No. B237804

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT

DIVISION FOUR

MIKE MALIN,

Plaintiff and Respondent,

v.

MARTIN D. SINGER, et al.,

Defendants and Appellants.

Appeal From the Los Angeles County Superior Court
Case No. BC466547
Hon. Mary M. Strobel, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF APPELLANTS

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TO THE PRESIDING JUSTICE OF THE SECOND APPELLATE DISTRICT, DIVISION FOUR:

Pursuant to Rule 8.200, subdivision (c) of the California Rules of Court, the Association of Southern California Defense Counsel (referred to as ASCDC or the Association) respectfully requests leave to submit the within amicus curiae brief in support of appellants Lavely & Singer, Martin D. Singer, Andrew B. Brettler, Shereen Arazm and Oren Koules.

ASCDC is a voluntary membership association comprised of approximately 1,100 attorney-members, among whom are some of the leading trial lawyers of California's civil defense bar. ASCDC's members

primarily represent parties involved in legal disputes from the business community, professionals, including attorneys, accountants and financial professionals, health care providers, religious and civic institutions who provide the goods and services vital to our nation's economic health and growth. Founded in 1959, the Association is dedicated to promoting the administration of justice, providing education to the public about the legal system, and enhancing the standards of civil litigation practice in this state.

ASCDC and its member-attorneys are frequently called upon to address similar questions of public concern regarding the proper scope and application of procedures and privileges intended to further the exercise of protected First Amendment speech and petition rights for parties, witnesses and attorneys who participate in proceedings before judicial, quasi-judicial, administrative and other "official" bodies, including *Rubin v. Green* (1993) 4 Cal.4th 1187, and more recently cases addressing the broad application of the absolute litigation privilege and the anti-SLAPP law, such as *Kibler v. Northern Inyo County Hosp. Dist.* (2006) 39 Cal.4th 192 and *Jarrow Formulas, Inc. v. La Marche* (2003) 31 Cal.4th 728.

ASCDC and its members therefore have substantial interests in the outcome of the significant questions of California law raised on this appeal, including the broad scope and proper application of California's anti-SLAPP law in the context of claims asserting that an attorney has engaged in "unethical" or "unlawful" conduct during the course of representing clients in litigation. In this case, the law firm of Lavely & Singer was sued for "extortion" by an opposing party, Mike Malin. Martin Singer (an attorney of the firm) sent a pre-suit demand letter enclosing a draft complaint alleging how Singer's client had been defrauded by her business partners (including Malin) through among other means, creating separate ledgers to hide money, putting money in off-shore accounts, engaging in

insurance fraud, as well as using partnership assets to pay for sexual partners.

In response to Malin's lawsuit, Lavely & Singer, the firm's client and her husband (the other defendants and appellants) filed an anti-SLAPP motion arguing that a pre-suit demand letter is classic petitioning-activity protected by the First Amendment and the absolute litigation privilege. The trial court denied the motion on the ground that the demand letter was illegal as a matter of law under *Flatley v. Mauro* (2006) 39 Cal.4th 299. Relying upon this supposed "illegality" exception, the trial court also cited *Gerbosi v. Gaimes, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435. According to *Gerbosi*, the Supreme Court in *Flatley* dispensed with "screening" a lawsuit under the anti-SLAPP statute where the claim merely *alleges* that defendant's "*assertedly protected activity* is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Gerbosi, supra,* at pp. 445-446, italics added.)

Not true. The anti-SLAPP statute requires that the plaintiff prove the probability of prevailing on the merits of a claim arising from First Amendment activity by admissible evidence. To invoke the narrow "illegal as a matter of law" exception to the anti-SLAPP statute under *Flatley*, defendant must admit or plaintiff must produce actual evidence (beyond the bare allegations of the complaint), *conclusively* showing the defendant's alleged conduct would be illegal as a matter of law. (See, e.g., *Scalzo v. Baker* (2010) 185 Cal.App.4th 91, 99–102; *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 711-713; *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 919-922 [extortion claims required screening].) Contrary to the Legislature's mandate that the anti-SLAPP law "shall be construed broadly," the trial court's narrow view of the statute seemingly allows a plaintiff to sue opposing parties and their counsel, thus avoiding the required merits-screening, by simply *alleging* that the conduct was illegal.

In ASCDC's view, *Gerbosi* was wrongly decided and represents a misguided application of a narrow "illegality exception" that eviscerates the purpose of the anti-SLAPP statute—a compulsory screening process for claims arising out of protected First Amendment activity, including settlement demands made prior to commencement of litigation. Relying principally upon *Gerbosi*, the trial court impermissibly declined to engage in the "merits" screening process mandated by the anti-SLAPP statute. While ASCDC's amicus brief will take no position on the "merits" of the claims or defenses asserted in *Malin v. Singer*, the failure to conduct this statutorily-mandated screening procedure was manifest error and that failure is central to the issues that ASCDC asks leave to address as amicus.

The Association thus will urge this court to recognize that *Flatley* and numerous other controlling Supreme Court precedents have appropriately "drawn lines" in addressing so-called "illegality" and "interest of justice" exceptions to privileged and constitutionally protected conduct at-issue in this case. At a minimum, examination of the merits of the claims alleged is required under the anti-SLAPP law. Accordingly, ASCDC respectfully requests leave to file the accompanying brief.

DATED: March 25, 2013

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF APPELLANTS

A. The Trial Court's Denial of Appellants' Anti-SLAPP Motion Without Conducting the Required Screening of the Merits of the Complaint is Contrary to the Legislative Declaration that the Anti-SLAPP Law "Shall Be Construed Broadly"

Malin sued the Lavely & Singer defendants (the law firm, Martin Singer, and associate Andrew Brettler), their client Shereen Arazm, and Arazm's husband Oren Koules, asserting claims for extortion, civil rights violations, and intentional and negligent infliction of emotional distress. {1 AA 1, 57} The complaint alleged that the Lavely & Singer defendants,

acting on behalf of Arazm and Koules, sent a letter to Malin that "threatened to file a lawsuit against" Malin. The threatened suit involved claims that Malin misappropriated funds from a restaurant venture in which he and Arazm were business partners. The letter stated that Arazm's lawsuit would allege that Malin, among other misconduct, had used '"company resources to arrange sexual liaisons'" and diverted restaurant group assets to his sexual partners, one of whom was a retired judge. The letter identified the retired judge and attached a photograph. A draft complaint was also attached containing blank spaces, and the letter stated that "[w]hen the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading.'" The letter indicated Malin could avoid the litigation by complying with Arazm's demand. {1 AA 3}

After receiving the demand letter, Malin immediately contacted Singer and Arazm by facsimile and e-mail, indicating his desire to meet and discuss settlement. While those communications were ongoing, Malin filed the present lawsuit. Singer was notified of Malin's action when he received a call from the media. {1 AA 56-57}

The Lavely & Singer defendants then filed Arazm's complaint alleging the same wrongful conduct set forth in the demand letter and draft complaint ("*Arazm* action"). {1 AA 88; RJN, exh. A.) The complaint as ultimately filed "filled-in" the blanks left in the draft complaint which had been attached to the lawyers' pre-suit letter. {1 AA 88-107} Arazm's lawsuit sought the return of the money that Malin and his co-defendants had allegedly misappropriated from the restaurant group. {1 AA 106}

Malin's present action charged defendants with extortion. In addition, on information and belief, Malin maintained that "over the past few weeks, an individual or individuals whose identity is currently

unknown, acting on behalf of Defendants, and each of them, have hacked into [Malin's] private e-mails ... and have also illegally eavesdropped and/or wiretapped [Malin's] telephones." {1 AA 3-4}

The Lavely & Singer defendants, Arazm, and Koules brought an anti-SLAPP motion in response to Malin's lawsuit. They argued that Malin was seeking to impose liability for privileged prelitigation communications. {See 1 AA 34} Malin argued in opposition that the anti-SLAPP law did not apply to his claims because all of the defendants' alleged conduct ostensibly fell within an asserted "illegal as a matter of law" exception to the statute adopted by the Supreme Court in *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*). {See 1 AA 137, 141, 147-152}

In his opposing declaration, Malin speculated that the lawyers must have been engaged in illegal wiretapping activities because a messenger used by the Lavely & Singer defendants supposedly once worked for private investigator Anthony Pellicano. He otherwise offered no proof that wiretapping, eavesdropping or computer hacking had actually been committed by anyone. {1 AA 157; cf. Lavely & Singer Reply Br. at p. 3}

The trial court agreed with Malin, and denied the defendants' anti-SLAPP motion on the sole basis that defendants' conduct was subject to the "illegality exception"—thus precluding the merits-screening process otherwise required under the anti-SLAPP statute. {2 AA 416-417} In particular, the trial court reasoned that the "allegations of sexual misconduct contained in the demand letter in this case are very tangential to the causes of action in [Arazm's] complaint, which have to do with a business dispute and alleged misuse of company resources"; the "letter is best read as extortion as a matter of law [because] [i]t threatens to reveal the names of sexual partners"; and the letter "accuses or imputes to the

Plaintiff some disgrace or crime or threatens to expose some secret affecting him for purposes of obtaining money." {*Id.* at 416}

The trial court also stated "on the cause of action *alleging* a wiretapping and computer hacking" that *Gerbosi v. Gaimes, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435 (*Gerbosi*) had declined to apply the anti-SLAPP law to similar claims: therefore, based upon *Gerbosi's* reading of *Flatley*, the "illegality exception" compelled denial of the motion on that cause of action as well. {AA 416, italics added}

After defendants noticed this appeal from the denial of their anti-SLAPP motion, the same trial court judge addressed Malin's demurrer and motion to strike Arazm's embezzlement claims in the related *Arazm* action. Malin argued that Arazm's allegations referring to Malin's misuse and misappropriation of company monies and resources to pay sexual partners were irrelevant to the business dispute that was the main subject of Arazm's action. {RJN, exh. F, pp. 4-5}

The trial court denied Malin's challenges to Arazm's pleading in their entirety. {RJN, exhs. K, L} With regard to the specific allegations concerning Malin's alleged expropriation of funds for sexual escapades, the trial court found those allegations were proper and relevant; explaining that Arazm's complaint "alleges that Mr. Malin engaged in these activities using company money and property, tying these allegations into Mr. Malin's alleged misuse of company resources." {RJN, exh. L, pp. 6-7}

Thus, the identical allegations which the trial court had concluded in Malin's action *conclusively* established illegal extortion under the first prong of the anti-SLAPP inquiry (eschewing any need to proceed to the second, "merits" prong) were found to by the same judge to be directly relevant to Arazm's claims against Malin in her related action—the lawsuit

which had been the subject of Lavely & Singer's offending prelitigation letter and settlement demand. (Lavely & Singer AOB at pp. 11-13.)

Respectfully, the trial court misapplied and misconstrued the anti-SLAPP law. California's anti-SLAPP law, Code of Civil Procedure section 425.16, was originally enacted in 1992 and has been broadened by amendments during the past two decades to provide the targets of SLAPP suits with a procedural vehicle for the early judicial examination and summary disposition of meritless claims. (Stats. 1992, ch. 726, pp. 3523-3524; see also Canan & Pring, *Strategic Lawsuits Against Public Participation* (1988) 35 Soc. Problems 506, 507 [SLAPP is an acronym for "Strategic Lawsuit Against Public Participation']; see *Dove Audio v. Rosenfeld, Meyer & Susman* (1994) 47 Cal.App.4th 777, 783.)

Section 425.16, subdivision (a) declares the Legislature's purpose and intent upon enacting this summary remedy to screen-out meritless derivative lawsuits that target participants in pending or prospective litigation: "[T]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. ... [I]t is in the public interest to encourage continued participation in matters of public significance, and ... this participation should not be chilled through abuse of the judicial process. To this end, this section *shall be construed broadly*." (Code Civ. Proc., § 425.16, subd. (a), emphasis added;. see generally *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*).)

Under the plain language of section 425.16, subdivisions (e)(1) and (e)(2), as well as the case law interpreting those provisions, all communications and communicative acts performed by attorneys as part of

their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute. (See, e.g., *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [anti-SLAPP statute protects "communicative conduct such as the filing, funding, and prosecution of a civil action," including such acts when "committed by attorneys in representing clients in litigation"]; *Briggs, supra*, 19 Cal.4th at pp. 1011-1016 [filing a lawsuit is an exercise of one's constitutional right of petition and extends to legal representatives]; *Thayer v. Kabateck, Brown & Kellner LLP* (2012) 207 Cal.App.4th 141, 157-158.)

Section 425.16 "'requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.)" (*Alpha & Omega Dev. Co. LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 663 (*Alpha & Omega*).)[1]

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[1] "To show a probability of prevailing for purposes of section 425.16 [under the second prong], a plaintiff must 'make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor.'" (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010 [*ComputerXpress*].) "'[T]he ***plaintiff 'cannot simply rely on the allegations in the complaint'*** [citation] ... .' (*Ibid.*, emphasis added.) Rather, plaintiff's showing of facts must consist of evidence that would be admissible at trial. "Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded.' (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.)" (*Alpha & Omega, supra*, 200 Cal.App.4th at p. 664.)

"'An appellate court reviews an order [ruling on] an anti-SLAPP motion under a de novo standard. [Citation.] In other words, [this court] employ[s] the same two-pronged procedure [and independently examines the same factual record] as the trial court in determining whether the anti-SLAPP motion was properly granted [or denied].' (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1651-1652.)" (*Alpha & Omega, supra*, 200 Cal.App.4th at p. 663.)

Like similar screening mechanisms, the anti-SLAPP procedure does not unconstitutionally impair the right to pursue a jury trial or other judicial resolution of legitimate claims; rather, it merely requires substantiation and summary disposition of meritless and improper harassing claims at an early stage. (*Briggs, supra*, 19 Cal.4th at p. 1123 [the screening process operates as a summary judgment or nonsuit motion, "in reverse"], citing *College Hospital v. Superior Court* (1994) 7 Cal.4th 704, 718-719.) "[S]ection 425.16's requirement that a plaintiff establish a probability of prevailing is intended 'to provide a fast and inexpensive unmasking and dismissal of SLAPP's'" that infringe defendants' constitutional rights. (*ComputerXpress, supra*, 93 Cal.App.4th at pp. 1013-1014; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 739-741 (*Jarrow*).)[2]

The Legislature and the courts also have consistently acknowledged the close inter-relationship between the anti-SLAPP law and the absolute litigation privilege codified by Civil Code section 47, subdivision (b).

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[2] "Section 425.16 sets out a mere rule of procedure, but it is founded on constitutional doctrine. Those who petition the government [e.g., seeking redress in a judicial proceeding] are generally immune from liability. This principle is referred to as the '*Noerr-Pennington*' doctrine[.]" (*Ludwig v. Superior Court* (1993) 37 Cal.App.4th 8, 21.)

(*Jarrow*, *supra*, 31 Cal.4th at pp. 741-742; *Briggs*, *supra*, 19 Cal.4th at pp. 1115-1116.) *Rubin v. Green* (1993) 4 Cal. 4th 1187, 1193-1194 (*Rubin*) described the broad scope and purpose of the absolute privilege:

> For well over a century, communications with "some relation" to judicial proceedings have been absolutely immune from tort liability by the privilege codified as section 47(b).[3] At least since then-Justice Traynor's opinion in *Albertson v. Raboff* (1956) 46 Cal.2d 375[,] California courts have given the privilege an expansive reach. [Fn. text and citations omitted.] Indeed, as we recently noted, "the only exception to [the] application of section 47(2) [now section 47(b)] to tort suits has been for malicious prosecution actions. [Citations]." ([*Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 (*Silberg*).)
>
> Undergirding the immunity conferred by section 47(b) is the broadly applicable policy of assuring litigants "the utmost freedom of access to the courts to secure and defend their rights ... ." (*Albertson v. Raboff, supra,* 46 Cal.2d at p. 380.) We have recently reemphasized the importance of virtually unhindered access to the courts in several opinions. In *Silberg, supra,* 50 Cal.3d 205, we said that the "principal purpose of section 47([b]) is to afford litigants ... the utmost

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[3] "As pertinent here, Civil Code section 47 provides: 'A privileged publication or broadcast is one made .... (b) In any ... (2) judicial proceeding ...'"

freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Id.* at p. 213.)

Equally settled is the principle that the absolute litigation privilege and the anti-SLAPP law apply to prelitigation settlement demands: "In light of this extensive history, it is late in the day to contend that communications with 'some relation' to an anticipated lawsuit are not within the privilege. .... [N]umerous decisions have applied the privilege to prelitigation communications, leaving no doubt as to its applicability to the facts alleged in [this] complaint. (See, e.g., *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 393 [privilege applies to communications with "some relation to a proceeding that is actually contemplated in good faith and under serious consideration by ... a possible party to the proceeding"]; *Rosenthal v. Irell & Manella* (1982) 135 Cal.App.3d 121, 126 [prelitigation settlement communications relating to "potential court actions"]; *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 865 [privilege extends to "preliminary conversations and interviews" related to contemplated action]; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 490 [meeting of parties and counsel to "marshal their evidence for presentation at the hearing"]; *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577 [privilege extends to "steps taken prior" to judicial proceedings].)" (*Rubin, supra*, 4 Cal.4th at pp. 1194-1195.)

In short, "we can imagine few communicative acts more clearly within the scope of the privilege than those alleged in [Malin's complaint]"—supposedly "extortionate" settlement demands based upon claims that would, in fact, be asserted in the *Arazm* action and which allegations were ultimately found to have at least some arguable relationship to Malin's asserted misappropriation and misuse of company funds. (Cf. *Rubin, supra*, 4 Cal.4th at pp. 1195-1196; *Pacific Gas &*

Electric Co. v. Bear Stearns & Co. (1990) 50 Cal.3d 1118, 1122-1126 [absolute privilege barred action alleging that defendants had wrongfully induced others to pursue colorable legal claims that intentionally interfered with contracts].)

Because the absolute privilege is unconditional and unqualified by allegations of malice or improper motive, the defendant need only show there is "some relationship" to the proceeding: "Just as communications preparatory to or in anticipation of the bringing of the action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b), ... such statements are equally entitled to the benefits of section 425.16." (*Dove Audio*, *supra*, 47 Cal.Appp.4th at p. 784, citing *Rubin*; see also *Ludwig*, *supra*, 37 Cal.Appp.4th at p. 19; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 728, disapproved on another point in *Briggs*, *supra*, 19 Cal.4th at p. 1123, fn. 10; cf. Respondent's Br. at p. 32.)

As defendants did in this case, the anti-SLAPP procedure is frequently employed in conjunction with defenses that challenge whether derivative lawsuits like this one (targeting protected speech and petition activity) are barred by substantive law privileges embodied in Civil Code section 47(b) and the *Noerr-Pennington* doctrine. (*Ludwig*, supra, 37 Cal.App.4th at pp. 20-21; *Briggs*, *supra*, 19 Cal.4th at pp. 1115-1116 [in this way, the anti-SLAPP motion supplements, but does not supplant, the absolute litigation privilege]; see also *Jarrow*, *supra*, 31 Cal.4th at pp. 737-738; Seider, *SLAPP Shot* (Nov. 2000) L.A. Lawyer 32 at pp. 32-36, 53; Lavely & Singer AOB at pp. 53-57.)

Using a pejorative label—i.e., calling the defendant's conduct "illegal," "extortionate" or "unethical"—does nothing to overcome the bar

of the absolute privilege. "'Conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage ... simply because it is *alleged* to have been unlawful or unethical.'" (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 285, italics in original text, citation omitted.)

According to the Supreme Court: "An exception to the use of section 425.16 applies ***only if [1] a 'defendant concedes, or [2] the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.'*** " (*Birkner v. Lam, supra*, 156 Cal.App.4th at p. 285, emphasis and brackets added, quoting *Flatley, supra*, 39 Cal.4th at p. 320.) Unless this narrow exception is established by admissible evidence, the burden remains on plaintiff to establish a prima facie case under prong two: "The litigation privilege is relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." (*Flatley, supra*, 39 Cal.4th at p. 323.)

On this record, the narrow illegality exception discussed in *Flatley* "does not apply here." (*Birkner v. Lam, supra*, 156 Cal.App.4th at p. 285.) Defendants neither conceded nor did plaintiff produce "evidence [that] conclusively establishes" extortion as a matter of law. (*Ibid.*) At least no evidence other than the letter. But the court accepted Malin's erroneous argument that prong one was not satisfied because he had merely *alleged* illegal activity, and declined to consider the merits of each of his claims.

Malin's "extortionate" settlement demand theory is hardly new. Prior cases have applied the absolute litigation privilege to dispose of virtually identical claims using the same label. For example, in *Izzi v. Reyes* (1980) 104 Cal.App.3d 254 defendant's counsel (Reyes) wrote to plaintiff's counsel (Izzi) during the course of settlement negotiations

accusing him of "extortion." Izzi sued for libel, and the trial court (Hon. Robert Weil) dismissed the lawsuit. Division 5 of this court affirmed the dismissal, rejecting "the central thrust of [Izzi's] ... argument that [Reyes'] statements were scurrilous as well as denigrating, and not protected by the privilege provided by section 47[(b).]" (*Id.* at p. 261.) The *Izzi* court held that the outcome was controlled by decades of precedent, including, "*Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573 ... [in which] [t]hat court dealt with the determination of whether or not a [prelitigation] letter sent by an attorney to a potential litigant, alleging fraud and violations of securities law, was privileged." (*Izzi v. Reyes*, *supra*, 104 Cal.App.3d at p. 261.)

> "The purpose of section 47 is to afford litigants the utmost freedom of access to the courts in order to secure and defend their rights [citation] and, to that end, to protect attorneys during the course of their representation of their clients. [Citations.] It is ... well established legal practice to communicate promptly with a potential adversary, setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action. [Citation.] [The attorney's] ... letter is a typical example of such a missive. [para.] For the above reasons, *the privilege to defame in the course of judicial proceedings is not limited to statements during trial but can extend, notwithstanding the phrasing of the statute, to steps taken prior thereto.*" (Brackets and italics in original.)
>
> (*Id.* at pp. 261-262, quoting *Lerette v. Dean Witter Organization, Inc.*, *supra*, 60 Cal.App.3d at pp. 576-577.)

Singer's prelitigation letter to Malin is also "typical" of communications with a "potential adversary"—"setting out the claims

made upon him, urging settlement, and warning of the alternative of judicial action." (*Izzi v. Reyes*, *supra*, 104 Cal.App.3d at pp. 261-262.) The obvious logic of these authorities has been extended to claims of outright "extortion" and related conduct committed by defendants prior to commencement of a lawsuit.

In *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, plaintiffs who purchased equipment used to decrypt and misappropriate satellite television programming brought an action comprised of recipients of a demand letter from satellite programming provider DIRECTV. The provider's pre-suit letters demanded that plaintiffs cease using the equipment and pay for the "pirated" programming. Plaintiffs sued DIRECTV alleging that its conduct in mailing the demand letters and thereafter pursuing enforcement remedies amounted to an unfair business practice under Business and Professions Code section 17200; a violation of the recipients' civil rights; and "extortion." The trial court granted DIRECTV's anti-SLAPP motion striking the entire action. Division 3 affirmed, after cataloguing plaintiffs' extortion claims:

> The operative complaint alleges ***"the demands constitute extortion."*** The complaint also alleges the following: none of the pieces of electronic equipment triggering the demand letters is contraband or illegal. ... DIRECTV sent demand letters to every name found on customer lists without first ascertaining whether the letter recipients actually possessed the hardware and used it in some improper fashion. The purpose of the demand letters was to intimidate and coerce the recipients into forfeiting the equipment and to extort money. Many of the statements contained in the demand letters were false, misleading, or deceptive. For example, the

> letter repeatedly implies that, unless the recipient settled, DIRECTV would seek monetary damages and "the recipient could face civil and criminal prosecution." The demand letters also contained "[a] list of demands which ... must be met in timely fashion" or DIRECTV threatened to "'initiate legal proceedings[,]'" and "'abandon its attempts to negotiate.'"
>
> The complaint further alleges that a secondary demand letter was sent to some of the plaintiffs several weeks or months later. The second letter reiterated the accusations of piracy and stated that, unless the recipient contacted the sender within days, a lawsuit would be filed based on a draft complaint that was enclosed with the letter.
>
> (*Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th at pp. 910-911, emphasis added.)

Digesting the abundant California precedent on the topic (including *Lerette v. Dean Witter Organization, Inc.*, *supra*),[4] *Blanchard* readily concluded that plaintiffs' claims based upon the supposedly "extortionate" demand letters sent prior to the commencement of any litigation satisfied prong one of the anti-SLAPP law. (*Blanchard v. DIRECTV, Inc.*, *supra*,

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[4] See *Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th at pp. 915, 919-921, also citing *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 262 (prelitigation demand letter was subject to the absolute privilege) and *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 902, 920 (*Kashian*) (privilege barred businessman's suit accusing defendant-lawyer of being the alter ego of his clients' organizations in seeking to "extort settlements").

123 Cal.App.4th at pp. 919-920.) Turning to the second prong, the *Blanchard* court independently examined the evidence, holding that: "Plaintiffs' showing failed to demonstrate prima facie that they could overcome the litigation privilege. By contrast, DIRECTV demonstrated that the privilege does apply. The trial court properly ruled that the demand letters are absolutely privileged under Civil Code section 47, subdivision (b)." (*Id.* at p. 922.) The same "screening" process should have been followed by the trial court here, but was not. This was error.

Blanchard also noted that, over the years, the prelitigation settlement demand cases predominately rejected any attempt to qualify the absolute nature of the privilege or to create "exceptions" to the broad scope of the immunity afforded. (See *Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th at pp. 921-922.) However, about the same time as the anti-SLAPP law was enacted in the early 1990s, the California Supreme Court grappled with a few conflicting decisions that suggested the absolute privilege should be qualified by an "interest of justice exception." (*Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th at pp. 919-922.)

Blanchard commented on one of those cases, *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, disapproved by *Silberg*, *supra*, 50 Cal.3d at p. 519—a factually similar "extortion" lawsuit arising out of prelitigation demands made by another satellite television provider. According to *Fuhrman*, "*special emphasis must be laid on the requirement that* [the publication] *be made in furtherance of the litigation and to promote the interest of justice*. Only if this requirement has been satisfied, is it appropriate for the courts to define liberally the scope of the term 'judicial proceeding' and the persons who should be regarded as litigants or other participants." (*Fuhrman*, *supra*, 179 Cal.App.3d at p. 421, italics and brackets in original.)

After *Fuhrman* and a handful of cases embraced this "exception," the Supreme Court stepped in to clarify that no "interest of justice" qualification limited the absolute nature of the privilege. In rejecting any such exception, *Silberg* explained that "the endorsement of [a subjective] 'interest of justice' requirement would be tantamount to the exclusion of *all* tortious publications from the privilege, *because tortious conduct is invariably inimical* to the 'interest of justice.' Thus, the exception would subsume the rule." (*Silberg, supra*, 50 Cal.3d at p. 214, second italics added; see also *id.* at p. 219, overruling *Fuhrman* and similar cases.)[5]

Blanchard thus rejected plaintiffs' argument in opposition to the anti-SLAPP motion that they might overcome the absolute privilege in light of *Fuhrman*: "While similar to this case, *Fuhrman* differs in one crucial respect: The decision in that case was based on a demurrer where factual determinations are not permissible. Here, however, the trial court *must consider facts so as to make a determination whether plaintiffs can establish a prima facie probability of prevailing on their claims*. (Code Civ.

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[5] *Silberg* acknowledged that strict application of the privilege to disallow derivative tort actions would necessarily mean that some injuries would go uncompensated, but concluded that "the salutary policy reasons for an absolute privilege supersede individual litigants' interest in recovering damages for injurious publications made during the course of judicial proceedings." (*Silberg, supra,* 50 Cal.3d at p. 218.) "[I]n a good many cases of injurious communications, other remedies aside from a derivative suit for compensation will exist and may deter injurious publications during litigation," such as "criminal prosecution" for criminal offenses, presumably including extortion. (*Id.* at p. 219; accord *Rusheen, supra*, 37 Cal.4th at pp. 1063–1064; *Rubin, supra*, 4 Cal.4th at pp. 1198–1199; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 13 ["nontort remedies [for illegal conduct and obstruction of justice in litigation contexts] are both extensive and apparently effective"].)

Proc., § 425.16, subd. (b)(1) [other citation omitted].)" (*Blanchard v. DIRECTV, Inc., supra,* 123 Cal.App.4th at pp. 921, brackets added, italics in original. Accord *Kashian, supra,* 98 Cal.App.4th at pp. 902, 920 [after *Silberg*, claims of "unethical" acts, "extort[ing] settlements" etc. could not avoid the bar of absolute privilege raised by lawyer's anti-SLAPP motion].)

As *Blanchard* correctly discerned, the explicit purpose of section 425.16(a) is to go behind the bare allegations of the complaint and require an evidentiary analysis of the potential "merits" of plaintiff's claims: "Unlike demurrers or [ordinary] motions to strike, which are designed to eliminate sham or facially meritless allegations, at the pleading stage a SLAPP motion, like a summary judgment motion, *pierces the pleadings and requires an evidentiary showing.* [Citation.]" (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal. App. 4th 604, 613, emphasis added.)

Whether a pre-suit settlement demand amounts to "extortion" is often in the eye of the beholder. Consequently, the application of the privilege or the anti-SLAPP law can never be dependent upon the "label" placed on the plaintiff's lawsuit or the "motive" he attributes to the opposing lawyers in representing their clients. (*Rubin, supra,* 4 Cal.4th at pp. 1201-1202.) The allegedly unethical or improper character of the "acts" or communications complained of in no way abrogates the absolute nature of the privilege: "While one might believe the communications ethically unacceptable, we conclude the present derivative causes of action were based solely on *communicative* acts done in a judicial proceeding by litigants, to achieve the objects of litigation, and had a logical relation to the action." (*Kupiec v. American Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326, 1331–1332; accord *Birkner v. Lam, supra,* 156 Cal.App.4th at p. 285; *Kashian, supra,* 98 Cal.App.4th at pp. 918-920.)

The privilege is absolute "not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions[.]" (*Silberg, supra,* 50 Cal.3d at p.214, brackets in original; accord *Rubin, supra,* 4 Cal.4th at p. 1202; cf. Respondent's Br. at pp. 30-34.)

In light of this extensive history, and the Legislature's unequivocal intent that the anti-SLAPP law "shall be construed broadly," the notion the mere *allegation* of "extortion" or other "illegality" can operate to avoid the screening of Malin's claims is incongruous. The Supreme Court has held "that the plain language of the 'arising from' prong encompasses any action based on protected speech or petitioning activity" and declined to "judicially engraft the [anti-SLAPP] statute with requirements" that would impair the salutary application of that process. (*Jarrow, supra,* .31 Cal.4th at p. 733-734; *Flatley. supra,* .39 Cal.4th at p. 312.)

The trial court erred in ruling that an ostensible "illegality exception" precluded any necessity to proceed to the second, "merits" prong of the anti-SLAPP inquiry.

B. *Gerbosi* and the Trial Court Misconstrued and Misapplied the Narrow "Illegality Exception" to the Anti-SLAPP Law

Instead of applying the anti-SLAPP law broadly, the trial court incorrectly reasoned that *Flatley* and *Gerbosi* compelled a different reading. {2 AA 414-417} *Flatley,* 39 Cal.4th 299 articulated a "narrow" exception to the anti-SLAPP law; an exception that after close examination of the factual record by two lower courts under the screening procedure, justified allowing the plaintiff's claims to proceed. Michael Flatley, the world famous dance impresario, received a seven-figure settlement demand from a lawyer (Mauro) representing a woman (Robinson) with whom Flatley

acknowledged having a consensual sexual liaison in his Las Vegas hotel suite. Mauro's letter (followed by phone calls) threatened to publicly accuse Flatley of raping his client if Flatley did not comply with her demand. When Flatley refused, Mauro filed suit on Robinson's behalf in Illinois; and both lawyer and client appeared on television with Robinson describing the alleged rape "in lurid detail." (*Id.* at pp. 305-307.) After Robinson abandoned her Illinois action, Flatley sued in California for damages. The trial court denied Mauro's anti-SLAPP motion. The Court of Appeal agreed a prima facie case was shown. (*Ibid.*)

The California Supreme Court granted review, and in conjunction with a companion case,[6] stated the rule that "a defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected by constitutional guarantees of free speech and petition, cannot use the anti-SLAPP statute to strike the plaintiff's complaint." (*Flatley*, *supra*, 39 Cal.4th at p. 318.) *Flatley* made clear, however, that its holding was limited to "the specific and extreme circumstances of this case," in which the assertedly protected communications, as a matter of law, fell outside the ambit of protected speech. (*Id.* at p. 332, fn. 16.) "In ***such a narrow circumstance***, where either ***the defendant concedes the illegality of its conduct*** or ***the illegality is conclusively shown by the evidence***, the motion must be denied." (*Id.* at p. 318, emphasis added; see also *id.* at p. 320.)

Gerbosi, *supra*, 193 Cal.App.4th 435 drastically expanded this "narrow circumstance"—construing *Flatley's* "illegality as a matter of law"

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[6] *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 286.

exception in a manner that eviscerates the anti-SLAPP law. *Gerbosi* involved two of many lawsuits seeking damages allegedly caused by the clandestine illegal activities of private investigator Anthony Pellicano. (*Id.* at pp. 441-442.)

After Pellicano was indicted for wiretapping and other unlawful conduct, the claimants sued Gaims, Weil, West & Epstein, LLP (Gaims), a law firm that had allegedly accepted the fruits of Pellicano's activities. One of the claimants (Erin Finn) alleged that Gaims filed harassing lawsuits against her, and had hired Pellicano to commit unlawful acts of wiretapping and eavesdropping while Gaims was representing an adversary party (recording executive Robert Pfeifer) during the prior litigation involving Finn and Pfeifer. The disputes between Finn and Pfeifer were settled by agreement in November 2001. In early 2006, a federal grand jury returned an indictment against Pellicano and Pfeifer and others on conspiracy and wiretapping charges. Eventually, Pfeifer agreed to plead guilty and to testify against Pellicano. In March 2008, Pfeifer testified against Pellicano at his criminal trial. (*Gerbosi*, *supra*, 193 Cal.App.4th at pp. 440-442.)

The other claimant (Michael Gerbosi) was Finn's neighbor. Gerbosi alleged that he was also a victim of the Pellicano's activities. The gist of Gerbosi's action was that he engaged in confidential communications with Finn during 2000 and 2001, and that Pfeifer, Pellicano, Pacific Bell, and Gaims, acting in furtherance of a common scheme, intercepted his confidential communications by unlawful wiretaps and unlawful eavesdropping. (*Gerbosi*, *supra*, 193 Cal.App.4th at pp. 440-442.)

Gaims' anti-SLAPP motions argued that all of the causes of action asserted by Gerbosi's and Finn's complaints arose from protected activity; namely, the firm's representation of the firm's client, Pfeifer, in lawsuits

involving Finn. The Court of Appeal agreed that all of Finn's "litigation-related causes of action (e.g., negligence, malicious prosecution, abuse of process) "arose from" Gaims' representation of Pfeifer in the underlying legal disputes with Finn, and she could not prevail on those causes of action under prong two because her claims were time-barred or released under the settlement agreement. However, all remaining claims asserted by Finn and Gerbosi based on *alleged* involvement in wiretapping and eavesdropping were not subject to screening because "[e]ach is based on alleged criminal activity." (*Gerbosi, supra*, 193 Cal.App.4th at pp. 447-448.)

Gaims argued that the trial court had misapplied *Flatley*—the firm "had satisfied the first step of the anti-SLAPP procedure because Finn's opposition papers did not establish either (1) that Gaims has conceded its conduct was illegal, or (2) that the evidence "conclusively" proves that Gaims engaged in illegal conduct." (*Gerbosi, supra*, 193 Cal.App.4th at pp. 445.) The Court of Appeal disagreed:

> We read *Flatley* differently than does Gaims. This is the predominant rule to be taken away from *Flatley*: "[S]ection 425.16 cannot be invoked by a defendant whose *assertedly protected activity* is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley, supra,* at p. 317, italics added.) ...
>
> ***
>
> [Para.] Here, to the extent that Gaims's anti-SLAPP motion sought to strike Finn's privacy-related causes of action, the assertedly protected activity must be said to be wiretapping in the course of representing a client. Under no factual scenario offered by Gaims is such wiretapping activity protected by

> the constitutional guarantees of free speech and petition. Gaims's argument that its evidence showed it did not do the acts that Finn alleges it did is more suited to the second step of an anti-SLAPP motion. A showing that a defendant did not do an *alleged* activity is not a showing that the *alleged* activity is a protected activity.
>
> (*Gerbosi, supra*, 193 Cal.App.4th at pp. 447-448, italics added.)

According to *Gerbosi*, *Flatley* should be read to mean that any time the mere *allegation* is made concerning conduct that, if proven, would be "illegal as a matter of law," then prong one of the anti-SLAPP law cannot be satisfied. (*Gerbosi, supra*, 193 Cal.App.4th at p. 447 ["The bottom line is this: section 425.16 was not enacted to protect an attorney who *allegedly* hired an 'investigator' like Anthony Pellicano to wiretap telephones ... [Para.] ... [T]he record suggests that Gaims may well have winning defenses to Finn's causes of action alleging criminal activity, but those defenses must be established by a procedural tool other than the anti-SLAPP motion procedure."] (Italics added.).)

That logic does not follow. Many other cases do not support *Gerbosi's* overly narrow view of the section 425.16 screening procedure. Contrary to *Gerbosi's* reasoning, the "illegality" exception to the anti-SLAPP law was narrowly drawn, not the statute itself. (See *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 541–546 [discussing the limited effect of *Flatley* and *Soukup*].) "'[T]he plaintiff 'cannot simply rely on the allegations in the complaint'" in order to avoid the merits-screening process. (*Alpha & Omega, supra*, 200 Cal.App.4th at p. 664.)

Certainly Malin's *allegation* of "extortion" must be screened under section 425.16. *Blanchard* held that DIRECTV's numerous prelitigation

demand letters—which the plaintiffs also characterized as being "extortionate" as a matter of law—satisfied prong one. Under prong two, *Blanchard* held that the absolute litigation privilege barred all of the plaintiffs' claims involving the *alleged* extortion and related unlawful business practices as a matter of law. (*Blanchard, supra,* 123 Cal.App.4th at pp. 921-922.)

Flatley likewise held that, at a minimum, section 425.16 required evidentiary screening—beyond the mere allegations of the complaint—to ascertain whether the lawyer's prelitigation letter and phone calls amounted to extortionate conduct that was "illegal as a matter of law." (*Flatley, supra,* 39 Cal.4th at pp. 318-322.) Only in the "extreme" and "narrow circumstance" presented by those facts, did the Supreme Court hold that "the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law[.]" (*Id.* at pp. 318, 320; accord *Birkner v. Lam, supra,* 156 Cal.App.4th at p. 285.)

Before *Gerbosi,* numerous cases had uniformly upheld the view that even *allegedly* unethical or illegal conduct "in furtherance of" the litigation nonetheless remained privileged under section 47. (See, e.g., *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 711-713] ["mere allegation" of defendant's "illegal" conduct was insufficient to satisfy *Flatley's* exception]; *Pettitt v. Levy, supra,* 28 Cal.App.3d at p. 491 ["the allegation of [a criminal] conspiracy ... does not remove the privilege"]; see also *Silberg, supra,* 50 Cal.3d at pp. 218–219; *Scalzo v. Baker* (2010) 185 Cal.App.4th 91, 99–102 [lawyers and forensic accountants were allegedly involved in client's misappropriation of privileged financial records for later use in litigation—all claims against client's professionals, but not the client, stricken under section 425.16]; Lavely & Singer ARB at pp. 5-6, 9.)

Kachig v. Boothe (1971) 22 Cal.App.3d 626, written by Justice Kaufman (also the author of *Silberg*) while on the Court of Appeal, illustrates the broad scope of the litigation privilege in a case involving *proven* "attorney misconduct" resulting in a criminal conviction. In *Kachig,* an attorney named Jones was convicted of subornation of perjury and offering false evidence in a prior lawsuit that Jones brought against Mr. and Mrs. Kachig. The Kachigs lost their home as a result. (*Id.* at pp. 630–631; see also *People v. Jones* (1967) 254 Cal.App.2d 200.) Jones was suspended from the practice of law for his part in an illegal conspiracy with his clients to manufacture false evidence because the Supreme Court found he had committed crimes of "moral turpitude" in violation of Business & Professions Code section 6068. (See *In Re Jones* (1971) 5 Cal.3d 390, 400.)

Although each of these egregious facts was already *proven* in the criminal case, *Kachig* concluded that the conduct of Jones and his clients remained privileged from civil liability under former subdivision (2) (now subdivision (b)) of section 47: "[W]e recognize that the wrong in this case is a most grievous one, and we should be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse." (*Kachig, supra,* 22 Cal.App.3d at pp. 641–642, brackets in original text].)

Malin capitalizes on *Gerbosi's* constricted reading of section 425.16.[7] He asserts that mere allegations "regarding computer hacking and eavesdropping, as criminal acts in and of themselves, are not constitutionally protected activities." (Respondent's Br. at pp. 2, 19

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[7] He also attempts to draw the nefarious Mr. Pellicano into this case; insinuating that Lavely & Singer must have engaged in similar misdeeds because their messenger was once Pellicano's employee. {1 AA 157}

[asserting that challenges to those claims may only be raised by demurrer or summary judgment, but not an anti-SLAPP motion].) Not so.

In the specific context of claims involving illegal "wiretapping" and "eavesdropping" prohibited under the Penal Code, the Supreme Court has carefully drawn distinctions between the types of conduct that are subject to the absolute privilege and those which might give rise to a viable claim for damages. For example, in *Kimmel v. Goland* (1990) 51 Cal.3d 202, the court applied the "sound reasoning" of *Ribas v. Clark* (1985) 38 Cal.3d 355 (*Ribas*), and explained its significant "distinction between injury allegedly arising from *communicative* acts ... and injury resulting from *noncommunicative* conduct. ... *This distinction has traditionally served as a threshold issue for determining the applicability of* [*the litigation privilege*]." (*Kimmel, supra,* 51 Cal.3d at pp. 210-211, italics and brackets added [noting that any "damages" recoverable in a civil action are generally limited to those provided by Penal Code for each offense].)

In *Ribas, supra,* 38 Cal.3d at pages 364-365, the Supreme Court held that injuries arising out of noncommunicative criminal conduct (the act of eavesdropping itself for which injuries accrued at the moment of the violation) were not barred by the section 47 privilege but *applied* the privilege to bar recovery for damages allegedly arising from the *testimonial* use of the substance of the overheard conversations, finding "the purpose of the ... [litigation privilege] no less relevant" to the plaintiff's claim. The *Kimmel* court emphasized that its holding that the privilege did not apply was "*limited* to the narrow facts before us involving [only] *noncommunicative* acts—the illegal recording of confidential telephone conversations—for the purpose of gathering evidence to be used in future litigation." (*Kimmel, supra,* 51 Cal.3d at p. 205, italics added.)

Rubin, supra, 4 Cal.4th 1187 drew the same distinction. There, the "gravamen of [the] plaintiff's complaint" was that the defendant law firm had used a nonattorney resident of a mobilehome park to solicit other park residents to sue the plaintiff, "conduct the Legislature has made criminal." (*Id.* at pp. 1196-1197.) Because the plaintiff's claims were "founded essentially upon alleged misrepresentations made by the defendant" (and the resident acting on its behalf) to the other residents in discussing park conditions, the possibility of filing suit and the subsequent filing of pleadings, "whether these acts amounted to wrongful attorney solicitation or not, they were *communicative in their essential nature and therefore within the privilege* of section 47(b)." (*Id.* at p. 1196, italics added.)

Carried to its illogical extreme, *Gerbosi's* conclusion is that lawyers who are merely charged with claims of "illegal" conduct during their representation of a client may never invoke the anti-SLAPP statute to demonstrate those claims are without merit. Such a rule would frustrate the very purpose of the statute. Every day during the course of routine litigation, or in preparation for the lawsuit, lawyers are called upon to make settlement demands, gather evidence and communicate with their clients and third parties to "marshal evidence" about their claims and defenses. Those activities are all clearly undertaken "in furtherance" of both the clients' and the lawyers' protected First Amendment rights. (*Briggs, supra,* 19 Cal.4th at pp. 1011-1016; *Jarrow, supra,* 31 Cal.4th at pp. 737-742.)

If the law were otherwise, claims of illegal "invasion of privacy" or "subornation of perjury" or "unlawful solicitation" or "extortion" could never be the subject of the screening process mandated by the anti-SLAPP law. Thus, *Gerbosi* cannot be reconciled with numerous decisions that have carefully scrutinized claims *alleging* precisely that kind of illegal conduct under the anti-SLAPP law. (See, e.g., *Flatley, supra,* 39 Cal.4th at pp. 318-

323 [extortion]; *Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th at pp. 919-922 [extortionate pre-suit demands in furtherance of unlawful and unfair business practices] *Rusheen*, *supra*, 37 Cal.4th at pp. 1063–1064 [subornation]; *Baker v. Scalzo*, *supra*, 185 Cal.App.4th at pp. 99–102 [claims alleging statutory invasion of privacy and theft of private financial records screened in light of *Flatley's* illegality exception]; *Birkner v. Lam*, *supra*, 156 Cal.App.4th at p. 285-286 [digesting cases under section 425.16, including *Flatley*, alleging criminal or unethical conduct].)

Like the so-called "interest of justice" exception soundly rejected by the Supreme Court over 20 years ago, the "illegality exception" as contemplated by *Gerbosi* would swallow the absolute privilege and eviscerate the anti-SLAPP procedure. (Cf. *Silberg*, *supra*, 50 Cal.3d at p. 214; *Baker v. Scalzo*, *supra*, 185 Cal.App.4th at pp. 101–102 ["*Silberg* leaves no room for doubt: For policy reasons, even an act committed fraudulently or with malice is privileged under section 47"].)

ASCDC expresses no view about the merits of the parties' claims and defenses that were the subject of the anti-SLAPP motion.[8] However, the screening process under section 425.16 was compulsory, and to the extent the trial court concluded that an "illegality" exception precluded that analysis under *Flatley* or *Gerbosi*, it was mistaken.

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[8] When the trial court erroneously fails to apply the anti-SLAPP procedure, the Court of Appeal may remand to require statutory screening, or review the evidence independently and resolve the merits on its own. (See *Jarrow*, *supra*, 31 Cal.4th at pp. 737-741 [analyzing the merits after the trial court declined to screen malicious prosecution claims]; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150-155 [dismissing some claims, remanding others for additional findings].)

C. Conclusion

For all the foregoing reasons, and those stated in appellants' principal briefs on the merits, declining to conduct the merits-screening procedure under the anti-SLAPP law was manifest error. The order denying appellants' special motion to strike accordingly should be reversed.

DATED: March 25, 2013

Respectfully submitted,

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WORD COUNT CERTIFICATION [CRC 8.204(c)]

Counsel for Amicus Curiae Association of Southern California Defense Counsel certifies that the Application for Leave to File Amicus Curiae Brief contains 851 words and the Amicus Curiae Brief in Support of Appellants contains 7,499 words, including footnotes, for a total of 8,350 words as measured by the Word 2010 word processing software used in the preparation of the application and the brief.

DATED: March 25, 2013

Respectfully submitted,

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[PROPOSED] ORDER

No. B237804

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT
DIVISION FOUR

MIKE MALIN,

Plaintiff and Respondent,

v.

MARTIN D. SINGER, et al.,

Defendants and Appellants.

[PROPOSED] ORDER GRANTING LEAVE TO FILE ASCDC'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

The court has considered the application of the Association of Southern California Defense Counsel (ASCDC) under Rule 8.200(c), California Rules of Court, for leave to file an amicus curiae brief in support of appellants, and good cause appearing, the application is hereby **GRANTED**.

The ASCDC amicus curiae brief which accompanied the application, having been served on all parties, shall be filed upon entry of this Order. Any party may file an answer to the ASCDC amicus curiae brief within 30 days from the entry of the Order. **IT IS SO ORDERED**.

Dated:_____

_____
PRESIDING JUSTICE

PROOF OF SERVICE

Malin v. Singer, et al.
California Court of Appeal, 2nd District, No. B237804

I, BESS HUBBARD, declare: I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614.

On **March 25, 2013**, I served a copy of the within document:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF APPELLANTS

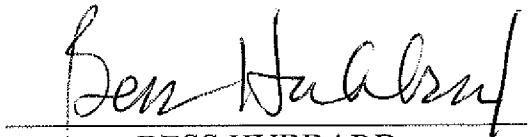
by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **March 25, 2013**, at Los Angeles, California.



BESS HUBBARD

SERVICE LIST

Malin v. Singer, et al.
California Court of Appeal, 2nd District, No. B237804

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