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 LOS ANGELES COUNTY SUPERIOR COURT
MARY M. STROBEL, JUDGE • CASE NO. BC466547

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE BEVERLY HILLS BAR ASSOCIATION, THE CENTER FOR PUBLIC INTEREST LAW, PROFESSOR GEORGE (ROCK) PRING, NEMECEK & COLE, MITCHELL GILLEON LAW FIRM, SCOTT BONAGOFSKY, ESQ., PAUL GLUSMAN, ESQ., SCOTT KAUFMAN, ESQ., AND RICHARD PHELPS, ESQ. IN SUPPORT OF DEFENDANTS AND APPELLANTS

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE PRESIDING JUSTICE:

Pursuant to California Rules of Court, rule 8.200(c), the Beverly Hills Bar Association, the Center for Public Interest Law, Professor George (Rock) Pring, Nemecek & Cole, Mitchell Gilleon Law Firm, Scott Bonagofsky, Esq., Paul Glusman, Esq., Scott Kaufman, Esq., and Richard Phelps, Esq. (collectively, referred to as "*Amici*") request permission to file the attached amici curiae brief in support of defendant and appellants, Martin D. Singer, *et al.*, in the above-captioned matter.

The Beverly Hills Bar Association ("BHBA") is a voluntary bar association with more than 5,000 members who live or work in the Westside of Los Angeles County. BHBA is dedicated to improving the administration of justice, meeting the professional needs of Los Angeles lawyers, and serving the public in law-related ways.

Significant among BHBA's concerns are ensuring a robust adversary

system, grounded in the highest ethical and professional standards, that enables attorneys and their clients to vigorously prosecute and defend their cases in court—or at the negotiating table—to achieve the ends of justice, and to ensure access to justice for all people that reduces the costs of resolving disputes without sacrificing just results. The use of pre-litigation demand letters, at issue in this case, sits squarely in the center of those concerns.

BHBA is also deeply concerned with eliminating bias from the justice system, in the profession and practice of law, and in society at large. For example, in keeping with its significant leadership in the area of marriage equality, on January 21, 2009, BHBA filed an Amici Curiae Brief in the California Supreme Court supporting the petitions challenging Proposition 8. On February 27, 2013, BHBA, along with several other bar associations, filed an Amici Curiae Brief in support of respondents in Hollingsworth v. Perry, currently pending before the U.S. Supreme Court (Docket No. 12-144).

Even though demand letters are, and should be, broadly protected under law, BHBA also believes that such letters, as with all communications written by attorneys, should not make invidious distinctions based on an adversary's or party's race, national origin, religion, sexual orientation, or the like and should conform to the highest standards of civility, such as those espoused by the Los Angeles County Bar Association. (*See* Los Angeles County Bar Association, *Litigation Guidelines* (1989) § 4.)

The Center for Public Interest Law ("CPIL") is a nonprofit, nonpartisan, academic center of research, teaching, learning, and advocacy in regulatory and public interest law based at the University of San Diego School of Law. Since 1980, CPIL has studied the state's regulation of

business, professions, and trades, and monitors the activities of state occupational licensing agencies — including the regulatory boards within the Department of Consumer Affairs. CPIL publishes the California Regulatory Law Reporter, which chronicles the activities and decisions of 25 California regulatory agencies. CPIL's Executive Director, Robert Fellmeth, is coauthor of the treatise *California White Collar Crime* (with Papageorge, Tower, 4th edition 2013) and was the State Bar Discipline Monitor from 1987 to 1992.

George (Rock) Pring is a Professor of Law at the University of Denver Sturm College of Law. He co-authored (with Professor Penelope Canan) the National Science Foundation-funded study, SLAPPs: Getting Sued for Speaking Out, which first named and drew national and international attention to the problem of "Strategic Lawsuits Against Public Participation" in government or "SLAPPs," and numerous legal articles on the subject. In 1990, Professors Pring and Canan's advice was sought by then-Senator Bill Lockyer, Chair of the California Senate Committee on the Judiciary, in his drafting of the original bill that became California's pioneering anti-SLAPP Law in 1992; they authored a 1998 report for the Judicial Council of California Administrative Office of the Courts, at its request, on recommended amendments to the law which were adopted; and have otherwise advised legislatures in California and other states on anti-SLAPP Laws and filed amicus curiae briefs in SLAPP cases.

Nemecek & Cole is a preeminent law firm that specializes in professional liability defense. Nemecek & Cole frequently represents attorneys sued for their pre-litigation demand letters. The firm disagrees with the superior court's finding that the demand letter at issue is extortionate as a matter of law and further believes that the record is clear that Appellants met their first prong burden because they dispute

Respondent's allegation that the asserted petitioning activity is illegal and the letter is not illegal as a matter of law.

Mitchell Gilleon Law Firm is a San Diego firm handling plaintiff's personal injury, business, and employment cases, as well as defamation cases. The firm employs pre-lawsuit demand letters for its clients in many instances. Mitchell Gilleon believes that the issues in this case concerning such demand letters are important because lawyers should be free to send such letters without the fear that by simply threatening to file a lawsuit if a matter cannot be settled, the client, and possibly the lawyers, can be subjected to civil liability for such letters.

Scott Bonagofsky is an attorney who specializes in plaintiffs' employment litigation. He has been practicing law for more than 15 years. Sending pre-litigation demand letters has always been an important part of responsible and efficient representation of his clients and has proven to be an effective means of resolving some cases without initiating formal litigation. He believes that lawsuits against lawyers or their clients for such pre-litigation communications have an undesirable chilling effect on the exercise of First Amendment rights.

Paul Glusman is an attorney who has been practicing in the State of California for more than 37 years. He regularly sends pre-litigation demand letters to persons with interests adverse to those of his clients. Each time he sends such a demand letter it is with the hope of initiating a dialogue that will lead to the early settlement of a case. Glusman has found that a significant portion of the time, either pre-litigation or early in the litigation process, a frank and honest exchange can lead to a settlement of a dispute, relieving our over-burdened courts of the necessity of administering a trial with the attendant conferences and pre-trial motion practice. He has been sued personally for a pre-litigation demand, as well as for demands made in

litigation, by a former opponent of a client who charged him with malicious prosecution. Although he prevailed in that matter, he found that the prospect—and reality—of being sued had a chilling effect on his practice of writing demand letters, and thus, hampered his efforts to achieve for his clients early resolutions of disputes.

Scott Kaufman is an attorney who has practiced consumer protection law since 1997. He is the California co-chair for the National Association of Consumer Advocates. Many of his cases can be (and have been) settled with a well-written demand letter, lessening the strain on an overburdened court system. Many more of his cases require—by law—that a demand letter be sent prior to the filing of an action. Kaufman has also been sued by a litigation adversary as a result of sending a pre-litigation demand letter and filing a complaint. That lawsuit against him was dismissed by the trial court as a meritless SLAPP.

Richard Phelps is an attorney and mediator in Oakland. He is a member of the California Academy of Distinguished Neutrals. Phelps has represented parties on both sides of an anti-SLAPP motion in trial courts and at the Court of Appeal. He was also the co-author of Code of Civil Procedure Section 425.18 and has great concern for the rights of attorneys to try to settle cases pre-litigation using their creativity, short of actual extortion or other actual criminal activity.

All the *Amici* believe that lawyers' pre-litigation demand letters are an integral part of the constitutional rights of petition and speech and should be entitled to broad protection under both the anti-SLAPP statute and the litigation privilege. Specifically, the *Amici* believe that attorneys' pre-litigation demand letters deserve protection on the first-prong of the analytical framework set forth in *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, (2002) 29 Cal.4th 53, 67, under the anti-SLAPP, statute subject

to the limited crime exception set forth in *Flatley v. Mauro* (2006) 39 Cal.4th 299. The *Flatley* crime exception only applies if the defendant concedes, or the evidence conclusively establishes, that the asserted protected speech or petitioning activity is illegal, as a matter of law. (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1188.) Furthermore, the *Amici* also believe that merely alleging that a demand letter or other activity is illegal should not satisfy the standard for overcoming the first prong of *Equilon* analysis under an anti-SLAPP motion, as the court ruled in the *Gerbosi* decision.

This brief is timely. The last Appellants' reply brief was filed on March 11, 2013, pursuant to rule 8.220(a) of the California Rules of Court. BHBA is submitting this brief for filing within 14 days of that date. (See Cal. Rules of Court, rule 8.200(c)(1) [amicus curiae brief and application should be filed "[w]ithin 14 days after the last appellant's reply brief is filed or could have been filed under rule 8.212, whichever is earlier . . ."].)

Dated: March 25, 2013

ABRAMS GARFINKEL MARGOLIS BERGSON, LLP
Thomas H. Vidal

By: _____
THOMAS H. VIDAL

Attorneys for Amici Curiae
Beverly Hills Bar Association, the Center for Public Interest Law, Professor George (Rock) Pring, Nemecek & Cole, Mitchell Gilleon Law Firm, Scott Bonagofsky, Esq., Paul Glusman, Esq., Scott Kaufman, Esq., and Richard Phelps, Esq.

AMICI CURIAE BRIEF

INTRODUCTION

In denying Appellants' special motion to strike under Code of Civil Procedure section 425.16 (the "anti-SLAPP" statute), the trial court misapplied the holdings in *Flatley v. Mauro (2006)* 39 Cal.4th 299 *(Flatley)* and *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435 (*Gerbosi*), by concluding that the Singer demand letter was illegal as a matter of law. As both Appellants and Respondent have acknowledged, an activity may be deemed unlawful as a matter of law when (i) defendant does not dispute that the activity was unlawful, or (ii) uncontroverted evidence conclusively shows the activity was unlawful. (*Flatley* at 317.) In this case, the record plainly demonstrates that Appellants dispute that the pre-litigation demand letter was unlawful. The issues presented on this appeal focus only on the second prong of the *Flatley* test: what makes an activity "unlawful as a matter of law" and what evidence is sufficient to "conclusively" show that the activity is unlawful as a matter of law.

The trial court erred in denying Appellant's anti-SLAPP motion on the first prong of the *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*), analytical framework. First, Respondent failed to meet his burden to present uncontroverted evidence that conclusively shows the demand letter was unlawful, and thus, not a protected activity under prong one of the *Equilon Enterprises* framework. Second, *Gerbosi*, on which the trial court based its decision, should not be followed. To the extent that *Gerbosi* stands for the proposition that merely alleging that defendant engaged in criminal activities is enough to preclude those activities from protection of the anti-SLAPP statute, then it was wrongly decided.

LEGAL DISCUSSION

I. OUR SYSTEM OF ZEALOUS ADVOCACY REQUIRES BROAD PROTECTION OF PRE-LITIGATION DEMAND LETTERS

A. Pre-Litigation Demand Letters Are Important, Effective, and Ubiquitous.

The importance, effectiveness, and ubiquity of the pre-litigation demand letter cannot be overstated. Appellants' Opening Brief presents the important role that demand letters play in resolving disputes and the substantial protection to which they are entitled. (AOB at 29-32.) The arguments that Appellants make in this regard are aligned with public policy because the use of demand letters is so widespread in civil practice. For example, many patent lawsuits brought by patent licensing firms against large corporations settle at the demand letter stage prior to litigation or before trial. (*See* Comment, *Introducing the Defense of Independent Invention to Motions for Preliminary Injunctions in Patent Infringement Lawsuits* (2003) 91 Calif. L.Rev. 117, 124 (citing Sandburg, *Trolling for Dollars*, S..F. Recorder (July 30, 2001) at 1).) Demand letters are used by aggrieved copyright holders in the process of obtaining a web-site domain owner's contact information, which may consist of a "strongly-worded letter containing clear evidence of the infringing activity...." (Note & Comment, *Unmasking the Mask-Maker: Domain Privacy Services and Contributory Copyright Infringement* (2010-2011) 31 Loy. L.A. Ent. L.Rev. 27, 32.) Young lawyers are frequently taught that "[t]ypically, before a complaint is filed plaintiff's counsel sends a settlement demand letter to the potential defendant. This demand letter sets out the claims, allegations, and the type of recovery sought by the plaintiff." (Wilcox, *Applying the Litigation Privilege Before Trial* (June 2003) 26 L.A. Lawyer 12.) "The

communications," Wilcox described euphemistically "can be provocative, as they usually include sensitive issues." *Ibid.*

B. Public Policy Favors Powerful Protection of Lawyers' Ability to Zealously and Creatively Advocate for Their Clients.

As Appellants observed in their Opening Brief, "[o]ur legal system is founded upon zealous advocacy by lawyers for their clients." (AOB at 29.) That system faces its most serious threat when lawyers can be the subject of sanctions or retaliatory lawsuits as a result of allegations, argument, or communications made by lawyers when advocating for their clients. (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 356 (dis. opn. of Mosk, J.).) In order to avoid a retaliatory lawsuit, attorneys "might temper the zealousness of their advocacy to avoid increasing the incentive for the adversary to pursue" such a suit. (*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1028.) Moreover, fear of retaliatory lawsuits may also chill the creativity of lawyers, especially those "who operate on the leading edge of legal development." (*Franklin Mint* at p. 356.)

The public policy is so strongly in favor of zealous advocacy and avoiding these types of chilling effects that numerous safeguards have been developed to enshrine, protect, and promote it. Examples are legion. The tort of malicious prosecution, for example, has been regarded as a disfavored cause of action. (*Sheldon Appel Co. v. Albert & Iliker* (1989) 47 Cal.3d 863, 872.) The litigation privilege was extended to immunize "communications and actions made even before a proceeding has commenced." (AOB at 29.) More importantly, with respect to this case, our Legislature enacted the anti-SLAPP statute because it found that there had 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," such as issues "under consideration or review by . . . a judicial body." (Code Civ. Proc. § 425.16(a), (e)(2).) While the holder of the right that is subject to being chilled may be the aggrieved party him- or herself, those who seek to chill the valid exercise of the rights of speech and petition try to gain leverage by chilling the lawyers who represent these aggrieved parties. Consequently, this Court must "avoid burdening the ability of potentially adverse parties to make legal representations in demand letters and other presuit communications sent in contemplation of possible litigation." (*Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 940-941.)

II. THE TRIAL COURT ERRED IN CONCLUDING THAT RESPONDENT MET HIS BURDEN TO PRESENT UNCONTROVERTED EVIDENCE CONCLUSIVELY SHOWING THE DEMAND LETTER WAS UNLAWFUL.

As both Appellants and Respondent, have acknowledged an activity may be deemed unlawful as a matter of law when (i) defendant does not dispute that the activity was unlawful, or (ii) uncontroverted evidence conclusively shows the activity was unlawful. (*Flatley, supra, 39 Cal.4th* at p. 317.) The issues presented on this appeal focus on the second prong of that test: what makes an activity "unlawful as a matter of law" and what evidence is sufficient to "conclusively" show that the activity is unlawful as a matter of law.

A. Activities Involving Speech Have Only Been Found "Illegal as a Matter of Law" When Coupled with Additional Acts of Non-Speech Conduct.

In *Flatley*, *supra*, *39 Cal.4th* 299, and its progeny[1], courts have concluded that an activity involving speech is illegal as a matter of law only in circumstances where the speech is accompanied with additional acts and conduct. The "threats in *Flatley* involved 'extreme circumstances....' From the initial settlement demand letter to the last threatening telephone call, the Illinois lawyer engaged in extortion—conduct which is not protected by the Federal and state Constitutions." (*Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 544.) In *Flatley*, "[u]ncontradicted and uncontested evidence showed that the defendant wrote letters and made calls that, when taken together, threatened to accuse the plaintiff of a variety of crimes and disgrace him in the public media unless he paid a large sum of money." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 384 (*Cross*).) Under those circumstances, the evidence conclusively established extortion as a matter of law. *Ibid.*

In *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntington Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, the Court of Appeal held that speech made in a public forum in connection with an issue of public interest coupled with a criminal conspiracy to physically attack and terrorize the executives of a biomedical testing laboratory was illegal as a matter of law. (*Id.* at pp. 1296-1297; *see also*, *Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1655 (*Mendoza*) [agreeing with the holding in *Novartis*].) Defendant, an organization whose

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[1] Here we refer only those cases where the defendant has not conceded illegality.

purpose was to stop animal cruelty, targeted plaintiff Chiron, a biopharmaceutical company. (*Novartis*, at p. 1289.) Defendant listed the names, home phone numbers, home addresses, and bank account information of plaintiff's employees, along with the names of their spouses and children. (*Ibid.*) The heart of defendant's campaign against plaintiff was referred to on defendant's website as a "'home visit', a euphemism for a terrifying and often destructive nighttime invasion." (*Ibid.*) A number of these "home visits" occurred. (*Id.* at pp. 1289-1290.) Plaintiff brought claims based on these activities, to which the defendant responded with an unsuccessful anti-SLAPP motion. (*Id.* at pp. 1291-1293.)

The Court of Appeal affirmed the denial of the anti-SLAPP motion, holding that "the evidence conclusively establishes that the activities[,] about which there is no dispute, are illegal as a matter of law" because the defendant criminally conspired with various persons to physically attack and terrorize the plaintiff's employees. (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntington Animal Cruelty USA, Inc.*, *supra*, 143 Cal.App.4th at p. 1296; *see also Mendoza*, *supra*, 182 Cal.App.4th at p. 1655.) There was ample evidence that defendant engaged in this conspiracy. (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntington Animal Cruelty USA, Inc.*, at p. 1296.) Consequently, the speech activity by defendant coupled with the evidence of the criminal conspiracy was illegal as a matter of law. (*Ibid.*)

Contrast that case with *Cross, supra,* 197 Cal. App. 4th at p. 385-386, where the Court of Appeal held that threats by a tenant to tell prospective buyers that a registered sex offender lived nearby unless given a month of free rent was not illegal as a matter of law. The defendant-tenant in *Cross* sent a series of e-mails to the plaintiff-landlord stating that he would allow the house to be shown to prospective tenants if plaintiff gave

him 48 hours' notice, waived rent for August, and promised to return the deposit immediately after the walk-through. (*Ibid.*) He sent a subsequent e-mail stating that "he would cooperate with showings on Tuesdays. He further said that he would not guarantee cooperation on other days nor promise not to express his opinion about the value of the house or the recent visit by police to the nearby house of the sexual offender." (*Id.* at p. 386.) In her declaration, plaintiff stated "that she believed Cooper was threatening to tell prospective buyers that a registered offender lived nearby unless she waived rent for August or increased his property rights." (*Ibid.*) Defendant admitted to disclosing to a buyer's agent that a registered sex offender lived in the neighborhood. (*Id.* at p. 366.) Defendant did not concede criminal conduct. (*Id.* at p. 386.)

The court held that "we do not find this to be one of those rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law." (*Cross, supra,* 197 Cal. App. 4th at p. 386). In arriving at this conclusion, the court reasoned that the threat of disclosing that a registered sex offender lived in the neighborhood did not constitute attempted extortion under Penal Code section 518. (*Id.* at 386-388.) The court also noted that "even if Cross conclusively demonstrated that Cooper's disclosure was unauthorized as a matter of law, under *Mendoza*, that unauthorized, but noncriminal, conduct would not preclude anti-SLAPP protection." (*Id.* at p. 390.) Nevertheless, the court concluded that plaintiff failed to conclusively demonstrate that Defendant's disclosure was unauthorized as a matter of law. (*Ibid.*)

In another "speech only" case, the Court of Appeal concluded that the alleged speech was not illegal as a matter of law after the court found that the statute involved was an impermissible restriction on speech. (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 692.) In that case, a

bank sued a former employee who allegedly violated California Financial Code section 1327 by posting false statements about the bank on the popular Craigslist website. (*Id.* at p. 380.) The employee filed an anti-SLAPP motion, which the bank opposed on the grounds that the speech was illegal as a matter of law. (*Ibid.*) The employee denied that the activity was illegal. (*Id.* at p. 683.)

In analyzing Financial Code section 1327, the court in that case found that the statute was an impermissible content-based restriction on speech and unconstitutional on its face. (*Summit Bank v. Rogers, supra,* 206 Cal.App.4th at p. 691-692.) Consequently, the court concluded that the bank did not meet its burden to present "uncontroverted and conclusive evidence establishing that anything [the employee] posted on Craigslist was illegal as a matter of law under Financial Code section 1327." (*Id.* at p. 692.)

In *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, disapproved on other grounds in *Equilon, supra,* 29 Cal.4th 53, 68 and footnote 5, the Court of Appeal emphasized the narrow circumstances in which a defendant's assertedly protected activity could be found to be illegal as a matter of law:

> In order to avoid any misunderstanding as to the basis for our conclusions, we should make one further point. This case, as we have emphasized, involves a factual context in which defendants have effectively conceded the illegal nature of their election campaign finance activities for which they claim constitutional protection. Thus, there was no dispute on the point and we have concluded, as a matter of law, that such activities are not a valid exercise of constitutional rights as contemplated by section 425.16. However, had there been a factual dispute as to the legality of defendants' actions,

> then we could not so easily have disposed of defendants' motion. [¶] As we have noted, a defendant need only make a prima facie showing that the plaintiff's suit arises 'from any act of [the defendant] in furtherance of [the defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue.' [Citation.] If the plaintiff contests this point, and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case.

(*Id.* at p. 1367.)

Flatley adopted this rule from *Paul for Council*, holding that the illegality exception applies only in the "narrow circumstance" where a "defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence." (*Flatley*, *supra*, 39 Cal.4th at p. 316; accord, *id.* at p. 320 [illegality exception applies only where there is a "concession" of illegality from the defendant or where "uncontroverted and conclusive evidence" establishes "that the assertedly protected speech or petition activity was illegal as a matter of law"].) Following *Paul for Council*, *Flatley* stressed that where "a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step [of the anti-SLAPP analysis] but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits" under the second step of the anti-SLAPP analysis. (*Id.* at p. 316; accord, *id.* at 320 ["[i]f there is a dispute as to the illegality of the defendant's conduct, however, the court cannot conclude that the conduct

was illegal as a matter of law"].)

The case at bar is nothing like *Flatley* or any of the other cases that found certain activities illegal as a matter of law. The demand letter in *Flatley* emphasized certain text using various font sizes, boldface type, capital letters, underlining, and italics. The body of the letter at issue here used one font—and consistently used the same font size. There was no underling other than in the style of the case identified in the subject line of the letter. There was no bolding or italics in the letter. And the letter did not incorporate any non-standard use of capitalization.

The letter in *Flatley* also included repeated references to disclosure of facts, such as immigration, social security issuances, tax levies, and other information, and stated that the media would "enjoy" what they would have found. The court in *Flatley* found that:

> Mauro's letter accuses Flatley of rape and also imputes to him other, unspecified violations of various criminal offenses involving immigration and tax law as well as violations of the Social Security Act. With respect to these latter threats, Mauro's letter goes on to threaten that "[w]e are positive the media worldwide will enjoy what they find." Thus, contrary to Mauro's claim that he did nothing more than suggest that, if evidence of other criminal conduct became public knowledge it would receive media attention, the letter implies that Mauro is already in possession of information regarding such criminal activity and is prepared to disclose this information to the "worldwide" media. . . . Moreover, the threat to disclose criminal activity entirely unrelated to any alleged injury suffered by Mauro's client "exceeded the limits of respondent's representation of his client" and is itself evidence of extortion.

(*Flatley, supra*, 39 Cal.4th 299 at 330-331.) The letter at issue in this case never expressly threatened to disclose or make public any facts, other than the reference that the complaint would be filed with no blanks in the pleading. Moreover, unlike the letter in *Flatley*, the letter here directly expressed the claims being asserted.

The letter in *Flatley* was heavy handed in a number of other respects not applicable here: the *Flatley* letter included a reference to a $100,000,000 punitive damages award the attorney obtained in an unidentified case; it included statements from putative experts; and it included 51 pages of material such as medical records, a letter written to the Las Vegas Police Department, and newspaper articles chronicling the attorney's multimillion-dollar cases and settlement. None of those heavy-handed techniques are present in the demand letter at issue in this case.

While the demand letters in *Flatley* and the present case are sufficiently distinguishable, there is much more that separates the activity in *Flatley* from the activity in this case. *Flatley* was not decided on the text of the demand letter alone, but on "extreme circumstances." There were numerous telephone calls where the attorney demanded that "sufficient payment" be made by a specific deadline, telephone calls where the attorney stated that he would publicize the allegations in every place Flatley was to go for the rest of his life, and even a message that stated that if the call was not returned in a half hour he was going public. Our Supreme Court was careful to note that "[i]n his very first conversation with Brandon, Mauro did not discuss the particulars of the claim or express an interest in negotiations but simply stated a deadline for Flatley 'to offer sufficient payment.'" The court concluded that this demonstrated that it was never his intention to engage in settlement negotiations. "Instead, the insistent theme of his conversations with Flatley's lawyers is the immediate and extensive

threat of exposure if Flatley failed to make a sufficient offer of money." (*Flatley, supra,* 39 Cal.4th 299 at p. 333.)

None of the conduct at issue in *Flatley* is even remotely implicated in this case. There were no threatening phone calls, there were no threats to publicize criminal activity, there were no demands that Malin pay exorbitant settlement demands, there were no threats to go to the media. The only phone call at issue in this case, was on July 29, 2011, when Mr. Singer called Mr. McDonald to schedule a meeting to discuss a potential settlement of Ms. Arazm's claims. (1 AA 56-67.)

Both the speech and the conduct in this case are so far removed from the heavy handed demand letter and excessive conduct in *Flatley*—and every other case finding the anti-SLAPP statute inapplicable—that this case simply is not "one of those rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law." Consequently, the trial court erred in finding that the demand letter was illegal as a matter of law.

B. ***Gerbosi* Was Wrongly Decided Because it Gives Plaintiffs a Tool for Avoiding the Application of the Anti-SLAPP Statute; Thus, the Trial Court Erroneously Relied on It.**

Not all illegal activities are "unlawful as a matter of law" for purposes of the anti-SLAPP statute. For example, the Court of Appeal has held that the rule from *Flatley* is limited to criminal conduct. (*See Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169 (conduct violating attorney's duties of confidentiality and loyalty to former client cannot be "illegal as a matter of law"); *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 971 (illegality exception applies only to "criminal" conduct, not to conduct that "merely violat[es]" a statute); *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 612-616

(*Flatley's* illegality exception addresses criminal activities); *Mendoza, supra,* 182 Cal.App.4th at p. 1653-1655 (*Flatley's* "use of the phrase 'illegal' was intended to mean criminal [conduct]").

Division Eight of this Court, however, in *Gerbosi*, concluded that

> [t]o the extent Finn **alleges** criminal conduct, there is no protected activity as defined by the anti-SLAPP statute. [citation.] As a result, Finn's first cause of action for invasion of privacy, third cause of action for eavesdropping, and fourth cause of action for violation of the UCL (which is predicated on violations of the Pen. Code) are outside the protective umbrella of an anti-SLAPP special motion to strike procedure. Each is based on **alleged** criminal activity.

(*Gerbosi, supra,* 193 Cal.App.4th 435 at p. 445 [emphasis added].) To the extent that the superior court relied on the above statement from *Gerbosi* to reach its conclusion that the demand letter did not satisfy the first prong of the *Equilon* analysis, it erred. The above statement from *Gerbosi* is wrong and conflicts with other correct statements in the same opinion, particularly, that the *Flatley* crime exception applies only if the asserted petitioning activity is criminal as a matter of law—not as a matter of mere allegation—or the defendant concedes the activity is illegal. (*Id.* at p. 446.)

"[C]onduct 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." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910–911; *see also, e.g., Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1188 ("the fact that a defendant's conduct was alleged to be illegal . . . does not preclude protection under the anti-SLAPP law"); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245-1246 ("Mere allegations that

defendants acted illegally, however, do not render the anti-SLAPP statute inapplicable").) Indeed, "a plaintiff's complaint always alleges a defendant engaged in illegal conduct in that it violated some common law standard of conduct or statutory prohibition, giving rise to liability." (*Cross*, *supra,* 197 Cal.App.4th at p. 390 (internal citations omitted).) Thus, if a complaint's mere allegations of illegality could satisfy the illegality exception, "the anti-SLAPP statute would be meaningless." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1545; *Kashian*, at 910-911.)

The trend in the law, as demonstrated above, is to strengthen the public policy interests protected under the anti-SLAPP statute by limiting the "illegal as a matter of law" doctrine to criminal conduct and requiring plaintiff to conclusively establish any such criminal conduct with uncontroverted evidence. While the *Gerbosi* case did involve criminal conduct (the wiretapping), it bucked prevailing jurisprudence by holding that *merely* alleging criminal activity in the complaint is sufficient to negate defendant's threshold showing that the cause of action arose from a protected activity. (*Gerbosi*, *supra,* 193 Cal.App.4th at pp. 446-447.) This holding is contrary to the rule in *Flatley* and all other authority construing *Flatley.* Indeed, *Gerbosi* is at odds with that same division's decision in *Mendoza, supra*, 182 Cal.App.4th at p. 1654. In *Mendoza*, Division Eight of this Court held:

> a reading of *Flatley* to push any **statutory** violation outside the reach of the anti-SLAPP statute would greatly weaken the constitutional interests which the statute is designed to protect. . . . a plaintiff's complaint *always* alleges a defendant engaged in illegal conduct in that it violated some common law standard of conduct or statutory prohibition, giving rise to liability, and we decline to give plaintiffs a tool for

> avoiding the application of the anti-SLAPP statute merely by showing any statutory violation.

(*Mendoza, supra*, 182 Cal.App.4th at p. 1654; emphasis added; accord *Wallace, supra*, 196 Cal.App.4th at p. 1188 [because the defendants "do not admit any illegality; nor does the evidence *conclusively* establish that they committed conduct that was illegal as a matter of law," the *Flatley* crime exception does not apply], italics added.)

The *Gerbosi* court's holding that *merely* alleging criminal activity in the complaint is sufficient to negate defendant's threshold showing that the cause of action arose from a protected activity is also contrary to those cases that hold where "the legality of [a defendant's] exercise of a constitutionally protected right [is] in dispute in the action, the threshold element in a section 425.16 inquiry has been established." (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 460; accord *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089-1090 ["under the statutory scheme, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary"].)

Gerbosi's holding would eviscerate the stringent illegality showing mandated by *Flatley* and its progeny. In *Flatley*, the plaintiff asserted legal claims in which he alleged that the defendant committed extortion. (*See Flatley, supra*, 39 Cal.4th at p. 306.) Indeed, much like the plaintiff's civil claims for illegal wiretapping in *Gerbosi* were by their very nature predicated on allegations of illegal activities, so too is a civil claim for extortion—like the one the plaintiff asserted in *Flatley* (*ibid.*)—inherently based on allegations of criminal extortion. (*See Fuhrman v. California*

Satellite Systems (1986) 179 Cal.App.3d 408, 425-426, disapproved on another ground in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212-213.) Yet the Supreme Court did not hold that the illegality exception applied in *Flatley* because the plaintiff there merely alleged extortion. Rather, *Flatley* emphasized that the illegality exception applies only where the plaintiff has "establish[ed] conduct illegal as a matter of law—either through a *concession* or by *uncontroverted and conclusive evidence*," and then examined the evidence in that case to determine whether the attorney's egregious and extreme statements there constituted uncontroverted and conclusive evidence of extortion as a matter of law. (*Flatley*, at pp. 320, 328-332, emphases added.) Accordingly, Courts of Appeal have repeatedly followed *Flatley* to hold that a plaintiff's mere allegations of illegal activity—whether that activity consists of criminal extortion or some other allegedly criminal activity—are insufficient to satisfy the illegality exception. (E.g., *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 710-712 [plaintiff's "mere allegation" that defendant engaged in illegal activities such as conspiring with others to falsify evidence against him "is insufficient to render alleged actions unlawful as a matter of law and outside the protection of Code of Civil Procedure section 425.16"]; *Cross*, *supra*, 197 Cal.App.4th at pp. 385-388 [illegality exception did not apply where plaintiff merely alleged extortion but did not present "uncontroverted and uncontested evidence that establishes the crime as a matter of law"]; *Huntingdon Life Sciences*, *supra*, 129 Cal.App.4th at pp. 1245-1246, 1264 [refusing to apply illegality exception to plaintiffs' trespass claim because plaintiffs' "[m]ere allegations" that defendants illegally trespassed "do not render the anti-SLAPP statute inapplicable" and plaintiffs did not present conclusive evidence that defendants trespassed].) Since *Gerbosi* cannot be reconciled with these authorities—including with the stringent evidentiary

standard *Flatley* required plaintiffs invoking the illegality exception to satisfy—this Court should decline to follow *Gerbosi*.

III. IN ORDER TO OBTAIN A FINDING THAT PETITIONING ACTIVITY IS ILLEGAL AS A MATTER OF LAW, PLAINTIFF MUST PRODUCE UNCONTROVERTED EVIDENCE THAT CONCLUSIVELY SHOWS THE ACTIVITY WAS UNLAWFUL.

A. Respondents Have Not Presented Uncontroverted Evidence that the Demand Letter is Illegal as a Matter of Law.

At the outset, we note that the trial court erred in concluding that the demand letter was illegal as a matter of law on prong one of the *Equilon* analysis because there was a factual dispute as to the legality of the conduct. "If a factual dispute exists about the lawfulness of the defendant's conduct, it cannot be resolved within the first prong, but must be raised by the plaintiff in connection with the plaintiffs burden to show a probability of prevailing on the merits (the second prong)." (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th at 681.)

The burden that respondents must meet to present uncontroverted evidence that an activity is illegal as a matter of law is exceedingly high. For example, in one "speech only" case, the Court of Appeal concluded that speech reporting alleged child abuse was not illegal as a matter of law where the defendant did not concede that she was engaged in any unlawful activities and where there was no "uncontroverted evidence that her coaching and conspiracy activities, as plaintiff characterized them, were unlawful as a matter of law." (*Dwight R. v. Christy B., supra,* 212 Cal.App.4th 697.) In her declaration in support of the motion, defendant denied unduly persuading or coaching the child to draw illicit pictures of herself and plaintiff, or engaging in any conspiracy with social workers or others to falsify evidence that Plaintiff was sexually abusing the child. (*Id.*

at p. 712.) Plaintiff's mere allegation that Defendant engaged in unlawful coaching and conspiracy activities is insufficient to render her alleged actions unlawful as a matter of law and outside the protection of Code of Civil Procedure section 425.16. (*Ibid.*)

Contrast *Dwight R* with *Lefebvre v. Lefebvre*, where the Court of Appeal held that the filing of a false crime report—after a trial on the merits of the alleged crime—was illegal as a matter of law. (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696.) Alice Lefebvre and Nancy Toothman conspired to bring false criminal accusations against Alice's husband, Jon. (*Id.* at p. 700.) Ultimately, Alice "reported to a sheriff's deputy that Jon had recently threatened to kill her and their children, and Toothman confirmed Alice's criminal report to the deputy." (*Ibid.*) A criminal case was brought against Jon, which he defended and obtained a finding of factual innocence. (*Ibid.*) Jon later filed a complaint alleging numerous causes of action; in summary: the "complaint alleged that Alice and Toothman conspired to bring a false criminal report against him, that their statements to police precipitated the underlying criminal action, that they repeated their false accusation at trial, and that the trial ended with his acquittal, and the subsequent finding of factual innocence." (*Id.* at p. 701.) Alice and Toothman brought an anti-SLAPP motion to strike, Jon opposed on the grounds that their conduct was illegal as a matter of law. (*Ibid.*)

The court found the conduct at issue in the *Lefebvre* case illegal as a matter of law. First, it was undisputed that the filing a false police report was a crime. (*Lefebvre v. Lefebvre, supra,* 199 Cal.App.4th at 713.) Second, the defendant admitted that she filed "an illegal, false criminal report." (*Ibid.*) Third, the plaintiff had been prosecuted, acquitted, and found factually innocent of the crime. (*Id.* at p. 705.) Consequently, the court concluded that, as a matter of law, the former wife could not show

that her former husband's claims against her and her codefendant were based on protected speech or petition activities. (*Ibid.*)

This case is analogous to *Dwight R.*, where the evidence that the demand letter is extortionate consists of nothing more than mere allegations of such by Respondent. Unlike *Lefebvre*, where the illegal activity was undisputed because it had been previously established in a criminal trial, there is nothing in the record tending to show "uncontroverted" evidence that the demand letter in this case was illegal as a matter of law. Indeed, as discussed below, the demand letter does not meet the definition of extortion under the Penal Code.

B. The Demand Letter Does Not Meet the Definition of Extortion or Attempted Extortion Because It Does Not Threaten to Reveal a Secret Affecting Malin.

Finally, the letter at issue would not be considered extortionate in any case; thus, Respondent cannot meet his burden to present uncontroverted evidence that the letter is illegal as a matter of law. California Penal Code section 518 defines the crime extortion as obtaining property from another through force or fear. Fear is defined as

> Fear, such as will constitute extortion, may be induced by a threat, either:
>
> 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or,
>
> 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or,
>
> 3. To expose, or to impute to him or them any deformity, disgrace or crime; or,
>
> 4. To expose any secret affecting him or them.

(Penal Code § 519.)

The demand letter Singer sent Malin did not threaten to physically harm anyone or any property, accuse anyone of a crime, or expose or impute to Malin some deformity or disgrace. The letter did not threaten to "go public" with any information other than to file a lawsuit if the dispute was not resolved by the parties. More particularly, as in *Cross, supra*, 197 Cal.App.4th 357, neither the letter nor the evidence in support of or opposed to the anti-SLAPP motion conclusively establish that the letter was designed to convey an extortionate message. The fact that Malin, like *Cross*, inferred as much and believed it conveyed an extortionate message does not establish that message or Singer's intent to convey it as a matter of law.

Consequently, the only category of the definition of "fear" applicable in this case would be a threat to reveal a secret affecting Malin. Again, the decision in *Cross* is particularly applicable to this case. As in *Cross*, the record does not establish as a matter of law that revealing the names of one or more men with whom Malin allegedly used company resources to arrange sexual liaisons was the sort of "secret" that the threatened disclosure would constitute extortion within the meaning of Penal Code section 519. *Cross v. Cooper* is instructive here:

> The 'secret' referred to in the statute is a matter 'unknown to the general public, or to some particular part thereof which might be interested in obtaining knowledge of the secret; the secret must concern some matter of fact, relating to things past, present or future; the secret must affect the threatened person in some way so far unfavorable to the reputation or to some other interest of the threatened person, that threatened exposure thereof would be likely to induce him through fear to pay out money or property for the purpose of avoiding the exposure.'

> [Citation.] Whether a threatened exposure would have this effect on the victim is a factual question and depends on the nature of the threat and the susceptibility of the victim. [Citations.]

(*Cross v. Cooper, supra,* 197 Cal.App.4th at p. 387.) In the case at bar there is evidence tending to show that it was already a matter of public record that Malin had male sex partners. (2 AA 227, 232, 234.) Thus, no secret about Mailin would have been revealed. Here, the record from below does not contain uncontroverted evidence conclusively showing that revealing the name of any third party was a secret that affected Malin "in some way so far unfavorable. . . to some other interest of the threatened person, that threatened exposure thereof would be likely to induce him through fear to pay out money or property for the purpose of avoiding the exposure." The demand letter here, like the e-mail messages in *Cross*, does not meet the definition of fear under the Penal Code. Therefore, the trial court erred in concluding that the demand letter was illegal as a matter of law.

CONCLUSION

For the foregoing reasons, this court should reverse the denial of Appellants' anti-SLAPP motion.

Dated: March 25, 2013

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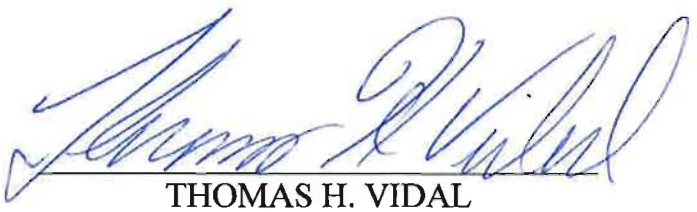

THOMAS H. VIDAL

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At the time of service, I was over 18 years. of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 5900 Wilshire Boulevard, Suite 2250, Los Angeles, California 90036.

On March 25, 2013, I served true copies of the following document(s) described as APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE BEVERLY HILLS BAR ASSOCIATION, THE CENTER FOR PUBLIC INTEREST LAW, PROFESSOR GEORGE (ROCK) PRING, NEMECEK & COLE, MITCHELL GILLEON LAW FIRM, SCOTT BONAGOFSKY, ESQ., PAUL GLUSMAN, ESQ., SCOTT KAUFMAN, ESQ., AND RICHARD PHELPS, ESQ. IN SUPPORT OF DEFENDANTS AND APPELLANTS on the interested parties in this action as follows:

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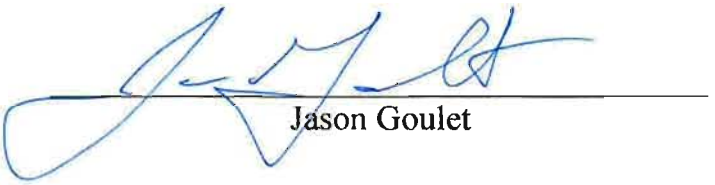
Executed on March 8, 2013, at Encino, California.



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