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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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Miscellaneous

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INTRODUCTION

In this lawsuit, plaintiff Mike Malin sued the law firm of Lavely & Singer and individual lawyers Martin D. Singer and Andrew B. Brettler (collectively, the Lavely & Singer defendants) for sending a prelitigation demand letter on behalf of their client, co-defendant Shereene Arazm, to Malin. The letter explained that Arazm—who is a business partner with Malin in a restaurant group that Malin manages—anticipated filing a civil lawsuit based on Malin's financial misdeeds unless the matter was resolved to Arazm's satisfaction. In doing so, the demand letter described the factual bases for Arazm's anticipated civil action, including Malin's misuse of restaurant group assets to pay his sexual partners.

Since Malin's lawsuit was based on absolutely protected prelitigation petitioning and speech activities, the Lavely & Singer defendants moved to strike his action as a strategic lawsuit against public participation (SLAPP). The trial court denied this anti-SLAPP motion on the sole ground that the anti-SLAPP statute did not apply because Malin's claims were based on activities conclusively shown to be illegal as a matter of law. The opening brief demonstrated that the court erred because Malin has not met his burden of satisfying this illegality exception. Malin's respondent's brief fails to rehabilitate his arguments.

First, Malin misstates the requirements for invoking the illegality exception. It is not enough, as Malin asserts, simply to allege illegal conduct in his complaint. Rather, this exception applies *only* where uncontroverted evidence conclusively demonstrates as a matter of law that the defendant engaged in illegal activities. And, also contrary to Malin's assertion, it is he who must bear the burden of satisfying this stringent standard.

Second, Malin contends that he has conclusively shown that the demand letter on which his extortion claim is based amounts to criminal extortion as a matter of law under existing case law. Malin is wrong. The cases on which he relies are wholly inapposite and cannot support the application of the illegality exception here. Indeed, were the exception applied here, it would intrude upon petitioning and speech activities that are absolutely protected by the First Amendment and severely chill lawyer advocacy in sending demand letters that are a common and necessary feature of modern litigation.

Third, Malin argues that the illegality exception applies to his civil rights claim for investigative activities because his mere allegations of illegality suffice to satisfy the exception. Malin is wrong because this exception is inapplicable where, as here, a plaintiff has not conclusively shown, *based on uncontroverted evidence*, that the defendants engaged in activities that are illegal as a matter of law. Malin has presented *no* evidence, much less uncontroverted and conclusive evidence, to show the Lavely & Singer defendants were responsible for hacking, eavesdropping, or wiretapping, and the respondent's brief does not argue to the contrary. In fact, the only evidence in the record shows that they were *not* responsible for any hacking, eavesdropping, or wiretapping, and the factual dispute raised by this evidence alone renders the illegality exception inapplicable.

Finally, Malin argues that the illegality exception applies to his emotional distress claims because they are based on his extortion and civil rights claims. But, since the illegality exception does not apply to his other claims, it is equally inapplicable to his emotional distress claims.

Notwithstanding Malin's meritless efforts to invoke the illegality exception, this appeal involves a straightforward anti-SLAPP motion challenging a lawsuit seeking to hold the Lavely & Singer defendants liable for absolutely protected activities. Since Malin has not met his burden of demonstrating that he has a probability of prevailing on any of his claims, his lawsuit should be stricken with prejudice.

LEGAL ARGUMENT

I. THE ANTI-SLAPP STATUTE APPLIES TO MALIN'S CLAIMS.

A. Malin does not dispute that the anti-SLAPP statute applies to his claims absent the narrow illegality exception.

The opening brief demonstrated that the anti-SLAPP statute applies to all of Malin's claims because they are based on a prelitigation demand letter sent to Malin in anticipation of litigation and prelitigation investigative activities conducted in support of anticipated litigation, all of which are activities taken in furtherance of the constitutional rights to petition and free speech. (AOB 14-23.) Malin does not dispute that the anti-SLAPP statute applies to all of his claims if they do not fall within the narrow "illegal as a matter of law" exception to this statute. (See RB 2-8, 13-17, 22-30, 35-46.)

B. The illegality exception requires Malin conclusively to demonstrate, based on uncontroverted evidence, that the Lavely & Singer defendants' activities were illegal as a matter of law.

Malin contends his claims fall outside the anti-SLAPP statute's scope because he simply alleges the defendants engaged in activities that are illegal as a matter of law. (See RB 2-8, 13-17, 22-30, 35-46.) Malin is wrong.

The Supreme Court has carved out an illegality exception to the anti-SLAPP statute that applies only in "rare cases" and under "narrow circumstance[s]." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 316-320 (*Flatley*).) Contrary to Malin's contention that mere *allegations* of illegality satisfy this exception, *Flatley* held that where (as here) defendants do not concede their activities were illegal, the illegality exception applies only if "the *evidence conclusively establishes*[ ] that the assertedly protected speech or petition activity was illegal *as a matter of law*." (*Id.* at p. 320, emphases added.) *Flatley* stressed that "the showing required to establish conduct illegal as a matter of law" must be made "*by uncontroverted and conclusive evidence*." (*Ibid.*, emphasis added; accord, e.g., *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 384 (*Cross*); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1188 (*Wallace*).)

Thus, "conduct that would otherwise be protected by the anti-SLAPP statute does not lose its coverage simply because it is *alleged* to have been unlawful. [Citation.] If that were the test, the

anti-SLAPP statute would be meaningless." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1545; accord, e.g., *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 712 (*Dwight R.*); *Wallace, supra,* 196 Cal.App.4th at p. 1188; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910-911 (*Kashian*).)

If the evidence of the purported illegality is disputed, or if undisputed evidence does not *conclusively* establish the activity is illegal as a matter of law, the illegality exception is inapplicable. (E.g., *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 681 (*Summit Bank*) ["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 plaintiff's burden to show a probability of prevailing on the merits (the second prong)"]; *Wallace, supra,* 196 Cal.App.4th at p. 1188 ["that there was some evidence to support a finding of illegality[ ] does not preclude protection under the anti-SLAPP law"].)

Malin relies on *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435 (*Gerbosi*) for his contention that a complaint's mere allegations of illegality satisfy the exception. (RB 2, 17, 27, 38-40, 42-43.) But Malin's view of *Gerbosi* is contrary to the illegality exception standard set by the Supreme Court in *Flatley*, which requires either a "concession" or "uncontroverted and conclusive evidence" of illegality. (*Flatley, supra,* 39 Cal.4th at p. 320; see also *Dwight R., supra,* 212 Cal.App.4th at pp. 711-712 [construing *Gerbosi* as standing for the unremarkable rule that the illegality exception can be satisfied only "when the defendant does not dispute that the activity was unlawful, or *uncontroverted*

evidence conclusively shows the activity was unlawful" (emphasis added)].) In any event, *Gerbosi* does not bind this court (see *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1489, fn. 10), and to the extent *Gerbosi* purports to hold that mere allegations are sufficient to satisfy the exception, this court should decline to follow *Gerbosi* because any such purported holding is directly contrary to all other case law—including the Supreme Court's binding precedent. (AOB 24-26; *ante*, pp. 5-7.)

Malin also implies that *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696 (*Lefebvre*) permits mere allegations of illegality to satisfy the exception. (See RB 41-42.) Not so. *Lefebvre* simply affirmed a trial court's determination that the evidence in "the record 'conclusively' established" that the activities there were illegal as a matter of law. (*Lefebvre*, at pp. 701, 703-706.) Even had *Lefebvre* erroneously determined allegations alone were sufficient, this court should decline to follow *Lefebvre* for the same reason it should refuse to follow any such erroneous holding in *Gerbosi*.

Finally, Malin argues that it is not his burden to show the activities here were illegal as a matter of law, but is instead the Lavely & Singer defendants' burden to establish the illegality exception does not apply. (See RB 42-43.) This argument has been rejected by the Supreme Court and Courts of Appeal. (See AOB 25-26.) As the Supreme Court has explained, a defendant need not "initially demonstrate his or her exercise of constitutional rights of speech or petition was valid as a matter of law." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 286 (*Soukup*).) Accordingly, "a defendant who invokes the anti-SLAPP statute

should not be required to bear the additional burden of demonstrating in the first instance that the filing and maintenance of the underlying action was not illegal as a matter of law. . . . [¶] . . . [O]nce the defendant has made the required threshold showing that the challenged action arises from assertedly protected activity, the plaintiff may counter by demonstrating that the underlying action was illegal as a matter of law." (*Id.* at pp. 286-287.) In short, a "defendant need not show as a matter of law that his or her conduct was legal. [Citation.] Thus, if a plaintiff claims that the defendant's conduct is illegal and thus not protected activity, the plaintiff bears the burden of conclusively proving the illegal conduct." (*Cross, supra*, 197 Cal.App.4th at p. 385; accord, e.g., *Wallace, supra*, 196 Cal.App.4th at p. 1188; *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1549-1550 (*Haight Ashbury*); *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 964-965.)

As we now explain, the respondent's brief fails to meet Malin's burden of conclusively demonstrating, based on uncontroverted evidence, that the activities at issue were illegal as a matter of law.

C. Malin has not met his burden of conclusively establishing that his claims fall within the narrow illegality exception to the anti-SLAPP statute.

1. Malin has not conclusively demonstrated that the Lavely & Singer defendants committed extortion.

a. To show extortion, Malin must conclusively establish the required wrongful use of fear and the necessary intent.

Malin's first cause of action alleges that the Lavely & Singer defendants committed extortion in violation of Penal Code sections 519, subdivisions (2) and (3), and 523. (1 AA 4-5.)

Malin's mere allegations of extortion cannot satisfy the illegality exception. (E.g., *Dwight R.*, *supra*, 212 Cal.App.4th at p. 712 ["mere allegation" that defendant engaged in illegal activities were "insufficient to render her alleged actions" illegal as a matter of law].) Rather, the illegality exception is inapplicable unless Malin conclusively establishes, based on uncontroverted evidence, "criminal extortion as a matter of law." (*Cross*, *supra*, 197 Cal.App.4th at pp. 384-386; see also *ante*, pp. 5-7.)

To establish extortion, Malin must demonstrate: "(1) [a] wrongful use of force or fear, (2) with the specific intent of inducing the victim to consent to the defendant's obtaining his or her property . . . ." (*People v. Hesslink* (1985) 167 Cal.App.3d 781, 789; see also *Flatley*, *supra*, 39 Cal.4th at p. 326.)

Malin's extortion claim seeks to satisfy the wrongful use of fear element based on what Malin asserts is an extortionate threat. (See 1 AA 3-5; RB 14-15, 22-30.) Penal Code section 519 specifies that the "[f]ear" necessary to "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." (Pen. Code, § 519.) Malin must therefore establish the statements at issue constitute one of these four statutorily proscribed threats. (*People v. Umana* (2006) 138 Cal.App.4th 625, 639 (*Umana*).)

Penal Code section 523—the additional criminal extortion statute on which Malin's claim is predicated (1 AA 4)—"proscribes sending a threatening letter with the intent to extort." (*Umana*, *supra*, 138 Cal.App.4th at p. 639.) To prove extortion under section 523, Malin must satisfy all of the previously described elements of extortion and also establish that the threat was sent or delivered by means of a writing. (See Pen. Code, § 523; *Umana*, at p. 639; accord, *People v. Fox* (1958) 157 Cal.App.2d 426, 428-430.)

The opening brief demonstrated that Malin has not conclusively established—much less done so based on uncontroverted evidence—the elements of extortion. (AOB 29-44.) We next explain that that none of the arguments Malin advances in the respondent's brief refute the fact that he has failed conclusively to establish extortion as a matter of law.

b. The inapposite *Flatley* case demonstrates why the illegality exception is inapplicable to Malin's extortion claim.

i. The statements *Flatley* found to be extortionate threats are far different than the statements Malin contends were extortionate here.

Flatley analyzed whether an attorney's extreme and egregious statements were extortionate threats proscribed by Penal Code section 519 and thus whether those statements satisfied the wrongful use of fear element necessary to prove extortion. (*Flatley*, *supra*, 39 Cal.4th at pp. 326-332.) Malin, whose extortion claim is based on a demand letter that threatened to file a civil lawsuit against him (1 AA 3-4, 9-10), asserts generally that the statements found to be extortionate threats in *Flatley* are "effectively *identical* to" and "essentially on all fours with the facts" here. (RB 22-30.) Nonsense.

Flatley is inapposite and could not support the application of the illegality exception. (See AOB 37-41.) *Flatley* found a lawyer's statements were extortionate threats because, in addition to a demand letter threatening to bring a civil lawsuit against the plaintiff for an alleged rape, the lawyer: (1) threatened in subsequent phone calls that he would directly and personally publicize the plaintiff's alleged rape of his client to "worldwide" media; (2) threatened to publicize completely unrelated additional

criminal activity (consisting of criminal offenses involving tax and immigration issues) having nothing to do with the lawyer's client or potential lawsuit against the plaintiff for the alleged rape; and (3) threatened to pursue criminal charges against the plaintiff unless the plaintiff paid an exorbitant settlement (perhaps upwards of $100 million). (*Flatley*, *supra*, 39 Cal.4th at pp. 307-311, 326-332.) The attorney also made a sham police report, did not negotiate in good faith, and stood to gain personally from any settlement his client received as he admitted that he held a 40 percent attorney's lien on the total recovery. (*Id.* at pp. 308, 331-332.)

In sharp contrast, the demand letter on which Malin's extortion claim is based: (1) identified Lavely & Singer as Arazm's counsel; (2) stated that Arazm intended to sue Malin and Lonnie Moore—Malin and Arazm's business partner in a restaurant group (1 AA 58; 2 AA 225)—for misappropriating over $1 million from Arazm unless the matter was resolved to Arazm's satisfaction; (3) described for Malin the factual bases of the anticipated lawsuit, which included a detailed description of the wide range of financial wrongdoing Malin engaged in, including Malin's misuse of restaurant group assets to pay his sexual partners; and (4) explained that, as part of the anticipated lawsuit, Arazm would "seek a full-fledged forensic accounting of the books and records" of the various establishments and entities under Malin and Moore's management and ownership, as well as their personal accounts, to determine the exact amount of damages caused by their misconduct. (1 AA 9-10, 55-56, 61-62.)

Unlike the attorney's statements in *Flatley*, the demand letter did not threaten to publicize anything to the media and certainly did not threaten to publicize allegations having nothing to do with the anticipated civil lawsuit. (1 AA 9-10, 61-62.) Nor did the letter say that anyone had filed a police report (indeed, no one had filed such a report), and the letter did not threaten to report Malin to the police or threaten to pursue or assist others with pursuing criminal prosecution against Malin or anyone else. (*Ibid.*) Moreover, the letter stated that Arazm only sought recovery of misappropriated monies, and explained that the anticipated lawsuit would seek an accounting to determine the precise amount taken. (See *ibid.*) The letter's demand for a forensic accounting of Malin's records to determine Arazm's actual damages could hardly be more different from the attorney's demand for an exorbitant sum in excess of his client's actual damages in *Flatley*. Additionally, the letter confirms that the Lavely & Singer defendants were simply advocating on behalf of their client in a legal demand letter. (*Ibid.*) Unlike the attorney in *Flatley*, who stood to gain personally from the exorbitant settlement he demanded since he held a 40 percent attorney's lien on the total recovery (*ante*, p. 12), nothing in the letter here says the Lavely & Singer defendants had any personal stake in the lawsuit. (See 1 AA 9-10, 61-62.) Finally, evidence confirms that the Lavely & Singer defendants sought to negotiate a resolution of the dispute in good faith, and that it was Malin, not they, who abruptly withdrew from settlement discussions and filed a lawsuit after having asked for more time to negotiate. (See 1 AA 9-10, 55-57, 61-

62, 191-193, 218; 2 AA 225-228.) In sum, the demand letter here is nothing like the inapposite extortionate statements in *Flatley*.

ii. Threats to file civil lawsuits do not constitute extortion, and *Flatley* does not hold otherwise.

Malin's complaint alleges the Lavely & Singer defendants committed extortion by sending a demand letter threatening to file a civil lawsuit against Malin for his misconduct. (1 AA 3-4, 9-10; see also RT 13:21-27 [Malin's counsel arguing alleged extortion here consisted of demand letter saying a complaint would be filed].) But *Flatley* did *not* hold that threats to file a civil lawsuit could constitute extortion.

Although the threat to file a civil lawsuit was among the many statements made by the attorney in *Flatley* (*Flatley*, *supra*, 39 Cal.4th at p. 307), this "threat to file a civil action against the plaintiff for the alleged rape was merely incidental to the attorney's attempt to extort money from the plaintiff by threatening to publicize the alleged rape." (*Dwight R.*, *supra*, 212 Cal.App.4th at p. 712, fn. 7; accord, *Flatley*, at pp. 329-332 [describing inapposite bases for finding an extortionate threat that had nothing to do with threat to file civil litigation]; *Cross*, *supra*, 197 Cal.App.4th at p. 384 [explaining that *Flatley* found extortion where "[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"].)

Indeed, *Flatley* took pains to "emphasize" that the finding of an extortionate threat there was "based on the specific and extreme circumstances of th[at] case" and that *Flatley* "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." (*Flatley*, *supra*, 39 Cal.4th at p. 332, fn. 16, emphasis added.)

Flatley's refusal to conclude that a threat to file a civil lawsuit amounts to extortion is not surprising. It is well settled that a threat to file civil litigation—including threats to do so in prelitigation demand letters—cannot constitute extortion under California law where the plaintiff has not demonstrated the threatened claim is a sham. (E.g., *Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 939-940 (*Sosa*) [prelitigation demand letter threatening civil litigation does not satisfy the wrongful use of fear element of California extortion law where threatened civil claims "do not rise to the level of a sham"]; *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 426 ["To be actionable [extortion under California law] the threat of [civil] prosecution must be made with knowledge of the falsity of the claim"], disapproved on another ground in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212-213; *In re Nichols* (1927) 82 Cal.App. 73, 76-77 [threat to sue can constitute criminal extortion under California law only if threatened claim could not be maintained].)

Courts in other jurisdictions have likewise concluded that threats to file a civil lawsuit (including threats to do so in demand letters) cannot constitute extortion; indeed, the majority of such courts to consider the issue have concluded that even baseless threats of civil litigation cannot amount to extortion. (E.g., *State v. Rendelman* (2008) 404 Md. 500 [947 A.2d 546, 547-550, 554-559] (*Rendelman*) [demand letter's "threat to litigate a meritless cause of action" cannot constitute the wrongful or unlawful act necessary to prove extortion]; *U.S. v. Pendergraft* (11th Cir. 2002) 297 F.3d 1198, 1202, 1205-1208 (*Pendergraft*) [same]; *Tilberry v. McIntyre* (1999) 135 Ohio App.3d 229 [733 N.E.2d 636, 644] ["a threat to pursue a civil action, even if the action would be entirely frivolous or brought in bad faith, does not constitute extortion"]; *Vemco, Inc. v. Camardella* (6th Cir. 1994) 23 F.3d 129, 134 [threat of civil litigation "does not constitute extortion"]; *Harris v. NCNB Nat. Bank of N.C.* (1987) 85 N.C.App. 669 [355 S.E.2d 838, 841, 843] [demand letter's threat to file civil litigation is not extortion since it is neither the requisite threat nor wrongful or unlawful]; *I.S. Joseph Co., Inc. v. J. Lauritzen A/S* (8th Cir. 1984) 751 F.2d 265, 267-268 (*I.S. Joseph*) [threat to file groundless civil action is not extortion because it cannot inflict requisite fear]; *Various Markets, Inc. v. Chase Manhattan Bank, N.A.* (E.D.Mich. 1995) 908 F.Supp. 459, 468 [demand letter's threat of civil litigation does not amount to extortion]; *Heights Community Congress v. Smythe, Cramer Co.* (N.D.Ohio 1994) 862 F.Supp. 204, 206-207 [demand letter's threat to bring civil action absent settlement was not extortion].)

iii. Extortion laws must be construed narrowly so as not to prohibit the constitutionally protected threat to file non-sham civil litigation on which Malin's extortion claim is based.

Extortion statutes can fall afoul of the United States Constitution if they are construed to prohibit activities protected by the First Amendment. (AOB 32-34; accord, e.g., *National Organization for Women, Inc. v. Scheidler* (1994) 510 U.S. 249, 264 [114 S.Ct. 798, 127 L.Ed.2d 99] (conc. opn. of Souter, J., in which Kennedy, J., joined) ["[c]onduct alleged to amount" to extortion "may turn out to be fully protected First Amendment activity"]; *Melugin v. Hames* (9th Cir. 1994) 38 F.3d 1478, 1483.) Thus, statutes that potentially criminalize activities protected by the First Amendment "must be interpreted with the commands of the First Amendment clearly in mind," and "[w]hat is a threat must be distinguished from what is constitutionally protected" First Amendment activity. (*Watts v. United States* (1969) 394 U.S. 705, 706-708 [89 S.Ct. 1399, 22 L.Ed.2d 664].) This approach is consistent with the well-settled rule that criminal statutes must be construed narrowly so as to render them free of any doubt as to their constitutionality. (AOB 32-33.)

At a minimum, the constitutional rights to petition and free speech afforded by the First Amendment protect a party's threat to file civil litigation where the threatened lawsuit is not a sham. (See, e.g., *Sosa, supra,* 437 F.3d at pp. 929-940 [constitutional right

to petition protects prelitigation demand letters that threaten to file civil litigation if the threatened party has not shown the threatened claims were sham claims]; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 822-823, fn. 6 [threat to file meritorious civil lawsuit does not fall outside the First Amendment's protection of right to free speech], disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

Courts therefore construe extortion statutes narrowly to exclude from their coverage threats to file such civil claims in order to avoid unconstitutionally impinging on these First Amendment rights. (E.g., *Sosa, supra,* 437 F.3d at pp. 931-932, 939-940 [construing California extortion law as excluding from its coverage a demand letter's threat to file a civil lawsuit because right to petition granted by First Amendment protects such letters and thus "presuit letters threatening legal action and making legal representations in the course of doing so cannot come within a statutory restriction . . . absent representations so baseless that the threatened litigation would be a sham"]; *I.S. Joseph, supra,* 751 F.2d at pp. 267-268 ["criminal statutes are to be strictly construed[ ] and only the most liberal construction" of an extortion statute prohibiting wrongful use of fear "could make it apply" to threats to file a civil action; prohibiting such threats could lead citizens to "feel that their rights of access to the courts of this country had been severely chilled"]; see also *State v. Haugen* (N.D. 1986) 392 N.W.2d 799, 801-806 [construing statute prohibiting threats against public officials as excluding from its coverage threats of civil litigation due to constitutional protection for rights to petition and free speech].)

The illegality exception applies only to activities that are "not protected by constitutional guarantees of free speech and petition." (*Flatley, supra*, 39 Cal.4th at p. 317.) Malin does not argue that *Flatley* holds, or could have held in light of constitutional limitations, that constitutionally protected threats of civil litigation amount to criminal extortion or could otherwise fall within the illegality exception's scope. (See RB 22-30.) But Malin nonetheless attacks the Lavely & Singer defendants' citation to *Summit Bank* for its discussion of the constitutional limitations the First Amendment imposes on California law. (RB 28-29.) According to Malin, if *Summit Bank* "were to be accorded any relevance to the instant matter," then California's extortion laws "would all have to be found unconstitutional, as well." (RB 29.)

This argument makes no sense. Consistent with the rule against unconstitutionally vague or overbroad criminal statutes that prohibit activities protected by the First Amendment (see, e.g., *Winters v. New York* (1948) 333 U.S. 507, 509-510 [68 S.Ct. 665, 92 L.Ed. 840]), *Summit Bank* simply held that the illegality exception could not be applied based on the violation of a criminal law proscribing speech derogatory to the solvency of a bank because this law was unconstitutionally vague and overbroad. (*Summit Bank, supra*, 206 Cal.App.4th at pp. 682-692.) Thus, the Lavely & Singer defendants properly cited *Summit Bank* for its unremarkable holding that the illegality exception cannot be applied based on

criminal laws that unconstitutionally proscribe activities protected by the First Amendment. (AOB 27.)[1]

Malin does not explain how this principle would render all of California's extortion laws unconstitutional—nor can he.[2] At any rate, Malin never disputes that threats of civil litigation are not criminal extortion under California law and that extortion laws would run afoul of the First Amendment (and therefore fall outside the illegality exception's scope) if they prohibited such constitutionally protected threats. (See RB 22-30.) And courts have

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[1] The Lavely & Singer defendants also cited *Summit Bank* for its equally unremarkable holding that the illegality exception is inapplicable where there is a factual dispute over whether the plaintiff has conclusively shown the defendants engaged in illegal conduct. (AOB 26, 34, 41, 44.) This principle was previously adopted by the California Supreme Court (see *Flatley*, *supra*, 39 Cal.4th at pp. 316, 320) and Courts of Appeal followed it even before *Summit Bank* (e.g., *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1168; *Kemps v. Beshwate* (2009) 180 Cal.App.4th 1012, 1017-1018).

[2] For example, no one disputes that it would be constitutional for California extortion laws to prohibit individuals from threatening to file criminal complaints or assist with criminal prosecutions. (See, e.g., *Libarian v. State Bar* (1952) 38 Cal.2d 328, 328-330 [threat to file criminal complaint violated extortion law].) This is unsurprising because—unlike the First Amendment's protection of demand letters that seek compensation for civil wrongs and are thereby intimately related to a party's constitutional right to seek redress in court (see *Sosa*, *supra*, 437 F.3d at pp. 935-936)—the threat to initiate or assist with a criminal prosecution is unrelated to seeking monetary redress for an injury because criminal prosecutions are not concerned with compensating injured individuals, who may serve as "a witness for the state" but "will leave the courtroom empty-handed." (Prosser & Keeton, Torts (5th ed. 1984) § 2, p. 7.)

repeatedly held that California's extortion laws do not proscribe threats of civil litigation where the threatened claims are not shown to be a sham. (*Ante*, p. 15.)

To qualify as a sham, a lawsuit must be *both*: (1) objectively baseless; *and* (2) brought with the sole intention to hinder and harass the opposing party. (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 965-966; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 22 (*Ludwig*); accord, *Borough of Duryea, Pa. v. Gaurnieri* (2011) 564 U.S. ___ [131 S.Ct. 2488, 2496, 180 L.Ed.2d 408].) Malin does not contend, and he has presented no evidence showing (much less uncontroverted evidence conclusively demonstrating as a matter of law) that: (1) the anticipated civil lawsuit discussed in the demand letter was objectively baseless; and (2) this lawsuit would have been filed with the sole intention of hindering and harassing Malin. (See generally RB; 1 AA 156-175; 2 AA 303-307, 369-381.)[3]

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[3] For that matter, the trial court excluded and struck much of the evidence Malin submitted. (See 2 AA 387-388, 415-416.) Of the evidence Malin initially filed with his opposition to the anti-SLAPP motion in October 2011, the court excluded nearly all of the statements in the declarations of Malin and Rick Sesman, excluded significant parts of Moore's and James MacDonald's declarations, and excluded three of the four exhibits submitted with those declarations; the court also completely struck *all* of the declarations submitted in opposition to the anti-SLAPP motion in November 2011. (Compare 2 AA 387-388 and 415-416 [orders sustaining specific evidentiary objections] with 2 AA 237-263 and 291-293 [defendants' evidentiary objections].) Malin does not challenge this evidentiary ruling on appeal, which means the excluded and stricken evidence cannot be considered in this appeal. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1195-

(continued...)

Indeed, the only evidence in the record is that the threatened civil claims were not baseless and would be filed with the intention of seeking monetary redress for Malin's tortious financial misdeeds rather than with the intention of hindering or harassing Malin. (See 1 AA 55-57, 61-80. 191, 218; 2 AA 225-227.) In fact, when Arazm actually filed her claims against Malin, the court overruled the demurrer and denied the motion to strike Malin filed in response. (RJN, exh. L, pp. 1-7.) Thus, the evidence confirms the civil claims the demand letter threatened to file were not a sham.

Malin has therefore failed to argue or conclusively demonstrate as a matter of law that the anticipated lawsuit discussed by the demand letter was a sham. Accordingly, the illegality exception is inapplicable to Malin's extortion claim, which is based on a constitutionally protected threat to file a civil action that does not (and, in accordance with the First Amendment, could not) constitute extortion.

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1198; see also *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41.) And even with that evidence, Malin's evidence was not uncontroverted. Evidence submitted in support of the anti-SLAPP motion provided a far different account of the events leading up to this lawsuit, including of the demand letter. (See 1 AA 55-135, 190-218; 2 AA 219-236.) Thus, even had Malin submitted admissible evidence, disputed facts render the illegality exception inapplicable. (*Ante*, pp. 6, 20, fn. 1.)

c. The demand letter's reference to Malin's sexual partner does not, and cannot, amount to extortion.

i. Malin's extortion claim is based on the demand letter's constitutionally protected threat of civil litigation, not on any supposed threat to identify his sexual partners.

While Malin does not dispute that the demand letter threatened to commence a civil lawsuit against him by filing a complaint based on his misuse of restaurant group assets to pay his sexual partners, Malin contends his extortion claim is somehow not based on this protected threat of civil litigation and is instead based on a supposedly different and unprotected threat to identify his sexual partners in that same complaint. (See RB 2-5, 8-10, 12-14, 16, 22, 33-34.) Malin's contention is without merit.

First, contrary to Malin's assertion, his extortion claim is in fact based on the demand letter's constitutionally protected threat to file a civil lawsuit rather than on some supposedly different threat. As Malin's extortion claim alleged, the purported "extortion" consisted of a "July 25, 2011 letter sent" by Singer "demanding" that a business dispute "be resolved 'to [his] client's satisfaction,' " and "if the dispute was not so resolved, then a lawsuit would be filed" in which Malin asserted "third parties unrelated to that dispute would be exposed to public embarrassment and humiliation . . . ." (1 AA 4;

accord, 1 AA 3 [Malin alleging letter sent by Singer "threatened to file a lawsuit against the Plaintiff, and in that lawsuit he would allege that Plaintiff had used 'company resources to arrange sexual liaisons . . . ,' and that although the draft complaint that was attached to the letter contained blank spaces, that '[w]hen the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading' "]; RT 13:21-27 [Malin's counsel arguing alleged extortion here consisted of demand letter saying a complaint would be filed].)

Second, contrary to Malin's mischaracterization of the record, the demand letter did not threaten to identify Malin's sexual partners in the anticipated civil complaint against him. (AOB 39-41.) The letter explained that Arazm anticipated filing a civil lawsuit against Malin based on his financial misdeeds, including his misuse of restaurant group assets to pay his sexual partners. (1 AA 9-10, 61-62; see also 2 AA 227 [Arazm explaining that a whistleblower has provided evidence Malin misappropriated "company assets and resources and services for his own benefit and the benefit of his sexual partners at the expense of investors" such as Arazm].) In doing so, the letter itself identified the name of one of those sexual partners and provided a picture of him (3 AA 448-449), but the letter did not say this individual or any other of Malin's sexual partners would be named in the complaint against Malin. (See 1 AA 9-10, 61-62; 3 AA 447-448.)

The letter did say that the draft complaint accompanying the letter included "blank spaces" in those portions of the complaint dealing with Malin's improper expenditure of assets on his sexual

partners, and explained that there would be "no blanks" in this complaint once it was filed. (1 AA 9-10, 61-62, 193.) The letter, however, never said these "blank spaces" would be filled in with the names of the sexual partners on whom Malin improperly spent restaurant group assets. (1 AA 9-10, 61-62; 3 AA 447-448.) To the contrary, the blanks in the draft complaint had nothing to do with the actual names of Malin's sexual partners. (See 1 AA 22-23, 74-75.) The *only* real name the draft complaint would reveal in connection with Malin's sexual liaisons was Malin's name along with the *aliases* Malin used for those sex partners on whom he improperly spent assets. (See 1 AA 22-23, 91, 99-100.) The blanks in the draft complaint to which Malin refers were present only because a copy of the draft complaint and a separate demand letter were being sent to Moore (another of Arazm's business partners). (1 AA 10, 62, 193.)

In fact, neither the draft complaint accompanying the demand letter nor the actual complaint Arazm subsequently filed against Malin mentioned any of the actual names of Malin's sexual partners on whom Malin improperly spent restaurant group assets. (1 AA 62, 66, 74, 91, 99-100.)[4] While the real names of Malin's sexual

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[4] Malin suggests that the complaint Arazm actually filed did not " 'fill in' " the "blanks" in the draft complaint that accompanied the demand letter and this shows the letter "had crossed a line . . . ." (RB 9, fn. 2.) Nonsense. Arazm's complaint filled in those blanks. (Compare, e.g., 1 AA 22-23 with 1 AA 99-100.) If Malin means to fault the complaint for not naming his sexual partners, the absence of those names should come as no surprise since, as explained above, the demand letter never threatened to name his sexual

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partners will surely arise during civil discovery conducted on Arazm's claims against Malin and may be used as evidence at trial to prove the improper use of restaurant group assets, nothing in the demand letter or the draft complaint accompanying it threatened to publicly identify those sexual partners. Indeed, many of the blanks in the draft complaint had nothing to do with Malin's sexual partners; these blanks were placeholders for the names of Malin's alleged co-conspirators who participated in other aspects of Malin's various financial misdeeds. (1 AA 72-73.)

ii. The demand letter's reference to Malin's sexual partner was directly relevant to the anticipated civil lawsuit.

As explained earlier, the demand letter stated that Arazm intended to sue Malin and Moore for misappropriating over $1 million from Arazm unless the matter was resolved to Arazm's satisfaction and described the factual bases for the anticipated lawsuit, including Malin's misuse of restaurant group assets to pay his sexual partners. (1 AA 9-10, 55-56, 61-62.) In explaining this basis for Arazm's anticipated lawsuit against Malin, the letter named and provided a picture of one of those partners. (3 AA 447-449.) Contrary to Malin's assertion, these details identifying one of

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partners and the blank spaces in the draft complaint had nothing to do with such names.

the sexual partners on whom Malin improperly spent corporate assets belonging to Arazm and Malin's other business partners was directly relevant—rather than tangential—to the letter's threat of civil litigation over Malin's improper expenditure of those assets on his sexual partners. This is so because the statement and photograph identifying this individual confirmed that Arazm knew of the very financial misdeeds that would be the subject of her civil lawsuit and knew on whom Malin had improperly spent the very funds for which Arazm would be seeking compensation in that lawsuit. (See 1 AA 55-56, 193; 2 AA 227.)

Even had the demand letter threatened to identify Malin's sexual partners in the allegations of the civil complaint that Arazm anticipated filing against Malin, such a threat would be indistinguishable from the letter's constitutionally protected threat to file a civil complaint. Pleadings in a lawsuit *are* the litigation (*Kashian, supra*, 98 Cal.App.4th at p. 920), and a pleading consists of allegations (see *Henderson v. Jacobs* (1933) 219 Cal. 477, 478 [explaining that "gravamen of the complaint consists of allegations"]). Thus, contrary to Malin's puzzling efforts to distinguish between a complaint and the allegations asserted in the complaint, any threat to include specific allegations in a complaint (such as allegations identifying Malin's sexual partners) cannot be considered tangential to the threat to file that very complaint; the complaint and the allegations within it are one and the same.

Moreover, even if the allegations in a complaint were somehow distinct from the complaint itself, any threat to identify Malin's sexual partners in the civil complaint Arazm anticipated

filing would still have been directly relevant rather than tangential to the threatened lawsuit. This is so because, in Arazm's lawsuit against Malin for his financial misdeeds, it will be entirely proper for her and the Lavely & Singer defendants (as Arazm's attorneys) to demonstrate that Malin tortiously spent restaurant group assets on specific individuals who were his sexual partners in order to show Malin did not properly use those assets for the restaurant group's business. (See, e.g., *People v. O'Brand* (1949) 92 Cal.App.2d 752, 754 ["it is the settled law" that evidence of "degrading practices" is admissible "where such proof is relevant to an issue in the case on trial"].) Malin cannot improperly misappropriate his business partner's money to pay his sexual partners, and then complain when is he called to account for this tortious misconduct.

Furthermore, because the basis for Arazm's anticipated civil case against Malin was that he improperly spent restaurant group assets on sexual partners, the Lavely & Singer defendants would have had every right had they so chosen to identify those particular sexual partners in any complaint they filed on Arazm's behalf for this financial wrongdoing. (See *Anderson v. Blean* (1912) 19 Cal.App. 581, 583 [plaintiff "ha[s] a perfect right to allege" facts of the case in the complaint].) Since they had every right to include the names in the actual complaint, they could not have committed extortion had the demand letter that Singer sent threatened to identify those sexual partners in such a complaint, as Malin contends. (See *Rothman v. Vedder Park Management* (9th Cir. 1990) 912 F.2d 315, 317-318 (*Rothman*) [defendant's threats to take particular actions cannot constitute extortion under California law

where the defendant actually had the right to take those actions since " ' "what you may do in a certain event you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences" ' "].)

In short, the demand letter's recitation of the details supporting its protected threat of civil litigation over Malin's misuse of assets to pay sexual partners was relevant and necessary—not tangential—to Arazm's legal grievances against Malin for his financial misconduct. Indeed, the trial court reached the same conclusion in denying Malin's motion to strike allegations concerning his sexual liaisons from the complaint Arazm actually filed against him for his financial wrongdoing, finding that these allegations of Malin's sexual liaisons were relevant and necessary to Arazm's allegations and claims for redress of financial misconduct. (RJN, exh. L, pp. 6-7 [ruling denying Malin's motion to strike as irrelevant "allegations of Mr. Malin's sexual activity" because Arazm "alleges that Mr. Malin engaged in these activities using company money and property, tying these allegations into Mr. Malin's alleged misuse of company resources"].)[5]

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[5] Malin contends this decision is irrelevant because it supposedly involved a far different issue. (RB 4.) Nonsense. Malin asserts that the demand letter's supposed threat to discuss his sexual partners in a civil complaint was irrelevant to the letter's constitutionally protected threat to file that complaint against Malin for his financial misdeeds. (See, e.g., RB 5, 13-16.) The trial court considered that issue when it analyzed whether to strike detailed allegations about Malin's sexual liaisons from Arazm's complaint and declined to strike them because they were absolutely

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iii. Even if the demand letter's reference to Malin's sexual partner was tangential to the threatened litigation, the illegality exception is still inapplicable.

The Lavely & Singer defendants had every right to file a complaint containing tangential allegations (even though they did not do so).[6] Accordingly, they could not have committed extortion by threatening in the demand letter to include supposedly tangential allegations in the anticipated civil complaint. (See *Sosa, supra*, 437 F.3d at pp. 936, 939-940 [under the First Amendment, demand letter's prelitigation conduct cannot be restricted as extortion where the same conduct could be undertaken in court because this restriction would "impos[e] a substantial burden on a party's ability to seek redress from the courts"]; *Rothman, supra*, 912 F.2d at pp. 317-318 [defendant's threats to take particular actions cannot constitute extortion under California law where the defendant actually had the right to take those actions].)

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relevant to Arazm's lawsuit for Malin's misuse of restaurant group assets. (See RJN, exh. L, pp. 6-7.)

[6] To file a lawsuit, a party need only file a complaint. (See *Safeco Surplus Lines Co. v. Employer's Reinsurance Corp.* (1992) 11 Cal.App.4th 1403, 1408; Code Civ. Proc., §§ 350, 411.10.) If the party files a complaint that includes irrelevant allegations, those allegations do not justify the dismissal of the entire complaint. (See *Triodyne, Inc. v. Superior Court* (1966) 240 Cal.App.2d 536, 542.)

Moreover, the First Amendment protection afforded to demand letters is not limited to statements in the letter threatening to include allegations in a complaint. The protection extends to " 'conduct incidental to the prosecution' " of a lawsuit and therefore protects *any* statements in demand letters that (1) support a demand for negotiations aimed at settling claims before civil litigation begins or (2) help parties frame their legal positions, because setting restrictions on such statements in a demand letter would "impos[e] a substantial burden on a party's ability to seek redress from the courts." (See *Sosa*, *supra*, 437 F.3d at pp. 934-936; see also *Tichinin v. City of Morgan Hill* (2010) 177 Cal.App.4th 1049, 1068-1069 [right to petition protects conduct that is "incidental" to "a claim that could ripen into" litigation and therefore protects not only prelitigation demand letters that "threaten legal action" but also those that merely "demand settlement"].)

Here, the demand letter's supposedly tangential statement and photograph identifying Malin's sexual partner satisfy both of those categories of constitutionally protected statements. The letter invited settlement negotiations to avoid anticipated claims against Malin for, among other financial wrongdoing, misusing restaurant group assets to pay his sexual partners. (1 AA 9-10, 61-62.) By including a statement and photograph identifying one of the sexual partners on whom Malin improperly spent these corporate assets, the letter supported this request for settlement negotiations by confirming for Malin that Arazm had evidence to back up her anticipated civil claims since she knew of the very financial

misdeeds (Malin's misuse of restaurant group assets on specific sexual partners) that would form the basis of her claims and knew precisely on whom Malin had improperly spent the very funds for which she would be seeking compensation. (See 1 AA 55-56, 193; 2 AA 227.) Indeed, Malin's initial response to receiving the letter was to engage in efforts towards reaching a settlement. (See 1 AA 56, 83, 86, 192-193.) Similarly, even though the identification of Malin's sexual partner did not lead to a settlement, it helped frame Arazm's legal position by demonstrating that her claim that Malin had misused restaurant group assets on sexual partners was supported by specific facts known to Arazm and was not a mere baseless allegation unsupported by any facts. If anything, by providing detailed information about the person on whom Malin had improperly spent business assets, the demand letter provided precisely the type of details that are antithetical to criminal extortion since extortionate threats use the "vagueness of [an] accusation" to generate fear. (*Flatley*, *supra*, 39 Cal.4th at p. 331.)

By arguing that the supposedly tangential reference to Malin's sexual partner is not protected by the Constitution, Malin seeks improperly to thwart the protections afforded by the First Amendment. Prelitigation demand letters are "a common, if not universal feature of modern litigation" (*Sosa*, *supra*, 437 F.3d at p. 936; see also AOB 29-32), and modern demand letters are more elaborate than ever before, providing a narrative that reads much like a closing argument to legitimately persuade the other party to settle and thereby avoid actual litigation (Subrin & Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural*

Universe (2004) 79 Notre Dame L.Rev. 1981, 2002-2003; see also AOB 31-32). This is why placing restrictions on demand letters, as Malin tries to do, imposes a "substantial burden on a party's ability to seek redress from the courts." (*Sosa*, at p. 936.)

Yet these are precisely the substantial, unconstitutional burdens that would be placed on First Amendment rights if the party and her attorneys had to worry about whether each sentence in their demand letter was directly relevant to the threatened civil claim or whether it was instead a tangential statement that would expose them to criminal prosecution or civil liability for extortion. It is for these very reasons that a demand letter's statements that support a request for settlement negotiations or help frame a party's legal position cannot amount to extortion. (See *Sosa*, *supra*, 437 F.3d at pp. 935-936 [while responding to demand letters can be burdensome, "it is likely less burdensome than if the opposing party, fearing liability in tort for demanding settlement" instead "proceed[s] directly to litigation"].) To render illegal "an individual's attempt, such as in this case, to resolve a perceived dispute" through a demand letter "would only serve to disrupt our system of justice" and lead to " 'a piling of litigation on litigation without end.' " (*Rendelman*, *supra*, 947 A.2d at pp. 547-550, 556-557 [rendering demand letter's threats "a potential criminal offense" when the actual filing of a lawsuit "is not unlawful will only serve to stifle our judicial system and overwhelm the courts with excessive litigation between feuding parties"]; accord, *Pendergraft*, *supra*, 297 F.3d at pp. 1202, 1205-1208 [refusing to permit extortion charge to be based on statements in a demand letter because "[a]llowing

litigants to be charged with extortion" on this basis "would open yet another collateral way for litigants to attack one another"].)

iv. At any rate, Malin cannot show extortion based on alleged threats to identify his sexual partners in a civil complaint.

Malin's extortion claim alleges that the Lavely & Singer defendants made extortionate threats to him in violation of subdivisions (2) and (3) of Penal Code section 519. (1 AA 4.) Those specific subdivisions proscribe extortionate threats "[t]o accuse *the individual threatened, or any relative of his, or member of his family*, of any crime" and "[t]o expose, or to impute *to him or them* any deformity, disgrace or crime." (Pen. Code, § 519, subds. (2) & (3), emphases added.) A threat to identify Malin's sexual partners in a civil complaint cannot, as a matter of law, satisfy either of these subdivisions because it is not a threat directed at Malin or his relatives or family members; rather, to the extent this is a distinct "threat" directed at anyone, it is directed at the third parties who had sexual relationships with Malin. (AOB 35-36.) Notably, the sexual partner identified in the demand letter did not sue the defendants. (See 1 AA 1-7.)

Malin does not argue, nor does he cite any authority holding, that he can prove extortion in violation of subdivisions (2) and (3) based on supposedly extortionate threats directed at third parties like his sexual partners who are neither his family members nor

relatives. Instead, Malin asserts the Lavely & Singer defendants waived this argument because they did not raise it in the trial court. (RB 14, fn. 4.) But Malin is wrong. The defendants did argue in the trial court that, to the extent the demand letter's reference to sexual partners was a distinct threat, it was a threat directed at third parties rather than Malin. (See RT 10:2-9.)

Moreover, as the party invoking the illegality exception, it was Malin's burden conclusively to establish, based on uncontroverted evidence, extortion as a matter of law. (*Ante*, pp. 7-8.) Accordingly, whatever non-exhaustive points the defendants may have raised in response to Malin's illegality arguments in the trial court, the specific points they raised did not relieve Malin of *his* burden of conclusively demonstrating as a matter of the law the specific threats necessary to prove a violation of subdivisions (2) and (3). (Cf. *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239 [fact defendants made certain arguments about why plaintiff had not shown a probability of prevailing on its claims "does not relieve" plaintiff of its burden to establish the requisite probability].)

In any event, this court may consider whether Malin has shown the extortionate threats necessary to satisfy subdivisions (2) and (3) for the first time on appeal since the issue of whether a plaintiff has conclusively established an illegal activity as a matter of law is a purely legal question this court reviews de novo. (See *Flatley*, *supra*, 39 Cal.4th at p. 328.)

Additionally, Malin contends his extortion claim is also based on subdivision (4) of Penal Code section 519. (RB 5, 14, fn. 4.) Not

so. Nowhere in his extortion claim (or anywhere else in his complaint) did Malin ever cite subdivision (4). (1 AA 1-7.) Rather, his extortion claim's only reference to section 519 exclusively alleges a violation of subdivisions (2) and (3). (1 AA 4:16-17.)[7]

At any rate, Malin has not conclusively shown a violation of subdivision (4), which proscribes threats to expose a " 'secret affecting' " the threatened "victim or his family[ ]." (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1078.) Even assuming the demand letter made a distinct threat to expose the identities of Malin's sexual partners, this threat to third parties cannot satisfy subdivision (4) since it is not a threat directed at Malin or his family or relatives.

Furthermore, even had the letter threatened the requisite individuals, Malin has not conclusively demonstrated based on uncontroverted evidence that it was a threat to expose a "secret" within the meaning of subdivision (4). " '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." ' " (*Cross, supra,* 197 Cal.App.4th at p. 387.) Not only is this court foreclosed from considering the majority of what little evidence Malin submitted in opposition to the anti-SLAPP motion (*ante,* pp. 21-22, fn. 3), *none* of Malin's evidence

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[7] If Malin means to suggest his extortion claim should not be limited to the specific subdivisions of section 519 that he alleged were violated in his complaint, he is wrong. (See AOB 35-36, fn. 8.) " ' "As is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings." ' " (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 109.)

shows—and it certainly does not conclusively demonstrate as a matter of law—that the identity of Malin's sexual partners was a matter unknown to the public. (See 1 AA 156-175; 2 AA 303-307, 369-381.) Malin's failure to present any such evidence is unsurprising since the public knows about Malin's sexual relationships with men. (See 2 AA 227.)

d. Inapposite cases addressing false speech do not support the application of the illegality exception here.

i. The demand letter does not contain false statements.

Malin contends the illegality exception applies to his extortion claim because two California cases hold that the First Amendment does not apply to false speech. (See RB 6, 27, 29 [citing *Lefebvre, supra*, 199 Cal.App.4th 696, and *Cohen v. Brown* (2009) 173 Cal.App.4th 302 (*Cohen*)].) But, like *Flatley*, these two cases are inapposite and provide no guidance here.

Lefebvre concluded that the illegality exception applied to claims that were based on the submission of a false criminal report because the First Amendment did not protect such a false report. (*Lefebvre, supra*, 199 Cal.App.4th at pp. 701, 703-706.) Similarly, *Cohen* held that extortion had been committed, and therefore the illegality exception applied, where a defendant embroiled in a fee dispute with the plaintiff filed a false state bar complaint against

the plaintiff to secure an advantage in underlying litigation, threatened that this false complaint would make plaintiff's life "a living hell," and refused to negotiate the fee dispute in good faith. (*Cohen*, *supra*, 173 Cal.App.4th at pp. 310-311, 316-318.)

But, in sharp contrast to those cases, Malin does not even argue that the demand letter contains false statements. (See generally RB.) Moreover, even had Malin advanced such an argument, he presented *no* evidence showing—and certainly no uncontested evidence conclusively demonstrating—that anything the demand letter said was false. (See 1 AA 156-175; 2 AA 303-307, 369-381.)[8] Indeed, the only evidence in the record is that the statements in the demand letter were true. (See 1 AA 191, 218; 2 AA 225-227; see also 1 AA 55-57.)

Furthermore, neither *Lefebvre* nor *Cohen* provide any guidance as to whether Malin has conclusively established extortion as a matter of law here. *Lefebvre* never even discussed whether the activities there constituted extortion. (See *Lefebvre*, *supra*, 199 Cal.App.4th at pp. 703-706.) And while *Cohen* addressed extortion, the attorney's statements there were far different from those in the demand letter on which Malin's extortion claim is based. Not only has Malin—unlike the plaintiff in *Cohen*—not argued or presented evidence conclusively demonstrating that the demand letter contained false statements, he has not argued or established that the Lavely & Singer defendants said they would make anyone's life

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[8] For that matter, the trial court excluded and struck much of Malin's evidence, and this evidence cannot now be considered in this appeal. (*Ante*, pp. 21-22, fn. 3.)

a "living hell" or refused to negotiate in good faith over a disputed fee, as did the defendant attorney in *Cohen*. (See *Cohen*, *supra*, 173 Cal.App.4th at pp. 310-311, 316-318.) In fact, the evidence filed in support of the anti-SLAPP motion, which Malin does not even dispute, shows that the defendants attempted to negotiate in good faith; it was Malin who abruptly broke off any settlement negotiations and filed this lawsuit instead in a preemptive strike against Arazm, her husband, and her attorneys as the Lavely & Singer defendants prepared to file a civil action on Arazm's behalf against Malin. (See 1 AA 55-58, 192-193.)

ii. This court should not follow the false speech cases on which Malin relies even if they were relevant here.

After *Flatley* carved out a narrow illegality exception to the anti-SLAPP statute, Courts of Appeal disagreed over whether false speech could satisfy this exception. (Compare *Lefebvre*, *supra*, 199 Cal.App.4th at pp. 701, 703-706 and *Cohen*, *supra*, 173 Cal.App.4th at pp. 310-311, 316-318 with *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 970-971 [rejecting argument that defamatory speech satisfies exception because "[t]he term 'illegal' in *Flatley* means criminal"] and *Haight Ashbury*, *supra*, 184 Cal.App.4th at pp. 1549-1550 ["whether or not [defendant's] statements were false does not determine whether they constitute protected activity for purposes of the SLAPP statute" since illegality exception applies only to illegal conduct].)

Those cases holding that false speech did not satisfy the illegality exception were better reasoned than *Cohen* or *Lefebvre* because the United States Supreme Court has never adopted "the categorical rule" that "false statements receive no First Amendment protection." (*U.S. v. Alvarez* (2012) 567 U.S. ___ [132 S.Ct. 2537, 2545, 183 L.Ed.2d 574] (*Alvarez*) (plurality opn. of Kennedy, J.); accord, e.g., *BE & K Const. Co. v. N.L.R.B.* (2002) 536 U.S. 516, 530-531 [122 S.Ct. 2390, 153 L.Ed.2d 499] [false speech is not completely unprotected by First Amendment].) But this court need not weigh in on this prior division between California's courts because the United States Supreme Court's recent *Alvarez* decision abrogated cases like *Lefebvre* and *Cohen*.

In 2012, *Alvarez* clarified that, *at a minimum*, the First Amendment protects false statements absent evidence that the speaker made the statements with knowledge of or reckless disregard for their falsity. (See *Alvarez, supra*, 132 S.Ct. at p. 2545 (plurality opn. of Kennedy, J.) [rejecting argument that First Amendment affords no protection to false speech; holding that "falsity alone may not suffice to bring the speech outside the First Amendment" and that the false "statement must be a knowing or reckless falsehood"]; *id.* at pp. 2553-2555 (conc. opn. of Breyer, J.) [explaining that Supreme Court precedent cannot be construed as affording no protection to false speech and that "[s]ome potential First Amendment threats can be alleviated by interpreting [a] statute [prohibiting false speech] to require knowledge of falsity"].)

Here, Malin has never argued, nor has he presented any evidence showing (and certainly no uncontroverted evidence

conclusively demonstrating), that the Lavely & Singer defendants knew there were any false statements in the letter or made statements in the letter with reckless disregard for any falsity. (See generally RB; 1 AA 156-175; 2 AA 303-307, 369-381.) Indeed, the evidence is to the contrary, establishing that Singer had a good faith basis to send the demand letter. (See 1 AA 191, 218; 2 AA 225-227; see also 1 AA 55-57.) Thus, in accordance with *Alvarez*, even had Malin argued or conclusively shown the demand letter included false statements—which he has not (*ante*, p. 38)—that alone could not remove the letter from the First Amendment's protection and therefore could not warrant the application of the illegality exception.

e. Inapposite case law addressing criminal vandalism cannot justify the application of the illegality exception either.

Malin suggests the illegality exception could be applied to his extortion claim because *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284 (*Novartis*) applied this exception to criminal vandalism. (See RB 6, 26-27.) But *Novartis* is plainly inapposite.

Malin does not contend, nor can he, that the elements necessary to prove the criminal vandalism in *Novartis* are the same as those necessary to prove the far different crime of extortion. And Malin offers no explanation of how *Novartis*' inapposite analysis of whether criminal vandalism had been established in that case

demonstrates that Malin has likewise conclusively established as a matter of law, based on uncontroverted evidence, the sharply different elements of criminal extortion.

Moreover, *Novartis* applied the illegality exception *only* after first determining " 'evidence conclusively establishe[d]' " the illegal conduct there. (*Novartis*, *supra*, 143 Cal.App.4th at p. 1296.) By contrast, as the opening brief explains (AOB 29-44) and as this reply brief confirms, Malin has not conclusively demonstrated extortion as a matter of law based on uncontroverted evidence.

f. Malin has also failed conclusively to establish the requisite intent to extort.

The opening brief explained that Malin failed conclusively to establish, based on uncontroverted evidence, that the Lavely & Singer defendants made their statements with the necessary intent to extort. (AOB 42-44.) In response, Malin merely asserts as a general matter that he has established extortion because the facts of this case are supposedly on all fours with *Flatley* and *Cohen*. (See RB 22-30.)

But *Flatley* only examined whether an attorney's statements were extortionate threats that satisfied the wrongful use of fear element of extortion. (*Flatley*, *supra*, 39 Cal.4th at pp. 326-332.) *Cohen*, in turn, simply relied on *Flatley*'s analysis of the "threat" necessary to prove extortion to hold that the attorney in *Cohen* committed extortion. (*Cohen*, *supra*, 173 Cal.App.4th at pp. 317-318.) Nowhere did *Flatley* or *Cohen* say they were addressing the

distinct intent element of extortion or that the parties there had even litigated the issue of whether the requisite intent had been shown. " 'A decision, of course, does not stand for a proposition not considered by the court.' " (*Flatley*, at p. 320.)

Besides, even had *Flatley* and *Cohen* addressed the intent element, they are inapposite because the statements the attorneys made in those cases are sharply different from the statements made in the demand letter on which Malin's extortion claim is based. (*Ante*, pp. 11-22, 37-39.)

Moreover, unlike in *Flatley* or *Cohen*, the Lavely & Singer defendants here presented evidence that none of the statements in the demand letter were made with the specific intent of extorting money. (AOB 43-44.) Thus, at a minimum there is a factual dispute as to whether the Lavely & Singer defendants had the requisite specific intent. (*Ibid.*) This factual dispute precludes the application of the illegality exception to Malin's extortion claim. (AOB 44; *ante*, pp. 6, 20, fn. 1.)

Malin also appears to suggest he established extortion based on the *Novartis* and *Lefebvre* cases. (See RB 6, 29.) But neither of these inapposite cases even discusses whether the activities there constituted extortion (*ante*, pp. 38, 41-42), much less addressed in particular whether the plaintiffs there had conclusively shown the intent element of extortion.

2. Because Malin has presented no evidence of any alleged illegal investigative activities, he has not met his burden of demonstrating as a matter of law that the Lavely & Singer defendants engaged in illegal conduct in violation of his civil rights.

Malin's second cause of action, for civil rights violations, contends that individuals "acting on behalf of" and at the "behest" of the Lavely & Singer defendants "hacked" into Malin's private e-mails and "eavesdropped and/or wiretapped [Malin's] phones" in violation of state and federal criminal laws. (1 AA 5; RB 22.)

In denying the anti-SLAPP motion, the trial court did not find that Malin had conclusively established or even had *any* evidence that the defendants engaged in or were responsible for others engaging in hacking, eavesdropping, or wiretapping; nor could the court have made such a finding since it excluded and struck what little evidence Malin submitted in opposition to the anti-SLAPP motion that potentially pertained to his civil rights claim. (AOB 45-46; see also *ante*, pp. 21-22, fn. 3.) In any event, *none* of the evidence Malin submitted—including the evidence the trial court excluded and struck—established that the Lavlely & Singer defendants hacked, eavesdropped, or wiretapped or were responsible for anyone else doing so. (AOB 46-47.)

Malin does not even argue that he presented any evidence that the Lavely & Singer defendants committed these activities or were responsible for them. Instead, the trial court found, and Malin now contends, that the illegality exception applies to his civil rights

claim because Malin's complaint merely *alleged* that the defendants were responsible for hacking, eavesdropping, or wiretapping. (See 2 AA 416-417; RT 7-8, 19; RB 2, 17, 27-28, fn. 8, 35-45.)

But both Malin and the trial court are wrong. As explained earlier, Malin cannot satisfy the illegality exception based on mere allegations in his complaint; Malin must conclusively demonstrate, based on uncontroverted evidence, that the defendants engaged in activities that are illegal as a matter of law. (*Ante*, pp. 5-7.)[9]

Moreover, the Lavely & Singer defendants and their client (Arazm) submitted evidence specifically denying any direct or indirect involvement with the alleged accessing of Malin's e-mail accounts or telephone conversations. (AOB 47-48.) Accordingly, *at a minimum*, there is a factual dispute as to whether the Lavely & Singer defendants committed or were responsible for hacking, eavesdropping, or wiretapping, and this factual dispute renders the illegality exception inapplicable since there is no uncontroverted evidence conclusively establishing criminal activity as a matter of law. (*Ibid.*; *ante*, pp. 6, 20, fn. 1.)

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[9] The opening brief cited several cases that applied the anti-SLAPP statute to claims based on investigative activities conducted in support of potential or pending litigation. (AOB 19-21.) Malin contends these cases do not render the illegality exception inapplicable because the defendants there did not commit illegal activities. (RB 35-38.) But this irrelevant argument is a red herring. The Lavely & Singer defendants do not contend the illegality exception is inapplicable to illegal conduct; rather, the exception is inapplicable because Malin has not conclusively shown, based on uncontroverted evidence, that the Lavely & Singer defendants committed or were responsible for any illegal investigative activities. (AOB 44-48; *ante*, pp. 44-45.)

Malin argues that this court should disregard the portion of this evidence that was submitted with the anti-SLAPP reply brief because no evidence can be submitted with a summary judgment reply brief. (RB 43-44; see also RB 11, fn. 3.) Malin suggests it would be particularly inappropriate to consider that evidence because the court struck as untimely his additional evidence in opposition to the anti-SLAPP motion that he filed *after* both Malin and the defendants had previously filed their respective opposition and reply briefs (and accompanying evidence). (See RB 43; 1 AA 136-218; 2 AA 219-236.)

But, in the trial court, Malin never objected to the evidence submitted with the reply brief—even though he had more than a month between the submission of this evidence in late October 2011 and the hearing on the anti-SLAPP motion in late November 2011 to object and present legal arguments in response to this evidence. (Compare 1 AA 190-218 [evidence filed with reply brief in late October 2011] and 2 AA 219-236 [same] with RT 1 [hearing held on November 29, 2011].) He has therefore waived his objections to this evidence by raising them for the first time on appeal. (See *Armando D. v. Superior Court* (1999) 71 Cal.App.4th 1011, 1024-1025; *People v. Young* (1987) 192 Cal.App.3d 812, 818.)

Moreover, Malin's arguments are based on the false premise that evidence cannot timely and appropriately be filed with an anti-SLAPP reply brief. (See RB 43-44.) Malin cites no authority for this assertion, relying instead on a single case addressing evidence filed with a summary judgment motion. (RB 43-44.) Contrary to Malin's assertion, additional evidence in support of a motion *can* be

filed with a reply brief, including with a reply in support of a summary judgment motion, especially where as here Malin had more than a month to challenge the evidence or request a continuance to address it. (See *California Retail Portfolio Fund GMBH & Co., KG v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, 861; *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308; *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8.)

The summary judgment case on which Malin's argument relies is not to the contrary. It stands for the unremarkable proposition that a trial court has the discretion to disregard evidence filed with a summary judgment reply brief where the evidence was not referenced in the statutorily required separate statement of undisputed material facts, and should disregard such evidence where it is "hidden in voluminous papers" and the opposing party is not given an opportunity to challenge the evidence. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-316.) That proposition is inapposite here since: (1) the anti-SLAPP statute does not require any evidence to be referenced in a separate statement (see Code Civ. Proc., § 425.16); (2) the evidence filed with the reply brief was not hidden in voluminous papers (see 1 AA 190-218; 2 AA 219-236); and (3) Malin had more than a month between the time the evidence was filed with the reply and the hearing on the anti-SLAPP motion to object or present arguments in response to that evidence or to ask for a continuance to challenge the evidence (*ante*, p. 46).

Indeed, a defendant's anti-SLAPP motion need not "demonstrat[e] in the first instance" that the illegality exception is inapplicable, particularly since it "would be impractical and inefficient" to "require the defendant to identify and address" every conceivable illegality argument "that might have had some bearing on the underlying action and then prove a negative"—i.e., that there was no illegal conduct. (*Soukup*, *supra*, 39 Cal.4th at p. 286; accord, e.g., *Cross*, *supra*, 197 Cal.App.4th at p. 385.) Because an anti-SLAPP motion need not anticipate that a plaintiff will assert the illegality exception in opposition to the motion and need not affirmatively refute the exception's application, the Lavely & Singer defendants could not have been obliged to respond to the illegality exception with evidence until they filed a reply to Malin's assertion of the illegality exception in his opposition brief.[10]

In any event, Malin ignores the fact that the evidence filed with defendants' initial anti-SLAPP motion also disputed Malin's allegations of illegal investigative activities. (1 AA 54, 57

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[10] Malin also appears to complain that he was unable to respond to the Lavely & Singer defendants' arguments and evidence because the anti-SLAPP statute stays discovery. (See RB 7, fn. 1, 44.) But a party may ask the trial court for discovery "on noticed motion and for good cause shown . . . ." (Code Civ. Proc., § 425.16, subd. (g).) Thus, Malin could have requested discovery—including during the more than one month interval between the filing of the reply and accompanying evidence in late October and the hearing on the anti-SLAPP motion on November 29, 2011 (*ante*, p. 46)—yet he elected not to do so, and therefore he cannot now complain about the absence of discovery. (See *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 951; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867.)

[declaration from Singer explaining that the "allegations of extortion, wiretapping and/or hacking asserted in Mr. Malin's lawsuit" were "false"].) Given this factual dispute alone, the illegality exception cannot apply to Malin's civil rights claim. (*Ante*, pp. 6, 20, fn. 1.)

Finally, Malin contends *Summit Bank* would render unconstitutional criminal laws proscribing hacking, eavesdropping, or wiretapping if it were applied here. (RB 29.) But this argument is even more puzzling than his baseless contention concerning *Summit Bank*'s impact on extortion law. *Summit Bank* never addresses hacking, eavesdropping, or wiretapping. Nor do the Lavely & Singer defendants cite *Summit Bank* in explaining why the illegality exception is inapplicable to Malin's civil rights claim. (AOB 44-48.) And they do not contend that criminal laws prohibiting hacking, eavesdropping, or wiretapping are unconstitutional. Rather, the illegality exception is inapplicable simply because Malin has not conclusively shown, based on uncontroverted evidence, that the defendants were responsible for hacking, wiretapping, or eavesdropping. (*Ibid.*)

3. The illegality exception cannot apply to Malin's emotional distress claims since they do no more than incorporate the extortion and civil rights claims.

Malin does not dispute that his third and fourth causes of action for negligent and intentional infliction of emotional distress are based entirely on the allegations in his extortion and civil rights claims, nor does he dispute that the illegality exception therefore cannot apply to the emotional distress claims if it is inapplicable to the latter claims. (See RB 45-46.) Accordingly, the illegality exception does not apply to Malin's emotional distress claims either. (AOB 48, fn. 13.)

4. At minimum, the illegality exception cannot apply to Brettler.

The illegality exception cannot apply to any of the claims against defendant Brettler because there is *no* evidence he had any role in any supposedly improper misconduct. (AOB 44, fn. 10.) Malin points to no such evidence in his brief. (See generally RB.)

II. MALIN HAS NOT MET HIS BURDEN OF SHOWING THAT HE IS LIKELY TO PREVAIL ON THE MERITS OF ANY OF HIS CLAIMS.

A. To avoid dismissal, Malin must show how admissible evidence substantiates each element of each of his claims.

The illegality exception does not apply to any of Malin's claims (AOB 24-48; *ante*, pp. 9-50), and Malin does not dispute that the anti-SLAPP statute applies to all of his claims absent the illegality exception. (See generally RB.) Thus, the anti-SLAPP statute applies to Malin's claims and Malin therefore bears the burden of establishing a probability of prevailing on the merits of each of his claims in order to avoid their dismissal with prejudice. (AOB 14-23, 48-49.)

According to Malin, to satisfy this standard he need do little more than demonstrate that his claims would survive a "demurrer." (See RB 7 & fn. 1.) But Malin misstates the law. A plaintiff must do more than adequately plead a claim to satisfy the anti-SLAPP statute. To show a probability of prevailing on a claim and avoid dismissal of the claim under this statute, a plaintiff " ' "must demonstrate that the complaint is *both* legally sufficient *and* supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714, emphases added.) A plaintiff therefore " 'cannot rely on the

allegations of the complaint' " to show a probability of prevailing. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 80.) Rather, a plaintiff " ' "must provide the court with sufficient *evidence* to permit the court to determine whether 'there is a probability that the plaintiff will prevail on the claim[s].' " ' " (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) In particular, a plaintiff must show how evidence that would be admissible at trial substantiates *every* element of *each* of his claims. (AOB 49.)

The opening brief demonstrated that Malin has not satisfied this burden. (AOB 48-57.) As we next explain, none of the arguments in the respondent's brief refute Malin's failure to meet his burden under the anti-SLAPP statute.

B. Malin has not shown how admissible evidence substantiates any of his claims against the Lavely & Singer defendants.

Malin contends that he has established criminal extortion because, in his view, statements found to be extortionate threats in *Flatley* are "effectively *identical* to" and "essentially on all fours with the facts" here. (RB 22-30.) But Malin is wrong; *Flatley* is inapposite and does not demonstrate that the Lavely & Singer

defendants made any extortionate threats or that they did so with the requisite intent. (*Ante*, pp. 11-22, 42-43.)[11]

As for his civil rights and emotional distress claims, Malin simply insists he need not show a probability of prevailing on them because they fall within the illegality exception to the anti-SLAPP statute and the second step of the anti-SLAPP analysis is therefore inapplicable to them. (See RB 42-46.) This contention, however, is without merit because the illegality exception does not apply to these claims. (AOB 44-48; *ante*, pp. 44-50.)

C. All of Malin's claims are barred by the litigation privilege.

Even had Malin substantiated every element of each of his claims with admissible evidence—which is not the case—he cannot demonstrate a probability of prevailing on any of them because they are all barred by the litigation privilege, which broadly protects prelitigation demand letters and investigative activities undertaken in anticipation of litigation. (AOB 52-55.)

Malin does not dispute that the litigation privilege applies to his civil rights and emotional distress claims. (See RB 35-46.) Rather, relying on *Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140 (*Nguyen*), Malin argues that the litigation privilege

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[11] Malin's discussion of his extortion claim also refers to *Cohen*, *Lefebvre*, and *Novartis*. (See RB 26-27, 29.) Those decisions, however, are also inapposite; indeed, *Lefebvre* and *Novartis* do not even address extortion. (*Ante*, pp. 37-39, 41-43.)

is inapplicable to his extortion claim because it is supposedly based on a threat that has no logical relation to the subject matter of the civil lawsuit the letter anticipated filing. (RB 30-34.) Not so.

Nguyen is inapposite and does not render the litigation privilege inapplicable. *Nguyen* holds "that the litigation privilege d[oes] not apply where an attorney threatens or misrepresents the existence of criminal proceedings." (*Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 170.) Here, however, Malin has not argued, nor has he presented any evidence showing, that the demand letter on which his extortion claim is based on threatened criminal prosecution or misrepresented the existence of any criminal proceedings. (See generally RB; 1 AA 156-175; 2 AA 303-307, 369-381.) In fact, the letter never even mentions criminal proceedings or prosecution. (1 AA 61-62.)

Nguyen is also inapposite because the lawsuit to which *Nguyen* declined to apply the litigation privilege was based on a demand letter's statement that the individual improperly soliciting another company's employees and customers had been in prison for assaulting his wife—a statement that was *completely unrelated* to the letter's threat to bring a civil action for improper solicitation against this individual's new employer. (*Nguyen*, *supra*, 69 Cal.App.4th at pp. 143-144). In sharp contrast, the demand letter's reference here to the sexual partner on whom Malin had improperly spent restaurant group assets was directly relevant to the letter's threat to file a civil action against Malin for misusing restaurant group assets to pay this and other sexual partners. (*Ante*, pp. 26-29.) Thus, the litigation privilege applies here because the letter's

reference to Malin's sexual partner was made in connection with the letter's threat to file a civil action for financial wrongdoing based on money improperly spent on that sexual partner. (See *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1259, 1266-1268 [following litigation privilege case law to hold that prelitigation statements in letter prepared by attorney were made in connection with lawsuit because they were directly related to the lawsuit].)

Moreover, the litigation privilege would apply to Malin's extortion claim even if the demand letter's reference to his sexual partner was not directly relevant to the subject matter of the civil claims the letter threatened to file. "[T]he 'connection or logical relation' which a communication must bear to litigation in order for the [litigation] privilege to apply is a *functional* connection. That is to say, the *communicative act*—be it a document filed with the court, a letter between counsel or an oral statement—must function as a necessary or useful step in the litigation process and must serve its purposes." (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1146.) This functional "test is satisfied by demand letters and like communications between litigants or their attorneys which are directed toward settlement of a pending or anticipated lawsuit." (*Id.* at p. 1148.) Accordingly, this functional test is satisfied here and the litigation privilege therefore applies to the extortion claim because it is based on a demand letter that sought to settle anticipated litigation (1 AA 3-4, 9-10)—especially since the reference to Malin's sexual partner supported the letter's purpose of seeking settlement negotiations and framing the parties' legal positions (*ante*, pp. 31-32).

D. All of Malin's claims are also barred by the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine affords broader protection to prelitigation demand letters and investigative activities than the litigation privilege, applying to all conduct in exercise of the right of petition. (AOB 56.) Malin does not dispute that the *Noerr-Pennington* doctrine applies to all of his claims. (See RB 37, fn. 9.) Instead, Malin contends this doctrine "has absolutely no relevance" to the anti-SLAPP motion here because this is not a federal case and the doctrine is supposedly inapplicable to anti-SLAPP motions. (See *ibid.*) But Malin cites no authority for this argument and has therefore waived it. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 644.) At any rate, Malin is wrong. An anti-SLAPP motion must be granted where the *Noerr-Pennington* doctrine prevents a plaintiff from establishing a probability of prevailing on his state law claims. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 470-471, 478-480 (*Premier*); *Ludwig, supra,* 37 Cal.App.4th at pp. 21-23.)

Indeed, Malin's argument make no sense. The *Noerr-Pennington* doctrine is an "affirmative defense" (e.g., *Acoustic Systems, Inc. v. Wenger Corp.* (5th Cir. 2000) 207 F.3d 287, 296; *N.C. Elec. Membership v. Carolina Power & Light* (4th Cir. 1981) 666 F.2d 50, 52)—one that provides a defendant with "immunity" from " 'virtually any tort' " that is based on petitioning activity, including state tort claims (*Premier, supra,* 136 Cal.App.4th at pp. 478-479; *Ludwig, supra,* 37 Cal.App.4th at p. 21, fn. 17; *Hi-Top*

Steel Corp. v. Lehrer (1994) 24 Cal.App.4th 570, 577-578). Affirmative defenses can prevent a plaintiff from demonstrating a probability of prevailing on his claims. (*Dwight R., supra,* 212 Cal.App.4th at p. 715.) There is therefore no legitimate reason why the *Noerr-Pennington* doctrine cannot prevent a plaintiff from satisfying his anti-SLAPP burden just like any other affirmative defense.

III. THE LAVELY & SINGER DEFENDANTS ARE ENTITLED TO FEES.

Malin does not dispute that, if the Lavely & Singer defendants prevail, in whole or in part, on their anti-SLAPP motion in this appeal, they are statutorily entitled to the fees and costs they incurred below and on appeal.

CONCLUSION

For the foregoing reasons, this court should: (1) reverse the order denying the anti-SLAPP motion; (2) direct the trial court to grant the motion; and (3) direct the trial court to award the defendants the fees and costs they incurred below and on appeal.

March 8, 2013

HORVITZ & LEVY LLP
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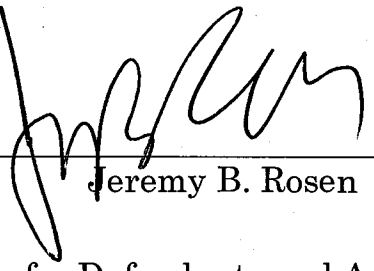
FELIX SHAFIR

By: 
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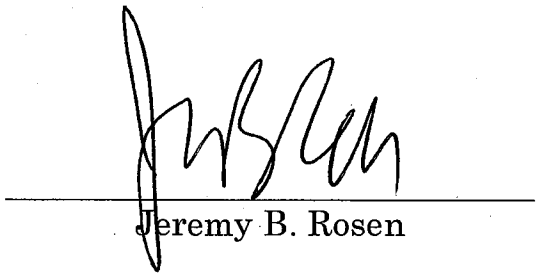
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 13,971 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: March 8, 2013



Jeremy B. Rosen

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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 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

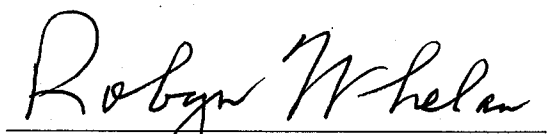
On March 8, 2013, I served true copies of the following document(s) described as **APPELLANTS' REPLY BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

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



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