B237804

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 4

MIKE MALIN,

Plaintiff and Respondent,

v.

MARTIN D. SINGER, et al.,

Defendants and Appellants.

After Order by the Los Angeles County Superior Court
Hon. Mary H. Strobel
Case No. BC466547

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS

RONALD E. MALLEN SBN 040928
CASSIDY E. CHIVERS SBN 203043
HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, CA 94111
(415) 362-6000; fax: (415) 834-9070
rmallen@hinshawlaw.com
cchivers@hinshawlaw.com

Amicus Curiae in Support of Defendant
and Appellants

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AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, Rule 8.200(c) , Hinshaw & Culbertson LLP submits this amicus curiae brief in support of Defendants and Appellants.

INTRODUCTION

We represent lawyers in legal malpractice cases, and, frequently, in cases brought by adversaries of the lawyers' clients for litigation-related conduct, as is the situation here. The anti-SLAPP statute was designed in part to address and combat this latter category of lawsuits. "The Legislature enacted Code of Civil Procedure section 425.16 . . . to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights," which includes "qualifying acts committed by attorneys in representing clients in litigation." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *See also Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400 [attorney's settlement letter and negotiations are subject to anti-SLAPP].) The anti-SLAPP statute effects significant public policy and provides a cost-efficient and expeditious procedure to terminate a groundless claim. For that reason, access to "prong one" of the statute

should be liberally construed and exceptions should be narrowly construed.

Lawyers, who operate in an adversarial system, must have the ability, and freedom from unwarranted threat, to advocate on behalf of their clients consistent with their ethical obligation of zealous representation. Prelitigation settlement demands are a vital tool of this advocacy. Thus, the "illegality exception" to the anti-SLAPP law created by the California Supreme Court in *Flatley v. Mauro* (2006) 39 Cal.4th 299 has been construed narrowly to preclude a chilling effect on a lawyer's ability to effectively and zealously represent a client.[2] A lawyer should not have to question whether his or her communications, which are both permissible and mandated under professional ethics principles, nevertheless, will be construed as "extortion as a matter of law." We submit that in the context of the illegality exception, there should be a bright-line rule limited to truly criminal conduct, which is different than the situation underlying the trial court's ruling below. This trial court's decision and resulting judgment should be reversed, and this case should be remanded.

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2 *E.g.*, *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169 (allegation of illegality does not suffice); *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153 (limited to criminal conduct); *Cabral v. Martins* (2009) 177 Cal.App.4th 471.

LEGAL ARGUMENT

I. *FLATLEY* MUST BE NARROWLY TAILORED TO "SPECIFIC AND EXTREME" CIRCUMSTANCES.

Respondent Malin's recitation of the facts concerning the settlement demand is simple. He received a letter from Appellants threatening to sue him for serious alleged acts of embezzlement and money laundering. Respondent then filed this lawsuit for extortion. (RB 8-9) The demand letter set forth the relevant alleged facts supporting Appellants' legal theory that Respondent wrongfully mismanaged and stole assets from their restaurant group. One relevant fact is that Respondent allegedly spent company assets on sexual dalliances with certain individuals, including a retired judge. The demand letter did not threaten to publicize these allegations other than by seeking legal recourse in civil court, or disclose criminal activity "entirely unrelated" to the harm inflicted by the alleged theft. (*Flatley v. Mauro* (2006) 39 Cal.App. 299, 331.) Thus, this case does not present the "rare," "specific and extreme" circumstance that the Supreme Court in *Flatley* envisioned when it crafted the "narrow" "illegal as a matter of law" exception to the anti-SLAPP law. (*Flatley, supra,* st 332.)

More specifically, the demand letter here does not resemble the multiple threats by the plaintiff's counsel in *Flatley* to "go public" to "the media worldwide" if Mr. Flatley, his company and his insurers did not offer a "significant payment" to settle the matter. *Flatley* involved a claim for sexual assault and date rape against Michael Flatley, the world-renowned Irish dance impresario and entertainer. Sometime prior to October 2002, Mr. Flatley met the plaintiff, Tyna Marie Robertson and he gave her his telephone number. In October 2002, she contacted him to "arrange a rendezvous" in Las Vegas. When she arrived at his hotel, she put her belongings in his hotel room. They then had dinner. Ms. Robertson spent the night with Mr. Flatley in his hotel room, and left the next morning, without incident. (*Id.* at 305-306.)

Three months later, on January 3, 2003, Ms. Robertson's attorney, D. Dean Mauro, wrote to Mr. Flatley, advising: "we represent a women [*sic*] with whom you engaged in forcible sexual assault . . .. Please consider this our ***first*** and ***only,*** attempt to resolve this claim against all Defendants named in the Complaint at Law enclosed herein." Mr. Mauro made the following threats of public disclosure in the letter, none of which were necessary or relevant to

the filing of a civil complaint for damages stemming from the alleged sexual assault:

- "**Any and all information, including Immigration, Social Security Issuances and Use, and IRS and various State Tax Levies and information will be exposed.** We are positive the media worldwide will enjoy what they find."

- "[A]ll pertinent information and documentation, if in violation of any U.S. Federal Immigration, I.R.S., S.S. Admin., U.S. State, Local, Commonwealth U.K. or International Laws, shall immediately [be] turned over to any and all appropriate authorities."

- "**P.S. Note: along with filing suit, there shall be PRESS RELEASES DISSEMINATED TO, but not limited to, THE FOLLOWING MEDIA SOURCES: Fox News Chicago, Fox News Indiana, Fox News Wisconsin, and the U.S. National Fox News Network; WGN National U.S. Television; All Local Las Vegas Television, radio stations and newspapers; The Chicago Tribune, The Chicago Southern Economist, The News Sun, The Beacon News, The Daily Herold, The New York Times,**

The Washington Post; ALL National U.S. Television Networks of NBC, ABC and CBS, as well as INTERNET POSTINGS WORLDWIDE, including the BRITISH BROADCASTING COMPANY, and the Germany National News Network Stations."

(*Id.* at 307-310.)

After Mr. Mauro sent the letter, he contacted Mr. Flatley's attorney on numerous occasions, demanding a response, or "they are going public;" advising "I already have the news media lined up;" and threatening that he "would hit [Mr. Flatley] at every single place he tours." Mr. Mauro warned that "he would ensure that the story would follow Flatley wherever he or his troupes performed and would "ruin' him," without a settlement in the "seven figure[]" range. (*Id.* at 310-311.)

Mr. Flatley did not heed the demands. Instead, he sued Mr. Mauro and Ms. Robertson for civil extortion, defamation, fraud, intentional infliction of emotional distress and wrongful interference with prospective economic advantage. (*Id.* at 305, 311.)

In finding "extortion as a matter of law" beyond the reach of anti-SLAPP protection, the Supreme Court focused on Mr. Mauro's

threats to use worldwide media outlets to accuse Mr. Flatley publicly of rape and violations of other laws that had nothing to do with the threatened civil suit for personal injury damages:

> At the ***core*** of Mauro's letter are ***threats to publicly accuse Flatley of rape and to report and publicly accuse him of other unspecified violations of various laws*** . . . With respect to these latter threats, Mauro's letter goes on to threaten that "[w]e are positive the media worldwide will enjoy what they find." Thus, contrary to Mauro's claim that he did nothing more than suggest that, if evidence of other criminal conduct became public knowledge it would receive media attention, the letter implies that Mauro is already in possession of information regarding such criminal activity and is prepared to disclose this information to the "worldwide" media. . . . Moreover, ***the threat to disclose criminal activity entirely unrelated to any alleged injury suffered by Mauro's client "exceeded the limits of respondent's representation of his client" and is itself evidence of extortion.*** [Citation.] . . . . Lastly, any doubt as to extortionate character of the letter is dispelled by the accounts from Brandon and Fields of Mauro's telephone calls to them within a week of having sent the letter. In his very first conversation with Brandon, Mauro did not discuss the particulars of the claim or express an interest in negotiations . . . Instead, ***the insistent theme*** of his conversations with Flatley's lawyers ***is the immediate and extensive threat of exposure if Flatley failed to make a sufficient offer of money. This culminates in Mauro's threat to "go public" and "ruin" Flatley if the January 30 deadline was not met.*** We conclude that Mauro's conduct constituted criminal extortion as a matter of law in violation of Penal Code sections 518, 519 and 523.

(*Id.* at 329-330, emphasis added.)

Thus, the Supreme Court confirmed the unremarkable rule that in applicable cases, a settlement demand cannot be used as a pretext

for extortion. (*See, Libarian v. State Bar* (1952) 38 Cal.2d 328; *People v. Umana* (2006) 138 Cal.App.4th 625). However, the Court cautioned, presumably to avoid "copycat" challenges to the anti-SLAPP law where, as here, objectively legitimate settlement demands are at issue, that its holding was limited to the "specific and extreme circumstances of this case," *i.e.*, Mr. Mauro's "immediate and extensive" threats to widely disseminate accusations of rape against Mr. Flatley; to publicly accuse Mr. Flatley of tax and immigration crimes and expose his personal financial information, neither of which was even remotely relevant to the sexual assault civil allegations. Absent these or similarly egregious circumstances, threats to file a civil lawsuit if legal claims are not settled - - which inherently involve public disclosure of supporting factual allegations - - are not criminal extortion. (*Sosa v. DirectTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 939.) "Trying to transmogrify what was obviously a settlement demand in a pending civil case into an act of extortion is like trying to fit a square peg into a round hole. If given widespread credence, that tactic would severely impede the salutary policies favoring settlements in civil actions." (*Waldron v. George Weston Bakeries, Inc.* (1st Cir.2009) 570 F.3d 5, 10.)

The demand letter in this case does not fit within the narrow *Flatley* paradigm. As plainly detailed in Appellant Lavely & Singer et al.'s briefs, there was no threat to go to the media or publicly accuse Respondent of inapposite crimes. (*Flatley v. Singer, et al.*, AOB 6-8.)[3] Nevertheless, the trial court erroneously found "extortion as a matter of law." (2 AA 416-417.) In so ruling, the trial court employed an impermissibly broad construction of *Flatley*, eviscerating the line between a legitimate settlement demand, in an albeit salaciously-charged case, and extortion: a demarcation critical to *Flatley's* holding.

Unlike the *Flatley* court, the trial court below engaged in no analysis as to whether the threats contained in the demand letter went beyond the intent to sue and whether the contents of the letter

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3 Indeed, Respondent moved to strike "irrelevant" allegations contained in Appellant Arazm's pending embezzlement lawsuit, which was denied by the trial court in that case. Specifically, the court ruled: "The allegations regarding embezzling of monies is one of the main allegations of Plaintiff's conversion claim. As regards the allegations of Mr. Malin's sexual activity, Plaintiff 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. The motion to strike these allegations is DENIED." (*Flatley v. Singer*, RJN, exh. L, pp 6-7.) The *Arazm* ruling highlights the illogic of the trial court's decision in this case: how can a potential litigant advise his opponent of the intent to file suit and its supporting factual predicates with the hope of achieving a prelitigation settlement, while simultaneously face the risk of an extortion claim? It does not make sense. It turns the policy favoring prelitigation settlements on its head.

encompassed accusations irrelevant to the threatened suit. Instead, the court summarily stated that "the allegations of sexual misconduct are very tangential to the causes of action" and the demand letter "threatens to reveal the names of sexual partners . . .. This is well beyond a typical demand letter . . .." (2 AA 416) The court did not even address the possibility that the "sexual allegations" were legitimately tied to the alleged misappropriation of company funds. (*See,* fn. 1, *supra.*) It ignored that the threat "to reveal" the names of sexual partners was not a threat to contact media outlets with nefarious and wrongful motives, as in *Flatley*, but a threat to sue, alleging relevant factual predicates of the embezzlement claims. "It is clear, and the cases so hold, that when the threat of litigation has some legitimate basis, i.e., the person making the threat has a colorable legal claim of entitlement to damages, the conduct is not extortion." (*Rendleman v. State of Maryland* (2007) 175 Md.App. 422, 439.)

In short, the trial court's failure to exercise the restraint implied in *Flatley*'s narrow holding will create a ripple effect in the legal community. Affirming the trial court's ruling would mean that lawyers and litigants have no clear guidance as to what is and what is not extortion, thus creating an unintended chilling effect on

prelitigation settlement negotiations, and more broadly, a lawyer's obligation of zealous representation.

II. THE TRIAL COURT'S IMPERMISSIBLE EXPANSION OF THE *FLATLEY* EXCEPTION IMPINGES ON A LAWYER'S ETHICAL OBLIGATIONS.

The trial court's ruling impermissibly extends the reach of *Flatley* to include ethically sanctioned conduct. The demand letter communicated an intent to sue if settlement is not achieved, and explained the factual basis of the threatened lawsuit. (*Sosa*, *supra*, at 936.) That the factual basis encompassed potentially embarrassing matters is irrelevant. "Lawyers in an adversarial system are free to inflict hard blows on their opponents as part of their responsibility to zealously guard the interests of their clients...." (*Caro v. Smith* (1997) 59 Cal.App.4th 725, 739.)

Thus, the trial court's ruling creates a chilling deprivation of the statute's protection for lawyers who are duty-bound to ". . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." (Rule 1.3 Diligence, Ann. Mod. Rules Prof. Cond. s. 1.3; *See also,* California Rule of Professional Conduct 3-110.) Instead of an efficient testing of the propriety of the lawyer's conduct and the ability to recover the legal cost of doing so, the

lawyer's judgment is chilled by the cost of having to defend, potentially to trial, a lawsuit that should not have been brought. A lawyer must "act with commitment and dedication to the interests (*ibid.*) of the client and with zeal in advocacy upon the client's behalf." The trial court's decision means that a lawyer cannot fulfill this obligation without risking an extortion charge when the subject matter of the client's case involves sexually-charged or sensitive matters. The law does not support such a proposition.

Under *Flatley,* a lawyer can be reasonably certain of the difference between extortive communications and a demand to settle a civil dispute. The trial court has now blurred this line, making it impossible to decipher the bounds of legality. "[W]ith regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. . . . [A]n attorney must be able to determine beforehand whether particular conduct is permissible . . . . Unclear rules risk blunting an advocate's zealous representation of a client." (*Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp.* (1992) 6 Cal. App. 4th 1256, 1264.) Thus, attorneys fearful of a retaliatory lawsuit "might temper the zealousness of their advocacy to avoid increasing the incentive for the adversary to pursue" such a suit.

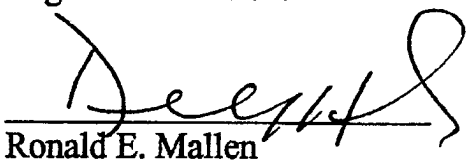
(*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1028).

We do not mean to suggest that lawyers should be granted a free pass to engage in criminal conduct, including extortion, as was advanced by Mr. Mauro in *Flatley*. (*Flatley, supra*, at 320-21: "Mauro argues: 'All litigation-related speech, lawful or not, is in furtherance of petition or free speech rights'".) We mean only that *Flatley* must be narrowly tailored and confined to "specific and extreme" circumstances that involve more than threats to file a civil suit. The line between criminal and professional conduct should be clear, and should be coextensive with a lawyer's ethical obligations.

CONCLUSION

For the foregoing reasons, this Court should reverse the order denying the anti-SLAPP motion and direct the trial court to grant the motion.

March 25, 2013



Ronald E. Mallen
Cassidy E. Chivers
Amicus Curiae in Support of
Defendant and Appellants

CERTIFICATION OF WORD COUNT

The text of this brief consists of 2,494 words as counted by the Microsoft Word 2000, the word-processing program used to generate the brief.

Dated: March 25, 2013

CASSIDY E. CHIVERS
Attorneys for Defendanst/Appellants

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PROOF OF SERVICE
***Malin v. Singer* – B237804**

I am employed in the City and County of San Francisco. I am over the age of 18 years and not a party to the within entitled action. My business address is Hinshaw & Culbertson, One California Street, 18th Floor, San Francisco, California 94111.

On March 25, 2013, I served the within:

Amicus Curiae Brief in Support of Defendants and Appellants

on the following attorney(s) of record and/or interested parties in the above referenced case by depositing a true and correct copy (copies) by the following means:

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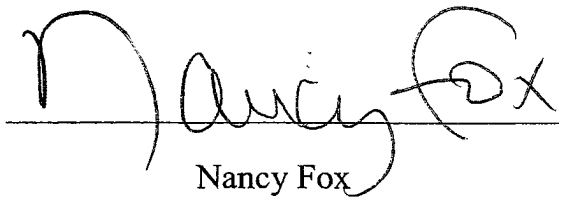
Attorneys for Defendants/Appellants Lavely & Singer, Martin D. Singer and Andrew B. Brettler Jeremy B. Rosen (SBN 1924753) Felix Shafir (SBN 207372) Wesley T. Shih (SBN 233531) Horvitz & Levy LLP 15760 Ventura Boulevard, 18th Fl. Encino, CA 91436 Phone: (818) 995-0800 Fax: (818) 995-3157	**Attorneys for Plaintiff/Respondent Mike Malin** Barry P. King Law Offices of Barry P. King 9255 Sunset Boulevard, #920 Los Angeles, CA 90069 Phone: (310) 277-0420 Fax: (310) 277-0490
Attorneys for Defendants/Appellants Shereen Arazm aka Shereene Arazm and Oren Koules Mark Goldowitz Paul Clifford Ryan Metheny California Anti-Slapp Project 2903 Sacramento Street Berkeley, CA 94702 Phone: (510) 486-9123 Fax: (510) 486-9708	**Hon. Mary H. Strobel** Los Angeles Superior Court Central District – Dept. 32 111 N. Hill Street Los Angeles, CA 90012 (213) 974-5639 **Clerk** **California Supreme Court** 350 McAllister Street San Francisco, CA 94102-3600

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 25, 2013, at San Francisco, California.



Nancy Fox