chance of recovery in the prior action.'") (quoting *Morat v. State Farm Mut. Auto. Ins. Co.*, 949 S.W.2d 692, 696 (Tenn. Ct. App. 1997)). As a result, the Concerned Citizens' capable counsel commenced and maintained litigation on the Concerned Citizens' behalf.[47] The Concerned Citizens' counsel also made all strategic decisions in the preceding litigation based on their advice to the Concerned Citizens.[48] Under these circumstances, the advice of the Concerned Citizens' counsel "entitles the [Concerned Citizens] to complete immunity from damages." *Cooper*, 84 S.W. at 802.

iii. The Concerned Citizens are immune from suit under Tenn. Code Ann. § 4-21-1003(a).

Tenn. Code Ann. § 4-21-1003(a) provides that:

> Any person who in furtherance of such person's right of free speech **or petition** under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.

Id. (emphasis added).

The immunity conferred by Tenn. Code Ann. § 4-21-1003(a) "shall not attach" if the person communicating it "[k]new the information to be false[,]" communicated it "in reckless disregard of its falsity[,]" or "[a]cted negligently in failing to ascertain the falsity of the information[.]" *See id.* at § 4-21-1003(b). The import of the statute, though, is that communicating truthful information to the government—or communicating information

[46] **Ex. 8**, Berry Decl., ¶¶ 30–33; **Ex. 9**, Bowen Decl., ¶ 15.
[47] **Ex. 8**, Berry Decl., ¶¶ 30–33; **Ex. 9**, Bowen Decl., ¶ 15.
[48] **Ex. 8**, Berry Decl., ¶ 32; **Ex. 9**, Bowen Decl., ¶ 6.

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to the government non-negligently—"shall be immune from civil liability on claims based upon the communication to the agency." Tenn. Code Ann. § 4-21-1003(a).

Here, the Plaintiffs' Amended Complaint does not allege—anywhere—that anything the Concerned Citizens told any court during the preceding litigation was false. *See generally* Amended Compl. At any rate, every factual statement that the Concerned Citizens made in the earlier litigation was true.[49] That is hardly a surprise, either, given that: (1) every statement that the Concerned Citizens made in the earlier litigation was made through well-respected counsel;[50] (2) those attorneys had affirmative obligations to make truthful statements, *see* Tenn. R. Civ. P. 11.02(3); and (3) no Rule 11 motion was ever filed in any of the preceding litigation.[51]

For these reasons, the Concerned Citizens are "immune from civil liability on claims based upon the" declaratory judgment action. *See* Tenn. Code Ann. § 4-21-1003(a). Thus, the Developers' claims must be dismissed based on Tenn. Code Ann. § 4-21-1003(a)'s statutory immunity.

v. The Developers cannot recover for an allegedly frivolous appeal.

"The remedy for a frivolous appeal is provided in Tenn. Code Ann. § 27–1–122[.]" *In re Hess*, No. M2011-01561-COA-R3-CV, 2012 WL 3104917, at *4 (Tenn. Ct. App. July 31, 2012). "This statute 'must be interpreted and applied strictly . . . .'" *Sircy v. Wilson*, No. M2007-01589-COA-R3-CV, 2008 WL 4830806, at *4 (Tenn. Ct. App. Nov. 5, 2008); *see also Smith v. Evans*, No. M2007-02855-COA-R3-CV, 2008 WL 3983117, at *5 (Tenn. Ct. App. Aug. 27, 2008). Further, whether to award "damages for a frivolous appeal lies **solely** within [an appellate court's] discretion." *See Dominion Real Est., LLC*, 2024 WL

[49] **Ex. 8**, Berry Decl., ¶¶ 31, 33; **Ex. 9**, Bowen Decl., ¶ 10.
[50] **Ex. 8**, Berry Decl., ¶ 33; **Ex. 9**, Bowen Decl., ¶ 11.
[51] **Ex. 8**, Berry Decl., ¶ 34; **Ex. 9**, Bowen Decl., ¶¶ 9, 13.

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1885430, at *2 (emphasis added); *see also Chiozza*, 315 S.W.3d at 493 ("The decision to award damages for the filing of a frivolous appeal rests solely in the discretion of this Court."). Entrusting that exclusive discretion to appellate courts is necessary to promote the judiciary's recognized interest in "not [] discourag[ing] legitimate appeals[.]" *Davis*, 546 S.W.2d at 586.

Here, neither appellate decision rendered in the Parties' preceding litigation determined that the Concerned Citizens' appeals were "frivolous." *See* **Ex. 3**, Order, *Snyder v. Metropolitan Nashville Planning Commission, et al.*, M2022-00722-COA-R3-CV (Apr. 27, 2023); *Snyder*, 2023 WL 7153694, at *4. Nor did any opposing party assert that the Concerned Citizens' appeals were frivolous.[52] That settles the matter, given that Tenn. Code Ann. § 27–1–122 is the exclusive remedy for a frivolous appeal. *See supra* at 49–50; *cf. Coleman v. Gulf Ins. Grp.*, 718 P.2d 77, 85–86 (Ca. 1986) ("Given the complex and specialized nature of the task of distinguishing frivolous and nonfrivolous appeals, we conclude that—in the absence of an explicit legislative authorization of an independent cause of action for 'malicious appeal'—an aggrieved party's remedy properly lies in the provisions of [the frivolous appeal statute].").

Nor were the Concerned Citizens' appeals frivolous. Indeed, the costs of the Concerned Citizens' first appeal were assessed against *the Developers*. *See* **Ex. 3**, Order, *Snyder v. Metropolitan Nashville Planning Commission, et al.*, M2022-00722-COA-R3-CV (Apr. 27, 2023). As for the second: the Concerned Citizens won on an important intermediate issue presented in the appeal that the Developers unsuccessfully contested. *See Snyder*, 2023 WL 7153694, at *3–4 ("The Developers offer at most a conclusory

[52] **Collective Ex. 10**; *see also* **Ex. 8**, Berry Decl., ¶ 35; **Ex. 9**, Bowen Decl., ¶ 14.

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defense of the trial court's ruling on the VPRA issue without providing any legal authority. Metro, alternatively, concedes that the trial court erred with regard to its analysis of the VPRA issue. . . . While the Developers here may have gained vested property rights upon the adoption of the ordinances, those vested rights themselves have no bearing on the Plaintiffs' ability to bring this lawsuit or to argue that the ordinances themselves violate the law."). This matters, because under Tennessee law, presenting even one valid issue in an appeal will render it non-frivolous. *See Winchester v. Little*, 996 S.W.2d 818, 828 (Tenn. Ct. App. 1998) ("Appellee has asked us to declare that this appeal is frivolous and award damages pursuant to Tenn. Code Ann. § 27-1-122. While several of the issues raised by Appellant are devoid of merit, the issue of guardian ad litem immunity under state law was a valid issue that does not appear to have been previously addressed on facts similar to those presented in this case. Accordingly, we decline to award Appellee damages for a frivolous appeal.").

For all of these reasons, as a matter of law, the Developers cannot recover for an allegedly frivolous appeal.

V. COSTS, ATTORNEY'S FEES, & SANCTIONS

Under Tennessee Code Annotated § 20-17-107(a):

> If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party:
>
> > (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition; and
> >
> > (2) Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.

Id.

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Here, the Developers' prosecution of this nakedly retaliatory action merits costs, fees, and severe sanctions. Considering the numerous categorical bars to the Developers' claims, no litigant acting in good faith could reasonably believe that the claims in this lawsuit had merit. Instead, this lawsuit is a transparent attempt "to intimidate a citizen into silence regarding an issue of public concern"—intentional misbehavior that Tennessee's judiciary properly characterizes as "evil[.]" *See Residents Against Indus. Landfill Expansion, Inc. (RAILE)*, 1998 WL 18201, at *3 & n.6.

A host of considerations—including the length of time the Developers maintain this lawsuit and its ultimate cost—factor into the appropriate sanctions calculus, though. *See Foreman v. Rosenberg*, Davidson Cnty. Cir. Ct. Case No. 23C891, Order (Dec. 4, 2023) (citing *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 71–72 (Tex. App. 2018), *aff'd in part, rev'd in part on other grounds*, 631 S.W.3d 40 (Tex. 2021)). Thus, after this Court grants the Concerned Citizens' TPPA Petition, the Concerned Citizens request the opportunity to submit supplemental briefing detailing the appropriate sanctions to issue.

VI. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss and Tennessee Public Participation Act Petition to dismiss this action should be **GRANTED**. Afterward, the Plaintiffs should be ordered to pay the Defendants' court costs, reasonable attorney's fees, and discretionary costs pursuant to Tenn. Code Ann. § 20-12-119(c), Tenn. Code Ann. § 20-17-107(a)(1), and Tenn. Code Ann. § 4-21-1003(c). This Court should also assess sanctions against the Plaintiffs—to be quantified following further briefing—as necessary to deter repetition of their conduct pursuant to Tenn. Code Ann. § 20-17-107(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of June, 2024, a copy of the foregoing was sent via the Court's e-filing system, via USPS mail, postage prepaid, or via email to the following parties:

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