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
The Honorable Mary M. Strobel, Judge
Case No. BC466547

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

AMICI CURIAE BRIEF OF THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS, KOSNOFF FASY PLLC, CHRISTINE LOZIER, PEACE OVER VIOLENCE, PROTECT MASS CHILDREN, SMITH LAW FIRM, CHARLIE STECKER, TAYLOR & RING, AND THE ZALKIN LAW FIRM, P.C. IN SUPPORT OF APPELLANTS

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Pursuant to California Rules of Court, Rule 8.200(c), THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS, KOSNOFF FASY PLLC, CHRISTINE LOZIER, PEACE OVER VIOLENCE, PROTECT MASS CHILDREN, SMITH LAW FIRM, CHARLIE STECKER, TAYLOR & RING, and ZALKIN LAW FIRM request permission to file the attached Amici Curiae Brief in support of Defendants and Appellants MARTIN D. SINGER et al.

1. THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS ("SNAP") is an independent, confidential network of survivors of religious sexual abuse and their supporters who work to expose predators and those who shield them.

2. Kosnoff Fasy PLLC, 520 Pike Street, Suite #1010, Seattle, WA 98101. The attorneys at Kosnoff Fasy are dedicated to assisting the survivors of sexual abuse. Tim Kosnoff and Dan Fasy have collectively spent more than 20 years focusing exclusively on representing child sexual abuse survivors. From our offices in Seattle, Washington we have successfully represented clients throughout the United States and Canada. Our attorneys are devoted to applying their experience, advocacy skills, and dedication to fight the sexual abuse of children.

3. Christine Lozier, 139 Wampum Street, Wrentham, MA 02093. Christine Lozier is a victim, survivor and advocate of sexual child abuse, it's prevention and holding sex offenders accountable. She is a member of the Executive Board of Protect Mass Children and has the responsibilities of Spokesperson, Advocate, Education and Survivorship programming.

4. Peace Over Violence, 1015 Wilshire Boulevard, Los Angeles, CA 90017. Peace Over Violence is a community-based, non-profit organization whose mission is to build healthy relationships, families and communities free from sexual, domestic and interpersonal violence. First established in 1971 as the Los

Angeles Commission on Assaults Against Women, Peace Over Violence is dedicated to changing cultural norms regarding interpersonal violence and has played a major role in the acceptance of rape, battering, and stalking as crimes, the development of anti-violence policies and curricula, and training of professionals to recognize and intervene in domestic violence and rape. Peace Over Violence serves a multicultural population in the dense, urban environment of the City of Los Angeles. Peace Over Violence is signing on to the Survivors Network of those Abused by Priests Amicus Brief because we strongly believe in the need for victims/survivors to address the issue of their sexual abuse in demand letters. Any decision to the contrary would yet again silence victims and reduce the ability of victims to hold their abusers accountable. When sexual misconduct is the basis of the claim, victims should be able to send forceful demand letters that include details about the incident(s). Victims should be supported and protected in revealing their abuse, not further traumatized, threatened, nor bullied into silence.

5. Protect Mass Children, PO Box 1207, Lynnfield, MA 01940.

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those in positions of authority (teacher, coach, religious leader, therapist, etc). We are advocates for victims of sexual abuse and have represented hundreds of these deserving victims. We have handled cases throughout all of California and are committed to making employers and youth organizations do more to put an end to child abuse in their organizations.

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Each of these proposed Amici have an interest in preserving the rights of a litigant to make demand upon the perpetrators of child molestation and other sexual crimes, and in the absence of a resolution, to threaten the filing of a lawsuit. The right to freely communicate with a person accused of sexual misconduct enables Amici to open up the channels of communication, potentially settle and resolve a claim in an atmosphere of privacy and confidentiality, ferret out claims

which might be factually or legally incorrect, and ultimately provide the accused with one last clear chance to clear his or her name. This case raises the specter that a demand letter that threatens the filing of suit in which the lawsuit might reveal humiliating conduct as part of the cause of action itself would be actionable and would end any presuit communications. If the trial court's ruling is upheld, no victim of sexual misconduct would ever write a demand letter for fear of a cross-complaint for civil extortion.

These Amici Curiae request that the court grant relief to file this brief in order to advocate their interest in maintaining an exchange of presuit communications without the specter of satellite litigation.

Dated: March 22, 2013

COOK COLLECTION ATTORNEYS, PLC

By: _____
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I. STATEMENT OF INTEREST ON BEHALF OF AMICI CURIAE.

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A. THE AMICI CURIAE.

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very involved in education, training, and public policy advocacy in the field of child maltreatment.

B. BACKGROUND.

The media has reported tragic instances of members of the clergy abusing their trust and molesting hundreds, or even thousands of children throughout the United States and around the world. These are heinous crimes which deprive children of their childhood and inevitably damage their health and well-being.

Nearly all of these cases involve a criminal and civil component which sometimes flows in a parallel path. Given the humiliating nature of child molestation and the ancillary harm, the interest of the Amici, the victims, and their counsel, is to freely communicate with suspected molesters and related third parties. Virtually all of the written communications to any suspected molester and third party enablers would essentially contain the identical communication, as follows:

> "We are informed and believe that you have molested [the victim] on a repeated basis and caused grievous harm, giving rise to a civil cause of action. We view this conduct as a criminal, civil and moral wrong. Our client is therefore entitled to significant compensation for the tragic losses, both medical and emotional, that have been sustained. I enclose a copy of the lawsuit which reveals the conduct and your participation. You surely will suffer great embarrassment if we file this lawsuit. I urge you to contact me upon receipt of this letter in an effort to open a dialogue which hopefully will lead to a negotiated settlement. If I do not hear from you within 7 days from date hereof, it is our intention to file this lawsuit."

This is precisely the type of letter that victims of sexual abuse would write to the suspected abuser and molester.

This letter closely tracks Mr. Singer's letter in this case in which he wrote words to the effect of "Settle or I will file a lawsuit that would expose misconduct which gives rise to a cause of action against you." In this case, the trial court found that Mr. Singer's letter was extortive, and therefore actionable as opposed to immune from liability as privileged under Civil Code Section 47(b)(2) and protected under Code of Civil Procedure Section 425.16.

The interest of the Amici Curiae is to enable victims to write these types of demand letters without the fear of a viable cross-complaint for civil extortion, which is envisioned should this court upheld the trial court's order denying the motion to strike in this case. Based on the trial court's ruling and fear of an tort action, the Amici Curiae and others equally situated would never be able to write such a demand letter. Whether or not the cross action would be viable, or frivolous, is not the issue. The issue here is that the cross action would have sufficient viability to survive the pleading, and even the summary judgment stage. The mere pendency of the cross action, no matter that the anticipated outcome, would effectively deter the filing of the action by the victim, for fear of facing a cross action, the expenses of defense and potential liability. Unraveling the cloak of immunity protecting demand letters would obstruct, if not quash, any prospect

of financial recovery due the victims and immunize predators from any civil liability.

Demand letters are paramount to the Amici Curiae as presuit demand letters enable victims to negotiate a settlement without the burden and trauma of reliving the tragedy through a judicial proceeding. Given the horrific and personal nature of molestation, many victims long for compensation and compassion, afforded through a confidential and private settlement. When news of any sexual misconduct breaks, initially one victim comes forward. Inevitably, and over the next few days, or weeks, a torrent of victims comes forward. The fact that so many victims refused to come forward for years is a powerful testament of the imperative to keep the incident private notwithstanding the sense of humiliation, grief and injustice.

A settlement would relieve the victim of public trial, the rigors, expense and strain of litigation, the prospect of invasive and embarrassing discovery, and even a medical and mental examination.

In sexual molestation cases, demand letters permit the parties to explore longer term solutions which are accompanied by tolling, confidentiality and secrecy agreements. Demand letters open up channels of communications. While victims believe that they have identified the wrongdoers, enablers, conspirators and umbrella organization, demand letters directed to the *wrong* person might

provoke a response that would educate the plaintiff and avoid an unnecessary and needless error. Demand letters weed out an ill filed lawsuit and protect the innocent from the ill-founded and erroneous public accusations of horrendous misconduct. Demand letters sometimes set the record straight. Demand letters prevent errors from becoming a nightmare that would smear the character of an innocent person.

Demand letters serve as the "last clear chance" to enable an innocent party to respond and prove up that they did not commit the acts upon which they are accused, that the accuser is suffering from a case of mistaken identity, or some other valid legal defense. Demand letters which flush out any type of defense enable an accuser to avoid the repercussions of a malicious prosecution action. Accusations of child molestation are sensational, and the mere accusation itself can readily destroy a person's career. The public filing of any type would certainly impair anybody's career and livelihood. A demand letter, therefore, creates a "breathing space" between the decision to file and the actual filing and enables the accused and the accuser an opportunity, either to resolve the matter or exchange reasons why such a lawsuit should not be filed. If this court affirms the trial court's order, the parties who are unjustly accused of child molestation will find themselves the object of lawsuits which otherwise could have been avoided had the accused been warned in advance of such a suit and sought to clear his name.

Demand letters get the parties talking and in a clear case, negotiating a settlement without the necessity or burden of suit, which is a benefit due the victim. The demand letter is the key in the door to a negotiated settlement which offers the victim a financial recovery free of the immense burden of lengthy and grinding litigation.

In cases involving a large number of victims of sexual abuse, in which the perpetrator might be one or more individuals, and all which lead to a potential class action lawsuit or mass tort filing, presuit demands are common in attempting to identify not only the right party, but convincing the alleged wrongdoer to settle as part of a global settlement.

In summary, the interest of the Amici Curiae is to insure that presuit communications are free of civil liability when the presuit communications themselves aid in the settlement or resolution of the case, the exchange of useful information, or even information that might exonerate an individual. If this court upholds the ruling of the trial court, the recipient of any letter that threatens to file suit to reveal claims of molestation, unless settled, would be handed gratis a retaliatory cause of action that would effectively destroy any chances of recovery and surely frighten away any attorney for fear of facing a lawsuit.

By this Amici Curiae Brief, the Amici Curiae do not condone nor suggest that presuit communications would include the conduct by counsel, as illustrated in

Flatley v. Mauro (2006) 39 Cal.4th 299 ("*Flatley*"). The Amici Curiae also make it clear that the Singer Letter did nothing more than threaten the filing of a lawsuit, which it might necessarily contain embarrassing or potentially shameful conduct, if the conduct is part and parcel of the cause of action.

II. SYNOPSIS.

Is "Settle or my *lawsuit* will air out your dirty laundry"a cause of action?

If a family law case, is "Settle or the *divorce* will air out your dirty laundry" a cause of action?

If the person is a celebrity who caters to family entertainment and in the throes of a custody battle, is "Settle or the *custody case* will air out that you smoke recreational marijuana and therefore you are not a fit parent" a cause of action?

This appeal asks the question whether a litigant can demand a settlement in exchange for foregoing filing a lawsuit that reflects embarrassing conduct. This appeal frames the questions whether the threat to reveal "dirty laundry" in a lawsuit, or the threat of payment of money, is actionable. If the court in fact finds a cause of action, as opposed to privileged conduct under Civil Code Section 47(b)(2), and subject to anti-SLAPP under Code of Civil Procedure Section 425.16(b), all written demands for settlement, prior to suit, would inexorably be altered.

If this court affirms the trial court order denying the motion to strike the

complaint on the basis that the threat in the Singer Letter is actionable, this outcome effectively creates an entire census of causes of actions and claims based upon a threat to file a lawsuit that might reveal embarrassing information. Literally, should the court affirm, the entire landscape of human dialogue, prior to suit, would be changed forever. Will *Malin vs. Singer* judicially rewrite every demand letter or settlement or put a stopper on every rancorous exchange by antagonistic litigants?

Civil litigation and presuit demands by their very nature predominate with ruthless, vulgar, impolite, and highly aggressive communications. Civil litigation can be a full body contact sport. In many instances, parties express their emotional outbursts, both as an act of anger and as a threat of economic retaliation should the party win. This is common in litigation and these outbursts by parties are themselves not actionable and subject to the litigation privilege under Civil Code Section 47(b)(2). Litigation and presuit demands clearly do not comply with the rules of boxing enunciated by the Marquis of Queensberry. In reflection, many of the demands, statements, or claims by themselves are spiteful and hateful, but still privileged. Impolite speech or aggressive demand letters are not actionable. Presuit communications, such as demand letters are not actionable simply because a threat contained therein might be hurtful, embarrassing, or painful, if in fact the threat is nothing more than filing a lawsuit.

Therefore, the issue in this case is whether the Singer Letter (1AA9-10, hereinafter "Singer Letter") is a legitimate settlement demand and subject to the protections of Civil Code Section 47(b)(2) and Code of Civil Procedure Section 425.16(b). The core of extortion is the demand for money in exchange for secrecy as opposed to the threat to reveal humiliating conduct untethered to the demand for payment of money. *Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1079.

The synopsis[1] of this brief is that the Singer Letter is not extortive because the Singer Letter does not threaten a revelation beyond the filing of a lawsuit in the Los Angeles County Superior Court. The Singer Letter is a single incident in which the alleged "extortive demand," is one paragraph on the second page of a letter sent to one person. The Singer Letter does not threaten the turnover of the lawsuit, or information contained therein, to third parties, the media, law enforcement, or anyone else.

For purposes of brevity, and given the court's familiarity with the factual background and the chronology of the proceedings, this brief focuses on the textual analysis of the Singer Letter and whether the letter, standing alone, is

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[1] This Amici Curiae Brief have omitted the factual and procedural introductions which are contained in the Appellants' and Respondent's Brief. Moreover, the Amici Curiae Brief focuses on the text of the letter, rather than the broad policy imperatives, and general analysis of the law which are treated in the briefs filed by the Appellants.

extortive or legitimately communicative. Amici Curiae do not concede, and in fact, reject that the information which was sought to be revealed on its face was illegal as a matter of law, immoral, or inherently wrongful. The burden falls upon the Plaintiff to demonstrate that the communication was illegal as a matter of law. *(Cross vs. Cooper* (2011) 197 Cal.App.4th 357, 388.) The letter asserted that "company resources" were used to finance personal liaisons, all at the expense of Singer's clients, as part owner of the bar. (1AA 9-10)

No claim is made in this case that the lawsuit filed by Arazm was sham. (1AA 88-107).

III. SUMMARY OF EXTORTION.

The gist of all extortion is that the "threats" are coercive, or stated more simply, by the risk or threat of injury, harm, fright, fears of humiliation, or community approbation, compel the victim to part with money. *People v. Beggs* (1918) 178 Cal. 79, 83. Unlike many other torts, extortion lacks finite lines and enters the lexicon of "But I know it when I see it," as stated by Justice Potter Stewart, concurring opinion in *Jacobellis v. State of Ohio* (1964) 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

"Pay me a sum of money, or I will tell the *world* [or your wife, employer, friends, members of your congregation etc.] you engaged in 'shameful conduct' that you wish to keep secret" is an act of extortion. Penal Code Sections 518 and

519.

IV. SINGER LETTER.

The Singer Letter is not extortive. This is the essence of the Singer Letter: "Settle or I will file a lawsuit that incorporates the personal, and shameful, conduct which is part of the cause of action." Victims of sexual misconduct write letters similar to the Singer Letter as a precursor to civil litigation.

The Singer Letter threatens the filing of a lawsuit and nothing more that contains embarassing information and necessarily coercive and threatening. However, threats, acts of coercion, unpleasantries, embarrassment, and intimidation necessarily arise from all litigation. Any lawsuit, or the threat of a lawsuit, is coercive by its very nature and threatening. *See Seidner vs. 1551 Greenfield Owner's Association* (1980) 108 Cal.App.3d 895, 904-905 ("*Seidner*"), which provides as follows:

> " . . . What, if anything else, did the respondents as defendants do except file its lawsuit? ***Is it not true that in any lawsuit there is a element of threat or coercion? It is difficult for us to determine the improper purpose to which the process, filing the corporate suit, is put so as to pressure the appellant to settle the partnership suit.*** If he feels pressure, that may be his subjective feelings or thoughts. If he does not wish to settle, it is doubtful if any further lawsuits will cause him to want to settle. It may be said here that settlements have long been favored by the courts. The courts look with favor upon settlements, where there is no fraud. (Citations omitted).

Seidner clearly enunciates that lawsuits by their very nature are coercive, or better stated, intimidating, in the face of a big judgment, attorneys' fees to defend

the case, the commitment of time and effort, and the risk of losing. Post O.J. Simpson, nothing is certain and everything is up for grabs. Post-digital, lawsuits are even more coercive where parties forfeit their ostensible privacy as lawsuits and other proceedings can appear online if uploaded by the parties, made a part of a party's website, or picked up by the media.

However, the Singer Letter did nothing more than threaten the filing of a complaint, and no more, which per se is coercive or intimidating by its very nature, and no more or no less than any other lawsuit. As a matter of law, the *Seidner* court held that lawsuits, right, wrong, or indifferent, are necessarily coercive and intimidating, and hence compel parties to settle, which is the exact purpose of the Singer Letter.

V. ANALYSIS OF LETTER - COMPARISON BETWEEN FLATLEY LETTER AND SINGER LETTER.

A. Comparison Between Flatley Letter and Singer Letter.

The core of the underlying claim asserted by Respondent is the letter of 7/25/11, and more specifically, the following language:

> "Because Mr. Moore has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange _____ liaisons with _____ (see enclosed photo), _____. When the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading.
>
> My client ***will file the Complaint against you and your other joint***

conspirators unless this matter is resolved to my client's satisfaction within five (5) business days from your receipt of this Complaint." (Emphasis added) . . .

Sincerely,

MARTIN D. SINGER

(1AA 10) [Underlining indicates text redacted by Respondent.]

The core of any extortion is the threat to expose which coerces the payment of money. "I will call the police and tell them that you are a . . . . ." is not extortion. "Pay me what you owe me or I will file a lawsuit that is very embarrassing and humiliating"is not an act of extortion. But, "I will call the police and tell them that you a . . . . ., or pay me what you owe me" is extortive.

In *Flatley*, on the other hand, the tone of the letter and its purpose was clearly an act of extortion. The starting point with *Flatley* was an ostensibly consensual sexual encounter between Flatley and Ms. Robertson at a Las Vegas hotel. (*Flatley*, Page 307) Shortly thereafter, Ms. Robertson's lawyer, Mauro, sent a letter to Flatley's lawyer which threatened a lawsuit based upon a claim of rape and sexual assault. (*Flatley*, Pages 307-08) The letter contained emphasized text, various font sizes, bold-faced type, capital letters, underling, and italics (*Flatley*, Page 307). The Flatley Letter provided for a 29-day time period to settle the case, and threatened punitive damages (*Flatley*, Page 308). The letter accused Flatley of sexual assault. *Ibid.* The letter threatened enforcement of a judgment, if awarded. (*Flatley*, Page 308) The letter stated that any information would "become a matter

of public record." (*Flatley*, Page 309) Any information will be sent to Immigration, Social Security, IRS, and tax agencies, and that the worldwide media will "enjoy what they find." *Ibid.* The letter threatened that all pertinent information if in violation of U.S. federal, Immigration, IRS, Social Security Admin., U.S., state, local, Commonwealth U.K., will be turned over to these agencies. The letter threatened ***press releases*** to major media, both in the U.S. and the U.K.[2] *(Flatley,* Page 309) The letter contained a draft of the complaint, medical records, and essentially Mr. Mauro's Resume. (*Flatley*, Page 309) The plaintiff in *Flatley* was an international dance star, in which his worldwide reputation was paramount, and the accusation of sexual misconduct, to say the least, would be horrifically damaging. (*Flatley*, Page 305)

The inference from the tone, content, and coercive nature of the letter is that the exposure to the general media would destroy Flatley's career. The all-encompassing motivating factor in the letter was to compel the payment of an enormous sum of money, in order to keep "secret" the claim of a sexual assault, which if revealed, would destroy Flatley's career.

While it is true that the attorney in *Flatley* indicated that the filing of the complaint itself would necessarily reveal these secrets, the gist of *Flatley* is not necessarily that a lawsuit would be filed, but rather necessarily the information in

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[2]. Mauro threatened to issue press release to media sources. *Flatley*, Page 309.

the lawsuit, directly and indirectly, would be exposed to the general media, and therefore the general public at large. (*Flatley*, Pages 309, 329 & 332). The court stated at *Flatley v. Mauro* (2006) 39 Cal.4th 299, 329, 46 Cal.Rptr.3d 606, 629, 139 P.3d 2, 21-22, as follows:

> "At the core of Mauro's letter are threats to publicly accuse Flatley of rape and to report and publicly accuse him of other unspecified violations of various laws unless he "settled" by paying a sum of money to Robertson of which Mauro would receive 40 percent. In his follow-up phone calls, Mauro named the price of his and Robertson's silence as "seven figures" or, at minimum, $1 million. The key passage in Mauro's letter is at where Flatley is warned that, unless he settles, "an in-depth investigation" will be conducted into his personal assets to determine punitive damages and this information will then "**BECOME A MATTER OF PUBLIC RECORD, AS IT MUST BE FILED WITH THE COURT . . . [] Any and all information, including Immigration, Social Security Issuances and Use, and IRS and various State Tax Levies and information will be exposed.** We are positive the media worldwide will enjoy what they find." This warning is repeated in the fifth paragraph: "**[A]ll pertinent information and documentation, if in violation of any U.S. Federal, Immigration, I.R.S., S.S. Admin., U.S. State, Local, Commonwealth U.K., or International Laws, shall immediately [be] turned over to any and all appropriate authorities.**"
>
> . . .
>
> At the top of the final page of the letter is the caption: "***FIRST & FINAL TIME–LIMIT SETTLEMENT DEMAND.***" Beneath it a paragraph warns that there shall be "***no continuances nor any delays.***" At the bottom of the page, beneath Mauro's signature, a final paragraph warns Flatley that, along with the filing of suit, press releases will be disseminated to numerous media sources and placed on the Internet." (P. 329)

Repeatedly in the Flatley Letter, the threat was to reveal the sexual misconduct to virtually all of the major media outlets, along with governmental

entities who normally would have no contact with claims of sexual misconduct. (*Flatley*, Pages 309, 330-331) ["Mauro also threatened to accuse Flatley of raping Robertson unless he paid for her silence." p. 330]

The unrelenting tenor of the letter was horrific in leaving Flatley with virtually no choice but to pay seven figures lest Flatley face total and complete economic destruction. (*Flatley*, Page 332) The letter did not seek or suggest, an explanation for the alleged "assault," exchange of information or even a "settlement discussion." Making the letter more extortive was the fact that Mauro, as the lawyer, took a brittle stance that he would not compromise or extend time, or otherwise act in any manner consistent with normal trial practices, leading to the inescapable inference that the a large sum of money was to be paid before a lawsuit was filed, and therefore an intolerable demand lest Flatley face complete humiliation through the court of public opinion and a court of law. (*Flatley*, Pages 308 & 332)

The threats in *Flatley* also sought to expose "shameful conduct," unless a huge sum of money was paid (Flatley, Page 308). The press releases, and disclosures to reveal a claim of rape, which is a crime, would destroy Flatley's career. The Flatley letter was clearly extortion as follows:

> "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. This culminates in Mauro's threat to "go public" and "ruin" Flatley if the January 30 deadline was not met. We conclude that

> Mauro's conduct constituted criminal extortion as a matter of law in violation of Penal Code sections 518, 519 and 523.[16]" Flatley v. Mauro (2006) 39 Cal.4th 299, 332-33 [46 Cal.Rptr.3d 606, 631-32, 139 P.3d 2, 24]

The Singer Letter is in stark contrast. The Singer Letter does not threaten the disclosure of the "shameful conduct," beyond the necessary disclosures in filing with the LASC, and nothing more. The Singer Letter does not demand a huge sum of money but rather settlement. The Singer letter does not attach a resume or medical (or accounting records). The Singer Letter arises from the operation of a business, and specifically a bar and restaurant[3] (1AA 9-10 at page 9, paragraph 1, "Geisha House and Wonderland." which are described as clubs and restaurants) and not a public forum such as a world-wide dancing sensation. (*Flatley*, Page 305) The business which was the venue for the illicit conduct in Singer was a bar and restaurant which catered to adults. (*Ibid)*. In *Flatley*, Mauro accused Flatley of sexual assault (a crime) which itself would lead to ruin and dire financial consequences. (*Flatley*, Pages 332-333). The Singer letter does not threaten revelation with the accompanying negative fall-out that would spell out economic ruination for the Malin which sharply contrasts with ruination for Flatley.(*Flatley*, Page 329 "We are positive the media worldwide will enjoy what they find.")

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[3] Page 1 of the Singer Letter (1AA 9-10) spells out the alleged details of mismanagement in the operation of one or more bars and restaurants in the Los Angeles area.

The facts in *Flatley* suggest a pure "shakedown," when the "victim" in Flatley Letter made very incendiary claims (rape and sexual assault). (*Flatley*, Pages 308-309) The Flatley Letter ran the gamut of threats (to the media, IRS, Immigration, stalking, general exposure) in a relentless fashion and most important, without stop. (*Flatley*, Page 308-309) The Flatley Letter's sole purpose was to instill fear as opposed to commencing a dialogue.

In *Flatley,* the court suggested that threats to file a lawsuit, reporting to the law enforcement authorities, contact the media is not extortive as follows:

> "We emphasize that our conclusion that Mauro's communications constituted criminal extortion as a matter of law are based on the specific and extreme circumstances of this case. Extortion is the threat to accuse the victim of a crime or "expose, or impute to him . . . any deformity, disgrace or crime"(Pen.Code, 519) accompanied by a demand for payment to prevent the accusation, exposure, or imputation from being made. Thus, our opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion. (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian, supra,* 218 Cal.App.3d at p. 1079, 267 Cal.Rptr. 457 [" person, generally speaking, has a perfect right to prosecute a lawsuit in good faith, or to provide information to the newspapers"].) Nor is extortion committed by an employee who threatens to report the illegal conduct of his or her employer unless the employer desists from that conduct. In short, our discussion of what extortion as a matter of law is limited to the specific facts of this case. *Flatley v. Mauro*, 39 Cal. 4th 299, 332, 139 P.3d 2, 24 (2006) [footnote 16]

Whether the Singer Letter was in good taste, or not, is not relevant. Whether or not Malin felt coerced, embarrassed, frightened or worried is not relevant, and Malin's subjective response to the Singer Letter does not substantiate a cause of

action for damages. Lawsuits and threats of a lawsuit are pressuring and instill fear and alarm in the hearts of the prospective defendant. *Seidner, supra.* holds that all lawsuits are coercive by their nature. The question is whether the Singer letter is an act of criminal extortion as a matter of law and therefore vulnerable to civil extortion claim. The answer is straightforward: The Singer Letter is not extortive because the Singer letter, unlike in *Flatley*, did not threaten revelation of alleged sexual misconduct, beyond the filing of suit only.

Attorneys are given wide berth in writing demand letters, in which some are downright horrid. *See Blanchard et al. v. DirectTV, Inc., et al.*, 123 Cal.App.4th 903 (Cal.App.2 Dist. 2004; Review Denied Jan. 26, 2005), in which the court stated as follows:

> "Equally unavailing is plaintiffs' assertion that DIRECTV's demand letter was not sent in good faith and in serious consideration of litigation because DIRECTV knew it did not have a legally viable claim. The success of its *Trone* action, along with the existence of numerous lawsuits DIRECTV brought across the country [citations omitted] evinces DIRECTV's belief that it had a legally viable claim under federal law. Nor may plaintiffs avoid the litigation privilege by arguing that the statements were published to coerce a settlement. (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1148, 57 Cal.Rptr.2d 284 [demand letters directed toward settlement of anticipated lawsuit are "in furtherance of litigation"and thus protected].) **More important, "communications made in connection with litigation do not necessarily fall outside the privilege merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal" assuming they are logically related to litigation.** [Citations omitted] [Emphasis added]

Emily Post sets the standard for etiquette and not a cause of action. Being rude is

not being sued.

B. Who is the target audience of the Singer Letter? Answer: No one, but Malin.

While a complaint is generally a public record, the second paragraph of the Singer Letter does not threaten that the complaint would be "widely read," or independently disseminated by Singer, or for that matter, that anybody would ever receive a copy of the complaint. Singer does not threaten to disclose the accusations in the complaint to anybody. Singer did not state anything to the effect that the lawsuit, or the allegations, would be publically disseminated or exposed. Singer did not threaten a press conference, release of material to the press, "going public," or providing a press release unlike in *Flatley* (*Flatley*, Page 309). The letter does not have "cc's" to anyone in the media or the like.

Singer does not threaten to post the complaint online, communicate with the media that a lawsuit has been filed, or for that matter, inform anyone that a lawsuit has been filed. The letter does not threaten to provide the complaint to anybody. The letter does not threaten to communicate the alleged misconduct, separate from filing a lawsuit, to third parties, law enforcement, the media, the Internet (blogs etc.), nascent social media or any one else. Post digital, the Singer Letter did not suggest that the alleged revelation would go "viral."[4] On the other hand, Flatley

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[4] In *Flatley* the extortion took place in January, 2003 which on upward rise of the internet and clearly prior to the age of digital media, much less the terms "viral" or "flaming."

threatened disclosure of the "rape charges," directly to third parties. (*Flatley*, Pages 309-310, page 329, 332-333: "This culminates in Mauro's threat to "go public" and "ruin" Flatley if the January 30 deadline was not met.")

Singer did not threaten that the complaint would leave the clerk's office of the Los Angeles County Superior Court (Stanley Mosk Courthouse) [trial court case number is BC 291551]. Singer did not threaten to hand the complaint to the media, law enforcement, or otherwise. Singer did not threaten to put out a press release or report the allegations to law enforcement authorities. Singer did not threaten to contact the California Department of Alcoholic Beverage Control, State Board of Equalization, or the Police Department. The letter makes it clear that the complaint would be filed in the Los Angeles County Superior Court.

The court files of the Los Angeles County Superior Court are only accessible to the public by case number, rather than "alpha," which requires a modest fee.[5] Absent knowledge of the case number, or payment of a modest fee, the general public, or even the media, would not be able to readily find this lawsuit, and absent payment of a fee, determine the contents.[6] Moreover, unlike

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5 www.lasuperiorcourt.org/civilcasesummarynet/ui ["Enter a case number, select a filing court house (required for limited jurisdiction cases only) and click search.]

6 Suffice it to state, court files are open to the public. The issue here is not whether the files are public, but whether the letter threatened exposure of allegedly humiliating conduct which would be kept secret, if money was paid. The fact that the lawsuit would be difficult to access further supports the fact that Singer did not intend to disclose the contents of the lawsuit or make public the accusations,

the federal courts or other state courts (Alameda), the filings are not readily available unless a small fee is paid. Moreover, the first page of the letter does not indicate or intimate any threat to reveal to the general public, and moreover, the general facts do not indicate that the defendants were not "public figures" or had a "public following."

The public status of the parties in *Flatley* and here are illustrative. *Flatley*, e.g., the plaintiff was an international entertainer whose celebrity and livelihood were making public appearances. (*Flatley*, Page 305) In contrast, no claim is made that Respondent is a public figure, or earns his livelihood through public appearances, performances or a public persona, e.g., an international celebrity. While accusations of misconduct are injurious to all, the accusations of sexual misconduct (e.g., Michael Jackson, among many other entertainment figures, including the lately deceased BBC entertainment star, Jimmy Saville) are far more injurious to a true celebrity who earns their livelihood in the public are than a local bar and restaurant owner (Respondent). (See Singer Letter, 1AA 9-10.)

The threat to Flatley was the disclosure of the *allegations* of sexual misconduct (aside from a lawsuit) and directed to his celebrity status given that his livelihood and persona was based on his celebrity. Accusing an international

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as the lawsuit itself would not necessarily "see the light of day" absent knowledge of the case number, specific revelation of the contents, or some person being duly motivated to find the case.

celebrity of sexual misconduct would get the media's attention, as urged by Mauro (*See Flatley*, Page 309 which threatens disclosure to the media). In stark contrast, the Singer Letter conspicuously does not threaten disclosure to the media of the lawsuit, or the allegation in the lawsuit.

C. The Personal Conduct is the Core of the Cause of Action, and the Personal Conduct is Subsidiary to the Overarching Claim of Embezzlement.

The secondary issue is whether or not the alleged personal conduct is subsidiary to the underlying claim itself. The textual analysis of the Singer Letter is that the allegation is that "company resources were used to arrange liaisons with third parties." The charging allegation in the second paragraph and the claims in the first paragraph are that the plaintiff was allegedly embezzling, misusing or abusing funds, in which the plaintiff had a financial interest therein. The inference is that company money was being used for an illicit purpose. Arazm, as the investor and part owner of the bar, would have a colorable claim for damages if her partner and bar manager was squandering company assets for personal uses, particularly sexual misconduct in the operation of the partnership business.

Sexual misconduct gives rise to civil redress. The threat to file a lawsuit that would seek damages for the sexual misconduct could never be an act of extortion because the victim (qua plaintiff) does not threaten a revelation beyond the filing of suit, or unrelated to the causes of action alleged in the lawsuit. This form of

demand letter would precede the filing of suit:

> " . . . . .During a sexual liaison, you infected Ms. Doe with genital herpes. Ms. Doe is afflicted with an incurable sexually transmitted disease which has now damaged her prospects for marriage and children. Settle or we file a lawsuit."

Sexual misconduct cases reveal tragic circumstances. See *John B vs. Superior* Court (2006) 38 Cal. 4th 1177 (2006) [civil liability for transmission of HIV if the actor knows or has reason to know that he or she is HIV positive].

D. Totality of the Facts in Singer Show That the Letter Seeks to Resolve a Bitter Dispute, While the Totality of the Facts in Flatley Seeks to Coerce Payment of Money as the Price of Keeping a False Claim of Sexual Assault a Secret.

About 90% of the content of the Flatley Letter constituted nothing more than a threat of revelation to the mass media of the claim of rape in which the matter would be kept "silent" in exchange for the payment of some staggering, but unstated, sum of money (*Flatley*, Pages 308-309). To say the least, the Flatley Letter was atrocious. *Flatley* at page 308. The Flatley Letter (and telephone call) was an act of extortion (*Flatley*, Page 332).

On the other hand, the Singer Letter threatens to seek damages for an embezzlement which necessarily would compel the disclosure of sexual misconduct in the filing of a lawsuit which might never leave the courthouse door. The Singer Letter did nothing more than threaten to file a lawsuit which might reveal embarrassing conduct which itself was integral to a viable cause of action for embezzlement, breach of fiduciary duty etc.

Singer Letters are common currency in civil litigation. Every day of the week, lawyers write letters as follows:

> Letter #1: "I am going to sue you for something that you did which is incredibly humiliating and embarrassing, and cost my client good money, unless you settle the case with me . . ."
>
> Or more aptly for the Amici Curiae,
>
> Letter #2: "I am going to sue you for your campaign of child molestation that you inflicted upon my clients. This lawsuit will reveal to the world that you are predator of children, engaged in lurid acts of sexual predation. The bad publicity from this lawsuit will end career."

Letter #1 is a threat to sue over humiliating and presumptively embarassing conduct. Letter #1 is not extortive because the writer does not threaten to disclose the accusations to anyone at all. Letter #2 is not extortive because the lawsuit, a public record, would be damaging to the defendant, but the writer did not threaten to disseminate the lawsuit or accusations to third parties, and that the claim of child molestation is the cause of action itself.

If the trial court's order denying (2AA 416-417) the anti-SLAPP motion is affirmed, necessarily, this would be an extortive letter as the trial court ruled that the Singer Letter was an extortive letter because, in this scenario, the threat is to reveal in a lawsuit "shameful conduct." Therefore, depriving Singer of protections under anti-SLAPP would in effect render virtually any demand letter vulnerable to a lawsuit for extortion and bar the alleged "extorter" from the protections afforded under anti-SLAPP.

VI. IMPACT UPON THE AMICI CURIAE AND ACTS OF SEXUAL MISCONDUCT.

The Amici Curiae represent the interests of victims of sexual misconduct perpetrated by, among others, priests, clergy persons and other persons of trust in a religious institution. The bulk of this misconduct are acts of sexual molestation suffered by children at the hands of priests and other clergymen. A demand letter directed to the tortfeasor would read as follows:

> Example # 1: "You have sexually molested my client, a minor. This is a legal, moral and criminal wrong, and a humiliating act by which you have shown no remorse. I intend to file a lawsuit against you, name the religious institution which you serve and your direct superiors which failed to report your wrongful conduct to the police, all of which becomes a public record, and accessible to the press, as in all such lawsuits, unless this matter is settled to my client's satisfaction. Worse, you are a person of great stature in the community and this lawsuit will be very embarrassing to you. Making this situation even worse is that your position of stature and power that enabled you to earn the trust of my client, a minor, likely enhanced your unfettered accesses and opportunity to molest my client. My client trusted you because you are a person of stature and standing in the community."

This letter is no different that the Singer Letter which does even accuse Respondent with his sexual misconduct, or humiliating act, but does state:

> Example #2: "I will sue you for using my company money that was spent on sexual misconduct with Mr. So and So and whose names will be revealed . . . unless you settle the case. If you don't settle the case, the complaint will spell out the lurid details."

The *Flatley* version would be:

> Example #3: "Pay my client a huge sum of money for an alleged

> (and false) rape charge, or I will put out press releases and inform the mass media that you raped my client through the medium of a lawsuit. You are a big international star, and this information will ruin you life. This will ruin your life. I will make a point of telling the world about this rape, and report this incident to tax, immigration and law enforcement authorities. I will insure that this goes viral and flood social media. I will not make a deal with you."

The difference is clear. Examples #1 and 2 threaten to sue for shameful conduct in which the lawsuit, although coercive and embarrassing, are the gist of the threat. Example #3 coerces payment based on the threat of revelation itself given the public status of *Flatley*, direct and immediate dissemination to the media and law enforcement, and that the amount of money was untethered to the tort itself, which incidentally was fabricated.

Demand letters foster settlement which sometimes is predicated upon the legitimate interest of the wrongdoer in maintaining some modicum of confidentiality, if permissible, which itself is a motivating factor to settle. Some demand letters compel the disclosure of information that might reveal that the alleged wrongdoer is innocent, or the case of a factual error by the accuser. Some demand letters might reveal to others information that might reveal the identity of others who are liable (or innocent), and the disclosure of evidence that might alter or change the claims.

Demand letters sometimes get parties talking and might lead to a non-monetary resolution. Whatever the outcome, demand letters explore, get parties

talking, diffuse, or convince parties to stake out a position that might aid in the settlement of any controversy, the least of which is to learn the position of the adverse party before suing the person. In the vernacular:

> "If you told me that you would sue me, I might have compensated you with more money because I could have kept the whole matter confidential. That confidentiality, when I had it, was worth a lot of money to me, but you took that away when you sued me with a chance to settle the claim at the outset."

Confidentiality is worth something to the defendant. Sometimes confidentiality, if possible, is worth everything. Confidentiality has its own inherent value.

VII. BLACKMAIL.

Extortion is sometimes called "blackmail" and differs from robbery in that the property is obtained with the consent of the victim. *See People v. Sales* (2004) 116 Cal.App.4th 741, 748, 10 Cal.Rptr.3d 527, 532, in which the court stated as follows:

> "Extortion is defined in pertinent part by section 518 as "the obtaining of property from another, with his consent, ... induced by a wrongful use of force or fear...." This crime, which is sometimes called "blackmail," differs from robbery in that the property is obtained with the consent of the victim. (2 Witkin & Epstein, Cal. Criminal Law, *supra,* Crimes Against Property, 103, p. 135.)"

No matter how Mauro could reconcile his conduct in *Flatley*, Mauro engaged in nothing less than blackmail, as it is commonly understood, when Mauro threatened to put out press releases that Flatley committed an act of sexual assault and demanded a staggering sum of money to keep the matter quiet. Clearly, Mauro

engaged in criminal conduct.

Singer acted as a lawyer for a client. He writes a letter (1AA 9-10), lays out the prima facie elements of a case of embezzlement, breach of fiduciary duty, and other civil wrongful conduct, points out that company monies were used for illicit purposes, and threatens the filing of a lawsuit, absent a settlement. Lawyers write these letters every day of the week, and as the court stated in *Blanchard v. DirectTV, Inc., supra*, these letters sometimes contain false, fraudulent, perjurious, unethical, or even illegal statements, and are still privileged. Singer's Letter does not even fall into the category of possible "Blanchard letters."

Mauro was a blackmailer and rightfully was precluded from the umbrella of protection under Civil Code Section 47(b)(2). On the other hand, Singer was acting in his capacity as an attorney and seeking compensation for financial losses suffered by a client at the hands of the operators of clubs and restaurants. Absent a settlement, Singer did what every lawyer would do and state that a lawsuit would be filed. Under no set of facts could this conduct amount to blackmail, which is exactly what Mauro did.

VIII. DEMAND LETTERS FLUSH OUT AN UNDISCLOSED BANKRUPTCY.

Confronted by a large number of claims, or lacking insurance, some perpetrators, and even other liable parties, such as a religious organization, might

file bankruptcy including a Chapter 11. Bankruptcy law provides a stay against the filing of any suit, collection of claim, or enforcement of a judgment under Bankruptcy Code Section 362(a) [11 USC Section 362(a)]. Any act in contravention of the stay is void, and not voidable. *See* ***In re Schwartz***, 954 F.2d 569, 591 (9th Cir. 1992), in which the court held that the imposition of the automatic stay acts as a complete bar to any action, and that any subsequent action itself would be void as a matter of law. Violating the automatic stay might result in the imposition of sanctions. Bankruptcy Code Section 362(k)(1) as follows:

> (k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Unlike a commercial or financial transaction, the predator, and ancillary institution, might lack any record of who might be a claimant. The demand letter is sometimes the first written communication which identifies the name and address of the claimant and the nature of the claim.

In other instances, the predator, now a "debtor" under the Bankruptcy Code, might have filed and even sent a notice of the first meeting of creditors to the victim who might have not realized the significance. More than 60 days passed from the date of the first meeting of creditors and for some unknown reason, the victim, now a creditor, failed to file a dischargeability action under Bankruptcy Code Section 523(a)(4) [breach of fiduciary duty], or Section 362(a)(6) [wilful and

malicious injury]. The demand letter, from the attorney, would quickly ferret out these facts, which might in fact foreclose the filing and prosecution of any civil proceeding.

In response to the demand letter, the predator and ancillary institution might notify the victim of the fact of bankruptcy. Once notified of the bankruptcy, the victim would recalibrate his or her legal strategy which might include the hiring of a bankruptcy attorney, filing a proof of claim before the bar date expires, participating in the proceeding such as hearings, and filing, timely, a non dischargeability action to exempt the debt (i.e., the tort claim) from the bankruptcy discharge.

The demand letter is the key to the door of the bankruptcy court.[7]

IX. CONCLUSION.

This brief raises the basic issue whether the Singer Letter was extortive. The answer is "no," because the Singer Letter did not threaten the revelation of any allegedly humiliating conduct beyond the filing of an embarassing lawsuit. Absent the threat to reveal beyond the filing of a lawsuit, no demand letter could be extortive.

Amici Curiae hereby request that this court reverse the trial court's Order Denying The Appellants' Special Motion To Strike, grant that motion, and award

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[7] This author routinely sends out demand letters which are sometimes returned with a bankruptcy discharge notice.

Appellants their attorneys fees and costs.

Dated: March 22, 2013

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CERTIFICATE OF WORD COUNT
(C.R.C. Rule 14(c)(1))

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Dated: March 22, 2013

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I declare:

I am employed in the County of San Francisco, California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 165 Fell Street, San Francisco, CA 94102. On the date set forth below, I served the attached:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

AMICI CURIAE BRIEF OF THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS, KOSNOFF FASY PLLC, CHRISTINE LOZIER, PEACE OVER VIOLENCE, PROTECT MASS CHILDREN, SMITH LAW FIRM, CHARLIE STECKER, TAYLOR & RING, AND ZALKIN

on the above-named person(s) by:

XXX (BY MAIL) Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed to the persons served above

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 26, 2013.

Karene Jen